

YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
1969

*Volume II*

*Documents of the twenty-first session  
including the report of the Commission  
to the General Assembly*

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UNITED NATIONS





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## CONTENTS

	<i>Page</i>
<b>RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (agenda item 1)</b>	
<i>Document A/CN.4/218 and Add.1</i> : Fourth report on relations between States and international organizations, by Mr. Abdullah El-Erian, Special Rapporteur . . . . .	1
<b>SUCCESSION OF STATES AND GOVERNMENTS (agenda item 2)</b>	
<b>(a) SUCCESSION IN RESPECT OF TREATIES</b>	
<i>Document A/CN.4/210</i> : Succession of States to multilateral treaties: sixth study prepared by the Secretariat . . . . .	23
<i>Document A/CN.4/214 and Add.1 and 2</i> : Second report on succession in respect of treaties, by Sir Humphrey Waldock, Special Rapporteur . . . . .	45
<b>(b) SUCCESSION IN RESPECT OF MATTERS OTHER THAN TREATIES</b>	
<i>Document A/CN.4/216/Rev.1</i> : Second report on succession in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur—Economic and financial acquired rights and State succession . . . . .	69
<b>STATE RESPONSIBILITY (agenda item 3)</b>	
<i>Document A/CN.4/208</i> : Supplement, prepared by the Secretariat, to the “Digest of the decisions of international tribunals relating to State responsibility” . . . . .	101
<i>Document A/CN.4/209</i> : Proposals submitted to, and decisions of, various United Nations organs relating to the question of State responsibility: supplement prepared by the Secretariat to document A/CN.4/165 . . . . .	114
<i>Document A/CN.4/217 and Add.1</i> : First report on State responsibility, by Mr. Roberto Ago, Special Rapporteur—Review of previous work on codification of the topic of the international responsibility of States . . . . .	125
<b>MOST-FAVoured-NATION CLAUSE (agenda item 4)</b>	
<i>Document A/CN.4/213</i> : First report on the most-favoured-nation clause, by Mr. Endre Ustor, Special Rapporteur. . . . .	157
<b>CO-OPERATION WITH OTHER BODIES (agenda item 5)</b>	
<i>Document A/CN.4/212</i> : Report on the tenth session of the Asian-African Legal Consultative Committee, by Mr. Abdul Hakim Tabibi, Observer for the Commission . . .	187
<i>Document A/CN.4/215</i> : Report on the 1968 meeting of the Inter-American Juridical Committee, by Mr. José María Ruda, Observer for the Commission . . . . .	196
<b>OTHER BUSINESS (agenda item 8)</b>	
<i>Document A/CN.4/219</i> : Letter dated 3 June 1969 from the Secretary-General to the Chairman of the International Law Commission . . . . .	201
<b>REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY</b>	
<i>Document A/7610/Rev.1</i> : Report of the International Law Commission on the work of its twenty-first session, 2 June-8 August 1969 . . . . .	203
<b>CHECK LIST OF DOCUMENTS REFERRED TO IN THIS VOLUME . . . . .</b>	<b>239</b>
<b>CHECK LIST OF DOCUMENTS OF THE TWENTY-FIRST SESSION NOT REPRODUCED IN THIS VOLUME</b>	<b>241</b>



# RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

[Agenda item 1]

## DOCUMENT A/CN.4/218 AND ADD.1 \*

Fourth report on relations between States and international organizations,  
by Mr. Abdullah El-Erian, Special Rapporteur

[Original text: English]  
[12 May 1969]

### CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
I. INTRODUCTION . . . . .		3
A. The basis of the present report . . . . .	1-6	3
B. Summary of the Commission's discussions at its twentieth session . . . .	7-9	3
C. Summary of the Sixth Committee's discussion at the twenty-third session of the General Assembly on the question of relations between States and international organizations . . . . .	10-12	5
D. Summary of the Sixth Committee's discussion at the twenty-third session of the General Assembly on the draft Convention on Special Missions . .	13-21	5
E. The scope and the arrangement of the present group of draft articles . .	22-25	7
II. DRAFT ARTICLES ON THE LEGAL POSITION OF REPRESENTATIVES OF STATES TO INTERNATIONAL ORGANIZATIONS WITH COMMENTARIES . . . . .		7
Part II. Permanent missions to international organizations ( <i>continued</i> ) . . .		7
Section II. Facilities, privileges and immunities . . . . .		7
General comments . . . . .		7
Article 22. General facilities . . . . .		9
Article 23. Accommodation of the permanent mission and its members Commentary . . . . .		9
Article 24. Inviolability of the premises of the permanent mission . . .		9
Article 25. Exemption of the premises of the permanent mission from taxation . . . . .		9

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\* Incorporating documents A/CN.4/218/Corr.1, 2 and 3/Rev.1.

CONTENTS (*continued*)

	<i>Page</i>
Article 26. Inviolability of archives and documents . . . . .	10
Commentary . . . . .	10
Article 27. Freedom of movement . . . . .	10
Commentary . . . . .	10
Article 28. Freedom of communication . . . . .	11
Commentary . . . . .	11
Article 29. Personal inviolability . . . . .	11
Article 30. Inviolability of residence and property . . . . .	12
Commentary . . . . .	12
Article 31. Immunity from jurisdiction . . . . .	12
Article 32. Waiver of immunity . . . . .	12
Commentary . . . . .	12
Article 33. Consideration of civil claims . . . . .	13
Commentary . . . . .	13
Article 34. Exemption from social security legislation . . . . .	13
Commentary . . . . .	13
Article 35. Exemption from dues and taxes . . . . .	14
Commentary . . . . .	14
Article 36. Exemption from personal services . . . . .	14
Commentary . . . . .	14
Article 37. Exemption from customs duties and inspection . . . . .	14
Commentary . . . . .	15
✓ Article 38. Acquisition of nationality . . . . .	15
Commentary . . . . .	15
Article 39. Persons entitled to privileges and immunities . . . . .	15
Commentary . . . . .	16
Article 40. Nationals of the host State and persons permanently resident in the host State . . . . .	16
Commentary . . . . .	16
Article 41. Duration of privileges and immunities . . . . .	16
Commentary . . . . .	17
Article 42. Duties of third States . . . . .	17
Commentary . . . . .	17
Article 43. Non-discrimination . . . . .	18
Commentary . . . . .	18
Section III. Conduct of the permanent mission and its members . . . . .	18
Article 44. Obligation to respect the laws and regulations of the host State . . . . .	18
Commentary . . . . .	18
Article 45. Professional activity . . . . .	18
Commentary . . . . .	18
Section IV. End of the function of the permanent representative . . . . .	19
Article 46. Modes of termination . . . . .	19
Commentary . . . . .	19
Article 47. Facilities for departure . . . . .	20
Article 48. Protection of premises and archives . . . . .	20
Commentary . . . . .	20
Article 49. Consultations between the sending State, the host State and the Organization . . . . .	20
Commentary . . . . .	20

## I. Introduction

### A. THE BASIS OF THE PRESENT REPORT

1. At the twentieth session of the Commission in 1968, the Special Rapporteur submitted a third report<sup>1</sup> containing a set of draft articles, with commentaries, on the legal position of representatives of States to international organizations and conferences. Those draft articles were divided into the following four parts:

- Part I. General provisions;
- Part II. Permanent missions to international organizations;
- Part III. Delegations to organs of international organizations and to conferences convened by international organizations;
- Part IV. Permanent observers from non-member States to international organizations.

2. As stated by the Special Rapporteur in the general comments with which he prefaced parts III and IV of his third report, the draft articles contained in these two parts (articles 47-52 and articles 53-56 respectively) were presented in a tentative form with a view to enabling the Commission to decide the preliminary question whether its draft articles on representatives of States to international organizations should be confined to permanent missions to international organizations, or should be broadened in scope to include delegations to organs of international organizations and to conferences convened by international organizations, as well as permanent observers of non-member States to international organizations.

3. At its 986th meeting, on 31 July 1968, the Commission adopted a provisional draft of twenty-one articles, with the Commission's commentary to each article.<sup>2</sup> The first five articles form part I (General provisions). They cover: the use of terms, the scope of the articles, their relationship to the relevant rules of international organizations and to other existing international agreements and derogation from the rules. The remaining articles make up the first section of part II (Permanent missions to international organizations). This section is entitled "Permanent missions in general". It regulates the following questions: establishment of permanent missions; functions of a permanent mission; accreditation to two or more international organizations and other related situations; appointment of the members of the permanent mission and their nationality; credentials of the permanent representative, his accreditation to organs of the organization and his full powers to represent the State in the conclusion of treaties; composition of the permanent mission and its size; notifications; *chargés d'affaires*; precedence; missions' offices and the use of the flag and emblem.

4. In accordance with articles 16 and 21 of its statute, the Commission decided to transmit the provisional

draft of twenty-one articles, through the Secretary-General, to Governments for their comments.<sup>3</sup>

5. In connexion with the examination of the provisional draft of twenty-one articles adopted by the Commission at its twentieth session, suggestions were made to the Special Rapporteur that he prepare additional articles relating to permanent missions to international organizations. Some members of the Commission proposed a provision on consultations between the host State, the organization concerned and the sending State. The purpose of the consultations in question would be to provide remedies for difficulties which may arise as a result of the non-application, between States members of international organizations and between States members and the organizations, of rules of inter-State bilateral diplomatic relations regarding *agrément*, the declaring of a diplomatic agent as *persona non grata* and reciprocity. In preparing the present revised text of the draft articles, the Special Rapporteur has also taken into consideration the views expressed on the subjects of delegations to organs of international organizations and to conferences convened by international organizations and of observers from non-member States appointed to international organizations in the course of the general discussion which preceded the examination of the draft articles by the Commission at its twentieth session. These suggestions and views are summarized in section B of this introduction.

6. Since the time when the Special Rapporteur's third report was considered by the Commission, discussions on the "Report of the International Law Commission on the work of its twentieth session" and on the "Draft Convention on Special Missions" have taken place in the Sixth Committee during the twenty-third session of the General Assembly. The discussions touched on a number of questions which relate to representatives of States to international organizations and conferences. The Special Rapporteur has deemed it appropriate to include a summary of those discussions in sections C and D of the introduction to the present report.

### B. SUMMARY OF THE COMMISSION'S DISCUSSIONS AT ITS TWENTIETH SESSION

7. *Remedies for the host State.* This question was discussed by the Commission in connexion with its examination of articles 9 and 14, as presented in the Special Rapporteur's third report. Article 9, which was entitled "Appointment of the members of the permanent mission", provides that "The sending State may freely appoint the members of the permanent mission". Unlike the relevant articles of the Vienna Convention on Diplomatic Relations<sup>4</sup> and the draft articles of the International Law Commission on special missions,<sup>5</sup> article 9 did not make the freedom of the sending State in the choice of the

<sup>1</sup> *Yearbook of the International Law Commission, 1968*, vol. II, document A/CN.4/203 and Add.1-5, p. 119.

<sup>2</sup> *Ibid.*, document A/7209/Rev.1, p. 194, para. 21.

<sup>3</sup> *Ibid.*, p. 195, para. 22.

<sup>4</sup> United Nations, *Treaty Series*, vol. 500, p. 96.

<sup>5</sup> *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, pp. 347 *et seq.*

members of its permanent mission to an international organization subject to the *agrément* of the host State for the appointment of the permanent representative or head of the permanent mission. Nor did article 9 make such freedom of choice subject to the right of the host State to notify the sending State that the head of the permanent mission or any member of the diplomatic staff of the mission is *persona non grata*. The reasons were stated by the Special Rapporteur in paragraph (2) of the commentary to article 9<sup>6</sup> to be that:

The members of the permanent mission are not accredited to the host State in whose territory the seat of the organization is situated. They do not enter into direct relationship and transactions with the host State, unlike the case of bilateral diplomacy. In the latter case, the diplomatic agent is accredited to the receiving State in order to perform certain functions of representation and negotiation between the receiving and his own State. This legal situation is the basis of the institution of acceptance by the receiving State of the diplomatic agent (*agrément*) and of the right of the receiving State to request his recall when it declares him *persona non grata*.

The basic principle underlying the freedom of the sending State in the choice of the members of its permanent mission to an international organization, as reflected by the Special Rapporteur in article 9, was accepted by the Commission. Several members stated that the right of a sending State freely to appoint the members of a permanent mission was an essential concept of the law of international organizations. Some members pointed out, however, that the host State might need some protection, and that they assumed, therefore, that before completing the draft articles, the Commission would insert the necessary provisions to ensure that protection.<sup>7</sup> Article 14 of the Special Rapporteur's draft, which was entitled "Size of the permanent mission", provided that:

The sending State should observe that the size of its permanent mission does not exceed what is reasonable and normal, having regard to the circumstances and conditions in the host State, and to the needs of the particular mission and the organization concerned.

Paragraph (5) of the Special Rapporteur's commentary to this article contained the following statement:

Article 14. . . does not provide that the host State or the organization may require that the size of the mission be kept within certain limits or that they may refuse to accept a size exceeding those limits, a prerogative which was recognized to the receiving State under article 11, paragraph 1, of the Vienna Convention on Diplomatic Relations. Unlike the case of bilateral diplomacy, the members of permanent missions to international organizations are not accredited to the host State. Nor are they accredited to the international organization in the proper sense of the word. As will be seen in different parts of these draft articles, remedy for the grievances which the host State of the organization may have against the permanent mission or one of its members cannot be sought in the prerogatives recognized to the receiving State in bilateral diplomacy, prerogatives which flow from the fact that diplomatic envoys are accredited to the receiving State and from the latter's inherent right in the last analysis to refuse to maintain relations

with the sending State. In the case of permanent missions to international organizations, remedies must be sought in consultations between the host State, the organization concerned and the sending State, but the principle of the freedom of the sending State in the composition of its permanent mission and the choice of its members must be recognized.<sup>8</sup>

Some members of the Commission expressed the opinion that the provision concerning consultations should not only be stated in the commentary but should also be embodied in the draft article itself (article 14). They pointed out that the rule as stated in article 14 might be described as *lex imperfecta*, since it stated the obligation of the sending State but said nothing about what would happen in the event of the sending State failing to abide by that rule.<sup>9</sup> This suggestion was referred to the Drafting Committee. Other members thought that the provision concerning consultations deserved serious consideration and should be embodied, in some appropriate place, in the draft articles themselves. The Drafting Committee decided not to include a provision on consultations in article 14. The text as agreed on in the Drafting Committee was adopted by the Commission with the tacit understanding that the Special Rapporteur would prepare for the consideration of the Commission a provision of general application on the question of consultations between the sending State, the host State and the organization. This understanding was reflected in a statement by the Special Rapporteur to the effect that the Commission was going to consider a general provision for inclusion at the end of the draft concerning remedies available to the host State.<sup>10</sup>

8. *Delegations to organs of international organizations and to conferences.* On the treatment of this question within the framework of these articles opinion in the Commission was divided.<sup>11</sup> Some members thought that the draft should be confined to permanent missions and that it would be preferable to leave aside the question of delegations to organs of international organizations and to conferences. They suggested that the Commission should take something firm and concrete as a starting point and see later whether it should venture further. In support of this view one member pointed out that conferences could be regarded as temporary organizations so that the topic of conferences would form part of the diplomatic law of organizations themselves. The subject of delegations to organs was difficult to codify in view of the great differences between organizations and between their organs. Other members took issue with such a restrictive definition of the scope of the draft. They maintained that the Commission should encourage the Special Rapporteur to submit draft articles on delegations to organs of international organizations and to conferences. Intermediate positions were also reflected in the discussion. One of them was that the Commission would probably have to concern itself with delegations sent to sessions of international organizations, but it was

<sup>6</sup> *Yearbook of the International Law Commission, 1968*, vol. II, document A/CN.4/203 and Add.1-5, p. 135.

<sup>7</sup> *Ibid.*, vol. I, 953rd meeting, p. 58.

<sup>8</sup> *Ibid.*, vol. II, document A/CN.4/203 and Add.1-5, p. 142.

<sup>9</sup> *Ibid.*, vol. I, 958th and 959th meetings, pp. 87-99.

<sup>10</sup> *Ibid.*, 984th meeting, p. 233.

<sup>11</sup> *Ibid.*, 943rd-945th meetings, pp. 3-20.

doubtful whether the draft should cover delegations sent to conferences convened by international organizations. One member stated that there was an international law of diplomatic conferences, which applied to conferences convened by States no less than to conferences convened by international organizations. He concluded that recent developments of that subject seemed to require that representatives to conferences be dealt with as a separate topic. Another member expressed the view that a distinction should be made between conferences convened by international organizations and other conferences. According to that view, which was supported by one or two more members, theoretical and practical considerations required the Commission to deal at once with the legal position of delegations to conferences held within or convened by international organizations. Other conferences were not connected with international organizations, and the Commission would be going beyond the limits of its subject (relations between States and inter-governmental organizations) if it concerned itself with them.

9. The decision of the Commission on this question was recorded in paragraph 28 of its report on the work of its twentieth session,<sup>12</sup> where it is stated:

Some members of the Commission were of the opinion that the scope of the draft articles should be confined to permanent missions to international organizations. In his third report the Special Rapporteur had included a number of articles on delegations to organs of international organizations and to conferences convened by international organizations and on permanent observers of non-member States to international organizations (parts III and IV). The Commission was of the opinion that no decision should be taken on that question until it had an opportunity to consider those articles. If the Committee were to decide to cover those two subjects in the draft articles, the title of the draft articles would have to be changed.

#### C. SUMMARY OF THE SIXTH COMMITTEE'S DISCUSSION AT THE TWENTY-THIRD SESSION OF THE GENERAL ASSEMBLY ON THE QUESTION OF RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

10. The Sixth Committee considered the item entitled "Report of the International Law Commission on the work of its twentieth session" at its 1029th to 1039th meetings, held from 3 to 15 October 1968. Most of the observations on chapter II of the International Law Commission's report related to the twenty-one draft articles which are contained in that chapter and which constitute the first unit of the set of draft articles which the Commission intends to submit on relations between States and international organizations. Some representatives raised two further questions not covered in the twenty-one draft articles. The first was the question of delegations to sessions of organs of international organizations and to conferences convened by international organizations. The second was the "question of permanent

observers from non-member States to international organizations".<sup>13</sup>

11. Several representatives noted that the International Law Commission had expressed the intention of considering at a future session whether rules concerning delegations to organs of international organizations and to conferences convened by international organizations should be included in the draft articles. Some of those representatives expressed the opinion that that "should be done because the absence of such rules in the draft articles would leave an unfortunate gap".<sup>14</sup> One delegation stated that it was looking forward with interest to a decision on that subject, and that accordingly it would seem premature to consider extending the scope of the draft convention on special missions to "delegations to sessions of organs of international organizations and to conferences convened by international organizations". Another delegation thought, however, that no decision should be taken on whether to include articles on delegations to organs and conferences of international organizations, since that question could be clarified in the work on special missions.<sup>15</sup>

12. Some representatives expressed the view that the Commission should take up the question of permanent observers from non-member States to international organizations. They maintained that this question was particularly urgent inasmuch as it had often been dealt with on a partisan and discriminatory basis.<sup>16</sup> They recalled<sup>17</sup> that in the study prepared by the Secretariat on the practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities,<sup>18</sup> the Secretariat had stated that neither the Charter nor the Headquarters Agreement nor the resolutions of the General Assembly contained any information on the status of observers.<sup>19</sup>

#### D. SUMMARY OF THE SIXTH COMMITTEE'S DISCUSSION AT THE TWENTY-THIRD SESSION OF THE GENERAL ASSEMBLY ON THE DRAFT CONVENTION ON SPECIAL MISSIONS

13. The Sixth Committee considered the item entitled "Draft Convention on Special Missions" at its 1039th to 1059th and 1061st to 1072nd meetings, held between 15 October and 15 November 1968 and at its 1087th to 1090th meetings, held on 5, 6 and 9 December 1968. In the course of the consideration of some of the articles of the draft convention, the discussion touched on the relationship between those articles and the subject of

<sup>13</sup> *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 84, document A/7370, para. 18.

<sup>14</sup> *Ibid.*, para. 36.

<sup>15</sup> *Ibid.*, *Twenty-third Session, Sixth Committee*, 1032nd meeting.

<sup>16</sup> *Ibid.*, *Twenty-third Session, Annexes*, agenda item 84, document A/7370, para. 37.

<sup>17</sup> *Ibid.*, *Twenty-third Session, Sixth Committee*, 1033rd meeting.

<sup>18</sup> Hereinafter referred to as "Study by the Secretariat", *Yearbook of the International Law Commission, 1967*, vol. II, documents A/CN.4/L.118 and Add.1 and 2, p. 154.

<sup>19</sup> *Ibid.*, p. 190, para. 169, sub-para. 2.

<sup>12</sup> *Ibid.*, vol. II, document A/7209/Rev.1, pp. 195 and 196.

delegations to organs of international organizations and to conferences. A number of suggestions and amendments were submitted which have a bearing on that subject and in particular on the extent of the privileges and immunities to be accorded to representatives of States within the framework of *ad hoc* diplomacy, whether bilateral (special missions) or multilateral (organs of international organizations and international conferences).

14. Article 6: "*Sending of special missions by two or more States in order to deal with a question of common interest*". This article as drafted by the International Law Commission provided that: "Two or more States may each send a special mission at the same time to another State in order to deal, with the agreement of all of them, with a question of common interest." Several representatives stated that, although they had no objection to the substance of the text proposed by the International Law Commission, they nevertheless had misgivings as to its application.<sup>20</sup> They pointed out that the wording of article 6 seemed to contradict the contents of paragraph 17 of the historical background section preceding the draft articles, where it was stated that most of the members of the Commission had expressed the opinion that for the time being the terms of reference of the Special Rapporteur on Special Missions should not cover the question of delegates to congresses and conferences. In stressing the ambiguity of article 6, some representatives noted that the text failed to give a clear answer to the question whether the draft articles applied to delegates to international conferences convened by States. They stated that, if it was desired to retain the idea set forth by the Commission in the historical introduction, the question arose, in connexion with the application of article 6, where the distinction should be drawn between special missions, to which the draft would apply, and delegates to international conferences convened by States, to which it would not apply. They considered that the precise scope of article 6 must be made clear. Reference was made to the comments of the Austrian and Swedish Governments.<sup>21</sup> In the view of the Austrian Government, "this article should clearly state if and to what extent the present draft articles shall apply to delegations to congresses and conferences convened by States"; while the Swedish Government had wondered which were the special cases provided for in article 6, since it was obvious from the commentary of the International Law Commission that the article had not been included in the draft in order to extend the scope of the proposed Convention to delegates to international conferences in general.

15. Another view was, however, expressed to the effect that it was obvious that the draft articles did not apply to delegates to international conferences convened by States, since such delegates could not be regarded as members of missions "to another State". The representative who expressed this view stated that his country availed itself of the opportunity to express the hope that the status of delegates to international conferences

convened by States would be regulated as soon as possible. In line with this trend of thought another representative suggested the inclusion in the draft, at a later stage, of an article which would deal in detail with the convening of *ad hoc* conferences.

16. The Expert Consultant (the Special Rapporteur on Special Missions) stated at the 1045th meeting of the Sixth Committee<sup>22</sup> that article 6 was designed to cover cases of *ad hoc* diplomacy on subjects of common interest to a limited number of States, which could not be subsumed under the heading of collective diplomacy. The topics dealt with in such cases were not wide enough for consideration by international conferences and were often subjects of local interest only. The Commission had agreed that such cases should be regarded as relating more closely to the subject of special missions than to that of international conferences. The Commission had felt, the Expert Consultant continued, that the codification of the rules pertaining to such cases under the heading of special missions would be useful because it would provide for the settlement of questions of common interest to a limited number of States without the cumbersome arrangements normally required for an international conference.

17. The drafting committee of the Sixth Committee decided to retain the principle set forth in article 6 but to redraft the International Law Commission's text so as to make it clearer. The text of article 6 as adopted by the Sixth Committee at its 1089th meeting is worded as follows:

Two or more States may each send a special mission at the same time to another State, with the consent of that State obtained in accordance with article 2, in order to deal together, with the agreement of all of these States, with a question of common interest to all of them.<sup>23</sup>

18. *A single set or different sets of privileges and immunities for different categories of special missions.* When the Sixth Committee began consideration of part II of the Draft Convention on Special Missions, which is entitled "Facilities, Privileges and Immunities", an extensive discussion took place on whether there should be one or more régimes according to a distinction between the different kinds of special missions.

19. Article 21 prepared by the International Law Commission provided that:

1. The Head of the sending State, when he leads a special mission, shall enjoy in the receiving State or in a third State, in addition to what is granted by these articles, the facilities, privileges and immunities accorded by international law to Heads of State on an official visit.

2. The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy, in the receiving State or in a third State, in addition to what is granted by these articles, the facilities, privileges and immunities accorded by international law.

<sup>20</sup> *Official Records of the General Assembly, Twenty-third Session, Sixth Committee, 1044th meeting.*

<sup>21</sup> *Ibid., Twenty-third Session, Annexes, agenda item 85, document A/7156 and Add.1 and 2, p. 2, para. 6, and p. 7, para. 6.*

<sup>22</sup> *Ibid., Twenty-third Session, Sixth Committee, 1045th meeting.*

<sup>23</sup> *Ibid., Twenty-third Session, Annexes, agenda item 85, document A/7375, para. 141.*

In paragraph 1 of the commentary on this article, the International Law Commission stated that it had “considered on several occasions whether there should not be a special régime for so-called ‘high-level’ missions, i.e. missions whose members include persons of high rank such as a Head of State, a Head of Government, or a Minister for Foreign Affairs. After a careful study of the matter, the Commission concluded that the rank of the head or members of a special mission does not give the mission any special status. In international law, however, rank may confer on the person holding it exceptional facilities, privileges and immunities which he retains on becoming a member of a special mission.”

20. One delegation stated that the Commission articles should be applied to “ministerial” special missions, while an alternative régime could be applied to other, “standard”, special missions.<sup>24</sup> It suggested that the scale given in the Convention on Privileges and Immunities of the Specialized Agencies (Functional immunities) should be selected for “standard” special missions, i.e. those not led by the highest officers of the State.<sup>25</sup> Some delegations expressed the view that the criterion of the person at the head of the mission was a purely formal and rather arbitrary criterion which did not take into account the importance of the mission’s task, though that should be the determining factor. Several delegations supported the basic approach of part II of the draft Convention on Special Missions as adopted by the Commission. They expressed themselves in favour of a uniform régime of privileges and immunities to be applied to special missions.

21. *Proposal for a new article on conferences.* The delegation of the United Kingdom suggested the inclusion in the draft Convention on Special Missions of a provision pertaining to conferences. It submitted an amendment (A/C.6/L.704) which would add a new article (article 0, entitled *Conferences*) before article 48 in the existing part III of the draft articles. The new draft article would read as follows:

1. A State may apply the provisions of part II or part III of the present articles, as appropriate, in respect of a conference attended by representatives of States or Governments which is held in its territory and which is not governed by similar provisions in any other international agreement.

2. Where a State applies the provisions of paragraph 1 of this article in respect of a conference held in its territory, officials of the secretariat of that conference shall:

(a) Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;

(b) Unless they are nationals or permanent residents of the receiving State, enjoy exemption from taxation on the emoluments paid to them in respect of their services to the conference;

(c) Be immune from immigration restrictions and from aliens’ registration;

(d) Be accorded the treatment in matters of exchange control which is accorded in the receiving State to a diplomatic agent of the State of which the official concerned is a national;

(e) Be given the same repatriation facilities as members of diplomatic missions of comparable rank;

(f) Have the right to import free of duty the personal baggage accompanying them at the time of first arriving in the receiving State to take up their duties in connexion with the conference.

3. Where a State applies the provisions of paragraph 1 of this article in respect of a conference held in its territory, the premises occupied for the purposes of the conference and all archives, papers and documents relating to the conference shall enjoy inviolability.

## E. THE SCOPE AND ARRANGEMENT OF THE PRESENT GROUP OF DRAFT ARTICLES

22. The present group of draft articles covers the subjects of: facilities, privileges and immunities of permanent missions to international organizations; conduct of the permanent mission and its members; and end of the function of the permanent representative (sections II, III and IV of part II).

23. In revising the draft articles contained in section II of part II, the Special Rapporteur has endeavoured to bring them into harmony with the terminology used in the twenty-one articles contained in section I of part II as adopted by the Commission. New provisions have been added in response to suggestions made in the Commission, e.g., a provision of general application on consultations between the sending State, the host State and the organization.

24. In accordance with the practice of the Commission in dealing with other topics, the Special Rapporteur has not given the articles in the present group a separate set of numbers, but has numbered them in sequence after the last article of section I of part II—the first article being numbered 22.

## II. Draft articles on the legal position of representatives of States to international organizations with commentaries

### PART II: PERMANENT MISSIONS TO INTERNATIONAL ORGANIZATIONS (*continued*)

#### *Section II. Facilities, privileges and immunities*

##### *General comments*

(1) As a common feature, the headquarters agreements of international organizations, whether universal or regional, include provisions for the enjoyment by permanent representatives of the privileges and immunities which the host State “accords to diplomatic envoys accredited to it”. In general, these headquarters agreements do not contain

<sup>24</sup> *Ibid.*, Twenty-third Session, Sixth Committee, 1055th meeting.

<sup>25</sup> Formal amendments to this effect were submitted by the delegation of the United Kingdom. One amendment (A/C.6/L.697) would consist of a new paragraph 1 to article 21, reading:

“The privileges and immunities set out in this part shall be accorded to a special mission led by the Head of State, the Head of Government or the Foreign Minister or other Ministers of the Government on the sending State by whatever title they may be called. Any other special mission may be accorded the privileges and immunities set out in this part by agreement between the sending and receiving States.”

The other amendment (A/C.6/L.698 and Corr.1) would insert after article 47 a new part III consisting of five articles.

restrictions on the privileges and immunities of permanent representatives which are based on the application of the principle of reciprocity in the relations between the host State and the sending State. However, the relevant articles of some of the headquarters agreements include a proviso which makes it an obligation of the host State to concede to permanent representatives the privileges and immunities which it accords to diplomatic envoys accredited to it, "subject to corresponding conditions and obligations". Examples are provided by: article V, section 15, of the Headquarters Agreement of the United Nations;<sup>26</sup> article XI, section 24, paragraph (a), of the Headquarters Agreement of the Food and Agriculture Organization of the United Nations (FAO);<sup>27</sup> and article I of the Headquarters Agreement of the Organization of American States (OAS).<sup>28</sup>

(2) In determining the rationale of diplomatic privileges and immunities the International Law Commission discussed, at its tenth session in 1958, the theories which have exercised an influence on the development of diplomatic privileges and immunities. The Commission mentioned the "extritoriality" theory, according to which the premises of the mission represent a sort of extension of the territory of the sending State, and the "representative character" theory, which bases such privileges and immunities on the idea that the diplomatic mission personifies the sending State. The Commission pointed out that "there is now a third theory which appears to be gaining ground in modern times, namely, the 'functional necessity' theory, which justifies privileges and immunities as being necessary to enable the mission to perform its functions".<sup>29</sup>

(3) Functional necessity is one of the bases of the privileges and immunities of representatives of States to international organizations. Article 105, paragraph 2, of the Charter of the United Nations provides 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".

(4) The representation of States in international organizations is the basic function of permanent missions as defined in article 7 of the twenty-one provisional articles adopted by the Commission. Article 1, sub-paragraph (d), of these articles, defines a "permanent mission" as "a mission of representative and permanent character sent by a State member of an international organization to the Organization".<sup>30</sup> Paragraph (2) of the commentary to article 7 states that:

Sub-paragraph (a) is devoted to the representational function of the permanent mission. It provides that the mission represents the sending State in the Organization. The mission, and in particular the permanent representative as head of the mission, is responsible for the maintenance of official relationship between the Government of the sending State and the Organization.<sup>31</sup>

(5) The representation of States within the framework of the diplomacy of international organizations and conferences has its particular characteristics. The representative of a State to an international organization does not represent his State to the host State. He does not enter into direct relationship and transactions with the host State, unlike the case of a diplomat accredited to the State. In the latter case, the diplomatic agent is accredited to the receiving State in order to perform certain functions of representation and negotiation between it and his own State. The representative of a State to an international organization represents his State to the organization as a collective organ which possesses a separate identity and legal personality distinct from those of the individual member States. In a sense it may be said that he also performs some kind of representation to the States members of the organization in their collegiate capacity as an organization of States and not in their individual capacity. The host State is included in such a community when it is a member of the organization. Such a situation cannot be said to exist when the host State is not a member of the organization.

(6) Another characteristic of representation to international organizations springs from the fact that the observance of juridical rules governing privileges and immunities is not solely the concern of the sending State as in the case of bilateral diplomacy. In the discussion on the "question of diplomatic privileges and immunities" which took place in the Sixth Committee during the twenty-second session of the General Assembly, it was generally agreed that the organization itself had an interest in the enjoyment by the representatives of Member States of the privileges and immunities necessary to enable them to carry out their tasks. It was also recognized that the Secretary-General should maintain his efforts to ensure that the privileges and immunities concerned are respected.<sup>32</sup> In his statement at the 1016th meeting of the Sixth Committee the Legal Counsel, speaking as the representative of the Secretary-General, said:

... the rights of representatives should properly be protected by the Organization and not left entirely to bilateral action of the States immediately involved. The Secretary-General would therefore continue to feel obligated in the future, as he has done in the past, to assert the rights and interests of the Organization on behalf of representatives of Members as the occasion may arise. I would not understand from the discussion in this Committee that the Members of the Organization would wish him to act in any way different from that which I have just indicated. Likewise, since the Organization itself has an interest in protecting the rights of representatives, a difference with respect to such rights may arise between the United Nations and a Member and consequently be the subject of a request for an advisory opinion under Section 30 of the Convention [the

<sup>26</sup> United Nations, *Treaty Series*, vol. 11, p. 26.

<sup>27</sup> *United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. II (ST/LEG/SER.B/11), p. 195.

<sup>28</sup> United Nations, *Treaty Series*, vol. 181, p. 147.

<sup>29</sup> *Yearbook of the International Law Commission, 1958*, vol. II, document A/3859, p. 95.

<sup>30</sup> *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, p. 196.

<sup>31</sup> *Ibid.*, p. 200.

<sup>32</sup> *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 98, document A/6965, para. 14.

Convention on the Privileges and Immunities of the United Nations of 1946]. It is thus clear that the United Nations may be one of the "parties" as that term is used in Section 30.<sup>33</sup>

(7) The privileges and immunities of permanent missions to international organizations, being analogous to, if not identical with, those of diplomatic bilateral missions, the articles thereon are modelled on the corresponding provisions of the Vienna Convention on Diplomatic Relations. In view of this, there does not appear to be any need for an independent and elaborate commentary to this section, except in so far as it may be necessary to draw attention to certain departures from the Vienna text or to point to any particular application which a given rule may have had within one or more international organizations.

#### *Article 22. General facilities*

**The organization and the host State shall accord to the permanent mission the facilities required for the performance of its functions, having regard to the nature and task of the permanent mission.**

#### *Article 23. Accommodation of the permanent mission and its members*

**1. The host State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its permanent mission or assist the latter in obtaining accommodation in some other way.**

**2. The host State and the organization shall also, where necessary, assist permanent missions in obtaining suitable accommodation for their members.**

#### *Commentary*

(1) Article 22 is based on article 25 of the Vienna Convention on Diplomatic Relations<sup>34</sup> and article 22 of the draft articles on special missions.<sup>35</sup> It states in general terms the obligations of both the organization and the host State to accord to the permanent mission the facilities required for the performance of its functions.

(2) The reference in the text of article 22 to the nature and task of the permanent mission—a reference which does not appear in article 25 of the Vienna Convention—makes the extent of the obligations both of the organization and of the host State depend on the individual characteristics of the permanent mission according to the specific functional needs of the organization to which the mission is assigned.

(3) A permanent mission may often need the assistance of the host State, in the first place during the installation

of the mission and also in the performance of its functions. To an even greater extent, the permanent mission needs the assistance of the organization which has a more direct interest in the permanent mission being able to perform its functions satisfactorily. The organization can be particularly helpful to the permanent mission in obtaining documentation and information, an activity referred to in article 7, sub-paragraph (d), of the draft articles.

(4) Article 23 is based on article 21 of the Vienna Convention on Diplomatic Relations.<sup>36</sup> As observed by the International Law Commission in the commentary on the relevant provision (article 19) of its draft articles on diplomatic intercourse and immunities,<sup>37</sup> which served as the basis for the Vienna Convention, the laws and regulations of a given country may make it impossible for a mission to acquire the premises necessary to it. For that reason the Commission inserted in that provision a rule which makes it obligatory for the receiving State to ensure the provision of accommodation for the mission if the latter is not permitted to acquire it. These considerations equally underlie article 23, paragraph 1, of the draft articles.

#### *Article 24. Inviolability of the premises of the permanent mission*

**1. The premises of the permanent mission shall be inviolable. The agents of the host State may not enter them, except with the consent of the head of the mission.**

**2. The host State is under a special duty to take all appropriate steps to protect the premises of the permanent mission against any intrusion or damage and to prevent any disturbance of the peace of the permanent mission or impairment of its dignity.**

**3. The premises of the permanent mission, their furnishings and other property thereon and the means of transport of the permanent mission shall be immune from search, requisition, attachment or execution.**

#### *Article 25. Exemption of the premises of the permanent mission from taxation*

**1. The sending State and the head of the permanent mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the permanent mission, whether owned or leased, other than such as represent payment for specific services rendered.**

**2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the sending State or the head of the permanent mission.**

<sup>33</sup> *Ibid.*, document A/C.6/385, para. 8.

<sup>34</sup> United Nations, *Treaty Series*, vol. 500, p. 108.

<sup>35</sup> *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 359.

<sup>36</sup> United Nations, *Treaty Series*, vol. 500, p. 107.

<sup>37</sup> *Yearbook of the International Law Commission, 1958*, vol. II, document A/3859, p. 95.

### Article 26. Inviolability of archives and documents

**The archives and documents of the permanent mission shall be inviolable at any time and wherever they may be.**

#### Commentary

(1) Articles 24 to 26 relate to certain immunities and exemptions concerning the premises of the permanent mission and its archives and documents. These articles reproduce, with the necessary drafting changes, the provisions of articles 22 to 24 of the Vienna Convention on Diplomatic Relations.<sup>38</sup>

(2) The requirement that the host State should ensure the inviolability of permanent missions' premises, archives and documents has been generally recognized. In a letter sent to the Legal Adviser of one of the specialized agencies in 1964, the Legal Counsel of the United Nations stated that:

There is no specific reference to mission premises in the Headquarters Agreement and the diplomatic status of these premises therefore arises from the diplomatic status of a resident representative and his staff.<sup>39</sup>

(3) The headquarters agreements of some of the specialized agencies contain provisions relating to the inviolability of the premises of permanent missions and their archives and documents (for example, article XI of the Headquarters Agreement of FAO;<sup>40</sup> articles XIII and XIV, section 33 (c), of the Headquarters Agreement of the International Atomic Energy Agency (IAEA)<sup>41</sup> which recognize the inviolability of correspondence, archives and documents of the missions of member States.

(4) The inviolability of the premises of the United Nations and the specialized agencies were sanctioned in article II, section 3, of the Convention on the Privileges and Immunities of the United Nations<sup>42</sup> and article III, section 5, of the Convention on the Privileges and Immunities of the Specialized Agencies<sup>43</sup> respectively. These texts provide that the property and assets of the United Nations and the specialized agencies, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action. The conventions also contain provisions on the inviolability of the archives and documents of the United Nations and the specialized agencies. Provision is made for the inviolability of all papers and documents of "Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United

Nations" and of "Representatives of members at meetings convened by a specialized agency".<sup>44</sup>

(5) An explicit reference to the premises of permanent missions is made in the Headquarters Agreement of the International Civil Aviation Organization (ICAO). Article II, section 4 (1), of this Agreement provides that the "headquarters premises of the Organization shall be inviolable".<sup>45</sup> Article I, section 1 (b), defines the expression "headquarters premises" as follows:

The expression "headquarters premises" means any building or part of a building occupied permanently or temporarily by any unit of the organization or by meetings convened in Canada by the organization, including the offices occupied by *Resident Representatives of Member States*.<sup>46</sup> [Italics added by the Special Rapporteur.]

(6) Article 25 provides for the exemption of the premises of the permanent mission from taxation. The replies of the United Nations and the specialized agencies indicate that this exemption is generally recognized. Examples of provisions of headquarters agreements granting such exemption are to be found in article XI of the Headquarters Agreement of FAO and in articles XII and XIII of the Headquarters Agreement of IAEA.<sup>47</sup>

### Article 27. Freedom of movement

**Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State shall ensure to all members of the permanent mission freedom of movement and travel in its territory.**

#### Commentary

(1) This article is based on article 26 of the Vienna Convention on Diplomatic Relations.<sup>48</sup>

(2) The replies of the specialized agencies indicate that no restrictions have been imposed by the host State on the movement of members of the permanent missions of member States.

(3) At United Nations Headquarters the host State has imposed limits on the movement of the representatives of certain Member States on the ground that similar restrictions have been placed on the representatives of the host State in the countries concerned.

(4) The problem of reciprocity will be dealt with in article 43 on non-discrimination. Suffice it to mention here that it has been the understanding of the Secretariat of the United Nations that the privileges and immunities granted should generally be those accorded to the diplomatic corps as a whole, and should not be subject to

<sup>38</sup> United Nations, *Treaty Series*, vol. 500, pp. 106 and 108.

<sup>39</sup> Study by the Secretariat, *Yearbook of the International Law Commission, 1967*, vol. II, documents A/CN.4/L.118 and Add.1 and 2, p. 187, para. 154.

<sup>40</sup> *United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. II (ST/LEG/SER.B/11), p. 195.

<sup>41</sup> United Nations, *Treaty Series*, vol. 339, pp. 163-165.

<sup>42</sup> *Ibid.*, vol. 1, p. 18.

<sup>43</sup> *Ibid.*, vol. 33, p. 266.

<sup>44</sup> *Ibid.*, vol. 1, p. 20; and *ibid.*, vol. 33, pp. 270 and 272.

<sup>45</sup> *Ibid.*, vol. 96, p. 160.

<sup>46</sup> *Ibid.*, p. 156.

<sup>47</sup> *Ibid.*, vol. 339, p. 163.

<sup>48</sup> *Ibid.*, vol. 500, p. 108.

particular conditions imposed, on a basis of reciprocity, upon the diplomatic missions of particular States.<sup>49</sup>

### *Article 28. Freedom of communication*

1. The host State shall permit and protect free communication on the part of the permanent mission for all official purposes. In communicating with the Government and the diplomatic missions, consulates and special missions of the sending State, wherever situated, the permanent mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the host State.

2. The official correspondence of the permanent mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.

3. The bag of the permanent mission shall not be opened or detained.

4. The packages constituting the bag of the permanent mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the permanent mission.

5. The courier of the permanent mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the host State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the permanent mission may designate couriers *ad hoc* of the permanent mission. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the permanent mission's bag in his charge.

7. The bag of the permanent mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a courier of the permanent mission. By arrangement with the appropriate authorities, the permanent mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

#### *Commentary*

(1) This article is based on article 27 of the Vienna Convention on Diplomatic Relations.<sup>50</sup>

(2) Permanent missions to the United Nations, the specialized agencies and other international organizations enjoy in general freedom of communication on the same terms as the diplomatic missions accredited to the host State.

<sup>49</sup> Study by the Secretariat, *Yearbook of the International Law Commission, 1967*, vol. II, documents A/CN.4/L.118 and Add.1 and 2, p. 178, para. 96.

<sup>50</sup> United Nations, *Treaty Series*, vol. 500, pp. 109 and 110.

(3) The replies of the United Nations and the specialized agencies indicate also that the inviolability of correspondence, which is provided for in article IV, section 11 (b), of the Convention on the Privileges and Immunities of the United Nations<sup>51</sup> and in article V, section 13 (b), of the Convention of Privileges and Immunities of the Specialized Agencies<sup>52</sup> has been fully recognized.

(4) One difference between this article and article 27 of the Vienna Convention on Diplomatic Relations is the addition in paragraph 1 of the words "with special missions" in order to co-ordinate the article with article 28, paragraph 1, of the draft articles on special missions.<sup>53</sup>

(5) Another difference is that paragraph 7 of article 28 provides that the bag of the permanent mission may be entrusted not only to the captain of a commercial aircraft, as provided for the diplomatic bag in article 27 of the Vienna Convention on Diplomatic Relations, but also to the captain of a merchant ship. This additional provision is taken from article 35 of the Vienna Convention on Consular Relations<sup>54</sup> and article 28 of the draft articles on special missions.

(6) On the model of article 28 of the draft articles on special missions, the article uses the expression "the bag of the permanent mission" and the "courier of the permanent mission". The expressions "diplomatic bag" and "diplomatic courier" were not used, in order to prevent any possibility of confusion with the bag and courier of the permanent diplomatic mission.

(7) The expression "diplomatic missions" in paragraph 1 of the article is used in the broad sense in which it is used in paragraph 1 of article 28 of the draft articles on special missions, so as to include other missions to international organizations. Paragraph 4 of the commentary of the International Law Commission on article 28 of the draft articles on special missions states that:

the Commission wishes to stress that by the expression "diplomatic missions", used in the second sentence of paragraph 1, it means either a permanent diplomatic mission, or a mission to an international organization, or a specialized diplomatic mission of a permanent character.<sup>55</sup>

### *Article 29. Personal inviolability*

The persons of the permanent representative and of the members of the diplomatic staff of the permanent mission shall be inviolable. They shall not be liable to any form of arrest or detention. The host State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.

<sup>51</sup> *Ibid.*, vol. I, p. 20.

<sup>52</sup> *Ibid.*, vol. 33, p. 272.

<sup>53</sup> *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, pp. 360 and 361.

<sup>54</sup> United Nations, *Treaty Series*, vol. 596, pp. 290 and 292.

<sup>55</sup> *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 361.

### *Article 30. Inviolability of residence and property*

1. The private residence of the permanent representative and the members of the diplomatic staff of the permanent mission shall enjoy the same inviolability and protection as the premises of the permanent mission.

2. Their papers, correspondence and, except as provided in paragraph 3 of article 31, their property, shall likewise enjoy inviolability.

#### *Commentary*

(1) Articles 29 and 30 reproduce, without change of substance, the provisions of articles 29 and 30 of the Vienna Convention on Diplomatic Relations<sup>56</sup> and of the draft articles on special missions.<sup>57</sup>

(2) Articles 29 and 30 deal with two generally recognized immunities which are essential for the performance of the functions of the permanent representative and of the members of the diplomatic staff of the permanent mission.

(3) The principle of the personal inviolability of the permanent representative and of the members of the diplomatic staff, which article 29 confirms, implies, as in the case of the inviolability of the premises of the permanent mission, the obligation for the host State to respect, and to ensure respect for, the person of the individuals concerned. The host State must take all necessary measures to that end, including possibly the provision of a special guard where circumstances so require.

(4) Inviolability of all papers and documents of representatives of members to the organs of the organizations concerned is generally provided for in the Conventions on the Privileges and Immunities of the United Nations, the Specialized Agencies and other international organizations.

(5) In paragraph (1) of its commentary to article 28 (Inviolability of residence and property) of its draft articles on diplomatic intercourse and immunities adopted in 1958, the International Law Commission stated that:

This article concerns the inviolability accorded to the diplomatic agent's residence and property. Because this inviolability arises from that attaching to the person of the diplomatic agent, the expression "the private residence of a diplomatic agent" necessarily includes even a temporary residence of the diplomatic agent.<sup>58</sup>

### *Article 31. Immunity from jurisdiction*

1. The permanent representative and the members of the diplomatic staff of the permanent mission shall enjoy immunity from the criminal jurisdiction of the host State. They shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) a real action relating to private immovable property situated in the territory of the host State unless they hold

it on behalf of the sending State for the purposes of the permanent mission;

(b) an action relating to succession in which the permanent representative or a member of the diplomatic staff of the permanent mission is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the permanent representative or a member of the diplomatic staff of the permanent mission in the host State outside his official functions.

2. The permanent representative and the members of the diplomatic staff of the permanent mission are not obliged to give evidence as witnesses.

3. No measures of execution may be taken in respect of a permanent representative or a member of the diplomatic staff of the permanent mission except in cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a permanent representative or a member of the diplomatic staff of the permanent mission from the jurisdiction of the host State does not exempt him from the jurisdiction of the sending State.

### *Article 32. Waiver of immunity*

1. The immunity from jurisdiction of permanent representatives or members of the diplomatic staff of permanent missions and persons enjoying immunity under article 39 may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by a permanent representative, by a member of the diplomatic staff of a permanent mission or by a person enjoying immunity from jurisdiction under article 39 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary.

#### *Commentary*

(1) Article 31 is based on article 31 of the Vienna Convention on Diplomatic Relations.<sup>59</sup>

(2) The immunity from criminal jurisdiction granted under paragraph 1 of article 31 is complete and the immunity from civil and administrative jurisdiction is subject only to the exceptions stated in paragraph 1 of the article. This constitutes the principal difference between the "diplomatic" immunity enjoyed by permanent missions and the "functional" immunity accorded

<sup>56</sup> United Nations, *Treaty Series*, vol. 500, p. 110.

<sup>57</sup> *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 361.

<sup>58</sup> *Yearbook of the International Law Commission, 1958*, vol. II, document A/3859, p. 98.

<sup>59</sup> United Nations, *Treaty Series*, vol. 500, p. 112.

to delegations to organs of international organizations and conferences convened by them, by the Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies. Article IV, section 11 (a), of the Convention on the Privileges and Immunities of the United Nations<sup>60</sup> and article V, section 13 (a), of the Convention on the Privileges and Immunities of the Specialized Agencies<sup>61</sup> accord to the representatives of Members to the meetings of the organs of the organization concerned or to the conferences convened by it "immunity from legal process of every kind" in respect of "words spoken or written and all acts done by them" in their official capacity.

(3) Article 32 is modelled on the provisions of article 32 of the Vienna Convention on Diplomatic Relations.<sup>62</sup> The basic principle of the waiver of immunity is contained in article IV, section 14, of the Convention on the Privileges and Immunities of the United Nations which states:

Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.<sup>63</sup>

This provision is reproduced *mutatis mutandis* in article V, section 16 of the Convention on the Privileges and Immunities of the Specialized Agencies and in a number of the corresponding instruments of regional organizations.

#### Article 33. Consideration of civil claims

The sending State shall waive the immunity of any of the persons mentioned in paragraph 1 of article 32 in respect of civil claims in the host State when this can be done without impeding the performance of the functions of the permanent mission, and when immunity is not waived, the sending State shall use its best endeavours to bring about a just settlement of the claims.

#### Commentary

(1) This article is based on the important principle stated in resolution II, adopted on 14 April 1961, by the United Nations Conference on Diplomatic Intercourse and Immunities.<sup>64</sup>

<sup>60</sup> *Ibid.*, vol. 1, p. 20.

<sup>61</sup> *Ibid.*, vol. 33, p. 270.

<sup>62</sup> *Ibid.*, vol. 500, p. 112.

<sup>63</sup> *Ibid.*, vol. 1, p. 22.

<sup>64</sup> *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II, document A/CONF.20/10/Add.1, p. 90.

(2) The International Law Commission embodied this principle in article 42 of its draft articles on special missions

because [as stated in the commentary to that article] the purpose of immunities is to protect the interests of the sending State, not those of the persons concerned, and in order to facilitate, as far as possible, the satisfactory settlement of civil claims made in the receiving State against members of special missions.

This principle is also referred to in the draft preamble drawn up by the Commission.<sup>65</sup>

#### Article 34. Exemption from social security legislation

1. Subject to the provisions of paragraph 3 of this article, the permanent representative and the members of the diplomatic staff of the permanent mission shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the host State.

2. The exemption provided for in paragraph 1 of this article shall also apply to persons who are in the sole private employ of a permanent representative or of a member of the diplomatic staff of the permanent mission, on condition:

(a) That such employed persons are not nationals of or permanently resident in the host State, and

(b) That they are covered by the social security provisions which may be in force in the sending State or a third State.

3. The permanent representative and the members of the diplomatic staff of the permanent mission who employ persons to whom the exemption provided for in paragraph 2 of this article does not apply shall observe the obligations which the social security provisions of the host State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this article does not exclude voluntary participation in the social security system of the host State where such participation is permitted by that State.

5. The provisions of the present article do not affect bilateral and multilateral agreements on social security which have been previously concluded and do not preclude the subsequent conclusion of such agreements.

#### Commentary

(1) This article is based on article 33 of the Vienna Convention on Diplomatic Relations.<sup>66</sup>

(2) Paragraph 2 is modelled on paragraph 2 of article 32 of the draft articles on special missions in that it substitutes the expression "persons who are in the sole private employ" for the expression "private servants", which is used in article 33 of the Vienna Convention.

<sup>65</sup> *Yearbook of the International Law Commission*, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 365.

<sup>66</sup> United Nations, *Treaty Series*, vol. 500, pp. 112 and 114.

Referring to this change in terminology, the International Law Commission stated in paragraph 2 of its commentary to article 32 of the draft articles on special missions: "Article 32... applies not only to servants in the strict sense of the term, but also to other persons in the private employ of members of the special mission such as children's tutors and nurses".<sup>67</sup>

(3) Permanent representatives are generally exempt from payment of social security contributions. Permanent missions to the International Atomic Energy Agency (IAEA) are exempt from paying employers' social security contributions by virtue of articles XII and XIII of the Headquarters Agreement; it is understood that in practice the employers' contribution has been paid by permanent missions on a voluntary basis.<sup>68</sup>

#### *Article 35. Exemption from dues and taxes*

The permanent representative and the members of the diplomatic staff of the permanent mission shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) Indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) Dues and taxes on private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purposes of the permanent mission;

(c) Estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article 41;

(d) Dues and taxes on private income having its source in the host State and capital taxes on investments made in commercial undertakings in the host State;

(e) Charges levied for specific services rendered;

(f) Registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 25.

#### *Commentary*

(1) This article is based on article 34 of the Vienna Convention on Diplomatic Relations.<sup>69</sup>

(2) The immunity of representatives from taxation is dealt with indirectly in article IV, section 13, of the Convention on the Privileges and Immunities of the United Nations which provides that:

Where the incidence of any form of taxation depends upon residence, periods during which the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations are present in a State for the discharge of their duties shall not be considered as periods of residence.<sup>70</sup>

<sup>67</sup> *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 362.

<sup>68</sup> Study by the Secretariat, *Yearbook of the International Law Commission, 1967*, vol. II, documents A/CN.4/L.118 and Add.1 and 2, p. 201, para. 46.

<sup>69</sup> United Nations, *Treaty Series*, vol. 500, p. 114.

<sup>70</sup> *Ibid.*, vol. 1, p. 22.

This provision is reproduced *mutatis mutandis* in article V, section 15 of the Convention on the Privileges and Immunities of the Specialized Agencies<sup>71</sup> and in a number of the corresponding instruments of regional organizations. (3) Except in the case of nationals of the host State, representatives enjoy extensive exemption from taxation. In ICAO and UNESCO all representatives, and in FAO and IAEA resident representatives, are granted the same exemptions in respect of taxation as diplomats of the same rank accredited to the host State concerned. In the case of IAEA, no taxes are imposed by the host State on the premises used by missions or delegates, including rented premises and parts of buildings. Permanent missions to UNESCO pay taxes only for services rendered and real property tax (*contribution foncière*) when the permanent representative is the owner of the building. Permanent representatives are exempt from tax on movable property (*contribution mobilière*), a tax imposed in France on occupiers of rented or occupied properties, in respect of their principal residence but not in respect of any secondary residence.<sup>72</sup>

#### *Article 36. Exemption from personal services*

The host State shall exempt the permanent representative and the members of the diplomatic staff of the permanent mission from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

#### *Commentary*

(1) This article is based on the provisions of article 35 of the Vienna Convention on Diplomatic Relations.<sup>73</sup>

(2) The immunity in respect of national service obligations provided in article IV, section 11 (d), of the Convention on the Privileges and Immunities of the United Nations<sup>74</sup> and article V, section 13 (d), of the Convention on the Privileges and Immunities of the Specialized Agencies<sup>75</sup> has been widely acknowledged. That immunity does not normally apply when the representative is a national of the host State.<sup>76</sup>

#### *Article 37. Exemption from customs duties and inspection*

1. The host State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes and related

<sup>71</sup> *Ibid.*, vol. 33, p. 272.

<sup>72</sup> Study by the Secretariat, *Yearbook of the International Law Commission, 1967*, vol. II, documents E/CN.4/L.118 and Add.1 and 2, p. 201, para. 45.

<sup>73</sup> United Nations, *Treaty Series*, vol. 500, p. 114.

<sup>74</sup> *Ibid.*, vol. 1, p. 22.

<sup>75</sup> *Ibid.*, vol. 33, p. 272.

<sup>76</sup> Study by the Secretariat, *Yearbook of the International Law Commission, 1967*, vol. II, documents A/CN.4/L.118 and Add.1 and 2, p. 200, para. 37.

charges other than charges for storage, cartage and similar services, on:

(a) Articles for the official use of the permanent mission;

(b) Articles for the personal use of a permanent representative or a member of the diplomatic staff of the permanent mission or members of his family forming part of his household, including articles intended for his establishment.

2. The personal baggage of a permanent representative or a member of the diplomatic staff of the permanent mission shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host State. Such inspection shall be conducted only in the presence of the person enjoying the exemption or of his authorized representative.

#### Commentary

(1) This article is based on article 36 of the Vienna Convention on Diplomatic Relations.<sup>77</sup>

(2) While in general permanent representatives and members of the diplomatic staff of permanent missions enjoy exemption from customs and excise duties, the detailed application of this exemption in practice varies from one host State to another according to the system of taxation followed by the country in question.

(3) At United Nations Headquarters the United States Code of Federal Regulations, Title 19—Customs Duties (Revised 1964) provides in section 10.30 b, paragraph (b), that resident representatives and members of their staffs may import "... without entry and free of duty and internal-revenue tax articles for their personal or family use".<sup>78</sup>

(4) At the United Nations Office at Geneva the matter is dealt with largely by the Swiss Customs Regulation of 23 April 1952. Briefly, permanent missions may import all articles for official use and belonging to the Government they represent (article 15). Permanent representatives with a title equivalent to that of the head of a diplomatic mission and who have a *carte de légitimation* may import free of duty all articles destined for their own use or that of their family (article 16, paragraph 1). Representatives with a title equivalent to members of a diplomatic mission and who have a *carte de légitimation*, have a similar privilege except that the importation of furniture may only be made once (article 16, paragraph 2).<sup>79</sup>

(5) The position in respect of permanent missions to specialized agencies having their headquarters in Switzer-

land is identical with that of permanent missions to the United Nations at Geneva. In the case of FAO, the extent of the exemption of resident representatives depends on their diplomatic status and is granted in accordance with the general rules relating to diplomatic envoys. Permanent representatives to UNESCO assimilated to heads of diplomatic missions can import goods at any time for their own use and for that of their mission free of duty. Other members of permanent missions may import their household goods and effects free of duty at the time of taking up their appointment.

#### Article 38. Acquisition of nationality

Members of the permanent mission not being nationals of the host State, and members of their families forming part of their household, shall not, solely by the operation of the law of the host State, acquire the nationality of that State.

#### Commentary

This article is based on the rule stated in the Optional Protocol concerning Acquisition of Nationality adopted on 18 April 1961 by the United Nations Conference on Diplomatic Intercourse and Immunities.<sup>80</sup>

#### Article 39. Persons entitled to privileges and immunities

1. The members of the family of a permanent representative or of a member of the diplomatic staff of the permanent mission forming part of his household shall, if they are not nationals of the host State, enjoy the privileges and immunities specified in articles 29 to 37.

2. Members of the administrative and technical staff of the permanent mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 29 to 36, except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in article 37, paragraph 1, in respect of articles imported at the time of first installation.

3. Members of the service staff of the permanent mission who are not nationals of or permanently resident in the host State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in article 34.

4. Private staff of members of the permanent mission shall, if they are not nationals of or permanently resident in the host State, be exempt from dues and taxes on the emoluments they receive by reason of their employment.

<sup>77</sup> United Nations, *Treaty Series*, vol. 500, p. 116.

<sup>78</sup> Study by the Secretariat, *Yearbook of the International Law Commission*, 1967, vol. II, documents A/CN.4/L.118 and Add.1 and 2, p. 238, para. 134. For details of the position in respect of the various federal and State taxes in New York, *ibid.*, pp. 185 and 186, paras. 144-147.

<sup>79</sup> *Ibid.*, p. 183, para. 136.

<sup>80</sup> *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II, document A/CONF.20/11, p. 89.

In other respects, they may enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the permanent mission.

#### *Commentary*

(1) This article is modelled on article 37 of the Vienna Convention on Diplomatic Relations.<sup>81</sup>

(2) The study by the Secretariat does not include data on the privileges and immunities which host States accord to members of the families of permanent representatives, to the members of the administrative and technical staff and of the service staff of permanent missions and to the private staff of the members of permanent missions. It is assumed that the practice relating to the status of these persons conforms to the corresponding rules established within the framework of inter-State diplomatic relations as codified and developed in the Vienna Convention on Diplomatic Relations. This assumption is corroborated by the identical legal basis of the status of these persons inasmuch as their status attaches to and derives from diplomatic agents or permanent representatives, who are accorded analogous diplomatic privileges and immunities.

(3) In paragraph 4 of the article the expression "private servants" which appears in paragraph 4 of article 37 of the Vienna Convention on Diplomatic Relations, has been replaced by the expression "private staff" on the model of articles 32 and 38 of the draft articles on special missions.<sup>82</sup> Paragraph 2 of the commentary to article 32 of the draft articles on special missions explains this change as follows: "Article 32...applies not only to servants in the strict sense of the term, but also to other persons in the private employ of members of the special mission such as children's tutors and nurses". This explanation is also valid for permanent missions to international organizations.

#### *Article 40. Nationals of the host State and persons permanently resident in the host State*

1. Except in so far as additional privileges and immunities may be granted by the host State, a permanent representative or a member of the diplomatic staff of the permanent mission who is a national or a permanent resident of that State or is, or has been, its representative, shall enjoy immunity from jurisdiction, and inviolability, only in respect of official acts performed in the exercise of his functions.

2. Other members of the staff of the permanent mission and private staff who are nationals or permanent residents of the host State shall enjoy privileges and immunities only to the extent admitted by the host State. However,

the host State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

#### *Commentary*

(1) This article reproduces, with the necessary drafting changes, article 38 of the Vienna Convention on Diplomatic Relations.<sup>83</sup> Here, too, the expression "private servants" has been replaced by "private staff".

(2) As mentioned in the third report submitted by the Special Rapporteur, a number of the conventions on the privileges and immunities of international organizations, whether universal or regional, stipulate that the provisions which define the privileges and immunities of the representatives of members are not applicable as between a representative and the authorities of the State of which he is a national or of which he is or has been the representative.<sup>84</sup>

#### *Article 41. Duration of privileges and immunities*

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the host State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the host State.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the permanent mission, immunity shall continue to subsist.

3. In case of the death of a member of the permanent mission the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

4. In the event of the death of a member of the permanent mission not a national or permanent resident of the host State or a member of his family forming part of his household, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the host State was due solely to the presence there of the deceased as a member of the permanent mission or as a member of the family of a member of the permanent mission.

<sup>81</sup> United Nations, *Treaty Series*, vol. 500, p. 116.

<sup>82</sup> *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, pp. 362 and 364.

<sup>83</sup> United Nations, *Treaty Series*, vol. 500, p. 118.

<sup>84</sup> *Yearbook of the International Law Commission, 1968*, vol. II, document A/CN.4/203 and Add.1-5, p. 136, para. 35.

## Commentary

(1) This article is based on the provisions of article 39 of the Vienna Convention on Diplomatic Relations.<sup>85</sup>

(2) The first two paragraphs of the article deal with the times of commencement and termination of entitlements for persons who enjoy privileges and immunities in their own right. For those who do not enjoy privileges and immunities in their own right other dates may apply, viz. the dates of commencement and termination of the relationship which constitutes the grounds for the entitlement.

(3) Article IV, section 11, of the Convention on the Privileges and Immunities of the United Nations<sup>86</sup> and article V, section 13, of the Convention on the Privileges and Immunities of the Specialized Agencies<sup>87</sup> provide that representatives shall enjoy the privileges and immunities listed therein "while exercising their functions and during their journeys to and from the place of meeting". In 1961 the Legal Counsel of the United Nations replied to an inquiry made by one of the specialized agencies as to the interpretation to be given to the first part of this phrase. The reply contained the following: "You enquire whether the words 'while exercising their functions' should be given a narrow or broad interpretation . . . I have no hesitation in believing that it was the broad interpretation that was intended by the authors of the Convention".<sup>88</sup>

(4) The duration of privileges and immunities of members of permanent missions gave rise to differences between the Secretariat of the United Nations and the host State both at Headquarters in New York and at the Geneva Office. One of the two host Governments contended that the commencement of privileges and immunities was dependent on the notification to it of the appointment of the members of the mission and the other required the prior consent of its authorities before giving diplomatic privileges and immunities to the individual concerned.<sup>89</sup>

(5) Article IV, section 12, of the Convention on the Privileges and Immunities of the United Nations, which is reproduced *mutatis mutandis* in article V, section 14, of the Convention on the Privileges and Immunities of the Specialized Agencies,<sup>90</sup> provides that:

In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members.<sup>91</sup>

<sup>85</sup> United Nations. *Treaty Series*, vol. 500, p. 118.

<sup>86</sup> *Ibid.*, vol. I, pp. 20 and 22.

<sup>87</sup> *Ibid.*, vol. 33, pp. 270 and 272.

<sup>88</sup> Study by the Secretariat, p. 176, para. 87.

<sup>89</sup> See the case of *B. v. M.*; *Arrêts du Tribunal fédéral suisse*, 85, 1959, II, p. 153; also study by the Secretariat, p. 176, para. 89 and the Santiesteban case, *ibid.*, p. 172, para. 56. For the differences of interpretation of section 15 (2) of the Headquarters Agreements of the United Nations, see paragraph (3) of the commentary to article 17. (*Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, p. 209).

<sup>90</sup> United Nations, *Treaty Series*, vol. 33, p. 270.

<sup>91</sup> *Ibid.*, vol. 1, p. 22.

## Article 42. Duties of third States

1. If a permanent representative or a member of the diplomatic staff of the permanent mission passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the permanent representative or member of the diplomatic staff of the permanent mission or travelling separately to join him or to return to their country.

2. In circumstances similar to those specified in paragraph 1 of this article, third States shall not hinder the passage of members of the administrative and technical or service staff of a permanent mission, and of members of their families, through their territories.

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the host State. They shall accord to diplomatic couriers who have been granted a passport visa if such visa was necessary, and diplomatic bags in transit the same inviolability and protection as the host State is bound to accord.

4. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and diplomatic bags, whose presence in the territory of the third State is due to *force majeure*.

## Commentary

(1) The provisions of this article are taken from article 40 of the Vienna Convention on Diplomatic Relations.<sup>92</sup>

(2) Reference has been made in paragraph (3) of the commentary on article 41 to the broad interpretation given by the Legal Counsel of the United Nations to the provision of article IV, section 11, of the Convention on the Privileges and Immunities of the United Nations and article V, section 13, of the Convention on the Privileges and Immunities of the Specialized Agencies which stipulate that representatives shall enjoy the privileges and immunities listed in those provisions "while exercising their functions and during their journeys to and from the place of meeting".

(3) The study by the Secretariat mentions the special problem which may arise when access to the country in which a United Nations meeting is to be held is only possible through another State. It states that:

While there is little practice, the Secretariat takes the position that such States are obliged to grant access and transit to the representatives of Member States for the purpose in question.<sup>93</sup>

<sup>92</sup> *Ibid.*, vol. 500, pp. 118 and 120.

<sup>93</sup> Study by the Secretariat, *Yearbook of the International Law Commission, 1967*, vol. II, documents A/CN.4/L.118 Add.1 and 2, p. 190, para. 168.

**Article 43. Non-discrimination**

In the application of the provisions of the present articles, no discrimination shall be made as between States.

*Commentary*

(1) Article 43 reproduces, with the necessary drafting changes, paragraph 1 of article 47 of the Vienna Convention on Diplomatic Relations.<sup>94</sup>

(2) A difference of substance between the two articles is the non-inclusion in article 43 of paragraph 2 of article 47 of the Vienna Convention. That paragraph refers to two cases in which, although an inequality of treatment is implied, no discrimination occurs, since the inequality of treatment in question is justified by the rule of reciprocity.

(3) In general, the headquarters agreements of international organizations contain no restrictions on the privileges and immunities of members of permanent missions based on the application of the principle of reciprocity in relations between the host State and the sending State. Some headquarters agreements, however, include a clause providing that the host State shall grant permanent representatives the privileges and immunities which it accords to diplomatic envoys accredited to it, "subject to corresponding conditions and obligations". Examples of such clauses may be found in article V, section 15, of the Headquarters Agreement of the United Nations,<sup>95</sup> article XI, section 24, paragraph (a), of the Headquarters Agreement of the Food and Agriculture Organization<sup>96</sup> and article 1 of the Headquarters Agreement of the Organization of American States.<sup>97</sup>

(4) The study by the Secretariat states that it has been the understanding of the Secretariat of the United Nations that the privileges and immunities granted should generally be those afforded to the diplomatic corps as a whole, and should not be subject to particular conditions imposed, on a basis of reciprocity, upon the diplomatic missions of particular States.<sup>98</sup> In his statement at the 1016th meeting of the Sixth Committee of the General Assembly, the Legal Counsel of the United Nations stated that:

The Secretary-General in interpreting diplomatic privileges and immunities would look to provisions of the Vienna Convention so far as they would appear relevant *mutatis mutandis* to representatives to United Nations organs and conferences. It should of course be noted that some provisions such as those relating to *agrément*, nationality or reciprocity have no relevancy in the situation of representatives to the United Nations.<sup>99</sup>

<sup>94</sup> United Nations, *Treaty Series*, vol. 500, pp. 122 and 124.

<sup>95</sup> *Ibid.*, vol. 11, p. 26.

<sup>96</sup> *United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. II (ST/LEG/SER.B/11), p. 195.

<sup>97</sup> United Nations, *Treaty Series*, vol. 181, p. 141.

<sup>98</sup> Study by the Secretariat, *Yearbook of the International Law Commission, 1967*, vol. II, documents A/CN.4/L.113 and Add.1 and 2, p. 178, para. 96.

<sup>99</sup> *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 98, document A/C.6/385, para. 4.

**Section III. Conduct of the permanent mission and its members****Article 44. Obligation to respect the laws and regulations of the host State**

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the host State. They also have a duty not to interfere in the internal affairs of that State.

2. The premises of the permanent mission must not be used in any manner incompatible with the functions of the permanent mission as laid down in the present articles or by other rules of general international law or by special agreements in force between the sending and the host State.

*Commentary*

(1) This article is based on the provisions of article 41, paragraphs 1 and 3, of the Vienna Convention on Diplomatic Relations,<sup>100</sup> and article 48 of the draft articles on special missions.<sup>101</sup>

(2) Paragraph 1 states that, in general, it is the duty of all persons enjoying privileges and immunities to respect the laws and regulations of the host State. This duty naturally does not apply when the member's privileges and immunities exempt him from it. With respect to immunity from jurisdiction, this immunity implies merely that a member of the permanent mission may not be brought before the courts if he fails to fulfil his obligations. Such a failure by a member of the permanent mission who enjoys immunity from jurisdiction does not absolve the host State from its duty to respect the member's immunity.

(3) Paragraph 2 stipulates that the premises of the permanent mission shall be used only for the legitimate purposes for which they are intended. Failure to fulfil the duty laid down in this article does not render article 24 (Inviolability of the premises of the permanent mission) inoperative. That inviolability, however, does not authorize a use of the premises which is incompatible with the functions of the permanent mission.

**Article 45. Professional activity**

The permanent representative and the members of the diplomatic staff of the permanent mission shall not practice for personal profit any professional or commercial activity in the host State.

*Commentary*

(1) This article reproduces, with the necessary drafting changes, the provisions of article 42 of the Vienna

<sup>100</sup> United Nations, *Treaty Series*, vol. 500, p. 120.

<sup>101</sup> *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 367.

Convention on Diplomatic Relations<sup>102</sup> and article 49 of the draft articles on special missions.<sup>103</sup>

(2) In paragraph 2 of the commentary on article 49 of its draft articles on special missions, the Commission stated that:

Some Governments proposed the addition of a clause providing that the receiving State may permit the persons referred to in article 49 of the draft to practise a professional or commercial activity on its territory. The Commission took the view that the right of the receiving State to grant such permission is self-evident. It therefore preferred to make no substantive departure from the text of the Vienna Convention on this point.

#### *Section IV. End of the function of the permanent representative*

##### *Article 46. Modes of termination*

The function of a permanent representative or a member of the diplomatic staff of the permanent mission comes to an end, *inter alia*:

(a) On notification by the sending State that the function of the permanent representative or the member of the diplomatic staff of the permanent mission has come to an end;

(b) If the membership of the sending State in the international organization concerned is terminated or suspended or if the activities of the sending State in that organization are suspended.

#### *Commentary*

(1) Sub-paragraph (a) of this article reproduces, with the necessary drafting changes, the provisions of sub-paragraph (a) of article 43 of the Vienna Convention on Diplomatic Relations.<sup>104</sup>

(2) Sub-paragraph (b) refers to those cases where the sending State recalls the permanent mission for reasons relating to the membership of the sending State in the organization to which that mission has been sent. In general, constituent instruments of international organizations contain provisions on expulsion of a member, withdrawal from membership and suspension of membership. Sub-paragraph (b) expressly provides also for the case of suspension of the activities of the sending State in the organization. The absence of Indonesia from the United Nations during the period from 1 January 1965 to 28 September 1966 has been interpreted by the United Nations as suspension of activities in the Organization and not as withdrawal from membership. On 19 September 1966, the Ambassador of Indonesia in Washington

transmitted a message to the Secretary-General from his Government, stating that it had decided

to resume full co-operation with the United Nations and to resume participation in its activities starting with the twenty-first session of the General Assembly.<sup>105</sup>

At the 1420th plenary meeting of the General Assembly on 28 September 1966, the President, having read this communication, declared:

It would... appear that the Government of Indonesia considers that its recent absence from the Organization was based not upon a withdrawal from the United Nations but upon a cessation of co-operation. The action so far taken by the United Nations on this matter would not appear to preclude this view.<sup>106</sup>

(3) This article does not contain a provision corresponding to sub-paragraph (b) of article 43 of the Vienna Convention on Diplomatic Relations, which provides as one of the modes of termination of the function of a diplomatic agent the "notification by the receiving State to the sending State that, in accordance with paragraph 2 of article 9, it refuses to recognize the diplomatic agent as a member of the mission".<sup>107</sup> Under paragraph 2 of article 9 of the Vienna Convention on Diplomatic Relations, the receiving State may refuse such recognition if the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 relating to the declaration of a diplomatic agent as *persona non grata*<sup>108</sup> by the receiving State. As mentioned in paragraph (3) of the commentary to article 10 of these draft articles,

the members of the permanent mission are not accredited to the host State in whose territory the seat of the organization is situated. They do not enter into direct relationship with the host State, unlike the case of bilateral diplomacy. In the latter case, the diplomatic agent is accredited to the receiving State in order to perform certain functions of representation and negotiation between the receiving State and his own. That legal situation is the basis of the institution of *agrément*, for the appointment of the head of the diplomatic mission.<sup>109</sup> It is also the basis of the right of the receiving State to request the recall of the diplomatic agent when it declares him *persona non grata*.

(4) Article VII, section 25 (1) of the Convention on the Privileges and Immunities of the Specialized Agencies provides that:

Representatives of members at meetings convened by specialized agencies, while exercising their functions and during their journeys to and from the place of meeting, and officials within the meaning of section 18, shall not be required by the territorial authorities to leave the country in which they are performing their functions on account of any activities by them in their official capacity. In the case, however, of abuse of privileges of residence committed

<sup>105</sup> *Official Records of the Security Council, Twenty-first Year, Supplement for July, August and September 1966*, document S/7498, p. 127.

<sup>106</sup> Study by the Secretariat, *Yearbook of the International Law Commission, 1967*, vol. II, documents A/CN.4/L.118 and Add.1 and 2, p. 177, foot-note 39.

<sup>107</sup> United Nations, *Treaty Series*, vol. 500, p. 122.

<sup>108</sup> *Ibid.*, p. 102.

<sup>109</sup> *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, p. 203.

<sup>102</sup> United Nations, *Treaty Series*, vol. 500, p. 120.

<sup>103</sup> *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 367.

<sup>104</sup> United Nations, *Treaty Series*, vol. 500, p. 122.

by any such person in activities in that country outside his official functions, he may be required to leave by the Government of that country...<sup>110</sup>

The following comment was made on this provision in the study by the Secretariat.

No corresponding provision is contained in the General Convention [the Convention on the Privileges and Immunities of the United Nations]. In the absence of any cases in which article VII of the Specialized Agencies Convention, or any similar provision in a headquarters agreement, has been applied, no practice has been developed regarding its interpretation.<sup>111</sup>

#### *Article 47. Facilities for departure*

**The host State must, even in the case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the host State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.**

#### *Article 48. Protection of premises and archives*

**1. When the functions of a permanent mission come to an end, the host State must, even in the case of armed conflict, respect and protect the premises as well as the property and archives of the permanent mission. The sending State must withdraw that property and those archives within a reasonable time.**

**2. The host State is required to grant the sending State, even in the case of armed conflict, facilities for removing the archives of the permanent mission from the territory of the host State.**

#### *Commentary*

The provisions of article 47 are substantially the same as those of article 44 of the Vienna Convention on Diplomatic Relations.<sup>112</sup> The provisions of article 48 are based on the provisions of article 45 of the same Convention.<sup>113</sup> The Special Rapporteur considers that these two articles call for no special comment.

#### *Article 49. Consultations between the sending State, the host State and the Organization*

**1. Consultations shall be held between the sending State, the host State and the Organization on any question arising out of the application of the present articles. Such consulta-**

**tions shall in particular be held as regards the application of articles 10, 16, 43, 44, 45 and 46.**

**2. The preceding paragraph is without prejudice to provisions concerning settlement of disputes contained in the present articles or other international agreements in force between States or between States and international organizations or to any relevant rules of the Organization.**

#### *Commentary*

(1) Reference has been made before in this report to the fact that in connexion with the examination of the provisional twenty-one draft articles adopted by the Commission in the course of its twentieth session, suggestions were made by some members of the Commission that the Special Rapporteur prepare a provision of general scope of application on the question of consultations between the sending State, the host State and the organization.<sup>114</sup> The purpose of the consultations in question would be to provide remedies for difficulties which may arise as a result of the non-application, between States members of international organizations and between States members and the organizations, of rules of inter-State bilateral diplomatic relations regarding *agrément*, the declaring of a diplomatic agent as *persona non grata* and reciprocity.

(2) Paragraph 1 of article 49 refers in particular to the following provisions of the present draft articles: Article 10 (Appointment of the members of the permanent mission); Article 16 (Size of the permanent mission); Article 43 (Non-discrimination); Article 44 (Obligation to respect the laws and regulations of the host State); Article 45 (Professional activity) and Article 46 (Modes of termination).

(3) Paragraph 1 is drafted in such a flexible manner as to envisage the holding of consultations between the Sending State and the host State or between either or both of them and the organization concerned. In the discussion on the "question of diplomatic privileges and immunities" which took place in the Sixth Committee during the twenty-second session of the General Assembly, it was generally agreed that the organization itself had an interest in the enjoyment by the representatives of member States of the privileges and immunities necessary to enable them to carry out their tasks. It was also recognized that the Secretary-General should maintain his efforts to ensure that the privileges and immunities concerned were respected.<sup>115</sup> In his statement at the 1016th meeting of the Sixth Committee the Legal Counsel, speaking as the representative of the Secretary-General, stated that:

... the rights of representatives should properly be protected by the Organization and not left entirely to bilateral action of the States immediately involved. The Secretary-General would therefore continue to feel obligated in the future, as he has done in the past, to assert the rights and interests of the Organization on behalf of representatives of Members as the occasion may arise. I would not understand from the discussion in this Committee that the Members of the Organization would wish him to act in any way

<sup>110</sup> United Nations, *Treaty Series*, vol. 33, p. 278.

<sup>111</sup> Study by the Secretariat, *Yearbook of the International Law Commission, 1967*, vol. II, documents A/CN.4/L.118 and Add.1 and 2, p. 200, para. 36.

<sup>112</sup> United Nations, *Treaty Series*, vol. 500, p. 122.

<sup>113</sup> *Ibid.*

<sup>114</sup> See para. 7 above.

<sup>115</sup> *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 98, document A/6965, para. 14.

different from that which I have just indicated. Likewise, since the Organization itself has an interest in protecting the rights of representatives, a difference with respect to such rights may arise between the United Nations and a Member and consequently be the subject of a request for an advisory opinion under section 30 of the Convention [the Convention on the Privileges and Immunities of the United Nations of 1946]. It is thus clear that the United Nations may be one of the "parties" as that term is used in section 30.<sup>116</sup>

(4) The term "Organization" as used in paragraph 1 of article 49 must be understood to refer to the principal executive official of the international organization in question, whether designated "Secretary-General", "Director-General" or otherwise. Practical considerations make it necessary that the consultations envisaged in article 49 be conducted with such an organ on behalf of the organization inasmuch as those consultations are designed to deal with practical difficulties which arise in the every day relationship between the permanent missions and the organization to which they are accredited and with which they maintain the necessary liaison.

(5) The provision for consultations is not uncommon in international agreements. It may be found for example in section 14 of article IV of the Agreement concerning the Headquarters of the United Nations;<sup>117</sup> in article VII of the Treaty of Brussels of 17 March 1948, for collaboration in economic, social and cultural matters and for collective self-defence<sup>118</sup> and article 6 of the Inter-American Treaty of Reciprocal Assistance of 2 September 1947.<sup>119</sup>

<sup>116</sup> *Ibid.*, document A/C.6/385, para. 8.

<sup>117</sup> United Nations, *Treaty Series*, vol. 11, p. 24.

<sup>118</sup> *Ibid.*, vol. 19, p. 59.

<sup>119</sup> *Ibid.*, vol. 21, pp. 97 and 99. For other examples, see P. Guggenheim, *Traité de droit international public* (Geneva, Librairie de l'Université, Georg et Cie S.A., 1954), vol. II, pp. 198-200.

(6) Paragraph 2 of article 49 contains a saving clause relating to provisions on the settlement of disputes. Its purpose is to make clear that the consultations envisaged in the article relate to difficulties of a practical character and not to disputes of a rather more formal character to which the interpretation of the articles may give rise and for which a specific mode of settlement may be provided for in the present articles or in other applicable international agreements or in the relevant rules of the organization concerned. An example of such provisions is section 30 of article VIII of the Convention on the Privileges and Immunities of the United Nations which reads:

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 hand, 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.<sup>120</sup>

(7) The expression "relevant rules of the Organization" used in paragraph 2 of article 49 is broad enough to include all relevant rules whatever their source: constituent instruments, resolutions of the organization concerned or the practice prevailing in that organization.

<sup>120</sup> United Nations, *Treaty Series*, vol. 1, p. 30. Identical or similar provisions are embodied in the Convention on the Privileges and Immunities of the Specialized Agencies and the corresponding conventions of some regional organizations.



# SUCCESSION OF STATES AND GOVERNMENTS : SUCCESSION IN RESPECT OF TREATIES

[Agenda item 2 (a)]

## DOCUMENT A/CN.4/210

Succession of States to multilateral treaties : sixth study prepared by the Secretariat \*

[Original text: English]

[11 June 1968]

### CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
NOTE . . . . .		25
VI. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS: CONSTITUTION AND MULTILATERAL CONVENTIONS AND AGREEMENTS CONCLUDED WITHIN THE ORGANIZATION AND DEPOSITED WITH ITS DIRECTOR-GENERAL . . . . .		25
A. The Constitution of the Food and Agriculture Organization of the United Nations . . . . .	1-13	25
(a) Establishment, purposes and organs of the Organization . . . . .	1-5	25
(b) Categories of membership: "Member Nations" and "Associate Members" . . . . .	6	26
(c) Methods of becoming a member . . . . .	7-13	27
1. Full membership (Parties to the Constitution) . . . . .	7-11	27
(i) Nations eligible for original membership . . . . .	7	27
(ii) Additional Member Nations . . . . .	8-11	27
2. Associate membership (territories or groups of territories for the international relations of which a Member Nation or authority is responsible) . . . . .	12-13	28
B. Multilateral conventions and agreements concluded within FAO and deposited with its Director-General . . . . .	14-29	28
(a) Article XIV of the FAO Constitution and rule XXI of the General Rules of the Organization . . . . .	14-17	28

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\* For the first five studies prepared by the Secretariat, see *Yearbook of the International Law Commission, 1968*, vol. II, documents A/CN.4/200/Rev.2 and A/CN.4/200/Add.1 and 2, p. 1.

CONTENTS ( <i>continued</i> )		<i>Paragraphs</i>	<i>Page</i>
(b) Principles and procedures which should govern conventions and agreements concluded under article XIV of the FAO Constitution . . . . .	18-19		29
(c) Multilateral conventions and agreements concluded under article XIV of the FAO Constitution . . . . .	20-29		30
1. Constitution of the International Rice Commission (1948) . . . . .	21		30
2. Agreement for the establishment of the Indo-Pacific Fisheries Council (1948) . . . . .	22		30
3. Agreement for the establishment of a General Fisheries Council for the Mediterranean (1949) . . . . .	23		31
4. International Plant Protection Convention (1951) . . . . .	24		31
5. Constitution of the European Commission for the Control of Foot-and-Mouth Disease (1953) . . . . .	25		31
6. Plant Protection Agreement for the South East Asia and Pacific Region (1956) . . . . .	26		32
7. Convention placing the International Poplar Commission within the framework of FAO (1959) . . . . .	27		32
8. Agreement for the establishment of a Commission for Controlling the Desert Locust in the Eastern Region of its Distribution Area in South West Asia (1963) . . . . .	28		32
9. Agreement for the establishment of a Commission for Controlling the Desert Locust in the Near East (1965) . . . . .	29		32
C. Description of relevant cases concerning participation in FAO instruments	30-67		33
(a) Cases relating to the FAO Constitution . . . . .	31-56		33
1. Admission as Member Nations of former non-metropolitan territories for whose international relations a Member Nation was responsible . . . . .	32-48		33
(i) After attaining independence . . . . .	32-35		33
(ii) Before attaining full independence . . . . .	36-48		34
a. Membership effective prior to accession to full independence	36-40		34
<i>Burma</i> . . . . .	37		35
<i>Indonesia</i> . . . . .	38-39		35
<i>Tunisia</i> . . . . .	40		35
b. Membership effective after accession to independence . . . . .	41-48		36
<i>Cyprus, Nigeria and Somalia; Cameroon and Togo</i> . . . . .	42-44		36
<i>Jamaica and Tanganyika</i> . . . . .	45-46		36
<i>Kenya, Malta and Zanzibar; Botswana and Lesotho</i> . . . . .	47		37
<i>Guyana and Mauritius</i> . . . . .	48		37
2. Changes undergone by members . . . . .	49-56		37
(i) Member Nations . . . . .	49-53		37
a. Partition of <i>India</i> . . . . .	49		37
b. Formation and dissolution of a union between <i>Syria</i> and <i>Egypt (United Arab Republic)</i> . . . . .	50-51		38
c. Formation of the <i>United Republic of Tanzania</i> . . . . .	52		38
d. Formation of <i>Malaysia</i> and separation of <i>Singapore</i> . . . . .	53		38
(ii) Associate Members . . . . .	54-56		39
a. Attainment of independence of <i>Chad, Gabon and Madagascar</i> . . . . .	54		39
b. Attainment of independence of <i>Mali and Senegal</i> . . . . .	55		39
c. Dissolution of the <i>Federation of Rhodesia and Nyasaland</i> . . . . .	56		39
(b) Cases relating to multilateral conventions and agreements concluded within FAO and deposited with its Director-General . . . . .	57-67		39
1. Constitution of the International Rice Commission (1948) <i>Cambodia, Federation of Malaya, Ghana, Guyana, Indonesia, Laos, Madagascar, Mali, Nigeria, Sierra Leone and Viet-Nam</i> . . . . .	57		39
2. Agreement for the establishment of the Indo-Pacific Fisheries Council (1948) <i>Cambodia, Federation of Malaya, Indonesia and Viet-Nam</i> . . . . .	58		40
3. Agreement for the establishment of a General Fisheries Council for the Mediterranean (1949) <i>Algeria, Cyprus, Malta, Morocco and Tunisia</i> . . . . .	59		40

CONTENTS ( <i>continued</i> )		
	<i>Paragraphs</i>	<i>Page</i>
4. International Plant Protection Convention (1951) . . . . .	60-61	40
<i>Nauru and Western Samoa</i> . . . . .	60	40
<i>Former Netherlands New Guinea (West Irian)</i> . . . . .	61	40
5. Constitution of the European Commission for the Control of Foot-and-Mouth Disease (1953) . . . . .	62	40
6. Plant Protection Agreement for the South East Asia and Pacific Region (1956) . . . . .	63-64	41
<i>Federation of Malaya</i> . . . . .	63	41
<i>Former Netherlands New Guinea (West Irian)</i> . . . . .	64	41
7. Convention placing the International Poplar Commission within the framework of FAO (1959) . . . . .	65-66	41
<i>Syrian Arab Republic</i> . . . . .	65	41
<i>Former territories under Belgian, British, French or Spanish administration</i> . . . . .	66	41
8. Agreement for the establishment of a Commission for Controlling the Desert Locust in the Eastern Region of its Distribution Area in South West Asia (1963) and		
9. Agreement for the establishment of a Commission for Controlling the Desert Locust in the Near East (1965)		
<i>Qatar and Bahrain</i> . . . . .	67	41
D. Summary . . . . .	68-80	41
(a) Constitution of FAO . . . . .	68-75	41
(b) Conventions and agreements concluded within FAO and deposited with its Director-General. . . . .	76-80	43

### Note

The present document contains the sixth study of the series "Succession of States to multilateral treaties". It relates to the Constitution of the Food and Agriculture Organization of the United Nations (FAO) and the multilateral conventions and agreements concluded within FAO and deposited with its Director-General. The study has been prepared by the Codification Division of the Office of Legal Affairs of the United Nations Secretariat as part of a research project undertaken by it in order to assist the International Law Commission in its work on the topic of "Succession of States and Governments".

The first five studies of the series, published in 1968 as documents of the twentieth session of the International Law Commission, are the following: "International Union for the Protection of Literary and Artistic Work: Berne Convention of 1886 and subsequent Acts of revision" (Study I), "Permanent Court of Arbitration and The Hague Conventions of 1899 and 1907" (Study II), "The Geneva Humanitarian Conventions and the International Red Cross" (Study III), "International Union for the Protection of Industrial Property: Paris Convention of 1883 and subsequent Acts of revision and special agreements" (Study IV) and "The General Agreement on Tariffs and Trade (GATT) and its subsidiary instruments" (Study V). These studies are reproduced in document A/CN.4/200/Rev.2 and A/CN.4/200/Add.1 and 2.

Further studies will be issued as addenda to this document or as separate documents. As in previous studies the designations employed, the dates mentioned and the presentation of the material in this document do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country or territory.

### VI. Food and Agriculture Organization of the United Nations: Constitution and Multilateral Conventions and Agreements concluded within the Organization and deposited with its Director-General\*\*

#### A. *The Constitution of the Food and Agriculture Organization of the United Nations*

##### (a) ESTABLISHMENT, PURPOSES AND ORGANS OF THE ORGANIZATION

1. From 18 May to 3 June, 1943, representatives of forty-five Governments met in conference at Hot Springs, Virginia, to plan the post-war organization for food and agriculture. The Conference authorized an Interim Commission, composed of representatives of all attending Governments, to determine the purposes and structure

\*\* As of January 1969.

of the organization and to perform other functions until a permanent body could be established. The United Nations Interim Commission on Food and Agriculture was set up in July 1943 and in its first report to Governments presented a draft Constitution for the permanent Food and Agriculture Organization of the United Nations (hereinafter referred to as FAO). The Constitution was open to acceptance by the forty-five States represented in the Interim Commission<sup>1</sup> which were to be the "Nations<sup>2</sup> eligible for original membership" of FAO.<sup>3</sup>

2. Upon the receipt of twenty notifications of acceptance, the Interim Commission was to arrange for signature of the Constitution by representatives of not less than twenty of the accepting original Member Nations, at which moment the Constitution would come into effect.<sup>4</sup> Thirty-four nations signed the Constitution of FAO at the first session of its Conference, held in Quebec from 16 October to 1 November 1945.<sup>5</sup> With the formal establishment of the Organization, the United Nations Interim Commission on Food and Agriculture ceased to exist.<sup>6</sup>

3. Nations members of FAO undertake to further separate and collective action for the purposes of "raising levels of nutrition and standards of living of the peoples under their respective jurisdictions; securing improvements in the efficiency of the production and distribution of all food and agricultural products [and] bettering the condition of rural populations...thus contributing toward an expanding world economy and ensuring humanity's freedom from hunger".<sup>7</sup> In order to facilitate the achievement of those purposes, FAO (a) collects, analyses, interprets and disseminates information relating to nutrition, food and agriculture; (b) promotes and recommends national and international action with respect to research, education and administration, conservation of natural resources and methods of production, processing, marketing and distribution, credit and commodity arrangements; and (c) furnishes on request technical assistance, organizes assistance missions and generally takes all necessary and appropriate action to implement the purposes of the Organization.<sup>8</sup>

4. The Organization has three main organs: the Conference, the Council<sup>9</sup> and the Director-General, who

heads the Staff. The Conference consists of the representatives of Member Nations and associate members, each Member Nation having the right to one vote.<sup>10</sup> The Council consists of thirty-four Member Nations elected by the Conference,<sup>11</sup> which appoints also an independent Chairman of the Council.<sup>12</sup> The Director-General directs the work of the Organization and participates, without the right to vote, in all meetings of the Conference and of the Council.<sup>13</sup>

5. The FAO is a specialized agency within the meaning of Article 57 of the Charter of the United Nations.<sup>14</sup> An "Agreement between the United Nations and the Food and Agriculture Organization of the United Nations" which came into force on 14 December 1946 defines the relations between both organizations.<sup>15</sup>

#### (b) CATEGORIES OF MEMBERSHIP: "MEMBER NATIONS" AND "ASSOCIATE MEMBERS"

6. The Constitution of FAO is mainly devoted to defining the structure and functions of the Organization. It does not contain a territorial application clause. Article II of the Constitution, however, has provided since 1955 for two categories of membership: "Member Nations" and "Associate Members". "Member Nations" are the "original Member Nations" and the "additional Member Nations" admitted to the Organization. "Associate Members" are "any territory or group of territories which is not responsible for the conduct of its international relations" admitted to the Organization upon application made on their behalf by a Member Nation or authority having responsibility for their international relations. Only the Member Nations are parties to the Constitution and enjoy full membership. It is incumbent upon the Member Nation or authority which makes the application for associate membership to accept on behalf of the proposed Associate Member the obligations of the Constitution and to assume responsibility for ensuring the observance of relevant provisions of the Constitution with regard to the Associate Member in question (see paragraph 12 below). The nature and extent of the rights and obligations of Associate Members are defined in the Constitution and the General Rules and Regulations of the Organization.<sup>16</sup>

<sup>1</sup> FAO, *Basic Texts*, vol. I (1968), p. 25, Constitution, art. XXI, para. 1.

<sup>2</sup> The English text of the Constitution and other basic texts of FAO (General Rules, Financial Regulations) use the term "Nation" rather than "State". The English version of the present study will use, therefore, the term "Nation" when quoting or referring to FAO texts. The French and Spanish texts of the Constitution, General Rules and Financial Regulations of FAO use the term "Etat" and "Estado", respectively.

<sup>3</sup> See foot-note 17 below.

<sup>4</sup> FAO, *Basic Texts*, vol. I (1968), p. 25, Constitution, art. XXI, para. 3.

<sup>5</sup> FAO, *Report of the First Session of the Conference* (1945), p. vii.

<sup>6</sup> FAO, Constitution, original art. XXVI (later deleted); see *Report of the First Session of the Conference* (1945), p. 88.

<sup>7</sup> FAO, *Basic Texts*, vol. I (1968), p. 7, Constitution, preamble.

<sup>8</sup> *Ibid.*, pp. 7 and 8, Constitution, art. I.

<sup>9</sup> Originally called "Executive Committee"; the name was changed by amendment to article V of the Constitution (FAO, *Report of the Third Session of the Conference* (1947), p. 18).

<sup>10</sup> FAO, *Basic Texts*, vol. I (1968), p. 10, Constitution, art. III, paras. 1 and 4.

<sup>11</sup> *Ibid.*, p. 11, Constitution, art. V, para. 1. The original number of "not less than nine or more than fifteen" members was successively increased to eighteen, twenty-four, twenty-five, twenty-seven, thirty-one and thirty-four at the third, seventh, tenth, eleventh, thirteenth and fourteenth sessions of the Conference.

<sup>12</sup> FAO, *Basic Texts*, vol. I (1968), p. 12, Constitution, art. V, para. 2.

<sup>13</sup> *Ibid.*, p. 15, Constitution, art. VII, paras. 5 and 6.

<sup>14</sup> *Ibid.*, p. 18, Constitution, art. XII, para. 1.

<sup>15</sup> See United Nations, *Treaty Series*, vol. I, pp. 212-230.

<sup>16</sup> FAO, *Basic Texts*, vol. I (1968), p. 9, Constitution, art. II, para. 4. Associate Members have the right to participate in the deliberations of the Conference or of commissions, committees, working parties, conferences or consultations but cannot hold office nor have the right to vote; they are subject to similar obligations as those of Member Nations but their status is taken into account in determining their contributions to the budget (FAO, *Report of the Eighth Session of the Conference* (1955), pp. 143 and 144, resolution 30/55).

## (c) METHODS OF BECOMING A MEMBER

## 1. FULL MEMBERSHIP (PARTIES TO THE CONSTITUTION)

(i) *Nations eligible for original membership*

7. In accordance with the provisions laid down in article II, para. 1, and article XXI of the Constitution of FAO, the nations eligible for original membership listed in annex I to the Constitution become parties to the Constitution and original Member Nations of the Organization by acceptance.<sup>17</sup> Before the formal establishment of FAO in 1945 (see paragraphs 1 and 2 above), the instruments of acceptance of nations eligible for original membership were transmitted or notified to the United Nations Interim Commission on Food and Agriculture. Following the establishment of FAO these instruments have been transmitted or notified to the Director-General of the Organization who has acted as depositary of the Constitution since the Interim Commission ceased to exist. Acceptances of nations eligible for original membership received after the entry into force of the Constitution become effective upon their receipt<sup>18</sup> and are, therefore, not subject to a prior admission procedure.

(ii) *Additional Member Nations*

8. Article II, paragraph 2, of the Constitution of FAO provides:

2. The Conference may by a two-thirds majority of the votes cast, provided that a majority of the Member Nations of the Organization is present, decide to admit as an additional Member of the Organization any nation which has submitted an application for membership and a declaration made in a formal instrument that it will accept the obligations of the Constitution as in force at the time of admission.

9. Membership as an additional Member Nation is, therefore, attained through an admission procedure

<sup>17</sup> They are the following: Australia, Belgium, Bolivia, Brazil, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Iceland, India, Iran, Iraq, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippine Commonwealth, Poland, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela and Yugoslavia. With the exception of China, Czechoslovakia, South Africa and the Union of Soviet Socialist Republics, all the remaining forty-one States are at present Member Nations of FAO. Czechoslovakia and China withdrew as from 27 December 1950 and 21 July 1952, respectively (FAO, *Report of the Special Session of the Conference* (1950), p. 4, and *Report of the 6th Session of the Conference* (1951), back cover). Poland, one of the original signatories, withdrew with effect as from 25 April 1951 (FAO, *Report of the Special Session of the Conference* (1950), p. 4. However, on 29 August 1957, Poland applied for membership under article II, para. 2 of the Constitution—see paragraph 8 above—and was admitted by resolution 59/57 of the Conference, with effect as from 9 November 1957 (FAO, *Report of the Ninth Session of the Conference* (1957), pp. 205 and 206). South Africa's withdrawal from the Organization became effective on 18 December 1964 (*Report of the Council of FAO* (Forty-third Session), inside back cover).

<sup>18</sup> FAO, *Basic Texts*, vol. I (1968), p. 25, Constitution, art. XXI, para. 4.

following the submission of an application and a formal declaration accepting the obligations of the Constitution. According to the original article II of the Constitution, the effective date of membership of additional Member Nations was that of acceptance.<sup>19</sup> That provision was later amended so as to specify that membership would "commence upon the date of deposit of an instrument" of acceptance.<sup>20</sup> By amendment to article II adopted at the sixth session of the Conference in 1951, the effective date of membership is at present that of the approval of the application by the Conference.<sup>21</sup>

10. The procedure for admission of additional Member Nations is determined in rule XIX of the "General Rules of the Organization", as follows:

1. Any nation which desires to become a Member of the Organization... shall submit an application to the Director-General. This application shall be accompanied or followed by the formal instrument of acceptance of the Constitution, required under Article II, paragraphs 2... of the Constitution. This formal instrument shall reach the Director-General not later than the opening day of the Conference session at which the admission of the applicant is to be considered.

2. Any such application shall be transmitted immediately by the Director-General to Member Nations and shall be placed on the agenda of the next Conference session which opens not less than 30 days from the receipt of the application.

3. The first contribution of an additional Member Nation... shall be determined by the Conference at the time of its decision on the application for membership.

4. The Director-General shall inform the applicant nation of the decision of the Conference. If the application is approved, such notice shall also state the amount of the first contribution.<sup>22</sup>

11. The provisions concerning admission of "additional Member Nations" described above have been subject to certain derogations in the practice of the Organization, resulting from *ad hoc* decisions taken by the Conference in order to avoid delay in admissions. Thus, before the adoption of an amendment to the original article II of the Constitution allowing for associate membership (see paragraph 12 below) several countries became additional Member Nations before attaining full independence. Following the adoption of that amendment, a number of dependent territories have been admitted by the Conference as additional Member Nations before attaining full independence, but the effectiveness of their membership has been postponed until a date subsequent to independence (see paragraphs 41 to 48 below). Occa-

<sup>19</sup> FAO, *Report of the First Session of the Conference* (1945), pp. 84 and 85.

<sup>20</sup> FAO, *Report of the Special Session of the Conference* (1950), p. 28.

<sup>21</sup> FAO, *Basic Texts*, vol. I (1968), p. 9, Constitution, art. II, para. 5. This provision, adopted on 6 December 1951 by resolution No. 46 of the Conference (FAO, *Report of the 6th Session of the Conference* (1951), pp. 105-108) was directed to overcome the difficulties concerning effective date of membership that arose under the former text (See FAO, *Report of the 5th Session of the Conference* (1949), pp. 2 and 3, and *Report of the Special Session of the Conference* (1950), pp. 2 and 3.

<sup>22</sup> FAO, *Basic Texts*, vol. I (1968), pp. 56 and 57.

sionally, also, the time limits prescribed in paragraphs 1 and 2 of rule XIX of the "General Rules of the Organization" have been temporarily suspended.<sup>23</sup>

2. ASSOCIATE MEMBERSHIP (TERRITORIES OR GROUPS OF TERRITORIES FOR THE INTERNATIONAL RELATIONS OF WHICH A MEMBER NATION OR AUTHORITY IS RESPONSIBLE)

12. As in the case of additional Member Nations, associate membership is attained through an admission procedure.<sup>24</sup> Paragraph 3 of article II of the FAO Constitution, as amended at the eighth session of the Conference in 1955, provides:

3. The Conference may, under the same conditions regarding the required majority and quorum as prescribed in paragraph 2 above,<sup>25</sup> decide to admit as an Associate Member of the Organization any territory or group of territories which is not responsible for the conduct of its international relations, upon application made on its behalf by the Member Nation or authority having responsibility for its international relations, provided that such Member Nation or authority has submitted a declaration made in a formal instrument that it will accept on behalf of the proposed Associate Member the obligations of the Constitution as in force at the time of admission, and that it will assume responsibility for ensuring the observance of the provisions of paragraph 4 of article VIII, paragraphs 1 and 2 of article XVI, and paragraphs 2 and 3 of article XVIII of this Constitution with regard to the Associate Member.<sup>26</sup>

13. In accordance with article II, paragraph 5 of the FAO Constitution, associate membership, like membership of additional Member Nations, becomes effective at present on the date on which the Conference approves the application (see paragraph 9 above). The admission procedure for associate membership set forth in rule XIX of the "General Rules of the Organization" is *mutatis mutandis*, the one prescribed for additional Member Nations (see paragraph 10 above). The application for associate membership shall be submitted to the Director-General of FAO by the Member Nation or authority responsible for the international relations of the territory or group of territories whose associate membership is requested and on behalf of such territory or group.

<sup>23</sup> Such was the case, *inter alia*, in admitting *Burma and Pakistan; Ceylon; Laos, Tunisia; Togo, Cameroon, Cyprus, Nigeria and Somalia*; and *Jamaica*. (See, respectively, FAO, reports of the third, special (1948), sixth, eighth, tenth and eleventh sessions of the Conference).

<sup>24</sup> Admission to associate membership was approved by resolution No. 30/55, amending the original article II of the Constitution (FAO, *Report of the Eighth Session of the Conference* (1955), pp. 142-144 and 191 *et seq.*).

<sup>25</sup> Two-thirds majority of the votes cast, provided that a majority of the Member Nations of the Organization is present.

<sup>26</sup> Article VIII, para. 4, relates to privileges, immunities and facilities accorded to the Director-General and staff of the Organization; article XVI, paras. 1 and 2, to the legal status, privileges and immunities of the Organization itself; and article XVIII, paras. 2 and 3, to contributions to the budget of the Organization.

B. *Multilateral conventions and agreements concluded within FAO and deposited with its Director-General*<sup>27</sup>

(a) ARTICLE XIV OF THE FAO CONSTITUTION AND RULE XXI OF THE GENERAL RULES OF THE ORGANIZATION

14. Article XIV, paragraph 1, of the FAO Constitution empowers the Conference to approve and submit to Member Nations "conventions and agreements" concerning questions relating to food and agriculture. In accordance with paragraph 2 of the same article, the Council may also approve and submit to Member Nations: (a) "agreements" concerning questions relating to food and agriculture which are of particular interest to Member Nations of specified geographical areas and designed to apply only to such areas; (b) "supplementary conventions or agreements" designed to implement any convention or agreement in force approved by the Conference or by the Council itself. The conventions or agreements are submitted to the Conference or Council through the Director-General on behalf of a "technical meeting or conference comprising Member Nations which has assisted in drafting the convention or agreement and has suggested that it be submitted to Member Nations concerned for acceptance".<sup>28</sup> Pursuant to article XIV, paragraph 6, of the Constitution, rule XXI of the "General Rules of the Organization" lays down the procedure to be followed in order to secure proper consultations with Governments and adequate technical preparations prior to consideration by the Conferences or the Council of proposed conventions and agreements, as well as certain requirements to be met by such conventions and agreements in order that they may be approved by the Conference or the Council.<sup>29</sup>

15. Conventions and agreements are generally open to participation by all Member Nations and Associate Members of FAO or—in the case of agreements with a limited regional scope—such Member Nations and Associate Members as may be defined in the agreement, and, where the conventions and agreements so provide, also by non-member Nations which are Members of the United Nations. In the case of conventions and agreements establishing commissions or committees, participation by non-member Nations of FAO that are Members of the United Nations is subject to prior

<sup>27</sup> Agreements concluded between FAO and Member Nations under article XV of the FAO Constitution are excluded from the present study. They are the "Agreement for the establishment on a permanent basis of a Latin-American Forest Research and Training Institute under the auspices of the Food and Agriculture Organization of the United Nations", approved by the Conference of FAO on 18 November 1959, in force as from 16 November 1960 (United Nations, *Treaty Series*, vol. 390, p. 228), and the "Agreement amending the Convention for the Establishment of the Desert Locust Control Organization for Eastern Africa", approved in 1965 by the FAO Council acting under the authority delegated to it by the Conference (not yet in force).

<sup>28</sup> FAO, *Basic Texts*, vol. I (1968), p. 19, Constitution, art. XIV, para. 3 (a).

<sup>29</sup> *Ibid.*, pp. 58 and 59, General Rules of the Organization, rule XXI, para. 1 (a), 1 (b) and 1 (c); see also p. 28, rule II, para. 1, and p. 72, rule XXV, para. 7 (a).

approval by such commissions or committees.<sup>30</sup> As regards Associate Members of FAO, the conventions and agreements shall be submitted to the authority having responsibility for the international relations of the Associate Member concerned.<sup>31</sup>

16. Each Member Nation and Associate Member must report periodically to the Organization on the action taken on the basis of conventions submitted by the Conference.<sup>32</sup> The receipt of the official text of a convention or agreement as approved by the Conference or Council constitutes due notice to each Member Nation concerned and to the authority having responsibility for the international relations of an Associate Member that "its consideration thereof is invited with a view to acceptance".<sup>33</sup>

17. The entry into force for each contracting party of any convention or agreement is to be governed by the provisions laid down in the respective instrument.<sup>34</sup> Each accepting Member Nation shall communicate its acceptance to the Director-General of FAO who acts as depositary for conventions and agreements concluded within the Organization.<sup>35</sup> The Director-General must promptly inform the other Member Nations of the acceptances received and report to the Conference whenever a convention or agreement has come into force, ceased to be in force, or has been amended and the amendments come into force.<sup>36</sup> Conventions or agreements in force are transmitted to the Secretary-General of the United Nations for registration.<sup>37</sup>

#### (b) PRINCIPLES AND PROCEDURES WHICH SHOULD GOVERN CONVENTIONS AND AGREEMENTS CONCLUDED UNDER ARTICLE XIV OF THE FAO CONSTITUTION

18. At its ninth session, held from 2 to 27 November 1957, the Conference of FAO came to the conclusion that it was necessary to lay down principles and procedures to be adhered to in the future whenever the provisions of article XIV of the Constitution were being applied.<sup>38</sup> As characterized by the Conference at that session, conventions and agreements concluded

<sup>30</sup> FAO, *Basic Texts*, vol. I (1968), p. 20, Constitution, art. XIV, para. 3 (b).

<sup>31</sup> *Ibid.*, p. 20, art. XIV, para. 5.

<sup>32</sup> *Ibid.*, p. 17, art. XI, para. 1.

<sup>33</sup> *Ibid.*, p. 59, General Rules of the Organization, rule XXI, para. 3.

<sup>34</sup> *Ibid.*, p. 20, Constitution, art. XIV, para. 4. Participation in conventions and agreements may be effected, depending on the provisions of the instrument concerned, through one of the methods enumerated in the principles and procedures which should govern conventions and agreements concluded under article XIV of the FAO Constitution (see foot-note 43 below). The present study, however, refers generally to "acceptance" as does the FAO Constitution.

<sup>35</sup> FAO, *Basic Texts*, vol. I (1968), p. 21, Constitution, art. XIV, para. 7.

<sup>36</sup> *Ibid.*, pp. 59 and 60, General Rules of the Organization, rule XXI, paras. 3 and 5.

<sup>37</sup> *Ibid.*, p. 21, Constitution, art. XIV, para. 7.

<sup>38</sup> FAO, *Report of the Ninth Session of the Conference* (1957), pp. 180 and 181; see also: FAO, *Basic Texts*, vol. II (1968), pp. 30-34.

under article XIV are those concluded under the aegis of the Organization "between states, with respect to which, in conformity with the principles of public international law, the expressed consent of sovereign entities constitutes the required juridical act".<sup>39</sup> Bearing in mind that "the express purpose of multilateral agreements is to create contractual obligations for those who become parties to them", the Conference concluded that any agreement entered into under article XIV among Member Nations of FAO "should entail financial or other obligations going beyond those already assumed under the Constitution of the Organization. Failing this, there would be no grounds for such an agreement, at least not in the legal form prescribed under article XIV".<sup>40</sup>

19. The considerations and conclusion of the Conference were embodied in its resolution 46/57.<sup>41</sup> By that resolution, the Conference further adopted a set of principles<sup>42</sup> to govern in the future the drafting of conventions and agreements concluded under article XIV and to be taken into account by the Conference or Council when approving such conventions and agreements, as well as to govern the drafting of the constituent rules of bodies to be established under the same article. The Conference also urged the parties to existing conventions and agreements and the members of the bodies established thereunder to apply as far as possible the rules contained in said set of principles and invited those parties to amend the texts of their conventions and agreements when feasible in order to bring them into line therewith.<sup>43</sup>

<sup>39</sup> The Conference noted that the "procedure of multilateral agreements" had been used to establish commissions and committees whose tasks fell within the general terms of reference of the Organization even though, in accordance with the provisions of article VI of the Constitution, general or regional commissions or committees could be established by a decision of the Conference or Council.

<sup>40</sup> In the Conference's view, although "any multilateral agreement between Member Governments [might] undoubtedly provide for the establishment of a commission or an executive body... the setting up of a commission or a committee by [such an] agreement [would be] justified only when the agreement [presupposed] the assumption of specific obligations going beyond mere participation in the work of the body thus established."

<sup>41</sup> FAO, *Basic Texts*, vol. II (1968), pp. 32-34.

<sup>42</sup> FAO, *Report of the Ninth Session of the Conference* (1957), appendix D, pp. 223-235; see also FAO, *Basic Texts*, vol. II (1968), pp. 35-50.

<sup>43</sup> Below are quoted some of the principles to govern conventions and agreements relevant in the context of the present study (see FAO, *Basic Texts*, vol. II (1968), pp. 35, 36, 38, 39 and 40):

#### "Terminology

"1. Such treaties concluded under Article XIV of the Constitution as are of a world-wide scope, shall in the future be designated by the term 'convention', while the others shall be designated by the term 'agreement'."

...

#### "Participation in Conventions and Agreements

"4. *Method of participation*: Both the traditional system, i.e. that of signature, signature subject to ratification, and accession, as well as the more recent and simplified system of acceptance by the deposit of an instrument of acceptance have in the past been applied by the Organization and shall be retained. Under both systems the period during which nations may become parties to the conventions

(Continued on next page.)

## (c) MULTILATERAL CONVENTIONS AND AGREEMENTS CONCLUDED UNDER ARTICLE XIV OF THE FAO CONSTITUTION

20. Nine multilateral treaties have been adopted under article XIV of the FAO Constitution, and all of them have already entered into force. They are briefly described below in the chronological order of their approval by the Conference or Council of FAO. With one exception they are constituent instruments of international bodies, set up to facilitate technical co-operation in specific areas.<sup>44</sup> The first six were done and came into force prior to the adoption by the Conference of the set of

(Continued.)

or agreements may be limited by a provision in the basic text if circumstances so warrant.

...

*"Participation of Associate Members"*

"7. Existing bodies established under conventions and agreements shall be invited to amend their basic instrument, if and when necessary, in order to make participation by Associate Members possible.

...

*"Territorial Application"*

"11. Each convention and agreement shall contain a clause regarding its territorial application in order to avoid any ambiguity in this respect. The contracting parties shall, at the time of signature, ratification, accession or acceptance declare explicitly to what territories the convention or agreement shall extend, especially in those cases where a Government is responsible for the international relations of more than one territory. In the absence of such a declaration, the convention or agreement shall be deemed to apply to all the territories for the international relations of which the nation is responsible. Subject to the principles laid down in paragraph 14 and to any relevant provision of the convention or agreement regarding withdrawal, the scope of the territorial application may be modified by a subsequent declaration.

...

*"Withdrawal and Denunciation"*

"14. (a) All conventions and agreements drafted in future shall contain a clause regarding withdrawal or denunciation on the basis of the following principles:

...

"(ii) A nation that is responsible for the international relations of more than one territory, shall, when giving notice of its withdrawal from a convention or agreement, state to which territory or territories the withdrawal is to apply. In the absence of such a declaration the withdrawal shall be deemed to apply to all the territories for the international relations of which the nation concerned is responsible, with the exception of Associate Members.

"(iii) A nation may give notice of withdrawal with respect to one or more of the territories for the international relations of which it is responsible.

...

"Any Member Nation that gives notice of withdrawal from the Organization is deemed to have simultaneously given notice of withdrawal from such conventions or agreements and this withdrawal is deemed to apply to all the territories for the international relations of which the Member Nation is responsible. A clause dealing with this aspect of the participation shall be incorporated in all conventions and agreements of this nature drafted in future, having regard to the principles contained in paragraph 3 (b) of article XIV of the Constitution." [See paragraph 15 above].

<sup>44</sup> The exception is the International Plant Protection Convention (see FAO, *Directory of Statutory Bodies* (1967); United Nations, *Treaty Series*, vol. 150, p. 67).

principles referred to in the preceding subsection (b). With two exceptions,<sup>45</sup> they were subsequently amended in order to bring them into line with said principles.

I. CONSTITUTION OF THE INTERNATIONAL RICE COMMISSION (1948)

21. The Constitution of the International Rice Commission<sup>46</sup> was formulated at the International Rice Meeting at Baguio, Philippines (1-13 March 1948) and approved by the Conference of FAO at its fourth session held in Washington, D.C., from 16 to 29 November 1948.<sup>47</sup> It came into force on 4 January 1949. Amendments to the Constitution have been adopted by the International Rice Commission on three occasions: at its third session held in Bandung from 12 to 16 May 1952,<sup>48</sup> at its fourth session held in Tokyo from 11 to 19 October 1954,<sup>49</sup> and at its seventh session held in Saigon from 16 to 20 November 1960.<sup>50</sup> The amendments have entered into effect as from the respective dates of approval by the FAO Conference. The Constitution has been open to acceptance by Member Nations since its approval by the FAO Conference; as from the date of the entering into effect of the third amendment, namely 23 November 1961,<sup>51</sup> it has also been open to acceptance by Associate Members. Article IX of the Constitution of the International Rice Commission, as amended with effect from the same date, incorporates the territorial application clause prescribed in the principles governing conventions and agreements adopted at the ninth session of the Conference.<sup>52</sup>

2. AGREEMENT FOR THE ESTABLISHMENT OF THE INDO-PACIFIC FISHERIES COUNCIL (1948)

22. The Agreement for the establishment of the Indo-Pacific Fisheries Council<sup>53</sup> was formulated at Baguio, Philippines, on 26 February 1948 and the establishment of that Council was approved by the Conference of FAO at its fourth session held in Washington from 15 to

<sup>45</sup> The International Plant Protection Convention and the Plant Protection Agreement for the South East Asia and Pacific Region (United Nations, *Treaty Series*, vol. 247, p. 400).

<sup>46</sup> United Nations, *Treaty Series*, vol. 120, p. 13.

<sup>47</sup> FAO, *Report of the Fourth Session of the Conference* (1948), p. 65.

<sup>48</sup> Approved by resolution 56/53 of the FAO Conference on 10 December 1953 (FAO, *Report of the Seventh Session of the Conference* (1953), pp. 156-157). For the text of the amendment see: United Nations, *Treaty Series*, vol. 193, p. 352.

<sup>49</sup> Approved by resolution 36/55 of the FAO Conference on 18 November 1955 (FAO, *Report of the Eighth Session of the Conference* (1955), p. 151). For text of the amendment, see United Nations, *Treaty Series*, vol. 229, p. 297.

<sup>50</sup> Approved by resolution 26/61 of the FAO Conference on 23 November 1961 (FAO, *Report of the Eleventh Session of the Conference* (1961), pp. 68 and 69). For the text of the amendment, see United Nations, *Treaty Series*, vol. 418, p. 334.

<sup>51</sup> United Nations, *Treaty Series*, vol. 418, p. 334.

<sup>52</sup> See foot-note 43 above.

<sup>53</sup> United Nations, *Treaty Series*, vol. 120, p. 59.

29 November 1948.<sup>54</sup> The Agreement came into force on 9 November 1948; amendments to it have been adopted by the Indo-Pacific Fisheries Council on four occasions with effect as from the dates indicated in parentheses:<sup>55</sup> at its fourth session held at Quezon City from 23 October to 7 November 1952 (9 December 1952);<sup>56</sup> at its sixth session held in Tokyo from 30 September to 14 October 1955 (31 October 1955);<sup>57</sup> at its eighth session held at Colombo from 6 to 22 December 1958 (17 December 1958);<sup>58</sup> and at its ninth session held in Karachi from 6 to 23 January 1961 (23 November 1961).<sup>59</sup> With effect as from the date of the fourth amendment, namely 23 November 1961, the Agreement is open to acceptance by Member Nations and Associate Members of FAO and non-member Nations which are Members of the United Nations, the latter being subject in addition to an admission procedure, in accordance with article I, para. 2 and article IX, para. 2, of the Agreement as amended.<sup>60</sup> Article XI of the Agreement, as amended with effect as from that same date, incorporates the territorial application clause prescribed in the principles governing conventions and agreements.<sup>61</sup>

### 3. AGREEMENT FOR THE ESTABLISHMENT OF A GENERAL FISHERIES COUNCIL FOR THE MEDITERRANEAN (1949)

23. The Agreement for the establishment of a General Fisheries Council for the Mediterranean<sup>62</sup> was formulated at Rome on 24 September 1949 and, after being approved by the FAO Conference<sup>63</sup> at its fifth session, held from 21 November to 6 December 1949, it entered into force on 20 February 1952.<sup>64</sup> Amendments to the Agreement were adopted on 22 May 1963 by the General Fisheries Council for the Mediterranean and entered into force on 3 December 1963, date of their approval by the FAO Conference.<sup>65</sup> Prior to this date, the Agree-

<sup>54</sup> FAO, *Report of the Fourth Session of the Conference* (1948), pp. 53 and 54.

<sup>55</sup> Under the original article VII of the Agreement, amendments required in general a two-thirds majority vote of all the members of the Council. In addition, approval by the Conference or the Director-General of FAO was needed when amendments concerned the extension of the Council's functions or the Council's powers to incur expenses to be borne by FAO. (United Nations, *Treaty Series*, vol. 120, p. 66). However, under article VII as amended (effective 23 November 1961), future amendments will become effective only upon approval of FAO's Council or Conference as appropriate (United Nations, *Treaty Series*, vol. 418, pp. 356-358).

<sup>56</sup> United Nations, *Treaty Series*, vol. 190, p. 383.

<sup>57</sup> *Ibid.*, vol. 227, p. 322.

<sup>58</sup> *Ibid.*, vol. 343, p. 343.

<sup>59</sup> *Ibid.*, vol. 418, p. 348. Approved by resolution 27/61 of the FAO Conference (FAO, *Report of the Eleventh Session of the Conference* (1961), pp. 69 and 70).

<sup>60</sup> United Nations, *Treaty Series*, vol. 418, pp. 348 and 358.

<sup>61</sup> See foot-note 43 above.

<sup>62</sup> United Nations, *Treaty Series*, vol. 126, p. 237.

<sup>63</sup> FAO, *Report of the 5th Session of the Conference* (1949), p. 50.

<sup>64</sup> United Nations, *Treaty Series*, vol. 126, p. 239.

<sup>65</sup> FAO, *Report of the Twelfth Session of the Conference* (1963), pp. 84 and 85, resolution 39/63. For the text of the amendment, see United Nations, *Treaty Series*, vol. 490, p. 444.

ment was open to acceptance by "Governments... members of [FAO]" and by "Governments...not members of [FAO]", the latter being subject to an admission procedure (original article VIII (1) and (2) of the Agreement). With effect as from the date of the amendment, the Agreement is open to acceptance by Member Nations or Associate Members of FAO and by non-member nations which are Members of the United Nations, the latter being subject to an admission procedure, in accordance with article I, para. 2, and article IX, para. 2 of the Agreement as amended.<sup>66</sup> Article XI of the Agreement, as amended, incorporates the territorial application clause prescribed in the principles governing conventions and agreements.<sup>67</sup>

### 4. INTERNATIONAL PLANT PROTECTION CONVENTION (1951)

24. The *International Plant Protection Convention*<sup>68</sup> was approved by the Conference of FAO on 6 December 1951<sup>69</sup> and came into force on 3 April 1952.<sup>70</sup> The Convention was open for signature by governments until 1 May 1952, to be followed by ratification, and for adherence by non-signatory governments after its coming into force.<sup>71</sup> Governments may, at the time of ratification or adherence, or at any time thereafter, extend the application of the Convention to all or any of the territories for the international relations of which they are responsible.<sup>72</sup>

### 5. CONSTITUTION OF THE EUROPEAN COMMISSION FOR THE CONTROL OF FOOT-AND-MOUTH DISEASE (1953)

25. The *Constitution of the European Commission for the Control of Foot-and-Mouth Disease*<sup>73</sup> was approved by the Conference of FAO on 11 December 1953<sup>74</sup> and came into force on 12 June 1954.<sup>75</sup> Amendments to the Constitution have been adopted by the Commission on three occasions: at its fourth session held in Rome on 2 and 3 April 1957,<sup>76</sup> at its fifth session held in Rome on 17 and 18 April 1958,<sup>77</sup> and at its ninth session held in Rome on 29 March 1962.<sup>78</sup> The amendments have entered into force on the dates of their approval by the

<sup>66</sup> United Nations, *Treaty Series*, vol. 490, pp. 446 and 454.

<sup>67</sup> See foot-note 43 above.

<sup>68</sup> United Nations, *Treaty Series*, vol. 150, p. 67.

<sup>69</sup> FAO, *Report of the 6th Session of the Conference* (1951), pp. 154 and 155, resolution 85/51.

<sup>70</sup> United Nations, *Treaty Series*, vol. 150, p. 68.

<sup>71</sup> *Ibid.*, art. XII.

<sup>72</sup> *Ibid.*, art. XI.

<sup>73</sup> United Nations, *Treaty Series*, vol. 191, p. 285.

<sup>74</sup> FAO, *Report of the Seventh Session of the Conference* (1953), p. 115, resolution 33/53.

<sup>75</sup> United Nations, *Treaty Series*, vol. 191, p. 286.

<sup>76</sup> Approved on 12 June 1957 by the FAO Council (United Nations, *Treaty Series*, vol. 274, pp. 374 and 375).

<sup>77</sup> Approved on 31 October 1958 by the FAO Council (United Nations, *Treaty Series*, vol. 315, p. 241).

<sup>78</sup> Approved by resolution 3/39 adopted on 26 October 1962 by the FAO Council (United Nations, *Treaty Series*, vol. 454, p. 556).

Council of FAO. The Constitution is open to acceptance by European Member Nations of FAO and by European members of the International Office of Epizootics which are Members of the United Nations. Other European nations which are Members of the United Nations may be admitted to membership through an admission procedure.<sup>79</sup>

#### 6. PLANT PROTECTION AGREEMENT FOR THE SOUTH EAST ASIA AND PACIFIC REGION (1956)

26. The Plant Protection Agreement for the South East Asia and Pacific Region<sup>80</sup> was given final approval by the FAO Council on 26 November 1955<sup>81</sup> and came into force on 2 July 1956.<sup>82</sup> The Agreement was open for signature until the date of its entry into force (2 July 1956) and for adherence as from that date.<sup>83</sup> It is open to participation by the Government of any State situated in the South East Asia and Pacific Region or any Government responsible for the international relations of a territory or territories in the Region.<sup>84</sup> The Region "comprises the territories in South East Asia east of the western border of Pakistan and south of the Himalayas, the southern border of China and the northern border of the Philippines, and all those territories in the Pacific Ocean, the South China Sea and the Indian Ocean situated wholly or partly in the area bounded by longitudes 100° East and 165° West and latitudes 15° North and 20° South, but excluding Australia".<sup>85</sup>

#### 7. CONVENTION PLACING THE INTERNATIONAL POPLAR COMMISSION WITHIN THE FRAMEWORK OF FAO (1959)

27. The Convention placing the International Poplar Commission within the framework of FAO<sup>86</sup> was approved by the Conference of FAO on 19 November 1959.<sup>87</sup> and came into force on 26 September 1961. An amendment to article IV of the Convention was adopted by the International Poplar Commission at its second special session, held at Rome on 30 October 1967<sup>88</sup> and entered into force on 21 November 1967,

<sup>79</sup> Article I, para. 1, and article XV, para. 2 of the Constitution (United Nations, *Treaty Series*, vol. 454, pp. 556 and 562). Prior to the date of the last amendments "membership of the United Nations" was not a condition of participation by European non-member Nations of FAO.

<sup>80</sup> United Nations, *Treaty Series*, vol. 247, p. 400.

<sup>81</sup> FAO, *Proceedings of the Twenty-third Session of the Council*, document CL/23/PV-1. See also: FAO, document CL/23/3 and *Report of the Twenty-first Session of the Council*, pp. 20 and 21.

<sup>82</sup> United Nations, *Treaty Series*, vol. 247, p. 400.

<sup>83</sup> *Ibid.*, pp. 406 and 407, art. X, paras. 2 and 3.

<sup>84</sup> *Ibid.*, p. 406, art. X, para. 1.

<sup>85</sup> *Ibid.*, p. 400, article 1 (a) of the Agreement. The definition of the area has been modified by an amendment to article 1 (a) of the Agreement, not yet in force (FAO, *Report of the Forty-ninth Session of the Council* (1967), pp. 14 and 15, resolution 2/49).

<sup>86</sup> United Nations, *Treaty Series*, vol. 410, p. 155.

<sup>87</sup> FAO, *Report of the Tenth Session of the Conference* (1959), pp. 227 and 228, resolution 61/59.

<sup>88</sup> United Nations, *Statement of Treaties and International Agreements registered or filed and recorded with the Secretariat* (hereinafter referred to as "United Nations, *Statement*"), April 1968, p. 10.

the date of its approval by the FAO Conference.<sup>89</sup> The Convention is open to acceptance by Member Nations or Associate Members of FAO and by non-member Nations which are States Members of the United Nations, the latter being subject to an admission procedure.<sup>90</sup> Article XIV of the Convention incorporates the territorial application clause prescribed in the "principles governing conventions and agreements".<sup>91</sup>

#### 8. AGREEMENT FOR THE ESTABLISHMENT OF A COMMISSION FOR CONTROLLING THE DESERT LOCUST IN THE EASTERN REGION OF ITS DISTRIBUTION AREA IN SOUTH WEST ASIA (1963)

28. The Agreement for the establishment of a Commission for Controlling the Desert Locust in the Eastern Region of its Distribution Area in South West Asia<sup>92</sup> was approved by the Conference of FAO on 3 December 1963<sup>93</sup> on the basis of a recommendation originally made by a special conference held in Teheran from 1 to 4 October 1962. It came into force on 15 December 1964. The Agreement is open to acceptance by Member Nations or Associate Members of FAO situated in the Region and by non-member Nations situated in the Region which are Members of the United Nations, the latter being subject to an admission procedure.<sup>94</sup> The Region is defined as consisting of "the territories of Afghanistan, India, Iran and Pakistan and any territories adjacent to the above countries".<sup>95</sup> Article XVI of the Agreement incorporates the territorial application clause prescribed in the "principles governing conventions and agreements".<sup>96</sup>

#### 9. AGREEMENT FOR THE ESTABLISHMENT OF A COMMISSION FOR CONTROLLING THE DESERT LOCUST IN THE NEAR EAST (1965)

29. The Agreement for the establishment of a Commission for Controlling the Desert Locust in the Near East<sup>97</sup> was approved by the Council of FAO at its forty-fourth session held from 21 June to 2 July 1965,<sup>98</sup> on the basis of recommendations made by the Conference in resolution 9/61<sup>99</sup> and by a special technical conference held in Beirut from 15 to 18 March 1965. It came into force on 21 February 1967. The Agreement is open to

<sup>89</sup> FAO, *Report of the Fourteenth Session of the Conference* (1967), pp. 103 and 104, resolution 18/67.

<sup>90</sup> United Nations, *Treaty Series*, vol. 410, p. 158, art. II.

<sup>91</sup> See foot-note 43 above.

<sup>92</sup> United Nations, *Treaty Series*, vol. 529, p. 217.

<sup>93</sup> FAO, *Report of the Twelfth Session of the Conference* (1963), p. 92, resolution 44/63.

<sup>94</sup> United Nations, *Treaty Series*, vol. 529, pp. 218 and 220, art. I.

<sup>95</sup> *Ibid.*, p. 218, preamble.

<sup>96</sup> See foot-note 43 above.

<sup>97</sup> United Nations, *Treaty Series*, vol. 592, p. 215.

<sup>98</sup> FAO, *Report of the Forty-fourth Session of the Council* (1965), p. 39, resolution 6/44.

<sup>99</sup> FAO, *Report of the Eleventh Session of the Conference* (1961), pp. 30 and 31.

acceptance by Member Nations or Associate Members of FAO "situated in the Region" and by non-member Nations "situated in the Region that are Members of the United Nations", the latter being subject to an admission procedure.<sup>100</sup> The Region is defined as consisting of "the territories of Iraq, Jordan, Kuwait, Lebanon, Saudi Arabia, Sudan, Syrian Arab Republic, Turkey, United Arab Republic and Yemen and of other territories in the Arabian Peninsula situated south of latitude 27 degrees north".<sup>101</sup> Article XV of the Agreement incorporates the territorial application clause prescribed in the "principles governing conventions and agreements".<sup>102</sup>

### C. Description of relevant cases concerning participation in FAO instruments

30. Cases concerning participation in FAO instruments are described below with a view to ascertaining any features of States' succession to multilateral treaties that may be present in the practice of the Organization. In that light, the present section reviews participation in connexion with both the FAO Constitution (subsection (a)) and the multilateral conventions and agreements concluded within FAO and deposited with its Director-General (subsection (b)). The description of each case is based on FAO official documents, in particular the reports of the successive sessions of the FAO Conference,<sup>103</sup> and on the *Treaty Series* of the United Nations.

#### (a) CASES RELATING TO THE FAO CONSTITUTION

31. As at 31 January 1969 there were 117 Member Nations<sup>104</sup> and 2 associate members<sup>105</sup> of FAO. Fifty-one of the present 117 Member Nations are newly inde-

pendent States, emerged since the entry into force of the FAO Constitution from non-metropolitan territories for the international relations of which a Member Nation of FAO was responsible before their independence. All those cases have been grouped below in subsection 1. Cases concerning changes (formation and dissolution of unions; partition; transfer of sovereignty; etc.) undergone by Member Nations or Associate Members of FAO have been grouped in subsection 2.

#### 1. ADMISSION AS MEMBER NATIONS OF FORMER NON-METROPOLITAN TERRITORIES FOR WHOSE INTERNATIONAL RELATIONS A MEMBER NATION WAS RESPONSIBLE

##### (i) After attaining independence

32. Pursuant to article II, paragraph 2 of the Constitution (see paragraph 8 above), thirty-five States former non-metropolitan territories for whose international relations a Member Nation of FAO was responsible were, after attaining independence, admitted by the Conference as Member Nations of the Organization and became, upon acceptance of the obligations of the Constitution, parties thereto.

33. The following six States were admitted before the Conference, at its sixth session in 1951, amended the original text of article II of the FAO Constitution as to the effective date of admission (see paragraph 9 above):

States	Dates of approval of application for admission	Effective date of membership <sup>106</sup>
Ceylon . . . . .	14 April 1948 <sup>107</sup>	21 May 1948
Israel . . . . .	23 Nov. 1949 <sup>108</sup>	23 Nov. 1949
Jordan . . . . .	10 Nov. 1950 <sup>109</sup>	23 Jan. 1951
Cambodia . . . . .	10 Nov. 1950 <sup>109</sup>	11 Nov. 1950
Viet-Nam . . . . .	10 Nov. 1950 <sup>109</sup>	11 Nov. 1950
Laos . . . . .	21 Nov. 1951 <sup>110</sup>	21 Nov. 1951

34. When applying for admission, as well as at the time of effective membership, *Cambodia*, *Viet-Nam* and *Laos* were independent within the French Union. Their applications were transmitted to FAO in communications the pertinent paragraphs of which are quoted below:

Tunisia, Turkey, Uganda, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Upper Volta, Uruguay, Venezuela, Viet-Nam, Yemen, Yugoslavia, Zambia.

<sup>105</sup> Bahrain and Qatar.

<sup>106</sup> FAO, *Manual*, chap. VI, sect. 615 (hereinafter referred to as "FAO, *Manual*").

<sup>107</sup> FAO, *Report of the Special Session of the Conference* (1948), p. 2.

<sup>108</sup> FAO, *Report of the 5th Session of the Conference* (1949), pp. 3 and 4.

<sup>109</sup> FAO, *Report of the Special Session of the Conference* (1950), pp. 3 and 4.

<sup>110</sup> FAO, *Report of the 6th Session of the Conference* (1951), pp. 138 and 139.

<sup>100</sup> United Nations, *Treaty Series*, vol. 592, pp. 216 and 218, art. 1.

<sup>101</sup> *Ibid.*, preamble.

<sup>102</sup> See foot-note 43 above.

<sup>103</sup> The FAO Conference meets in regular session once every two years (FAO, *Basic Texts* (1968), vol. I, p. 10, Constitution, art. III, para. 6). The last session (fourteenth) took place from 4-23 November 1967.

<sup>104</sup> Afghanistan, Algeria, Argentina, Australia, Austria, Barbados, Belgium, Bolivia, Botswana, Brazil, Bulgaria, Burma, Burundi, Cambodia, Cameroon, Canada, Central African Republic, Ceylon, Chad, Chile, Colombia, Congo (Brazzaville), Congo (Democratic Republic of the), Costa Rica, Cuba, Cyprus, Dahomey, Denmark, Dominican Republic, Ecuador, El Salvador, Ethiopia, Federal Republic of Germany, Finland, France, Gabon, Gambia, Ghana, Greece, Guatemala, Guinea, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Kenya, Kuwait, Laos, Lebanon, Lesotho, Liberia, Libya, Luxembourg, Madagascar, Malawi, Malaysia, Mali, Malta, Mauritania, Mauritius, Mexico, Morocco, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Rwanda, Saudi Arabia, Senegal, Sierra Leone, Somalia, Spain, Sudan, Sweden, Switzerland, Syrian Arab Republic, Thailand, Togo, Trinidad and Tobago,

*Cambodia*<sup>111</sup>

Letter dated 30 August 1950, from the Minister of Foreign Affairs of the Kingdom of Cambodia, addressed to the Director-General of FAO:

...

Cambodia, having acquired the status of an independent State within the French Union, following ratification by the Republic of France of the Franco-Khmer Treaty of 8 November 1949, is desirous of participating, as a full Member, in the work of [FAO].

I have the honour to request you to submit to the... [Conference]... the candidacy of Cambodia with a view to its admission to membership in the Organization.

...

*Viet-Nam*<sup>112</sup>

Letter dated 31 August 1950, from the President of the Government, Minister of Foreign Affairs of the State of Viet-Nam, addressed to the Director-General of FAO:

...

Viet-Nam, having acquired the status of an independent State within the French Union, following ratification by the French Parliament, on 2 February 1950, of the Agreement negotiated on 8 March 1949 between M. Vincent Auriol, President of the French Republic, and His Majesty Bao-Dai, Chief of State of Viet-Nam, is desirous of participating in the action undertaken by the Food and Agriculture Organization of the United Nations...

Therefore, I have the honour to request you to submit to the... Conference... the application of the State of Viet-Nam for membership in the Food and Agriculture Organization.

In submitting the request for the admission of Viet-Nam, the Government of His Majesty Bao-Dai declares its acceptance of the Constitution of the Food and Agriculture Organization of the United Nations together with the obligations thereby incurred, which it promises to observe, and affirms its wish to co-operate fully with the other Member States.

...

*Laos*<sup>113</sup>

Letter dated 23 October 1951, from the Embassy of the French Republic in Italy, addressed to the Director-General of FAO:

...

The Government of Laos has requested the French Government to inform you of its decision to apply for membership in the Food and Agriculture Organization of the United Nations.

The French Government would therefore request that the application for membership of Laos be placed on the agenda of the forthcoming session of the Conference.

...

<sup>111</sup> FAO, *Special Session of the Conference* (1950), document C 50/15, annex II.

<sup>112</sup> *Ibid.*, annex III.

<sup>113</sup> FAO, *6th Session of the Conference* (1951), document C 51/5, supplement 1, appendix I.

35. The remaining twenty-nine States were admitted after the adoption of the amendment to article II referred to in paragraph 33 above, as from the indicated dates:

<i>States</i>	<i>Effective date of membership</i>
Morocco . . . . .	13 September 1956 <sup>114</sup>
Sudan . . . . .	13 September 1956 <sup>114</sup>
Ghana . . . . .	9 November 1957 <sup>115</sup>
Federation of Malaya . . . . .	9 November 1957 <sup>115</sup>
Guinea . . . . .	5 November 1959 <sup>116</sup>
Central African Republic . . . . .	9 November 1961 <sup>117</sup>
Chad . . . . .	9 November 1961 <sup>117</sup>
Congo (Brazzaville) . . . . .	9 November 1961 <sup>117</sup>
Congo (Democratic Republic of the) . . . . .	9 November 1961 <sup>117</sup>
Dahomey . . . . .	9 November 1961 <sup>117</sup>
Gabon . . . . .	9 November 1961 <sup>117</sup>
Ivory Coast . . . . .	9 November 1961 <sup>117</sup>
Kuwait . . . . .	9 November 1961 <sup>117</sup>
Madagascar . . . . .	9 November 1961 <sup>117</sup>
Mali . . . . .	9 November 1961 <sup>117</sup>
Mauritania . . . . .	9 November 1961 <sup>117</sup>
Niger . . . . .	9 November 1961 <sup>117</sup>
Senegal . . . . .	9 November 1961 <sup>117</sup>
Sierra Leone . . . . .	9 November 1961 <sup>117</sup>
Upper Volta . . . . .	9 November 1961 <sup>117</sup>
Algeria . . . . .	19 November 1963 <sup>118</sup>
Burundi . . . . .	19 November 1963 <sup>118</sup>
Rwanda . . . . .	19 November 1963 <sup>118</sup>
Trinidad and Tobago . . . . .	19 November 1963 <sup>118</sup>
Uganda . . . . .	19 November 1963 <sup>118</sup>
The Gambia . . . . .	22 November 1965 <sup>119</sup>
Malawi . . . . .	22 November 1965 <sup>119</sup>
Zambia . . . . .	22 November 1965 <sup>119</sup>
Barbados . . . . .	6 November 1967 <sup>120</sup>

*(ii) Before attaining full independence**a. Membership effective prior to accession to full independence*

36. Before attaining full independence, *Burma*, *Indonesia* and *Tunisia* became additional Member Nations of FAO. The first two States were admitted, and their membership became effective, prior to the adoption of the amendment to article II of the Constitution referred to in para-

<sup>114</sup> FAO, *Report of the Third Special Session of the Conference* (1956), pp. 2 and 3.

<sup>115</sup> FAO, *Report of the Ninth Session of the Conference* (1957), pp. 205 and 206.

<sup>116</sup> FAO, *Report of the Tenth Session of the Conference* (1959), p. 268.

<sup>117</sup> FAO, *Report of the Eleventh Session of the Conference* (1961), pp. 84 and 85.

<sup>118</sup> FAO, *Proceedings of the Twelfth Session of the Conference* (1963), sixth plenary meeting, document C 63/PV-6, and *Report of the Twelfth Session of the Conference* (1963), p. 103.

<sup>119</sup> FAO, *Manual and Report of the Thirteenth Session of the Conference* (1965), p. 105.

<sup>120</sup> FAO, *Proceedings of the Fourteenth Session of the Conference* (1967), fourth plenary meeting, document C 67/PV-4 and *Report of the Fourteenth Session of the Conference* (1967), p. 124.

graph 33 above. *Tunisia* was admitted after the adoption of said amendment and at the same session of the Conference at which associate membership was established.<sup>121</sup> A brief description is given below of the process of admission to FAO as regards those three States.

#### *Burma*

37. At its third session (1947), the Conference had before it, *inter alia*, an application for membership from the Government of Burma, dated 25 August 1947.<sup>122</sup> On the recommendation of its General Committee the Conference, at the third plenary meeting held on 26 August 1947, decided that "in order to allow delegations to obtain instructions regarding [that] application... the vote... be delayed for a maximum of one week".<sup>123</sup> The application having been approved at the sixth plenary meeting, held on 2 September 1947,<sup>124</sup> Burma became a Member Nation with effect as from 11 September 1947.<sup>125</sup> Burma attained independence on 4 January 1948, date of the entry into force of the "Treaty (with Exchange of Notes) between the Government of the United Kingdom of Great Britain and Northern Ireland and the provisional Government of Burma regarding the recognition of Burmese independence and related matters".<sup>126</sup>

#### *Indonesia*

38. At its fifth session (1949), the Conference had before it an application for membership from the Government of Indonesia dated 20 October 1949.<sup>127</sup> As regards this application the seventh session of the Council had reported to the Conference as follows:

With respect to the application of Indonesia, the Council wishes to place before the Conference the following information regarding the status of that country, supplied by the representative of the Netherlands:

A Provisional Federal Government of Indonesia is now in existence and Indonesia is virtually fully sovereign, since the treaty signed on 2 November 1949 between the Netherlands and Indonesia provides for official transfer of sovereignty not later than 30 December 1949.

A Delegation will attend the Conference with full powers from that Provisional Federal Government, and with the concurrence of all the parties to that treaty, to accept the Constitution of FAO.

While decision on the application for membership is entirely a matter for determination by the Conference, the Council wishes to point out that if the admission of Indonesia were postponed because that country had not yet obtained full status of sovereignty it would involve a delay of at least one year, while that status will presumably become effective not later than three weeks after the

conclusion of the Conference. It would also point out that in the past the Conference has admitted nations to membership before such nations had actually become fully sovereign.<sup>128</sup>

39. On the recommendation of its General Committee<sup>129</sup> the Conference, at the fourth plenary meeting held on 23 November 1949, approved Indonesia's application for admission.<sup>130</sup> At the fifth plenary meeting of the Conference, the Indonesian representative stated:

On behalf of Indonesia and its people I wish to express my gratitude to the Conference for admitting Indonesia as a member of the Food and Agriculture Organization. I also wish to thank the Government of the Netherlands for transmitting the application for membership of Indonesia and the Netherlands delegation to this Conference for its efforts to achieve this result. Our delegation has been empowered to accept, in accordance with article 2, the Constitution of FAO. In the very near future, Indonesia will be an independent and sovereign State and we are grateful that the FAO is the first specialized agency of which Indonesia becomes a member...<sup>131</sup>

Indonesia's membership of FAO became effective as from 28 November 1949.<sup>132</sup>

#### *Tunisia*

40. At its eighth session, on 23 November 1955, the Conference was informed that an application for membership had been submitted by the Government of France on behalf of the Government of *Tunisia*. On the recommendation of the General Committee, which had reported that

the Minister of National Economy of *Tunisia*, who would be representing his Government on that occasion, had full powers to accept the FAO Constitution as required under article II (2) of that instrument,

the Conference decided to add to the agenda of its eighth session the question of admission of *Tunisia* to membership of the Organization. The application having been approved, *Tunisia* was admitted to membership as of 25 November 1955.<sup>133</sup> It is to be noticed that although the application was made by France on behalf of *Tunisia*, which attained full independence on 20 March 1956, the acceptance of the Constitution was made by Tunisian authorities. It must also be pointed out that the decision concerning the admission of *Tunisia* as a Member Nation was taken some days after the adoption at the same session of the Conference, of the amendment to the FAO Constitution providing for associate membership.<sup>134</sup> The reference to article II,

<sup>128</sup> FAO, *Report of the Seventh Session of the Council* (14-17 November 1949), pp. 22 and 23.

<sup>129</sup> FAO, *Fifth Session of the Conference* (1949), *Report of General Committee*, document C 49/34.

<sup>130</sup> FAO, *Proceedings of the Fifth Session of the Conference* (1949), p. 38, document C 49/PV-4.

<sup>131</sup> *Ibid.*, p. 39, document C 49/PV-5.

<sup>132</sup> FAO, *Manual*.

<sup>133</sup> FAO, *Report of the Eighth Session of the Conference* (1955), pp. 177 and 178.

<sup>134</sup> See paragraph 12 above. The amendment was adopted at the sixth plenary meeting, on 18 November 1955 (FAO, *Proceedings of the Eighth Session of the Conference* (1955), pp. 92 and 93, document C 55/PV-6) after having been approved "in principle" by the Con-

(Continued on next page.)

<sup>121</sup> See para. 12 above.

<sup>122</sup> FAO, *Report of the Third Session of the Conference* (1947), p. 3.

<sup>123</sup> FAO, *Proceedings of the Third Session of the Conference* (1947), pp. 7 and 8.

<sup>124</sup> *Ibid.*, p. 33.

<sup>125</sup> FAO, *Manual*.

<sup>126</sup> United Nations, *Treaty Series*, vol. 70, p. 184.

<sup>127</sup> FAO, *Report of the 5th Session of the Conference* (1949), pp. 3 and 4.

para. 2, in the General Committee's report makes clear, however, that the status granted was that of a Member Nation, which was the one indicated in the application submitted by France.

*b. Membership effective after accession to independence*

41. Beginning at the tenth session, in 1959, fourteen nations were admitted to membership by decisions taken by the Conference prior to their accession to independence, the effectiveness of their membership being, however, postponed until a date subsequent to that of independence. A brief description is given below of the process of admission to FAO as regards those nations.

*Cyprus, Nigeria and Somalia; Cameroon and Togo*

42. At its tenth session in 1959, the Conference had before it: (a) an application for associate membership on behalf of *Somalia*, at the time a Trust Territory under Italian Administration, (b) applications on behalf of *Cyprus* and the *Federation of Nigeria* for associate membership until they became independent and for membership from the date on which they became independent, and (c) applications for membership, under cover of transmittal letters from the French Government, from the *Republic of Togo* and the *State of Cameroon*, nations still under Trusteeship.<sup>135</sup>

43. The Conference noted that those five applications concerned nations which would become independent during 1960 and the wish of the applying metropolitan Powers that they were admitted without delay. The Conference agreed with that wish "since the interests of FAO would undoubtedly be best served if the membership of the Organization included the largest possible number of States"<sup>136</sup> and adopted, on 5 November 1959, the two resolutions quoted below:

*Resolution 89/59:*

*The Conference*

*Decides*, with respect to the applications received concerning *Cyprus*, *Nigeria*, *Cameroon*, *Togo* and *Somalia*:

(a) to proceed to a secret ballot as laid down in Article II of the Constitution;

(b) to grant membership to each of the above nations that obtain the required two-thirds majority of the votes cast, on condition that the government of each such nation shall submit to the Director-General, after the end of trusteeship or on accession to independence, an instrument confirming its desire to be a member of the Organization and its acceptance of the obligations of the Constitution;

(Continued.)

ference at its previous session (FAO, *Report of the Seventh Session of the Conference* (1953), pp. 141 and 142). Since amendments of this kind enter into effect immediately (FAO, *Basic Texts* (1968), vol. I, p. 24, Constitution, article XX, para. 2). It would appear that Tunisia might have been admitted to associate membership rather than to full membership.

<sup>135</sup> FAO, *Tenth Session of the Conference* (1959), documents C 59/40; C 59/40, Suppl. 1; C 59/LIM/9; and *Report of the Tenth Session of the Conference* (1959), p. 266.

<sup>136</sup> FAO, *Report of the Tenth Session of the Conference* (1959), pp. 266 and 267.

(c) that such admission to membership shall take effect on the day of receipt of the aforesaid instrument if found valid, and that all Member Nations shall immediately be notified accordingly;

(d) in respect of *Cyprus*, *Nigeria* and *Somalia* only, that for the interim period, i.e., from the time the results of the ballot have been announced until accession to membership, each Nation having obtained the required majority shall enjoy the privileges set out in paras. 3 and 4 of Article II of the Constitution.<sup>137</sup>

*Resolution 92/59:*

*The Conference*

*Having proceeded* to a secret ballot in accordance with article II para. 2 of the Constitution and Rule XII, para. 7 of the Rules adopted by the Conference

*Declares* that *Cyprus*, the *Federation of Nigeria*, the *State of Cameroon*, the *Republic of Togo* and *Somalia* are admitted as members of the Food and Agriculture Organization of the United Nations as from the date on which trusteeship ends in the case of *Cameroon*, *Somalia* and *Togo*, and as from the date on which they become independent in the case of *Cyprus* and *Nigeria*.<sup>138</sup>

44. In accordance with resolution 89/59, *Cyprus*, *Nigeria* and *Somalia* became Associate Members as from the date of the adoption of the resolution (5 November 1959). Paragraphs 3 and 4 of article II of the Constitution mentioned in paragraph (d) of the said Resolution refer to associate membership. *Togo* and *Cameroon*, however, were not admitted to associate membership. This conclusion is supported by the fact that in assessing the contributions to be paid for the new members and associate members for the fiscal year 1959, the Conference did not include *Togo* and *Cameroon*.<sup>139</sup> The non-granting of associate membership to *Togo* and *Cameroon* might be explained by the fact that their applications were for membership only, while that of *Somalia* was for associate membership and those of *Cyprus* and *Nigeria* for associate membership until independence and for membership thereafter. In accordance with resolution 92/59, read together with resolution 89/59, although the admission as Member Nations of all five nations (*Cameroon*, *Cyprus*, *Nigeria*, *Somalia* and *Togo*) was approved at the time, their membership in that capacity was to take effect on the day of the receipt by FAO of their instruments of acceptance, after accession to independence or the end of trusteeship. The five States concerned attained independence in 1960.<sup>140</sup> Upon fulfilment of the conditions laid down by resolution 89/59 their membership became effective as from the dates indicated in parentheses.<sup>141</sup> *Cameroon* (22 March 1960); *Cyprus* (14 September 1960); *Nigeria* (11 October 1960); *Somalia* (17 November 1960); *Togo* (23 May 1960).

*Jamaica and Tanganyika*

45. At its eleventh session (1961) the Conference had before it applications for associate membership from the Government of the United Kingdom on behalf of

<sup>137</sup> *Ibid.*, p. 267.

<sup>138</sup> *Ibid.*, pp. 268 and 269.

<sup>139</sup> FAO, *Report of the Tenth Session of the Conference* (1959), pp. 270 and 271, resolution 94/59.

<sup>140</sup> The respective dates of independence are as follows: *Cameroon* (1 January 1960); *Cyprus* (16 August 1960); *Nigeria* (1 October 1960); *Somalia* (1 July 1960); *Togo* (27 April 1960).

<sup>141</sup> FAO, *Manual*.

*Jamaica and Tanganyika*.<sup>142</sup> As the applications concerned nations which would shortly become independent, the Conference decided "at the request of the metropolitan Power" and "in accordance with a precedent established at its tenth session":

(a) that Jamaica and Tanganyika should be admitted to associate membership until they become independent,

(b) that the status of each would become that of full membership after it attained independence and after the Government of the newly independent Nation had submitted to the Director-General an instrument confirming its desire to be a member of the Organization and its acceptance of the obligations of the Constitution,

(c) that such change of status would take place on the date of receipt by the Director-General of the aforesaid instrument, if found valid, and

(d) that all Member Nations would immediately be notified accordingly.<sup>143</sup>

46. The associate membership of *Jamaica and Tanganyika* took effect on 9 November 1961.<sup>144</sup> *Tanganyika* and *Jamaica* attained their independence in 1961 and 1962 respectively.<sup>145</sup> Upon fulfilment of the conditions laid down by the Conference's decision quoted above, their membership became effective as from 8 February 1962 and 13 March 1963, respectively.<sup>146</sup>

#### *Kenya, Malta and Zanzibar; Botswana and Lesotho*

47. At its twelfth and thirteenth sessions, in 1963 and 1965, the Conference took a position similar to that described in paragraphs 43 and 45 above in connexion with the applications for associate membership made by the Government of the United Kingdom on behalf of *Kenya, Malta and Zanzibar*<sup>147</sup> and *Basutoland and Bechuanaland*<sup>148</sup> respectively. The associate membership of *Kenya, Malta and Zanzibar* took effect on 19 November 1963.<sup>149</sup> That of *Basutoland and Bechuanaland* on 22 November 1965.<sup>150</sup> *Kenya* and *Malta* attained their independence in 1963 and 1964, respectively.<sup>151</sup> *Basutoland* and *Bechuanaland* attained their independence in 1966 under the names of *Lesotho* and *Botswana*.<sup>152</sup> Upon

fulfilment of the conditions laid down by the Conference, their membership became effective as from the dates indicated in parentheses:<sup>155</sup> *Kenya* (27 January 1964); *Malta* (5 October 1964); *Lesotho* (7 November 1966); *Botswana* (1 November 1966). As regards *Zanzibar*, which became independent on 10 December 1963, see paragraph 52 below.

#### *Guyana and Mauritius*

48. At its eleventh session (1961) the Conference, upon applications made on their behalf by the Government of the United Kingdom, granted associate membership to *British Guiana* and *Mauritius*, with effect as from 9 November 1961, date of the approval of their applications.<sup>154</sup> At its thirteenth session (1965), however, the Conference was informed that the Director-General had received two communications from the United Kingdom requesting that action be taken in order that the above two Associate Members be granted full membership of the Organization upon attaining independence, subject to the Governments of *British Guiana* and *Mauritius* confirming at that time their desire to become full members of the Organization and accepting the obligations of the Constitution. The Conference noted that when *British Guiana* and *Mauritius* were admitted as Associate Members at its eleventh session, no proviso had been included regarding the granting of full membership. The Conference, therefore, by resolutions 38/65 and 39/65, of 8 December 1965, adopted decisions similar to those described in paragraphs 43 and 45 above.<sup>155</sup> *British Guiana*, under the name *Guyana*, and *Mauritius*, attained their independence in 1966 and 1968, respectively.<sup>156</sup> Upon fulfilment of the conditions laid down by the Conference, their membership became effective on 22 August 1966 and 12 March 1968, respectively.<sup>157</sup>

## 2. CHANGES UNDERGONE BY MEMBERS

### (i) Member Nations

#### a. Partition of India

49. Before the partition, *India*, an original Member Nation of FAO (see paragraph 7 above), signed the Constitution of FAO and became a party thereto as from 16 October 1945.<sup>158</sup> On 15 August 1947, India divided into two States, *India* and *Pakistan*, which became both independent as from that date. On 25 August 1947, the Government of *Pakistan* submitted an application for membership to the third session of the FAO Con-

<sup>142</sup> FAO, *Eleventh Session of the Conference* (1961), documents C 61/46; C 61/46 Supp. 1; C 61/INF/6; and *Report of the Eleventh Session of the Conference* (1961), p. 84.

<sup>143</sup> FAO, *Report of the Eleventh Session of the Conference* (1961), p. 84.

<sup>144</sup> *Ibid.*, para. 556.

<sup>145</sup> *Tanganyika* became independent on 9 December 1961 and *Jamaica* on 6 August 1962.

<sup>146</sup> FAO, *Manual*.

<sup>147</sup> FAO, *Twelfth Session of the Conference* (1963), documents C 63/57 and C 63/57, Suppl. 1, and *Report of the Twelfth Session of the Conference* (1963), p. 103.

<sup>148</sup> FAO, *Thirteenth Session of the Conference* (1965), documents C 65/48 and Add.1; C 65/INF/3 and Rev.1; and *Report of the Thirteenth Session of the Conference* (1965), pp. 105 and 106.

<sup>149</sup> FAO, *Proceedings of the Twelfth Session of the Conference* (1963), sixth plenary meeting, document C 63/PV-6.

<sup>150</sup> FAO, *Manual*.

<sup>151</sup> *Kenya* became independent on 12 December 1963 and *Malta* on 21 September 1964.

<sup>152</sup> *Lesotho* became independent on 4 October 1966 and *Botswana* on 30 September 1966.

<sup>153</sup> FAO, *Manual*.

<sup>154</sup> FAO, *Report of the Eleventh Session of the Conference* (1961), p. 84.

<sup>155</sup> FAO, *Report of the Thirteenth Session of the Conference* (1965), pp. 106 and 107.

<sup>156</sup> *Guyana* became independent on 26 May 1966 and *Mauritius* on 12 March 1968.

<sup>157</sup> FAO, *Manual*.

<sup>158</sup> FAO, *Report of the First Session of the Conference* (1945), p. vii. See also *Proceedings of the First Session of the Conference* (1945), preliminary meeting, document 12 (G/7), p. 9.

ference.<sup>159</sup> The application was approved at the sixth plenary meeting, held on 1 September 1947,<sup>160</sup> and Pakistan became an additional Member Nation with effect as from 7 September 1947.<sup>161</sup> *India* continued, after the partition, as an original Member Nation of FAO, with membership effective as from 16 October 1945.<sup>162</sup>

b. *Formation and dissolution of a union between Syria and Egypt (United Arab Republic)*

50. On 21 February 1958, *Egypt* and *Syria*, Member Nations of FAO, united in a single State under the name United Arab Republic. *Egypt* had been an original Member Nation as from 16 October 1945.<sup>163</sup> *Syria's* membership had become effective on 27 October 1945.<sup>164</sup> As regards that union, the twenty-ninth session of the Council had reported to the Conference as follows:

The representative of the United Arab Republic informed the Council that, as a result of the referendum held in Egypt and Syria on 21 February 1958, the two States had effected a union and had established the United Arab Republic. On 11 April 1958, the Minister for Foreign Affairs of the United Arab Republic had formally communicated this information to the Director-General. Since both Egypt and Syria had been elected to seats on the Council, the Government of the United Arab Republic had instructed its representative to state that it was formally vacating the seat of Syria.<sup>165</sup>

51. The union dissolved on 28 September 1961 and the Conference, at its eleventh session in 1961, acknowledged the restoration of the *Syrian Arab Republic's* membership in the Organization as from 4 November 1961.<sup>166</sup> Its effective date of membership remains, however, that of

<sup>159</sup> FAO, *Report of the Third Session of the Conference* (1947), p. 3. In accordance with the Agreement as to the devolution of international rights and obligations upon the Dominions of India and Pakistan, contained in the Schedule to the Indian Independence (International Arrangements) Order, 1947 [United Nations, Legislative Series, *Materials on Succession of States* (ST/LEG/SER.B/14), p. 162]:

"...  
"2. (1) Membership of all international organizations together with the rights and obligations attaching to such membership, will devolve solely upon the Dominion of India.

"...  
"(2) The Dominion of Pakistan will take such steps as may be necessary to apply for membership of such international organizations as it chooses to join.

"..."  
<sup>160</sup> FAO, *Proceedings of the Third Session of the Conference* (1947), p. 32.

<sup>161</sup> FAO, *Manual*.

<sup>162</sup> *Ibid.*

<sup>163</sup> FAO, *Report of the First Session of the Conference* (1945), p. vii. See also, *Proceedings of the First Session of the Conference* (1945), preliminary meeting, document 12 (G/7), p. 8.

<sup>164</sup> FAO, *Report of the First Session of the Conference* (1945), p. vii. See also, *Proceedings of the First Session of the Conference* (1945), eighth plenary meeting, p. 153.

<sup>165</sup> FAO, *Report of the Twenty-ninth Session of the Council* (27 October-7 November 1958), p. 9.

<sup>166</sup> FAO, *Report of the Eleventh Session of the Conference* (1961), p. 840.

*Syria* before the union, namely 27 October 1945.<sup>167</sup> The former *Egypt*, under the name *United Arab Republic* continues to be regarded as an original Member Nation of FAO, with membership effective as from 16 October 1945.<sup>168</sup> After the dissolution of the union, the *United Arab Republic* (formerly *Egypt*) continued as member of the Council, post to which the union had been elected at the tenth session of the Conference (1959), for the period 1 January 1961-November 1963.<sup>169</sup>

c. *Formation of the United Republic of Tanzania*

52. On 26 April 1964, *Tanganyika*, a Member Nation and *Zanzibar*, a former "Associate Member" of FAO (see paragraphs 45-47 above) united in a single State under the name *United Republic of Tanzania*. The Conference, at its thirteenth session (1965), took cognizance of the merger and recognized officially that the *United Republic of Tanzania* "replaced the former Member Nation *Tanganyika* and the former Associate Member *Zanzibar*".<sup>170</sup> The Conference also, on the recommendation of the forty-fourth session of the Council, decided to cancel the separate assessments of the former States of *Tanganyika* and *Zanzibar* for the years 1964 and 1965 and replace them with the single assessment of the *United Republic of Tanzania*.<sup>171</sup> The effective date of membership of the *United Republic of Tanzania* remains that of the former member *Tanganyika* (8 February 1962).<sup>172</sup> As regards *Zanzibar*, its membership status from the date of independence (10 December 1963) until its merger into the *United Republic of Tanzania* (26 April 1964) was in practice equivalent to that of a non-member Nation of FAO (information provided by FAO).

d. *Formation of Malaysia and separation of Singapore*

53. On 16 September 1963, the *Federation of Malaya*, a Member Nation of FAO since 9 November 1957 (see paragraph 35 above) and the territories of *Singapore*, *Sabah (North Borneo)* and *Sarawak* federated under the name *Malaysia*. *Malaysia* replaced the *Federation of Malaya* and is listed as a Member Nation as from the same date as that of the former Federation. On 7 August 1965, *Singapore* separated from *Malaysia* and became an independent State. *Malaysia's* membership remained unaltered.<sup>173</sup> *Singapore* has taken no action thus far concerning membership in the Organization.

<sup>167</sup> FAO, *Manual*.

<sup>168</sup> *Ibid.*

<sup>169</sup> FAO, *Proceedings of the Tenth Session of the Conference* (1959), p. 371. sixteenth plenary meeting, document C 59/PV-16. See also FAO, *Report of the Thirty-seventh Session of the Council* (24-25 November 1961), p. 233.

<sup>170</sup> FAO, *Report of the Thirteenth Session of the Conference* (1965), p. 107.

<sup>171</sup> *Ibid.*, p. 99, resolution 32/65.

<sup>172</sup> FAO, *Manual*.

<sup>173</sup> *Ibid.*

(ii) *Associate Members*<sup>174</sup>a. *Attainment of independence of Chad, Gabon and Madagascar*

54. At its tenth session (1959), the FAO Conference admitted to associate membership *Chad, Gabon and Madagascar*.<sup>175</sup> Upon attaining independence in 1960, *Chad, Gabon and Madagascar*<sup>176</sup> applied for and were granted membership as Member Nations with effect as from 9 November 1961 (see paragraph 35 above).<sup>177</sup>

b. *Attainment of independence by Mali and Senegal*

55. The Republics of *Senegal* and *Sudan* were admitted to associate membership at the tenth session of the FAO Conference (1959).<sup>178</sup> The application for associate membership submitted by France on behalf of the *Republic of Senegal* and the *Republic of Sudan* had suggested the possibility of a joint representation "by reason of the association" of the two Republics.<sup>179</sup> Both were, however, admitted as separate Associate Members.<sup>180</sup> The Federation of Mali, composed of the Republics of *Sudan* and *Senegal*, became independent on 20 June 1960. However, two months later, on 20 August 1960, *Senegal* withdrew from the Federation and proclaimed the independence of the *Republic*. Thereafter, *Senegal* and *Mali* (formerly *Republic of Sudan*) applied for and were granted membership as Member Nations of FAO with effect as from 9 November 1961 (see paragraph 35 above).<sup>181</sup>

c. *Dissolution of the Federation of Rhodesia and Nyasaland*

56. The *Federation of Rhodesia and Nyasaland*, admitted to associate membership at the tenth session of the Conference (1959)<sup>182</sup> was dissolved on 31 December 1963. Subsequently, two newly independent States emerged in 1964 from two of the territories which constituted the former Federation: *Malawi* (former Nyasaland) and *Zambia* (former Northern Rhodesia).<sup>183</sup> At its thirteenth session (1965) the Conference had before it applications

for membership in FAO from the Governments of *Zambia* and *Malawi* and for associate membership from the Government of the United Kingdom, on behalf of *Southern Rhodesia*.<sup>184</sup> Their applications having been approved, *Zambia* and *Malawi* became Member Nations as from 22 November 1965 (see paragraph 35 above).<sup>185</sup> However, at the request of the Government of the United Kingdom, the Conference did not proceed with its application for associate membership for *Southern Rhodesia*.<sup>186</sup> From the foregoing it would appear that the "associate membership" of the *Federation of Rhodesia and Nyasaland* ceased on 31 December 1963, date of its dissolution.

## (b) CASES RELATING TO MULTILATERAL CONVENTIONS AND AGREEMENTS CONCLUDED WITHIN FAO AND DEPOSITED WITH ITS DIRECTOR-GENERAL

## 1. CONSTITUTION OF THE INTERNATIONAL RICE COMMISSION (1948)

*Cambodia, Federation of Malaya, Ghana, Guyana, Indonesia, Laos, Madagascar, Mali, Nigeria, Sierra Leone and Viet-Nam*

57. The Constitution of the International Rice Commission came into force with respect to France and the Netherlands<sup>187</sup> on 4 January 1949 and with respect to the United Kingdom on 28 February 1949.<sup>188</sup> Subsequently, and after becoming Member Nations of FAO, eleven former non-metropolitan territories under British, French or Dutch administration have joined the "International Rice Commission" by accepting its Constitution. Their acceptance became effective as from the dates indicated in parentheses: *Indonesia* (15 March 1950),<sup>189</sup> *Viet-Nam* (13 June 1951),<sup>190</sup> *Cambodia* (16 July 1951),<sup>191</sup> *Laos* (21 July 1954),<sup>192</sup> *Federation of Malaya* (15 September 1958),<sup>193</sup> *Nigeria* (13 November 1961),<sup>194</sup> *Mali* (4 June 1963),<sup>195</sup> *Sierra Leone* (22 September 1964),<sup>196</sup> *Madagascar* (27 October 1966)<sup>197</sup> *Guyana* (24 January 1967)<sup>198</sup> and *Ghana* (8 March 1968).<sup>199</sup> It is to be

<sup>174</sup> For the effects of the attainment of independence upon the status of associate membership granted for an interim period see paragraphs 42-48 above.

<sup>175</sup> FAO, *Report of the Tenth Session of the Conference* (1959), pp. 269 and 270, resolution 93/59.

<sup>176</sup> *Chad* became independent on 11 August 1960, *Gabon* on 17 August 1960 and *Madagascar* on 26 June 1960.

<sup>177</sup> FAO, *Report of the Eleventh Session of the Conference* (1961), pp. 84-85.

<sup>178</sup> FAO, *Report of the Tenth Session of the Conference* (1959), pp. 269 and 270, resolution 93/59.

<sup>179</sup> FAO, *Tenth Session of the Conference* (1959), document C 59/40, pp. 2 and 12.

<sup>180</sup> FAO, *Report of the Tenth Session of the Conference* (1959), p. 270.

<sup>181</sup> FAO, *Report of the Eleventh Session of the Conference* (1961), pp. 84 and 85.

<sup>182</sup> FAO, *Report of the Tenth Session of the Conference* (1959), pp. 269 and 270, resolution 93/59.

<sup>183</sup> *Malawi* became independent on 6 July 1964 and *Zambia* on 24 October 1964.

<sup>184</sup> FAO, *Thirteenth Session of the Conference* (1965), document C 65/48.

<sup>185</sup> FAO, *Report of the Thirteenth Session of the Conference* (1965), p. 105.

<sup>186</sup> *Ibid.*, p. 106.

<sup>187</sup> United Nations, *Treaty Series*, vol. 120, p. 14.

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.*

<sup>190</sup> *Ibid.* Independent at the time within the French Union.

<sup>191</sup> *Ibid.*

<sup>192</sup> United Nations, *Treaty Series*, vol. 196, p. 351. Independent at the time within the French Union.

<sup>193</sup> United Nations, *Treaty Series*, vol. 313, p. 345.

<sup>194</sup> *Ibid.*, vol. 417, p. 349.

<sup>195</sup> *Ibid.*, vol. 469, p. 417.

<sup>196</sup> *Ibid.*, vol. 511, p. 268.

<sup>197</sup> *Ibid.*, vol. 579, p. 260.

<sup>198</sup> *Ibid.*, vol. 590, p. 270.

<sup>199</sup> United Nations, *Statement*, March 1968, p. 18.

noticed that by 23 November 1961, date when the amendment of the Constitution of the International Rice Commission relating to territorial application (see paragraph 21 above) entered into force, *British Guiana* was a territory for whose international relations the United Kingdom was responsible. In the absence of any declaration by the latter concerning territorial application, the Constitution must be deemed to have applied as from that date to *British Guiana*.

## 2. AGREEMENT FOR THE ESTABLISHMENT OF THE INDO-PACIFIC FISHERIES COUNCIL (1948)

*Cambodia, Federation of Malaya, Indonesia and Viet-Nam*

58. This Agreement came into force on 9 November 1948 with respect to France, on 12 November 1948 with respect to the Netherlands and on 28 February 1949 with respect to the United Kingdom.<sup>200</sup> After being admitted to FAO as Member Nations, the following four former non-metropolitan territories under French, Dutch or British administration, became members of the Indo-Pacific Fisheries Council by accepting the Agreement with effect as from the dates indicated in parentheses: *Indonesia* (29 March 1950),<sup>201</sup> *Cambodia* (19 January 1951),<sup>202</sup> *Viet-Nam* (3 January 1951)<sup>203</sup> and *Federation of Malaya* (15 September 1958).<sup>204</sup> All of them became parties to the Agreement before its provisions concerning territorial application came into force on 23 November 1961. In the absence of a declaration by France or the United Kingdom concerning territorial application, the Agreement must be deemed to have applied as from that date to all the territories for whose international relations those two parties were responsible at the moment. No other newly independent State which has since emerged from the former non-metropolitan territories under French or British administration has yet expressed its position with respect to the Agreement.

## 3. AGREEMENT FOR THE ESTABLISHMENT OF A GENERAL FISHERIES COUNCIL FOR THE MEDITERRANEAN (1949)

*Algeria, Cyprus, Malta, Morocco and Tunisia*

59. The United Kingdom became a party to the Agreement with effect as from 20 November 1950<sup>205</sup> and France with effect as from 8 July 1952.<sup>206</sup> Subsequently, the French Government, pursuant to the original article VIII of the Agreement (see paragraph 23 above), applied for membership in the Fisheries Council on

behalf of the Government of Tunisia, not yet an independent State. The Council, at its second session held from 26 to 29 October 1953, unanimously decided to transmit to FAO the French Government's request. Its admission to the Fisheries Council having been approved by the FAO Conference,<sup>207</sup> Tunisia deposited an instrument accepting the Agreement, under covering letter from the French Government, with effect as from 22 June 1954.<sup>208</sup> In addition, four newly independent States, former non-metropolitan territories under British or French administration, have accepted the Agreement after becoming member Nations of FAO. Three of them attained independence before the provisions relating to territorial application mentioned in paragraph 23 above came into force. Their acceptance became effective as from the dates indicated in parentheses: *Morocco* (17 September 1956),<sup>209</sup> *Cyprus* (10 June 1965)<sup>210</sup> and *Algeria* (11 December 1967).<sup>211</sup> *Malta*, which attained independence after the entry into force of the provisions regarding territorial application, accepted the Agreement with effect as from 29 April 1965.<sup>212</sup>

## 4. INTERNATIONAL PLANT PROTECTION CONVENTION (1951)

*Nauru and Western Samoa*

60. By declarations communicated to the Director-General, New Zealand extended the application of the Convention to the Trust Territory of Western Samoa, with effect as from 16 October 1952<sup>213</sup> and Australia to Nauru with effect as from 8 September 1954.<sup>214</sup> Since independence, *Western Samoa* and *Nauru* have not expressed their position with respect to the Convention.

Former *Netherlands New Guinea (West Irian)*

61. The Netherlands extended also the application of the Convention to the former *Netherlands New Guinea*, with effect as from 29 October 1954.<sup>215</sup> *Indonesia*, one of the original signatories,<sup>216</sup> has not ratified it as yet.

## 5. CONSTITUTION OF THE EUROPEAN COMMISSION FOR THE CONTROL OF FOOT-AND-MOUTH DISEASE (1953)

62. The United Kingdom accepted the Commission's Constitution with effect as from 1 March 1954.<sup>217</sup> After attaining independence, *Cyprus* and *Malta*, former

<sup>207</sup> FAO, *Report of the Seventh Session of the Conference* (1953), pp. 160 and 161, resolution 57/53.

<sup>208</sup> United Nations, *Treaty Series*, vol. 191, p. 403.

<sup>209</sup> *Ibid.*, vol. 251, p. 380.

<sup>210</sup> *Ibid.*, vol. 540, p. 334.

<sup>211</sup> United Nations, *Statement*, December 1967, p. 30.

<sup>212</sup> United Nations, *Treaty Series*, vol. 535, p. 410.

<sup>213</sup> *Ibid.*, vol. 150, p. 68.

<sup>214</sup> *Ibid.*, vol. 199, p. 348.

<sup>215</sup> *Ibid.*, vol. 201, p. 379.

<sup>216</sup> *Ibid.*, vol. 150, p. 97.

<sup>217</sup> *Ibid.*, vol. 191, p. 286.

<sup>200</sup> United Nations, *Treaty Series*, vol. 120, p. 60.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.* Independent at the time within the French Union.

<sup>203</sup> United Nations, *Treaty Series*, vol. 120, p. 60. Independent at the time within the French Union.

<sup>204</sup> United Nations, *Treaty Series*, vol. 313, p. 346.

<sup>205</sup> *Ibid.*, vol. 126, p. 239. The United Kingdom withdrew from the Agreement with effect as from 25 June 1968 (United Nations, *Statement*, May 1968, p. 18).

<sup>206</sup> United Nations, *Treaty Series*, vol. 135, p. 398.

territories under British administration, have not as yet expressed their position on the Constitution of the Commission.

#### 6. PLANT PROTECTION AGREEMENT FOR THE SOUTH EAST ASIA AND PACIFIC REGION (1956)

##### *Federation of Malaya*

63. The United Kingdom ratified the Agreement with effect as from 3 December 1956.<sup>218</sup> After attaining independence on 31 August 1957 and becoming a Member Nation of FAO on 9 November 1957, the *Federation of Malaya* (later *Malaysia*) adhered to the Agreement with effect as from 20 November 1957.<sup>219</sup> *Singapore*, separated from Malaysia as from 7 August 1965 (see paragraph 53 above) has not as yet expressed its position with respect to the Agreement.

##### *Former Netherlands New Guinea (West Irian)*

64. The Netherlands ratified the Agreement in regard to former *Netherlands New Guinea* with effect as from 19 July 1957.<sup>220</sup> By a communication addressed to FAO on 28 December 1964 the Government of the Netherlands stated that, as a consequence of the Agreement between the Netherlands and Indonesia and the Understanding between the United Nations and the Netherlands and Indonesia, all signed at the Headquarters of the United Nations, New York, on 15 August 1962, the Government of the Netherlands considered that it had ceased to be a party to the above-mentioned Agreement, which it had ratified with respect to the Netherlands New Guinea, as from 1 October 1962, the date of transfer of the administration of that territory to the United Nations Temporary Executive Authority.<sup>221</sup> *Indonesia* which had signed the Agreement, subject to ratification, on 28 June 1956,<sup>222</sup> ratified it with effect as from 21 December 1967.<sup>223</sup>

#### 7. CONVENTION PLACING THE INTERNATIONAL POPLAR COMMISSION WITHIN THE FRAMEWORK OF FAO (1959)

##### *Syrian Arab Republic*

65. The *Syrian Arab Republic* acceded to the Convention on 19 December 1961.<sup>224</sup> The United Arab Republic's membership of the Commission had become effective by acceptance of the Convention as from 26 September 1961,<sup>225</sup> when Syria still formed part of the United Arab Republic.

<sup>218</sup> *Ibid.*, vol. 256, p. 355.

<sup>219</sup> *Ibid.*, vol. 282, p. 364.

<sup>220</sup> *Ibid.*, vol. 274, p. 347.

<sup>221</sup> United Nations, *Statement*, March 1965, p. 16; United Nations, *Treaty Series*, vol. 527, p. 308. See also letter to the Legal Counsel of FAO dated 23 November 1964, United Nations, *Juridical Yearbook* (1964), pp. 254 and 255.

<sup>222</sup> United Nations, *Treaty Series*, vol. 247, p. 427.

<sup>223</sup> United Nations, *Statement*, January 1968, p. 22.

<sup>224</sup> United Nations, *Treaty Series*, vol. 422, p. 343.

<sup>225</sup> *Ibid.*, vol. 410, p. 156.

##### *Former territories under Belgian, British, French or Spanish administration*

66. Spain, France and Belgium accepted the Convention with effect as from 21 April 1960,<sup>226</sup> 17 March 1961<sup>227</sup> and 24 April 1962,<sup>228</sup> respectively, without making a declaration concerning its territorial application. Since then, *Algeria*, *Rwanda*, *Burundi* and *Equatorial Guinea* have attained independence and membership of the United Nations, and the first three States membership of FAO, but none has expressed as yet its position with respect to the Convention. Since the United Kingdom, at the time of its acceptance on 3 April 1962, made a declaration extending the Convention to the Channel Islands and the Isle of Man,<sup>229</sup> it might be implied that its application did not extend to any other territory for the international relations of which the United Kingdom was at the time responsible.

#### 8. AGREEMENT FOR THE ESTABLISHMENT OF A COMMISSION FOR CONTROLLING THE DESERT LOCUST IN THE EASTERN REGION OF ITS DISTRIBUTION AREA IN SOUTH WEST ASIA (1963)

and

#### 9. AGREEMENT FOR THE ESTABLISHMENT OF A COMMISSION FOR CONTROLLING THE DESERT LOCUST IN THE NEAR EAST (1965)

##### *Qatar and Bahrain*

67. No questions relevant to the purpose of the present study exist in the context of these two Agreements given their recent conclusion and limited regional participation. *Qatar*<sup>230</sup> and *Bahrain*<sup>231</sup> became parties to the second Agreement by acceptance in their capacity as Associate Members of FAO as from 31 December 1968 and 24 February 1969 respectively. The respective instruments of acceptance were submitted by the Governments of *Qatar* and *Bahrain* to the Director-General of FAO.

## D. Summary

### (a) CONSTITUTION OF FAO

68. Participation by succession in the Constitution of FAO has taken place only in certain cases of change undergone by Member Nations (parties). In accordance with the Constitution, participation of additional Member Nations is subject to an admission procedure which involves prior approval of an application by the FAO Conference. Consequently, and in the absence of an

<sup>226</sup> *Ibid.*

<sup>227</sup> *Ibid.*

<sup>228</sup> *Ibid.*, vol. 429, p. 303.

<sup>229</sup> *Ibid.*, vol. 426, p. 349.

<sup>230</sup> United Nations, *Statement*, January 1969, p. 18.

<sup>231</sup> *Ibid.*, March 1969, p. 19.

*ad hoc* procedure, the newly independent States emerging from non-metropolitan territories for the international relations of which a Member Nation was responsible cannot but follow the method of participation open to additional Member Nations, which precludes the possibility of becoming a party by succession on the basis of an earlier membership of the parent Member Nation concerned.

69. The recorded cases relating to changes undergone by Member Nations (parties) might be classified for the purposes of this study as follows: (1) formation or constitution of a union (*United Arab Republic*) or federation (*Malaysia*), or a merger (*United Republic of Tanzania*); (2) dissolution of a union (*United Arab Republic*), separation from a federation (*Singapore* from *Malaysia*) or partition (*India*). Succession, which took place in all cases of the first group, and in some of the second, prevents discontinuity of participation in the FAO Constitution because it does not involve a new acceptance and approval of admission.

70. With respect to the first group, the *United Arab Republic* inherited the membership of *Egypt* and *Syria*. *Malaysia* continued the membership of the *Federation of Malaya* and the *United Republic of Tanzania* that of *Tanganyika*. The *United Arab Republic* has been considered a party as from the date of the earliest of the two inherited memberships, namely the date when former *Egypt*, an original Member Nation, became a party to the FAO Constitution. *Malaysia* and the *United Republic of Tanzania* are listed as Member Nations as from the date when the *Federation of Malaya* and *Tanganyika*, respectively, became parties to the Constitution. It should be noticed that while the *United Arab Republic* was a union between two independent Member Nations (*Egypt* and *Syria*), *Malaysia* was constituted by an independent Member Nation (*Federation of Malaya*) and three dependent territories (*Singapore*, *Saba* (North Borneo) and *Sarawak*) and the *United Republic of Tanzania* by an independent Member Nation (*Tanganyika*) and an independent State (*Zanzibar*) which was an Associate Member of FAO before attaining independence.

71. The cases of the second group do not present the same degree of uniformity. After the dissolution of the union between former *Egypt* and *Syria*, *Egypt*, under the name of the union (*United Arab Republic*), continued to be regarded as a party to the FAO Constitution and a Member Nation as from the same date as the former *Egypt*. *Syria*, under the name *Syrian Arab Republic* resumed separate membership about one month after the dissolution of the union, but continued to be considered a party to the Constitution as from the same date as that of former *Syria*. The partition of *India*, an original non-independent Member Nation, gave birth to two independent States: *India* and *Pakistan*. One of them only, *India*, continued the membership of former *India* and is considered a party to the FAO Constitution as from the same date as *India*, the original Member Nation. *Pakistan* applied for membership in accordance with the provisions contained in the Schedule to the Indian Independence (International Arrangements) Order, 1947.

Admitted as an additional Member Nation, *Pakistan* became a party to the FAO Constitution by acceptance a few days after the approval of its admission by the Conference. The independence and separation of *Singapore* from *Malaysia* did not alter the latter's membership. *Malaysia* continues to be a party to the FAO Constitution as of the same date as before *Singapore's* separation. *Singapore*, which has not expressed as yet its position with respect to the FAO Constitution, is not listed at present among the Member Nations of FAO. In this connexion, it should be noticed that in the case of the dissolution of the union between former *Egypt* and *Syria* (*United Arab Republic*), two previous memberships were involved while only one previous membership existed in each of the other two cases, namely the membership of *India*, original Member Nation, and the membership of *Malaysia*.

72. The procedure prescribed in the Constitution of FAO for admission of additional Member Nations has been consistently followed in all cases concerning newly independent States, former territories for the international relations of which a Member Nation of FAO was responsible. All of them became parties to the FAO Constitution by acceptance and once their respective applications received the approval of the FAO Conference. In most (thirty-five) cases admission was approved by the Conference after the attainment of independence of the former non-metropolitan territories in question, *Cambodia*, *Laos* and *Viet-Nam* being independent within the French Union at the time of their admission. The competent authorities of *Cambodia*, *Laos* and *Viet-Nam* accepted the obligations of the FAO Constitution and transmitted the applications for membership directly (*Cambodia*, *Viet-Nam*), or through the representatives of the parent member nation (*Laos*).

73. When former territories were expected to attain independence shortly (seventeen cases), the FAO Conference, in order to avoid delays in admission approved applications for their membership as Member Nations, before independence. However, only in three of those cases (*Burma*, *Indonesia*, *Tunisia*) the former non-metropolitan territories became parties to the FAO Constitution and Member Nations before attaining independence. The competent authorities of *Burma*, *Indonesia* and *Tunisia* accepted the obligations of the FAO Constitution and their applications for admission were transmitted by them directly (*Burma*, *Indonesia*) or by the parent Member Nation on behalf of the applying Government (*Tunisia*). The respective parent Member Nations supported the applications which, in the case of *Burma* and *Indonesia*, followed the conclusion of agreements concerning the transfer of sovereignty between the former metropolitan State and the former non-metropolitan territory.

74. In the remaining fourteen cases, the approval of membership was made by the Conference on the basis of applications submitted by the parent Member Nation on behalf of the territory concerned, but the effectiveness of the approved full membership was postponed until the date when, subsequently to independence, the newly independent States former territories would submit an

instrument accepting the obligations of the Constitution to the Director-General of FAO (*Cameroon* and *Togo* and other Nations enumerated in this paragraph). In several instances, at the time of approval of full membership and at the request of the parent Member Nation, the Conference granted the status of associate membership for an interim period which ended with the attainment of independence (*Botswana, Cyprus, Jamaica, Kenya, Lesotho, Malta, Nigeria, Somalia, Tanganyika, Zanzibar*). In two cases (*Guyana* and *Mauritius*), it granted first associate membership, the only requested, and approved full membership at a later stage upon a new application made by the parent Nation on behalf of the associate member concerned.

75. Since only Member Nations are parties to the Constitution, only that membership which was effective and full before independence (*India, Burma, Indonesia, Tunisia*) secured continued participation thereafter. Within FAO's Constitution, associate membership allows for separate participation of territories or groups of territories in the work and activities of the Organization before the attainment of their independence but it does not make them parties to the Constitution. Associate membership being subject in the final analysis to the consent of the Member Nation which administers the territory, it lapses when the territory enjoying it attains independence. Once independent, a former Associate Member, in order to become a party to the FAO Constitution, must either submit an instrument accepting the obligations of the Constitution to the Director-General of FAO if its full membership has already been approved (cases indicated in the preceding paragraph) or apply for full membership in accordance with the procedure prescribed in the Constitution for the admission of additional Member Nations (i.e. *Chad, Gabon, Madagascar, Mali, Senegal*). Finally, in the only case where a federation had the status of associate member (*Federation of Rhodesia and Nyasaland*), associate membership seems to have lapsed after the dissolution of the union and the attainment of independence of two of its three former constituent territories (*Malawi, Zambia*). The new application made by the United Kingdom on its behalf proves that *Southern Rhodesia* did not inherit the associate membership of the former Federation.

(b) CONVENTIONS AND AGREEMENTS CONCLUDED WITHIN FAO AND DEPOSITED WITH ITS DIRECTOR-GENERAL

76. Until now, all the newly independent States—former non-metropolitan territories for the international relations of which a contracting party was responsible—which have become parties to multilateral conventions or agreements concluded within FAO have followed the methods of participation provided for in the respective convention or agreement formally open to them, namely acceptance or adherence. Thus, *Cambodia, the Federation of Malaya, Ghana, Guyana, Indonesia, Laos, Madagascar, Mali, Nigeria, Sierra Leone* and *Viet-Nam* became parties to the Constitution of the International

Rice Commission by acceptance; *Cambodia, the Federation of Malaya, Indonesia* and *Viet-Nam* parties to the Agreement for the establishment of the Indo-Pacific Fisheries Council by acceptance; *Algeria, Cyprus, Malta, Morocco* and *Tunisia* parties to the Agreement for the establishment of a General Fisheries Council for the Mediterranean by acceptance; and the *Federation of Malaya* party to the Plant Protection Agreement for the South East Asia and Pacific Region by adherence. With the exception of *Tunisia's* acceptance of the Agreement for the establishment of a General Fisheries Council for the Mediterranean, acceptances or adherences took place after the States in question had attained independence and joined FAO as Member Nations. Participation of newly independent States through declarations of continuity has not been developed in practice.

77. Acceptance by *Tunisia* of the Agreement for the establishment of a General Fisheries Council for the Mediterranean was made at a time when *Tunisia* was neither independent nor a Member Nation of FAO. After attaining independence *Tunisia* did not deposit a new instrument of acceptance and continued to be considered a party to said Agreement as from the date of effectiveness of the original acceptance. In this case, continuity was secured after independence as a result of full participation before independence. On the other hand, territorial application before independence does not seem to have secured such continuity with respect to *Guyana's* participation in the Constitution of the International Rice Commission and *Malta's* participation in the Agreement for the establishment of a General Fisheries Council for the Mediterranean. Even though these two agreements applied respectively to the territories of *Guyana* and *Malta* before independence, *Guyana* and *Malta* became parties, after attaining independence, by acceptance and their respective acceptances became effective at a date subsequent to that of independence. It would seem, therefore, in the absence of a clear indication to the contrary, that territorial application of those agreements lapsed with respect to *Guyana* and *Malta* at the moment of their independence.

78. In other cases of territorial application prior to independence, the newly independent States concerned have not as yet expressed their position with regard to the conventions or agreements in question. Such are the cases of former non-metropolitan territories under British (with the exception of *Guyana*) or French administration in connexion with the Constitution of the International Rice Commission; of former non-metropolitan territories under British or French administration in connexion with the Agreement for the establishment of the Indo-Pacific Fisheries Council; of former non-metropolitan territories under British (with the exception of *Malta*) or French administration in connexion with the Agreement for the establishment of a General Fisheries Council for the Mediterranean; of *Nauru* and *Western Samoa* in connexion with the International Plant Protection Convention and of former non-metropolitan territories under Belgian, French or Spanish administration in connexion with the Convention placing the International Poplar Commission within the framework of FAO. In the light of this situation the conclusions

reached with respect to the cases of *Guyana* and *Malta* referred to above should be regarded as reflecting a tendency rather than a general practice.

79. In the only case relating to the dissolution of a union, namely the participation of the *Syrian Arab Republic* in the Convention placing the International Poplar Commission within the framework of FAO, succession is also to be excluded. By acceding to the Convention after its separation from the United Arab Republic, the *Syrian Arab Republic* did not consider

itself a successor to the United Arab Republic, which has ratified the Convention prior to the dissolution of the union.

80. Finally, it appears that FAO has not expressed any view as to the feasibility of succession to conventions or agreements concluded within the Organization, nor adopted a practice of requesting new States to declare their attitude with respect to instruments which had—or may have—been applicable in their territory prior to independence.

DOCUMENT A/CN.4/214 AND ADD.1 \* AND 2

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

[Original text: English]  
[18 April, 9 June and 22 July 1969]

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
<b>I. INTRODUCTION</b>		
A. The basis of the present report . . . . .	1-10	46
B. Proceedings in the General Assembly . . . . .	11	47
C. Secretariat studies relating to the topic of succession of States . . . . .	12	47
D. Recent study by the International Law Association . . . . .	13-18	47
E. The question of decolonization as an element in the topic of succession of States . . . . .	19-23	49
<b>II. TEXT OF DRAFT ARTICLES WITH COMMENTARY</b>		
Article 1. Use of terms . . . . .		50
Commentary . . . . .		50
Article 2. Area of territory passing from one State to another . . . . .		52
Commentary . . . . .		52
Article 3. Agreements for the devolution of treaty obligations or rights upon a succession . . . . .		54
Commentary . . . . .		54
Article 4. Unilateral declaration by a successor State . . . . .		62
Commentary . . . . .		62

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\* Incorporating document A/CN.4/214/Add.1/Corr.1.

## I. Introduction

### A. THE BASIS OF THE PRESENT REPORT

1. The Special Rapporteur's first report on this topic, which was entitled "Succession of States and Governments in respect of treaties",<sup>1</sup> was submitted to the Commission at its twentieth session. Owing to the heavy calls upon his time made by the first session of the United Nations Conference on the Law of Treaties, the Special Rapporteur found himself obliged to confine that report to a review of certain aspects of the topic and to the submission of four articles of a primarily introductory character.

2. At that session the Commission also had before it a first report of a preliminary character on "Succession of States in respect of rights and duties resulting from sources other than treaties",<sup>2</sup> submitted by Mr. Mohamed Bedjaoui, Special Rapporteur on that aspect of the topic of succession of States.

3. The two reports were considered successively by the Commission, beginning with the report of Mr. Bedjaoui on succession in respect of rights and duties resulting from sources other than treaties and continuing with the report of the present Special Rapporteur on succession in respect of treaties. A full summary of the Commission's discussion of the two reports, together with its conclusions, is included in chapter III, section C of the Commission's report for 1968.<sup>3</sup>

#### *Dividing lines between the two topics of succession*

4. In the course of the discussion in the Commission general agreement was expressed with the view that the criterion for demarcation between the topics entrusted to the two separate Special Rapporteurs should be "the subject-matter of succession, i.e. the content of succession and not its modalities".<sup>4</sup> Accordingly, considering that the reference to "rights and duties resulting from sources other than treaties" in the title to the topic entrusted to Mr. Bedjaoui might imply a different line of demarcation, the Commission amended that title to read more simply: "Succession in respect of matters other than treaties". Consequent upon this amendment, the Commission also endorsed the present Special Rapporteur's suggestion that in the interests of uniformity the title to the topic dealt with in his report should be modified to read: "Succession in respect of treaties".<sup>5</sup>

5. In the same general connexion, the Commission noted<sup>6</sup> the present Special Rapporteur's interpretation of his task as "strictly limited to succession with respect to treaties, i.e. to the question how far treaties previously concluded and applicable with respect to a given territory

might still be applicable after a change in the sovereignty over that territory"; and his proposal to proceed on the basis that the present topic is "essentially concerned only with the question of succession in respect of the treaty as such".

#### *Nature and form of the work*

6. The Commission was agreed that its work on succession of States in respect of treaties, as also on the topics of succession of States entrusted to Mr. Bedjaoui, should combine the technique of codification with that of progressive development of international law.<sup>7</sup>

7. The Commission, while postponing its decision on the final form to be given to its work, noted<sup>8</sup> the statements of the present Special Rapporteur that he intended:

(a) To cast his study of succession in respect of treaties in the form of draft articles on the model of a convention in order to provide the Commission with specific texts on which to focus the discussion and in order to clarify the issues; and

(b) To prepare the draft in the form of an autonomous group of articles on the specific topic of succession in respect of treaties.

The Special Rapporteur has accordingly proceeded upon that basis in drawing up his second report.

#### *Origins and types of succession*

8. On the substantive aspects of its work on succession of States, the Commission was unanimous in thinking that it would not be advisable to deal separately with the origins and types of succession. Members considered that it would be "sufficient for the Commission and the Special Rapporteurs on the topic to bear in mind the various situations, with a view to formulating, when necessary, a special rule for the case of a succession due to a particular cause".<sup>9</sup>

#### *Specific problems of new States*

9. During the discussion members of the Commission commented upon the possible implications of "decolonization" in regard to its study of succession of States. Varying views were expressed, particular reference being made to General Assembly resolutions 1765 (XVII) of 20 November 1962 and 1902 (XVIII) of 18 November 1963, which recommended that the Commission should proceed with its work on the succession of States "with appropriate reference to the views of States which have achieved independence since the Second World War". In the light of the discussion and the resolutions in question, the Commission concluded that "the problem of new States should be given special attention throughout the study of the topic without, however, neglecting other causes of succession on that account".<sup>10</sup> This conclusion

<sup>1</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, document A/CN.4/202, p. 87.

<sup>2</sup> *Ibid.*, document A/CN.4/204, p. 94.

<sup>3</sup> *Ibid.*, document A/7209/Rev.1, pp. 216-223, paras. 44-91.

<sup>4</sup> *Ibid.*, p. 216, para. 46.

<sup>5</sup> *Ibid.*, p. 222, para. 91.

<sup>6</sup> *Ibid.*, p. 221, para. 82.

<sup>7</sup> *Ibid.*, p. 217, para. 51, and p. 221, para. 83.

<sup>8</sup> *Ibid.*, pp. 221 and 222, paras. 84-89.

<sup>9</sup> *Ibid.*, p. 218, para. 59.

<sup>10</sup> *Ibid.*, p. 218, paras. 60 and 61.

the Special Rapporteur has taken as a guideline in preparing the present report. As he observed in his first report: "The Commission cannot fail to give particular importance to the case of 'new' States because it is both the commonest and the most perplexing form in which the issue of succession arises. But there is a risk that the perspective of the effort at codification might become distorted if succession in respect of treaties were to be approached too much from the viewpoint of the 'new' State alone".<sup>11</sup>

10. Various particular aspects of succession in respect of treaties were touched upon by members in the course of the discussion but were not pursued having regard to its preliminary character. One point made by some members was that the Sub-Committee in 1963 had recommended that the Special Rapporteur 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".<sup>12</sup> In the light of that recommendation these members suggested the omission of any reference to "Governments" in the title of the present topic; and this suggestion has been followed by the Special Rapporteur in the present report.

#### B. PROCEEDINGS IN THE GENERAL ASSEMBLY

11. During the twenty-third session of the General Assembly the report of the International Law Commission on the work of its twentieth session was considered by the Sixth Committee at its 1029th to 1039th meetings. The topic of succession of States gave rise to comments from a number of representatives whose observations were in the main directed to the same aspects of the topic as had been the subject of discussion within the Commission. As in the Commission, differing views were expressed on some of the points; and, the debate being of a preliminary character, no conclusions were recorded by the Sixth Committee. A summary of the debate is contained in paragraphs 38 to 58 of the Committee's report to the General Assembly.<sup>13</sup> In resolution 2400 (XXIII) of 11 December 1968 the General Assembly confined itself to recalling its previous resolutions on succession of States and Governments and to recommending that the Commission should continue its work on this topic, "taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII)".

#### C. SECRETARIAT STUDIES RELATING TO THE TOPIC OF SUCCESSION OF STATES

12. The Secretariat, it may be useful to recall, has prepared and distributed to members of the Commission the following documents relevant to the Commission's study of succession in respect of treaties:

<sup>11</sup> *Ibid.*, document A/CN.4/202, p. 90, para. 14.

<sup>12</sup> *Ibid.*, document A/7209/Rev.1, p. 222, para. 90.

<sup>13</sup> *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 84, document A/7370.

(a) A memorandum on the succession of States in relation to membership in the United Nations;<sup>14</sup>

(b) A memorandum on the succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary;<sup>15</sup>

(c) A study entitled "Digest of the decisions of international tribunals relating to State succession";<sup>16</sup>

(d) A study entitled "Digest of decisions of national courts relating to succession of States and Governments";<sup>17</sup>

(e) Five studies on the succession of States to multilateral treaties;<sup>18</sup>

(f) A volume of the United Nations Legislative Series entitled *Materials on Succession of States*,<sup>19</sup> containing the information provided or indicated by Governments of Member States in response to the Secretary-General's circular note inviting them to submit the text of any treaties, laws, decrees, regulations, diplomatic correspondence etc., concerning the procedure of succession relating to the States which have achieved independence since the Second World War.

#### D. RECENT STUDY BY THE INTERNATIONAL LAW ASSOCIATION

13. The legal literature on the subject of the succession of States and Governments is extensive<sup>20</sup> and, so far as was possible and appropriate, has been consulted by the Special Rapporteur. Special mention must, however, be made of a recent study by the International Law Association because of its convenient collection and exposition of a large volume of State practice relating to succession in respect of treaties. In 1961, the International Law Association established a Committee of fourteen members to study the subject of "the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors", the Chairman of the Committee being Professor Charles Rousseau and the Rapporteur Professor D. P. O'Connell. The Committee presented an interim report which was discussed at the Fifty-Second Conference of the Association held at Helsinki in 1966.<sup>21</sup> On the basis of this interim report the Association adopted four recommendations of a policy character

<sup>14</sup> See *Yearbook of the International Law Commission, 1962*, vol. II, document A/CN.4/149 and Add.1, p. 101.

<sup>15</sup> *Ibid.*, document A/CN.4/150, p. 106.

<sup>16</sup> *Ibid.*, document A/CN.4/151, p. 131.

<sup>17</sup> See *Yearbook of the International Law Commission, 1963*, vol. II, document A/CN.4/157, p. 95.

<sup>18</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, documents A/CN.4/200/Rev.2 and A/CN.4/200/Add.1 and 2, p. 1.

<sup>19</sup> ST/LEG/SER.B/14.

<sup>20</sup> The most recent work is a comprehensive study of the subject in two volumes by Professor D. P. O'Connell entitled *State Succession in Municipal Law and International Law* (University Press, Cambridge, 1967). A valuable bibliography of the law of State succession is to be found at the end of vol. I (pp. 543-562) and vol. II (pp. 387-406).

<sup>21</sup> The International Law Association, *Report of the Fifty-Second Conference, Helsinki, 1966*, p. xiii and pp. 557-595.

designed to achieve the maximum degree of continuity in the treaty relations of newly independent States. In 1965 the Association published a volume entitled *The Effect of Independence on Treaties* and comprising sixteen chapters, which contain a series of studies on particular aspects of succession in respect of treaties accompanied by extracts from State practice set out in appendices to the various chapters. Meanwhile, the Committee continued its examination of the law of succession in relation to newly independent States and presented to the Fifty-Third Conference of the Association, held at Buenos Aires in September 1968, a second interim report in which it submitted a draft of nine resolutions for adoption by the Association.<sup>22</sup>

14. Eight of the nine resolutions drawn up by the Committee relate to succession in respect of treaties, and all these were adopted by the Association without amendment.<sup>23</sup> The resolutions are to a large extent cast in the form of draft articles and, as the product of a very recent study by a learned society having a wide membership, they are clearly of direct interest to the Commission. The report of the Committee stated that the resolutions were "presented as a carefully considered compromise"; and that, although there might be some basic differences of view among its members, the Committee was unanimous in believing that its proposals would "constitute a satisfactory working system for the solution of most problems which will arise internationally, between States of differing viewpoints".

15. The texts of the eight resolutions proposed by the Committee and adopted by the International Law Association are as follows:

1. Unless the treaty otherwise provides, a State, on attaining independence may invoke and may have invoked against it a treaty which was internationally in force with respect to the entity or territory corresponding with it prior to independence if:

(a) The newly independent State has been notified or otherwise knows that the treaty has been internationally in force with respect to the entity or territory corresponding with it prior to independence, and

- (b) (i) The newly independent State and the other party or parties have expressly agreed to be bound by the terms of the treaty; or
- (ii) The newly independent State and the other party or parties have applied the terms of the treaty *inter se*; or
- (iii) In the case of a bilateral treaty, neither the newly independent State nor the other party has declared, within a reasonable time after the attaining of independence, that the treaty is regarded as no longer in force between them; or
- (iv) In the case of a multilateral treaty, the newly independent State has not declared, within a reasonable time after the attaining of independence, that the treaty is not in force with respect to it.

<sup>22</sup> International Law Association, Buenos Aires Conference (1968), *Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors*, pp. 1-3.

<sup>23</sup> Information supplied by the secretariat of the International Law Association; the ninth resolution, which concerns liability for the debts of the previous administration, was deferred for further consideration.

2. In cases of unions or federations of States, treaties, unless they otherwise provide, remain in force within the regional limits prescribed at the time of their conclusion to the extent to which their implementation is consistent with the constitutional position established by the instrument of union or federation.

In such a case where the treaty remains in force, the question whether the union or federation becomes responsible for performance of the treaty is dependent on the extent to which the constituent governments remain competent to negotiate directly with foreign States and to become parties to arbitration proceedings therewith.

In cases of dissolution of unions or federations, the separate components of the composite State may invoke or have invoked against them treaties of the composite State to the extent to which these are consistent with the changed circumstances resulting from the dissolution.

3. Termination of a treaty by notice or otherwise between two original parties does not in itself have the effect of terminating the application of the treaty vis-à-vis the successor States or as between the successor States.

4. In view of the circumstances that some successor States of two or more parties to a treaty may remain parties thereto, it is recommended that when a successor State takes action either to affirm the treaty or to terminate it, it should consider the question whether the treaty is in force with respect to other States, and it should, where it wishes to terminate a treaty as against such successor States, address notes to this effect to those successor States who have not clearly stated their intention to continue the treaty, as well as to those who have.

5. Unless a multilateral treaty otherwise provides, a newly independent State which succeeds to it becomes a beneficiary of the rights and becomes affected by the obligations thereof vis-à-vis all parties thereto, including its own predecessor and other succeeding States, whether they are successors to the same predecessor State or to other parties.

6. The question whether successor States which indicate their wish and intention to regard themselves as successor States to treaties which are not in force at the time of their independence can be counted for the purpose of aggregating the number of States parties to the convention for the purpose of bringing it into force is a question which requires further study.

7. A newly independent State is not bound by any of the rights or obligations resulting from the ratification by its predecessor State of a convention which is not in force at the date of independence.

8. When a treaty which provides for the delimitation of a national boundary between two States has been executed in the sense that the boundary has been delimited and no further action needs to be taken, the treaty has spent its force and what is succeeded to is not the treaty but the extent of national territory so delimited; but where a boundary treaty provides for future action to delimit it, or provides for future reciprocal rights in relation to the boundary, the question whether the treaty is succeeded to or not is a question to be answered by reference to the principles in section 1 above where these are applicable, and where they are not applicable it is to be answered by reference to such other legal principles as may prove to be relevant.

16. In its report the Committee attached to its draft resolutions a number of explanatory "notes" together with the "separate comments" of the Rapporteur and five other members of the Committee. Included also in the report were the texts of five "additional points" proposed by the Rapporteur and concerned with the implications of "reservations" and "interpretative declarations" in cases of succession in respect of treaties. As the Committee had been unwilling to take a position on the question of reservations to treaties pending its consideration by the United Nations Conference on the

Law of Treaties, these "additional points" were referred to as merely "offered for consideration" and were not the subject of any pronouncement by the Committee or by the plenary conference of the International Law Association.

17. The texts of the "additional points" proposed by the Rapporteur of the International Law Association were as follows:

10. A successor State can continue only the legal situation brought about as a result of its predecessor's signature or ratification. Since a reservation delimits that legal situation it follows that the treaty is succeeded to (if at all) with the reservation.

11. A new State which does not wish to continue the reservations of its predecessor is free to withdraw these, or delimit them so as to enter more fully into the undertakings of the convention.

12. A new State may not append new reservations to its declaration of continuity without the consent of the other parties to the convention. However, under the existing rules of international law, this consent may be tacit, and if no other party objects within a reasonable time to the reservation it may be deemed to be effective in virtue of tacit consent. However, tacit consent may not be presumed when in virtue of the terms of the convention reservations are excluded or are permitted only in respect of some articles and the successor State has reserved other than these articles.

13. Since a new State take over the legal situation of its predecessor, it takes over the consequences of its predecessor's objections to an incompatible reservation made to a multilateral convention by another party. Therefore the reservation would not be effective against the new State unless the latter formally waives the objection.

14. A new State also takes over the effects of any interpretative declaration of its predecessor until it makes an alternative declaration which it can do in its declaration of continuity.

18. Appended to the texts of the "resolutions" and "additional points" are a number of "notes" on particular aspects of the topic and of "comments" by individual members of the Committee. The report also has five annexes containing recent State practice and other material relating to succession of new States.

#### E. THE QUESTION OF DECOLONIZATION AS AN ELEMENT IN THE TOPIC OF SUCCESSION OF STATES

19. The International Law Association resolutions, although limited to the succession of "new" States, cover much of the ground which falls within the subject entrusted to the present Special Rapporteur. They do not touch the case of the simple passing of an area of territory from the sovereignty of one existing State to that of another; nor do they have any special provision for "protected States" or territories under "mandate" or "trusteeship". On the other hand, they do deal generally with cases of "unions" and "federations" of States. Furthermore, although the main emphasis of the resolutions is on "newly independent" States, they formulate general rules for application to "new" States and do not differentiate between "new" States resulting from decolonization and other "new" States.

20. Both in the International Law Commission and in the Sixth Committee of the United Nations General Assembly, varying views were expressed regarding the significance of the process of "decolonization" as an

element in the law of succession.<sup>24</sup> Some members considered that succession resulting from decolonization should be the subject of a special study by the Commission, envisaging as a possibility the need to include a separate chapter on decolonization in the Commission's draft. These members urged that decolonization is one of the aims of the international community and is proceeding under its supervision; that succession resulting from decolonization, as a result, presents specific aspects peculiar to it; and that decolonization has given rise to rules which affect the rules of traditional succession. It was not, they said, a question of minimizing the other aspects of succession, but of emphasizing the aspects resulting from decolonization. Other members, however, stressed the need to avoid confusing succession with decolonization, which they considered as merely one of the processes of transferring sovereignty from one State to another that create succession problems. In the view of these other members elements of continuity and rupture appear both in decolonization and traditional succession; decolonization is approaching completion, and the adoption of rules governing it will not satisfy future needs; attention should therefore be devoted mainly to the cases of succession most likely to occur in the future, e.g. dissolution, merger, economic integration, and not only to the important but transitory problems of decolonization. Certain other members took the view that, since the Commission was to study the problems of succession affecting all new States, the question of studying decolonization was ultimately only a question of priorities.

21. The principal new factor which has appeared in the practice regarding succession of States during the period of decolonization under the United Nations has been the use of the agreements commonly referred to as "devolution" or inheritance agreements. Otherwise, the State practice which has so far been published—and this is now quite extensive—contains comparatively little evidence suggesting, so far as concerns the present topic, a need to treat decolonization as a specific category of succession. Equally, it contains little evidence to suggest that decolonization, as such, calls for recognition as a specific element in the legal rules applicable to the succession of new States. The points mentioned in the Commission or in the Sixth Committee as possibly calling for a special treatment of decolonization appear for the most part to be points which, if valid, will be valid also in the case of a new State arising from a dismemberment outside the process of decolonization. As to "devolution" agreements, these may, in principle, occur in any instance of the creation of a new State by agreement with the predecessor State. On the other hand, they have been specially connected with the creation of new States within the process of "decolonization"; and the context in which these agreements were concluded may clearly, under the general law of treaties, affect their interpretation or even their validity. Accordingly, the State practice in regard to these agreements must, in the view of the Special Rapporteur, be closely examined by the Commission and due account be taken of

<sup>24</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, pp. 218-220, paras. 57-70.

their special context. But when this has been done, it is not believed that the State practice will be found to call for a general study of decolonization as a separate category of succession.

22. In general, the question with which the Commission has to concern itself is believed to be not so much whether decolonization may constitute a special new form of succession as what may be the implications of the principles of the Charter, including "self-determination", in the modern law concerning succession in respect of treaties. The point may be illustrated by reference to resolution 1 adopted by the International Law Association. Sub-paragraphs (b) (iii) and (b) (vi) of that resolution clearly proceed upon the basis that the modern law does, or ought to, presume that a "newly independent State" consents to be bound by any treaties previously in force internationally with respect to its territory, unless within a reasonable time it declares a contrary intention. In formulating that presumption the International Law Association was no doubt influenced by the ever-increasing interdependence of States, the consequential advantages of promoting the continuity of treaty relations in cases of succession and the considerable extent to which in the era of decolonization newly independent States have accepted the continuance of the treaties of the predecessor sovereigns. It is, however, one thing to admit as a matter of policy the general desirability of a certain continuity in treaty relations upon the occurrence of a succession and another thing to express that policy in terms of a legal presumption. On this point, quite independently of the question whether such a presumption is compatible with the modern State practice, the Commission may have to consider the possible relevance in this regard of the principle of self-determination.

23. Attention has been drawn in this introduction to the above-mentioned presumption in the first resolution of the text of the International Law Association because it touches a fundamental point of principle affecting the Commission's general approach to the formulation of the law relating to the succession of newly independent States. The point will be further, and more closely, examined in the commentaries to articles 3 and 4 of the present draft. The traditional law on this point—the principle that a new State begins its treaty relations with a clean slate—was certainly consistent with the principle of self-determination, even if in certain respects it may have been inadequate. The question for the Commission will be whether to retain this principle of the traditional law as the underlying norm or to follow the International Law Association and admit a certain presumption in favour of the transmission of the treaties of the predecessor sovereign to a new State.

## II. Text of draft articles with commentary

### *Article 1. Use of terms*

For the purposes of the present articles:

1. (a) "Succession" means the replacement of one State by another in the sovereignty of territory or in the competence to conclude treaties with respect to territory;

(b) "Successor State" means the State which has replaced another State on the occurrence of a "succession";

(c) "Predecessor State" means the State which has been replaced on the occurrence of a "succession".

### *Commentary*

(1) *Paragraph 1* (a) specifies the sense in which the term "succession" is used in the draft articles and is of cardinal importance for the whole structure of the draft. In many systems of municipal law, "succession" is a legal term and a legal institution which connotes the devolution from one person to another of rights or obligations automatically *by operation of law* on the happening of an event, as, for example, upon a death. The "successor" may or may not, in any particular system of law, have an option to disclaim the "succession". But in principle the event in question and the relationship of the "successor" to the person affected by the event cause the successor as a matter of law to "succeed" to certain rights or obligations of that person. The term "succession" therefore tends in municipal law to carry the meaning of a legal institution which, given the relevant event, by itself brings about the transfer of legal rights and obligations. In international law analogies drawn from municipal law concepts of succession are frequent in the writings of jurists and are sometimes also to be found in State practice. A natural enough tendency also manifests itself both among writers and in State practice to use the word "succession" as a convenient term to describe any assumption by a State of rights or obligations previously applicable with respect to territory which has passed under its sovereignty without any nice consideration of whether this is truly succession by operation of law or merely a voluntary arrangement of the States concerned. This looseness in the use of the expression "State succession" in international law is reflected in the definition given to the term "*Succession d'Etats*" in the *Dictionnaire de la terminologie du droit international*<sup>25</sup> which translated \*reads as follows:

A term frequently used by writers to denote:

(a) The situation which occurs when one State permanently replaces another State in a territory and with respect to the population of that territory as a result of total incorporation or partial annexation, of division or of the creation of a new State, whether the State to which the territory in question previously pertained continues or ceases to exist:

(b) The substitution of one State in the rights and obligations of the other State which results from that situation "Succession of States means both the territorial change itself—in other words, the fact that within a given territory one State replaces another—and the succession of one of those States to the rights and obligations of the other (i.e., of the State whose territory has passed to the successor State)." Kelsen, *Académie de Droit International*, vol. 42, p. 314.

(2) Municipal law analogies, however suggestive and valuable in some connexions, have always to be viewed

<sup>25</sup> Paris, Sirey, 1960, p. 587.

\* *Editorial note.* Translation supplied by Sir Humphrey Waldock.

with caution in international law; for an assimilation of States to individuals as legal persons neglects fundamental differences and may lead to unjustifiable conclusions derived from municipal law. In international law and more especially in the field of treaties, the crucial question is to determine whether and how far the law recognizes any cases of "succession" in the strict, municipal law sense of the transfer of rights or obligations by operation of law. The answer to be given to this question will only become clear for the purposes of the present articles when the Commission has undertaken a full examination of the subject of succession in respect of treaties. Meanwhile, for working purposes and without in any way prejudging the outcome of that examination, the Special Rapporteur considers it advisable to use the term "succession" exclusively as referring to the *fact* of the replacement of one State by another in the sovereignty of territory or in the competence to conclude treaties with respect to territory. Indeed, purely for drafting reasons it will probably be found convenient, whatever the Commission's conclusions on the questions of substance, to use the term "succession" exclusively as referring to the fact of a change in the sovereignty or treaty-making competence and to state separately and specifically any possible transfer of rights or obligations occurring upon such a "succession".

(3) The Special Rapporteur emphasizes that the meaning attributed to the term "succession" in paragraph 1 (a) is not intended as a general or exclusive definition of "succession" as a legal term in international law. On the contrary, as the title and opening words of the article imply, paragraph 1 (a) simply states the meaning with which the word "succession" is used in the present draft. If heavy circumlocutions are to be avoided, some convenient expression is needed to denote the fact of change of sovereignty, or of change of treaty competence, which raises the question of the continuance or otherwise of the application of treaties. The expressions "State succession" or "succession of States" are in general use and so convenient in this connexion that the temptation to employ the word "succession" for this purpose is almost inescapable, despite a certain ambiguity as to its legal implications. On the other hand, the word is certainly ambiguous since it may denote either the mere fact of a change of sovereignty or both a change of sovereignty and a transmission of rights and obligations as a legal incident of that change. Accordingly, if the word "succession" is to be used—provisionally at any rate—in its narrower, purely factual, sense of the replacement of one State by another in the sovereignty or treaty competence of a territory, it is necessary that this should be clearly stated in order to avoid any misunderstanding of the rules formulated in the draft. The Special Rapporteur, as already indicated in the previous paragraph, believes that to adopt this meaning for the word "succession" at this stage may be helpful also in regard to the Commission's study of the substantive law. The extent to which, and the conditions under which, any form of transmission of treaty rights or obligations is recognized in international law are complex and delicate questions; and it may be better that in the first instance they should be studied individually on the merits of each

particular case unadulterated by concepts deriving from notions of succession in municipal law. When the relevant rules have been identified and stated for the various cases of "succession of States", the Commission will be in a better position to decide upon the appropriate terminology.

(4) These further explanations of the meaning attributed to "succession" in paragraph 1 (a) are prompted by the Commission's discussion of this point at the twentieth session.<sup>26</sup> In the course of that discussion members commented upon the formulation of article 1, paragraph 2 (a) in the Special Rapporteur's first report, in which it read: "Succession' means the replacement of one State by another...in the possession of the competence to conclude treaties with respect to a given territory".<sup>27</sup> It was explained by the Special Rapporteur that the phrase "competence to conclude treaties" had been used in the formulation, instead of "sovereignty", because it was capable of covering such special cases as "mandates", trusteeships and protected States. Some members supported this formulation, pointing out that it might also embrace maritime zones of limited jurisdiction in respect of which treaties might have been concluded by the predecessor State. Certain other members, however, preferred a formulation in terms of a change of "sovereignty" on the ground that this would exclude certain situations such as a military occupation. The Special Rapporteur doubts whether the formulation of the meaning of the term "succession" in the draft ought to be in any way influenced by such a special case as a military occupation. The appropriate procedure would seem rather a general article reserving the question of military occupations altogether from the draft, just as such special cases as "aggression" and the "outbreak of hostilities" have been reserved from the draft Convention on the Law of Treaties.<sup>28</sup> Equally, to formulate "succession" only in terms of change of sovereignty may be too narrow, having regard to the special categories of cases mentioned in the debate. In view, however, of the feeling of some members that change of "sovereignty" should find mention in the formulation, the Special Rapporteur suggests that the difficulty might be met by referring to both cases, change of sovereignty and change of treaty competence.

(5) The meanings attributed in paragraphs 1 (b) and 1 (c) to the terms "Successor State" and "Predecessor State" are merely consequential upon the meaning given to "succession" in paragraph 1 (a).

(6) As the work progresses, it may be found desirable in the present article to add the meanings of further terms in order to give precision to the sense in which they are used in the draft. But the Commission has usually found it convenient to leave the general question

<sup>26</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, p. 217, paras. 47-50.

<sup>27</sup> *Ibid.*, document A/CN.4/202, p. 90.

<sup>28</sup> See *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, p. 189, para. 14, and *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, p. 176, para. 29.

of the use of terms until a later stage of its work. In this connexion, as indicated in the first report of the Special Rapporteur, certain questions may arise as to the relation between terms used in the present draft and also used in the draft convention on the law of treaties. For example, in the draft Convention on the Law of Treaties the term "treaty" is given a specific meaning<sup>29</sup> which has the effect of limiting the categories of international agreements to which the draft convention applies. Similarly, in the present draft, as in the draft Convention on the Law of Treaties, the question will arise as to whether any general reservation should be made in regard to the relevant rules of international organizations where the "succession" has reference to a constituent instrument or a treaty adopted within the organization concerned. These questions were ventilated in the Special Rapporteur's first report in articles 2 and 3 of a chapter entitled "General provisions".<sup>30</sup> The interpretation placed by the Special Rapporteur, however, on the preliminary discussion of succession of States at the twentieth session is that the Commission would, on the whole, prefer to leave aside questions of this kind until a later stage of its work on "succession". For this reason, they have been omitted from the present report in which, therefore, articles 2 and 3 of the previous draft do not again appear.

*Article 2. Area of territory passing  
from one State to another*

**When an area of territory, which is not itself organized as a State possessing treaty-making competence, passes under the sovereignty of an already existing State:**

**(a) Treaties of the successor State, concluded before the succession, become applicable in respect of that area from the date of the succession, unless it appears from a particular treaty or is otherwise established that such application would be incompatible with the object and purpose of that treaty.**

**(b) Treaties of the predecessor State cease to be applicable in respect of that area from the same date.**

*Commentary*

(1) This article concerns the application of a rule, which is often referred to by writers as the "moving treaty frontiers" rule, in cases where an area of territory not itself a State undergoes a change of sovereignty and the successor State is an already existing State. The article is thus confined to cases which do not involve a union or federation of States and equally do not involve the emergence of a new State. Admittedly, the moving treaty frontiers rule has a wider application than the present article, since it also operates in varying degrees both in the case of a union or federation of States and in the

case of the emergence of a new State. But in these other cases the question of the continued application of the treaties of the predecessor State is much more prominent, so that the operation of the moving treaty frontiers rule requires considerable qualification. In the cases covered by the present article—the mere addition of a piece of territory to an existing State by transfer or otherwise—the moving treaty frontiers rule appears in its simplest form. As that rule is a basic element underlying the whole law regarding succession in respect of treaties, it seems desirable to state it in the clearest possible form before entering upon the various cases in which its operation may require to be qualified by other rules.

(2) It is, of course, true that the moving treaty frontiers rule is a rule which by its terms excludes any succession in respect of treaties. Shortly stated, the rule provides that, on a territory's undergoing a change of sovereignty, it passes automatically out of the treaty régime of the predecessor sovereign into the treaty régime of the successor sovereign. It thus has two aspects, one positive and the other negative. The positive aspect is that the treaties of the successor State begin automatically to apply in respect of the territory as from the date of the succession. The negative aspect is that the treaties of the predecessor State, in turn, cease automatically to apply in respect of the territory. The rule thus assumes a simple substitution of one treaty régime for another, and denies altogether any succession in respect of treaties. No doubt, it was because the cases covered by the present article do not normally raise any question of succession in respect of treaties that they find no place in the recommendations of the International Law Association. Nevertheless, these cases do involve a "succession" in the sense of a replacement of one State by another in the sovereignty of the territory, so that their inclusion in the present draft articles seems in itself logical. Furthermore, as already indicated, the whole law of succession in respect of treaties is really concerned with the questions in what cases and under what conditions are there exceptions to the moving treaty frontiers rule, which is, therefore, a basic provision of that law. Accordingly, it seems not merely desirable but necessary for the Commission to include the present article in its draft.

(3) Sub-paragraph (a) of the article sets out the positive part of the moving treaty frontiers rule in its application to cases where territory is added to an already existing State. This aspect of the rule derives directly from the general provision of the law of treaties contained in article 25 of the draft Vienna Convention, which reads as follows:

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.<sup>31</sup>

Implicit in that provision is the rule that when an existing State acquires the sovereignty of an additional piece of territory, its treaties automatically become applicable in respect of the newly acquired territory to the same extent as would have been the case if the territory had been

<sup>29</sup> See article 2, para.1 (a) of the draft articles on the law of treaties, *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, p. 187.

<sup>30</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, document A/CN.4/202, pp. 91 and 92.

<sup>31</sup> *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference*, document A/CONF.39/14, para. 256.

under its sovereignty when each treaty was concluded. Under the law of treaties the Parties are presumed to intend that a treaty shall be applicable in respect of all the territory of each of them unless it is established that they intended the treaty to apply in respect only of a particular territory or territories or of a particular region. Except, therefore, in the case of a treaty's having a restricted territorial scope which does not embrace the newly acquired territory, a treaty must be understood as applicable automatically *and of its own force in respect of any territory newly acquired by one of its Parties*. That this is indeed the rule where an existing State acquires an additional piece of territory is confirmed by State practice.

(4) Among the earlier precedents one of the clearest statements of the rule is to be found in an Opinion given to the British Government in 1856 concerning the application of a Franco-British Treaty of 1826 to Algiers after the latter's annexation by France. The Queen's Advocate there said :

... it may be pointed out to the French Government that Treaty obligations are permanent and indefeasible, whilst the actual Geographical and Political boundaries of the Dominions of the contracting parties are necessarily subject to frequent changes, and that the object and spirit, no less than the text of this Convention, requires that its application and operation shall be co-extensive with the actual limits of the Dominions of both Nations, whatsoever may be the changes in such limits, or the date or circumstances of the acquisition of any particular place to which it may be sought to apply the provisions of the Convention, or the Administrative or fiscal system which may be there permitted or enforced by the Sovereign Power.<sup>32</sup>

Other older precedents include the extension of French treaties to Madagascar in 1896,<sup>33</sup> the extension of United States treaties to the Hawaiian Islands in 1898 by Joint Resolution of Congress,<sup>34</sup> and the application of British treaties to Cyprus after its annexation in 1915.<sup>35</sup>

(5) Similarly, on the formation of Yugoslavia after the First World War, the former treaties of Serbia were regarded as having become applicable to the whole territory of Yugoslavia. If some have questioned whether it was correct to treat Yugoslavia as an enlarged Serbia rather than as a new State, in State practice the situation was treated as one where the treaties of Serbia should be regarded as applicable *ipso facto* in respect of the whole of Yugoslavia. This seems to have been the implication of article 12 of the Treaty of St. Germain so far as concerns all treaties concluded between Serbia and the several Principal Allied and Associated Powers.<sup>36</sup> The

United States afterwards took the position that Serbian treaties with the United States both continued to be applicable and extended to the whole of Yugoslavia,<sup>37</sup> while a number of neutral Powers, including Denmark, Holland, Spain, Sweden and Switzerland, also recognized the continued application of Serbian treaties and their extension to Yugoslavia.<sup>38</sup> The United States position was made particularly clear in a State Department memorandum filed as *amicus curiae* in the case of *Ivancevic v. Artukovic*, where the Department said :

The weight of authority among writers on international law, as well as customary international practice, supports the rule that territorial changes of a State, whether by addition or loss of territory, do not in general deprive that State of its rights or relieve it of its obligations under a treaty, unless the changes are such as to render execution of the treaty impossible. In the case of the enlargement of a State by addition of new territory, the weight of authority supports the principle that the territory annexed becomes impressed with the treaty obligations of the acquiring State.<sup>39</sup>

(6) Among more recent examples of the application of this rule may be mentioned the extension of Canadian treaties to Newfoundland upon the latter's becoming part of Canada,<sup>40</sup> the extension of Ethiopian treaties to Eritrea in 1952, when Eritrea became an autonomous unit federated with Ethiopia,<sup>41</sup> the extension of Indian treaties to the former French and Portuguese possessions on their absorption into India, and the extension of Indonesian treaties to West Irian after the transfer of that territory from the Netherlands to Indonesia.

(7) In most cases, as in the case of the French<sup>42</sup> and Portuguese possessions in India or of the recent realignment of the United States-Mexican boundary in the Chamizal tract, the moving of the treaty frontier is an automatic process and is not made the subject of any special agreement or notification. It is rather assumed to be the natural consequence of the passing of the territory under the sovereignty of the State now responsible for its foreign relations.

(8) Sub-paragraph (b) provides that the treaty obligations of the former sovereign in principle cease to be applicable in respect of territory which has passed into the sovereignty of another State. It states a rule which is the corollary of the rule in sub-paragraph (a). If the general rule in the law of treaties is that the obligations of a treaty are intended to attach to each Party in respect

<sup>32</sup> See G. H. Hackworth, *Digest of International Law* (Washington D.C., Government Printing Office, 1940-44), vol. V, pp. 374-375; *Foreign Relations of the United States (1927)* (Washington D.C., Government Printing Office, 1942), vol. III, pp. 842-843.

<sup>33</sup> See J. Péritch, *op. cit.*, pp. 402-403.

<sup>34</sup> See M. M. Whiteman, *Digest of International Law* (Washington D.C., Government Printing Office, 1963), vol. 2, pp. 940-945, and especially at pp. 944-945.

<sup>35</sup> R. W. G. de Muralt, *op. cit.*, pp. 118-119.

<sup>36</sup> See *Summary of the practice of the Secretary-General as depositary of multilateral agreements (ST/LEG/7)*, p. 63; R. W. G. de Muralt, *op. cit.*, pp. 84-86.

<sup>37</sup> The "acts done by France for public purposes" dealt with in article 7 of the Treaty of Cession appear to relate only to internal public acts; see United Nations, *Treaty Series*, vol. 203, p. 155; A. Coret, *Revue juridique et politique de l'Union française* (Paris, Librairie générale de droit et de jurisprudence, 1957), vol. XI, No. 3, p. 588.

<sup>32</sup> A. D. McNair, *The Law of Treaties*, rev. ed. (Oxford, Clarendon Press, 1961), pp. 634-635.

<sup>33</sup> See D. P. O'Connell, *op. cit.*, vol. II, p. 34.

<sup>34</sup> See J. B. Moore, *A Digest of International Law* (Washington D.C., Government Printing Office, 1906), vol. V, pp. 348-351.

<sup>35</sup> See A. D. McNair, *op. cit.*, p. 637. For other older precedents, see A. D. McNair, *op. cit.*, 633-638, R. W. G. de Muralt, *The Problem of State Succession with regard to Treaties* (The Hague, W. P. van Stockum and Son, 1954), chap. II, and D. P. O'Connell, *op. cit.*, vol. II, chap. 21.

<sup>36</sup> See A. D. McNair, *op. cit.*, pp. 637-638. A contrary view was expressed by J. Péritch in *Recueil des cours de l'Académie de droit international* (1929-III), Paris, Librairie Hachette, 1930, vol. 28, pp. 390-391.

of its entire territory, this intention necessarily has reference only to the territory possessed at any given time by a Party; for a State is not normally responsible internationally for territory which is not within its sovereignty. Accordingly, its rights and obligations under a treaty necessarily cease in respect of territory which is no longer within its sovereignty. The rule recognizing the cessation of the obligations of the former sovereign in these cases is probably best explained in the above manner as following simply from the intention of the Parties to the treaties in question. But the same result would equally be arrived at by recourse to other principles of the law of treaties such as impossibility of performance and fundamental change of circumstances.

(9) In the case of some treaties, more especially general multilateral treaties, the treaty itself may still be applicable to the territory after the succession, for the simple reason that the successor State also is a Party to the treaty. In such a case there is not, of course, any succession to or continuance of the treaty rights or obligations of the predecessor State. On the contrary, even in these cases the treaty régime of the territory is changed and the territory becomes subject to the treaty exclusively in virtue of the successor State's independent participation in the treaty. For example, any reservation made to the treaty by the predecessor State would cease to be relevant while any reservation made by the successor State would become relevant in regard to the territory.

(10) Sub-paragraph (b) does not, of course, touch the treaties of the predecessor State otherwise than in respect of their application to the territory which passes out of its sovereignty. Apart from the contraction in their territorial scope, its treaties are not normally affected by the loss of the territory. Only if the piece of territory concerned had been the object, or very largely the object of a particular treaty might the continuance of the treaty in respect of the predecessor's own remaining territory be brought into question on the ground of impossibility of performance or fundamental change of circumstances.

### *Article 3. Agreements for the devolution of treaty obligations or rights upon a succession*

**1. A predecessor State's obligations and rights under treaties in force in respect of a territory which is the subject of a succession do not become applicable as between the successor State and third States, parties to those treaties, in consequence of the fact that the predecessor and the successor States have concluded an agreement providing that such obligations or rights shall devolve upon the successor State.**

**2. When a predecessor and a successor State conclude such a devolution agreement, the obligations and rights of the successor State in relation to third States under any treaty in force in respect of its territory prior to the succession are governed by the provisions of the present articles.**

#### *Commentary*

(1) Article 3 deals with the legal effect of agreements by which, upon a succession, the predecessor and successor

States have sought to make general provision for the devolution to the successor of the obligations and rights of the predecessor under treaties formerly applicable in respect of the territory concerned. A quite recent phenomenon has been the insertion of clauses in some particular treaties which purport to regulate in advance the legal position in regard to the application of the treaty in the event of part of the territory of one of the parties undergoing a succession. This type of agreement is, however, legally quite distinct from the first type and will be dealt with separately in article 5.

(2) Agreements of the first type, conveniently referred to as "devolution agreements", have been quite common. This seems to be due primarily to the fact that it has been the settled practice of the United Kingdom to propose a devolution agreement to all its overseas territories on their emergence as independent States and to the fact that the great majority of the ex-British territories have accepted the proposal and entered into such an agreement. New Zealand also concluded a devolution agreement with Western Samoa<sup>43</sup> on the same model as that of the United Kingdom agreements with its overseas territories, as did also Malaysia with Singapore on the latter's separation from Malaysia. Analogous agreements were concluded between Italy and Somalia<sup>44</sup> and between the Netherlands and Indonesia.<sup>45</sup> As to France, it has concluded devolution agreements in a comprehensive form with, respectively, Cambodia,<sup>46</sup> Laos<sup>47</sup> and Vietnam,<sup>48</sup> and an agreement in more particular terms with Morocco,<sup>49</sup> but devolution agreements do not seem to have been usual between France and her African territories.<sup>50</sup> Starting with the United Kingdom-Iraq agreement of 1931,<sup>51</sup> some twenty devolution agreements have now been concluded in connexion with the emergence of a territory to independent Statehood. Their terms vary to some extent, more especially when the

<sup>43</sup> Exchange of letters of 30 November 1962, see United Nations, *Treaty Series*, vol. 470, pp. 4 and 6.

<sup>44</sup> Treaty of Friendship (with Exchange of Notes) concluded between Italy and Somalia, Mogadiscio, 1 July 1960; for the original Italian text see *Diritto Internazionale*, vol. XVI, 1962, pp. 440-442 and *Bollettino Ufficiale della Repubblica Somalia*, Anno II, 31 Dicembre 1961, Suppl. N. 9 al N. 12, pp. 5-9; English text provided by the United Kingdom Government appears in *United Nations Legislative Series, Materials on Succession of States (ST/LEG/SER.B/14)*, pp. 169 and 170.

<sup>45</sup> Draft Agreement on Transitional Measures included in the Round-Table Conference Agreement between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia of 27 December 1949; see United Nations, *Treaty Series*, vol. 69, p. 266.

<sup>46</sup> D. P. O'Connell, *op. cit.*, vol. II, pp. 363 and 364.

<sup>47</sup> *Traité d'amitié et d'association entre le Royaume du Laos et la République française* du 22 octobre 1953, art. premier; see *United Nations Legislative Series, Materials on Succession of States (ST/LEG/SER.B/14)*, p. 72.

<sup>48</sup> Treaty of Independence, signed 4 June 1954, between Vietnam and the French Republic, article 2: see *British and Foreign State Papers, 1954*, vol. 161, p. 649.

<sup>49</sup> Convention diplomatique franco-marocain du 20 mai, 1956; see *Annuaire français de droit international, 1956*, Paris, C.N.R.S., vol. II, p. 126.

<sup>50</sup> One such Agreement seems to have been made between France and the Ivory Coast; see M. M. Whiteman, *op. cit.*, p. 983.

<sup>51</sup> League of Nations, *Treaty Series*, vol. CXXXII, p. 366, art. 8.

agreement deals with a particular situation, as in the case of the France-Morocco and Italy-Somalia Agreements. But, with the exception of the Indian Independence (International Arrangements) Order, 1947,<sup>52</sup> providing for the special cases of India and Pakistan, the agreements are in the form of treaties; and, with some exceptions, notably the French agreements, they have been registered as such with the Secretariat of the United Nations.

(3) Some of the newly emerged States, which have not concluded devolution agreements, have taken no formal step to indicate their general standpoint regarding succession in respect of treaties; such is the case, for example, with the ex-French African territories. Quite a number, however, have made unilateral declarations of a general character, in varying terms, by which they have taken a certain position—negative or otherwise—in regard to the devolution of treaties concluded by the predecessor State with reference to their territory. These declarations, although they have affinities with devolution agreements, are clearly distinct types of legal act, and will therefore be considered separately in the next article. The present article is concerned only with *agreements* between the predecessor and successor States purporting to provide for the devolution of treaties.

(4) Devolution agreements are of interest from two quite separate aspects. The first is the extent to which, if any, they are effective in bringing about a succession to or continuance of the predecessor State's treaties; and the second is the evidence which they may contain of the views of States concerning the customary law governing succession in respect of treaties. The second aspect will be considered in the commentary to article 6 in discussing what should be regarded as the existing law concerning succession to or continuance of treaties upon the emergence of a new State. The present article thus deals only with the legal effects of a devolution agreement as an instrument purporting to make provision concerning the treaty obligations and rights of a newly emerged State.

(5) If there are some variations in the terms of devolution agreements, their general character is the same: they provide for the transmission from the predecessor to the successor State of all the obligations and rights of the predecessor State in respect of the territory under treaties concluded by the predecessor and applying to the territory. Clearly, the present article cannot concern itself with the interpretation of particular formulations of devolution agreements and must be confined to stating the effects of devolution agreements in general terms. Accordingly, it is thought sufficient for the purposes of the present article to set out here a typical example of a devolution agreement and to refer members of the Commission to an appendix to this article for other formulations of these agreements. The Agreement concluded in 1957 between the Federation of Malaya and the United Kingdom by an Exchange of Letters<sup>53</sup> may serve as such

a typical example of a devolution agreement. The operative provisions, contained in the United Kingdom's letter, read as follows:

I have the honour to refer to the Federation of Malaya Independence Act, 1957, under which Malaya has assumed independent status within the British Commonwealth of Nations, and to state that it is the understanding of the Government of the United Kingdom that the Government of the Federation of Malaya agree to the following provisions:

(i) All obligations and responsibilities of the Government of the United Kingdom which arise from any valid international instrument are, from 31st August, 1957, assumed by the Government of the Federation of Malaya in so far as such instruments may be held to have application to or in respect of the Federation of Malaya.

(ii) The rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to or in respect of the Federation of Malaya are from 31st August, 1957, enjoyed by the Government of the Federation of Malaya.

I shall be grateful for your confirmation that the Government of the Federation of Malaya are in agreement with the provisions aforesaid and that this letter and your reply shall constitute an agreement between the two Governments.

(6) Devolution agreements have to be considered, first, from the point of view of their effect as between their own parties and, secondly, from the point of view of their effect in regard to third States. However, before considering them from either of these points of view, it is necessary to comment briefly upon their intrinsic validity as treaties.

(7) The validity of devolution agreements was discussed in one of the memoranda submitted in 1963 to the Subcommittee on States and Governments, where it was said that "the question seriously arises whether these treaties have any binding force for the newly created States".<sup>54</sup> Devolution agreements, it was said in that memorandum, are in part the price of freedom paid to the former sovereign and in part also provisions benefiting third parties, i.e. provisions relating to the obligations of the new State towards the treaty partners of the former sovereign; and both kinds of provisions are designed to safeguard established rights or their continued existence under the future régime of independence of the emancipated territory. There is a difficulty, it was further said, in that memorandum, in considering devolution agreements as representing freely accepted international treaty obligations or their signatories as the genuine representatives of the new sovereign State and its people. The conclusion was finally reached in the memorandum that the fate of these treaties should not be decided in an absolutely uniform manner, nor should they be declared invalid *a priori*: they should rather be regarded as belonging to a special class and as voidable either in whole or in part.

(8) The question of the validity of devolution agreements would seem to be one which now has to be determined by reference to the general law of treaties as set out in

<sup>52</sup> *British and Foreign State Papers, 1947, Part I, vol. 147, London, 1955, pp. 158-176.*

<sup>53</sup> *United Nations, Treaty Series, vol. 279, p. 287.*

<sup>54</sup> See Working Paper submitted by Mr. M. Bartos, *Yearbook of the International Law Commission, 1963, vol. II, p. 297.*

the Vienna Convention on the Law of Treaties<sup>55</sup> and in particular in articles 42-53. The Special Rapporteur therefore doubts the need to state a special rule for the validity of these agreements in the context of succession of States; and this doubt is reinforced by the way in which State practice in regard to these agreements has developed. In practice they have generally been treated as valid but, as will appear in the paragraphs which follow, they have been interpreted and applied in a manner which appears to leave the newly emerged State a free hand. Moreover, although the earlier devolution agreements, such as those of Iraq and Jordan, may in some degree have been regarded as part of the "price of independence", later devolution agreements seem to have been entered into more as an incident of the emergence of the new State than as a condition of independence. At any rate, the major part of their purpose seems to have been simply to obviate the risk of a total gap in the treaty relations of the newly emerged State and at the same time to record the former sovereign's disclaimer of any future liability under its treaties in respect of the territory concerned. That devolution agreements have certain deficiencies even from this limited point of view was underlined in another memorandum<sup>56</sup> submitted to the Sub-Committee on Succession of States and Governments in 1963; and these deficiencies it will be necessary to discuss below. But they relate to the utility and implications, rather than to the validity, of devolution agreements.

(9) The question of the legal effects of a devolution agreement as between the parties to it—as between the former sovereign and the successor State—cannot be completely separated from that of its effects vis-à-vis third States; for third States have rights and obligations under the treaties with which a devolution agreement purports to deal. Accordingly, it seems important to begin by considering how the general rules of international law concerning treaties and third States, that is articles 34 to 36 of the Vienna Convention, apply to devolution agreements, and this involves determining the intention of parties to those agreements. A glance at the typical devolution agreement set out in paragraph (5) above suffices to show that the intention of the parties to these agreements is to make provision *as between themselves for their own obligations and rights* under the treaties concerned and is not to make provision for obligations or rights of third States within the meaning of articles 35 and 36 of the Vienna Convention. It may be that, in practice, the real usefulness of a devolution agreement is in facilitating the continuance of treaty links between a territory newly independent and other States. But the language of devolution agreements does not admit of their being interpreted as being intended to be the means of establishing obligations or rights for third States.

<sup>55</sup> See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference*, document A/CONF.39/27.

<sup>56</sup> See Supplement to item 5 of the note on succession of States and Governments submitted by Mr. T. O. Elias, *Yearbook of the International Law Commission, 1963*, vol. II, p. 283; see also summary record of the 629th meeting of the Commission, *Yearbook of the International Law Commission, 1962*, vol. I, pp. 4 and 5, paras. 25-27.

According to their terms they deal simply with the transfer of the treaty obligations and rights of the predecessor to the successor State.

(10) A devolution agreement has then to be viewed, in conformity with the apparent intention of its parties, as a purported assignment by the predecessor to the successor State of the former's obligations and rights under treaties previously having application to the territory. It is, however, extremely doubtful whether such a purported assignment *by itself* changes the legal position of any of the interested States. The Vienna Convention on the Law of Treaties contains no provisions regarding the assignment either of treaty rights or of treaty obligations. The reason is that the institution of "assignment" found in some national systems of law by which, under certain conditions, contract rights may be transferred without the consent of the other party to the contract does not appear to be an institution recognized in international law. An assignment is by its very nature a transaction which purports to impose an obligation on a third party—an obligation on the third party to accept a different form of performance of its contract than that to which it is entitled; and in international law the rule seems clear that an agreement by a party to a treaty to assign either its obligations or its rights under the treaty cannot bind any other party to the treaty without the latter's consent.<sup>57</sup> Accordingly, a devolution agreement is in principle ineffective by itself to pass either treaty obligations or treaty rights of the predecessor to the successor State. It is an instrument which, *as a treaty*, is binding only as between the predecessor and successor States and the direct legal effects of which are necessarily confined to them.

(11) What then are the direct legal effects which devolution agreements may have as between the predecessor and successor States? The answer would seem to be very little more than a formal and public declaration of the transfer of responsibility for the treaty relations of the territory from the predecessor to the successor State. This answer really follows from the general principles of the law of treaties, and appears to be confirmed by State practice.

(12) Taking the assignment of obligations first, it seems clear that, from the date of independence, the treaty obligations of the predecessor State cease automatically to be binding upon itself in respect of the territory now independent. This follows necessarily from the principle of moving treaty frontiers which is as much applicable to a predecessor State in the case of independence as in the case of the mere transfer of territory to another existing State dealt with in article 2. The territory of the newly emerged State having ceased to be part of the "entire territory" of the predecessor State, the latter's treaties cannot and do not *in relation to itself* apply any longer in respect of the territory now independent; the

<sup>57</sup> See A. D. McNair, *op. cit.*, pp. 340-341; E. Lauterpacht, *The International and Comparative Law Quarterly* (London, The Society of Comparative Legislation), vol. 7 (1958), pp. 567-568; D. P. O'Connell, *op. cit.*, vol. II, p. 352. Cf. F. A. Mann, *The British Yearbook of International Law, 1953* (London, Oxford University Press, 1954), vol. 30, pp. 475-478.

territory has passed outside the scope of the obligations of the predecessor State under its treaties. Accordingly, so far as concerns the release of the predecessor State from its obligations, a devolution agreement does not seem to do any more than provide for something which is brought about in any event by operation of the general rules of international law independently of the agreement. Conversely, on the date of the succession, the territory passes into the treaty régime of the newly emerged State; and, since the devolution agreement is incapable by itself of effecting an assignment of the predecessor's treaty obligations to the successor State, the agreement does not *of itself* establish any treaty nexus between the successor State and third States parties to the treaties of the predecessor State. Thus, even if a newly emerged State has concluded a devolution agreement, the only treaty obligations of the predecessor State which can immediately become obligations also of the successor State vis-à-vis the other contracting parties are such obligations, if any, as would in any event pass to the successor State by operation of the general rules of international law independently of the devolution agreement.

(13) It has, indeed, been explained by a former Legal Adviser to the Commonwealth Relations Office that in the devolution agreements concluded by the United Kingdom the clause requiring the newly emerged State to assume the obligations and responsibilities of the United Kingdom is intended to refer only to "instruments which may *in future* be held to have application to the new State".<sup>58</sup> In other words, the agreement merely contemplates the assumption by the new State of any obligation which may be held to be binding upon the new State *after* the date of independence under any general rules of international law regarding succession; and, in addition, any obligation in respect of the territory which a third State might still be entitled to call upon the *predecessor* State to perform after the date of independence. He thus explains, as does also another United Kingdom Legal Adviser,<sup>59</sup> the clause regarding "obligations and responsibilities" in United Kingdom devolution agreements simply as a general *indemnity* given by the new State to its predecessor in respect of any treaty obligations the performance of which after independence a third State might under general international law be entitled to demand either from the new State or from the United Kingdom. Having regard to the principle of moving treaty frontiers and to the implications of independence and self-determination, a predecessor State's need for any such indemnity would seem to be doubtful. In fact, the main reason why a clause regarding the

assumption of obligations was included in the United Kingdom devolution agreements seems to have been a feeling of uncertainty as to the rules of international law concerning succession to treaties.<sup>60</sup>

(14) As to the assignment of rights, it is crystal clear that a devolution agreement cannot bind the other parties to the predecessor's treaties (who are "third States" in relation to the devolution agreement) and cannot, therefore, operate by itself to transfer to the successor State any rights vis-à-vis those other parties. Consequently, however wide may be the language of a devolution agreement and whatever may have been the intention of the predecessor and successor States,<sup>61</sup> the devolution agreement cannot of itself pass to the successor State any treaty rights of the predecessor State which would not in any event pass to it under general international law.

(15) It also scarcely needs to be pointed out that in the great majority of cases the treaties of the predecessor State will involve both obligations and rights in respect of the territory. In most cases, therefore, the passing of obligations and the passing of rights to the successor State under a treaty are questions which cannot be completely separated from each other.

(16) The general view, in fact, seems to be that devolution agreements do not by themselves materially change for any of the interested States the position which they would otherwise have under general international law and that the significance of the agreements is primarily as an indication of the intentions of the newly emerged State in regard to the predecessor's treaties. At the same time, however, it seems also to be widely thought that devolution agreements may play a not unimportant role in promoting continuity of treaty relations upon independence. One writer<sup>62</sup> has, for example, said:

The absence of any clear rule of international law relating to the assignment of treaty rights and duties, coupled with the generally accepted principle *pacta tertiis nec nocent nec prosunt*, suggests that these agreements may be of no real legal force. Alternatively, if the view is taken that the *pacta tertiis* rule is not so strict as to exclude the possibility of the existence of a genuine customary international law of succession, then one is led to the conclusion that the agreements may be redundant.

At present, the truth appears to lie somewhere between these two positions. It is not possible to ignore the fact that frequent reference is made to these inheritance agreements as well by successor States seeking recognition as parties to existing multilateral treaties entered into by their parent States as by third States pointing to some basis on which to treat as operative between themselves and the new State treaties previously concluded with the parent State.

...

At the same time, it may be noted that there are many occasions on which successor States give notice that they consider themselves

<sup>58</sup> See K. Roberts-Wray, *Commonwealth and Colonial Law* (London, Stevens, 1966), pp. 276 and 277. Compare, however, the opinion expressed by the United Kingdom to Cyprus in regard to the Road Traffic Convention, where the interpretation given to a devolution agreement may have been broader; see *United Nations Legislative Series, Materials on Succession of States* (ST/LEG/SER.B/14), pp. 182 and 183.

<sup>59</sup> See R. Hone, "International Legal Problems of Emergent Territories", in *Report of International Law Conference* (London, The David Davies Memorial Institute of International Studies, 1960), p. 19.

<sup>60</sup> See K. Roberts-Wray, *op. cit.*, pp. 267-273; see also the Commonwealth Office Note on the question of treaty succession on the attainment of independence by territories formerly dependent internationally on the United Kingdom (International Law Association, Buenos Aires Conference (1968), *Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors*, p. 24).

<sup>61</sup> See K. Roberts-Wray, *op. cit.*, pp. 277 and 278.

<sup>62</sup> E. Lauterpacht, *op. cit.*, pp. 525-530.

as bound by multilateral agreements concluded by the parent States but make no mention of any agreement relating to the inheritance of treaty rights and duties.

...

The evidence would not, therefore, really support a conclusion that the treaty inheritance conferred upon the successor State in this context any greater rights or duties than it would have enjoyed in the absence of the treaty. This is the more true when consideration is given to the fact that in a number of instances, even in the presence of an inheritance agreement, the successor State did not regard itself as bound by the treaties of the parent State and, in consequence, took steps to become a fresh contracting party to the treaty in question.

...

Nevertheless, despite the doubtful juridical basis on which these agreements rest and the difficulties which accompany their application, they are not entirely purposeless. They assist, in the early days of independence, in focusing the attention of the authorities of the new State upon the need to clarify the range and extent of their treaty commitments. They provide a basis on which third States can take the initiative in proposing the maintenance or novation of pre-existing bilateral treaties. Finally, if the practice persists, it may help to establish a true concept of succession, under which the successor State assumes the rights and duties created by every treaty which is closely linked with its territory and which cannot be regarded as of so odious a nature politically as to terminate upon the change in sovereignty. At present, however, inheritance agreements clearly do not provide a complete solution to the problem of succession to treaties, either multilateral or bilateral.

This decidedly cautious assessment of the value of devolution agreements seems fairly typical of British legal opinion<sup>63</sup> despite the fact that the United Kingdom is largely responsible for the introduction of the institution of devolution agreements.

(17) The general uncertainty as to the position in customary law regarding succession in respect of treaties makes it difficult to assess the precise value given to devolution agreements in State practice. But State practice seems to confirm that their primary value is simply as an expression of the successor State's willingness to continue the treaty relations of the predecessor State in respect of the territory. That devolution agreements do constitute at any rate a *general* expression of the successor State's willingness to continue the predecessor State's treaties applicable to the territory would seem to be clear. The critical question, it seems to the Special Rapporteur, is whether a devolution agreement constitutes something more; namely an *offer* to continue the predecessor State's treaties which a third State, party to one of those treaties, may accept and by that acceptance alone bind the successor State to continue the treaties. The opinion has already been expressed in paragraph 9 above that a devolution agreement cannot, according to its terms, be understood as an instrument intended to be the means of establishing rights for third States. Even so, is a devolution agreement to be considered as a declaration of consent by the successor State to the

continuance of the treaties which a third State may by its mere assent, express or tacit, convert into an agreement *novating* the treaties of the predecessor State formerly having application to the territory? Or, in the case of multilateral treaties, does the conclusion and registration of a devolution agreement constitute a notification of a claim to be a party so that the successor State is forthwith to be regarded by the depositary as a party to the treaty? The answers given to these questions must be sought in State practice the precise evaluation of which is made difficult by the uncertainty concerning the general law of succession.

(18) A considerable volume of State practice regarding multilateral treaties had been made available in memoranda submitted by the Secretariat.<sup>64</sup> The Secretary-General's own practice as depositary of multilateral treaties seems to have begun by attributing largely automatic effects to devolution agreements but to have evolved more recently in the direction of regarding them rather as a general expression of intention. Thus in 1959, after referring generally to his practice in dealing with notifications from new States claiming to continue or accede to their predecessors' treaties, the Secretary-General described his practice in regard to devolution agreements as follows:

However, where the treaty of independence contains a devolution clause and this clause is precise, he has inserted in the relevant Secretariat publications, against the name of the new State, a reference to the agreements previously applicable to its territory, and has in such cases invited the Governments of the new States to become parties to any protocols amending such agreements. Furthermore, if a precise and explicit devolution clause concerning the rights and obligations arising out of international conventions accepted by the State then responsible for the external relations of the new State's territory is the subject of a specific agreement concluded between the two States concerned, and if that agreement is registered with the Secretariat, the Secretary-General considers the new State to be bound by such conventions without having to transmit any notification on the subject. Moreover, the publication of the devolution agreement in the United Nations *Treaty Series* and the inclusion of the new State in the Secretariat publication *Status of Multilateral Conventions* (ST/LEG/3) among the States parties to conventions previously applied in its territory gives the States concerned all the information they require.

The same view of a devolution agreement, as having automatic effects in making the new State a party to a multilateral treaty formerly applicable to its territory, would appear to underlie a legal opinion given by the United Nations Secretariat to the United Nations High Commissioner for Refugees in 1963.<sup>65</sup> Asked whether Jamaica could be considered a party to the 1951 Convention on the Status of Refugees, the Secretariat

<sup>63</sup> See K. Roberts-Wray, *op. cit.*, p. 275; R. Hone, *op. cit.*, p. 19; *The Effect of Independence on Treaties* (a handbook published under the auspices of the International Law Association), London, Stevens and Sons, 1965, chap. 9; D. P. O'Connell, *op. cit.*, pp. 358-373.

<sup>64</sup> See *Summary of the Practice of the Secretary-General as Depositary of Multilateral Treaties* (1959) (ST/LEG/7), paras. 108-134; "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary (1962)" (*Yearbook of the International Law Commission, 1962*, vol. II, document A/CN.4/150, p. 106); "Succession of States to multilateral treaties (1968)" (*Yearbook of the International Law Commission, 1968*, vol. II, document A/CN.4/200 and Add.1 and 2, p. 1).

<sup>65</sup> See *United Nations Juridical Yearbook, 1963*, pp. 181 and 182.

drew attention to the United Kingdom-Jamaica devolution agreement and continued:

...

3. In our opinion this exchange of letters constitutes an international agreement and in accordance with the established practice of the Secretariat it should be assumed that Jamaica has succeeded to the rights and obligations of the 1951 Convention. The fact that Jamaica has not yet replied to the general inquiry sent by the Secretary-General on 18 December 1962 inquiring about its succession to multilateral treaties does not invalidate the above conclusion based on its agreement.

Then, having referred to a reservation that had been made to the Convention by the United Kingdom, the Secretariat advised:

However, we think your main inquiry at present is answered by the conclusion that Jamaica is under the obligations of the Convention subject to the reservations made by the United Kingdom.

(19) The Special Rapporteur, without taking any position in regard to particular cases, doubts the conclusion apparently drawn in the 1959 memorandum from the registration of the devolution agreement with the Secretariat and its publication in the United Nations *Treaty Series*. A devolution agreement is a bilateral agreement between the predecessor and successor States and it is registered with the Secretariat simply in pursuance of the obligation contained in Article 102 of the Charter. The Secretary-General, it is clear, does not receive a devolution agreement in his capacity as a depositary of multilateral treaties but under Article 102 of the Charter in his capacity simply as registrar and publisher of treaties. In short, it seems at least doubtful whether the registration of a devolution agreement, even after publication in the United Nations *Treaty Series*, can be equated with a notification by the new State to the Secretary-General, as depositary, of its intention to become a separate party to a specific multilateral treaty. Therefore, it seems arguable that, on general principles, some further manifestation of will on the part of the new State with reference to the particular treaty is needed to establish definitively the new State's position as a party to the treaty in its own name. Moreover, the present practice of the Secretary-General, as set out in a more recent memorandum, appears to be based on the view that, notwithstanding the conclusion of a devolution agreement, a new State ought not to be included among the parties to a multilateral treaty without first obtaining confirmation that this is in accord with its intention. Thus the Secretariat memorandum on succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary, dated 1962, explains<sup>66</sup> that, when a devolution agreement has been registered or has otherwise come to the knowledge of the Secretary-General, a letter is written to the new State which refers to the devolution agreement and continues on the following lines:

It is the understanding of the Secretary-General, based on the provisions of the aforementioned agreement, that your Government recognises itself bound, as from [the date of independence], by all international instruments which had been made applicable to [the

new State] by [its predecessor] and in respect of which the Secretary-General acts as depositary. The Secretary-General would appreciate it if you would confirm this understanding *so that in the exercise of his depositary functions he could notify all interested States accordingly.* [Italics added by the Special Rapporteur.]

Again, when considering whether to regard a new State as a party for the purpose of counting the number of parties needed to bring a Convention into force, it is the new State's specific notification of its will with regard to that Convention, not its devolution agreement, which the Secretary-General has treated as relevant.

(20) The practice of other depositaries of multilateral treaties equally does not seem to support the idea that a devolution agreement, as such, operates to effect or perfect a succession to a multilateral treaty without any notification of the State's will specifically with reference to the treaty in question. Occasionally, some reliance seems to have been placed on a devolution agreement as a factor in establishing a State's participation in a multilateral treaty. Thus, at the instance of the Netherlands Government, the Swiss Government appears to have regarded the Netherlands-Indonesian devolution agreement as a sufficient basis for considering Indonesia as a separate party to the Berne Convention for the Protection of Literary and Artistic Works.<sup>67</sup> But in its general practice as depositary of this and of other Conventions, including the Geneva humanitarian conventions, the Swiss Government does not seem to have treated a devolution agreement as a sufficient basis for considering a successor State as a party to the Convention but has acted only upon a declaration or notification of the State in question.<sup>68</sup> It is also the fact that the particular State concerned, Indonesia, has made it plain in another connexion that it does not interpret its devolution agreement as having the effects attributed to it by the Swiss Government in the case of the above-mentioned Berne Convention. Furthermore, it appears from the practice of the United States published in *Materials on Succession of States*<sup>69</sup> that the United States also acts only upon a declaration or notification of the successor State, not upon its conclusion of a devolution treaty, in determining whether that State should be considered a party to a multilateral treaty for which the United States is the depositary.

(21) The practice of individual States, whether "successor" States or interested "third" States, may be less clear cut but it also appears to confirm the limited significance of devolution agreements. The United Kingdom, it is true, has sometimes appeared to take the view that a devolution agreement may suffice to constitute the successor State a party to United Kingdom treaties previously applied to the territory in question. Thus, in 1961 the United Kingdom appears to have advised the Federation of Nigeria that its devolution agreement would suffice to establish Nigeria as a separate party to

<sup>67</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, document A/CN.4/200 and Add.1 and 2, pp. 13 and 14, paras. 26-29.

<sup>68</sup> *Ibid.*, pp. 16-24, paras. 35-85, and pp. 39-52, paras. 158-224.

<sup>69</sup> See *United Nations Legislative Series, Materials on Succession of States (ST/LEG/SER.B/14)*, pp. 224-228.

<sup>66</sup> See *Yearbook of the International Law Commission, 1962*, vol. II, document A/CN.4/150, p. 106, para. 133.

the Warsaw Convention of 1929<sup>70</sup> and Nigeria appears on that occasion ultimately to have accepted that point of view. On the other hand, Nigeria declined to treat its devolution agreement as committing it to assume the United Kingdom's obligations under certain extradition treaties.<sup>71</sup> In any event, the United Kingdom seems previously to have advised the Government of Burma rather differently in regard to that same Warsaw Convention.<sup>72</sup> It had then warned Burma that, whatever view Burma and the United Kingdom might take of their devolution agreement, this agreement:

... could not bind third countries to accept the transfer of all treaty rights and obligations to Burma and that there was consequently always a possibility of some third country taking a different view from the United Kingdom and Burma on that matter.

And, having concluded that it would be expedient to leave most cases until a concrete instance arose, the United Kingdom suggested that Burma should accede formally to the Warsaw Convention and to other international instruments as and when the occasion arose.

(22) Moreover, when looking at the matter as a "third State", the United Kingdom has declined to attribute any automatic effects to a devolution agreement. Thus, when informed by Laos that it considered the Anglo-French Civil Procedure Convention of 1922 as continuing to apply between Laos and the United Kingdom in consequence of a devolution agreement, the United Kingdom expressed its *willingness* that this should be so but added that the United Kingdom:

... wished it to be understood that the Convention continued in force not by virtue of the 1953 Franco-Laotian Treaty of Friendship, but because Her Majesty's Government and the Government of Laos were agreed that the 1922 Anglo-French Civil Procedure Convention should continue in force as between the United Kingdom and Laos.<sup>73</sup>

The Laos Government, it seems, acquiesced in this view. Even more explicit is the United Kingdom's comment upon this episode:

Her Majesty's Government did not consider that there was any *automatic succession* by newly independent territories to the rights and obligations under civil procedure conventions or treaties of a similar nature entered into by their mother country on their behalf before independence. Any agreement between the mother country and the newly independent State to the effect that the independent State should succeed to the rights and duties under treaties entered into by the mother country on their behalf was binding upon the Contracting Parties to that agreement, *but not necessarily on States which had entered into Agreements with the mother country in respect of the territory which had now become independent. Consequently, there must be some act after independence of "novation" between the newly independent State and the other Contracting Party.*<sup>74</sup> [Italics added by the Special Rapporteur.]

<sup>70</sup> *Ibid.*, p. 181.

<sup>71</sup> *Ibid.*, pp. 193 and 194.

<sup>72</sup> *Ibid.*, pp. 180 and 181.

<sup>73</sup> *Ibid.*, pp. 188 and 189.

<sup>74</sup> *Ibid.* See also the United Kingdom's advice to Pakistan that the Indian Independence (International Arrangements) Order 1947 could have validity only between India and Pakistan and could not govern the position as between Pakistan and Siam.

Similarly, in the case concerning the Temple of Preah Vihear<sup>75</sup> Thailand in the proceedings on its preliminary objections formally took the position before the International Court that in regard to "third States" devolution agreements are *res inter alios acta* and in no way binding upon them.

(23) The United States in its practice takes account of a devolution agreement as an acknowledgment in general terms by the newly independent State of its intention to continue in force treaties previously applied to the territory of which it is now the sovereign. But it does not seem to regard this general expression of intention as conclusive as to the continuity of specific treaties. The United States practice has been described by an Assistant Legal Adviser to the State Department in a letter to the Editor-in-Chief of the *American Journal of International Law* as follows:

In practice the United States Government endeavours to negotiate new agreements, as appropriate, with a newly independent State as soon as possible. In the interim it tries, where feasible, to arrive at a mutual understanding with the new State specifying which bilateral agreements between the United States and the former parent State shall be considered as continuing to apply. In most cases the new State is not prepared in the first years of its independence to undertake a commitment in such specific terms. To date the United States-Ghana exchange is the only all-inclusive formal understanding of this type arrived at, although notes have also been exchanged with Trinidad and Tobago and Jamaica regarding continued application of the 1946 Air Services Agreement. An exchange of Notes with Congo (Brazzaville) on continuation of treaty obligations is couched only in general terms.

Where a new State has signed a devolution agreement with the parent country or otherwise undertaken in general terms to acknowledge the continuance in force of agreements applied to it as a territory, that fact is noted in "Treaties in Force". The Department of State undertakes, with due regard for practical considerations, to determine which bilateral agreements of the parent country with the United States may clearly be considered as covered by the new State's general acknowledgment. These are listed under the name of the new State in "Treaties in Force".<sup>76</sup>

A devolution agreement is thus treated by the United States as an "acknowledgment in general terms of the continuance in force of agreements" justifying the making of appropriate entries in its "Treaties in Force" series. But the United States does not seem to regard the devolution agreement as conclusive of the attitude of the newly independent State with respect to individual treaties; nor its own entry of an individual treaty against the name of the new State in "Treaties in Force" as doing more than record a *presumption* or probability as to the continuance in force of the treaty vis-à-vis that State. The practice of the United States seems rather to be to seek to clarify the newly independent State's intentions and to arrive at a common understanding with it

<sup>75</sup> *I.C.J. Reports 1962*, Pleadings, Oral Arguments, Documents, vol. II, p. 33. The Court itself did not pronounce upon the question of succession, as it held its jurisdiction to entertain the case upon other grounds.

<sup>76</sup> Printed in *The Effect of Independence on Treaties* (a handbook published under the auspices of the International Law Association), London, Stevens and Sons, 1965, pp. 382-386.

in regard to the continuance in force of individual treaties.<sup>77</sup>

(24) As to newly independent States which have entered into devolution agreements, their practice has been uneven. In the case of multilateral conventions of which the Secretary-General is depositary many of these States have recognized themselves as bound by the conventions previously applied with respect to their territories. Some of these States, on the other hand, have not done so.<sup>78</sup> In the case of other general multilateral treaties the position seems to be broadly the same.<sup>79</sup> In the case of bilateral treaties, as already indicated, newly independent States appear not to regard a devolution agreement as committing them vis-à-vis third States to recognize the continuance in force of each and every treaty but to reserve the right to make known their intentions with respect to each particular treaty. The Government of Indonesia took this position very clearly in a Note of 18 October 1963 to the Embassy of the Federal Republic of Germany:

... Article 5 of the Transitional Agreement of 1949 between the Republic of Indonesia and the Kingdom of the Netherlands does not cause by itself the automatic application to the Republic of Indonesia of international agreements which were applicable to the territory of the former Netherlands Indies. For the continued application of such international agreements a further step is required on the part of the Indonesian Government; i.e. the sending of a declaration to the other contracting party(ies) or depositary, as the case may be, that the Indonesian Government wishes to be regarded as a party to the agreement concerned in the place of the former Netherlands Indies.<sup>80</sup>

Neither this Note nor a previous Note addressed by the Indonesian Government to the United Kingdom in similar terms in January 1961<sup>81</sup> appears to have met with any objection from the other State. The Ivory Coast, which had agreed with France that it would "assume all

the rights and obligations of treaties made applicable to the Ivory Coast prior to its independence", nevertheless took the position in correspondence with the United States in 1962-1963 that it did not consider itself as bound by a Franco-American extradition treaty and that such matters should be raised *de novo*.<sup>82</sup> Again, while referring to its devolution agreement as evidence of its willingness to continue certain United Kingdom-United States treaties in force after independence, Ghana in its correspondence with the United States reserved a certain liberty to negotiate regarding the continuance of any particular clause or clauses of any existing treaties.<sup>83</sup> Equally, in correspondence with the United Kingdom concerning extradition treaties Nigeria seems to have considered itself as possessing a wide liberty of appreciation in regard to the continued application of this category of treaties,<sup>84</sup> and in correspondence with the United States it likewise denied the existence of any extradition treaty or arrangement between itself and the United States.<sup>85</sup> Again, even where the successor State is in general disposed in pursuance of its devolution agreement to recognize the continuity of its predecessor's treaties, it not infrequently finds it necessary or desirable to enter into an agreement with a third State providing specifically for the continuance of a particular treaty.<sup>86</sup>

(25) The practice of States in regard to devolution agreements is thus too diverse to admit the conclusion that a devolution agreement should be considered as by itself creating a legal nexus between the successor State and third States, in relation to treaties applicable to the successor State's territory prior to its independence. Some successor States and some third States have undoubtedly tended to regard a devolution agreement as creating a certain presumption of the continuance in force of certain types of treaties. But neither successor States nor third States nor depositaries have as a general rule attributed automatic effects to devolution agreements. Accordingly, State practice as well as the relevant principles of the law of treaties would seem to indicate the devolution agreements, however important as general manifestations of the attitude of successor States to the treaties of their predecessors, should be considered as *res inter alios acta* for the purposes of their relations with third States.

(26) Another consideration to be taken into account is the difficulty in some cases of identifying the treaties

<sup>77</sup> See United States Exchanges of Notes with Ghana, Trinidad and Tobago and Jamaica, *United Nations Legislative Series, Materials on Succession of States* (ST/LEG/SER.B/14), pp. 211-213 and 220-223.

<sup>78</sup> For example, Indonesia, Cyprus and Somalia; see *Yearbook of the International Law Commission, 1962*, vol. II, document A/CN.4/150, p. 110, para. 21; pp. 110 and 111, paras. 31-33; pp. 114 and 115, para. 67, and p. 119, para. 106.

<sup>79</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, document A/CN.4/200 and Add.1 and 2, p. 1. The case of international labour conventions is special owing to the practice of the International Labour Organisation requiring new States to recognize the continuance of labour conventions on their admission to the organization.

<sup>80</sup> See K. Zemanek "State Succession after Decolonization", *Recueil des Cours de l'Académie de droit international de La Haye, 1965-III* (Leyden, Sijthoff), vol. 116, p. 236. In the *Westerling case*, Indonesia invoked the Anglo-Netherlands Extradition Treaty of 1898 and the United Kingdom Government informed the Court that it recognized Indonesia's succession to the rights and obligations of the Netherlands under the Treaty; see *United Nations Legislative Series, Materials on Succession of States* (ST/LEG/SER.B/14), pp. 196 and 197.

<sup>81</sup> See *United Nations Legislative Series, Materials on Succession of States* (ST/LEG/SER.B/14), p. 186. A similar note has, it appears, been sent by the Indonesian Government to other States which have inquired as to its position regarding succession to treaties formerly applicable to the Netherlands Indies; see K. Zemanek, *op. cit.*, p. 236, foot-note 100.

<sup>82</sup> See M. M. Whiteman, *op. cit.*, p. 983.

<sup>83</sup> See *United Nations Legislative Series, Materials on Succession of States* (ST/LEG/SER.B/14), pp. 211-213.

<sup>84</sup> *Ibid.*, pp. 193 and 194.

<sup>85</sup> See International Law Association, Buenos Aires Conference (1968), *Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors*, annex E, p. 35.

<sup>86</sup> For example, agreements between India and Belgium (*Moniteur Belge*, 26 February 1955, p. 967); Pakistan and Belgium (*United Nations, Treaty Series*, vol. 133, pp. 200-202); Pakistan and Switzerland (*Recueil officiel des lois et ordonnances de la Confédération suisse, nouvelle série*, 1955, p. 1168); Pakistan and Argentina (*United Nations Legislative Series, Materials on Succession of States* (ST/LEG/SER.B/14), pp. 6 and 7); United States and Trinidad and Tobago and United States and Jamaica (*ibid.*, pp. 220-224).

covered by a devolution agreement. Attention is drawn to this difficulty in the report of the Committee of the International Law Association,<sup>87</sup> and also in a Note communicated to that Committee by the Commonwealth Relations Office concerning territories formerly dependent on the United Kingdom.<sup>88</sup> The latter Note states:

The British Government has provided the government of territories approaching independence with a list of the treaties considered to apply to those territories. It is not, however, possible to guarantee that such a list will be fully comprehensive or accurate though every effort is made to render it so. The number of treaties involved is enormous and the position concerning the re-application to dependent territories often obscure. *Such lists cannot therefore be regarded as definitive, and they have not been appended to any of the inheritance agreements or otherwise published.* [Italics added by the Special Rapporteur.]

Moreover, even when it is reasonably certain that a treaty was considered to apply to the territory prior to independence, a question may remain as to whether its application after independence would be compatible with the nature of its provisions. Difficulties such as these equally point to the need for a considerable liberty of appreciation to be reserved to successor States in regard to the continuance in force of treaties, notwithstanding their having entered into a devolution agreement.

(27) Accordingly, *paragraph 1* of the present article states the negative rule that the obligations and rights of a predecessor State under treaties do not become applicable as between the successor State and third States in consequence *only* of the fact that the predecessor and successor States have concluded a devolution agreement. This does not deny the general relevance of a devolution agreement as an expression of the successor State's *policy* in regard to continuing its predecessor's treaties in force. But in order to remove any possible uncertainty on the point, it seems desirable to lay down explicitly that a devolution agreement does not by itself create any legal nexus between the successor State and third States.

(28) *Paragraph 2* of the article then provides simply that, when a devolution agreement has been concluded, the obligations and rights of the successor State under treaties formerly in force in respect of its territory are governed by the provisions of the present articles. In other words, they are governed by such principles of the novation of treaties or of succession in the matter of treaties as may be considered to exist in general international law.

#### **Article 4. Unilateral declaration by a successor State**

**1. When a successor State communicates to a third State, a party to treaties in force in respect of the successor State's territory prior to independence, a declaration of its will with regard to the maintenance in force of such**

treaties, the respective obligations and rights of the successor State and the third State are governed by the subsequent articles of the present draft.

**2. When a successor State communicates to the third State a declaration expressing its consent to the provisional application of such treaties pending a decision with regard to their maintenance in force, modification or termination, the treaties shall continue to apply provisionally as between the successor State and the third State unless in the case of a particular treaty:**

(a) The treaty comes into force automatically as between the States concerned under general international law independently of the declaration; or

(b) It appears from the treaty or is otherwise established that the application of the treaty in relation to successor State would be incompatible with its object and purpose; or

(c) Within three months of receiving the notification the third State in question has informed the successor State of its objection to such provisional application of the treaty.

**3. The provisional application of a treaty as between a successor State and a third State under the present article is terminated if:**

(a) Subject to any requirement of notice that may have been agreed between them either State communicates to the other its decision to terminate the provisional application of the treaty; or

(b) The declaration specified a period for the duration of the provisional application of the treaty and this period has expired; or

(c) At any time they mutually agree that the treaty shall thenceforth be considered as terminated or, as the case may be, brought into force between them, whether in full or in modified form, or

(d) It appears from the conduct of the States concerned that they must be considered as having agreed to terminate the treaty, or as the case may be, to bring it into force; or

(e) The termination of the treaty itself shall have taken place in conformity with its own provisions.

#### *Commentary*

(1) In March 1961 the United Kingdom Government suggested to the Government of Tanganyika that, on independence, it should enter into a devolution agreement by exchange of letters, as had been done by other British territories on their becoming independent States. Tanganyika replied that, according to the advice which it had received, the effect of such an agreement might be that it (1) would enable third States to call upon it Tanganyika to perform treaty obligations from which it would otherwise have been released on its emergence into statehood; but (2) would not, by itself, suffice to entitle it to call upon third States to perform towards Tanganyika treaties which they had concluded with the United Kingdom. Accordingly, it did not enter into a devolution agreement, but wrote instead to the Secre-

<sup>87</sup> See International Law Association, *Buenos Aires Conference (1968)*, *Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors*, p. 4, note 1 (a).

<sup>88</sup> *Ibid.*, annex B, pp. 28 and 29, para. 6.

tary-General of the United Nations in December 1961 making the following declaration:

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 8 December 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.<sup>89</sup>

At Tanganyika's express request, the Secretary-General circulated the text of its declaration to all Members of the United Nations.

The United Kingdom then in turn wrote to the Secretary-General requesting him to circulate to all Members of the United Nations a declaration couched in the following terms:

I have the honour . . . to refer to the Note dated 9 December 1961 addressed to your Excellency by the then Prime Minister of Tanganyika, setting out his Government's position in relation to international instruments concluded by the United Kingdom, whose provisions applied to Tanganyika prior to independence. Her Majesty's Government in the United Kingdom hereby declare that, upon Tanganyika becoming an independent Sovereign on 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.<sup>90</sup>

In other words, the United Kingdom caused to be circulated to all Members of the United Nations a formal disclaimer, so far as concerned the territory of Tanganyika, of any obligations or rights of the United Kingdom under treaties applied by it to that territory prior to independence.

<sup>89</sup> *United Nations Legislative Series, Materials on Succession of States* (ST/LEG/SER.B/14), pp. 177 and 178.

<sup>90</sup> *Ibid.*, p. 178.

(2) The precedent set by Tanganyika<sup>91</sup> has been followed by a number of other newly independent States whose unilateral declarations have, however, taken varying forms.

(3) Botswana in 1966 and Lesotho in 1967 made declarations in the same terms as Tanganyika.<sup>92</sup> In 1969 Lesotho requested the Secretary-General to circulate to all Members of the United Nations another declaration extending the two-year period of review for bilateral treaties specified in its 1967 declaration for a further period of two years. At the same time, it pointed out that its review of its position under multilateral treaties was still in progress and that, under the terms of its previous declaration, no formal extension of the period was necessary. The new declaration concluded with the following *caveat*:

The Government of the Kingdom of Lesotho wishes it to be understood that this is merely a transitional arrangement. Under no circumstances should it be implied that by this Declaration Lesotho has either acceded to any particular treaty or indicated continuity of any particular treaty by way of succession."<sup>93</sup>

(4) In 1968 Nauru also made a declaration which with some minor differences of wording, follows the Tanganyika model closely. But the Nauru declaration does differ on one point of substance to which attention is drawn because of its possible interest in the general question of the existence of rules of customary law regarding succession in the matter of treaties with respect to bilateral treaties. The Tanganyika declaration provides that on the expiry of the provisional period of review Tanganyika will regard such of them as "*could not by the application of the rules of customary international law be regarded as otherwise surviving, as having terminated*". The Nauru declaration, on the other hand, provides that Nauru will regard "each such treaty as having terminated *unless it has earlier agreed with the other contracting party to continue that treaty in existence*" without any reference to customary law. In addition, Nauru requested the circulation of its declaration to members of the specialized agencies as well as to States Members of the United Nations.

(5) Uganda, in a Note to the Secretary-General of 12 February 1963,<sup>94</sup> made a declaration applying a single procedure of provisional application to both bilateral and multilateral treaties. The declaration stated that in respect of all treaties validly concluded by the United Kingdom on behalf of the Uganda Protectorate or validly extended to it before 9 October 1962 (the date of independence) Uganda would continue to apply them, on the basis of reciprocity, until the end of 1963, unless they

<sup>91</sup> For the subsequent declaration made by the United Republic of Tanzania on the Union of Tanganyika with Zanzibar, see para. (7) below.

<sup>92</sup> See International Law Association, *op. cit.*, annex A, sect. III, pp. 17 and 18, and sect. V, pp. 20 and 21.

<sup>93</sup> Text supplied by the Secretariat.

<sup>94</sup> See *United Nations Legislative Series, Materials on Succession of States* (ST/LEG/SER.B/14), pp. 179 and 180. See also the explanatory statement of the Government of Uganda in Sessional Paper No. 2 of 1963 in *The Effect of Independence on Treaties* (a handbook published under the auspices of the International Law Association), London, Stevens and Sons, 1965, p. 386.

should be abrogated, or modified by agreement with the other parties concerned. The declaration added that at the end of that period, or of any subsequent extension of it notified in a similar manner, Uganda would regard the treaties as terminated except such as "must by the application of the rules of customary international law be regarded as otherwise surviving". The declaration also expressed Uganda's hope that before the end of the period prescribed the normal processes of diplomatic negotiations would have enabled it to reach satisfactory accords with the States concerned upon the possibility of the continuance or modification of the treaties; and, in the case of multilateral treaties, it expressed its intention within that same period to notify the depositary of the steps it wished to take in regard to each treaty. Like Tanganyika, Uganda expressly stated that, during the period of review, the other parties to the treaties might, on the basis of reciprocity, rely on their terms as against Uganda.<sup>95</sup>

Kenya<sup>96</sup> and Malawi<sup>97</sup> subsequently requested the Secretary-General to notify Members of the United Nations of declarations made by them in the same form as Uganda. Kenya's declaration contained an additional paragraph which is of some interest in connexion with so-called dispositive treaties and which reads:

Nothing in this Declaration shall prejudice or be deemed to prejudice the existing territorial claims of the State of Kenya against third parties and the rights of a dispositive character initially vested in the State of Kenya under certain international treaties or administrative arrangements constituting agreements.

(6) In September 1965 Zambia communicated to the Secretary-General a declaration framed on somewhat different lines:

I have the honour to inform you that the Government of Zambia, conscious of the desirability of maintaining existing legal relationships, and conscious of its obligations under international law to honour its treaty commitments, acknowledges that many treaty rights and obligations of the Government of the United Kingdom in respect of Northern Rhodesia were succeeded to by Zambia upon independence by virtue of customary international law.

2. Since, however, it is likely that in virtue of customary international law, certain treaties may have lapsed at the date of independence of Zambia, it seems essential that each treaty should be subjected to legal examination. It is proposed, after this examination has been completed, to indicate which, if any, of the treaties which may have lapsed by customary international law the Government of Zambia wishes to treat as having lapsed.

3. The question of Zambia's succession to treaties is complicated by legal questions arising from the entrustment of external affairs powers to the former Federation of Rhodesia and Nyasaland. Until these questions have been resolved it will remain unclear to what extent Zambia remains affected by the treaties contracted by the former Federation.

<sup>95</sup> In Uganda's declaration the statement in terms refers only to multilateral treaties; but Uganda's intention seems clearly to be that parties to any of the treaties should be able, on the basis of reciprocity, to rely on their terms as against it self during the period of review.

<sup>96</sup> See *The Effect of Independence on Treaties* (a handbook published under the auspices of the International Law Association), London, Stevens and Sons, 1965, p. 387.

<sup>97</sup> *Ibid.*, p. 389.

4. It is desired that it be presumed that each treaty has been legally succeeded to by Zambia and that action be based on this presumption until a decision is reached that it should be regarded as having lapsed. Should the Government of Zambia be of the opinion that it has legally succeeded to a treaty and wishes to terminate the operation of the treaty, it will in due course give notice of termination in the terms thereof.

5. The Government of Zambia desires that this letter be circulated to all States members of the United Nations and the United Nations specialized agencies, so that they will be effected with notice of the Government's attitude.<sup>98</sup>

Subsequently, declarations in the same form were made by Guyana, Barbados and Mauritius. The declarations of Barbados and Mauritius did not contain anything equivalent to paragraph 3 of the Zambian declaration. The Guyanese declaration, on the other hand, did contain a paragraph similar to paragraph 3 dealing with Guyana's special circumstances, and reading as follows:

Owing to the manner in which British Guiana was acquired by the British Crown, and owing to its history previous to that date, consideration will have to be given to the question which, if any, treaties contracted previous to 1804 remain in force by virtue of customary international law.

(7) In all the above instances the United Kingdom requested the Secretary-General to circulate to States Members of the United Nations a formal disclaimer of any continuing obligations or rights of the United Kingdom in the same terms as in the case of Tanganyika (see paragraph (1) above).

(8) Swaziland, the most recent of the ex-British dependencies to make a declaration, has framed it in terms which are at once simple and comprehensive:

I have the honour . . . to declare on behalf of the Government of the Kingdom of Swaziland that for a period of two years with effect from 6 September, 1968, the Government of the Kingdom of Swaziland accepts all treaty rights and obligations entered into prior to independence by the British Government on behalf of the Kingdom of Swaziland, during which period the treaties and international agreements in which such rights and obligations are embodied will receive examination with a view to determining, at the expiration of that period of two years, which of those rights and obligations will be adopted, which will be terminated, and which of these will be adopted with reservations in respect of particular matters.

The declaration was communicated to the Secretary-General with the request that it should be transmitted to all States Members of the United Nations and members of the specialized agencies.

(9) In 1964 the Republic of Tanganyika and the People's Republic of Zanzibar were united into a single sovereign State which subsequently adopted the name of United Republic of Tanzania. Upon the occurrence of the union the United Republic addressed a Note to the Secretary-General informing him of the event and continuing:

The Secretary-General is asked to note that the United Republic of Tanganyika and Zanzibar declares that it is now a single Member of the United Nations bound by the Charter, and that all international treaties and agreements in force between the Republic of Tanganyika or the People's Republic of Zanzibar and other States or international organizations will, to the extent that their imple-

<sup>98</sup> Text supplied by the Secretariat.

mentation is consistent with the constitutional position established by the Articles of Union, remain in force within the regional limits prescribed on their conclusion and in accordance with the principles of international law.<sup>99</sup>

The Note concluded by requesting the Secretary-General to communicate its contents to all Member States of the United Nations, to all organs, principal and subsidiary of the United Nations, and to the specialized agencies. The Note did not in terms continue in force, or refer to in any way, the previous declaration made by Tanganyika in 1961 (see paragraph (1) of this Commentary). But equally it did not annul the previous declaration which seems to have been intended to continue to have effects according to its terms with regard to treaties formerly in force in respect of the territory of Tanganyika.

(10) Two States formerly dependent upon Belgium have also made declarations which have been circulated to States Members of the United Nations. Rwanda's declaration, made in July 1962, was in quite general terms:

The Rwandese Republic undertakes to comply with the international treaties and agreements concluded by Belgium and applicable to Rwanda which the Rwandese Republic does not denounce or which have not given rise to any comments on its part.

The Government of the Republic will decide which of these international treaties and agreements should in its opinion apply to independent Rwanda, and in so doing will base itself on international practice.

These treaties and agreements have been and will continue to be the subject of detailed and continuous investigation. [*Translation from the French by the United Nations Secretariat.*]<sup>100</sup>

(11) Burundi, on the other hand, in a Note of June 1964, framed a much more elaborate declaration which was cast somewhat on the lines of the Tanganyika declaration. It read:

The Ministry of Foreign Affairs and Foreign Trade of the Kingdom of Burundi presents its compliments to U Thant, Secretary-General of the United Nations, and has the honour to bring to his attention the following Declaration stating the position of the Government of Burundi with regard to international agreements entered into by Belgium and made applicable to the Kingdom of Burundi before it attained its independence.

I. The Government of the Kingdom of Burundi is prepared to succeed to *bilateral agreements* subject to the following reservations:

- (1) the agreements in question must remain in force for a period of four years, from 1 July 1962 the date of independence of Burundi, that is to say until 1 July 1966;
- (2) the agreements in question must be applied on a basis of reciprocity;
- (3) the agreements in question must be renewable by agreement between the parties;
- (4) the agreements in question must have been effectively applied;

<sup>99</sup> See *The Effects of Independence on Treaties* (a handbook published under the auspices of the International Law Association), London, Stevens and Sons, 1965, pp. 381-382; and United States, Department of State, *Treaties in Force—A List of Treaties and other International Agreements of the United States in Force on January 1, 1968* (Washington D.C., Government Printing Office, 1968), p. 200.

<sup>100</sup> See *United Nations Legislative Series, Materials on Succession of States* (ST/LEG/SER.B/14), p. 146. This declaration was transmitted to the Secretary-General by the Belgian Government in 1967 "à titre d'information".

(5) the agreements in question must be subject to the general conditions of the law of nations governing the modification and termination of international instruments;

(6) the agreements in question must not be contrary to the letter or the spirit of the Constitution of the Kingdom of Burundi.

When this period has expired,\* any agreement which has not been renewed by the parties or has terminated under the rules of customary international law will be regarded by the Government of Burundi as having lapsed.

Similarly, any agreement which does not comply with the reservations stated above will be regarded as null and void.

With regard to bilateral agreements concluded by independent Burundi the Government intends to submit such agreements to the Secretary-General for registration once internal constitutional procedures have been complied with.

II. The Government of Burundi is prepared to succeed to *multilateral agreements* subject to the following reservations:

- (1) that the matters dealt with in these agreements are still of interest;
- (2) that these agreements do not, under article 60 of the Constitution of the Kingdom of Burundi, involve the State in any expense or bind the Burundi individually. By the terms of the Constitution, such agreements cannot take effect unless they have been approved by Parliament.

In the case of multilateral agreements which do not meet the conditions stated above, the Government of Burundi proposes to make known its intention explicitly in each individual case. This also applies to the more recent agreements whose provisions are applied tacitly, as custom, by Burundi. The Government of Burundi may confirm their validity, or formulate reservations, or denounce the agreements. In each case it will inform the depositary whether it intends to be bound in its own right by accession or through succession.

With regard to multilateral agreements open to signature, the Government will shortly appoint plenipotentiaries holding the necessary powers to execute formal acts of this kind.

III. In the intervening period, however, the Government will put into force the following *transitional provisions*:

- (1) any party to a regional multilateral treaty or a multilateral treaty of universal character which has been effectively applied on a basis of reciprocity can continue to rely on that treaty as of right in relation to the Government of Burundi until further notice;
- (2) the transitional period will terminate on 1 July 1966;
- (3) no provision in this Declaration may be interpreted in such a way as to infringe the territorial integrity, independence or neutrality of the Kingdom of Burundi.

The Ministry requests the Secretary-General to be so good as to issue this Declaration as a United Nations document for circulation among Member States and takes this opportunity to renew to the Secretary-General the assurances of its highest consideration. [*Translation from the French by the United Nations Secretariat.*]<sup>101</sup>

In this declaration, it will be noted, the express provision that during the period of review the other parties may continue to rely on the treaties as against Burundi appears to relate only to multilateral treaties.

(12) Thus, the number of newly formed States which have made unilateral declarations proclaiming their attitude towards treaties previously having application in

\* Extended for a further period of two years by a Note of December 1966.

<sup>101</sup> See International Law Association, *op. cit.*, annex A, VI, pp. 21-24.

respect of their territory, is now quite substantial. Those declarations will be examined in a later commentary, together with devolution agreements, for such indications as they may contain of rules of customary law governing succession in the matter of treaties. The present article is concerned rather with the specific legal effects of the declarations, as such, in the relations between the declarant State and other States parties to treaties having application in respect of its territory prior to independence.

(13) The declarations here in question do not fall neatly into any of the established treaty procedures. They are not sent to the Secretary-General in his capacity as registrar and publisher of treaties under Article 102 of the Charter. The communications under cover of which they have been sent to the Secretary-General have not asked for their registration or for their filing and recording under the relevant General Assembly resolutions. In consequence, the declarations have not been registered or filed and recorded; nor have they been published in any manner in the United Nations *Treaty Series*.

(14) Equally, the declarations are not sent to the Secretary-General in his capacity as a depositary of multilateral treaties. A sizable number of the multilateral treaties which these declarations cover may, no doubt, be treaties of which the Secretary-General is the depositary. But the declarations also cover numerous bilateral treaties for which there is no depositary, as well as multilateral treaties which have depositaries other than the Secretary-General.

(15) The declarations seem to be sent to the Secretary-General on a more general basis as the international organ specifically entrusted by the United Nations with functions concerning the publication of acts relating to treaties or even merely as the convenient diplomatic channel for circulating to all States Members of the United Nations and members of the specialized agencies notifications of such acts. At any rate, the Secretary-General has in each case accepted the function entrusted to him by the State concerned and has communicated the text of the declaration to all States Members of the United Nations and, in addition, when so requested, to any other States members of the specialized agencies.

(16) Unlike devolution agreements, the declarations are addressed directly to the other interested States, that is, to the States parties to the treaties applied to the new State's territory prior to its independence. Moreover, they appear to contain, in one form or another, an engagement by the declarant State, on the basis of reciprocity, to continue the application of those treaties after independence provisionally pending its determination of its position with respect to each individual treaty. The Uganda-type declarations (paragraph (5) above) fix both for bilateral and multilateral treaties a specific period—usually of two years from independence—during which the new State accepts the provisional application of its predecessor's treaties; and they expressly state that at the end of this period (or of any extension of it subsequently notified) the predecessor's treaties will be regarded as terminated except such as must be considered under customary international law as still surviving. The Swaziland declaration (paragraph (8)

above), although it is formulated somewhat differently and does not contain the express statement concerning determination, also fixes a specific period of two years for all treaties and would seem, by implication, to have the same effect as the Uganda-type declarations. The Tanganyika-type declarations (paragraphs (1) to (4) and (11) above) deal with bilateral treaties in the same manner as the Uganda-type declarations, prescribing a specific period of provisional application after which the predecessor's treaties are to be regarded as terminated. But in the case of multilateral treaties they appear to envisage provisional application of each treaty for an indeterminate period pending the review by the new State of its position with respect to that treaty.

(17) The Zambia-type declarations, as commentators have pointed out,<sup>102</sup> are more affirmative in their attitude towards succession to the predecessor State's treaties. These declarations assume that the declarant State will have succeeded, by virtue of customary international law to "many treaty rights and obligations" of its predecessor. And their technique is to express the wish that the other parties to the treaties should presume that each treaty has been succeeded to by the declarant State and base their action on this presumption until a decision is reached that it should be regarded as having lapsed. Even so, it may be doubted whether the Zambia-type declarations constitute anything more than a particular form of engagement by a new State for the provisional application of its predecessor's treaties. They expressly recognize that in virtue of customary law certain treaties may have lapsed at the date of independence; they furnish no indications which might serve to identify either the treaties which are to be considered as succeeded to by the declarant State or those which are to be considered as likely to have lapsed; and they expressly state it to be essential that *each* treaty should be subjected to legal examination with a view to determining whether or not it has lapsed. No doubt, the affirmative form of the presumption contained in these declarations may have some significance in appreciating whether a "novation" has afterwards occurred with regard to a particular treaty. But the declarations, according to their express terms, envisage the continued application of the predecessor State's treaties until a decision has been reached by the declarant State with respect to each particular treaty whether or not it has lapsed; and this would seem clearly to be an engagement for the provisional application of each treaty for an indeterminate period pending a decision whether the treaty has been succeeded to or has lapsed.

(18) The declarations, as previously mentioned, are addressed to a large number of States among which are, for the most part, to be found the other parties to the treaties applied to the declarant State's territory prior to its independence. On the other hand, they are unilateral acts the legal effects of which for the other parties to the treaties cannot depend on the will of the declarant State alone. This could be so only if a newly independent

<sup>102</sup> See D. P. O'Connell, *op. cit.*, vol. II, pp. 121-122; see also the Commonwealth Office Note, in International Law Association, *op. cit.*, annex B, p. 26.

State might be considered as possessing under international law a right to the provisional application of the treaties of its predecessor for a certain period after independence. The notion of such a right is not without its attractions. But that notion does not seem to have any basis in State practice; indeed, many of the declarations themselves clearly assume that the other parties to the treaties are free to accept or reject the declarant State's proposal to apply its predecessor's treaties provisionally. Equally, the treaties themselves do not contemplate the possibility either of "provisional parties" or of a "provisional application". Accordingly, the legal effect of the declarations seems to be that they furnish the basis for a *collateral* agreement in simplified form between the new State and the individual parties to its predecessor's treaties for the provisional application of the treaties after independence. The agreement may, of course, be express but may equally arise from the conduct of any individual State party to any treaty covered by the declaration in particular from acts showing that it regards the treaty as still having application with respect to the territory.

(19) The declarations now under discussion thus appear to have as their first object the creation, in a different context, of a treaty relation analogous to that which is the subject of article 25 of the Vienna Convention on the Law of Treaties. This is the article which deals with agreements for the provisional application of treaties pending their entry into force. Here the declarations in effect invite an agreement for provisional application pending determination of the question whether each individual treaty is to be considered as in force with respect to the new State either by virtue of a "succession" or "novation". As previously explained, they do not purport to deal with the question of the *definitive participation* of the new State in the treaties; this they leave as a matter to be determined with respect to each individual treaty during a period of review, the situation being covered meanwhile by the application of the treaty provisionally on the basis of reciprocity.

(20) There is, of course, nothing to prevent a new State from making a unilateral declaration in which it announces definitively that it considers itself, or desires to have itself considered, as a party to treaties, or certain treaties, of its predecessor applied to its territory prior to independence. In that event, since the declaration would not, as such, be binding on other States, its legal effect would be governed simply by the provisions of the present articles relating to succession to or "novation" of treaties in force in respect of a territory prior to independence. In other words, in relation to the third States parties to the predecessor State's treaties the legal effect of such a unilateral declaration would be analogous to that of a devolution agreement and would depend on the general law set out in the subsequent articles of the present draft.

(21) *Paragraph 1* of article 4 lays down for unilateral declarations a general provision similar to that stated in paragraph 2 of article 3 for devolution agreements. It seems necessary to include such a general provision in the article even although up till now the declarations of successor States have for the most part been directed

to the provisional application of the treaties rather than to determining definitively their position with regard to their predecessor's treaties. The possibility of a successor State's making a declaration of its understanding or its will regarding the actual question of succession cannot be excluded. Indeed, the Zambia-type declaration in some respects goes near to being such a declaration. Since a unilateral declaration of the kind here in question cannot of its own force create obligations or rights for third States, its effects like those of a devolution agreement would seem necessarily to be governed by such principles of the novation of treaties or of succession as may be found to apply in general international law.

(22) *Paragraph 2* seeks to determine under what conditions a declaration by a successor State inviting the provisional application of its predecessor's treaties becomes binding upon third States parties to those treaties. Its first two sub-paragraphs deal with cases in which, for quite opposite reasons, provisional application would appear to be excluded by the nature of the treaty.

*Sub-paragraph (a)* excludes such treaties, if any, as the Commission may consider to be automatically binding upon a successor State; for any such treaties would be maintained in force in accordance with their terms definitively and not merely provisionally. The insertion of this sub-paragraph is purely precautionary, pending the Commission's conclusions whether any, and if so which, treaties are succeeded to automatically by a newly independent State.

*Sub-paragraph (b)*, on the other hand, excludes treaties which by reason of their particular object and purpose are not susceptible of any application in relation to the successor State. A typical example is where participation in the treaty presupposes membership of an international organization and the successor State is not a member of the organization; e.g. the European Convention on Human Rights, concluded by the United Kingdom as a member of the Council of Europe but extended by it to non-European territories which afterwards became independent.

(23) It is *sub-paragraph 2 (c)* which contains the main provision and this requires separate consideration. The critical point is whether, in the event of a declaration inviting the provisional application of the predecessor State's treaties, the acceptance of third States should be presumed unless they notify the successor State to the contrary or whether the presumption should be against provisional application unless the third State in question has manifested in some way its acceptance of the invitation. If State practice may not be very clear on the point, general considerations of convenience and of the orderly conduct of international relations would seem to favour the institution of "provisional application" as a transitional procedure for smoothing the solution of the treaty problems which arise on the emergence of a new State. Accordingly, the rule proposed in *sub-paragraph (c)* contemplates that, in the event of such a declaration, the predecessor State's treaties shall be applied provisionally unless within three months the third State in question has notified its objection to the

successor State. A period of three months seems long enough to enable a third State to decide whether or not to accept what is, after all, only the *provisional* application of the existing treaties, whereas to allow a longer period might unduly diminish the value of the "provisional application" procedure. Moreover, it would in any case still be open to the third State to terminate the provisional application of the treaties at any time under the rule proposed in paragraph 3 (b) of the article.

(24) *Paragraph 3* deals with the duration of a provisional application of a treaty under the present articles and does so in terms of the several events which may put an end to it.

*Sub-paragraph (a)* admits the right of either State, subject to any agreement that they may have made regarding the need for notice, to terminate the provisional application of any of the predecessor State's treaties at any time. This right seems inherent in the provisional character of the arrangement as well as being indicated by the circumstances existing between the States concerned in cases of succession.

*Sub-paragraph (b)* covers cases, such as those which arise under the Tanganyika and Uganda types of declaration, where the declaration itself specifies the period during which the "provisional application" arrangement is to operate. Unless the declaration is renewed—as has happened sometimes—it would seem clear that, on the expiry of the period specified, provisional application of the predecessor State's treaties will automatically come to an end.

*Sub-paragraph (c)* merely states the obvious rule that, if and when a successor State and a third State reach a definitive decision in regard to a particular treaty—to terminate it or to bring it into force, whether in full or in a modified form—the provisional régime comes to an end.

*Sub-paragraph (d)* states the same rule for cases where there is no express agreement but an agreement to terminate the treaty or bring it into force, whether in full or in modified form, is to be inferred from the conduct of the States concerned. This rule appears necessary, because to regard a regular and long-lasting application of a treaty as "provisional application" over a considerable period of time would seem undesirable. Equally, if the conduct of both States clearly implied that they regarded the treaty as having become a dead-letter, it would be unjustifiable to consider it as still subject to a régime of provisional application merely by reason of the declaration.

*Sub-paragraph (e)* states, *ex abundanti cautela*, that the régime of provisional application ceases automatically if the treaty itself comes to an end, through the operation of its own provision (article 54 of the Vienna Convention on the Law of Treaties). A successor State and a third State, if they so desired, might no doubt agree for special reasons to continue the provisional application of a treaty despite its expiry. But third States could not, in general, be considered as accepting anything more than the provisional application of the predecessor State's treaties according to their terms.

# SUCCESSION OF STATES AND GOVERNMENTS : SUCCESSION IN RESPECT OF MATTERS OTHER THAN TREATIES

[Agenda item 2 (b)]

## DOCUMENT A/CN.4/216/REV.1

Second report on succession in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur

### *Economic and financial acquired rights and State succession*

[Original text: French]

[18 June 1969]

## CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
INTRODUCTION . . . . .	1-18	70
<i>Chapter</i>		
I. Acquired rights and sovereign equality of States . . . . .	19-43	75
A. The successor State, a sovereign State . . . . .	21-35	75
1. The successor State as a State . . . . .	22-23	75
2. The successor State as a successor . . . . .	24-27	76
3. The successor State and equality of States . . . . .	28-35	76
(a) Is there a transfer or a substitution of sovereignty ? . . . . .	29-34	77
(b) The relationship of equality between the successor State and the predecessor State . . . . .	35	78
B. Absence of acquired rights in the case of public rights . . . . .	36-38	78
C. Acquired rights and public debts . . . . .	39-43	78
II. Acquired rights and equality of persons . . . . .	44-86	79
A. Consequences of the equality of States . . . . .	48-60	80
1. Independence of the juridical order of the successor State . . . . .	49-53	80
2. The doctrine of act of state . . . . .	54-57	81
3. Diplomatic protection . . . . .	58-60	81

CONTENTS ( <i>continued</i> )		
<i>Chapter</i>	<i>Paragraphs</i>	<i>Page</i>
B. The meaning and scope of equality of persons . . . . .	61-76	82
1. Evolution of the status of aliens: from privileged status to non-discrimination . . . . .	61-64	82
2. Meaning of non-discrimination . . . . .	65-71	82
3. Public policy and the successor State . . . . .	72-76	84
C. The practice of non-recognition of the acquired rights of individuals . . . . .	77-79	84
D. The problem of compensation . . . . .	80-86	85
1. Differences of opinion among writers . . . . .	81	85
2. Lack of a basis for compensation . . . . .	82-86	86
III. Acquired rights and types of succession . . . . .	87-147	87
A. Colonization: is the principle of acquired rights inapplicable or non-existent? . . . . .	94-104	88
1. "No State, no succession" . . . . .	95-96	88
2. "A State, but a backward one" . . . . .	97	88
3. Inadmissibility of acquired rights in the case of colonization . . . . .	98-100	89
4. The antinomy between conquest and acquired rights . . . . .	101-104	89
B. Non-existence of acquired rights in the case of decolonization . . . . .	105-118	90
1. The antinomy between acquired rights and decolonization . . . . .	106-108	90
2. Acquired rights and the right of peoples to dispose of their natural resources . . . . .	109-112	91
3. State micro-power and private macro-power . . . . .	113-118	92
C. New conditions affecting the problem of compensation in the case of decolonization . . . . .	119-136	93
1. Reappraisal of the ethics of compensation . . . . .	120-124	93
2. Structural impediments to compensation . . . . .	125-127	94
3. Inadequacy of the theory of unjustified enrichment . . . . .	128-133	95
4. Bypassing the problem of compensation: global settlements and co-operation . . . . .	134	96
5. Law in the process of formation: United Nations General Assembly resolution 1803 (XVII) and non-compensation . . . . .	135-136	97
D. Rejection of acquired rights and of compensation in decolonization practice . . . . .	137-142	97
E. The trend towards compensation by the predecessor State . . . . .	143-147	98
1. The experience of France . . . . .	144	99
2. The example of the United Kingdom . . . . .	145	99
3. The colonial loans of IBRD . . . . .	146-147	99
CONCLUSION . . . . .	148-156	99

### Introduction

1. The International Law Commission, after considering, at its 960th to 965th and 968th meetings,<sup>1</sup> the First report on succession of States in respect of rights and duties resulting from sources other than treaties<sup>2</sup> submitted by the Special Rapporteur for that question, instructed him to prepare for its next session a report on succession

of States in economic and financial matters.<sup>3</sup> However, judging by the arrangements made for the Commission's future work, that session will be devoted almost entirely to topics other than that on which the Special Rapporteur was instructed to submit a report.<sup>4</sup> Not until the Commission's twenty-second session in 1970, will the problem which constitutes the subject of this report be given priority consideration.<sup>5</sup> For that reason the Special

<sup>1</sup> *Yearbook of the International Law Commission, 1968*, vol. I, pp. 99-133 and pp. 144-149.

<sup>2</sup> *Ibid.*, 1968, vol. II, document A/CN.4/204, pp. 94-117.

<sup>3</sup> *Ibid.*, vol. II, document A/7209/Rev.1, p. 221, para. 79.

<sup>4</sup> *Ibid.*, p. 224, para. 103.

<sup>5</sup> *Ibid.*, p. 224, para. 104.

Rapporteur, in his 1969 report, has taken only a provisional approach to the problem, with the intention of making all the necessary amendments and corrections in a more detailed report which he will submit at the twenty-second session in 1970, when the matter will be studied in depth. However, he sincerely hopes that the Commission will be able to devote some time to a discussion of this study at its 1969 session, thus enabling him to take into account the learned and valuable comments of members when preparing his next report.

2. The predominant view in the Commission was that in studying State succession in respect of matters other than treaties the economic and financial aspects of the topic should be considered first. The idea was that the study should focus mainly on questions of public property and public debts, government contracts and concession rights, all of which would be examined in the light of the right of peoples to dispose of their natural resources.

3. All these and other aspects of State succession in economic and financial matters are dominated by one central problem, namely, the existence or non-existence of "acquired rights". In fact, this problem arises constantly in every field of State succession. Since it has always led to vehement debate, now more intense than ever, the Special Rapporteur suggested in his preliminary report that it should be studied during the last stage of the Commission's work, in order that the Commission might avoid becoming involved in paralysing controversy at the very outset.<sup>6</sup> He therefore felt that it would be more prudent to begin the general study of State succession with easier questions, and work up gradually to the more intricate problems. After further consideration, however, he finally concluded that such a course would be somewhat unrealistic and unpractical. It would be tantamount to studying the problem of acquired rights solely under a special heading relating to the private rights of individuals, consideration of which would have been deferred until the end of the Commission's work because of the difficulties involved, whereas in fact the problem of acquired rights is more general in nature and arises in connexion with virtually all aspects of State succession in economic and financial matters.

4. It therefore seems that in practice this delicate question of "acquired rights" can be avoided only by resorting to a variety of expedients and by dismissing this complex and perennial problem which is encountered in every field of State succession. That would mean solving the problem by simplifying it to the point of distortion. It therefore seems wiser to tackle the central problem of acquired rights at the outset, with the legitimate hope that the Commission's efforts to solve it will help to clarify the other problems and facilitate the Commission's future work, for it is certainly a problem that dominates and affects all the others.

5. In following this course, the Special Rapporteur is merely acting in accordance with the views expressed in the Sixth Committee. Some members of the Committee considered that "the question of acquired rights" should

be examined closely by the International Law Commission. They felt that the Commission "should endeavour to strengthen the sovereignty of new States in that area. States had no obligation, on the international plane, to distinguish between acquired rights and other property rights, which could be modified by their legislation when the general interest so required".<sup>7</sup>

6. The Special Rapporteur therefore intends to examine here the problem of "acquired rights" in economic and financial matters; whatever conclusions he reaches should help to clarify the approach not only to the problems peculiar to succession in economic and financial matters but also to all other problems of succession. The initial conclusions in this report might form the basis of a set of draft articles which would constitute the first chapter of the work on succession and would be prepared for the twenty-second session, after this report has been discussed.

7. The problem of acquired rights has always given rise to diametrically opposed views, in the literature, in judicial practice and in State practice. Even in municipal law it is a controversial concept, difficult to encompass in a precise definition which, while disarming the opponents of the concept, would provide reliable criteria for its application. A French author, Léon Duguit, tried to bring out the ambiguity of the concept by referring to its opposite and challenged writers to explain exactly what "a non-acquired right" could mean. The concept of acquired rights is currently invoked in both international law and municipal law, but is equally imprecise and fluid in both cases. In municipal law, its supporters and its opponents form two irreconcilable camps. Basically, these conflicts are nothing more than a reflection of the struggle which inevitably occurs, after every upheaval, between the old structures which resist with waning strength and the new structures which assert themselves with increasing vigour. At the end of this necessary transitional phase, which varies in length and is regulated by the intertemporal law and is the sum and the reflection of the contradictions between what is accepted and what is contested, a normalized period begins. This does not mean that "the fight is over because there is no one left to fight", but simply that society has assimilated the new norms and harmonized them into a new equilibrium. This situation will last until such time as it is once again disrupted by further normative upheavals, when the same doctrinal conflicts will break out anew. This is a problem as old as the world, constantly occurring and recurring, and it is always solved without the supporters of acquired rights having fully learnt the lesson that change is inevitable, because force of habit engenders a feeling of hostility towards everything new and because it is in the nature of things that novelty should arouse resistance for a time.

8. It will probably never be possible to say who is right in this centuries-old debate—the supporters or the adversaries of acquired rights. No doubt the very progress of society requires that neither of the two camps

<sup>6</sup> *Ibid.*, document A/CN.4/204, p. 105, para. 75.

<sup>7</sup> *Official Records of the General Assembly, Twenty-third Session, Annexes, agenda item 84, document A/7370, para. 52.*

should disappear forever, for the subtle interplay of social phenomena would perhaps be impossible if innovations did not encounter the opposition they need in order to impose themselves more effectively. This resistance thus performs a useful social function, being conducive either to the definitive formulation of the innovation or to its rejection, temporary or permanent, according as the time is not yet ripe for it or it is utterly incompatible with the existing structures.

9. In a debate in which at a given stage there may be almost as many reasons for supporting acquired rights as for opposing them, it is of little importance in the final analysis which camp a person chooses, according to his deep-seated convictions or his preferences. On the other hand, it must be realized that the issue will unquestionably be settled by events. However, the jurist has perhaps better things to do than to engage in a rearguard action that leaves him supporting acquired rights when practice has definitively condemned them. Similarly—the law being essentially conservative—he cannot single-handed take the opposite course and lead the struggle. The jurist must possess an unerring skill in interpreting the trends in society in order to perform his function, which is to help that society to produce the new forms needed for social progress.<sup>8</sup>

10. Progress means a change for the better, but a change none the less; in other words, it usually rejects acquired rights. If such rights were maintained, all human societies would be paralysed. Sociology demolishes the concept of acquired rights, for it teaches us that no social group and no State can indefinitely retain its privileges, which are constantly called in question. How could the law fully endorse a concept which is unknown in sociology?

11. A closer examination of this venerable concept of acquired rights reveals some interesting facts. Contrary to the implications of the term “acquired rights”, legal situations are not established *ne varietur*. The new law or the new juridical order takes effect immediately and effects all legal situations which came into existence before its promulgation. There is some confusion involved in contending, as do advocates of the opposite view, that such an approach would be tantamount to making the new juridical order retroactive. As we see it, a law is not retroactive unless it nullifies the effects of another law which have already been produced and consummated. If, for example, the legislator decides to amend the law of property, the new regulations will apply in future to all existing property rights. But it would be inadmissible for the legislator to change the way in which those rights have been exercised under the old law, whose effects, having already been acquired, have been acquired

definitively. The argument of *non-retroactivity* of legislation should thus be clarified by drawing a distinction between acquired rights on the one hand and the *effects* of acquired rights on the other, the latter, *ex hypothesi*, having already been fully consummated in the past. There can be no objection to invoking the concept of acquired rights in support of the contention that the State cannot make a new law retroactive in order to contest rights whose benefits have in fact already been obtained. A law abolishing acquired rights, which sought to take back profits already collected or benefits already enjoyed, would certainly be illegal by reason of its very retroactivity. That is the sense in which the protection of acquired rights should be interpreted. However, when the legislator, legislating for the future only, suspends all the advantages previously granted by the former juridical order, he is not violating any acquired rights.

12. In *municipal law*, as in international law, respect for acquired rights does not mean that the State cannot encroach on property rights for reasons of public utility. However, some consider that, although the State may incontestably expropriate or nationalize, it must offer equivalent pecuniary compensation. In short, according to this view, the whole problem is whether the power to nationalize is limited by capacity to pay. Recent trends show that if the theory of acquired rights, which constituted the basis or justification for compensation, were abandoned, there would be no grounds for compensation, so that it no longer seems legally possible to limit the acknowledged sovereignty of the State by its capacity to pay, which may be inadequate. It may even be said that in the context of decolonization a country nationalizes because it is poor, or in other words, that nationalization presupposes a certain incapacity to pay.

13. The same disputes and uncertainties prevailed when the concept of acquired rights was carried over into international law. The writers who traditionally contest the legitimacy of resorting to concepts of private law in the field of public international law were joined by all those who deny the existence of a principle of acquired rights. There are thus grounds for claiming that the concept of acquired rights, which is so obscure in municipal law, makes no positive contribution to international law.<sup>9</sup> Furthermore, it will be noted that both the supporters and the adversaries of this principle in international law invoke with equal enthusiasm precedents derived from court judgements and State practice. So much so that it may be argued *a priori* either that these two types of precedent are of little use, since with their obvious contradictions they can be used to support either case, or that they have been appealed to under such stress of emotion that what is now needed is a calmer reappraisal of their consistency and their significance so as not to be led to accept without a careful stock-taking the succession of writers in this field.

<sup>8</sup> A similar idea has been expressed by Manfred Lachs:

“The opposition of two contradictory tendencies is one of the characteristics of the rich and profuse practice of international law. The vital point is to know which of the two will triumph. When society is in a process of historic transformation it is impossible to set up small enclaves, a field in which such a transformation is denied, a zone sheltering a sacrosanct past.” M. Lachs, “The position of property in contemporary international law”, *Review of Contemporary Law*, No. 2 (published by the International Association of Democratic Lawyers, Brussels, December 1961), pp. 24-25.

<sup>9</sup> See A. Cavaglieri, “La notion des droits acquis et son application en droit international public”, *Revue générale de droit international public* (Paris, 1931), vol. XXXVIII, pp. 257-296. See also S. Friedman in a very interesting study entitled: “L'expropriation en droit international public”, *L'Egypte contemporaine*, Nos. 257-258 (March-April 1950), p. 323.

Cavaglieri observed that the assessments which writers had made of precedents derived from judicial practice, treaties, and so on "show such divergences and contrasts that it seems absolutely impossible to identify, in the manifestations of the will of States of which these acts should be the proof, *conclusive*, i.e., *unequivocal*, facts from which could be deduced the existence of a concordant will of States in favour of the alleged recognition of the duty to grant privileged treatment to the private property of aliens".<sup>10</sup> On the other hand, another expert on succession problems has written: "There is little doubt that the respect for acquired rights is a principle well established in international law. Just how far this protection extends and what exactly is its nature are matters of considerable controversy."<sup>11</sup> Further on, he writes: "The doctrine of acquired rights is perhaps one of the few principles firmly established in the law of State succession, and the one which admits of least dispute."<sup>12</sup>

14. The fact that there are flagrant contradictions between well-known writers suggests that the discussion might be elevated to a higher plane by viewing the controversial concept of acquired rights, whose evolution has been linked with that of liberalism, in its historical perspective. With the disappearance of the patrimonial State in the seventeenth century, a distinction began to be drawn between *imperium*, which was reserved for the liberal State, and *dominium*, which enabled individuals to exercise the right of property. When there was a change of sovereignty, *imperium* alone changed hands, while *dominium* remained undisturbed. The rights of individuals (*dominium*) constituted acquired rights. Traditional State succession involved only the substitution of one sovereign—who was often a monarch—for another and left the legal relationships between individuals intact. This trend was reinforced during the nineteenth century in Great Britain by the *laissez-faire* doctrine of property and in the United States by the provisions of the Constitution relating to property rights. It is thus easy to account for the much quoted opinion of Chief Justice Marshall in the case of *U.S. v. Percheman*: "The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed" (32 U.S. 51,87). Hence, if the doctrine of acquired rights is, as has been seen, inseparable from political liberalism, it may be expected *a priori* to be called in question again in an age and an environment where the liberalism which nurtured it is itself under attack. From a more general standpoint, it may be said that the political régime of a given community is linked to the private property régime in the territory which it controls, and the political upheavals which affect it automatically involve, sooner or later, new property arrangements. It is therefore not surprising that failure to respect acquired rights in cases either of succession or of non-succession constitutes a fairly marked

trend in modern times, which are characterized by the growing denial of the absolute nature of private property and by the possibility of creating other forms of ownership. His Holiness Paul VI stated in his encyclical *Populorum Progressio* that "private property does not constitute an absolute and unconditional right for anyone".

15. The calling in question of the political status of peoples, which has been the dominant phenomenon of the past quarter-century, inevitably leads to a similar questioning of the legal principles which presided over changes in sovereignty. In considering these events, characterized by tremendous territorial changes, it is impossible any longer to endorse the ideas of the defenders of acquired rights, one of whom, Descamps, once wrote: "Surely to claim that nothing has an absolute title to subsist is to ignore completely situations which have an inviolable right to be respected, to open the way to flagrant iniquities and to undermine the stability of social relations."<sup>13</sup>

"To open the way to flagrant iniquities. . .". That may be true, but many think that what in fact successor States are trying to do which resort to the modern formulae of nationalization and expropriation and put an end to acquired rights is precisely to correct flagrant iniquities, admittedly profitable to the few but detrimental to the nation as a whole. These decisions are prompted by a desire to begin the social and economic transformation of a community whose development might be paralysed by the existence of unconscionable private interests. The economic liberalism of the nineteenth and early twentieth centuries, which performed a necessary historical function, inevitably influenced the thinking of Descamps and led him to establish a strict parallel between the maintenance of acquired rights and equity. Today, the elements of the problem seem to have been reversed and if there is anything which threatens to "open the way to flagrant iniquities", it is surely the maintenance of acquired rights, or even of unconscionable privileges which jeopardize the general interest of an entire community. A whole new—or rather reanimated—philosophy has come into play in the debate on acquired rights. As the product of the purest liberalism, those rights must share the latter's vicissitudes and pass away with it altogether if it is true—as seems obvious to some—that liberalism's historical function is drawing to an end. In the ideological sphere, it is now the turn of mass philosophies which propose the use of new methods for solving the problems of under-development and for the speedier liberation of man. With this approach, the problem of acquired rights is tending to be relegated to the background.

"To undermine the stability of social relations. . .". This statement, although it seems to suggest a great deal, is not borne out by the facts. Such a danger would be present, and legal relations could not survive, if such profound upheavals occurred every day in the life of a State. However, State succession is an exceptional pheno-

<sup>10</sup> A. Cavaglieri, *op. cit.*, p. 296.

<sup>11</sup> D. P. O'Connell, *State succession in municipal law and international law*, 2 vol. (Cambridge, England, 1967), vol. 1: "Internal Relations", p. 263.

<sup>12</sup> *Ibid.*, p. 267.

<sup>13</sup> P. Descamps, "La définition des droits acquis. Sa portée générale et son application en matière de succession d'Etat à Etat", *Revue générale de droit international public* (Paris, 1908), vol. XV, p. 385.

menon, occurring only once or twice in the life of a nation, which may span many centuries. In fact, the precariousness of legal life results less from the refusal to recognize acquired rights than from the general tendency of a rapidly evolving world to question structures and principles, and this tendency alone suffices to explain a phenomenon which is wrongly attributed to the refusal to recognize acquired rights. It is difficult to stifle or disregard these new concepts which play a part—desirable or deplorable, according to the view one takes—in the problems of State succession and in the matter of acquired rights.

“Situations which have an inviolable *right* to be respected...”. But it is precisely the existence of these situations which have an inviolable “right” to be respected that is used to justify acquired rights. The existence of acquired rights is demonstrated by the simple statement that they are rights to be respected because they are supposedly inviolable. Tautological arguments have never been very convincing. Merlin, in France, used to say the same thing: “Acquired rights are those which have become part of our patrimony and of which we cannot be deprived by those from whom we acquired them.” It can at least be inferred from this tautological definition that entities other than those from which such rights are derived—for example, the successor State—are not obliged to respect them.

16. Ready-made formulae should be mistrusted, but it is also necessary to scrutinize the arguments usually advanced. It is said that diplomatic and judicial practice in the matter of acquired rights can be used to support both the theory which defends such rights and the adverse theory which opposes them. However, at this initial stage of our investigation, we wish to point out that precedents are often invoked mechanically without paying due attention to the need to analyse them seriously and the obligation to determine their true significance. For example, the advisory opinion given by the Permanent Court of International Justice on certain questions relating to settlers of German origin in the territory ceded by Germany to Poland<sup>14</sup> is cited as having sanctioned the inviolable principle of acquired rights, overlooking the fact that the opinion was not designed to settle that question absolutely. Poland had undertaken *by treaty* to respect the acquired rights of the German settlers and to refrain from enacting legislation abolishing those rights. The Permanent Court of International Justice was called upon to give an opinion on the violation of an international undertaking rather than on the existence of a principle of public international law. As a second, supplementary approach, it may be questioned whether the recognition of acquired rights in a treaty expresses a customary rule of international law or constitutes a departure from a general principle of non-recognition of those rights. The question at issue in the aforementioned case was not whether the old law could

and should survive through the application of a principle of international law relating to succession. That question had been settled by treaty. The question was whether acquired rights were to be respected in virtue of a law which it had been provided by treaty should be maintained. It is also necessary to question the meaning, or even the existence, of a rule which is persistently ignored in diplomatic practice; for diplomatic practice consists of something more than an exchange of letters supporting opposite points of view, which each of the two schools of writers uses to buttress its own argument. To equate “practice” with a series of notes supporting only one of the two opposing arguments is much too arbitrary a method. In order to grasp the real significance of diplomatic practice, it is necessary to determine the *actual solution* that was applied to a given problem concerning acquired rights. Only when a full inventory has been made will the significance of this practice become apparent.<sup>15</sup>

17. No definite conclusions can be reached by examining judicial precedents, studying the literature or analysing practice, if for no other reason than that they contradict each other or that each suffers from internal contradictions. Treaties, for example, are nothing more than the outcome of compromises dictated by considerations which distort all the general, or allegedly general, principles of succession. Some writers have been tempted to state that while the theory of acquired rights has not achieved its purpose, it has at least made the mass of historical precedents intelligible.<sup>16</sup> It might also be asserted that acquired rights do not exist in the case of State succession (which would not mean that they do not exist in general international law). The reasoning must be different, according as it relates to time or to space. In a temporal context, the problem of acquired rights arises from the intervention of new norms in one and the same State and under one and the same sovereignty. That is the conflict of laws in time, which is the subject of the intertemporal law. In a spatial context, the problem arises when a territory passes from one sovereignty to another. That is State succession. But in the latter case there should be no permanently acquired rights, for theoretically a right can be claimed only from the entity which created it—in this case, the predecessor State, which has disappeared. Subrogation of obligations is not a principle that is clearly applicable in relations between States.

18. In any event, the Special Rapporteur felt that it would be useful to consider the problem from aspects which he considers more illuminating than the traditional distinction between public rights, private rights

<sup>15</sup> It would be useful if the International Law Commission could be provided with a document making a conspectus of practice with all the attention to detail which this very delicate question requires. Such a study would call for a wide-ranging survey by the Secretariat. In a second, supplementary stage, the results of the survey would be broken down according to the nature of the acquired rights involved: private rights, regalian or political public rights, government contracts, concessions.

<sup>16</sup> See D. P. O’Connell, *op. cit.*, pp. 369-370. However, even this is not certain, for the theory would have had more value as an explanatory system if it had been based on facts or precedents whose discrepancies were less disconcerting.

<sup>14</sup>(a) *P.C.I.J.*, 1923, series B, No. 6. For a summary, see *Yearbook of the International Law Commission*, 1962, vol. II, document A/CN.4/151, p. 138, paras. 39-44.

(a) Foot-note 14 of the mimeographed document, cited at the 1001st and 1006th meetings of the Commission, has been renumbered to read 15.

and composite rights. Chapter I, entitled "Acquired rights and sovereign equality of States", poses the problem of the successor State, first as a *State* and secondly as a *successor State*. The successor State is viewed primarily as a subject of international law in this chapter, which to a large extent covers the concept of *public rights* as contained in the traditional distinction. Chapter II, entitled "Acquired rights and equality of persons", is a continuation of chapter I, showing how the different holders of acquired rights are treated. Hence, in chapter II the successor State is viewed as a subject of municipal law, involved with holders claiming respect for private or composite rights. Lastly, chapter III, entitled "Acquired rights and types of succession", examines the question whether the phenomena of colonization and decolonization have given a special colour to the theory of acquired rights.

## CHAPTER I

### Acquired rights and sovereign equality of States

19. It is a truism to state that the political system of a given community is closely linked to the property system and to the distribution of property within its territory, and that the development of modern techniques tends to foster the organization of economic life at the national level. Irrespective of the nature of political institutions, however, property systems everywhere are being subjected to severe strains which distort their original framework. In liberal States, this encroachment on property rights will be to a greater or lesser degree prejudicial to the holders of those rights. At the very least there will be organization—that is to say, restriction of property rights—as was the case, for example, in the United Kingdom where, under a customary rule of common law, gold and silver ores, and, under more recent laws, petroleum, coal and mineral oil cannot be privately owned. At the other extreme, the acquired rights of individuals, even in constitutional texts, will be called in question.<sup>17</sup> Other States consider that property rights, far from being unfettered, should serve the interests of the social group and contribute to a better economic distribution of the means of production. The principle of compensation has even been abandoned in

<sup>17</sup> Despite the existence of the Fifth Amendment to the United States Constitution, of 17 September 1787, which provides that "No person shall be...deprived of...property without due process of law", it has been acknowledged that the State has the power of eminent domain over property. Acquired rights have often had to be suppressed without compensation in cases where this was justified in the public interest. (See numerous examples in J. P. Bullington, "Problems of international law in the Mexican constitution of 1917", *American Journal of International Law*, 1927, vol. 21, pp. 685-705. After the abolition of lotteries, private telegraphic enterprises, the privileges of publishers and booksellers, and pool halls, the best-known example is that of the abolition of the manufacture and sale of alcoholic beverages during the famous period of prohibition. Certain activities previously considered lawful were suppressed and large quantities of corporeal property were destroyed and incorporeal property suppressed without any compensation.

some constitutions. The Roman concept of property is being replaced by that of property as a social function. Lastly, there are States which, repudiating the principles of a liberally organized economy, intend to transfer all privately owned means of production to the community and refuse to recognize any acquired rights or even to pay any compensation to those affected by the measures they take for that purpose.

20. The Draft Declaration on the Rights and Duties of States, which was the work of the International Law Commission, specifies that, by virtue of the sovereignty of States, every people has the right to decide freely its political, economic and social system. Consequently, it possesses the inviolable right to change existing economic institutions and create new ones. This postulate of international relations and of public international law is confirmed by article 4 of the original draft, which reads: "Every State has the right to its own independence in the sense that it is free to provide for its own well-being and to develop materially and spiritually without being subjected to the domination of other State...".<sup>18</sup> The successor State is thus a fully sovereign State, like any other.

### A. THE SUCCESSOR STATE, A SOVEREIGN STATE

21. Sovereignty finds expression in the right of the State to organize the law of property as it sees fit. This was confirmed by the Permanent Court of Arbitration in the *North Atlantic Coast Fisheries Case*,<sup>19</sup> in which the Court stated that the right to dispose of property is an attribute of sovereignty, and as such resides in the territorial sovereign.<sup>20</sup> Similarly, the successor State is not obliged to recognize public rights, since they derive from the constitutional and administrative law of the predecessor State and reflect the existence of the former sovereignty. The successor State is the equal of the predecessor State, and the concept of equality of States sheds a special light on the question of acquired rights, which may be approached in the following two ways:

#### 1. THE SUCCESSOR STATE AS A STATE

22. As a first approach, it may be argued that in the matter of acquired rights nothing should be imposed on the successor State that would not be imposed on any

<sup>18</sup> United Nations, *Preparatory study concerning a draft declaration on the rights and duties of States*, Memorandum submitted by the Secretary-General (A/CN.4/2), p. 58.

<sup>19</sup> Carnegie Endowment for International Peace, *The Hague Court Reports* (New York, Oxford University Press, 1916), pp. 141-225.

<sup>20</sup> See M. Lachs, *op. cit.*, p. 22. Lachs cites not only the sometimes contradictory decisions of national courts but also diplomatic correspondence, and in particular the note addressed to the Mexican Government by Secretary of State Kellogg on 28 January 1926: "declaring that every sovereign State had an absolute right, within its duly constituted powers, to introduce legislation regulating methods for the future acquisition of property." This is what is expressed in national constitutions, which are acts of sovereignty *par excellence*.

other State. The emphasis is on statehood, which the successor State possesses like any other State. If we stopped at this concept, however, the principle of the equality and sovereignty of States would be applied mechanically, without taking any account of the special situation of the successor State. That would be tantamount to denying the existence not only of acquired rights but also of all State succession. The successor State would be merely a State, no different from the other members of the international community and not governed by a special régime, that of State succession, which would cease to exist in public international law.

23. Such an approach would be more idealistic than realistic. The successor State has not been established *ex nihilo*,<sup>21</sup> any more than it has come from outer space to lodge in a corner of the Earth. It cannot disengage itself from pre-existing rules and situations, or at least it cannot do so immediately and forever. For a considerable time after its accession to independence, during which it gradually creates its own juridical order, the exigencies of life will oblige it to use that of its predecessor. Consequently, there will be situations and even rights which are not acquired, but which are renewed by force of circumstances. This is the intertemporal or transitional stage of the law applied by the successor State. Then, as the need to maintain the previous legal system becomes less pressing, the will of the successor State begins to manifest itself. This is the more specifically successional phase, during which the question of acquired rights arises, leading to a conflict between the free will of the successor State, which is anxious to change an old, alien juridical order, and the interests deriving from situations acquired under that juridical order. The problem then is to decide whether the will of the successor State must be respected by virtue of the equality and sovereignty of States, because the successor State is a State like any other, or whether it is to be limited, precisely because it is a successor State.

## 2. THE SUCCESSOR STATE AS A SUCCESSOR

24. According to the second approach, the principle of equality of States means that the successor State has obligations as a successor (a character peculiar to it) and not only as a State (a character which it shares with all the other members of the international community). What exactly are the nature and scope of these obligations? If they are all to be reduced to acquired rights, the principle of the equality of States requires, not that the successor State and all other States shall be placed on the same footing, but the successor State and the predecessor State; in other words, that no more obligations shall be imposed on the successor State than on the predecessor State as concerns respect for the same rights. For it seems obvious that, if a State is acknowledged to have the right to nationalize property for which it has freely granted a concession, the State which succeeds it must be acknowledged *a fortiori* to possess the same right. The successor State cannot be held to have more

obligations than the predecessor State in relation to acquired rights recognized by the latter.

25. The converse of this proposition also merits consideration. Although, according to the principle of equality of States, the successor State is acknowledged to possess at least the same power as the predecessor State to challenge an acquired right, that leaves intact the question whether the successor State is obliged to respect whatever it was that bound the predecessor State. That is the heart of the problem. But before answering that question—which is what the theory of State succession sets out to do—it is necessary to set out the facts clearly and to keep in mind that the successor State is a State like any other. If it is true that all States are equal before the law, then the successor State cannot be held to have more obligations than the predecessor State with regard to respect for acquired rights. In other words, international law does not reduce the successor State to an inferior status; it does not—or it should no longer—recognize a category of diminished or minor States, which would include the successor States. Such a classification of the members of the international community cannot be reconciled with the principle of equality of States.

26. This discussion is of no little interest. It has been argued that the successor State is bound, not by an obligation *derived* from that of its predecessor, but by an obligation imposed *ab exteriore* by public international law, which would thus impose obligations on every new State, not by succession but through the application of a principle. Some States—it is maintained—come into being with special duties. Logically then, it is not *acquired rights that constitute the basis of the obligation imposed on new States to respect the legal situations defined by the predecessor States*. The successor State does not respect acquired rights simply because the predecessor State respected them; according to this theory, the attitude of the successor State is independent of that of the predecessor State. Even if it is admitted that the latter is entitled to reconsider the acquired rights which it has freely granted, a similar power would not necessarily be conferred on the successor State, upon which obligations would be imposed by international law.

27. This theory has the undeniable advantage of not basing the successor State's obligations on the quicksand of the disputed and disputable theory of acquired rights. It avoids the weakness of the latter theory, which cannot explain how rights acquired by an act of will alien to the will of the successor State can be imposed on the successor State. It does not help to solve the problem, however, because it simply imposes obligations on the successor State with the bald assertion that they are imposed and protected by the public international law of succession. More specifically, it conflicts with the rule of equality of States because it allows the creation of two categories of States.

## 3. THE SUCCESSOR STATE AND EQUALITY OF STATES

28. That acquired rights should be respected to exactly the same extent as they were by the predecessor State may seem to be in conformity with the principle of

<sup>21</sup> Unless, of course, it is created from a so-called "territory without a ruler", a situation that cannot arise in the modern world.

equality of States, since the successor does not have to assume more obligations than its predecessor. In fact, however, to argue that the obligations of the successor State derive from those of the predecessor State is to make the sovereignty of the successor not only something inferior but something which the successor State also derives from the predecessor State.

(a) *Is there a transfer or a substitution of sovereignty?*

29. The successor State does not derive its sovereignty from the predecessor State, but from international law and from its own statehood. In other words, there is not a *transfer* of one sovereignty, but a *substitution* of sovereignties by the extinction of one and the creation of another. The successor State possesses its own sovereignty because it has acceded to the dignity of statehood. It would be dangerous to see a German filiation in French sovereignty over Alsace-Lorraine, or a renewal of British sovereignty in India's sovereignty. Otherwise, sovereignty itself would to some extent be an acquired right, renewed by its very nature, even though baptized with the name of the new State. Current terminology is revealing of what should be retained and what should be avoided. We speak of the extinction of one sovereignty and the creation of another—which is correct—while the expression “transfer of sovereignty” is also used. But can something which has ceased to exist be transferred? Sovereignty is an attribute of public international law which attaches to statehood. The new State does not derive its sovereignty from the predecessor State, but from international law. Furthermore, if sovereignty is necessarily derived only from a predecessor, from whom then did the very first sovereign, at the beginning of a long chain of succession, derive his sovereignty?

30. The inappropriateness of the current expression “transfer of sovereignty” is even more obvious when the so-called “successor” State does not succeed any other State because it conquers a territory without a ruler. Can it be said that sovereignty over that region has been transferred to it? Viewed from a higher angle, it is doubtful whether this question falls within the purview of the topic of State succession, but it has nevertheless been raised several times in the course of history in terms of State succession. For example, it is known that certain companies, under a charter granted to them in 1670 by Charles II of England, exercised quasi-sovereign rights over vast “possessions” to the north and west of the United States, which were occupied by those companies and were considered at the time to be “territories without a ruler”, even though there were Indians there. When the United States expanded into these areas, it came into collision with these companies, which claimed acquired rights. This situation gave rise to the famous arbitral award of 10 September 1869 (the *Hudson's Bay and Puget's Sound Agricultural Companies Case*).<sup>22</sup>

31. The Powers which met in the Conference of Berlin solved an identical problem by conventional means when they decided not to recognize a new occupation by one

of their number of a territory on the coast of the African continent unless the occupier could guarantee that it possessed sufficient authority to ensure respect for acquired rights.<sup>23</sup>

32. The fact is that in cases of this kind, where one cannot even speak of predecessor States in any sense, respect for acquired rights can be explained only by political expediency and not by legal constraint. Even if it is the “transfer” of sovereignty which carries with it the transfer of rights and duties and justifies respect for acquired rights, there is, *ex hypothesi*, no “transfer” of sovereignty in such cases.

33. But let us suppose, for the sake of argument, that there is a transfer of sovereignty, as a result of which the successor State assumes an international obligation. This does not explain the relationship between the two ideas of a transfer of sovereignty and the imposition of an international obligation on the successor State. If the obligation is linked to the transfer, it must necessarily have existed previously and have been imposed on the predecessor State. Yet it is not disputed that the predecessor State is under no international obligation to respect acquired rights. Insufficient attention has been paid to the fact that if a State encroaches on acquired rights in ordinary times—i.e., when succession is not involved—it is bound only by an obligation under municipal law, which is not susceptible to any international recourse. By some mysterious phenomenon of legal transmutation, however, these acquired rights, which derived from an obligation under municipal law for the predecessor State, become rights derived from an international obligation for the successor State. Even if it is assumed that there is an unbroken legal nexus between the predecessor State and the successor State, it is not clear why the one should be bound by an obligation under municipal law while the other would be bound by an obligation under international law. If the obligation continues to exist and is transferred, how can we accept that it is at the same time transformed?

34. This problem of the “transfer” of sovereignty becomes even more complicated in the reverse case, when it is not the predecessor State but the successor State which is non-existent, or, to put it more accurately, is not recognized as a State. The question of acquired rights has some influence on the question of the recognition of new situations by States, just as the non-recognition of territorial changes or changes of sovereignty has some effects on acquired rights. Clearly, when a change of sovereignty is not recognized by a third State or by the predecessor State, the acquired rights of those States or of their nationals are claimed with a vigour commensurate with those States' opposition to the new situation and commensurate also with the firmness with which the successor State refuses to allow its existence to be challenged. Thus, the point at issue here is not so much the existence of the acquired rights as the existence of the successor State itself, so that the problem—which is

<sup>22</sup> A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux* (Paris, 1923), vol. 2, pp. 490-523.

<sup>23</sup> See article 35 of the General Act of the Conference of Berlin (26 February 1885) in G. F. de Martens, ed., *Nouveau recueil général de traités* (Göttingen, Librairie de Dieterich, 1885), 2nd series, vol. X, p. 426.

more fundamental and radical—belongs naturally to the general theory of recognition, rather than to the particular theory of acquired rights.

(b) *The relationship of equality between the successor State and the predecessor State*

35. The successor State derives its sovereignty from international law. If this approach to the problem is correct, it may be considered that it is the principle of equality that enables it to assume its sovereignty fully and without restriction. It demonstrates and manifests that sovereignty when it agrees to assume certain obligations which devolved upon its predecessor. Thus, it may be said that there are no inviolable acquired rights which can be enforced against the new sovereign State, but only pre-existing situations which that State is prepared to take into consideration for its own good reasons and not for any reason imposed upon it by some unidentified rule of international law and State succession. This is the angle from which the question of State succession must be approached if it is to be studied in the spirit indicated by the General Assembly of the United Nations, which is anxious to see the new sovereign States strengthened. The successor State's respect for acquired rights does not depend on public international law, which provides no adequate rule, still less on the predecessor State. The successor State does not assume a *differential* obligation—imposed upon it alone by a public international law which, it is said, does not accord equal treatment to all States—any more than it has to assume a *derived* obligation imposed upon it by the will of the predecessor State.

B. ABSENCE OF ACQUIRED RIGHTS IN THE CASE OF PUBLIC RIGHTS

36. The predecessor State and the successor State stand on a footing of strict equality. However, that equality would be impaired if the predecessor State were to retain all or some of the public rights which it formerly exercised, when it should be deprived of them by the extinction of its sovereignty. This is so obvious that no proof is necessary. Hence, it is generally agreed that the rights appertaining to the public power and the regalian rights of the predecessor State are abolished *ipso facto* when the previous juridical order is terminated. Anything else would be tantamount to a dismemberment of the new sovereignty. It is inconceivable that political rights or rights which are wholly linked to the exercise of sovereignty over the territory involved in the succession should survive a change of sovereignty. Thus, all the public property and the public and private domain of the predecessor State devolve to the successor State.

37. This freedom of the successor State vis-à-vis the previous juridical order also accounts for the fact that that State is not obliged to respect rights granted to third States. Such States and the predecessor State entered into their contracts *intuitu personae*. When the relationship is so personal as to imply the existence of rights and duties which are closely connected with the character and the

interests of the States concerned, the disappearance of one of the Contracting Parties must entail the disappearance of the legal situation which brought them together. As Cavaglieri noted, "the spirit of these relationships is contrary to the very idea of succession, which presupposes the existence of rights and duties which have a certain autonomy".<sup>24</sup>

38. Basically, only economic and financial rights which are not directly linked to the State and its sovereignty may perhaps survive.<sup>25</sup> Other rights, which are pervaded with *intuitu personae*, can in no way be regarded as acquired rights. The third State can bring an action for liability on the grounds of violation of a rule of public international law against the predecessor State, if the latter has not completely disappeared. But we then leave the realm of State succession and enter that of State responsibility, which cannot concern the successor State. The latter may indeed recognize acquired rights of third States, but such recognition is, in law and in fact, limited to cases where it is expressly formulated in a devolution treaty, a cession agreement or a special agreement between the successor State and the third State.

C. ACQUIRED RIGHTS AND PUBLIC DEBTS

39. Do creditors possess an acquired right which they can enforce against the successor State? To what extent does the principle of equality of States permit the successor State to assume responsibility for the payment of debts which it has not contracted? On the face of it, the relationship between debtor and creditor is so personal that it is difficult to imagine what part of the legal operation could make the successor State a debtor. Some of the writers who have put forward this view have based their position on the principle of the unity of the patrimony of the State, which succeeds to both the assets and the debts of the predecessor, and on the theory of unjustified enrichment. However, the literature, judicial practice and State practice remain divided on this point. It is true that this subject is perhaps one of the most intractable in regard to legal systematization, because political factors play a decisive part. Neither refusal to recognize the acquired rights of creditors nor the contrary position is in practice dictated by the desire to contest or to confirm the existence of a principle of international law, so that it is pointless for either side to cite the immense number of historical cases where this problem has been settled either this way or that.

40. It is interesting to note that even in cases not involving State succession, for instance, the ordinary case of the debtor State, public debts have often been

<sup>24</sup> A. Cavaglieri, *op. cit.*, p. 276.

<sup>25</sup> When the acquired rights possessed by third States represent the counterpart of obligations assumed by the predecessor State in the exclusive interest of the territory which is involved in the change of sovereignty, they should probably be respected, if other conditions are fulfilled. However, the successor State usually opens negotiations with the third States and it is on the basis of these treaties, and not on the basis of a principle of international law relating to acquired rights, that certain interests are recognized, for reasons moreover which have nothing to do with a legal duty.

suspended, reduced or cancelled for political or economic reasons. As Gaston Jèze had noted, the example comes from on high, since it was set by the great Powers themselves. In periods of monetary crisis or economic recession, the economists stifle the voices of the jurists and recommend the cancellation of debts.

41. A distinction has sometimes been drawn in this matter between the predecessor State and third States and between universal succession and partial succession, but such distinctions have not always led their authors to the same solution in every case.

The principle of unjustified enrichment is of little help in this general confusion, where the attitude towards acquired rights is determined by political whims. Those who refused to recognize acquired rights naturally invoked the principle of the sovereignty of the successor State, especially in cases of conquest, and insisted that sovereignty and equality were incompatible with the assumption of responsibility for debts incurred by another State. At the same time, the principle of unjustified enrichment was also invoked. The fear of endangering the financial stability of the successor State was all the greater because the predecessor State might have borrowed more than it needed, or more than it could repay, or for unprofitable purposes, and so forth.

42. It has also been recognized, at least in the case of annexation, that the successor State has the right to disclaim responsibility for the public debt of a bankrupt predecessor State. The successor State has, in a sense, a right of inventory. This idea first appeared in the case of the debts of the Boer Republics, of 30 November 1900. It was rationalized by the British agent in the Hawaiian Claims Arbitration<sup>26</sup> as follows: "It is obviously ridiculous...that after the end of a successful war the State which is the conquering State is bound to take care of all the obligations of the State it conquers, which may be bankrupt, for instance. Persons who might have claims against a bankrupt Government when there is no earthly chance of getting them paid will certainly, when a powerful neighbour invades that State and annexes it, present their bills and expect them to be duly honoured. That seems to be ridiculous."<sup>27</sup>

43. Financial policy, and hence the problem of the public debt, are too closely linked to the *imperium* of the State and to its public law for any inviolable acquired rights to exist in this sphere. However, the intervention of the modern State is constantly expanding, even in countries with a liberal system, so that the State's *imperium* progressively develops till it reaches to all sectors, especially those traditionally reserved for the exercise of the *dominium* of individuals. This aspect becomes apparent when we consider the acquired rights of private persons, whether individuals or bodies corporate.

## CHAPTER II

### Acquired rights and equality of persons

44. It is argued that acquired rights pertaining to individuals may either derive from the international obligations of the States affected by the change of sovereignty (as in the case of the right to nationality, for example) or have their origin in the municipal law of the predecessor State. Actually, the idea that international obligations can justify acquired rights is the result of rather muddled thinking. The Makarov draft resolution submitted to the Institute of International Law in 1950 (point 4)<sup>28</sup> regarded as an *acquired* right (i.e., one that is *accomplished* and if possible *protected*) the right to the acquisition (which is prospective and remains to be achieved) of the nationality of the successor State. The definition of a right already acquired...which still remains to be acquired shows that there is a certain amount of confusion on this subject.

45. Even if the successor State assumes some obligation towards individuals and private-law bodies corporate—and this is the point that must now be inquired into—it can only be a municipal-law obligation, whereby the successor State acts towards individuals in this respect in its capacity as a subject of municipal law. Its capacity as a subject of international law, which might perhaps impose some international obligations on it, was discussed in the preceding section. If we accept that the successor State really takes its sovereignty from the predecessor State<sup>29</sup> and that this transfer of sovereignty entails a transfer of obligations from one to the other, it is somewhat difficult to conceive why a municipal-law obligation assumed by the predecessor State should be transformed into an international obligation once it is taken over by the successor. Thus, even assuming a continuity of juridical relationships from the predecessor State to the successor State, it is impossible to see how the latter could be bound by an international obligation where the former had assumed a national obligation. If the obligation continues to exist and if it is transferred, how can we accept the argument that it is also transformed? If, on the other hand, we start from the contrary argument that, since the two juridical orders are different and extraneous to each other, an obligation created under one of them cannot be transmitted to the other but, upon its extinction, gives rise to another obligation which international law imposes on every successor State, then we are faced with two consequences. The first is that the existence of this rule of international law, a rule independent of the obligation of the predecessor State, has to be proved, and the second is that the very theory of acquired rights, which forms the link between predecessor State and successor State with respect to rights created before the change-over and enforceable after it, has to be abandoned.

<sup>26</sup> United Nations, *Reports of International Arbitral Awards*, vol. VI, p. 157. See also D. P. O'Connell, *op. cit.*, pp. 490-491.

<sup>27</sup> F. K. Nielsen, *American and British Claims Arbitration* (Washington, Government Printing Office, 1926), p. 90.

<sup>28</sup> A. Makarov, "Les changements territoriaux et leurs effets sur les droits de particuliers, Partie B: Projet de résolutions", *Annuaire de l'Institut de droit international*, 1950, vol. 43-I, (Session de Bath), p. 52.

<sup>29</sup> See above (paras. 29-35) the reservations which may be made with respect to the theory of "transfer" of sovereignty.

If this latter argument is correct, the reason why the successor State respects a right is not that it was respected by its predecessor but that a superior rule of international law, autonomous and extraneous to the grounds on which the predecessor respected the right in question, is binding on the successor State and on it alone.

46. One writer, discussing administrative contracts, states that: "Such practice as exists is the outcome of an attempt to create a contractual relationship between the private contractor and the successor State, and it is therefore of a controversial character. The most that can be extracted from a consideration of such practice is the obligation of the successor State to respect the acquired rights of the contractor. There is no justification for assuming a transmission of the contract itself."<sup>30</sup> Thus a distinction is made, as it were, between original acquired rights which oblige the successor State to *maintain the contract* and derived acquired rights which only require *compensation* because of the existence of an autonomous rule of international law, these latter rights alone being taken into account in the case of State succession.

47. It is by no means clear that this rule exists, and it seems advisable to revert to the principle of the sovereign equality of States and to delve into all its implications in order to elucidate the problem of private acquired rights, after which the scope and meaning of equality of persons and non-discriminatory treatment will be determined, followed by a few remarks on the non-recognition and non-compensation of private acquired rights.

#### A. CONSEQUENCES OF THE EQUALITY OF STATES

48. The independence of the juridical order of the successor State leads *a priori* to the assumption that the new authority will not be bound by rights of individuals, which it had no part in creating. This is borne out by the fact that for many years the foreign State has not claimed any right to inquire into action taken by the successor State with respect to such rights (the Anglo-American doctrine of "act of state"). However, the requirements of diplomatic protection of nationals have raised the problem of safeguarding such rights.

##### 1. INDEPENDENCE OF THE JURIDICAL ORDER OF THE SUCCESSOR STATE

49. Traditional doctrine draws a distinction between aliens and nationals and allows aliens to profit from acquired rights. For years, people have been reciting the "litany of acquired rights" and closing their eyes to the fact that they are barrenly locking themselves in the vicious circle of *idem per idem*; for when asked why there is succession, that is, an obligatory transfer of relationships contrary to the specific will of the succeeding State, they reply that it is because of the principle of acquired rights, while at the same time they justify acquired rights as an obligation accompanying succession.

50. One preliminary remark should perhaps be restated before examining this problem of the acquired rights of aliens. The successor State must so far as possible be treated as a State, out of respect for the principle of equality which governs the international community. This means that, if any other State is shown to be under an obligation to recognize acquired rights, *more onerous obligations* cannot be imposed on the successor State in that respect. Secondly, it may be stated that proof of recognition of the acquired rights of aliens by the predecessor State is not a sufficient ground for transferring the burden of them to the successor State. In other words, proper grounds must be given for the existence of such an obligation on the successor. It is understandable that a State which freely amends its laws should respect the acquired rights which it has no less freely recognized as belonging to aliens under its own former law. As the creator of the rights of those individuals, it may feel "responsible", in equity or for any other reason, for maintaining them. However, an argument along these lines would definitely not be sufficient in itself to justify the imposition of a similar obligation on the successor State, which had no part in creating the rights of the aliens in question.

51. Cavaglieri draws a distinction between rights acquired by an alien against the predecessor State and rights acquired against any person in the same territory. In the first case, he believes that the successor State is *internationally* bound to recognize such obligations. He does not, however, base this view on acquired rights, but considers "that it suffices to invoke the elementary principle of logic and justice which requires that juridical situations should be considered against the background of the rules of law prevailing at the time when the situations came into being. Any juridical relationship, once established, embodies and carries with it a chronological element which must be taken into account whenever the effective validity of that relationship is to be appraised". In the second case, Cavaglieri states that there is not in international law any principle of respect for such acquired rights. "In the absence", he writes, "of a general obligation to accept the previous law, which may at any time be amended or abrogated, it is hardly possible to concede that rights acquired on the basis and with the guarantee of that law should be inviolable where the annexing State is concerned. . . . The fact that the two juridical orders, and consequently the rights based on them, are independent of each other means that there is no legal reason for continuance of the rights derived from the previous order, except in the case of rights which are specially recognized by international law, such as those relating to the patrimonial obligations assumed by the previous State."<sup>31</sup>

52. Actually, there are no apparent reasons why this argument should not apply to the first case also. The writers do not really give any explanation, but simply make assertions. A typical example is the statement by one writer that the refusal of a new State to recognize pre-established juridical situations would be "an insult (!) to the other State, to its right (?) to have what was validly

<sup>30</sup> D. P. O'Connell, *op. cit.*, p. 355.

<sup>31</sup> A. Cavaglieri, *op. cit.*, pp. 284-291.

done in its sphere of jurisdiction respected".<sup>32</sup> Others<sup>33</sup> observe that the same grounds which in private law require that a new statute should not apply to certain prior juridical relationships or situations are irrefutably valid in this case also. This is simply an admission that no specific argument is to be found in international law to justify respect for such obligations.

53. It must also be pointed out that a State which amends its own laws is entitled to respect its legislation only to the extent that to do so is not contrary to the *public interest*. What then can prevent a successor State, which has even less reason to respect rights in which it has had no hand, from also arguing its public policy? Writers who hold that such rights must continue to burden the successor State acknowledge that the latter may rid itself of the burden by invoking its own *public policy*. As will be noted later,<sup>34</sup> however, the introduction of this idea sounds the death-knell of the alleged obligation to recognize acquired rights; for it is inconceivable that anyone other than the successor State itself should be the judge of what its public policy is. Thus, the criterion of public policy would result in a vague and flexible obligation which a State could evade at any time by its own interpretation of the requirements of its public policy. In point of fact, the equality of States and respect for each other's sovereignty have long since prohibited one State from judging the validity of measures taken by another State. This is the Anglo-American doctrine of *act of state*.

## 2. THE DOCTRINE OF ACT OF STATE

54. Until quite recently, measures taken by the successor State in violation of alleged acquired rights, with or without compensation, were regarded in some countries as acts on which its courts could not sit in judgement. This is the Anglo-American system of the act of state, which denies the judge any power to review the legality of decisions taken by a foreign Government. The State must bow to the effects of acts of nationalization, for instance, decided upon by a successor State.

55. This was a traditional position up to the day in 1953 when an English judge, following the nationalization of the Iranian oil industry by Dr. Mossadegh, restricted this doctrine to nationals of the nationalizing State. Once the measure affects an alien, the judge considers himself competent to appraise its validity. However, this results in a very debatable conception of *personal* competence in an area of *territorial* sovereignty. On 23 March 1964, with the well-known *Sabbatino decision*,<sup>35</sup> in a case relating to American interests in Cuba, the Supreme

Court of the United States made an even more spectacular and more decisive shift by rejecting the doctrine of act of state whenever the measure taken by the foreign State was a violation of an international convention or of the common rules generally accepted in international law.

56. But is there in fact any international legal rule? And what is meant by the breach of an international commitment? Obviously, in the case of State succession, this cannot refer to an agreement concluded by the predecessor State guaranteeing the inviolability of acquired rights. This would be no solution to the problem, since what we need to know is whether there is an acquired right to the renewal of the international commitment itself. Nor can it refer to an agreement whereby the successor State had bound itself to respect such rights. That would, in any event, take us outside the theory of succession and raise a problem falling within the purview of the law of treaties.

57. However, it is not the Anglo-American doctrine of act of state (which is not to be found either in international law or in most municipal codes) that somewhat restricts the equality of States which is the basis for the successor's claim to be entitled to rid itself of acquired rights which it had no part in creating. It is rather the practice of *diplomatic protection*, which sets the limit at which the powers of the successor State cease and those of the others begin. The problem of acquired rights has really become the problem of diplomatic protection, which is at the root of the artificial distinction between aliens and nationals.

## 3. DIPLOMATIC PROTECTION

58. Intervention by States to protect the acquired rights of their nationals is dictated by the dogma of private appropriation of property. According to one writer:

Encroachment on the property of one of our fellow citizens abroad inevitably arouses feelings which are a vestige of those of the close-knit tribal society of olden times, while equally serious encroachments on property leave us quite unmoved when they are committed in our own country. Hence the emotional and often biased nature of very many studies on the question of expropriation. Expropriation in particular is the point at which the clash between large and small States has often materialized. On the part of the large States, whose economic power extends far beyond their frontiers, the property of their nationals abroad was often, wrongly, regarded as forming part of the nation's wealth, and diplomatic intervention to protect it was on more than one occasion the instrument of economic or political imperialism. On the other hand, the less their internal stability, the more vigorously the weaker States asserted their sovereignty and their right to expropriate as and when they pleased. They resented foreign diplomatic intervention as a brake on social changes which were considered essential and as an attempt to give foreigners a privileged status in contrast to nationals and thus to perpetuate their political and economic subjugation to the large States.<sup>36</sup>

59. The traditional distinction which is made between aliens and nationals has been used as a pretext to spread the notion—with the help of abuses of diplomatic pro-

<sup>32</sup> J. Hatschek, *Völkerrecht* (Leipzig, A. Deichert'sche Verlagsbuchhandlung Dr. Werner Scholl, 1923), pp. 172 ff.

<sup>33</sup> E. Nys, *Le droit international: Les principes, les théories, les faits* (Bruxelles, 1912), vol. II, new ed., pp. 33-37.

<sup>34</sup> See paras. 72-76 below.

<sup>35</sup> United States of America, Supreme Court, *Cases adjudged in the Supreme Court at October Term, 1963* (376 U.S. 398), Washington, United States Government Printing Office, pp. 398-472. (a)

(a) This reference was not given in the mimeographed version of the report considered by the Commission at its twenty-first session.

<sup>36</sup> S. Friedman, *op. cit.*, p. 208.

tection—that aliens enjoy privileges and international treatment superior to that of nationals. The real reason why the distinction was made was not that aliens ought to be favoured but that international law did not in practice apply to nationals. The apparent privileged treatment of aliens was a secondary consequence. However, a State forced to accord to aliens treatment superior to that which it accorded to its nationals would really cease to have the full and free exercise of sovereignty and would ultimately be subject to a *capitulations régime*.

60. It was argued in some quarters not only that aliens should be privileged in relation to nationals, but also that some States should have heavier responsibilities than others, thus creating two classes of States in the international community. In the nineteenth century, for instance, Turkey, the “sick man”, China, the victim of “unequal treaties”, Persia and other so-called semi-civilized States were forced to respect acquired rights in spheres where they were not enforceable against other States, so that it is rather hard to see how the basis for those rights can be, as was contended, morality and equity, whose shackles could be cast aside by civilized States but not by others. Borchard expounds this as follows: “The weaker the control of the police, or the local safeguards for the protection of foreigners and the proper administration of justice... the harsher [becomes] the demand for prompt satisfaction for violation of the rights of person or property of an alien.”<sup>37</sup> This, however, is utterly condemned by the principle of equality and sovereignty of States. Nor is there in international law any discrimination in favour or to the detriment of aliens.

## B. THE MEANING AND SCOPE OF EQUALITY OF PERSONS

### 1. EVOLUTION OF THE STATUS OF ALIENS: FROM PRIVILEGED STATUS TO NON-DISCRIMINATION

61. A quite considerable evolution has been noted both in the views of writers and in judicial and State practice.

62. It was originally contended that the State—any State—could not question the acquired rights of aliens, who must be accorded *international treatment* and whose status must remain inviolable. The de Lapradelle draft resolution submitted to the Institute of International Law is based on this theory when it discriminates in favour of aliens, who, according to the draft, are entitled to treatment directly determined by international law and not subject to any review by the State of residence.<sup>38</sup> It was soon realized, however, that the status thus accorded to aliens was quite unreasonable and that the advantages thus acquired were in some cases preposterous.

63. A softening of this attitude found expression in the idea of an *international minimum standard*. This second theory affirms equality between nationals and aliens but declares it operable only at a level corresponding to an international minimum. Thus, it guarantees aliens an international minimum treatment, and nationals must be brought up to the same level if equality is to be ensured. This theory means that the alien entering a territory brings with him the municipal law of his own country to govern him. The basis of the theory—with the judicial institutions omitted—is the anachronistic idea that an absolute guarantee of rights is possible only in a capitulatory framework—i.e. when it is implemented according to an outdated formula incompatible with sovereignty. Moreover, this theory of a minimum leads to a number of uncertainties. If aliens have rights which are recognized by international law, do they include respect for property? Cavaglieri takes the view that this is entirely a matter for the municipal law of the State concerned and notes that “... in accordance with a universally accepted principle, that State is even entitled to sacrifice the acquired rights of the individual whenever the application of a new law so requires.”<sup>39</sup> Its power to do so cannot be limited in practice by a principle as vague as that of an international minimum, which employs such hazy criteria as the demands of civilization.

64. Lastly, there is a third theory, which advocates the application of *the principle of non-discrimination*, meaning that aliens are accorded the right—and this right alone—not to be treated worse than nationals. This theory is gaining ground and finding favour in diplomatic and judicial practice. With increasing consistency and force, many lawgivers, writers and judges are coming out in favour of the assimilation of aliens to nationals. As long ago as 1926, it was stated in the report of the Committee of Experts for the Progressive Codification of International Law of 9 February that “the maximum that may be claimed for a foreigner is civil equality with nationals”. Their State of residence “owes nothing more than that to foreigners, and any pretension to the contrary would be inadmissible and unjust both morally and juridically”.<sup>40</sup>

### 2. MEANING OF NON-DISCRIMINATION

65. The fact is that, so long as quite artificial distinctions continue to be made between aliens and nationals, a sufficiently realistic approach will be impossible. We say “artificial” distinctions because neither in equity nor from the social and economic standpoint is any sound basis for such discrimination apparent. Since aliens and nationals alike are seeking profit, they must run the

<sup>37</sup> E. M. Borchard, *The diplomatic protection of citizens abroad or The law of internal claims* (New York, Banks' Law Publishing Company, 1922), p. 406.

<sup>38</sup> I. M. Anghel, “Nationalisation and Aliens”, *Review of Contemporary Law*, 1966, No. 2, pp. 114-127.

<sup>39</sup> A. Cavaglieri, *op. cit.*, p. 293.

<sup>40</sup> League of Nations, *Committee of Experts for the Progressive Codification of International Law* (C.P.D.I./35-74), “Report of the Sub-Committee on the responsibility of States for damage done in their territories to the person or property of foreigners”, Annex, document C.P.D.I. 24 (revised), p. 5, art. 2.

risks and hazards which that inevitably involves on an equal footing.<sup>41</sup>

66. It is, of course, argued that a national enjoying political rights which are out of reach of the alien may be able to influence his country's legislators and even have a hand in framing any law passed by them which may affect him. Aliens, on the other hand, may find themselves in a situation which they have had no opportunity either to contest or to avoid. But what is presented in these terms as an advantage for nationals (the right to participate in the creation of the juridical order) benefits both nationals and aliens, whereas if this argument were accepted, the obligation to suffer the disadvantages of the new law would rest only on nationals. This would clearly make the situation of aliens more enviable, since they would reap the benefits and not suffer the disadvantages of the new law.

67. The real problem, however, is on a rather higher plane than this. When, for example, a nationalization measure is taken, it is not directed against a class of persons because of their foreign nationality (if it were, there would be some grounds for refusing to recognize its legality); it is directed at loftier objectives which have nothing to do with any question of nationality: namely, the objectives of economic liberation and development. At least, States which take such measures believe that they can better attain those objectives through nationalization, which is thus regarded as an effective process of social and economic change. Consequently, nationalization is a matter entirely within the national competence of the State concerned and, since there can accordingly be no sector to which it may not be applied, it can affect nationals and aliens without distinction. If it did not, it would be meaningless and illusory. It happens that it is mainly aliens that have, in fact, been touched by nationalization measures in many countries, and sizable interests have been affected, but this merely proves that such measures would have been ineffective had they applied only to nationals.

68. A nationalization law is a legal instrument applicable *erga omnes* for the purposes of social and economic development. It seems quite natural that it should be within the exclusive competence of the State to determine the juridical régime of the persons and property in its territory. Aliens cannot object to changes in the juridical order in a country or evade its effects. As has been said, "there is no reason why the State of residence should assume greater responsibility for the protection of aliens than for that of its own nationals". Thus, it is neither sound doctrine nor in conformity with practice and judicial precedent to assert that aliens should be treated

better than nationals (or even, as will be seen,<sup>42</sup> to argue that they are in fact simply treated in the same way as nationals). The successor State, which took no part in the drafting of the previous law under which the individual acquired certain rights, cannot be compelled to do more than any other State is legally bound to do.

69. The criterion of non-discrimination was applied by the Permanent Court of International Justice in the *Oscar Chinn Case*, when it declared: "The form of discrimination which is forbidden is therefore discrimination based upon nationality and involving differential treatment by reason of their nationality as between persons belonging to different national groups".<sup>43</sup> In this particular case, however, the Court considered that the decisions had been taken because of the public-service (in the broad sense) character of the company involved and were therefore justified by the acknowledged competence of the State in matters affecting the operation of its public services.

70. The notion of *discriminatory* nationalization has been put forward, though not without protest, as justifying the action of a foreign court in reviewing the validity of measures taken by the successor State. Netherlands and United States courts, considering acts of nationalization by Indonesia and Cuba, assumed this power, but German courts took a different view. The Bremen court declared that "The concept of equality simply means that equal subjects must be accorded equal treatment, and that different treatment is to be recommended for those that are not equal. For this decision to be objective, it is sufficient that the previously colonized country should adopt towards its former masters a different attitude from that which it adopts towards strangers."<sup>44</sup> It will be seen later that, in any event, the problem is different in the case of decolonization.<sup>45</sup> International law—and this is the sense in which equality of persons must be understood—does not, as was stated by the Bremen court, prohibit differential treatment of persons who are not equal. Still less should it prohibit such treatment in the case of measures affecting property of the colonizing State which is of vital importance to the economy of the newly independent State; to terminate a privileged situation is not discrimination, but the means of restoring the equality which was previously disrupted in favour of the former metropolitan country.

71. It should further be noted that ordinary law, which is applicable not only to all forms of State succession but also outside any succession, would even justify treatment that discriminated against an alien. The application of equality cannot be mechanical and cannot be extended to the point where it imperils higher interests. For its own security and in order, for instance, to secure control of vital industries, such as defence industries, the State is justified in taking measures *ratione personae* which

<sup>41</sup> Cf. "Deutsche-Amerikanische Petroleum Gesellschaft Oil Tankers Case" in United Nations, *Reports of International Arbitral Awards*, vol. II, pp. 779 to 795. In this case, which was settled by arbitration between the Reparations Commission and Germany. Standard Oil of New Jersey, claiming ownership of certain tankers transferred by Germany, had its claim dismissed "whereas, in application of a generally accepted principle, any person taking up residence or investing capital in a foreign country must assume the concomitant risks and must submit, under reservation of any measures of discrimination against him as a foreigner, to all the laws of that country." (*Ibid.*, p. 794).

<sup>42</sup> See para. 71 below.

<sup>43</sup> *P.C.I.J.*, 1934, Series A/B, No. 63, p. 87.

<sup>44</sup> Bremen Court of Appeal, 21 August 1959. Cited by El-Khocheri Ahmed Sadek, "Les nationalisations dans les pays du Tiers monde devant le juge occidental", *Revue critique de droit international privé*, 1967, No. 2, vol. LVI, pp. 249-275.

<sup>45</sup> See chap. III.

affect only aliens. More generally, equality in the treatment of persons is limited by the requirements of public policy.

### 3. PUBLIC POLICY AND THE SUCCESSOR STATE

72. There are no legal ties between the predecessor State and the successor State, and their two juridical orders are independent and evolve in different spheres. Consequently, it seems strange that the successor should be obliged to respect rights acquired under the régime of the predecessor. It is for this reason that the advocates of acquired rights have moderated their theory by invoking the notion of public policy.

73. Verdross wrote in 1931 that "rights acquired by aliens are not protected by the law of nations in an absolute manner; for that law is not intended in any way to prevent reforms demanded by social development". He went on to say: "All that international law prescribes in this respect is that the State must not *arbitrarily* violate the private rights of aliens, even by an act of the legislator". International law does not prohibit change "if, according to an impartial judgement, such a law can be recognized as necessary for the common good of the nation".<sup>46</sup> Yet, how is it to be established that the legislator of the successor State has "arbitrarily" violated private rights in the exercise of his sovereign power to legislate? And how and to whom is the exercise of this sovereign power to be referred for an "impartial judgement"?

74. Once the notion of public policy is brought in to attenuate the logical impossibility of imposing on the successor State the obligation to respect a previous right, acquired rights cease to have any consistency or any reality. If there is one sphere in which the exclusive jurisdiction of the State is exercised as a sovereign right, it is precisely that of determining what constitutes public policy, which cannot be submitted to the impartial judgement of any authority external to the State. In the case of financial acquired rights this was ably demonstrated by Gaston Jèze: "A Government is entitled to suspend or reduce the servicing of its public debt *whenever essential public services would be jeopardized or neglected if the debt continued to be serviced*. In other words, the public debt is not the first public service that must be satisfied."<sup>47</sup> Professor Jèze also noted that (1) "only the debtor Government is competent to say whether essential public services would be jeopardized by servicing the debt", and (2) only the debtor Government is competent to decide its own economic and financial policies. Thus, every State possesses sovereign power to set its own policies in this field and is equally free to determine the requirements of its public policy in this respect. What is conceded to every State—including

that is to say, the predecessor State, which was the creator of the acquired rights—must *a fortiori* be conceded to the successor State, which had nothing whatever to do with the creation of those rights.

75. If the right created under the former sovereignty conflicts with the new public policy or at least pertains to a legal institution that does not exist in the new State, there can be no acquired right. In 1728, Don Sebastian Calvo de la Puerta purchased from the Spanish Crown the office of *alguacil mayor* at Havana, a perpetual and hereditary office carrying with it the right to inspect butcher's meat and to collect a tax on every head of cattle slaughtered. The United States, as the successor in Cuba in 1898, abolished this acquired right on the ground that it was of a personal nature. In reality, however, it was because the legal institution of the purchasing of offices did not exist in United States law.<sup>48</sup>

76. This latitude enjoyed by the successor State in determining public policy is summed up as follows by an advocate of the theory of acquired rights: "The old laws remain in force wherever they do not conflict with the new *political order* introduced by the annexation".<sup>49</sup> Since political order is even broader and more general than public policy, this means that the whole notion of acquired rights is demolished by one of its own defenders. Descamps, who was one of the first to take what Cavaglieri<sup>50</sup> called the "unfortunate" step of systematizing the theory of acquired rights, wrote thus: "Every State establishes its public policy as a sovereign right in the light of its awareness of the social security needs which it has to meet".<sup>51</sup> This is tantamount to saying that there is no obligation to recognize acquired rights. And that is what we learn from State practice, despite some inconsistencies.

### C. THE PRACTICE OF NON-RECOGNITION OF THE ACQUIRED RIGHTS OF INDIVIDUALS

77. Basically, the rule is that the "successor" State does not succeed. There are, however, factual considerations which induce it to renew previous situations, not because it lacks the legal power to annul or change them, but because it does not wish to do so for reasons of expediency, for other reasons or because of material or other constraints. It "carries with it its own juridical order which is entitled, if it wishes, to ignore previous laws and individual rights created under those laws".<sup>52</sup> This opinion of Cavaglieri is echoed in equally strong terms by Bartin: "Whatever the old sovereignty of the dismembered State would have permitted it to do, the new sovereignty of the annexing State likewise permits it to do in the annexed territories".<sup>53</sup>

<sup>48</sup> See foot-note 87 below.

<sup>49</sup> A. Pillet, *Principes de droit international privé*, 1903, p. 528.

<sup>50</sup> A. Cavaglieri, *op. cit.*, p. 266.

<sup>51</sup> P. Descamps, *op. cit.*, p. 398.

<sup>52</sup> A. Cavaglieri, *op. cit.*, p. 264.

<sup>53</sup> E. Bartin, "Les transformations de la propriété foncière roumaine et le régime des liquidations", *Journal du droit international*, 1927, vol. 54, p. 887.

<sup>46</sup> A. Verdross, "Les règles internationales concernant le traitement des étrangers", *Recueil des cours de l'Académie de droit international de La Haye*, 1931 (III), vol. 37, p. 359.

<sup>47</sup> G. Jèze, "Les défaillances d'Etats", *Recueil des cours de l'Académie de droit international de La Haye*, 1935 (III), vol. 53, p. 391. For English text see *British and Foreign State papers*, 1933, vol. CXXXVI, p. 892.

78. The well-known judgement of the Permanent Court of International Justice in the *Chorzow Factory Case*<sup>54</sup> relating to certain German interests in Polish Upper Silesia, which is frequently cited as having confirmed the principle that acquired rights form part of general international law, is actually cited out of context. The whole case was presented by both parties as a question of interpreting the peace treaties, and not of confirming the principle of respect for private property. The Polish Government stated that it had expropriated, *in conformity with the treaties*, German public property disguised as private property, while the other side attacked this argument by referring to the texts, which protected only private property. The whole case hinged on the interpretation of a treaty right pertaining only to the parties.<sup>55</sup> Likewise, the *Hungarian Optants Case* of 1927<sup>56</sup> and the *German Settlers Case*<sup>57</sup> are clearly concerned with incidents arising out of the execution of treaties. Thus, the judgement in these cases was based on the interpretation of specific treaties which led to a given result, and the question whether that result is a reflection of ordinary law or an exception to it remains open. In the first-mentioned case, the League of Nations had fully conceded Romania's right to apply its land reform to Hungarian nationals and rejected the theory that the peace treaties imposed a definite rule that private property was to be protected.<sup>58</sup> In the case of *Niederstrasser v. Polish State*<sup>59</sup> of 6 June 1931, Dr. Kaeckenbeeck, the President of the Upper Silesian Arbitral Tribunal, held that "the successor State may... take away and modify" acquired private rights.

79. Nor is the principle of respect for acquired rights of individuals confirmed by the 1919 peace treaties. If there is any general international law which lays down that principle, it is obvious that on the one hand it was violated by those treaties in permitting the seizure and liquidation of all German private assets abroad, while on the other hand it was given the appearance of being respected through the obligation laid on the Germans to compensate the persons expropriated. Actually, the history of the peace conferences makes it abundantly clear that States are motivated by political considerations.<sup>60</sup> The peace treaties which put an end to the Second World War reflect the same tendencies and involve decisions of pure expediency. Sometimes they allow the liquidation of former enemy property; at other times they require the return of such property. As for municipal law, it is too diverse for any precise rule to be drawn from it. Moreover, it is not permissible to

conclude that a rule of general international law exists simply on the basis of the existence (if it is real) of a minimum factor common to all municipal law. Even if it is general, municipal law cannot prove, much less create, an identical international legal rule. The same uncertainties and the same political factors encountered in connexion with acquired rights extend into the field of compensation.

#### D. THE PROBLEM OF COMPENSATION

80. Writers are divided in their opinions on this point, especially as there is no established basis for compensation.

##### 1. DIFFERENCES OF OPINION AMONG WRITERS

81. Opinions on this question vary from one extreme to the other. Professor Verzijl maintains that "the power to nationalize is limited by the power to pay".<sup>61</sup> English and American writers are apt to state that compensation must be "prompt, effective and adequate", thus making more flexible the old traditional French formula of "fair compensation in advance". Others speak only of "suitable" or "appropriate compensation", thus showing concern for the special circumstances of the small successor States, particularly the underdeveloped countries. De Lapradelle<sup>62</sup> took the view that compensation should be based on a reasonable assessment of the debtor's means and that payment should be spread over a period of time. De Visscher argues that "nationalization, being a large-scale reform, hardly permits more than partial reparation, proportionate not so much to the extent of the damage as to the means and the goodwill of the nationalizing State".<sup>63</sup> On the other hand, Rudolf Bystricky writes that "no universally accepted ruling in international law exists linking the admissibility of nationalisation or the validity of measures of nationalization to the payment of compensation".<sup>64</sup> Professor Louis Delbez, struck by the enormous scale of compensation which major acts of nationalization would inevitably require, is reluctant to saddle the State with the burden of full and complete compensation unless the intention is to prevent it from nationalizing; he goes on: "To require compensation in full might in many cases make reform impossible or jeopardize its success".<sup>65</sup> Lastly, some writers feel unable to express a view as to whether or not the obligation exists: "It is

<sup>54</sup> *P.C.I.J.*, 1928, Series A, No. 17.

<sup>55</sup> See S. Friedman, *op. cit.*, pp. 280-285 for an excellent study of this case.

<sup>56</sup> League of Nations, Report of the Committee of Three (C.489.1927.VII), Minutes of the Council, 46th and 47th sessions, para. 2024, pp. 1379-1383 (*Official Journal*, 8th year, No. 10, October 1927).

<sup>57</sup> *P.C.I.J.*, 1923, Series B, No. 6; *ibid.*, 1926, Series A, No. 7.

<sup>58</sup> See foot-note 56 above.

<sup>59</sup> H. Lauterpacht, *Annual digest of public international law cases (1931-1932)*, p. 67.

<sup>60</sup> See H. W. V. Temperley, *A History of the Peace Conference of Paris*, London, Institute of International Affairs, 1920-1924.

<sup>61</sup> "Lettre de Monsieur J. H. W. Verzijl à Monsieur de Lapradelle", *Annuaire de l'Institut de droit international*, 1950, vol. 43-I, p. 104.

<sup>62</sup> A. de Lapradelle, "Les effets internationaux des nationalisations", *ibid.*, pp. 42-72.

<sup>63</sup> Ch. de Visscher, *Théories et réalités en droit international public*, (Paris, A. Pedone, 1960), 3<sup>e</sup> éd., pp. 248-249.

<sup>64</sup> R. Bystricky, "Notes on certain international legal problems relating to socialist nationalisation", VIth Congress of the International Association of Democratic Lawyers (Brussels, 22-25 May 1956), *Proceedings of the Commission on Private International Law*, p. 23.

<sup>65</sup> L. Delbez, *Les principes généraux du droit international public* (Paris, Librairie générale de droit et de jurisprudence, 1964), p. 208.

not possible solely on the basis of international treaty practice to give a definite answer to the question whether lawful nationalization entails a liability to pay compensation to the victims of the same in cases where they are nationals of a foreign State.”<sup>66</sup> Thus, opinions vary, ranging from a denial of any compensation through various intermediate formulae to compensation in full. There are few sectors of international law which are more full of contradictions and on which writers are more divided.

## 2. LACK OF A BASIS FOR COMPENSATION

82. The fact that there are no juridical ties between the predecessor State and the successor State and the fact that their juridical orders are independent of each other create a situation only remotely resembling that which occurs in municipal law when a State amends its own laws by sovereign right. It is an established fact that, even where the law is amended without change of sovereignty, acquired rights are not recognized either as situations which are absolutely inviolable or as situations which can never be encroached on without compensation. This is indisputable in the case of nationals, for whom there is not—or is not yet—in international law any rule requiring compensation by their own State. Where aliens are concerned, the tendency is simply to assimilate them to nationals. Compensation is not regarded as a right. This is a tendency which has been noted in many cases of nationalization in connexion with structural reforms (Eastern Europe) or with upheavals due to war (especially in Europe).<sup>67</sup> The assimilation of aliens to nationals for purposes of compensation was confirmed by the League of Nations International Conference on the Treatment of Foreigners, which adopted a text on this point reading as follows:

Each of the High Contracting Parties shall accord to the nationals of the other High Contracting Parties, as regards compensation for the exactions, requisitions, expropriation . . . , treatment equal to that which it grants to its own nationals.<sup>68</sup>

One of the Rapporteurs at this Conference<sup>69</sup> expressed the view that:

foreigners established in a country and enjoying the protection of its laws and the advantages of its administration must share in its burdens on the same footing as nationals; even if those burdens are of an exceptional character and involve sacrifices amounting in certain cases to total or partial deprivation of property.

<sup>66</sup> I. Foighel, *Nationalization, a study in the protection of alien property in international law* (London, Stevens and Sons Ltd., 1957), p. 85.

<sup>67</sup> S. Friedman (*op. cit.*, pp. 244 ff.) notes, for example, in connexion with the compensation payments made by Poland after the Second World War, that “the compensation does not in any way derive, in the thinking of the Polish legislator, from juridical considerations and is not in any apparent manner the logical consequence of expropriation. The granting or refusal of compensation is accounted for entirely by political reasons and, in the case of aliens, by reasons of mere expediency.”

<sup>68</sup> League of Nations, “Draft Convention on the Treatment of Foreigners”, C.174.M.53.1928.II, p. 12 (League of Nations publications, 1928.II.14).

<sup>69</sup> N. Politis, Rapporteur for Committee A.

Assimilating aliens to nationals means depriving them, too, of any compensation.

83. Proceeding from the general to the particular case of State succession, there are strong grounds for asserting that, as has been noted, there is even less reason for recognizing acquired rights or paying compensation. It is hard to admit that rights acquired under previous laws should continue when the successor State had had absolutely no part in the framing of those laws. As the theory of acquired rights is somewhat tautological, another explanation must be sought to justify compensation. Or, to put it more accurately, since the existence of the principle of acquired rights has not been proved, the problem is whether a specific basis for compensation can be found.

84. *A priori*, recognizing that a State (any State) has the right, for instance, to nationalize or expropriate, means conceding the lawfulness of the action taken by that State. If the act whereby it abolishes acquired rights is regarded as lawful, how can its refusal to pay any compensation be regarded as unlawful, or, in other words, as engaging its responsibility? If the nationalization measure is conceded to be within the natural competence of the State, it is self-evident that it cannot be a wrongful act. In any event, this takes us out of the sphere of State succession into that of the international responsibility of States.

85. Leaving aside the theory of unjustified enrichment, which will be disposed of later,<sup>70</sup> it is thus quite difficult to find any justification for compensation. The “right” to compensation, once its fragile underpinning of acquired rights is removed, is seen to be unsubstantial indeed. In any event, “acquired rights” and “right to compensation” cannot legitimately be linked together by arguing that refusal to recognize the former gives rise to the latter. *The abolition of “acquired rights” has its basis in the exercise of a competence which international law does not take away from the successor State.* It should not therefore entail the granting of compensation.

86. Thus, Cavaglieri, although accepting—within narrow bounds, it is true—the existence of an obligation to respect the patrimonial rights of aliens, writes: “. . . where there is no treaty or other form of express obligation of one State to other States or to aliens even, there is at present no general principle of international law that obliges the State in question to expropriate the property of aliens only against payment of compensation corresponding to the value of the property expropriated, or deemed satisfactory by the owner.”<sup>71</sup> “This is, of course, not to say”, another author wrote, “that such expropriation [i.e., except on terms of paying full or ‘adequate’ compensation] is wise or politic or even moral. . . . Our examination seems, however, to have established that the supposed obligation of States in this respect has never taken shape in any formulated rule of international

<sup>70</sup> See below, paras. 128 ff.

<sup>71</sup> A. Cavaglieri, *op. cit.*, p. 296.

law".<sup>72</sup> If the existence of the principle of acquired rights and the principle of compensation thus remains still to be proved in connexion with State succession generally, it is even more ethereal in the case of succession resulting from colonization or decolonization. This is the next point to be examined.

### CHAPTER III

#### Acquired rights and types of succession

87. It has by no means been proved that there is a rule of international law requiring any successor State to respect acquired rights, and it is to be feared that as time goes by the declining number of writers who continue boldly to defend such rights will find less and less support in practice. It must be acknowledged that political considerations, rather than juridical grounds, are the deciding factor in the attitude of Governments on this question. Examples to illustrate this fact are so many and varied that they can be chosen at random. Suffice it to mention one that is particularly instructive, although out of context, since it concerns succession of Governments rather than succession of States. After the Revolution of 1789 broke out, the French Constituent Assembly decided, on the famous "Night of 4 August", that all feudal rights were abolished without compensation. In the Revolution of 1848, however, when slavery was abolished in the French colonies, the slave-owners were paid compensation totalling 6 million francs. It is difficult to discern any rule other than that of political expediency which can explain both the abolition, without compensation, of feudal property rights and the abolition, against compensation, of the right of property over the human person! Politics, with the shifting power relationships which are its very fabric, is clearly—to the discomfiture of the jurist—the criterion for respecting or denying acquired rights, according as the State concerned is weak or strong. Almost simultaneously, two countries, Uruguay and Italy—the former in February 1911, the latter in June 1911—established an insurance monopoly. The Italian State ignored diplomatic protests, whereas Uruguay had to give way to outside pressure and relinquish the monopoly, even though it had been instituted by a law enacted as a matter of sovereign right by both houses of the legislature.

88. If, therefore, politics rather than law dominates this field, it is natural also to expect different solutions according to the type of succession. The Permanent Court of Arbitration sensed this when it took the view, in the *Lighthouses Case*<sup>73</sup> concerning acquired rights in connexion with government contracts, that the different cases of annexation, cession, dismemberment and independence could not all be governed by a rigid rule. The Court held that it was impossible to enunciate one

and the same general solution for all hypothetical transfers of territory and that any attempt to do so was doomed to failure because of the great diversity of cases in practice.

89. Acquired rights in the case of merger or integration of States do not appear in the same light as in the case of colonization or decolonization, for instance. When a voluntary merger of two States occurs, the States in question are, by construction, aiming at common objectives and share the same views concerning the development of the community which they are forming. Consequently, it must be anticipated that acquired rights will be respected, or even that the question will not arise. By construction, so to speak, integration implies the pre-existence of two juridical orders which are fairly near (otherwise there would probably not be a merger) and in any event are not mutually antagonistic. The operation will have been facilitated, or even dictated, by an identity of present interests and the prospect of a common political and juridical future. It is obvious that one State does not merge with another if its rights and interests or those of nationals would suffer as a result. It is for this reason that, *ex hypothesi*, the problem of acquired rights in this case takes on a special hue. It is true that the integration creates a new State which legally replaces the other two, but—to use a metaphor—it may safely be asserted that the "substance" of the two components continues to exist therein. The new State is in this case almost the arithmetical sum of the other two, so far as rights and obligations are concerned, and if it should refuse to recognize acquired rights it would be despoiling itself, as it were, in seeking to despoil the two States to whose disappearance it owes its existence.

90. Similarly, acquired rights in the context of colonization or decolonization have a hue of their own and display some interesting special features. The reason why the practice of States and an incipient trend among judges and writers are now combining in an attempt to give the decolonized countries different treatment in the matter of State succession may well be that the reverse phenomenon of colonization likewise necessitated some special conditions in this respect.

91. Yet it is ironical to see how the same imperial Powers of the nineteenth century which, in their colonial policies, vigorously denied the existence of any rule affording protection to acquired rights—or shrugged it off in order to practice the principle of *tabula rasa* in this matter—have felt able, in connexion with the reverse modern phenomenon of decolonization, to demand the application of the same "traditional rules" that they once sought to emasculate. It is child's play for the student of politics to note that one and the same Power has shifted its position, according as it was involved in the capacity of successor State (repudiating all acquired rights in the colonial territory which it had just conquered), of third State (conversely demanding respect for acquired rights, in the context of the colonial rivalries of the time) or of predecessor State (claiming in the case of decolonization the protection of rights similar to those which it had itself previously repudiated, since in some cases it was the same territory that was involved). But to pass on from the student of politics, however, the

<sup>72</sup> Sir John F. Williams, *Chapters on current international law and the League of Nations* (London, Longmans, Green & Co., 1929), pp. 184-185.

<sup>73</sup> *P.C.I.J.*, 1934, Series A/B, No. 62.

jurist can only be taken aback and voice serious doubts concerning the soundness, or even the existence, of rules that come and go according to circumstances.

92. These variations on the single theme of acquired rights would never have been possible without the introduction of the notion of "public policy" as a criterion for the respect of such rights, which shows that the criterion of acquired rights has no substance of its own and no other function than to enable political expediency to find an appropriate frame for intervention. The reader will appreciate the irony of what Pillet wrote, early in this century, to justify the different appraisal of acquired rights according to the region involved: "In the case of the annexation of colonial peoples whom there can be no question of assimilating to the people of the metropolitan country because of the difference in social conditions, there is nothing to prevent and everything to commend the practice of drawing of a distinction between public policy in the colonies and public policy in the metropolitan country."<sup>74</sup>

93. Thus, in the case of colonization, it was possible according to circumstances to conclude that the principle of acquired rights, although recognized to be applicable to other types of succession, did not apply here. Not all confusion had been cleared away, however, and some doubts were expressed as to whether refusal to recognize acquired rights in the case of colonization was an exception to an established principle or whether it reflected the fact that no such principle existed. In the phase of decolonization, on the other hand, ambiguity is tending gradually to disappear as it is asserted with increasing confidence that acquired rights do not exist, as compensation is refused, and as compensation is paid to claimants by the former colonial Power itself.

#### A. COLONIZATION : IS THE PRINCIPLE OF ACQUIRED RIGHTS INAPPLICABLE OR NON-EXISTENT ?

94. The political position of refusing to take account of acquired rights was justified by one weak argument after another, all of them based on the inapplicability of the principle of acquired rights, whereas what this policy implied was the actual *non-existence* of such a rule. The attitude of the European States was explained by the fact that the international law they had formulated was intended to apply only among themselves and not in their relations with "uncivilized countries".

##### I. "NO STATE, NO SUCCESSION"

95. It was argued initially that the vast areas conquered by the imperial Powers were not organized into States, so that the non-existence of a State in the colonized territory justified the metropolitan country's rejection of any claim to acquired rights: no State, therefore no succession, therefore no acquired rights. For example in connexion with a British concession to build a dam on

Lake Tana in Ethiopia, the Italian Government maintained, at the time of the annexation of the Empire of Ethiopia by Italy in 1935, that principles of international law could not apply to the conquest of a backward area. In fact, Mussolini's decree of 9 May 1935 treated Ethiopia not as an empire but as a conglomeration of tribes. It was also argued that Ethiopia was unable to exploit its own resources.

96. The truth is that local sovereignties did exist, but the imperial Powers interpreted the concept of a State in accordance with their own juridical criteria and their own canons. In many cases, however, it was most embarrassing to deny the existence of a local sovereignty with which the colonial Power had regularly negotiated and whose treaty obligations may later have been invoked by the colonial Power itself.<sup>75</sup> Nor was it a comfortable position to deny the existence of State succession for the purpose of rejecting the acquired rights of the native population while accepting it for the purpose of granting the petitions of other claimants.

##### 2. "A STATE, BUT A BACKWARD ONE"

97. The next step was to fall back on the argument that a more or less feeble sovereignty existed before the colonization but that the territory was still too backward for the rules of the international law of the time to be applied to it. That is why Great Britain, for example, considered that it could not be called on to respect acquired rights in Burma because "when a civilized Government succeeds a Government like that of the Kingdom of Upper Burma, it is under no obligation to accept and to discharge, subject to the conditions imposed by civilization and good Government, the obligations incurred by its predecessor under entirely unlike conditions."<sup>76</sup> The Colonial Office admitted that Upper Burma was "an uncivilized country, and it was possible that in dealing with such a State rules more favourable to the succeeding Government could be applied than to the case where two civilized States have been incorporated with Her Majesty's Dominions".<sup>77</sup> The line of argument went somewhat astray when Great Britain refused to recognize acquired rights "because of the absolute character of the [Burmese] monarchy, and the risks ordinarily incidental to a contract with a person irresponsible in law".<sup>78</sup>

<sup>75</sup> On the question of these local sovereignties, see *inter alia*, the very interesting studies of Professor Charles H. Alexandrowicz on colonial international law and his dissertation at the Academy of International Law in The Hague: "Treaty and diplomatic relations between European and South Asian powers in the seventeenth and eighteenth centuries", *Recueil des cours de l'Académie de droit international de La Haye*, 1960 (II), pp. 203-316.

<sup>76</sup> (a) Letter from the Secretary for Upper Burma to the Secretary to the Government of India, dated 8 June 1886, cited by D. P. O'Connell, *op. cit.*, p. 359.

(a) Foot-note 76 of the mimeographed document, cited at the 1006th meeting of the Commission, has been renumbered to read 95.

<sup>77</sup> Cited by D. P. O'Connell, *op. cit.*, p. 360.

<sup>78</sup> D. P. O'Connell, *op. cit.*, p. 359.

<sup>74</sup> A. Pillet, *op. cit.*, p. 528.

### 3. INADMISSIBILITY OF ACQUIRED RIGHTS IN THE CASE OF COLONIZATION

98. A third attitude was to accept more or less explicitly the existence of a State and of a succession and to recognize the principle of acquired rights, but at the same time to reduce the field of application of that principle to cases of succession other than colonization. In other words, its non-application in the case of colonization was an exception to a rule that was otherwise considered to be well established. It would be futile to seek a juridical basis for an exception that was due primarily to political considerations: "The United States, France and Italy did not deny the existence of the general principle, but sought only to establish, in the particular cases in which they were concerned, exceptions to it."<sup>79</sup> The members of the British special commission on the concessions granted by the Transvaal Government doubted "whether the duties of an annexing State towards those claiming under concessions or contracts granted or made by the annexed State have been defined with such precision in authoritative statement, or acted upon with such uniformity in civilized practice, as to warrant their being termed rules of international law."<sup>80</sup>

99. The Berlin Conference of 1885 tried in vain to counter this practice of not respecting acquired rights in colonial cases. The imperial Powers, which were in danger of getting embroiled with each other, had envisaged a "truce", which in fact was not observed, by agreeing to the occupation of a part of the African continent by one of their number only if it set up "an authority sufficient to cause acquired rights to be respected". These literal terms of article 35 of the General Act of the Conference of Berlin<sup>81</sup> of 26 February 1885 did not in any way reflect an uncontested principle; they were an attempt to establish a conventional norm denying the inapplicability of the rule of acquired rights in the case of colonization.

100. In fact, diplomatic or judicial history does yield a number of cases in which acquired rights were respected by the colonial Power. In the *Burt Case*, known as the Fijian Land Claims Case, the Arbitral Tribunal (constituted by Great Britain and the United States) in its award of 18 August 1910,<sup>82</sup> declared that Mr. Burt had acquired from the local sovereigns of Fiji valid rights which Great Britain, as the successor State, was bound to recognize. But the efforts of the Berlin Conference were, of course, limited to the protection of the rights of third States or of their nationals and did not extend to the rights of the natives. In any event, they had no lasting effects, because there was a school of thought, more radical than all the others, which maintained that there was absolute incompatibility between acquired rights and conquest.

<sup>79</sup> D. P. O'Connell, *op. cit.*, p. 346.

<sup>80</sup> *Report of the Transvaal Concessions Commission*, 19 April 1901, Cd.623. See also D. P. O'Connell, *op. cit.*, pp. 317-318.

<sup>81</sup> See foot-note 23 above.

<sup>82</sup> United Nations, *Reports of International Arbitral Awards*, vol. VI, p. 93.

### 4. THE ANTINOMY BETWEEN CONQUEST AND ACQUIRED RIGHTS

101. The statement of reasons accompanying the French law of 6 August 1896<sup>83</sup> declaring Madagascar and its dependencies to be French colonies drew a *distinction between traditional succession and succession of the colonial type*, in order to enable France to evade its obligations with respect to acquired rights: "These principles are not strictly speaking binding on the new sovereign, since the latter *holds only from itself*<sup>84</sup> its sovereignty over the absorbed country." Consequently, "the new sovereign may regulate the exercise of its power as it wishes and is not to be regarded as the continuation of the old; otherwise the very condition of its independence would be destroyed". In fact, at the time of the annexation of Madagascar by France in 1896, the French Government had declared that it did not accept "any responsibility arising out of... concessions granted by the Government of Her Majesty the Queen of Madagascar before the signature of the present treaty."<sup>85</sup> The rights granted to British and United States nationals, including mining rights, were not recognized, despite diplomatic protests. Similarly, the concessions granted to English missionaries to build and maintain hospitals on public land were cancelled. Again, in Southern Rhodesia, when Great Britain occupied the Matabele and Mashona territories, a German businessman, Leppert, produced the concessions he had held from the local sovereign, Lobengula, since 1891. The British Privy Council ruled that Great Britain, the successor by conquest, was in no way bound by the arrangements made in that matter by the local sovereign, and denied the petitioner any compensation.

102. Needless to say, according to this way of thinking, the acquired rights of the natives enjoy even less protection. The occupation of colonial territories meant the loss not only of the independence which the indigenous population enjoyed but also of the property which it owned. A case often cited as a notable exception is that of William Penn, who, having received a grant of land from the English Crown, nevertheless paid the Indians a sum of money for the land in 1681. It is this unlimited power derived from conquest that Great Britain adduced at the time of the annexation of the Boer Republics in 1900, an episode which offers some notable precedents for the denial of acquired rights.<sup>86</sup>

<sup>83</sup> See *Journal du droit international privé*, 1896, vol. XXIII, p. 921.

<sup>84</sup> Italics supplied by the Special Rapporteur.

<sup>85</sup> From a draft treaty of cession.

<sup>86</sup> In this operation, the British Government, which cancelled all concessions previously granted, produced a variety of justifications for its action including:

(a) Precedents, especially that of France in Madagascar;

(b) The doctrine of "unneutral service" invoked against the Netherlands South African Railway Company, which had made facilities available to the Boer Government during the war;

(c) The exercise of a monopoly against the public interest (argument invoked against the Johannesburg Water Supply Concession);

(d) The fact that a conqueror is at liberty to fix the terms on which it proposes to acquire the conquered country (justification invoked against the West Rand Gold Mining Company).

The British Government was in a particularly awkward position

(Continued on next page.)

103. This denial is all the more significant in the above-mentioned case, in that it relates to "second-degree colonization", in other words, to rights acquired not from an indigenous sovereign but from a first European colonizer ousted by a second. This attitude, with its rejection of acquired rights, is to be found in other examples. When Java was ceded to the Netherlands by Great Britain in 1830, British subjects who in 1813 had received grants of real property and lands on the island from their own Government sought in vain, through four years of diplomatic discussions, to obtain from the Netherlands respect for their rights or compensation.<sup>87</sup>

104. Thus, it will readily be seen that in the case of colonization political considerations took precedence over the juridical approach to the principle of acquired rights, concerning which there was doubt as to whether the principle existed at all or whether, its existence being simply assumed, it was applicable to colonial situations. With the reverse phase of decolonization, the same parallelism of situations is to be seen, but with an intensification of the negative position, in the light of modern developments. But in both cases—colonization and decolonization—it is political expediency that has really called the tune, and this makes the task of the jurist more delicate.

## B. NON-EXISTENCE OF ACQUIRED RIGHTS IN THE CASE OF DECOLONIZATION

105. It has been noted above<sup>88</sup> that in succession by decolonization the situation is quite different from what it is in other types of succession. The latter do not, *ex hypothesi*, involve any relationships based on subordination and hierarchy, on which colonization was founded. Those relationships involve an antinomy of acquired rights and decolonization, just as in parallel fashion they caused the same incompatibility in the context of colonization.

### 1. THE ANTIMONY BETWEEN ACQUIRED RIGHTS AND DECOLONIZATION

106. Decolonization does not involve a mere nominal change of sovereignty, as in cases of traditional succession where one monarch replaced another in a given territory.

(Continued.)

in defending its actions in the case of the Transvaal concessions, because it had had at the very same time to adopt the opposite position as a claimant against the United States in the case of Spanish concessions in the Philippines and Cuba, and against France with respect to British acquired rights in Madagascar.

<sup>87</sup> It is not possible within the scope of this report to give very many examples. Suffice it to cite one more, namely, the well-known claim of the Countess of Buena Vista. Don Sebastian Calvo de la Puerta was the owner of the office, declared to be perpetual and hereditary, of *alguacil mayor* of the city of Havana, Cuba. This office, which he purchased from the Spanish Crown in 1728 and conveyed to the Countess of Buena Vista, who sold a moiety of it to a Mr. Duplessis, entitled its holder to inspect butcher's meats and to levy a tax on every head of cattle slaughtered. Upon the occupation of Cuba by the United States in 1898, these rights, which were of considerable monetary value, were not recognized (see para. 75 above).

<sup>88</sup> See paras. 89 ff.

Decolonization stands in a completely different context. The economic liberalism and substantially equivalent levels of development of the predecessor and successor States caused the economic aspects of State succession to be relegated to the background and impelled the successor to leave the inherited economic situation almost unchanged. The theory of State succession, and in particular the principle of respect for acquired rights, was developed largely on the basis of the similarity of economic conditions in the two States, whereas the situation is radically different in the case of decolonization.

107. Since the Soviet October Revolution, a feature of world affairs has been the coexistence (more or less precarious) of countries with *different social systems*. Now, however, with decolonization, a feature of international relations is the existence of States at *different economic levels*. It follows that, contrary to what occurred in cases of traditional succession, decolonization raises, perhaps for the first time, the problem of economic distortion between States. And since the predecessor State and the successor State are at different economic levels, in contrast to what was the case with the traditional form of succession, the economic importance of the problem of acquired rights becomes apparent. It is for this reason that, while in the case of other types of succession respect for acquired rights may be necessary for reasons of equity, in this case it clearly frustrates the whole development of the nation. This peculiarity cannot be overemphasized if one is to understand (and how can anyone codify without understanding?) the strength of the movements that are sweeping the world, where the real antagonism, according to Nehru, is between the industrialized and the non-industrialized. The distinctive character of decolonization results from the fact that it is accompanied in the more or less short term by *structural reforms*. This inevitably makes succession by decolonization unique, for even if we accept the principle of compensation for a few individual acts of expropriation it would be illusory to expect it actually to be applied in the case of very extensive structural reforms.<sup>89</sup>

108. Rather than the "renewing function" (*fonction reconstitutive*) of decolonization, it is its "reversing function" (*fonction inverse*)<sup>90</sup> that necessarily takes precedence, in order to put an end to the relationships based on domination. And these relationships are not just political; indeed, it may be said that they are primarily economic. Consequently, the process of decolonization is inevitably a process of gradual destruction of certain types of economic and financial relationships which helped to maintain those relationships based on subordi-

<sup>89</sup> Mr. Karl Zemanek, for instance, writes: "Thus it has perhaps never occurred in European State successions that the aggregation of privately owned estates of agricultural land achieved proportions that were contrary to the public policy of the successor State and therefore warranted extraordinary measures" ("States succession after decolonization", *Recueil des cours de l'Académie de droit international de La Haye*, 1965 (III), p. 288).

<sup>90</sup> The terms used are those of Mohammed Gharsallah: "Réflexions sur la décolonisation—Notion juridique, politique et économique" (a posthumous article summarizing an unfinished doctoral thesis), *Revue juridique et politique d'outre-mer* (Paris, 1963), No. 2, pp. 234-253.

nation. The relationship between the metropolitan country and its overseas possessions was nothing more than a particular system of exploitation known as the "colonial compact" régime. If the colonial system cannot operate without a hierarchical economic order, characterized by the predominance of the interests of the metropolitan country and of its nationals and by the existence of a structural imbalance between the colony and the metropolitan country, conversely decolonization can only be the restoration of egalitarian structures, which implies the rejection of certain economic situations resulting from the colonial régime. *Thus, it is clear that decolonization and the renewal of acquired rights are contradictory.* Either decolonization or acquired rights must be sacrificed.<sup>91</sup> The colonial compact enabled the great "dominant economies" (François Perroux) to keep themselves supplied with raw materials and foodstuffs by distorting the flow of trade to the detriment of the colonies. From the economic standpoint, colonization is rather like grafting an artificial limb on the colonized country, when a modern sector, "imported" and un-integrated, is installed in a traditional environment to which it remains alien.<sup>92</sup> The fundamental incompatibility between decolonization and acquired rights derives from the fact that the successor State is confronted with a choice, over which it cannot hesitate, between the possible equity which requires it to respect private rights and the *real* necessity which forces it to consider the public interest and national development. It was for no other reasons at bottom that the United Nations recognized the right of peoples to dispose of their natural resources and exploit them themselves, and exempted former colonies from any acquired right and from payment of any compensation.

## 2. ACQUIRED RIGHTS AND THE RIGHT OF PEOPLES TO DISPOSE OF THEIR NATURAL RESOURCES

109. The very notion of the redistribution of wealth has changed so tremendously that a mere reminder of what used to be considered "equitable" suffices to show how relative and how very fluid are the canons of international ethics. It was in the name of an "equitable" redistribution of wealth that Pope Alexander VI, by his famous bull, divided the New World between its wrangling conquerors, that the Congress of Berlin in 1885 carved anew the boundaries of empires, and that Hitler's Germany and Mussolini's Italy in the period between the two wars

called themselves "unsatisfied nations".<sup>93</sup> Today the third world, in its Charter of Algiers (November 1967), lays down for an equitable redistribution of wealth other criteria which have become more objective through the emergence as takers of countries which for centuries were the taken. In the great-Power camp also, voices are being raised against a world organized on the basis of the "hand-out economy" and in favour of a rational apportionment of resources between rich nations and poor.<sup>94</sup>

110. That the new States have the absolute, inalienable and permanent rights freely to dispose of their natural resources, as proclaimed in resolution 1803 (XVII) of the General Assembly of the United Nations of 14 December 1962, is no longer in doubt. This resolution,<sup>95</sup> which is the charter of combat of the poor against the rich and which was adopted by eighty-eight States, lays down a number of principles which constitute an impressive whole possessing considerable moral force, even if they are not yet binding legal rules. It is an instrument for the economic liberation of formerly subject peoples. Resolution 1803 (XVII) is a powerful conception expressing the contention of the proletarian peoples. It indicates the path to be followed for the achievement of binding legal rules on the lines it has laid down.

111. Paragraph 4 of resolution 1803 (XVII) formally envisages the procedure of nationalization. But is it implied that the new State will be bound, when nationalizing foreign interests, to pay the owner appropriate compensation, as that paragraph stated? It is significant that in this well-known resolution one of the preambular paragraphs—the drafting of which, it must be acknowledged, could profitably have been clearer—makes a reservation in the case of successor States "in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule". This preambular paragraph therefore excludes, in the case of successor States that were formerly colonized, the application of paragraph 4, which provides for the principle of compensation.

112. This reservation reflects a profound change which is there for all to see and which, at least in the case of former overseas possessions, has put a stop to the strict rule which efforts have been made to introduce that nationalization automatically meant compensation. Sovereignty either is or is not; its existence cannot depend

<sup>91</sup> The reference is to decolonization, and not simply to more or less formal independence: "Decolonization follows independence" (G. Fischer, *Un cas de décolonisation: les Etats-Unis et les Philippines* (Paris, Librairie générale de droit et de jurisprudence), 1960, p. 366).

<sup>92</sup> Many writers compare the modern colonial economy to an enclav economy. Philippe Kahn, referring to concession problems in a colonized territory writes: "A concession leads to the creation inside the State which grants the concession of a foreign enclave, leading its own life, much more than to integration in the local environment" ("Problèmes juridiques de l'investissement dans les pays de l'ancienne Afrique française", *Journal du droit international*, 1965, p. 383).

<sup>93</sup> G. Maroger: "La question des matières premières et les revendications coloniales—Examen des solutions proposées", Centre d'études de politique étrangère, Travaux des groupes d'études, Publication No. 4 (Paris, P. Hartmann, *édit.*, 1937).

<sup>94</sup> F. Perroux, *Economie et société—contrainte, échange, don* (Paris, P.U.F., 1960).

<sup>95</sup> It was preceded by a number of resolutions, including resolution 523 (VI) of 12 January 1952 and resolution 626 (VII) of 21 December 1952. The resolution of 21 December 1952 provides that "the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty and is in accordance with the Purposes and Principles of the Charter of the United Nations". In addition, resolution 1515 (XV) of 15 December 1960 recommends "that the sovereign right of every State to dispose of its wealth and its natural resources should be respected in conformity with the rights [...] of States".

on the capacity to pay. There is incompatibility between the concept of acquired rights and the affirmation of the *inalienable* and *permanent* right of peoples to dispose of their natural resources. If such a right is inalienable, it is inconceivable that rights belonging to anyone other than the people can arise, much less that they can have the status of inviolable acquired rights. It may be asked whether it is possible still to distinguish between the *imperium* which was the prerogative of the State and the *dominium* which was allowed to aliens for the exploitation of wealth. This distinction is a reflection of economic liberalism and is more and more out of place in modern times, when many new States cannot conceive of sovereignty without full right of ownership and without removing private macro-power from the corridors of power.

### 3. STATE MICRO-POWER AND PRIVATE MACRO-POWER

113. State succession resulting from decolonization nearly always pits against each other, "in an uncertain struggle", a weak under-developed State and powerful private interests whose propensity for dominating the life of the country is the very condition of their survival. Safeguarding the acquired rights of individuals does not mean merely respecting, as a matter of equity, the small saver who owns a few stocks and shares; in many cases, especially for a new State, it means leaving effective power in the hands of private companies and making do with a sham of power commensurate with the situation of financial dependence in which the State finds itself vis-à-vis these private companies. "Compare" writes Duroselle, "the turnover of the company with the State budget, and you will be astounded to discover how immense is the former in relation to the meagreness of the latter".<sup>96</sup>

114. These companies often began as *chartered companies*. Throughout the sixteenth and seventeenth centuries, and even up to the nineteenth century, they were the privileged instrument of colonization. It is necessary to gauge exactly what, in fact, respect for the acquired rights of such companies would mean and what obstacles to national development it would constitute, seeing that these companies were granted by the colonizing State with *some of the powers of sovereignty*, such as the right to recruit armed forces, to levy taxes and to perform acts of administration. Thus, these private companies enjoyed, as chartered companies, some of the privileges of the State and powers of government.<sup>97</sup>

<sup>96</sup> J.-B. Duroselle, "Les conflits internationaux", *Revue française de science politique*, vol. XVII, No. 2, April 1967, p. 287. Thus, the powerful Union Minière du Haut Katanga provided the Congo (Kinshasa) with 50 per cent of its public revenue and 80 per cent of its foreign exchange earnings (R. Kovar, "La 'congolisation' de l'Union Minière du Haut Katanga", *Annuaire français de droit international*, 1967, p. 744). The Iraq Petroleum Company claimed that it provided 85 per cent of the public revenue of Iraq (see B. Vernier, "La Syrie et l'Irak Petroleum", *Revue française de science politique*, vol. XVII, No. 2, April 1967, p. 304).

<sup>97</sup> Clearly, therefore, it is structurally impossible to draw a distinction between "public rights" and "private rights" in such cases. For instance, the British South Africa Company, which was created by a Charter granted by Queen Victoria on 29 October 1889, was

115. These private companies—and they are still to be found in every colony, with varying degrees of government powers—have their own methods of securing a hold not only on the territory concerned, whether or not it had become independent, and the metropolitan country. Those methods are beginning to be understood and studied by writers on political affairs, and it is now known by what means, as varied as they were effective, such groups have managed to make and unmake both local and metropolitan Governments, and thus to make and unmake the general policies of the States concerned.<sup>98</sup> This is where the root contradiction between acquired rights and decolonization is clearly seen.

116. In addition, on the economic plane, these companies continue to create "imported" sectors which in time become veritable "enclave economies", shielded from the impact of local conditions. As has been seen,<sup>99</sup> these

given wide powers in northern Bechuanaland, the northern and western Transvaal and western Mozambique to *conclude treaties, promulgate laws*, preserve the peace, maintain a police force and acquire new concessions. Thus, the chartered company "is vested with political, administrative and economic functions. It is the public and administrative authority." (G. Fischer, "La Zambie et la British South Africa Company", *Revue française de science politique*, vol. XVII, No. 2, April 1967, pp. 329-338). Even when a new agreement was reached (the Devonshire Agreement of 1923), the chartered company was accorded recognition in perpetuity of the mineral rights it owned in Northern Rhodesia. When copper was discovered, the chartered company itself granted concessions to the operating companies, which in exchange paid royalties to it. Thus, this private company symbolized the State and did not operate itself, but collected royalties.

A fresh agreement of 14 September 1950 allowed the company to retain its rights until 1 October 1996. Its rights and its income were not to be subject to any duty or tax, but it was to pay 20 per cent of its income to the Government of Northern Rhodesia. The United Kingdom undertook to respect its acquired rights so long as Northern Rhodesia remained under British sovereignty, but it also undertook to use all its powers to ensure that those same rights were respected by the successor State. In fact, the Order in Council which gave Zambia a Constitution provided for respect for acquired rights, but the provision could be amended by means of a referendum favouring such action, if approved by the National Assembly by a two-thirds majority. Such a procedure meant exposing both the private interests and the United Kingdom to an outburst of emotion on the part of the voters, and that is why such action was never taken. It will be noted, however, that in its original form this procedure went a long way towards protecting acquired rights by constitutionally preventing the executive from encroaching on them and requiring action by the people themselves and by their National Assembly before such encroachment could take place.

<sup>98</sup> See the works of writers on political affairs, including English, American, Soviet and French authors. See, for example, in addition to studies quoted above, P. Gilhodès, "La Colombie et l'United Fruit Company", *Revue française de science politique*, 1967, No. 2, pp. 307-317; N. Deney, "L'Égypte et la compagnie universelle du canal maritime de Suez", *ibid.*, pp. 293-299; J.-P. Bernard, "La Bolivie et les compagnies productrices de minerai d'étain", *ibid.*, pp. 317-329; H. Carrère d'Encausse, "Le conflit anglo-iranien 1951-1954", *Revue française de science politique*, August 1965, No. 4, p. 737; D. Wise and Th. B. Ross, *The invisible Government* (N.Y., Random House, 1964). J.-B. Duroselle (*op. cit.*) refers, *inter alia*, to the cases of Firestone in Liberia, the United Fruit Company against President Arbenz, and the Panama Company in its relations with the secessionist Revolution of 1903 which separated Panama from Colombia. R. Anaya (*Nacionalización de las minas de Bolivia*, Cochabamba, Imprenta Universitaria, 1952) shows how there arose in Bolivia a private mining "super-State", an anti-Bolivian monster, which "finances elections, appoints and deposes ministers and presidents".

<sup>99</sup> See para. 107 above.

economic structures are so linked to the colonization which produced them that it is impossible, unless the colonization itself is continued, to confer on them the sanction of inviolability. Even the juridical status of the major companies—their legal form—cannot be dissociated from the colonial structure. The demise of colonialism cannot but entail *ipso facto* the end of this status.<sup>100</sup>

117. Some writers take the view that, in these cases, not only should acquired rights not be respected by newly independent States to the point where they themselves are paralysed, but that even rights granted by those States in complete sovereignty and irrespective of any succession should be subject to review. As one author writes of some African States,

They provide too great advantages . . . . Some advantages are very great, they are indeed abnormally great. For instance, the stabilization of legislation, tax régimes of long duration. It may be asked why a State should mortgage the future to such an extent (p. 388). . . . it may be asked whether an African State is not entitled to invoke some arguments to justify its position, especially as closer investigation of the situation shows that, in addition to the pressure exerted on its will by the state of necessity (not recognized in public international law), the African countries were subject to the pressures which the major international companies were in a position to exert at the time of the conclusion of the conventions of establishment. These are companies whose economic power is very great, often greater than that of the States parties to the convention of establishment. Are there not therefore grounds for introducing an appropriate theory of invalid consent . . . ? *There should be an international economic law determining the extent to which coercion exercised against a State by a private person by reason of his economic power can provide grounds for invalidation.* . . .<sup>101, 102</sup>

This, in accordance with the principle that peoples have a *permanent* and *inalienable* right over their natural resources, newly independent States (like any others) should be recognized as having the right to denounce those commitments which in the long run would be clearly harmful to the economic development of their countries. The International Law Commission has had occasion to deal with some aspects of this subject in connexion with its work on the law of treaties, and this is not the place to reopen that discussion. It may be noted, however, that according to some recent writers excessive situations created by the successor State itself do not merit being accorded inviolability. This being so, where the acquired rights derived from similar situations were created by the predecessor State, it would be even more objectionable to impose recognition of those rights on the successor State.

<sup>100</sup> This is so in the case of all private companies, whether chartered or not, which possess sovereign privileges or government powers.

The Special Committee for Katanga, which was responsible for the fact that the Union Minière "conditioned the whole economy of the Congo" (R. Kovar, *op. cit.*, p. 748), was devised, so far as its legal machinery was concerned, directly in terms of the Belgian presence in the Congo. Various legal changes had to be made in it, unsuccessfully, immediately prior to independence, before it was finally abolished.

<sup>101</sup> Italics supplied by the Special Rapporteur.

<sup>102</sup> Ph. Kahn, "Problèmes juridiques de l'investissement dans les pays de l'ancienne Afrique française", *Journal du droit international*, 1965, pp. 338-390.

118. The purpose of these brief remarks was to indicate some of the special features of the problem of acquired rights in the case of decolonization. New conditions and specific factors are also evident in the case of compensation by the successor State after decolonization.

### C. NEW CONDITIONS AFFECTING THE PROBLEM OF COMPENSATION IN THE CASE OF DECOLONIZATION

119. It is unnecessary to recapitulate here the differences of opinion, described above,<sup>103</sup> which occur among writers in dealing with the problem of compensation in general international law, and even more in discussing that problem within the context of State succession. Such differences of opinion are bound to become more pronounced when new factors peculiar to decolonization are taken into account. These factors arise, firstly, from a reappraisal of the principle of equity on which the claim for compensation is based in the case of traditional succession; secondly from certain structural obstacles which inevitably preclude compensation; and, lastly, from the inadequacy of the theory of unjustified enrichment. For all these reasons, there has been a tendency to bypass the problem and to substitute co-operation for compensation.

#### 1. REAPPRAISAL OF THE ETHICS OF COMPENSATION

120. The moral reasons for compensation have always been emphasized in general international law and in the law of State succession, especially since no legal basis for compensation has yet been found. Equity is still the most frequently used argument. But, for ethical reasons, many newly independent countries consider that the problem of compensation is incorrectly formulated. The same arguments of equity, put to them as justifying compensation, lead those countries to reject it in the case of decolonization. In their opinion, even in the most favourable case—the apparently theoretical one in which conquest was not accompanied by the seizure of indigenous property—there are no grounds for agreeing to pay compensation on the attainment of independence, because colonization has enriched the metropolitan country and made a substantial historical contribution to the industrialization, power and prosperity of the conquering State. Consequently, according to this view, the latter has no acquired right to compensation but, on the contrary, has incurred a debt to its former overseas possession. This view was expressed in the final declaration of the Conference of Heads of State or Government of Non-aligned Countries, held at Belgrade in 1961, which maintained that the wealthy States, "whose industrialization could not have taken place without the exploitation of the colonies, were indebted to the new States".<sup>104</sup> This view is further

<sup>103</sup> See para. 81.

<sup>104</sup> Even in the nineteenth century the German economist Werner Sombart, in studying capitalism, wrote: "We have become wealthy because entire races, entire peoples have died for us: continents have been depopulated for our benefit."

substantiated by reference to the expropriation of the property of the indigenous inhabitants, which took place without compensation. According to those holding this view, the property rights derived from the innumerable expropriations, concealed more or less skilfully by legal artifices, do not entitle their possessors to claim acquired rights or to expect compensation. They ask us to consider the basic cause, the origin of these property rights, which reveals that the apparent damage of today for which reparation is claimed is itself the rejoinder to a more incontrovertible and prolonged injury of the past.

121. There is a considerable amount of mutual misunderstanding between the two camps in this connexion. The colonized pass judgement, not on the individuals whose property is affected and who may indeed merit protection, but on a general policy for which they draw up a balance-sheet that precludes the payment of any compensation because there is a balance in favour of the former metropolitan country. This global approach is opposed by the individualized reasoning of the victims, who inevitably concentrate on their own particular cases, for which they claim full compensation. In fact, it is well known that during the colonization phase individuals acquired very substantial resources without payment. Free concessions were widely granted in some territories, and even where the property was paid for, the prices were ridiculously low.

122. It is thus difficult to see how equity or the principle of unjustified enrichment could be applied in the case of such property, which is simply being returned through decolonization to the original owners who were dispossessed. This is so, for example, in the case of the property known in Moslem law as *waqf* or *habous* property—that is religious property which is inalienable and held in mortmain, the income from it being used for social, religious or charitable purposes. During the various stages of the conquest of the Moslem countries, most of the colonial Powers failed to respect the legal status of this property and, as successor States, expropriated it without paying compensation to the owners. It is difficult to see why the new successor States created by the reverse process of decolonization should be obliged to pay compensation in order to validate the recovery of this property, which was usurped—something that it is hard to forget because of the religious character of the property. The fact that this is as much a problem of public policy as of elementary equity makes the inadequacy of the theory of unjustified enrichment particularly apparent.<sup>105</sup>

123. The successor State, which sometimes abandons its global approach and meets the victim, who argues on the basis of his individual case, on his own ground, considers that, even then, the concept of “equitable” compensation must be re-examined in the case of decolonization. According to the successor State, all the profits obtained by concessionary enterprises, the re-use of which outside the territory has caused injury to the latter, should be taken into account in disputes con-

cerning compensation claims. It is also pointed out that in such cases it is not enough to refer to a traditional concept of compensation based solely on the amortization of plant, which may already have been amortized several times over, or to a concept that takes into account the amount of capital originally invested, which may have yielded a return of many times its own value. The concessions granted have been exploited intensively with high profits, so that the capital has been quickly amortized. Hence, any attempt to impose compensation for enterprises whose operations have been so profitable to their owners and so ruinous to the newly independent territory would be tantamount to providing super-profits for individuals who have already obtained the maximum profits without concerning themselves greatly about the economic development of the territory.<sup>106</sup>

124. When the moral debate concerning the equity of compensation moves to the higher level of the problems affecting the future of a whole nation, it is found that the successor State encounters certain structural obstacles, even where it is willing to pay compensation to those who have shown proof of certain acquired rights.

## 2. STRUCTURAL IMPEDIMENTS TO COMPENSATION

125. Even if it were admitted that equity makes compensation permissible and advisable, the economic and financial structures of the new country would in practice prevent payment of it. This is a phenomenon peculiar to succession by decolonization. The economies of the colonial Powers are, *ex hypothesi*, managed according to the principles of liberalism. For that reason, most of the property left in the newly independent territory has been privately owned. Land, housing, transport facilities, industry, trade, and so on belonged to private parties. Payment of compensation for all this property during the structural reforms which may be necessary in the course of decolonization would involve sums of such magnitude as to be beyond the reach even of developed countries. Payment of such compensation would almost be tantamount to repurchasing the whole country. This specific aspect of the problem should be taken fully into account, especially in the case of former “settler colonies”. The successor State would be indebted almost in perpetuity—a situation which would place an intolerable strain on its finances. No budget could bear such a burden, even if it were spread over several decades. Furthermore, in addition to its inequitable nature and its structural impossibility, this “repurchase of freedom”

<sup>105</sup> The *habous* property wrongfully appropriated by Mussolini was returned to Libya by General Assembly resolution 388 (V), of 15 December 1950.

<sup>106</sup> It should be added that the reaction of the newly independent countries has sometimes been to oppose claims for compensation with counter-claims based on the tax evasion attributed to private companies. The Congo claimed 4,000 million Belgian francs from Union Minière in respect of taxes and duties for the period of the secession of Katanga. Although this example concerns refusal to pay taxes rather than tax evasion, it is nevertheless significant. The following examples, although taken out of context, are also significant: when the Bolivian tin companies were nationalized, they claimed \$60 million, while the Bolivian State claimed \$485 million in respect of tax evasion; the United Fruit Company, which had such power in Colombia that it could frustrate the State's right to inspect its accounts by refusing to allow the Colombian tax authorities to carry out any investigation, was prosecuted for tax evasion.

would be regrettably reminiscent of the period when colonies were objects of commerce and were bought and sold. Moreover, the process would involve massive transfers resulting either from the payment of compensation or simply from "disinvestment", on so vast a scale that it would inevitably ruin the economy of the successor State. Because decolonization implies structural upheavals, claims for transferable compensation place the newly independent country in an especially difficult position. From the point of view of the owner of the property, respect for his right of ownership is not enough; the possibility of transferring profits and capital is of fundamental importance to him. Yet, whatever the goodwill of the newly independent successor States, they are faced with the absolute necessity of balancing monetary transfers and cannot allow an outflow of capital resulting from substantial disinvestment without irremediably jeopardizing their economies. Furthermore, experience has clearly shown that a successor State which gives the predecessor State an undertaking to permit the free movement of capital will find it very difficult to maintain that freedom indefinitely.

126. To raise the discussion to a higher plane, we feel that there is even more reason to apply to the successor State the principle which is accepted in the case of any State that finds itself in difficulties. This principle was formulated as follows in the Turkey-Russia arbitral award of 11 November 1912: "International law must adapt itself to political necessities. The Imperial Russian Government expressly admits (Russian reply, p. 33 and note 3) that the obligation of a State to carry out treaties may give way 'if the very existence of the State should be in danger, if the observance of the international duty is... self-destructive'."<sup>107</sup> The United States, for example, wisely recognized this principle, even as a creditor, when it stated in its reply to a British note of 1 December 1932: "Nor does the principle of the capacity to pay require the foreign debtor to pay to the full limit of its present or future capacity. *It must be permitted to preserve and improve its economic position, to bring its budget into balance, and to place its finances and currency on a sound basis, and to maintain, and if possible, to improve the standard of living of its citizens.*"<sup>108</sup>

127. It has been pointed out that the acquired right to compensation is very fragile,<sup>109</sup> since a solid foundation has still not been found for it. It was believed that the duty to pay compensation could be justified by the doctrine of unjustified enrichment. This doctrine, which has been carried over from municipal private law, is

open to methodological objections based on the principle of such transposition. Above all, however, it is largely inapplicable in the case of succession resulting from decolonization.

### 3. INADEQUACY OF THE THEORY OF UNJUSTIFIED ENRICHMENT

128. First of all, from the technical point of view it is difficult, if not impossible, to prove (a) that the successor State has been enriched, (b) that the enrichment took place at the expense of the claimant, and (c), that the enrichment is unjustified.

129. It will be clear from the brief references above<sup>110</sup> to chartered companies and colonial companies that it would be pointless, unjust and sometimes incongruous to apply the theory of unjustified enrichment in their case. For example, it is difficult to see on what the British South Africa Company could base its claim for compensation from the Zambian Government. Through an anachronistic survival of institutions and concepts which were not only colonial but feudal, this company held the rights to all the ores which had been or might be discovered in Zambia. Under the agreements of 1923 and 1950 with the United Kingdom Government, it was permitted not only to make no investments (the expropriation of which *might* have justified the payment of compensation) but even to refrain from any work or activity on its own account. In lieu of the State, it possessed the unconscionable privilege of granting concessions to operating companies, receiving royalties in exchange. It thus enjoyed what one author has rightly called the "status of a *roi faiméant*" and "did nothing for itself except collect income."<sup>111</sup> This is one example among many to show that, although the theory of unjustified enrichment may be applicable, it should be applied not to the successor State but to the possessors of this kind of "acquired right"; it was really the company which was unjustifiably enriching itself.<sup>112</sup>

130. In a rather similar connexion, it may also be noted that the theory of unjustified enrichment makes little sense where, for example, the successor State nationalizes without compensation *public services which show a deficit*. In this case, the non-renewal by the successor State of concessions granted by the predecessor State to private companies has a special purpose, namely, the transfer to State ownership of enterprises which are clearly of public utility but are operating at a loss because the cost of their development cannot be met by increasing charges to the public for electricity, transportation, etc., since this is considered undesirable. In this case the successor State would find it difficult to maintain the

<sup>107</sup> Carnegie Endowment for International Peace, *The Hague Court Reports* (New York, Oxford University Press, 1916), pp. 317-318.

<sup>108</sup> Quoted by G. Jèze, *op. cit.*, p. 392. For English text see *British and Foreign State papers*, 1933, vol. CXXXVI, p. 892.

<sup>109</sup> If the problem of acquired rights is reduced to that of compensation, one problem that has not been studied is the following: if the predecessor State acknowledged its liability to pay compensation for acquired rights but did not pay it before its demise, does the successor State assume liability for that compensation or for compensation in lieu of it?

<sup>110</sup> See paras. 113 ff.

<sup>111</sup> G. Fischer, *op. cit.*, p. 332.

<sup>112</sup> It was argued that the expropriation of the British South Africa Company would harm the credit of the future State, Zambia, and discourage private investment. However, it was difficult to argue that the credit of the State made it necessary for Zambia to continue sharing concession rights derived solely from its own sovereignty with a company which was not only foreign but privately owned. It was scarcely conceivable that the expropriation of a company not concerned with investing could discourage investment.

acquired rights—that is, to renew the concession—for it would then be called upon to *subsidize foreign companies*, a course which might be unpopular with the taxpayers. This explains the nationalization of certain public utilities in Tunisia, for example.

131. Again, how could compensation be paid for rights acquired during what the Special Rapporteur described in his first report as the *période suspecte*;<sup>113</sup> that is to say, rights which were admittedly acquired legally according to the legislation of the predecessor State but were obtained hastily just before independence under *ad hoc* regulations, with the obvious aim of reducing or *impoverishing* the patrimony of the successor State? If the theory of unjustified enrichment were to be applied, it would in this case be applicable not to the successor State but to the predecessor State, which had tried to impoverish its successor. A typical case of rights acquired during the *période suspecte* is that of the Union Minière du Haut Katanga.<sup>114</sup> Shortly before the Congo became independent, a Belgian Act of 17 June 1960 gave Belgian companies incorporated under colonial law the option of transferring their head offices to the Congo and being subject to Congolese law or of placing themselves under Belgian law while maintaining operational offices in the Congo. This Act was designed to remove the Union Minière, which naturally opted for Belgian law, from the control of the new Congolese authorities. The Special Committee for Katanga, which had set up the Union Minière and in which the Belgian State held a two-thirds majority, was dissolved only a few days before independence so that the two-thirds majority would not pass to the Congolese successor State. The dissolution was not recognized by the Congolese Government, which, after adopting a Constitution that protected the nation's rights over its natural resources,<sup>115</sup> proceeded to dissolve the Committee for a second time, without compensation, by a Decree of 29 November 1964. After many vicissitudes and the conclusion of the Belgian-Congolese Agreements of February 1965, which remained a dead letter, an agreement between the Congolese Government and the Union Minière, which did not provide for compensation, was signed on 15 February 1967.<sup>116</sup>

<sup>113</sup> *Yearbook of the International Law Commission, 1968*, vol. II, document A/CN.4/204, p. 104, paras. 68 and 69.

<sup>114</sup> The case which may be cited as an example in the context of traditional succession is the *Chorzow Factory Case* [*P.I.C.J.*, 1928, Series A, No. 17]. In June 1922 Poland extended to Upper Silesia, which it had regained from Germany, the operation of a Polish law declaring void certain rights created or alienated by the *Reich* during the *période suspecte*, between the Armistice and the actual transfer of sovereignty.

<sup>115</sup> The Constitution of 1 August 1964 protects private property, but paragraph 4 of article 43 provides by way of exception that "the legal status of transfers and grants of land made before 30 June 1960 shall be finally determined by a national law". This was the law known as the Bakajika law (from the name of its sponsor), "Legislative Ordinance No. 66-343 of 7 June 1966 restoring to the Congo all land, forest and mining rights granted to any individual or body corporate, whether in full ownership or on a joint basis, before 30 June 1960..." (art. 1) [*Moniteur Congolais*, Kinshasa, No. 15, 15 August 1966, p. 560].

<sup>116</sup> According to the Chairman of the Union Minière, the property seized was worth about 40,000 million Belgian francs. However, the Union minière, the "corpse which is alive and well" (*Le Monde*, 14 February 1967, p. 5), "continues to play an important role in the economy of the Congo" (R. Kovar, *op. cit.*, p. 775).

132. Lastly, on a more general plane, it is argued that the theory of unjustified enrichment is completely inapplicable because enrichment can be considered legitimate in the case of decolonization; it is not unjustified, since it constitutes compensation for the exploitation of the territory during the preceding decades.

133. Because the question of compensation presents so many difficulties, not to say, intractable problems, there is a growing tendency to *bypass* it, reflected in the preference for *global settlements* and in the *substitution of co-operation for compensation*. Co-operation performs a dual function here, its main function being to provide for a measure of continuity—a notable feature of which is the preservation of acquired rights—while its secondary function is to help to mitigate the effects of measures for the confiscation of those rights where they cannot be respected.

#### 4. BYPASSING THE PROBLEM OF COMPENSATION: GLOBAL SETTLEMENTS AND CO-OPERATION

134. When the successor State pays compensation, it does so for reasons in which political expediency plays a certain role. It is rarely commensurate with the damage sustained. There is a growing tendency to adopt a global approach to the problems and a "lump-sum" approach to compensation. The predecessor State and the successor State settle their differences on a global basis by subrogating themselves to their nationals. Nationals of the predecessor State are paid compensation by their own State. The global, lump-sum nature of the financial settlements, which involve a number of factors unrelated to a precise inventory of the property concerned or to a purely financial evaluation of the problems, shows that the theory of unjustified enrichment is outdated, if indeed it was ever applied in a consistent manner which would confirm its existence as a rule of international law. By its very nature, the concept of a settlement which is both global and lump-sum and involves political factors of all kinds excludes the concept of unjustified enrichment *stricto sensu*.

Compensation is only one of the factual elements in a vast economic and financial transaction. This transaction is often arranged within a specific context, namely, that of co-operation. The metropolitan Powers, anxious to retain a measure of influence in the spheres which interest them, or at least to mitigate or postpone the shock of structural upheavals, bypass the problem of compensation by setting up a system of co-operation which takes the form, *inter alia*, of *financial aid* to the successor State. Since it is difficult to offer money with one hand and demand it with the other, the provision of financial aid to some extent precludes the payment of compensation. The aid is granted in order to induce respect for acquired rights—in other words, in order to avoid from the outset any violation of those rights that would raise the problem of compensation.

5. LAW IN THE PROCESS OF FORMATION: UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 1803 (XVII) AND NON-COMPENSATION

135. We conclude this rapid survey of the question by referring to what was said above<sup>117</sup> regarding the various resolutions of the United Nations General Assembly concerning the absolute, inalienable and permanent right of peoples over their natural resources and their wealth. In one of the preambular paragraphs of General Assembly resolution 1803 (XVII) of 14 December 1962, the right to compensation in the case of succession by decolonization was excluded. The United Nations thus showed its awareness of the special nature of succession in the case of newly independent States and indicated the course to be followed in the work of codification and progressive development of international law, with a view to arriving at a positive law of non-compensation.

136. The fact is that, despite numerous precedents to the contrary, non-compensation has acquired a force which the jurist must take into account. Some salient aspects of this practice are indicated below, although the Special Rapporteur has not aspired to be exhaustive or attempted to draw up a summary of cases and decisions, which would be tedious, nor does he deny the existence of practice to the contrary.

D. REJECTION OF ACQUIRED RIGHTS AND OF COMPENSATION IN DECOLONIZATION PRACTICE

137. An initial observation is called for. In his preliminary report, the Special Rapporteur noted that, since decolonization was a phenomenon inclined to rapid development and the relations between the former metropolitan country and the new State might very soon become different from what they should have been if the agreements had been respected for a long time, the International Law Commission could not concern itself with abortive or precarious solutions.<sup>118</sup> Thus, if we eliminate the unambiguous case in which the agreements preclude or do not provide for the payment of compensation, we are left with the case of agreements which clearly make the successor State responsible for the payment of compensation. But the problem is then to determine whether we should base our reasoning on the solutions provided for in the documents without ascertaining whether they have in fact been applied. In the opinion of the Special Rapporteur, it is not possible to speak of State practice with regard to compensation where the agreements providing for such compensation have remained a dead letter. "... the enormous amount of work which went into the agreement between the Netherlands and Indonesia makes a strange contrast with the utter *de facto* sterility of this effort; the most explicit, comprehensive and detailed of decolonization agreements is also the one which has remained most

completely a dead letter."<sup>119</sup> Consequently, only the *actual* practice of States will be taken into account.

138. The important dispute between the Congo (Kinshasa) and the Union Minière du Haut Katanga was the subject of a number of decisions. A legislative decree adopted by the Tshombé Government on 29 November 1964, to which was prefixed a statement of reasons constituting a veritable legal dissertation on State succession, made no provision for compensation for Belgian interests. A few months later, in February 1965, the same Government signed an agreement which reversed the decisions of the legislative decree of 1964 but which was itself called in question by the Mobutu Government. The statement of reasons prefaced to a 1966 Ordinance<sup>120</sup> stated:

The land, forest and mining rights which the colonial companies seek to retain by virtue of agreements concluded between them and the "Independent State of the Congo" or "the Colony of the Belgian Congo" from 1891 to 29 June 1960 *do not constitute acquired rights and are not enforceable against the Congolese State*. . . . The successor State is not bound by the acts of its predecessor. . . . The most unassailable right of all, that of immovable property, must yield if it is contrary to the public interest. . . . The new States have a greater moral freedom—their legal authority being unquestionable—to impose on private property the bases, limitations and regulations called for by public utility and the general interest, which must be placed above private interests. . . . Under the juridical order of the new Congolese State, no individual or body corporate may claim to retain any property rights over portions of the national territory or over the substance of the subsoil that may have been granted before 30 June 1960.

The statement of reasons ends with a second, equally emphatic denial of acquired rights and of any compensation: "All rights of these companies shall revert to the State *unconditionally and without any compensation*. . . [because] the chartered companies were authorized by the Power which established them to acquire settlement rights without payment, to the detriment of the indigenous population." Finally, a new agreement between the Mobutu Government and the Union Minière du Haut Katanga was signed on 15 February 1967. It made no provision for the payment of compensation.<sup>121</sup>

139. Indonesia repudiated its external debt as soon as it became independent. After the events of 1957, it was decided to abolish all rights pertaining to individual citizens of the Netherlands. On 8 October 1958, Indonesia justified this step by stating that during the period 1950-1956, it had made every effort to fulfil the financial and economic obligations which had been imposed on it. It referred in particular to the problem of West Irian, explaining that the only reason why it had agreed to assume substantial successional obligations was because the 1949 Round Table Conference Agreement had given

<sup>119</sup> P. Moussa, *Cahiers de la Fondation nationale des sciences politiques*, No. 131, 1964, p. 171.

<sup>120</sup> Ordinance No. 66-413 of 8 July 1966 implementing Ordinance No. 66-343 of 7 June 1966, known as the "Bakajika law", which assured the Congo of "its full rights of ownership over its domain and complete sovereignty with respect to the transfer and grant of land, forest and mining rights throughout its territory".

<sup>121</sup> See para. 131 above.

<sup>117</sup> See paras. 109 ff.

<sup>118</sup> *Yearbook of the International Law Commission*, 1968, vol. II, document A/CN.4/204, p. 100, para. 35.

it hope of the return of West Irian.<sup>122</sup> On 31 December 1958, Indonesia adopted a nationalization law confirming the steps which had been taken. When West Irian was incorporated into Indonesia, the agreement of 15 August 1962 stated that the successor State would honour only those acquired rights which were "not inconsistent with the interests and economic development of the people of the territory".<sup>123</sup> The inevitable effect of this important provision was to deprive acquired rights of their substance.

140. In Ghana, a commission was established after independence to examine the question of concessions. In the report which it submitted on 31 December 1958, it noted the existence of 527 concessions granted to United Kingdom, South African and Netherlands companies. The Commission concluded that acquired rights should be rejected. It observed that those who had granted the concessions, being illiterate, had not understood the full significance of the instruments, which the concessionaires themselves had drawn up in their own interests. The consideration was illusory and the profits excessive. The Ghanaian Government endorsed the Commission's report and enacted three laws in 1962. Two of these laws provided for the straightforward return of all the country's natural wealth and all common land to the public domain of the Ghanaian State.<sup>124</sup> The third law,<sup>125</sup> which regulated the concession system and, as recommended by the Commission, established a special tribunal empowered to cancel any concession or to vary its terms, provided (in article 5) for the possible cancellation of any concession held by an alien if it was or might prove *prejudicial to public safety or interests*.

141. The practice of non-compensation was quite widespread in North Africa, especially in the case of land.<sup>126</sup> In Algeria, land belonging to aliens was nationalized by the Decree of 1 October 1963. Since compensation was precluded, the only problem was the reimbursement of farming costs incurred in respect of the current harvest. These costs were met by the predecessor State from the funds earmarked for French aid to Algeria. In the Evian Agreements of 19 March 1962, which provided for respect for acquired rights, France had given its prior approval to any land reform that the Algerian Government might decide to introduce and had agreed to assist in its execution. Acquired rights relating to hydrocarbons, based on the Saharan Petroleum Code

which predated independence, underwent far-reaching but none the less negotiated changes. Vacant real property used for housing or for purposes of tourism, handicrafts, commerce or industry was first placed under State protection and then nationalized, usually without compensation. The subsequent negotiations between Algeria and France led to a comprehensive financial settlement, which bore very little relation to the value of the property.<sup>127</sup> In Morocco, an agreement concluded on 24 July 1964 made France responsible for the greater part of the compensation paid to its own nationals. On 12 May 1964, Tunisia nationalized all land which had remained in the possession of aliens and made any compensation somewhat illusory by affirming the principle of the non-transferability of compensation. In 1958 La Goulette power station, which supplies the capital with electricity, was nationalized, likewise without compensation.

142. In the Democratic Republic of Viet-Nam, France did not succeed in ensuring respect for its acquired rights when the Yunnan Railways were nationalized. The payment of retirement pensions to French personnel was soon terminated.

These and other precedents sometimes force the predecessor State itself to assume responsibility for the payment of compensation to its nationals.

#### E. THE TREND TOWARDS COMPENSATION BY THE PREDECESSOR STATE

143. There seems to be a gradually increasing tendency to make the predecessor State, and not the successor State, responsible for payment of compensation in respect of measures by the new sovereign which affect the patrimonial rights of aliens. This solution mitigates the effects—which are sometimes grievous to the individual—of the accession of colonized peoples to political and economic independence. Any major upheaval such as that which results from the substitution of one sovereign for another, and particularly from a change in economic structures, inevitably affects the situation of individuals. In view of the extent of the damage unavoidably sustained by private persons, the latter turn to the former colonial Power, claiming, if necessary, that it bears the responsibility. The former metropolitan countries are beginning, somewhat hesitantly, to take the course of paying more or less full compensation to their nationals.

<sup>122</sup> Once again it will be noted that respect for acquired rights was not imposed on the strength of the existence of a legal rule, but resulted from a global transaction of a political nature.

<sup>123</sup> United Nations, *Treaty Series*, vol. 437, p. 284.

<sup>124</sup> Ghana, GP/A 1726/4, 596/6/61-62, Accra, Government Printing Department, Minerals Act, 1962 (Act No. 126) and State Lands Act, 1962 (Act No. 125).

<sup>125</sup> *Ibid.*, Concessions Act, 1962 (Act No. 124).

<sup>126</sup> In North Africa, the land was taken from the indigenous inhabitants by somewhat irregular procedures which have been described by many authors. The question of land, which was important to the colonists in these settler colonies and also to the indigenous farmers, who were deeply attached to the soil, served for decades as a constant spur to the struggle waged by the nationalist movements. It was somewhat unrealistic to assume that, after independence, compensation would be paid for lands which the North Africans considered had been returned to their lawful owners.

<sup>127</sup> The arguments used by Algeria in support of its refusal to pay compensation included the fact that it could not repay investments when the corresponding income no longer existed; that it could not assume responsibility for debts arising from agriculture of the French type (vineyards) when it had been obliged to uproot 400,000 hectares of vines and to convert the vineyards to other uses because there was no market for their output, owing to the closing of the French market, which had been the only customer; and that the respective obligations of the two parties were not balanced.

### 1. THE EXPERIENCE OF FRANCE

144. French municipal law, for example—which in this context mainly reflects a concern for the rehabilitation and reabsorption of individuals repatriated from the former French dependencies—has made certain concessions to this trend and is taking the first steps towards the establishment of a system for the payment of compensation by the predecessor State. This is the purpose, for example, of the Act of 26 December 1961, article 4 of which provides that “a special law shall determine, in the light of the circumstances, the amount of compensation and the procedures for its payment in cases where dispossession and losses have been definitively established”.<sup>128</sup> The Act contains a commitment to provide compensation for the injuries suffered by the overseas French. This new principle, which is emerging slowly from the mists of still hesitant legislation, has been applied even in the context of co-operation between the predecessor State and the successor State. This policy of co-operation includes the granting of financial aid to the successor, and the predecessor State sometimes deducts from such aid an amount equivalent to the compensation it is to pay to its repatriated nationals.

### 2. THE EXAMPLE OF THE UNITED KINGDOM

145. When the Federation of Rhodesia and Nyasaland was dissolved in 1963, the Rhodesian Government contended that the United Kingdom was responsible for the payment of the federal debt. A clearer example, however, is provided by Zambia's abolition of the rights of the British South Africa Company. The United Kingdom paid the chartered company £2 million.<sup>129</sup>

### 3. THE COLONIAL LOANS OF IBRD

146. Lastly, it may be noted that the International Bank for Reconstruction and Development, in its Loan Regulation No. 4,<sup>130</sup> stipulates that the metropolitan country shall guarantee loans granted to dependent Territories. The guarantee is always provided by the Power of which the Territory granted the loan is a dependency. This system has the effect of negating the principle of the localization of debts. In particular, it means that when the Territory becomes independent, two States are legally responsible for payment of the debt—the successor State as the principal debtor, and the predecessor State as the guarantor. For example, IBRD called upon Belgium, as the contractual guarantor, to settle the debt not paid by the Congo.

147. In short, the course of development may be outlined as follows: at the outset, the successor State was held to be the only debtor, but this concept was replaced by another, according to which the successor State and the predecessor State were held to be jointly responsible for

payment of the debt. Now there is a growing tendency to regard the predecessor State as solely responsible for the payment of compensation to its own nationals. However, this is not a rule common to the municipal law of all the former metropolitan countries, much less a rule of international law.

### Conclusion

148. The concept of acquired rights is not only indefinable and full of ambiguities, but also ineffective. International law has not raised it to the status of a principle. It is largely influenced by political considerations. Where legislation is amended without a change of sovereignty, acquired rights have certainly not always been respected, and where they have, it has been for reasons unconnected with law. The same tendency to ignore acquired rights is clearly present in the case of State succession. In this context, however, the legal aspect becomes more obscure and acquired rights seem more indefinable and incongruous. If the predecessor State can free itself from rights which it has itself created, why should those rights be binding upon the successor, which has had no part in their creation? The change of sovereignty, which has given rise to discontinuity by the very fact of the existence of two different, independent juridical orders where there was previously only one, results in a hiatus and the extinction of pre-existing rights.

149. The theory of acquired rights cannot be salvaged by contending that it has two different aspects—the inviolability of legal situations created under the preceding juridical order, and the simple right to compensation—for this distinction has wrecked the whole theory. It is gratifying to note that the only point relating to this very complex subject on which there is unanimity—complete agreement among all writers, borne out by consistent diplomatic and judicial practice—is that the existence of acquired rights has never implied the inviolability of existing situations or the impossibility for a State, whether a successor or not, to undertake any reform it considers desirable. It was necessary to concede that the inviolability of existing situations was not an argument that could be invoked against the State: for to deny the latter the power to take such measures as it deemed essential in the general interest would seriously impair its sovereignty. However, if there has never been an acquired right to the maintenance *ne varietur* of a given situation, the theory of acquired rights is useless. In any case, it does not provide a completely satisfactory explanation, since a basis would still have to be found for the theory itself; otherwise, the obligation to respect acquired rights would be justified tautologically by the theory of acquired rights.

150. The search for a basis for the theory reveals two possibilities. The first establishes a close link between the successor State and the predecessor State and bases the obligation to respect acquired rights on the transfer of sovereignty itself. Those who hold this view thus clearly endorse the idea of continuity, without substantiation, in a case where *a priori* the change of sovereignty

<sup>128</sup> France, *Journal Officiel de la République française* (Paris, 28 December 1961), 93rd year, No. 304, p. 11997.

<sup>129</sup> A similar amount was paid to the company by Zambia.

<sup>130</sup> Loan Regulation No. 4, applicable to loans made by the Bank to borrowers other than member Governments.

should logically entail rupture as a result of the creation of a new juridical order. The supporters of this view reason as though the two juridical orders were not independent of each other and contend that the obligation created under the one exists anew under the other, without giving a satisfactory explanation for this phenomenon. They simply assert that the obligation is transmitted, together with the sovereignty, to the successor State.

151. According to the second view, which seeks to provide a more satisfactory explanation, the obligation is not transferred as such to the succeeding juridical order, but is transformed into an *international* obligation on the successor State. More specifically, since the internal juridical orders of the two States do not provide grounds for the transfer of the obligation, the latter can survive only on the basis of a third order, the international juridical order. The latter would, according to this view, impose on any successor State an international rule of respect for acquired rights. According to this view, the obligation of the predecessor State does not survive, but is replaced by an international duty deriving solely from international law. Thus, the immutability of pre-existing *situations*, derived from a former non-transmittable obligation, would not be imposed, but a new international duty would be created which would merely place on the successor State *an obligation to pay compensation*. However, it has not been possible to prove the existence of such a rule of international law.

152. This brings us back to the other position, which reduces the theory of acquired rights to the obligation to pay compensation. But if, as has been agreed, the rule of the inviolability of situations does not exist, there is no basis for the rule of compensation. Where legislation is amended without a change of sovereignty, the obligation to pay compensation *necessarily derives* from encroachment on an acquired situation and corresponds to the payment of damages. In municipal law, the one (the obligation to pay compensation) can be justified only by the other (failure to fulfil an obligation to maintain acquired situations). The one is thus supported by the other. This reasoning may be applied *a fortiori* in the case of State succession. If in the intertemporal municipal law the existence of an obligation to pay compensation depends upon the presence of a link, the absence of that link in the law of State succession, where it is in fact acknowledged that there is no rule relating to the *maintenance* of acquired situations, leaves the alleged obligation to pay compensation without foundation or support.

153. Thus, the theory of acquired rights is useless and explains nothing. Furthermore, it somewhat paradoxically creates uncertainty where it seeks to provide stability. To impose acquired rights in economic and financial matters on countries which subscribe to collectivist

doctrines, or even on the developing countries in general, is a course which, it has been noted, "will in the end neither help to preserve private property nor strengthen the power of international law".<sup>131</sup> This course leads many States to question the rules of international law without providing better protection for private rights. Similarly, to limit the right to nationalize by capacity to pay is not as equitable or as wise as is sometimes thought. The right to nationalize is an attribute of sovereignty. Sovereignty either is or is not. It cannot be held to depend on a capacity to pay. This position would, in any case, imprison the newly independent countries in the vicious circle of poverty: they cannot nationalize because they are poor, and they remain poor because they cannot nationalize. This theory may be ultimately self-defeating, for by making the smaller successor States more aware of the impasse in which it imprisons them, it accelerates the tendency to refuse compensation.

154. Cavaglieri, as Rapporteur of the 1931 Cambridge session of the Institute of International Law, felt able to conclude:

Consequently, we cannot accept as a general rule of law the principle supported by several writers, namely, that the annexing State should respect the rights acquired by third parties under the legislation of the extinguished State. The dissolution of this legislation logically entails the dissolution of claims based on it, unless the annexing State recognizes them wholly or partially by maintaining the legislation on which they depend, in so far as they are not contrary to its interests and its legislation relating to public policy. Thus, there is no general obligation to protect acquired rights, deriving from the principles of international law relating to State succession, but a recognition the effectiveness and extent of which depend entirely on the free will of the annexing State.<sup>132</sup>

155. Hence, acquired rights are respected only if the successor State so wishes, or if its competence is limited by treaty. Even in the latter instance some writers consider, at least in the case of decolonization, that the excessive advantages granted more or less freely by the new State give it the right, in the light of its urgent development needs, to repudiate its commitments, not only on the basis of the theory of treaties but even on that of State succession.<sup>133</sup>

156. However, the competence of the successor State is clearly not unlimited. Its actions should always be consistent with the rules of conduct that govern any State; for it is, first and foremost, not a successor State, but a State—in other words, a subject having, in addition to its rights, international obligations the violation of which would engage its international responsibility.

<sup>131</sup> Sir John F. Williams, "International law and the property of aliens", *British Yearbook of International Law*, 1928, p. 22.

<sup>132</sup> *Annuaire de l'Institut de droit international*, Session de Cambridge, juillet 1931, vol. I, p. 196.

<sup>133</sup> See para. 117 above.

# STATE RESPONSIBILITY

[Agenda item 3]

## DOCUMENT A/CN.4/208

Supplement, prepared by the Secretariat, to the "Digest of the decisions of international tribunals relating to State responsibility"

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### CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
INTRODUCTION . . . . .		102
I. ORIGIN OF INTERNATIONAL RESPONSIBILITY . . . . .	1-14	102
1. General . . . . .	1-3	102
2. International wrongful act . . . . .	4-11	102
3. Causation . . . . .	12-14	105
II. IMPUTABILITY . . . . .	15-24	105
1. General . . . . .	15-19	105
2. Excess of competence and erroneous acts . . . . .	20	106
3. Fraudulent acts . . . . .	21	106
4. Acts of <i>de facto</i> local government . . . . .	22-24	106
III. CIRCUMSTANCES IN WHICH AN ACT IS NOT WRONGFUL . . . . .	25-27	107
1. Self-defence . . . . .	25	107
2. War measures . . . . .	26-27	107
IV. EXHAUSTION OF LOCAL REMEDIES . . . . .	28-29	108
V. LEGAL INTEREST OF CLAIMANT . . . . .	30-39	109
1. General . . . . .	30-32	109
2. Nationality . . . . .	33-37	109
3. Companies . . . . .	38-39	110
VI. EXTINCTIVE PRESCRIPTION AND WAIVER . . . . .	40-46	110
1. Extinctive prescription . . . . .	40-41	110
2. Waiver . . . . .	42-46	111
VII. FORMS AND EXTENT OF REPARATION . . . . .	47-57	112
1. General . . . . .	47	112

## CONTENTS (continued)

	Paragraphs	Page
2. Monetary compensation . . . . .	48-57	112
(a) General . . . . .	48-49	112
(b) Punitive damages . . . . .	50	112
(c) Indirect damages, including loss of profits . . . . .	51-55	112
(d) Interest . . . . .	56-57	113

### Introduction

To assist the International Law Commission in its work on the question of State responsibility, the Secretariat has prepared the following supplement to the "Digest of the decisions of international tribunals relating to State responsibility".<sup>1</sup> It covers the relevant aspects of the decisions of the International Court of Justice since 1964 and of other international tribunals whose awards are contained in volumes XII-XVI of the *Reports of International Arbitral Awards*.

The material has been arranged under subject headings which follow as closely as possible the outline programme of work approved by the Commission in 1963<sup>2</sup> and 1967.<sup>3</sup>

## I. ORIGIN OF INTERNATIONAL RESPONSIBILITY

### 1. General

1. In the *Armstrong Cork Company case* (1953) (Italian-United States Conciliation Commission),<sup>4</sup> the company's claim arose from the action of the Italian Government in recalling on 6 June 1940, the vessels of the Italian merchant marine. The Commission, first, quoted with approval the following passage from Strupp in *Das Völkerrechtliche Delikt* (1920):

One must consider as illicit actions . . . producing the responsibility of those performing such actions and allowing the State which has suffered or whose subjects who have suffered damage to demand reparation, all actions of a State which are in contradiction with any rule whatsoever of international law.<sup>5</sup>

and, second, reaffirmed that

The responsibility of the State would entail the obligation to repair the damages suffered to the extent that said damages are the result of the inobservance of the international obligation.

<sup>1</sup> See *Yearbook of the International Law Commission, 1964*, vol. II, document A/CN.4/169, p. 132.

<sup>2</sup> See *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, p. 224, para. 54.

<sup>3</sup> See *Yearbook of the International Law Commission, 1967*, vol. II, documents A/6709/Rev.1 and Rev.1/Corr.1, p. 368, para. 42.

<sup>4</sup> *Reports of International Arbitral Awards*, vol. XIV, p. 159.

<sup>5</sup> *Ibid.*, p. 163.

2. The claimant in the *Wollemborg case* (1956) (Italian-United States Conciliation Commission)<sup>6</sup> argued that, in terms of the Italian Peace Treaty, he should be exempted from certain Italian taxes. In argument the parties discussed at length certain questions of Italian tax law. The Commission refused to enter into these questions since "One thing is certain: the Italian Government cannot avail itself, before an international court, of its domestic law to avoid fulfilling an accepted international obligation". The Commission referred to three decisions of the Permanent Court of International Justice to this effect.<sup>7</sup> See similarly the *Flegenheimer case* (1958),<sup>8</sup> decided by the same Commission.

3. See also the *Différend S.A.I.M.I. (Società per azione industriale marmi d'Italia)* (1948); the *Différend Guillemot-Jacquemin* (1948); and the *Différend Société Verdol* (1949)<sup>9</sup> where the French-Italian Conciliation Commission held that, under a well-known principle of international law, the international jurisdiction set up by a treaty prevails over municipal jurisdiction: any municipal proceedings must be discontinued, and any judgement given could be ignored. Similarly, in the *Différend Dame Mossé* (1953)<sup>10</sup> the French-Italian Conciliation Commission held that it was not necessary for it to determine whether the claimant had a right of action under Italian law:

Apart from the repercussions of one juridical system upon the other, each of them—in this instance, the international juridical system—appears to be autonomous (Morelli, *Nozioni di Diritto internazionale*, p. 77).

The Commission then went on to consider the merits of the claim.

### 2. International wrongful act

4. In the *Rosa Gelbrunk claim* (1902),<sup>11</sup> the property of the claimant's predecessors in title (who were also United States nationals) was looted by soldiers of an El Salvador revolutionary army. There was no proof

<sup>6</sup> *Ibid.*, p. 283.

<sup>7</sup> *Ibid.*, p. 289.

<sup>8</sup> *Ibid.*, pp. 327, 359 and 360.

<sup>9</sup> *Ibid.*, vol. XIII, pp. 43 and 45; 62 and 63; 94 and 95.

<sup>10</sup> *Ibid.*, pp. 486, 490 and 491.

<sup>11</sup> *Ibid.*, vol. XV, p. 463.

that this was done pursuant to the orders of army officers in authority or as an act of military necessity; it was apparently an act of lawless violence by the soldiers. In an opinion in which all three arbitrators concurred, it was said to be a "well established doctrine of international law" that

A citizen or subject of one nation who, in the pursuit of commercial enterprise, carries on trade within the territory and under the protection of the sovereignty of a nation other than his own is to be considered as having cast in his lot with the subjects or citizens of the State in which he resides and carries on business. Whilst on the one hand he enjoys the protection of that State, so far as the police regulations and other advantages are concerned, on the other hand he becomes liable to the political vicissitudes of the country in which he thus has a commercial domicile in the same manner as the subjects or citizens of that State are liable to the same. The State to which he owes national allegiance has no right to claim for him as against the nation in which he is resident any other or different treatment in case of loss by war—either foreign or civil—revolution, insurrection, or other internal disturbance caused by organized military force or by soldiers, than that which the latter country metes out to its own subjects or citizens.

This proposition might, however, be subject to a qualification:

It is, however, not to be assumed that this rule would apply in a case of mob violence which might, if due diligence had been used, have been prevented by civil authorities alone or by such authorities aided by an available military force. In such a case of spoliation by a mob, especially where the disorder has arisen in hostility to foreigners, a different rule may prevail. It would, however, be irrelevant to the present case now to discuss such a question. It therefore appears that all we have to do now is to inquire whether citizens of the United States, in the matter of losses incurred by military force or by the irregular acts of the soldiery in the revolution of November, 1898, in Salvador, were treated less favourably or otherwise than the citizens of Salvador.<sup>12</sup>

They were not, said the arbitrators, in any way discriminated against, and, accordingly, the claim was rejected.

5. The same tribunal, by a majority, affirmed the above positive proposition in the *Salvador Commercial Company claim* (1902):<sup>13</sup>

... such [United States] citizens as... invested their money in the Republic of Salvador must abide by the laws of that country, and seek their remedy, if any they have, in the courts of Salvador....<sup>14</sup>

In the instant case, however, because of actions taken by the El Salvador Government, an appeal to the Courts would have been in vain. This action was both a capricious annulment of the concessions in issue and a violation of "the rule of natural justice obtaining universally throughout the world" which afforded to the parties to a contract, in the exercise of their reciprocal rights and remedies, the right equally "to invoke for their redress and for their defence the hearing and the judgment of an impartial and disinterested tribunal".<sup>15</sup> Since this right had been denied to the claimant by El Salvador

it was entitled to compensation. See also the *Affaire du Guano* (1901).<sup>16</sup>

6. Several of the cases decided by the Conciliation Commissions established under the Italian Peace Treaty concerned the responsibility of Italy and (in respect of certain Italian property in Tunisia) of France for losses resulting from the sequestration of property. In the *Différend concernant l'interprétation de l'Article 79* (1955)<sup>17</sup> (relating to Italian property in Tunisia), France argued that it was responsible provided that the losses resulted from the grave negligence (*une faute grave*) of the Government or of persons for whose acts it was responsible. It also denied any responsibility for loss of profit. Italy, on the other hand, denied the relevance of negligence (*faute*) and argued that loss of profit could be claimed. The Conciliation Commission, acting as a *Collège arbitral*, ruled as follows:

The responsibility of the French Government... derives... from the general principles of public international law. It is true that the putting of enemy property under sequestration—as distinct from requisition without compensation and appropriation without compensation of foreign property (cf. Rousseau, *Droit international public*, pp. 371 and 372) is recognized as legal by public international law by reason of its character as a simple measure of conservation and administration (cf. Sibert, *Traité de Droit international public*, vol. II, p. 323). But if sequestration in itself does not involve the responsibility of the seizing Government, the way in which it is effected, or in which the sequestered property is administered, may constitute an act contrary to the law of nations; in such a case, if a loss to the owner results, the seizing Government is bound to make the loss good. The Franco-Italian Conciliation Commission has on several occasions, when interpreting article 78 (4) (d) of the Treaty, decided in that sense when Italy has appeared as sequestrator of property of the United Nations or their nationals.

As regards measures of sequestration applied to Italian property in Tunisia, ordered by the French Government up to the coming into force of the Peace Treaty (15 September, 1947) and their effects up to that date (the position subsequent thereto will be dealt with later on), a causal nexus between the said measure (the sequestration) and the damage or loss, is not sufficient to give rise to responsibility on the part of the French Government; there must also be a causal nexus between the loss or damage and the negligence of the French Government in the person of its organs. These may have committed an error (negligence or indiscretion) in the appointment of the administrator-sequestrator (*culpa in eligendo*) or in the control of the administration (*culpa in custodiendo*) or in giving the requisite instructions (*culpa in instruendo*), or in giving the authorizations required by municipal legislation (cf. article 7 of the Residential Decree of 8 March, 1943). On the other hand, the administrator-sequestrator, himself also an organ of the French Government, may have been guilty of negligence *in committendo* or *in omittendo*.

In legal theory, the basis of international responsibility of States is a matter of controversy. Traditional doctrine, which goes back to Grotius, requires that there be negligence, while Anzilotti and other modern writers are content with "risk" and speak of an objective responsibility founded on the causal connexion between the activity in question and the act which is contrary to international law (cf. Rousseau, *Droit international public*, pp. 359 and 360; Verdross, *Völkerrecht*, 2nd ed., p. 285; Guggenheim, *Traité de Droit international public*, vol. II, pp. 49 *et seq.*; Morelli, *Nozioni di Diritto internazionale*, pp. 348 *et seq.*). The second opinion mentioned cannot in any way be admitted, for example, as concerns facts which

<sup>12</sup> *Ibid.*, pp. 464-466.

<sup>13</sup> *Ibid.*, p. 467.

<sup>14</sup> *Ibid.*, p. 476.

<sup>15</sup> *Ibid.*, pp. 477 and 478.

<sup>16</sup> *Ibid.*, pp. 125, 245 and 246.

<sup>17</sup> *Ibid.*, vol. XIII, pp. 422, 431 ff.

consist of the omission of preventive or punitive measures with regard to individual activities, which prejudice given foreign interests; in such a case, the State is responsible in so far as its organs have not exercised a certain degree of diligence (see Morelli, *op. cit.*, p. 350; Rousseau, *op. cit.*, p. 360). In the present instance, the act contrary to international law is not the measure of sequestration, but an alleged lack of diligence on the part of the French State—or, more precisely, of him who was acting on its behalf—in the execution of the said measure, as the Italian Government has recognized even for the period under consideration.

It follows that the loss to be compensated cannot consist of the difference between the total estate [*la situation patrimoniale*] of the owner of the sequestered property at the moment of restitution (or the moment when restitution ought to have taken place) and what it would have been if sequestration had not been imposed. The object of a sequestration is purely conservatory and, by definition, there is no room for the initiatives which the owner of the sequestered property could have taken, and probably would have taken, at his own risk, if he had not been deprived of the powers of management and disposition. The so-called "loss of profit" is therefore excluded from compensation so far as it goes beyond the idea of profits which could arise from an administration free from negligence on the part of the sequesteror, if the normal course of business had been pursued.

On the other hand, it is not necessary that the negligence attributable to the French Government or its organs, officials, agents or, in particular, the sequesteror, should be gross negligence. On behalf of the French Government, it is said that this proviso finds a justification in the provision of French civil law that when an agency is gratuitous, the responsibility of the agent is lighter (article 1992, para. 2). It is contended that we are dealing with a gratuitous agency, since the Italian Government is claiming repayment of all sums paid to the administrator-sequesteror. But, on the one hand, it is here a question of the international responsibility of the French Government for the execution of administrative measures which it has ordered; that responsibility has nothing to do with the provisions of French municipal law relating to contractual agency. On the other hand, the Italian Government is wrong in claiming repayment of all sums paid to the sequesteror: the Franco-Italian Conciliation Commission held in its decision of 6 July 1954,<sup>18</sup> in the case of the *Société anonyme de filatures de Schappe* that "The sequestration being also a measure of conservation, the owner of the sequestered property ought, in principle, to bear the expenses, which are not a charge within the meaning of article 78 (2) of the Treaty...". In that decision the Franco-Italian Conciliation Commission only reserved the right to examine the account for the expenses of the sequestration in case any of the charges were excessive; the *Collège arbitral* will not decide differently in the application of general principles of public international law. [*Translation from the French by the United Nations Secretariat.*]<sup>19</sup>

7. So far as sequestrations following the entry into force of the Treaty of Peace were concerned, the *Collège arbitral* held, first, that because of agreements concluded between France and Italy, the above stated rules would apply until the property was restituted, but, secondly, that

On the other hand, on 2 February 1951, the Italian Government did not recognize that the French Government had the right to liquidate, either wholly or in part, properties in respect of which the question had arisen whether or not the respective owners could claim the benefit of article 79 (6) (c) of the Treaty. The French Government ought to have preserved these properties; to have liquidated them (except under *force majeure*) renders the Govern-

ment liable to compensate the owners in a sum equal to the value which the liquidated property would now have if it had been kept up and managed in the ordinary way, less the costs of management and administration if these were greater than the profits or adding the balance of the profits if they were not. [*Translation from the French by the United Nations Secretariat.*]<sup>20</sup>

The fact that certain sequestrations were carried out by a Court made no difference (see further, para. 19 below).

8. The principle stated in paragraphs 6 and 7 above was applied in several other cases, in particular in the following decisions of the French-Italian Conciliation Commission acting as *Collège arbitral* in accordance with an agreement concluded between France and Italy: the *Différend biens italiens en Tunisie—Patrimoine Giuseppe Canino* (1959, 1960);<sup>21</sup> *Patrimoine Marcello Cellura* (1959);<sup>22</sup> *Patrimoine Pia Maria Teresa Ambre* (1959);<sup>23</sup> *Patrimoine Clément Raoul Boccara* (1959);<sup>24</sup> *Patrimoine Bonomo Francesco* (1959);<sup>25</sup> *Patrimoine Tagliarino Filippo* (1959);<sup>26</sup> the *Différend Joseph Ousset* (1954);<sup>27</sup> the *Différend Industrie Vicentine Elettro-Meccaniche (I.V.E.M.)* (1952, 1955);<sup>28</sup> the *Différend Société Anonyme de Filatures de Schappe* (1954);<sup>29</sup> and the *Différend Textiloses et Textiles* (1959).<sup>30</sup> For discussions of the standards of negligence see, for example, *Patrimoine Bonomo Francesco* (1959); (*une erreur d'appréciation not une faute*);<sup>31</sup> the *Différend Société anonyme de filatures de Schappe* (1954); and *Différend Textiloses et Textiles* (1959).

9. In the *Don Luis Piola case* (1901),<sup>32</sup> the arbitrator, who was obliged to decide in accordance with a treaty in force between Italy and Peru, the rules of international law, as well as with established practice and decisions, held that the claimant could not recover damages in respect of the killing of his brother by Peruvian soldiers, since the shooting was not intentional but the result of an accident. On the other hand in the *Doña Carolina Soria Galvarro case* (1901),<sup>33</sup> decided by the same arbitrator, the widow of a foreign neutral recovered in respect of his death, although it was not proved that the Peruvian soldiers who had killed him had shot at him intentionally and deliberately. In this case the deceased had been forced to act as a go-between by one of the belligerent forces, and they had not taken the necessary steps to guarantee his safety. This was not a case where persons not involved in a conflict happened by accident to be injured. Moreover, although the responsibility might be reduced by the absence of proof of intention to kill,

<sup>20</sup> *Ibid.*, p. 438.

<sup>21</sup> *Ibid.*, p. 440.

<sup>22</sup> *Ibid.*, p. 453.

<sup>23</sup> *Ibid.*, p. 457.

<sup>24</sup> *Ibid.*, p. 461.

<sup>25</sup> *Ibid.*, p. 466.

<sup>26</sup> *Ibid.*, p. 475.

<sup>27</sup> *Ibid.*, p. 258.

<sup>28</sup> *Ibid.*, p. 325.

<sup>29</sup> *Ibid.*, p. 598.

<sup>30</sup> *Ibid.*, p. 742.

<sup>31</sup> *Ibid.*, p. 473.

<sup>32</sup> *Ibid.*, vol. XV, p. 444.

<sup>33</sup> *Ibid.*, p. 449.

<sup>18</sup> *Reports of International Arbitral Awards*, vol. XIII, p. 598.

<sup>19</sup> *Ibid.*, pp. 431-433 and 610.

it was not established that the Peruvian Government had taken adequate steps to discover the wrongdoer. On this final point, see also the *Don Jacinto Cadino case* (1901).<sup>34</sup>

10. The same arbitrator affirmed in several other cases that it is a universally recognized principle of international law that a State is responsible for violations of international law committed by its agents, when it fails to take all necessary care to safeguard the interests of aliens who are neutral in the civil war: *Don Luis Chiessa*; *Don Jeronimo Sessarego*; *Don Juan B. Sanguinetti*; *Don Pablo Vercelli*; *Don Lorenzo Roggero*; and *Don Jose Miglia* claims (1901).<sup>35</sup>

11. The Italian-Netherlands Conciliation Commission in the *Affaire relative à une quantité d'or revendiquée par les Pays-Bas* (1963),<sup>36</sup> held that the Italian Peace Treaty, which required Italy to restore monetary gold "wrongfully" removed from one of the United Nations, did not impose responsibility on Italy if it acquired the gold *dans des transactions normales*. In the instant case Italy had not acted negligently when it received the gold and accordingly was not responsible.

### 3. Causation

12. The Italian Peace Treaty 1947 required the Italian Government to compensate those nationals of the United Nations whose property in Italy had been lost or damaged as a result of the war. The Conciliation Commissions established under the Treaty, accordingly, had to determine what damage was "a result of the war" and as such involved Italy's responsibility. Many of the decisions bear on the "war" element and are not of general purport, but others discuss the question of causation. In the *Currie case* (1954),<sup>37</sup> the Anglo-Italian Conciliation Commission upheld a claim which included damage resulting from the subsequent deterioration of buildings which had been damaged by bombing. The Commission held Italy liable to make good foreseeable damage whether it arose directly and immediately or indirectly and subsequently.

13. On the other hand, the Italian-United States Commission rejected a claim based on the theft in 1946 of an American national's property from an American Army warehouse in Naples: the loss sustained was the result of an occurrence which did not have a "sufficiently direct causal relationship" to the war, notwithstanding the fact that the social conditions existing shortly after the cessation of hostilities may have resulted in an increase in theft: *Hoffman case* (1952).<sup>38</sup> Similarly the French-Italian Conciliation Commission rejected the claim made in the *Différend Dames de Wytenhove* (1950),<sup>39</sup> in respect of property which was lost while it was being moved for fear of damage caused by bombardment: the loss was

fortuitous and could not be considered to be the result of the war.

14. The following decisions of the Italian-United States Conciliation Commission may be mentioned: the *Armstrong Cork Company case* (1953);<sup>40</sup> (see also paragraph 1 above); the *Shafer case* (1954);<sup>41</sup> the *MacAndrews and Forbes Co. case* (1954);<sup>42</sup> and the *Palumbo case* (1956);<sup>43</sup> and, among the decisions of the French-Italian Conciliation Commission, the *Différend Guillemot-Jacquemin* (1949);<sup>44</sup> the *Différend Tournes* (1949);<sup>45</sup> the *Différend Roger Sudreau* (1955);<sup>46</sup> and the *Différend Etablissements Agache* (1955).<sup>47</sup>

## II. IMPUTABILITY

### 1. General

15. In the *Salvador Commercial Company claim*,<sup>48</sup> (see also paragraph 5 above) the arbitrators affirmed that, in the words of Halleck whom they quoted with approval,

a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Governments, so far as the acts are done in their official capacity.<sup>49</sup>

16. Thus in *The Lottie May Incident* (1899),<sup>50</sup> the arbitrator, awarding damages to the United Kingdom against Honduras in respect of the wrongful detention of a ship, underlined the fact

the *Comandante* had full authority to make the arrest without having recourse to the courts. It was therefore an official act carried out by him by virtue of the powers invested in him as a military servant of the Nation. It was an act of the Government, carried out under an order of the Government on its behalf, and the doctrine of obedience and the rule of *respondeat superior* makes the Government responsible for the detention of the ship and the arrest of its captain.<sup>51</sup>

And in the *Doña Clara Lanatta case* (1901),<sup>52</sup> Peru was held responsible for the assassination of an Italian national by members of the defence forces who were accompanied by commanders who did nothing to prevent or to punish the wrongdoers. This was not the simple act of a marauding or disbanded group. See similarly the *Don Ricardo Castiglione* and *Don Evangelista Machiavello* claims (1901).<sup>53</sup> Conversely, the same arbitrator in the *Don Aquilino Capelletti case* (1901),<sup>54</sup> held that the Peru-

<sup>34</sup> *Ibid.*, p. 414.

<sup>35</sup> *Ibid.*, pp. 399, 400, 403, 406, 408 and 411.

<sup>36</sup> *Ibid.*, vol. XVI, p. 299; see also Société suisse de droit international, *Annuaire suisse de droit international*, 1933 (Zurich, Editions polygraphiques S.A.), vol. XX, p. 135.

<sup>37</sup> *Reports of International Arbitral Awards*, vol. XIV, p. 21.

<sup>38</sup> *Ibid.*, pp. 97 and 100.

<sup>39</sup> *Ibid.*, vol. XIII, p. 227.

<sup>40</sup> *Ibid.*, vol. XIV, p. 159.

<sup>41</sup> *Ibid.*, p. 205.

<sup>42</sup> *Ibid.*, p. 221.

<sup>43</sup> *Ibid.*, p. 251.

<sup>44</sup> *Ibid.*, vol. XIII, p. 64.

<sup>45</sup> *Ibid.*, p. 105.

<sup>46</sup> *Ibid.*, p. 680.

<sup>47</sup> *Ibid.*, p. 696.

<sup>48</sup> *Ibid.*, vol. XV, p. 467.

<sup>49</sup> *Ibid.*, p. 477.

<sup>50</sup> *Ibid.*, p. 23.

<sup>51</sup> *Ibid.*, p. 30.

<sup>52</sup> *Ibid.*, p. 416.

<sup>53</sup> *Ibid.*, pp. 417 and 439.

<sup>54</sup> *Ibid.*, p. 438.

vian Government was not responsible for the theft of the claimant's property since the theft was not imputable to the Government forces, any official nor any other authority. This was a delict under domestic law for which the remedy was an action pursuant to Peruvian law. Nor, in another case, was it responsible for the acts of private citizens who damaged the claimant's property by fire: the unfortunate facts were not imputable to the armed forces with the exactness necessary to establish the responsibility: *Don Juan B. Serra claim* (1901).<sup>55</sup>

17. The same arbitrator refused, in determining whether Peru was or was not responsible, to distinguish between acts or omissions of superior and of inferior officers: see the cases mentioned in paragraph 10 above. The acts of disbanded, individual soldiers not under command would not, however, give rise to responsibility unless the authorities failed to punish those responsible, e.g., the *Lanatta* and *Castiglione* cases, paragraph 16 above.

18. In the *Différend Société Verdol* (1949),<sup>56</sup> Italy argued that it was not responsible for the "wrongful acts" of the liquidator of the claimant's business since they could not be considered as "acts committed in the discharge of his duties but were personal acts on his part". The French-Italian Conciliation Commission rejected the contention: the claimant company had been placed under syndication by a ministerial decree, its liquidation had been ordered by a ministerial decree, and these measures were taken within the framework of Italian law. These measures were of a nature to engage the responsibility of the Italian Government. See similarly the *Différend Dame Mossé* (1953)<sup>57</sup> (para. 20 below).

19. In the *Différend concernant l'interprétation de l'Article 79* (1955),<sup>58</sup> the French-Italian *Collège arbitral* in ruling on France's responsibility for sequestrations ordered by French courts in Tunisia said:

Although it is true that in certain arbitral awards handed down in the twentieth century the opinion is expressed that the independence of the courts, in accordance with the principle of separation of powers generally recognized in civilized countries, excludes the international responsibility of States for acts of the Judiciary which are contrary to law, that theory now appears to be universally and rightly repudiated by writers on and courts administering international law. The judgement or order of a court is something issuing from an organ of the State, just like a law promulgated by the Legislature or a decision taken by the executive authorities. The non-observance by a court of a rule of international law creates international responsibility on the part of the collectivity of which the court is an organ, even if the court has applied municipal law in conformity with international law (cf. Guggenheim, *Traité de Droit international public*, vol. II, p. 11, n. 6; Cavaré, *Le Droit international public positif*, vol. II, p. 381; l.c., No. 3 at p. 11; Charles Rousseau, *Droit international public*, pp. 370 and 374; Verdross, *Völkerrecht*, 2nd ed., p. 291). Now, either the French courts ordered the liquidations in conformity with French municipal law but in violation of the Treaty, in which case France is responsible for the legislative act which is contrary to its international obligations; or the French courts ordered the liquidations in violation of both

French municipal law and the Treaty, in which case France is responsible for the judicial act which is contrary to its international obligations. [Translation from the French by the United Nations Secretariat.]<sup>59</sup>

## 2. Excess of competence and erroneous acts

20. In the *Différend Dame Mossé* (1953),<sup>60</sup> the claimant's property had been taken by error. The Italian Government was nevertheless held responsible:

Such an error does not have the effect of transforming the removal of the property of Mme Mossé into a personal act on the part of the officials who carried out that removal; mistakes of this kind are clearly conceivable and inevitable in the ordinary conduct of administration. [Translation from the French by the United Nations Secretariat.]<sup>61</sup>

The acts were acts within the competence of the officials (see para. 18 above), and, moreover,

Even if it were to be admitted that Albertini and the officials who accompanied him were, at the time of the removal of the effects of Mme Mossé, acting outside the prescribed limits of their duties, it should not be deduced from that, without more ado, that the present claim is not well founded. It is also necessary to consider a question of law and a question of fact, namely, whether in the international juridical system a State should be held responsible for acts committed by officials within the apparent limits of their duties, according to a line of conduct which was not completely contrary to the instructions they had received (Cavaré, *Le Droit international public positif*, vol. II, pp. 337-340), and whether a group of police officials who, in northern Italy and in 1944, that is to say when the atmosphere of anti-Jewish persecution was most intense, removed property hidden in a church, were not acting in a manner contrary to the instructions received from the real political authority and were acting within the apparent limits of their duties.

The two questions may be left unanswered. [Translation from the French by the United Nations Secretariat.]<sup>62</sup>

See also the *Différend Joseph Ousset* (1954).<sup>63</sup>

## 3. Fraudulent acts

21. In determining the legality of measures taken under sequestration (see generally paragraph 6 above), the French-Italian Conciliation Commission required the proof of either negligence (*faute*) or fraud (*dol*). The latter certainly did not have the effect of excluding the Government's responsibility; on the contrary, in the absence of negligence, it was an essential element: e.g., *Différend Joseph Ousset* (1954);<sup>64</sup> *Différend Société anonyme de filatures de Schappe* (1954).<sup>65</sup>

## 4. Acts of de facto local government

22. The acts of the Italian Social Republic (The Salò Republic) established in 1943 were in issue in several

<sup>55</sup> *Reports of International Arbitral Awards*, vol. XV, p. 410.

<sup>56</sup> *Ibid.*, vol. XIII, p. 94.

<sup>57</sup> *Ibid.*, pp. 486, 492 and 493.

<sup>58</sup> *Ibid.*, p. 422.

<sup>59</sup> *Ibid.*, p. 438.

<sup>60</sup> *Ibid.*, p. 486.

<sup>61</sup> *Ibid.*, p. 493.

<sup>62</sup> *Ibid.*, p. 494.

<sup>63</sup> *Ibid.*, pp. 258 and 265.

<sup>64</sup> *Ibid.*, pp. 258, 265 and 267-269.

<sup>65</sup> *Ibid.*, pp. 598 and 605.

cases decided by the Conciliation Commissions set up under the Italian Peace Treaty.

23. In one group of cases decided by the Italian-United States Conciliation Commission, the question was whether the claimants had been treated as enemy aliens "under the laws in force in Italy during the war" and as such had status to recover from Italy. The laws in question were laws enacted by the Social Republic. The Italian Government argued that the laws enacted by the Republic were not "laws" within the meaning of the Treaty, since only a State can enact laws and the Social Republic was not a State. In several cases, this question was treated solely as one of interpretation and the Italian argument was rejected: *Treves case* (1956),<sup>66</sup> *Levi case* (1956),<sup>67</sup> *Wollemborg case* (1956),<sup>68</sup> and the *Sonnino case* (1956).<sup>69</sup> In three other cases, the decision rejecting the Italian argument was put on broader grounds: *Baer case* (1959),<sup>70</sup> *Falco case* (1959),<sup>71</sup> and *Fubini case* (1959).<sup>72</sup> The majority of the Commission stated:

In point of fact, in conformity with the principle of effectiveness sanctioned by the law of nations, when a legal Government and a Government of insurgents share power within a State, the laws enacted by each one of them, in the parts of territory which they respectively occupy, are considered as laws in force which find support in the actual power exercised by each of these two Governments over the territory where it is able, by threat of punishment, to insure the carrying out of its intent. It follows that, in all parts of Italy subjected to the power of the Italian Social Republic, the legislative acts emanated by this Republic fall within the notion of "laws in force in Italy during the war" contained in the aforementioned Article. A teleological interpretation of this provision would not lead to a different conclusion, because the purpose of the text adopted by the contracting Parties is that of according the benefits of the Treaty of Peace to persons whose property, rights and interests sustained damages under the laws in force in Italy during the war; as the contracting Parties failed to indicate by which Italian power these laws were to have been enacted, this gap must be filled, as has been affirmed by the Institut de droit international in its resolution of April 19, 1956, Grenade session, "in accordance with good faith and in the light of the principles of international law" (*Annuaire*, vol. 46, p. 365); the principle that must be applied in the instant case is that of effectiveness as it is explained above.<sup>73</sup>

24. The other case involving the acts of the Republic of Salò was one in which the Republic's officials had taken the claimant's property: the *Différend Dame Mossé* (1953).<sup>74</sup> Again in interpreting the relevant provisions of the Treaty and holding the Italian Government responsible for the Republic's acts, the French-Italian Commission referred to the principles of international law: This interpretation of the Peace Treaty does not depart from the doctrines of public international law. As Balladore Pallieri observes (*Diritto internazionale pubblico*, p. 92):

The internal organization to which the international juridical system refers is that which in fact really exists within the State.

In that connexion, international law does not consider as the organization that which should exist, according to internal rules, but that which does exist, effectively and positively. An internal revolutionary movement may, violently and without juridical continuity, substitute new organs for those which formerly existed, but it is of no importance to the international juridical system that those organs have no basis in the former rules and assert themselves as organs of the State in fact only, in virtue of the success of the revolution which brought them to power. It is that fact alone which matters, without limitation of any sort, for international law and for the international juridical system. As far as the latter system is concerned, the organization of the State begins with its *de facto* constitution, and is maintained or modified by the facts. The imputation concerns whoever possesses the real public authority within the State, and consequently, in the eyes of the international juridical system, those who no longer effectively wield such authority cease to be organs of the State, while those who for any reason come to possess such authority become organs of the State. [Translation from the French by the United Nations Secretariat.]<sup>75</sup>

See also the *Affaire du Guano* (1901).<sup>76</sup>

### III. CIRCUMSTANCES IN WHICH AN ACT IS NOT WRONGFUL

#### 1. Self-defence

25. The Italian-United States Conciliation Commission in the *Armstrong Cork Company case* (1953)<sup>77</sup> affirmed that

It is not necessary to say that the action performed by the State within the limits of its rights or inspired by the protection of its own defence does not constitute an illegal international act (Fiore, Oppenheim). And one must not confuse the right of legitimate defence, which is the legitimate protection of the right of preservation of the State, with the right of the necessity which very often is only an expedient created in order to legalize the arbitrary.<sup>78</sup>

See also the *Affaire concernant la fixation par la Belgique des prix minima des tomates pour le deuxième trimestre de 1957* (1958),<sup>79</sup> and the *Affaire du Lac Lanoux* (1957).<sup>80</sup>

#### 2. War measures

26. See the *Gelbrunk* and *Galvarro* cases (paragraphs 4 and 9 above), for the proposition that aliens are, generally speaking, entitled to no better treatment than nationals in time of civil war. See similarly the *Don Rafael Crovetto claim* (1901).<sup>81</sup> See the sequestration cases, paragraph 6 above, and also the *Orr and Laubenheimer claim* (1900):<sup>82</sup>

the right of eminent domain and the rights incident to a state of war, and martial law, justify the use by any Government, in an emergency, of any private property found available.<sup>83</sup>

<sup>66</sup> *Ibid.*, vol. XIV, pp. 262, 266 and 267.

<sup>67</sup> *Ibid.*, pp. 272 and 281.

<sup>68</sup> *Ibid.*, pp. 283 and 288.

<sup>69</sup> *Ibid.*, pp. 296 and 302.

<sup>70</sup> *Ibid.*, p. 402.

<sup>71</sup> *Ibid.*, p. 408.

<sup>72</sup> *Ibid.*, p. 420.

<sup>73</sup> *Ibid.*, p. 406; see also pp. 417, 428-431.

<sup>74</sup> *Ibid.*, vol. XIII, p. 486.

<sup>75</sup> *Ibid.*, p. 493; for the dissenting opinion, see pp. 495-497.

<sup>76</sup> *Ibid.*, vol. XV, pp. 125, 349-354.

<sup>77</sup> *Ibid.*, vol. XIV, p. 159.

<sup>78</sup> *Ibid.*, p. 163.

<sup>79</sup> *Ibid.*, vol. XII, p. 319 and especially p. 330.

<sup>80</sup> *Ibid.*, pp. 281 and 305.

<sup>81</sup> *Ibid.*, vol. XV, p. 419.

<sup>82</sup> *Ibid.*, p. 37.

<sup>83</sup> *Ibid.*, p. 40. See also p. 42.

But the arbitrator went on to say:

Full compensation, however, for all damage suffered by private parties must afterwards be made.

(This was a case of sequestration of the claimant's steamers by the Nicaraguan Government in an effort to put down an insurrection, and not a case of sequestration of property used by enemy aliens; see also the *Don Luis Palmi claim* (1901).<sup>84</sup>)

27. The arbitrator in the Italian-Peruvian arbitration of 1901 resulting from the Peruvian civil war of 1894-95 also exempted Peru from responsibility if it were shown that the claimant had not remained neutral: this rule was stated in the arbitration agreement, but, according to the arbitrator, was also part of the universally recognized principle of international law that

when a Government does not use the means within its power to prevent an attack on a *neutral alien who respects and observes the law of the country in which he resides*, or does not punish the offenders, it becomes responsible... [Translation from the French by the United Nations Secretariat—Italics added by the Secretariat] (Don Jacinto Gadino claim).<sup>85</sup>

See also the *Don Rafael Canevaro* (two); *Don José Nocetti* and *Don Romulo Guidino* claims (1901).<sup>86</sup>

#### IV. EXHAUSTION OF LOCAL REMEDIES

28. In the *Ambatielos claim* (1956),<sup>87</sup> one of the questions put to the Commission of Arbitration was whether the claim submitted by Greece was valid having regard to

...

(ii) The question raised by the United Kingdom Government of the non-exhaustion of legal remedies in the English Courts in respect of the acts alleged to constitute breaches of the Treaty;

...

"This well established rule means", said the Commission, that the State against which an international action is brought for injuries suffered by private individuals has the right to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State. The defendant State has the right to demand that full advantage shall have been taken of all local remedies before the matters in dispute are taken up on the international level by the State of which the persons alleged to have been injured are nationals.

In order to contend successfully that international proceedings are inadmissible, the defendant State must prove the existence, in its system of internal law, of remedies which have not been used. The views expressed by writers and in judicial precedents, however, coincide in that the existence of remedies which are obviously ineffective is held not to be sufficient to justify the application of the rule. Remedies which could not rectify the situation cannot be relied upon by the defendant State as precluding an international action.

...

Furthermore, however, it is generally considered that the ineffectiveness of available remedies, without being legally certain, may

also result from circumstances which do not permit any hope of redress to be placed in the use of those remedies. But in a case of that kind it is essential that such remedies, if they had been resorted to, would have proved to be *obviously futile*.

Here a question of considerable practical importance arises.

If the rule of exhaustion of local remedies is relied upon against the action of the claimant State, what is the test to be applied by an international tribunal for the purpose of determining the applicability of the rule?

As the arbitrator rules in the *Finnish Vessels Case* of 9th May-1934, the only possible test is to assume the truth of the facts on which the claimant State bases its claim. As will be shown below, any departure from this assumption would lead to inadmissible results.<sup>88</sup>

In this case, the majority of the Commission held that Mr. Ambatielos had failed to exhaust his domestic remedies in the following three respects:

(a) He failed to call a witness whose evidence, the Greek Government alleged, would have resulted in a decision favourable to him. This allegation was accepted for the purpose of the plea. Moreover, the rule of domestic remedies applied to such a failure:

The rule requires that "local remedies" shall have been exhausted before an international action can be brought. These "local remedies" include not only reference to the courts and tribunals, but also the use of procedural facilities which municipal law makes available to litigants before such courts and tribunals. It is the whole system of legal protection, as provided by municipal law, which must have been put to the test before a State, as the protector of its nationals, can prosecute the claim on the international plane. . . .

It is clear, however, that it cannot be strained too far. Taken literally, it would imply that the fact of having neglected to make use of some means of procedure—even one which is not important to the defence of the action—would suffice to allow a defendant State to claim that local remedies have not been exhausted, and that, therefore, an international action cannot be brought. This would confer on the rule of the prior exhaustion of local remedies a scope which is unacceptable.

In the view of the Commission, the non-utilization of certain means of procedure can be accepted as constituting a gap in the exhaustion of local remedies only if the use of these means of procedure were essential to establish the claimant's case before the municipal courts.<sup>89</sup>

(b) Mr. Ambatielos had failed to exhaust his rights as an appellant. The reason for this failure was that the Court of Appeal had refused to admit the evidence of the witness who had not been called at the trial level (a) above and that the appeal would, as a result, be futile. The Commission rejected this argument on the ground that

It would be wrong to hold that a party who, by failing to exhaust his opportunity in the Court of first instance, has caused an appeal to become futile should be allowed to rely on this fact in order to rid himself of the rule of exhaustion of local remedies.<sup>90</sup>

(c) Two other claims, as formulated in argument before the Commission, had never been submitted to the English Courts. There was no obstacle to such submission.

<sup>84</sup> *Reports of International Arbitral Awards*, vol. XV, p. 412.

<sup>85</sup> *Ibid.*, pp. 414 and 415.

<sup>86</sup> *Ibid.*, pp. 420, 424-427; 452 and 453; 434 and 435.

<sup>87</sup> *Ibid.*, vol. XII, p. 83.

<sup>88</sup> *Ibid.*, pp. 118 and 119.

<sup>89</sup> *Ibid.*, p. 120.

<sup>90</sup> *Ibid.*, p. 122.

See also the individual opinion of Mr. Alfaro<sup>91</sup> and the dissenting opinion of Professor Spiropoulos.<sup>92</sup>

29. See also *The Lottie May Incident* (1899);<sup>93</sup> *Don Virgilio Dall' Orso claim* (1901);<sup>94</sup> the *Salvador Commercial Company claim* (1902);<sup>95</sup> the *Gelbrunk claim* (1902);<sup>96</sup> and the *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgments*<sup>97</sup> (where the plea was joined to the merits). Compare the decisions of the Conciliation Commissions noted in paragraph 3 above.

## V. LEGAL INTEREST OF CLAIMANT

### 1. General

30. In the *South West Africa Cases* Ethiopia and Liberia asked the International Court of Justice to adjudge and declare that the mandate for South West Africa remained in force, that South Africa was under certain obligations of a procedural and substantive nature, and that, by certain actions and policies, South Africa had violated these obligations. In 1962, the Court rejected a number of preliminary objections to its jurisdiction, one of which was that

the conflict or disagreement alleged by the Governments of Ethiopia and Liberia to exist between them and the Government of the Republic of South Africa, is by reason of its nature and content not a "dispute" as envisaged in Article 7 of the Mandate for South West Africa, more particularly in that no material interests of the Governments of Ethiopia and/or Liberia or of their nationals are involved therein or affected thereby;<sup>98</sup>

The Court decided that

the manifest scope and purport of the provisions of this Article [7] indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory and toward the League of Nations and its Members.<sup>99</sup>

*Preliminary Objections, Judgment*, see also the separate opinions of Judges Bustamante and Jessup and the dissenting opinions of Judges Winiarski, Spender and Fitzmaurice, Morelli and Van Wyk.<sup>100</sup>

31. In the *Second Phase, Judgment*, the Court referred to another "matter . . . which had an antecedent character, namely the question of the Applicants' standing in the present phase of the proceedings—not, that is to say, of their standing before the Court itself, which was the subject of the Court's decision in 1962, but the question, as a matter of the merits of the case, of their legal right

or interest regarding the subject-matter of their claim, as set out in their final submissions".<sup>101</sup>

32. The Court held that the Applicants did not have such a legal right or interest under the Mandate and rejected their claims.

One of the arguments on this issue amounted, said the Court,

to a plea that the Court should allow the equivalent of an *actio popularis*, or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the "general principles of law" referred to in Article 38, paragraph 1 (c) of its Statute.<sup>102</sup>

See also the separate opinions of Judges Morelli and Van Wyk, and the dissenting opinions of Judges Wellington Koo, Koretsky, Tanaka, Jessup, Padilla Nervo, Forster and Mbanefo.<sup>103</sup>

### 2. Nationality

33. The Italian-United States Conciliation Commission held in the *Flegenheimer case* (1958),<sup>104</sup> that it was entitled to go behind the certificate of nationality given to the claimant, to determine whether, according to national and international law, the certificate was correct. Thus the certificates could be rejected

. . . when these certificates are the result of fraud, or have been issued by favour in order to assure a person a diplomatic protection to which he would not be otherwise entitled, or when they are impaired by serious errors, or when they are inconsistent with the provisions of international treaties governing questions of nationality in matters of relationship with the alleged national State, or, finally, when they are contrary to the general principles of the Law of Nations on nationality which forbid, for instance, the compulsory naturalization of aliens.<sup>105</sup>

34. The Treaty of Peace with Italy provided that claims could be brought in respect of "United Nations nationals" who were defined, *inter alia*, as "individuals who are nationals of any one of the United Nations . . .".<sup>106</sup> In several cases claimants who were nationals of one of the United Nations were also Italian nationals. Italy argued that the

. . . principle of international law, universally recognized and constantly applied, by virtue of which diplomatic protection cannot be exercised in cases of dual nationality when the claimant possesses also the nationality of the State against which the claim is being made<sup>107</sup>

should be applied. The United States and the United Kingdom invoked the "clear and literal sense of the expressions in the Treaty": any national of one United

<sup>91</sup> *Ibid.*, pp. 124-126.

<sup>92</sup> *Ibid.*, pp. 126-132.

<sup>93</sup> *Ibid.*, vol. XV, pp. 23 and 31.

<sup>94</sup> *Ibid.*, pp. 432 and 434.

<sup>95</sup> *Ibid.*, pp. 467 and 477.

<sup>96</sup> *Ibid.*, pp. 467 and 476.

<sup>97</sup> *I.C.J. Reports 1964*, pp. 6, 46, 114 and 115 and 166.

<sup>98</sup> *I.C.J. Reports 1962*, p. 327.

<sup>99</sup> *Ibid.*, p. 343.

<sup>100</sup> *Ibid.*, pp. 319; 349, 387, 449, 465, 564 and 575.

<sup>101</sup> *I.C.J. Reports 1966*, pp. 6 and 18.

<sup>102</sup> *Ibid.*, p. 47.

<sup>103</sup> *Ibid.*, pp. 57; 65; 214; 237; 248; 323; 441; 472 and 482.

<sup>104</sup> *Reports of International Arbitral Awards*, vol. XIV, pp. 327, 336-349.

<sup>105</sup> *Ibid.*, p. 349.

<sup>106</sup> United Nations, *Treaty Series*, vol. 49, p. 163.

<sup>107</sup> *Reports of International Arbitral Awards*, vol. XIV, p. 239.

Nations was entitled to claim, regardless of the fact that he may have some other nationality (*Cases of Dual Nationality* (1954),<sup>108</sup> and *Mergé case* (1955)).<sup>109</sup> The Italian-United States Conciliation Commission adopted neither of these views (the Anglo-Italian Commission refused to rule on the issue: *Cases of Dual Nationality* above; the French-Italian Commission appears implicitly to have adopted the same rule as the Italian-United States Commission: see decisions in paragraph 36 below). It held, first, that the Treaty did not resolve the question but that rather it was to be decided according to "the general principles of international law". Second, these principles entitled the United States to protect its nationals before the Commission in cases of dual nationality, United States and Italian, whenever the United States nationality was the effective nationality. The Commission said that habitual residence was one but only one of the criteria. "The conduct of the individual in his economic, social, political, civic and family life, as well as the closer and more effective bond with one of the two States must also be considered." The Commission then stated a number of guiding principles.<sup>110</sup>

35. It applied these principles in several later decisions:<sup>111</sup> *Mazzonis* (1955); *Spaulding* (1956); *Zangrilli* (1956); *Gattone* (1957); *Cestra* (1957); *Salvoni* (1957); *Ruspoli-Droutzkov* (1957); *Vereano* (1957); *Puccini* (1957); *Tuciarone* (1959); and *Ganapini* (1959) cases; cf. the *Flegenheimer case*.<sup>112</sup>

36. The French-Italian Commission appears to have applied basically the same test: the *Différend Dame Rambaldi* (1957); the *Différend Dame Menghi née Gibey* (1958); the *Différend Dame Lombroso née De Bonfils de Rochon de Lapeyrouse* (1958); and the *Différend Consorts Lupi* (1958).<sup>113</sup>

37. On dual nationality see also the *Don Rafael Canevaro claim* (1901),<sup>114</sup> and the *Don Romulo Guidino claim* (1901).<sup>115</sup> See also the *Don Agustin Arata*, and the *Don Carlos Yon* claims (1901);<sup>116</sup> concerning the right of a widow with dual nationality to pursue claims originally made by her husband, on behalf of her children. See also the *Doña Carolina Soria Galvarro claim* (1901).<sup>117</sup>

### 3. Companies

38. In the *Salvador Commercial Company claim* (1902),<sup>118</sup> the majority of the Arbitrators, in awarding damages to the American shareholders in an El Salvador corporation

whose concession had been wrongly terminated by the El Salvador Government, stated:

We have not discussed the question of the right of the United States under international law to make reclamations for these shareholders in El Triunfo Company, a domestic corporation of Salvador, for the reason that the question of such right is fully settled by the conclusions reached in the frequently cited and well-understood Delagoa Bay Railway Arbitration.<sup>119</sup>

See also the *Don Evangelista Machiavello claim* (1901).<sup>120</sup> 39. This question was also raised in the *Barcelona Traction, Light and Power Company, Limited (Preliminary Objections)*,<sup>121</sup> but has not yet been decided by the International Court of Justice, having been joined to the merits,<sup>122</sup> see also the separate opinions of Judges Wellington Koo and Bustamante, and the dissenting opinions of Judges Morelli and Armand-Ugon.<sup>123</sup> See also the many claims brought by France on behalf of French shareholders in Italian and other foreign companies before the French-Italian Conciliation Commission: this right was, however, conferred by the express terms of the Peace Treaty; e.g. the *Différend Société financière métallurgique électrique (SOFIMELEC)* (1949),<sup>124</sup> and the *Différend Società Mineraria et Metallurgica di Pertusola* (1950).<sup>125</sup> See also the *Affaire du Guano* (Judgement of 8 January 1901).<sup>126</sup>

## VI. EXTINCTIVE PRESCRIPTION AND WAIVER

### 1. Extinctive prescription

40. In the *Ambatielos claim* (1956),<sup>127</sup> the United Kingdom Government argued that "the claim of the Greek Government ought to be rejected by reason of the delay in its presentation". The Commission ruled that

It is generally admitted that the principle of extinctive prescription applies to the right to bring an action before an international tribunal. International tribunals have so held in numerous cases (Oppenheim—Lauterpacht—*International Law*, 7th Edition, I, paragraph 155 c; Ralston—*The Law and Procedure of International Tribunals*, paragraphs 683-698, and *Supplement*, paragraphs 683 (a) and 687 (a). L'Institut de Droit international expressed a view to this effect at its session at The Hague in 1925.

There is no doubt that there is no rule of international law which lays down a time-limit with regard to prescription, except in the case of special agreements to that effect, and accordingly, as l'Institut de Droit international pointed out in its 1925 Resolutions, the determination of this question is "left to the unfettered discretion of the international tribunal which, if it is to accept any argument based on lapse of time, must be able to detect in the facts of the case before it the existence of one of the grounds which are indispensable to cause prescription to operate."<sup>128</sup>

<sup>108</sup> *Reports of International Arbitral Awards*, vol. XIV, pp. 27 and 28.

<sup>109</sup> *Ibid.*, pp. 236, 238 and 239.

<sup>110</sup> *Ibid.*, pp. 247 and 248.

<sup>111</sup> *Ibid.*, pp. 249; 292; 304; 307; 311; 314; 321; 323; 398 and 400.

<sup>112</sup> *Ibid.*, pp. 375-378; see also para. 33 above.

<sup>113</sup> *Ibid.*, vol. XIII, pp. 786; 801; 804 and 821.

<sup>114</sup> *Ibid.*, vol. XV, p. 420.

<sup>115</sup> *Ibid.*, p. 434.

<sup>116</sup> *Ibid.*, pp. 401 and 446.

<sup>117</sup> *Ibid.*, p. 449.

<sup>118</sup> *Ibid.*, p. 467.

<sup>119</sup> *Ibid.*, p. 479.

<sup>120</sup> *Ibid.*, p. 439.

<sup>121</sup> *I.C.J. Reports 1964*, p. 6.

<sup>122</sup> *Ibid.*, pp. 44-47.

<sup>123</sup> *Ibid.*, pp. 53-64; 81-84; 110-114; 165 and 166.

<sup>124</sup> *Reports of International Arbitral Awards*, vol. XIII, p. 88.

<sup>125</sup> *Ibid.*, p. 174.

<sup>126</sup> *Ibid.*, vol. XV, p. 107.

<sup>127</sup> *Ibid.*, vol. XII, p. 83.

<sup>128</sup> *Ibid.*, p. 103.

41. The United Kingdom depended solely on the fact that it was only in 1939 (the claim was originally presented in 1925) that the Greek Government based its claim on the Greek-United Kingdom Treaty of 1886; previously it had referred only to general international law. The Commission rejected the argument:

If it [the Greek Government] did not adopt this attitude until 1939 when its initial diplomatic intervention dates back to 1925, that fact cannot be held against it in so far as concerns the operation of prescription, unless it brought about results which, *in themselves*, would justify the operation of prescription—such, for instance, as the difficulties of the United Kingdom in assembling the elements of proof requisite for or useful to its defence.

Furthermore, it is not very clear from the United Kingdom Counter-Case whether the allegation against the Greek Government is directed to that Government's having waited until 1939 to decide upon the present legal basis for its action, or whether it is not rather directed to the Greek Government's having waited until 1951 to institute the legal proceedings which it was open to it to "institute, compulsorily, as early as, at the latest, 1926" (Counter-Case, paragraph 168).

In the latter case the alleged delay would be concerned not with the fact that reliance was placed on the Treaty of 1886, but that *legal action* was taken on the basis of that Treaty.

The Government of the United Kingdom desires it to be understood that if the Greek Government had acted earlier, the evaluation and appreciation of the events in dispute would have been simpler and more certain. (Counter-Case, paragraph 169.) This contention, however, does not find support in any specific fact, and it would seem to be all the more difficult to accept because—even though *the legal basis* of the claim has been changed during the diplomatic exchanges—*the facts* which constitute its substance have remained the same from the beginning, and from the point of view of difficulty of proof these facts are, above all, important.<sup>129</sup>

## 2. Waiver

42. In the *Barcelona Traction, Light and Power Company, Limited case*, Belgium alleges injury and damage to Belgian interests in a Canadian Company, resulting from the treatment of the company in Spain said to engage Spain's international responsibility. Spain advanced a number of preliminary objections to the claim. One of them was that Belgium's discontinuance of the earlier proceedings relating to the same dispute disentitled it from bringing the new proceedings.<sup>130</sup> The Court first held that, under the Rules, the act of

discontinuance is a procedural and, so to speak, "neutral" act, the real significance of which must be sought in the attendant circumstances...<sup>131</sup>

The Court accordingly then considered the arguments based on those circumstances and put forward by Spain in an attempt to establish that Belgium no longer had the right to bring proceedings on its claim.

43. Spain contended first that there was an understanding between it and Belgium about the discontinuance. The Court rejected this argument, given that (i) the acts in question were the acts of the representatives of the

private interests involved, who did not act in such a manner as to commit their Governments, and (ii) the acts were in any event wholly inconclusive.<sup>132</sup>

44. The second argument, "having the character of a plea of estoppel", was to the effect that Belgium had "by its conduct misled [Spain] about the import of the discontinuance, but for which [Spain] would not have agreed to it, and, as a result of agreeing to which, it had suffered prejudice". The Court saw two preliminary difficulties: first, "it [was] not clear whether the alleged misleading conduct was on the part of the [Belgian] Government itself or of private Belgian parties, or in the latter event, how far it is contended that the complicity or responsibility of the [Belgian] Government is involved". Second, it did not consider that the conduct had been proved. Moreover, the Court held that Spain was not prejudiced by the fact that Belgium was able in the new proceedings, to frame its application and memorial with a foreknowledge of the probable nature of Spain's reply: "The scope of the Court's process is... such as, in the long run, to neutralize any initial advantage that might be obtained by either side".<sup>133</sup> Judge Bustamante in his separate opinion and Judges Morelli and Armand-Ugon in their dissenting opinions also discussed the objection.<sup>134</sup>

45. The claimant in the *Wollemborg case* (1956),<sup>135</sup> was attempting to recover tax which he had paid but from which he was exempt under the Italian Peace Treaty. The Italian Government opposed the claim on the ground that the claimant's attorney signed an agreement with the Italian financial administration and that the taxes were paid pursuant to that agreement. The Italian-United States Conciliation Commission rejected this argument:

Viewed from the international standpoint, the cited settlement (*concordato*) could be relevant only as a waiver of a right on the part of its principal (Balladore Pallieri [*Diritto internazionale pubblico*] p. 251). Certainly, the waiver is, save in exceptional cases, binding on the subject from whom the unilateral declaration of relinquishment emanates (*ibid.*). But waivers cannot be presumed and there is nothing in the instant case that authorizes one to admit that there was intention to relinquish.<sup>136</sup>

The attorney and the claimant were unaware, at the relevant times, of several important facts: the relevant provisions of the Treaty of Peace and of another Italo-United States agreement and a relevant decision of the French-Italian Conciliation Commission. Further, because of the attitude of the Italian authorities, the claimant could succeed in his claims only before the Conciliation Commission "and it was not necessary to make any specific reservation in this connexion".<sup>137</sup>

46. The questions of estoppel and preclusion were discussed by the Court of Arbitration in the *Argentine-*

<sup>129</sup> *Ibid.*, pp. 22 and 23.

<sup>130</sup> *Ibid.*, pp. 24 and 25.

<sup>131</sup> *Ibid.*, pp. 78-82; 101-109; 116-133.

<sup>132</sup> *Reports of International Arbitral Awards*, vol. XIV, p. 283.

<sup>133</sup> *Ibid.*, p. 290.

<sup>134</sup> *Ibid.*

<sup>129</sup> *Ibid.*, pp. 103 and 104.

<sup>130</sup> *I.C.J. Reports 1964*, pp. 6, 16-26.

<sup>131</sup> *Ibid.*, p. 21.

*Chile Frontier case* (1966)<sup>138</sup> and by the Arbitral Tribunal in the *Case concerning the interpretation of the Air Transport Services Agreement between the United States of America and France* (1963).<sup>139</sup>

## VII. FORMS AND EXTENT OF REPARATION

### 1. General

47. In the *Affaire relative à une quantité d'or revendiquée par les Pays-Bas* (1963)<sup>140</sup> the Italian-Netherlands Conciliation Commission noted with approval the Netherlands concession that it could not simultaneously pursue its claim to the return of certain monetary gold before two separate tribunals:

Such a double claim would involve an unlawful enrichment which is prohibited by the general principles of law that are recognized by civilized nations and form an integral part of international law (cf. Guggenheim, *Traité de droit international public*, vol. I, p. 155). [Translation from the French by the United Nations Secretariat.]<sup>141</sup>

Accordingly the Netherlands declared that it was ready to withdraw its claim (under the Paris Agreement of 1946) before the Tripartite Commission for the Restitution of Monetary Gold to the extent that it was indemnified by the Italian Government, under the Peace Treaty.

### 2. Monetary compensation

#### (a) General

48. As already noted (see paragraph 1 above), the Italian-United States Conciliation Commission has affirmed that

The responsibility of the State [which has violated international law] would entail the obligation to repair the damages suffered to the extent that said damages are the result of the inobservance of the international obligation.<sup>142</sup>

49. The Anglo-Italian Conciliation Commission was asked in the *Theodorou case* (1961),<sup>143</sup> to determine the amount of damages even although the exact amount could not be established partly because the evidence adduced was not sufficiently precise. Guided by certain precedents, it decided "to determine equitably the amount of the compensation". The Commission quoted the following statement from the *Pinson case* (1928):

... in any case, the convention does not in any way limit the power of the Commission to decide on the admissibility and value of evidence. In these circumstances, it must be assumed to have complete freedom of appreciation, a restriction of such freedom does not appear to be anymore a general principle of public international law on the subject of arbitration....

Admitting that international law has never drawn up precise rules as to the conditions to be satisfied by evidence before international tribunals, and that they have generally benefited by great freedom,

which permitted them to evaluate evidence according to the normal or abnormal circumstances, in which the evidence happened to have been got together, equity remained all the same.... If the use of the word "equity" in this context runs up against objections, I am quite prepared to replace it by "freedom to evaluate evidence according to the attendant circumstances." [Translation from the French by the United Nations Secretariat.]<sup>144</sup>

See also decisions of the Conciliation Commissions established under the Italian Peace Treaty in which the amount of compensation was fixed by reference to their "power of appreciation", *ex aequo et bono*, or by the Commission acting in a spirit of conciliation, e.g. the *Feldman case* (1954),<sup>145</sup> and the *Différend Héritiers Raoul Mailhac* (1956).<sup>146</sup>

#### (b) Punitive damages

50. In the *Orr and Laubenheimer claim* (1900)<sup>147</sup> (see paragraph 26 above) the arbitrator ruled, in a case where damages were being claimed in respect of losses arising from the seizure of the claimants' vessels by the Government to put down an insurrection, that

There is no question of a "solatium" or of punitive damages, for the right of eminent domain and the rights incident to a state of war, and martial law, justify the use by any Government, in an emergency, of any private property found available. Full compensation, however, for all damage suffered by private parties must afterwards be made. But the obligation rests upon every party damaged to do all in his power to reduce his losses to a minimum.<sup>148</sup>

#### (c) Indirect damages, including loss of profits

51. The Italian Peace Treaty, *inter alia*, provided that certain nationals of the United Nations were entitled to compensation to the extent of two-thirds of the sum necessary "to make good the loss suffered". In the *Currie case* (1954),<sup>149</sup> the Anglo-Italian Conciliation Commission ruled that the Italian Government was responsible for foreseeable and unavoidable increases in the damage and that the "loss suffered"

is not only that arising directly and immediately "as a result of injury or damage" but also that arising indirectly and subsequently....<sup>150</sup>

Accordingly Italy was held responsible for the subsequent deterioration in the state of the claimants' property and not merely for the initial damage caused by bombing. Compare the decision of the French-Italian Conciliation Commission in *Différend Textiloses et Textiles* (1959).<sup>151</sup>

52. The arbitrators in the *Salvador Commercial Company claim* (1902),<sup>152</sup> had "full power to grant complete, just and legal relief to the parties: the damages awarded shall be fully compensatory but shall not include any which are merely speculative or imaginary". As seen (paragraph 5 above), the arbitrators, by a majority, held

<sup>144</sup> *Ibid.*, vol. V, pp. 412 and 414.

<sup>145</sup> *Ibid.*, vol. XIV, p. 212.

<sup>146</sup> *Ibid.*, vol. XIII, p. 723.

<sup>147</sup> *Ibid.*, vol. XV, p. 37.

<sup>148</sup> *Ibid.*, p. 40.

<sup>149</sup> *Ibid.*, vol. XIV, p. 21.

<sup>150</sup> *Ibid.*, p. 24.

<sup>151</sup> *Ibid.*, vol. XIII, pp. 742 and 745.

<sup>152</sup> *Ibid.*, vol. XV, p. 467.

<sup>138</sup> *Reports of International Arbitral Awards*, vol. XVI, p. 109.

<sup>139</sup> *Ibid.*, p. 5.

<sup>140</sup> *Ibid.*, p. 299.

<sup>141</sup> *Ibid.*, p. 318.

<sup>142</sup> *Ibid.*, vol. XIV, p. 163.

<sup>143</sup> *Ibid.*, pp. 53, 64 and 65.

that the El Salvador Government was responsible for the termination of the claimant's concession which then had twenty-one years to run. The arbitrators held:

Under the terms of the protocol and by the accepted rules of international courts in such cases, nothing can be allowed as damages which has for its basis the probable future profits of the undertaking thus summarily brought to an end.<sup>153</sup>

The arbitrators then went on to calculate the value of the franchise "computed without reference to future or speculative profits or any speculative or imaginary basis whatever".

53. Similarly the arbitrator of the claims made by Italians resident in Peru in respect of the civil war of 1894-95 excluded loss of profits and other indirect damages: *Don Lorenzo Roggero*; *Don Juan B. Serra*, *Don Nicolas O. Maltese* ("indirect damages are not taken into consideration in claims of this kind"); *Don Andrés Ratti*; and *Don Juan Tiscornia et Compagnie* claims (1901).<sup>154</sup>

54. On the other hand, the arbitrator in the *May case* (1900),<sup>155</sup> having held that there were no legal and moral reasons for expelling May from his post as manager of the Guatemalan Railways, and noting that under the terms of his contract with the Government he was entitled to serve for another five months, decided that he was entitled to the profits which he would have earned in that period. The parties seem to have been agreed on this issue, however, since the Guatemalan Government, in its pleadings, stated:

The law of Guatemala... (*to which the claimant is subject in this case\**), establishes, like those of all civilized nations of the earth, that contracts produce reciprocal rights and obligations between the contracting parties and have the force of law in regard to those parties; that whoever concludes a contract is bound not only to fulfill it, but also to recoup or compensate (the other party) for damages and prejudice which result directly or indirectly from the nonfulfillment or infringement by default or fraud of the party concerned, and that such compensation includes both the damage suffered and the profits lost. *Damnum emergens et lucrum cessans*.<sup>156</sup> [\* *Italics added by the Secretariat.*]

The arbitrator also held that May was entitled to substantial damages for the delay in reaching a settlement of the debt owing to him, but that since there was clearly a speculative element in his acceptance of the contract, the damages "should be confined to what may be considered a sufficient amount to cover May's actual expenses and losses."<sup>157</sup>

55. Under an agreement of 1895 Guatemala agreed to indemnify those Mexican citizens

who were injured by its agents, for the value of the property occupied or destroyed, and for the damages that may have been *directly* \* caused to them by such occupation or destruction.<sup>158</sup> [\* *Italics added by the Secretariat.*]

In one case, the claimant sought the payment of profits allegedly lost because of the fact that it could not, as a result of the Guatemalan occupation, cut and sell timber. The arbitrator rejected that part of the claim:

Loss of earnings (*lucro cesante*) is certainly a damage caused to the claimant by the occupation; but the allegation mentioned above did not succeed in convincing the arbitrator that such damages are the direct damages to which article 2 applies. The arbitrator had to bear in mind that if the High Contracting Parties, in drawing up their Convention, had wished to include in it indirect or secondary effects, they would have had to express that clearly, in such a way as not to give rise to any doubt. Since they did not do so, the arbitrator had to attribute to the expressions used a strict sense, thus following established precedents in the many arbitral decisions before him. He also had to take into account that in this case, as the claimants acknowledged in their submission, and as Mexico acknowledged in signing the Convention, it was a matter of one who caused damage, but acted in good faith, in the belief that he was exercising acts of jurisdiction in his own territory.<sup>159</sup>

*Romano and Company, Successors claim* (1898);<sup>160</sup> see also *Policarpo Valenzuela and Sons*; *Tránsito Mejenes*; and *Frederico Schindler* claims (1898).<sup>161</sup>

#### (d) Interest

56. In the *Fatovich case* (1954),<sup>162</sup> a claim for interest was rejected by the Italian-United States Conciliation Commission since no express request for interest had been made and

the fundamental principles of justice and equity, as well as the sounder opinion of other international tribunals, require that a clear and express request for interest, whenever the subject matter of the claim does not involve a prior contractual provision for interest, is a condition precedent to the responsibility of a State (if it exists) for interest on claims.<sup>163</sup>

See similarly the *Batchelder* (1954); *MacAndrews and Forbes Co.* (1954); and *Rosasco* (1955) cases;<sup>164</sup> and see also the *Carnelli case* (1952).<sup>165</sup>

57. In several cases Commissions set up under the Peace Treaties following the Second World War, were asked to award interest. In some cases, they did so—the *Différend Dame Mélanie Lachenal* (1953, 1954);<sup>166</sup> the *Différend Dame Baron née Vaccari* (1958);<sup>167</sup> *Tidewater Oil Company case* (1960),<sup>168</sup> (see similarly the *Post-Glover Electric Company case* (1900),<sup>169</sup> and the *May case* (1900))<sup>170</sup>—and in at least one, they refused—the *Wollemborg case* (1956);<sup>171</sup> (see similarly the *Don Andrés Ratti* and *Don Juan Tiscornia et Compagnie* cases (paragraph 53 above)).

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*, p. 12.

<sup>161</sup> *Ibid.*, pp. 7, 10 and 11; 16 and 17; 19 and 20.

<sup>162</sup> *Ibid.*, vol. XIV, pp. 190, 195-200.

<sup>163</sup> *Ibid.*, p. 196.

<sup>164</sup> *Ibid.*, pp. 201 and 204; 221 and 226; 227 and 230.

<sup>165</sup> *Ibid.*, pp. 86, 94-96.

<sup>166</sup> *Ibid.*, vol. XIII, pp. 117, 125 and 130.

<sup>167</sup> *Ibid.*, pp. 793 and 794.

<sup>168</sup> *Ibid.*, vol. XIV, pp. 480 and 483.

<sup>169</sup> *Ibid.*, vol. XV, pp. 37 and 46.

<sup>170</sup> *Ibid.*, pp. 47 and 75.

<sup>171</sup> *Ibid.*, vol. XIV, pp. 283 and 290.

<sup>153</sup> *Ibid.*, p. 478.

<sup>154</sup> *Ibid.*, pp. 408; 410; 413; 431 and 445.

<sup>155</sup> *Ibid.*, p. 47.

<sup>156</sup> *Ibid.*, p. 73.

<sup>157</sup> *Ibid.*, p. 75.

<sup>158</sup> *Ibid.*, p. 13.

DOCUMENT A/CN.4/209

Proposals submitted to, and decisions of, various United Nations organs relating to the question of State responsibility:  
supplement prepared by the Secretariat to document A/CN.4/165 \*

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CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
INTRODUCTION . . . . .		115
I. PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES . . . . .	1-19	115
II. THE INADMISSIBILITY OF INTERVENTION IN THE DOMESTIC AFFAIRS OF STATES AND THE PROTECTION OF THEIR INDEPENDENCE AND SOVEREIGNTY . . . . .	20-23	119
III. THE QUESTION OF DEFINING AGGRESSION . . . . .	24-26	119
IV. PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES . . . . .	27-31	120
V. PEACEFUL USES OF OUTER SPACE . . . . .	32-40	121
VI. THE PEACEFUL USES OF THE SEA-BED AND THE OCEAN FLOOR BEYOND THE LIMITS OF NATIONAL JURISDICTION . . . . .	41-42	123

ANNEX

List of General Assembly resolutions cited . . . . .	123
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\* *Yearbook of the International Law Commission, 1964, vol. II, p. 125.*

## Introduction

To assist the International Law Commission in its work on the question of State responsibility, the Secretariat has prepared the following supplement to document A/CN.4/165 which was prepared in 1964 at the request of the Commission. It consists of proposals submitted to, and decisions of, various organs of the United Nations between 1964 and 1968, having a bearing on the question of State responsibility.

### I. PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES

#### 1. The General Assembly, in resolution 1815 (XVII) of 18 December 1962, recognized:

... the paramount importance, in the progressive development of international law and in the promotion of the rule of law among nations, of the principles of international law concerning friendly relations and co-operation among States and the duties deriving therefrom, embodied in the Charter of the United Nations which is the fundamental statement of those principles, notably:

(a) The principle that States shall refrain in their international relations from that threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations;

(b) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered;

(c) The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter;

(d) The duty of States to co-operate with one another in accordance with the Charter;

(e) The principle of equal rights and self-determination of peoples;

(f) The principle of sovereign equality of States;

(g) The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter.

In the same resolution, the Assembly resolved:

... to undertake, pursuant to Article 13 of the Charter, a study of the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter with a view to their progressive development and codification, so as to secure their more effective application.

It accordingly decided to study the first, second, third and sixth principles at its eighteenth session. At that session, the Assembly, by resolution 1966 (XVIII) of 16 December 1963, decided to establish a Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States.<sup>1</sup> The Com-

mittee was to "draw up a report containing, for the purpose of the progressive development and codification of the [first, second, third and sixth] principles so as to secure their more effective application, the conclusions of its study and its recommendations...", and the Assembly itself would, at its nineteenth session, consider the report of the Special Committee and study the other three principles.

2. In resolution 2103 A (XX) of 20 December 1965, the Assembly noted the report of the 1964 Special Committee and reconstituted it "in order to complete the consideration and elaboration of the seven principles set forth in General Assembly resolution 1815 (XVII)". The Committee was requested to "submit a comprehensive report on the results of its study of the seven principles... including its conclusions and recommendations, with a view to enabling the General Assembly to adopt a declaration containing an enunciation of these principles". The Assembly, by resolution 2181 (XXI) of 12 December 1966, took note of the report of the 1966 Special Committee, of its formulations concerning the principles of the peaceful settlement of disputes and sovereign equality, and of its decision that with regard to the principle on non-intervention it would abide by resolution 2131 (XX) of 21 December 1965,<sup>2</sup> and asked the Committee to continue its work. More specifically, it requested the Committee to complete the formulations of the principles of the non-use of force, the duty to co-operate, equal rights and self-determination, and good-faith fulfilment of obligations; to consider proposals on the principle of non-intervention "with the aim of widening the area of agreement already expressed in General Assembly resolution 2131 (XX)"; "to examine any additional proposals with a view to widening the areas of agreement expressed in the formulations of the 1966 Special Committee concerning 'the principle of peaceful settlement of disputes and sovereign equality'"; and to submit "a comprehensive report on the principles entrusted to it for study and a draft declaration on the seven principles". By resolution 2327 (XXII) of 18 December 1967, the Assembly noted the report of the 1967 Special Committee, and asked it to continue its work. In particular, it requested the Committee to complete the formulation of the principles of the non-use of force and equal rights and self-determination; to "consider proposals compatible with General Assembly resolution 2131 (XX)" on the principle of non-intervention "with the aim of widening the area of agreement already expressed in that resolution" and, to submit to the Assembly at its twenty-third session "a comprehensive report on the principles entrusted to it". By resolution 2463 (XXIII) of 20 December 1968, the Assembly noted the report of the 1968 Special Committee, asked it to continue and to complete its work, and requested it "to endeavour to resolve, in the light of General Assembly resolution 2327 (XXII), all relevant questions relating to the formulation of the seven principles, in

<sup>1</sup> The reports of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States appear in the following documents:

1964 report—*Official Records of the General Assembly, Twentieth Session, Annexes*, agenda items 90 and 94, document A/5746.

1966 report—*Ibid.*, *Twenty-first Session, Annexes*, agenda item 87, document A/6230.

1967 report—*Ibid.*, *Twenty-second Session, Annexes*, agenda item 87, document A/6799.

1968 report—*Ibid.*, *Twenty-third Session*, agenda item 87, document A/7326.

<sup>2</sup> Report of the 1966 Special Committee, paras. 248, 272, 341, 403 and 413. See also on the principle of sovereign equality, report of the 1964 Special Committee, para. 339; on the principle of non-intervention, see paras. 20-23 below.

order to complete its work as far as possible, and to submit to the General Assembly at its twenty-fourth session a comprehensive report”.

3. As noted, the Special Committee in 1966 adopted formulations concerning the principles of the peaceful settlement of disputes and sovereign equality of States and adopted a resolution relating to the principle of non-intervention.<sup>3</sup> In 1967 it took note of texts adopted by its Drafting Committee on the principle on the duty of States to co-operate with one another in accordance with the Charter and on the principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter.<sup>4</sup> And in 1968 the Committee adopted the report of its Drafting Committee on the principle of the non-use of force.<sup>5</sup>

4. Since the work on the principles is still in progress and since the principles are closely interrelated, members of the Special Committee and of the Sixth Committee have from time to time reserved their position in relation to particular texts, statements and resolutions, pending the final completion of the work. Relevant decisions reached, and proposals made, concerning the principles of the non-use of force, non-intervention, sovereign equality and good-faith fulfilment and obligations appear below under appropriate headings.<sup>6</sup>

A. *The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations*

5. *International wrongful act.* In 1968 the Committee adopted its Drafting Committee's report which, under the heading “Consequences and corollaries of the prohibition of the threat or use of force”, contained the following agreed statement:

A war of aggression constitutes a crime against the peace, for which there is responsibility under international law.<sup>7</sup>

<sup>3</sup> See foot-note 2.

<sup>4</sup> Report of the 1967 Special Committee, paras. 161, 285 and 474. In addition, the Working Group of the Drafting Committee submitted a report relating to the principles of peaceful settlement of disputes and sovereign equality. The Drafting Committee took note of the report and transmitted it to the Special Committee, which, in turn, took note of the Drafting Committee's report and transmitted it to the General Assembly (*Ibid.*, paras. 438 and 474).

<sup>5</sup> Report of the 1968 Special Committee, paras. 111 and 134.

<sup>6</sup> See also para. 31 below where decisions and proposals relating to one aspect of the principles of non-intervention, equal rights and self-determination and sovereign equality are discussed.

<sup>7</sup> Report of the 1968 Special Committee, paras. 111 and 134. For the relevant proposals and discussions see reports of the 1964 Special Committee, paras. 27, 68-72 and 106; 1966 Special Committee, paras. 25-27, 29, 77-81 and 156; 1967 Special Committee, paras. 22-24, 26, 27, 58-61 and 107; and 1968 Special Committee, paras. 22-24, 26, 27, 55-57, 114, 117, 119, 121 and 124.

For discussions in the Sixth Committee see the relevant reports of that Committee for 1965 (*Official Records of the General Assembly, Twentieth session, Annexes*, agenda items 90 and 94, document A/6165, para. 22); 1967 (*Ibid.*, *Twenty-second Session, Annexes*, agenda item 87, document A/6955, para. 42), and 1968 (*Ibid.*, *Twenty-*

The Special Committee has not reached agreement on the following more detailed provision:

The planning, preparation, initiation and waging of wars of aggression constitute international crimes against peace, giving rise to political and material responsibility of States...<sup>8</sup>

6. *Imputability.* In 1968, the Committee adopted its Drafting Committee's report which, under the heading “Consequences and corollaries of the prohibition of the threat or use of force”, contained the following agreed statement:

In accordance with the purposes and principles of the United Nations States have the duty to refrain from propaganda for wars of aggression.<sup>9</sup>

Some proposals would go beyond this statement and would prohibit all propaganda for war and for preventive war, or propaganda which encourages the threat or use of force.<sup>10</sup> Another proposal would prohibit “in the light of each country's constitutional system” such propaganda,<sup>11</sup> while another would provide that Members of the United Nations should “take appropriate steps to discourage propaganda against peace”.<sup>12</sup>

7. In 1968, the Committee adopted the report of its Drafting Committee, which, under the heading “Organization of armed bands”, contained the following agreed statement:

Every State has the duty to refrain from organizing or encouraging the organization of irregular or volunteer forces or armed bands, including mercenaries, for incursion into the territory of another State.<sup>13</sup>

*third Session, Annexes*, agenda item 87, document A/7429, paras. 24 and 25).

See also General Assembly resolution 2160 (XXI), para. 1 (a), which, after reaffirming Article 2 (4) of the Charter, states:

“Accordingly, armed attack by one State against another or the use of force in any other form contrary to the Charter of the United Nations constitutes a violation of international law giving rise to international responsibility” (see further, *Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 92.)

<sup>8</sup> Reports of the 1966 Special Committee, para. 25; the 1967 Special Committee, para. 22; and the 1968 Special Committee, para. 22. See also the report of the 1964 Special Committee, para. 27.

<sup>9</sup> Report of the 1968 Special Committee, paras. 111 and 134. For the relevant proposals and discussions see reports of the 1964 Special Committee, paras. 27, 94-97 and 106; 1966 Special Committee, paras. 25, 26, 28, 29, 82-89 and 156; 1967 Special Committee, paras. 22, 25-27, 58-62, 114, 117, 119, 121, 127, 132 and 133.

<sup>10</sup> Reports of the 1964 Special Committee, para. 27; the 1966 Special Committee, paras. 25, 26 and 28; the 1967 Special Committee, paras. 22 and 26; and the 1968 Special Committee, paras. 22 and 26.

<sup>11</sup> Reports of the 1967 Special Committee, para. 27; and the 1968 Special Committee, para. 27. See also the report of the 1966 Special Committee, para. 29.

<sup>12</sup> Report of the 1968 Special Committee, para. 25.

For discussions in the Sixth Committee see the relevant reports of that Committee for 1965 (*Official Records of the General Assembly, Twentieth Session, Annexes*, agenda items 90 and 94, document A/6165, para. 27); 1966 (*Ibid.*, *Twenty-first Session, Annexes*, agenda item 87, document A/6547, para. 40); 1967 (*Ibid.*, *Twenty-second Session, Annexes*, agenda item 87, document A/6955, para. 42); and 1968 (*Ibid.*, *Twenty-third Session, Annexes*, agenda item 87, document A/7429, para. 26).

<sup>13</sup> Report of the 1968 Special Committee, para. 111.

There was also agreement in principle that every State has the duty to refrain from involvement in civil strife and terrorist acts in another State.<sup>14</sup> A number of the proposals submitted to the Committee would go further and require States not to tolerate, connive at, or acquiesce in, activities of a terrorist or subversive nature directed against another State.<sup>15</sup>

8. *Circumstances in which an act is not wrongful: Self-defence.* The proposals submitted raise, *inter alia*, the following issues relevant to self-defence:

- (a) the priority principle,<sup>16</sup>
- (b) the limitation of action in self-defence to cases of the use of armed force;<sup>17</sup>
- (c) proportionality,<sup>18</sup> and
- (d) the right of a State which is subject to subversive or terrorist acts to take reasonable and appropriate measures to safeguard its institutions.<sup>19</sup>

The Committee has not yet reached any agreement on these issues.

9. *Sanctions.* In 1968 the Committee adopted the report of its Drafting Committee, which included the following passage:

States have a duty to refrain from acts of reprisal involving the use of force.<sup>20</sup>

<sup>14</sup> *Ibid.*, para. 134. For the relevant proposals and discussions see reports of the 1964 Special Committee, paras. 29, 31, 42-45 and 106; the 1966 Special Committee, paras. 26-29, 60-63 and 156; the 1967 Special Committee, paras. 23, 24, 26, 27, 47-50 and 107; and the 1968 Special Committee, paras. 23, 24, 26, 27, 28, 46-48, 114, 117, 119, 120 and 123.

<sup>15</sup> Report of the 1964 Special Committee, para. 29; the 1966 Special Committee, para. 27; the 1967 Special Committee, paras. 23, 24 and 27; and the 1968 Special Committee, paras. 23, 24 and 27.

For discussions in the Sixth Committee see the relevant reports of that Committee for 1966 (*Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 87, document A/6547, para. 37); 1967 (*Ibid.*, *Twenty-second Session, Annexes*, agenda item 87, document A/6955, para. 40); and 1968 (*Ibid.*, *Twenty-third Session, Annexes*, agenda item 87, document A/7429, para. 30).

<sup>16</sup> See the reports of the 1964 Special Committee, paras. 27, 28, 31, 81, 82 and 106; the 1966 Special Committee, paras. 25, 26, 28, 130-135 and 156; the 1967 Special Committee, paras. 22, 26, 27, 97-99 and 107; and the 1968 Special Committee, paras. 22, 26, 27, 97-101 and 131.

<sup>17</sup> See the reports of the 1964 Special Committee, paras. 28, 31, 53-54, 82 and 106; the 1966 Special Committee, paras. 25, 26, 28, 70, 132-135 and 156; the 1967 Special Committee, paras. 22, 26, 27, 97-99 and 107; and the 1968 Special Committee, paras. 22, 26, 27, 97-101 and 116.

<sup>18</sup> See the reports of the 1964 Special Committee, para. 82; and the 1968 Special Committee, para. 101.

<sup>19</sup> See the reports of the 1966 Special Committee, paras. 28, 130, 132 and 156; the 1967 Special Committee, paras. 27, 97, 99 and 107; and the 1968 Special Committee, paras. 27, 97 and 116.

For discussions in the Sixth Committee see the relevant reports of that Committee for 1965 (*Official Records of the General Assembly, Twentieth Session, Annexes*, agenda items 90 and 94, document A/6165, paras. 25, 30 and 40); 1966 (*Ibid.*, *Twenty-first Session, Annexes*, agenda item 87, document A/6547, paras. 39, 43 and 58); 1967 (*Ibid.*, *Twenty-second Session, Annexes*, agenda item 87, document A/6955, para. 47); 1968 (*Ibid.*, *Twenty-third Session, Annexes*, agenda item 87, document A/7429, paras. 36 and 39).

<sup>20</sup> Report of the 1968 Special Committee, paras. 111 and 134.

There is as yet no agreement whether this statement applies only to reprisals by the use of armed force.<sup>21</sup>

10. Several of the proposals would provide that territorial acquisitions or special advantages obtained by force or by other means or coercion will not be recognized. The Committee has not reached agreement on any of these proposals.<sup>22</sup>

B. *The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter*

11. Since the adoption by the General Assembly, in resolution 2131 (XX) of 21 December 1965, of the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty,<sup>23</sup> discussion in the Special Committee of the above principle has centred around the Declaration.<sup>24</sup> In 1966 the Committee adopted by a vote of 22 in favour, 8 against, with 1 abstention, a resolution containing the following preambular and operative paragraphs:

*The Special Committee,  
Bearing in mind:*

...

(c) That the General Assembly, in its resolution 2131 (XX) of 21 December 1965, adopted a Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty which, by virtue of the number of States which voted in its favour, the scope and profundity of its contents and, in particular, the absence of opposition, reflects a

<sup>21</sup> *Ibid.*, paras. 64, 114, 117, 119, 121, 131 and 133. For the relevant proposals and discussions see reports of the 1964 Special Committee, paras. 31, 42, 46 and 106; the 1966 Special Committee, paras. 25, 27-29, 90, 91 and 156; the 1967 Special Committee, paras. 22-24, 27, 66, 67 and 107; and the 1968 Special Committee, paras. 22-24, 27, 63, 64, 114, 117, 119, 121, 131 and 133.

For discussions in the Sixth Committee see the relevant reports of that Committee for 1965 (*Official Records of the General Assembly, Twentieth Session, Annexes*, agenda items 90 and 94, document A/6165, para. 43); 1966 (*Ibid.*, *Twenty-first Session, Annexes*, agenda item 87, document A/6547, para. 58); 1967 (*Ibid.*, *Twenty-second Session, Annexes*, agenda item 87, document A/6955, para. 92); 1968 (*Ibid.*, *Twenty-third Session, Annexes*, agenda item 87, document A/7429, para. 29).

<sup>22</sup> See the reports of the 1964 Special Committee, paras. 28, 31, 90-93 and 106; the 1966 Special Committee, paras. 26, 28, 98-103 and 156; the 1967 Special Committee, paras. 26, 27, 75-77 and 107; and the 1968 Special Committee, paras. 26, 27, 71-76, 111, 116, 123, 127, 129 and 130.

For discussions in the Sixth Committee, see the reports of the Committee on the relevant agenda items for 1965 (*Official Records of the General Assembly, Twentieth Session, Annexes*, agenda items 90 and 94, document A/6165, para. 27); 1967 (*Ibid.*, *Twenty-second Session, Annexes*, agenda item 87, document A/6955, para. 44); and 1968 (*Ibid.*, *Twenty-third Session, Annexes*, agenda item 87, document A/7429, paras. 28, 32 and 33).

One of the proposals submitted to the Special Committee on the question of defining aggression contained, in a preambular paragraph, a similar proposal. The proposal was not voted on, see report of the Special Committee (*Ibid.*, *Twenty-third Session*, agenda item 86, document A/7185/Rev.1, para. 7).

<sup>23</sup> See also section II below.

<sup>24</sup> See report of the 1966 Special Committee, chap. IV (especially paras. 292-300) and chap. IX; see also report of the 1967 Special Committee, chap. III and chap. VI, paras. 457 and 474.

universal legal conviction which qualifies it to be regarded as an authentic and definite principle of international law,

1. *Decides* that with regard to the principle of non-intervention the Special Committee will abide by General Assembly resolution 2131 (XX) of 21 December 1965;<sup>25</sup>

12. At its twenty-first session the General Assembly in resolution 2181 (XXI) of 12 December 1966 took note of this decision and requested the Committee to consider proposals on the principle of non-intervention "with the aim of widening the area of agreement already expressed in General Assembly resolution 2131 (XX)".<sup>26</sup> The Committee was unable to do this,<sup>27</sup> and at its twenty-second session the Assembly, in resolution 2327 (XXII), requested it to consider proposals compatible with resolution 2131 (XX) "with the aim of widening the area of agreement already expressed in" it. The Committee did not have sufficient time to consider this question in 1968.<sup>28</sup> Relevant proposals submitted to the Special Committee are reproduced below under appropriate headings.

13. *Imputability.* Most of the substantive proposals would require States not to tolerate or permit subversive or terrorist activities against another State.<sup>29</sup> (See also paragraph 22 below concerning operative paragraph 2 of the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (General Assembly resolution 2131 (XX)).

14. *Circumstances in which an act is not wrongful: Self-defence.* One proposal submitted to the Committee in 1966 and 1967 would provide that "The right of States in accordance with international law to take appropriate measures to defend themselves individually or collectively against intervention is a fundamental element of the inherent right of self-defence".<sup>30</sup>

15. *Sanctions.* Proposals submitted in 1964 and 1966 to the Committee would have required States not to recog-

nize territorial acquisitions or special advantages obtained by duress of any kind by another State.<sup>31</sup>

C. *The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter*

16. *International wrongful act.* One of the proposals put to the Committee in 1967 would provide that any State which fails to perform the obligations binding on it in accordance with the Charter should be deemed to have incurred international liability in accordance with the relevant provisions of the Charter. The agreed text on the above principle contains no relevant provision.<sup>32</sup>

17. *Circumstances in which an act is not wrongful.* In 1967 the Drafting Committee of the Special Committee submitted a report to the Special Committee containing the following provisions:

3. Every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles of international law.

4. Where obligations arising under international agreements are in conflict with the obligations of Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail.

The Special Committee took note of the report and transmitted it to the General Assembly.<sup>33</sup> A number of the proposals submitted to the Committee would have stated that the free conclusion of, and the equality of the parties to, an international agreement were essential to its good-faith fulfilment.<sup>34</sup> There was some disagreement within the Special Committee whether this proposal was, or should be, included in paragraph 3 above.<sup>35, 36</sup> Other proposals would have denied States the right to avoid their obligations on the grounds of their incompatibility with national law or national policy.<sup>37</sup>

<sup>25</sup> Report of the 1966 Special Committee, para. 341.

<sup>26</sup> See also paras. 52-58 of the report of the Sixth Committee (*Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 87, document A/6547).

<sup>27</sup> Report of the 1967 Special Committee, chap. III, and chap. VI, paras. 457-474.

<sup>28</sup> Report of the 1968 Special Committee, chap. III. See further General Assembly resolution 2463 (XXIII) and the report of the Sixth Committee (*Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 87, document A/7429, paras. 55-63).

<sup>29</sup> See the reports of the 1964 Special Committee, paras. 204, 208, 209, 241, 270-274 and 292; the 1966 Special Committee, paras. 276, 277, 279, 310 and 311, 341, 353 and 355; and the 1967 Special Committee, paras. 303, 306, 349-351 and 355.

For discussions in the Sixth Committee see the relevant reports of the Committee for 1965 (*Official Records of the General Assembly, Twentieth Session, Annexes*, agenda items 90 and 94, document A/6165, para. 43); 1966 (*Ibid.*, *Twenty-first Session, Annexes*, agenda item 87, document A/6547, para. 58); and 1967 (*Ibid.*, *Twenty-second Session, Annexes*, agenda item 87, document A/6955, para. 92).

<sup>30</sup> See the reports of the 1966 Special Committee, paras. 279, 280, 325-328, 341, 353 and 355; and the 1967 Special Committee, paras. 303, 305 and 365.

<sup>31</sup> See the reports of the 1964 Special Committee, paras. 209, 285 and 292, and the 1966 Special Committee, paras. 277, 278, 318-320, 341, 353 and 355.

<sup>32</sup> See the report of the 1967 Special Committee, paras. 241 and 285.

<sup>33</sup> Report of the 1967 Special Committee, paras. 285 and 474. For the relevant proposals and discussions see the reports of the 1966 Special Committee, paras. 523-525, 554-558, 560-563 and 566; and of the 1967 Special Committee, paras. 237-240, 242, 269-282, 285, 287-295 and 297-299.

<sup>34</sup> Reports of the 1966 Special Committee, paras. 523 and 524; and the 1967 Special Committee, paras. 237, 238 and 242.

<sup>35</sup> See the report of the 1967 Special Committee, paras. 269-273, 287-295 and 297-299.

<sup>36</sup> In discussions in the Special Committee other possible limits on the obligation of States to fulfil their obligations in good faith have been mentioned: the conclusion of the agreement in bad faith, report of the 1966 Special Committee, para. 559; the incompatibility of an agreement with a peremptory norm, report of the 1967 Special Committee, paras. 275-278, and the doctrine of *rebus sic stantibus*, *ibid.*, paras. 283 and 284.

<sup>37</sup> See the reports of the 1966 Special Committee, paras. 525, 548 and 566; and the 1967 Special Committee, paras. 239, 240, 291, 296 and 297.

For discussions in the Sixth Committee see the relevant reports of that Committee for 1965 (*Official Records of the General Assembly, Twentieth Session, Annexes*, agenda items 90 and 94, docu-

D. *The principle of sovereign equality of States*<sup>38</sup>

18. *International wrongful act: necessity of fault.* In connexion with the above principle, proposals have been submitted to the effect that States have no right to conduct any experiment or to resort to any action which is capable of having harmful effects on other States or endangering their security.<sup>39</sup> The texts accepted in 1964 and 1966 by the Special Committee contained none of these proposals. In 1967 the Drafting Committee noted the report of its Working Group which contained the following passage:

Although there was no agreement on the specific proposal that no State has the right to conduct any experiment or resort to any action which is capable of having harmful effects on other States, there was agreement that this concept might become an acceptable element to be added to the consensus text if certain modifications were made to the text of the proposal.<sup>40</sup>

The Special Committee took note of the report and transmitted it to the Assembly.<sup>41</sup>

19. *Circumstances in which an act is not wrongful: Self-defence.* In 1964 the Committee took no action on a suggestion that the principle that the right of each State to protect itself and to live its own life does not authorize it to commit unjust acts against another State should be included in its text.<sup>42</sup>

II. THE INADMISSIBILITY OF INTERVENTION IN THE DOMESTIC AFFAIRS OF STATES AND THE PROTECTION OF THEIR INDEPENDENCE AND SOVEREIGNTY

20. In resolution 2131 (XX) of 21 December 1965, the General Assembly adopted the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty. The Declaration was reaffirmed by the Assembly in its resolution 2225 (XXI) of 19 December 1966 and has been considered at length in the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States (see paragraphs 11 to 15 above). Relevant passages of the Declaration and proposals submitted

ment A/6165, paras. 64 and 65); 1966 (*Ibid.*, *Twenty-first Session, Annexes*, agenda item 87, document A/6547, para. 75); and 1967 (*Ibid.*, *Twenty-second Session, Annexes*, agenda item 87, document A/6955, paras. 75-79).

<sup>38</sup> For a discussion of this principle, in so far as it concerns permanent sovereignty over natural resources, see para. 31 below.

<sup>39</sup> See the reports of the 1964 Special Committee, para. 339; the 1966 Special Committee, paras. 362, 364, 393-396, 403, 409-411 and 413; and the 1967 Special Committee, paras. 413, 415, 436, 438 and 474.

<sup>40</sup> Reports of the 1964 Special Committee, para. 339; and the 1966 Special Committee, para. 403; and see the report of the 1967 Special Committee, paras. 438 and 474.

<sup>41</sup> Report of the 1967 Special Committee, paras. 438 and 474. For discussions in the Sixth Committee see the relevant reports of the Committee for 1965 (*Official Records of the General Assembly, Twentieth Session, Annexes*, agenda items 90 and 94, document A/6165, para. 45); and 1966 (*Ibid.*, *Twenty-first Session, Annexes*, agenda item 87, document A/6547, para. 62).

<sup>42</sup> Report of the 1964 Special Committee, para. 339.

during its elaboration by the First Committee of the Assembly are reproduced below under appropriate headings.

21. *International wrongful act.* The Declaration contains the following provision:

1. No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.

One of the draft resolutions submitted to the First Committee would have warned

those States which, in defiance of the Charter of the United Nations, are engaged in intervention in the domestic affairs of other States that, in so doing, they are assuming a heavy burden of international responsibility before all peoples.<sup>43</sup>

Suggested amendments to the draft would have deleted this provision.<sup>44</sup>

22. *Imputability.* The Declaration "solemnly declares", in paragraph 2, that

No State shall...tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State....<sup>45</sup>

23. *Sanctions.* The Declaration reads in paragraph 4:

... the practice of any form of intervention not only violates the letter and spirit of the Charter of the United Nations but also leads to the creation of situations which threaten international peace and security.<sup>46</sup>

A further proposal, not included in the Declaration, would have endorsed

... the provisions embodied in the Charter of the Organization of American States, as well as in the Declaration of the Second Conference of Heads of State or Government of Non-Aligned Countries and the resolution adopted by the Organization of African Unity on...the non-recognition of territorial acquisitions obtained by force.<sup>47</sup>

III. THE QUESTION OF DEFINING AGGRESSION

24. On 18 December 1967 the General Assembly adopted resolution 2330 (XXII) establishing a Special Committee on the Question of Defining Aggression and instructing the Committee to consider all aspects of the question so that an adequate definition of aggression might be

<sup>43</sup> *Official Records of the General Assembly, Twentieth Session, Annexes*, agenda item 107, document A/C.1/L.343/Rev.1.

See also paragraph (d) of a draft resolution submitted to the twenty-first session (*Ibid.*, *Twenty-first Session, Annexes*, agenda item 96, document A/6598; para. 5). The resolution finally adopted—General Assembly resolution 2225 (XXI)—contains no relevant provision.

<sup>44</sup> See *Official Records of the General Assembly, Twentieth Session, Annexes*, agenda item 107, document A/C.1/L.350, para. 12, and document A/C.1/L.351.

<sup>45</sup> *Ibid.*, documents A/C.1/L.349/Rev.2 and A/C.1/L.351.

<sup>46</sup> *Ibid.*, documents A/C.1/L.349 and Rev.1 and 2. See also General Assembly resolution 2225 (XXI), para. (b).

<sup>47</sup> See *Official Records of the General Assembly, Twentieth Session, Annexes*, agenda item 107, document A/C.1/L.354, para. 7.

prepared. The Committee considered the question in 1968 but did not reach any decisions on the three substantive proposals submitted to it.<sup>48</sup>

25. *International wrongful act.* The first two draft proposals put to the Committee contained no provision relating to the liability of those responsible for acts of aggression.<sup>49</sup> The third proposal contained the following:

9. Armed aggression as defined herein, and the acts enumerated above, shall constitute crimes against international peace, giving rise to international liability and responsibility.<sup>50</sup>

26. *Circumstances in which an act is not wrongful.* Proposals and discussions in the Special Committee related to the following relevant aspects of the right of self-defence:

- (a) the priority principle;<sup>51</sup>
- (b) the restriction of action in self-defence to cases of the use of armed force;<sup>52</sup>
- (c) proportionality;<sup>53</sup>
- (d) self-defence in the case of subversive and terrorist acts threatening a State's existence and institutions.<sup>54</sup>

#### IV. PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES<sup>55</sup>

27. The Second Committee of the General Assembly considered the item "Permanent Sovereignty over Natural Resources" at the twentieth,<sup>56</sup> twenty-first<sup>57</sup> and twenty-third sessions.<sup>58</sup>

<sup>48</sup> For the report of the Special Committee, see *Official Records of the General Assembly, Twenty-third Session*, agenda item 86, document A/7185/Rev.1. See also foot-note 22 above. The Committee is meeting again in 1969, see General Assembly resolution 2420 (XXIII).

<sup>49</sup> See *Official Records of the General Assembly, Twenty-third Session*, agenda item 86, document A/7185/Rev.1, paras. 7 and 8.

<sup>50</sup> *Ibid.*, para. 9; see also para. 107.

<sup>51</sup> *Ibid.*, paras. 54, 55, 83, 84 and 104; see also the report of the Sixth Committee (*Ibid.*, *Twenty-third Session, Annexes*, agenda item 86, document A/7402, paras. 15, 17 and 19).

<sup>52</sup> See the three substantive proposals submitted to the Committee, report of the Special Committee (*Official Records of the General Assembly, Twenty-third Session*, agenda item 86, document A/7185/Rev.1, paras. 7-9 and 56-59); see also the report of the Sixth Committee (*Ibid.*, *Twenty-third Session, Annexes*, agenda item 86, document A/7402, paras. 15 and 17).

<sup>53</sup> Report of the Special Committee (*Ibid.*, *Twenty-third Session*, agenda item 86, document A/7185/Rev.1, para. 8 (relating to action against subversive and terrorist acts) and paras. 9 and 57; see also the report of the Sixth Committee (*Ibid.*, *Twenty-third Session, Annexes*, agenda item 86, document A/7402, para. 18).

<sup>54</sup> Report of the Special Committee (*Ibid.*, *Twenty-third Session*, agenda item 86, document A/7185/Rev.1, paras. 8, 9, 92, 93 and 106).

<sup>55</sup> For developments up to 1963 see *Yearbook of the International Law Commission, 1964*, vol. II, document A/CN.4/165, pp. 131 and 132, paras. 44-54.

<sup>56</sup> See *Official Records of the General Assembly, Twentieth Session, Annexes*, agenda item 45. The question was deferred; for relevant proposals see the report of the Second Committee (*Ibid.*, document A/6196, paras. 5-10).

<sup>57</sup> *Ibid.*, *Twenty-first Session, Annexes*, agenda item 45; see further paras. 28 and 29 below.

<sup>58</sup> *Ibid.*, *Twenty-third Session, Annexes*, agenda item 39. The resolution adopted—General Assembly resolution 2386 (XXIII) of 19 November 1968—does not bear directly on the question of state responsibility.

28. At its twenty-first session the General Assembly, in resolution 2158 (XXI) of 25 November 1966, reaffirmed

the inalienable right of all countries to exercise permanent sovereignty over their natural resources in the interest of their national development, in conformity with the spirit and principles of the Charter of the United Nations and as recognized in General Assembly resolution 1803 (XVII);

and recognized

the right of all countries, and in particular of the developing countries, to secure and increase their share in the administration of enterprises which are fully or partly operated by foreign capital and to have a greater share in the advantages and profits derived therefrom on an equitable basis, with due regard to mutually acceptable contractual practices, and [called] upon the countries from which such capital originates to refrain from any action which would hinder the exercise of that right.

29. This second provision, in its original non-amended form, would have recognized

the right of the developing countries to secure and increase their share in the administration, advantages and profits derived from the exploitation of their natural resources when it is carried out fully or partly by foreign capital.<sup>59</sup>

One amendment to this proposal would have recognized

the rights of all countries, and in particular of the developing countries, to secure and increase their share on an equitable basis in the administration of enterprises which are fully or partly operated by foreign capital and to a greater share in the advantages and profits derived therefrom on an equitable basis to be determined in the light of the development needs and objectives of the peoples concerned without prejudice to any obligation arising out of international economic co-operation, based upon the principle of mutual benefit, and international law.<sup>60</sup>

30. This question has also been considered in the context of the Covenants on Human Rights. Earlier in the drafting of the Covenants it was decided that they should contain a provision reading as follows:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.<sup>61</sup>

This provision is now contained in article 1, paragraph 2, of the Covenant on Economic, Social and Cultural Rights and article 1, paragraph 2, of the Covenant on Civil and Political Rights.<sup>62</sup> When the Third Committee was considering the implementation provisions of the two Covenants in 1966, the following additional provision was suggested:

Nothing in the present Covenant shall be interpreted as impairing

<sup>59</sup> Report of the Second Committee (*Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 45, document A/6518, para. 4).

<sup>60</sup> *Ibid.*, para. 6. See also paras. 5, 13 and 16.

<sup>61</sup> See *Official Records of the General Assembly, Tenth Session, Annexes*, agenda item 28, part 1, document A/3077, para. 77. See also General Assembly resolution 545 (VI).

<sup>62</sup> General Assembly resolution 2200 A (XXI), annex.

the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.<sup>63</sup>

This provision was adopted as article 25 of the Covenant on Economic, Social and Cultural Rights and article 47 of the Covenant on Civil and Political Rights.<sup>64</sup>

31. The matter has also been considered by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States,<sup>65</sup> mainly in the context of the principle of sovereign equality of States.<sup>66</sup> In 1964 and 1966 the Special Committee adopted a consensus text which included as an element of sovereign equality "the right [of each State] freely to choose and develop its political, social, economic and cultural systems".<sup>67</sup> In 1967 the Working Group of the Drafting Committee agreed to maintain the 1964 and 1966 consensus text and agreed in principle

on the desirability of including a provision covering the concept of the right of every State freely to dispose of its national wealth and natural resources, but no agreement was reached on the text of such a provision.<sup>68</sup>

Some proposals would simply permit each State to dispose freely of its national wealth and natural resources, while others would require States exercising the right to pay due regard to the applicable rules of international law and to the terms of agreements validly entered into.<sup>69</sup> The Drafting Committee took note of the report of the Working Group and passed it for information to the Special Committee which in turn took note of it and transmitted it to the General Assembly.<sup>70</sup>

<sup>63</sup> Report of the Third Committee (*Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 62, document A/6546, paras. 95-101 and 553-556).

<sup>64</sup> General Assembly resolution 2200 A (XXI), annex.

<sup>65</sup> See paras. 1-4 above concerning the tentative and conditional nature of the decisions reached in the Special Committee.

<sup>66</sup> It has also been raised in relation to the principle of non-intervention and the principle of equal rights and self-determination. See the reports of the 1964 Special Committee, paras. 204, 208, 278-282 and 292; the 1966 Special Committee, paras. 457, 480 and 481, 492, 493 and 521; the 1967 Special Committee, paras. 172 and 229; and the 1968 Special Committee, para. 135.

<sup>67</sup> Reports of the 1964 Special Committee, para. 339; and the 1966 Special Committee, paras. 403 and 413.

<sup>68</sup> Report of the 1967 Special Committee, para. 438.

<sup>69</sup> Reports of the 1964 Special Committee, paras. 294, 295 and 297; the 1966 Special Committee, paras. 358, 362-364; and of the 1967 Special Committee, paras. 411 and 413-416. See also the reports of the 1964 Special Committee, paras. 328-331, 339, 341, 343 and 351; the 1966 Special Committee, paras. 359, 375-379, 403, 406 and 409-412; and the 1967 Special Committee, paras. 425-429, 438, 448, 450, 451 and 474.

<sup>70</sup> Report of the 1967 Special Committee, paras. 438 and 474.

For discussions in the Sixth Committee of the General Assembly of the above aspect of the principle of sovereign equality, see the relevant reports of the Committee for 1965 (*Official Records of the General Assembly, Twentieth Session, Annexes*, agenda items 90 and 94, document A/6165, para. 46); 1966 (*Ibid.*, *Twenty-first Session, Annexes*, agenda item 87, document A/6547, paras. 61 and 70), and for 1967 (*Ibid.*, *Twenty-second Session, Annexes*, item 87, document A/6955, para. 100).

## V. PEACEFUL USES OF OUTER SPACE <sup>71</sup>

32. Articles VI, VII and IX of the Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (done at Moscow, London and Washington on 27 January 1967) read as follows:

### *Article VI*

States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty. When activities are carried on in outer space, including the Moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization.

### *Article VII*

Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the Moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air space or in outer space, including the Moon and other celestial bodies.

### *Article IX*

In the exploration and use of outer space, including the Moon and other celestial bodies, States Parties to the Treaty shall be guided by the principle of co-operation and mutual assistance and shall conduct all their activities in outer space, including the Moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty. States Parties to the Treaty shall pursue studies of outer space, including the Moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial matter and, where necessary, shall adopt appropriate measures for this purpose. If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space, including the Moon and other celestial bodies, would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space, including the Moon and other celestial bodies, it shall undertake appropriate international consultations before proceeding with any such activity or experiment. A State Party to the Treaty which has reason to believe that an activity or experiment planned by another State Party in outer space, including the Moon and other celestial bodies, would cause potentially harmful interference with activities in the peaceful exploration and use of outer space, including the Moon and other celestial bodies, may request consultation concerning the activity or experiment.<sup>72</sup>

<sup>71</sup> For developments up to 1963, see *Yearbook of the International Law Commission, 1964*, vol. II, document A/CN.4/165, pp. 128-130, paras. 22-36.

<sup>72</sup> General Assembly resolution 2222 (XXI), annex; United Nations, *Treaty Series*, vol. 610.

33. In resolution 1963 (XVIII) of 13 December 1963, the Assembly had requested the Committee on the Peaceful Uses of Outer Space, *inter alia*, to arrange for the prompt preparation of a draft international agreement on liability for damage caused by objects launched into outer space. The Working Group of the Legal Sub-Committee of the Committee reached agreement on the texts of three draft articles<sup>73</sup> which were incorporated without relevant change in the above-quoted articles of the Treaty. The General Assembly, when commending the Treaty in its resolution 2222 (XXI) of 19 December 1966, requested the Committee on the Peaceful Uses of Outer Space, *inter alia*, to continue its work on the elaboration of the agreement. The Committee and its Legal Sub-Committee have continued this work,<sup>74</sup> and, although there are still several important issues outstanding, the Legal Sub-Committee has reached agreement or provisional agreement on several relevant elements which are arranged below under appropriate headings.<sup>75</sup>

#### 34. *International wrongful act.*

The launching (respondent) State should be absolutely liable to pay compensation for damage caused on the surface of the earth and to aircraft in flight.

In the event of damage being caused to a space object of one State or to persons or property on board such a space object by the space object \* of another State, the latter State shall be liable only if the damage is due to its fault or the fault of persons for whom it is responsible.

[\* On the understanding that the term "space object" includes its component parts.]

35. *Imputability.* It was agreed that the definition of "launching State" should include States from whose territory or facility the space object is launched. No agreement has been reached on the question whether the liability of States members of an international organization in respect of damage caused by the space objects of that organization should be residual and arise only in the event of default by the international organization, or whether it should arise immediately.

#### 36. *Exoneration from liability.*

Unless otherwise provided in the Convention, exoneration from absolute liability shall be granted to the extent that the respondent establishes that the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of the claimant or of natural or juridical

<sup>73</sup> Appendix II to annex III of the report of the Committee on the Peaceful Uses of Outer Space (*Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda items 30, 89 and 91, document A/6431), articles accepted on 28 July, 1 and 2 August 1966 (documents Working Group/L.2, 6 and 9 respectively).

<sup>74</sup> See especially the reports of the Committee for 1967 and 1968 (*Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 32, document A/6804 and Add.1 and *ibid.*, *Twenty-third Session*, agenda item 24, document A/7285).

<sup>75</sup> See report of the Committee for 1967 (*Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 32, document A/6804, annex III, para. 17), and report of the Committee for 1968 (*Ibid.*, *Twenty-third Session*, agenda item 24, document A/7285, annex III, para. 10). The latter paragraph also includes the points agreed to in 1967.

persons it represents. No exoneration whatever shall be granted in cases where the damage results from activities conducted by the respondent which are not in conformity with international law, in particular, the Charter of the United Nations and the Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies.

Further, the proposed convention would not apply to damage sustained by nationals of the launching State or by foreign nationals in the immediate vicinity of a planned launching or recovery area as the result of an invitation by the launching State. Finally, a claim could not be submitted in respect of the nationals of the respondent.

37. *Legal interest of claimant.* Under the proposed convention a claim for compensation could be submitted by

1. A Contracting Party which suffers damage, or whose natural or juridical persons suffer damage. . . .

2. Subject to the provision of paragraph 1, a Contracting Party. . . in respect of damage sustained by any natural or juridical person in its territory.

3. A Contracting Party. . . [in respect of] damage sustained by its permanent residents in respect of whom neither the State of nationality nor the State in which the damage was sustained has presented a claim or notified its intention of presenting a claim.

...

No agreement was reached on the question of the rights of international organizations under the convention.

#### 38. *Exhaustion of local remedies.*

Presentation of a claim under the Convention shall not require the prior exhaustion of any local remedies that may be available to the claimant or to those whom the claimant represents.

Nothing in this Convention shall prevent a claimant or any natural or juridical person that it might represent from pursuing a claim in the courts or administrative tribunals or agencies of a respondent. A claimant shall not however be entitled to pursue claims under this Convention in respect of the same damage for which a claim is being pursued in the courts or administrative tribunals or agencies of a respondent, or under another international agreement which is binding on the claimant and the respondent.

#### 39. *Extent of reparation.*

"Damage" means loss of life, personal injury or other impairment of health, or damage to property of States or of their persons, natural or juridical, or of international organizations.

No agreement was reached on the inclusion of indirect and delayed damage. The question of the law to be applied in assessing compensation was left open. If, however, the claimant and respondent were in agreement on the applicable law, then that law should be applied.

40. The Legal Sub-Committee noted in conclusion in 1968 that while some progress had been made there remained important elements on which rapprochement of views was necessary.<sup>76</sup> The Committee took note of the

<sup>76</sup> See report of the Committee on the Peaceful Uses of Outer Space for 1968 (*Official Records of the General Assembly, Twenty-third Session*, agenda item 24, document A/7285, annex III). For the texts of the proposals submitted to the Legal Sub-Committee see report of the Committee for 1967 (*Ibid.*, *Twenty-second Session, Annexes*, agenda item 32, document A/6804, annex III) and the report of the Committee for 1968, annex III, appendix I.

two reports of its Legal Sub-Committee.<sup>77</sup> At its twenty-third session, the General Assembly, having considered the report of the Committee on the Peaceful Uses of Outer Space, requested it, in General Assembly resolution 2453 B (XXIII) of 20 December 1968, "to complete urgently the preparation of a draft agreement on liability for damage caused by the launching of objects into outer space and to submit it to the General Assembly at its twenty-fourth session".

#### VI. THE PEACEFUL USES OF THE SEA-BED AND THE OCEAN FLOOR BEYOND THE LIMITS OF NATIONAL JURISDICTION

41. In the course of the examination of this question by the General Assembly and by the *Ad Hoc* Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, several draft statements of principle have been submitted. One of them would provide, *inter alia*, that activities in the sea-bed and ocean floor are to conform to a number of guidelines which are aimed at protecting the rightful interest of other States:

(a) No impediments shall be created to navigation and fishing nor shall there be undue interference with the laying and the maintenance of submarine cables and pipelines;

(b) Coastal States closest to the area in which any activities occur shall be consulted lest their rightful interest be harmed;

(c) Any such activity must take into account the economic interest of the developing countries so as not to be detrimental, in particular, to the activities undertaken within the national jurisdictions of those countries;

(d) Appropriate safety measures shall be adopted in all activities of exploration, use and exploitation of the area and international co-operation for assistance in case of mishap shall be facilitated;

(e) Pollution of waters of the marine environment, specially radioactive contamination, shall be avoided by means of international co-operation;

(f) No damage shall be caused to animal and plant life in the marine environment;

(g) Damages caused by any such activities shall entail liability.<sup>78</sup>

<sup>77</sup> Report of the Committee for 1967 (*Ibid.*, *Twenty-second Session*, *Annexes*, agenda item 32, document A/6804, para. 14), and

42. At its twenty-third session the Assembly, in resolution 2467 A (XXIII) of 21 December 1968, established a Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction. The First Committee of the Assembly decided not to vote on the various proposals dealing with principles but it instead referred them to the new Committee.<sup>79</sup> The Assembly in the above resolution instructed the Committee to study, *inter alia*, the elaboration of the legal principles and norms which would promote international co-operation in the exploration and exploitation of the sea-bed and the ocean floor, and to examine proposed measures of co-operation to be adopted by the international community to prevent the marine pollution which might result from the exploration and exploitation of the resources of the area. Further, the Assembly, in resolution 2467 B (XXIII), "*Mindful of the threat to the marine environment presented by pollution and other hazardous and harmful effects which might result from exploration and exploitation...*", welcomed the adoption by States of appropriate safeguards against such pollution and other hazardous and harmful effects, and called for a study to be made by the Secretary-General to clarify all aspects of the protection of the resources of the sea-bed and ocean floor, the superjacent water and the adjacent coasts against the consequences of pollution and other hazardous and harmful effects arising from the various means of exploration and exploitation.

report of the Committee for 1968 (*Ibid.*, *Twenty-third Session*, agenda item 24, document A/7285, para. 24).

<sup>78</sup> Report of the First Committee (*Ibid.*, *Twenty-third Session*, *Annexes*, agenda item 26, document A/7477, para. 12 (e)); report of the *Ad Hoc* Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction (*Ibid.*, *Twenty-third Session*, agenda item 26, document A/7230, para. 88). For other related proposals see report of the *Ad Hoc* Committee, pp. 54-56, 58-60 and 62-64; see also paras. 37 and 61-67 of that report, and paras. 39 and 43 of the report of the Legal Working Group of the *Ad Hoc* Committee (*Ibid.*, annex II).

<sup>79</sup> See report of the First Committee (*Ibid.*, *Twenty-third Session*, *Annexes*, agenda item 26, document A/7477, para. 16).

## ANNEX

### LIST OF GENERAL ASSEMBLY RESOLUTIONS CITED

<i>Paragraphs</i>	<i>Paragraphs</i>
Resolution 545 (VI) of 5 February 1952: Inclusion in the International Covenant or Covenants on Human Rights of an article relating to the right of peoples to self-determination . . . . .	30 (foot-note 61)
Resolution 1803 (XVII) of 14 December 1962: Permanent sovereignty over natural resources . . . . .	28
Resolution 1815 (XVII) of 18 December 1962: Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations . . . . .	1
Resolution 1963 (XVIII) of 13 December 1963: International co-operation in the peaceful uses of outer space . . . . .	33
Resolution 1966 (XVIII) of 16 December 1963: Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations . . . . .	1
Resolution 2103 A (XX) of 20 December 1965: Consideration of principles of international law concerning friendly relations and co-operation among	1

	<i>Paragraphs</i>		<i>Paragraphs</i>
States in accordance with the Charter of the United Nations . . . . .	2	Affairs of States and the Protection of Their Independence and Sovereignty . . . . .	20, 21 (foot-note 43), 23
Resolution 2131 (XX) of 21 December 1965: Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty . . . . .	2, 11, 12, 13, 20-23	Resolution 2327 (XXII) of 18 December 1967: Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations . . . . .	2, 12
Resolution 2158 (XXI) of 25 November 1966: Permanent sovereignty over natural resources . . . . .	28	Resolution 2330 (XXII) of 18 December 1967: Need to expedite the drafting of a definition of aggression in the light of the present international situation . . . . .	24
Resolution 2160 (XXI) of 30 November 1966: Strict observance of the prohibition of the threat or use of force in international relations, and of the right of peoples to self-determination . . . . .	5 (foot-note 7)	Resolution 2386 (XIII) of 19 November 1968: Permanent sovereignty over natural resources . . . . .	27 (foot-note 58)
Resolution 2181 (XXI) of 12 December 1966: Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations . . . . .	2, 12	Resolution 2453 B (XXIII) of 20 December 1968: International co-operation in the peaceful uses of outer space . . . . .	40
Resolution 2200 A (XXI) of 16 December 1966: International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights . . . . .	30 (foot-note 62 and 64)	Resolution 2420 (XXIII) of 18 December 1968: Report of the Special Committee on the Question of Defining Aggression . . . . .	24
Resolution 2222 (XXI) of 19 December 1966: Treaty on Principles Concerning the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies . . . . .	32, 33	Resolution 2463 (XXIII) of 20 December 1968: Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations . . . . .	2, 12
Resolution 2225 (XXI) of 19 December 1966: Status of the implementation of the Declaration on the Inadmissibility of Intervention in the Domestic		Resolution 2467 (XXIII) of 21 December 1968: Examination of the question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor and the sub-soil thereof, underlying the high seas beyond the limits of national jurisdiction, and the use of their resources in the interests of mankind . . . . .	42

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First report on State responsibility, by Mr. Roberto Ago, Special Rapporteur

*Review of previous work on codification of the topic of the international responsibility of States*

[Original text: French]

[7 May 1969 and 20 January 1970]

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
INTRODUCTION . . . . .	1-6	126
<i>Chapter</i>		
I. CODIFICATION BY PRIVATE BODIES . . . . .	7-14	127
II. CODIFICATION UNDER THE AUSPICES OF REGIONAL BODIES . . . . .	15-30	128
A. Codification by inter-American bodies . . . . .	15-24	128
B. Codification by African and Asian countries . . . . .	25-30	130
III. CODIFICATION UNDER THE AUSPICES OF THE LEAGUE OF NATIONS . . . . .	31-40	130
IV. CODIFICATION UNDER THE AUSPICES OF THE UNITED NATIONS . . . . .	41-107	132

ANNEXES

I. Project on "diplomatic protection", prepared by the American Institute of International Law in 1925 . . . . .	141
II. Draft code of international law, adopted by the Japanese branch of the International Law Association and the Kokusaiho Gakkwai (International Law Association of Japan) in 1926 . . . . .	141
III. Resolution on "international responsibility of States for injuries on their territory to the person or property of foreigners", prepared by the Institute of International Law in 1927 . . . . .	142
IV. Resolution on "the rule of the exhaustion of local remedies", adopted by the Institute of International Law in 1956 . . . . .	142

\* Incorporating document A/CN.4/217/Corr.1.

CONTENTS (*continued*)

	<i>Page</i>
V. Resolution on "the national character of an international claim presented by a State for injury suffered by an individual", adopted by the Institute of International Law in 1965 . . . . .	142
VI. Draft convention on "responsibility of States for damage done in their territory to the person or property of foreigners", prepared by the Harvard Law School in 1929 . . . . .	142
VII. Draft convention on the international responsibility of States for injuries to aliens, prepared by the Harvard Law School, 1961 . . . . .	142
VIII. Draft convention on the responsibility of States for injuries caused in their territory to the person or property of aliens, prepared by the Deutsche Gesellschaft für Völkerrecht (German International Law Association) in 1930 . . . . .	149
IX. Draft treaty concerning the responsibility of a State for internationally illegal acts, prepared by Professor Strupp in 1927 . . . . .	151
X. Draft convention on the responsibility of States for international wrongful acts, prepared by Professor Roth in 1932 . . . . .	152
XI. Recommendation concerning "claims and diplomatic intervention", adopted at the First International American Conference (Washington, 1889-1890) . . . . .	152
XII. Convention relative to the rights of aliens, signed at the Second International Conference of American States (Mexico City, 1902) . . . . .	152
XIII. Resolution on "international responsibility of the State", adopted at the Seventh International Conference of American States (Montevideo, 1933) . . . . .	152
XIV. Principles of international law that govern the responsibility of the State in the opinion of Latin American countries, prepared by the Inter-American Juridical Committee in 1962 . . . . .	153
XV. Principles of international law that govern the responsibility of the State in the opinion of the United States of America, prepared by the Inter-American Juridical Committee in 1965 . . . . .	153
XVI. Conclusions of the report of the Sub-Committee on State Responsibility, annexed to Questionnaire No. 4 adopted by the League of Nations Committee of Experts for the Progressive Codification of International Law (1926) . . . . .	154
XVII. Bases of discussion drawn up in 1929 by the Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930), arranged in the order that the Committee considered would be most convenient for discussion at the Conference . . . . .	155
XVIII. Text of articles adopted in first reading by the Third Committee of the Conference for the Codification of International Law (The Hague, 1930) . . . . .	155
XIX. Bases of discussion drawn up in 1956 by Mr. F. V. García Amador, Special Rapporteur of the International Law Commission on State responsibility . . . . .	155
XX. Draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens, prepared in 1957 by Mr. F. V. García Amador, Special Rapporteur of the International Law Commission on State responsibility . . . . .	155
XXI. Draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens, prepared in 1958 by Mr. F. V. García Amador, Special Rapporteur of the International Law Commission on State responsibility . . . . .	155
XXII. Revised draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens, prepared in 1961 by Mr. F. V. García Amador, Special Rapporteur of the International Law Commission on State responsibility . . . . .	155
XXIII. List of International Law Commission documents relating to State responsibility . . . . .	155

### Introduction

1. The international responsibility of States has long been among the topics which have most often attracted the attention of scholars and learned societies engaged in attempts to codify international law. In particular, when codification was taken up at the official level, both regional and universal, State responsibility was one of

the first topics to be considered and to be included in the programmes of work which were established.

2. Nevertheless, as a result of the exceptional difficulties inherent in the subject, the uncertainties with which it has always been fraught, and the divergences of opinion and interests in the matter, previous codification efforts have not proved successful, their resumption having been postponed until a more propitious moment. On the strong

recommendation of the General Assembly of the United Nations, the International Law Commission has now decided to make a fresh attempt in that direction, with the firm intention of overcoming the obstacles and of ultimately succeeding in the task, so far unaccomplished, of preparing a draft codification for submission to States.

3. Now that the International Law Commission is about to engage in a new examination of the question, the Special Rapporteur thought it would be useful for its members to have before them, in the first place, a recapitulation of earlier attempts at codification, a general view of the subject that would also indicate the main obstacles encountered and draw attention to the few methodological conclusions which may nevertheless be considered to have been reached. In other words, it seemed desirable for such a summary to mention the trends which have become apparent and the comments and reactions elicited by the various drafts that have been prepared and considered. For although the scholarly and unstinted efforts so far made have not as yet led to definitive results, they have nevertheless made a valuable contribution to the exploration of the subject, a contribution which has, in particular, helped to clarify ideas and to provide some guidance regarding the changes of approach that should be adopted in the new stage on which we are to embark. This first report is accordingly intended to supply the historical review just described and thus to serve as an introduction and a point of departure for the work to be undertaken by the Commission.

4. In taking stock of the present situation, it should perhaps be emphasized that it is only in recent years that the bodies engaged in preparing the codification of international law have become aware of the need to deal with the international responsibility of States as a single and distinct general problem.

5. Most of the drafts hitherto prepared, both private and official, have concentrated on one particular sector of the topic, that of the responsibility of the State for injuries caused in its territory to aliens. Sometimes, the specific subjects of examination have even been more detailed problems arising within that sector, such as the exhaustion of local remedies as a condition for the submission of an international claim or certain aspects of the exercise of diplomatic protection. In the development of international legal theory, progress in the analysis of international responsibility has undeniably been linked with progress in the study of the status of aliens and advances in the understanding of one of these subjects have contributed to clearer thinking on the other.

6. At some stage, however, it unquestionably became essential to isolate the subject of responsibility *stricto sensu*, together with the relevant principles, and to divorce it from any other body of substantive rules of international law. The continued confusion of State responsibility with other topics was undoubtedly one of the reasons which prevented it from becoming ripe for codification. The Special Rapporteur firmly believes that, for purposes of codification, the international responsibility of the State must be considered as such, i.e., as the situation resulting from a State's non-fulfilment of

an international legal obligation, regardless of the nature of that obligation and the matter to which it relates. This conclusion even seems to the Special Rapporteur to be the most valuable lesson to be drawn from a retrospective examination of the successive efforts to codify this important and delicate sector of international law.

## CHAPTER I

### Codification by private bodies

7. Many drafts codifying the rules which govern the international responsibility of the State have been prepared by learned societies and private individuals. Some of these drafts have even influenced the development of international law on the subject. Reference will be made here only to the more important of these drafts<sup>1</sup> and chiefly to those prepared with a view to official action, since it is on measures taken collectively by States themselves that attention should be focused.

8. In 1925, the American Institute of International Law, at the invitation of the Governing Board of the Pan American Union, prepared thirty "projects" dealing with various subjects of international law. Project No. 16, as indicated by its title "Diplomatic Protection", dealt with the rules governing the exercise of diplomatic protection, the requirement of the exhaustion of local remedies, the question of denial of justice, etc.<sup>2</sup>

9. In 1926, in connexion with the work undertaken by the League of Nations for the progressive codification of international law<sup>3</sup> the Kokusaiho Gakkwai (International Law Association of Japan) prepared, in co-operation with the Japanese branch of the International Law Association, a draft code of international law. Chapter II of that code, entitled "Rules Concerning Responsibility of a State in Relation to the Life, Person and Property of Aliens", set forth the rules relating to certain problems of responsibility which arise in connexion with the violation of the duties of a State towards aliens.<sup>4</sup>

10. In 1927, at its Lausanne session, the Institute of International Law, in anticipation of the consideration of the same subject by the Codification Conference to be held at The Hague in 1930, adopted<sup>5</sup> a resolution on "International responsibility of States for injuries on

<sup>1</sup> On this subject, see also the first report by Mr. F. V. García Amador on State responsibility, *Yearbook of the International Law Commission*, 1956, vol. II, document A/CN.4/96, p. 173.

<sup>2</sup> See *American Journal of International Law* (Washington D.C.), *Special Supplement*, vol. 20 (1926), pp. 329-330. For the text of the project, see annex I below.

<sup>3</sup> See chapter III below.

<sup>4</sup> International Law Association, *Report of the Thirty-Fourth Conference*, 1926 (London, Sweet and Maxwell, 1927), pp. 382-383. The draft is reproduced in annex II below.

<sup>5</sup> See paragraph 39 below.

their territory to the person or property of foreigners".<sup>6</sup> This resolution, drawn up in the form of draft articles, included many provisions on the basis of international responsibility and on the imputability of wrongful acts and their consequences. The Institute has not discussed the general problem of State responsibility since 1927. It has, however, adopted two other resolutions dealing with particular aspects of the problem: the resolution on "The Rule of the Exhaustion of Local Remedies", which was adopted at the Granada session in 1956<sup>7</sup> and the resolution on "The National Character of an International Claim Presented by a State for Injury Suffered by an Individual", which was adopted at the Warsaw session in 1965.<sup>8</sup>

11. Another draft convention on "Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners" was produced by the Harvard Law School in 1929, also in contemplation of the Codification Conference to be held at The Hague in 1930.<sup>9</sup> This draft, the preparation of which was entrusted to Professor Borchard, covered the same problems as that of the Institute of International Law. Each article of the draft was followed by a commentary which cited the treaty provisions, international judicial decisions, practice of States and writings of authors relied on.

12. In 1956, at the suggestion of the Secretary of the International Law Commission of the United Nations,<sup>10</sup> the Harvard Law School decided to revise the draft convention and bring it up to date, entrusting that task to Professors Sohn and Baxter. The final text of the "Draft Convention on the International Responsibility of States for Injuries to Aliens", together with a commentary, was published in 1961.<sup>11</sup> This text is much more than a mere revision and bringing up to date of the 1929 text: it constitutes an entirely new draft.

13. Another draft convention on the responsibility of States for injuries caused in their territory to the person or property of aliens was prepared in 1930 by the Deutsche Gesellschaft für Völkerrecht (German Inter-

national Law Society).<sup>12</sup> This draft, like that of the Institute of International Law, contains many provisions dealing with problems of responsibility proper.

14. Before concluding this rapid examination of the draft codifications on the subject of international responsibility prepared by private bodies, reference should also be made to two private publications: the draft "Treaty concerning the responsibility of a state for internationally illegal acts" prepared by Professor Strupp in 1927<sup>13</sup> and the draft convention on the responsibility of States for international wrongful acts prepared by Professor Roth in 1932.<sup>14</sup> These two drafts are of interest chiefly because the articles which they contain set forth the rules governing State responsibility in general, regardless of the content of the obligations violated, instead of confining themselves to failure by a State to observe its obligations relating to treatment of aliens.

## CHAPTER II

### Codification under the auspices of regional bodies

#### A. Codification by inter-American bodies<sup>15</sup>

15. The question of the responsibility of States for injuries caused to aliens has an important place in the history of inter-American efforts to codify international law. The principles governing the responsibility of States for the violation of obligations towards aliens are, however, generally set forth in instruments which deal mainly with the content of these obligations.

16. Thus, the First International Conference of American States, held at Washington in 1889-1890, adopted a recommendation concerning "Claims and Diplomatic Intervention", which referred to the enjoyment by foreigners of civil rights and legal remedies open to natives.<sup>16</sup> The Second Conference (Mexico City, 1901-1902) adopted a "Convention Relative to the Rights of Aliens", which dealt, *inter alia*, with the problem of State responsibility for the acts of individuals, the question

<sup>6</sup> *Annuaire de l'Institut de droit international*, 1927, vol. 33, tome III, pp. 330-335. See also the report by Mr. L. Strisower, *ibid.*, tome I, pp. 455-562, and general discussion, *ibid.*, tome III, pp. 81-168. For the text of the resolution, see annex III below.

<sup>7</sup> *Ibid.*, 1956, vol. 46, p. 364. See also the report by Mr. J. H. W. Verzijl, *ibid.*, 1954, vol. 45, tome I, pp. 1-111 and general discussion, *ibid.*, 1956, vol. 46, pp. 1-50. For the text of the resolution, see annex IV below.

<sup>8</sup> *Ibid.*, 1965, vol. 51, tome II, pp. 269-271. See also the report by Mr. H. Briggs, *ibid.*, tome I, pp. 1-225 and general discussion, *ibid.*, tome II, pp. 157-253. For the text of the resolution, see annex V below.

<sup>9</sup> Harvard Law School, *Research in International Law: Nationality, Responsibility of States, Territorial Waters (Drafts of Conventions prepared in anticipation of the first Conference on the Codification of International Law, The Hague, 1930)* (Cambridge, Mass., 1929), part II, pp. 133-135. For the text of the draft, see annex VI below.

<sup>10</sup> See paragraph 46 below.

<sup>11</sup> Harvard Law School, *Draft Convention on the International Responsibility of States for Injuries to Aliens* (Cambridge, Mass., 1961) and *American Journal of International Law* (Washington, D.C.), vol. 55, 1961, pp. 548-584. For the text of the draft, see annex VII below.

<sup>12</sup> Institut für Internationales Recht an der Universität Kiel, *Zeitschrift für Völkerrecht* (Breslau, 1930), vol. XV, pp. 359-364. For the text of the draft, see annex VIII below.

<sup>13</sup> K. Strupp, *Die völkerrechtliche Haftung des Staates insbesondere bei Handlungen Privater, Abhandlung zur fortschreitenden Kodifikation des internationalen Rechts*, Heft 1 (Kiel, 1927). For the text of the draft treaty, see annex IX below.

<sup>14</sup> A. Roth, *Das völkerrechtliche Delikt vor und in der Verhandlungen auf der Haager Kodifikationskonferenz 1930* (Leipzig, Universitätsverlag von Robert Noske, 1932), pp. 177-178. For the text of the draft convention, see annex X below.

<sup>15</sup> See, in this connexion, the first report by Mr. F. V. García Amador on State responsibility, *Yearbook of the International Law Commission*, 1956, vol. II, document A/CN.4/96, pp. 178-179, paras. 24-29.

<sup>16</sup> Carnegie Endowment for International Peace, *The International Conferences of American States, 1889-1928* (New York, Oxford University Press, 1931), p. 45. For the text of the recommendation, see annex XI below.

of diplomatic protection and the rule of the exhaustion of local remedies.<sup>17</sup>

17. A specific examination of the entire problem of State responsibility for injuries caused to aliens was first undertaken by the Seventh Conference held at Montevideo in 1933. That Conference adopted a resolution reaffirming certain principles which had been laid down at previous Conferences and resolved that the study of the whole problem should be undertaken by the agencies of codification instituted by the International Conferences of American States, and that their studies should be co-ordinated with the work of codification being done under the auspices of the League of Nations.<sup>18</sup> This recommendation, however, was not followed up.

18. In 1954, the Tenth International Conference of American States, held at Caracas, based its position on two considerations: first, that the General Assembly of the United Nations, during its eighth session, had requested the International Law Commission to proceed to the codification of the principles of international law that govern the responsibility of the State<sup>19</sup> and, second, that co-operation between the International Law Commission and the inter-American organs charged with the development and codification of international law should be encouraged. The Conference accordingly recommended to the Inter-American Council of Jurists and its permanent committee, the Inter-American Juridical Committee of Rio de Janeiro, the preparation of a study on the contribution made by the American continent to the development and the codification of the principles of international law that govern the responsibility of the State.<sup>20</sup>

19. In view of the wide scope of the task entrusted to it, the Inter-American Juridical Committee decided to confine its work to the rules which govern the responsibility of the State for injuries caused to aliens. This sector was selected not only because a large body of documentation already existed on the subject but also in the belief that it was precisely in this sector that the American continent had made its most original contribution to the development of international law. The Committee considered that, in the case of problems of a more universal character, such as the basis of State responsibility or the imputability of wrongful acts, the contribution of American thinking and practice had been of a less original character. The Committee also decided to confine its study to the practice of the Latin American countries because, in its opinion, only those countries had made a "contribution to the development of international law" on the subject. In the Committee's view, the position of the United States of America, which in many respects differed from that of the Latin

American States, did not represent a new departure, but was based rather on the principles upheld by the European States in the nineteenth century.

20. Having thus defined the subject of its study, the Committee adopted, at its 1961 session, a report entitled "Contribution of the American Continent to the principles of international law that govern the responsibility of the State", setting out the principles which the Latin American States considered to be applicable in the matter. The report was followed by a commentary outlining the views of international authorities and international practice. The dissenting opinions of Mr. H. J. Gobbi, the Argentinian representative, and of Mr. J. O. Murdock, the United States representative, were annexed to the report.<sup>21</sup>

21. The report of the Committee was submitted to the Inter-American Council of Jurists at its fifth session held at San Salvador in 1965. In the resolution which it adopted on the subject, the Council recalled the principles stated in the Committee's report and declared that they presented the Latin American contribution to the principles of international law that govern the responsibility of the State; it expressed its appreciation of the Committee's work and recommended that it should be expanded by incorporating the contribution of all the American States. To that end, the Committee was requested to prepare a supplementary report on the contribution of the United States of America. The first report would then be maintained as a statement of the opinion of the Latin American countries; the second would present the opinion of the United States of America.<sup>22</sup>

22. In response to the Council's request, the Inter-American Juridical Committee has examined at its 1965 session the question of the contribution of the American continent to the principles of international law that govern the responsibility of the State and prepared a second report setting out the principles applied by the United States.<sup>23</sup>

23. The questions considered by the Inter-American Juridical Committee include one which, although more directly relevant to another subject, is of interest for the purposes of determining the rules governing State responsibility: that of the law of outer space. Many problems of State responsibility in fact arise under this heading, such as those of the basis of responsibility and the imputability of wrongful acts.

24. In 1965, at its fifth session, the Inter-American Council of Jurists recommended that the Committee should carry out preliminary studies on the law of outer space. The legal department of the Pan American Union

<sup>17</sup> *Ibid.*, pp. 90-91. For the text of the Convention, see annex XII below.

<sup>18</sup> *The International Conferences of American States, First Supplement, 1933-1940* (Washington, Carnegie Endowment for International Peace, 1940) pp. 91-92. For the text of the resolution, see annex XIII below.

<sup>19</sup> See paragraph 42 below.

<sup>20</sup> *Tenth Inter-American Conference, Final Act* (Washington D.C., Pan American Union, 1954), p. 103.

<sup>21</sup> Inter-American Juridical Committee, *Contribution of the American Continent to the principles of international law that govern the responsibility of the State*, doc. CIJ-61 in *OAS Official Records, OEA/SER.I/VI.2* (Washington, D.C., Pan American Union, 1962). For the text of the above-mentioned principles, see annex XIV below.

<sup>22</sup> *Ibid.*, doc. CIJ-78, in *OAS Official Records, OEA/SER.I/VI.2* (Washington, D.C., Pan American Union, 1965).

<sup>23</sup> *Ibid.*, pp. 7-12. For the text of the second report, see annex XV below.

accordingly prepared a study which was submitted to the Committee at its 1966 session. This study provided the basis for an extensive discussion during which many interesting problems of State responsibility were considered. On the conclusion of that discussion, the Committee recommended the Governments of the American States to accede to the general "Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space" contained in resolution 1962 (XVIII) adopted by the General Assembly of the United Nations in 1963.<sup>24</sup>

#### B. Codification by African and Asian countries

25. At its first session held at New Delhi in 1957, the Asian-African Legal Consultative Committee dealt, among other topics, with that of the status of aliens, including questions relating to the responsibility of States in respect of the treatment of foreign nationals. A general discussion on that subject took place at the second session of the Committee held at Cairo in 1958. Following the discussion, the Committee decided that the subject should be studied in greater detail and accordingly requested the secretariat to submit to it at its next session a report in the form of draft articles.

26. At its third session held at Colombo in 1960, the Committee considered the report submitted by the secretariat and decided to differentiate "the aspects relating to the diplomatic protection of citizens abroad and the responsibility of the State for maltreatment of aliens" from the other aspects of the status of aliens, on the grounds that the first two were not related to the substantive rules governing the status and treatment of aliens. The Committee then approved a set of provisional draft articles on the second aspect of the problem, a draft which was adopted in its final form at the Committee's fourth session at Tokyo in 1961. Where the first aspect of the problem was concerned, the Committee decided, at that same session, to include in the agenda of its fifth session the topic of State responsibility and the diplomatic protection of citizens abroad.<sup>25</sup> In view, however, of the large number of questions before it, the Committee was not able to consider that problem either at its fifth or sixth sessions.

27. At its seventh session, held at Baghdad in 1965, the Committee considered, at the request of the Government of Japan, the questions of the diplomatic protection of aliens by their home States and of the responsibility of States arising out of maltreatment of aliens. It decided to study these two questions together at some future session and, to that end, requested the secretariat to

revise the draft it had prepared for the 1960 session, taking into account subsequent developments.<sup>26</sup>

28. The Asian-African Legal Consultative Committee has examined two other questions which primarily involve other issues, but which are nevertheless relevant to the study of State responsibility: the question of the legality of nuclear tests and that of the law of outer space. The question of the legality of nuclear tests was placed on the Committee's agenda at its third session in 1960 and the secretariat was requested to assemble the relevant documentation, which was examined by the Committee at its fourth session (1961); after a general debate, the Committee decided to make a more detailed study of the question at its fifth session and requested the secretariat to collect fuller information on the subject.<sup>27</sup>

29. In accordance with this decision, the secretariat prepared a memorandum which was submitted to the Committee at its fifth session, held at Rangoon in 1962. The Committee, after an extensive debate, adopted a draft report which it submitted to member States for their comments.<sup>28</sup> At its sixth session, held at Cairo in 1964, the Committee re-examined the question in the light of the comments which it had received and adopted the final report.<sup>29</sup>

30. At its seventh session (1965), the Committee dealt with the question of the law of outer space. It held a preliminary discussion on that topic and directed the secretariat to prepare a detailed study on the subject.<sup>30</sup>

### CHAPTER III

#### Codification under the auspices of the League of Nations<sup>31</sup>

31. By a resolution adopted on 22 September 1924, the Assembly of the League of Nations, "Desirous of increasing the contribution of the League of Nations to

<sup>26</sup> See Report on the seventh session of the Asian-African Legal Consultative Committee by R. Ago, Observer for the International Law Commission, *Yearbook of the International Law Commission*, 1965, vol. II, document A/CN.4/180, p. 150, para. 16.

<sup>27</sup> See Report on the fourth session of the Asian-African Legal Consultative Committee by F. V. García Amador, Observer for the International Law Commission, in *Yearbook of the International Law Commission*, 1961, vol. II, document A/CN.4/139, p. 81.

<sup>28</sup> See Report on the fifth session of the Asian-African Legal Consultative Committee by R. Pal, Observer for the International Law Commission, in *Yearbook of the International Law Commission*, 1962, vol. II, document A/CN.4/146, p. 152.

<sup>29</sup> See Report on the sixth session of the Asian-African Legal Consultative Committee by E. Jiménez de Aréchaga, Observer for the International Law Commission, in *Yearbook of the International Law Commission*, 1964, vol. II, document A/CN.4/172, p. 119.

<sup>30</sup> See Report on the work of the seventh session of the Asian-African Legal Consultative Committee, by R. Ago, Observer for the International Law Commission, in *Yearbook of the International Law Commission*, 1965, vol. II, document A/CN.4/180, p. 149, para. 6.

<sup>31</sup> See the memorandum prepared by the United Nations Secretariat, "Historical Survey of Development of International Law and its Codification by International Conferences", 29 April 1947

<sup>24</sup> Inter-American Juridical Committee, *Work Accomplished by the Inter-American Juridical Committee during its 1966 Regular Meeting (July-October)*, doc. CIJ-86, in *OAS Official Records, OEA/SER.I/VI.2* (Washington, D.C., Pan American Union, 1966), pp. 77 ff.

<sup>25</sup> See Report on the fourth session of the Asian-African Legal Consultative Committee, by F. V. García Amador, Observer for the International Law Commission, in *Yearbook of the International Law Commission*, 1961, vol. II, document A/CN.4/139, p. 81, para. 23.

the progressive codification of international law", requested the Council to convene a committee of experts which would have the duty:

(1) 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;

(2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and

(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.<sup>32</sup>

32. The Committee of Experts for the Progressive Codification of International Law held its first session at Geneva from 1 to 8 April 1925, at which it selected a provisional list of eleven subjects. It appointed a sub-committee for each subject to carry out a preliminary inquiry and report to the Committee. The responsibility of States for injury caused in their territory to the person or property of foreigners was among the subjects chosen.<sup>33</sup>

33. At its second session (Geneva, 12-29 January 1926), the Committee of Experts considered the reports of the sub-committees. It selected seven subjects and drafted a questionnaire on each to be circulated to States, whether Members of the League or not, to ascertain whether, in their view, those subjects lent themselves to international regulation. The report of the sub-committee which had studied the problem was annexed to each questionnaire.<sup>34</sup> Questionnaire No. 4 concerned the "Responsibility of States for damage done in their territories to the person or property of foreigners". The report of the sub-committee, composed of Mr. Guerrero, Rapporteur, and Mr. Wang Chung-Hui, was annexed to the questionnaire.<sup>35</sup>

34. The replies of Governments to the questionnaires were examined by the Committee of Experts at its third session, held at Geneva from 22 March to 2 April 1927.<sup>36</sup> In its report to the Council of the League of Nations, the Committee stated that, in its view, the replies received

indicated that all the subjects selected were sufficiently ripe for treatment in an international convention. The questionnaires adopted by the Committee at its second session, the replies of Governments to the questionnaires and an analysis of those replies prepared by the Committee were annexed to the report.<sup>37</sup> With regard to the question of State responsibility, twenty-five Governments had expressed themselves in favour of codification without reservations, five had replied affirmatively but with certain reservations and only four had expressed the opinion that the conclusion of a convention on the subject was neither possible nor opportune.

35. On 13 June 1927, the Council of the League of Nations, having considered the report of the Committee of Experts, decided to place the question on the agenda of the eighth session of the Assembly and transmitted documents to it for that purpose.<sup>38</sup>

36. The Assembly considered the documents transmitted to it by the Council<sup>39</sup> and decided, by a resolution of 27 September 1927, to convene a conference for the codification of the following subjects: nationality; territorial waters; and responsibility of States for damage done in their territory to the person or property of foreigners. A preparatory committee was set up to prepare for the conference and, in particular, to study the three subjects and draft reports on each comprising sufficiently detailed bases of discussion.<sup>40</sup>

37. The Preparatory Committee for the Codification Conference held three sessions at Geneva between February 1928 and May 1929. At its first session (6-15 February, 1928), it prepared requests to be sent to States for information concerning existing municipal law, the position reflected in national court decisions and doctrine; their domestic and international practice; their opinions regarding possible or desirable changes in existing international law.<sup>41</sup> At its second session (28 January-19 February 1929), it examined the replies received from States and drew up bases of discussion.<sup>42</sup> At its third session (6-11 May 1929), it reviewed the bases of discussion and drafted them in final form.<sup>43</sup>

(A/AC.10/5, part III). See also in this connexion the first report of F. V. Garcia Amador on State responsibility, in *Yearbook of the International Law Commission, 1956*, vol. II, document A/CN.4/96, pp. 177-178, paras. 16-23.

<sup>32</sup> League of Nations, *Official Journal, Special Supplement No. 21*, October 1924, p. 10. Also reproduced in *American Journal of International Law* (Washington, D.C.), *Special Supplement*, vol. 20 (1926), pp. 2-3.

<sup>33</sup> League of Nations, *Official Journal*, June 1925, document C.275, 1925.V. Also reproduced in *American Journal of International Law* (Washington, D.C.), *Special Supplement*, vol. 20 (1926), p. 12 ff.

<sup>34</sup> League of Nations publication, *V. Legal, 1926.V.11*, document C.96.M.47.1926.V and *American Journal of International Law* (Washington, D.C.), *Special Supplement*, vol. 20, 1926, pp. 18 ff.

<sup>35</sup> League of Nations publication, *V. Legal, 1926.V.3*, document C.46.M.23.1926.V and *American Journal of International Law* (Washington, D.C.), *Special Supplement*, vol. 20, 1926, pp. 176 ff. For the conclusions of Mr. Guerrero's report, see annex XVI below.

<sup>36</sup> League of Nations publication, *V. Legal, 1927.V.5*, document C.200.M.74.1927.V and *American Journal of International Law*, (Washington, D.C.), *Special Supplement*, vol. 22, 1928, pp. 1 ff.

<sup>37</sup> League of Nations publication, *V. Legal, 1927.V.1*, document C.196.M.70.1927.V and *American Journal of International Law*, (Washington, D.C.), *Special Supplement*, vol. 22, 1928, pp. 4 ff.

<sup>38</sup> League of Nations publication, *V. Legal, 1927.V.15*, document A.18.1927.V and *American Journal of International Law* (Washington, D.C.), *Special Supplement*, vol. 22, 1928, pp. 215 ff.

<sup>39</sup> League of Nations publication, *V. Legal, 1927.V.28*, document C.548.M.196.1927.V and *American Journal of International Law*, (Washington, D.C.), *Special Supplement*, vol. 22, 1928, pp. 345 ff.

<sup>40</sup> League of Nations, *Official Journal, Special Supplement No. 53* (October 1927); also reproduced in *American Journal of International Law* (Washington, D.C.), *Special Supplement*, vol. 22, 1928, pp. 231 ff.

<sup>41</sup> League of Nations publication, *V. Legal, 1928.V.1*, document C.44.M.21.1928.V.

<sup>42</sup> League of Nations publication, *V. Legal, 1929.V.3*, document C.75.M.69.1929.V and *American Journal of International Law* (Washington, D.C.), *Special Supplement*, vol. 24, 1930, pp. 1-3.

<sup>43</sup> League of Nations publication, *V. Legal, 1929.V.3*, document C.75.M.69.1929.V and *American Journal of International Law* (Washington, D.C.), *Special Supplement*, vol. 24, 1930,

38. In drafting the bases of discussion for the Conference, the Committee's purpose was not to reflect its members' view regarding the existing rules or the rules which it might be desirable to adopt. Those bases of discussion represented, rather, an effort to harmonize the opinions expressed by Governments in their replies. Moreover, the Committee based itself not only on what Governments held to be the existing law but also on what Governments, or certain Governments, were disposed to accept as a new provision of international law. To use the language which has since become current, the Committee's work represented a compromise between a simple codification of the existing law and proposals for the progressive development of international law, the whole, however, being based on information supplied by States.

39. The Conference for the Codification of International Law met at The Hague from 13 March to 12 April 1930. It set up three committees, one for each question on the agenda. The Committee on responsibility of States for damage done in their territory to the person or property of foreigners considered the question as a whole and adopted in first reading the text of ten articles (dealing with the basis of responsibility and the objective and subjective elements of wrongful international acts). Serious divergences appeared, however, which related less to the principles concerning responsibility as such than to the substantive principles governing the treatment of foreigners, the two questions being closely connected in the draft under consideration. Owing to lack of time, the Committee was unable to complete its study of the problem. Moreover, since, as stated above, the various questions were closely interdependent, each being subordinated to the others, the Committee considered it preferable not to embody the adopted articles in definite formulae, and informed the Conference that it was unable to submit any conclusions on the subject.<sup>44</sup> The Conference merely took note of that situation.<sup>45</sup>

40. After the Hague Conference of 1930, the League of Nations continued to promote the progressive codification of international law but took no further action in regard to the question of State responsibility.

#### CHAPTER IV

##### Codification under the auspices of the United Nations

41. After the Second World War, the legacy of the League of Nations in the matter of efforts to codify the rules governing the international responsibility of

pp. 3 ff. The same document contains the replies of States to the requests for information made by the Preparatory Committee and the bases of discussion drawn up by that Committee. A supplement to the replies of States is contained in League of Nations publication *V. Legal, 1929.V.10*, document C.75(a).M.69(a).1929.V. For the bases of discussion, see annex XVII to this report.

<sup>44</sup> League of Nations publication, *V. Legal, 1930.V.17*, document C.351(c).M.145(c).1930.V. For the text of the articles adopted by the Committee see annex XVIII below.

<sup>45</sup> League of Nations publication, *V. Legal, 1930.V.7*, document C.228.M.115.1930.V, and *American Journal of International Law* (Washington, D.C.), *Special Supplement*, vol. 24, 1930, p. 188.

States passed to the United Nations and to the body entrusted by the General Assembly with the task of promoting the codification and the progressive development of international law. At its first session in 1949, the International Law Commission of the United Nations drew up a provisional list of fourteen topics which it considered suitable for codification. Among these topics was the question of State responsibility.<sup>46</sup>

42. In 1953, the Cuban delegation submitted a draft resolution to the Sixth Committee of the United Nations General Assembly requesting the International Law Commission to undertake, as soon as possible, the codification of the principles of international law governing State responsibility. After a brief debate, the draft resolution was adopted, in a slightly amended form, by the Sixth Committee<sup>47</sup> and then, upon the latter's recommendation, was adopted without discussion by the General Assembly on 7 December 1953.

43. The complete text of the resolution is as follows:

*Request for the codification of the principles of international law governing State responsibility*

*The General Assembly,*

*Considering that it is desirable for the maintenance and development of peaceful relations between States that the principles of international law governing State responsibility be codified,*

*Noting that the International Law Commission at its first session included the topic "State responsibility" in its provisional list of topics of international law selected for codification,*

*Requests the International Law Commission, as soon as it considers it advisable, to undertake the codification of the principles of international law governing State responsibility. (Resolution 799 (VIII)).*

44. At its sixth session (1954), the International Law Commission took note of General Assembly resolution 799 (VIII). After considering a memorandum<sup>48</sup> by Mr. F. V. García Amador describing the background and scope of the General Assembly resolution, the Commission decided to undertake the study of the principles governing State responsibility. However, because of the many questions included in its agenda, it was unable to begin the study of the matter during its sixth session.<sup>49</sup>

45. At its seventh session (1955), the Commission appointed Mr. F. V. García Amador Special Rapporteur for the topic of State responsibility.<sup>50</sup>

46. In connexion with the preliminary work for the study of the principles governing State responsibility, the

<sup>46</sup> *Yearbook of the International Law Commission, 1949, Summary Records of the First Session, 2nd-7th meetings*, pp. 14 ff., and *Official Records of the General Assembly, Fourth Session, Supplement No. 10 (A/925)*, paras. 9-14.

<sup>47</sup> *Official Records of the General Assembly, Eighth Session, Sixth Committee, 393rd and 394th meetings and ibid., Eighth Session, Annexes*, agenda item 33, document A/2589, paras. 26-34.

<sup>48</sup> *Yearbook of the International Law Commission, 1954*, vol. II, document A/CN.4/80, pp. 21 ff. The English text of document A/CN.4/80 is available in mimeographed form only.

<sup>49</sup> *Ibid.*, vol. I, 270th meeting, pp. 146 ff., paras. 1-15 and *ibid.*, vol. II, document A/2693, p. 140.

<sup>50</sup> *Yearbook of the International Law Commission, 1955*, vol. I, 315th meeting, p. 190, para. 2, and *Official Records of the General Assembly, Tenth Session, Supplement No. 9 (A/2934)*, para. 33.

Commission's secretariat took the initiative of requesting the Harvard Law School Research Center, directed by Mr. Milton Katz, to revise and bring up to date the draft convention on "Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners", prepared for the Center in 1929 by Professor Borchard with the assistance of an advisory committee with a view to its use by the Conference for the Codification of International Law, held at The Hague in 1930. The Commission confirmed the secretariat's action at its eighth session (1956).<sup>51</sup>

47. At the Commission's eighth session (1956), the Special Rapporteur submitted an initial report of a preliminary nature.<sup>52</sup> In his introduction, he emphasized the development which, in his opinion, had occurred in the international law governing responsibility. According to him, that development had been marked, firstly, by the emergence of an international criminal responsibility in addition to the ordinary traditional duty to make reparation for injury caused by the breach or non-fulfilment of an international obligation. Consequently, it would in future be necessary to draw a distinction between acts which are "merely wrongful" and acts which are "punishable". Secondly, and, in his view, even more obviously, that development had been characterized by the appearance of international organizations and, in particular, of individuals in the capacity of subjects of international responsibility. That capacity, in his opinion, was even twofold, since the individual could be considered both as a subject to whom responsibility might be directly imputed and as the possessor of the subjective international right which had been violated and of the right to claim reparation. Mr. García Amador concluded that individuals themselves must be recognized as having the right to bring international claims with a view to obtaining reparation for injuries sustained. Thirdly and lastly, the Special Rapporteur, in describing the recent development of international law on the topic, drew attention to the consequences of the progressive definition which had been achieved in the field of human rights, a definition which, in his opinion, should make it possible to modify the terms of the traditional antagonism between the principle of a certain "international standard of justice" to be guaranteed to aliens and the principle of equality of treatment between nationals and aliens.

48. In the light of the developments just described, the Special Rapporteur examined, in particular, the grounds for exoneration from responsibility, with particular reference to the renunciation of diplomatic protection both by the State and by the injured individual. He also studied the character, function and measure of reparations; and, lastly, international claims and modes of settlement. In that connexion, the Rapporteur expressed support for the view that an international claim was identical with the claim previously brought under municipal law.

49. The conclusions of Mr. García Amador's report were summarized in the form of "bases of discussion",<sup>53</sup> on which the Commission was called upon to give an opinion with a view to settling the fundamental criteria that were to govern the actual work of codification. In this connexion, the Special Rapporteur proposed that the work of codification should initially be limited to one aspect of the topic, namely, the "responsibility of States for damage caused to the person or property of aliens".

50. The Commission devoted its 370th to 373rd meetings to the consideration of this first report.<sup>54</sup> The Special Rapporteur's scholarly report was duly appreciated by the members of the Commission, who congratulated him on his work. However, certain differences of opinion became evident during the discussion, concerning the ideas he had expressed on the developments he believed to have occurred in the matter of international responsibility. Some speakers suggested that the question of international criminal responsibility should be completely set aside. The great majority of the Commission also took exception to the idea that an individual could be regarded as the possessor of international subjective rights, could plead international responsibility for the violation of those rights or bring claims on his own behalf in international courts. Reservations were also expressed regarding the possibility of taking the violation of a fundamental human right as a criterion in establishing international responsibility for injuries to aliens. Lastly, emphasis was placed on the need to consider whether international responsibility was an objective responsibility or a responsibility by reason of fault.

51. At the Commission's next session (ninth session, 1957), the Special Rapporteur submitted a second report which was expressly limited, even in its title, to responsibility of the State for injuries caused in its territory to the person or property of aliens. The report, which was accompanied by a preliminary set of draft articles, at that stage consisted only of a first part entitled "Acts and omissions", the presentation of the part concerning "procedure" being left to a later stage.<sup>55</sup> In addition, the Rapporteur explained that, in deference to the opinions expressed by some members of the Commission, he had deliberately refrained from considering the problem of international criminal liability and had set aside the question of "causality" and "fault" as being purely "academic".

52. A special feature of the report was the fact that only two chapters were devoted to the problems of responsibility *stricto sensu*, i.e. the chapter concerning the questions of the imputability of acts and omissions of organs and officials and the chapter dealing with the acts of ordinary private individuals and acts committed during internal disturbances. On the other hand, the central and most outstanding part was devoted—and this point was

<sup>51</sup> *Yearbook of the International Law Commission, 1956*, vol. I, 370th meeting, pp. 228 ff., para. 16. See also para. 11, above.

<sup>52</sup> *Ibid.*, vol. II, document A/CN.4/96, p. 173.

<sup>53</sup> For the text of these bases of discussion, see annex XIX below.

<sup>54</sup> *Yearbook of the International Law Commission, 1956*, vol. I, pp. 228 ff., and *ibid.*, vol. II, document A/3159, p. 301, para. 35.

<sup>55</sup> *Yearbook of the International Law Commission, 1957*, vol. II, document A/CN.4/106, p. 104. For the preliminary set of draft articles, see annex XX below.

specifically emphasized by the Special Rapporteur—to determining the substantive rules “which govern the conduct or acts of the State in relation to aliens”. This part was composed of two sections. The first contained a proposed definition of the “fundamental human rights” which the State would be under a duty to ensure to aliens; the second stated the special obligations of States towards aliens with respect to contractual obligations, public debts and acts of expropriation.

53. The Commission considered the second report of Mr. F. V. García Amador at its 413th, 416th and 418th meetings.<sup>56</sup> During the discussion, several participants stressed the care and zeal displayed by the Special Rapporteur in the preparation of that new document. At the same time, however, serious reservations were made with respect to the contents of the different parts of the report and the report as a whole.

54. In the first place, many members of the Commission, while fully appreciating the lofty sentiments which had inspired the Special Rapporteur, said it was necessary to bear in mind that the Universal Declaration of Human Rights did not create any legal obligations for signatory States. It was difficult, therefore, to subscribe to the idea that any violation of one of the numerous human rights mentioned in the report could give rise to international responsibility. Similarly, doubts were also expressed concerning the very broad criteria by which ordinary violations of contracts under municipal law were elevated to the status of sources of international State responsibility.

55. Criticisms were also made of methods. These criticisms were essentially that the attempt at codification, which should have been devoted to the entire topic of responsibility, now appeared to be limited to the sole field of responsibility for injuries caused to individual aliens. The Special Rapporteur was thus reproached for having disregarded other aspects of the question which were of much greater importance, especially from the standpoint of consequences.

56. In general, two main conclusions may be said to have emerged from the discussion:

(1) It was clearly demonstrated that, in practice, responsibility for injuries to the person or property of aliens could not be treated without raising, in relation to that particular sector, all the fundamental problems presented by international State responsibility, its causes and particular aspects, regardless of the field in which the responsibility arose. Thorny questions, such as the conflict between objective responsibility and a responsibility by reason of fault, the moment at which responsibility arose, the circumstances excluding wrongfulness and responsibility, the responsibility of a State for the act of another State, the consequences of the wrongful act, etc., could not be avoided merely by deciding to treat responsibility in relation to a single specific sector. The attempt to evade the difficulties inherent in the problems of responsibility in general by limiting the attempt at codification to responsibility for the violation

of obligations concerning the treatment of aliens was therefore seen to be illusory.

(2) On the other hand, as a result of the fact that, in the sector selected, no clear dividing line had been drawn between the definition of the substantive rules governing the status of aliens and the consideration of the rules governing the responsibility arising from a breach of the obligations created by those substantive rules, the difficulties inherent in the topic of responsibility proper were compounded by the difficulties, which were at present even more intractable, concerning the determination of the status of aliens. The codification of this special sector proved to be more difficult than that of the general rules concerning responsibility *stricto sensu*.

57. Owing to lack of time, however, the Commission was compelled to limit itself to a general and preliminary discussion at its ninth session. It was unable to make a detailed examination of the report; the Special Rapporteur did not therefore modify it for consideration at the following session, but simply added to it. He consequently submitted to the Commission at its fifth session (1958), a third report which, like its predecessor, was accompanied by a set of draft articles.<sup>57</sup> This report contained the second part of the study on the responsibility of the State for injuries caused in its territory to the person or property of aliens. This part was divided into four chapters, the first two being devoted to the grounds for exoneration from responsibility and to the exhaustion of local remedies, and the remaining chapters, to the submission of international claims and the nature and scope of reparations.

58. The most striking feature of this new part of the report was the emphasis placed on the need to recognize the right of a foreign national—regarded as the potential possessor of international subjective rights—to present an international claim directly. Under the system outlined by the Special Rapporteur, this capacity was even to take precedence over the right possessed, by virtue of diplomatic protection, by the State of which the injured private individual was a national. That result was held to be the logical consequence of the emergence of bodies, both judicial and arbitral, expressly set up to hear claims submitted by private individuals. In that connexion, the Special Rapporteur placed together on one and the same footing judicial bodies set up by intergovernmental agreements, such as the Central American Court of Justice, the mixed arbitral tribunals, etc., and other bodies which were merely provided for in agreements between Governments and private individuals, such as the arbitral tribunals set up to settle disputes concerning the performance of certain contracts concluded with commercial companies. The new part of the report thus contained material which was difficult to discuss. However, since the Commission was fully occupied in considering the other items on its agenda, it did not have time at its tenth session to deal, even briefly, with the question of the international responsibility of States,

<sup>56</sup> *Yearbook of the International Law Commission, 1957*, vol. I, pp. 154-172 and 181 and *ibid.*, vol. II, document A/3623, p. 143, para. 17.

<sup>57</sup> *Yearbook of the International Law Commission, 1958*, vol. II, document A/CN.4/111, p. 47. For the text of the preliminary set of draft articles, see annex XXI below.

and deferred consideration of Mr. García Amador's third report to the following session.<sup>58</sup>

59. At the Commission's eleventh session,<sup>59</sup> the Special Rapporteur submitted a fourth report in which he undertook a new and more detailed study of the questions which had been dealt with in chapter IV of his second report, i.e. the international protection of acquired rights, expropriation and the contractual rights of private individuals *vis-à-vis* foreign States. Even at that session, however, the Commission was unable to consider either that report or its predecessors. The problem of international responsibility was dealt with only at its 512th meeting and during half of its 513th meeting, which were almost entirely devoted to a report by Professor Sohn and Professor Baxter of Harvard University on the draft which they had prepared at the request of the Harvard Law School Research Center and which was not yet in final form;<sup>60</sup> their report was followed by a very short discussion of this draft.<sup>61</sup>

60. According to its authors, this draft differed considerably from the text prepared by the Center in 1928, and its basic ideas showed many analogies with those developed by Mr. García Amador in his reports. Like the preliminary draft prepared by Mr. García Amador, the Harvard Law School draft was limited to the single sector of State responsibility for injuries to the person or property of aliens and, at the same time, dealt together with the subject of international responsibility proper and that of the status of aliens. A large part of the draft was, in fact, devoted to a highly original attempt to define the principal obligations of States *vis-à-vis* aliens, even though it took the form of a list of the most important possible violations of those obligations. Moreover, the draft, clearly departing from the traditional view—which, its authors considered, had been largely abandoned at that stage—not only envisaged the possibility of the direct submission of international claims by private individuals, but gave such claims definite priority over claims presented by the State on the traditional ground of diplomatic protection. According to the draft, the State was debarred from presenting a claim in the event of a waiver by the private individual concerned. That was a clear departure from the rule upheld by the International Court of Justice, namely, that, in exercising diplomatic protection, the State was relying on its own right, not that of the private individual who considers himself to have been injured.

61. Abandonment of the idea that only States may invoke international responsibility; the affirmation of the identity of a claim under municipal law with a claim submitted at the international level and of the law relied on by the private individual with the law which may be relied upon by the State; the assimilation, at the international level, of disputes between Governments and

private individuals to disputes between States—these, in brief, are the ideas which made the draft of Professor Sohn and Professor Baxter broadly similar to the various reports of the Commission's Special Rapporteur.

62. The brief discussion which followed the report by the authors of the draft showed that the members of the Commission, though highly appreciative of the work done by the Harvard University Research Center and expressing their gratitude for the valuable contribution made to the Commission's work, were not generally prepared to accept a number of the ideas and trends reflected in the draft or to follow its authors in so marked a departure from the traditional views on the subject. It was seriously questioned whether the existing law could be regarded as providing corroboration of the principles upheld by the Harvard jurists. At the same time, it was yet again evident that the constant confusion between the formulation of rules concerning international responsibility and rules concerning the status of aliens increased the difficulty of any systematic consideration of the subject and made the possibility of reaching agreement more doubtful.

63. A fifth report on State responsibility<sup>62</sup> was presented by Mr. García Amador at the Commission's twelfth session (1960). This report was divided into three parts. The first was a continuation of the study in the fourth report of measures affecting acquired rights, in which the extra-territorial effects of such measures were examined together with the methods and procedures applicable to the disputes to which they might give rise. The second part of the report was devoted to the problem of the constituent elements of the wrongful act, with particular regard to the problems of the "abuse of rights" and "fault". On the basis of the information supplied by these new studies, proposals were made in the third part of the report for amendments and additions to the preliminary draft on State responsibility contained in the Special Rapporteur's second and third reports.

64. But the Commission was yet again unable to undertake a study of that report or of its predecessors. It devoted two meetings (566th and 568th meetings)<sup>63</sup> to the problem of responsibility, and that solely in order to hear and briefly comment on, first, the statement of Mr. Gomez Robledo, Observer for the Inter-American Juridical Committee<sup>64</sup> and, secondly, a second statement by Professor Sohn, who presented a new version of the Harvard Law School draft containing amendments to the first draft but leaving the main lines of that draft unchanged.

65. During the discussion, the positions already taken by the various members of the Commission were reaffirmed, and in particular emphasis was placed on the need to remove the continued confusion between inter-

<sup>58</sup> See *Yearbook of the International Law Commission, 1958*, vol. II, document A/3859, p. 106.

<sup>59</sup> *Yearbook of the International Law Commission, 1959*, vol. II, document A/CN.4/119, p. 1.

<sup>60</sup> See paragraph 11 above.

<sup>61</sup> *Yearbook of the International Law Commission, 1959*, vol. I, pp. 152 ff. and *ibid.*, vol. II, document A/4169, p. 88, para. 7.

<sup>62</sup> *Yearbook of the International Law Commission, 1960*, vol. II, document A/CN.4/125, p. 41.

<sup>63</sup> *Yearbook of the International Law Commission, 1960*, vol. I, pp. 264-270 and 276-283, and *ibid.*, vol. II, document A/4425, p. 144, para. 7.

<sup>64</sup> The Inter-American Juridical Committee was requested by the Tenth Inter-American Conference (1954) to prepare a study or report on the contribution of the American continent to the principles of international law that govern the responsibility of the State. See para. 18 above.

national responsibility and the status of aliens and of considering, in the first place, responsibility *per se* without reference to any particular sector. In the second place, definite reservations were again expressed to the idea that the individual and not the State was the owner of the international subjective right violated by an international wrongful act, and that, consequently, the right to bring a claim before an international tribunal belonged to the individual rather than to the State.

66. In 1960, the question of the codification of State responsibility was raised in the United Nations General Assembly for the first time since 1952. This took place at the Assembly's fifteenth session, during the consideration of the International Law Commission's report on the work of its twelfth session.<sup>65</sup>

67. In its report the Commission expressed its intention to complete its work on consular intercourse and immunities at its thirteenth session, and thereafter to take up at the same session the subject of responsibility.<sup>66</sup> When speaking on this matter, some representatives expressed regret that the Commission had not found time to undertake a thorough study of the subject, although it had before it five reports prepared by Mr. García Amador. Turning to the work already done, they maintained that it was inadmissible to confine the subject of the responsibility of States to responsibility for injury caused in their territory to the person or property of aliens. Such an approach, they maintained, would be contrary to the spirit of General Assembly resolution 799 (VIII); the subject should therefore be extended to include the principles governing State responsibility for violation of the national sovereignty, independence and national integrity of other States, and of the right of nations to self-determination and the use of their natural resources. The same representatives criticized the United Nations Secretariat for having, in 1955, invited the Harvard Law School to revise and bring up to date its 1929 draft on State responsibility. In their opinion, the Secretariat had no right to approach the Harvard Law School without a prior decision by the Commission. Because of that action, and the fact that the Special Rapporteur had consequently consulted only that Law School, without seeking the views of learned bodies in other countries with different legal systems, the report took into account only certain concepts, which were not universally accepted.

68. Replying to those criticisms, the representative of the Secretary-General affirmed that the Secretariat's action had been correct and had been approved by the International Law Commission in its report to the General Assembly. Some representatives expressed the same view and noted that the Secretariat had sought the assistance of the Harvard Law School because, at that time, it was the only legal institution which had prepared a draft on the subject.

<sup>65</sup> *Official Records of the General Assembly. First part of fifteenth session, Sixth Committee*, 649th to 672nd meetings and *ibid.*, Annexes, agenda item 65, document A/4605, paras. 19-24.

<sup>66</sup> *Yearbook of the International Law Commission, 1960*, vol. II, document A/4425, p. 180, para. 41.

69. Several speakers expressed the hope that the International Law Commission would give priority to the question of responsibility so that the General Assembly should have before it a preliminary draft on the subject at its sixteenth session. As serious differences of opinion had also arisen regarding other subjects to be studied by the International Law Commission, however, the Sixth Committee finally expressed the view that the General Assembly should, at its next session, reconsider the question of the International Law Commission's future work on the subject of responsibility and in other fields.

70. On the recommendation of the Sixth Committee, the General Assembly decided, in its resolution 1505 (XV), to include in the agenda of its sixteenth session the question of future work in the field of the codification and progressive development of international law, and invited Member States to submit in writing any views or suggestions they had on the subject.

71. At its thirteenth session, in 1961, the International Law Commission had before it the sixth and last report by Mr. García Amador on the subject of reparation for injury.<sup>67</sup> That report included, as an addendum, the complete revised text of the preliminary draft articles on the international responsibility of States for injuries caused in their territory to the person or property of aliens.<sup>68</sup> As indicated in the explanatory note preceding it, the preliminary draft was revised in the light of the conclusions reached by the Special Rapporteur in his three previous reports.

72. Being fully occupied with the subject of consular intercourse and immunities, the Commission was unable, despite its stated intention, to take up the question of State responsibility at the thirteenth session.<sup>69</sup> It nevertheless touched on the problem of the codification of State responsibility when, at its 614th, 615th and 616th meetings, it discussed the planning of its future work in the light of the debate which had taken place in the Sixth Committee of the General Assembly and of General Assembly resolution 1505 (XV).<sup>70</sup> During that discussion, the question of the work to be done on the subject of State responsibility was raised. All the members who spoke on the subject believed that it should be included among the priority topics. There were again differences of opinion, however, regarding the approach to the subject, and in particular as to whether the Commission should begin by codifying the general rules governing

<sup>67</sup> *Yearbook of the International Law Commission, 1961*, vol. II, document A/CN.4/134 and Add.1, p. 1.

<sup>68</sup> *Ibid.*, pp. 46 ff. Although that document was prepared for the Commission's thirteenth session, it was only submitted in December 1961, that is, after the closure of the session. As the term of office of the Commission's members ended at the thirteenth session, and Mr. García Amador was not re-elected, he submitted that report to the Commission, so that his contribution to the work of codification in the field of responsibility should not remain incomplete. For the text of the revised preliminary draft, see annex XXII below.

<sup>69</sup> *Yearbook of the International Law Commission, 1961*, vol. I, 581st meeting, p. 2, paras. 6 and 7, and *ibid.*, vol. II, document A/4843, p. 89, para. 7.

<sup>70</sup> *Ibid.*, vol. I, 614th to 616th meetings, pp. 203-226, and *ibid.*, vol. II, document A/4843, p. 129, paras. 40 and 41.

State responsibility, or whether it should codify at the same time the rules whose violation entailed international responsibility.

73. At its 613th meeting, the Commission also heard Professor L. B. Sohn present the final draft, prepared by the Harvard Law School, on the responsibility of States for injury caused in their territory to the person or property of aliens.<sup>71</sup>

74. At its sixteenth session (1961) the General Assembly had before it, in response to its invitation in resolution 1505 (XV), the comments of seventeen Governments on future work in the field of codification and progressive development of international law.<sup>72</sup> Nine of those Governments regarded State responsibility as a priority topic, and some of them expressed the wish that it be studied from a broader standpoint than that of responsibility for injury to aliens.

75. Consideration of the question of future work in the field of the codification and progressive development of international law was referred by the General Assembly to the Sixth Committee, which devoted its 713th to 730th meetings to that subject.<sup>73</sup> The vast majority of speakers held the view that priority should be given to the law of treaties and State responsibility, which the International Law Commission had already begun to consider. With regard to responsibility, some speakers reiterated earlier requests that the International Law Commission should not confine itself to State responsibility for injury to aliens, but should also consider other aspects of the question, such as responsibility for the violation of rules designed to safeguard international peace and security, and of rules establishing the right of nations to self-determination, etc.

76. After that discussion, the General Assembly, in resolution 1686 (XVI), of 18 December 1961, recommended the International Law Commission:

(a) To continue its work in the field of the law of treaties and of State responsibility and to include on its priority list the topic of succession of States and Governments;

(b) To consider at its fourteenth session its future programme of work, on the basis of sub-paragraph (a) above and in the light of the discussion in the Sixth Committee at the fifteenth and sixteenth sessions of the General Assembly and of the observations of Member States submitted pursuant to resolution 1505 (XV), and to report to the Assembly at its seventeenth session on the conclusions it has reached.

77. In pursuance of General Assembly resolution 1686 (XVI), the International Law Commission considered its future programme of work at its fourteenth session (1962), at the 629th to 637th meetings.<sup>74</sup> The opinion that State responsibility should be included among the priority topics was shared by all members of the Commission. It was pointed out, however, that as Mr. García Amador

was no longer a member of the Commission, and as his reports had not been discussed or approved by the Commission, it was not merely a question of continuing work already begun on the subject of responsibility, as recommended by the General Assembly, but of taking up the subject *ex novo*, determining first of all how it should be approached. Divergent views on that point were expressed from the outset.

78. In the opinion of some members of the Commission, it was preferable, because of the broad scope of the subject, to begin by studying a clearly defined sector of it. If that was to be done, the most appropriate sector to choose would be that of responsibility for injury to aliens. The cases in which international responsibility had been invoked were in fact mainly those of responsibility for injury to aliens. It was in relation to that subject that the most extensive body of international judicial precedents existed, a fact which confirmed the special practical importance of that aspect of the problem. Unless the Commission took those precedents into account when preparing a draft on State responsibility, its work would be incomplete.

79. Other members believed, on the contrary, that all aspects of the subject should be considered together, taking recent developments in international law into account. In the past, the treatment of aliens had been central to the theory of State responsibility, but in modern law responsibility was incurred less by the treatment of aliens than by acts likely to endanger international peace. In traditional law on responsibility, such matters as denial of justice or the rule of exhaustion of local remedies were predominant. Those were still cogent issues, but their importance in international law had diminished. The Commission would, of course, make a useful contribution in studying them, but it could not, and should not, confine itself to such a study.

80. Some members also urged that in delimiting the subject care must be taken to avoid being influenced by a situation which was purely the result of historical circumstances. Though responsibility theory had no doubt been based on a body of judicial precedents concerned specifically with violation of the rights of aliens, a distinction must now be made between two subjects: State responsibility in general and the treatment of aliens. The Commission should begin by studying the general principles governing State responsibility, wherever it was incurred, and then perhaps go on to study its application in specific fields, especially that of injury to aliens. That suggestion was supported by many members of the Commission.

81. Divergent opinions were also expressed regarding the method to be adopted in studying the question of State responsibility. Some members believed that the Commission should adopt its usual method and appoint a special rapporteur to study the subject. In the opinion of other members of the Commission, because of the special difficulties involved in a study of State responsibility, it was necessary to depart from the usual procedure and establish a sub-committee, consisting of a few members, which would be asked to submit a report dealing, initially, not with the substance of the question, but with ways of approaching it and the aspects to be considered.

<sup>71</sup> *Ibid.*, vol. I, 613th meeting, pp. 195, paras. 1-7 and *ibid.*, vol. II, document A/4843, p. 129, para. 46.

<sup>72</sup> *Official Records of the General Assembly, Sixteenth Session, Annexes*, agenda item 70, document A/4796 and Add.1-8.

<sup>73</sup> *Official Records of the General Assembly, Sixteenth Session, Sixth Committee and ibid., Sixteenth Session, Annexes*, agenda item 70, document A/5036, para. 29.

<sup>74</sup> *Yearbook of the International Law Commission, 1962*, vol. I, pp. 2-45; *ibid.*, vol. II, document A/5209, p. 187, para. 24 ff.

82. The Commission finally agreed to adopt the latter procedure. It therefore established, at its 637th meeting, a Sub-Committee on State Responsibility consisting of 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.<sup>75</sup>

83. The Sub-Committee held its first meeting on 21 June, 1962. At that meeting it formulated a number of suggestions, which it submitted to the Commission at the 668th meeting. In the light of those suggestions, the Commission adopted the following decisions: (1) the Sub-Committee would meet at Geneva between the Commission's current session and its next session; from 7 to 16 January 1963; (2) its work would be devoted primarily to the general aspects of State responsibility; (3) the members of the Sub-Committee would prepare for it specific memoranda relating to the main aspects of the subject, those memoranda to be submitted to the Secretariat not later than 1 December 1962 so that they could be reproduced and circulated before the meeting of the Sub-Committee in January 1963; (4) the Chairman of the Sub-Committee would prepare a report on the results of its work for submission to the Commission at its next session.<sup>76</sup>

84. The differences of opinion which emerged from the outset in the International Law Commission regarding the most appropriate way of approaching the codification of State responsibility recurred in the Sixth Committee of the General Assembly (seventeenth session, 1962) during the debate on the work of the International Law Commission's fourteenth session.<sup>77</sup>

85. Again, some representatives expressed the view that the work should begin with codification of responsibility for injury to aliens, in view of the importance of that aspect and the extensive documentation on it. The other aspects of the subject had not been reduced to systematic order, or universally recognized, and were therefore not yet ready for codification and might delay the work to be done.

86. In the opinion of the vast majority of representatives, however, it was inadmissible at that stage for the Commission to confine itself to codification of responsibility for injury to aliens. The scope of the study should be firmly extended to include the principles governing responsibility for acts contrary to the purposes and principles of the United Nations Charter, and especially acts constituting a threat to international peace and security. Many speakers supported the Commission's suggestion that it should begin by studying the general aspects of State responsibility.

87. Accordingly, the General Assembly, noting that the International Law Commission had established a Sub-Committee on State Responsibility, which was to meet

in January 1963 and report to the Commission at its fifteenth session, recommended that the Commission should:

(b) continue its work on State responsibility, taking into account the views expressed at the seventeenth session of the General Assembly and the report of the Sub-Committee on State Responsibility and giving due consideration to the purposes and principles enshrined in the Charter of the United Nations (resolution 1765 (XVII)).

It should be noted that this recommendation, which was made in a resolution adopted on 20 November 1962, was shortly to be confirmed in the declaration contained in section II of resolution 1803 (XVII) on *Permanent sovereignty over natural resources*, adopted by the General Assembly on 14 December 1962, on the recommendation of the Second Committee. In that declaration, the Assembly stated that it

*Welcomes* the decision of the International Law Commission to speed up its work on the codification of the topic of responsibility of States for the consideration of the General Assembly;<sup>78</sup>

88. The Sub-Committee on State Responsibility held seven meetings during its January session.<sup>79</sup> 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/SC.1/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).<sup>80</sup> 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 Special Rapporteur on that topic.

89. Some members of the Sub-Committee expressed the view that it would be desirable to begin the study of the very broad 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 necessary 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 main rules—and in particular those relating to the treatment of aliens—the breach of which could give rise to respon-

<sup>78</sup> Resolution I A, which appeared in the annex to the report submitted in 1961 by the Committee on Permanent Sovereignty over Natural Resources (A/AC.97/5/Rev.2 - E/3511 - A/AC.97/13) contained *in fine* the following passage:

"Requests the International Law Commission to speed up its work on the codification of the topic of responsibility of States for the consideration of the General Assembly".

This report also contains the Secretariat study on the status of permanent sovereignty over natural wealth and resources, chapter III of which gives a most useful survey of "International adjudication and studies prepared under the auspices of intergovernmental bodies relating to responsibility of States in regard to the property and contracts of aliens".

<sup>79</sup> *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, annex I, pp. 227 ff.

<sup>80</sup> *Ibid.*, pp. 237 ff.

<sup>75</sup> *Yearbook of the International Law Commission, 1962*, vol. I, p. 45 and *ibid.*, vol. II, document A/5209, p. 189, para. 47.

<sup>76</sup> *Ibid.*, p. 191, para. 68.

<sup>77</sup> *Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 734th to 752nd meetings, and ibid., Seventeenth Session, Annexes, agenda item 76, document A/5287, paras. 44-47.*

sibility. Some of the members in this second group stressed in particular that, in the study of the topic of responsibility, recent developments of international law in other fields, notably that of the maintenance of peace, ought also to be taken into account.

90. 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 States. It was agreed, firstly, that there would be no question of neglecting the experience and material gathered in certain special sectors, especially that of responsibility for injuries to the person or property of aliens; and, secondly, that careful attention should be given to the possible repercussions which new developments in international law might have had on responsibility. The Sub-Committee suggested that the question of the responsibility of other subjects of international law, such as international organizations, should be left aside.

91. Having reached that general conclusion, the Sub-Committee discussed in detail an outline programme of work submitted by Mr. Ago. After that debate, it decided unanimously to recommend to the Commission the following main points for consideration in connexion with the general aspects of the international responsibility of the State, the understanding being that these points might serve as a guide to the special rapporteur to be appointed by the Commission.

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

*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>81</sup> Problem of the abuse of rights. 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 the organ. Legislative, administrative and judicial organs. Organs acting *ultra vires*.

<sup>81</sup> The Sub-Committee considered that the question of possible responsibility based on "risk", in cases where a State's conduct does not constitute a breach of an international obligation, might be studied in this connexion.

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>82</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*.

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.

92. The work of the Sub-Committee on State Responsibility was reviewed by the Commission at its 686th meeting, held during its fifteenth session (1963), on the

<sup>82</sup> The Sub-Committee believed that it would be desirable to consider whether or not the study should include the very important questions which might arise in connexion with the proof of the events giving rise to responsibility.

basis of the report prepared by the Chairman of the Sub-Committee.<sup>83</sup>

93. All the members of the Commission who took part in the discussion agreed with the general conclusions contained in the Sub-Committee's report, and already mentioned in paragraph 90 above. Some members of the Commission reiterated their opinion that emphasis should be placed on State responsibility in matters relating to the maintenance of peace, in the light of the changes which had occurred in international law on that subject. Other members contended that no aspect of responsibility should be neglected and that a study should be made of precedents in all fields where the principle of State responsibility had been applied.

94. The members of the Commission also approved the work programme proposed by the Sub-Committee, without prejudice to their position on the substance of the topics set out in the programme. During the discussion some doubts or reservations were expressed regarding the procedures to be adopted to deal with certain problems arising in connexion with the questions listed. It was pointed out in that connexion that those questions were merely intended to serve as a guide for the Special Rapporteur in his study of the substance of particular aspects of the definition of general rules governing the international responsibility of States, but that he would not be obliged to pursue one solution in preference to another. 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.

95. After unanimously approving the report of the Sub-Committee on State Responsibility, the Commission appointed Mr. Ago as Special Rapporteur for the topic of State responsibility. It was also agreed that the Secretariat should prepare certain working papers on that question.

96. The report of the International Law Commission on the work of its fifteenth session was considered by the Sixth Committee of the General Assembly at its 780th-793rd meetings (eighteenth session (1963)).<sup>84</sup> With respect to the problem of the codification of State responsibility, many representatives congratulated the Sub-Committee on its work, and all approved the general conclusions reached by the Commission.

97. One representative, while approving those general conclusions, stated that in his opinion the problem of responsibility for injuries caused to aliens was still the central problem and that it would be wrong to make it a secondary question. All the other representatives who spoke on that item, however, supported the Commission's decision to begin the codification of the topic by defining the general rules governing State responsibility. Some of them once more expressed the hope that when doing so,

the Commission would take due account of the recent evolution of international law, particularly in the sector of the maintenance of international peace and security. 98. Following that discussion, the General Assembly, in its resolution 1902 (XVIII) of 18 November 1963, recommended that the International Law Commission should:

(b) Continue its work on State responsibility, taking into account the views expressed at the eighteenth session of the General Assembly and the report of the Sub-Committee on State Responsibility and giving due consideration to the purposes and principles enshrined in the Charter of the United Nations.

99. At its sixteenth session (1964), the Commission had before it two working papers concerning State responsibility. Those documents, which had been prepared by the Secretariat in compliance with the wish expressed by the Commission at its preceding session, contained, respectively, a summary of the discussions in various United Nations organs and the resulting decisions and a digest of the decisions of international tribunals relating to State responsibility.<sup>85</sup>

100. Owing, however, to the fact that the term of office of the members of the Commission would expire in 1966, and that it was desirable to complete, by that date, the study of the topics which were already in an advanced state, the Commission decided to devote its 1964, 1965 and 1966 sessions to the completion of the work on the law of treaties and special missions, and not to begin its consideration of the substance of the question of responsibility until it had completed its study of those topics.<sup>86</sup>

101. In its resolution 2045 (XX) of 8 December 1965, the General Assembly approved that decision of the Commission, at the same time recommending that the Commission should continue, when possible, its work on State responsibility.

102. In 1967, at its nineteenth session, the Commission had before it a working note on State responsibility prepared by the Special Rapporteur.<sup>87</sup> Since the term of office of the members who had been elected in 1962 had expired in 1966, and since the General Assembly had altered the membership of the Commission, Mr. Ago expressed the wish that the Commission, as newly constituted, should consider afresh the report which it had approved at its fifteenth session, and that it should let him know whether it intended to confirm his appointment and repeat, if it thought necessary, the instructions it had given him at that time. In that connexion, the Special Rapporteur drew attention to the work which the Commission had devoted to the subject at its fourteenth and fifteenth sessions.

103. The Commission considered the note submitted by Mr. Ago at its 934th and 935th meetings.<sup>88</sup> The decision

<sup>83</sup> *Yearbook of the International Law Commission, 1964*, vol. II, documents A/CN.4/165 and A/CN.4/169, pp. 125 and 132.

<sup>84</sup> *Ibid.*, vol. I, 749th meeting, p. 164, paras. 1-6, and *ibid.*, vol. II, document A/5809, p. 226, paras. 36 and 37.

<sup>85</sup> *Yearbook of the International Law Commission, 1967*, vol. II, document A/CN.4/96, p. 325.

<sup>86</sup> *Ibid.*, vol. I, pp. 225 ff., and *ibid.*, vol. II, documents A/6709/Rev.1 and Rev.1/Corr.1, p. 368, para. 42.

<sup>83</sup> *Yearbook of the International Law Commission, 1963*, vol. I, p. 79 and *ibid.*, vol. II, document A/5509, pp. 223-224, paras. 51-55.

<sup>84</sup> *Official Records of the General Assembly, Eighteenth Session, Sixth Committee*, and *ibid.*, *Eighteenth Session, Annexes*, agenda item 69, document A/5601, paras. 26 and 27.

taken at the fifteenth session to give priority, in the codification of the topic, to a definition of the general rules of the international responsibility of States, as well as the programme of work drawn up for that purpose, met with the approval of all the members of the Commission. After a discussion, in the course of which certain questions of detail were also raised, the Commission repeated to Mr. Ago—whose appointment as Special Rapporteur for that topic had been confirmed—the instructions it had given him at its fifteenth session. The Special Rapporteur stated that he intended to present an initial detailed report on the question of responsibility at the Commission's twenty-first session.

104. In the Sixth Committee of the General Assembly, the representatives who spoke on the item at the twenty-second session (1967) approved the decision recently taken by the International Law Commission and expressed the hope that the Commission would finally be in a position to make progress with that topic, which had been on its agenda since 1954.<sup>89</sup> The General Assembly accordingly recommended, in its resolution 2272 (XXII) of 1 December 1967, that the Commission should "expedite the study of the topic of State responsibility".

<sup>89</sup> *Official Records of the General Assembly, Twenty-second Session, Sixth Committee, 957th to 968th meetings, and ibid., Twenty-second Session, Annexes, agenda item 85, document A/6898, paras. 84-85.*

105. In 1968, at its twentieth session, the International Law Commission confirmed its decision to undertake, at its following session, substantive consideration of the topic of State responsibility.<sup>90</sup>

106. On 11 December 1968, at its twenty-third session, the General Assembly adopted a resolution in which it recommended, *inter alia*, that the Commission should:

(c) Make every effort to begin substantive work on State responsibility as from its next session, taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII), (resolution 2400 (XXIII)).

107. In 1969, with a view to assisting the International Law Commission in its work on the question of State responsibility, the Secretariat published a supplement<sup>91</sup> to the "Digest of the decisions of international tribunals relating to State responsibility" and a supplement<sup>92</sup> to the "Summary of the discussions in various United Nations organs and the resulting decisions". The two initial documents<sup>93</sup> had been prepared in 1964 at the Commission's request.

<sup>90</sup> *Yearbook of the International Law Commission, 1968, vol. II, document A/7209/Rev.1, p. 224, para. 104.*

<sup>91</sup> See above, document A/CN.4/208, p. 101.

<sup>92</sup> See above, document A/CN.4/209, p. 114.

<sup>93</sup> *Yearbook of the International Law Commission, 1964, vol. II, documents A/CN.4/169, and A/CN.4/165, pp. 125 and 132.*

## ANNEXES

### ANNEX I

#### Project on "diplomatic protection", prepared by the American Institute of International Law (1925)

[For the text, see *Yearbook of the International Law Commission, 1956, vol. II, p. 227 (document A/CN.4/96, annex 7).*]

### ANNEX II

#### Draft code of international law, adopted by the Japanese branch of the International Law Association and the Kokusaiho Gakkwai (International Law Association of Japan) in 1926<sup>a</sup>

[Original text: English]

#### II. RULES CONCERNING THE RESPONSIBILITY OF A STATE IN RELATION TO THE LIFE, PERSON AND PROPERTY OF ALIENS

##### Article 1

A State is responsible for injuries suffered by aliens within its territories, in life, person or property through wilful act, default or negligence of the official authorities in the discharge of their official functions, if such act, default or negligence constitutes a violation of international duty resting upon the State to which the said authorities belong.

##### Article 2

If, in the case of an injury sustained by an alien either in life, person or property through an act or an omission on the part of a private individual, and the State within which the injury occurred has unlawfully refused or neglected to give proper judicial remedies, the State to which the injured alien belongs may demand redress by diplomatic means.

The same rule shall apply in the case of an injury sustained by an alien through an act done by an official outside his official functions.

##### Article 3

If in time of an insurrection or mob violence an alien has been made the object of injury in life, person or property for the reason that he was an alien or was of a particular nationality, the State within whose territory the injury occurred cannot disclaim responsibility for the occurrence.

##### Article 4

In case a State is deemed responsible in accordance with the present Rules it shall make apology, restitution, or reparation or offer guarantees for the prevention of any recurrence of a similar act or omission complained of.

##### Article 5

A State cannot evade the responsibility established by the present Rules for reasons of its own constitutional law or practice.

<sup>a</sup> International Law Association, *Report of the Thirty-Fourth Conference, 1926* (London, Sweet and Maxwell, 1927), pp. 382-383.

## ANNEX III

**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)**

[For the text, see *Yearbook of the International Law Commission*, 1956, vol. II, pp. 227-229 (document A/CN.4/96, annex 8).]

## ANNEX IV

**Resolution on "the rule of the exhaustion of local remedies", adopted by the Institute of International Law in 1956<sup>a</sup>**

[Original text: French]

When a State claims that an injury to the person or property of one of its nationals has been committed in violation of international law, any diplomatic claim or claim before a judicial body vested in the State making the claim by reason of such injury to one of its nationals is irreceivable if the internal legal order of the State against which the claim is made provides means of redress available to the injured person which appear to be effective and sufficient and so long as the normal use of these means of redress has not been exhausted.

This rule does not apply:

- (a) if the injurious act affected a person enjoying special international protection;
- (b) if the application of the rule has been set on one side by agreement between the States concerned.

## ANNEX V

**Resolution on "the national character of an international claim presented by a State for injury suffered by an individual", adopted by the Institute of International Law in 1965<sup>b</sup>**

[Original text: French]

The Institute of International Law,

Considering it opportune to formulate with precision the rules regarding the national character of claims as developed from the practice of States and from international jurisprudence;

Reserving the study of proposals which might improve the protection of individuals whether by diplomatic protection or by other methods and in particular by any special procedures established by an international organization;

Reserving more especially for later examination the case where the nationality of the injured individual has changed as a consequence of territorial modifications of the State of which he was a national or by modifications of his personal statute;

Adopts the following rules as applicable in the absence of contrary provisions agreed upon by the Parties:

*Article 1*

(a) An international claim brought by a State for injury suffered by an individual may be rejected by the State to which it is presented unless it possessed the national character of the claimant State both at the date of its presentation and at the date of the injury. Before a court (*jurisdiction*) seised of such a claim, absence of such national character is a ground for inadmissibility.

(b) An international claim presented by a new State for injury suffered by one of its nationals prior to the attainment of independence by that State, may not be rejected or declared inadmissible in

<sup>a</sup> *Annuaire de l'Institut de droit international*, 1956, vol. 46, p. 364.

<sup>b</sup> *Annuaire de l'Institut de droit international*, 1965, vol. 51, tome II, pp. 269-271.

application of the preceding paragraph merely on the ground that the national was previously a national of the former State.

*Article 2*

When the beneficiary of an international claim is a person other than the individual originally injured, the claim may be rejected by the State to which it is presented and is inadmissible before the court seised of it unless it possessed the national character of the claimant State both at the date of injury and at the date of its presentation.

*Article 3*

(a) An international claim presented in respect of an injury suffered by an individual possesses the national character of a State when the individual is a national of that State or a person which that State is entitled under international law to assimilate to its own nationals for purposes of diplomatic protection.

(b) By date of injury is meant the date of the loss or detriment suffered by the individual.

(c) By date of presentation is meant, in case of a claim presented through diplomatic channels, the date of the formal presentation of the claim by a State and, in case of resort to an international court (*jurisdiction*), the date of filing of the claim before it.

*Article 4*

(a) An international claim presented by a State for injury suffered by an individual who possesses at the same time the nationalities of both claimant and respondent States may be rejected by the latter and is inadmissible before the court (*jurisdiction*) seised of the claim.

(b) An international claim presented by a State for injury suffered by an individual who, in addition to possessing the nationality of the claimant State, also possesses the nationality of a State other than the respondent State may be rejected by the latter and is inadmissible before the court (*jurisdiction*) seised of the claim, unless it can be established that the interested person possesses a closer (*prépondérant*) link of attachment with the claimant State.

(c) An international claim presented by a State for injury suffered by an individual may be rejected by the respondent State or declared inadmissible when, in the particular circumstances of the case, it appears that naturalization has been conferred on that individual in the absence of any link of attachment.

## ANNEX VI

**Draft convention on "responsibility of States for damage done in their territory to the person or property of foreigners", prepared by the Harvard Law School (1929)**

[For the text, see *Yearbook of the International Law Commission*, 1956, vol. II, pp. 229-230 (document A/CN.4/96, annex 9).]

## ANNEX VII

**Draft convention on the international responsibility of States for injuries to aliens, prepared by the Harvard Law School, 1961<sup>a</sup>**

[Original text: English]

## SECTION A

## GENERAL PRINCIPLES AND SCOPE

*Article 1*

(Basic principles of State responsibility)

1. A State is internationally responsible for an act or omission which, under international law, is wrongful, is attributable to that

<sup>a</sup> Harvard Law School, *Draft Convention on the International Responsibility of States for Injuries to Aliens* (Cambridge, Mass., 1961).

State, and causes an injury to an alien. A State which is responsible for such an act or omission has a duty to make reparation therefor to the injured alien or an alien claiming through him, or to the State entitled to present a claim on behalf of the individual claimant.

2. (a) An alien is entitled to present an international claim under this Convention only after he has exhausted the local remedies provided by the State against which the claim is made.

(b) A State is entitled to present a claim under this Convention only on behalf of a person who is its national, and only if the local remedies and any special international remedies provided by the State against which the claim is made have been exhausted.

#### Article 2

##### *(Primacy of international law)*

1. The responsibility of a State under Article 1 is to be determined according to this Convention and international law, by application of the sources and subsidiary means set forth in paragraph 1 of Article 38 of the Statute of the International Court of Justice.

2. A State cannot avoid international responsibility by invoking its municipal law.

3. Nothing in this Convention shall adversely affect any right which an alien enjoys under the municipal law of the State against which the claim is made if that law is more favorable to him than this Convention.

#### SECTION B

#### WRONGFUL ACTS AND OMISSIONS

#### Article 3

##### *(Categories of wrongful acts and omissions)*

1. An act or omission which is attributable to a State and causes an injury to an alien is "wrongful", as the term is used in this Convention:

(a) if, without sufficient justification, it is intended to cause, or to facilitate the causing of, injury;

(b) if, without sufficient justification, it creates an unreasonable risk of injury through a failure to exercise due care;

(c) if it is an act or omission defined in Articles 5 to 12; or

(d) if it violates a treaty.

2. The wrongfulness of such an act or omission may be the result of the fact that the law of the State does not conform to international standards or of the fact that the law, although conforming to international standards, has been misapplied.

#### Article 4

##### *(Sufficiency of justification)*

1. The imposition of punishment for the commission of a crime for which such punishment has been provided by law is a "sufficient justification" within the meaning of sub-paragraph 1 (a) of Article 3, except when the decision imposing the punishment is wrongful under Article 8.

2. The actual necessity of maintaining public order, health, or morality in accordance with laws enacted for that purpose is a "sufficient justification" within the meaning of sub-paragraphs 1 (a) and 1 (b) of Article 3, except when the measures taken against the injured alien clearly depart from the law of the respondent State or unreasonably depart from the principles of justice or the principles governing the action of the authorities of the State in the maintenance of public order, health, or morality recognized by the principal legal systems of the world.

3. The valid exercise of belligerent or neutral rights or duties under international law is a "sufficient justification" within the meaning of sub-paragraphs 1 (a) and 1 (b) of Article 3.

4. The contributory fault of the injured alien, or his voluntary participation in activities involving an unreasonable risk of injury, to the extent that such fault or voluntary participation bars the claim of a person under both the law of the respondent State and the principles recognized by the principal legal systems of the world, is a "sufficient justification" within the meaning of sub-paragraph 1 (b) of Article 3.

5. In circumstances other than those enumerated in paragraphs 1 to 4 of this Article, "sufficient justification" within the meaning of sub-paragraphs 1 (a) and 1 (b) of Article 3 exists only when the particular circumstances are recognized by the principal legal systems of the world as constituting such justification.

#### Article 5

##### *(Arrest and detention)*

1. The arrest or detention of an alien is wrongful:

(a) if it is a clear and discriminatory violation of the law of the arresting or detaining State;

(b) if the cause or manner of the arrest or detention unreasonably departs from the principles recognized by the principal legal systems of the world;

(c) if the State does not have jurisdiction over the alien; or

(d) if the arrest or detention otherwise involves a violation by the State of a treaty.

2. The detention of an alien becomes wrongful after the State has failed:

(a) to inform him promptly of the cause of his arrest or detention, or to inform him within a reasonable time after his arrest or detention of the specific charges against him;

(b) to grant him prompt access to a tribunal empowered both to determine whether his arrest or detention is lawful and to order his release if the arrest or detention is determined to be unlawful;

(c) to grant him a prompt trial; or

(d) to ensure that his trial and any appellate proceedings are not unduly prolonged.

3. The mistreatment of an alien during his detention is wrongful.

#### Article 6

##### *(Denial of access to a tribunal or an administrative authority)*

The denial to an alien of the right to initiate, or to participate in, proceedings in a tribunal or an administrative authority to determine his civil rights or obligations is wrongful:

(a) if it is a clear and discriminatory violation of the law of the State denying such access;

(b) if it unreasonably departs from those rules of access to tribunals or administrative authorities which are recognized by the principal legal systems of the world; or

(c) if it otherwise involves a violation by the State of a treaty.

#### Article 7

##### *(Denial of a fair hearing)*

The denial to an alien by a tribunal or an administrative authority of a fair hearing in a proceeding involving the determination of his civil rights or obligations or of any criminal charges against him is wrongful if a decision or judgment is rendered against him or he is accorded an inadequate recovery. In determining the fairness of any hearing, it is relevant to consider whether it was held before an independent tribunal and whether the alien was denied:

(a) specific information in advance of the hearing of any claim or charge against him;

(b) adequate time to prepare his case;

(c) full opportunity to know the substance and source of any evidence against him and to contest its validity;

(d) full opportunity to have compulsory process for obtaining witnesses and evidence;

(e) full opportunity to have legal representation of his own choice;

(f) free or assisted legal representation on the same basis as nationals of the State concerned or on the basis recognized by the principal legal systems of the world, whichever standard is higher;

(g) the services of a competent interpreter during the proceedings if he cannot fully understand or speak the language used in the tribunal;

(h) full opportunity to communicate with a representative of the government of the State entitled to extend its diplomatic protection to him;

(i) full opportunity to have such a representative present at any judicial or administrative proceeding in accordance with the rules or procedure of the tribunal or administrative agency;

(j) disposition of his case with reasonable dispatch at all stages of the proceedings; or

(k) any other procedural right conferred by a treaty or recognized by the principal legal systems of the world.

#### Article 8

##### *(Adverse decisions and judgments)*

A decision or judgment of a tribunal or an administrative authority rendered in a proceeding involving the determination of the civil rights or obligations of an alien or of any criminal charges against him, and either denying him recovery in whole or in part or granting recovery against him or imposing a penalty, whether civil or criminal, upon him is wrongful:

(a) if it is a clear and discriminatory violation of the law of the State concerned;

(b) if it unreasonably departs from the principles of justice recognized by the principal legal systems of the world; or

(c) if it otherwise involves a violation by the State of a treaty.

#### Article 9

##### *(Destruction of and damage to property)*

1. Deliberate destruction of or damage to the property of an alien is wrongful, unless it was required by circumstances or urgent necessity not reasonably admitting of any other course of action.

2. A destruction of the property of an alien resulting from the judgment of a competent tribunal or from the action of the competent authorities of the State in the maintenance of public order, health, or morality shall not be considered wrongful, provided there has not been:

(a) a clear and discriminatory violation of the law of the State concerned;

(b) a violation of any provision of Articles 6 to 8 of this Convention;

(c) an unreasonable departure from the principles of justice recognized by the principal legal systems of the world; or

(d) an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.

#### Article 10

##### *(Taking and deprivation of use or enjoyment of property)*

1. The taking, under the authority of the State, of any property of an alien, or of the use thereof, is wrongful:

(a) if it is not for a public purpose clearly recognized as such by law of general application in effect at the time of the taking; or

(b) if it is in violation of a treaty.

2. The taking, under the authority of the State, of any property

of an alien, or of the use thereof, for a public purpose clearly recognized as such by a law of general application in effect at the time of the taking is wrongful if it is not accompanied by prompt payment of compensation in accordance with the highest of the following standards:

(a) compensation which is no less favorable than that granted to nationals of such State; or

(b) just compensation in terms of the fair market value of the property or of the use thereof unaffected by this or other takings or by conduct attributable to the State and designed to depress the value of property in anticipation of the taking; or

(c) if no fair market value exists, just compensation in terms of the fair value of such property or of the use thereof.

If a treaty requires a special standard of compensation, the compensation shall be paid in accordance with the treaty.

3. (a) A "taking of property" includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.

(b) A "taking of the use of property" includes not only an outright taking of use but also any unreasonable interference with the use or enjoyment of property for a limited period of time.

4. If property is taken by a State in furtherance of a general program of economic and social reform, the just compensation required by this Article may be paid over a reasonable period of years, provided that:

(a) the method and modalities of payment to aliens are no less favorable than those applicable to nationals;

(b) a reasonable part of the compensation due is paid promptly;

(c) bonds equal in fair market value to the remainder of the compensation and bearing a reasonable rate of interest are given to the alien and the interest is paid promptly; and

(d) the taking is not in violation of an express undertaking by the State in reliance on which the property was acquired or imported by the alien.

5. An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results from the execution of the tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health, or morality; or from the valid exercise of belligerent rights; or is otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful, provided:

(a) it is not a clear and discriminatory violation of the law of the State concerned;

(b) it is not the result of a violation of any provision of Articles 6 to 8 of this Convention;

(c) it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world; and

(d) it is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property;

6. The compensation and interest required by this Article shall be paid in the manner specified in Article 39.

7. The term "property" as used in this Convention comprises all movable and immovable property, whether tangible or intangible, including industrial, literary, and artistic property, as well as rights and interests in any property.

8. The responsibility of a State for the annulment or nonperformance of a contract or concession is determined by Article 12.

#### Article 11

##### *(Deprivation of means of livelihood)*

1. To deprive an alien of his existing means of livelihood by excluding him from a profession or occupation which he has hitherto pursued

in a State, without a reasonable period of time in which to adjust his affairs, by way of obtaining other employment, disposing of his business or practice at a fair price, or otherwise, is wrongful if the alien is not accorded just compensation, promptly paid in the manner specified in Article 39, for the failure to provide such period of adjustment.

2. Paragraph 1 of this Article has no application if an alien :

(a) has, as a result of professional misconduct or of conviction for a crime, been excluded from a profession or occupation which he has hitherto pursued, or

(b) has been expelled or deported in conformity with international standards relating to expulsion and deportation and not with the purpose of circumventing paragraph 1.

#### Article 12

*(Violation, annulment, and modification of contracts and concessions)*

1. The violation through an arbitrary action of the State of a contract or concession to which the central government of that State and an alien are parties is wrongful. In determining whether the action of the State is arbitrary, it is relevant to consider whether the action constitutes :

(a) a clear and discriminatory departure from the proper law of the contract or concession as that law existed at the time of the alleged violation;

(b) a clear and discriminatory departure from the law of the State which is a party to the contract or concession as that law existed at the time of the making of the contract or concession, if that law is the proper law of the contract or concession;

(c) an unreasonable departure from the principles recognized by the principal legal systems of the world as applicable to governmental contracts or concessions of the same nature or category; or

(d) a violation by the State of a treaty,

2. If the violation by the State of a contract or concession to which the central government of a State and an alien are parties also involves the taking of property, the provisions of Article 10 shall apply to such taking.

3. The exaction from an alien of a benefit not within the terms of a contract or concession to which the central government of a State and an alien are parties or of a waiver of any term of such a contract or concession is wrongful if such benefit or waiver was secured through the use of any clear threat by the central government of the State to repudiate, cancel or modify any right of the alien under such contract or concession.

4. The annulment or modification by a State, to the detriment of an alien, of any contract or concession to which the alien and a person or body other than the central government of a State are parties is wrongful if it constitutes :

(a) a clear and discriminatory departure from the proper law of the contract or concession;

(b) an unreasonable departure from the principles recognized by the principal legal systems of the world as applicable to such contracts or concessions; or

(c) a violation by the State of a treaty.

#### Article 13

*(Lack of due diligence in protecting aliens)*

1. Failure to exercise due diligence to afford protection to an alien, by way of preventive or deterrent measures, against any act wrongfully committed by any person, acting singly or in concert with others, is wrongful :

(a) if the act is criminal under the law of the State concerned; or

(b) the act is generally recognized as criminal by the principal legal systems of the world.

2. Failure to exercise due diligence to apprehend, or to hold after apprehension as required by the laws of the State, a person who has committed against an alien any act referred to in paragraph 1 of this Article is wrongful; to the extent that such conduct deprives that alien or any other alien of the opportunity to recover damages from the person who has committed the act.

#### SECTION C

#### INJURIES

##### Article 14

*(Definitions of injury and causation)*

1. An "injury" as the term is used in this Convention, is a loss or detriment caused to an alien by a wrongful act or omission which is attributable to a State.

2. Injuries within the meaning of paragraph 1 include, but are not limited to :

(a) bodily or mental harm;

(b) loss sustained by an alien as the result of the death of another alien;

(c) deprivation of liberty;

(d) harm to reputation;

(e) destruction of, damage to, or loss of property;

(f) deprivation of use or enjoyment of property;

(g) deprivation of means of livelihood;

(h) loss or deprivation of enjoyment of rights under a contract or concession; or

(i) any loss or detriment against which an alien is specifically protected by a treaty.

3. An injury is "caused", as the term is used in this Convention, by an act or omission if the loss or detriment suffered by the injured alien is the direct consequence of that act or omission.

4. An injury is not "caused" by an act or omission :

(a) if there was no reasonable relation between the facts which made the act or omission wrongful and the loss or detriment suffered by the injured alien; or

(b) if, in the case of an act or omission creating an unreasonable risk of injury, the loss or detriment suffered by the injured alien occurred outside the scope of the risk.

#### SECTION D

#### ATTRIBUTION

##### Article 15

*(Circumstances of attribution)*

A wrongful act or omission causing injury to an alien is "attributable to a State", as the term is used in this Convention, if it is the act or omission of any organ, agency, official, or employee of the State acting within the scope of the actual or apparent authority or within the scope of the function of such organ, agency, official, or employee.

##### Article 16

*(Persons and agencies through which a State acts)*

1. The terms "organ of a State" and "agency of a State", as used in this Convention, include the Head of State and any legislative, deliberative, executive, administrative, or judicial organ or agency of a State.

2. The terms "official of a State" and "employee of a State", as used in this Convention, include both a civilian official or employee of a State and any member of the armed forces or of a para-military organization.

*Article 17*

*(Levels of government)*

1. The terms "organ of a State", "agency of a State", "official of a State", and "employee of a State", as used in this Convention, include any organ, agency, official or employee, as the case may be, of:

- (a) the central government of a State;
- (b) in the case of a federal State, the government of any state, province, or other component political unit of such federal State;
- (c) the government of any protectorate, colony, dependency, or other territory of a State, for the international relations of which that State is responsible, or the government of any trust territory or territory under mandate for which a State acts as the administering authority; or
- (d) the government of any political subdivision of any of the foregoing.

2. The terms "organ of a State", "agency of a State", "official of a State", and "employee of a State", as used in this Convention, do not include any organ, agency, official, or employee of any enterprise normally considered as commercial which is owned in whole or in part by a State or one of the entities referred to in paragraph 1 if such enterprise is, under the law of such State, a separate juristic person with respect to which the State neither accords immunity in its own courts nor claims immunity in foreign courts.

*Article 18*

*(Activities of revolutionaries)*

1. In the event of a revolution or insurrection which brings about a change in the government of a State or the establishment of a new State, an act or omission of an organ, agency, official, or employee of a revolutionary or insurrectionary group is, for the purposes of this Convention, attributable to the State in which the group established itself as the government.
2. In the event of an unsuccessful revolution or insurrection, an act or omission of an organ, agency, official, or employee of a revolutionary or insurrectionary group is not, for the purposes of this Convention, attributable to the State.

SECTION E

EXHAUSTION OF LOCAL REMEDIES

*Article 19*

*(When local remedies considered exhausted)*

1. Local remedies shall be considered as exhausted for the purposes of this Convention if the claimant has employed all administrative, arbitral, or judicial remedies which were made available to him by the respondent State, without obtaining the full redress to which he is entitled under this Convention.
2. Local remedies shall be considered as not available for the purposes of this Convention:
  - (a) if no remedy exists through which substantial recovery could be obtained;
  - (b) if the remedies are in fact foreclosed by an act or omission attributable to the State; or
  - (c) if only excessively slow remedies are available or justice is unreasonably delayed.

SECTION F

PRESENTATION OF CLAIMS BY ALIENS

*Article 20*

*(Persons entitled to present claims)*

1. A claim may be presented, as provided in Article 22, by an injured alien or by a person entitled to claim through him.

2. Injured aliens, for the purposes of this Convention, include:

- (a) the alien who has suffered an injury;
- (b) in the case of the killing of an alien, another alien who is:
  - (1) a spouse of the decedent;
  - (2) a parent of the decedent;
  - (3) a child of the decedent; or
  - (4) a relative by blood or marriage actually dependent on the decedent for support;
- (c) an alien who holds a share in, or other analogous evidence of ownership or interest in a juristic person which is a national of the respondent State or of any other State of which the alien is not a national, and who suffers an injury to such interest through the dissolution of, or any other injury to, such juristic person, if that juristic person has failed to take timely steps adequately to defend the interests of such alien.

3. Upon the death of an alien who has suffered an injury, such claim as may have accrued to him before his death may be presented by an heir, if such heir is an alien, or by the personal representative of the decedent.

4. If a claim has been assigned, it may be presented by the assignee thereof; provided such assignee is an alien.

*Article 21*

*(Definition of alien, national, and claimant)*

1. An "alien", as regards a particular State, is, as the term is used in this Convention, a person who is not a national of that State.
2. A "person", as the term is used in this Convention, is a natural person or a juristic person.
3. A "national" of a State, for the purposes of this Convention, shall be considered to include:
  - (a) a natural person who possesses the nationality of that State;
  - (b) a natural person who possesses the nationality of any territory under the mandate, trusteeship, or protection of that State;
  - (c) a stateless person having his habitual residence in that State; and
  - (d) a juristic person which is established under the law of that State or of one of the entities referred to in paragraph 1 of Article 17.
4. A member of the armed forces of a State or an official of a State, who does not possess the nationality of that State, is treated as if he were a national of that State as regards injuries incurred by him in the service of that State.
5. A "claimant", as the term is used in this Convention, is a person who asserts that he is an injured alien or a person entitled to claim through such injured alien.

*Article 22*

*(Procedure)*

1. A claimant is entitled to present his claim directly to the State alleged to be responsible.
2. A claimant is entitled to present his claim directly to a competent international tribunal if the State alleged to be responsible has conferred on that tribunal jurisdiction over such claim.
3. Subject to Article 25, a claimant shall not be precluded from submitting his claim directly to the State alleged to be responsible or to an international tribunal by reason of the fact that the State of which he is a national has refused to present his claim or that there is no State which is entitled to present his claim.
4. No claim may be presented by a claimant if, after the injury and without duress, the claimant himself or the person through whom he derived his claim waived, compromised, or settled the claim.
5. No claim under this Convention may be presented by a claimant with respect to any injury listed in sub-paragraphs 2 (e), 2 (f), 2 (g), or 2 (h) of Article 14:

(a) if prior to his acquisition of property rights or of a right to exercise a profession or occupation in the territory of the State responsible for the injury, or as a condition of obtaining rights under a contract with or a concession granted by that State, the alien to whom such rights were accorded agreed to waive such claims as might arise out of a violation by the respondent State of any of the rights thus acquired,

(b) if the respondent State has not altered the agreement unilaterally through a legislative act or in any other manner, and has otherwise complied with the terms and conditions specified in the agreement, and

(c) if the injury arose out of the violation by the State of the rights thus acquired by the alien.

6. No claim may be presented by a claimant with respect to any of the injuries listed in paragraph 2 of Article 14, if as a condition of being allowed to engage in activities involving an extremely high degree of risk, which privilege would otherwise be denied to him by the State, the alien has agreed to waive any claim with respect to such injuries and if the claim arises out of an act or omission attributable to the State which has a reasonably close relationship to such activities. Such a waiver is effective, however, only as to injuries resulting from a negligent act or omission or from a failure to exercise due diligence to afford protection to the alien in question and not as to injuries caused by a wilful act or omission attributable to the State.

7. No claim may be presented by a juristic person if the controlling interest in that person is in nationals of the State alleged to be responsible or in an organ or agency of that State. This provision shall not, however, affect the rights of aliens under sub-paragraph 2 (c) of Article 20.

8. The right of the claimant to present or maintain a claim terminates if, at any time during the period between the original injury and the final award, the injured alien, or the holder of the beneficial interest in the claim while he holds such interest, becomes a national of the State alleged to be responsible.

## SECTION G

### EPOUSAL AND PRESENTATION OF CLAIMS BY STATES

#### Article 23

*(Espousal of claims and continuing nationality)*

1. A State is entitled to present a claim on behalf of its national directly to the State which is alleged to be responsible and, if the claim is not settled within a reasonable period, to an international tribunal which has jurisdiction of the subject-matter and over the States concerned, whether or not its national has previously presented a claim under Article 22. If a claim is being presented both by a claimant and by the State of which he is a national, the right of the claimant to present or maintain his claim shall be suspended while redress is being sought by the State.

2. If so provided in an instrument by which a State has conferred jurisdiction upon an international tribunal pursuant to paragraph 2 of Article 22, the presentation of a claim by any other State on behalf of the claimant to present or maintain his claim shall be suspended remedies thus made available to him.

3. A State is not entitled to present a claim on behalf of a natural person who is its national if that person lacks a genuine connection of sentiment, residence, or other interests with that State.

4. A State is not entitled to present a claim on behalf of a juristic person if the controlling interest in that person is in nationals of the State alleged to be responsible or in an organ or agency of that State.

5. A State is entitled to present a claim of its national arising out of the death of another person only if that person was not a national of the State alleged to be responsible.

6. A State has the right to present or maintain a claim on behalf of a person only while that person is a national of that State. A State shall not be precluded from presenting a claim on behalf of a person by reason of the fact that that person became a national of that State subsequent to the injury.

7. The right of a State to present or maintain a claim terminates, if, at any time during the period between the original injury and the final award or settlement, the injured alien, or the holder of the beneficial interest in the claim while he holds such interest, becomes a national of the State against which the claim is made.

#### Article 24

*(Waiver, compromise, or settlement of claims by claimants and imposition of nationality)*

1. A State is not entitled to present a claim if the claimant or a person through whom he derives his claim has waived, compromised, or settled the claim under paragraphs 4, 5 or 6 of Article 22.

2. A State is not relieved of its responsibility by having imposed its nationality, in whole or in part, on the injured alien or any other holder of the beneficial interest in the claim, except when the person concerned consented thereto or nationality was imposed in connection with a transfer of territory. Such consent need not be express; it shall be implied if the law of the State provides that an alien thereafter acquiring real estate, obtaining a concession, or performing any other specified act shall automatically acquire the nationality of that State for all purposes and the alien voluntarily fulfills these conditions. Such a requirement may be applied to both natural and juristic persons, subject to the provisions of sub-paragraph 2 (c) of Article 20.

#### Article 25

*(Waiver, compromise, or settlement of claims by States)*

A State may by a treaty waive, compromise, or settle any actual or potential claim of its nationals accruing under this Convention and may make such waiver, compromise, or settlement binding not only on itself but also on any actual or potential claimant who is a national of such State, even if that person became a national of such State after the waiver, compromise, or settlement was effected.

## SECTION H

### DELAY

#### Article 26

*(Claims barred by lapse of time)*

If the presentation of a claim is delayed, after the exhaustion of local remedies to the extent provided for in Article 19, for a period of time which is unreasonable under the circumstances, the claim shall be barred by the lapse of time.

## SECTION I

### REPARATION

#### Article 27

*(Form and purpose of reparation)*

1. The reparation which a State is required to make for a wrongful act or omission for which it is responsible may take the form of:

(a) measures designed to re-establish the situation which would have existed if the wrongful act or omission attributable to the State had not taken place;

(b) damages; or

(c) a combination thereof.

2. Measures designed to re-establish the situation which would have existed if the act or omission attributable to the State had not taken place may include:

- (a) revocation of the act;
- (b) restitution in kind of property wrongfully taken;
- (c) performance of an obligation which the State wrongfully failed to discharge; or
- (d) abstention from further wrongful conduct.

3. Damages are awarded in order to:

(a) place the injured alien or an alien claiming through him in as good a position, in financial terms, as that in which the alien would have been if the act or omission for which the State is responsible had not taken place;

(b) restore to the injured alien or an alien claiming through him any benefit which the State responsible for the injury obtained as the result of its act or omission; and

(c) afford appropriate satisfaction to the injured alien or an alien claiming through him for an injury suffered by the injured alien as the result of an act or omission occasioned by malice, reckless indifference to the rights of the injured alien, any category of aliens, or aliens in general, or a calculated policy of oppression directed against the injured alien, any category of aliens, or aliens in general.

4. Factors normally to be taken into account in the computation of damages are set forth in Articles 28 to 38, but such enumeration in no wise limits the scope of this Article.

#### Article 28

##### *(Damages for personal injury or deprivation of liberty)*

Damages for bodily or mental harm, for mistreatment during detention, or for deprivation of liberty shall include compensation for past and prospective:

- (a) harm to the body or mind;
- (b) pain, suffering, and emotional distress;
- (c) loss of earnings and or earning capacity;
- (d) reasonable medical and other expenses;
- (e) harm to the property or business of the alien resulting directly from such bodily or mental injury or deprivation of liberty; and
- (f) harm to the reputation of the alien resulting directly from such deprivation of liberty.

#### Article 29

##### *(Damages for death)*

Damages in respect of the death of an alien shall include compensation for the expected contribution of the decedent to the support of the persons specified in sub-paragraph 2 (b) of Article 20.

#### Article 30

##### *(Damages for wrongful acts of tribunals and administrative authorities)*

1. If, as set forth in Articles 6, 7, and 8, in any civil proceeding an alien has been denied access to a tribunal or an administrative authority or an adverse decision or judgment has been rendered against an alien or an inadequate recovery obtained by an alien, damages shall include compensation for the amount wrongfully assessed against or denied such alien and any other losses resulting directly from such proceeding or denial of access.

2. If in any criminal proceeding an alien has been arrested or detained as set forth in Article 5 or an adverse decision or judgment has been rendered against an alien as set forth in Articles 7 and 8, damages shall, in addition to damages otherwise payable under this Section, include compensation for the costs of defense, litigation, and judgment, and any other losses resulting directly from such proceeding.

#### Article 31

##### *(Damages for destruction of and damage to property)*

1. Damages for destruction of property under Article 9 shall include:

(a) an amount equal to the fair market value of the property prior to the destruction or, if no fair market value exists, the fair value of such property; and

(b) payment, if appropriate, for the loss of use of the property.

2. Damages for damage to property under Article 9 shall include:

(a) the difference between the value of the property before the damage and the value of the property in its damaged condition; and

(b) payment, if appropriate, for the loss of use of the property.

#### Article 32

##### *(Damages for taking and deprivation of use or enjoyment of property)*

1. In case of the taking of property or of the use thereof under paragraph 1 of Article 10, the property shall, if possible, be restored to the owner and damages shall be paid for the use thereof.

2. Damages for the taking of property or of the use thereof under paragraph 2 of Article 10, or under paragraph 1 of Article 10 if restoration of the property is impossible, shall be equal to the difference between the amount, if any, actually paid for such property or for the use thereof and the amount of compensation required by paragraph 2 of Article 10.

#### Article 33

##### *(Damages for deprivation of means of livelihood)*

Damages for the deprivation of an existing means of livelihood under Article 11 shall include compensation for any losses caused the alien by failure to accord him a reasonable period of time in advance of such deprivation in which to adjust his affairs. In particular, such damages shall include the difference between the amount, if any, actually received by the alien in connection with such deprivation of means of livelihood and the compensation required by Article 11.

#### Article 34

##### *(Damages for violation, annulment, or modification of a contract or concession)*

1. Damages for the violation, annulment, or modification of a contract or concession under paragraph 1 or 4 of Article 12 shall include compensation for losses caused, and gains denied as the result of such wrongful act or omission or compensation which will restore the claimant to the same position in which the injured alien was immediately preceding such act or omission.

2. Damages for the exaction of a benefit not within the terms of a contract or concession or for the waiver of a term thereof under paragraph 3 of Article 12 shall include compensation for the benefit wrongfully exacted.

#### Article 35

##### *(Damages for failure to exercise due diligence)*

Damages for any injury sustained as the result of the failure of a State under Article 13 to exercise due diligence to afford protection to an alien or to apprehend or to hold a person who has committed a criminal act shall be computed as if the State had originally caused such injury directly.

*Article 36**(Costs)*

The claimant shall be reimbursed for those expenses incurred by him in the local and international prosecution of his claim which are reasonable in amount and the incurrence of which was necessary to obtain reparation on the international plane.

*Article 37**(Subtraction of damages obtained through other remedies)*

Damages which a State is required to pay on account of an act or omission for which it is responsible shall be diminished by the amount of any recovery which has been obtained through local and international remedies. The amount so recovered must be payable in the form specified in Article 39.

*Article 38**(Interest)*

1. The amount of any award shall include interest, either by way of inclusion in the lump sum awarded or by the addition of an amount computed from the date of the injury to the date of the award. If, however, the injured alien is dilatory in presenting his claim, such interest may be computed from the date at which he gave notice of his claim to the responsible State.
2. Interest on the amount of the award shall be due for the period from the date of the award to the date of the payment thereof.
3. The rate of interest under paragraphs 1 and 2 shall be that prevailing with respect to obligations of analogous amount and duration at the time of the award in the place in which the injured alien was habitually resident at the time of the injury.

*Article 39**(Currency and rate of exchange)*

1. Damages shall, except in the case dealt with in paragraph 2 of this Article, be computed and paid in the currency of the State of which the injured alien was a national at the time of the injury or, in the case of claims accruing under Article 12, in the currency specified in the contract or concession. The respondent State may pay the award either in that currency or in any other currency readily convertible to that currency, computed at the rate of exchange prevailing on the date of the award or payment, whichever is more favorable to the claimant. In the case of a multiple exchange rate, the rate of exchange shall be that approved by the International Monetary Fund for such transactions or, in the absence of a rate so approved, a rate which is equitable under the circumstances of the case.
2. If, however, the injured alien was a natural person and had his habitual residence in the territory of the respondent State for an extended period of time prior to the injury, damages under Articles 31 to 34 may, in the discretion of that State, be paid in the currency thereof.
3. The provisions of this Article shall apply also to the compensation payable under Articles 10 and 11.
4. Damages and compensation payable under paragraphs 1 and 3 of this Article shall be exempt from exchange controls.

*Article 40**(Local taxes prohibited)*

Neither damages nor compensation shall be subjected to special taxes or capital levies within the State paying such damages or compensation pursuant to this Convention.

## ANNEX VIII

**Draft convention on the responsibility of States for injuries caused in their territory to the person or property of aliens, prepared by the Deutsche Gesellschaft für Völkerrecht (German International Law Association) in 1930<sup>a</sup>**

[Original text: German]

*Article 1*

1. Every State is responsible to other States for injury caused in its territory to the person or property of aliens as a consequence of the violation by that State of any of its obligations towards the other State under international law.
2. The violation of an obligation under international law may consist of an omission if action or a specific act would, in the circumstances, have been an obligation under international law.
3. It is immaterial whether the violation results from acts or omissions of the constituent or legislative power, of the Government, of the administrative authorities, of the courts or of the corporations and agencies which perform public functions in its territory.
4. Responsibility is not avoided by reason of the fact that an authority acts beyond its competence, provided that it purports to be acting in its official capacity and is employing the official machinery, or by reason of the fact that the violation is committed in the performance of official functions. Where an act does not fulfil these conditions, the State is responsible in the same manner as in the case of acts and omissions of private persons.

*Article 2*

1. In the absence of special agreements or other rules of international law, every State is obligated to protect the life, freedom and property of aliens in its territory.
2. This obligation means, in particular, that:
  - (a) An alien may not be wrongfully deprived of his freedom. Wrongful deprivation of freedom is deemed to include, in particular, the upholding of an unlawful arrest, detention in provisional custody for a manifestly unnecessary or inadmissible length of time, and imprisonment without due cause or in conditions of unnecessary hardship.
  - (b) Expropriation of duly acquired rights is admissible only for reasons of the general welfare and against appropriate compensation.
  - (c) Concessions granted to aliens or rights conferred by contract on aliens may be withdrawn only for compelling reasons of public welfare and against full compensation.
  - (d) The obligations of indebtedness of a State towards an alien may not be annulled by that State and performance of them may not be refused by that State without lawful cause. Payments of interest and repayments of principal may be suspended or modified only in the event of financial necessity.

*Article 3*

1. Apart from the foregoing, the State is obligated only to apply conscientiously to aliens municipal law relating to international law and to allow them access to the courts.
2. In the case of the application of municipal law in conformity with international law by its governmental and administrative authorities, the State is responsible only if it has failed to do all such things as are appropriate to and necessary in the circumstances in order to ensure a just application of such municipal law to aliens.

<sup>a</sup> Institut für Internationales Recht an der Universität Kiel, *Zeitschrift für Völkerrecht* (Breslau, 1930), vol. XV, pp. 359-364.

3. In the case of the application of municipal law in conformity with international law by its courts, State responsibility arises only in the event of denial of justice. A denial of justice takes place:

- (1) If the courts which exist for the protection of person and property are not functioning, or are not available to aliens, or proceedings relating to aliens are unduly prolonged.
- (2) If the decision of the court is so defective that it cannot be deemed to be the expression of a conscientious judicial determination. Lack of a conscientious judicial determination may be presumed if the courts do not present those guarantees of independence which are essential to the proper administration of justice or if the courts have acted with malice towards aliens in general or towards persons having the nationality of the aliens concerned.

*Article 4*

A federal State is responsible for its component States, irrespective of whether a case concerns its own obligations under international law or the like obligations of such component States.

*Article 5*

1. The State is responsible only according to the measure of Article 1, paragraph 2, for injury caused in its territory by the acts of private persons.
2. The public status of an alien and the circumstances under which he is present in its territory obligate the State to exercise special diligence and care.

*Article 6*

1. A State is responsible for injury caused on the occasion of riots, insurrections and civil war or in similar cases only if it has failed to apply such diligent care as the circumstances require in order to prevent or counteract the injuries and if it fails to afford to aliens the same protection and the same compensation for injury as it affords to its own nationals.
2. If the disturbances are directed against aliens in general or against persons of a given State or nationality, the State is responsible for injuries caused to the foreign nationals unless it proves that it is not chargeable with any failure as specified in paragraph 1.
3. If the State recognizes the insurgents as a belligerent party, its responsibility terminates in respect of injuries caused after such recognition. Its responsibility towards States which have recognized the insurgents as a belligerent party terminates in respect of injuries caused after such recognition.

*Article 7*

1. The criterion for State responsibility is afforded solely by international law.
2. Accordingly, responsibility is not, in particular, avoided by reason of the fact that the organs of the State:
  - (1) Are acting in contravention of municipal law or of the orders of their superiors;
  - (2) Are complying with the Constitution, with municipal law or with the orders of their superiors;
  - (3) Are, in accordance with their municipal law, treating aliens in the same manner as their own nationals, where the treatment of their own nationals does not conform to the principles laid down by international law for the protection of life, freedom and property.

*Article 8*

1. A State which is responsible in accordance with the foregoing provisions is obligated towards the State which has been injured in

the person of its nationals to make reparation, in an appropriate manner and as fully as is practicable, for the injury consequent on the act which is contrary to international law.

2. An injury which is only remotely connected with the act contrary to international law is not deemed to be consequent on that act.
3. Damages shall include, in addition to damages for the injury caused to the injured national, damages for any injury thereby caused to the State itself.

*Article 9*

1. The injured State may in the first instance demand the re-establishment of the situation in fact and in law which would have existed if the event causing the injury had not taken place, to the extent that such re-establishment is possible.
2. Difficulties in effecting such re-establishment, and in particular the necessity of expropriating and compensating third-party assignees, do not preclude the right to demand such re-establishment.
3. Re-establishment may not be demanded if such a demand is unreasonable, and in particular if the difficulties of re-establishment are disproportionate to the advantages for the injured person.

*Article 10*

1. If re-establishment is not demanded or under the terms of the preceding article may not be demanded, or if and to the extent that re-establishment does not constitute full reparation for the injury caused, the injured person is entitled to monetary compensation.
2. Interest at an appropriate rate shall be paid as from the date of the injury. Compensation may be demanded for any demonstrable loss of earnings over and above the amount of the interest. Costs of litigation shall be reimbursed.
3. The domestic price levels of the State causing the injury shall not be taken into account in computing the amount of compensation if that State had depressed the domestic price through special measures. If the injured person is compelled by circumstances to obtain the compensation or to re-establish his livelihood outside the State causing the injury, the price and currency levels of the State in which he obtains the compensation or re-establishes his livelihood shall be taken into account.

*Article 11*

The compensation shall be placed at the disposal of the State which has been injured in the person of one of its nationals. If payment to the injured private person is demanded, this may only be deemed to constitute designation of the place of payment for the State entitled to compensation.

*Article 12*

1. A State injured in the person of its nationals may in appropriate cases demand, in addition to re-establishment of the situation formerly existing and in addition to compensation for material injury, compensation for mental injury.
2. The foregoing shall apply in particular in the case of serious violations of the life, freedom, reputation, intellectual property or means of livelihood of aliens.

*Article 13*

1. Where an injured private person has a claim to compensation under the terms of municipal law, the State injured in the person of one of its nationals may advance its claim to compensation under international law only if and to the extent that the municipal law of the responsible State does not make available to the injured

private person in this connexion legal remedies that are effective and adequate and are endowed with the necessary guarantees, or if and to the extent that the injured private person has employed and exhausted such legal remedies without obtaining reparation for his injury.

2. This restriction shall not apply if, in the circumstances, the injured private person cannot reasonably be expected to employ such legal remedies.

*(Reservation to article 13)*

The foregoing shall be without prejudice to the question whether, to what extent and in what manner it is advisable to grant to injured private persons an individual right to bring actions before international tribunals and to the question in what relationship the proceedings and judgements of such international tribunals stand to the proceedings and judgements of domestic tribunals and to those of the international tribunals which have jurisdiction of disputes between States in matters of State responsibility, inasmuch as these questions appear to be not yet ripe for regulation by international treaty.

*Article 14*

1. Without prejudice to the provisions of articles 9 to 13, a State injured in the person of its nationals may demand satisfaction, where the general principles of international law entitle it to do so.

2. Such satisfaction may not be disproportionate to the injury or by its nature be humiliating to the State affording satisfaction.

*Article 15*

A State injured in the person of its nationals may hold the State causing the injury responsible only if the injured private persons were already its nationals at the time of the injury or if it was entitled at that time under existing international law to grant them protection.

*Article 16*

1. Unless otherwise provided in special agreements between individual States, such States undertake to refer any disputes concerning the interpretation and application of this Convention to commissions of inquiry, settlement boards, arbitral tribunals or the Permanent Court of International Justice, and to take measures of self-defence only if the other party refuses such a settlement of the disputes.

2. Measures of self-defence shall not exceed the bounds of necessity and shall not be disproportionate to the injury. In the event of disagreement on whether this is the case, the States shall endeavour to settle the disagreement by peaceful means.

*Article 17*

This Convention shall be without prejudice to special provisions of martial law.

*Article 18*

Where, under the national legislation of a State which is obligated in accordance with this Convention to provide compensation for injury or under international agreements which a State has concluded with other States parties to this Convention, the obligation to provide compensation has been made dependent on a guarantee of reciprocity, reciprocity is deemed to be guaranteed in the case of States which are signatories of this Convention.

**ANNEX IX**

**Draft treaty concerning the responsibility of a State for internationally illegal acts, prepared by Professor Strupp in 1927<sup>a</sup>**

*[Original text: German]*

Convinced that the question of the international responsibility of States, which has so often given rise to doubts and difficulties can and must be regulated by treaty, the High Contracting Parties have agreed upon the following articles, reserving for a subsequent treaty the responsibility of States in the absence of illegality.

*Article 1*

A State is responsible to other States for the acts of persons or groups whom it employs for the accomplishment of its purposes (its "organs"), in so far as these acts conflict with the duties which arise out of the State's international legal relations with the injured State.

If the act consists of an omission, the employing State is responsible only if it is chargeable with fault.

*Article 2*

Such responsibility is not relieved or avoided by the fact that the person or group has exceeded his or its authority provided it had general jurisdiction to undertake the act or action in question.

*Article 3*

A State is responsible only according to the measure of Article 1, paragraph 2, for the acts of private persons, especially for disadvantages or injuries which foreigners sustain on the occasion of riots, insurrections, civil war and in similar cases through the acts of persons or groups.

*Article 4*

In the case of an omission, a State may release itself from responsibility by proving that it has not acted wilfully or has not negligently failed to observe the necessary care.

Such care is required as may be demanded from a civilized or constitutional State (*Kultur- oder Rechtsstaat*).

Defective legislation, and particularly in federal States constitutional limitations upon the legislative power of the central government, can neither release nor diminish the responsibility of a State.

*Article 5*

In composite States (federations, confederations, protectorates) the sovereign State (*Oberstaat*) is responsible for the inferior or protected State (*Unterstaat*). Articles 1 and 2 are to be applied here also.

*Article 6*

The State is responsible for courts only if they have been guilty of an intentional denial or delay of justice.

<sup>a</sup> K. Strupp, *Die völkerrechtliche Haftung des Staates insbesondere bei Handlungen Privater, Abhandlung zur fortschreitenden Kodifikation des internationalen Rechts*, Heft 1 (Kiel, 1927). Translation by the Harvard Law School, *Research in International Law: Nationality, Responsibility of States, Territorial Waters (Drafts of Conventions prepared in anticipation of the first Conference on the Codification of International Law, The Hague, 1930)* (Cambridge Mass., 1929) Part II, Appendix No. 8, pp. 235-236.

A denial of justice takes place if foreigners are denied access to the courts or if, contrary to existing international duties, such access is made dependent upon special conditions.

*Article 7*

An injured State is not unlimited in its election of remedies. Such remedies may not be uncommensurate in severity with the original injury or by their nature be humiliating.

*Article 8*

If a private person is injured, a State may advance a claim only if the injured person was at the time of injury a citizen of the State.

*Article 9*

All claims arising of this treaty, if diplomatic processes fail to result in an agreement, or if special tribunals are not otherwise designated by treaty, shall be submitted to the Permanent Court of International Justice at The Hague.

*Article 10*

The international rules concerning the responsibility of States in the absence of illegality are not affected by this treaty.

*Article 11*

This treaty shall come into force as soon as at least five Powers have deposited their ratification at . . . and only in relations between or among the ratifying States. For other States, particularly non-signatories, to whom adhesion is unconditionally open, the treaty shall come into force with the deposit of ratifications at . . .

**ANNEX X**

**Draft convention on the responsibility of States for international wrongful acts, prepared by Professor Roth in 1932<sup>a</sup>**

[*Original text: German*]

*Article 1*

A State is responsible for the acts contrary to international law of any individuals whom or corporations which it entrusts with the performance of public functions, provided that such acts are within the general scope of their jurisdiction.

*Article 2*

The State is not liable for the acts of private persons.

*Article 3*

The State is liable for omissions only if it has failed to exercise such care as should, with due regard to the circumstances, be expected of a member of the international community.

*Article 4*

The State may not evade its liability by invoking its municipal law.

*Article 5*

In the case of confederations and of dependencies under international law, the sovereign State (*Oberstaat*) is liable for the inferior State (*Unterstaat*).

<sup>a</sup> A. Roth, *Das völkerrechtliche Delikt vor und in den Verhandlungen auf der Haager Kodifikations Konferenz 1930* (Leipzig, Universitätsverlag von Robert Noske, 1932), pp. 177-178.

*Article 6*

In the event of domestic disturbances, the State is liable only according to the measure of articles 1 to 4.

*Article 7*

A State is liable for its judicial organs only in cases of perversion or denial of justice. "Denial of justice" takes place if:

1. The State does not have available such courts as are necessary for the protection of aliens;
2. The available courts do not proceed in a proper manner;
3. Aliens are, contrary to existing obligations, denied access to the courts.

*Article 8*

Compensation shall in every case be provided for the injury caused by the acts contrary to international law.

*Article 9*

Where a private person is injured, a claim may be advanced by diplomatic representation only if all domestic legal remedies have been exhausted, unless in the circumstances the injured person cannot reasonably be expected to employ such legal remedies.

*Article 10*

Where a private person is injured, a claim may be presented only if the injured person was at the time of the injury a national of the complainant State, or if the illegality of the act under international law also affects the State accepting the injured person.

*Article 11*

Any disputes concerning this Convention shall, if diplomatic agreement is not possible, be submitted to the Permanent Court of International Justice.

**ANNEX XI**

**Recommendation concerning "claims and diplomatic intervention", adopted at the First International American Conference (Washington, 1889-1890)**

[For the text, see *Yearbook of the International Law Commission*, 1956, vol. II, p. 226 (document A/CN.4/96, annex 4).]

**ANNEX XII**

**Convention relative to the rights of aliens, signed at the Second International Conference of American States (Mexico City, 1902)**

[For the text, see *Yearbook of the International Law Commission*, 1956, vol. II, p. 226 (document A/CN.4/96, annex 5).]

**ANNEX XIII**

**Resolution on "international responsibility of the State", adopted at the Seventh International Conference of American States (Montevideo, 1933)**

[For the text, see *Yearbook of the International Law Commission*, 1956, vol. II, pp. 226-227 (document A/CN.4/96, annex 6).]

## ANNEX XIV

**Principles of international law that govern the responsibility of the State in the opinion of Latin American countries, prepared by the Inter-American Juridical Committee in 1962<sup>a</sup>**

## I

Intervention in the internal or external affairs of a State is not admissible to enforce the responsibility of said State.

On the contrary, intervention establishes the responsibility of the intervening State.

## II

The State is not responsible for acts or omissions with respect to foreigners except in those same cases and conditions where, according to its own laws, it has such responsibility towards its own nationals.

## III

The responsibility of the State for contractual debts claimed by the government of another State to be due to it or its nationals cannot be enforced by recourse to armed force.

This principle applies even where the debtor State fails to reply to a proposal for arbitration or fails to comply with an arbitral award.

## IV

A State is relieved of all international responsibility if the alien has, by contract, renounced the diplomatic protection of his government, or if domestic legislation subjects the contracting alien to the jurisdiction of the local courts, or if it places him in a similar status with nationals for all purposes of the contract.

## V

Damages suffered by aliens as a consequence of disturbances or commotion of a political or social nature and injuries caused to aliens by acts of private parties create no responsibility of the State, except in the case of the fault of duly constituted authorities.

## VI

The theory of risk as the basis for international responsibility is not admissible.

## VII

The State responsible for an aggressive war is responsible for damages that may arise therefrom.

## VIII

The obligation of the State regarding judicial protection shall be considered as having been fulfilled when it places at the disposal of foreigners the national courts and the legal remedies essential to implement their rights. A State cannot initiate diplomatic claims for the protection of its nationals nor bring an action before an international tribunal for this purpose when the means of resorting to the competent courts of the respective State have been made available to the aforementioned nationals.

Therefore:

(a) There is no denial of justice when aliens have had available the means to place their case before competent domestic courts of the respective States.

(b) The State has fulfilled its international obligations when the judicial authority pronounces its decision, even if it disallows the claim, action or appeal brought by the foreigner.

(c) The State is not internationally responsible for a judicial decision that is not satisfactory to the claimant.

## IX

The State is responsible if it provides aid, within its territory or abroad, to persons who conspire or encourage hostile movements against a foreign State, or when it fails to take the available legal measures to prevent such situations from arising.

## X

The definition and enumeration of the basic rights and duties of the States, contained in American international declarations and treaties, also represent a contribution to the development and codification of the international law regarding the responsibility of the State.

## ANNEX XV

**Principles of international law that govern the responsibility of the State in the opinion of the United States of America, prepared by the Inter-American Juridical Committee in 1965<sup>a</sup>**

## I

*General standard of responsibility*

When a State admits foreigners to its territory, it has an international duty to protect their life and property according to a minimum standard of rights determined by international law.

Neither the receiving State nor the foreigner's State can by its own law determine this international standard. It is determined by international law.

A State that fails to comply with the applicable international law, as regards the person or property of foreigners in its territory, incurs international responsibility and must make reparation in such form as may be appropriate.

## II

*Responsibility for acts and omissions of the legislative organ (including deprivation of property)*

Enactment of legislation of a constitutional or any other character incompatible with international customary law or the treaty rights of other States will, if enforced by the State to the injury of a foreigner, give rise to international responsibility.

Failure to enact legislation necessary for the purpose of implementing a treaty or other international obligation of the State makes the State responsible internationally, if an injury is caused thereby to a foreigner or his property.

Enacting legislation incompatible with the terms of concessions or contracts granted to or concluded with foreigners or of a nature

<sup>a</sup> Inter-American Juridical Committee, *Contribution of the American Continent to the principles of international law that govern the responsibility of the State*, document CIJ-61, in *OAS Official Records, OEA/Ser.L/V/II.2* (Washington D.C., Pan American Union, 1962), chap. III, pp. 7-8.

<sup>a</sup> Inter-American Juridical Committee, *Contribution of the American Continent to the principles of international law that govern the responsibility of the State*, document CIJ-78, in *OAS Official Records, OEA/Ser.L/V/II.2* (Washington D.C., Pan American Union, 1965), pp. 7-12.

to obstruct their execution may make the State responsible internationally, if an injury is caused thereby to a foreigner or his property.

Similarly, the enactment of legislation infringing vested rights of foreigners and the repudiation of debts may form the basis for State responsibility for injuries caused thereby, since a State may not take property of aliens except for a public purpose and upon payment of just compensation.

### III

#### *Responsibility for acts of tribunals, denial of justice*

The State becomes responsible when there is a pronounced degree of improper administration of justice by the courts, some notable examples of which are as follows:

- (a) Refusal to allow foreigners access to tribunals to defend their rights.
- (b) Decisions of the tribunal irreconcilable with the treaty obligations or the international duties of the State.
- (c) Unconscionable delay on the part of the tribunal.
- (d) Decisions of the tribunal that are manifestly discriminatory against foreigners.
- (e) The use of the tribunal to harass and persecute foreigners.
- (f) The courts are under the arbitrary control of the executive.

### IV

#### *Responsibility for acts of executive officials*

A State becomes responsible when there is a pronounced degree of improper governmental administration due to acts or omissions of executive officials.

### V

#### *Acts of private persons (failure to protect aliens, failure to apprehend and punish individuals who injure aliens)*

The State is not responsible for the acts of private persons since international responsibility of the State must be attributable to an official or agency of the government.

The State, however, is responsible for:

- (a) A failure to exercise due diligence to protect the life and property of foreigners.
- (b) A failure to exercise due diligence to apprehend and punish private individuals who injure foreigners.

### VI

#### *Damage caused by insurgents, rioters, or mob violence*

For damage done to the person or property of foreigners by persons engaged in insurrections or riots, or through mob violence, in general the State is not responsible in such cases, except:

- (a) Where negligence on the part of the Government or its officials can be established, or where connivance on the part of the latter can be shown.
- (b) Where the Government pays compensation for damage done in such cases to its own nationals or to other foreigners.
- (c) Where a rebellion is successful and the insurgent party which did the damage is installed in power and becomes the Government.

### VII

#### *Responsibility of the State for acts of its subdivisions*

Responsibility of the State for acts of its subdivisions applies to tort cases but not ordinarily to contract cases.

### VIII

#### *Circumstances in which a State is entitled to disclaim responsibility*

In each particular case, there are factual circumstances that permit a State to disclaim responsibility.

Several arbitral awards are cited in this respect, among them: (a) The United States was exonerated from responsibility for the capture of a British vessel in 1794 by United States privateers when the loss to the ship's cargo was due to negligence of the claimant in failing to make a timely appeal to United States authorities and demand bond and bail; (b) Nonadmission of a claim for imprisonment, damage to reputation, and bankruptcy where the claimant who was arrested as a spy was given opportunity to return to France and refused to do so.

### IX

#### *Exhaustion of the remedies afforded by the municipal law*

The enforcement of the responsibility of the State under international law is ordinarily subordinated to the exhaustion by the individuals concerned of the remedies afforded by the municipal law of the State whose responsibility is in question.

### X

#### *The Calvo Clause and exhaustion of local remedies*

Where an alien contracts with a national Government and agrees not to resort to the diplomatic or other protection of the Government of the State of which he is a national, in connection with the contract, his Government is not precluded from espousing a claim based on a violation of international law by the other Government.

According to the United States jurisprudence, the Calvo Clause in no case acquired true legal force, in the sense that its existence influenced the final decision of a case that, in its absence, would have been decided in a contrary way.

The Calvo Clause generally provides that the alien must rely upon local remedies for the adjustment of differences arising under the contract and may not invoke the diplomatic protection of his Government.

### XI

#### *National character of the claim*

Ordinarily the person interested in the claim should be a national of the State making the claim from the time of damage until the claim is settled.

### XII

#### *Modes of settlement*

A State may present by diplomatic representation a claim for reparation for the injury caused by the breach or nonperformance of an international obligation.

Where recourse to diplomatic representation does not settle disputes arising from the breach or nonperformance of an international obligation, States are under a duty to submit the dispute to impartial third-party decision, or some other means of pacific settlement.

### ANNEX XVI

**Conclusions of the report of the Sub-Committee on State Responsibility, annexed to Questionnaire No. 4 adopted by the League of Nations Committee of Experts for the Progressive Codification of International Law (Geneva, 1926)**

[For the text, see *Yearbook of the International Law Commission*, 1956, vol. II, pp. 222-223 (document A/CN.4/96, annex 1).]

## ANNEX XVII

Bases of discussion drawn up in 1929 by the Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930) arranged in the order that the Committee considered would be most convenient for discussion at the Conference

[For the text, see *Yearbook of the International Law Commission*, 1956, vol. II, pp. 223-225 (document A/CN.4/96, annex 2).]

## ANNEX XVIII

Text of articles adopted in first reading by the Third Committee of the Conference for the Codification of International Law (The Hague, 1930)

[For the text, see *Yearbook of the International Law Commission*, 1956, vol. II, pp. 225-226 (document A/CN.4/96, annex 3).]

## ANNEX XIX

Bases of discussion drawn up in 1956 by Mr. F. V. García Amador, Special Rapporteur of the International Law Commission on State responsibility

[For the text, see *Yearbook of the International Law Commission*, 1956, vol. II, pp. 219-221 (document A/CN.4/96, para 241).]

## ANNEX XX

Draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens, prepared in 1957 by Mr. F. V. García Amador, Special Rapporteur of the International Law Commission on State responsibility

[For the text, see *Yearbook of the International Law Commission*, 1957, vol. II, pp. 128-129 (document A/CN.4/106, annex).]

## ANNEX XXI

Draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens, prepared in 1958 by Mr. F. V. García Amador, Special Rapporteur of the International Law Commission on State responsibility

[For the text, see *Yearbook of the International Law Commission*, 1958, vol. II, pp. 71-73 (document A/CN.4/111, annex).]

## ANNEX XXII

Revised draft on international responsibility of the States for injuries caused in its territory to the person or property of aliens, prepared in 1961 by Mr. F. V. García Amador, Special Rapporteur of the International Law Commission on State responsibility

[For the text, see *Yearbook of the International Law Commission*, 1961, vol. II, pp. 46-49 (document A/CN.4/134 and Add.1, and addendum).]

## ANNEX XXIII

## List of International Law Commission documents relating to State responsibility

Document	Title	Reference
A/CN.4/80	<i>Memorandum presentado por F. V. García Amador</i>	<i>Yearbook of the International Law Commission</i> , 1954, vol. II, p. 21.
A/CN.4/96	State responsibility: International responsibility: report by F. V. García Amador, Special Rapporteur	<i>Ibid.</i> , 1956, vol. II, p. 173.
A/CN.4/106	State responsibility: International responsibility: second report by F. V. García Amador, Special Rapporteur	<i>Ibid.</i> , 1957, vol. II, p. 104.
A/CN.4/111	State responsibility: International responsibility: third report by F. V. García Amador, Special Rapporteur	<i>Ibid.</i> , 1958, vol. II, p. 47.
A/CN.4/119	State responsibility: International responsibility: fourth report by F. V. García Amador, Special Rapporteur	<i>Ibid.</i> , 1959, vol. II, p. 1.
A/CN.4/125	State responsibility: International responsibility: fifth report by F. V. García Amador, Special Rapporteur	<i>Ibid.</i> , 1960, vol. II, p. 41.
A/CN.4/134 and Add.1	State responsibility: International responsibility: sixth report by F. V. García Amador, Special Rapporteur	<i>Ibid.</i> , 1961, vol. II, p. 1.
A/CN.4/152	Report by Mr. Roberto Ago, Chairman of the Sub-Committee on State responsibility	<i>Ibid.</i> , 1963, vol. II, p. 227.
	<i>Appendix: Memoranda submitted by members of the Sub-Committee</i>	
	ILC (XIV)/SC.1/WP.1. The duty to compensate for the nationalization of foreign property: submitted by Mr. Eduardo Jiménez de Aréchaga	<i>Ibid.</i> , vol. II, p. 237.
	ILC (XIV)/SC.1/WP.2 and Add.1. An approach to State responsibility: submitted by Mr. Angel Modesto Paredes	<i>Ibid.</i> , p. 244.
	A/CN.4/SC.1/WP.3. Working paper prepared by Mr. André Gros	<i>Ibid.</i> , p. 246.
	A/CN.4/SC.1/WP.4. Working document prepared by Mr. Senjin Tsuruoka	<i>Ibid.</i> , p. 247.

<i>Document</i>	<i>Title</i>	<i>Reference</i>
	A/CN.4/SC.1/WP.5. Working paper prepared by Mr. Mustafa Kamil Yasseen	<i>Ibid.</i> , p. 250.
	A/CN.4/SC.1/WP.6. Working paper prepared by Mr. Roberto Ago	<i>Ibid.</i> , p. 251.
	A/CN.4/SC.1/WP.7. The social nature of personal responsibilities: working paper prepared by Mr. Angel Modesto Paredes	<i>Ibid.</i> , p. 256.
A/CN.4/165	State responsibility: Summary of the discussions in various United Nations organs and the resulting decisions: working paper prepared by the Secretariat	<i>Ibid.</i> , 1964, vol. II, p. 125.
A/CN.4/169	Digest of the decisions of international tribunals relating to State responsibility, prepared by the Secretariat	<i>Ibid.</i> , p. 132.
A/CN.4/196	State responsibility: note by Mr. Roberto Ago, Special Rapporteur	<i>Ibid.</i> , 1967, vol. II, p. 325.
A/CN.4/208	Supplement to the "Digest of the decisions of international tribunals relating to State responsibility", prepared by the Secretariat	Reproduced in this volume, p. 101.
A/CN.4/209	Proposals submitted to, and decisions of, various United Nations organs relating to the question of State responsibility: supplement prepared by the Secretariat to the document A/CN.4/165	Reproduced in this volume, p. 114.

# MOST-FAVoured-NATION CLAUSE

[Agenda item 4]

## DOCUMENT A/CN.4/213

First report on the most-favoured-nation clause, by Mr. Endre Ustor, Special Rapporteur

[Original text: English]

[18 April 1969]

### CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
INTRODUCTION . . . . .	1-9	158
<i>Chapter</i>		
I. A SHORT HISTORY OF THE MOST-FAVoured-NATION CLAUSE UP TO THE SECOND WORLD WAR . . . . .	10-64	159
1. The beginnings: unilateral grants . . . . .	10-12	159
2. Bilateral treaty clauses appear . . . . .	13-14	159
3. The seventeenth century . . . . .	15-16	160
4. Appearance of commercial treaties . . . . .	17-18	160
5. Most-favoured-nation rights acquired in Asia and Turkey . . . . .	19-24	160
6. The conditional form and the conditional interpretation . . . . .	25-27	161
7. The era of "free trade" . . . . .	28-29	162
8. The war and its effects . . . . .	30-33	162
9. The post-war period . . . . .	34-37	163
10. The economic crisis . . . . .	38-40	163
11. The clause in the treaties of the USSR . . . . .	41-52	164
12. The clause in treaties relating to consuls . . . . .	53-59	166
13. The practice of the Permanent Court of International Justice . . . . .	60-64	167
II. ATTEMPTS AT CODIFICATION UNDER THE AEGIS AND IN THE ERA OF THE LEAGUE OF NATIONS . . . . .	65-106	168
1. The Covenant of the League of Nations . . . . .	65-66	168
2. The International Economic Conference (Genoa, 1922) . . . . .	67-69	168
3. The International Economic Conference (Geneva, 1927) . . . . .	70-72	169
4. The work of the Economic Committee of the League of Nations Assembly . . . . .	73-78	169

CONTENTS ( <i>continued</i> )		
	<i>Paragraphs</i>	<i>Page</i>
5. The work of the Committee of Experts for the Progressive Codification of International Law . . . . .	79-97	170
(a) Field of application of the clause . . . . .	81	171
(b) Duration of the privilege . . . . .	82	171
(c) Future favours . . . . .	83	171
(d) Conditional and unconditional interpretation . . . . .	84	171
(e) Violations of the clause . . . . .	85-89	171
(i) The minute classification of articles in tariff schedules . . . . .	85-86	171
(ii) Geographical discriminations . . . . .	87	171
(iii) Imposition of countervailing duties . . . . .	88	171
(iv) Imposition of sanitary prohibitions . . . . .	89	172
(f) Conclusions of Mr. Wickersham . . . . .	90-92	172
(g) The contrary view . . . . .	93	172
(h) Questions to be regulated . . . . .	94	172
(i) Rules of interpretation . . . . .	95	172
(j) Conclusion of Professor Barbosa de Magalhães . . . . .	96	172
(k) The decision of the Committee of Experts . . . . .	97	172
6. The World Monetary and Economic Conference (London, 1933) . . . . .	98-103	173
7. The Seventh International Conference of American States (1933) . . . . .	104-105	174
8. Codification by the Institute of International Law . . . . .	106	175

#### ANNEXES

I. Excerpts from the conclusions of the Economic Committee of the League of Nations in regard to the most-favoured-nation clause . . . . .	175
Can States claim most-favoured-nation treatment from each other as a right?—The most-favoured-nation clause in customs matters: a plea for the clause to be unconditional. . . and unrestricted.—Fields other than Customs matters.—Fields not appropriate for the clause.—What is to be understood by the term "Customs questions"?—The operation of the clause in the presence of import and export prohibitions.—Customs quotas: are they compatible with the unconditional and unrestricted most-favoured-nation clause?—Will the clause operate in the case of temporary imports and exports?—Essential characteristics of goods benefiting by the clause.—Nationality of a product.—"Like products".—Exceptions to the clause (frontier traffic, Customs unions, special exceptions).—Wording of the clause.—Relations between bilateral agreements based on the most-favoured-nation clause and economic plurilateral conventions.	
II. Resolution of the Institute of International Law, adopted at its fortieth session (Brussels, 1936)	180
III. Selected bibliography on the most-favoured-nation clause . . . . .	181

#### Introduction

1. In the introduction to the working paper submitted at the twentieth session of the International Law Commission,<sup>1</sup> the present Special Rapporteur gave an account of the circumstances under which the Commission had decided to begin the study of the topic of most-favoured-nation clauses in the law of treaties. The subsequent events are as follows:

2. As reflected in chapter IV of the report on the work of its twentieth session,<sup>2</sup> the Commission discussed the

matter briefly and gave instructions to the Special Rapporteur. According to the instructions, the studies to be undertaken should not be confined to the field of international trade. Although the fundamental importance of the role of the most-favoured-nation clause in this domain was expressly recognized, the Special Rapporteur was asked to explore all the major fields of application of the clause.

3. The Commission stated in its report that it wished to focus on the legal character of the clause and the legal conditions governing its application; and to clarify the scope and effect of the clause as a legal institution in the context of all aspects of its practical application.

4. Finally the Commission expressed its wish to base its studies on the broadest possible foundations without,

<sup>1</sup> *Yearbook of the International Law Commission, 1968*, vol. II, document A/CN.4/L.127, p. 165.

<sup>2</sup> *Ibid.*, document A/7209/Rev.1, p. 223.

however, entering into fields outside its responsibilities.

5. In the light of these considerations, the Commission instructed the Special Rapporteur to consult, through the Secretariat, all organizations and interested agencies which might have particular experience in the application of the most-favoured-nation clause.

6. Having acted according to these instructions and while awaiting the answers to all the letters sent by the Secretariat to thirty-three agencies, the Special Rapporteur began to work according to the plan outlined in his above-mentioned working paper and prepared the present report.

7. The report attempts to give an outline of the history of the clause mainly in the domain of international trade, its chief field of application. It does not go further in time than the end of the Second World War, it being the belief of the Special Rapporteur that the history of the last twenty-five years is too closely related to the activities of the agencies whose answers are awaited. A particular place is given in the report to the works on the clause which were undertaken in the League of Nations and under its aegis. Notwithstanding the great changes which have taken place since the times of the League, the research undertaken in its various bodies and for the conferences of the inter-war period contains a wealth of material and is still of a considerable doctrinal value.

8. While giving a picture—admittedly fragmentary—of the history of the clause, it is also the purpose of the report—which does not pretend to be based on original research<sup>3</sup>—to collect and present the available material both in respect of the legal problems as they emerged in the given period and, to a lesser extent, in respect of the economic and political context with which the clause is inextricably linked.

9. The Special Rapporteur hopes to be able to complete the present report by another one which will be based largely on the answers of the organizations and agencies consulted and will contain also an account of the three cases dealt with by the International Court of Justice pertaining to the clause: the *Anglo-Iranian Oil Company Case (jurisdiction)* [1952],<sup>4</sup> the *Case concerning rights of nationals of the United States of America in Morocco* [1952],<sup>5</sup> and the *Ambatielos Case (merits: obligation to arbitrate)* [1953].<sup>6</sup> Such preparatory work may then serve as a sufficient basis for the substantial work of codification: the drafting of the rules of modern international law on the most-favoured-nation clause.

## CHAPTER I

### A short history of the most-favoured-nation clause up to the Second World War

#### 1. *The beginnings: unilateral grants*

10. The most-favoured-nation clause can be traced back to the eleventh century. The merchants of the Middle Ages tried in the first place to secure a monopoly for themselves in the exploitation of a foreign—and therefore far and difficult—market. When, however, with the development of commerce, such efforts failed and, accordingly, they had not succeeded in excluding their competitors from a given market, they strove to gain opportunities at least equal to those of their rivals. Thus the jealousy and competition between the merchants of the Italian, French and Spanish trading cities compelled them to content themselves with equal opportunities in foreign lands. It was at the insistence of the Mediterranean French and Spanish cities that Arab princes of western Africa issued franchises in which the merchants of those cities were accorded the same treatment as granted to the citizens of Venice and later to those of Pisa, Genoa, Ancona and Amalfi.

11. Similar franchises and stipulations were solicited and received in the twelfth century from the Byzantine Emperors by Venice. This city secured for its merchants in this way the same rights and privileges as were granted to the Genoans and Pisans. Promises of the same kind were sought from and given by the French princes of the Kingdom of Jerusalem to several trading cities of the Mediterranean. These transactions related to the personal rights of and jurisdictional favours for the merchants rather than to concessions in respect of customs duties.

12. Within the Holy Roman Empire, Imperial grants of customs privileges were given to certain cities on the basis of favours obtained “by whatsoever other town”. Such privileges were accorded to Mantua by Emperor Henry III in 1055. Emperor Frederic II conceded to the City of Marseilles in 1226 the privileges previously granted to the citizens of Pisa and Genoa. From this early period, treaties between England and continental cities such as Cologne have also been mentioned.<sup>7</sup>

#### 2. *Bilateral treaty clauses appear*

13. It is not until the fifteenth century that more elaborate texts are quoted. Thus a treaty between Henry V of England and the Duke of Burgundy and Count of Flanders of 17 August 1417 contained the following clause:

*Les Maistres de Neifs et Maronniers de la Partie d'Engleterre, a leur venue es Ports et Havres de nôtre dit Pays de Flandres, porront*

<sup>3</sup> Sir Gerald Fitzmaurice entered a *caveat* on this point in his fifth report on the law of treaties, see *Yearbook of the International Law Commission, 1960*, vol. II, document A/CN.4/130, p. 74, para 8.

<sup>4</sup> *I.C.J. Reports 1952*, p. 93.

<sup>5</sup> *Ibid.*, p. 176.

<sup>6</sup> *I.C.J. Reports 1953*, p. 10.

<sup>7</sup> S. Basdevant, “Clause de la nation la plus favorisée”, in A. de Lapradelle et J.-P. Niboyet, *Répertoire de droit international* (Paris, Recueil Sirey, 1929), t. III, pp. 464 and 468; A. Nussbaum, *A Concise History of the Law of Nations* (New York, MacMillan, 1954) rev. ed., p. 33; B. Nolde, “Droit et technique des traités de commerce” and “La clause de la nation la plus favorisée et les tarifs préférentiels”, *Recueil des cours de l'Académie de droit international de La Haye, 1924* (II), t. 3, p. 295, and *ibid.*, 1932, t. 39, p. 5; G. Schwarzenberger, “The Most-Favoured-Nation Standard in British State Practice”, *The British Yearbook of International Law, 1945* (London, Oxford University Press), vol. XXII, p. 97.

*faire licitement lier leur Neifs es dis Ports et Havres, par la manière que feront François, Hollandois, Zellois, et Escohois, sans encourir pour ce en aucune fourfaiture ou amende : et semblablement, pourront faire les Maistres de Neifs et Maronniers de Flandres es Ports et Havres de la Partie d'Angleterre.*<sup>8</sup>

This clause shows already a bilateral form, but the reciprocal favours between the contracting parties were limited to concessions granted to certain specified nations only.

14. By the end of the fifteenth century the stipulations were broadened in the sense that the privileges granted to the beneficiary were no longer restricted to those accorded to certain specifically named countries but extended to favours accorded to any foreign nation. The commercial treaty between England and Brittany of 1486<sup>9</sup> and the Anglo-Danish treaty of 1490<sup>10</sup> have been cited as examples of treaties of this modern type.

### 3. The seventeenth century

15. The use of the clause became common practice during the seventeenth century. It appears in the following form in the treaty of commerce concluded between the Netherlands and Sweden at Nijmegen in 1679:

*The Contracting Parties ad minimum privilegii, libertatibus, immunitatibus et concessionibus utantur, fruuntur, parique favore in omnibus gaudeant, quibus amicissima quaevis gens externa utitur, fruatur gaudetque aut in posterum uti, frui aut gaudere possit.*<sup>11</sup>

16. The clause appears sometimes in the unilateral form, the more powerful nation assuring for itself, against a more or less important concession, the most-favoured-nation treatment. Thus the treaty concluded between England and Portugal on 29 January 1692, specifies that "subjects of Great Britain shall enjoy all the immunities accorded to the subjects of any nation whatsoever in league with the Portugals".<sup>12</sup>

### 4. Appearance of commercial treaties

17. The modern form of the clause evolved in the eighteenth century, when the phrase "most favored foreign nation" also appeared.<sup>13</sup> Political and commercial treaties became more clearly differentiated. In this respect the example was set at Utrecht in 1713 when, in addition to the political convention between England and France—the core of the peace—a commercial treaty between them was negotiated. This treaty contained a

<sup>8</sup> Quoted by G. Schwarzenberger, *op. cit.*, p. 97.

<sup>9</sup> Quoted by B. Nolde, "Droit et technique des traités de commerce", *Recueil des cours de l'Académie de droit international de La Haye, 1924* (II), t. 3, p. 303, and by S. Basdevant, *op. cit.*, p. 468.

<sup>10</sup> Quoted by G. Schwarzenberger, *op. cit.*, p. 97.

<sup>11</sup> J. Dumont, *Corps universel diplomatique du droit des gens...*, t. VII, part one, p. 439. Quoted by B. Nolde, *op. cit.*, pp. 307-308.

<sup>12</sup> Quoted by G. P. Verbit, "Preferences and the public law of international trade: the end of most-favoured-nation treatment?", in Hague Academy of International Law, *Colloquium 1968: International Trade Agreements* (Leyden, Sijthoff, 1969), pp. 19-56.

<sup>13</sup> R. C. Snyder, *The Most-Favored-Nation Clause: An Analysis with Particular Reference to Recent Treaty Practice and Tariffs* (New York, King's Crown Press, Columbia University, 1948), p. 239.

full-fledged most-favoured-nation clause, by which each party guaranteed to the other all advantages conceded or to be conceded to a third State in matters of commerce and navigation.<sup>14</sup> Article 8 of the treaty ran as follows:

It is further agreed and concluded, as a general Rule, That all and singular the Subjects of each Kingdom, shall, in all Countrys and Places, on both sides, have and enjoy at least the same Privileges, Libertys, and Immunitys, as to all Dutys, Impositions, or Customs whatsoever, relating to Persons, Goods and Merchandizes, Ships, Freight, Seamen, Navigation and Commerce; and shall have the like Favour in all things as the Subjects of France, or any other foreign Nation, the most favour'd, have, possess and enjoy, or at any time hereafter may have, possess or enjoy.<sup>15</sup>

18. This clause prompted the British Parliament to reject the treaty. An earlier convention concluded between England and Portugal in 1703 had some bearing on this decision: Portugal undertook then to permit the importation of English cloth, and England pledged herself to levy upon Portuguese wines no more than two-thirds of the customs duties imposed upon French wines. The treaty—styled after its English negotiator, Lord Methuen—technically supplemented older treaties of commerce between the two countries. It remained in force for more than a century, deeply influencing Anglo-Portuguese relations, and English foreign policies in general. In fact, the English rejection of the commercial convention of Utrecht was based on the allegation that its most-favoured-nation clause ran counter to the Methuen treaty. It was only in 1786 that a new commercial treaty (the Eden treaty), embodying the most-favoured-nation clause, was entered into by England and France. In the Eden treaty, preferential treatment was reserved for Portuguese imports to England and Spanish imports to France.<sup>16</sup>

### 5. Most-favoured-nation rights acquired in Asia and Turkey

19. In their relations with Asian rulers in the seventeenth and eighteenth centuries the European Powers made efforts to gain markets to the exclusion of others. Where attempts at acquiring a monopoly failed or where they were hopeless *ab initio*, the policy of the Europeans was to obtain most-favoured-nation treatment. Thus the draft treaty submitted by the East India Company to the King of Burma in 1680, proposing free trade and the establishment of factories, stated in article XVII that "if the King shall hereafter grant any more or other privileges to any other nation than what are comprehended in these Articles, the same privileges are to be granted to the English". The Articles of Agreement of 1684 between the Company and the rulers of the West coast of Sumatra stipulated the right of the Company to purchase spices and other goods "at the same prices the Dutch formerly paid". The French East India Company

<sup>14</sup> A. Nussbaum, *op. cit.*, p. 127.

<sup>15</sup> F. L. Israel, ed., *Major Peace Treaties of Modern History 1648-1967* (New York, Chelsea House Publishers, 1967), vol. I, p. 223.

<sup>16</sup> A. Nussbaum, *op. cit.*, p. 127, and B. Nolde, "La clause de la nation la plus favorisée et les tarifs préférentiels", *Recueil des cours de l'Académie de droit international de La Haye, 1932*, t. 39, p. 28.

in 1666 reached an understanding with the Mogul Emperor Aurangzeb who granted it by firman the same privileges as those enjoyed by the English and the Dutch, particularly in relation to the factories in Surat and Soually.<sup>17</sup>

20. A most-favoured-nation clause was often included in capitulations. In the earliest instances it assured the beneficiary of the same advantages as previously granted to certain other nations or towns expressly mentioned. Thus in the Turkish capitulation of 1612 the United Provinces were accorded the same rights as enjoyed by France and England.<sup>18</sup> In the eighteenth century the capitulations contain the clause usually drafted in a very broad form. Thus article 83 of the 1740 French capitulation states: "The privileges and honours granted to the other European nations shall also be granted to the subjects of the Emperor of France."<sup>19</sup>

21. What is today very exceptional and under normal conditions practically non-existent, namely, a unilateral most-favoured-nation clause, was a constant feature of the capitulations. As these in most cases—at least in the earlier periods—took the form of a unilateral grant, the clause included in them was also devoid of reciprocity. This form of the clause was a useful tool in the hands of the European rulers. When one of them succeeded in extorting new concessions for himself and his subjects, the others through the operation of the clause could claim the same advantages for themselves.

22. Thus after the Ottoman Empire was defeated by Russia and its defeat sealed by the Peace of Kuchuk Kainarji in 1774, the peace treaty was followed by a commercial agreement concluded in 1783. This granted Russian subjects the most extensive privileges; but as other nations had protected, or would protect, themselves by most-favoured-nation clauses, their nationals participated in the new concessions. The treaty of 1783 became thereby an important legal document for the foreign commercial relations of the Ottoman Empire.<sup>20</sup>

23. It was not until the French-Turkish Peace Treaty of 1802 that a Western Power concluded a treaty with the Turkish Emperor which contained a reciprocity clause.<sup>21</sup>

24. On the question whether a unilateral most-favoured-nation clause is consistent with the principle of the sovereign equality of States, the case of the Belgian-Chinese commercial treaty of 1865 presents instructive information.<sup>22</sup>

#### 6. The conditional form and the conditional interpretation

25. It was in the eighteenth century that the "conditional" form made its first appearance in the treaty

concluded between France and the United States of America on 6 February 1778. Article II of this treaty was as follows:

The Most Christian King and the United States engage mutually not to grant any particular favour to other nations, in respect of commerce and navigation, which shall not immediately become common to the other Party, who shall enjoy the same favour, freely, if the concession was freely made, or on allowing the same compensation, if the concession was conditional.<sup>23</sup>

It is held that the conditional clause was inserted in the treaty of 1778 at French insistence. Even if it were true that the idea was of French origin, the conditional form of the clause peculiarly suited the political and economic interests of the United States for a long period.<sup>24</sup>

26. The phrase "freely, if the concession was freely made, or on allowing the same compensation [or the equivalent], if the concession was conditional" was the model for practically all commercial treaties of the United States until 1923. Prior to that year, the commercial treaties of the United States contained (with only three exceptions) conditional rather than unconditional pledges on the part of that country.<sup>25</sup>

27. In two of the cases in which the United States negotiated apparently unconditional treaties in this period, i.e. where the treaties did not specifically include the conditional wording of the clause, they were afterwards interpreted as conditional.<sup>26</sup> One such instance was the so-called Louisiana Purchase, the treaty of 30 April 1803 by which France ceded Louisiana to the United States. Article 8 of this treaty provided that "the ships of France shall be treated upon the footing of the most favored nations" in the ports of the ceded territory. By virtue of this provision, the French Government asked in 1817 that the advantages granted to Great Britain in all the ports of the United States should be secured to France in the ports of Louisiana. The advantages accorded to Great Britain were based upon an Act of Congress of 3 March 1815. This Act exempted the vessels of foreign countries from discriminating duties in ports of the United States on condition of a like exemption of American vessels in the ports of such countries. This exemption was granted by Great Britain but not by France, with the result that French vessels continued to pay discriminating duties in the ports of the United States, while British vessels became exempt. The French claim was rejected upon the ground that the clause did not mean that France should enjoy as a free gift

<sup>17</sup> Ch. H. Alexandrowicz, "Treaty and Diplomatic Relations between European and South Asian Powers in the Seventeenth and Eighteenth Centuries", *Recueil des cours de l'Académie de droit international de La Haye*, 1960 (II), t. 100, pp. 207, 270-271.

<sup>18</sup> S. Basdevant, *op. cit.*, p. 468.

<sup>19</sup> *Ibid.* (translation by the United Nations Secretariat).

<sup>20</sup> A. Nussbaum, *op. cit.*, p. 122.

<sup>21</sup> S. Basdevant, *op. cit.*, p. 475.

<sup>22</sup> See paras. 63-64 below.

<sup>23</sup> W. M. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776-1909* (Washington, Government Printing Office), vol. I, p. 468.

<sup>24</sup> V. G. Setser, "Did Americans Originate the Conditional Most-Favored-Nation Clause?", *The Journal of Modern History* (Chicago, University of Chicago Press), vol. V (September 1933), pp. 319-323.

<sup>25</sup> C. C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (Boston, Little, Brown and Co., 1947), 2nd rev. ed., vol. II, p. 1504.

<sup>26</sup> R. C. Snyder, *op. cit.*, p. 244. The third case—where the United States agreed that the clause was truly unconditional—concerned a convention of 1850 with Switzerland. See G. H. Hackworth, *Digest of International Law* (Washington, Government Printing Office, 1943), vol. V, pp. 274-275, 330-331. See also para. 84 below.

that which was conceded to other nations for a full equivalent.

'It is obvious', said Mr. Adams, 'that if French vessels should be admitted into the ports of Louisiana upon the payment of the same duties as the vessels of the United States, they would be treated, not upon the footing of the most-favoured-nation, according to the article in question, but upon a footing more favoured than any other nation; since other nations, with the exception of England, pay higher tonnage duties, and the exemption of English vessels is not a free gift, but a purchase at a fair and equal price.'

France, however, did not concede the correctness of this position and maintained her claim in diplomatic correspondence until 1831, when it was settled by a treaty which practically accepted the American interpretation.<sup>27</sup>

### 7. The era of "free trade"

28. The conditional form of the clause was dominant also in Europe after the Napoleonic period. It has been asserted that perhaps ninety per cent of the clauses written into treaties during the years 1830 to 1860 were conditional in form.<sup>28</sup> The conditional form was virtually abandoned with the conclusion of the treaty of commerce between Great Britain and France of 23 January 1860, often called the Cobden treaty or Chevalier-Cobden treaty after the main English negotiator, Richard Cobden, a passionate advocate of free trade and *laissez-faire*, and his counterpart, Michel Chevalier, the economic adviser to Napoleon III.<sup>29</sup> In this treaty England and France reduced their tariffs very substantially, abolished import prohibitions and granted each other unconditionally the status of a most favoured nation.

29. The Chevalier-Cobden treaty was a signal for the negotiation of many commercial agreements embodying the unconditional clause with a wider scope of application than at any time in its history. A wave of liberal economic sentiment carried the unconditional clause to the height of its effectiveness. From 1860 until the First World War this form of the clause enjoyed its greatest ascendancy and remained the almost universal basis of a vast system of commercial treaties.<sup>30</sup> Within this period, however, during the depression following the Franco-Prussian war, when the transitional growth of protectionism and trade discrimination became prevalent, there was a certain drop in the inclusion of most-favoured-nation clauses in treaties. It is from the pre-war years of the present century that the famous designation of the clause as being "the corner-stone of all modern commercial treaties" originates.<sup>31</sup>

<sup>27</sup> J. B. Moore, *A Digest of International Law* (Washington, Government Printing Office, 1906), vol. 5, pp. 257-260. See also G. W. Wickersham, Rapporteur, Committee of Experts for the Progressive Codification of International Law, Publications of the League of Nations, 1927.V.10 (C.205.M.79.1927.V), p. 7.

<sup>28</sup> L.-E. Visser, "La clause de la nation la plus favorisée dans les traités de commerce", *Revue de droit international et de législation comparée*, Bruxelles, II<sup>e</sup> série, t. IV (1902), pp. 66, 159 and 270. Quoted by R. C. Snyder, *op. cit.*, p. 41.

<sup>29</sup> *British and Foreign State Papers*, vol. 50, p. 13.

<sup>30</sup> R. C. Snyder, *op. cit.*, p. 239.

<sup>31</sup> S. K. Hornbeck, "The Most-Favored-Nation Clause", *American Journal of International Law*, vol. 3, No. 2 (1909), p. 395.

### 8. The war and its effects

30. The outbreak of the First World War not only severed treaty relations between the adversaries but also affected the idea of the most-favoured-nation treatment itself and caused—although temporarily—a retreat in the use of the clause. Throughout the war it was felt that there was something "unnatural" in the effect of the clause, in so far as it required that a State treat close allies and more distant nations in the same manner. In the case of enemies, of course, the operation of the clause can be terminated, but outside this extreme, relations with other States can vary widely from very warm to the frigidity of a near-freezing point.<sup>32</sup>

31. So far as enemies were concerned, the Allied Economic Conference of 1916 agreed that, following the war, those who were the allies' adversaries in that war should be subjected to "systematic discrimination in economic matters...". M. Clementel, the French Minister of Commerce, stated on 15 December 1918: "The Government has denounced all commercial conventions which embody the most-favoured-nation clause. That clause will not reappear. [...] It will never again poison our tariff policy."<sup>33</sup>

32. Other States, however, held the opposite view and believed that economic discrimination had been one of the causes of the war.<sup>34</sup> According to Viner: "... Tariff discriminations are invariably resented by the countries which are discriminated against, and three centuries of experience demonstrate that under all circumstances they operate to poison international relations and to make more difficult the task of maintaining international harmony."<sup>35</sup> This was seemingly the view of President Wilson, who, in the third of his Fourteen Points, spoke out in favour of the removal of trade barriers and the establishment of equality in trade conditions.<sup>36</sup>

33. Such conflicting ideas resulted in compromise solutions such as the pertinent provisions of the Covenant of the League of Nations (Art. 23, para. e)<sup>37</sup> and of the peace treaties of 1919. In these treaties the victorious allies compelled the defeated States to grant them unilaterally the unconditional most-favoured-nation treatment for five years in the case of Germany, and for three years in the case of Austria, Bulgaria and Hungary.<sup>38</sup> A similar position was secured for the allied and associated States in the minorities treaties concluded with Poland, the Serb-Croat-Slovene Kingdom, Czechoslovakia, Romania and Greece in the sense that these States were bound to extend to the allies all favours in customs matters which they might grant within five years to any ex-enemy State.<sup>39</sup>

<sup>32</sup> G. P. Verbit, *op. cit.*, p. 26.

<sup>33</sup> J. Viner, *International Economics* (Glencoe, Ill., Free Press, 1951), p. 95.

<sup>34</sup> G. P. Verbit, *op. cit.*

<sup>35</sup> J. Viner, *op. cit.*, p. 355.

<sup>36</sup> See para. 65 below.

<sup>37</sup> See paras. 65-66 below.

<sup>38</sup> Treaty of Versailles, art. 267; Treaty of Saint-Germain, art. 220; Treaty of Neuilly, art. 150; Treaty of Trianon, art. 203.

<sup>39</sup> League of Nations, *Commercial Policy in the Interwar Period: International Proposals and National Policies*, 1942.II.A.6, p. 15.

### 9. The post-war period

34. In the years after the First World War, the most-favoured-nation clause never regained its former firm position as the general foundation of commercial treaty policy.<sup>40</sup> The destruction of the economy of Europe by four years of war, and the following depression of 1921-1924, with its collapse of currencies and contracting world trade, necessitated the adoption of trade restrictions as a result of which the clause either ceased to operate or could not operate successfully. The widespread reciprocity in trade policies, preoccupation with economic reconstruction and a pronounced opposition to the clause, particularly on the part of France<sup>41</sup> and Spain, prevented or at least slowed down the reappearance of the clause in the immediate post-war period. After a few years of peace, however, with partial recovery and stabilization achieved, the clause again became a common feature of commercial treaties.

35. Italy became the advocate of the unconditional clause as early as 1921, joining forces with the United Kingdom and other traditional upholders of the clause, together with Germany and her ex-allies, to break down the opposition of France and Spain.<sup>42</sup> Soviet Russia appeared on the scene of international trade and beginning with the 1922 Rapallo Treaty concluded a long series of agreements on a most-favoured-nation basis.<sup>43</sup> The United States of America adopted the unconditional clause in 1922. The conditional clause served the purposes of the United States so long as it was a net importer and its primary aim was to protect a growing industrial system. Since the position of the United States in the world economy changed radically after the war, the conditional clause proved to be inadequate. The essential condition for a successful penetration of international markets, i.e., the elimination of discrimination against American products, could only be achieved through the unconditional clause.<sup>44</sup>

36. In consequence of the American move, the conditional form of the clause practically disappeared from the commercial treaties. According to one analyst, of the six hundred and seven most-favoured-nation clauses negotiated between 1920 and 1940, only nine were the conditional type.<sup>45</sup>

37. The year 1927 was of particular importance in the history of the clause. The League of Nations International Economic Conference of that year gave a great impetus to both the use and the study of the clause.<sup>46</sup> France broke with the idea of reciprocity and returned to her pre-war practice by concluding a most-favoured-nation agreement with Germany. Spain adopted the clause by a law passed in 1928. It seemed as if a new period of the general acceptance of the clause had started again. Economists and lawyers dealt with the

problems presented by the application of the clause, and study and research work was undertaken by various bodies of the League.<sup>47</sup>

### 10. The economic crisis

38. In 1929 the great economic crisis broke. It started in the United States of America and swept over the whole world with the notable exception of the Soviet Union, whose national economy, based on socialist ownership of the means of production and on monopoly of foreign trade, was not sensitive to the shocks and troubles of the world market. As a result of the depression international trade declined, differential tariffs arose and destroyed the conditions which premised an efficient operation of most-favoured-nation treatment.<sup>48</sup>

39. By the end of 1931, twenty-six major trading nations had imports and exchange controls, all of which operated in a discriminatory manner.<sup>49</sup> In February 1932, the United Kingdom abandoned its long-standing policy of free trade and enacted a tariff. In the following summer the Imperial Preference System was established. The League of Nations International Convention for the Abolition of Import and Export Prohibitions and Restrictions, done at Geneva, 8 November 1927, which had been brought into operation under a special arrangement in January 1930, between Denmark, Japan, the Netherlands, Norway, Portugal, the United Kingdom and the United States, was denounced by all of these States by the middle of 1934. The foremost proponent and practitioner of discriminatory trade restrictions was Nazi Germany, which regarded the principle of the most-favoured-nation treatment as a particularly vicious offshoot of a discredited *liberalism*.<sup>50</sup> It utilized all kinds of trade controls to make the German economy self-sufficient and provide it with the implements for war.<sup>51</sup> According to the research carried out by Snyder, based upon an analysis of some five hundred and ten bilateral commercial treaties concluded between 1931 and 1939, the most-favoured-nation clause was included in only forty-two per cent of the agreements, whereas according to the same source it appeared in some form in approximately ninety per cent of the commercial agreements negotiated before 1931.<sup>52</sup>

40. Not only did the world economic crisis fail to diminish the interest of lawyers and economists in the most-favoured-nation clause; on the contrary, individual and collective research went on as if it could lead to the solution of the burning problems of the world. The Economic Committee of the League of Nations carried on its work, international conferences (in Stresa and London) dealt with the clause in one form or another, and an abundant literature on the clause flourished in the first half of the 1930s.

<sup>40</sup> R. C. Snyder, *op. cit.*, p. 239.

<sup>41</sup> See para. 31 above.

<sup>42</sup> League of Nations, *op. cit.*, p. 43.

<sup>43</sup> These are dealt with in some detail in paras. 41-52 below.

<sup>44</sup> R. C. Snyder, *op. cit.*, p. 243.

<sup>45</sup> *Ibid.*, p. 41.

<sup>46</sup> See paras. 70-72 below.

<sup>47</sup> See paras. 65-103 below.

<sup>48</sup> R. C. Snyder, *op. cit.*, p. 242.

<sup>49</sup> G. P. Verbit, *op. cit.*, p. 27.

<sup>50</sup> Royal Institute of International Affairs, *Survey of International Affairs, 1938* (London, Oxford University Press, 1941), vol. I, p. 33.

<sup>51</sup> G. P. Verbit, *op. cit.*, p. 27.

<sup>52</sup> R. C. Snyder, *op. cit.*, p. 133.

11. *The clause in the treaties of the USSR*

41. The victory of the October Revolution ushered in a new era by creating the first State built on a socio-economic system different from that of the other members of the community of nations. The young Republic of the Soviets, in its struggle for recognition and economic relations based on equality and non-discrimination, was naturally disposed to avail itself of the old tool of the most-favoured-nation clause. It might be instructive to take a cursory look at the early treaty practice of Soviet Russia, all the more as the application of the most-favoured-nation clauses in commercial treaties concluded between capitalist and socialist States has been often cited as posing specific problems, those connected with the so-called east-west trade, which will have to be considered later.<sup>53</sup>

42. The first economic and commercial conventions of the Republic of the Soviets contain vague formulations of the clause, or rather provisions in order to obtain a normal and non-discriminatory treatment.<sup>54</sup> Thus in the agreement with the United Kingdom of 16 March 1921<sup>55</sup> the Parties pledged "not to exercise any discrimination" against the trade between them "as compared with that carried on with any other foreign country" (art. 1) and undertook that "British and Russian ships, their masters, crews and cargoes shall, [in their ports] receive in all respects, the treatment, privileges, facilities, immunities and protections which are usually accorded by the established practice of commercial nations to foreign merchant ships, their masters, crews and cargoes..." (art. 2).

43. The Treaty of Rapallo concluded with Germany on 16 April 1922,<sup>56</sup> contained, however, a clear stipulation according to which the two Governments agreed "that the establishment of the legal status of those nationals of the one Party, who live within the territory of the other

<sup>53</sup> The main but not exclusive source for this section is the article by E. A. Korovin, "Soviet Treaties and International Law", *American Journal of International Law* [vol. 22, No. 4 (October 1928)], pp. 754-763], and his earlier article on most-favoured-nation clauses in the treaties of the Russian Socialist Federal Soviet Republic in *Sovetskoe pravo* [Soviet Law] 1922, No. 3, pp. 30-41. For an American view of these treaties see J. F. Triska and R. M. Slusser, *The Theory, Law and Policy of Soviet Treaties* (Stanford, Calif., Stanford University Press, 1962), pp. 333-347.

<sup>54</sup> A most-favoured-nation clause had already been included in the short-lived separate peace treaty of Brest-Litovsk of 3 March 1918 (G. F. de Martens, ed., *Nouveau Recueil général de traités et autres actes relatifs aux rapports de droit international*, Continuation du grand recueil de G. F. de Martens, par H. Triepel (Leipzig, Librairie Theodor Weicher, 1921), III<sup>e</sup> série, t. X, p. 773). This clause related to matters of commerce, navigation and rights of citizens.

The treaties of peace with Estonia of 2 February 1920 (League of Nations, *Treaty Series*, vol. 11, p. 51, annex I to article 16), with Lithuania of 12 July 1920 (*ibid.*, vol. 3, p. 122, art. 13 and remark), with Latvia of 11 August 1920 (*ibid.*, vol. 2, p. 212), contained more or less general announcements on most-favoured-nation treatment in commercial relations, whereas the clauses contained in the treaties of peace with Finland and Poland (Finnish treaty of 14 October 1920, *ibid.*, vol. 3, p. 65, art. 32; Polish peace treaty of 18 March 1921, *ibid.*, vol. 6, p. 123, art. 20) pertain only to secondary matters, (E. Sauvignon, "La clause de la nation la plus favorisée" (thesis, Université de Nice, 1968).

<sup>55</sup> League of Nations, *Treaty Series*, vol. 4, p. 127.

<sup>56</sup> *Ibid.*, vol. 19, p. 247.

Party, and the general regulation of mutual commercial and economic relations, shall be effected on the principle of the most favoured nation" (art. 4). The general rule thus established is followed by only one exception: "This principle shall, however, not apply to the privileges and facilities which the Russian Socialist Federal Soviet Republic may grant to a Soviet Republic or to any State which in the past formed part of the former Russian Empire." Article 6 of the treaty provides that "[Article] 4 of this Agreement shall come into force on the day of ratification, and the remaining provisions shall come into force immediately". Korovin remarks in this connexion<sup>57</sup> that the fact that the clause becomes operative only from the day of ratification is "sufficient evidence that this principle [i.e., the principle of the most-favoured-nation treatment] had, prior thereto, been absent".

44. The Danish-Russian preliminary agreement of 23 April 1923<sup>58</sup> which—as pointed out by Korovin—was coincident with the development in Russia of the New Economic Policy (NEP), contains a number of articles promising reciprocal most-favoured-nation treatment in various fields. The clause on trade in general (art. 2) and some others also contain a specific exception:

Art. 2... Trade between the two countries shall not be subjected to other restrictions or other or higher duties than those imposed on the trade with any other country. Denmark shall, however, not be entitled to claim the special rights and privileges accorded by Russia to a country which has recognized or may recognize Russia *de jure* unless Denmark is willing to accord to Russia the corresponding compensations as the country in question...

45. In Korovin's evaluation of the position up to 1924, the USSR "avoided inserting in its treaties any clause of absolute favouredness"—or rather did so only in some individual cases—"wishing to safeguard the largest economic freedom of action in respect of this reservoir of possible concessions, against the day of intense participation by the Soviet State in the economy of world trade".<sup>59</sup>

46. With the development of the New Economic Policy the clause became extensively used and in some treaties covered broad fields. Thus according to the treaty concluded with Italy on 7 February 1924 it applied to the professional activities of the respective citizens, to their legal status, to fiscal regulations, to taxes imposed upon imports etc.<sup>60</sup> In the Convention embodying the basic rules of the relations between Japan and the USSR of 20 January 1925<sup>61</sup> the parties undertook in Article 4 not to apply

in discrimination against the other Party any measures of prohibition, restriction or impost which may serve to hamper the growth of the intercourse, economic or otherwise, between the two countries, it being the intention of both Parties to place the commerce, navigation and industry of each country, as far as possible, on the footing of the most favoured nation.

<sup>57</sup> E. A. Korovin, *op. cit.*, p. 755.

<sup>58</sup> League of Nations, *Treaty Series*, vol. 18, p. 15.

<sup>59</sup> E. A. Korovin, *op. cit.*, p. 757.

<sup>60</sup> *Ibid.*

<sup>61</sup> League of Nations, *Treaty Series*, vol. 34, p. 31.

47. The treaty with Germany of 12 October 1925,<sup>62</sup> based on the Treaty of Rapallo, confirms the general most-favoured-nation principle adopted at Rapallo. It added to the one exception to the clause stated there, the following: (1) frontier traffic (fifteen kilometres); (2) Customs Union; (3) favours granted by the USSR to Persia, Afghanistan and Mongolia; (4) favours granted by the USSR to Turkey and China, in respect to frontier traffic (article 6). The seven agreements included in the treaty covering special fields (Conditions of Residence and Business and Legal Protection, Economic matters, Railways, Navigation, Fiscal questions, Commercial courts of arbitration, and Industrial property) contain detailed regulations also in respect of the level of treatment. Thus in respect of conditions of professional and industrial activities, national treatment and most-favoured-nation treatment—side by side—are the general rule. National treatment is the rule as regards legal aid to the poor. In the economic agreement the parties express their desire to restore trade between their countries to the pre-war level “being guided therein solely by economic considerations” (article 1). Most-favoured-nation treatment is assured in respect of German requests for and holding of concessions granted by the USSR (articles 40 and 41). Reciprocal most-favoured-nation treatment is accorded to goods in transit and to the accompanying persons (article 42). National treatment is the general rule concerning matters of navigation with a combination of a most-favoured-nation pledge (Agreement concerning navigation, article 1). Exceptions are, however:

- (1) Special laws concerning the maintenance, renewal and development of the national fleet;
- (2) Favours granted to the national fisheries;
- (3) Favours granted to athletic associations;
- (4) Navigation between the ports of the other Party situated on the same sea (minor coasting trade, minor cabotage);
- (5) Harbour services (towage, rescue work and salvage) [but duties and charges shall be generally the same for all merchant vessels];
- (6) Pilotage services.

National treatment applies to industrial property in general (Agreement concerning the legal protection of industrial property, article 1).

48. The treaty with Germany was followed by other treaties based on a most-favoured-nation clause concluded with a large number of countries (Norway, Turkey, Persia, Sweden, Iceland and Latvia are mentioned by Korovin).

49. Of particular interest is the temporary commercial agreement concluded with the United Kingdom on 16 April 1930.<sup>63</sup> This contained in article 1 a full-fledged most-favoured-nation clause in respect of rights to trade and to property of natural and legal persons, as well as in respect of “the natural produce and manufactures”

of the Contracting Parties. A protocol annexed to the treaty is worded as follows:

In concluding the present Agreement the Contracting Parties are animated by the intention to eliminate from their economic relations all forms of discrimination. They accordingly agree that, so far as relates to the treatment accorded by each Party to the trade with the other, they will be guided in regard to the purchase and sale of goods, in regard to the employment of shipping and in regard to all similar matters by commercial and financial considerations only and, subject to such considerations, will adopt no legislative or administrative action of such a nature as to place the goods, shipping, trading organizations and trade in general of the other Party in any respect in a position of inferiority as compared with the goods, shipping and trading organizations of any other foreign country.

In accordance with the above principle, trade between the United Kingdom and the Union of Soviet Socialist Republics shall be eligible for consideration on the same basis as trade between the United Kingdom and other foreign countries in connexion with any legislative or administrative measures which are or may be taken by His Majesty's Government in the United Kingdom for the granting of credits to facilitate such trade. That is to say, that in considering any given transaction, regard shall be had to financial and commercial considerations only.

The text of this Protocol apparently served as a basis for the drafting of article XVII, paragraph 1 of the General Agreement on Tariffs and Trade dealing with State trading enterprises.<sup>64</sup>

50. The provisional commercial agreement concluded by the USSR with France on 11 January 1934<sup>65</sup> contains a reciprocal most-favoured-nation clause in respect of the treatment of “French merchants and manufacturers, being natural or legal persons under French law” in the USSR and “Economic organs of State of the Union of Soviet Socialist Republics and Soviet legal persons possessed of civil personality under Soviet law, as also natural persons, being nationals of the Union of Soviet Socialist Republics” in France in the exercise of their economic activities under the conditions authorized by the State of the territory (chap. III, art. 9). Another clause declares that merchant vessels flying the flag of the Contracting Parties, shall be admitted in each other's seaports “under the same conditions in all respects as merchant vessels of the most favoured nation” (chap. III, art. 10). The agreement contains, however, a firm and unilateral pledge of the USSR “to place orders in France for French goods to the value of 250 million francs” within twelve months from the signature of the agreement (chap. II). This is, however, followed by a proviso according to which “It is understood that the prices quoted shall be approximately such as would be obtainable... in the international market for the same quality of goods, and that conditions in respect of interest rates and negotiability by the banks of the bills hereinafter mentioned shall be normal.”<sup>66</sup>

51. Unilateral declarations of the USSR on its intention to make purchases of goods to the amount of \$US30 million and \$US40 million respectively were made in the

<sup>64</sup> E. Sauvignon, *op. cit.*, p. 235.

<sup>65</sup> League of Nations, *Treaty Series*, vol. 167, p. 349.

<sup>66</sup> See Sauvignon's views on this kind of obligation, *op. cit.*, p. 276.

<sup>62</sup> *Ibid.*, vol. 53, p. 85.

<sup>63</sup> *Ibid.*, vol. 101, p. 409.

trade agreements with the United States of July 1935 and August 1937, both embodied in exchanges of notes. In the exchange the United States unilaterally promised most-favoured-nation treatment. This promise is only implicit in the agreement of 1935 but the clause is clearly spelled out in that of 1937. By this clause the United States undertook to

grant to the Union of Soviet Socialist Republics unconditional and unrestricted most-favored-nation treatment in all matters concerning Customs duties and charges of every kind and in the method of levying duties and, further, in all matters concerning the rules, formalities and charges imposed in connexion with the clearing of goods through the Customs, and with respect to all laws or regulations affecting the sale or use of imported goods within the country.<sup>67</sup>

The clause—which then goes further into lengthy details—points to several exceptions. One of them refers to the advantages accorded by the United States to “its territories or possessions”, to the Philippines, to the Panama Canal Zone or to another zone, or to Cuba. Another excepts the operation of the clause from prohibitions or restrictions “(1) imposed on moral or humanitarian grounds, (2) designed to protect human, animal or plant life, (3) relating to prison-made goods, or (4) relating to the enforcement of police or revenue laws”.

52. The main feature of the agreement, however, was its quite exceptional character, inasmuch as the most-favoured-nation pledge bound only the United States without a reciprocal pledge from the USSR.

## 12. *The clause in treaties relating to consuls*

53. Various denoted bilateral treaties of the nineteenth and twentieth centuries (treaties concerning friendship, commerce and navigation establishment, consular matters, legal protection, etc.) deal, in one form or another, with questions of consular relations and consular immunities. Many such treaties contain a most-favoured-nation clause. Although these treaties show a certain diversity in their provisions, it is through their identical and similar provisions, and also through the operation of the clause, that the consular institution has attained a certain degree of uniformity of law and practice. This development made it possible to codify on a world-wide basis important aspects of the law pertaining to consuls in the 1963 Vienna Convention.

54. Mr. Zourek, as Special Rapporteur of the topic of Consular intercourse and immunities, examined in his second report of 30 March 1960,<sup>68</sup> the question whether it was possible and desirable to insert a most-favoured-nation clause in the codification of consular law. In order to answer the question, he considered briefly the essential principles governing the operation of the clause in general and examined in particular its functioning in bilateral treaties pertaining to consular matters.

<sup>67</sup> League of Nations, *Treaty Series*, vol. 162, p. 91 and vol. 182, p. 113.

<sup>68</sup> *Yearbook of the International Law Commission, 1960*, vol. II, document A/CN.4/131, part II, p. 19.

55. With regard to subject-matter, Mr. Zourek's report reveals that the most-favoured-nation clauses refer most often to consular privileges and immunities. Many treaties, and among them the older ones, extend the clause also to the functions of the consuls, though they use different expressions for describing them (powers, functions, duties, competence, rights, attributions etc.). Treaties restricting the operation of the clause to privileges and immunities are also numerous; they denote these variously as prerogatives, exemptions, facilities, etc. Some clauses cover the “treatment accorded to consuls” in general, others refer to special immunities such as non-liability for taxation. A number of treaties contain clauses the scope of which is restricted to the establishment and location of consulates. By these clauses the Contracting Parties grant each other the reciprocal right to establish consulates in ports and towns where the right to appoint consular representatives has been granted to any third State.

56. The report draws attention to the fact that the most-favoured-nation clause in the field of consular relations often appears in conjunction with a reciprocity clause, i.e. the treatment of the most-favoured-nation is accorded “subject to reciprocity”. This may denote—according to Mr. Zourek—an abstract or formal reciprocity, or else a material reciprocity. The difference between these two notions is explained as follows:

Under a formal reciprocity, identity of treatment in a particular sphere is guaranteed but not necessarily identity of advantages in a specific case, as for example where one of the two States grants to a third State national treatment in some particular aspect. Material reciprocity, on the other hand, entitles a State to claim for itself, its representatives, nationals, ships and products, the same effective treatment as it grants in its territory to the other State, even though, in the case in question, the grantor State does not discriminate between the nationals of the beneficiary State and the nationals of other foreign States.<sup>69</sup>

57. It has been pointed out that the practice of referring to reciprocity in most-favoured-nation clauses has become widespread. In addition, the reference to reciprocity is sometimes more explicit as, for example, in the following clause in article 14 of the Italo-Turkish Consular Convention of 9 September 1929.<sup>70</sup>

The Consular officials of each of the High Contracting Parties shall further enjoy, subject to reciprocity, in the territory of the other Party, the same privileges and immunities as the Consular officials of any third Party of the same character and rank, so long as the latter enjoy such privileges.

The High Contracting Parties agree that neither of them shall be entitled to appeal to the advantages under a Convention with a third Party in order to claim for its Consular officials privileges or immunities other or more extended than those granted by the Party itself to the Consular officials of the other Party.

58. It is submitted in this connexion that a reference to reciprocity in a most-favoured-nation clause changes the formal reciprocity of an unconditional clause into a material one, i.e., subjects the operation of the clause to a condition—namely, that of a materially reciprocal

<sup>69</sup> *Ibid.*, pp. 20-21, para. 13.

<sup>70</sup> League of Nations, *Treaty Series*, vol. 129, p. 195.

treatment in specified cases. Thus we are confronted with a simplified form of a conditional clause. This is certainly not exactly the same as the classical form of a conditional clause ("freely, if the concession was freely made..." etc.),<sup>71</sup> but it still hampers the automatic application of the clause, which is the main feature of its unconditional form. When the clause pertains to consular immunities, a reciprocity clause operates smoothly in most cases because the material identity of, or difference in, the reciprocal advantages can easily be established. The position may become more complicated if the clause refers to consular functions, for the dissimilarity of the national laws, in the sphere of which the consul works, can make a comparison between the respective positions of the consuls concerned extremely difficult.

59. Although the classical form of the conditional clause appeared in very few treaties relating to consuls, the conditional interpretation of the most-favoured-nation clause still prevails in the practice of the United States, inasmuch as most-favoured-nation treatment is subject to materially reciprocal treatment being accorded by the country invoking the provision.<sup>72</sup>

### 13. *The practice of the Permanent Court of International Justice*

60. The Permanent Court of International Justice dealt only incidentally with the clause in its advisory opinion of 7 February 1923 on the *Nationality Decrees issued in Tunis and Morocco (French zone)*.<sup>73</sup> In the dispute between Great Britain and France, in regard to which the Council of the League of Nations requested the advisory opinion of the Court, Great Britain relied *inter alia* upon a most-favoured-nation clause contained in an arrangement of 1897 and an exchange of notes supplementing it. By these instruments the French Government undertook not to accord to the subjects, protected persons or merchandise of a third Power any treatment in Tunis which should not be effectively applicable to the subjects, protected persons and merchandise of the United Kingdom. By a consular convention concluded between France and Italy in 1896 it was provided that Italians in Tunis should be exempt from obligatory military service as well in the army as in the navy, the national guard or the militia.

61. It was the British contention that, by reason of the terms introduced into the Anglo-French arrangement of 1897 and the exchange of notes in 1919, the French Government was bound to accord to British subjects in Tunis treatment not less favourable than that accorded to Italian subjects in Tunis by the consular convention of 1896. The French Government, however, denied that the most-favoured-nation clause relied upon by Great Britain was applicable in this case, first, because of the exclusively economic bearing of the clause and, second,

because of the synallagmatic character of the Franco-Italian convention which had been concluded in the interest of the two Contracting Parties, and not to place one of them in an advantageous position.<sup>74</sup>

62. The Court was not in a position to decide the question because it was only requested to give an advisory opinion whether the dispute between France and Great Britain as to certain nationality decrees issued in Tunis and Morocco (French zone) on 8 November 1921, and their application to British subjects, "is or is not by international law solely a matter of domestic jurisdiction". The Court found that the issue did not concern a matter solely within the domestic jurisdiction of France. The matter was settled later by agreement.<sup>75</sup>

63. The question whether a treaty containing unilateral most-favoured-nation clauses could be considered consistent with the principle of sovereign equality of States played a certain role in the conflict between China and Belgium in the 1920s. The Government of China notified the Government of Belgium on 16 April 1926 that it considered the Sino-Belgian Treaty of Amity, Commerce and Navigation of 2 November 1865, would terminate on 27 October 1926. The treaty in question contained a most-favoured-nation pledge by China in respect of privileges and immunities of Belgian consuls (art. 7), and of customs duties to be paid by Belgian merchants on imported and exported goods (art. 30), and a clause in which China generally accorded "to Belgium and the Belgians full and equal participation in all privileges, immunities and advantages which have been accorded or will henceforth be conceded by His Majesty the Emperor of China to the Government or the subjects of any other nation..." (art. 45). The Government of Belgium did not recognize the right of China to terminate the treaty. In the course of the ensuing negotiations a possible *modus vivendi* was envisaged, but ultimately no agreement was reached.<sup>76</sup> The Belgian Government brought the case before the Permanent Court of International Justice, but the Chinese Government refused to participate in the proceedings. The Chinese Ministry of Foreign Affairs published a statement of the Chinese Government which ran partly as follows:

... The "unequal treaties" which were exacted from China nearly a century ago have established between Chinese and foreigners discriminations that are now sources of endless discontent and friction with foreign Powers. Such a state of affairs is not as it should be, since intercourse between nations, as between individuals, finds its rational *motif* in the exchange of mutual benefits which will endure and lead to lasting friendship. In an age which has witnessed the coming into existence of the League of Nations and the birth of the "spirit of Locarno", there does not seem to be any valid reason to justify international relations which are not founded on equality and mutuality. Reciprocity engenders mutual confidence which, in turn, promotes goodwill and understanding.

To attain this desire, the Chinese Government have repeatedly sought through diplomatic channels and international conferences to put an end to the unequal clauses contained in China's treaties with the Powers which seriously restrict the free exercise of her legitimate rights in such important matters as customs tariff,

<sup>71</sup> See paras. 25-27 above.

<sup>72</sup> C. C. Hyde, *op. cit.*, p. 1513, and Kearney in the 976th meeting of the International Law Commission (*Yearbook of the International Law Commission*, 1968, vol. I, p. 186, para. 8).

<sup>73</sup> *P.C.I.J.*, Series B, No. 4.

<sup>74</sup> *Ibid.*, pp. 15, 30-31.

<sup>75</sup> League of Nations, *Treaty Series*, vol. 18, p. 305.

<sup>76</sup> *P.C.I.J.*, Series C, No. 16-I, pp. 14-16 and 25-36.

jurisdiction over foreign nationals, etc. These provisions create unilateral rights and derogate from China's sovereignty; they impede the development of her international relations and hamper her political and economic life. Consequently, the Chinese Government have, on the one hand, raised the question of revision of China's unequal treaties at Versailles and Washington as well as at the Special Conference on the Chinese Customs Tariff in Peking and, on the other hand, have consistently refrained from concluding new treaties unless they were based on equality, reciprocity and mutual respect for territorial sovereignty. Treaties on this new basis have been steadily growing in number: they now include those with Austria, Bolivia, Chile, Finland, Germany, Persia and the Union of Soviet Socialist Republics.

... The Chinese Government, therefore, communicated to the Belgian Government on April 16th, 1926, their desire to terminate the Sino-Belgian Treaty on 27 October 1926, in its present form, and proposed to commence negotiations at the earliest possible date for the conclusion of a new treaty [...]

After lengthy negotiations, however, the two Governments agreed to terminate the Treaty of 1865 and adopt in its stead a provisional *modus vivendi* according reciprocally the most-favoured-nation treatment to the diplomatic and consular agents, citizens, juridical persons, products and vessels of each country in the territory of the other and agreeing to conclude a new treaty on the basis of equality and mutual respect for territorial sovereignty [...]

(The statement then describes the unsuccessful negotiations between the two Governments and declares that the Chinese Government had no alternative but to terminate the Treaty of 1865 unilaterally.)<sup>77</sup>

64. The views of the Belgian Government on this point were set forth by the agents of the Government as follows:

...

(2) The principle of the legal equality of States.

The Chinese Government seems to attach great importance to the principle of the legal equality of States. The Belgian Government fully appreciates the value of this rule of law in the relations between States when international conventions are silent, but it cannot admit that the validity of special arrangements which have been freely agreed to by States in connexion with particular situations can be called into question in the name of that principle.<sup>78</sup>

The Belgian Government ultimately withdrew its request and hence the matter was not decided by the Court.<sup>79</sup>

## CHAPTER II

### Attempts at codification under the aegis and in the era of the League of Nations

#### 1. *The Covenant of the League of Nations*

65. In the time of the League of Nations the problem of the most-favoured-nation clause was for a long period of prime interest to economists and it served also as

<sup>77</sup> *P.C.I.J.*, Series C, No. 16-I, pp. 271-276.

<sup>78</sup> *Ibid.*, p. 22 (translation by the United Nations Secretariat).

<sup>79</sup> *Ibid.*, Series A, No. 18/19, p. 5; K. Marek, H. P. Furrer and A. Martin, *Répertoire des décisions et des documents de la procédure écrite et orale de la Cour permanente de Justice internationale et de la Cour internationale de Justice* (Geneva, Publications de l'Institut universitaire de Hautes Etudes internationales), No. 47, series I, vol. 2, 1967, pp. 155-158.

a topic of important legal studies. Article 23, paragraph *e*, of the Covenant of the League of Nations has its origin in the third of the fourteen points of the American President, Woodrow Wilson. In this he proposed the "removal so far as possible of all economic barriers and the establishment of an equality of trade conditions among all nations consenting to the peace and associating themselves for its maintenance". In his third draft of the Covenant submitted to the Paris Peace Conference he formulated this idea as follows:

It is further covenanted and agreed by the Contracting Powers that in their fiscal and economic regulations and policy no discrimination shall be made between one nation and another among those with which they have commercial and financial dealings.

66. Article 23, paragraph *e*, of the Covenant is but a watered-down version of this proposal. It establishes the principle of "equitable treatment of the commerce of all Members of the League" subject to and in accordance with "the provisions of international conventions existing or hereafter to be agreed by the Members of the League". This is supplemented by a reference to "the special necessities of the regions devastated during the war".<sup>80</sup> By virtue of this provision the League considered one of its main aims to be the reorganization of a world economy disrupted by the ravages of the First World War. A series of international economic conferences was believed to serve the purpose, which was of course the main concern of the Economic Committee of the League of Nations.

#### 2. *The International Economic Conference (Genoa, 1922)*

67. The memorable international economic conference held at Genoa in 1922—memorable because "the study of the Russian problem played a primordial role in it"<sup>81</sup>—adopted a report of its Economic Commission which included a recommendation on treaties of commerce running as follows:

##### *Article 9*

The Conference recalls the principle of the equitable treatment of commerce set out in article 23 of the Covenant of the League of Nations, and earnestly recommends that commercial relations should be resumed upon the basis of commercial treaties, resting on the one hand upon the system of reciprocity adapted to special circumstances, and containing on the other hand, so far as possible, the most-favoured-nation clause.

[Two notes, reading as follows, were appended to article 9:]

*Note 1.*—The majority of the countries represented on the Commission, while recognizing the temporary difficulties which may

<sup>80</sup> An important gloss was placed on the terms of Article 23 paragraph *e*, to the effect that the reference to the "commerce of Members of the League" gave no countenance, in the opinion of the Economic Committee of the League of Nations Assembly, to discrimination as between Members and non-Members as such. This position has been consistently maintained. See League of Nations Publications, 1942.II.A.6, p. 25.

<sup>81</sup> France, Ministère des affaires étrangères, *Conférence économique internationale de Gènes (9 avril-19 mai 1922)—Documents diplomatiques* (Paris, Imprimerie Nationale, 1922), p. 144.

preclude the general adoption of the most-favoured-nation treatment, declare that this is the goal at which they should aim.

*Note 2.*—The majority of the States also declare that it is desirable that the States should not bind themselves in any commercial treaties which they may make either among themselves or with other States, by any stipulation which would prevent the extension to other States of reductions of customs duties or customs facilities accorded by one to another.<sup>82</sup>

68. The formulation of article 9 and of the notes smacks of compromise. Indeed, the reasons why the recommendation was so vague and why no unanimity was reached were given in the report on the results of the technical commission as follows:

... the German delegation submitted a draft providing for the reciprocal and immediate granting, by all nations, of the most-favoured-nation clause in the matter of tariffs. Its aim, which was scarcely concealed, was to make us abandon, as the result of a wish expressed by an International Conference, the unilateral advantages we derive from articles 264 to 267 of the Treaty of Versailles. [<sup>83</sup>] These articles, which are to remain in effect for five years and may subsequently be maintained by the League of Nations by virtue of article 280 of that Treaty, are motivated by the fact that it is impossible for France to admit the products of German industry to its territory on the same conditions as the products of other countries, owing to the lead taken by that industry during the war. The Japanese, British and Italian delegations, while stating that they respected existing treaties, enthusiastically supported the principle underlying the German proposal. In particular, the statement which the French delegation made after having set aside the German proposal through an interlocutory motion, led the Swiss delegation to submit a compromise text on the principle of the most-favoured-nation clause, which was adopted.

This text [...] states [...] that these bilateral treaties should be based not on the principle of equal commercial conditions, which is usually expressed by the most-favoured-nation clause, but on the principle of the equitable treatment of commerce. Only in an appended note is it stated that the majority of the States represented on the Commission, while recognizing the current difficulties which may preclude the general application of the most-favoured-nation clause, declare that that is the goal at which they should aim. However, the very form of the note implies that this majority has given up the idea of imposing its system; immediate and general application cannot be recommended in view of the present situation in Europe.<sup>84</sup>

69. The Economic Commission of the Genoa Conference dealt also with the treatment of foreign persons and companies engaged in business. It recommended, in matters of taxation, national treatment as a general rule. If in exceptional cases public interest made a derogation from the general rule necessary, such derogations were to apply equally to all foreigners without distinction as to their nationality.<sup>85</sup>

### 3. *The International Economic Conference (Geneva, 1927)*

70. The International Economic Conference held at Geneva in May 1927 under the auspices of the League of Nations discussed in greater detail the problems of

international trade and adopted recommendations on the most-favoured-nation clause. These have given a great impetus for further studies of the clause.

71. The recommendations of the 1927 Conference read as follows:

(1) The Conference therefore considers that the mutual grant of unconditional most-favoured-nation treatment as regards customs duties and conditions of trading is an essential condition of the free and healthy development of commerce between States, and that it is highly desirable in the interest of stability and security for trade that this treatment should be guaranteed for a sufficient period by means of commercial treaties.

(2) While recognizing that each State must judge in what cases and to what extent this fundamental guarantee should be embodied in any particular treaty, the Conference strongly recommends that the scope and form of the most-favoured-nation clause should be of the widest and most liberal character and that it should not be weakened or narrowed either by express provisions or by interpretation.

(3) The Conference recommends that the Council of the League of Nations should entrust the Economic Organisation to undertake, in connection with the inquiry provided for in the preceding recommendations, all the necessary discussions, consultations and enquiries to enable it to propose the measures best calculated to secure either identical tariff systems in the various European countries or at least a common basis for commercial treaties, as well as the establishment, for all countries, of clearly defined and uniform principles as to the interpretation and scope of the most-favoured-nation clause in regard to customs duties and other charges.

(4) The Conference, however, considers that the fact that certain discussions, consultations and enquiries may be taking place as contemplated in these recommendations should not in any way be permitted to retard commercial negotiations, now pending or to dissuade States from entering upon such negotiations.<sup>86</sup>

72. On 16 June 1927 the Council of the League instructed the Economic Committee to examine the recommendations of the International Economic Conference and this instruction was subsequently confirmed by the Assembly on 24 September 1927.

#### 4. *The work of the Economic Committee of the League of Nations Assembly*

73. In pursuance of the relevant resolution of the Assembly the Economic Committee in the course of its twenty-third session drew up a programme of its work. The Committee stated in its report *inter alia* that "its main work must be to carry out the commercial policy advocated by the" International Economic Conference of 1927. According to the report, the outstanding result of this Conference was "the new orientation of commercial policy towards a liberal and equitable régime of trade". The report repeats the affirmation of a liberal commercial policy of which the Committee "feels itself to be the chosen advocate". The report continues:

The Committee accordingly decided to attempt to devise treaty-making methods by which a general reduction of tariffs could gradually be effected and their stability ensured, and which would encourage the conclusion of bilateral conventions affording the

<sup>82</sup> *Ibid.*, pp. 162 and 163.

<sup>83</sup> See para. 33 above.

<sup>84</sup> France, Ministère des affaires étrangères, *op. cit.*, p. 145.

<sup>85</sup> *Ibid.*, p. 164 (rapport de la Commission économique, art. 15).

<sup>86</sup> League of Nations, document C.356.M.129.1927.II (C.E.I.46), p. 43.

contracting States equal commercial opportunities and establishing their trade on a footing that would make it impossible to dig pitfalls for other countries.

The Committee has conducted this technical investigation in the conviction that the adoption of the solutions to which it will lead may very greatly improve the position of international trade and become a determining factor in the pacification of international commercial relations [...]. With this intention the Committee, in compliance with a particularly explicit recommendation of the Conference, has undertaken to codify most-favoured-nation treatment, which should be either the central principle or the normal outcome of every commercial negotiation. [The Committee would soon furnish particulars], which might serve as a basis for international engagements, with regard to its mechanism, its scope, and its bearing on multilateral conventions. [The Committee also envisaged the] examination of those general, special and geographical exceptions of which the introduction seems desirable on account of established international practice or the peculiar circumstances of certain States. [Finally, the Committee expressed its conviction that] well-considered action in the matter of commercial conventions based on the most-favoured-nation clause must speedily bring about the re-establishment of regular currents of trade, which will no longer have to contend with a policy of protectionism and isolation.<sup>87</sup>

74. Based on this programme, adopted in the spirit of the then-fashionable liberalism, the Committee carried out its inquiry with regard to most-favoured-nation treatment in the sphere of tariffs and trade. It drafted a model clause, and examined the problems of interpretation and application and those of the relations between bilateral agreements based on the clause and plurilateral—as they then were called—economic conventions. The Committee's doctrine in regard to all these matters formed the subject of three separate reports submitted to the Council of the League of Nations in 1928 and 1929.<sup>88</sup>

75. In 1930 the Economic Committee resumed its study of the most-favoured-nation clause. At that point it considered the compatibility of Customs quotas and anti-dumping and countervailing duties with the most-favoured-nation clause, the interpretation of the expression "like products" for the purposes of the application of the clause and, lastly, the question of the nationality of goods. The results of these latter investigations were embodied in the report to the Council of the League of Nations.<sup>89</sup> In this the Committee took care to emphasize that

... it had no intention of interpreting a particular formula of the most-favoured-nation clause, since this clause occurs in different forms, but that it had endeavoured to define the *general principles of most-favoured-nation treatment*.

76. In 1933, the Secretariat of the League of Nations thought it advisable to amalgamate in a single paper<sup>90</sup> the conclusions of the Committee's earlier and later investigations with regard to the most-favoured-nation clause.

<sup>87</sup> League of Nations, document C.666.M.224.1927.II, pp. 2-3.

<sup>88</sup> *Id.*, documents C.357.M.111.1928.II, pp. 3-5; C.20.M.14.1929.II, pp. 2 and 5-12; C.155.M.61.1929.II, pp. 1-2.

<sup>89</sup> *Id.*, document C.427.M.177.1931.II.B, pp. 2-3, 7-13.

<sup>90</sup> *Id.*, document E.805.1933.II.B.1, reproduced in the League of Nations publication *Commercial Policy in the Post-War World* (C.31.M.31.1945.II.A.7), Annex I.

77. In 1936, the Economic Committee again devoted long consideration to "the question of equality of treatment in international economic relations which it is the object of the most-favoured-nation clause included in commercial treaties to ensure". On this occasion the Committee was faced with the problems raised by the world-wide depression and by new phenomena, such as foreign exchange control, clearing arrangements and the like which it then called "temporary disturbances of the economic mechanism". The results of its renewed studies were embodied in a detailed report, entitled "Equality of treatment in the present state of international commercial relations: The most-favoured-nation clause".<sup>91</sup>

78. Even if the doctrine of the Economic Committee is almost entirely restricted to the application of the clause in Customs matters and, in some parts, may be considered obsolete today, it contains elements which cannot be bypassed in the course of a modern codification of the clause. The Special Rapporteur thinks it useful therefore to present in annex I to the present report excerpts from the two papers mentioned in paragraphs 76 and 77 above, believing that these excerpts—or at least some of them—may have legal relevance to the formulation of the rules to be adopted in the course of codification.

#### 5. *The work of the Committee of Experts for the Progressive Codification of International Law*

79. The "progressive codification of international law" undertaken by the League of Nations originated in a resolution of the Assembly adopted on 22 September 1924. The Committee of Experts convened in pursuance of this resolution had the duty to prepare a list of subjects which it considered "sufficiently ripe" for codification. Among the subjects to be examined for this purpose it selected also the most-favoured-nation clause and appointed a Sub-Committee, which had to consider the following question:

If it be possible, and in what degree, to reach an international agreement concerning the principal means of determining and interpreting the effects of the most-favoured-nation clause in treaties.

The sub-committee was composed of Mr. George W. Wickersham, former Attorney-General of the United States, as Rapporteur, and Professor Barbosa de Magalhães of Portugal.

80. The report of Mr. Wickersham<sup>92</sup> began with the indication that his attention was directed to the clause as it appears in commercial treaties. The report then gave an explanation on the meaning of national treatment on the one hand and most-favoured-nation treatment on the other. It quoted examples of most-favoured-nation clauses, arranging them in the following classes: unconditional, conditional, unlimited, limited and irregular forms.

<sup>91</sup> *Id.*, document C.379.M.250.1936.II.B, pp. 2 and 5.

<sup>92</sup> Publications of the League of Nations, 1927.V.10. (C.205.M.79.1927.V).

(a) *Field of application of the clause*

81. On the question of the subjects to which the clause may be applied the report had this to say:

It may be stated broadly that the clause may apply to every right, privilege or immunity which the State grants in its public capacity, but not to private rights or privileges which it grants as an individual. For instance, France may claim for her subjects the privilege granted to British subjects to import certain articles at lower tariff rates, or to hold land in the United States, or to maintain suits in the American courts, or to maintain a residence in the United States. But she could not claim the right to share a contract of the United States Government with a British company for the furnishing of material, or in a grant of public lands to a British subject.

The favours embraced in the most-favoured-nation clause are those which a State may grant in its governmental, as distinguished from its business, activities.

Provisions in commercial treaties may be as wide and diversified as the objects, interests, activities and instruments of commerce and industry in all their phases, so as to protect the rights and interests of nations and individuals participating in "commercial and industrial development on an international scale".

Bearing in mind that any favour which a State may grant as a public right may be claimed under an unlimited most-favoured-nation clause, *it would be idle to attempt a list of subjects which are or may be subject to most-favoured-nation treatment.*<sup>93, 94</sup>

(b) *Duration of the privilege*

82. On the question of the duration of the privilege granted by the clause, the report accepted the view according to which the right to the favour accorded by the clause is wholly dependent upon the primary right, and stands or falls with it.

(c) *Future favours*

83. The report agreed with the view of those (and it believed that they were in the majority) who considered that the clause applied to all favours, past and future, even in the case that this was not specifically so provided.

(d) *Conditional and unconditional interpretation*

84. The report related two cases to demonstrate that the United States was inclined to interpret the most-favoured-nation clause as conditional even if its wording would not clearly indicate a condition. It quoted one instance when the United States was bound to admit that an unconditional operation was intended by the negotiators of the treaty (concluded with Switzerland in 1850) but at the same time announced that this was to be considered as an exception to the American practice and steps were taken to terminate the treaty.

(e) *Violations of the clause*

85. The report then considered the "attempts to avoid effects of the clause", classifying these as follows:

(i) *The minute classification of articles in tariff schedules*

The following examples were given:

The imposition of one rate of duty on black oils and another and heavier one on yellow oils. . . . On its face there is no discrimination;

<sup>93</sup> Italics supplied by the Special Rapporteur.

<sup>94</sup> Publications of the League of Nations, 1927.V.10 (C.205.M.79.1927.V), p. 6.

all nations are treated equally, and the only requisite for the lower duty is that the oil be black. One must know that all Russian oils are black and that most American oils yellow to get the true purpose of the provision.

As another classic example of such a condition, item 103 of the German Tariff of 1902 was cited. It provided a very low special rate on

Large dappled mountain cattle reared at a spot at least 300 metres above sea-level, and which have at least one month's grazing each year at a spot at least 800 metres above sea-level. . . . Brown cattle are those breeds which. . . belonging to the long-headed variety, especially to the races of Alpine cattle. . . have a silver-grey to dark or very dark-brown hide, with lead-coloured muzzle, bordered with very light brown, almost white; black hooves and horn tips, and dark tail tuft.

This provision admitted cattle from Switzerland and the Austrian Tyrol, while effectively shutting out French, Belgian, Dutch, Danish and Russian cattle. Yet, so far as language goes, the favour was open to all nations.

86. The report pointed out that conditions which were perfectly proper shaded off imperceptibly into restrictions and descriptions which were, without question, in violation of the spirit—and usually in violation of the letter—of the clause. For the example given—"black oils"—it was not very far to such illogical and impossible tariff conditions as "goods imported by railway [. . .], salt from a country which imposes no duty on salt [. . .], products from countries whose tariff schedule the President deems unreasonable" or from "monarchies whose rulers have blue eyes".<sup>95</sup>

(ii) *Geographical discriminations*

87. The controversy between the United States and Norway in 1828 over a discrimination in the tonnage tax imposed by the latter on vessels coming from European ports and on those coming from ports not European, was quoted in the report as an example of an effort to avoid the effect of the most-favoured-nation clause. Another example was the provision of the United States Navigation Act of 1884, which imposed a lower tonnage tax on vessels coming from certain American ports and a higher one on those coming from other ports. This gave rise to protests on the part of States having treaties with the United States containing most-favoured-nation clauses.

(iii) *Imposition of countervailing duties*

88. Certain countries adopted the system of paying bonuses to encourage particular industries, first, to stimulate production and, secondly, to enable the products to be sold in foreign markets in successful competition with domestic products in those markets. Arguments were advanced for and against the compatibility of the countervailing duties with the most-favoured-nation clause. According to Mr. Wickersham, countervailing duties would seem in the view of the experts to be against the principle of most-favoured-nation treatment, but there appeared to be an overwhelming necessity for something of the kind to stop "dumping". Consequently, he thought that countervailing duties were permissible,

<sup>95</sup> *Ibid.*, p. 9.

even though they were in technical violation of the clause, if they were used justly and as a matter of necessity. The arguments advanced to sustain the practice in general were merely *ex necessitate*. The Rapporteur added that the following line of argument would probably be more convincing than any other: namely, where a higher duty was imposed upon goods coming from a country which paid bounties for their production than upon the products of other countries, far from constituting a discrimination contrary to the treaty provision, the countervailing duty was a means of protecting against such discrimination. But this argument was sound only when such a duty was actually necessary to equalize conditions.

(iv) *Imposition of sanitary prohibitions*

89. The quarantine on cattle from districts where there was foot-and-mouth disease, the prohibition on the importation of Japanese silkworms, because they carried a dangerous parasite, or the prohibition of the importation of opium, were examples of justified prohibitions, such as no nation would claim to be in violation of its most-favoured-nation clause. It had never been doubted that a nation might impose sanitary embargoes, but some restrictions ought to be placed on nations in this respect so as to avoid wanton discrimination.

(f) *Conclusions of Mr. Wickersham*

90. Lastly the report gave a brief summary of the history of the clause as it was affected by the First World War. It recalled the changes in the policy of the United States of America which occurred through the adoption of the "open door" theory and correspondingly through the inclusion of unconditional clauses in the commercial treaties. It quoted the text of an elaborate most-favoured-nation clause as it appeared in the German-American commercial treaty of 1924. Emphasizing the necessity of drafting treaties in such a way as to make the intention of the parties perfectly clear, the report of Mr. Wickersham concluded that a negative answer must be given to the original question put to the Sub-Committee: "it would not seem either necessary or desirable even if it were practicable to endeavour to frame a code provision to govern the case".<sup>96</sup>

91. In case of disputes as to the interpretation of most-favoured-nation clauses Mr. Wickersham recommended a reference to "one of The Hague tribunals".

92. He was also not convinced of the necessity of having special substantive rules of interpretation in regard to the clause. "The ordinary rules of judicial interpretation would seem adequate and more desirable"—the report concluded.<sup>97</sup>

(g) *The contrary view*

93. The second member of the Sub-Committee, Professor Barbosa de Magalhães, made his observations verbally<sup>98</sup> and came to different conclusions from those of his colleague. He believed that "it was not only

desirable, but possible to reach international agreement" in regard to the rules governing the clause and "he saw no legal, and more particularly no political obstacles in the way". Such rules, "which should be framed [...] in harmony with settled practice, would prove very useful to economic interests".<sup>99</sup>

(h) *Questions to be regulated*

94. The questions which might be regulated by means of a general convention could be, according to Professor Barbosa de Magalhães, *inter alia* the following:

... Should the clause cover favours granted to third parties prior to the convention, as well as favours subsequent to the conclusion of the convention? Should the equality of rights have the same period of duration as the clause itself? Did the favours granted subsist or fall with the conventions concluded with third parties? What were the third parties whose rights were included in the clause? Should it cover all foreign States, including their dominions or protectorates, with the exception of those with which the contracting party had concluded a customs union? Did it follow that colonies could not be regarded as third parties from the point of view of the application of the clause?<sup>100</sup>

Professor Magalhães thought that all these questions should be answered in the affirmative. As to the question whether the clause, in the absence of a clear and explicit stipulation, should be regarded as conditional or unconditional, he opted for the second alternative.

(i) *Rules of interpretation*

95. He believed, in contrast to Mr. Wickersham, that

The ordinary rules of judicial interpretation did not suffice to prevent disputes between the contracting States; that it was desirable to frame supplementary provisions in a general international convention [...]. It would be better [...] to lay down certain general rules [...] which, being purely of a supplementary character and devoid of any binding force as regards the use of the clause, its application, its form or its scope, would be of great value for the guidance of States by determining the interpretation, meaning, scope and application of the clause when it was not clearly expressed.<sup>101</sup>

(j) *Conclusion of Professor Barbosa de Magalhães*

96. In conclusion Professor Magalhães thought that the subject, which was such as to allow of the regulation by an international convention of at least certain problems, should not be dropped and that it ought to be submitted to Governments, either with a draft convention or a questionnaire.

(k) *The decision of the Committee of Experts*

97. As is commonly known, however, the Committee of Experts for the Progressive Codification of International Law found on balance, at its third session held in 1927, that "the international regulation of these questions by way of a general convention, even if desirable, would encounter serious obstacles" and it did not place the topic on the list of those topics which it recommended for codification.<sup>102</sup>

<sup>96</sup> Publications of the League of Nations, 1927.V.10 (C.205.M.79.1927.V), p. 14.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*, pp. 14-15.

<sup>99</sup> *Ibid.*, p. 15.

<sup>100</sup> *Ibid.*, p. 14.

<sup>101</sup> *Ibid.*, p. 15.

<sup>102</sup> *Ibid.*, p. 1.

6. *The World Monetary and Economic Conference*  
(London, 1933)

98. The problem of the most-favoured-nation clause was also in the forefront of the deliberations of the World Monetary and Economic Conference convened by the Council of the League of Nations in London in 1933. Its task was to decide upon "measures necessary to solve the [...] economic and financial difficulties which are responsible for, and may prolong, the present world crisis".

99. The machinery set up by the Council included a Preparatory Commission of Experts. The Commission prepared a draft annotated agenda of the Conference. In their report<sup>108</sup> the experts, after an introduction giving a short but graphic picture of the ravages of the economic crisis of the period, commented in detail on the various items to be dealt with by the Conference: monetary and credit policy, prices, resumption of the movement of capital, restrictions on international trade, tariff and treaty policy, and organization of production and trade. Under the heading "Tariff and treaty policy" the report devoted a special section to the most-favoured-nation clause which, the experts considered, should constitute, under normal conditions and in its unconditional and unrestricted form, the basis of commercial relations between nations. Accordingly, the experts recommended:

That the Conference should reach an agreement at any rate as to the scope of the most-favoured-nation clause, if not as to its precise form.

It will be desirable... to reach an agreement in regard to the more important questions connected with the application of this clause, such as customs quotas, the excessive specialization of tariffs, dumping and anti-dumping measures, the nationality of goods, "like" products, and, until such time as all restrictions on currency are abolished, [104] exchange restrictions and compensation and clearing agreements.

It will also be desirable to reach an agreement regarding the exceptions to the clause which may be deemed necessary.<sup>105</sup>

100. The report distinguished between permanent exceptions, such as frontier traffic, customs unions, etc., and temporary ones. In connexion with the former it raised the question whether a new permanent exception should be admitted as regards rights derived from collective agreements. It referred to a

Suggestion which has been strongly pressed in various quarters [...] that States should admit an exception to the most-favoured-nation clause whereby advantages derived from plurilateral agreements should be limited to the contracting States and to such States as may voluntarily grant equivalent advantages [...].

It has been argued [...] that, in the absence of an exception of this kind, the conclusion of collective conventions would encounter insuperable difficulties, since the application of the clause would, in such circumstances, place a premium on abstention. On the other hand, it has to be borne in mind that the circumstances of various countries differ considerably, so that in many cases they could not adhere to a plurilateral agreement when they are unaware of the concrete cases to which its provisions might later be applied

and of the possible consequences which its application might involve for themselves. Moreover, there would be a danger of provoking the formation of mutually opposed groups of countries, thus aggravating the very evils which it is sought to mitigate. Finally, it has been emphasised that care must be taken to avoid prejudicing the rights of third parties.

In any case, these exceptions must be subject to the condition that agreements of this kind be open to the adhesion of all interested States and that their aim should be in harmony with the general interest. Amongst the conditions that might be considered for this purpose, mention may be made of a proviso that these agreements shall have been concluded under the auspices of the League of Nations or of organizations dependent on the League. Further, these agreements must not involve new hindrances to international trade vis-à-vis countries having most-favoured-nation rights. Finally "collective agreements" can only be regarded as such when they comply with certain conditions, to be determined, as to the number of participating States.<sup>106</sup>

The Commission of the Experts, who were plainly not of one mind on this issue, concluded this part of the report with the hopeful if vague recommendation that "the Conference should endeavour to find a solution for the whole of this question which will reconcile the interests of all".

101. Under the heading "Temporary exceptions" the report recommended consideration whether too rigid an insistence on most-favoured-nation rights might not involve a risk, in certain cases, of creating difficulties in the path of economic progress which might be overcome by admitting temporary exceptions. In this respect, however, the utmost prudence was felt necessary. Attention was drawn to the so-called agrarian preferences which the Danube countries have received through special agreements in respect of limited quantities of cereals on the basis of the recommendations of the Stresa Conference for the economic restoration of Central and Eastern Europe (September 1932).<sup>107</sup>

102. The Monetary and Economic Conference took place in London in the Geological Museum at South Kensington. Sixty-four States were represented.<sup>108</sup> Much of the general debate in the Conference centred on the problems of international trade. The vital need for a lowering of tariff barriers was generally recognized, without agreement on the means of achieving that aim. The role of the most-favoured-nation clause was emphasized by many speakers.<sup>109</sup>

103. The delegation of the USSR, headed by Litvinov, introduced a proposal to conclude a pact of economic non-aggression. According to the relevant draft resolution the signatory Governments would withdraw reciprocally all the legislative and administrative measures already passed by them having the nature of economic aggression or discrimination against any one country. The types of

<sup>106</sup> *Ibid.*, pp. 31-32.

<sup>107</sup> *Ibid.*, p. 32. For the Stresa Conference, see Royal Institute of International Affairs, *Survey of International Affairs, 1932* (London, Oxford University Press, 1933), pp. 19-27.

<sup>108</sup> According to A. J. Toynbee, the historian, it was perhaps both the best attended and least effective international gathering that had ever been held up to its date. Royal Institute of International Affairs, *Survey of International Affairs, 1933* (London, Oxford University Press, 1934), p. vi.

<sup>109</sup> *Ibid.*, pp. 49-56 for the details.

<sup>108</sup> League of Nations, document C.48.M.18.1933.II.

<sup>104</sup> This qualification may raise a grim smile when reread thirty-five years later.

<sup>105</sup> League of Nations, document C.48.M.18.1933.II, p. 31.

economic warfare denounced by the Soviet delegation included all methods of discrimination, tariff wars, covert or overt, currency wars, the discriminatory prohibition of imports and exports, and all forms of official boycott.<sup>110</sup> The proposal failed to receive enough support. In almost all other matters the Conference was equally unsuccessful. Its practical results were negligible.<sup>111</sup> Its Sub-Commission on Commercial Policy devoted a section in its report to the most-favoured-nation clause which ran partly as follows:

*The Most-Favoured-Nation Clause*

This problem has also been studied by the Sub-Commission especially from the point of view of the exceptions that might be allowed in order to make its application more elastic and better suited to present conditions.

There was a general opinion in favour of the maintenance of the most-favoured-nation clause, in its unconditional and unrestricted form—naturally with the usually recognised exceptions—stressing the points that it represents the basis of all liberal commercial policy; and that any general and substantial reduction of tariffs by the method of bilateral treaties is only possible if the clause is unrestricted; and that this method would avoid the constant resumption of negotiations.

However, certain delegations manifested a strong tendency in favour of allowing new exceptions in addition to those hitherto unanimously admitted, on the ground that, although the unconditional and unrestricted most-favoured-nation clause does, under normal conditions, secure for trade the indispensable minimum of guarantees and prevents arbitrary and discriminatory treatment, if insisted upon with too great rigidity, it may obstruct its own purposes in a period of crisis and difficulty such as we are now passing through.

As regards the nature of these exceptions, opinion differed very widely, and the following recommendations were made:

An exception in favour of collective conventions for the reduction of economic barriers, open to all countries;

An exception in favour of agricultural products;

An exception in favour of agreements arising out of historic ties between certain countries, subject to a favourable opinion by the Council of the League of Nations;

An exception in favour of agreements binding only those countries which undertake to accept a certain regime and to maintain a certain standard of living for their population;

An exception in favour of the agreements contemplated at Stresa and in favour of regional and collective agreements concluded under the auspices of the League of Nations;

An exception based on reciprocity and equitable treatment.<sup>112</sup>

*7. The Seventh International Conference of American States (1933)*

104. In 1933, the year of the World Monetary and Economic Conference, the Seventh International Conference of American States was also held. Opened in Montevideo on 3 December, after the conclusion of the London Conference, it also took a stand on economic matters and dealt with the role of the most-favoured-

nation clause. Its principal achievement on the economic plane was the adoption of a resolution on economic, commercial and tariff policy on 16 December 1933. On the problem of the most-favoured-nation clause the resolution contained the following passage:

The subscribing Governments declare that the principle of equality of treatment stands and must continue to stand as the basis of all acceptable commercial policy. Accordingly, they undertake that whatever agreements they enter into shall include the most-favoured-nation clause in its unconditional and unrestricted form, to be applied to all types of control of international trade, limited only by such exceptions as may be commonly recognized as legitimate, and they undertake that such agreements shall not introduce features which, while possibly providing an immediate advantage for the Contracting Parties, might react disadvantageously upon world trade as a whole.

The subscribing Governments declare further that the most-favoured-nation principle enjoins upon States, making use of the quota system or other systems for limiting imports, the application of these systems in such a way as to dislocate as little as possible the relative competitive positions naturally enjoyed by the various countries in supplying the articles affected.

With a view to encouraging the development of unified and comprehensive multilateral treaties as a vitally important instrument of trade liberalization, the advantages of which treaties ought not to be open to countries which refuse to confer similar advantages, the subscribing Governments declare, and call upon all countries to declare, that they will not invoke their right to demand, under the most-favoured-nation clause contained in bilateral treaties to which they may be parties, any benefits of multilateral treaties which have as their general purpose the liberalization of international economic relations and which are open to the accession of all countries, provided that such renunciation shall not operate in so far as the country entitled to most-favoured-nation treatment in fact reciprocally accords the benefits which it seeks.

For the purpose of carrying out the policy embraced in the foregoing undertaking, the subscribing Governments favour the establishment of a permanent international agency, which shall closely observe the steps taken by each of them in effecting reductions of trade barriers, and which shall upon request furnish information to them regarding the progress made by each in effectuating the aforesaid programme.<sup>113</sup>

105. In the course of the Montevideo Conference of 1933, the United States delegation had put forward also a proposal in connexion with "the development of economic relations among the peoples of the world by means of multilateral conventions, the benefits of which ought not to accrue to countries which refuse to assume their obligations". The suggestion was that the Governments of the American republics should bind themselves by a general convention not to

invoke the obligations of the most-favoured-nation clause for the purpose of obtaining advantages enjoyed by the parties to multilateral economic conventions of general applicability, which include a trade area of substantial size, have as their objective the liberalization and promotion of international trade or other international economic intercourse, and are open to adoption by all countries.<sup>114</sup>

This proposal was discussed, but it did not meet with general acceptance, and the Conference decided in its "Resolution on Multilateral Commercial Treaties"

<sup>110</sup> Monetary and Economic Conference, document Conf. M.E./C.E.15; Royal Institute of International Affairs, *op. cit.*, p. 52.

<sup>111</sup> Royal Institute of International Affairs, *op. cit.*, p. 76.

<sup>112</sup> League of Nations, document C.435.M.220.1933.II [Conf. ME 22 (1)], pp. 22-23.

<sup>113</sup> Seventh International Conference of American States (Montevideo, Uruguay, December 3-26, 1933), *Final Act*, pp. 23-24.

<sup>114</sup> *Ibid.*, p. 124.

(24 December 1933) that the American draft convention should be deposited at the office of the Pan American Union and declared open to adherence by all countries.<sup>115</sup> The resolution of the Conference was embodied in an "Agreement on the application of the most-favoured-nation clause", opened to signature on 15 July 1934.<sup>116</sup>

<sup>115</sup> *Ibid.*

<sup>116</sup> Pan American Union, Serie sobre tratados No. 6, OEA Documentos oficiales OEA/Ser. A/51a (SEPF).

It has been signed by six States but ratified only by two: Cuba and the United States in 1935.

#### 8. Codification by the Institute of International Law

106. The Institute of International Law examined the "effects of the most-favoured-nation clause in matters of commerce and navigation" in the course of its 1934 and 1936 sessions and adopted a resolution on the topic at its session held at Brussels in 1936. The text of this resolution is contained in annex II.

## ANNEXES

### ANNEX I

#### Excerpts from the conclusions of the Economic Committee of the League of Nations in regard to the most-favoured-nation clause<sup>1</sup>

##### *Can States claim most-favoured-nation treatment from each other as a right?*

"In fact, different conceptions regarding tariffs and contractual methods appear to be generally associated with different ideas regarding most-favoured-nation treatment. While the States which refuse to negotiate in tariff matters claim most-favoured-nation treatment as a preliminary condition of any treaty and as a right which is beyond discussion, on the other hand, those States which have conceived their tariffs with a view to negotiation and who attach more value to tariff agreements than to the juridical guarantee constituted by the most-favoured-nation clause, when it is not accompanied by tariff advantages, consider the grant of the most-favoured-nation clause as subordinate to agreement on tariffs.

"The Committee was of opinion that the Economic Conference of 1927 had not embraced the doctrine which considers equality of treatment as a right above question. It has borne in mind that the resolutions of the Conference declare that each State must judge in what cases and to what extent this fundamental guarantee should be embodied in any particular Treaty. But it has taken care, on the other hand, not to misunderstand that the doctrine clearly affirmed by the Conference was in favour of the reciprocal grant of most-favoured-nation treatment and in favour of the widest possible extension of its scope and of a liberalism as enlightened as possible in its application.

"In this matter... the Committee has inclined towards a compromise of fact rather than to a choice between opposing doctrines. It is convinced that, whereas those States which claim most-favoured-nation treatment by right before any negotiation nevertheless reserve the power to revise it if they run against prohibition duties or unjust discrimination, the States which regard most-favoured-nation treatment as the price of a favourable tariff agreement nevertheless admit, in general theory, that this agreement could not be arrived at without the grant of most-favoured-nation treatment.

<sup>1</sup> Excerpts from: (i) "Recommendations of the Economic Committee relating to Tariff Policy and the Most-Favoured-Nation Clause" (document E 805.1933.II.B.1.(a) [hereinafter "1933 document"]), and (ii) Economic Committee, "Equality of Treatment in the Present State of International Commercial Relations: The Most-Favoured-Nation Clause" (document C.379.M.250.1936.II.B. [hereinafter "1936 document"]).

(a) See foot-note 90 above.

"The Committee has noted, therefore, that unanimity could undoubtedly be reached on a doctrine which declared that the grant of most-favoured-nation treatment ought to be the normal, and that the refusal of this guarantee or the corresponding establishment of a differential regime ought not to arise unless in the case of States which refuse an equitable tariff policy or have recourse to discriminatory practices."<sup>2</sup>

##### *The most-favoured-nation clause in customs matters: a plea for the clause to be unconditional...*

"The most-favoured-nation clause implies the right to demand and the obligation to concede all reductions of duties and taxes and all privileges of every kind accorded to the most favoured nation, no matter whether such reductions and privileges are granted autonomously or in virtue of conventions with third parties.

"Regarded in this way, the clause confers a whole body of advantages, the extent of which actually depends on the extent of the concessions granted to other countries... At the same time, it constitutes a guarantee, in the sense that it provides completely and, so to speak automatically, for full and entire equality of treatment with the country which is most favoured in the matter in question.

"However, in order that the clause may produce these results, it must be understood to mean that a Government which has granted most-favoured-nation treatment is bound to concede to the other contracting party every advantage which has been granted to any third country, immediately and as a matter of right, without the other party being required to give anything by way of compensation. In other words, the clause must be unconditional.

"As is generally known, conditional most-favoured-nation clauses have in some cases been inserted in treaties, while in other cases existing most-favoured-nation clauses have been construed in a conditional sense, with the effect that a reduction of duties granted to a given country in exchange for a given concession may not be accorded to a third country, except in exchange for the like or equivalent concessions. This opinion is based on the conception that a country which has not, in some given respect, made the same concessions as another is not entitled to obtain, in this respect, the same advantages, even if it has made wider concessions in other respects. It cannot, however, be too often repeated that a conditional clause of this kind—in justification of which it is argued that, if it does not grant equality of tariffs, it offers at any rate equality of opportunity—has nothing whatever in common with the sort of clause

<sup>2</sup> 1933 document, p. 68.

which the [1927] International Economic Conference and the Economic Consultative Committee recommended for the widest possible adoption.

"It is in fact the negation of such a clause, for the very essence of the most-favoured-nation clause lies in its exclusion of every sort of discrimination, whereas the conditional clause constitutes, by its very nature, a method of discrimination; it does not offer any of the advantages of the most-favoured-nation clause proper, which seeks to eliminate economic conflicts, to simplify international trade and to establish it on firmer foundations. Moreover, it is open to the very grave objection of being unfair to countries which have very few, or very low, duties, and which are thus less favourably situated for negotiating than those which possess heavy or numerous duties.<sup>3</sup>

"...

"Moreover, it has very rightly been observed<sup>a</sup> that the granting of the conditional clause really amounts to a polite refusal to grant the most-favoured-nation clause, and that the real significance of this "conditional clause" is that it constitutes a *pactum de contrahendo*, by which the contracting States undertake to enter later into negotiations to grant each other certain advantages similar or correlative to those previously granted to third countries.<sup>4</sup>

<sup>a</sup> Viner—*The Most-favoured-nation Clause, Index*, January 1931.

"...

"We may therefore conclude that the first fundamental principle, implicit in the conception of most-favoured-nation treatment, is that this treatment must be *unconditional*".

*... and unrestricted*

"... in order to allow for the free play of competition in international trade and to present the reintroduction of discrimination, the clause needs to be not only unconditional, but also unrestricted; in other words, it must apply to the whole of the tariffs of the contracting countries.

"If the clause is made not to apply to a large number of articles or even to a single article which plays an important part in the trade between two countries, it ceases to provide equality of treatment with any third State and, on the contrary, results in actual discrimination as between the country which is thus excluded from certain advantages in respect of particular goods and the country or countries which receive such advantages.

"Such discrimination may, in a certain sense, be regarded as legitimate, if it has been agreed to by the country which it affects. But [...] such a restriction could only be accepted with reluctance, and consequently an agreement based on the restricted clause could merely be regarded by the contracting party who is the chief sufferer by the restrictions as a lesser evil than the absence of any agreement whatsoever in regulation of trade.

"[...]

"[Even if these] restrictions affect both parties to the same extent [...], the agreement based on the granting of limited, though ostensibly equivalent, advantages only constitutes a very imperfect application of the most-favoured-nation treatment.

"..."

*Fields other than Customs matters*

"If the clause fulfils these two fundamental conditions—in other words, if it is unconditional and unrestricted—it assures the best treatment which two countries can possibly grant one another in Customs questions.

"In other fields, the most-favoured-nation clause, even if unconditional and unrestricted, only represents on the contrary a minimum of the privileges and safeguards which two countries can grant one another; we would instance, as examples, the treatment of nationals permitted to engage in business in a foreign country (the right of establishment), the payment of direct and indirect taxes on the exercise of any commercial activity, the payment of internal taxes on the manufacture, distribution and consumption of goods, and also on navigation (not including coastal traffic).

"Without going further into these questions, we may observe that it is generally admitted—either in theory or in international practice—that, in regard to the points we have just mentioned, national treatment is as a rule an indispensable condition for the free and productive growth of co-operation between peoples; in consequence, the most-favoured-nation clause can in such cases only offer an additional safeguard supplementing those already provided by national treatment."

*Fields not appropriate for the clause*

"... it must be admitted that, in regard to certain questions, the treatment provided by the clause is too wide in its scope and that these questions can only be properly regulated on a reciprocal basis. This applies, for example, to double taxation.

"..."

*What is to be understood by the term "Customs questions"?*

"According to the general practice in commercial treaties, the term 'Customs questions' includes the scales of Customs duties and the method of levying them—i.e., import and export duties, supercharge co-efficients, where they exist, and subsidiary charges of every sort levied on imports or exports. The term also covers all the rules, formalities and charges inseparable from Customs operations of every description (including, for instance, the regulations for the treatment of passengers' luggage or commercial travellers' samples; the procedure and time limits for appeals to administrative, judicial or arbitral authorities against Customs decisions relating to the application of tariffs).

"..."

*The operation of the clause in the presence of import and export prohibitions*

"... the principle universally recognised prior to the war was that of freedom of trade; in other words, prohibitions on economic grounds were non-existent. There was therefore no occasion to demand the most-favoured-nation clause in questions of this sort.

"The war made it necessary to close the markets wholly or in part to a number of articles, indeed in some cases to goods of all kinds. The abnormal economic situation in the period immediately after the peace induced many Governments to make considerable use of prohibitions.

"..."

"As the situation gradually became more normal again, the principle of most-favoured-nation treatment gained ground and was expressly stipulated in a number of treaties, some of which also provided that such concessions should be limited to quotas.

"One question continued to be a subject of keen debate: whether, in cases where the most-favoured-nation clause was not expressly extended to the import and export system, regarded in the above sense, prohibitions should nevertheless be deemed to come under the clause, as falling within the general boundaries of Customs questions; or whether, on the contrary, they should be governed by the principle of reciprocity?

"..."

"... we should, in principle, conclude that the standard most-favoured-nation clause herein suggested does not, unless other-

<sup>3</sup> 1933 document, pp. 69-70.

<sup>4</sup> 1936 document, p. 24.

wise expressly stipulated in commercial treaties, apply to prohibitions. But we must not forget that this solution does not entirely meet the present situation. Although prohibitions have in the main been abolished, some still exist and, as long as this continues to be the case, it would be desirable that the interpretation adopted during and after the war, to the effect that the clause should apply as far as possible to prohibitions, should still be adhered to.<sup>5</sup>

“...”

*Customs quotas: are they compatible with the unconditional and unrestricted most-favoured-nation clause?*

[The following considerations pertaining to Customs quotas, i.e. quotas limiting the agreed Customs concessions to definite quantities, apply *mutatis mutandis* also to import quotas, i.e. quotas limiting the import of certain goods altogether.]

“In the first place, it should be pointed out that the most-favoured-nation clause has two objects: (a) to secure to the country enjoying its benefits a total of advantages represented by all the Customs concessions and privileges granted to third countries and by all the concessions made by autonomous act, and (b) to ensure absolute equality of treatment by guaranteeing to all countries which enjoy its benefits equal terms in all matters covered by commercial treaties and, as a result, the free development of their economic aspects.

“The total advantages assured by the clause are not fixed or immutable. They may be increased if the State that grants the most-favoured-nation treatment concludes new commercial treaties making new or greater concessions in favour of other States or grants fresh privileges or advantages by autonomous act. They may decrease if one of the former commercial agreements becomes null and void, or if one of the privileges granted by autonomous act is withdrawn. For that reason, a State which in virtue of the clause has had the right to import an unlimited amount of certain goods at a given Customs duty cannot claim that the clause has been violated merely because the duty in question has been raised later by means of an autonomous provision and it only continues to benefit from the former duty for quantities corresponding to a Customs quota.

“But, if a State is not entitled to preserve unchanged the original advantages of the clause, it certainly has the right of insisting that the principle of equality of treatment which is assured by the clause, and which consists in guaranteeing every country equal conditions where international commercial competition is concerned, should not be departed from.<sup>6</sup>

“Up to the present, no system has been discovered by which quotas can be allocated without injuring the interests of countries entitled to benefit under the most-favoured-nation clause. The three principal methods tried up to the present are:

“1. The so-called ‘arithmetical’ method, by which all countries may import the same quantities of a given commodity. *Summum jus, summa injuria*.<sup>7</sup>

“[T]he object of the clause is to preserve respective positions [of the interested States] intact, by treating all countries *on the same footing*, which is quite a different thing from treating all countries in a mechanically equal way.<sup>8</sup>

“2. What is known as the ‘proportional’ method has been held to be more in keeping with the spirit of the clause. Under this method, each country is allowed to import, in the case of any given product, a quantity representing a definite proportion of the total quantity imported during a basic reference period. For very many reasons, however, the choice of a suitable basic period is a very difficult matter and gives rise to disputes of

many kinds. Moreover, in view of the rapidity with which, at the present time, changes take place in production and sale conditions in the various countries, it is impossible to discover, among the statistics of the past, a basis which satisfies *equally* the *present* needs of all countries. This method, though it has no direct connexion with the clause, for a fundamental reason that we shall explain later, is nevertheless the only one which can ensure as equitable an allocation as the existence of quotas allows.

“...”

“3. The third method is to fix a total quota of permitted imports without allocating it among the various countries, and leaving all comers to compete for it. This method might be regarded as that which is least contrary to the principle of the clause, but, for practical and administrative reasons, it has seldom, if ever, been applied in this crude form.”<sup>9</sup>

“... it is inevitable that quotas should disturb the freedom of competition between the various countries interested, so that they develop into a violation of the most-favoured-nation clause.

“As a general rule, therefore, they are to be condemned and avoided.

“If, however, their tendency is to *regulate* the import trade by helping to tide over periods of temporary difficulty, in such cases they must be so fixed as to cause a minimum of injury to the interests of third countries.

“Any country desiring to adopt Customs quotas must bear in mind that the most-favoured-nation treatment which it has conceded to other countries imposes on it the obligation not to impair the equality of conditions in international commercial competition; therefore, quotas must be fixed so as to safeguard, as far as possible, the position of the countries interested. Whether this is done by fixing the first Customs quota with the principal exporting country, or by negotiations conducted with each of the various interested countries in turn, is not a matter of essential importance.

“What is of importance is that the interests of the various countries enjoying most-favoured-nation treatment should be considered and respected.

“...”

*Will the clause operate in the case of temporary imports and exports?*

“... a distinction must be drawn between temporary imports and exports in the true sense of the term and the so-called finishing trade.

“In regard to the former, the clause applies to all concessions which, being solely designed to facilitate international trade, relate only to goods which are not intended to undergo any further transformation (for instance, containers, imported empty and re-exported full, implements and apparatus intended for the erection of plant and re-exported on completion of the work; goods sent to fairs or exhibitions and re-exported because they have not been sold).

“On the other hand, the special cases of temporary imports and exports which come under the description of finishing trade give rise to the following considerations:

“...”

“The term ‘*active*’ finishing trade is employed when a Government authorises the importation free of duty, or at a reduced rate, of foreign goods (usually raw materials or semi-finished articles) on condition that such goods are transformed into finished articles of a specified character intended solely for export.

“...”

<sup>5</sup> 1933 document, pp. 70-74.

<sup>6</sup> *Ibid.*, p. 80.

<sup>7</sup> 1936 document, p. 14.

<sup>8</sup> 1933 document, p. 81.

<sup>9</sup> 1936 document, p. 14.

*The Economic Committee had no difficulty in reaching the conclusion that:*

"... it would be in flagrant contradiction with the principle of equality of treatment, implicit in the most-favoured-nation clause, if a country to which this treatment had been granted in Customs questions were to be debarred from the privilege of exemption.

"The most-favoured-nation clause must therefore be applicable to 'active' finishing trade, it being understood, however, that, when the laws of a country make this trade dependent on an administrative decision, the right of the competent authorities to take a decision in each particular case is in no way affected thereby.

"The Economic Committee arrived at a somewhat different conclusion in regard to 'passive' finishing trade.

"'Passive' finishing trade arises when a country authorises the temporary export of certain goods, and readmits them free of duty when they return to the country after being finished abroad.

"..."

*The Committee found that:*

"... among the countries which follow an autonomous policy in regard to temporary exports, a certain number apply the most-favoured-nation clause to the 'passive' finishing trade....

"Other countries, on the contrary, deny that 'passive' finishing trade can be governed by the most-favoured-nation clause, arguing that a concession which could be defended in regard to one country might have no justification in regard to another.

"Having regard to the diversity of opinions and systems, the Economic Committee did not feel able to advocate the application of most-favoured-nation treatment to 'passive' finishing trade. It did, however, express the opinion that a country would only be justified in refusing, under the most-favoured-nation clause, to extend to others the concessions already granted to one country, if the other country demanding them were quite differently situated—in regard to the circumstances in view of which the concessions were allowed—from the country to which they had originally been granted."<sup>10</sup>

In concurrence with the views of the Economic Committee, the Institute of International Law, in paragraph 5 of its resolution of 1936, excepted only "passive" finishing trade (See annex II below).

[Nolde finds it difficult to follow the reasoning of the Economic Committee and believes that the clause should apply equally to "active" and "passive" finishing trade.<sup>11</sup>

#### *Essential characteristics of goods benefiting by the clause*

"The two essential conditions are as follows:

"The goods must *have their origin* in the country which enjoys most-favoured-nation treatment, and they must be *like products*, in the sense that they must possess the characteristics which entitle certain goods to a given Customs treatment."<sup>12</sup>

"..."

#### *Nationality of a product*

"The basis taken for the purpose of determining the nationality of a product shall be its origin. The origin declared at the Customs shall be accepted, provided that such evidence of origin or

consignments as the legislation of the importing country may require is produced, and provided that there is no presumption of the incorrectness of the declaration of origin.

"The country of origin in the case of *natural* products shall be taken to be the country in which such products have been grown, harvested, extracted or in any other manner obtained, or, in other words, the products of the soil or sub-soil of the country in question.

"The country of origin of *manufactured* products shall be taken to be the country in which such products have been finished. No account shall be taken of the origin of the raw materials or of the raw, semi-manufactured or manufactured products which have entered into the composition of a product, or of the fact that the work of manufacturing or finishing took place in free circulation or under Customs supervision, except, however, in the case in which finishing is only aimed at evading payment of a higher duty.

"..."

"We may... lay down the principle that the following operations undergone by a consignment on its journey will be considered not to affect its origin—viz., unloading and reloading, changes in the mode of transport, bonding in Customs warehouses, free ports or free zones, external alterations in the putting up of the goods, division into lots or sorting, provided always that the origin appears clearly from the accompanying papers and that the above operations have taken place under official supervision and are attested in a satisfactory manner (by the Customs authority or the management of the bonded warehouses or free ports, etc.)."

"..."

#### *"Like products"*

"Coming next to the question of what conditions, as regards their nature, the goods must fulfil in order to qualify for most-favoured-nation treatment, it may be observed that these conditions are usually expressed by the words 'like' or 'similar' and sometimes by 'identical'. If these expressions are held to imply different standards, it must be admitted that the word 'like' is far preferable to the others, the expression 'identical' being the least desirable of the three, since the condition of identity may in practice involve a too restricted application of the clause, and is moreover too difficult to determine. However, the problem will not be solved merely by the use of one or other of these expressions. If we adopt the word 'like' we have still to decide what in practice is meant by 'like products'.

"..."

"... we may hope that the difficulties inherent in this question will be diminished with the introduction of the uniform Customs nomenclature....

"But what we are most concerned to declare is that, no matter what standards may be used to determine, in the case of a given category of goods, that these goods are 'like products', these standards must be applied in the same manner to all products of that category having their origin in any of the countries entitled to the benefit of the clause.<sup>13</sup>

"..."

#### *Exceptions to the clause*

##### *Frontier traffic*

"The strict maintenance of a Customs barrier between two adjacent countries is so clearly hampering to the inhabitants of the frontier districts, in regions where the frontier is not represented by some almost impassable physical obstacle, and an agreement allowing freedom of trade within a restricted zone

<sup>10</sup> 1933 document, pp. 85-88.

<sup>11</sup> B. Nolde, "La clause de la nation la plus favorisée et les tarifs préférentiels", *Recueil des cours de l'Académie de droit international de La Haye*, 1932, t. 39, p. 43.

<sup>12</sup> 1933 document, p. 89.

<sup>13</sup> *Ibid.*, pp. 91-93.

on each side of the frontier is so manifestly justifiable that an exception in favour of such traffic is something to which a third party, entitled in other respects to most-favoured-nation treatment, could not reasonably object. Accordingly, in most commercial treaties, allowance is made for the special situation in these districts by excepting the Customs facilities granted to frontier traffic from the most-favoured-nation regime.

“... ”

“... the reservation, where employed, is of a more or less elastic character.

“In any case, it must be admitted that the exception concerning frontier traffic is rendered necessary, not merely by long-standing tradition, but by the very nature of things, and that it would be impossible, owing to differences in the circumstances, to lay down precisely the width of frontier zone which should enjoy a special regime. Hence we must be content to state that this exception is only legitimate and admissible if it is restricted to such limits as are essential to the attainment of its purpose—i.e., to facilitating trade and in some cases also to rendering existence practicable for the inhabitants on either side of the frontier.”

#### *Customs unions*

“The most-favoured-nation clause frequently includes a provision allowing for the possibility of each of the parties concluding a complete Customs union with a third power. In such a case, the economic unit becomes in practice something different from the political unit, and the Customs union may be regarded rather as the abolition of a Customs frontier than as a form of discrimination between competing foreign purveyors.

“In such cases, the exception to the most-favoured-nation clause takes the form of a reservation covering the privileges accorded to a third power in virtue of a Customs union which has been or may hereafter be concluded. The clause may be drawn up in different ways, but the variations do not involve substantial differences. It appears in a large number of treaties.

“... it is sufficient to declare that Customs unions constitute exceptions, recognised by tradition, to the principle of most-favoured-nation treatment.”

“... ”

#### *Special exceptions*

“Apart from Customs unions, it is necessary to consider the case of concessions which some countries grant one another on account of the special ethnic, historical, geographical or other ties which unite them (e.g., the Iberian Clause, the Baltic Clause, the Scandinavian Clause, the South-American Clause, etc., and the special regime between Switzerland and certain zones of French territory).

“The exceptions falling within these categories could not be accepted as *implicit* by a mere reference; they must be expressly stated and their meaning and scope must be agreed to by the parties concerned.”

#### *Wording of the clause*

“A study of the numerous examples which might be quoted would show that the most-favoured-nation clause takes the most varied forms in different treaties.

“... ”

“These differences... cannot fail in the long run to work to the prejudice of international trade, which—more particularly in this field—needs rules which are clear, unequivocal, simple and intelligible to all.

“The elaboration of a single form of clause for Customs matters appears in these circumstances to be a work of the greatest utility.

“The question then arises whether it will be best to be content with an extremely simple and purely synthetic form of words

merely declaring the intention of the contracting parties to grant each other most-favoured-nation treatment (leaving the actual scope of this guarantee to be elucidated in accordance with the rules for interpretation), or to adopt a rather more explicit style, stating the substantial provisions of the clause in direct terms in accordance with the principles we wish to see universally accepted.

“The former method, that of an extremely simple clause (such, for instance, as the following: ‘The two Contracting Parties undertake to grant each other most-favoured-nation treatment in all Customs questions’) would perhaps make it easier for everyone to adopt the clause. But it would have the objection of leaving open all questions connected with the scope of the most-favoured-nation clause and of making the positive value of the clause *wholly* and *exclusively* dependent on the rules for interpretation.

“For these reasons, we have thought it better to adopt the second method... ”

“The outcome of these considerations is the following formula, the terms of which are appreciably more explicit than those given above as an example. This formula is worded in general terms which may be adapted to meet special circumstances:

“ ‘The High Contracting Parties agree to grant each other unconditional and unrestricted most-favoured-nation treatment in all matters concerning Customs duties and subsidiary duties of every kind and in the method of levying duties, and further, in all matters concerning the rules, formalities and charges imposed in connexion with the clearing of goods through the Customs.

“ ‘Accordingly, natural or manufactured products having their origin in either of the contracting countries shall in no case be subject, in regard to the matters referred to above, to any duties, taxes or charges other or higher, or to any rules and formalities other or more burdensome, than those to which the like products having their origin in any third country are or may hereafter be subject.

“ ‘Similarly, natural or manufactured products exported from the territories of either Contracting Party and consigned to the territories of the other Party shall in no case be subject, in regard to the above-mentioned matters, to any duties, taxes or charges other or higher, or to any rules and formalities other or more burdensome, than those to which the like products when consigned to the territories of any other country are or may hereafter be subject.

“ ‘All the advantages, favours, privileges and immunities which have been or may hereafter be granted by either Contracting Party, in regard to the above-mentioned matters, to natural or manufactured products originating in any other country or consigned to the territories of any other country shall be accorded immediately and without compensation to the like products originating from the other Contracting Party or to products consigned to the territories of that Party.

“ ‘Nevertheless, the advantages now accorded or which may hereafter be accorded to other adjacent countries in order to facilitate frontier traffic, and advantages resulting from a Customs union already concluded or hereafter to be concluded by either Contracting Party, shall be excepted from the operation of this article.’ ”<sup>14</sup>

#### *Relations between bilateral agreements based on the most-favoured-nation clause and economic plurilateral conventions*

“During the Diplomatic Conference held at Geneva to draw up an International Convention on the Abolition of Import and Export Prohibitions and Restrictions, the question arose whether States not parties to that Convention could, by virtue of bilateral agreements based on the most-favoured-nation clause, claim the

<sup>14</sup> *Ibid.*, pp. 97-101.

benefit of any advantages mutually conceded by the signatories of the International Convention. In deference to this consideration, it was even proposed to include a clause to that effect in the Convention. It was soon realized, however, that this question could not be answered in the Convention, which could not affect the contents of bilateral agreements based on the most-favoured-nation clause. The Conference realised the great importance of the problem, both for the general economic work of the League and for the conclusion of future economic agreements under the League's auspices, and the nature and field of application of such agreements. It was urged at the Conference that the conclusion of plurilateral conventions would be hindered if countries, while not acceding to such agreements, could still, without giving any counter-engagements, avail themselves of the engagements undertaken by the signatory States of such conventions.

"The Economic Committee of the League was asked to make an exhaustive study of the most-favoured-nation clause in commercial treaties and to put forward proposals regulating it in as comprehensive and as uniform a manner as possible, and it has carefully considered the question, which is the subject of the present report. It took the view that the World Economic Conference of Geneva, when it recommended the conclusion of plurilateral economic conventions with the object of improving the world economic situation and the application of the most-favoured-nation clause in the widest and most unconditional form, probably did not quite realise that—up to a point—these two recommendations might clash. One argument—and a very sound one—brought up in the Economic Committee was that in certain cases countries would have little or no interest in acceding to a plurilateral economic convention or in undertaking the commitments it entailed if, by invoking the most-favoured-nation clause, as embodied in bilateral agreements, they could claim as of right and without incurring corresponding obligations, that the obligations contracted by the signatory States of the plurilateral convention should apply to themselves. It was strongly urged, indeed, that such possibility might seriously impair the whole future economic work of the League and that the only means of averting the danger would be to adopt a provision whereby the most-favoured-nation clause embodied in bilateral commercial treaties would not, as a rule, affect plurilateral economic conventions.

"It was objected, however, that a clause of this kind, instead of leading, as the World Economic Conference recommended, to the unlimited application of the most-favoured-nation clause, would actually check it, and that, more especially in countries where the unlimited application of this clause is the basis of commercial relations with foreign countries, such a reservation would probably be misunderstood and might give rise to a hostile attitude towards the League's economic work. It was further argued that a State might quite conceivably, on wholly serious and genuine grounds, be unable to undertake the commitments involved by an international economic convention; that the final decision whether it could do so or not would lie with the State itself; and that it could hardly be asked, as a result of a most-favoured-nation clause drafted *ad hoc* in bilateral commercial treaties, to give up the right in cases of this kind to refuse to accept differential treatment on the part of one or more other States.

"The arguments advanced on both sides are so cogent that the Economic Committee has not found it possible at this moment to find a general and final solution for this difficult problem.

"It is unanimously of opinion, however, that, although this reservation in plurilateral conventions may appear in some cases legitimate, it can only be justified in the case of plurilateral conventions of a general character and aiming at the improvement of economic relations between peoples, and not in the case of conventions concluded by certain countries to attain particular ends the benefits of which those countries would, by such a procedure, be refusing to other States when the latter might,

by invoking most-favoured-nation treatment, derive legitimate advantages.

"The said reservation should also be expressly stipulated and should not deprive a State not a party to the plurilateral convention of advantages it enjoys either under the national laws of the participating State or under a bilateral agreement concluded by the latter with a third State itself not a party to the said plurilateral Convention.

"Finally, this reservation should not be admitted in cases in which the State claiming the advantages arising under the plurilateral convention, though not acceding to it, would be prepared to grant full reciprocity in the matter.

"The Economic Committee expresses the view that countries which, with reference to the terms of plurilateral economic conventions, agreed to embody in their bilateral agreements based on the most-favoured-nation clause a reservation defined in accordance with the principles set forth above would not be acting contrary to the recommendations of the World Economic Conference of Geneva, and consequently will not be acting in a manner inconsistent with the objects which the League has set itself to attain."<sup>15</sup>

Reservations of this kind were indeed embodied in several European treaties in the following years. One example is the following provisions of a commercial treaty concluded between the Economic Union of Belgium and Luxembourg and Switzerland on 26 August 1929:

"It is furthermore understood that the most-favoured-nation clause may not be invoked by the High Contracting Parties in order to obtain new rights or privileges which either of them may hereafter grant under collective conventions to which the other is not a party, provided that the said conventions are concluded under the auspices of the League of Nations or registered by it and open for the accession of the States. Nevertheless, the High Contracting Party concerned may claim the benefit of the rights or privileges in question if such rights or privileges are also stipulated in conventions other than collective conventions which fulfil the afore-mentioned conditions, or if the Party claiming such benefits is prepared to grant reciprocal treatment."<sup>16</sup>

(Cf. also the Pan-American Agreement of 15 July 1934. See para. 105 above).

## ANNEX II

### Resolution of the Institute of International Law, adopted at its fortieth session (Brussels, 1936)<sup>17</sup>

[Original text: French]

#### *The effects of the most-favoured-nation clause in matters of commerce and navigation*

Considering that the meaning and scope of the most-favoured-nation clause in matters of commerce and navigation often give rise to disputes and difficulties of interpretation;

Desiring to contribute to the legal construction and interpretation of this clause in the afore-mentioned matters;

Considering that to that end it is appropriate to formulate the rules of general law which are applicable unless there are provisions to the contrary;

<sup>15</sup> 1933 document, pp. 102-104.

<sup>16</sup> League of Nations, *Treaty Series*, vol. 105, p. 13.

<sup>17</sup> *Annuaire de l'Institut de droit international, session de Bruxelles (avril 1936)*, Paris, Pédone, édit., 1936, vol. II, pp. 289-292.

Reserving for subsequent study the questions relating to the application of the clause in other domains, particularly that of private international law:

The Institute of International Law adopts the following resolutions:

*Paragraph 1*

The most-favoured-nation clause is unconditional, unless there are express provisions to the contrary.

Consequently, in matters of commerce and navigation, the clause confers upon the nationals, goods and ships of the contracting countries, as a matter of right and without compensation, the regime enjoyed by any third country.

*Paragraph 2*

The most-favoured-nation clause confers upon the beneficiary the regime granted by the other contracting party to the nationals, goods and ships of any third country by virtue of its municipal law and its treaty law.

This regime of unconditional equality cannot be affected by the contrary provisions of municipal law or of conventions establishing relations with third States.

*Paragraph 3*

The duration of the effects of the most-favoured-nation clause is limited by that of the conventions with third States which led to the application of that clause.

*Paragraph 4*

By virtue of the most-favoured-nation clause, goods coming from or consigned to the contracting countries enjoy, as a matter of right and without compensation, treatment equal to that of goods coming from or consigned to third countries. The equal treatment applies to Customs duties and related duties, the method of levying them, and the rules, formalities and charges which may be applicable to Customs clearance operations.

*Paragraph 5*

The effects of the most-favoured-nation clause apply to the importation, exportation or transit of goods and to their temporary admission.

They do not apply to the "passive" finishing trade (i.e. the temporary export of goods for finishing abroad, and their subsequent reimportation duty-free after being finished).

*Paragraph 6*

For the purposes of paragraph 4 above, goods coming from contracting countries means goods imported from those countries, irrespective of their place of origin.

*Paragraph 7*

The most-favoured-nation clause does not confer the right:

to the treatment which is or may hereafter be granted by either contracting country to an adjacent third State to facilitate the frontier traffic;

to the treatment resulting from a Customs union which has been or may hereafter be concluded;

to the treatment resulting from the provisions of conventions open for signature by all States, whose purpose is to facilitate and stimulate international trade and economic relations by a systematic reduction of Customs duties;

to the treatment resulting from mutual and exclusive agreements between States, implying the organization of regional or continental economic regimes; or

to the regime resulting from an economic agreement among the members of a political community.

*Paragraph 8*

In the absence of a treaty provision to the contrary, the most-favoured-nation clause precludes the application of all so-called "anti-dumping" rights to the disadvantage of a country enjoying the benefits of most-favoured-nation treatment.

*Paragraph 9*

The most-favoured-nation regime must be applied in good faith and precludes recourse to all measures tending to create *de facto* discrimination against the contracting parties, contrary to the spirit of that regime.

*Paragraph 10*

All disputes concerning the interpretation and application of the most-favoured-nation clause should be resolved through the courts or by arbitration.

### ANNEX III

#### Selected bibliography on the most-favoured-nation clause

*Note:* The Codification Division of the Office of Legal Affairs of the United Nations Secretariat prepared for the convenience of the United Nations Conference on the Law of Treaties a "Selected Bibliography on the Law of Treaties", contained in document A/CONF.39/4 of 1 February 1968.

This bibliography contains in chapter I a list of treaties on international law and in chapter II, section I, a list of works relating to the law of treaties in general. It contains, however, no reference to works relating specifically to the most-favoured-nation clause, as has been pointed out in the explanatory note to the document.

The aim of the present bibliography, which is not intended to be exhaustive, is to complement the bibliography prepared by the Codification Division in respect of books and articles relating to the clause. To avoid duplication it contains no list of general works in regard to which the reader is referred to the above-mentioned document.

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## CO-OPERATION WITH OTHER BODIES

[Agenda item 5]

### DOCUMENT A/CN.4/212

**Report on the tenth session of the Asian-African Legal Consultative Committee,  
by Mr. Abdul Hakim Tabibi, Observer for the Commission**

[Original text: English]

[9 June 1969]

In accordance with the decision taken by the International Law Commission at its twentieth session,<sup>1</sup> I was asked by the Chairman of the Commission, Ambassador José María Ruda, to attend as an Observer for the Commission the Karachi meeting of the Asian-African Legal Consultative Committee during the last part of January 1969.

The Asian-African Legal Consultative Committee met for its tenth regular session at Karachi, Pakistan, from 21 to 30 January 1969. A special feature of the session was its utilization as a forum for consultation among Asian and African States on the law of treaties, in preparation for the second session of the United Nations Conference on the Law of Treaties. Two other subjects were considered at the session of the Committee: first, the rights of refugees and, secondly, the law of international rivers.

Eleven member States of the Committee were represented by high-level delegations. These were Ceylon, Ghana, India, Indonesia, Iraq, Japan, Jordan, Pakistan, Sierra Leone, Thailand and the United Arab Republic. Burma was the only member State not represented.

Thirteen non-member Asian and African States were represented by observers. These were Afghanistan,

Cambodia, Cyprus, the Democratic Republic of the Congo, Iran, Kenya, Mongolia, Morocco, Nigeria, Philippines, Republic of Korea, Singapore and Turkey. These observers were given full right of participation in the consideration of the law of treaties, on the same basis as representatives of member States.

In addition, the Office of the United Nations High Commissioner for Refugees was represented by two officials, who assisted in the deliberations of the Committee on the subject of refugees. Representatives of the American Society of International Law, the Federal Republic of Germany's Section of the International Law Association and the International Law Association of the Union of Soviet Socialist Republics also attended as observers.

The full list of delegates and observers who attended the session is annexed to this report (annex I).

The proceedings were conducted in English, which is the working language of the Committee, but facilities for simultaneous interpretation were provided for French-speaking observers.

Mr. Sharifuddin Pirzada, Attorney General of Pakistan, was elected President of the session and Mr. Shukri Al Muhtadi of Jordan was elected Vice-President.

The session was inaugurated by the Minister for Law and Parliamentary Affairs, Government of Pakistan, in his capacity as the personal representative of the Pre-

<sup>1</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, p. 225, para. 109.

sident of Pakistan. At the inaugural meeting the heads of delegation of the member States of the Committee made general statements. The only observer invited to address the inaugural session was the representative of the International Law Commission. The text of the statement which I made is annexed to this report (annex II).

I was also invited to attend the private meeting of the heads of delegation. It was at this private meeting that I was asked to explain my personal views about the steps to be taken by the Asian-African Legal Consultative Committee regarding the second session of the United Nations Conference on the Law of Treaties. I am happy to say that the suggestions which I made at that meeting were received with favour and materialized later on at Vienna in article 62 *bis* as a famous compromise formula.

#### *Law of treaties*

The Committee began the discussion on the subject of the law of treaties at its very first business meeting held on 21 January 1969. The Committee had been considering this subject since its seventh session held at Baghdad in 1965, as a matter arising out of the work done by the International Law Commission, in conformity with the provisions of article 3 (*a*) of the Committee's Statutes. This provision makes it obligatory for the Committee to consider the reports of the Commission and make its recommendations thereon to its member Governments. The special importance given to this subject at the Karachi session was a consequence of requests made by certain Asian and African Governments for an opportunity to discuss important issues in preparation for the second session of the United Nations Conference on the Law of Treaties. After two plenary meetings were devoted to a general consideration of the subject, two sub-committees were constituted for a detailed discussion of certain important articles, namely, articles 2, 5 *bis*, 12 *bis*, 16, 17, 62 *bis*, 69 *bis*, and 76. The reports made by the sub-committees were adopted by the Committee at its tenth plenary meeting held on 30 January 1969. Copies of the reports are annexed (annex III).

#### *Rights of refugees*

The subject of refugees was brought up before the Committee at the request of the Government of Pakistan for reconsideration of the report of the Committee on the subject, adopted at its eighth session held in Bangkok in 1966. The delegation of Jordan also brought forward certain special problems of a legal nature concerning the

Palestinian refugees. The questions which the Committee considered at this session were (*a*) the question of extension of the definition of refugees as contained in the Bangkok principles adopted by the Committee; (*b*) the question of repatriation or return of refugees; (*c*) the question of payment of compensation to refugees and constitution of compensation tribunals; (*d*) the standard of treatment of refugees; (*e*) travel documents and visas, and (*f*) territorial asylum. The Committee was not in a position to finalize its recommendations on the questions discussed, and decided to continue its discussions on the subject at its next session. The Committee, however, adopted a special resolution on the subject of Palestinian refugees. A copy of the resolution is annexed (annex IV).

#### *Law of international rivers*

The third subject on the agenda of the session was the law relating to international rivers. This subject came before the Committee at the request of the Governments of Iraq and Pakistan. The Committee could not devote sufficient time to this subject. After some general discussion in the plenary meeting it was decided that an inter-sessional sub-committee should be constituted for the detailed consideration of this subject. A copy of the resolution is annexed (annex IV).

#### *Other decisions*

The Committee decided to hold its eleventh session at Accra (Ghana) in the early part of 1970, and to invite the International Law Commission to send an observer to that session.

The Committee also decided to nominate its President, Mr. Sharifuddin Pirzada, to attend the twenty-first session of the Commission in the capacity of an observer.

The Committee also unanimously adopted a resolution thanking the Commission for sending its observer to the Karachi meeting.

#### *Expression of thanks*

In conclusion, I take particular pleasure in expressing my warmest thanks to the secretariat of the Asian-African Legal Consultative Committee and particularly to its able Secretary, Mr. B. Sen, and for the warm reception and kindness of the officials of the Government of Pakistan and the warm welcome accorded to me by the President of the Committee, Mr. Pirzada, the Attorney General of Pakistan.

## ANNEXES

## ANNEX I

## List of delegates and observers at the tenth session of the Asian-African Legal Consultative Committee

[not reproduced] \*

## ANNEX II

## Statement by Mr. Abdul Hakim Tabibi, Observer for the International Law Commission, at the Tenth Session of the Asian-African Legal Consultative Committee

It is a source of great pleasure, indeed, to speak here on behalf of the International Law Commission which rightly attaches great importance to its relations with your Committee, an institution of brotherhood in legal understanding between the great Asian and African countries.

I feel particularly happy to participate here, in this beautiful city of Karachi, at a time when your Committee is completing and observing its first decade of fruitful endeavours, representing as I do the International Law Commission which is itself marking its twentieth anniversary.

As an Asian jurist interested in the progress of international law, I have followed with close attention the work of your Committee. Its impact on the progressive development of international law and its codification in various organs of the United Nations has been felt. I have every hope that the close contacts and co-operation which exist happily between this Committee and the Commission will serve for the further progress of international law, in order to govern, in a more positive manner, the behaviour of nations.

Before introducing the report of the International Law Commission on the work of its twentieth session,<sup>a</sup> I should like to say a few words about the achievements of the Commission as stated before the twenty-third session of the General Assembly by Mr. Ruda, our Chairman this year. Among the various achievements of the Commission, we can cite only those works which are now universally accepted or are near universal acceptance, such as the four Conventions on the Law of the Sea, the Convention on the Reduction of Statelessness, the Model Rules on Arbitral Procedure, the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, the draft Convention on the Law of Treaties; and, finally, the draft Convention on Special Missions. In addition to these works, on the basis of decisions of the General Assembly, other important topics were also dealt with by the Commission such as the draft Declaration on Rights and Duties of States; ways and means for making the evidence of customary international law more readily available; principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal; international criminal jurisdiction; reservations to the Convention on the Prevention and Punishment of the Crime of Genocide; the question of defining aggression; and finally the draft Code of Offences against the Peace and Security of Mankind. This is a clear balance-sheet in favour of the Commission, in whose work in the last twenty years sixty-four elected jurists from forty-three countries have participated.

It was with this background that the International Law Commission met in Geneva from 27 May to 2 August 1968 and discussed various topics of which the following were the most important: succession of States and Governments in respect of treaties and also

in respect of matters other than treaties; relations between States and international organizations; the most-favoured-nation clause and, finally, the review of the Commission's programme and methods of work.

As regards the topic of succession of States and Governments, which has already been on the agenda of the Commission for some years, both the Special Rapporteurs, namely Sir Humphrey Waldock and Mr. M. Bedjaoui, have submitted their first reports. On the report of Mr. Bedjaoui, entitled "First report on succession of states in respect of rights and duties resulting from sources other than treaties"<sup>b</sup> because of the breadth and complexity of the question, the Commission favoured the idea of giving priority to one or two aspects for immediate study. After careful consideration the Commission decided to ask the Special Rapporteur to prepare a report on the topic "Succession of States in economic and financial matters" for the next session.<sup>c</sup>

On the report of Sir Humphrey Waldock, entitled "First report on succession of States and Governments in respect of treaties",<sup>d</sup> the Commission noted the view of the Special Rapporteur, that he was casting his work in the form of draft articles on the model of a Convention "in order to provide the Commission with specific texts on which to focus the discussion and in order to clarify the issues",<sup>e</sup> but the Rapporteur stressed that he had not intended in any way to anticipate the ultimate decision of the Commission on this point. Finally, the Commission deemed it desirable to continue in 1969 its study on succession in respect of treaties.<sup>f</sup> With regard to the topic entrusted to Mr. Bedjaoui, the Commission will give priority to its consideration in 1970. The Commission also made a great deal of progress on the topic of relations between States and inter-governmental organisations, on which the Special Rapporteur, Mr. Abdullah El-Erian, presented his third report entitled "Third report on relations between States and inter-governmental organisations",<sup>g</sup> containing a full set of draft articles, with commentaries. On 31 July 1968, the Commission adopted a provisional draft of twenty-one articles.<sup>h</sup> The Commission decided to transmit the provisional draft of these articles through the Secretary-General to Governments for their observations.

The Special Rapporteur, Mr. Endre Ustor, submitted a working paper giving an account of the work undertaken by him on the topic of the most-favoured-nation clause entitled "The most-favoured-nation clause in the law of treaties".<sup>i</sup> The Commission, after considering this working paper and a questionnaire, and recognising the fundamental importance of the role of the most-favoured-nation clause in the domain of international trade, instructed the Special Rapporteur to explore the major fields of application of the clause.<sup>j</sup>

As regards the review of the Commission's programme and methods of work, the Commission, on the basis of twenty years of experience and a study prepared by the Secretariat, made a careful review of the question. This question has been described fully in chapter V of the report of the Commission presented to the General Assembly this year.<sup>k</sup> Your study of this issue and your views on the Commission's future work will be greatly appreciated.

<sup>b</sup> *Ibid.*, document A/CN.4/204, p. 94.

<sup>c</sup> *Ibid.*, document A/7209/Rev.1, p. 221, para. 79.

<sup>d</sup> *Ibid.*, document A/CN.4/202, p. 87.

<sup>e</sup> *Ibid.*, document A/7209/Rev.1, p. 221, para. 84.

<sup>f</sup> *Ibid.*, document A/7209/Rev.1, p. 224, paras. 103 and 104.

<sup>g</sup> *Ibid.*, document A/CN.4/203 and Add.1-5, p. 119.

<sup>h</sup> *Ibid.*, document A/7209/Rev.1, p. 194, para. 21.

<sup>i</sup> *Ibid.*, document A/CN.4/L.127, p. 165.

<sup>j</sup> *Ibid.*, document A/7209/Rev.1, p. 223, para. 93.

<sup>k</sup> *Ibid.*, p. 223.

\* For the list, see the mimeographed version of the present document, annex A.

<sup>a</sup> *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, p. 191.

Finally, I wish to mention that this year [1969] is the most important year for all of us, because the second session of the Vienna Conference will adopt the Convention on the Law of Treaties. The adoption of this historical document will be another legal milestone, which will solve international discord and enhance friendship between nations.

I hope that the participants in the Asian-African Legal Consultative Committee will do their utmost to make the second session of the Vienna Conference a success, because it is in the interest of us all.

### ANNEX III

#### 1. Report of the First Sub-Committee on the Law of Treaties

##### PART I

1. The First Sub-Committee on the Law of Treaties at its first meeting considered the question of the admission of observers to its meetings and agreed to allow the observers from the Asian-African countries attending the tenth session to participate fully in its deliberations.

2. At its first, second, third and fourth meetings the Sub-Committee considered the question of article 62 *bis*, proposed by thirteen Powers at the first session of the United Nations Conference on the Law of Treaties<sup>a</sup> for inclusion in the Convention after article 62.

3. The Sub-Committee first took up the question whether it was sufficient to have just article 62, or whether it was necessary to go beyond the said article. Opinion was evenly divided between those who regarded article 62 as sufficient and those who were prepared or considered it necessary to go beyond it.

4. The Sub-Committee then considered the possibility that circumstances at the second session of the Vienna Conference might make it necessary to go beyond article 62, and what the position of the States should be if circumstances so required. It was the unanimous opinion of the Sub-Committee that under such circumstances all States should be prepared to go beyond article 62.

5. Thereupon, the Sub-Committee considered the question to what extent, and in what form, a provision beyond article 62 would be acceptable:

(a) A majority of the delegates and observers were of the opinion that a machinery for settlement of disputes arising under part V of the Convention on the Law of Treaties should be provided in an optional protocol.

(b) Some delegates and observers took the view that there should be an obligation to choose at least one compulsory method of settlement.

(c) Some delegates and observers were of the view that a formula could be sought along the lines of the proposed article 62 *bis*, with the possibility of entering reservations, opting out or contracting out.

(d) A few others found article 62 *bis* acceptable as it was, and

(e) A few expressed the view that the jurisdiction of the International Court of Justice should also be included.

6. Various proposals and views were then put forward and discussed in the Sub-Committee in order to bring together the different viewpoints. The proposals that were submitted are annexed hereto and may be summed up as follows:

(a) There should be an optional protocol providing for compulsory settlement of disputes (conciliation, arbitration and adjudication by the International Court of Justice), together with an

optional or a reservation clause enabling the parties to the Convention to specify, or to exclude, any particular compulsory mode of settlement.

(b) An article should be included in the Convention imposing an obligation on the parties to settle any disputes arising from the application of part V of the Convention on the Law of Treaties by choosing any one method of compulsory third-party settlement, namely, conciliation, arbitration or adjudication, to cover those cases where the parties had been unable to agree, as provided in article 62, upon any means of reaching a solution. The choice should be specified in the relevant treaty.

(c) Article 62 *bis* should be included in the Convention on the Law of Treaties subject to the following provisions:

(i) Parties may *opt out* of its provisions, in full or in part, by making a declaration at the time of signing, ratifying or acceding to the Convention on the Law of Treaties to that effect, or at the time of concluding a treaty.

(ii) Parties may *contract out* of its provisions, in whole or in part, with respect to a particular treaty. (The parties would thus be bound by article 62 *bis* if they were not able to agree to any modification thereof.)

All the aforesaid formulae referred to future treaties only and sought to exclude existing treaties.

7. The Sub-Committee then agreed that these formulae should be submitted to the Governments of member States to be considered by them in their efforts to find a compromise formula on the matter at the coming second session of the Vienna Conference.

##### *New Article 76<sup>b</sup>*

8. At its fifth meeting the Sub-Committee took up the question of the proposed new article 76 dealing with the settlement of disputes relating to interpretation and application of the provisions of the Convention. With a few exceptions, it was the opinion of the Sub-Committee that the proposed article, in its present form, was unacceptable.

9. Some delegates and observers were in favour of distinguishing between disputes, covered by part V, and those relating to interpretation and application of other provisions of the Convention. Others were of the view that both categories of disputes could be settled in an identical manner.

10. A large majority was of the opinion that machinery for settlement of disputes relating to the interpretation and application of the provisions of the Convention other than those arising from part V, should be provided in an optional protocol providing for a single machinery or one consisting of two parts providing for different machinery depending upon whether or not a distinction was to be made between disputes covered by part V and those relating to interpretation and application of other provisions of the Convention. Some delegates and observers also referred to the need to exclude adjudication by the International Court of Justice from such a protocol, or to include in it a reservation clause or an opting out clause.

11. A few delegates and observers emphasised the necessity for compulsory settlement of disputes relating to interpretation and application and considered inclusion of compulsory adjudication by the International Court of Justice necessary.

12. Three delegates reserved their respective Government's position on the proposed article 76.

13. All the delegates and observers, however, recognized the interdependence of solutions in regard to articles 62 *bis* and 76, and the influence of either of them upon the other.

<sup>a</sup> *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference*, document A/CONF.39/14, para. 583 (b).

<sup>b</sup> *Ibid.*, paras. 690-692.

## PART II

*Article 5 bis<sup>c</sup>*

14. The Sub-Committee discussed the proposed article 5 bis at its sixth and seventh meetings.

15. Virtually all delegates and observers supported the principle of universality. A majority of the delegates and observers supported the inclusion of the principle only of present article 5 bis, while some could accept article 5 bis as at present drafted. Some delegates and observers were not in favour of article 5 bis or a variant thereof, on the ground that it would create practical difficulties.

16. A large majority of delegates and observers were willing to accept the term "general multilateral treaty". Some of these delegates and observers would like to see a clearer definition of the term, while some others made it a condition of acceptance that a clearer definition be arrived at.

17. A majority of the delegates and observers, while recognising the existence of restricted multilateral treaties had reservations regarding the inclusion of a provision in the Convention on the subject. Some delegates and observers were opposed to the definition of this term on the ground that it was redundant.

18. The views referred to above may be summed up as follows:

- (a) The Convention should include a provision in regard to universal participation in general multilateral treaties, with or without definition of a general multilateral treaty.
- (b) The Convention should include such a provision, without a definition of a "restricted multilateral treaty".
- (c) The Convention should include such a provision together with a definition of "general multilateral treaty". A few of the delegates and observers in this category found the definition proposed by eight Powers at the first session of the Vienna Conference<sup>d</sup> to be acceptable, while others preferred to have a clearer definition.
- (d) There should be only a clearer definition of "restricted multilateral treaty". One observer reserved the position of his Government in the matter of definition of "restricted multilateral treaty".
- (e) The Conference should adopt a declaration on the principle of universality and in each specific treaty, a solution could be provided in the relevant final clauses, depending on the intention of the parties.
- (f) The Convention should neither include a provision in regard to universal participation in general multilateral treaties, nor a provision regarding restricted multilateral treaties.

19. Without prejudice to their respective positions on article 5 bis, all delegates and observers reached the consensus that no definitions of "general multilateral treaty" and "restricted multilateral treaty" should be included in article 2 of the Convention.

## PART III

*Final clauses including the question of applicability of the Convention*

20. The Sub-Committee first discussed the question whether it should be open to all States to become parties to the Convention on the Law of Treaties, which was a question apart from that of including in the Convention a provision on the lines of present article 5 bis.

21. With a few exceptions all delegates and observers were in favour of including a provision in the final clauses whereby it would be open to all States to become parties to the Convention on the Law

of Treaties. In this context, two suggestions were made for avoiding any practical difficulties that might arise from the inclusion of such a provision. One suggestion was to have a system of multiple depositaries. The other was that, while providing for only one depositary—the United Nations Secretary-General—the Convention should also include a declaration or proviso to the effect that recognition of one State by another would not be implied solely from the fact that both were parties to the Convention. Most of the delegates who supported the inclusion of an all-States formula in the Convention had an open mind on the two suggestions, with several delegates tending to favour the multiple depositaries system. Some delegates expressed the view that a provision regarding non-recognition (contained in the second suggestion) was superfluous since under the existing international law, recognition could not be implied from common participation in a multilateral treaty of this character.

22. One delegation supported a multiple depositaries system linked with a non-recognition provision. Two delegations formally reserved their positions. Another delegation indicated that it had had no time to consider the question and thus could not express its view at the present time.

23. One delegation favoured the incorporation of the "Vienna formula" in the Convention (i.e. leaving the Convention open only to States Members of the United Nations, members of the specialized agencies and the International Atomic Energy Authority, States parties to the Statute of the International Court of Justice and those States invited by the United Nations General Assembly to become parties thereto).

24. The question whether all the provisions of the Convention would be prospective in application was raised. Without prejudice to the application of other provisions of the Convention it was the general opinion that articles 62 bis and 76, if adopted, would be prospective in application.

25. The number of ratifications required for the entry into force of the Convention was also discussed briefly and there was general agreement that in that regard the customary practice with regard to multilateral conventions concluded under the auspices of the United Nations should be followed.

*Proposals submitted to the First Sub-Committee on the question of article 62 and the proposed article 62 bis*

1. There should be an optional protocol on the question of settlement of disputes under part V of the Convention drawn up along the lines of the proposed article 62 bis as set out in the thirteen-Power proposal,<sup>e</sup> and also providing for compulsory adjudication by the International Court of Justice. The said optional protocol should provide for an option enabling the States to specify any of the three modes of settlement (compulsory conciliation, compulsory arbitration and compulsory adjudication) at the time of signing the protocol.

2. There should be an optional protocol on the question of settlement of disputes under part V of the Convention. The contents of the protocol should be exactly along the lines of article 62 bis as proposed by the thirteen Powers.

3. 62 bis as contained in the thirteen-Power amendment, together with the following proviso:

"Provided that in any treaty any contracting party may expressly indicate its unwillingness to be bound by article 62 bis or any part thereof, or with the agreement of the other party or parties, agree on any of the methods specified therein for compulsory settlement of disputes."

<sup>c</sup> *Ibid.*, paras. 67-69.

<sup>d</sup> *Ibid.*, para. 35 (ii) (b).

<sup>e</sup> *Ibid.*, para. 583 (b).

4. Article 62 *bis* should be included in the Convention on the Law of Treaties subject, if necessary, to the following provisions:

- (a) Parties may *opt out* of its provisions, in full or in part, by making a declaration at the time of signing, ratifying or acceding to the Convention on the Law of Treaties to that effect.
- (b) Parties may *contract out* of its provisions, in full or in part, while concluding a treaty. (This would imply that parties will be bound by article 62 *bis* if they are not able to agree to any modification thereof.)

5. An article providing for compulsory conciliation should be included in the Convention. In addition, there should be an optional protocol providing for compulsory arbitration and adjudication.

6. (a) (i) If the parties have been unable to agree, as provided in article 62, upon any means of reaching a solution to their dispute within four months following the date on which the objection was raised, they shall solve the dispute by any one of the following methods: conciliation, arbitration and adjudication by the International Court of Justice.

(ii) The parties shall choose one of the above methods by mutual consent. This method shall be specified by the parties in their treaty at the time of concluding such treaty, though they may have recourse to any of the remaining two methods at any time subsequently if the parties so wish.

(iii) The parties or any of them may then request the Secretary-General of the United Nations to set in motion the relevant procedure specified in the thirteen-Power proposal on article 62 *bis*.

(b) If no choice is specified in the treaty, the parties shall be bound to settle their dispute by reference to compulsory conciliation. By agreement, however, they may refer their dispute to compulsory arbitration or adjudication. Alternatively, on failure of a choice by the parties the provisions of the annex <sup>f</sup> to the proposed article 62 *bis* shall apply.

The procedure regarding compulsory conciliation or arbitration shall be on the lines of the annex to article 62 *bis* or any acceptable variant thereof. In the case of compulsory adjudication the dispute shall be referred to the International Court of Justice on the application of any of the parties within *four* months of the date on which objection was raised.

7. Paragraph 6 to be added to article 62 *bis* as proposed in the thirteen-Power proposal:

Notwithstanding the provisions of previous paragraphs where in any treaty, it is expressly provided that any dispute arising therefrom shall be settled by any one of the means of compulsory settlement specified in this article, the contracting parties shall settle their disputes in the manner so specified in the treaty.

8. The Convention on the Law of Treaties should include an article along the lines of the thirteen-Power draft of article 62 *bis* providing for the automatic conciliation and arbitration of disputes arising under part V of the Convention, and for the payment by the United Nations of the expenses of conciliation commissions and arbitral tribunals.

The aforesaid article could, in addition, contain two other provisions:

- (a) The settlement mechanism would apply only to treaties that enter into force after the entry into force of the Convention on the Law of Treaties, subject, however to the right of parties to a treaty concluded prior to the entry into force of the Convention, to apply the mechanism to disputes in relation to that treaty, by unanimous agreement. [*May be omitted if the principle is covered in a more general provision of the Convention.*]

<sup>1</sup> *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference, document A/CONF. 39/14, para. 583 (b).*

(b) The parties to any treaty may by unanimous agreement decide:

- (i) to exclude from operation of the settlement mechanism, all or any specified disputes arising out of a particular treaty, and to subject them to some other specified mode of settlement; and
- (ii) to vary, in relation to that particular treaty, the mode of constitution of the commission or tribunal provided for under the article.

## 2. Report of the Second Sub-Committee on the Law of Treaties

The Second Sub-Committee on the Law of Treaties was set up by the Committee at its second plenary meeting to consider the question of the law on treaties. It consisted of the delegates of Ceylon, Ghana, India, Indonesia, Japan, Pakistan and the United Arab Republic. The delegate of the United Arab Republic acted as its Chairman. The Second Sub-Committee's terms of reference comprised consideration of articles 2, 12 *bis*, 16, 17, 69 *bis* and the question of a provision for contracting out of the Convention. It held four meetings and arrived at the following conclusions:

### I. Article 2 <sup>g</sup>

The Sub-Committee had extensive discussions on article 2. The principal points of agreement which emerged may be stated as follows:

(a) The definition of the term "Treaty" in sub-paragraph (a) of paragraph 1 of article 2, as drafted by the International Law Commission should be maintained. The amendment tabled by Ecuador <sup>h</sup> seems unnecessary because the conditions of validity are fully covered by other articles of a substantive nature providing that the Treaty must be "freely consented to", "concluded in good faith", and that its object is "licit". While agreeing that the amendment by Ecuador was unnecessary, the delegates of Japan and the United Arab Republic stressed that they did not favour the introduction into a definition of the term "Treaty" of substantive elements which were to be covered in part V of the draft Convention. The delegate of Pakistan, while agreeing that the amendment in question was unnecessary, emphasised the importance of the amendment in case articles 49 and 50 of the draft Convention were not finally adopted. In his opinion, the inclusion of the words "freely consented to", "concluded in good faith" and "licit object" were essential elements for the existence of a valid treaty in accordance with the general principles of law. As regards the amendment by Malaysia and Mexico, <sup>i</sup> the delegate of the United Arab Republic pointed out that his delegation was in favour of the amendment because in his opinion it would be more precise to define the term "Treaty" as an international agreement "which establishes a legal relationship between the parties" in order to exclude explicitly the category of "gentleman's agreement" which was not binding legally even though concluded between States. But the majority of the members of the Second Sub-Committee considered that the Malaysian and Mexican amendment added nothing new to the text, and that consequently there was no need to include in the text an explicit reference to the intention of creating a legal relationship.

(b) The definition of the term "general multilateral treaty" in a new sub-paragraph to be inserted between sub-paragraphs (a) and (b) of paragraph 1 of article 2 was proposed at Vienna by an amendment <sup>j</sup> moved jointly by eight States including three Asian and African States (Democratic Republic of the

<sup>g</sup> *Ibid.*, para. 33.

<sup>h</sup> *Ibid.*, para. 35 (i) (c).

<sup>i</sup> *Ibid.*, para. 35 (i) (e).

<sup>j</sup> *Ibid.*, para. 35 (ii) (b).

Congo, United Arab Republic and the United Republic of Tanzania). In the view of the sponsors of the amendment, the inclusion of a definition of the term "general multilateral treaty" was necessary in order to take into account the increasingly important role played by those treaties which were constantly increasing in number and importance and related to matters of concern to the whole community of States.

Most of the delegates emphasized that they were not yet convinced whether any useful purpose would be served by including in the draft Convention a definition of the term "general multilateral treaty". First of all, such a definition might raise the question of distinguishing it from a "restricted multilateral treaty" which might not be so easy to do. Secondly, if the purpose was to emphasize that the conclusion of certain treaties might be open to all States, that was an independent subject and could be taken care of by adopting article 5 *bis*. The Indonesian delegate expressed the view that his delegation had no objection to the definition of the term "general multilateral treaty". The majority of members of the Second Sub-Committee took the view that although there was no doubt about the existence of such treaties relative to the world public order, it would be preferable not to include in article 2 a definition of the term "general multilateral treaty". Even if the principle of universality embodied in article 5 *bis* was adopted, it did not necessarily imply that the category of treaties to which it referred must be previously defined in article 2. Such a definition could hardly be formulated precisely in the draft Convention, as there was no accepted criterion to distinguish between the three categories of treaties, viz., general multilateral treaties, multilateral treaties, and restricted multilateral treaties. The concept of "restricted multilateral treaty" had been introduced by the French delegation at Vienna,<sup>k</sup> as a particular concept in contradistinction to the concept of "general multilateral treaty". The distinction was mainly of a doctrinal nature, and it would be more appropriate to improve the drafting of article 5 *bis* (if the First Sub-Committee agreed that it should be adopted) without defining in article 2 the category of treaties in which all States had the right to participate. (This question should be considered along with the report of the First Sub-Committee on article 5 *bis*.)

- (c) The definition of the term "restricted multilateral treaty" to be inserted in a new sub-paragraph between sub-paragraphs (d) and (e) of paragraph 1 of article 2 was proposed at Vienna by the delegate of France and was supported by some Asian and African States e.g. Syria, Kenya, Central African Republic and Mali. During the discussion on this question in the Second Sub-Committee the delegates noted that the proposed French amendment to article 2 and to other subsequent articles, tended to generalize a concept which had been implicitly adopted by the International Law Commission in paragraph 2 of article 17.<sup>1</sup> This paragraph stipulates: "When it appears from the limited number of the negotiating States and the object and purpose of the treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties." The derogation from the general rule as formulated in article 17 was justified on the ground that the treaties in question constituted a particular category which by their very nature were restricted to a limited number of States and regulated matters of special interest to those States only. The importance of this category of treaties in the emerging new patterns of regional co-operation and integration was self-evident, and the French amendment could be

regarded from that point of view as useful in adapting international law to the realities of the changing world community. However, the French delegate at Vienna went too far in his attempt to create within the general frame of the draft Convention a special legal régime applicable only to the so-called new category of "restricted multilateral treaties". Consequently, the French delegate wanted to exclude systematically the general rules laid down in articles 8, 12, 26, 36, 37, 55 and 66. The implications of the French conception were not clear beyond doubt and it would detract from the uniformity of the draft Convention. The necessary flexibility could be achieved by introducing in those articles a phrase "unless the treaty otherwise provides". In view of the foregoing reasons, the Second Sub-Committee unanimously concluded that it would be unwise to introduce in article 2 a new sub-paragraph defining the term "restricted multilateral treaty". The adoption of article 17, paragraph 2, did not necessarily require the insertion of a generalized definition, which might create further difficulties.

- (d) The definition of the term "reservation" in sub-paragraph (d) of paragraph 1 of article 2 might be maintained as drafted by the International Law Commission.<sup>m</sup> The amendment moved by Hungary at Vienna<sup>n</sup> was unacceptable, as it was intended to include under the concept of "reservation" a totally different category of legal acts which were mere "declarations". The delegate of the United Arab Republic pointed out that declarations did not exclude or vary the legal effect of certain provisions of a treaty and that interpretative statements clarifying a State's position could not be considered as "reservations" within the meaning of the original text. The other delegates raised no objection to the Hungarian amendment.

## II. Article 12 bis

After a careful study of the new article 12 *bis* proposed by Belgium<sup>o</sup> the purpose of which was similar to the new article 9 *bis* proposed by Poland and the United States of America in a joint amendment,<sup>p</sup> namely, to take into account methods other than those specified in articles 10, 11 and 12 by which States expressed their consent to be bound, the Sub-Committee was unanimously of the view that the article as adopted by the Committee of the Whole at the first session of the Vienna Conference, should be adopted without any change. The said article reads as follows:

"The consent of a State to be bound by a treaty may be expressed by a signature, exchange of instruments constituting a treaty, ratification, approval, acceptance or accession, or by any other means if so agreed."<sup>q</sup>

## III. Articles 16 and 17

Considering the important and complex questions raised by articles 16 and 17 and keeping in view the necessity of maintaining a balance between the principle of integrity of treaties and the principle of freedom of States to make reservations, the Sub-Committee agreed as follows:

- (a) Article 16, as unanimously approved by the Committee of the Whole at Vienna,<sup>r</sup> was acceptable. The Second Sub-Committee considered the amendment submitted by Japan, Philippines and the Republic of Korea<sup>s</sup> proposing a collegiate

<sup>m</sup> *Ibid.*, p. 118.

<sup>n</sup> *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference*, document A/CONF.39/14, para. 35 (vi) (e).

<sup>o</sup> *Ibid.*, para. 104 (b).

<sup>p</sup> *Ibid.*, para. 104 (a).

<sup>q</sup> *Ibid.*, para. 108.

<sup>r</sup> *Ibid.*, para. 188.

<sup>s</sup> *Ibid.*, para. 177 (i) (a).

<sup>k</sup> *Ibid.*, para. 35 (vii).

<sup>1</sup> *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, p. 179.

system for determining the compatibility of a reservation with the object and purpose of a treaty, as containing a useful innovation in the law of treaties. The majority supported this amendment in principle. The delegate of India was, however, not clear as to how it would function in view of the provisions of article 17 (4) (a).

- (b) With regard to article 17, the Second Sub-Committee supported the deletion of the words "or impliedly" from paragraph 1 as they introduced a subjective element and could give rise to uncertainties.
- (c) The majority of the members opposed the amendment moved at Vienna by Czechoslovakia,<sup>†</sup> seeking to replace the words "the treaty" where it first occurred, by the words "a general multilateral treaty or other multilateral treaty, with the exception of cases provided for in paragraphs 2 and 3" on the ground that such formulation would reintroduce the doctrinal and unnecessary distinction between "general multilateral treaties" and "restricted multilateral treaties".
- (d) The Second Sub-Committee was not in favour of the joint amendment tabled at Vienna by France and Tunisia<sup>u</sup> seeking to replace the original text of Article 17, paragraph 2 by another formulation referring explicitly to the concept of "restricted multilateral treaty" which required, as in the case of reservations to a bilateral Treaty, acceptance by all the contracting States. The non-acceptance of the joint French-Tunisian amendment was a logical consequence of the aforementioned attitude of the Sub-Committee regarding the inadvisability of introducing a definition of the term "restricted multilateral treaty" in article 2.
- (e) The majority of the members of the Second Sub-Committee was not in favour of the amendment moved at Vienna by Switzerland<sup>v</sup> and by France and Tunisia<sup>w</sup> to delete paragraph 3 of article 17 dealing with reservations to treaties which were constituent instruments of international organizations. The provisional text of paragraph 3 as suggested by the Drafting Committee and as amended by the Committee of the Whole, was acceptable.
- (f) The majority of the Second Sub-Committee was not in favour of the proposed amendment to paragraph 4 of article 17 submitted by Czechoslovakia,<sup>x</sup> Syria<sup>y</sup> and the Soviet Union<sup>z</sup> and embodying the principle that a treaty enters into force between a reserving State and an objecting State, unless the objecting State expressly declares to the contrary. The original text of paragraph 4 (b) avoided the creation of a complex situation with regard to the application of treaties by assuming that the objection to a reservation precluded, in principle, the entry into force of the treaty between the objecting and reserving States.
- (g) The Second Sub-Committee unanimously approved the amendment submitted by the delegate of the United States of America<sup>aa</sup> at Vienna to insert the words "unless the Treaty otherwise provides" in paragraph 5 of article 17. This Amendment introduces a certain flexibility missing in the International Law Commission's text, as it gave to the negotiating States the power of stipulating in the treaty itself a period shorter or longer than twelve months.

<sup>†</sup> *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference*, document A/CONF.39/14, para. 179 (ii) (a).

<sup>u</sup> *Ibid.*, para. 179 (iii) (a).

<sup>v</sup> *Ibid.*, para. 179 (iv) (b).

<sup>w</sup> *Ibid.*, para. 179 (iv) (c).

<sup>x</sup> *Ibid.*, para. 179 (v) (a).

<sup>y</sup> *Ibid.*, para. 179 (v) (b).

<sup>z</sup> *Ibid.*, para. 175 (a).

<sup>aa</sup> *Ibid.*, para. 179 (vi) (a).

#### IV. Article 69 bis

The delegates of Ghana, India and Indonesia approved the adoption of the proposed new article 69 *bis* stipulating that "the severance or absence of diplomatic or consular relations between two or more States . . ." <sup>bb</sup> According to them, the article confirmed the existing international practice and reaffirmed the principle adopted in article 60 by extending it to cover not only pre-existing treaties but also agreements to be concluded in spite of severance or absence of diplomatic or consular relations.

The delegates of Ceylon, Japan, Pakistan and the United Arab Republic expressed the opinion that there was no need for the inclusion of article 69 *bis* because its substance was irrelevant to the law of treaties. The delegate of the United Arab Republic further expressed the view that the rule stated in article 69 *bis* concerned mainly the questions of diplomatic relations and the legal effect of non-recognition, which could better be left to the State practice.

The observer for Cambodia pointed out that in spite of the fact that his country used to conclude international agreements with non-recognised States or Governments, he would be more favourable to the deletion of article 69 *bis* for the reasons mentioned by the majority of members of the Second Sub-Committee.

#### V. The question of a provision for contracting out of the Convention

After a lengthy discussion in which observers from Cambodia, the American Society of International Law and the Federal Republic of Germany branch of the International Law Association participated, the Second Sub-Committee expressed the following views:

- (a) The Convention on the Law of Treaties was to be considered as a law-making treaty which was intended to govern future treaties to be concluded between the States parties to the Convention.
- (b) It would be desirable to emphasise that treaties concluded between States parties to the Convention might derogate from the rules laid down therein only in so far as such derogation was expressly or implicitly permitted in the respective articles of the Convention.

The delegates of Ghana and Japan emphasized that the word "impliedly" should be interpreted to cover the cases where derogation was permitted in the light of the nature or the object and purpose of the particular provisions of the Convention.

The delegate of India pointed out that the Convention on the Law of Treaties embodied two types of provisions viz., fundamental provisions and provisions of a procedural nature. The question of contracting out in regard to fundamental provisions should normally not arise. Such provisions should be mentioned in a separate article. The provisions might include, for example, article 23 and part V of the draft Convention. The obligations in regard to the fundamental provisions of the Convention could be enlarged by agreement but they could not be restricted, unless the Convention allowed it expressly or impliedly, such as in an article on reservations. The Convention should also contain a review clause providing for review of the Convention after ten years at the request of a specified number of States.

#### ANNEX IV

##### Resolutions adopted by the Asian-African Legal Consultative Committee

##### Resolution No. X (8)

The Committee,

Considering that the Government of the United Arab Republic by a reference made under article 3 (b) of the Statutes, had requested

<sup>bb</sup> *Ibid.*, para. 558.

the Committee to consider certain questions relating to the rights of refugees,

*And considering* that the Government of Pakistan had requested the Committee to reconsider its report on some of the aspects, which request had been supported by the Governments of Iraq, Jordan, and the United Arab Republic,

*Considering further* the recent developments in the field of international refugee law referred to by the delegations of Ghana, Sierra Leone and others . . . and explained in the Note prepared by the Office of the United Nations High Commissioner for Refugees at the request of the secretariat,

*Referring specifically* to the Protocol relating to the Status of Refugees of 31 January 1967 (General Assembly resolution 2198 (XXI) (and to the United Nations Declaration on Territorial Asylum of 14 December 1967 (General Assembly resolution 2312 (XXII)),

*Referring further* to the recommendations made by the Addis Ababa Refugee Conference of October 1967 and the Organization of African Unity draft instrument concerning refugees,

*Considering also* that it was not possible for the Committee, at its tenth session, to give detailed consideration to the above-mentioned instruments and recommendations on account of the limited time at its disposal,

*Takes note with satisfaction* of the entry into force of the above-mentioned Protocol, thus making the provisions of the 1951 Refugee Convention universally applicable;

*Requests* the secretariat to put the item concerning "Rights of Refugees" on the agenda of its eleventh session, including all the proposals made at the tenth session by the delegations of Pakistan and Jordan and, in the meantime, in order to facilitate the work of the Committee, to prepare, in co-operation with the Office of the United Nations High Commissioner for Refugees, a detailed analysis of the above-mentioned instruments and recommendations. The records of the Committee's debate on this item shall also be made available to the Governments.

*Resolution No. X (6)*

*Considering* that the Governments of Iraq and Pakistan, by references made under article 3 (b) of the Statutes, have requested the Committee to consider the law relating to international rivers,

*Recalling* resolution IX (16) in which the Committee decided to consider the subject of international rivers and directed the secretariat to collect relevant material on the issues indicated in the course of statements made by the delegations and to prepare a brief for consideration of the Committee,

*Taking note* of the statements made by the delegations present at the tenth session and the views expressed by the observer for Nigeria.

*Also noting* the work done by the International Law Association and other organizations and bodies, both governmental and non-governmental, concerning the law of international rivers,

*Considering* that the development and codification of the principles governing the law of international rivers are of vital significance to the emerging countries of Asia and Africa, particularly in the context of their food and agricultural development programmes,

*The Committee decides* that a Sub-Committee be formed to give detailed consideration to the aforesaid subject;

*The Committee further decides* that the Sub-Committee consist of the representatives of member Governments and meet at New Delhi, with a quorum of representatives of five member Governments, prior to the holding of the eleventh session of the Committee. The President and the Secretary may attend the meetings of the Sub-Committee. The Sub-Committee may also co-opt any person having expert knowledge of the subject to assist it in its deliberations;

*The Committee directs* the Sub-Committee to prepare a draft of articles on the law of international rivers particularly in the light of the experience of the countries of Asia and Africa and reflecting the high moral and juristic concepts inherent in their own civilizations and legal systems, for consideration at the Committee's eleventh session;

*The Committee further directs* the secretariat to assist the Sub-Committee and collect relevant background data in the light of the discussions in the Committee at its tenth session and requests the Governments of participating States to indicate points on which they desire data to be collected;

*The Committee further requests* the Governments concerned to assist the secretariat in the collection of the material whenever required.

DOCUMENT A/CN.4/215

Report on the 1968 meeting of the Inter-American Juridical Committee,  
by Mr. José María Ruda, Observer for the Commission

[Original text: Spanish]

[24 April 1969]

1. In accordance with the decision taken by the International Law Commission at its twentieth session,<sup>1</sup> I had the honour to attend, as Observer for the Commission, the meeting of the Inter-American Juridical Committee which was held at Rio de Janeiro from mid-June to early September 1968. I attended from 26 to 30 August. The following members participated in the meeting: Mr. Francisco Campos (Brazil), Mr. José Joaquín Caicedo Castilla (Colombia), Mr. Francisco González de la Vega (Mexico), Mr. Jorge Aja Espil (Argentina), Mr. Elbano Provenzali Heredia (Venezuela) and Mr. William S. Barnes (United States of America). Mr. Francisco Campos was elected Chairman of the Committee.

2. The items of substance considered by the Inter-American Juridical Committee at this meeting were:

- (a) Harmonization of the legislation of the Latin American countries on companies, including the problem of international companies (Rapporteur: Mr. J. J. Caicedo Castilla);
- (b) A uniform law for Latin America on commercial documents (Rapporteur: Mr. J. Aja Espil);
- (c) Draft statutes of the Inter-American Juridical Committee (Rapporteurs: Mr. J. Aja Espil and Mr. J. J. Caicedo Castilla);
- (d) Draft report to the first General Assembly of the

Organization of American States (Rapporteurs: Mr. E. Provenzali Heredia and Mr. J. J. Caicedo Castilla);

- (e) International Standstill Agreements (Mr. William S. Barnes).

3. A brief summary of the results of the discussion on each topic follows below.

- (a) *Harmonization of the legislation of the Latin American countries on companies, including the problem of international companies*

4. The Committee unanimously approved an opinion on this topic, in which it reviewed the American and European precedents, particularly since the creation of the European Economic Community, problems related to the nationality of companies and the laws applicable to them, recognition of the juridical personality of foreign companies and the position of "public international" or "multinational" companies.

5. In its conclusions, the Committee resolved again to request the Council of the Organization of American States to call a specialized conference to consider the revision of the Bustamante Code<sup>2</sup> or decide to adopt a code of private international law, at which the provisions concerning companies would be specially examined. It suggested the desirability of adopting new provisions in

<sup>1</sup> *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, p. 225, para. 114.

<sup>2</sup> League of Nations, *Treaty Series*, vol. 86, pp. 254 et seq.

chapter I of the Bustamante Code on Commercial Companies, to the effect that:

- (i) The commercial character of a company is determined by the law of the place where it has its domicile;
- (ii) Commercial companies duly constituted in a contracting State will enjoy the same juridical personality in the other contracting States, subject to the provisions of territorial law. Territorial laws are those referring to banks of issue, those relative to the exploitation of natural resources that are of importance to the country concerned, those that establish for foreign corporations the obligation to be registered and those that impose on them the obligation to maintain a permanent representative, with power of attorney, for judicial disputes and notifications.

6. The Committee further suggests the possibility of replacing articles 18 and 19 of the Code by a new article under which the nationality of civil, commercial or industrial companies, whether corporations or otherwise, shall be determined by their domicile, this to be defined as "the juridical centre of the administration".

7. The opinion elsewhere proposes a draft "Inter-American Convention on Reciprocal Recognition of Companies and Juridical Persons". The preamble refers to the need to facilitate the economic integration of the hemisphere.

8. Articles 1 and 2 recognize the extraterritorial juridical personality of companies under civil or commercial law, organized in one of the contracting States, which engage in activities or do business in the territory of another, and of moral persons under public or private law, other than those mentioned above, engaged in normal activity performed for consideration and in a continuous manner. These provisions shall not apply in the cases mentioned above in connexion with chapter I of the Bustamante Code—i.e., banks of issue, companies engaged in the exploitation of important natural resources, and so on.

9. Under article 4, a contracting State may declare that the Convention shall not apply to the companies or juridical persons mentioned in articles 1 and 2 when their true headquarters are outside the territory of the Parties, if such companies or juridical persons have no serious tie with the economy of any of the contracting States. "True headquarters" means "the legal centre of the administration". Under article 6, the Convention shall not apply if the company or juridical person violates, by its activities, rules of public order of the respective contracting State.

10. Under article 7, "public international" companies are governed by the agreement which has created them or, if such an agreement subsidiarily admits the application of a specified legislation, by the legislation existing at the time the agreement entered into force.

11. The Juridical Committee further resolved to include in the agenda for 1969 the topic "Preparation of a draft uniform law on commercial companies and studies on public international companies" and appointed a Rapporteur.

(b) *Uniform law for Latin America on commercial documents*

12. The opinion approved on this topic recommends that, in the absence of a doctrine regarding the advisability of systematizing under a single law all so-called commercial documents, it is advisable to begin with bills of exchange and cheques. It goes on to say that, as the most feasible solution, a draft convention, or draft conventions, to apply in the exclusively international sphere should be sponsored, and that each State should retain its domestic legislation. Uniformity at the sub-regional level may also be sponsored, following the principles of the relevant Geneva Convention<sup>3</sup> and the Cervantes Ahumada draft. The Committee decided to include the topic "Draft conventions on bills of exchange and cheques of international circulation" in the agenda for 1969.

(c) *Draft statutes of the Inter-American Juridical Committee*

13. The Protocol of Amendment to the charter of the Organization of American States, also called the "Protocol of Buenos Aires", which was signed at the Third Special Inter-American Conference,<sup>4</sup> substantially amended the part of the charter relating to the machinery for considering the legal affairs of the regional organization. The Inter-American Council of Jurists was abolished and the Inter-American Juridical Committee was included among the organs by means of which the Organization of American States accomplishes its purposes. Chapter XVII of the amended charter sets out the basic standards for its functions and procedures.

14. Although the amended charter has not yet entered into force, some members of the Committee felt that it was necessary to consider and prepare the statutes which will apply when the Committee begins to operate under the new system. The document is only a draft and will be presented to the first General Assembly of the Organization of American States in a spirit of co-operation and as a basis for discussion.

15. Following a reaffirmation in the opening articles of the draft of some basic principles of the charter, article 4 declares the Committee competent to deal with the following matters:

1. Rendering advice on juridical matters of international interest submitted to it by the Organization;
2. Undertaking the studies and preparatory work on the topics assigned to it by the Assembly, the Councils and the Meeting of Consultation;
3. Undertaking studies and work in pursuance of its specific purposes;
4. Suggesting the holding of specialized juridical conferences;
5. Establishing co-operative relations with universities, institutes and teaching centres, as well as with national and international committees and entities devoted to study, teaching or dissemination of information on juridical matters of international interest.

<sup>3</sup> *Ibid.*, vol. CXLII, pp. 257 and 356.

<sup>4</sup> Pan American Union, *OEA documentos oficiales (OEA/Ser.A/2 (SEFP) Add., p. 49)*.

16. Draft article 6 confers on the Committee "the broadest possible technical autonomy" and gives its members "complete independence of opinion".

17. The Committee represents the Organization as a whole; therefore, its members shall not represent the States which nominated them.

18. As regards the composition of the Committee, the draft states that it shall be composed, as provided in the charter, of eleven jurists "of high moral character and professional standing". They shall be elected by the Assembly, from panels of three candidates presented by member States, for a period of four years and may be re-elected. Membership shall be replaced partially.

19. According to draft article 15, the meetings of the Committee shall last three months, and may be extended for up to ten additional days when considered necessary. Special meetings may be held. The failure of a member to attend for two consecutive years shall result in the automatic vacation of his office.

20. The permanent seat of the Committee shall be Rio de Janeiro.

21. With regard to procedure, draft article 21 sets the quorum for conducting business at six members and for preparatory sessions at four. For the adoption of recommendations and opinions, the votes of six members are required.

22. The draft provides that the expenditures for the maintenance of the secretariat of the Committee shall be borne by the Organization of American States and that travel expenses and those occasioned by the stay of the members in Rio de Janeiro shall be borne by the Governments of which they are nationals; however, the Organization of American States shall pay members an attendance fee.

23. The general provisions of the draft provide that the Juridical Committee may utilize the services of specialists if it considers it necessary and may invite jurists to take part in its discussions on a given matter.

24. Draft article 34 provides that the Committee shall submit an annual report to the Assembly.

25. The draft statutes of the Inter-American Juridical Committee are reproduced as an annex to this report for the Commission's information.

(d) *Draft report to the first General Assembly*

26. The draft report was not approved, and it was agreed to include the topic in the agenda for the following year.

(e) *International Standstill Agreements*

27. The draft opinion was likewise not approved, and the topic will be discussed again in 1969.

28. I wish to point out that this was the first time that an Observer for the Commission attended a meeting of the Inter-American Juridical Committee and that this action was greatly appreciated by the members, who were most co-operative and understanding throughout. On behalf of the International Law Commission, I gave a detailed account of the Commission's current work and of its work plans for the immediate future.

29. The Inter-American Juridical Committee adopted as part of the Final Act a resolution in which it expressed its pleasure at receiving an observer from the Commission and reaffirmed its intention to maintain the best co-operative relations with the International Law Commission. The resolution was sent to the Secretary of the Commission by the Committee.

## ANNEX

### **Preliminary draft of the Statutes of the Inter-American Juridical Committee**

#### NATURE, PURPOSES, AND SEAT OF THE COMMITTEE

##### *Article 1*

The Inter-American Juridical Committee, established by the charter of the Organization of American States is the juridical organ of the Organization of American States. Its composition and its functions shall be fixed by the provisions of the charter.

##### *Article 2*

In accordance with the charter of the Organization, the purpose of the Inter-American Juridical Committee is to serve the Organization as an advisory body on juridical matters of an international nature, its specific purposes being to promote the progressive development and the codification of international law and to study juridical problems related to the integration of the developing countries of the hemisphere and, in so far as may appear desirable, the possibility of attaining uniformity in their legislation.

##### *Article 3*

The permanent seat of the Inter-American Juridical Committee shall be the city of Rio de Janeiro. This shall not prevent the Committee from meeting and performing its functions in any other place in special cases in which the Committee so decides, with the sole requirement of prior consultation with the member State concerned.

#### COMPETENCE OF THE COMMITTEE

##### *Article 4*

The competence of the Inter-American Juridical Committee shall cover the following matters:

1. Rendering advice on juridical matters of international interest submitted to it by the Organization;

2. Undertaking the studies and preparatory work on the topics assigned to it by the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs and/or the Councils of the Organization;

3. Undertaking the studies and work that it considers advisable and that refer to its specific purposes, expressed in article 2 of these statutes;

4. Suggesting the holding of specialized juridical conferences;

5. Rendering the Governments of member States legal advice on matters of public and private international law on which they consult it;

6. Establishing co-operative relations with universities, institutes, and other teaching centres, as well as with national and international committees and entities devoted to study, teaching or dissemination of information on juridical matters of international interest.

#### *Article 5*

The Inter-American Juridical Committee shall draft its own rules of procedure, in which it shall establish the standards for its operation.

#### *Article 6*

In the performance of its duties the Inter-American Juridical Committee shall have the broadest possible technical autonomy, and its members shall have complete independence of opinion. The latter shall enjoy the privileges and immunities established by article 140 of the charter.

### COMPOSITION OF THE COMMITTEE

#### *Article 7*

The Inter-American Juridical Committee shall be composed of eleven jurists, nationals of member States, of high moral character and professional standing, and no two members may be nationals of the same State.

#### *Article 8*

The members of the Committee shall be elected by the General Assembly from panels of three candidates presented by member States; one candidate who is not a national of the State presenting it may appear on such a panel. The Assembly shall take into account, in addition to the personal qualifications of the candidates, the criterion that equitable geographic representation on the Committee should be assured, in so far as possible.

#### *Article 9*

The members of the Committee shall be elected for a period of four years and may be re-elected. The membership shall be replaced partially, and for this purpose it is established that the term of office of five of the members elected in the first election, chosen by lot, shall be limited to two years.

#### *Article 10*

The Inter-American Juridical Committee represents all of the member States of the Organization. Therefore, a member nominated by a State and elected by the Assembly shall not represent that State and shall therefore have the same mandate as he has in respect of the other member States.

#### *Article 11*

The members of the Inter-American Juridical Committee shall exercise their functions from January 1 of the year following the year in which they were elected until December 31 of the year in which the election of new members is held.

#### *Article 12*

In the event of a vacancy by reason of the death or resignation of a member, once a successor is elected by the General Assembly he shall take office immediately and complete the term of office of his predecessor.

#### *Article 13*

Prior to an election to replace a member at the end of his term of office, the General Secretariat shall request the respective Governments to present panels of three candidates, together with their biographical data, and shall submit them to the General Assembly. It shall also make them known to the other American Governments.

#### *Article 14*

In the case of filling a vacancy caused by the death or resignation of a member, the General Secretariat shall request the Government that originally proposed that member to present a new panel of three candidates in the manner indicated in the preceding article.

### MEETINGS

#### *Article 15*

The Inter-American Juridical Committee shall hold one regular meeting each year, which shall last three months, and the meeting may be extended for up to ten additional days should the Committee consider this necessary. In special cases, in which the importance and urgency of some matter so requires, it may also hold special meetings.

#### *Article 16*

Before adjourning its regular meeting, the Inter-American Juridical Committee shall draw up the agenda and set the opening date for the next meeting.

#### *Article 17*

Special meetings of the Inter-American Juridical Committee may be convoked on the proposal of the General Assembly or of another competent organ of the Organization, or on the Committee's own initiative. Proposals of this nature should be addressed to the Chairman of the Committee and to the Secretary-General of the Organization. Once convocation has been decided upon by the written opinions of the members of the Committee, and the date of the meeting has been set, the Secretary-General shall notify the Governments of it.

#### *Article 18*

The jurists elected as members of the Inter-American Juridical Committee shall bear in mind that for the fulfilment of the purposes of the Committee it is essential that, during the meeting, they reside in Rio de Janeiro and devote full time to the work thereof.

#### *Article 19*

The failure of a member of the Committee to attend its regular meetings for two consecutive years shall result in the automatic vacation of his office.

#### *Article 20*

The Secretary-General of the Organization or his representative shall participate, but without the right to vote, in the discussions of the Committee and of such sub-committees or working groups as it may establish.

## QUORUM AND MAJORITY

*Article 21*

Seven members shall constitute a quorum for conducting the business of the Committee, but it may hold preparatory sessions with only four of its members present. The preparatory sessions shall be merely deliberative.

*Article 22*

For the adoption of recommendations and opinions of the Committee, the affirmative votes of at least six of its members shall be required.

The same majority shall be required for any resolutions the Committee may adopt for carrying out its purposes and for the drafting of its rules of procedure.

Each member, whether or not he is in agreement with a recommendation, opinion, or resolution adopted by the majority, shall have the right to have the explanation of his vote or his dissent included following such recommendation, opinion or resolution.

All other questions shall be decided by the vote of a majority of the members present.

## CHAIRMAN

*Article 23*

The Committee shall elect its Chairman and Vice-Chairman for a period of two years, and they may be re-elected. The majority vote of six members shall be required for these elections. The powers of the Chairman shall be set forth in the rules of procedure of the Committee.

In the event of the absence of the Chairman and the Vice-Chairman of the Committee, the Secretary thereof may take the necessary administrative measures concerning the work of the Secretariat and payment of its personnel.

## SECRETARIAT

*Article 24*

The permanent Secretariat of the Inter-American Juridical Committee in Rio de Janeiro shall be composed of officials and employees who shall also be members of the staff of the General Secretariat of the Organization of American States and shall enjoy the same benefits as the other members of that staff. The former shall be appointed by the Secretary-General of the Organization with the prior approval of the Committee.

*Article 25*

The General Secretariat shall provide the Inter-American Juridical Committee with such technical and administrative services as it may require.

## EXPENSES

*Article 26*

The expenses occasioned by the stay in Rio de Janeiro of the jurists who compose the Inter-American Juridical Committee, and the expenses of their transportation between their places of residence and Rio de Janeiro, shall be borne by the respective States of which those jurists are nationals.

*Article 27*

During the meetings of the Inter-American Juridical Committee the Organization of American States shall pay a fee to the members who attend.

*Article 28*

The expenditures for the maintenance of the Secretariat of the Inter-American Juridical Committee and for the fees to its members shall be included in the programme-budget of the Organization.

The Secretary-General, in consultation with the Chairman of the Juridical Committee, shall make an adequate estimate of the amounts necessary. For this purpose, the Secretary-General shall request the Chairman of the Committee, each year, to submit a draft budget.

The draft budget shall include a sufficient item for the enlargement of the headquarters and the library of the Inter-American Juridical Committee in Rio de Janeiro.

## GENERAL PROVISIONS

*Article 29*

In the event that the Inter-American Juridical Committee considers it necessary to utilize the services of specialists who are to be compensated by the Organization, it shall make the corresponding request to the General Secretariat.

*Article 30*

The Inter-American Juridical Committee may invite American jurists whom it regards as specialists in the subject to take part in its discussions on a given matter. In the event that such an invitation involves expenditures, the procedure set forth in the preceding article shall be followed.

*Article 31*

The Inter-American Juridical Committee shall give the legal opinions that the General Secretariat of the Organization may request of it on juridical questions relating to the purposes of the Organization of American States.

*Article 32*

The General Secretariat shall give due publicity to the activities and work of the Inter-American Juridical Committee, including the works and studies approved by the Committee, even when they have not been adopted by vote as opinions or recommendations.

*Article 33*

The recommendations, opinions, studies, reports, views or drafts prepared by the Inter-American Juridical Committee shall be transmitted to the General Secretariat so that it may make them known to the Governments and, when appropriate, transmit them to the General Assembly.

The opinions, reports, studies, views or drafts requested directly by the Governments or by the Council shall be transmitted by the Committee to the party making the requests.

The works, studies, views or drafts prepared by the Inter-American Juridical Committee under the plan for the development and codification of public and private international law and the uniformity of legislation shall be circulated in accordance with the procedure determined by the said plan.

## ANNUAL REPORT

*Article 34*

The Inter-American Juridical Committee shall submit to the General Assembly an annual report and such special reports as it deems pertinent.

## AMENDMENTS

*Article 35*

The present statutes may be amended only in the same manner in which they were originally adopted, and in accordance with the charter of the Organization of American States.

## OTHER BUSINESS

[Agenda item 8]

### DOCUMENT A/CN.4/219

Letter dated 3 June 1969 from the Secretary-General to the Chairman of the International Law Commission

[Original text: English]

[6 June 1969]

In your capacity as Chairman of the International Law Commission, I have the great pleasure of communicating to you, for transmission to the Commission, the text of a resolution which was adopted unanimously by the United Nations Conference on the Law of Treaties at its thirty-sixth plenary meeting on 22 May 1969. The resolution, which is entitled "Tribute to the International Law Commission", reads as follows:

*The United Nations Conference on the Law of Treaties,*

*Having adopted* the Vienna Convention on the Law of Treaties on the basis of the draft articles prepared by the International Law Commission,

*Resolves* to express its deep gratitude to the International Law Commission for its outstanding contribution to the codification and progressive development of the law of treaties.

The resolution is annexed to the Final Act of the Conference,<sup>1</sup> and therefore forms part of one of its most significant records.

I would also like to take this occasion to extend personally to the Commission my own congratulations on its monumental undertaking which has now found practical and enduring expression with the adoption of the Vienna Convention on the Law of Treaties. History will surely prove this Convention to be one of the most significant ever adopted in the course of the progressive development and codification of international law. I cannot neglect, in this connexion, to make special mention of the work of the four Special Rapporteurs on the Law of Treaties, who worked so tirelessly and with such great scholarship to make this ambitious project a reality.

(Signed) U THANT

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<sup>1</sup> *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference, document A/CONF.39/26.*



# REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

## DOCUMENT A/7610/REV.1

Report of the International Law Commission on the work of its twenty-first session, 2 June-8 August 1969

### CONTENTS

<i>Chapter</i>	<i>Paragraphs</i>	<i>Page</i>
I. ORGANIZATION OF THE SESSION . . . . .	1-8	204
A. Membership . . . . .	2	204
B. Officers . . . . .	3	204
C. Drafting Committee . . . . .	4	205
D. Secretariat . . . . .	5	205
E. Agenda . . . . .	6-8	205
II. RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS . . . . .	9-19	205
A. Introduction . . . . .	9-19	205
1. Summary of the Commission's proceedings . . . . .	9-12	205
2. The scope of the present group of draft articles . . . . .	13-19	206
B. Draft articles on representatives of States to international organizations . . . . .		207
Part II. Permanent missions to international organizations ( <i>continued</i> ) . . . . .		207
Section 2. Facilities, privileges and immunities (art. 22 to 44) . . . . .		207
Section 3. Conduct of the permanent mission and its members (art. 45 and 46) . . . . .		219
Section 4. End of functions (art. 47 to 50) . . . . .		220
III. SUCCESSION OF STATES AND GOVERNMENTS . . . . .	20-63	222
A. Historical background . . . . .	20-34	222
B. Succession in respect of matters other than treaties . . . . .	35-63	225
1. General views on the scope, approach and conclusions of the report submitted by the Special Rapporteur . . . . .	36-42	225
2. The succession of States and the problem of acquired rights . . . . .	43-51	226
3. Economic and financial acquired rights and specific problems of new States . . . . .	52-56	227
4. Succession in economic and financial matters as a question of continuity or discontinuity of legal situations existing prior to the succession . . . . .	57	228
5. Relationship between succession in economic and financial matters, the rules governing the treatment of aliens and the topic of State responsibility . . . . .	58-60	228
6. Conclusions and decisions of the Commission . . . . .	61-63	228

<i>Chapter</i>	<i>CONTENTS (continued)</i>	<i>Paragraphs</i>	<i>Page</i>
IV. STATE RESPONSIBILITY . . . . .		64-84	229
V. THE MOST-FAVOURED-NATION CLAUSE . . . . .		85-89	233
VI. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION . . . . .		90-110	234
A. Review of the Commission's programme and methods of work . . . . .		90-91	234
B. Organization of future work . . . . .		92-93	235
C. Relations with the International Court of Justice . . . . .		94	235
D. Co-operation with other bodies . . . . .		95-103	235
1. Asian-African Legal Consultative Committee . . . . .		95-97	235
2. European Committee on Legal Co-operation . . . . .		98-100	235
3. Inter-American Juridical Committee . . . . .		101-103	236
E. Date and place of the twenty-second session . . . . .		104	236
F. Representation at the twenty-fourth session of the General Assembly . . . . .		105	236
G. Seminar on International Law . . . . .		106-109	236
H. Index of the Commission's documents . . . . .		110	237

## CHAPTER I

### Organization of the session

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its twenty-first session at the United Nations Office at Geneva from 2 June to 8 August 1969. The work of the Commission during this session is described in the present report. Chapter II of the report, on relations between States and international organizations, contains a description of the Commission's work on that topic, together with twenty-nine additional draft articles on representatives of States to international organizations, consisting of provisions on permanent missions to international organizations, and commentaries thereon. Chapter III, on succession of States and Governments, contains an account of the historical background of the whole topic and a description of the Commission's work on one of the headings of the topic, namely succession in respect of matters other than treaties. Chapters IV and V relate to the progress of the Commission's work on State responsibility and the most-favoured-nation clause, respectively. Chapter VI deals with the organization of the Commission's future work and a number of administrative and other questions.

#### A. MEMBERSHIP

2. The Commission consists of the following members:  
 Mr. Roberto AGO (Italy);  
 Mr. Fernando ALBÓNICO (Chile);  
 Mr. Gilberto AMADO (Brazil);

Mr. Milan BARTOŠ (Yugoslavia);  
 Mr. Mohammed BEDJAOU (Algeria);  
 Mr. Jorge CASTAÑEDA (Mexico);  
 Mr. Erik CASTRÉN (Finland);  
 Mr. Abdullah EL-ERIAN (United Arab Republic);  
 Mr. Taslim O. ELIAS (Nigeria);  
 Mr. Constantin Th. EUSTATHIADES (Greece);  
 Mr. Louis IGNACIO-PINTO (Dahomey);  
 Mr. Eduardo JIMÉNEZ DE ARÉCHAGA (Uruguay);  
 Mr. Richard D. KEARNEY (United States of America);  
 Mr. NAGENDRA SINGH (India);  
 Mr. Alfred RAMANGASOAVINA (Madagascar);  
 Mr. Paul REUTER (France);  
 Mr. Shabtai ROSENNE (Israel);  
 Mr. José María RUDA (Argentina);  
 Mr. Abdul Hakim TABIBI (Afghanistan);  
 Mr. Arnold J. P. TAMMES (Netherlands);  
 Mr. Senjin TSURUOKA (Japan);  
 Mr. Nikolai USHAKOV (Union of Soviet Socialist Republics);  
 Mr. Endre USTOR (Hungary);  
 Sir Humphrey WALDOCK (United Kingdom of Great Britain and Northern Ireland);  
 Mr. Mustafa Kamil YASSEEN (Iraq).

#### B. OFFICERS

3. At its 990th meeting, held on 2 June 1969, the Commission elected the following officers:

*Chairman:* Mr. Nikolai Ushakov;  
*First Vice-Chairman:* Mr. Jorge Castañeda;  
*Second Vice-Chairman:* Mr. Nagendra Singh;  
*Rapporteur:* Mr. Constantin Th. Eustathiades.

## C. DRAFTING COMMITTEE

4. At its 1007th meeting, held on 24 June 1969, the Commission appointed a Drafting Committee composed as follows:

*Chairman:* Mr. Jorge Castañeda;

*Members:* Mr. Roberto Ago; Mr. Milan Bartoš; Mr. Louis Ignacio-Pinto; Mr. Eduardo Jiménez de Aréchaga; Mr. Paul Reuter; Mr. Abdul Hakim Tabibi; Mr. Arnold J. P. Tammes; Mr. Senjin Tsuruoka; Mr. Endre Ustor and Sir Humphrey Waldock. Mr. Fernando Albónico and Mr. Richard D. Kearney took part in the Committee's work in the absence of Mr. Eduardo Jiménez de Aréchaga and Sir Humphrey Waldock, respectively. Mr. Constantin Th. Eustathiades also took part in the Committee's work in his capacity as Rapporteur of the Commission.

## D. SECRETARIAT

5. Mr. Constantin A. Stavropoulos, Legal Counsel, attended the 990th to 999th meetings held from 2 to 13 June 1969, and represented the Secretary-General on those occasions. Mr. Anatoly P. Movchan, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General at the other meetings of the session, and acted as Secretary to the Commission. Mr. Nicolas Teslenko acted as Deputy Secretary to the Commission. Mr. Santiago Torres-Bernárdez and Mr. Eduardo Valencia-Ospina served as Assistant Secretaries.

## E. AGENDA

6. The Commission adopted an agenda for the twenty-first session, consisting of the following items:

1. Relations between States and international organizations.
2. Succession of States and Governments:
  - (a) Succession in respect of treaties;
  - (b) Succession in respect of matters other than treaties.
3. State responsibility.
4. Most-favoured-nation clause.
5. Co-operation with other bodies.
6. Organization of future work.
7. Dates and places of the Commission's meetings in 1970.
8. Other business.

7. In the course of the session, the Commission held fifty-two public meetings (990th to 1041st meetings) and four private meetings (on 21, 24, 29 and 31 July 1969, respectively). In addition, the Drafting Committee held ten meetings. The Commission considered all the items on its agenda with the exception of sub-item 2 (a) (Succession in respect of treaties).

8. The Commission received from the Secretary-General a letter entitled "Tribute to the International Law Commission" (A/CN.4/219), dated 3 June 1969 and addressed to the Chairman of the Commission, transmitting the text of a resolution adopted unanimously by the United Nations Conference on the Law of Treaties at its thirty-sixth plenary meeting, on 22 May 1969, entitled "Tribute to the International Law Commission".

## CHAPTER II

## Relations between States and international organizations

## A. INTRODUCTION

1. *Summary of the Commission's proceedings*<sup>1</sup>

9. At its 986th meeting, on 31 July 1968, the Commission adopted a provisional draft of twenty-one articles on representatives of States to international organizations, with the Commission's commentary on each article.<sup>2</sup> The first five articles form part I (General provisions), covering: use of terms, scope of the articles, their relationship with the relevant rules of international organizations and with other existing international agreements and derogation from the articles. The remaining articles make up section 1 of part II (Permanent missions to international organizations). This section is entitled "Permanent missions in general". It regulates the following questions: establishment of permanent missions; functions of a permanent mission; accreditation to two or more international organizations or assignment to two or more permanent missions; accreditation, assignment or appointment of a member of a permanent mission to other functions; appointment of the members of the permanent mission and their nationality; credentials of the permanent representative, his accreditation to organs of the organization and his full powers to represent the State in the conclusion of treaties; composition of the permanent mission and its size; notifications, *chargés d'affaires ad interim*; precedence; offices of permanent missions and the use of the flag and emblem.

10. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit the provisional draft of twenty-one articles, through the Secretary-General, to Governments for their observations.<sup>3</sup>

11. At the present session of the Commission, the Special Rapporteur, Mr. Abdullah El-Erian, submitted a fourth report (A/CN.4/218 and Add.1) containing a revised set of draft articles, with commentaries, on representatives of States to international organizations. Those draft articles covered the following subjects: facilities, privileges and immunities of permanent missions

<sup>1</sup> An account of the historical background of the topic is contained in the report of the International Law Commission on the work of its twentieth session, *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, pp. 193 and 194, paras. 9-20.

<sup>2</sup> *Ibid.*, para. 21.

<sup>3</sup> *Ibid.*, para. 22.

to international organizations; conduct of the permanent mission and its members; and end of the functions of the permanent representative (sections 2, 3 and 4 of part II). The Special Rapporteur also submitted a working paper (A/CN.4/L.136) containing draft articles on permanent observers of non-members to international organizations.

12. The fourth report also included a summary of the discussion which had taken place in the Sixth Committee during the twenty-third session of the General Assembly on the "Report of the International Law Commission on the Work of its Twentieth Session" (agenda item 84)<sup>4</sup> and on the "Draft Convention on Special Missions" (agenda item 85),<sup>5</sup> since those discussions had touched on certain questions which may present some interest as regards representatives of States to international organizations and conferences.

## 2. The scope of the present group of draft articles

13. The Commission considered the fourth report of the Special Rapporteur from its 991st to its 999th meetings and referred the draft articles contained therein to the Drafting Committee. From its 1014th to its 1035th meetings the Commission considered the reports of the Drafting Committee. The Commission adopted a provisional draft of twenty-nine articles on the subjects included in sections 2 (Facilities, privileges and immunities), 3 (Conduct of the permanent mission and its members) and 4 (End of functions) of part II (Permanent missions to international organizations). The provisional draft of the twenty-nine articles is reproduced below in the present chapter, together with commentaries. For the sake of convenience, the articles of the present group are numbered consecutively after the last article of the previous group. Accordingly, the first article of the present group is numbered 22.

14. The present group of draft articles has been arranged in three sections covering: (a) facilities, privileges and immunities of permanent missions to international organizations; (b) conduct of the permanent mission and its members, and (c) end of functions. The explanations of the terms used contained in article 1 of part I are also applicable to part II. At the same time, as is pointed out in paragraph (4) of the commentary on article 25, it was found necessary to add a further explanation, for the purposes of this part, of the term the "premises of the permanent mission". The explanation constitutes a new sub-paragraph of article 1, designated provisionally as (*k bis*), the text of which will be found in the commentary on article 25. Furthermore, during the discussion of this article, the question was raised whether the person charged by the sending State with the duty of acting as the head of the permanent mission

should be referred to as "the permanent representative", as laid down in sub-paragraph (e) of article 1. As is indicated below in paragraph (5) of the commentary on article 25, the Commission decided to examine, at the second reading of article 1, the use of the term "permanent representative" in sub-paragraph (e) of that article.

15. In preparing these draft articles, the Commission has sought to codify the modern rules of international law concerning permanent representatives to international organizations, and the articles formulated by the Commission contain elements of progressive development as well as of codification of the law.

16. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit the present group of draft articles, through the Secretary-General, to Governments for their observations. It also decided to transmit it, together with the previous group, to the Secretariats of the United Nations, the specialized agencies and the International Atomic Energy Agency (IAEA), for their observations. Bearing in mind the position of Switzerland as the host State in relation to the Office of the United Nations at Geneva and to a number of specialized agencies, as well as the wish expressed by the Government of that country, the Commission deemed it useful to transmit also both groups of draft articles to that Government for its observations.

17. At this session, the Commission again considered the question referred to in paragraph 28 of its report on the work of its twentieth session. At its 992nd meeting, it reached the conclusion that its draft should also include articles dealing with permanent observers for non-member States to international organizations and with delegations to sessions of organs of international organizations. Opinions were divided on whether the draft should, in addition, include articles on delegations to conferences convened by international organizations or whether that question ought to be considered in connexion with another topic. At its 993rd meeting, the Commission took a provisional decision on the subject, leaving the final decision to be taken at a later stage. The Commission intends to consider at its twenty-second session draft articles on permanent observers for non-member States and on delegations to sessions of organs of international organizations and to conferences convened by such organizations.

18. The Commission also briefly considered the desirability of dealing, in separate articles, with the possible effects of exceptional situations—such as absence of recognition, absence or severance of diplomatic relations or armed conflict—on the representation of States in international organizations. In view of the delicate and complex nature of those questions, the Commission decided to resume their examination at a future session and to postpone any decision on them for the time being.

19. The text of articles 22 to 50 with commentaries, as adopted by the Commission at the present session on the proposal of the Special Rapporteur, is reproduced below.

<sup>4</sup> *Official Records of the General Assembly, Twenty-third Session, Sixth Committee, 1029th to 1039th meetings.*

<sup>5</sup> *Ibid.*, 1039th to 1059th, 1061st to 1072nd and 1087th to 1090th meetings.

B. DRAFT ARTICLES ON REPRESENTATIVES OF STATES  
TO INTERNATIONAL ORGANIZATIONS

*Part II. Permanent missions to international  
organizations (continued)*

SECTION 2. FACILITIES, PRIVILEGES AND IMMUNITIES

*General comments*

(1) As a general rule, the headquarters agreements of international organizations, whether universal or regional, include provisions for the enjoyment by permanent representatives of foreign States of privileges and immunities which the host State "accords to diplomatic envoys accredited to it". Usually, these headquarters agreements do not contain restrictions on the privileges and immunities of permanent representatives which are based on the application of the principle of reciprocity in the relations between the host State and the sending State. However, the relevant articles of some of the headquarters agreements include a proviso which makes it an obligation of the host State to concede to permanent representatives the privileges and immunities which it accords to diplomatic envoys accredited to it, "subject to corresponding conditions and obligations". Examples are provided by: article V, section 15, of the Headquarters Agreement of the United Nations;<sup>6</sup> article XI, section 24, paragraph (a), of the Headquarters Agreement of the Food and Agriculture Organization of the United Nations (FAO);<sup>7</sup> article I of the Headquarters Agreement of the Organization of American States (OAS).<sup>8</sup>

(2) In determining the rationale of diplomatic privileges and immunities, the International Law Commission discussed, at its tenth session in 1958, the theories which have exercised influence on the development of diplomatic privileges and immunities. The Commission mentioned the "extritoriality" theory, according to which the premises of the mission represent a sort of extension of the territory of the sending State; and the "representative character" theory, which bases such privileges and immunities on the idea that the diplomatic mission personifies the sending State. The Commission pointed out that "there is now a third theory which appears to be gaining ground in modern times, namely, the 'functional necessity' theory, which justifies privileges and immunities as being necessary to enable the mission to perform its functions".<sup>9</sup>

(3) Functional necessity is one of the bases of the privileges and immunities of representatives of States to international organizations. In accordance with Article 105, paragraph 2, of the Charter of the United Nations. "Representatives of the Members of the United

Nations and officials of the Organization shall . . . enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization".

(4) The representation of States in international organizations is the basic function of permanent missions as defined in article 7 of the twenty-one provisional articles adopted by the Commission at its twentieth session. Article 1, sub-paragraph (d), of these articles, defines a "permanent mission" as "a mission of representative and permanent character sent by a State member of an international organization to the Organization". Paragraph (2) of the commentary on article 7 states that:

Sub-paragraph (a) is devoted to the representational function of the permanent mission. It provides that the mission represent the sending State in the Organization. The mission, and in particular the permanent representative as head of the mission, is responsible for the maintenance of official relationship between the Government of the sending State and the organization.<sup>10</sup>

(5) The representation of States within the framework of the diplomacy of international organizations and conferences has its particular characteristics. The representative of a State to an international organization is not the representative of his State to the host State, as is the case of the diplomat accredited to the State. In the latter case, the diplomatic agent is accredited to the receiving State in order to perform certain functions of representation and negotiation between it and his own State. The representative of a State to an international organization represents his State before the organization.

*Article 22. General facilities*

**The host State shall accord to the permanent mission full facilities for the performance of its functions. The Organization shall assist the permanent mission in obtaining those facilities and shall accord to the mission such facilities as lie within its own competence.**

*Commentary*

(1) The first sentence of article 22 is based on article 25 of the Vienna Convention on Diplomatic Relations.<sup>11</sup>

(2) During the discussion in the Commission some doubt was expressed whether it was desirable that the obligations of international organizations should be stated in the draft articles inasmuch as this would raise the general question whether it was intended that the organizations themselves should become parties to the draft articles. However, it was pointed out by several members that the Commission was trying to state what was the general international law concerning permanent missions to international organizations. The question whether international organizations would become parties to the draft articles was a separate one to be considered at a later stage.

<sup>6</sup> United Nations, *Treaty Series*, vol. 11, p. 26.

<sup>7</sup> *United Nations Legislative Series, Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations*, vol. II (ST/LEG/SER.B/11), p. 187.

<sup>8</sup> United Nations, *Treaty Series*, vol. 181, p. 148.

<sup>9</sup> *Yearbook of the International Law Commission, 1958*, vol. II, document A/3859, pp. 94 and 95.

<sup>10</sup> *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, p. 200.

<sup>11</sup> United Nations, *Treaty Series*, vol. 500, p. 96.

(3) The words "as lie within its own competence" at the end of the second sentence of article 22 are designed to emphasize both that the facilities which an organization is able to grant are limited and that the granting of facilities to a permanent mission by an organization is subject to the relevant rules of the organization, in particular those concerning budgetary and administrative matters.

*Article 23. Accommodation of the permanent mission and its members*

1. The host State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its permanent mission or assist the latter in obtaining accommodation in some other way.

2. The host State and the Organization shall also, where necessary, assist permanent missions in obtaining suitable accommodation for their members.

*Commentary*

(1) Article 23 is based on article 21 of the Vienna Convention on Diplomatic Relations. As indicated by the International Law Commission in the commentary on the relevant provision (art. 19) of its draft articles on diplomatic intercourse and immunities,<sup>12</sup> which served as the basis for the Vienna Convention, the laws and regulations of a given country may make it impossible for a mission to acquire the premises necessary for it. For that reason the Commission inserted in article 23 a rule which makes it obligatory for the receiving State to ensure the provision of accommodation for the mission if the latter is not permitted to acquire it. These considerations equally underlie paragraph 1 of the present article.

(2) Certain members of the Commission pointed out during the discussion of the article that in some cases property rights over the premises of a permanent mission could not be obtained by acquisition under the applicable municipal law and that in other cases the premises were acquired not by the sending State but, on its behalf, by the permanent representative. They believed therefore that the expressions "acquisition" and "by the sending State" unduly restricted the scope of article 23. It was, however, observed that both series of cases would come under the clause of article 23 obliging the host State to assist the sending State "in obtaining accommodation in some other way". The Commission decided, therefore, to retain in the article the expressions in question.

(3) The assistance which the Organization may give to the members of the mission in obtaining suitable accommodation under paragraph 2 would be very useful, among other reasons, because the Organization itself would have a vast experience of the real estate market and the conditions governing it.

*Article 24. Assistance by the Organization in respect of privileges and immunities*

The Organization shall, where necessary, assist the sending State, its permanent mission and the members of the permanent mission in securing the enjoyment of the privileges and immunities provided for by the present articles.

*Commentary*

One of the characteristics of representation to international organizations springs from the fact that the observance of juridical rules governing privileges and immunities is not solely the concern of the sending State as in the case of bilateral diplomacy. In the discussion of the "Question of diplomatic privileges and immunities" (agenda item 98) which took place in the Sixth Committee during the twenty-second session of the General Assembly, it was generally agreed that the United Nations itself had an interest in the enjoyment by the representatives of Member States of the privileges and immunities necessary to enable them to carry out their tasks. It was also recognized that the Secretary-General should maintain his efforts to ensure that the privileges and immunities concerned were respected.<sup>13</sup> In his statement at the 1016th meeting of the Sixth Committee the Legal Counsel, speaking as the representative of the Secretary-General, stated that:

... the rights of representatives should properly be protected by the Organization and not left entirely to bilateral action of the States immediately involved. The Secretary-General would therefore continue to feel obligated in the future, as he has done in the past, to assert the rights and interests of the Organization on behalf of representatives of Members as the occasion may arise. I would not understand from the discussion in this Committee that the Members of the Organization would wish him to act in any way different from that which I have just indicated. Likewise, since the Organization itself has an interest in protecting the rights of representatives, a difference with respect to such rights may arise between the United Nations and a Member and consequently be the subject of a request for an advisory opinion under section 30 of the Convention (the Convention on the Privileges and Immunities of the United Nations of 1946). It is thus clear that the United Nations may be one of the "parties" as that term is used in section 30.<sup>14</sup>

*Article 25. Inviolability of the premises of the permanent mission*

1. The premises of the permanent mission shall be inviolable. The agents of the host State may not enter them, except with the consent of the permanent representative. Such consent may be assumed in case of fire or other disaster that seriously endangers public safety, and only in the event that it has not been possible to obtain the express consent of the permanent representative.

<sup>12</sup> *Yearbook of the International Law Commission, 1958*, vol. II, document A/3859, p. 95.

<sup>13</sup> *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 98, document A/6965, para. 14.

<sup>14</sup> *Ibid.*, document A/C.6/385, para. 8.

2. The host State is under a special duty to take all appropriate steps to protect the premises of the permanent mission against any intrusion or damage and to prevent any disturbance of the peace of the permanent mission or impairment of its dignity.

3. The premises of the permanent mission, their furnishings and other property thereon and the means of transport of the permanent mission shall be immune from search, requisition, attachment or execution.

#### *Commentary*

(1) The requirement that the host State should ensure the inviolability of permanent missions' premises, archives and documents has been generally recognized in practice. In a letter sent to the Legal Adviser of one of the specialized agencies in 1964, the Legal Counsel of the United Nations stated that:

There is no specific reference to mission premises in the Headquarters Agreement and the diplomatic status of these premises therefore arises from the diplomatic status of a resident representative and his staff.<sup>15</sup>

(2) The headquarters agreements of some of the specialized agencies contain provisions relating to the inviolability of the premises of permanent missions. An example of such provision may be found in article XI of the Headquarters Agreement of FAO.

(3) The inviolability of the premises of the United Nations and the specialized agencies was sanctioned in article II, section 3, of the Convention on the Privileges and Immunities of the United Nations and article III, section 5, of the Convention on the Privileges and Immunities of the Specialized Agencies<sup>16</sup> respectively. These provisions state that the property and assets of the United Nations and the specialized agencies, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

(4) As a result of its consideration of article 25 the Commission decided to insert in article 1 (Use of terms) adopted at its twentieth session<sup>17</sup> a new paragraph designated provisionally as (*k bis*) relating to the term "the premises of the permanent mission". The new paragraph (*k bis*), which is based on paragraph (*i*) of article 1 of the Vienna Convention on Diplomatic Relations reads as follows:

(*k bis*) The "premises of the permanent mission" are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the permanent mission, including the residence of the permanent representative.

<sup>15</sup> "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat" (hereinafter referred to as "Study of the Secretariat"), *Yearbook of the International Law Commission, 1967*, vol. II, documents A/CN.4/L.118 and Add.1 and 2, p. 187, para. 154.

<sup>16</sup> United Nations, *Treaty Series*, vol. 33, p. 262.

<sup>17</sup> *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, p. 196.

(5) During the discussion in the Commission some members pointed out that it would be preferable to refer to the person in charge of the mission as "head of the mission" since the permanent representative was not always the head of the permanent mission and several members of the permanent mission might be permanent representatives to different organizations. Further, the permanent mission's premises could be located within the premises occupied by the diplomatic mission of the sending State or possibly by a consular mission. The question would then arise as to which representative of the sending State was responsible for the premises concerned. Considering that the term "permanent representative" was the one used in the twenty-one articles provisionally adopted at its previous session, the Commission decided for the sake of harmony between those articles and the present group of articles to conform to the terminology already used. Further consideration will be given, however, to this question when the Commission undertakes the second reading of the draft articles. The Commission intends to examine again the use of the term "permanent representative" as defined in sub-paragraph (*e*) of article 1.

(6) The third sentence of paragraph 1 reproduces part of the text of the amendment submitted by Argentina to article 25 of the draft articles on special missions and adopted at the 1088th meeting of the Sixth Committee during the latter's consideration of the item entitled "Draft Convention on Special Missions" at the twenty-third session of the General Assembly.<sup>18</sup>

#### *Article 26. Exemption of the premises of the permanent mission from taxation*

1. The sending State, the permanent representative or another member of the permanent mission acting on behalf of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the permanent mission, whether owned or leased, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the sending State, the permanent representative or another member of the permanent mission acting on behalf of the mission.

#### *Commentary*

(1) Article 26 is based on article 23 of the Vienna Convention on Diplomatic Relations, with the addition in paragraphs 1 and 2 of the expression "or another member of the permanent mission acting on behalf of the mission", which appears in article 24 of the draft articles on special missions.

<sup>18</sup> *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 85, document A/7375, paras. 190, 192, 194 and 195.

(2) The replies of the United Nations and the specialized agencies indicate that the exemption provided for in this article is generally recognized. Examples of provisions of headquarters agreements for such exemption are to be found in article XI of the Headquarters Agreement of FAO and in articles XII and XIII of the Headquarters Agreement of IAEA.<sup>19</sup>

(3) During the discussion of article 26 the attention of the Commission was drawn to the inequality resulting from the provisions of paragraph 2 as between a State that was able to buy property to house its mission, or the mission staff, and a State which found itself obliged to lease premises for the same purpose. It was pointed out that although the paragraph was based on the corresponding provisions of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations<sup>20</sup> and broadly reflected existing practice, the inequality in question did not represent a universal practice. Thus in the case of IAEA, no taxes are imposed by the host State on the premises used by missions or delegates, including rented premises and parts of buildings. It was suggested that the Commission should examine the problem in order to ascertain whether it was possible to incorporate in article 26 an element of progressive development for the purpose of eliminating that unsatisfactory inequality. It was also pointed out in the discussion that it would be desirable to ascertain whether a certain practice regarding refunds or rebates of taxes on leased premises was general. The Commission intends to examine these matters again at the second reading of the draft articles in the light of the information which the Special Rapporteur would elicit from the specialized agencies and the views of Governments.

### *Article 27. Inviolability of archives and documents*

**The archives and documents of the permanent mission shall be inviolable at any time and wherever they may be.**

#### *Commentary*

(1) Article 27 is based on article 24 of the Vienna Convention on Diplomatic Relations.

(2) In paragraph 3 of its commentary on article 22 (Inviolability of the archives) of its draft articles on diplomatic intercourse and immunities adopted in 1958, the International Law Commission stated:

Although the inviolability of the mission's archives and documents is at least partly covered by the inviolability of the mission's premises and property, a special provision is desirable because of the importance of the inviolability to the functions of the mission. This inviolability is connected with the protection accorded by article 25 to the correspondence and communications of the mission.<sup>21</sup>

<sup>19</sup> United Nations, *Treaty Series*, vol. 339, p. 152.

<sup>20</sup> *Ibid.*, vol. 596, p. 262.

<sup>21</sup> *Yearbook of the International Law Commission, 1958*, vol. II, document A/3859, p. 96.

### *Article 28. Freedom of movement*

**Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State shall ensure freedom of movement and travel in its territory to all members of the permanent mission and members of their families forming part of their respective households.**

#### *Commentary*

(1) This article is based on article 26 of the Vienna Convention on Diplomatic Relations.

(2) The only difference of substance between the two provisions is the addition in article 28 of the phrase "and members of their families forming part of their respective households". The Commission considered that the families of members of the permanent mission should have the right to travel freely in the host State. The Commission agreed that the present liberal practice with regard to the members of the families of diplomatic agents could be regarded as an expression of a customary rule but that it was preferable to insert a specific provision to that effect in the present draft articles in view, in particular, of the lack of reciprocity in multilateral diplomacy.

(3) Replies of the specialized agencies indicate that no restrictions have been imposed by the host State on the movement of members of permanent missions.

(4) During the discussion in the Commission some members raised the question whether the proper functioning of permanent missions to international organizations required that their members enjoy the same freedom of movement that was granted to members of diplomatic missions. They suggested that the freedom of movement guaranteed in article 28 should be qualified in the same manner as in the corresponding article (art. 27) of the draft articles on special missions.<sup>22</sup> In their view it would be appropriate to restrict freedom of movement to what was necessary for the purpose of the functions of the permanent mission. The majority of the members of the Commission came to the conclusion that the only grounds on which the host State could validly restrict freedom of movement were those of national security, and the article already covered that point. They thought that any attempt to introduce a limitation based on the functional element would unduly restrict the freedom of movement of members of permanent missions. The view of the majority of members was that it would be preferable not to add the reservation which had been provided for in the case of special missions and which was justified by the particular character of those missions. Reference was made in this respect to the fact that if difficulties arose in the case of permanent missions, it would be possible to resort to the consultations envisaged in article 50. Reference was also made to the possibility of regulating such matters in the headquarters agreement between the host State and the Organization, a possibility which was covered by article 4.

<sup>22</sup> *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 360.

*Article 29. Freedom of communication*

1. The host State shall permit and protect free communication on the part of the permanent mission for all official purposes. In communicating with the Government of the sending State, its diplomatic missions, its permanent missions, its consular posts and its special missions, wherever situated, the permanent mission may employ all appropriate means, including couriers and messages in code or cipher. However, the permanent mission may install and use a wireless transmitter only with the consent of the host State.

2. The official correspondence of the permanent mission shall be inviolable. Official correspondence means all correspondence relating to the permanent mission and its functions.

3. The bag of the permanent mission shall not be opened or detained.

4. The packages constituting the bag of the permanent mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the permanent mission.

5. The courier of the permanent mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the host State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the permanent mission may designate couriers *ad hoc* of the permanent mission. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the permanent mission's bag in his charge.

7. The bag of the permanent mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a courier of the permanent mission. The permanent mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

*Commentary*

(1) This article is based on article 27 of the Vienna Convention on Diplomatic Relations.

(2) Permanent missions to the United Nations, the specialized agencies and other international organizations enjoy in general freedom of communication on the same terms as the diplomatic missions accredited to the host State.

(3) Replies of the United Nations and the specialized agencies indicate also that the inviolability of correspondence, which is provided for in article IV, section 11 (b), of the Convention on the Privileges and Immunities of the United Nations<sup>23</sup> and in article V,

section 13 (b), of the Convention on the Privileges and Immunities of the Specialized Agencies, has been fully recognized.

(4) One difference between this article and article 27 of the Vienna Convention on Diplomatic Relations is the addition in paragraph 1 of the words "its special missions" in order to co-ordinate the article with article 28, paragraph 1, of the draft articles on special missions.<sup>24</sup> Another is the addition of the words "its permanent missions", in order to enable the permanent missions of the sending State to communicate with each other.

(5) A further difference is that paragraph 7 of article 29 provides that the bag of the permanent mission may be entrusted not only to the captain of a commercial aircraft, as provided for the diplomatic bag in article 27 of the Vienna Convention on Diplomatic Relations, but also to the captain of a merchant ship. This additional provision is taken from article 35 of the Vienna Convention on Consular Relations and article 28 of the draft articles on special missions.

(6) On the basis of article 28 of the draft articles on special missions, the article uses the expression "the bag of the permanent mission" and the "courier of the permanent mission". The expressions "diplomatic bag" and "diplomatic courier" were not used, in order to prevent any possibility of confusion with the bag and courier of the permanent diplomatic mission.

(7) The phrase "by arrangement with the appropriate authorities" which had been added to article 28, paragraph 7, of the draft articles on special missions, has not been included in paragraph 7. In the view of the Commission, although the provision might be of some value for special missions, which were not permanent, the same was not true of permanent missions, for which such arrangements were made on a continuing basis and not on each occasion. Permanent missions were in this respect similar to diplomatic missions. The view was expressed that the omission of the phrase was not, however, to be taken as implying that a member of the permanent mission could, for example, proceed to an aircraft without observing the applicable regulations.

*Article 30. Personal Inviolability*

The persons of the permanent representative and of the members of the diplomatic staff of the permanent mission shall be inviolable. They shall not be liable to any form of arrest or detention. The host State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.

*Article 31. Inviolability of residence and property*

1. The private residence of the permanent representative and of the members of the diplomatic staff of the permanent mission shall enjoy the same inviolability and protection as the premises of the permanent mission.

<sup>23</sup> United Nations, *Treaty Series*, vol. I, p. 16.

<sup>24</sup> *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, pp. 360 and 361.

2. Their papers, correspondence and, except as provided in paragraph 3 of article 32, their property, shall likewise enjoy inviolability.

#### *Commentary*

(1) Articles 30 and 31 are based on the provisions of articles 29 and 30 of the Vienna Convention on Diplomatic Relations and of the draft articles on special missions (art. 29 and 30).<sup>25</sup>

(2) Articles 30 and 31 deal with two generally recognized immunities which are essential for the performance of the functions of the permanent representative and of the members of the diplomatic staff of the permanent mission.

(3) The principle of the personal inviolability of the permanent representative and of the members of the diplomatic staff, which article 30 confirms, implies, as in the case of the inviolability of the premises of the permanent mission, the obligation for the host State to respect, and to ensure respect for, the person of the individuals concerned. The host State must take all necessary measures to that end, which may include the provision of a special guard if circumstances so require.

(4) Inviolability of all papers and documents of representatives of members to the organs of the organizations concerned is generally provided for in the Conventions on the Privileges and Immunities of the United Nations, the Specialized Agencies and other international organizations.

(5) In paragraph 1 of its commentary on article 28 (Inviolability of residence and property) of its draft articles on diplomatic intercourse and immunities adopted at its tenth session (1958), the International Law Commission stated that: "This article concerns the inviolability accorded to the diplomatic agent's residence and property. Because this inviolability arises from that attaching to the person of the diplomatic agent, the expression 'the private residence of a diplomatic agent' necessarily includes even a temporary residence of the diplomatic agent."<sup>26</sup>

#### *Article 32. Immunity from jurisdiction*

1. The permanent representative and the members of the diplomatic staff of the permanent mission shall enjoy immunity from the criminal jurisdiction of the host State. They shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) A real action relating to private immovable property situated in the territory of the host State unless the person in question holds it on behalf of the sending State for the purposes of the permanent mission;

(b) An action relating to succession in which the person in question is involved as executor, administrator,

heir or legatee as a private person and not on behalf of the sending State;

(c) An action relating to any professional or commercial activity exercised by the person in question in the host State outside his official functions;

[(d) An action for damages arising out of an accident caused by a vehicle used outside the official functions of the person in question.]

2. The permanent representative and the members of the diplomatic staff of the permanent mission are not obliged to give evidence as witnesses.

3. No measures of execution may be taken in respect of the permanent representative or a member of the diplomatic staff of the permanent mission except in cases coming under sub-paragraphs (a), (b) [and] (c) [and (d)] of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of the permanent representative or of a member of the diplomatic staff of the permanent mission from the jurisdiction of the host State does not exempt him from the jurisdiction of the sending State.

#### *Commentary*

(1) Article 32 is based on article 31 of the Vienna Convention on Diplomatic Relations.

(2) The immunity from criminal jurisdiction granted under paragraph 1 of article 32 is complete and the immunity from civil and administrative jurisdiction is subject only to the exceptions stated in paragraph 1 of the article. This constitutes the principal difference between the "diplomatic" immunity enjoyed by permanent missions and the "functional" immunity accorded to delegations to organs of international organizations and conferences by the Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies. Article IV, section 11 (a), of the Convention on the Privileges and Immunities of the United Nations and article V, section 13 (a), of the Convention on the Privileges and Immunities of the Specialized Agencies accord to the representatives of members to the meetings of organs of the organization concerned or to the conferences convened by it "immunity from legal process of every kind" in respect of "words spoken or written and all acts done by them" in their official capacity.

(3) The Commission agreed that the phrase "civil and administrative jurisdiction" in paragraph 1 of article 32 is used in a general sense, in contradistinction to "criminal jurisdiction", and includes, for instance, commercial and labour jurisdiction.

(4) After a lengthy discussion, the Commission was unable, owing to a wide divergence of views, to reach any decision on the substance of the provision in sub-paragraph 1 (d). It decided to place the provision in brackets and to bring it to the attention of Governments. Those favouring the proposal, which was based on sub-paragraph (2) (d) of article 31 of the draft articles on special missions, argued that it would meet a real and

<sup>25</sup> *Ibid.*, p. 361.

<sup>26</sup> *Yearbook of the International Law Commission, 1958*, vol. II, p. 98.

growing problem which had, it was said, been inadequately recognized at the 1961 Vienna Conference on Diplomatic Intercourse and Immunities. Further, there were problems in some countries concerning the application and effect of insurance laws and practices as well as the adequacy of the insurance coverage. On the other hand, it was argued that the Vienna precedent should be followed, since it provided the closer analogy. In addition, considerable emphasis was placed on articles 34 and 45 of the present draft; the former provision, which goes beyond the corresponding resolution of the 1961 Vienna Conference, requires the sending State to waive immunity in respect of civil claims in the host State "when this can be done without impeding the performance of the functions of the permanent mission"; if immunity is not waived the sending State "shall use its best endeavours to bring about a just settlement of such claims". The latter provision requires all persons enjoying privileges and immunities to respect the laws and regulations of the host State. Those opposing the proposal in sub-paragraph 1 (d) also argued that one particular kind of claim should not be singled out in this way and that the functional line drawn in it would be difficult to apply.

#### *Article 33. Waiver of immunity*

1. The immunity from jurisdiction of the permanent representative or members of the diplomatic staff of the permanent mission and persons enjoying immunity under article 40 may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by the permanent representative, by a member of the diplomatic staff of the permanent mission or by a person enjoying immunity from jurisdiction under article 40 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

#### *Commentary*

(1) Article 33 is based on the provisions of article 32 of the Vienna Convention on Diplomatic Relations. The basic principle of the waiver of immunity is contained in article IV, section 14, of the Convention on the Privileges and Immunities of the United Nations, which states:

Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.

(2) This provision was reproduced *mutatis mutandis* in article V, section 16, of the Convention on the Privileges and Immunities of the Specialized Agencies and in a number of the corresponding instruments of regional organizations.

#### *Article 34. Settlement of civil claims*

The sending State shall waive the immunity of any of the persons mentioned in paragraph 1 of article 33 in respect of civil claims in the host State when this can be done without impeding the performance of the functions of the permanent mission. If the sending State does not waive immunity, it shall use its best endeavours to bring about a just settlement of such claims.

#### *Commentary*

(1) This article is based on the important principle stated in resolution II adopted on 14 April 1961 by the United Nations Conference on Diplomatic Intercourse and Immunities.<sup>27</sup>

(2) The International Law Commission embodied this principle in article 42 of its draft articles on special missions because, as stated in the commentary on that article, "the purpose of immunities is to protect the interests of one sending State, not those of the persons concerned, and in order to facilitate, as far as possible, the satisfactory settlement of civil claims made in the receiving State against members of special missions. This principle is also referred to in the draft preamble drawn up by the Commission."<sup>28</sup>

#### *Article 35. Exemption from social security legislation*

1. Subject to the provisions of paragraph 3 of this article, the permanent representative and the members of the diplomatic staff of the permanent mission shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the host State.

2. The exemption provided for in paragraph 1 of this article shall also apply to persons who are in the sole private employ of the permanent representative or of a member of the diplomatic staff of the permanent mission, on condition:

(a) That such employed persons are not nationals of or permanently resident in the host State; and

(b) That they are covered by the social security provisions which may be in force in the sending State or a third State.

<sup>27</sup> *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities* (1961), vol. II, document A/Conf.20/10/Add.1, p. 90.

<sup>28</sup> *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, pp. 365, 367 and 368.

3. The permanent representative and the members of the diplomatic staff of the permanent mission who employ persons to whom the exemption provided for in paragraph 2 of this article does not apply shall observe the obligations which the social security provisions of the host State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this article shall not preclude voluntary participation in the social security system of the host State provided that such participation is permitted by that State.

5. The provisions of this article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

#### Commentary

(1) Article 35 is based on article 33 of the Vienna Convention on Diplomatic Relations.

(2) Like paragraph 2 of article 32 of the draft on special missions, paragraph 2 of article 35 substitutes the expression "persons who are in the sole private employ" for the expression "private servants", which is used in article 33 of the Vienna Convention. Referring to this change in terminology, the International Law Commission stated in paragraph 2 of its commentary on article 32 of the draft articles on special missions: "Article 32... applies not only to servants in the strict sense of the term, but also to other persons in the private employ of members of the special mission such as children's tutors and nurses."<sup>29</sup>

(3) The Commission intends to consider, in the light of the comments to be received from Governments, whether paragraph 5 is necessary in view of the provisions of articles 4 and 5 of the present draft.

#### Article 36. Exemption from dues and taxes

The permanent representative and the members of the diplomatic staff of the permanent mission shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) Indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) Dues and taxes on private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purposes of the permanent mission;

(c) Estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article 42;

(d) Dues and taxes on private income having its source in the host State and capital taxes on investments made in commercial undertakings in the host State;

(e) Charges levied for specific services rendered;

(f) Registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 26.

#### Commentary

(1) This article is based on article 34 of the Vienna Convention on Diplomatic Relations.

(2) The immunity of representatives from taxation is dealt with indirectly in article IV, section 13, of the Convention on the Privileges and Immunities of the United Nations which provides that:

Where the incidence of any form of taxation depends upon residence, periods during which the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations are present in a State for the discharge of their duties shall not be considered as periods of residence.

(3) This provision was reproduced *mutatis mutandis* in article V, section 15, of the Convention on the Privileges and Immunities of the Specialized Agencies and in a number of the corresponding instruments of regional organizations.

(4) Except in the case of nationals of the host State, representatives enjoy extensive exemption from taxation. In the International Civil Aviation Organization (ICAO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) all representatives, and in FAO and IAEA, resident representatives, are granted the same exemptions in respect of taxation as diplomats of the same rank accredited to the host State concerned. In the case of IAEA, no taxes are imposed by the host State on the premises used by missions or delegates, including rented premises and parts of buildings. Permanent missions to UNESCO pay taxes only for services rendered and real property tax (*contribution foncière*) when the permanent representative is the owner of the building. Permanent representatives are exempt from tax on movable property (*contribution mobilière*), a tax imposed in France on inhabitants of rented or occupied properties, in respect of their principal residence but not in respect of any secondary residence.<sup>30</sup>

(5) The final phrase of paragraph (f) may give rise to difficulties of interpretation mainly because it states an exception to a rule which is itself an exception. It is, however, based on the corresponding provision (art. 34) of the Vienna Convention on Diplomatic Relations. The Commission would be interested to learn whether Governments have found any practical difficulties in applying that provision.

#### Article 37. Exemption from personal services

The host State shall exempt the permanent representative and the members of the diplomatic staff of the permanent mission from all personal services, from all

<sup>29</sup> Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 362.

<sup>30</sup> Study of the Secretariat, Yearbook of the International Law Commission, 1967, documents A/CN.4/L.118 and Add.1 and 2, p. 201, para. 45.

public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

#### *Commentary*

(1) This article is based on the provisions of article 35 of the Vienna Convention on Diplomatic Relations. The Commission's commentary on the provision on which article 35 was based (article 33 of the draft articles on diplomatic intercourse and immunities), states that it dealt "with the case where certain categories of persons are obliged, as part of their general civic duties or in cases of emergency, to render personal services or to make personal contributions".<sup>31</sup>

(2) The immunity in respect of national service obligations provided in article IV, section 11 (*d*), of the Convention on the Privileges and Immunities, of the United Nations and article V, section 13 (*d*), of the Convention on the Privileges and Immunities of the Specialized Agencies has been widely acknowledged. That immunity does not normally apply when the representative is a national of the host State.<sup>32</sup> The phrase "military obligations" covers military obligations of all kinds; the enumeration in article 37 is by way of example only.

#### *Article 38. Exemption from customs duties and inspection*

1. The host State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services, on:

(a) Articles for the official use of the permanent mission;

(b) Articles for the personal use of the permanent representative or a member of the diplomatic staff of the permanent mission or members of his family forming part of his household, including articles intended for his establishment.

2. The personal baggage of the permanent representative or a member of the diplomatic staff of the permanent mission shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host State. Such inspection shall be conducted only in the presence of the person enjoying the exemption or of his authorized representative.

#### *Commentary*

(1) This article is based on article 36 of the Vienna Convention on Diplomatic Relations.

<sup>31</sup> *Yearbook of the International Law Commission, 1958*, vol. II, document A/3859, p. 100.

<sup>32</sup> Study of the Secretariat, *Yearbook of the International Law Commission, 1967*, document A/CN.4/L.118 and Add.1 and 2, p. 200, para. 37.

(2) While in general, permanent representatives and members of the diplomatic staff of permanent missions enjoy exemption from customs and excise duties, the detailed application of this exemption in practice varies from one host State to another according to the headquarters agreements and to the system of taxation in force.

(3) As regards the United Nations Headquarters, the United States Code of Federal Regulations, Title 19—Customs Duties (Revised 1964), provides in section 10.30 *b*, paragraph (*b*), that resident representatives and members of their staffs may import "...without entry and free of duty and internal-revenue tax articles for their personal or family use".<sup>33</sup>

(4) At the United Nations Office at Geneva the matter is dealt with largely in the Swiss Customs Regulation of 23 April 1952. Briefly, permanent missions may import all articles for official use and belonging to the Government they represent (art. 15). In accordance with the declaration of the Swiss Federal Council of 20 May 1958,<sup>34</sup> the heads of permanent delegations may import free of duty all articles destined for their own use or that of their family (art. 16, para. 1). Other members of permanent delegations have a similar privilege except that the importation of furniture may only be made once (art. 16, para. 2).<sup>35</sup>

(5) The position in respect of permanent missions to specialized agencies having their headquarters in Switzerland is identical with that of permanent missions to the United Nations Office at Geneva. In the case of FAO, the extent of the exemption of resident representatives depends on their diplomatic status and is granted in accordance with the general rules relating to diplomatic envoys. Permanent representatives to UNESCO assimilated to heads of diplomatic missions can import goods at any time for their own use and for that of their mission free of duty. Other members of permanent missions may import their household goods and effects free of duty at the time of taking up their appointment.

#### *Article 39. Exemption from laws concerning acquisition of nationality*

Members of the permanent mission not being nationals of the host State, and members of their families forming part of their household, shall not, solely by the operation of the law of the host State, acquire the nationality of that State.

#### *Commentary*

(1) This article is based on the rule stated in article II of the Optional Protocol concerning Acquisition of Nationality adopted on 18 April 1961 by the United

<sup>33</sup> *Ibid.*, p. 183, para. 134. For details of the position in respect of the various federal and State taxes in New York, *ibid.*, pp. 183-186, sect. 17 and 18.

<sup>34</sup> *Ibid.*, p. 173, para. 62.

<sup>35</sup> *Ibid.*, p. 183, para. 136.

Nations Conference on Diplomatic Intercourse and Immunities.<sup>36</sup>

(2) The origin of the rule stated in that Protocol is to be found in article 35 of the draft articles on diplomatic intercourse and immunities adopted by the Commission at its tenth session (1958). At the time, the Commission gave the following explanation on the matter in its commentary on article 35:

This article is based on the generally received view that a person enjoying diplomatic privileges and immunities should not acquire the nationality of the receiving State solely by the operation of the law of that State, and without his consent. In the first place the article is intended to cover the case of a child born on the territory of the receiving State of parents who are members of a foreign diplomatic mission and who also are not nationals of the receiving State. The child should not automatically acquire the nationality of the receiving State solely by virtue of the fact that the law of that State would normally confer local nationality in the circumstances. Such a child may, however, opt for that nationality later if the legislation of the receiving State provides for such an option. The article covers, secondly, the acquisition of the receiving State's nationality by a woman member of the mission in consequence of her marriage to a local national. Similar considerations apply in this case also and the article accordingly operates to prevent the automatic acquisition of local nationality in such a case. On the other hand, when the daughter of a member of the mission who is not a national of the receiving State marries a national of that State, the rule contained in this article would not prevent her from acquiring the nationality of that State, because, by marrying, she would cease to be part of the household of the member of the mission.<sup>37</sup>

(3) In support of the Commission's recommendation that the provision should form an integral part of the draft articles on permanent missions, the Commission wishes to point out a significant difference between the Vienna Convention on Diplomatic Relations and the present draft with regard to the scope of application of the rule on acquisition of nationality. The Optional Protocol concerning Acquisition of Nationality of 1961 was intended to apply to the bilateral relationships between the great number of States members of the community of nations. In the case of permanent missions, on the other hand, the persons whose nationality is in question are on the territory of the host State in virtue of their State's membership of the international organization and not of any purely bilateral relation between the two States; indeed, bilateral diplomatic relations may even in some cases not exist between the host State and the sending State. Similarly, the element of reciprocity which exists in the case of diplomatic missions is not present in the case of permanent missions. Accordingly, the Commission considered that in the case of permanent missions exemption from the operation of the local laws of nationality should be made a matter of express provision and not relegated to an Optional Protocol.

<sup>36</sup> *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities* (1961), vol. II, document A/Conf.20/11, p. 88.

<sup>37</sup> *Yearbook of the International Law Commission, 1958*, vol. II, document A/3859, p. 101.

*Article 40. Privileges and immunities of persons other than the permanent representative and the members of the diplomatic staff*

1. The members of the family of the permanent representative forming part of his household and the members of the family of a member of the diplomatic staff of the permanent mission forming part of his household shall, if they are not nationals of the host State, enjoy the privileges and immunities specified in articles 30 to 38.

2. Members of the administrative and technical staff of the permanent mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 30 to 37, except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 32 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in paragraph 1 of article 38, in respect of articles imported at the time of first installation.

3. Members of the service staff of the permanent mission who are not nationals of or permanently resident in the host State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in article 35.

4. Private staff of members of the permanent mission shall, if they are not nationals of or permanently resident in the host State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the permanent mission.

#### *Commentary*

(1) This article is based on article 37 of the Vienna Convention on Diplomatic Relations.

(2) The Study of the Secretariat does not include data on the privileges and immunities which host States accord to the members of the families of permanent representatives, to the members of the administrative and technical staff and of the service staff of permanent missions and to the private staff of the members of permanent missions. It is assumed that the practice relating to the status of these persons conforms to the corresponding rules established within the framework of inter-State diplomatic relations as codified and developed in the Vienna Convention on Diplomatic Relations. The assumption is corroborated by the identity of the legal bases of the status of these persons inasmuch as their status attaches to and derives from the diplomatic agents or permanent representatives, who are accorded analogous diplomatic privileges and immunities.

(3) In paragraph 4 of the article the expression "private servants" which appears in paragraph 4 of article 37 of the Vienna Convention on Diplomatic Relations, has been replaced by the expression "private staff" on the model of articles 32 and 38 of the draft articles on special missions. Paragraph 2 of the commentary on article 32 of the draft articles on special missions, quoted in paragraph (2) of the commentary on article 35 of the present draft, explains the change. That explanation is also valid for permanent missions to international organizations.

*Article 41. Nationals of the host State and persons permanently resident in the host State*

1. Except in so far as additional privileges and immunities may be granted by the host State, the permanent representative and any member of the diplomatic staff of the permanent mission who are nationals of or permanently resident in that State shall enjoy immunity from jurisdiction, and inviolability, only in respect of official acts performed in the exercise of their functions.

2. Other members of the staff of the permanent mission and persons on the private staff who are nationals of or permanently resident in the host State shall enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those members and persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

*Commentary*

(1) This article is based on article 38 of the Vienna Convention on Diplomatic Relations. Here, too, the expression "private servants" has been replaced by "private staff".

(2) A number of the conventions on the privileges and immunities of international organizations, whether universal or regional, stipulate that the provisions which define the privileges and immunities of the representatives of members are not applicable as between a representative and the authorities of the State of which he is a national or of which he is or has been the representative. Since the case of permanent representatives who are nationals of the host State is covered in article 41, paragraph 1, the Commission did not deem it advisable to include in this paragraph a clause concerning permanent representatives who are, or have been, representatives of that State. It considered that any such clause would refer to such an exceptional situation that there was no need to mention it. Moreover, if a person represented or had represented the host State, he was very likely to be one of its nationals and therefore subject to the limitation already imposed by the paragraph.

*Article 42. Duration of privileges and immunities*

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the host State on proceeding to take up his post or,

if already in its territory, from the moment when his appointment is notified to the host State by the Organization or by the sending State.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so. However, with respect to acts performed by such a person in the exercise of his functions as a member of the permanent mission, immunity shall continue to subsist.

3. In case of the death of a member of the permanent mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

4. In the event of the death of a member of the permanent mission not a national of or permanently resident in the host State or of a member of his family forming part of his household, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the host State was due solely to the presence there of the deceased as a member of the permanent mission or as a member of the family of a member of the permanent mission.

*Commentary*

(1) This article is based on the provisions of article 39 of the Vienna Convention on Diplomatic Relations. Having regard to the decision set out in paragraph 18 of this report, the Commission has not, however, included the reference to the case of armed conflict which appears in article 39 of the Vienna Convention.

(2) The first two paragraphs of the article deal with the times of commencement and termination of entitlements for persons who enjoy privileges and immunities in their official capacity. For those who do not enjoy privileges and immunities in their official capacity other dates may apply, viz. the dates of commencement and termination of the relationship which constitutes the grounds for the entitlement. The Commission noted that the Vienna Convention on Diplomatic Relations did not contain any specific provisions on the question, whereas the Vienna Convention on Consular Relations did so in article 53. The Commission wished to invite the views of Governments as to whether it was desirable to include a provision on these lines.

(3) Article IV, section 11, of the Convention on the Privileges and Immunities of the United Nations and article V, section 13, of the Convention on the Privileges and Immunities of the Specialized Agencies provide that representatives shall enjoy the privileges and immunities listed therein while exercising their functions and during their journey to and from the place of meeting. In 1961 the Legal Counsel of the United Nations replied to an inquiry made by one of the specialized agencies as to the interpretation to be given to the first part of this

phrase. The reply contained the following: "You inquire whether the words 'while exercising their functions' should be given a narrow or 'broad' interpretation... I have no hesitation in believing that it was the broad interpretation that was intended by the authors of the Convention."<sup>38</sup>

(4) Article IV, section 12 of the Convention on the Privileges and Immunities of the United Nations, which is reproduced *mutatis mutandis* in article V, section 14 of the Convention on the Privileges and Immunities of the Specialized Agencies, provides that:

In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members.

**Article 43. Transit through the territory  
of a third State**

1. If the permanent representative or a member of the diplomatic staff of the permanent mission passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of the members of his family enjoying privileges or immunities who are accompanying the permanent representative or member of the diplomatic staff of the permanent mission or travelling separately to join him or to return to their country.

2. In circumstances similar to those specified in paragraph 1 of this article, third States shall not hinder the passage of members of the administrative and technical or service staff of the permanent mission, and of members of their families through their territories.

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the host State. They shall accord to the couriers of the permanent mission who have been granted a passport visa if such visa was necessary, and to the bags of the permanent mission in transit, the same inviolability and protection as the host State is bound to accord.

4. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to the official communications and bags of the permanent mission, whose presence in the territory of the third State is due to *force majeure*.

*Commentary*

(1) The provisions of this article are based on article 40 of the Vienna Convention on Diplomatic Relations.

(2) Reference has been made in paragraph (3) of the commentary on article 42 to the broad interpretation given by the Legal Counsel of the United Nations to the provision of article IV, section 11, of the Convention on the Privileges and Immunities of the United Nations and of article V, section 13, of the Convention on the Privileges and Immunities of the Specialized Agencies which stipulates that representatives shall enjoy the privileges and immunities listed in those Conventions while exercising their functions and during their journeys to and from the place of meeting.

(3) The Study of the Secretariat mentions the special problem which may arise when access to the country in which a United Nations meeting is to be held is only possible through another State. It states that:

While there is little practice, the Secretariat takes the position that such States are obliged to grant access and transit to the representatives of Member States for the purpose in question.<sup>39</sup>

(4) During the discussion in the Commission the question was raised of deleting the sentence "which has granted him a passport visa if such visa was necessary" in paragraph 1 of article 43. It was noted, however, that when the Commission had drafted the corresponding articles of the Vienna Convention on Diplomatic Relations and of the draft on special missions, it had not intended to lay down an obligation for third States to grant transit, but merely wished to regulate the status of diplomatic agents in transit. Doubts were expressed as to whether such an obligation would be a positive rule at present and as to whether States would be prepared to accept it as *lex ferenda*. Reference was made to the difficulties which the obligation of granting transit would give rise to and in particular to the difficulties that would be encountered in the case in which the request for transit was made on behalf of a person who might be objectionable to the third State. Particular attention was given to the situation when a member of the permanent mission, being a national of a land-locked State, finds himself obliged to pass through the territory of the third State. In such an exceptional situation there is perhaps a case for asserting the existence of an obligation on the part of the third State, at least when it is a member of the organization concerned, by virtue of Articles 104 and 105 of the United Nations Charter and similar provisions in the constitutions of specialized agencies and regional organizations.

**Article 44. Non-discrimination**

In the application of the provisions of the present articles, no discrimination shall be made as between States.

<sup>38</sup> Study of the Secretariat, *Yearbook of the International Law Commission, 1967*, vol. II, documents A/CN.4/L.118 and Add.1 and 2, p. 176, para. 87.

<sup>39</sup> *Ibid.*, p. 190, para. 168.

*Commentary*

(1) Article 44 is based on paragraph 1 of article 47 of the Vienna Convention on Diplomatic Relations.

(2) A difference of substance between the two articles is the non-inclusion in article 44 of paragraph 2 of article 47 of the Vienna Convention. That paragraph refers to two cases in which, although an inequality of treatment is implied, no discrimination occurs, since the inequality of treatment in question is justified by the rule of reciprocity.

(3) In general, headquarters agreements of international organizations contain no restrictions on privileges and immunities of members of permanent missions based on the application of the principle of reciprocity in the relations between the host State and the sending State. Some headquarters agreements, however, include a clause providing that the host State shall grant permanent representatives the privileges and immunities which it accords to diplomatic envoys accredited to it, "subject to corresponding conditions and obligations". Examples of such clauses may be found in article V, section 15, of the Headquarters Agreement of the United Nations, article XI, section 24, paragraph (a), of the Headquarters Agreement of FAO and article 1 of the Headquarters Agreement of OAS.

(4) The Study of the Secretariat states that it has been the understanding of the Secretariat of the United Nations that the privileges and immunities granted should generally be those afforded to the diplomatic corps as a whole, and should not be subject to particular conditions imposed, on a basis of reciprocity, upon the diplomatic missions of particular States.<sup>40</sup> In his statement at the 1016th meeting of the Sixth Committee of the General Assembly, the Legal Counsel of the United Nations stated that:

The Secretary-General, in interpreting diplomatic privileges and immunities, would look to provisions of the Vienna Convention so far as they would appear relevant *mutatis mutandis* to representatives to United Nations organs and conferences. It should of course be noted that some provisions such as those relating to *agrément*, nationality or reciprocity have no relevancy in the situation of representatives to the United Nations.<sup>41</sup>

(5) In deciding not to include a second paragraph on the model of paragraph 2 of article 47 of the Vienna Convention on Diplomatic Relations, the Commission took into account the fact that the extension or restriction of privileges and immunities applies as a consequence of the operation of reciprocity within the framework of bilateral diplomatic relations between the sending State and the receiving State. In the case of multilateral diplomacy, however, it is a matter of relations among States and international organizations and not a matter which belongs exclusively to the relations between the host State and the sending State.

(6) Article 44 is formulated in such broad terms as to make its field of application cover all the obligations

provided for in the draft, whether assumed by the host State, the Organization or third States.

(7) The Commission wishes to point out that the article is placed provisionally and will be removed to the end of the whole draft in order to apply not only to permanent missions, but also to the parts on permanent observers from non-member States and delegations to organs of international organizations in the event that such parts are included in the draft.

### SECTION 3. CONDUCT OF THE PERMANENT MISSION AND ITS MEMBERS

#### *Article 45. Respect for the laws and regulations of the host State*

**1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the host State. They also have a duty not to interfere in the internal affairs of that State.**

**2. In case of grave and manifest violation of the criminal law of the host State by a person enjoying immunity from criminal jurisdiction, the sending State shall, unless it waives this immunity, recall the person concerned, terminate his functions with the mission or secure his departure, as appropriate. This provision shall not apply in the case of any act that the person concerned performed in carrying out the functions of the permanent mission within either the Organization or the premises of a permanent mission.**

**3. The premises of the permanent mission shall not be used in any manner incompatible with the exercise of the functions of the permanent mission.**

*Commentary*

(1) Paragraphs 1 and 3 of this article are based on the provisions of article 41, paragraphs 1 and 3, of the Vienna Convention on Diplomatic Relations, and article 48 of the draft articles on special missions.

(2) Unlike paragraph 3 of article 41 of the Vienna Convention on Diplomatic Relations and paragraph 2 of article 48 of the draft articles on special missions, paragraph 3 of this article does not include the expression "as laid down (envisaged) in the present Convention (articles) or by (in) other rules of general international law", nor a phrase similar to that referring to "any special agreements in force between the sending and the receiving State". These were deemed unnecessary, particularly in the light of article 4 of the present draft.

(3) Paragraph 2 has been included in the present article in order to ensure the protection of the host State in the event of a grave and manifest breach of its criminal law by a person enjoying immunity from criminal jurisdiction in the absence of the *persona non grata* procedure in the context of relations between States and international organizations. The expression "unless it waives this immunity", has been included in paragraph 2

<sup>40</sup> *Ibid.*, p. 178, para. 96.

<sup>41</sup> *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 98, document A/C.6/385, para. 4.

in order to emphasize that the provisions of the paragraph are not intended to derogate from those of article 33. The three alternatives offered to the sending State for the discharge of the obligation imposed on it by paragraph 2 are to be understood as covering the cases of the permanent representative or a member of the diplomatic staff, a member of one of the other categories in the permanent mission and the members of their families. The last sentence of the paragraph contains a saving clause intended *inter alia* to safeguard the independent exercise of the functions of the members of the permanent mission, while keeping within the rule grave crimes committed outside the Organization or the premises of permanent missions, including grave traffic violations.

#### *Article 46. Professional activity*

**The permanent representative and the members of the diplomatic staff of the permanent mission shall not practise for personal profit any professional or commercial activity in the host State.**

#### *Commentary*

(1) This article is based on the provisions of article 42 of the Vienna Convention on Diplomatic Relations and article 49 of the draft articles on special missions.

(2) In paragraph 2 of the commentary on article 49 of its draft articles on special missions, the Commission stated that:

Some Governments proposed the addition of a clause providing that the receiving State may permit the persons referred to in article 49 of the draft to practise a professional or commercial activity on its territory. The Commission took the view that the right of the receiving State to grant such permission is self-evident. It therefore preferred to make no substantive departure from the text of the Vienna Convention on this point.<sup>42</sup>

#### SECTION 4. END OF FUNCTIONS

#### *Article 47. End of the functions of the permanent representative or of a member of the diplomatic staff*

**The functions of the permanent representative or of a member of the diplomatic staff of the permanent mission come to an end, *inter alia*:**

**(a) On notification to this effect by the sending State to the Organization;**

**(b) If the permanent mission is finally or temporarily recalled.**

#### *Commentary*

(1) Sub-paragraph (a) of this article is based on the provisions of sub-paragraph (a) of article 43 of the Vienna Convention on Diplomatic Relations.

(2) Sub-paragraph (b) refers to the case where the sending State recalls the permanent mission for reasons which may or may not relate to the membership of the sending State in the organization to which that mission has been sent.

(3) This article does not contain a provision corresponding to sub-paragraph (b) of article 43 of the Vienna Convention on Diplomatic Relations, which provides as one of the modes of termination of the function of a diplomatic agent the "notification by the receiving State to the sending State that, in accordance with paragraph 2 of article 9, it refuses to recognize the diplomatic agent as a member of the mission". Under paragraph 2 of article 9 of the Vienna Convention on Diplomatic Relations, the receiving State may refuse such recognition if the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1—relating to the declaration of a diplomatic agent as *persona non grata* by the receiving State. As mentioned in paragraph (3) of the commentary on article 10 of the present draft.

The members of the permanent mission are not accredited to the host State in whose territory the seat of the organization is situated. They do not enter into direct relationship with the host State, unlike the case of bilateral diplomacy. In the latter case, the diplomatic agent is accredited to the receiving State in order to perform certain functions of representation and negotiation between the receiving State and his own. That legal situation is the basis of the institution of *agrément* for the appointment of the head of the diplomatic mission.<sup>43</sup>

It is also the basis of the right of the receiving State, to request the recall of the diplomatic agent when it declares him *persona non grata*.

#### *Article 48. Facilities for departure*

**The host State shall, whenever requested, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the host State, and members of the families of such persons irrespective of their nationality, to leave its territory. It shall, in case of emergency, place at their disposal the necessary means of transport for themselves and their property.**

#### *Commentary*

(1) Article 48 is based on the provisions of article 44 of the Vienna Convention on Diplomatic Relations. However, the expression "even in case of armed conflict" has not been included in the present article in view of the decision set out in paragraph 18 of the present report. The Commission has substituted instead the words "whenever requested". Also, the words "in particular, in case of need", which appear in article 44 of the Vienna Convention, have been replaced by the expression "in case of emergency", in order to emphasize that the host State is under no obligation to put at the disposal of members of the permanent mission means of transportation for travel taking place under normal circumstances.

<sup>42</sup> Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 367.

<sup>43</sup> Yearbook of the International Law Commission, 1968, vol. II, document A/7209/Rev.1, p. 203.

(2) The Commission considered the possibility of including in the draft, as a counterpart to article 48, a general provision on the obligation of the host State to allow members of permanent missions to enter its territory to take up their posts. However, the Commission postponed its decision on this matter until the second reading of the draft.

#### *Article 49. Protection of premises and archives*

1. When the permanent mission is temporarily or finally recalled, the host State must respect and protect the premises as well as the property and archives of the permanent mission. The sending State must take all appropriate measures to terminate this special duty of the host State within a reasonable time.

2. The host State, if requested by the sending State, shall grant the latter facilities for removing the property and the archives of the permanent mission from the territory of the host State.

#### *Commentary*

(1) The first sentence of paragraph 1 is based on the provisions of article 45 of the Vienna Convention on Diplomatic Relations, except as to the expression "even in case of armed conflict", which has been excluded in view of the decision set out in paragraph 18 of the present report.

(2) The second sentence of paragraph 1 does not appear in article 45 of the Vienna Convention on Diplomatic Relations. The Commission considered that its addition was needed because of the difference in character between a permanent mission and a diplomatic mission. Following a breach, diplomatic relations are normally resumed after a reasonable period. Withdrawal of a permanent mission to an international organization, on the other hand, may be due to a wide variety of causes and may even be final. The host State is not directly involved in the factors which may determine such a withdrawal or its duration. It would, therefore, mean imposing an unjustified burden on that State to require it to provide, for an unlimited period, special guarantees concerning the premises, archives and property of a permanent mission which has been recalled even on a temporary basis. It was therefore decided in article 49 that, in case of the recall of its permanent mission, the sending State must terminate this special duty of the host State within a reasonable time. The sending State is free to discharge that obligation in various ways, for instance, by removing its property and archives from the territory of the host State or by entrusting them to its diplomatic mission or to the diplomatic mission of another State. The second sentence of article 49, paragraph 1, has been drafted in the most general terms in order to cover all these possibilities. The premises similarly cease to enjoy special protection from the time the property and archives situated in them have been withdrawn or, after the expiry of a reasonable period, have ceased to enjoy special protection. Where the sending State has failed to discharge its obligation

within a reasonable period, the host State ceases to be bound by the special duty imposed by article 49, but, with respect to the property, archives and premises, remains bound by any obligations which may be imposed upon it by its municipal law, by general international law or by special agreements.

(3) Paragraph 2 of article 49 is based on article 46, paragraph 2, of the draft articles on special missions.

#### *Article 50.<sup>44</sup> Consultations between the sending State, the host State and the Organization*

If any question arises between a sending State and the host State concerning the application of the present articles, consultations between the host State, the sending State and the Organization shall be held upon the request of either State or the Organization itself.

#### *Commentary*

(1) In connexion with the examination of the provisional twenty-one draft articles adopted by the Commission in the course of its twentieth session, suggestions were made by some members of the Commission that the Special Rapporteur prepare a provision of general scope of application on the question of consultations between the sending State, the host State and the Organization.<sup>45</sup> The purpose of the consultations in question would be to seek solutions for any difficulties between the host State and the sending State in connexion with the establishment and the activities of the permanent mission. The need for such consultations is underlined by the difficulties which may arise as a result of the non-applicability between States members of international organizations and between States members and the organizations, of rules of inter-State bilateral diplomatic relations regarding *agrément*, the declaring of a diplomatic agent as *persona non grata* and reciprocity.

(2) Article 50 is intended to be sufficiently flexible to envisage the holding of consultations between the sending State and the host State or between either or both of them and the organization concerned. Moreover, the article provides that those consultations shall be held not only upon the request of the States concerned, but also upon the request of the Organization itself. It applies, in particular, to the case where a question arises between the host State on the one hand, and several sending States, on the other. In such a case, all the sending States concerned can participate in the consultations with the host State and the Organization.

<sup>44</sup> Article 50 was put provisionally at the end of the group of articles adopted by the Commission at its twenty-first session. Its place in the draft as a whole will be determined by the Commission at a later stage.

<sup>45</sup> See paragraph (8) of the commentary on article 16 in the report of the International Law Commission on the work of its twentieth session (*Yearbook of the International Law Commission, 1968*, vol. II, document A/7209, p. 209) and paragraph 5 of the Special Rapporteur's fourth report on relations between States and international organizations (A/CN.4/218 and Add.1).

(3) As regards the duty of the Organization to ensure the application of the provisions of the present draft, the Commission refers to article 24.

(4) The provision for consultations is not uncommon in international agreements. It may be found for example in article IV, section 14, of the Agreement of 26 June 1947 between the United Nations and the United States of America regarding the Headquarters of the United Nations and in article 6 of the Inter-American Treaty of Reciprocal Assistance of 2 September 1947.<sup>46</sup>

(5) In his fourth report, the Special Rapporteur had proposed the addition to this article, which was then article 49, of a second paragraph drafted as follows:

2. The preceding paragraph is without prejudice to provisions concerning settlement of disputes contained in the present articles or other international agreements in force between States or between States and international organizations or to any relevant rules of the Organization.<sup>47</sup>

The Commission did not consider it advisable to add this paragraph in view of the terms of articles 3, 4 and 5 concerning the application of the relevant rules of international organizations and of international agreements. It also reserved the possibility of including at the end of the draft articles a provision concerning the settlement of disputes which might arise from the application of the articles.

### CHAPTER III

#### Succession of States and Governments

##### A. HISTORICAL BACKGROUND

20. At its first session, held in 1949, the International Law Commission listed the topic "Succession of States and Governments" among the fourteen selected for codification but did not give priority to its study.<sup>48</sup> Following the adoption by the General Assembly of resolution 1686 (XVI) of 18 December 1961, entitled "Future work in the field of the codification and progressive development of international law", the International Law Commission in 1962, at its fourteenth session, decided to include "Succession of States and Governments" in its programme of work, in view of the fact that the General Assembly, in sub-paragraph 3 (a) of the above-mentioned resolution, had recommended the Commission to include that topic in its priority list.<sup>49</sup>

21. During its fourteenth session, at the 637th meeting held on 7 May 1962, the Commission set up a Sub-

Committee on the Succession of States and Governments, which it requested to submit suggestions on the scope of the subject, the method of approach for a study and the means of providing the necessary documentation. The Sub-Committee consisted of the following ten members: Mr. Lachs (Chairman), Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Liu, Mr. Rosenne, Mr. Tabibi and Mr. Tunkin. The Sub-Committee held two private meetings, on 16 May and 21 June 1962. In the light of the Sub-Committee's suggestions, the Commission took some procedural decisions at its 668th and 669th meetings, held on 26 and 27 June 1962. It decided, *inter alia*, to request the Sub-Committee to meet at Geneva in January 1963, in order to continue its work, and to place on the agenda for its fifteenth session the item "Report of the Sub-Committee on Succession of States and Governments".<sup>50</sup> The Secretary-General sent a circular note to the Governments of Member States, in accordance with the relevant provisions of the Commission's Statute, inviting them to submit the text of any treaties, laws, decrees, regulations, diplomatic correspondence, etc., concerning the procedure of succession relating to the States which had achieved independence since the Second World War.<sup>51</sup> By its resolution 1765 (XVII) of 20 November 1962, the General Assembly recommended that the Commission

continue its work on the succession of States and Governments taking into account the views expressed at the seventeenth session of the General Assembly and the report of the Sub-Committee on the Succession of States and Governments with appropriate reference to the views of States which have achieved independence since the Second World War.

22. The Sub-Committee on the Succession of States and Governments met at Geneva from 17 to 25 January 1963 and again on 6 June 1963, at the beginning of the International Law Commission's fifteenth session. On concluding its work, the Sub-Committee approved a report (A/CN.4/160), which appears as annex II to the report of the International Law Commission to the General Assembly on the work of its fifteenth session (1963). The Sub-Committee's report contains its conclusions on the scope of the topic of succession of States and Governments and its recommendations on the approach the Commission should adopt in its study. In the *Yearbook of the International Law Commission, 1963*, the Sub-Committee's report is accompanied by its two appendices. Appendix I reproduces the summary records of the meetings held by the Sub-Committee in January 1963 and on 6 June of the same year, and appendix II contains the memoranda and working papers submitted to the Sub-Committee by 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. Bartoš (A/CN.4/SC.2/WP.5) and Mr. Lachs (Chairman of the Sub-Committee) (A/CN.4/SC.2/WP.7).<sup>52</sup>

<sup>46</sup> United Nations, *Treaty Series*, vol. 11, p. 12 and *ibid.*, vol. 21, p. 92. For other examples, see P. Guggenheim, *Traité de droit international public* (Geneva, Librairie de l'Université, Georg et Cie S.A., 1954), vol. II, pp. 198-200.

<sup>47</sup> A/CN.4/218 and Add.1, art. 49.

<sup>48</sup> *Yearbook of the International Law Commission, 1949*, document A/925, p. 281, para. 16.

<sup>49</sup> *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, p. 190, para. 60.

<sup>50</sup> *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, pp. 189-192, paras. 54, 55, 70 to 72.

<sup>51</sup> *Ibid.*, p. 192, para. 73.

<sup>52</sup> *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, annex II, pp. 260-300.

23. The report of the Sub-Committee on the Succession of States and Governments was discussed by the Commission during its fifteenth session (1963), at the 702nd meeting, after being introduced by Mr. Lachs, the Chairman of the Sub-Committee, who explained the Sub-Committee's conclusions and recommendations. The Commission unanimously approved the Sub-Committee's report and gave its general approval to the recommendations contained therein. At the same time, the Commission appointed Mr. Lachs as Special Rapporteur on the topic "Succession of States and Governments". The Sub-Committee proposed that the Commission should remind Governments of the Secretary-General's circular note referred to above, and the Commission gave instructions to the Secretariat with a view to obtaining further information on the practice of States.<sup>53</sup>

24. The Commission endorsed the Sub-Committee's view that the objectives should be "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". Several members emphasized that in view of the modern phenomenon of decolonization, "special attention should be given to the problems of concern to the new States". The Commission considered that "the priority given to the study of the question of State succession was fully justified" and stated that the succession of Governments would, for the time being, be considered "only to the extent necessary to supplement the study on State succession". Likewise, the Commission underlined that it was "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". The Sub-Committee's opinion that succession in the matter of treaties should be "considered in connexion with the succession of States rather than in the context of the law of treaties" was also endorsed by the Commission. The broad outline, the order of priority of the headings and the detailed division of the topic recommended by the Sub-Committee were agreed to by the Commission, it being understood that the purpose was to lay down "guiding principles to be followed by the Special Rapporteur" and that the Commission's approval was "without prejudice to the position of each member with regard to the substance of the questions included in the programme". The headings into which the topic was divided were as follows: (i) succession in respect of treaties; (ii) succession in respect of rights and duties resulting from sources other than treaties; (iii) succession in respect of membership of international organizations.

25. In its resolution 1902 (XVIII) of 18 November 1963, the General Assembly, noting that the work of codification of the topic of succession of States and Governments was proceeding satisfactorily, recommended that the International Law Commission should continue its work on the topic, "taking into account the views expressed at the eighteenth session of the General Assembly. the report of the Sub-Committee on the Succession

of States and Governments and the comments which may be submitted by Governments, with appropriate reference to the views of States which have achieved independence since the Second World War". Occupied with the codification of other branches of international law, such as the law of treaties and special missions, the International Law Commission did not consider the topic of the successions of States and Governments at its sixteenth (1964), seventeenth (1965/1966) and eighteenth (1966) sessions.<sup>54</sup> In its resolutions 2045 (XX) of 8 December 1965 and 2167 (XXI) of 5 December 1966, the General Assembly noted with approval the Commission's programme of work referred to in its reports of 1964, 1965 and 1966. Resolution 2045 (XX) recommended that the Commission should continue, "when possible", its work on the succession of States and Governments, "taking into account the views and considerations referred to in General Assembly resolution 1902 (XVIII)". Resolution 2167 (XXI) in turn recommended that the Commission should continue that work, "taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII)".

26. At its nineteenth session (1967), the International Law Commission made new arrangements for the work on the succession of States and Governments. The topic was placed on the agenda of the Commission for that session in accordance with a decision taken in 1966.<sup>55</sup> Taking into account the agreed broad outline of the subject laid down in the report submitted by its Sub-Committee in 1963, and the fact that Mr. Lachs, the Special Rapporteur on the topic, had ceased to be a member of the Commission because of his election to the International Court of Justice in December 1966, the Commission, in order to advance its study more rapidly and acting on a suggestion previously made by Mr. Lachs, decided to divide the topic into the three headings mentioned in the Sub-Committee's report (see para. 24 above) and appointed Special Rapporteurs for two of them: Sir Humphrey Waldock, formerly Special Rapporteur of the Commission on the law of treaties, was appointed Special Rapporteur for "succession in respect of treaties" and Mr. Mohammed Bedjaoui, Special Rapporteur for "succession in respect of rights and duties resulting from sources other than treaties". The

<sup>54</sup> The final draft articles on the law of treaties adopted by the Commission in 1966 did not contain provisions concerning "the succession of States in respect of treaties, which the Commission considers can be more appropriately dealt with under the item of its agenda relating to succession of States and Governments" (*Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, p. 177, para. 30 of the report, and p. 256, para. 6 of the commentary on article 58 of the draft). Article 69 of the draft articles on the law of treaties embodied a reservation on this matter. The position of the Commission was in accordance with the decision of principle which it had adopted in 1963 in the context of the topic "Succession of States and Governments" (see para. 24 above). However, in the process of codifying the law of treaties reference was made to the succession of States and Governments, in 1963, in connexion with the extinction of the international personality of a State and the termination of treaties and, in 1964, with regard to the territorial scope of treaties and the effects of treaties on third States.

<sup>55</sup> *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, p. 278, para. 74.

<sup>53</sup> *Ibid.*, pp. 224 and 225, paras. 56-61.

Commission decided to leave aside, for the time being, the third heading in the division made by the Sub-Committee, namely, "succession in respect of membership of international organizations", which it considered to be related both to succession in respect of treaties and to relations between States and international organizations. Consequently, the Commission did not appoint a Special Rapporteur for this heading.<sup>56</sup>

27. With regard to "succession in respect of treaties", the Commission observed that it had already decided in 1963 to give priority to this aspect of the topic, and that the convocation by General Assembly resolution 2166 (XXI) of 5 December 1966 of a conference on the law of treaties in 1968 and 1969 had made its codification more urgent. The Commission therefore decided to advance its work on that aspect of the topic as rapidly as possible as from its twentieth session in 1968. The Commission considered that the second aspect of the topic, namely, "succession in respect of rights and duties resulting from sources other than treaties", was a diverse and complex matter which would require some preparatory study. It requested the Special Rapporteur for this second aspect of the topic "to present an introductory report which would enable the Commission to decide what parts of the subject should be dealt with, the priorities to be given to them, and the general manner of treatment".

28. The Commission's decisions referred to in paragraphs 26 and 27 above received general support in the Sixth Committee at the General Assembly's twenty-second session. The Assembly, in its resolution 2272 (XXII) of 1 December 1967, noted with approval the International Law Commission's programme of work for 1968, and, repeating the terms of its resolution 2167 (XXI), recommended that the Commission should continue its work on succession of States and Governments, "taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII)".

29. At its twentieth session (1968), the Commission had before it a first report on "Succession of States in respect of rights and duties resulting from sources other than treaties" (A/CN.4/204) submitted by Mr. Mohammed Bedjaoui, Special Rapporteur on that aspect of the topic, and a first report on "Succession of States and Governments in respect of treaties" (A/CN.4/202) submitted by Sir Humphrey Waldock, Special Rapporteur on succession in respect of treaties. The two reports were considered successively, beginning with the report on succession of States in respect of rights and duties resulting from sources other than treaties.

30. The Commission considered the report (A/CN.4/204) submitted by Mr. Mohammed Bedjaoui, the Special Rapporteur, at its 960th to 965th and 968th meetings. After a general debate on the report the Commission requested the Special Rapporteur to prepare a list of preliminary questions relating to points on which he wished to have the Commission's views. In compliance

with that request, the Special Rapporteur submitted to the Commission, at its 962nd meeting, a questionnaire on the following eight points: (a) title and scope of the topic; (b) general definition of State succession; (c) method of work; (d) form of the work; (e) origins and types of State succession; (f) specific problems of new States; (g) judicial settlement of disputes; (h) order of priority or choice of certain aspects of the topic. At its 965th meeting, the Commission provisionally adopted a number of conclusions on the points listed in the Special Rapporteur's questionnaire, pending whatever decisions it might take on succession in respect of treaties. After considering the report (A/CN.4/202) submitted by Sir Humphrey Waldock, the Commission, at its 968th meeting, reaffirmed the conclusions it had reached concerning succession in respect of matters other than treaties. These conclusions were reproduced in the Committee's report on the session together with a summary of the views expressed by the members of the Commission during the discussion preceding their adoption.<sup>57</sup>

31. The Commission considered the first report on succession of States and Governments in respect of treaties (A/CN.4/202) by Sir Humphrey Waldock, the Special Rapporteur, at its 965th to 968th meetings. The Commission endorsed the suggestion of the Special Rapporteur that it was unnecessary to repeat in the context of the Commission's report the general debate which had taken place on the several aspects of succession in matters other than treaties which might also be of interest in regard to succession in respect of treaties. It would be for the Special Rapporteur to take account of the views expressed by members of the Commission in that debate in so far as they might also have relevance in connexion with succession in respect of treaties. The Commission's report reproduced, however, a summary of views expressed on questions such as the title of the topic, the dividing line between the two topics of succession, and the nature and form of the work. Following the discussion, the Commission concluded that it was not called upon to take any formal decision in regard to "Succession in respect of treaties".<sup>58</sup>

32. As reflected in the pertinent chapter of the report on the work of its twentieth session, the Commission deemed it desirable, *inter alia*, to complete the study of succession in respect of treaties and to make progress on the study of succession in respect of matters other than treaties during the remainder of the Commission's term of office in its present composition.<sup>59</sup> At the General Assembly's twenty-third session, it was noted with satisfaction that the International Law Commission, following the recommendation of the General Assembly, had begun to consider in depth the topic of succession of States and Governments, and that some progress had already been achieved at the Commission's twentieth session. Once again, the General Assembly, in its resolution 2400 (XXIII) of 11 December 1968, noted with

<sup>56</sup> *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, p. 368, paras. 38-41.

<sup>57</sup> *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, pp. 216-221, paras. 45-79.

<sup>58</sup> *Ibid.*, pp. 221 and 222, paras. 80-91.

<sup>59</sup> *Ibid.*, pp. 223 and 224, paras. 100, 101, 103 and 104.

approval the programme of work planned by the International Law Commission and recommended the Commission to continue its work on succession of States and Governments, "taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII)".

33. At the present session of the Commission, Mr. Mohammed Bedjaoui, Special Rapporteur on succession in respect of matters other than treaties, submitted a second report (A/CN.4/216/Rev.1) entitled "Economic and financial acquired rights and State succession". Sir Humphrey Waldock, Special Rapporteur on succession in respect of treaties, submitted also a second report (A/CN.4/214 and Add.1 and 2) on this other aspect of the topic. Owing to the lack of time the Commission considered only the report submitted by Mr. Bedjaoui at the 1000th to 1003rd and 1005th to 1009th meetings.

34. The Secretariat distributed, at the present session of the Commission, a new study in the series "Succession of States to multilateral treaties". The study, the sixth of the series, was entitled "Food and Agricultural Organization of the United Nations: Constitution and multilateral conventions and agreements concluded within the Organization and deposited with its Director-General" (A/CN.4/210).<sup>60</sup>

#### B. SUCCESSION IN RESPECT OF MATTERS OTHER THAN TREATIES

35. In 1968, at its twentieth session, the Commission decided to begin its study of succession in respect of matters other than treaties with the aspect of the topic

<sup>60</sup> As recorded in paragraph 43 of the Commission's Report on the work of its twentieth session, the Secretariat had previously prepared and distributed, in accordance with the Commission's requests, the following documents and publication relating to succession of States and Governments: (a) a memorandum on "The succession of States in relation to membership in the United Nations" (*Yearbook of the International Law Commission, 1962*, vol. II, documents A/CN.4/149 and Add.1, p. 101); (b) a memorandum on "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary" (*ibid.*, document A/CN.4/150, p. 106); (c) a study entitled "Digest of the decisions of international tribunals relating to State Succession" (*ibid.*, document A/CN.4/151, p. 131); (d) a study entitled "Digest of decisions of national courts relating to succession of States and Governments" (*Yearbook of the International Law Commission, 1963*, vol. II, document A/CN.4/157, p. 95); (e) five studies in the series "Succession of States to multilateral treaties", entitled respectively "International Union for the Protection of Literary and Artistic Work: Berne Convention of 1886 and subsequent Acts of revision" (Study I), "Permanent Court of Arbitration and The Hague Conventions of 1889 and 1907" (Study II), "The Geneva Humanitarian Conventions and the International Red Cross" (Study III), "International Union for the Protection of Industrial Property: Paris Convention of 1883 and subsequent Acts of revision and special agreements" (Study IV) and "The General Agreement on Tariffs and Trade and its subsidiary instruments" (Study V) (*Yearbook of the International Law Commission, 1968*, vol. II, documents A/CN.4/200 and Add.1 and 2, p. 1); (f) a volume of the *United Nations Legislative Series* entitled "Material on succession of States" (ST/LEG/SER.B/14), containing the information provided or indicated by Governments of Member States in response to the Secretary-General's request referred to in paragraphs 21 and 23 above.

relating to "succession of States in economic and financial matters" and instructed the Special Rapporteur, Mr. Mohammed Bedjaoui, to prepare a report on it for the next session of the Commission.<sup>61</sup> At the present session, as indicated in paragraph 33 above, the Special Rapporteur submitted a report (A/CN.4/216/Rev.1), dealing with the question of "economic and financial acquired rights and State succession" and the Commission devoted nine meetings to its consideration (1000th to 1003rd and 1005th to 1009th meetings). An account is given below of the views expressed by the Special Rapporteur and other members of the Commission during the consideration of the report as well as of the conclusions reached and decisions taken by the Commission at the end of the debate.

#### 1. General views on the scope, approach and conclusions of the report submitted by the Special Rapporteur

36. As reflected in his report, the Special Rapporteur took as his starting-point the principle of equality of States and went on to show that international law does not recognize two categories of States, that of successor State constituting an inferior category. Even if a special status were to be accorded to the successor States, account would nevertheless have to be taken of a number of principles of contemporary international law and relevant resolutions adopted by the United Nations General Assembly which recognized that all peoples are entitled to decide freely their political and economic system.

37. The Special Rapporteur was of the opinion that acquired rights could not have a legal basis in a transfer of sovereignty from the predecessor State to the successor State entailing a transfer of obligations. There was no transfer but a substitution of sovereignties by the extinction of one and the creation of another. The successor State possessed its own sovereignty as an attribute that international law attached to statehood. On the other hand, a transfer would imply, in his opinion, a change in the character of the obligations themselves, making them more onerous for the successor State. In the light of contradictions in practice, jurisprudence and doctrine, the Special Rapporteur regarded also as neither provable nor useful the thesis that the successor State was obliged to respect acquired rights by virtue of an autonomous obligation of international law. Likewise, he saw a certain inadequacy in the theory of acquired rights as applied to the problems of compensation for derogations therefrom, in particular with regard to acquired rights of aliens. Considering that antinomy existed between decolonization and acquired rights, the Special Rapporteur felt that the theory of acquired rights was even more untenable in the case of newly independent States.

38. Finding no legal basis for the theory of acquired rights and convinced of the highly contradictory nature of the precedents, which needed re-examination, the Special Rapporteur held, in short, that the successor State was not bound by the acquired rights granted by the

<sup>61</sup> *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, p. 221, para. 79.

predecessor State, and that it was so bound only if it acknowledged those rights of its own free will or if its competence was restricted by treaty. But the competence of the successor State was obviously not arbitrary. In its actions, it must not depart at any time from the rules of conduct governing every State. For, before becoming a successor State, it was a State, in other words, a legal entity having, in addition to its rights, international obligations the violation of which would engage its international responsibility.

39. The approach and conclusions of the report were supported in principle by some members of the Commission, who found it a complete presentation of the various trends existing on the subject in practice and theory. Some members agreed with certain of the arguments advanced in the report but deemed it difficult to subscribe without reservation to its conclusions. Thus, it was pointed out that the principle of equality of States is not impaired because a State assumes additional obligations arising out of a valid treaty or from the application of a rule of general international law. Other members, however, disagreed with the content and conclusions of the report because, in their opinion, the issues were not adequately developed, and the presentation of the material was incomplete and somewhat lacking in balance. Express reservations as to the legal analysis of a number of issues dealt with in the report were also made by certain members of the Commission.

40. The Special Rapporteur's views that State succession implied a substitution and not a transfer of sovereignty, that under international law the sovereignty of a successor State was an attribute of its statehood, and that in its actions it was subject to the rules of international law applicable to any State were shared by several members. Some members of the Commission commended the Special Rapporteur on having studied the theory of acquired rights in the light of basic principles of contemporary international law and relevant declarations recently adopted by the General Assembly or by international conferences convened under the auspices of the United Nations. Others thought that those principles were not absolute and sometimes not acceptable and that, consequently, unrestrained discretion could not be allowed to the States invoking them. It was also added that the legal meaning and scope of General Assembly resolutions (e.g. resolution 1803 (XVII) of 14 December 1962 on permanent sovereignty over natural resources) should be invoked with caution because they reflected a delicate political compromise between Member States, and their interpretation was controversial.

41. The need to study all origins and types of succession in order to formulate appropriate rules was stressed by several members. For some, there were good reasons to place emphasis on decolonization but that type of succession, which would probably require special treatment, did not exhaust the subject. The study should, therefore, cover other causes of succession, such as the establishment and dissolution of unions, mergers, partitions and partial transfers of territory. Other members thought that the process of succession arising from decolonization should not be studied exclusively from the standpoint of the relationship between the predecessor

and the successor States, because relations with third States or among the successor States themselves (dissolution of colonial federations) could be likewise at stake. Some members were of the opinion that decolonization was more a cause than a type of succession. Considering that decolonization had reached a very advanced stage, other members said that the Commission should focus its attention on the causes of succession which might become more frequent in the future (e.g. establishment of and secession from economic integrations and federal unions). Lastly, some members emphasized that the circumstances surrounding certain cases of succession, in particular cases of independence resulting from a freely accepted agreement, should not be overlooked.

42. In this connexion, the Special Rapporteur stated that, in his view, decolonization was not a momentary phenomenon which came to an end simply because independence was attained, but rather a lengthy process during which the structural changes involved had to be examined in the specific context of State succession. This view was shared by some members of the Commission, while others took a different view.

## *2. The succession of States and the problem of acquired rights*

43. Some members of the Commission agreed with the Special Rapporteur's understanding that contemporary international law did not recognize so-called acquired rights in connexion with private persons, individuals or corporate bodies. The right of property has always been relative and subject to changes, and international law has allowed States to nationalize the property of aliens and nationals alike. Other members also considered juridically correct the thesis of the non-existence of a rule of international law on which acquired rights would be based but, at the same time, recognized that for political reasons certain elements of the concept had sometimes been applied in practice, or that it might occasionally help to solve some specific problems (e.g. debts of public utility, cases relating to certain types of private rights). With regard to certain public rights, it was pointed out that, where succession resulted from other causes than decolonization, certain rights of States (e.g., public property, public debts) deserved protection, and that the legal means of safeguarding them should be studied.

44. In the opinion of other members, the notion of acquired rights had been recognized in international practice and jurisprudence and in treaties and must be respected in cases of succession. Such rights might be not absolute, their concept might be somewhat imprecise, and they could be limited, but it was not possible to accept their outright suppression. The successor State must, like its predecessor, respect a minimum of rights of aliens (e.g. the right to property), including certain acquired rights; where appropriate, international law supported such respect of acquired rights by imposing an obligation to pay compensation. Exceptions to that principle were only admitted where the predecessor State had granted the rights in bad faith, where such rights

were not in conformity with the public and social order of the successor State, and where the maintenance of the rights in question was contrary to the general interest. It was also added by some members that acquired rights obtained by illegal means were not protected by international law.

45. Certain members considered it impossible either to reject the concept of acquired rights or to accept it without any qualifications. It had been recognized in the past by international jurisprudence as a rule of customary international law, but the position had shifted since then. At present, the concept was highly controversial. The Commission's task was not to engage in a doctrinal debate on the existence or non-existence of acquired rights, but to consider whether or not it was essential that, even in the case of State succession, aliens should be guaranteed the treatment accorded to them by international law.

46. It was also mentioned that no legal system could allow itself to reject all transitional rights. There could not be automatic extinction of all rights. The successor State was, by virtue of the rules governing State succession, under an obligation to respect those rights as long as no change of régime was introduced in its legal order, that change being, of course, subject to any limits laid down by the rules of international law.

47. For some members of the Commission, compensation was the remedy provided for by international law to reconcile the principle of acquired rights and the principle of the sovereign equality of States. Among the reasons advanced were the principles of unjust enrichment and equity. States had the right to nationalize or expropriate property rights which had the character of acquired rights, but the exercise of that right carried with it the obligation to pay compensation. Certain members referred to prompt, adequate and effective compensation. Others said that the compensation should be equitable, should be fixed according to the circumstances, and should take into consideration the capacity of the successor State to pay. While recognizing in principle the obligation to pay compensation, certain members excluded its automatic application in certain situations derived from some specific causes of succession.

48. On the other hand, other members were of the opinion that international law did not limit the sovereignty of the State in that respect, even though, for reasons of political or economic expediency, equitable compensation had been sometimes granted in practice, by agreement or otherwise. Some of them believed that in this matter a distinction should be made between large land-owners or corporations and private individuals of modest means. Only the latter should in certain cases receive reasonable compensation for reasons of humanity and equity.

49. Lastly, other members noted that the present trend was to have recourse to global settlements by international arrangements or agreements. It was also suggested that the problem of compensation should be approached in the light of the modern principles of international economic co-operation between developing and developed countries.

50. The principles of international law concerning unjust enrichment, human rights, good faith and equity were frequently mentioned during the debate as possible legal foundations for the protection of rights existing prior to the succession. Thus, it was said that the abolition by a successor State of certain economic and financial rights could involve an unjust enrichment, that the rules regarding human rights protected certain essential rights of aliens and nationals, including property rights, that good faith was at stake where investments were covered by formal or *de facto* agreements, and that equity could serve to remedy certain situations.

51. The Special Rapporteur for his part considered that in practice the notion of unjust enrichment would not be applicable in the context of decolonization, if only because, if applied, it would give rise to court cases which would not serve the cause of good relations between the predecessor and the successor States. As far as human rights were concerned, he voiced the opinion that present differences between the individualist and collectivist standpoints might also prove a source of difficulty. The notion of good faith was, in his view, too vague to be adopted as a basis. The Special Rapporteur's position on these points was the subject of lively controversy in the Commission.

### 3. *Economic and financial acquired rights and specific problems of new States*

52. Some members underlined that in cases of decolonization the starting-point should be that all so-called economic and financial acquired rights were void. In their view, the right of new States, as of all other States, to nationalize and exploit their natural resources in the way they believed most appropriate for their economic development should not be jeopardized. On the other hand, investments made during the colonial period had frequently been amortized long before independence and had paid off very often the equivalent of several times their value.

53. Other members considered that decolonization and respect for acquired rights were not necessarily contradictory. In their view, if the facts were that the respect of economic and financial acquired rights in a new State which was a former colony constituted a severe limitation on its economic development, this should be taken into account and appropriate remedies should be devised. Certain members affirmed that in the absence of particular agreements the principle of the respect of acquired rights remained valid, even in cases of succession resulting from decolonization.

54. Other members shared the view that compensation and terms of payment for expropriation of property should be calculated so as to take into account losses suffered by the former colony in connexion with that property. Benefits derived in the past under the colonial régime would have to be taken into consideration to avoid unjust enrichment.

55. Stress was laid on the difficulties which might arise in cases of decolonization where an enormous volume of rights became aliens' rights overnight. In such cases

the rules governing compensation were impracticable and should be replaced by equitable solutions based on international solidarity and economic co-operation. Once the decolonization process had been completed and there was again an equitable participation in economic and social progress in all continents, and flagrant inequalities had been remedied, the general rules of international law governing compensation would be seen in their normal perspective.

56. Lastly, certain members considered it important to ascertain what the economic and financial consequences might be of the maintenance, discontinuance or modification of the principle of acquired rights. In their view, large scale nationalization without compensation might adversely affect new States and developing countries by hindering the international assistance necessary for their economic development. On the other hand, equitable protection of economic and financial acquired rights could encourage foreign capital investment and technical assistance. Other members said that in this field not only legal but also economic and political factors should be taken into consideration in order to avoid reactions detrimental to the developing countries. Contemporary realities should be faced and acceptable safeguards and settlement procedures worked out.

4. *Succession in economic and financial matters as a question of continuity or discontinuity of legal situations existing prior to the succession*

57. In the opinion of some members the essential question was to ascertain the extent to which a successor State was bound to respect pre-existing legal situations (rights and obligations) lawfully constituted on the basis of the legal order of the predecessor State in respect of the territory which became that of the successor State. In other words, the problem was to find out in what situations, in the absence of a specific treaty régime, the very fact that a State had succeeded another introduced an element that authorized the successor to derogate from the general rules of international law applicable to those situations before the succession. The codification of the international law relating to succession in economic and financial matters would consist, for those members, in determining the possible exceptions to the general principle of the equality of rights and obligations of the predecessor and the successor States with regard to those legal situations. The Special Rapporteur and certain members deemed it reasonable to believe that the obligations of the successor State would be lessened because it had not participated in creating them (*res inter alios acta*).

5. *Relationship between succession in economic and financial matters, the rules governing the treatment of aliens and the topic of State responsibility*

58. It was generally agreed that problems relating to the protection of aliens and of their acquired rights arose both in connexion with State succession and in other contexts. The Special Rapporteur commented that it was not a question of determining whether or not

those problems arose exclusively in connexion with State succession, but whether they arose at the same time, and on the same terms, in the framework of succession in economic and financial matters. He considered that problems relating to the treatment of aliens would have to be dealt with specifically in the context of State succession.

59. Reference was made during the debate by certain members to matters such as the equal treatment of nationals and aliens, to the obsolescence of the distinction between nationals and aliens with respect to the protection of certain rights, to the desirability of giving separate treatment to economic and financial rights of individuals and to those which belonged to corporate bodies, to the difficult questions of nationality which arose from decolonization, and to the need of a reassessment of the notion of the "international minimum standard" in the light of present principles and rules of positive international law.

60. Some members took the view that the study of acquired rights belonged to the topic of State responsibility rather than to that of succession in economic and financial matters. Others considered that it could be studied either in the context of State succession or in that of State responsibility, or separately. The Special Rapporteur for the topic of succession in respect of matters other than treaties stated that succession was concerned only with the existence or non-existence of international obligations, namely with the question of what a successor State could or could not legally do, while State responsibility, as defined by the Special Rapporteur for that topic, dealt with the problems arising out of the violation of existing rules.

6. *Conclusions and decisions of the Commission*

61. At the end of the debate, most members of the Commission were of the opinion that the codification of the rules relating to succession in respect of matters other than treaties should not begin with the preparation of draft articles on acquired rights. The topic of acquired rights was extremely controversial and its study, at a premature stage, could only delay the Commission's work on the topic as a whole. The efforts of the Commission should, therefore, be directed to finding a solid basis on which to go forward with the codification and progressive development of the topic, taking into account the differing legal interests and current needs of States. Consequently, most members of the Commission considered that an empirical method should be adopted for the codification of succession in economic and financial matters, preferably commencing with a study of public property and public debts. Not until the Commission had made sufficient progress, or perhaps had even exhausted the entire subject, would it be in a position to deal directly with the problem of acquired rights.

62. Referring to the provisional decision adopted at its 1009th meeting and to paragraph 93 of this report, the Commission requested the Special Rapporteur to prepare another report containing draft articles on succession of States in respect of economic and financial matters, taking into account the comments of members

of the Commission on the reports he had already submitted at the Commission's twentieth and twenty-first sessions. The Commission took note of the Special Rapporteur's intention to devote his next report to public property and public debts. It thanked the Special Rapporteur for his second report on succession of States in respect of matters other than treaties, and confirmed its decision to give that topic priority at its twenty-second session, in 1970.

63. At the request of the Special Rapporteur, the Commission decided to ask the Secretary-General to circulate again a note inviting Governments of Member States to submit the texts of any treaties, laws, decrees, regulations and diplomatic correspondence relating to the process of succession and affecting States which have attained their independence since the Second World War, which had not been transmitted pursuant to the Secretary-General's notes of 27 July 1962 and 15 July 1963, as well as any additional documentation evidencing the practice followed by States in that respect. The Secretariat will compile and publish the information received in a volume of the United Nations Legislative Series. Further, the Secretariat will bring up to date the "Digest of the decisions of international tribunals relating to State succession" (A/CN.4/151), published in 1962.

#### CHAPTER IV

##### State responsibility

64. At its first session in 1949, the International Law Commission included "State responsibility" in the list of fourteen topics of international law selected for codification.<sup>62</sup> The Commission, however, did not give priority to the study of the topic. By resolution 799 (VIII) of 7 December 1953, the General Assembly requested the Commission "as soon as it considers it advisable, to undertake the codification of the principles of international law governing State responsibility".

65. At its sixth session (1954), the International Law Commission took note of General Assembly resolution 799 (VIII). However, because of its heavy agenda, the Commission was unable to begin the study of the topic at that session.<sup>63</sup> The Commission had before it a memorandum (A/CN.4/80) on the request of the General Assembly submitted by one of its members, Mr. F. V. García Amador.<sup>64</sup> The memorandum described the background of the General Assembly's request,

the nature and scope of the matter and a plan of work. In 1955, at its seventh session, the Commission appointed Mr. F. V. García Amador Special Rapporteur for the topic of State responsibility.<sup>65</sup>

66. Mr. F. V. García Amador, Special Rapporteur, submitted successively six reports on the topic to the Commission at its eighth (1956), ninth (1957), tenth (1958), eleventh (1959), twelfth (1960) and thirteenth (1961) sessions. The first report (A/CN.4/96), a preliminary one, was entitled "International Responsibility" and contained some "bases of discussion".<sup>66</sup> The second report (A/CN.4/106) added to the title the following sub-heading "Responsibility of the State for injuries caused in its territory to the person or property of aliens. Part I: Acts and Omissions" and contained a set of preliminary draft articles on that aspect of the topic.<sup>67</sup> All the reports which followed were equally limited to the study of questions relating to responsibility of the State for injuries caused in its territory to the person or property of aliens. The third report (A/CN.4/111) related to "Part II: The International Claim" contained also a set of preliminary draft articles,<sup>68</sup> the fourth (A/CN.4/119) undertook a new and more detailed study of certain questions already dealt with in the second report (international protection of acquired rights; expropriation in general; contractual rights)<sup>69</sup> and the fifth (A/CN.4/125), divided into three parts, continued the study made in the fourth report of measures affecting acquired rights, examined the problem of the constituent elements of the wrongful act, including "abuse of rights" and "fault", and revised the preliminary draft articles contained in the second and third reports.<sup>70</sup> The sixth and last report (A/CN.4/134 and Add.1) was devoted to the subject of "reparation of the injury". It included also an addendum containing revised texts of the preliminary draft articles submitted by the Special Rapporteur in his previous reports.<sup>71</sup>

67. Occupied with the codification of other branches of international law, such as arbitral procedure and diplomatic and consular intercourse and immunities, the Commission was not able between 1956 and 1961 to undertake the codification of State responsibility, although from time to time it held some general exchanges of

<sup>62</sup> *Yearbook of the International Law Commission, 1955*, vol. II, document A/2934, p. 42, para. 33.

<sup>63</sup> *Yearbook of the International Law Commission, 1956*, vol. II, p. 173.

<sup>64</sup> *Yearbook of the International Law Commission, 1957*, vol. II, p. 104.

<sup>65</sup> *Yearbook of the International Law Commission, 1958*, vol. II, p. 47.

<sup>66</sup> *Yearbook of the International Law Commission, 1959*, vol. II, p. 1.

<sup>67</sup> *Yearbook of the International Law Commission, 1960*, vol. II, p. 41.

<sup>68</sup> *Yearbook of the International Law Commission, 1961*, vol. II, p. 1. Although the sixth report was among the documents prepared for the Commission's thirteenth session, it was only submitted in December 1961, that is after the closure of the session. As the term of office of the Commission's members ended at 31 December 1961 and Mr. García Amador was not re-elected, he submitted that report to the Commission, so that his contribution to the work of codification in the field of State responsibility should not remain incomplete.

<sup>62</sup> *Yearbook of the International Law Commission, 1949*, document A/925, p. 281, para. 16. The Commission made the selection after undertaking a survey of the whole field of international law, in accordance with article 18, paragraph 1, of its Statute. In this connexion, the Commission used as a basis of discussion a memorandum by the Secretary-General entitled "Survey of International Law in relation to the work of Codification of the International Law Commission" (A/CN.4/Rev.1).

<sup>63</sup> *Yearbook of the International Law Commission, 1954*, vol. II, document A/2693, p. 162, para. 74.

<sup>64</sup> *Yearbook of the International Law Commission, 1954*, vol. II, p. 21.

views on the matter. Thus, at its eighth session (1956), the Commission considered the first report submitted by the Special Rapporteur, Mr. F. V. García Amador, and without taking any decision on particular points raised therein requested him to continue his work in the light of the views expressed by the members.<sup>72</sup> At its ninth session (1957), the Commission limited itself to a general and preliminary discussion of the second report of the Special Rapporteur and again requested the Special Rapporteur to continue his work.<sup>73</sup> In 1959, at its eleventh session, the Commission held a brief discussion on State responsibility almost entirely devoted to comment on a preliminary report from representatives of the Harvard Law School on the work undertaken by that School on the subject.<sup>74</sup> At its twelfth session (1960), the Commission heard and its members commented briefly on, first, a statement on the problems of State responsibility made by the Observer for the Inter-American Juridical Committee, and, secondly, a new statement by the representative of the Harvard Law School.<sup>75</sup> In 1961, at its thirteenth session, the Commission heard another statement by the representative of the Harvard Law School on the draft convention on the international responsibility of States for injury to aliens, prepared as part of the programme of international studies of the Harvard Law School.<sup>76</sup>

<sup>72</sup> *Yearbook of the International Law Commission, 1956*, vol. II, document A/3159, p. 301, para. 35. The discussion took place at the 370th to 373rd meetings of the Commission.

<sup>73</sup> *Yearbook of the International Law Commission, 1957*, vol. II, document A/3623, p. 143, para. 17. The discussion took place at its 413th to 416th meetings.

<sup>74</sup> *Yearbook of the International Law Commission, 1959*, vol. II, document A/4169, p. 88, para. 7. The discussion took place at its 512th and 513th meetings. In connexion with the preliminary work of the Commission for the study of the principles governing State responsibility, the Harvard Law School Research Center had decided, at the request of the Commission's Secretariat, to revise and bring up to date the "Draft Convention on responsibility of States for damages done in their territory to the person or property of foreigners" prepared by the Center in 1929. The Commission, at its eighth session (1956), confirmed the request of the Secretariat (*Yearbook of the International Law Commission, 1956*, vol. I, 370th meeting, p. 228, paras. 16-18).

<sup>75</sup> *Yearbook of the International Law Commission, 1960*, vol. II, document A/4425, pp. 144 and 181, paras. 7 and 44. The Commission considered the statements at its 566th and 568th meetings. The Inter-American Council of Jurists and its permanent committee, the Inter-American Juridical Committee, had been requested by the Tenth Inter-American Conference (1954) to prepare a study or report on the contribution of the American Continent to the principles of international law that govern the responsibility of the State. The Inter-American Juridical Committee adopted, in 1961, a report setting out the principles which the Latin American countries considered to be applicable in the matter. The Inter-American Council of Jurists, at its fifth session held at San Salvador in 1965, adopted a resolution on the subject recalling the principles stated in the Committee's report and declaring that they presented the Latin American contribution to the principles of international law that govern the responsibility of the State. The resolution requested the Committee to prepare a supplementary report on the contribution of the United States of America. In 1965, the Inter-American Juridical Committee prepared a second report setting out the principles of international law that govern the responsibility of the State in the opinion of the United States of America.

<sup>76</sup> *Yearbook of the International Law Commission, 1961*, vol. II, document A/4843, p. 129, para. 46. The Commission heard the statement at its 613th meeting.

68. In 1960, during the consideration of the International Law Commission's report on the work of its twelfth session, the question of the codification of State responsibility was raised in the Sixth Committee of the General Assembly for the first time since 1953. Different views having been expressed on the principles governing State responsibility and its codification, as well as with regard to the codification of other topics of international law, the General Assembly by its resolution 1505 (XV) of 12 December 1960 decided to place the question "Future work in the field of the codification and progressive development of international law" on the provisional agenda of its sixteenth session and invited Member States to submit in writing any views or suggestions they might have on that question. Following the adoption of the above-mentioned General Assembly resolution, the International Law Commission, at its thirteenth session (1961), had a general discussion on the planning of its future work in the light of the debate which had taken place in the Sixth Committee of the General Assembly. During that discussion, the question of the work to be done on the topic of State responsibility was raised. All the members of the Commission who spoke on the subject believed that it should be included among the priority topics. There were again differences of opinion, however, regarding the approach to the subject, and in particular as to whether the Commission should begin by codifying the general rules governing State responsibility, or whether it should codify at the same time the rules whose violation entailed international responsibility.<sup>77</sup>

69. At the sixteenth session of the General Assembly, in 1961, the Sixth Committee discussed the question of future work in the field of the codification and progressive development of international law. After that discussion the General Assembly by resolution 1686 (XVI) of 18 December 1961 recommended the International Law Commission, in sub-paragraph 3 (a) of the resolution, to continue, *inter alia*, its work in the field of State responsibility and, in sub-paragraph 3 (b), to consider at its fourteenth session its future programme of work "on the basis" of sub-paragraph 3 (a) of the resolution "and in the light of the discussion in the Sixth Committee at the fifteenth and sixteenth sessions of the General Assembly and of the observations of Member States submitted pursuant to resolution 1505 (XV), and to report to the Assembly at its seventeenth session on the conclusions it has reached".

70. In pursuance of General Assembly resolution 1686 (XVI), the International Law Commission considered its future programme of work at its fourteenth session (1962), at the 629th to 637th and 668th and 669th meetings. On the recommendation of a Committee set up by the Commission, it was agreed, in accordance with sub-paragraph 3 (a) of resolution 1686 (XVI), to include "State responsibility" in the future programme of work of the Commission as one of the three main topics under

<sup>77</sup> *Yearbook of the International Law Commission, 1961*, vol. I, pp. 206-223, and vol. II, document A/4843, pp. 128 and 129, paras. 40 and 41. The general debate took place at the 614th to 616th meetings of the Commission.

study out of the seven listed in the approved programme.<sup>78</sup> During the discussion, the opinion that State responsibility should be included among the priority topics was shared by all members of the Commission. It was pointed out, however, that as Mr. García Amador was no longer a member of the Commission, and as his reports had not been discussed or approved by the Commission, it was not merely a question of continuing work already begun on the topic of State responsibility, as recommended by the General Assembly, but of taking up the subject *ex novo*. There were divergent views, however, concerning the best approach to the study of the question and the issues which the study should cover, as well as different opinions concerning the method of work which should be adopted for the codification of the topic. As a result of the discussion, the Commission agreed that it would be necessary to undertake preparatory work before a special rapporteur was appointed. Accordingly, at its 637th meeting on 7 May 1962, the Commission decided to set up a Sub-Committee 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. The Sub-Committee held a private meeting, on 21 June 1962, and submitted some suggestions which were considered by the Commission at its 668th meeting on 26 June 1962. In the light of those suggestions, the Commission adopted the following decisions: (a) the Sub-Committee was to meet at Geneva from 7 to 16 January 1963; (b) its work was to be devoted primarily to the general aspects of State responsibility; (c) the members of the Sub-Committee were to prepare for it specific memoranda relating to the main aspects of the subject; (d) the Chairman of the Sub-Committee was to prepare a report on the results of its work to be submitted to the Commission at its next session. Accordingly, the Commission, at its 669th meeting, decided to include an item entitled "Report of the Sub-Committee on State Responsibility" in the agenda of its fifteenth session.<sup>79</sup>

71. The General Assembly, at its seventeenth session, noting that the International Law Commission had established a Sub-Committee on State Responsibility to study the scope of and approach to the topic and that the work of the Sub-Committee was to be devoted primarily to the general aspects of the topic, recommended the Commission in its resolution 1765 (XVII) of 20 November 1962 to "continue its work on State responsibility, taking into account the views expressed at the seventeenth session of the General Assembly and the report of the Sub-Committee on State Responsibility and giving due consideration to the purposes and principles enshrined in the Charter of the United Nations". This recommendation was shortly to be confirmed in the declaration contained in part II of resolution 1803 (XVII) on "Permanent sovereignty over natural resources", adopted by the General Assembly on 14 December 1962, on the recommendation of the Second Committee. In

that declaration, the Assembly stated that it "welcomes the decision of the International Law Commission to speed up its work on the codification of the topic of responsibility of States for the consideration of the General Assembly".<sup>80</sup>

72. The Sub-Committee on State Responsibility held seven meetings during its 1963 January session. 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/SC.1/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). The Sub-Committee held a general debate on 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 Special Rapporteur on that topic. 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.<sup>81</sup>

73. Having reached this general conclusion, the Sub-Committee discussed in detail an outline programme of work submitted by Mr. Ago and decided unanimously to give the Commission some indications as to the main points to be taken into consideration in connexion with the general aspects of the international responsibility of the State. These indications, which would serve as a guide to the work of a future special rapporteur to be appointed by the Commission, referred to the following points: (a) definition of the concept of the international responsibility of the State; (b) origin of international responsibility (international wrongful act; determination

<sup>80</sup> This recommendation followed the request contained in a passage of operative paragraph 8 of resolution I A annexed to the report submitted in 1961 by the "Commission on Permanent Sovereignty over Natural Resources". This report is printed in a publication (A/AC.97/5/Rev.2; E/3511; A/AC.97/13) (United Nations publication, Sales No.: 62.V.6), which also contains the Secretariat study on "The status of permanent sovereignty over natural wealth and resources", chapter III of which gives a useful survey of international jurisprudence and codification drafts on the responsibility of the State for the property of aliens and contracts concluded by them (paras. 1-179).

<sup>81</sup> The report (A/CN.4/152) by Mr. Ago, Chairman of the Sub-Committee on State Responsibility, approved by the Sub-Committee, was appended as annex I to the report of the International Law Commission on the work of its fifteenth session (*Yearbook of the International Law Commission, 1963*, vol. 11, document A/5509, pp. 227 and 228). The *Yearbook of the International Law Commission, 1963*, vol. 11, reproduced also, in pages 228 to 259, the summary records of the second to fifth meetings of the Sub-Committee as well as the memoranda submitted by the members of the Sub-Committee.

<sup>78</sup> *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, pp. 190 and 191, paras. 57-63.

<sup>79</sup> *Ibid.*, pp. 188, 189 and 191, paras. 35-56 and 67-69.

of the components parts of the international wrongful act, including the objective element and the subjective element; the various kinds of violations of international obligations; and circumstances in which an act is not wrongful); (c) the forms of international responsibility (the duty to make reparation; reparation; different forms of sanctions). The Sub-Committee suggested that the question of the responsibility of subjects of international law other than States, such as international organizations, should be left aside.

74. The work of the Sub-Committee on State Responsibility was reviewed by the International Law Commission at its 686th meeting, held during its fifteenth session (1963), on the basis of the report (A/CN.4/152) submitted by the Chairman of the Sub-Committee, Mr. Roberto Ago. All the members of the Commission who took part in the discussion agreed with the general conclusions recommended by the Sub-Committee. 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. In this connexion, it was pointed out that these questions were intended solely to serve as a guide for the Special Rapporteur in his substantive study of specific aspects of the formulation of the general rules governing the international responsibility of States. After having unanimously approved the report of the Sub-Committee, the Commission appointed Mr. Roberto Ago as Special Rapporteur for the topic of State responsibility. It was also agreed that the Secretariat would prepare some working papers on the topic.<sup>82</sup>

75. The report of the International Law Commission on the work of its fifteenth session was considered by the Sixth Committee during the eighteenth session of the General Assembly. The conclusions reached by the Commission on the codification of State responsibility were generally approved. By its resolution 1902 (XVIII) of 18 November 1963, the General Assembly recommended the International Law Commission to "continue its work on State responsibility, taking into account the views expressed at the eighteenth session of the General Assembly and the report of the Sub-Committee on State Responsibility and giving due consideration to the purposes and principles enshrined in the Charter of the United Nations". Owing, however, to the fact that the term of office of the members of the Commission would expire at the end of 1966, and that it was desirable to complete, by that date, the study of the topics which were already in an advanced state, the Commission decided to devote its 1964, 1965 and 1966 sessions to the completion of the work on the law of treaties and special missions, and not to begin its consideration of the substance of the question of State responsibility until it had completed its study of those other topics.<sup>83</sup> The General Assembly, in its resolution 2045 (XX) of 8 December 1965, recommended the Commission to

continue, "when possible", its work on State responsibility, "taking into account the views and considerations referred to in General Assembly resolution 1902 (XVIII)" and, in its resolution 2167 (XXI) of 5 December 1966, to continue its work on State responsibility, "taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII)".

76. In 1967, at its nineteenth session, the Commission had before it a note (A/CN.4/196) on State responsibility submitted by Mr. Roberto Ago, Special Rapporteur. Since the membership of the Commission had been altered as a result of the election which took place in the General Assembly in 1966, the Special Rapporteur expressed the wish that the Commission, as newly constituted, should confirm the instructions given to him in 1963. The Commission confirmed these instructions and noted with satisfaction that Mr. Ago will submit an initial report on the topic at the twenty-first session of the Commission.<sup>84</sup> At the twenty-second session of the General Assembly, the hope was expressed in the Sixth Committee that the Commission would finally be in a position to make progress with the topic of State responsibility. The General Assembly accordingly recommended, in its resolution 2272 (XXII) of 1 December 1967, that the Commission should "expedite the study of the topic of State responsibility". At its twentieth session (1968), the International Law Commission proceeded to review its programme of work as decided by it in 1967, and taking into consideration General Assembly resolution 2272 (XXII), stressed that a special effort should be made in order to do substantive work on State responsibility at the 1969 session of the Commission.<sup>85</sup> The General Assembly by its resolution 2400 (XXIII) of 11 December 1968 recommended the Commission to "make every effort to begin substantive work on State responsibility as from its next session, taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII)".

77. In conformity with the decision taken by the Commission referred to in paragraph 74 above, the Secretariat published in 1964, as documents of the sixteenth session of the International Law Commission, the following documents relating to the topic of State responsibility:<sup>86</sup> (a) a working paper containing a summary of the discussions in various United Nations organs and the resulting decisions (A/CN.4/165); (b) a digest of the decisions of international tribunals relating to State responsibility (A/CN.4/169). At the present session of the Commission, the Secretariat published a supplement (A/CN.4/209)

<sup>82</sup> *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, pp. 223 and 224, paras. 51-55.

<sup>83</sup> *Yearbook of the International Law Commission, 1964*, vol. II, document A/5809, p. 226, para. 36.

<sup>84</sup> *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 368, para. 42. The Commission considered the note at its 934th and 935th meetings. The note is reproduced in *Yearbook of the International Law Commission, 1967*, vol. II, p. 325.

<sup>85</sup> *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, p. 224, para. 101.

<sup>86</sup> *Yearbook of the International Law Commission, 1964*, vol. II, pp. 125-171.

to the working paper and a supplement (A/CN.4/208) to the digest.

78. At the present session of the Commission Mr. Roberto Ago, Special Rapporteur, submitted his first report on State responsibility (A/CN.4/217). This report, entitled "Review of previous work on codification of the topic of the international responsibility of States", gives a general description of the codification work undertaken on the subject by the United Nations, individual scholars, learned societies, regional bodies and the League of Nations. The most important texts prepared in the course of that earlier codification work were reproduced as annexes to the report for the convenience of the members of the Commission. The main purpose of this first report was to give the Commission, at the start of its substantive work on the topic of State responsibility, a full account of the work which had been done on the subject in the past and which could still be of great use in certain cases. At the same time this first report was intended to bring out, in historical perspective, some of the main obstacles which have hitherto frustrated all attempts to codify the topic, thus drawing attention to certain risks which must be avoided if the new undertaking was to succeed.

79. The Commission examined the report at its 1011th to 1013th meetings and at its 1036th meeting. The detailed exchange of views that took place at those meetings revealed a great identity of ideas in the Commission as to the most appropriate way to set about codifying the topic of State responsibility and as to the criteria that should govern the preparation of the different parts of the draft articles which the Commission now proposes to draw up on the subject. The Special Rapporteur, in summing up the debate, gave an account of the views of members of the Commission and announced his future plan of work. There was general agreement on the main lines of the programme to be undertaken on the subject during the next sessions.

80. Thus the Commission was in general agreement in recognizing that the codification of the topic of the international responsibility of States should not start with a definition of the contents of those rules of international law which laid obligations upon States in one or other sector of inter-State relations. The starting point should be the imputability to a State of the violation of one of the obligations arising from those rules, irrespective of their origin, nature and object. The aim, then, will be to establish, in an initial part of the proposed draft articles, the conditions under which an act which is internationally illicit and which, as such, generates an international responsibility can be imputed to a State. This first stage of the study will include the definition of the objective and subjective conditions for such imputation; the determination of the different possible characteristics of the act or omission imputed, and of its possible consequences; and an indication of the circumstances which, in exceptional cases, may prevent the imputation. The Special Rapporteur was asked to submit a report on the topic, containing a first set of draft articles, at the Commission's twenty-second session.

81. Once this first essential task has been accomplished, the Commission proposes to proceed to the second

stage, which concerns determination of the consequences of imputing to a State an internationally illicit act and, consequently, the definition of the various forms and degrees of responsibility. To that end, the Commission was in general agreement in recognizing that two factors in particular would guide it in arriving at the required definition: namely, the greater or lesser importance to the international community of the rules giving rise to the obligations violated, and the greater or lesser seriousness of the violation itself. A definition of the degrees of international responsibility will include determination of the respective roles of reparation and sanction and, particularly in connexion with the latter, separate consideration of the cases in which responsibility is reflected only in the establishment of a legal relationship between the defaulting State and the injured State and the cases in which, on the contrary, a particularly serious offence might also give rise to the establishment of a legal relationship between the guilty State and a group of States, or eventually between that State and the entire international community.

82. At a third stage it will be possible to take up certain problems concerning what has been termed the "implementation" of responsibility, and questions concerning the settlement of disputes which might be caused by a specific violation of the rules relating to international responsibility.

83. The Commission also agreed in recognizing the importance, alongside that of responsibility for internationally illicit acts, of the so-called responsibility for risk arising out of the performance of certain lawful activities, such as spatial and nuclear activities. However, questions in this latter category will not be dealt with simultaneously with those in the former category, mainly in order to avoid any confusion between two such sharply different hypotheses, which might have an adverse effect on the understanding of the main subject. Any examination of such questions will therefore be deferred until a later stage in the Commission's work. The same will apply to the study of questions relating to the responsibility of subjects of international law other than States.

84. The Commission was also in agreement in recognizing that the strict criteria by which it proposes to be guided in codifying the topic of the international responsibility of States do not necessarily entail renouncing the idea of proceeding, under a separate heading, with the codification of certain separate subjects of international law with which that of responsibility has often been linked.

## CHAPTER V

### The most-favoured-nation clause

85. At its sixteenth session, in 1964, the Commission considered a proposal put forward by one of its members, Mr. Jiménez de Aréchaga, to the effect that it should include in its draft on the law of treaties a provision on the so-called "most-favoured-nation clause". The suggested provision was intended to reserve formally

the clause from the operation of the articles dealing with the problem of the effect of treaties on third States.<sup>87</sup> In support of the proposal it was urged that the broad and general terms in which the articles relating to third States had been provisionally adopted by the Commission might blur the distinction between provisions in favour of third States and the operation of the most-favoured-nation clause, a matter that might be of particular importance in connexion with the article dealing with the revocation or amendment of provisions regarding obligations or rights of States not parties to treaties. The Commission, however, while recognizing the importance of not prejudicing in any way the operation of most-favoured-nation clauses, did not consider that these clauses were in any way touched by the articles in question and for that reason decided that there was no need to include a saving clause of the kind proposed. In regard to most-favoured-nation clauses in general, the Commission did not think it advisable to deal with them in the codification of the general law of treaties, although it felt that they might at some future time appropriately form the subject of a special study.<sup>88</sup> The Commission maintained this position in the course of its eighteenth session.<sup>89</sup>

86. At its nineteenth session, in 1967, the Commission noted that several representatives in the Sixth Committee at the twenty-first session of the General Assembly had urged that it should deal with the most-favoured-nation clause as an aspect of the general law of treaties. In view of the interest expressed in the matter and of the fact that clarification of its legal aspects might be of assistance to the United Nations Commission on International Trade Law (UNCITRAL) the Commission decided to place on its programme the topic of most-favoured-nation clauses in the law of treaties and appointed Mr. Endre Ustor as Special Rapporteur thereon.<sup>90</sup>

87. At its twentieth session, in 1968, the Special Rapporteur submitted a working paper<sup>91</sup> giving an account of the preparatory work undertaken by him on the topic and outlining the possible contents of a report to be presented at a later stage. The Special Rapporteur also submitted a questionnaire listing points on which he specifically asked the members of the Commission to express their opinion. The Commission, while recognizing the fundamental importance of the role of the most-favoured-nation clause in the domain of international trade, instructed the Special Rapporteur not to confine his studies to that area but to explore the major fields of application of the clause. The Commission considered that it should focus on the legal character of

the clause and the legal conditions governing its application and that it should clarify the scope and effect of the clause as a legal institution in the context of all aspects of its practical application. The Commission wished to base its studies on the broadest possible foundations without, however, entering into fields outside its functions. In the light of these considerations, the Commission instructed the Special Rapporteur to consult, through the Secretariat, all organizations and interested agencies which may have particular experience in the application of the most-favoured-nation clause.

88. By resolution 2400 (XXIII) of 11 December 1968, the General Assembly recommended that the Commission, *inter alia*, continue its study of the most-favoured-nation clause.

89. At the present session of the Commission, the Special Rapporteur submitted his first report (A/CN.4/213), containing a history of the most-favoured-nation clause up to the time of the Second World War, with particular emphasis on the work on the clause undertaken in the League of Nations or under its aegis. The Commission considered the report at its 1036th meeting and accepting the suggestion of the Special Rapporteur instructed him to prepare next a study based mainly on the replies from organizations and interested agencies consulted by the Secretary-General and having regard also to three cases dealt with by the International Court of Justice relevant to the clause.<sup>92</sup>

## CHAPTER VI

### Other decisions and conclusions of the Commission

#### A. REVIEW OF THE COMMISSION'S PROGRAMME AND METHODS OF WORK

90. The Commission referred to its initiative, as indicated in paragraph 98 (a) of its report on the work of its twentieth session,<sup>93</sup> in proposing that the term of office of its members should be extended in order better to ensure the necessary continuity in its membership, having regard to the method of work provided for in its Statute and the nature of the codification process itself, especially when it was engaged in the preparation of legal texts for the codification of particularly large and important sectors of international law. With a view to removing all doubt concerning this intention, the Commission wishes to make it clear that, in its opinion and in the light of its experience, the term of office of its members should preferably be seven years and that, in making a proposal for such an extension, it had solely intended to refer to the future terms of office of Commission members.

<sup>87</sup> *Yearbook of the International Law Commission, 1964*, vol. I, 752nd meeting, para. 2.

<sup>88</sup> *Yearbook of the International Law Commission, 1964*, vol. II, document A/5809, p. 176, para. 21.

<sup>89</sup> *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, p. 177, para. 32.

<sup>90</sup> *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 369, para. 48.

<sup>91</sup> *Yearbook of the International Law Commission, 1968*, vol. II, document A/CN.4/L.127, p. 165.

<sup>92</sup> *Anglo-Iranian Oil Company Case (Jurisdiction)*, ICJ Reports 1952, p. 93; *Case concerning rights of nationals of United States of America in Morocco*, ICJ Reports 1952, p. 176; *Ambatielos Case (Merits: obligation to arbitrate)*, ICJ Reports 1953, p. 10.

<sup>93</sup> *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, p. 191.

91. The Commission confirmed its intention of bringing up to date in 1970 or 1971 its long-term programme of work, taking into account the General Assembly recommendations and the international community's current needs, and discarding those topics on the 1949 list which were no longer suitable for treatment. For this purpose the Commission will again survey the topics suitable for codification in the whole field of international law, in accordance with article 18 of its Statute. It asked the Secretary-General to submit a preparatory working paper with a view to facilitating this task.

#### B. ORGANIZATION OF FUTURE WORK

92. The Commission reaffirms its view that it is desirable to complete the study of relations between States and international organizations before the expiry of the term of office of its present membership. As already stated in paragraph 104 of the report on the work of its twentieth session, the Commission aims, *inter alia*, at concluding its work on that topic at its twenty-third session, in 1971, if the scope of the work on the subject should allow it. In view of the stage which the work on the topic has now reached and taking into account the time-lapse for the receipt of comments from Governments, the Commission considers that its needs would not best be met by requesting authorization from the General Assembly to hold a winter session in 1970, a possibility that had been reserved in the Commission's report on the work of its twentieth session.<sup>94</sup> However, it deems it necessary to reserve the possibility of holding an additional or extended session in 1971 in order to achieve its stated aim. The Commission agreed to record this decision in the present report so that arrangements for budgetary appropriations could be made in time.

93. The Commission intends, as a matter of priority, at its twenty-second session in 1970, to conclude the first reading of its draft on relations between States and international organizations and to undertake substantive consideration of State responsibility and succession in respect of treaties. Also at that session, the Commission plans to further its study of succession of States in economic and financial matters. During its mandate, the Commission will continue its study of the most-favoured-nation clause.

#### C. RELATIONS WITH THE INTERNATIONAL COURT OF JUSTICE

94. The Commission devoted its 1004th meeting to the visit of the President of the International Court of Justice, Mr. José Luis Bustamante y Rivero, who commented on the features characterizing the functions of the Court and the Commission for the furtherance of international law, in accordance with their respective statutes.

#### D. CO-OPERATION WITH OTHER BODIES

##### 1. Asian-African Legal Consultative Committee

95. At the 1010th meeting, Mr. Abdul Hakim Tabibi introduced his report (A/CN.4/212) on the tenth session of the Asian-African Legal Consultative Committee, held at Karachi from 21 to 30 January 1969, which he had attended as an observer for the Commission.

96. The Asian-African Legal Consultative Committee was represented before the Commission by Mr. Shari-fuddin Pirzada, President of the tenth session of that Committee, who addressed the Commission at the 1021st meeting. He commented on the origins and tasks of the Committee, which had, at its various sessions, discussed and formulated principles on such topics as the privileges and immunities of diplomatic envoys, the extradition of offenders, free legal aid, reciprocal enforcement of foreign judgments, arbitral procedure and the legality of nuclear tests. He indicated that at its Karachi session the Committee had devoted considerable time to the Commission's draft articles on the law of treaties in an attempt to reach agreement on certain important articles in the interests of Asian-African solidarity. The Committee had also considered the law of international rivers, with particular attention to the needs of the Asian-African countries, as well as the subject of the rights of refugees, on which a resolution had been unanimously adopted. In this respect, he recalled that at its eighth session in Bangkok the Committee had adopted a report on the rights of refugees and had agreed to reconsider at its following session the Bangkok principles concerning the treatment of refugees. He stated that the Committee was taking a particular interest in such items on the Commission's present agenda as relations between States and international organizations, succession of States and Governments, and State responsibility.

97. The Commission was informed that the next session of the Committee, to which it has a standing invitation to send an observer, would be held in Ghana. The Commission requested its Chairman, Mr. Nikolai Ushakov, to attend the Committee's session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

##### 2. European Committee on Legal Co-operation

98. The European Committee on Legal Co-operation was represented by Mr. H. Golsong, who addressed the Commission at the 1029th meeting.

99. He mentioned that since the Commission's twentieth session a European international agreement concerning the immunity of persons summoned to appear before the European Commission or Court of Human Rights had been opened to signature and had been signed by several States. Also, two further documents had been virtually completed: a convention on State immunity from jurisdiction, and a report on the privileges and immunities of international organizations. He further referred to the resolution approved by the Committee of Ministers, adopting and publishing a guide to an index of digests of national State practice in the field of public

<sup>94</sup> *Ibid.*, p. 224, paras. 103 and 104.

international law. He indicated that the Committee's current work included a draft on third party risk insurance for motorists, a draft on harmonization of processes for computerizing legal data in the western European countries, in particular, the terminology of international treaties, and a draft convention on the international validity of judicial decisions in penal matters. He also called attention to the Committee's decision, taken at its session in June 1969, to hold exchanges of views between its member States on the International Law Commission's draft more frequently than had taken place at times in the past.

100. The Commission was informed that the next session of the Committee, to which it has a standing invitation to send an observer, would be held at Strasbourg in December 1969. The Commission requested its Chairman, Mr. Nikolai Ushakov, to attend the session or, if he were unable to do so, to appoint another member of the Commission for the purpose.

### 3. *Inter-American Juridical Committee*

101. At the 1010th meeting, Mr. José María Ruda introduced his report (A/CN.4/215) on the 1968 meeting of the Inter-American Juridical Committee, held at Rio de Janeiro, from mid-June to early September 1968, which he had attended from 26 to 30 August as an observer for the Commission.

102. The Inter-American Juridical Committee was represented by Mr. José Joaquín Caicedo Castilla, who addressed the Commission at its 999th meeting. He drew attention to the resolution adopted by the Committee on the occasion of the attendance at some of its meetings of the Commission's Chairman. He referred to the items of substance dealt with by the Committee in 1968, namely: harmonization of the legislation of the Latin-American countries on companies, including the problem of international companies; an Inter-American Convention on Reciprocal Recognition of Companies and Juridical Person; a uniform law for Latin America on commercial documents, and the rules of private international law applicable to the above matters. He further referred to the preparation of the preliminary draft of the Committee's Statutes and indicated that during the present year, the Committee would study the problems of improving the inter-American system for the peaceful settlement of disputes and of the juridical status of the so-called "foreign guerillas". He stated that the Committee was also concerned with the question of State responsibility. In a report approved in 1961, entitled "Contribution of the American continent to the principles of international law that govern the responsibility of the State", the Committee had laid down ten principles which expressed Latin American law on the subject. He expressed the hope that, in discussing the topic of State responsibility, the Commission would take the Latin American position into account as a new element which had introduced a change in the previously accepted rules of international law.

103. The Commission was informed that the 1969 session of the Committee, to which it has a standing invitation to send an observer, would be held at Rio

de Janeiro. The Commission requested its Chairman, Mr. Nikolai Ushakov, to attend the Committee's session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

### E. DATE AND PLACE OF THE TWENTY-SECOND SESSION

104. The Commission decided to hold its next session at the United Nations Office at Geneva for ten weeks from 4 May to 10 July 1970.

### F. REPRESENTATION AT THE TWENTY-FOURTH SESSION OF THE GENERAL ASSEMBLY

105. The Commission decided that it would be represented at the twenty-fourth session of the General Assembly by its Chairman, Mr. Nikolai Ushakov.

### G. SEMINAR ON INTERNATIONAL LAW

106. In pursuance of General Assembly resolution 2400 (XXIII) of 11 December 1968, the United Nations Office at Geneva organized during the twenty-first session of the Commission a fifth session of the Seminar on International Law for advanced students and young government officials whose functions habitually included a consideration of questions of international law.

107. Between 16 June and 4 July 1969, the Seminar held thirteen meetings devoted to lectures followed by discussion. It was attended by twenty-two students, all from different countries; they also attended meetings of the Commission during that period and had access to the facilities provided by the Library in the Palais des Nations. They heard lectures by nine members of the Commission (Mr. Albónico, Mr. Bartoš, Mr. Castrén, Mr. Kearney, Mr. Rosenne, Mr. Tabibi, Mr. Ustor, Sir Humphrey Waldock and Mr. Yasseen), a former member of the Commission (Mr. Žourek), the Legal Adviser to the International Labour Office (Mr. Wolf) and one member of the Secretariat (Mr. Raton). The lectures were given on various subjects connected with the work of the Commission, such as the codification and development of international law in the United Nations and the problems raised by the Vienna Conventions on diplomatic law, consular law and the law of treaties. Other lectures dealt with the question of special missions, the international unification of private law and the activities of UNCITRAL, the principle of co-operation in international law and the problems of land-locked States. One lecture was devoted to the International Labour Organisation.

108. The Seminar was held without cost to the United Nations, which assumed no responsibility for the travel or living expenses of the participants. However, the Governments of Denmark, Finland, the Federal Republic of Germany, Israel, the Netherlands, Norway and Sweden offered scholarships for participants from developing countries. Nine candidates were chosen to be beneficiaries of the scholarships, but two were unable

to attend the session. Three students holding scholarships granted by the United Nations Institute for Training and Research were also admitted to the Seminar. The grant of scholarships is making it possible to achieve a much better geographical distribution of students and to bring deserving candidates from distant countries, who would otherwise be unable to attend the session solely for pecuniary reasons. It is therefore desirable that scholarships should again be granted for the next session.

109. The Commission expressed appreciation, in particular to Mr. Pierre Raton, for the manner in which the Seminar was organized, the high level of discussion

and the results achieved. The Commission recommended that future seminars be held in conjunction with its sessions.

#### H. INDEX OF THE COMMISSION'S DOCUMENTS

110. The Commission was informed that the United Nations Library at Geneva is preparing an Index of the main documents of the Commission issued during its first twenty sessions. The Commission expresses its appreciation of the initiative taken by the Library at Geneva; it is convinced that the Index will be of value to the Commission and to jurists throughout the world.



## CHECK LIST OF DOCUMENTS REFERRED TO IN THIS VOLUME

NOTE.—This list includes all United Nations documents identified in the text by their symbols for which no reference is given in a foot-note.

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/AC.97/5/Rev.2— E/3511— A/AC.97/13 [and Corr.1 and 2]	I. The status of permanent sovereignty over natural wealth and resources : study by the Secretariat II. Report of the Commission on Permanent Sovereignty over Natural Resources	United Nations publication, Sales No. : 62.V.6.
A/C.6/L.697	Draft Convention on Special Missions—United Kingdom of Great Britain and Northern Ireland : amendment to article 21 of the draft articles on special missions	<i>Official Records of the General Assembly, Twenty-third Session, Annexes</i> , agenda item 85, document A/7375, para. 158 c.
A/C.6/L.698 and Corr.1	<i>Idem.</i> —United Kingdom of Great Britain and Northern Ireland : amendment to follow article 47 of the draft articles on special missions	<i>Ibid.</i> , document A/7375, Annex II, proposed Additional Articles, para. b.
A/C.6/L.704	<i>Idem.</i> —United Kingdom of Great Britain and Northern Ireland : proposed new article preceding article 48 of the draft articles on special missions	<i>Ibid.</i> , para. c.
A/CN.4/152	Report by Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility (approved by the Sub-Committee)	<i>Yearbook of the International Law Commission, 1963</i> , vol. II, document A/5509, Annex I.
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)	<i>Ibid.</i> , Annex II.
A/CN.4/165	State responsibility: Summary of the discussions in various United Nations organs and the resulting decisions : working paper prepared by the Secretariat	<i>Yearbook of the International Law Commission, 1964</i> , vol. II.
A/CN.4/169	Digest of the decisions of international tribunals relating to State responsibility, prepared by the Secretariat	<i>Ibid.</i>
A/CN.4/196	State responsibility : note by Mr. Roberto Ago, Special Rapporteur	<i>Yearbook of the International Law Commission, 1967</i> , vol. II.
A/CN.4/200 and Add.1 and 2	Succession of States to multilateral treaties : studies prepared by the Secretariat	<i>Yearbook of the International Law Commission, 1968</i> , vol. II.
A/CN.4/202	Succession of States and Governments in respect of treaties : first report by Sir Humphrey Waldock, Special Rapporteur	<i>Ibid.</i>

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/204	Succession of States in respect of rights and duties resulting from sources other than treaties: first report by Mr. Mohammed Bedjaoui, Special Rapporteur	<i>Ibid.</i>
A/CN.4/208	Supplement, prepared by the Secretariat, to the "Digest of the decisions of international tribunals relating to State responsibility"	Printed in this volume, p. 101.
A/CN.4/209	Proposals submitted to, and decisions of, various United Nations organs relating to the question of State responsibility: supplement prepared by the Secretariat to document A/CN.4/165	<i>Idem</i> , p. 114.
A/CN.4/210	Succession of States to multilateral treaties: sixth study prepared by the Secretariat	<i>Idem</i> , p. 23.
A/CN.4/212	Report on the tenth session of the Asian-African Legal Consultative Committee, by Mr. Abdul Hakim Tabibi, Observer for the Commission	<i>Idem</i> , p. 187.
A/CN.4/213	First report on the most-favoured-nation clause, by Mr. Endre Ustor, Special Rapporteur	<i>Idem</i> , p. 157.
A/CN.4/214 and Add.1 and 2	Second report on succession in respect of treaties, by Sir Humphrey Waldock, Special Rapporteur	<i>Idem</i> , p. 45.
A/CN.4/215	Report on the 1968 meeting of the Inter-American Juridical Committee, by Mr. José María Ruda, Observer for the Commission	<i>Idem</i> , p. 196.
A/CN.4/216/Rev.1	Second report on succession in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur—Economic and financial acquired rights and State succession	<i>Idem</i> , p. 69.
A/CN.4/217 and Add. 1	First report on State responsibility, by Mr. Roberto Ago, Special Rapporteur—Review of previous work on codification of the topic of the international responsibility of States	<i>Idem</i> , p. 125.
A/CN.4/218 and Add.1	Fourth report on relations between States and international organizations, by Mr. Abdullah El-Erian, Special Rapporteur	<i>Idem</i> , p. 1.
A/CN.4/219	Letter dated 3 June 1969 from the Secretary-General to the Chairman of the International Law Commission	<i>Idem</i> , p. 201.
A/CN.4/L.136	Relations between States and international organizations: working paper submitted by Mr. Abdullah El-Erian, Special Rapporteur	Mimeographed.
A/CN.4/SC.1/WP.3	State responsibility: working paper prepared by Mr. André Gros	<i>Yearbook of the International Law Commission, 1963</i> , vol. II, document A/5509, Annex I, Appendix II.
A/CN.4/SC.1/WP.4	<i>Idem</i> : working document prepared by Mr. Senjin Tsuruoka	<i>Ibid.</i>
A/CN.4/SC.1/WP.5	<i>Idem</i> : working paper prepared by Mr. Mustafa Kamil Yasseen	<i>Ibid.</i>
A/CN.4/SC.1/WP.6	<i>Idem</i> : working paper prepared by Mr. Roberto Ago	<i>Ibid.</i>
A/CN.4/SC.1/WP.7	<i>Idem</i> : The social nature of personal responsibilities: working paper prepared by Mr. Angel Modesto Paredes	<i>Ibid.</i>
ILC(XIV)/SC.1/WP.1	<i>Idem</i> : The duty to compensate for the nationalization of foreign property: submitted by Mr. E. Jiménez de Aréchaga	<i>Ibid.</i>
ILC(XIV)/SC.1/WP.2 and Add.1	<i>Idem</i> : An approach to State responsibility: submitted by Mr. Angel Modesto Paredes	<i>Ibid.</i>

**CHECK LIST OF DOCUMENTS OF THE TWENTY-FIRST SESSION  
NOT REPRODUCED IN THIS VOLUME**

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/211	Provisional agenda	Mimeographed. For the agenda as adopted, see vol. I.
A/CN.4/220	Report of the International Law Commission on the work of its twenty-first session	Same as document A/7610/Rev.1 printed in this volume, p. 203.
A/CN.4/L.136	Relations between States and international organizations: working paper submitted by Mr. Abdullah El-Erian, Special Rapporteur	Mimeographed.
A/CN.4/L.137	Relations between States and international organizations: draft articles on representatives of States to international organizations: Mr. R. Kearney: amendment to article 44	Mimeographed.
A/CN.4/L.138	Financial implications: estimated costs of holding an additional session of the International Law Commission early in 1970: note by the Secretary-General	Mimeographed.
A/CN.4/L.139 and Corr.2, Add.1-8, Add.9 and Corr.1 and Add.10	Relations between States and international organizations: draft articles on representatives of States to international organizations: text of articles 22 to 49 and of a new article adopted by the Drafting Committee	Mimeographed.
A/CN.4/L.140	<i>Idem</i> —Mr. R. Kearney: amendment to article 44	Mimeographed.
A/CN.4/L.141	<i>Idem</i> —Mr. A. J. Tammes: amendment to article 49	Mimeographed.
A/CN.4/L.142 and Corr.1 and 2	<i>Idem</i> —Mr. R. Kearney: amendment to the new article submitted by the Drafting Committee in document A/CN.4/L.139/Add.9 and Corr.1	Mimeographed.
A/CN.4/L.143, A/CN.4/L.144 and Add.1-3, A/CN.4/L.145 and Add.1, A/CN.4/L.146, A/CN.4/L.147 and Corr.1 and A/CN.4/L.148	Draft report of the International Law Commission on the work of its twenty-first session	Mimeographed.
A/CN.4/L.149 and Add.1	Relations between States and international organizations: draft articles on representatives of States to international organizations: text of articles 47 and 48 as adopted provisionally by the International Law Commission at its 1032nd and 1034th meetings respectively.	Mimeographed.
A/CN.4/SR.990 to SR.1041	Provisional summary records of the 990th to the 1041st meetings of the Commission	Mimeographed. For the final text, see vol. I.









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