

YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
1970

*Volume II*

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

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UNITED NATIONS





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# RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

[Agenda item 2]

## DOCUMENT A/CN.4/227 AND ADD.1 AND 2 \*

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

[Original text: English]  
[1 April, 29 April and 19 May 1970]

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#### ABBREVIATIONS

CMEA	Council for Mutual Economic Assistance
ECA	Economic Commission for Africa
ECAFE	Economic Commission for Asia and the Far East
FAO	Food and Agriculture Organization of the United Nations
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
IDA	International Development Association
IFC	International Finance Corporation
ILO	International Labour Organisation
IMCO	Inter-Governmental Maritime Consultative Organization
IMF	International Monetary Fund
ITU	International Telecommunication Union
OAS	Organization of American States
OAU	Organization of African Unity
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNITAR	United Nations Institute for Training and Research
UNRRA	United Nations Relief and Rehabilitation Administration
UPU	Universal Postal Union
WHO	World Health Organization
WMO	World Meteorological Organization

### I. Introduction

#### A. THE BASIS OF THE PRESENT REPORT

1. At its twentieth and twenty-first sessions, the Commission provisionally adopted parts I and II of its draft articles on representatives of States to international organizations, consisting of a first group of twenty-one articles on general provisions (part I) and permanent missions to international organizations in general (part II, section 1)<sup>1</sup> and of a second group of twenty-nine articles

on facilities, privileges and immunities of permanent missions to international organizations; conduct of the permanent mission and its members; and end of the functions of the permanent representative (part II, sections 2, 3 and 4).<sup>2</sup> The Commission decided, in accordance with articles 16 and 21 of its Statute, to submit the first and the second groups of articles, through the Secretary-General, to Governments for their observations. It also decided to transmit them to the secretariats of the United Nations, the specialized agencies, and IAEA, for their observations. Bearing in mind the position of

<sup>1</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, p. 194, document A/7209/Rev.1, para. 21.

*Ibid.*, 1969, vol. II, p. 206, document A/7610/Rev.1, para. 13.

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. At its twenty-first session, the Commission decided to continue at its twenty-second session its work on relations between States and international organizations and to consider at that session draft articles on permanent observers of non-member States to international organizations and on delegations to sessions of organs of international organizations and to conferences convened by such organizations.<sup>3</sup> The Special Rapporteur accordingly now submits to the Commission his fifth report dealing with those aspects of the question of representatives of States to international organizations.

#### B. SUMMARY OF THE COMMISSION'S DISCUSSION AT ITS TWENTY-FIRST SESSION<sup>4</sup>

2. The Commission did not have much difficulty in reaching the conclusion that its draft on representatives of States to international organizations should also include articles dealing with permanent observers of non-member States to international organizations and with delegations to sessions of organs of international organizations.

3. 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. Some members stated that there were, no doubt, certain theoretical differences between representatives to an organ of an international organization and representatives to a conference convened by an international organization, but that for practical purposes it was hardly possible to draw a distinction between those two categories of representatives from the point of view of diplomatic law, especially in respect of the privileges and immunities which should be accorded to them. Reference was made by one member to examples from the past and modern instances which, in his opinion, showed that there was no fundamental difference between an organ of an international organization and a conference convened by that organization. For instance, at the twenty-third session of the General Assembly, the Sixth Committee had turned itself into a conference of plenipotentiaries to consider the draft Convention on special missions. The reverse also occurred: it was not unknown for an international conference to wish to become something more than the sum of its participants and to act like an organ or even an organization. At the first Hague Conference, for example, when, in the absence of agreement on the text of a convention, some States had wished to adopt a declaration on compulsory arbitration, the question had arisen whether it would be a declaration by the States which had agreed to make it, or a declaration by the Conference.

4. On the other hand, some members did not think that international conferences convened by international organizations formed part of the topic which the Commission was now studying. According to that view, international conferences were sovereign bodies that were not dependent on the United Nations, and some of the States attending them were not members of the convening organization. Such conferences were therefore a separate topic and the Commission should be asked to treat them accordingly. One member stated that the Commission should confine itself to delegations to organs of international organizations; to go further, it would need a wider mandate from the General Assembly. Some members took a rather practical approach in their support for including the problem of representatives to international conferences convened by international organizations. They warned that if that problem was not dealt with at the present stage, when the Commission was working on the codification of diplomatic law, there was a danger that it would be completely neglected. It would not be advisable, in their opinion, to postpone consideration of the problem until the whole subject of conferences was examined, because that might well involve a long delay. One member stated that when a conference was convened by the United Nations, arrangements were normally made by the Secretariat with the host country and the Convention on the Privileges and Immunities of the United Nations would apply. He inferred that it was thus clear that there was a link between representatives to such conferences and permanent representatives.

5. The Legal Counsel stated that during the Sixth Committee's discussion on the draft Convention on special missions, a new article on the subject of conferences had been proposed. He understood that that proposal was not likely to be adopted and, in view of the danger that the question of conferences might not be dealt with at all, it would perhaps be useful for the Commission to include in its report on the twenty-first session a passage indicating its interest in the subject. The Sixth Committee would then probably decide that the Commission should be invited to deal with the subject. He pointed out that a conference convened by the United Nations was not a subsidiary organ of the Organization and did not report to the General Assembly. It had been said that a conference was sovereign but it might perhaps be more correct to describe it as semi-sovereign, because such matters as the date and place of meeting and the composition of the conference were decided by the General Assembly. He also pointed out that the question of conferences convened by States should also receive attention. It was not usual for important international conferences to be convened otherwise than under the auspices of an international organization, but such conferences were sometimes convened by States and raised problems in international law. For those reasons, the Legal Counsel deemed it desirable that the Commission should be empowered to examine the question of conferences.

6. At the 993rd meeting of the Commission, the Chairman, Mr. Ushakov, proposed that the Commission should, provisionally, authorize the Special Rapporteur to draft a chapter on the legal status of delegations of

<sup>3</sup> *Ibid.*, para. 17.

<sup>4</sup> *Ibid.*, vol. I, p. 4, 991st to 993rd meetings.

States to international conferences convened by international organizations, on the understanding that the Commission would take no decision of substance on the matter until it had examined that chapter. It was so agreed. The decision of the Commission on the question was recorded as follows in its report on the work of its twenty-first session:

"... the Commission again considered the question referred to in paragraph 28 of its report on the work of its twentieth session.<sup>5</sup> At its 992nd meeting, it reached the conclusion that its draft should also include articles dealing with permanent observers of 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 of non-member States and on delegations to sessions of organs of international organizations and to conferences convened by such organizations".<sup>6</sup>

**C. SUMMARY OF THE SIXTH COMMITTEE'S DISCUSSION, AT THE TWENTY-FOURTH SESSION OF THE GENERAL ASSEMBLY, OF THE QUESTION OF RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS**

7. The Sixth Committee considered the item entitled "Report of the International Law Commission on the work of its twenty-first session" at its 1103rd to 1111th meetings held from 25 September to 1 October 1969. Most of the observations on chapter II of the Commission's report related to the twenty-nine articles which are contained in that chapter.

8. Several representatives agreed with the Commission's conclusion that its draft should also include articles dealing with delegations to sessions of organs of international organizations. As regards, however, delegations to conferences convened by such organizations, some representatives reserved their position. It was said, in this connexion, that an international conference was a sovereign body, irrespective of who convened it.<sup>7</sup>

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

9. The delegation of the United Kingdom suggested the inclusion in the draft Convention on special missions of a provision pertaining to conferences. It introduced an

amendment,<sup>8</sup> the purpose of which was to add the following article to the draft Convention:

**Article 0**

*Conferences*

1. A State may apply the provisions of part II 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 given the same repatriation facilities as members of diplomatic missions of comparable rank;

(e) Have the right to import free of duty the personal baggage accompanying them at the same 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.

10. Introducing the new article,<sup>9</sup> the representative of the United Kingdom stated that the question of the status of delegations of States to international conferences and of officials of the secretariat of such conferences was of considerable practical importance and that, although the problem arose very frequently, it was not governed by a coherent set of legal rules. He posed the question whether it was suitable for inclusion in a draft convention on special missions or whether it would be preferable to include it in the convention on the representatives of States to international organizations. While recognizing the complexity of the problem, he considered that, since international conferences were, legally speaking, closely akin to special missions, it would seem logical to accord them the same facilities, privileges and immunities. He conceded, however, that the argument that the matter of international conferences should be dealt with in the future convention on representatives of States to international organizations, since these conferences were generally called by the latter, should be duly taken into consideration. He pointed out that paragraph 1 of article 0 imposed no obligation on States; it simply allowed them to have recourse, at their discretion, to the provisions of a precise legal instrument to settle a question which was not covered by any text. He also pointed out that the adoption of the new article would not prejudice the outcome of the studies to be made by the International

<sup>5</sup> *Ibid.*, 1968, vol. II, p. 195, document A/7209/Rev.1.

<sup>6</sup> *Ibid.*, 1969, vol. II, p. 206, document A/7610/Rev.1, para. 17.

<sup>7</sup> *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, para. 21.

<sup>8</sup> *Ibid.*, agenda item 87, document A/7799, para. 175.

<sup>9</sup> *Ibid.*, *Twenty-fourth Session, Sixth Committee*, 1142nd meeting.

Law Commission on the subject of international conferences but might on the contrary facilitate its work, since the Commission would have at its disposal the opinions expressed by States on the present occasion.

11. The Expert Consultant, Mr. Bartoš, stated at the same meeting<sup>10</sup> that in his view the United Kingdom proposal was in line with the relevant general principles of modern international law and came within the ambit of the rules contained in the draft Convention on special missions. It also took account of the practical difficulties arising from the lack of applicable rules in that field. He pointed out that it should not be forgotten that, if it was decided to include rules relating to international conferences in the draft convention on representatives of States to international organizations, it should be made clear that the article proposed by the United Kingdom, if it was adopted, was to be considered as provisional and applicable only until such time as that draft convention was adopted.

12. The position of the delegations who commented on the United Kingdom proposal<sup>11</sup> was divided. Some of those who supported it made their support conditional on the addition of the words "outside the framework of an international organization" after the word "territory" in paragraph 1 of the article, in order better to define the scope of the article. Others suggested that since the proposed provision was not imperative in nature and could be construed as giving States a free choice, it might be included in a protocol annexed to the Convention so that States would be free to decide whether or not to apply it. There was general agreement on the usefulness of the United Kingdom proposal which dealt with a question that was becoming increasingly important, and had the merit of drawing attention to the problem. The decision of the Sixth Committee not to include in the draft Convention on special missions a provision on conferences as suggested by the United Kingdom was influenced by considerations of rather practical character. Some delegations thought that a more thorough study of the question was necessary if certain difficulties were to be avoided. Several delegations considered that the best solution would be to leave the topic of international conferences to be dealt with by the International Law Commission. The Committee would thus ensure that the question of conferences came back to it in a form which would enable it to reach a more informed decision.

13. In the 1148th meeting, the representative of the United Kingdom withdrew his amendment and the Committee decided, on the proposal of the United Kingdom representative, to include in its report the following summary of the views expressed during the discussion of the question of conferences.<sup>12</sup>

The Committee was of the view that the question of the legal status, privileges and immunities of members of delegations to international conferences and of the secretariat of conferences constituted a gap in the law relating to international represen-

tation which remained to be filled. Once again, it was necessary to start from the proposition that the status, privileges and immunities should be those necessary to ensure the efficient and independent exercise of their respective functions. There were a number of precedents which could serve as a starting point for the study of the problem—the conventions on the privileges and immunities of international organizations (including those relating to the United Nations and to the specialized agencies) together with the Vienna Conventions on Diplomatic and Consular Relations and the forthcoming Convention on Special Missions.

The Committee noted that the International Law Commission's Special Rapporteur on relations between States and international organizations, Mr. El-Erian, had indicated his intention to include articles on the status of delegations to conferences in the draft articles on representatives of States to international organizations. The Committee also noted that the International Law Commission had discussed, and would discuss again at its next session, the general question of further work on the status, privileges and immunities of delegations to international conferences.

The Committee requested the International Law Commission to take into account in its further work on the subject the interest and the views expressed in the debates in the Sixth Committee at the twenty-fourth session of the General Assembly.<sup>13</sup>

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

14. The present group of draft articles covers the following subjects:

(a) Permanent observer missions to international organizations (part III);

(b) Delegations to organs of international organizations and to conferences convened by international organizations (part IV).

The subject of permanent observers of non-member States to international organizations is dealt with in this report immediately after that of permanent missions to international organizations. Theoretical and practical considerations require, in the opinion of the Special Rapporteur, that order of presentation. Having the character of permanent missions and not that of *ad hoc* diplomacy, permanent observers of non-member States to international organizations should logically be dealt with after permanent missions of Member States. While the subject of immunities and privileges of delegations to organs of international organizations and to conferences convened by international organizations has been regulated in the Conventions on the Privileges and Immunities of the United Nations<sup>14</sup> and the Specialized Agencies<sup>15</sup> as well as in a great number of special agreements, the immunities of permanent observers have in practice hitherto remained almost entirely unregulated by international law.

15. In accordance with the practice of the Commission in other topics, the Special Rapporteur has not given the articles in the present group a separate set of numbers but has numbered them starting from the last articles of section 4 of part II, the first article being numbered 51.

<sup>10</sup> *Ibid.*, paras. 2-3.

<sup>11</sup> *Ibid.*, 1142nd and 1143rd meetings.

<sup>12</sup> *Ibid.*, 1148th meeting.

<sup>13</sup> *Ibid.*, Annexes, agenda item 87, document A/7799, para. 178.

<sup>14</sup> United Nations, *Treaty Series*, vol. 1, p. 15.

<sup>15</sup> *Ibid.*, vol. 33, p. 261.

## II. Draft articles on representatives of States to international organizations, with commentaries

### PART III. PERMANENT OBSERVER MISSIONS TO INTERNATIONAL ORGANIZATIONS

#### *General comments*

(1) Permanent observers have been sent by non-member States to the Headquarters of the United Nations at New York and to its Office at Geneva. Since 1946 a permanent observer is being maintained by the Swiss Government. Observers have also been appointed by States such as Austria, Finland, Italy and Japan before they became Members of the United Nations. The Federal Republic of Germany, Monaco, the Republic of Korea, San Marino and the Republic of Viet-Nam, which are not, at the present time, members of the Organization, maintain permanent observers. In addition, the Holy See has recently appointed permanent observers, both at New York and at Geneva.

(2) There are no provisions relating to permanent observers of non-member States in the United Nations Charter, the Headquarters Agreement or General Assembly resolution 257 (III) of 3 December 1948 relating to permanent missions (of Member States) to the United Nations. The Secretary-General referred to permanent observers of non-member States in his report on permanent Missions to the fourth session of the General Assembly,<sup>16</sup> but no action was taken by the Assembly to provide a legal basis for permanent observers. Their status, therefore, has been determined by practice.<sup>17</sup>

(3) In the Introduction to his Annual Report on the Work of the Organization for the period 16 June 1965-15 June 1966, the Secretary-General of the United Nations stated:

... I feel that all countries should be encouraged and enabled, if they wish to do so, to follow the work of the Organization more closely. It could only be of benefit to them and to the United Nations as a whole to enable them to maintain observers at Headquarters, at the United Nations Office at Geneva and in the regional economic commissions, and to expose them to the impact of the work of the Organization and to the currents and cross-currents of opinion that prevail within it, as well as to give them some opportunity to contribute to that exchange. Such contacts and intercommunication would surely lead to a better understanding of the problems of the world and a more realistic approach to their solution. In this matter I have felt myself obliged to follow the established tradition by which only certain Governments have been enabled to maintain observers. I commend this question for further examination by the General Assembly so that the Secretary-General may be given a clear directive as to the policy to be followed in the future in the light, I would hope, of these observations.<sup>18</sup>

<sup>16</sup> *Official Records of the General Assembly, Fourth Session, Sixth Committee, Annex, document A/939/Rev.1 and Rev.1/Add.1, p. 17.*

<sup>17</sup> See the memorandum dated 22 August 1962 of the Legal Counsel to the then Acting Secretary-General, reproduced in *Yearbook of the International Law Commission, 1967, vol. II, p. 190, document A/CN.4/L. 118 and Add.1 and 2, para. 169.*

<sup>18</sup> *Official Records of the General Assembly, Twenty-first Session, Supplement No. 1 A (A/6301/Add.1), p. 14.*

(4) A similar statement was again included in the Introduction to the Annual Report of the Secretary-General on the Work of the Organization for the period 16 June 1966-15 June 1967.<sup>19</sup>

(5) Reference should also be made to the message of the Secretary-General of the United Nations to the twenty-third session of the Economic Commission for Europe,<sup>20</sup> dated 17 April 1968, in which he stated:

It seems to me that the advances so far achieved in the field of economic development in Europe, laudable as they have been, would be even greater if the United Nations and its agencies could achieve the goal of universality of membership. As the attainment of this objective may, however, take some time, I should like to reiterate what I have underscored in the introduction to my last two Annual Reports to the General Assembly that all countries should be encouraged and enabled, if they so wish, to follow the work of the Organization more closely at the Headquarters and regional levels.

(6) The position of permanent observers as regards privileges and immunities was stated as follows in the memorandum, dated 22 August 1962, sent by the Legal Counsel:<sup>21</sup>

Permanent observers are not entitled to diplomatic privileges or immunities under the Headquarters Agreement or under other statutory provisions of the host State. Those among them who form part of the diplomatic missions of their Governments to the Government of the United States may enjoy immunities in the United States for that reason. If they are not listed in the United States diplomatic list, whatever facilities they may be given in the United States are merely gestures of courtesy by the United States authorities.

#### *Article 0. Use of terms*

For the purposes of the present articles:

(a) A "permanent observer mission" is a mission of representative and permanent character sent by a State non-member of an international organization to the Organization;

(b) The "permanent observer" is the person charged by the sending State with the duty of acting as the head of a permanent observer mission.

#### *Commentary*

(1) In the twenty-one draft articles which it provisionally adopted at its twentieth session, the Commission includes an article (article 1) on use of terms. The terms defined in that article relate only to permanent missions. The inclusion in the draft of articles on permanent observer missions would therefore require the extension of the scope of article 1 by the addition thereto of the provisions set out in sub-paragraphs (a) and (b) of article 0.

<sup>19</sup> *Ibid., Twenty-second Session, Supplement No. 1 A (A/6701/Add.1), para. 168.*

<sup>20</sup> See *Official Records of the Economic and Social Council, Forty-fifth Session, Supplement No. 3 (E/4491), annex II, pp. 114-115.*

<sup>21</sup> See foot-note 17 above.

(2) The Special Rapporteur does not deem it necessary to add sub-paragraphs relating to such terms as "the members of the permanent observer mission", "the members of the staff of the permanent observer mission", etc., since their meaning is obvious by reference to the corresponding terms relating to permanent missions.

#### *Article 51. Establishment of permanent observer missions*

Non-member States may establish permanent observer missions to the Organization for the performance of the functions set forth in article 52.

#### *Article 52. Functions of permanent observer missions*

1. The principal function of a permanent observer mission is to ensure the necessary liaison between the sending State and the Organization.

2. Permanent observer missions may also perform *mutatis mutandis* other functions of permanent missions as set forth in article 7.

#### *Commentary*

(1) Article 51 lays down a general rule in accordance with which non-member States may establish permanent observer missions to effect the necessary association with an international organization, short of full membership.

(2) Underlying such a general rule is the assumption that the organization is one of universal character. As defined in article 1 (b), an "international organization of universal character" means an organization whose membership and responsibilities are on a world-wide scale.<sup>22</sup> Paragraph (4) of the commentary on that article states:

"The definition of the term 'international organization of universal character' in sub-paragraph (b) flows from Article 57 of the Charter which refers to the 'various specialized agencies, established by intergovernmental agreement and having wide international responsibilities'".<sup>23</sup>

Given the central position which such international organizations occupy in the present day international order and the world-wide character of their activities and responsibilities, it becomes of vital interest to non-member States to be able to follow the work of those organizations more closely. It could also be of benefit to the organizations as a whole and conducive to the fulfilment of their principles and purposes. The community of interest in the association of non-member States with international organizations of universal character cannot be assumed in the case of regional organizations, the structure and membership of which are established on the assumption that their activities are of particular interest to a specific group of States. This is not to say that one or more States which are not members of a regional organization may not be interested in being

brought into association with that organization. What it means is that it is not possible to generalize such an assumption or lay down a general rule. In the case of regional organizations, unlike that of international organizations of universal character, it is difficult to state a residual rule based on an established pattern. The question should therefore be left to be regulated in accordance with the particular conditions of the regional organizations in question.

(3) A number of States have not become members of the United Nations and, to a lesser degree, of the specialized agencies, notwithstanding the fact that the Charter of the United Nations and the constitutions of the specialized agencies are based on the principle of universality of membership. The reasons are varied. Some, like Switzerland and Western Samoa, have chosen themselves not to become members of the United Nations. The "package deal" arrangement of simultaneous admission of eighteen States in 1955 which resolved the membership crisis in the United Nations excluded from its application the "divided countries" of Germany, Korea and Vietnam. Some of these divided countries succeeded in gaining admission to the specialized agencies while the admission of the rest of the divided countries was blocked.

(4) The establishment of permanent observer missions has been mentioned in recent years as one of the solutions for the problem of "micro-States". In the Introduction to his Annual Report on the work of the Organization covering the period 16 June 1966-15 June 1967, the Secretary-General of the United Nations stated:

... 'micro-States' should also be permitted to establish permanent observer missions at United Nations Headquarters and at the United Nations Office at Geneva, if they so wish, as is already the case in one or two instances. Measures of this nature would permit the 'micro-States' to benefit fully from the United Nations system without straining their resources and potential through assuming the full burden of United Nations membership which they are not, through lack of human and economic resources, in a position to assume.<sup>24</sup>

The Secretary-General reiterated this position in the Introduction to his Annual Report covering the period 16 June 1967-15 June 1968 when he stated:

I drew attention last year to the problem of the 'micro-States'. I can well understand the reluctance of the principal organs of the United Nations to grapple with this problem, but I believe it is a problem that does require urgent attention. The question has been considered by many scholars and also by the United Nations Institute for Training and Research. It seems to me that several of the objectives which micro-States hope to achieve by membership in the United Nations could be gained by some other form of association with the Organization, such as the status of observers. In this connexion, I should like to reiterate the suggestion that I made last year that the question of observer status in general, and the criteria for such status, require consideration by the General Assembly so that the present institutional arrangements, which are based solely on practice, could be put on a firm legal footing.<sup>25</sup>

<sup>22</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, p. 196.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Official Records of the General Assembly, Twenty-second Session, Supplement No. 1A (A/6701/Add.1)*, para. 166.

<sup>25</sup> *Ibid.*, *Twenty-third Session, Supplement No. 1A (A/7201/Add.1)*, para. 172.

In a letter dated 18 August 1969 to the President of the Security Council, the Permanent Representative of the United States of America requested "an early meeting of the Security Council to consider a proposal that the Secretary-General be requested by the Security Council to inscribe an item entitled 'Creation of a Category of Associate Membership' on the provisional agenda of the twenty-fourth session of the General Assembly". He further stated that his delegation "would appreciate an opportunity to present its views on the problem posed by the association of emerging very small States with the United Nations".<sup>26</sup> The Council considered the matter at its 1505th and 1506th meetings held on 27 and 29 August 1969 and decided to establish "a committee of experts, consisting of all members of the Security Council, to study the question which was examined at the 1505th and 1506th meetings of the Security Council".<sup>27</sup> The Committee has not so far submitted a report.<sup>28</sup>

(5) Article 52, paragraph 1, provides that the principal function of a permanent observer mission is to ensure the necessary liaison between the sending State and the Organization. In the Introduction to his Annual Report on the work of the Organization covering the period 16 June 1966-15 June 1967, the Secretary-General of the United Nations stated:

In my introduction to last year's annual report as well as in previous years, I have already expressed my strong feeling that all countries should be encouraged and enabled, if they wish to do so, to follow the work of the Organization more closely by maintaining observers at the Headquarters of the United Nations, at Geneva and in the regional economic commissions. They will thus be exposed to the impact of the work of the Organization and the currents and cross-currents of opinion that prevail within it, besides gaining opportunities to contribute to that exchange.<sup>29</sup>

(6) Permanent observers, being representatives of States non-members of the Organization, do not perform functions identical with those of permanent missions of Member States. They do not perform as a general rule and on a standing basis the functions of permanent missions as set forth in article 7.<sup>30</sup> They may however perform some of these functions on an *ad hoc* basis: paragraph 2 of article 52 provides that permanent observer missions, besides their principal function of ensuring the necessary liaison between their respective Governments and the organization to which they are assigned, may also perform *mutatis mutandis* other functions of permanent missions. The functions of represen-

tation and negotiation can be performed in particular by permanent observers, if an organ of an international organization plays the role of a conference of plenipotentiaries and non-member States are allowed to participate therein. The most recent case of such a conference is the consideration of the draft Convention on special missions by the Sixth Committee at the twenty-fourth session of the General Assembly. An example of a similar procedure may be found in resolution 2520 (XXIV) of 4 December 1969, by which the General Assembly decided that "a State which is a party to the Statute of the International Court of Justice, but is not a Member of the United Nations, may participate in the General Assembly in regard to amendments to the Statute in the same manner as the Members of the United Nations".

*Note on assignment to two or more international organizations or to functions unrelated to permanent missions*

(1) The information supplied by the legal advisers of the United Nations, the specialized agencies and IAEA indicates that, apart from the Permanent Observer of the Holy See to FAO at Rome, permanent observers have been sent by non-member States only to the United Nations Headquarters at New York and to the United Nations Office at Geneva.<sup>31</sup> It may therefore appear unnecessary to include in the draft articles on permanent observer missions a provision corresponding to article 8 on accreditation to two or more international organizations or assignment to two or more permanent missions.<sup>32</sup>

(2) Cases may, however, arise in the future in which States non-members of international organizations will send permanent observers to two or more international organizations. In order to make as complete as possible the legal regulation of the institution of permanent observer missions of non-member States to international organizations, which constitutes the primary purpose of the draft articles on permanent observer missions, the Commission may wish to deal with the question of assignment to two or more international organizations. The Special Rapporteur therefore submits for the consideration of the Commission the following provision which is modelled on article 8:

1. The sending State may accredit the same person as permanent observer to two or more international organizations or assign a permanent observer as a member of another of its permanent observer missions.

2. The sending State may accredit a member of the staff of a permanent observer mission to an international organization as permanent observer to other international organizations or assign him as a member of another of its permanent observer missions.

(3) The Commission may also wish to provide for the situation in which a State accredits the same mission as permanent mission to an international organization of which that State is a member and as permanent observer

<sup>26</sup> *Official Records of the Security Council, Twenty-fourth Year, Supplement for July, August and September 1969*, document S/5397.

<sup>27</sup> See S/PV.1506.

<sup>28</sup> See on this question the study by the United Nations Institute for Training and Research entitled *Status and Problems of Very Small States and Territories*, UNITAR, Series No. 3, New York, 1969; see also P. Wohlgenuth Blair, "The Ministate Dilemma" (New York, Carnegie Endowment for International Peace, October 1967), Occasional Paper No. 6.

<sup>29</sup> *Official Records of the General Assembly, Twenty-second Session, Supplement No. 1 A (A/6701/Add.1)*, para. 168.

<sup>30</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, p. 200.

<sup>31</sup> See *Yearbook in the International Law Commission, 1967*, vol. II, p. 190, document A/CN.4/L.118 and Add.1 and 2, para. 169.

<sup>32</sup> *Ibid.*, 1968, vol. II, p. 201.

mission to another international organization of which it is not a member. This may be effected through the inclusion in article 9, which deals with accreditation, assignment or appointment of a member of a permanent mission to other functions,<sup>33</sup> of a reference to permanent observer missions. Such a solution however would not cover the situation in which the sending State assigns to one of the members of its permanent observer missions functions unrelated to permanent missions. The Special Rapporteur therefore submits to the consideration of the Commission a provision modelled on article 9 which reads as follows:

1. The permanent observer of a State to an international organization may be accredited as a permanent representative to another international organization or as head of a diplomatic mission or assigned as a member of a permanent mission of that State or as a member of one of its diplomatic or special missions to the host State or to another State.

2. A member of the staff of a permanent observer mission of a State to an international organization may be accredited as a permanent representative to another international organization or as head of a diplomatic mission or assigned as a member of a permanent mission of that State or as a member of one of its diplomatic or special missions to the host State or to another State.

3. A member of a permanent observer mission of a State may be appointed as a member of a consular post of that State in the host State or in another State.

4. The accreditation, assignment or appointment referred to in paragraphs 1, 2 and 3 of this article shall be governed by the rules of international law concerning diplomatic and consular relations.

**Article 53. Appointment of the members of the permanent observer mission**

Subject to the provisions of articles 54 and 56, the sending State may freely appoint the members of the permanent observer mission.

**Article 54. Nationality of the members of the permanent observer mission**

The permanent observer and the members of the diplomatic staff of the permanent observer mission should in principle be of the nationality of the sending State. They may not be appointed from among persons having the nationality of the host State, except with the consent of that State which may be withdrawn at any time.

*Commentary*

(1) Article 53 is based on the provisions of article 10 as adopted by the Commission. It seeks to underline the principle of the freedom of choice by the sending State of the members of the permanent observer mission. Article 53 expressly provides for two exceptions to that principle. The first is embodied in article 54 which requires the consent of the host State for the appointment of one of its nationals as a permanent observer or as a member of the diplomatic staff of the permanent observer mission

of another State. The second exception relates to the size of the mission; that question is regulated by article 56.

(2) In paragraphs (2) and (3) of its commentary on article 10, the Commission stated that:

Unlike the relevant articles of the Vienna Convention on Diplomatic Relations and the draft articles on special missions, article 10 does not make the freedom of choice by the sending State of the members of its permanent mission to an international organization subject to the *agrément* of either the organization or the host State as regards the appointment of the permanent representative, the head of the permanent mission.

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. As regards the United Nations, the Legal Counsel pointed out at the 1016th meeting of the Sixth Committee, on December 1967, 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>34</sup>

(3) Article 54, reproduces, with the necessary drafting changes, the provisions of article 11. In his report, the Special Rapporteur stated that State practice and treaty and statutory provisions reveal that the consent of the host State is not required for the appointment of one of its nationals as a member of a permanent mission of another State. The problem is usually dealt with in terms of the immunities conceded to the member of the mission, and a number of States make a distinction between nationals and non-nationals in this regard.<sup>35</sup> In view of that, the Special Rapporteur decided not to include in his third report a general provision of principle on the question of nationality of members of the permanent mission and to deal with this question as a problem of privileges and immunities in section 2 of part II of the draft articles.<sup>36</sup> When the Commission considered the third report of the Special Rapporteur at its twentieth session, some members supported the position stated above. This position, however, was not accepted by the majority of the members. The Commission therefore decided, as stated in paragraphs (3) and (4) of its commentary on article 11, to include in the present draft articles a provision based on paragraphs 1 and 2 of article 8 of the Vienna Convention on Diplomatic Relations.<sup>37</sup> This provision—contained in article 11—states that the permanent representative and the members of the diplomatic staff of the permanent mission should in principle be of the

<sup>34</sup> *Ibid.*, p. 203.

<sup>35</sup> *Ibid.*, p. 137, document A/CN.4/203 and Add.1-5, para. 36.

<sup>36</sup> *Ibid.*, p. 137, para. 38.

<sup>37</sup> United Nations, *Treaty Series*, vol. 500, p. 95.

<sup>33</sup> *Ibid.*, p. 202.

nationality of the sending State, and that they may not be appointed from among persons having the nationality of the host State, except with the consent of that State. The Commission decided to limit the scope of that provision to nationals of the host State and not to extend it to nationals of a third State. It therefore did not include in article 11 the rule laid down in paragraph 3 of article 8 of the Vienna Convention on Diplomatic Relations. The highly technical character of some international organizations makes it desirable not to restrict unduly the free selection of members of the mission since the sending State may find it necessary to appoint as members of its permanent mission nationals of a third State who possess the required training and experience.<sup>38</sup>

(4) The Special Rapporteur presumes that the Commission would like to take a similar approach in dealing with the problem of nationality of the members of the permanent observer mission. Article 54 is drafted with such an assumption in mind.

*Note on the question of credentials  
in relation to permanent observers*

(1) The study by the Secretariat<sup>39</sup> refers only indirectly to the question of credentials of permanent observers, in the context of facilities accorded to them. In that respect, the study quotes the above-mentioned memorandum by the Legal Counsel to the then Acting Secretary-General, paragraph 4 of which states *inter alia*:

Communications informing the Secretary-General of their [the permanent observers'] appointment are merely acknowledged by the Secretary-General or on his behalf and they are not received by the Secretary-General for the purpose of presentation of credentials as is the case for Permanent Representatives of States Members of the Organization.<sup>40</sup>

(2) Unlike permanent representatives of Member States, permanent observers of non-member States do not present credentials to the Secretary-General. The non-member State which wishes to maintain a permanent observer to the United Nations simply addresses a letter to the Secretary-General informing him of the identity of its permanent observer. The standard letter for the appointment of permanent observers reads as follows:

Since the Government of..... has decided to establish more permanent contact with the offices of the United Nations Organization, I have the honour to inform your Excellency that the..... will have a Permanent Observer to the United Nations in the person of His Excellency..... with residence at.....

In asking your Excellency to take note of the above-mentioned data, I have the pleasure in expressing [etc.].

(3) As far as the accreditation of permanent missions is concerned, the annex to the report on permanent

missions to the United Nations<sup>41</sup> submitted by the Secretary-General to the General Assembly at its fourth session gave a standard form of credentials, as a guide to the drafting of such instruments, which read as follows:

Whereas the Government of ..... has set up at the seat of the United Nations a permanent mission to maintain necessary contact with the Secretariat of the Organization,

Now therefore, we..... (name and title)..... have appointed and by these presents do confirm as permanent representative to the United Nations His Excellency..... (name)..... (title).....

His Excellency..... is instructed to represent the Government of..... in the following organs:..... He is also authorized to designate a substitute to act temporarily on his behalf after due notice to the Secretary-General.

In faith whereof we have signed these presents at..... on.....,

Signature .....

(title)  
(Head of the State,  
Head of the Government or  
Foreign Minister)

It was suggested that where a Government desires to accredit its permanent representative to all organs of the United Nations, the first sentence of the third paragraph of the form might be altered to read:

His Excellency..... is instructed to represent the Government of..... in all organs of the United Nations.

(4) The Secretary-General of the United Nations submits each year a report on permanent missions to the United Nations in pursuance of resolution 257 A (III) of 3 December 1948, which requests the Secretary-General to "... submit, at each regular session of the General Assembly, a report on the credentials of the permanent representatives accredited to the United Nations." The reports indicate which Member States have authorized their permanent representatives to represent them in all organs of the United Nations and which have authorized their permanent representative to represent them in certain organs of the United Nations. The latest report submitted by the Secretary-General on "Permanent missions to the United Nations" to the twenty-fourth session of the General Assembly<sup>42</sup> indicates that all Member States, with the exception of one, have set up permanent missions at the seat of the United Nations. It lists Member States which have appointed permanent representatives and transmitted to the Secretary-General credentials for those representatives in accordance with paragraph 1 of resolution 257 A (III). The report lists also the Member States the permanent missions of which are headed, pending the appointment of permanent representatives, by acting permanent representatives, *chargés d'affaires ad interim* or deputy permanent representatives.

(5) The Special Rapporteur is not convinced that a case exists for departing from the practice in accordance with

<sup>38</sup> Yearbook of the International Law Commission, 1968, vol. II, p. 204, document A/7209/Rev. 1, para. (4) of the commentary to article II.

<sup>39</sup> Ibid., 1967, vol. II, p. 154, document A/CN.4/L. 118 and Add.1 and 2.

<sup>40</sup> Ibid., p. 190, document A/CN.4/L. 118 and Add.1 and 2, para. 169.

<sup>41</sup> Official Records of the General Assembly, Fourth Session, Sixth Committee, Annex, document A/939/Rev.1 and Rev.1/Add.1, pp. 16-17.

<sup>42</sup> Document A/7631 of 12 December 1969.

which permanent observers do not present credentials, and he therefore did not include a provision on credentials of permanent observers analogous to article 12, as adopted by the Commission, on credentials of permanent representatives. Inasmuch as the letter of appointment of permanent observers takes the form of a notification, it could be covered by article 57 on notifications.

**Article 55. Composition of the permanent observer mission**

In addition to the permanent observer, a permanent observer mission may include members of the diplomatic staff, the administrative and technical staff and the service staff.

**Article 56. Size of the permanent observer mission**

The size of the permanent observer mission shall not exceed what is reasonable and normal, having regard to the functions of the Organization, the needs of permanent observer missions and the circumstances and conditions in the host State.

**Article 57. Notifications**

1. The sending State shall notify the Organization of:

(a) The appointment of the members of the permanent observer mission, their position, title and order of precedence, their arrival and final departure or the termination of their functions with the permanent observer mission;

(b) The arrival and final departure of a person belonging to the family of a member of the permanent observer mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the permanent observer mission.

(c) The arrival and final departure of persons employed on the private staff of members of the permanent observer mission and the fact that they are leaving that employment;

(d) The engagement and discharge of persons resident in the host State as members of the permanent observer mission or persons employed on the private staff entitled to privileges and immunities.

2. Whenever possible, prior notification of arrival and final departure shall also be given.

3. The Organization shall transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.

4. The sending State may also transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.

*Commentary*

(1) Article 55 reproduces, with the necessary drafting changes, the provisions of article 15 relating to the composition of the permanent mission.

(2) Every permanent observer mission must include at least one representative of the sending State, that is to say, a person to whom that State has assigned the task of being its representative in the permanent observer mission.

(3) As stated in paragraph (2) of the commentary on article 0 (Use of terms), the Special Rapporteur did not deem it necessary to add sub-paragraphs relating to such terms as "the members of the permanent observer mission", "the members of the staff of the permanent observer mission", etc., since their meaning is obvious by reference to the corresponding terms relating to permanent missions. The same applies to the commentary.

(4) Article 56 is based on article 16. There is, however, one essential difference between the two texts. In article 16, the needs of the permanent mission are referred to as "the needs of the particular mission" in the singular. This drafting aims at reflecting the fact that the needs of permanent missions vary according to the number of organs of the Organization in which the Member States concerned take part and in which they therefore have to be represented. Article 56 takes a different approach to the problem. It simply refers to the needs of permanent observer missions in general and not to the particular needs of a particular permanent observer mission. The reason for such drafting is very simple: permanent observer missions are sent by non-member States for the principal purpose of maintaining the necessary contact with the Organization. The sending State in such cases is in general not a member of any organ of the Organization and the members of its permanent observer mission do not participate in the meetings of the various organs of the Organization.

(5) The provisions of article 57 reproduce, with the necessary drafting changes, those of article 17. The Special Rapporteur considers that they do not call for any comment.

**Article 58. Offices of permanent observer missions**

1. The sending State may not, without the prior consent of the host State, establish offices of the permanent observer mission in localities other than that in which the seat or an office of the Organization is established.

2. The sending State may not establish offices of the permanent observer mission in the territory of a State other than the host State, except with the prior consent of such a State.

**Article 59. Use of flag and emblem**

1. The permanent observer mission shall have the right to use the flag and emblem of the sending State on its premises. The permanent observer shall have the same right as regards his residence and means of transport.

2. In the exercise of the right accorded by this article, regard shall be had to the laws, regulations and usages of the host State.

*Commentary*

(1) Article 58 reproduces with the necessary drafting changes the provisions of article 20. In paragraph (1) of its commentary on article 20, the Commission stated that the provisions of that article

have been included in the draft to avoid the awkward situation which would result for the host State if an office of a permanent

mission was established in a locality other than that in which the seat or an office of the Organization is established. The article deals also with the rare cases in which sending States wish to establish offices of their permanent missions outside the territory of the host State.<sup>43</sup>

(2) Article 59 is modelled on article 21. The Special Rapporteur considers that it calls for no comment.

*Article 60. Facilities, privileges and immunities*

The permanent observer mission and its members shall enjoy the same facilities, privileges and immunities as are accorded to the permanent mission and its members in accordance with articles 22 to 44.

*Article 61. Conduct of the permanent observer mission and its members and end of functions*

The rules relating to the conduct of permanent missions and their members and to the end of functions as laid down in articles 45 to 49 shall apply *mutatis mutandis* to permanent observer missions and their members.

*Commentary*

(1) The position as regards facilities accorded to permanent observers at United Nations Headquarters is summarized as follows in paragraphs 3 and 4 of the above-mentioned memorandum of the Legal Counsel:<sup>44</sup>

Since Permanent Observers of non-member States do not have an officially recognized status, facilities which are provided them by the Secretariat are strictly confined to those which relate to their attendance at public meetings and are generally of the same nature as those extended to distinguished visitors at United Nations Headquarters. The Protocol Section arranges for their seating at such meetings in the public gallery and for the distribution to them of the relevant unrestricted documentation. A list of their names is appended, for convenience of reference, to the List of Permanent Missions to the United Nations published monthly by the Secretariat, as Permanent Observers often represent their Governments at sessions of United Nations organs at which their Governments have been invited to participate.

No other formal recognition or protocol assistance is extended to Permanent Observers by the Secretariat. Thus no special steps are taken to facilitate the granting of United States visas to them and their personnel, nor for facilitating the establishment of their offices in New York. Communications informing the Secretary-General of their appointment are merely acknowledged by the Secretary-General or on his behalf, and they are not received by the Secretary-General for the purpose of presentation of credentials as is the case for Permanent Representatives of States Members of the Organization.

(2) The position as regards diplomatic privileges and immunities for permanent observers at United Nations Headquarters is summarized as follows in paragraph 5 of the memorandum:

Permanent Observers are not entitled to diplomatic privileges or immunities under the Headquarters Agreement or under other

statutory provisions of the host State. Those among them who form part of the diplomatic missions of their Governments to the Government of the United States may enjoy immunities in the United States for that reason. If they are not listed in the United States diplomatic list, whatever facilities they may be given in the United States are merely gestures of courtesy by the United States authorities.

(3) At the European Office, in Geneva, the Federal Republic of Germany, the Holy See, the Republic of Korea, and the Republic of San Marino maintain permanent observers, who enjoy *de facto* the same privileges and immunities as permanent representatives (except in the case of the permanent observer of San Marino, who is a Swiss citizen). In addition, Switzerland appointed in 1966 an *Observateur permanent du Département Politique Fédéral auprès de l'Office des Nations Unies à Genève*.

(4) In *Pappas v. Francisci*,<sup>45</sup> a claim by a member of the staff of the then Italian observer to the United Nations to full diplomatic immunity was rejected since the State Department of the United States had not recognized the defendant as an official with diplomatic status. The Court also referred in its decision to a letter of the Acting Chief of Protocol of the United Nations concerning the status of representatives of non-member nations maintaining observers' offices in New York, in which it was stated that the

"Headquarters Agreement does not mention the observers' category and up until now the agreement has not been interpreted to confer diplomatic immunity on such persons and/or members of their staff."

The benefits of the International Organizations Immunities Act, however (i.e. functional privileges and immunities) are granted to persons designated by foreign Governments to serve as their representatives "in or to" international organizations; this phrase has been interpreted as applying to permanent observers.

(5) Article 60 provides that the permanent observer missions and their members enjoy the facilities, privileges and immunities accorded to permanent missions and their members, as laid down in articles 22 to 44. The fact that the functions of permanent observer missions are not identical with those performed by permanent missions may suggest that their privileges and immunities should not be identical either. It should be noted, however, that, notwithstanding the fact that permanent observer missions are assigned to international organizations by non-member States while permanent missions are accredited by Member States, they have analogous legal status, since they both have a representative and permanent character. This is reflected in article 0 (Use of terms), sub-paragraph (a), which defines a "permanent observer mission" as "a mission of representative and permanent character sent by a State non-member of an international organization to the Organization". This definition is identical in substance with the definition of the permanent mission in article 1, sub-paragraph (d), according to

<sup>43</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, p. 212.

<sup>44</sup> See foot-note 17 above.

<sup>45</sup> *Supreme Court of the State of New York, Special Term, King's County, Part V*, 6 February 1953, 119 N.Y.S. 2d. 69.

which a permanent mission is a "mission of representative and permanent character sent by a State member of an international organization to the Organization".<sup>46</sup>

(6) Because of the difference, both in nature and in scope, between the functions of permanent missions on the one hand and those of permanent observer missions on the other, it is not necessary that the latter receive the same facilities as the former, especially from the organization. As mentioned above, the facilities which are extended to permanent observers of non-member States by the Secretariat of the United Nations are strictly confined to those which relate to their attendance at public meetings and are generally of the same nature as those extended to distinguished visitors at United Nations Headquarters. As regards the host State, the memorandum of the Legal Counsel states that if the permanent observers are not listed in the United States diplomatic list, i.e. if they do not form part of the diplomatic missions of their Governments to the Government of the United States, whatever facilities they may be given in the United States are merely gestures of courtesy by the United States authorities. This situation is explained in the memorandum by the fact that "Permanent Observers of non-member States do not have an officially recognized status". The purpose of article 60 is to redress such a situation by requiring both the host State and the organization to accord the permanent observer mission and its members facilities similar to those provided for in articles 22 to 44 regarding the permanent mission and its members. Article 22, as adopted by the Commission, on general facilities to be accorded to permanent missions refers to "facilities for the performance of its functions". It follows that in the application of such a rule *mutatis mutandis* to permanent observer missions, due account is to be taken of the more limited scope of the functions of the latter. This is reflected in paragraph (4) of the commentary on articles 55, 56 and 57.

(7) Article 61 provides for the application to permanent observer missions and their members, *mutatis mutandis*, of the rules applicable to the conduct of the permanent mission and its members and to the end of functions as laid down in articles 45-49. The rationale of such an assimilation is to be found in the fact that permanent missions and permanent observer missions have the same representative and permanent character, despite the constitutional difference which exists between them because the former are accredited by Member States of the Organization while the latter are sent by non-member States.

(8) Mention should be made of the fact that the articles referred to in article 61 do not include article 50 on "Consultations between the sending State, the host State and the Organization". The Special Rapporteur observes that, as stated in the report of the Commission on the work of its twenty-first session,<sup>47</sup> the place of article 50 in Part II concerning permanent missions is provisional;

he assumes that the content of that article will be transferred at a later stage either to part I entitled "General provisions" or to the end of the draft articles so that the article would be applicable to permanent missions, permanent observer missions and delegations to organs of international organizations and to conferences convened by international organizations.

#### PART IV. DELEGATIONS TO ORGANS OF INTERNATIONAL ORGANIZATIONS AND TO CONFERENCES CONVENED BY INTERNATIONAL ORGANIZATIONS

##### *General comments*

(1) The draft articles contained in this part consist of two categories: the first category seeks to regulate the general questions relating to delegations to organs of international organizations and to conferences convened by international organizations, e.g. composition, accreditation, powers in respect to the conclusion of treaties. The second category covers the question of facilities, privileges and immunities accorded to delegations to such organs and conferences.

(2) Out of the rules of procedure worked out by the different organs of the United Nations and the specialized agencies grew a substantial body of rules and regulations concerning the organization and procedure of diplomatic conferences which have become known as "multilateral" or "parliamentary" diplomacy.<sup>48</sup> Special mention should be made of the preparatory work on the "method of work and procedures" of the United Nations Conference on the Law of the Sea. This work was undertaken by the Secretariat of the United Nations with the advice and assistance of a group of experts in implementation of paragraph 7 of resolution 1105 (XI) of 21 February 1957 which reads as follows:

##### *The General Assembly*

[. . .]

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

[. . .]

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

The report submitted by the Secretary-General<sup>49</sup> pursuant to this request contained provisional rules of procedure which, for the most part, followed the standard pattern of the rules of procedure of the General Assembly. The same rules were adopted, with a limited number of appropriate significant variations, by the United Nations First and Second Conferences on the Law of the Sea in

<sup>48</sup> See P. C. Jessup, "Parliamentary diplomacy: an examination of the Rules of Procedure of organs of the United Nations" in *Recueil des cours de l'Académie de droit international de La Haye, 1956-I* (Leyden, Sijthoff, 1957), t. 89, pp. 185-316.

<sup>49</sup> See *Official Records of the United Nations Conference on the Law of the Sea*, vol. I, *Preparatory Documents* (United Nations publication, Sales No.: 58.V.4, Vol. I), pp. 172-175.

<sup>46</sup> *Yearbook of the International Law Commission, 1968*, vol. II, p. 196.

<sup>47</sup> *Ibid.*, 1969, vol. II, p. 221, document A/7610/Rev.1, footnote 44

1958 and 1960, the Conference on Diplomatic Intercourse and Immunities in 1961, the Conference on Consular Relations in 1963 and the Conference on the Law of Treaties in 1968 and 1969.

(3) A corresponding substantial body of rules grew in relation to privileges and immunities of representatives to organs of international organizations and conferences convened by them. Article 105, paragraph 2, of the Charter provides that the representatives of Member States shall "[...] enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization." Article 105, paragraph 3, specifies that the General Assembly may make recommendations with a view to determining the details of application of paragraph 2 or may propose conventions to Member States for this purpose. Even before such steps have been taken, however, Member States are bound by the terms of Article 105. At the United Nations Conference on International Organization (San Francisco Conference), the Committee on Legal Problems stated that Article 105 "sets forth a rule obligatory for all members as soon as the Charter becomes operative";<sup>50</sup> similarly, the Executive Committee of the Preparatory Commission of the United Nations reported in 1945 that Article 105 is "applicable even before the General Assembly has made the recommendations referred to in paragraph (3) of the Article, or the conventions there mentioned have been concluded."<sup>51</sup>

As regards the nature of the privileges and immunities granted under Article 105, the Committee on Legal Problems at the San Francisco Conference declared that the terms *privileges* and *immunities* used in that Article "indicate in a general way all that could be considered necessary to the realization of the purposes of the Organization, to the free functioning of its organs [...]: exemption from tax, immunity from jurisdiction, facilities for communication, inviolability of buildings, properties, and archives, etc."<sup>52</sup>

The Committee stated expressly that it had "seen fit to avoid the term 'diplomatic'", in describing the nature of the privileges and immunities conferred under Article 105, and had

preferred to substitute a more appropriate standard, based ... in the case of the representatives ..., on providing for the independent exercise of their functions.<sup>53</sup>

<sup>50</sup> *Documents of the United Nations Conference on International Organization*, IV/2/42 (2), vol. XIII, p. 704.

<sup>51</sup> Preparatory Commission of the United Nations, *Report by the Executive Committee* (PC/EX/113/Rev.1), Part III, chap. V, sect. 5, para. 2.

<sup>52</sup> See foot-note 50 above.

<sup>53</sup> Article 7, paragraph 4, of the Covenant of the League of Nations provided that:

"Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities."

Detailed arrangements concerning the privileges and immunities of the League of Nations were worked out between the Secretary-General of the League and the Swiss Government in the form of the "Modus Vivendi" of 1921 as supplemented by the "Modus Vivendi" of 1926. The "Modus Vivendi" of 1921 was embodied in a letter of 19 July 1921 from the Head of the Federal Political Department of the Swiss Government to the Secretary-General of the League of Nations on behalf of the Secretariat of the League and also of the International Labour Office. The "Modus Vivendi"

The Preparatory Commission of the United Nations instructed the Executive Secretary to invite the attention of the Members of the United Nations to the fact that, under Article 105 of the Charter, the obligation of all Members to accord to the United Nations, its officials and the representatives of its members all privileges and immunities necessary for the accomplishment of its purposes, operated from the coming into force of the Charter and was therefore applicable even before the General Assembly made the recommendations or proposed the conventions referred to in paragraph 3 of Article 105. It recommended that "the General Assembly, at its First Session, should make recommendations with a view to determining the details of the applications of paragraphs 1 and 2 of Article 105 of the Charter, or propose conventions to the Members of the United Nations for this purpose".<sup>54</sup> It transmitted for the consideration of the General Assembly a study on privileges and immunities, and, as working papers, a draft convention on privileges and immunities and a draft treaty to be concluded by the United Nations Organization with the United States of America, the country in which the headquarters of the Organization were to be located. It considered that the details of the prerogatives to be accorded to members of the International Court of Justice should be determined after the Court had been consulted, and that until further action had been taken "the rules applicable to the members of the Permanent Court of International Justice should be followed".<sup>55</sup> It recommended that the privileges and immunities of specialized agencies contained in their respective constitutions should be reconsidered and negotiations opened "for their co-ordination"<sup>56</sup> in the light of any convention ultimately adopted by the United Nations.

The documents of the Preparatory Commission were studied by the Sixth Committee of the General Assembly at the first part of its first session in January-February 1946. The following resolutions concerning the privileges and immunities of the United Nations were adopted by the General Assembly:

(a) A resolution relating to the adoption of the General Convention on Privileges and Immunities of the United Nations, to which the text of the convention is annexed [Resolution 22 A (I)];

(b) A resolution relating to negotiations with the competent authorities of the United States of America concerning the arrangements required as a result of the establishment of the seat of the United Nations in the United States of America, together with the text of a draft convention to be transmitted as a basis of discussion for these negotiations [Resolution 22 B (I)];

(c) A resolution on the privileges and immunities of the International Court of Justice [Resolution 22 C (I)];

of 1926 was submitted to the Council of the League for approval. For an account of the negotiations which led to the conclusion of these two Agreements, see M. Hill, *Immunities and Privileges of International Officials: The Experience of the League of Nations* (Washington, Carnegie Endowment for International Peace, 1947), pp. 14-23.

<sup>54</sup> *Report of the Preparatory Commission of the United Nations* (PC/20), chap. VII, sect. 1, para. 2.

<sup>55</sup> *Ibid.*, para. 4.

<sup>56</sup> *Ibid.*, para. 5.

(d) A resolution on the co-ordination of the privileges and immunities of the United Nations and the specialized agencies [Resolution 22 D (I)].

The general Convention on the Privileges and Immunities of the United Nations<sup>87</sup> (hereafter referred to as the General Convention) was approved by the General Assembly on 13 February 1946 and was in force on 1 April 1970 for 101 States.<sup>88</sup> Article IV, Section 11, of the General Convention provides that:

Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during the journey to and from the place of meeting, enjoy the following privileges and immunities:

(a) Immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind;

(b) Inviolability for all papers and documents;

(c) The right to use codes and to receive papers or correspondence by courier or in sealed bags;

(d) Exemption in respect of themselves and their spouses from immigration restrictions, aliens registration or national service obligations in the State they are visiting or through which they are passing in the exercise of their functions;

(e) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(f) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys, and also;

(g) Such other privileges, immunities and facilities, not inconsistent with the foregoing, as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales taxes.

(4) A Convention on the Privileges and Immunities of the Specialized Agencies<sup>89</sup> (hereafter referred to as the Specialized Agencies Convention) was approved by the General Assembly on 21 November 1947 and was in force on 1 April 1970 for 70 States.<sup>90</sup> Article V, section 13, on "Representatives of members" is modelled on article IV, section 11, of the General Convention. The Convention is applicable, subject to variations set forth in a special annex for each agency, the final form of which is determined by the agency concerned, to nine specialized agencies expressly designated in the Convention—namely the ILO, FAO, UNESCO, ICAO, IMF, IBRD, WHO, UPU and ITU, and to any other agency subsequently brought into relationship with the United Nations in accordance with Articles 57 and 63 of the Charter.<sup>91</sup> In accordance with that last provision, the Convention has

been applied to WMO, IMCO and IFC. An agreement on the privileges and immunities of IAEA was approved by the Board of Governors of the Agency on 1 July 1959, which "in general follows the Convention on the Privileges and Immunities of the Specialized Agencies."<sup>92</sup> The General Convention and the Specialized Agencies Convention are supplemented by headquarters agreements concluded between the United Nations and the specialized agencies on the one hand, and States on whose territory they maintain headquarters on the other hand. Headquarters agreements have been concluded by the United Nations with the United States of America and Switzerland, by ICAO with Canada, by UNESCO with France, by FAO with Italy, by IAEA with Austria, by ILO, WHO, WMO, ITU and UPU with Switzerland, and by IMCO with the United Kingdom.

(5) Constitutional instruments of regional organizations also usually contain provisions relating to privileges and immunities of the organization. Such provisions are found, for instance, in:

(a) Article 106 of the Charter of OAS signed at Bogota on 30 April 1948;

(b) Article 40 of the Statute of the Council of Europe of 5 May 1949;

(c) Article 14 of the Pact of the League of Arab States of 22 March 1945;

(d) Article XIII of the Statutes of CMEA signed at Sofia on 14 December 1959;

(e) Article XXXI of the Charter of OAU 25 May 1963.

These constitutional provisions have been implemented by general conventions on privileges and immunities<sup>93</sup> which were largely inspired by the General Convention and the Specialized Agencies Convention. A number of headquarters and host agreements were also concluded by regional organizations with States on whose territory they maintain headquarters or other offices.

#### Article 0. Use of terms

For the purposes of the present articles:

(a) A delegation is the person or body of persons charged with the duty of representing a State at a meeting of an organ of an international organization or at a conference.

(b) A conference is a meeting of representatives of States for negotiating or concluding a treaty on matters concerning the relations between the States.

<sup>87</sup> United Nations Legislative Series, *Legislative Texts and Treaty Provisions Concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. II (United Nations publication, Sales No.: 61.V.3), p. 358.

<sup>88</sup> Examples: Agreement on Privileges and Immunities of the Organization of American States, opened for signature on 15 May 1949; General Agreement on Privileges and Immunities of the Council of Europe, signed at Paris on 2 September 1949; Protocole sur les privilèges et immunités de la Communauté européenne du charbon et de l'acier, signed at Paris on 18 April 1951; Convention on the Privileges and Immunities of the League of Arab States approved by the Council of the League of Arab States on 10 May 1953; Convention concerning the juridical personality, privileges and immunities of the Council for Mutual Economic Assistance, signed at Sofia on 14 December 1959.

<sup>87</sup> See foot-note 14 above.

<sup>88</sup> Information on the status of this Convention and the number of States which had acceded to it on 1 April 1970 was communicated to the Special Rapporteur through the kindness of the Treaty Section of the Office of Legal Affairs of the United Nations.

<sup>89</sup> See foot-note 15 above.

<sup>90</sup> See foot-note 58 above.

<sup>91</sup> See F. Wolf, *Le droit aux privilèges et immunités des institutions spécialisées reliées aux Nations Unies* (thesis, Université de Montréal, 1948) [cited in W. Jenks, *International Immunities* (London, Stevens & Sons, 1961), p. 5, foot-note 34].

### Commentary

(1) As mentioned before,<sup>64</sup> the Commission included in the twenty-one draft articles which it provisionally adopted at its twentieth session an article (article 1) on use of terms. The terms defined in that article relate only to permanent missions. The inclusion in the draft of articles on delegations to organs of international organizations and conferences convened by international organizations would therefore require the extension of the scope of article 1 by the addition thereto of the provisions set out in sub-paragraphs (a) and (b) of article 0.

(2) "Conference": the definition of this term does not appear to require any comment except to indicate that

from the point of view of international law there is no essential difference between congresses and conferences. Both are meetings of plenipotentiaries for the discussion and settlement of international affairs; both include meetings for the determination of political questions, and for the treatment of matters of a social or economic order.<sup>65</sup>

The first Special Rapporteur on special missions (A.E.F. Sandström) used the two terms jointly in the draft articles which he prepared for the Commission in 1960.<sup>66</sup> The second Special Rapporteur (M. Bartoš) also used the two terms jointly in the third preliminary question which he included in his report on special missions.<sup>67</sup> As stated by an authority on diplomatic practice, the term "congress"

has in the past been more frequently applied to assemblies of plenipotentiaries for the conclusion of peace [ . . . ]. The first international gathering to which the name of conference was given was that on the affairs of Greece, held at London in 1827-32 [ . . . ]. At the present day the term 'conference' is habitually used to describe all international assemblages in which matters come under discussion with a view to settlement [ . . . ]<sup>68</sup>

A survey of the practice of the United Nations reveals a consistent tendency towards the usage of the term "conference". Examples: the United Nations Maritime Conference, 1948; the United Nations Conference on Freedom of Information, 1948; the United Nations Conference on Road and Motor Transport, 1949; the United Nations Conference on the Declaration of Death of Missing Persons, 1950; the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 1951; the United Nations Conference on Maintenance Obligations, 1956; the United Nations Conference of Plenipotentiaries on a Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956; the Conference on the Statute of the International

Atomic Energy Agency, 1956; the United Nations Conferences on the Law of the Sea, 1958 and 1960; the United Nations Conference on Diplomatic Intercourse and Immunities, 1961; the United Nations Conference on Consular Relations, 1963, and the United Nations Conference on the Law of Treaties, 1968 and 1969. The same applies to conferences convened by other international organizations, universal or regional, as well as to conferences convened by States.<sup>69</sup>

### Article 62. Composition of the delegation

1. A delegation to an organ of an international organization or to a conference convened by an international organization consists of one or more representatives of the sending State from among whom the sending State may appoint a head.

2. The expression "representatives" shall be deemed to include all delegates, deputy delegates, advisers, technical experts and secretaries of delegations.

3. A delegation to an organ of an international organization or to a conference convened by an international organization may also include administrative and technical staff and service staff.

### Commentary

(1) Every delegation to an organ of an international organization or to a conference convened by an international organization must include at least one representative of the sending State, that is to say, a person to whom that State has assigned the task of being its representative in the delegation to an organ of an international organization or to a conference convened by an international organization. If the delegation to an organ of an international organization or to a conference convened by an international organization comprises two or more representatives, the sending State may appoint one of them to be head of the delegation.

(2) The term "representatives" is defined in article IV, section 16, of the General Convention as follows:

In this article the expression "representatives" shall be deemed to include all delegates, deputy delegates, advisers, technical experts and secretaries of delegations.<sup>70</sup>

This definition is repeated in article IV, section 13, of the Interim Arrangement on Privileges and Immunities concluded between the Secretary-General of the United Nations and the Swiss Federal Council.<sup>71</sup> The term "secretaries of delegations" is deemed to refer to diplomatic secretaries only and not to include clerical staff.

In the agreement between the United Nations and Government of Thailand relating to the Headquarters

<sup>64</sup> See part III, article 0, para. (1), of commentary.

<sup>65</sup> See E. Satow, *A Guide to Diplomatic Practice*, 4th ed. (London, Longmans, Green and Co., 1957), p. 303.

<sup>66</sup> *Yearbook of the International Law Commission, 1960*, vol. II, pp. 113-114.

<sup>67</sup> *Ibid.*, 1964, vol. II, pp. 73-74, document A/CN.4/166, paras. 20-26.

<sup>68</sup> E. Satow, *op. cit.*, pp. 303-304.

<sup>69</sup> One of the few instances in which the term "congress" is still used at present relates to article 11 of the Universal Postal Convention (United Nations, *Treaty Series*, vol. 364, p. 169), which continues to be revised periodically at "congresses" of the States forming the Universal Postal Union.

<sup>70</sup> United Nations, *Treaty Series*, vol. 1, p. 24.

<sup>71</sup> *Ibid.*, p. 173.

of ECAFE in Thailand, a slight change is made that in the reference is to the "representatives of governments"; in article I, section 1 (k), of the agreement, this expression is declared "[. . .] to apply to delegates, deputy delegates, advisers, technical experts and secretaries of delegations, and to include the family of resident representatives".<sup>72</sup>

In article I, section 1 (i), of the agreement between the United Nations and Ethiopia regarding the Headquarters of the United Nations ECA, the expression "representatives of governments" is deemed "to include representatives, deputy representatives, advisers, technical experts and secretaries of delegations".<sup>73</sup>

In the case of the United Nations, further definition is, to some extent, provided by the rules of procedure of the four principal organs composed of representatives of Member States:

Rule 25 of the rules of procedure of the General Assembly provides:

The delegation of a Member shall consist of not more than five representatives and five alternate representatives, and as many advisers, technical advisers, experts and persons of similar status as may be required by the delegation.

Rule 13 of the provisional rules of procedure of the Security Council reads:

Each member of the Security Council shall be represented at the meetings of the Security Council by an accredited representative [. . .]

Rule 18 of the rules of procedure of the Economic and Social Council provides:

Each member of the Council shall be represented by an accredited representative, who may be accompanied by such alternate representatives and advisers as may be required.

Lastly, rule 11 of the rules of procedure of the Trusteeship Council reads:

Each member of the Trusteeship Council shall designate one specially qualified person to represent it therein.

(3) In the Specialized Agencies Convention, article I, section 1(v), provides that for the purposes of articles V and VII, dealing respectively with the representatives of Member States and abuses of privileges, ". . . the expression 'representatives of members' shall be deemed to include all representatives, alternates, advisers, technical experts and secretaries of delegations".<sup>74</sup>

In the ICAO Headquarters Agreement concluded between ICAO and Canada, article I, section 1 (f) which reproduces the substance of the above definition, specifies that the expression "secretaries of delegations" includes "the equivalent of third secretaries of diplomatic mission but not the clerical staff".<sup>75</sup>

The majority of the specialized agencies reported that no special problems had arisen regarding the interpretation of the term "representative". By reason of the tripartite character of the Organization, Government, employers' and workers' delegates enjoy an equal status in organs of the International Labour Organization. If, however, at the ILO General Conference, employers' and workers' delegates are in fact members of national delegations, the employers' and workers' members of the Governing Body do not represent the countries of which these persons are nationals but are elected by employers' and workers' delegates to the Conference. By virtue of paragraph 1 of the ILO annex to the Specialized Agencies Convention (Annex I), employers' and workers' members and deputy members of the Governing Body of the ILO are assimilated to representatives of member States, except that any waiver of the immunity of any such person may be made only by the Governing Body.<sup>76</sup>

(4) Owing to the particular organizational structure of some of the specialized agencies (IBRD, IFC, IDA, IMF), inasmuch as they have besides a Secretariat a Board of Governors as well as Executive Directors, the determination of the status of the members of such bodies presents particular problems. These problems relate to the question of the extent to which Governors, Executive Directors, and their respective alternates, may be regarded as the representatives of member States. Such questions are to be determined in the light of the particularities and relevant factors in each individual case. However, it could be stated in a general way that Governors and alternate Governors are appointed by their Governments, that they usually hold annual meetings and that they serve without receiving salaries or other emoluments from the organization to which they are appointed. Under the circumstances it would seem that Governors may be characterized as "representatives" of their Governments. On the other hand, Executive Directors function in continuous session at the principal offices of the organizations and meet as often as the business of each organization may require. While having been appointed or elected, as the case may be, by member Governments, the Executive Directors and their Alternates serve in each organization and receive salaries and other emoluments from one or more of the organizations. It should be noted, however, that Executive Directors and their Alternates usually report to the Governments which have appointed or elected them. The replies of the above mentioned specialized agencies indicate that some Executive Directors have also performed outside duties, e.g. in other organizations, national embassies and elsewhere. In view of all this, it might be wise to heed the warning contained in the study by the Secretariat that:

. . . It is therefore considered that, at least for present purposes, the variety of posts held by Executive Directors from time to time and the different ways in which individual Directors perform their duties make it inappropriate to treat them as being exclusively "representatives" or the opposite.<sup>77</sup>

<sup>72</sup> *Ibid.*, vol. 260, p. 35.

<sup>73</sup> *Ibid.*, vol. 317, p. 101.

<sup>74</sup> *Ibid.*, vol. 33, p. 264.

<sup>75</sup> *Ibid.*, vol. 96, p. 155.

<sup>76</sup> *Ibid.*, vol. 33, p. 290.

<sup>77</sup> See *Yearbook of the International Law Commission, 1967*, vol. II, p. 205, document A/CN.4/L.118 and Add.1 and 2, para. 71.

**Article 63. Appointment of a joint delegation by two or more States**

1. A delegation to an organ of an international organization or to a conference convened by an international organization should in principle represent one State only.

2. A member of a delegation sent by a State to an organ or an international organization or to a conference convened by an international organization may represent another State at that organ or conference, provided that the member concerned is not simultaneously acting as the representative of more than one State.

*Commentary*

(1) The third report of the Special Rapporteur contained a "Note on appointment of a joint permanent mission by two or more States".<sup>78</sup> In that note, it was mentioned that in the infrequent cases where such a situation arose within the framework of representation to international organizations, the question related in fact to representation to one of the organs of the organization or a conference convened by it and not the institution of permanent missions.

(2) The problem of representation of more than one State by a single representative has arisen in a number of cases in different organs of the United Nations. In 1949 the same person was appointed to represent two States on the Interim Committee of the General Assembly. At the request of the delegate, he sat as the representative of only one of the two States.<sup>79</sup> At the third session of the UNRRA Council held in London in August 1945, one State requested to be represented by a representative of another State participating in that session. The report of the Credentials Committee of the Council states that the Committee gave careful attention to the credentials of the requesting State and that it "resolved that the request be accepted, but hoped that such procedure would not be accepted as a precedent for future meetings". The report stated also that "the Committee understood that this procedure would not give [one State] a dual vote".<sup>80</sup> Reference to this question is made in the report of the Credentials Committee of the Technical Assistance Conference held in 1950, in the following terms:

[...] There appears to be no precedent in United Nations bodies or in conferences convened by the United Nations in which one government has been represented by the delegation of another government. Considering the possible implications of the proposal, the President and Vice Presidents believe that the Conference should not depart from the accepted United Nations practice, and it is accordingly recommended that the Conference not accept multiple representation as proposed.<sup>81</sup>

At the United Nations Coffee Conference in 1962, one person was accredited as a member of three delega-

<sup>78</sup> *Ibid.*, 1968, vol. II, p. 135, document A/CN.4/203 and Add.1-5, paras. 31-34.

<sup>79</sup> Interim Committee of the General Assembly, "Representatives and Members-Nominations and Credentials" (document LEG 23/02).

<sup>80</sup> UNRRA, third session of the Council, document 29 *Ad Hoc/CI*, 7 August 1945.

<sup>81</sup> Technical Assistance Conference, "Report on credentials" (document E/CONF.10/9), p. 2, para. 7.

tions. The Legal Adviser of the Conference informed the delegations concerned that it was contrary to established United Nations practice for one person to serve on more than one delegation to a conference. In addition, the representative of one State sent a letter accrediting as alternate on his country's delegation to the Economic Committee of the Conference the representative of another State to the Conference. The Legal Adviser informed the delegation concerned that it was contrary to United Nations practice and to the Conference's rules of procedure for a representative to be accredited to one committee only, rather than to the Conference as a whole. The matter was raised informally in the Credentials Committee, where views in favour of United Nations practice were expressed in respect of both cases. As a result, requests for dual or multiple representation were withdrawn by the delegations concerned.

(3) The interpretation of the practice of the United Nations is summed up in the study by the Secretariat in the following manner:

The question of representation of more than one Government or State by a single representative has been raised on several occasions in United Nations bodies. It has been the consistent position of the Secretariat and of the organs concerned that such representation is not permissible unless clearly envisaged in the rules of procedure of the particular body. The practice, which has sometimes been followed, of accrediting the official on one Government as the representative of another, has not been considered legally objectionable, provided the official concerned was not simultaneously acting as the representative of two countries.<sup>82</sup>

(4) It may be interesting in this respect to note that several commodity agreements drafted under United Nations auspices provide for one State to represent another. Article 13 (2) of the 1962 International Coffee Agreement, for example, provides in part as follows:

(2) Any exporting Member may authorize any other exporting Member, and any importing Member may authorize any other importing Member, to represent its interests and to exercise its right to vote at any meeting or meetings of the Council.<sup>83</sup>

**Article 64. Appointment of the members of the delegation**

Subject to the provisions of article 67, the sending State may freely appoint the members of its delegation to an organ of an international organization or to a conference convened by an international organization.

*Commentary*

(1) Article 64 is based on the provisions of article 10 concerning permanent missions as adopted by the Commission at its twentieth session and article 53 of the present draft articles. It, likewise, seeks to underline the principle of the freedom of choice by the sending State of the members of its delegation to an organ of an inter-

<sup>82</sup> See *Yearbook of the International Law Commission, 1967*, vol. II, p. 169, document A/CN.4/L. 118 and Add.1 and 2, para. 40.

<sup>83</sup> See United Nations, *Treaty Series*, vol. 469, p. 186.

national organization or to a conference convened by an international organization. Article 64 expressly provides for an exception to that principle which relates to the size of the delegation and which is regulated in article 67.

(2) Unlike articles 10 and 53, article 64 does not provide for a second exception relating to nationality. The reasons for this are explained in the following note.

*Note on nationality of members of a delegation*

(1) In his third report, the Special Rapporteur stated that State practice and treaty and statutory provisions reveal that the consent of the host State is not required for the appointment of one of its nationals as a member of a permanent mission of another State. The problem is usually dealt with in terms of the immunities conceded to the member of the mission, and a number of States make a distinction between nationals and non-nationals in this regard. In view of that, the Special Rapporteur decided not to include in his third report a general provision of principle on the question of nationality of members of the permanent mission and to deal with this question as a problem of privileges and immunities in section 2 of part II of the draft articles.<sup>84</sup> When the Commission considered the third report of the Special Rapporteur as its twentieth session, some members supported the position stated above. This position, however, was not accepted by the majority of the members. The Commission therefore decided, as stated in paragraphs (3) and (4) of its Commentary on article 11, to include in the present draft articles a provision based on paragraphs 1 and 2 of article 8 of the Vienna Convention on Diplomatic Relations.<sup>85</sup> This provision—contained in article 11—states that the permanent representative and the members of the diplomatic staff of the permanent mission should in principle be of the nationality of the sending State, and that they may not be appointed from among persons having the nationality of the host State, except with the consent of that State. The Commission decided to limit the scope of that provision to nationals of the host State and not to extend it to nationals of a third State. It therefore did not include in article 11 the rule laid down in paragraph 3 of article 8 of the Vienna Convention. The highly technical character of some international organizations makes it desirable not to restrict unduly the free selection of members of the mission since the sending State may find it necessary to appoint as members of its permanent mission nationals of a third State who possess the required training and experience.<sup>86</sup>

(2) The Special Rapporteur is of the opinion that the sending State should have a wider freedom of choice with respect to the members of its delegations to organs

of international organizations and to conferences convened by such organizations. One of the salient features of present-day international relations is the increasing number of subsidiary organs set up by international organizations to deal with very specialized matters of highly technical character which require the enlisting of the services of experts possessing the necessary training and experience. This trend is by no means limited to international organizations of technical character (the specialized agencies). It is also increasingly witnessed in general international organizations of predominantly political character such as the United Nations and the regional organizations which have a general rather than specialized character. Similarly, conferences for the promotion of institutionalized international co-operation are convened at a rate which exceeds by far that of international conferences prior to the era of the United Nations. For these reasons it is highly desirable, if not indispensable, that the sending State should enjoy the widest possible freedom in the choice of the members of its delegations to such organs and conferences.

Furthermore, it should be noted that such organs and conferences meet temporarily and for short periods. Given this fact, the question of the requirement of the consent of the host State to the appointment of one of its nationals in the delegation of another State should be seen in a light different from that in which the Commission viewed the question in relation to members of permanent missions.

*Article 65. Credentials and notifications*

1. The credentials of representatives to an organ of an international organization or to a conference convened by an international organization shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or by another competent minister or by an appropriate authority designated by one of the above if that is allowed by the practice followed in the Organization.

2. The credentials of representatives and the names of the members of a delegation to an organ of an international organization or to a conference convened by an international organization shall be submitted to the competent organ of the Organization if possible not less than one week before the date fixed for the opening of the session of the organ or of the conference.

3. The Organization shall transmit to the host State the notifications referred to in paragraph 2 of this article.

4. The sending State may also transmit to the host State the notifications referred to in paragraph 2 of this article.

*Article 66. Full powers to represent the State in the conclusion of treaties*

Representatives accredited by States to an organ of an international organization or to a conference convened by an international organization, in virtue of their functions and without having to produce full powers, are considered as representing their State for the purpose of adopting the text of a treaty in that organ or conference.

<sup>84</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, p. 137, document A/CN.4/203 and Add.1-5, para. 38.

<sup>85</sup> See foot-note 37 above.

<sup>86</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, p. 204, document A/7209/Rev.1, para. (4) of the commentary to article 11.

### Commentary

(1) Article 65 is based on the provisions of article 27 of the Rules of Procedure of the General Assembly of the United Nations. This provision served as a prototype for the corresponding provisions in the rules of procedure of a great number of international organizations, universal and regional. It also served as a model for a number of conferences convened by the United Nations, the most recent of which is the United Nations Conference on the Law of Treaties held in 1968 and 1969.

(2) The addition at the end of paragraph 1 of article 65 of the words "or by another competent minister or by an appropriate authority designated by one of the above if that is allowed by the practice followed in the Organization" is in order to co-ordinate the text of article 65 with that of article 12 as adopted by the Commission. It is designed to cover the situation in some of the international organizations of technical character, in which practice allows that the credentials of representatives be issued by the member of Government responsible for the department which corresponds to the field of competence of the organization concerned.<sup>87</sup>

In accordance with rule 22 (b) of the Rules of Procedure of the Assembly of the World Health Organization, credentials must be issued by the Head of State, by the Minister for Foreign Affairs, or by the Minister of Health or by any other appropriate authority. In practice the term "appropriate authority" has been considered to include government departments responsible for dealing with public health, ministries of health, heads of diplomatic missions and permanent missions.<sup>88</sup> Credentials for representatives on the Council of ICAO are usually signed by the Minister for Foreign Affairs or the Minister of Communications or Transport. In the case of a member of a temporary delegation, it is considered sufficient that his credentials be signed by the Ambassador of his State appointed to the country where the meeting is held, or by the representative of his State on the ICAO Council if the delegation represents a State which is a member of the Council.<sup>89</sup>

(3) Article 13 of the Provisional Rules of Procedure of the Security Council of the United Nations provides that "... The Head of Government or Minister of Foreign Affairs of each member of the Security Council shall be entitled to sit on the Security Council without submitting credentials." The Special Rapporteur does not deem it necessary to include in article 65 an explicit provision relating to the credentials of heads of Governments or ministers of foreign affairs. The case of the Security Council is a particular one for which such high-rank representation is envisaged in paragraph 2 of Article 28 of the Charter of the United Nations, as follows:

The Security Council shall hold periodic meetings at which each of its members may, if it so desires, be represented by a member of the government or by some other specially designated representative.

(4) Paragraph 2 of article 65 requires that the competent organ of the Organization be notified of the names of

the delegation to one of its organs or to a conference convened by it. It provides that such notification should be made, if possible, not less than one week before the date fixed for the opening of the session of the organ or of the Conference. While the rules of procedure of the General Assembly of the United Nations adopt the time-limit of one week, those of the Economic and Social Council and of the Trusteeship Council provide that the communications be made not less than twenty-four hours before the first meeting. The same rule is to be found in rule 3 of the Rules of Procedure of the United Nations Conference on the Law of Treaties of 1968 and 1969.<sup>90</sup> As to the specialized agencies, their rules of procedure generally provide for a two week time-limit for notification of names of members of delegations to their general assemblies and conferences (e.g. rule 22 (b) of the Rules of Procedure of the World Health Assembly, Rule III-2 of the General Rules of FAO).

(5) Paragraphs 3 and 4 of article 65 regulate the question of notification to the host State. They correspond to paragraphs 3 and 4 of article 17 as adopted by the Commission. It appears from a survey of the practice of the United Nations and the specialized agencies relating to notification to the host State of the members of delegations to an organ of an international organization or to a conference convened by such an organization that such practice is varied and far from systematized. It should be noted, however, that some headquarters agreements include provisions on this matter. Article III, Section 15, of the Headquarters Agreement between Canada and the International Civil Aviation Organization specifies that

No person shall be entitled to the provisions of Section 12 unless and until the name and status of this person shall have been duly notified to the Secretary of State for External Affairs as a Representative of a Member State.<sup>91</sup>

(6) The language of article 66 is based on the relevant provisions of article 7 of the Vienna Convention on the Law of Treaties.<sup>92</sup> The Special Rapporteur considers that it calls for no comment.

### Article 67. Size of the delegation

The size of a delegation to an organ of an international organization or to a conference convened by an international organization shall not exceed what is reasonable and normal, having regard to the functions of the organ or conference, the needs of the particular delegation and the circumstances and conditions in the host State.

### Article 68. Precedence

Precedence among heads of delegations to an organ of an international organization or to a conference convened

<sup>90</sup> See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No.: E.68.V.7), p. xxvi.

<sup>91</sup> United Nations, *Treaty Series*, vol. 96, p. 166.

<sup>92</sup> *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 290.

<sup>87</sup> *Ibid.*, p. 204, para. (4) of the commentary on article 12.

<sup>88</sup> *Ibid.*, 1967, vol. II, p. 194.

<sup>89</sup> *Ibid.*, p. 193.

by an international organization shall be determined by the alphabetical order, in accordance with the practice established in the Organization.

#### Commentary

(1) Article 67 is based on article 16 as adopted by the Commission. There is however one significant difference between the two texts. Article 16 lists as one of the determining factors in relation to the size of the permanent mission the functions of the Organization. Article 67 refers to the functions of the organ or conference. The size of a delegation to an organ of general competence (the General Assembly or Conference of the United Nations and the specialized agencies) is by necessity much larger than that of a delegation to an organ or subsidiary organ dealing with a limited subject matter. The same applies to the so-called "major-conferences" like the United Nations Conference on the Law of the Sea or the United Nations Conference on the Law of Treaties as compared to other conferences of much more limited scope and duration. Article 25 of the Rules of Procedure of the General Assembly of the United Nations provides that

The delegation of a Member shall consist of not more than five representatives and five alternate representatives, and as many advisers, technical advisers, experts and persons of similar status as may be required by the delegation.

Rule 13 of the Provisional Rules of Procedure of the Security Council provides that:

Each member of the Security Council shall be represented at the meetings of the Security Council by an accredited representative . . . .

Rule 18 of the Rules of Procedure of the Economic and Social Council reads:

Each member of the Council shall be represented by an accredited representative, who may be accompanied by such alternate representatives and advisers as may be required.

Lastly, rule 11 of the Rules of Procedure of the Trusteeship Council provides:

Each member of the Trusteeship Council shall designate one specially qualified person to represent it therein.

(2) Article 68 corresponds to article 19 as adopted by the Commission. There is, however, an essential difference between the two texts. Article 19 provides for two variants, the first being the alphabetical order and the second the time and date of submission of credentials of permanent representatives. Owing to the comparatively *ad hoc* character and short duration of the sessions of organs of international organizations and conferences, it is not practicable to adopt for them the second variant, i.e., the order of the time and date of submission of credentials. Article 68, therefore, provides for the alphabetical order. It may be relevant to recall what the Commission stated in paragraph (6) of its commentary on article 16 of its draft articles on special missions:

As there is no universally recognized alphabetical order, the Commission chose the alphabetical order used by the protocol of the State on whose territory the missions meet.<sup>93</sup>

In the case of sessions of organs of international organizations and conferences convened by them, it is to be noted that international organizations usually have a number of languages, whether official languages or working languages. A presumption can be made in favour of the alphabetical order used in the host State.

(3) Certain modalities for the alphabetical system as a basis of the rule regulating the precedence of heads of delegations to organs of international organizations have been worked out in the practice of those organizations. According to the information summarized by the Secretary-General of the United Nations in a note of 3 July 1968 to the Commission entitled "Precedence of representatives to the United Nations"<sup>94</sup> and the information provided to the Special Rapporteur by the Legal Advisers of the ILO, IAEA and UPU, it appears that, as a general rule, heads of delegations take precedence in accordance with their rank and, in case of equality of rank, in accordance with the alphabetical order. In both cases a certain precedence is accorded to heads of delegations who serve as chairmen of a committee of the organ concerned.

#### Article 69. Facilities, privileges and immunities

##### ALTERNATIVE A

The provisions of part II, section 2, of the present articles, shall apply, as appropriate, to delegations to organs of international organizations and to conferences convened by international organizations.

##### ALTERNATIVE B

Representatives to organs of international organizations and to conferences convened by international organizations shall enjoy the following facilities, privileges and immunities:

(a) Immunity from any form of arrest or detention and from seizure of their personal baggage;

(b) Immunity from the criminal jurisdiction of the host State;

(c) Immunity from legal process of any kind in respect of words spoken or written and all acts done by them in their capacity as representatives;

(d) Inviolability of all papers and documents;

(e) The right to use codes and to receive papers or correspondence by courier or in sealed bags;

(f) Exemption in respect of themselves and their spouses from immigration restrictions, aliens registration or national service obligations in the State they are visiting or through which they are passing in the exercise of their functions;

<sup>93</sup> *Yearbook of the International Law Commission, 1967*, vol. II, p. 355.

<sup>94</sup> *Ibid.*, 1968, vol. II, p. 163, document A/CN.4/L. 129.

(g) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign Governments on temporary official missions;

(h) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys, and also

(i) Such other privileges, immunities and facilities, not inconsistent with the foregoing, as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales taxes.

**Article 70. Conduct of delegations to organs of international organizations and to conferences convened by international organizations and end of functions**

The rules relating to the conduct of permanent missions and their members and to the end of functions as laid down in articles 45 to 49 shall apply *mutatis mutandis* to delegations to organs of international organizations and to conferences convened by international organizations and their members.

*Commentary*

(1) The privileges and immunities of delegations to organs of the United Nations and the specialized agencies and to conferences convened by them are regulated by provisions in the General Convention and the specialized agencies Convention and by the 1946 Interim Arrangement on Privileges and Immunities concluded between the Secretary-General of the United Nations and the Swiss Federal Council. One of the recent significant developments relating to the diplomatic law of international organizations is the completion of the necessary steps for the ratification by the Government of the United States of America—the host country of the United Nations—of the General Convention. On March 19, 1970, the Senate adopted the resolution of ratification by which it

Resolved, [...] That the Senate advise and consent to the ratification of the Convention on Privileges and Immunities of the United Nations approved unanimately by the General Assembly on February 13, 1946 (Executive J, Ninety-first Congress, first session) [...].<sup>95</sup>

It is noteworthy that among these privileges and immunities, immunity from jurisdiction is limited to words spoken or written and all acts done by members of such delegations in their capacity as representatives. This rather limited immunity from jurisdiction is in contrast with the full diplomatic immunities accorded by these same Conventions to the Secretary-General (e.g. article V, section 19, of the General Convention). It is also in contrast with the full diplomatic immunities which the members of the permanent missions to the United Nations and the specialized agencies enjoy in accordance

with the provisions of the Headquarters Agreement concluded between the United Nations and the United States on 26 June 1947 and with the decision of the Swiss Federal Council dated 31 March 1948.

(2) Authors generally agree that representatives to international conferences enjoy full diplomatic status. Their position is summed up by Satow as follows:

As regards delegates to the numerous conferences now held on a great variety of matters, some doubt might perhaps be felt, in the absence of cases arising for settlement, as to the extent of the immunities to which they and the members of their suites are entitled. Formerly international congresses and conferences were for the most part attended by personages of high ministerial rank, or by resident diplomatic agents who already possessed diplomatic privileges; now plenipotentiaries appointed are often officials or persons chosen for their special knowledge of the subject to be discussed, who with their retinues constitute the delegations to the conference. In the view of most writers, such representatives are entitled to full diplomatic privileges.<sup>96</sup>

Sometimes the foundation of this position is given as being the diplomatic character of the representative's mission. Thus, according to Hall:

The case of negotiators at a congress or conference is exceptional. Though they are not accredited to the government of the State in which it is held, they are entitled to complete diplomatic privileges, they being as a matter of fact representative of their State and engaged in the exercise of diplomatic functions.<sup>97</sup>

(3) The Pan-American Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928, contains the following articles:

*Article 1.* States have the right of being represented before each other through diplomatic officers.

*Article 2.* Diplomatic officers are classed as ordinary and extraordinary.

Those who permanently represent the Government of one State before that of another are ordinary.

Those entrusted with a special mission or those who are accredited to represent the Government in international conferences and congresses or other international bodies are extraordinary.

*Article 3.* Except as concerns precedence and etiquette, diplomatic officers, whatever their category, have the same rights, prerogatives and immunities.

Etiquette depends upon diplomatic usages in general as well as upon the laws and regulations of the country to which the officers are accredited.

[...]

*Article 9.* Extraordinary diplomatic officers enjoy the same prerogatives and immunities as ordinary ones.<sup>98</sup>

(4) Hesitation on the part of some writers to concede full diplomatic immunities to delegations to international conferences is prompted by the fact that some of these conferences are purely technical and of secondary importance, and such treatment would place the delega-

<sup>95</sup> E. Satow, *op. cit.*, p. 207.

<sup>97</sup> W. E. Hall, *A Treatise on International Law*, 8th ed. (Oxford, Clarendon Press, 1924), p. 365.

<sup>98</sup> League of Nations, *Treaty Series*, vol. CLV, pp. 265 and 267.

<sup>96</sup> United States of America, *Congressional Record: Proceedings and Debates of the 91st Congress, Second Session*, vol. 116, No. 42, pp. S 3963-S 3965, and *ibid.*, No. 43, pp. S 4011-S 4012.

tions on a level higher than that of representatives of States to the organs of the United Nations. Thus, Chaier observes in this respect that:

... it seems difficult to place delegates on the same footing as diplomats, for to do so would mean that delegates to a highly technical conference requiring them to fulfil relatively important functions would enjoy a higher privileged status than that enjoyed, for example, by representatives of States to the General Assembly of the United Nations. That does not seem very logical.

He concludes, however, that:

In this sphere too, it appears that international practice should try to achieve a degree of uniformity between the status granted in *ad hoc* diplomacy, the status of delegates to conferences and the status of representatives of States to meetings of organs of international organizations.<sup>99</sup>

(5) Pending discussion in the Commission of the preliminary question of the extent of privileges and immunities of representatives to organs of international organizations and to conferences convened by them, the Special Rapporteur takes the position that these representatives should be accorded in principle, and with particular reference to immunity from criminal jurisdiction, diplomatic privileges and immunities such as those accorded to members of permanent missions to international organizations. The basis of this position is that a number of recent developments have taken place in the codification of diplomatic law in the direction of the extension of diplomatic immunities and privileges rather than that of the restrictive functional approach. One of these developments is the evolution of the institution of permanent missions to international organizations and the assimilation of their status and immunities to diplomatic status and immunities. The second development is the tendency of the International Law Commission, as can be discerned from its discussions and formulation of the provisional draft articles on special missions, in favour of: (a) making the basis and extent of the immunities and privileges of special missions more or less the same as that of permanent diplomatic missions, and (b) taking the position that it was impossible to make a distinction between special missions of a political nature and those of a technical nature; every special mission represented a sovereign State in its relations with another State. The Special Rapporteur is therefore of the view that, owing to the temporary character of their task, delegations to organs of international organizations and

to international conferences occupy, in the system of the diplomatic law of international organizations, a position similar to that of special missions within the framework of bilateral diplomacy. It follows that the determination of their privileges and immunities should be co-ordinated with those of special missions as finalized by the Commission. Apart from the adjustments necessitated by the fact that their task is temporary, their privileges and immunities should not differ in principle or in basis from those of permanent missions to international organizations.

(6) In their consideration of the topics of "Special Missions" and "Relations between states and international organizations", neither the Sixth Committee nor the International Law Commission discussed the extent of privileges and immunities of representatives to organs of international organizations and to conferences. In his second report, the Special Rapporteur included that problem among the preliminary questions to be considered in relation to delegations to organs of international organizations and to international conferences.<sup>100</sup> The Commission focused its discussion on whether the draft articles should include articles on delegations to organs of international organizations and conferences convened by international organizations. The same approach was taken by the Commission when the question was raised by the second Special Rapporteur on Special Missions (Mr. M. Bartoš) in his first report.<sup>101</sup> As mentioned above in this report,<sup>102</sup> when the Sixth Committee considered, at the twenty-fourth session of the General Assembly, the Commission's draft articles on special missions, the delegation of the United Kingdom suggested the inclusion in the draft Convention on special missions of a provision pertaining to conferences. It introduced an amendment, the purpose of which was to add an article on conferences. The comments of delegations in the Sixth Committee were addressed to the question whether it was advisable to include such a provision in the Convention. No discussion of the substance of the amendment took place.

(7) Article 69 is presented in the form of two alternatives. In case the Commission should adopt the approach reflected in alternative A, some adjustments would be needed, for example, with respect to the privileges and exemptions of fiscal character which presuppose long sojourn—a condition which is not fulfilled in the case of *ad hoc* representatives to organs of international organizations. Alternative B is based on the corresponding provisions of the Conventions on the privileges and immunities of the United Nations (article IV, section 11) and of the specialized agencies (article V, section 13).<sup>103</sup> A noteworthy difference is sub-paragraph (b) which provides for complete immunity from criminal jurisdic-

<sup>99</sup> P. Cahier, *Le droit diplomatique contemporain* (Genève, Librairie E. Droz, 1962), Publications de l'Institut universitaire de hautes études internationales, No. 40, p. 402.

"... il paraît difficile d'assimiler les délégués aux diplomates, car si tel était le cas, les délégués à une conférence très technique dont les fonctions sont donc relativement importantes jouiraient d'un statut privilégié supérieur à celui des représentants des Etats à l'Assemblée générale des Nations Unies par exemple, ce qui ne semble pas très logique.

"Dans ce domaine aussi, il apparaît que la pratique internationale devrait tendre vers une certaine uniformisation entre le statut de la diplomatie *ad hoc*, celui des délégués aux conférences ainsi que celui des représentants des Etats auprès des réunions d'organes des organisations internationales." (English translation by the United Nations Secretariat.)

<sup>100</sup> *Yearbook of the International Law Commission, 1967*, vol. II, pp. 149-150, document A/CN.4/195 and Add.1, paras. 96-103.

<sup>101</sup> *Ibid.*, 1964, vol. II, pp. 73-74, document A/CN.4/166, paras. 20-26.

<sup>102</sup> See paras. 9-12 above.

<sup>103</sup> United Nations, *Treaty Series*, vol. 1, pp. 20 and 22, and *ibid.*, vol. 33, pp. 270 and 272.

tion. Should the Commission prefer alternative B, additional privileges would be needed, for example, concerning waiver of immunity, duration of privileges and immunities and persons covered by them other than representatives.

(8) Article 70 provides for the application to delegations to organs of international organizations and to conferences convened by international organizations and their members *mutatis mutandis*, of the rules applicable to the conduct of the permanent mission and its members and to the end of functions as laid down in articles 45 to 49. Mention should be made of the fact that the articles referred to in article 70 do not include article 50 on "Consultations between the sending State, the host State

and the Organization". The Special Rapporteur observes that, as stated in the report of the Commission on the work of its twenty-first session,<sup>104</sup> the place of article 50 in part II concerning permanent missions is provisional; he assumes that the content of that article will be transferred at a later stage either to part I entitled "General provisions" or to the end of the draft articles so that the article would be applicable to permanent missions, permanent observer missions and delegations to organs of international organizations and to conferences convened by international organizations.<sup>105</sup>

<sup>104</sup> *Yearbook of the International Law Commission, 1969*, vol. II, p. 221, document A/7610/Rev.1, foot-note 44.

<sup>105</sup> Cf. para. 8 of the commentary on articles 60 and 61.

**SUCCESSION OF STATES:  
SUCCESSION IN RESPECT OF TREATIES**

[Agenda item 3(a)]

**DOCUMENT A/CN.4/224 AND ADD.1**

**Third report on succession in respect of treaties,  
by Sir Humphrey Waldock, Special Rapporteur**

[Original text: English]  
[22 April and 27 May 1970]

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## ABBREVIATIONS

GATT	General Agreement on Tariffs and Trade
ICAO	International Civil Aviation Organization
I.C.J.	International Court of Justice
ILO	International Labour Organisation
IMCO	Inter-Governmental Maritime Consultative Organization
ITU	International Telecommunication Union
UNESCO	United Nations Educational, Scientific and Cultural Organization
UPU	Universal Postal Union
WHO	World Health Organization

\* \*

## EXPLANATORY NOTE: ITALICS IN QUOTATIONS

An asterisk inserted in a quotation indicates that, in the passage immediately preceding the asterisk, the italics have been supplied by the Special Rapporteur.

## I. Introduction

## A. THE BASIS OF THE PRESENT REPORT

1. The Special Rapporteur's first report on this topic,<sup>1</sup> submitted to the International Law Commission at its twentieth session, was of a preliminary character. It included four introductory articles designed to define the use of certain terms, notably the use of the term "succession" in the draft, and the relation of the draft to certain categories of international agreements. At that session, in conjunction with Mr. Mohammed Bedjaoui's first report on succession of States in respect of matters other than treaties,<sup>2</sup> it was the subject of a summary examination by the Commission.<sup>3</sup> Having regard, however, to the preliminary character of its discussion of the two reports, the Commission did not take up the study of the four introductory articles proposed by the Special Rapporteur.

2. The Special Rapporteur's second report on succession in respect of treaties,<sup>4</sup> submitted at the twenty-first session, contained an introduction and four articles designed to be a first group of substantive articles setting out general rules on succession in respect of treaties. The heavy calls

made on the Special Rapporteur by the second session of the United Nations Conference on the Law of Treaties and by proceedings before the International Court of Justice prevented him from submitting a more extensive series of articles. These and other factors led the Commission to defer its consideration of the topic of succession in respect of treaties to its twenty-second session; and in consequence, the second report has not yet been taken up by the Commission.

3. The present report assumes the form of a continuation of the Special Rapporteur's previous report and is intended to be read in conjunction with it. Members of the Commission are, therefore, asked to treat the "Introduction" and the four draft articles of the second report as an integral part of the present report.

4. The four articles embodied in the second report are not a repetition of the four introductory articles included in the first report. The reasons are partly given in paragraph (6) of the commentary to article 1 in the second report,<sup>5</sup> but a further word of explanation may be helpful. After a preliminary study of the topic, the Special Rapporteur concluded that the task of codifying it is more one of determining the implications of cases of succession within the law of treaties than of integrating treaties into a general law of State succession; and that the present draft should therefore be envisaged as an addendum or sequel to the codification of the general law of treaties

<sup>1</sup> *Yearbook of the International Law Commission, 1968*, vol. II, p. 87, document A/CN.4/202.

<sup>2</sup> *Ibid.*, p. 94, document A/CN.4/204.

<sup>3</sup> *Ibid.*, pp. 216-222, document A/7209/Rev.1, paras. 44-91.

<sup>4</sup> *Ibid.*, 1969, vol. II, p. 45, document A/CN.4/214 and Add.1 and 2.

<sup>5</sup> *Ibid.*, p. 51.

then in progress at the Conference on the Law of Treaties. In consequence, the Special Rapporteur proposed in his first report that Part I of the present draft, like Part I of the Vienna Convention on the Law of Treaties (hereinafter called Vienna Convention),<sup>6</sup> should begin by clarifying the scope of the international agreements covered by it, the use of certain terms, the relations of the draft to international agreements not within its scope and the application of the draft to treaties constituting international organizations or adopted within an international organization. He also proposed, as a complement to what is now paragraph 2 (a) of article 62 of the Vienna Convention, a further introductory article making a general reservation in regard to boundaries resulting from treaties. Although, as already noted, the four introductory articles were not discussed at the twentieth session, some members of the Commission then indicated that at such a preliminary stage of the Commission's work on succession of States they did not wish to prejudice the relationship between the present topic and the codification of the general law of treaties. It was in deference to the wishes of those members that the Special Rapporteur omitted from his second report the introductory provisions dealing with that relationship.

5. The Special Rapporteur sees no difficulty in postponing consideration of the introductory articles, provided that certain assumptions are made as to the basis of the Commission's work. Further study of the topic has only served to reinforce his view that its codification had to be oriented closely to that of the general law of treaties. As clearly appears in the commentaries to articles 2 to 4 of the second report and the commentaries to the further articles added in the present report, the implications of the provisions of the Vienna Convention have constantly to be taken into account in codifying the law of succession in respect of treaties. The Special Rapporteur has therefore felt bound to treat that Convention as an integral part of the legal foundations of the present draft. He has also felt bound, in the interests of uniform and coherent codification, to proceed on the basis that the present draft must be such as can be read together with the Vienna Convention, both in its language and in its provisions. In consequence, notwithstanding the fact that the introductory articles proposed in the first report are for the time being left aside, the draft articles now submitted assume the relevance to them of the provisions of the Vienna Convention concerning the use of terms, the international agreements within the scope of the articles and treaties constituting international organizations or adopted within them. As to succession in respect of boundaries resulting from treaties, this question is inescapable in connexion with so-called "dispositive" treaties, but its consideration can be deferred until a later point in the draft articles.

6. The need to assume the relevance of the introductory provisions of the Vienna Convention is well illustrated by article 7 of the present draft concerning succession in respect of multilateral treaties. If the Special Rapporteur's

reading of the treaty practice is correct, it is today a generally recognized rule of international law that a new State has a right to establish itself as a party to a multilateral treaty in force in respect of its territory prior to its independence by notifying the parties of its succession to the treaty. Then the question at once arises as to the extent to which this rule applies to a treaty which is a constituent instrument of an international organization or a treaty adopted within an organization. And, as paragraphs (9)-(18) of the commentary to article 7 clearly show, any specific rule on the point proposed by the Commission is likely to be unacceptable unless its application is made subject to "any relevant rules of the organization" by a provision corresponding to that contained in article 5 of the Vienna Convention.

#### B. THE SCHEME OF THE DRAFT ARTICLES

7. The present draft is, therefore, to be taken as beginning with the four articles contained in the Special Rapporteur's second report. Article 1 concerns the use of certain terms for the purposes of the draft and is followed by three articles of a general character. Article 2 formulates the principle commonly spoken of as "the moving treaty frontiers" principle; article 3 deals with the legal implications of a so-called "devolution agreement" entered into between a predecessor and successor State, and article 4 with the legal implications of a unilateral declaration made by a successor State in regard to the continuance in force of its predecessor's treaties. These four general articles may, for present purposes, be regarded as forming part I of the draft articles. As already indicated, the Special Rapporteur considers that ultimately certain other general provisions should be included in part I, and in that event the precise composition of part I may need reconsideration. But for the time being it will be convenient to treat the four articles of the second report as constituting part I of the draft articles.

8. The present report, therefore, continues with part II of the draft articles, which is entitled "New States". This title requires some explanation, first, because the phrase "new State" is used here and throughout the draft as a term of art and, secondly, because of its significance in relation to the logical arrangement of the draft articles.

9. The term "new State" as used in the present articles means a succession where a territory which previously formed part of an existing State has become an independent State. It thus covers a State formed either through the secession of part of the metropolitan territory of an existing State or through the secession or emergence to independence of a colony; but it excludes a State formed by a union of States, by a federation of a State with an existing State, by the termination of the protection of a protected State or by the emergence of a trusteeship or mandated territory to independence. The Special Rapporteur's reason for proposing that the term "new State" should, at the present stage of the work, be given this special meaning is to postpone until later the consideration of new States whose particular form of succession may *arguably* call for some differentiation in the rules applicable to them. On close examination, the Commission may or may not conclude that States arising through

<sup>6</sup> *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 287.

other particular forms of succession are in any respect governed by different principles from those applicable to a new State in its purest form. But for purposes of study it seems convenient, and even essential, first to identify the basic principles applicable to "new States" in their purest form before considering the possible effect of special factors in particular cases of succession.

10. The logical scheme of the draft articles is, therefore, that part I should contain certain general provisions, part II the basic rules regarding succession in respects of treaties applicable to new States, and part III any special rules called for in connexion with particular cases of succession such as union of States, a federation of a State with an existing State, the termination of the protection of a protected State, and the emergence of a trusteeship or mandated territory to independence. If the Commission should conclude that some of these particular cases, e.g. trusteeship territories and mandated territories, do not differ in any material way from "new States" as here defined, it may decide to review the definition of a "new State". But for purposes of study at the present stage of the work there seems to be advantage in adopting a logical structure of the draft articles which enables the rules for new States in their purest form to be settled first in part II and the other cases of succession then to be examined *seriatim* in part III. Any matters that may remain can then be included in a final part.

11. Although in the present report the text begins substantially with the articles in part II, it is necessary first to explain the use of three further terms in the draft. Accordingly, the text of the draft articles and commentaries opens with three additions to the provisions of article 1 regarding the use of terms.

## II. Text of draft articles with commentaries

### Article 1. Use of terms

#### (ADDITIONAL PROVISIONS)

For the purposes of the present articles:

...

(d) "Vienna Convention" means the Convention on the Law of Treaties adopted at Vienna on 22 May 1969;

(e) "New State" means a succession where a territory which previously formed part of an existing State has become an independent State;

[(f) "Notify succession" and "notification of succession" mean in relation to a treaty any notification or communication made by a successor State to the parties, directly or through a depositary, whereby it declares that it considers itself to be bound by its predecessor's expression of consent to be bound by the treaty in respect of the territory which is the subject of the succession.]

(f) "Notify succession" and "notification of succession" mean in relation to a treaty any notification or communication made by a successor State whereby on the basis of its predecessor's status as a party, contracting State or signatory to a multilateral treaty, it expresses its consent to be bound by the treaty.\*

## Commentary

(1) "Vienna Convention". The relevance of the provisions of the Vienna Convention on the Law of Treaties as part of the legal foundations of the present draft has been underlined in paragraphs 4 to 6 of the introduction to this report. It is true that the Convention is not yet in force and will not come into force until thirty days after the date of the deposit of the thirty-fifth instrument of ratification or accession. It is also true that, in general, the absence of any cross-references in codifying Conventions may perhaps slightly improve the prospects of States' ratifying or acceding to them. But in codifying the law of succession in respect of treaties it is necessary to have a fairly precise and well-accredited version of the general law of treaties as a frame of reference; and this need can be met only by the Convention on the Law of Treaties adopted at Vienna on 22 May 1969. The Commission would indeed be stultifying its own work if it were not to take the provisions of that Convention as the necessary basis for its codification of the present topic. Furthermore, reference to pertinent provisions of the Vienna Convention, e.g. in article 9 of the present draft articles dealing with succession in respect of reservations, may sometimes enable substantial economies to be made in the drafting of the present articles. Accordingly, the Special Rapporteur has thought it appropriate, at any rate at this stage of the work, to use cross-references to pertinent provisions of the Vienna Convention where this may serve to streamline the present draft. Since there are now several Vienna Conventions in existence, it seems desirable, in order to avoid the need to spell out the full title of the Convention each time, to state in Article 1 that the term "Vienna Convention", as used in the present articles, means the Convention on the Law of Treaties adopted at Vienna on 22 May 1969.

(2) "New State". The Special Rapporteur's reasons for employing the phrase "new State" as a term of art in the present draft, have already been set out in paragraphs 9 and 10 of the introduction to this report. The particular meaning intended to be given to that term in the present draft has also been explained in those paragraphs. It signifies a State which has arisen from a succession where *a territory which previously formed part of an existing State* has become an independent State. This includes a secession of part of the metropolitan territory of an existing State and the secession or emergence to independence of a colony. But it excludes a union of States, a federation with an existing State and the emergence to independence of a trusteeship territory, a mandated territory or a protected State.

(3) "Notify succession" and "notification of succession". These terms connote the act by which a successor State expresses and establishes on the international plane its consent to be bound by its predecessor's expression of consent to be bound by the treaty in respect of the territory which is the subject of the succession. Unlike ratifi-

\* The Special Rapporteur submitted the new text of article 1 (f) and the new commentary thereto (paragraph 3 *bis*) in document A/CN.4/224/Add.1, dated 27 May 1970.

cation, accession, acceptance and approval, notification of succession need not take the form of the deposit of an instrument. The procedure for notifying succession is further dealt with in article 11, but in general any notification or communication containing the requisite declaration of the will of the successor State suffices.

(3*bis*) The reason for the revised text of article 1 (*f*) is that the explanation of "notify succession" and "notification of succession" originally given in article 1 (*f*) had not wide enough terms to cover cases where a new State ratifies a treaty which its predecessor had signed but had not ratified prior to the succession. This is, it is true, a doubtful case and it will be for the Commission to decide whether or not to recognize it. But the Special Rapporteur has tentatively suggested in article 8 that the ratification of a predecessor State's signature should be admitted and it is, therefore, necessary for him to formulate article 1 (*f*) in terms wide enough to cover such a case. The revised formulation of article 1 (*f*) now proposed takes account of the special case of a ratification on the basis of a predecessor's signature; and in order to simplify the wording the expressions "contracting State" and "party" are used with the sense given to them in the Vienna Convention (article 2 (*f*) and (*g*)).

## PART II. NEW STATES

### Article 5. *Treaties providing for the participation of new States*

1. A new State becomes a party to a treaty in its own name if:

- (a) the treaty provides expressly for its right to do so upon the occurrence of a succession; and
- (b) it establishes its consent to be bound in conformity with the provisions of the treaty and of the Vienna Convention.

2. When a treaty provides that, on the occurrence of a succession, the successor State shall be or shall be deemed to be a party, a new State becomes a party to the treaty in its own name only if it expressly assents in writing to be so considered.

#### Commentary

(1) Some treaties, as already noted in the commentary to article 3, contain clauses purporting to regulate in advance the application of the treaty on the occurrence of a succession. Clauses of this kind have not been numerous and have mainly appeared in multilateral treaties.

(2) For example, article XXVI, paragraph 5(c), of the General Agreement on Tariffs and Trade of 1947 (as amended by the Protocol of 1955) states:

If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the

responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party\*.<sup>7</sup>

This clause, which was included in the original text of the General Agreement,<sup>8</sup> seems to have been designed to enable certain self-governing *dependent* territories to become separate contracting parties to GATT rather than to furnish a means of providing for the continuation as parties to GATT of *newly emerged independent States*.<sup>9</sup> In fact, however, the great majority of the newly independent States which have become parties to GATT have done so through the procedure set out in the clause. Moreover, the Contracting Parties have found it desirable to supplement that clause with a further procedure of "provisional application" analogous to that found in the unilateral declarations examined in the commentary to article 4. Thus, by a Recommendation of 1 November 1957, the Contracting Parties established a procedure under which: (a) the State previously responsible for the territory would notify the GATT Executive of the territory's emergence to full autonomy in its external commercial relations; (b) the Contracting Parties would set "a reasonable period" during which the General Agreement would be applied by them *de facto* with respect to the territory on the basis of reciprocity; and (c) sponsorship of the territory for continued participation in GATT in its own right could take place at any time during the period of *de facto* application. A later Recommendation of 18 November 1960 specifically recognized the need of of newly independent States for "some time to consider their future commercial policy and the question of their relations with the General Agreement" and fixed the *de facto* application for a period of two years. Subsequently, prolongations of this period were permitted and, finally, a Recommendation of 11 November 1967 provided for *de facto* application on a reciprocal basis without any specific time-limit.<sup>10</sup>

(3) The net result has been that under paragraph 5(c) of Article XXVI, some five newly independent States have become Contracting Parties to the General Agreement through the simple sponsoring of them by their predecessor State followed by a declaration of the existing Contracting Parties; and that some twenty-four others have become Contracting Parties by sponsoring and declaration after a period of provisional *de facto* application. In addition, some eight newly independent States are maintaining a *de facto* application of the General Agreement in accordance with the Recommendations, pending their final decisions as to whether they should become Contracting Parties.<sup>11</sup> It may be added that

<sup>7</sup> United Nations, *Treaty Series*, vol. 278, p. 204.

<sup>8</sup> Initially part of paragraph 4 of article XXVI of the General Agreement, it became paragraph 4(c) under the Amending Protocol of 13 August 1949 and then paragraph 5(c) under a further Protocol of 1955 which entered into force on 7 October 1957. (See *Yearbook of the International Law Commission, 1968*, vol. II, p. 73, document A/CN.4/200 and Add.1 and 2, foot-note 548.)

<sup>9</sup> Burma, Ceylon and Southern Rhodesia were the territories concerned. (*Ibid.*, foot-note 549.)

<sup>10</sup> *Ibid.*, p. 74, paras. 321-325, for the details of these Recommendations.

<sup>11</sup> *Ibid.*, pp. 76-80, paras. 332-350.

States which become contracting parties to the General Agreement under Article XXVI, paragraph 5(c), are considered as having by implication agreed also to become parties to the subsidiary GATT multilateral treaties made applicable to their territories prior to independence.

(4) Another example is article XXII, paragraph 6, of the Second International Tin Agreement of 1960, which reads:

A country or territory, the separate participation of which has been declared under Article III or paragraph 2 of this Article by any Contracting Government, shall, *when it becomes an independent State, be deemed to be a Contracting Government\** and the provisions of this Agreement shall apply to the Government of such State *as if it were an original Contracting Government\** already participating in this Agreement.<sup>12</sup>

This clause, taken literally, would appear to envisage the automatic translation of the newly independent State into a separate contracting party. It has, however, been ascertained from the Depositary, through the Secretariat, that the new States which have become parties to the 1960 Tin Agreement<sup>13</sup> have not done so under paragraph 6 of article XXII. Similarly, although the Third International Tin Agreement of 1965<sup>14</sup> also contains, in Article XXV, paragraph 6, a clause apparently providing for automatic participation, there has not, according to the Depositary, been any case of a new State's having assumed the character of a party under the clause.

(5) Article XXI, paragraph 1, of the 1960 Tin Agreement is also of interest in the present connexion. It provided that the Agreement should be open for signature until 31 December 1960 "on behalf of Governments represented at the session",<sup>15</sup> and among these were the Democratic Republic of the Congo and Nigeria, both of whom became independent prior to the expiry of the period prescribed for signatures. These two new States did proceed to sign the Agreement under article XXI, paragraph 1, and subsequently became parties by depositing instruments of ratification. They thus seem to have preferred to follow this procedure rather than to invoke the automatic participation provision in paragraph 6 of article XXII. The case of Ruanda-Urundi likewise indicates that the automatic participation provision was not intended to be taken literally. Belgium signed the Agreement on behalf of herself and Ruanda-Urundi, and then expressly limited her instrument of ratification to Belgium in order to leave Ruanda and Urundi free to make their own decision. These States took no action to establish their participation in the Agreement after independence and are not considered as parties.<sup>16</sup>

(6) The International Coffee Agreement of 1962 again makes provision for the emergence of a territory to independent statehood, but does so rather in terms of conferring a *right* upon the new State to become a party to the Agreement after independence if such should be its wish.

Thus, article 67, having authorized in paragraph 1 the extension of the Agreement to dependent territories, provides in paragraph (4):

The Government of a territory to which the Agreement has been extended under paragraph (1) of this Article and which has subsequently become independent *may, within 90 days after the attainment of independence, declare by notification to the Secretary-General of the United Nations that it has assumed the rights and obligations of a Contracting Party to the Agreement.\** It shall, as from the date of such notification, become a party to the Agreement.<sup>17</sup>

No territory, after becoming an independent State, exercised its right to notify the Secretary-General—who is the Depositary—of its assumption of the character of a separate contracting party. Of the two States which qualified to invoke paragraph (4), one—Barbados—recognized that it possessed the right to become a party under that paragraph to the extent of notifying the Secretary-General, with express reference to Article 67, paragraph (4), that it did *not* wish to assume the rights and obligations of a Contracting Party. The other—Kenya—allowed the 90 days' period to expire and did not become a party until three years after the date of its independence, when it did so by depositing an instrument of accession.

(7) Like the 1960 Tin Agreement, the 1962 Coffee Agreement laid down in its Final Provisions—Article 62—that it should be open for signature by the Government of any State represented before independence at the Conference as a dependent territory. Uganda, one of the territories so represented, achieved her independence before the expiry of the period prescribed for signatures and duly became a party by first signing<sup>18</sup> and then ratifying<sup>19</sup> the Agreement.

(8) The only other multilateral treaty containing a similar clause appears to be yet another commodity agreement: the International Sugar Agreement of 1968, Article 66, paragraph (2), of which is couched in much the same terms<sup>20</sup> as those of Article 67, paragraph 4, of the 1962 Coffee Agreement. The earlier 1958 Sugar Agreement had not contained this clause, and the emergence to independence of dependent territories to which the Agreement had been "extended" had given rise to problems.<sup>21</sup> The new Sugar Agreement is, however, too recent for the clause in paragraph 2 of article 66 to have been tested in practice.

(9) Outside GATT and the various commodity agreements discussed in the preceding paragraphs of this commentary, there do not appear, to be any multilateral

<sup>17</sup> United Nations, *Treaty Series*, vol. 469, p. 238. This paragraph is reproduced in the 1968 Coffee Agreement as Article 65, paragraph 4.

<sup>18</sup> *Ibid.*, p. 389.

<sup>19</sup> *Multilateral treaties in respect of which the Secretary-General performs depositary functions* (United Nations publication, Sales No.: E.69.V.5), p. 323.

<sup>20</sup> See *United Nations Sugar Conference, 1968: Summary of Proceedings* (United Nations publication, Sales No.: E.69.II.D.6), annex III, p. 73.

<sup>21</sup> See D. P. O'Connell, *State Succession in Municipal Law and International Law* (Cambridge, University Press, 1967), vol. II, pp. 201-202.

<sup>12</sup> United Nations, *Treaty Series*, vol. 403, p. 76.

<sup>13</sup> Democratic Republic of the Congo and Nigeria (United Nations, *Treaty Series*, vol. 403, pp. 4, 115 and 116).

<sup>14</sup> United Nations, *Treaty Series*, vol. 616, p. 317.

<sup>15</sup> *Ibid.*, vol. 403, p. 70.

<sup>16</sup> Information supplied by the Secretariat.

treaties containing provisions designed to enable dependent territories to become parties after achieving independence.

(10) Only one example of a bilateral agreement containing a clause providing for the future participation of a territory after its independence is known to the Special Rapporteur. This is the Geneva Agreement of 1966<sup>22</sup> concluded between the United Kingdom and Venezuela shortly before British Guiana's independence and dealing with the "controversy" between the United Kingdom and Venezuela regarding the British Guiana-Venezuelan frontier. The Agreement, which stated in its preamble that it was made by the United Kingdom "in consultation with the Government of British Guiana" and that it took into account the latter's forthcoming independence, provided in Article VIII:

Upon the attainment of independence by British Guiana, the Government of Guyana shall thereafter be a party to this Agreement,\* in addition to the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Venezuela.<sup>23</sup>

Prior to independence, the Agreement was formally approved by the House of Assembly of what was then still "British Guiana". Venezuela, moreover, in notifying the Secretary-General of its entry into force between herself and the United Kingdom, drew special attention to the provision in Article VIII under which the Government of Guyana would become a party after attaining independence. Guyana in fact attained her independence a few weeks later, and thereupon both Venezuela and Guyana acted on the basis that the latter had now become a third and separate Contracting Party to the Geneva Agreement.

(11) The State practice examined in the preceding paragraphs suggests that two rules may need to be enunciated in the present article. The first is the rule formulated in paragraph 1, which covers cases where a treaty provides for the right of a successor State, as such, to become a party, whether by signature and ratification, simple notification or any other procedure. These cases would seem to fall within the principle of article 36 of the Vienna Convention concerning treaties providing for rights of third States. But, whether or not a successor State is to be regarded as a third State in relation to the treaty, it clearly may exercise the right to become a party for which the treaty itself specifically provides. At the same time the exercise of that right would, of course, be subject to any conditions as to procedure or otherwise prescribed in the treaty and to the general law regarding the conclusion of treaties contained in the Vienna Convention.

(12) The second rule, formulated in paragraph 2 of the present article, concerns those cases where a treaty purports to lay down that, on a succession, the successor State shall be, or be deemed to be, automatically a separate contracting party. In those cases the treaty provision does not merely confer a *right* on the successor

State to become a party but appears to be intended to be the means of establishing an *obligation* for the successor State to consider itself a contracting party. In other words, these cases seem to fall within Article 35 of the Vienna Convention concerning treaties providing for obligations for third States. Under that article, the obligation envisaged by the treaty arises for the third State only if the third State expressly accepts it in writing. The question then is whether it should make any difference that the treaty was previously binding with respect to the successor State's territory when the territory was in the hands of its predecessor. Subject to one possible reservation, it seems to the Special Rapporteur that the general rule set out in draft article 6 ought to prevail. This would mean that the successor State would be considered as under no obligation to become a party to its predecessor's treaty and would become bound by it only if it expressly so agreed in writing. The possible reservation is a case where the territory was already in an advanced state of self-government at the time of the conclusion of the treaty and its representatives were consulted in regard to future participation in the treaty after independence; the Geneva Agreement of 1966 between the United Kingdom and Venezuela mentioned in paragraph (10) above is a case in point. Although the reality of the consultation with representatives of the people of the territory may be evident in that case, it may be less clear in others. Accordingly, it may be thought preferable to require some evidence of subsequent assent by the successor State in all cases, and such is the rule proposed in paragraph 2 of article 5.

**Article 6. General rule regarding a new State's obligations in respect of its predecessor's treaties**

Subject to the provisions of the present articles, a new State is not bound by any treaty by reason only of the fact that the treaty was concluded by its predecessor and was in force in respect of its territory at the date of the succession. Nor is it under any obligation to become a party to such treaty.

*Commentary*

(1) The question of a successor State's inheritance of the treaties of its predecessor has two aspects: (a) whether the successor State is under an *obligation* to continue to apply those treaties to its territory after the succession, and (b) whether it has a *right* to consider itself as a party to the treaties in its own name after the succession. Many writers appear to discuss these two aspects of succession in the matter of treaties as if they were one problem. If a successor State were to be considered as automatically bound by the treaty obligations of its predecessor, reciprocity would, it is true, require that it should also be entitled to invoke the rights contained in the treaties. And, similarly, if a successor State were to possess and to assert a right to be considered as a party to its predecessor's treaties, reciprocity would require that it should at the same time be subject to the obligations contained in them. But reciprocity does not demand that, if a State should be *entitled* to consider itself a party to a treaty, it must equally be *bound* to do so. Thus, a State which signs

<sup>22</sup> United Nations, *Treaty Series*, vol. 561, p. 321.

<sup>23</sup> *Ibid.*, p. 327.

a treaty subject to ratification has a right to become a party but is under no obligation to do so. In short, the question whether a newly independent State is under an *obligation* to consider itself a party to its predecessor's treaties is legally quite distinct from the question whether it may have a *right* to consider or to make itself a party to those treaties. Clearly, if a newly independent State is under a legal obligation to consider itself bound by its predecessor's treaties, the question whether it has a right to claim the status of a party to them becomes irrelevant. The first point, therefore, is whether such a legal obligation does exist in general international law, and it is this point which the present article seeks to determine.

(2) A modern writer on the law of treaties<sup>24</sup> takes the view that a newly established State begins its treaty life with a "clean slate" except in regard to "local" or "real" obligations:

In spite of some evidence to the contrary, emanating mainly from diplomatic rather than legal sources, it is submitted that the general principle is that newly established States which do not result from a political dismemberment and cannot fairly be said to involve political continuity with any predecessor, start with a clean slate in the matter of treaty obligations, save in so far as obligations may be accepted by them in return for the grant of recognition to them or for other reasons, and except as regards the purely local or "real" obligations of the State formerly exercising sovereignty over the territory of the new State.<sup>25</sup>

In support of this view he cites in particular the practice following upon the emergence to independent statehood of the United States, the Spanish American Republics, Belgium, Poland, Czechoslovakia, Finland, the Baltic States, Panama and Pakistan. He discusses more recent cases of the emergence of dependent territories to international statehood in a separate chapter without drawing from them any very definite conclusions concerning the applicable law. The view expressed in the above passage, that new States "start with a clean slate in the matter of treaty obligations", is generally recognized to be the "traditional" view and was accepted by the majority of writers, at any rate until quite lately.<sup>26</sup>

<sup>24</sup> A. D. McNair, *The Law of Treaties: British Practice and Opinions* rev. ed. (Oxford, Clarendon Press, 1961), pp. 600-606.

<sup>25</sup> *Ibid.*, p. 601.

<sup>26</sup> The assumption of C. W. Jenks [*British Year-book of International Law*, 1952 (London, Oxford University Press, 1953), vol. 29, pp. 116-117] that McNair's position is substantially different from that of the majority of writers does not seem justified. See, for example, the following writers: W. E. Hall, *A Treatise on International Law*, 8th ed., (Oxford, Clarendon Press, 1924), pp. 114-115; L. Oppenheim, *International Law: A Treatise*, 8th ed. [Lauterpacht] (London, Longmans, Green and Co., 1955), p. 167; J. L. Briery, *The Law of Nations*, 6th ed. (Oxford, Clarendon Press, 1963), pp. 153-154; F. F. Martens, *Traité de droit international* (Paris, Librairie Marescq Ainé, 1883), t. I, para. 68; P. Fauchille, *Traité de droit international public* (Paris, Rousseau & Cie, 1922), t. I, pp. 347-348; H. Wheaton, *Elements of International Law*, 8th edition of 1866 by R. H. Dana (Oxford, Clarendon Press, 1936); C. G. Fenwick, *International Law* (New York and London, The Century Company, 1924), pp. 118-119; K. Strupp, *Eléments du droit international public: universel, européen et américain* (Paris, Rousseau & Cie, 1927) pp. 57-58; A. Cavaglieri, "Effets juridiques des changements de souveraineté territoriale", in *Revue de droit international et de législation comparée* (Brussels, 1934), third series, t. XV,

(3) The published State practice in regard to new States which have arisen from a unilateral process of "secession" seems in general to support the traditional view.<sup>27</sup> The main precedents usually cited are those already mentioned in the previous paragraph. Particularly clear is a statement of the United Kingdom defining its attitude towards Finland's position in regard to Russian treaties applicable with respect to Finland prior to its independence:

I am advised that in the case of a new State being formed out of part of an old State there is no succession by the new State to the treaties of the old one, though the obligations of the old State in relation to such matters as the navigation of rivers, which are in the nature of servitudes, would normally pass to the new State. Consequently there are no treaties in existence between Finland and this country.<sup>28</sup>

It is also this view of the law which is expressed in the legal opinion given by the United Nations Secretariat in 1947 concerning Pakistan's position in relation to the Charter of the United Nations. Assuming that the situation was one in which part of an existing State had broken off and become a new State,<sup>29</sup> the Secretariat advised:

The territory which breaks off, Pakistan, will be a new State; it will not have the treaty rights and obligations of the old State, and will not, of course, have membership in the United Nations.

In international law, the situation is analogous to the separation of the Irish Free State from Great Britain, and of Belgium from the Netherlands. In these cases, the portion which separated was considered a new State; the remaining portion continued as an existing State with all the rights and duties which it had before.<sup>30</sup>

(4) The Secretariat's reasoning has been strongly criticised by a modern writer on State succession, who emphasizes that succession to multilateral treaties generally and succession to membership of international organizations are distinct questions and that to use the legal opinion as a precedent for the clean-slate principle is to "compound a fallacy".<sup>31</sup> It is true that succession to the constituent instrument of an international organization involves an additional element not present in the case of an ordinary multilateral treaty, namely membership of the organization and the rules of the organization regarding admission. This appears clearly from the several Secretariat studies on the succession of States to multilateral treaties.<sup>32</sup> Even so, the criticism seems to overlook the fact that in 1947 the practice concerning multilateral

pp. 219-248; S. Kiatibian, *Conséquences juridiques des transformations territoriales des Etats sur les traités* (Paris, A. Giard et E. Brière, édit., 1892); A. Ross, *A Textbook of International Law* (London, Longmans, Green and Co., 1947), pp. 127-129; D. P. O'Connell, *The Law of State Succession* (Cambridge, University Press, 1956), p. 32.

<sup>27</sup> See the examination of the practice in D. P. O'Connell, *State Succession in Municipal Law and International Law* (Cambridge, University Press, 1967), vol. II, pp. 90-100.

<sup>28</sup> A. D. McNair, *op. cit.*, p. 605.

<sup>29</sup> This assumption was disputed by Pakistan.

<sup>30</sup> See *Yearbook of the International Law Commission*, 1962, vol. II, p. 101, document A/CN.4/149 and Add.1, para. 3.

<sup>31</sup> D. P. O'Connell, *op. cit.*, p. 185.

<sup>32</sup> *Yearbook of the International Law Commission*, 1968, vol. II, p. 1, document A/CN.4/200 and Add.1 and 2.

treaties was by no means so developed as it is today. In the case of constituent instruments, there was a fundamental preliminary question to be decided: ought a new State, created from territory previously part of a member State and therefore previously within the régime of both the treaty and the organization, to be considered as automatically entitled to be a party to the treaty by succession and, in consequence, already within the organization? Or ought it, by the mere fact of its being a new State, to be considered as not automatically entitled to be a party and therefore subject to the participation clauses of the treaty and admission procedures of the organization? Today the practice of States and organizations may indicate that, in the case of many multilateral treaties, a new State formed from a portion of the territory of an existing party is entitled as of right to consider itself a party but that this is not the rule in the case of constituent instruments of international organizations. In 1947, however, the answer to the preliminary question was still undetermined, and it was perfectly logical for the Secretariat to ask itself first whether Pakistan, on the assumption that it was a "new State", should be considered as automatically entitled, by succession, to be a party to the Charter *as a treaty*. Its reply—that Pakistan, as a new State, would not have *any* of the treaty rights of its predecessor—may now seem too wide in the case of some multilateral treaties. Even so, that reply was certainly inspired by the "clean slate" doctrine and thus does confirm that this was the "traditional" and generally accepted view at that date. To that extent, the Secretariat's legal opinion concerning the case of Pakistan is not without significance as a precedent.

(5) Examples of the "clean slate" doctrine in connexion with bilateral treaties are to be found in the State practice collected in the Secretariat publication *Materials on Succession of States*.<sup>33</sup> Two of these examples relate to the case of Pakistan. Thus Afghanistan in its observations invokes the "clean slate" doctrine in connexion with her dispute with Pakistan regarding the frontier resulting from the Anglo-Afghan Treaty of 1921.<sup>34</sup> Similarly, Argentina seems to have stated from the basis of the "clean slate" principle in appreciating Pakistan's position in relation to the Anglo-Argentine Extradition Treaty of 1889,<sup>35</sup> although she afterwards agreed to regard the Treaty as in force between herself and Pakistan. Another manifestation of the "clean slate" doctrine would appear to be the position taken by Israel in regard to treaties formerly applicable with respect to Palestine.<sup>36</sup> On the hypothesis that she is a wholly new State, Israel has adopted a policy of not recognizing any automatic succession to treaty obligations, coupled with a policy of examining the prior treaties and of acceding *de novo* to any which she considers appropriate.

(6) The metaphor of the clean slate is a vivid and convenient way of expressing the basic concept that a new State begins its international life freed from any

*obligation* to continue in force treaties previously applicable with respect to its territory simply by reason of that fact. But even when that basic concept is accepted, the metaphor appears in the light of the existing State practice to be at once too broad and too categoric. It is too broad in that it suggests that, so far as concerns the new State, the prior treaties are wholly expunged and are without any relevance to its territory. The very fact that prior treaties are often continued or renewed indicates that the "clean slate" metaphor does not express the whole truth. The metaphor is too categoric in that it does not make clear whether it means only that a new State is not *bound* to recognize any of its predecessor's treaties as applicable in its relations with other States, or whether it means also that a new State is equally not *entitled* to claim any right to be or become a party to any of its predecessor's treaties. As already pointed out in paragraph (1) of this commentary, a new State may have a clean slate in regard to any *obligation* to continue to be bound by its predecessor's treaties without its necessarily following that the new State is without any *right* to be considered as a party to them.

(7) Writers, when they refer to the so-called principle of the clean slate, seem primarily to have in mind the absence of any general obligation upon a successor State to consider itself bound by its predecessor's treaties. At any rate, as already indicated, the majority of writers and the evidence of State practice support the traditional view that a newly independent State is not under any general obligation to take over the treaties of its predecessor previously applied in respect of its territory. Nor does it appear to the Special Rapporteur, despite some recent opinion to the contrary, that on this point any difference is to be made between multilateral and bilateral treaties.

(8) A strongly reasoned case, it is true, has been made by one writer<sup>37</sup> for regarding a new State as automatically bound by multipartite instruments of a legislative character. After a broad survey of the opinions of jurists and of State practice, and after distinguishing constituent instruments of international organizations, this writer arrived at the following conclusions:

In respect of obligations under other multipartite instruments of a legislative character there is a large body of literary opinion against the continuance of such obligations, but a significant number of writers of great weight take the opposite view and what is generally assumed to be the majority opinion is in large measure a survival from an earlier period when the multipartite instrument had not attained its present importance as one of the main instrumentalities for the development of international law on a wide range of subjects; the theoretical basis of this body of opinion over-emphasizes the contractual at the expense of the legislative element in such instruments and many of the writers concerned are clearly conscious of the difficulties of their position; no authoritative judicial decision, international or national, can be invoked to support the view that multipartite instruments of a legislative character should be treated in this respect as on the same footing as other treaties; state practice on the subject is too uncertain and inconsistent to be regarded as having settled the matter but has from time to time disclosed a recognition of the basic problem

<sup>33</sup> United Nations Legislative Series (United Nations publication, Sales No.: E/F.68.V.5).

<sup>34</sup> *Ibid.*, p. 2.

<sup>35</sup> *Ibid.*, pp. 6-7.

<sup>36</sup> *Ibid.*, pp. 41-42; see also *Yearbook of the International Law Commission, 1950*, vol. II, pp. 206-218, document A/CN.4/19.

<sup>37</sup> C. W. Jenks, *British Yearbook of International Law, 1952*, (London, Oxford University Press, 1953), vol. 29, pp. 105-144.

that the conscious development of international law by legislative effort will be seriously prejudiced if new members of the international community are regarded as starting with a clean slate in respect of obligations under legislative instruments.

As a matter of legal principle, the rationale of the rule that treaty obligations do not pass to a successor state has no application to obligations under multipartite instruments of a legislative character. Just as treaty provisions creating local obligations are to be regarded as having the character of executed conveyances rather than that of contractual provisions which continue to be executory, so obligations under legislative instruments should be regarded as obligations under the law rather than as contractual obligations. It is generally admitted that a new member of the international community is bound by existing rules of customary international law; now that the rules established by multipartite legislative instruments constitute so large a part of the operative law of nations, a new member of the international community should be in the same position in respect of rules which have a conventional rather than a customary origin.<sup>38</sup>

(9) The Special Rapporteur, as will appear in article 7 of the present draft, is of the opinion that a difference does exist and should be made between bilateral treaties and certain multilateral treaties in regard to a new State's *right* to be a party to a treaty concluded by its predecessor. But it seems to him very difficult to sustain the proposition that a new State is to be considered as automatically subject to the obligations of multilateral treaties of a law-making character concluded by its predecessor and, of course, applicable in respect of the territory in question. On the point of principle, the assimilation of law-making treaties to custom is not easy to admit even in those cases where the treaty embodies customary law. Clearly, the law contained in the treaty, in so far as it reflects customary rules, will affect the new State by its character as generally accepted customary law. But it is quite another thing to say that, because a multilateral treaty embodies custom, a new State must be considered as *contractually* bound by the treaty *as a treaty*. Why, the new State may legitimately ask, should it be bound *contractually* by the treaty any more than any other existing State which has not chosen to become a party thereto? A general multilateral treaty, although of a law-making character, may contain purely contractual provisions, as for example a provision for the compulsory adjudication of disputes. In short, to be bound by the treaty is by no means the same thing as to be bound by the general law which it contains. *A fortiori* may the new State ask that question when the actual content of the treaty is of a law-creating rather than of a law-consolidating character.

(10) As to the practice, it has been pointed out in the commentary to article 3 that, even when a new State has entered into a "devolution agreement", the Secretary-General does not today regard himself as able automatically to list the new State among the parties to multilateral treaties of which he is the depositary and which were applicable in respect of the new State's territory prior to its independence. It is only when he receives some indication of the new State's will to be considered as a party to a particular treaty that he enters it in the records as a party to that treaty. *A fortiori* is this the case

when the new State has not entered into a devolution agreement. The Secretary-General then addresses a letter to the new State drawing attention to such multilateral treaties as were formerly applicable in respect of its territory and continues:

In this connexion, I have the honour to call to your attention the practice which has developed regarding the succession of new States to the rights and obligations arising out of multilateral treaties applied in their territory by the States formerly responsible for their foreign relations. Under this practice, the new States generally acknowledge themselves to be bound by such treaties through a formal notification addressed to the Secretary-General by the Head of the State or Government or by the Minister for Foreign Affairs. The effect of such notification, which the Secretary-General, in the exercise of his depositary functions, communicates to all interested States, is to consider the new State as a party in its own name to the treaty concerned as of the date of independence, thus preserving the continuity of the application of the treaty in its territory...

The Secretary-General would be grateful if you would notify him of the position of your Government in regard to the treaties enumerated in the list referred to above, so that he may inform all interested States accordingly.<sup>39</sup>

Again, therefore, it is only upon receipt of a notification specifying the new State's will in regard to each particular treaty that the Secretary-General records it as a party to that treaty and so informs the other interested States.

(11) The practice of other depositaries appears also to be based upon the hypothesis that a new State to whose territory a general multilateral treaty was applicable before independence is not bound *ipso jure* by the treaty as a successor State and that some manifestation of its will with reference to the treaty is first necessary. Thus, in regard to the Berne Convention of 1886 for the Protection of Literary and Artistic Works and the subsequent Acts revising it,<sup>40</sup> the Swiss Government, as depositary, has not treated a new State as bound to continue as a party to the Convention formerly applicable to its territory. It does not appear ever to have treated a new State as bound by the Convention without some expression of its will to continue as, or to become, a party. In one case, as mentioned in paragraph (20) of the commentary to draft article 3,<sup>41</sup> the Swiss Government does seem to have treated the conclusion of a general devolution agreement as a sufficient manifestation of a new State's will. But that seems to be the only instance in which it has acted on the basis of a devolution agreement alone and, in general, it seems to assume the need for some manifestation of the new State's will specifically with reference to the Berne Conventions. This assumption seems also to be made by the Swiss Government in the discharge of its functions as depositary of the Paris Convention of 1883 for the Protection of Industrial Property and of the agreements ancillary thereto. The

<sup>38</sup> See *Yearbook of the International Law Commission, 1962*, vol. II, p. 122, document A/CN.4/150, para. 134.

<sup>40</sup> *Ibid.*, 1968, vol. II, pp. 7-26, document A/CN.4/200 and Add.1 and 2, paras. 4-98.

<sup>41</sup> *Ibid.*, 1969, vol. II, p. 59, document A/CN.4/214 and Add.1 and 2. The State concerned was Indonesia, which does not itself accept the view that its devolution agreement constitutes it a party to multilateral treaties previously applied to its territory.

<sup>39</sup> *Ibid.*, pp. 141-142.

Secretariat's study of succession to the treaties of the International Union for the Protection of Industrial Property, in summarizing the practice, indeed concludes: "Continuity in the application of the instruments requires the consent of the new State concerned."<sup>42</sup>

(12) The practice of the Swiss Federal Council as depositary of humanitarian Conventions has been the same. Despite the humanitarian objects of the Geneva Conventions and the character of the law which they contain as general international law, the Federal Council has not treated a newly emerged State as automatically a party in virtue of its predecessor's ratification or accession. It has waited for a specific manifestation of the State's will with respect to each Convention in the form either of a declaration of continuity or of an instrument of accession.<sup>43</sup> The International Committee of the Red Cross, it is true, has in the past tended, for the purpose of the recognition of Red Cross Societies, to regard newly independent States as automatically participants in the Geneva Conventions by virtue of their predecessor's signature and ratification.<sup>44</sup> In pursuit of its humanitarian objectives it has also actively sought to promote the automatic participation of new States in the Geneva Conventions. But the International Committee is not the depositary of the Conventions and has itself acknowledged the importance of ensuring that each new State should notify the Swiss Federal Council of its "confirmation of participation" or of its "declaration of continuity".<sup>45</sup> Moreover, it appears that the International Committee has recently decided not to grant recognition of a national Red Cross Society unless and until the new State's participation in the Geneva Conventions has been expressly confirmed by the communication to the Swiss Federal Council either of an instrument of accession or of a declaration of continuity.<sup>46</sup> As to the practice of individual States, quite a number have notified their acceptance of the Geneva Conventions in terms of a declaration of continuity, and some have used language indicating recognition of an obligation to accept the Conventions as successors to their predecessor's ratifications.<sup>47</sup> On the other hand, almost as large a number of new States have not acknowledged any obligation derived from their predecessors, and have become parties by depositing instruments of accession. Again, although in a communication to the International Committee of the Red Cross of 26 July 1956 the United Kingdom apparently took the position that Australia, Canada, India, the Irish Republic, New Zealand and South Africa should be considered parties to the 1906 Conventions simply in virtue of the United Kingdom's ratification; it seems also to have recognized that they had at some time had the right to repudiate those Conventions if they had so wished.<sup>48</sup>

<sup>42</sup> *Ibid.*, 1968, vol. II, p. 71, document A/CN.4/200 and Add.1 and 2, para. 311.

<sup>43</sup> *Ibid.*, pp. 32-54, paras. 128-187.

<sup>44</sup> *Ibid.*, pp. 47-49, paras. 199-210.

<sup>45</sup> *Ibid.*, p. 48, para. 199.

<sup>46</sup> *Ibid.*, p. 49, para. 210.

<sup>47</sup> *Ibid.*, pp. 38-43, paras. 152-180.

<sup>48</sup> *Ibid.*, p. 39, paras. 157-158. These States had in fact been admitted to the 1929 Geneva Conference on the basis that they were separate parties to the 1906 Conventions. But this seems

In general, therefore, the evidence of the practice relating to the Geneva Conventions does not seem to indicate the existence of any customary rule of international law enjoining the automatic acceptance by a new State of the obligations of its predecessor under humanitarian Conventions.

(13) A somewhat similar pattern has been followed in regard to the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes, of which the Netherlands Government is the depositary. In 1955 the Netherlands Government suggested to the Administrative Council of the Permanent Court of Arbitration that certain new States, which had formerly been part of one of the High Contracting Parties, could be considered as parties to the Conventions. The Administrative Council then sought the approval of the existing Parties for the recognition of the new States as parties. No objection having been voiced to this recognition, the Administrative Council decided to recognize as Parties those of the new States *which expressed a desire to that effect*.<sup>49</sup> In the event some 12 new States have expressed the desire to be considered as a party in virtue of their predecessor's signature, while three have preferred to become parties by accession. One new State expressly declared that it did not consider itself bound by either the 1899 or 1907 Convention and numerous others have not yet signified their intentions in regard to the Conventions. In the case of the Hague Conventions it is true that to become a party means also to participate in the Permanent Court of Arbitration. But again, the practice seems inconsistent with the existence of a customary rule requiring a new State to accept the obligations of its predecessor. Here the notion of succession seems to have manifested itself in the recognition of a new State's *right* to become a party without at the same time seeking to impose upon it an *obligation* to do so.

(14) The practice of the United States as depositary of multilateral treaties appears equally to have been based on the assumption that a newly independent State has a right but not an obligation to participate in a multilateral treaty concluded by its predecessor.<sup>50</sup>

(15) The evidence of State practice therefore appears to be unequivocally in conflict with the thesis that a newly independent State is under an obligation to consider itself bound by a general law-making treaty applicable in respect of its territory prior to independence. If general multilateral treaties of a law-making character must be left aside as not binding on the successor State *ipso jure*, are there any other categories of treaties in regard to which international law places an obligation on a newly independent State to consider itself as bound by its predecessor's treaties?

(16) Considerable support can be found among writers and in State practice for the view that general international

to be explained more by the particular circumstances of the evolution of the old British Dominions to independence than by any conscious application of principles of succession (*ibid.*, p. 38, paras. 154-156).

<sup>49</sup> *Ibid.*, p. 29, para. 113.

<sup>50</sup> See United Nations Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No.: E/F.68.V.5), p. 224.

law does impose an obligation of continuity on a newly independent State in respect of some categories of its predecessor's treaties. This view is indeed reflected in the devolution agreements inspired by the United Kingdom; for its very purpose in concluding these agreements, as explained in paragraph (13) of the commentary to draft article 3,<sup>51</sup> was to secure itself against being held responsible in respect of treaty obligations which might be considered to continue to attach to the territory after independence under general international law. It also finds reflection, and more explicitly, in certain of the unilateral declarations made by successor States. Thus, as paragraphs (1), (4)-(6) and (17) of the commentary to article 4 show,<sup>52</sup> almost all the unilateral declarations made by new States formerly administered by the United Kingdom contain phrases apparently based on the assumption that some of their predecessor's treaties would survive after independence in virtue of the rules of customary international law. Both the Tanganyika and the Uganda types of declaration, in speaking of the termination of the predecessor's treaties (unless continued or modified by agreement) after the expiry of a period of provisional application, expressly except treaties which by the application of the rules of customary international law could be regarded as otherwise surviving. The Zambian type of declaration actually "acknowledges" that many of the predecessor's treaties, without specifying what kinds, were succeeded to upon independence by virtue of customary international law. The various States concerned, as already noted, have not considered themselves as automatically parties to, or as automatically bound to become parties to, their predecessor's multilateral treaties; nor have they in their practice acted on the basis that they are in general bound by its bilateral treaties. It would therefore appear that these States, when entering into devolution agreements or making unilateral declarations, have assumed that there are *particular* categories in regard to which they may inherit the obligations of their predecessor.

(17) Neither the devolution agreements nor the unilateral declarations in any way identify the categories of treaties to which this assumption relates, while the varied practice of the States concerned also makes it difficult to identify them with any certainty. The probable explanation is that these States had in mind primarily the treaties which are most commonly mentioned in the writings of jurists and in State practice as inherited by a successor State and which are variously referred to as treaties of a "territorial character",<sup>53</sup> or as "dispositive", or "real", or "localized" treaties, or as treaties creating servitudes.<sup>54</sup>

<sup>51</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 57, document A/CN.4/214 and Add.1 and 2.

<sup>52</sup> *Ibid.*, pp. 62, 63-64 and 66.

<sup>53</sup> For example, E. J. S. Castrén, "Aspects récents de la succession d'Etats" in *Recueil des cours de l'Académie de droit international de La Haye, 1951-1* (Paris, Librairie du Recueil Sirey, 1952), vol. 78, pp. 436-439; C. Rousseau, *Droit international public* (Paris, Librairie du Recueil Sirey, 1953), p. 285.

<sup>54</sup> For example, A. D. McNair, *op. cit.*, chap. XXXIX; D. P. O'Connell, *State Succession in Municipal Law and International Law* (Cambridge, University Press, 1967), vol. II, pp. 12-23 and 231-291; K. Zemanek, "State succession after decolonization" in *Recueil des cours de l'Académie de droit international de La Haye, 1965-III* (Leyden, Sijthoff, 1965), vol. 116, pp. 239-243.

This seems to be confirmed by statements of the United Kingdom, by reference to whose legal concepts the authors of the devolution agreements and multilateral declarations in many cases guided themselves. The "Note on the question of treaty succession on the attainment of independence by territories formerly dependent internationally on the United Kingdom" transmitted by the Commonwealth Office to the International Law Association, for example, explains the United Kingdom's appreciation of the legal position as follows:

Under customary international law certain treaty rights and obligations of an existing State are inherited automatically by a new State formerly part of the territories for which the existing State was internationally responsible. Such rights and obligations are generally described as those which relate directly to territory within the new State (for example those relating to frontiers and navigation on rivers); but international law on the subject is not well settled and it is impossible to state with precision which rights and obligations would be inherited automatically and which would not be.<sup>55</sup>

In a paper presented to a learned society, it is true, a Commonwealth Office legal adviser appeared to put the inheritance of treaties by a new State in much broader terms, at any rate when it has emerged gradually into independent statehood by agreement:

First, all treaties and agreements of a purely local nature and application are regarded without qualification as remaining in full force. In this category are included arrangements regarding real rights, such as boundaries, rights of passage over roads, railways, rivers and bridges etc., and similar State servitudes, customs arrangements such as transit of goods in bond, and revenue and fiscal concessions such as double taxation agreements. In general, this represents the continued operation of all bilateral treaties and agreements made by the United Kingdom with other States which have application to the dependent territory concerned, thus embracing, for example, trade agreements, treaties for the surrender of fugitive offenders, the mutual recognition of authenticated documents and the like.<sup>56</sup>

At first glance, this passage might seem to envisage an automatic inheritance by the new State of a very wide range of bilateral treaties. The legal adviser in question, however, made it clear in his paper that he was addressing himself more to what the Commonwealth Office considered to be the desirable policy for a newly independent State than to its actual legal obligations. At any rate, as appears from the preceding paragraphs of the present commentary, modern State practice is incompatible with the existence

<sup>55</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* (London, published by the International Law Association, 1969), p. 619. Cf. also the advice given to Cyprus on the interpretation of Article 8 of the Treaty concerning the Establishment of the Republic of Cyprus [*United Nations Legislative Series, Materials on Succession of States* (United Nations publication, Sales No.: E/F.68.V.5), pp. 182-183].

<sup>56</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. 18.

of such a wide doctrine of inheritance of treaties, if this doctrine is put as a matter of legal obligation rather than as a desirable *policy* of continuity. Indeed, the unilateral declarations made by numerous new States, which are covered in article 4 of the present draft and to which no other State has raised objection, are in themselves incompatible with such a wide doctrine of inheritance.

(18) An examination of modern State practice poses rather the question whether there are any categories of treaties at all in respect of which general international law imposes an actual *obligation* upon a newly independent State to inherit the treaties of its predecessor. This question, as already indicated, arises primarily in connection with so-called "real" or "dispositive" or "localised" treaties, which will be the subject of separate examination later. The present article seeks only to establish the general rule in regard to a newly independent State's *obligation* to inherit treaties. The general rule deducible from State practice is clearly, in the view of the Special Rapporteur, that a newly independent State is not, *ipso jure*, bound to inherit its predecessor's treaties, whatever may be the practical advantages of continuity in treaty relations. This, accordingly, is the rule formulated in the present article.

**Article 7. Right of a new State to notify its succession in respect of multilateral treaties**

A new State, in relation to any multilateral treaty in force in respect of its territory at the date of its succession, is entitled to notify the parties that it considers itself a party to the treaty in its own right unless:

(a) The new State's becoming a party would be incompatible with the object and purpose of the particular treaty;

(b) The treaty is a constituent instrument of an international organization to which a State may become a party only by the procedure prescribed for the acquisition of membership of the organization;

(c) By reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any additional State in the treaty must be considered as requiring the consent of all the parties.

*Commentary*

(1) The question whether a new State has a *right* to consider itself a party to its predecessor's treaties, as already pointed out in the commentary to article 6, is legally quite distinct from the question whether it is under an *obligation* to do so. Moreover, although modern State practice does not support the thesis that a new State is under any general obligation to consider itself a successor to treaties previously applicable in respect of its territory, it does appear to compel the conclusion that a new State has a general *right*, if it so desires, to be a party to certain categories of those treaties in virtue of its character as a successor State. A distinction must, however, be drawn in this connection between multilateral and bilateral treaties; for it is only in regard to the former that a new State appears to have an actual right

to become a party *independently of the consent of the other parties to the treaty*. In addition, the fact that multilateral treaties normally have depositaries and that treaty relations with a number of different States are involved means that in respect of such treaties the question of succession does not present itself in quite the same manner as in the case of bilateral treaties. There are also some particular problems which arise in connection with multilateral but not bilateral treaties: e.g. treaties ratified but not yet in force, reservations, and the entry into force of the treaty as between the predecessor and successor States. Accordingly, it seems essential to consider the rights of successor States in respect of multilateral and bilateral treaties separately. Hence, the present article and the three articles which follow relate only to multilateral treaties.

(2) In the case of general multilateral treaties, the right of a new State to become a party in its own name seems well settled, and is indeed implicit in the practice already discussed in the commentaries to articles 3, 4 and 6 of this draft. As indicated in those commentaries, whenever a former dependency of a party to multilateral treaties of which the Secretary-General is the depositary emerges as an independent State, the Secretary-General addresses to it a letter inviting it to confirm whether it considers itself to be bound by the treaties in question. This letter is sent in all cases: that is, when the newly independent State has entered into a devolution agreement or has made a unilateral declaration of provisional application or has given no indication as to its attitude in regard to its predecessor's treaties.<sup>57</sup> The Secretary-General does not consult the other parties to the treaties before he writes to the new State, nor does he seek the views of the other parties or await their reactions when he notifies them of any affirmative replies received from the new State. He appears, therefore, to act upon the assumption that a new State has the right, if it chooses, to notify the depositary of its continued participation in any general multilateral treaty which was applicable in respect of its territory prior to the succession. Furthermore, so far as is known, no existing party to a treaty has ever questioned the correctness of that assumption; while the new States themselves have proceeded on the basis that they do indeed possess such a right.

(3) The same appears, in general, to hold good for multilateral treaties which have depositaries other than the Secretary-General. Thus, the practice of the Swiss Government as depositary of the Conventions for the Protection of Literary and Artistic Works and of the States concerned seems clearly to acknowledge that successor States possess a right to consider themselves parties to these treaties in virtue of their predecessors' participation;<sup>58</sup> and this is true also of the Geneva Humanitarian Conventions in regard to which the Swiss Federal Council is the depositary.<sup>59</sup> The practice in regard to multilateral conventions of which the United States is depositary has equally been based on a recognition of

<sup>57</sup> *Yearbook of the International Law Commission, 1962*, vol. II, p. 122, document A/CN.4/150, paras. 133-134.

<sup>58</sup> *Ibid.*, 1968, vol. II, p. 1, document A/CN.4/200 and Add.1 and 2, especially paras. 71-98.

<sup>59</sup> *Ibid.*, especially paras. 152-177.

the right of a newly independent State to declare itself a party to the convention on its own behalf. In its reply to the Secretary-General's circular note asking for information concerning the process of succession, the United States explained its depositary practice as follows:

The depositary practice of the United States with respect to newly independent States has been, in general, to recognise the right of such States to declare themselves bound uninterruptedly by multilateral treaties of a non-organizational type concluded in their behalf by the parent State before the new State emerged to full sovereignty.\* The United States likewise recognises the right of a newly independent State to deposit its own instrument of acceptance of such treaties, effective from the date of deposit of the new instrument.<sup>60</sup>

Thus, the United States has assumed that a newly independent State may transmit a declaration of continuance in all cases where it has the character of a successor State. It recognises that the new State may equally be entitled under the final clauses, and wholly independently of its predecessor's position in relation to the treaty, to become a party by establishing its consent to be bound in the manner which those clauses prescribe. But it also recognises that, quite apart from the final clauses, the new State has the right to establish itself as a separate party to the treaty by transmitting a notification of succession.

(4) Current treaty practice in cases of succession therefore seems to provide ample justification for the Commission to formulate a rule recognising the right of a newly independent State to establish itself as a separate party to a general multilateral treaty by notifying its continuance of, or succession to, the treaty. The view that newly independent States possess such a right was expressed by the Special Rapporteur at the twentieth session of the Commission at which certain other members also endorsed that view.<sup>61</sup> The majority of writers, it is true, do not refer—or do not refer clearly—to a successor State's right to be considered a party to multilateral treaties applicable in respect of its territory prior to independence.<sup>62</sup> The reason seems to be that they direct their attention to the question whether the successor State automatically inherits the rights and obligations of the treaty rather than to the question whether, in virtue of its status as a successor State, it may have the right, if it thinks fit, to be a party to the treaty in its own name. The International Law Association, in the relevant

resolution of its Buenos Aires Conference,<sup>63</sup> stated the law in terms of a presumption that a multilateral treaty is to continue in force as between a newly independent State and the existing parties unless within a reasonable time after independence the former shall have made a declaration to the contrary. In other words, that body envisaged the case as one in which the new State would have a right to contract out of, rather than to contract into, the treaty. Even so, recognition of a right to contract out of a multilateral treaty would seem clearly to imply, a fortiori, recognition of a right to contract into it; and it is the latter right which seems to the Special Rapporteur to be more consonant both with modern practice and the general law of treaties.

(5) The precise basis and scope of this right and the conditions for its exercise are more complex questions. Taking the basis of the right first, it seems to be generally agreed that an essential criterion of a successor State's right to inherit a treaty is that the treaty should be one that was applicable in respect of its territory at the date of the succession. Sometimes this criterion is expressed in terms that might appear to require the actual previous application of the treaty in respect of the territory of the successor State.<sup>64</sup> Thus, the letter addressed by the Secretary-General to newly independent States drawing their attention to the treaties of which he is the depositary contains the following sentence:

In this connexion, I have the honour to call to your attention the practice which has developed regarding the succession of new States to the rights and obligations arising out of multilateral treaties applied in their territory by the States formerly responsible for their foreign relations.<sup>65</sup>

Indeed, in a few cases newly independent States have said that they did not consider themselves to be bound by a particular treaty for the reason that it had not been applied to their territory before independence.<sup>66</sup> These States seem, however, to have been concerned more to explain their reasons for not accepting the treaty than to raise a question as to their right to accept it if they had so wished. It also seems clear that in his letter the Secretary-General intended by his words to indicate treaties internationally applicable, rather than actually applied, in respect of the successor State's territory.<sup>67</sup> The International Law Association, it may be added, formulated this criterion as follows: a treaty which was

<sup>60</sup> United Nations Legislative Series, *Materials on Succession of States* (United Nations Publication, Sales No.: E/F.68.V.5), p. 224.

<sup>61</sup> *Yearbook of the International Law Commission*, 1968, vol. I, p. 127, et seq., 965th-968th meetings. See also the discussion entitled "right of option concerning the validity of treaties" in a working paper submitted by Mr. Bartoš to the Commission's Sub-Committee on Succession of States and Governments in *Yearbook of the International Law Commission*, 1963, vol. II, pp. 294-296.

<sup>62</sup> An exception is K. Zemanek, who analyses the modern practice and concludes: "Succession in fact by way of separation or secession creates the right to succeed by unilateral declaration to those multilateral law-making conventions which the predecessor State has applied to the territory" (K. Zemanek, *op. cit.*, p. 232).

<sup>63</sup> Resolution No. 1 reproduced in *Yearbook of the International Law Commission*, 1969, p. 48, document A/CN.4/214 and Add.1 and 2, para. 15.

<sup>64</sup> Cf. K. Zemanek, *op. cit.*, pp. 229 and 231.

<sup>65</sup> *Yearbook of the International Law Commission*, 1962, vol. II, p. 122, document A/CN.4/150, para. 134.

<sup>66</sup> For example, the Democratic Republic of the Congo rejected the Convention on the Privileges and Immunities of the United Nations on this ground (*ibid.*, p. 115, para. 74), as did the Ivory Coast the 1953 Convention on the Political Rights of Women (*ibid.*, p. 116, para. 83).

<sup>67</sup> When summarising the Secretary-General's practice on this point, the secretariat refers explicitly to "treaties applicable \* to the territory of a new State". His acceptance of "notifications of succession" by successor States to multilateral treaties not yet in force would, indeed, otherwise be inexplicable (see the commentary to article 8).

"internationally in force with respect to the entity or territory corresponding with it prior to independence. . ." <sup>68</sup>

(6) The International Law Association's way of formulating the criterion appears to be more exact than that used in the Secretary-General's letter and to be accurate enough in regard to the treaties covered by the present article. But, as will be seen in the commentary to the next article, even that manner of formulating the criterion does not appear to express the whole truth. At any rate, in the case of treaties of which the Secretary-General is depositary a new State's right to notify its succession to the treaty is admitted on the basis simply of its predecessor's consent to be bound when the treaty has not yet come into force; and it seems possible that even a predecessor State's signature which is still subject to ratification may be a sufficient basis for a notification of succession. These cases are examined more fully in the commentary to article 8. If the rules there proposed are accepted by the Commission as correct, it is evident that the true criterion of inheritability is not that the treaty should have been actually in force in respect of the territory. It is rather that, by its acts, the predecessor State should have established a legal nexus <sup>69</sup> of a certain degree between the treaty and the territory; in other words, it should either have brought the treaty into force or have established its consent to be bound or have at least signed the treaty, *and in each case should have done so in respect of the territory in question*. In cases falling under the present article, in which the treaty is in force for the predecessor State at the date of the succession, the relevant criterion is the one suggested by the International Law Association: the treaty must have been internationally in force at that date in respect of the very territory which now constitutes the successor State or part of it.

(7) In applying this criterion, the essential point is not whether the treaty had come into force *in the municipal law of the territory* prior to independence, but whether the treaty, as a treaty, was in force *internationally* in respect of the territory. <sup>70</sup> This is simply a question of the interpretation of the treaty and of the act by which the predecessor State established its consent to be bound. The governing principle is that expressed in article 29 of the Vienna Convention:

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>71</sup>

The operation of this principle is well illustrated by the summary of the Secretary-General's depositary practice

<sup>68</sup> *Yearbook of the International Law Commission, 1969*, vol. II, p. 48, A/CN.4/214 and Add.1 and 2, para. 15 (Resolution 1).

<sup>69</sup> See paragraph (2)-(6) of the commentary to article 8.

<sup>70</sup> In this connexion it is important to distinguish between the incorporation of the treaty in the municipal law of the territory and the extension of the treaty on the international plane to the territory. This distinction seems to have been blurred a little in K. Zemanek's otherwise penetrating study of State succession (see K. Zemanek, *op. cit.*, pp. 231-232).

<sup>71</sup> *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 293.

given in the Secretariat's memorandum "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary":

In ascertaining whether a treaty was applicable in the territory, the terms of the treaty, if any, on territorial application are first examined. Some treaties have territorial clauses providing procedures for extension to dependent territories, and it can readily be ascertained whether the treaty was extended to the territory in question. Other treaties are limited in their geographical scope; for example, certain League of Nations treaties on opium are limited to the Far Eastern territories of the parties, and the Secretary-General, in reply to inquiries by some African States, has informed them that it is impossible for them either to succeed or accede to those treaties. Some United Nations treaties are likewise regional in scope; for example, the Convention regarding the Measurement and Registration of Vessels Employed in Inland Navigation, done at Bangkok on 22 June 1956, is open only to States falling within the geographical scope of the Economic Commission for Asia and the Far East, and States outside that area cannot become bound by it. <sup>72</sup>

Where the treaty contains no provision on territorial application, the Secretary-General proceeds on the basis that, as provided in Article 29 of the Vienna Convention, the treaty was binding on the predecessor State in respect of its entire territory and, therefore, in respect of all its dependent territories. <sup>73</sup> For example, the Vienna Convention on Diplomatic Relations and the four Geneva Conventions on the Law of the Sea contain no provisions regarding their territorial application, and the Secretary-General has assumed that any ratifications of these Conventions by predecessor States embraced all their territories so as to entitle any new States which were their dependencies as the time of ratification to notify their succession to any of the Conventions.

(8) The Secretariat memorandum emphasizes that, in identifying the treaties to which new States may notify their succession, the relevant point is the previous legal nexus between the new State's territory and the treaty, *and not the qualifications of the new State to become a party under the provisions of the treaty*. <sup>74</sup> In other words, a new State's right to be considered as a party in its own name is wholly independent of the question whether the treaty is open to its participation through a provision for accession or the like under the final clauses. In many cases, even in the majority of cases, the alternative will be open to a successor State of becoming a party to the treaty by exercising a right to do so specifically provided for in the treaty—usually a right of accession. But a successor State's right to notify its succession to a treaty neither requires, nor usually finds, any mention in the final clauses. <sup>75</sup> It arises under general international law from the relationship which existed at the date of the succession between the treaty, the predecessor State and the territory which has now passed to the successor

<sup>72</sup> *Yearbook of the International Law Commission, 1962*, vol. II, p. 122, document A/CN.4/150, para. 137.

<sup>73</sup> *Ibid.*, p. 123, para. 138.

<sup>74</sup> *Ibid.*, para. 139.

<sup>75</sup> For some cases where a treaty does specifically make provision for the participation of successor States in the treaty, see the commentary to article 5.

State. Whether this right is properly to be regarded as deriving from a principle of the law of treaties or from a principle of "succession" seems to the Special Rapporteur to be primarily a doctrinal question. What seems more important is to identify the elements of the principle with as much precision as possible. If the conclusions drawn from the modern practice in the commentaries to articles 8, 9 and 10 are correct, what the principle confers upon a successor State is simply a right to establish itself as a separate party to the treaty in virtue of the legal nexus established by its predecessor between its territory and the treaty. It is not a right to "succeed" to its predecessor's participation in the treaty in the sense of a right to step exactly, and only to step exactly, into the shoes of its predecessor. The successor State's right is rather *to notify its own consent to be bound by the treaty as a separate party*. In the absence of any indication of a contrary intention, a successor State will be presumed to wish to maintain its predecessor's reservations, declarations, etc.; essentially, however, it is to be regarded as establishing its own consent to be bound by the treaty and therefore free to fix for itself the conditions of that consent—subject of course to any relevant provisions of the treaty. If articles 8, 9 and 10, which reflect the practice in regard to treaties of which the Secretary-General is the depositary, state the law correctly, the general principle appears to be this: a new State whose territory was subject to the régime of a multilateral treaty at the date of its succession is entitled, in virtue of that fact, to establish its own consent to be bound as a separate party to the treaty.

(9) The general principle, as already indicated in paragraph (4) of the commentary to article 6, does not apply in the case of a treaty which is the constituent instrument of an international organization and participation in which involves a process of admission to the organization. This exception to the general principle clearly touches the subject of succession in respect of membership of international organizations which the Commission decided to leave aside for the time being.<sup>76</sup> At the same time, any statement of the general law regarding succession in respect of multilateral treaties must take account of constituent instruments of international organizations which form one of the most important categories of multilateral treaties; and it is therefore necessary for the purposes of the formulation of the present article to examine the nature and scope of the exception in regard to those instruments.

(10) The difficulty arises from the fact that international organizations take various forms and differ considerably in their treatment of membership. In many organizations, membership, other than original membership, is subject

to a formal process of admission. Where this is so, practice appears now to have established the principle that a new State is not entitled automatically to become a party to the constituent treaty and member of the organization as a successor State, simply by reason of the fact that at the date of the succession its territory was subject to the treaty and within the ambit of the organization. The leading precedent in the development of this principle was the case of Pakistan's admission to the United Nations in 1947, mentioned in paragraph (4) of the commentary to article 6. The Secretariat then advised the Security Council that Pakistan should be considered as a new State formed by separation from India. Acting upon this advice, the Security Council treated India as a continuing member, but recommended Pakistan for *admission* as a new member; and after some debate, the General Assembly adopted this solution of the case. Subsequently, the general question was referred to the Sixth Committee which, *inter alia*, reported:

2. That when a new State is created, whatever may be the territory and the populations which it comprises and whether or not they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.<sup>77</sup>

New States have, therefore, been regarded as entitled to become members of the United Nations only by admission, and not by succession. The same practice has been followed in regard to membership of the specialized agencies and of numerous other organizations.<sup>78</sup>

(11) The practice excluding succession is clearest in cases where membership of the organization is dependant on a *formal process of admission*, but it is not confined to them. It appears to extend to cases where accession or acceptance of the constituent treaty suffices for entry, but where membership of the organization is a material element in the operation of the treaty. Thus, any member of the United Nations may become a member of WHO simply by acceptance of the WHO Convention but "notifications of succession" are not admitted in the practice of WHO from new States even if they were subject to the régime of the Convention prior to independence and are now members of the United Nations.<sup>79</sup> The position is similar in regard to IMCO and was explained to Nigeria by the Secretary-General of that organization as follows:

In accordance with the provisions of article 9 of the Convention, the Federation of Nigeria was admitted as an associate member

<sup>76</sup> The Commission recorded the following decision in the report on the work of its nineteenth session: "The third aspect of the topic, succession in respect of membership of international organizations, was considered to be related both to succession in respect of treaties and to relations between States and inter-governmental organisations. It was therefore left aside for the time being, without being assigned to a Special Rapporteur." (See *Yearbook of the International Law Commission, 1967*, vol. II, p. 368, document A/6709/Rev.1 and Corr.1, para. 41.)

<sup>77</sup> *Ibid.*, 1962, vol. II, p. 103, document A/CN.4/149 and Add.1, para. 16.

<sup>78</sup> *Ibid.*, p. 124, document A/CN.4/150, para. 145. See also International Law Association, *The Effect of Independence on Treaties: A Handbook* (London, Stevens & Sons, 1965), chapter 12, for a general review of succession in respect of membership of international organizations; however, the classifications adopted in this chapter seem to be based on the hypothesis that "succession" is necessarily a process which takes place automatically.

<sup>79</sup> See *Yearbook of the International Law Commission, 1962*, vol. II, p. 124, document A/CN.4/150, para. 145.

of IMCO on 19 January 1960. Since that date Nigeria has attained independence and has been admitted as a Member of the United Nations. The Secretary-General [of IMCO], in drawing attention to the fact that the Convention contains no provision whereby an associate member automatically becomes a full member, advised Nigeria of the procedure to be followed, as set out in articles 6 and 57 of the Convention, should it wish to become a full member of the Organization. The Secretary-General's action was approved by the Council at its fourth session.<sup>80</sup>

In other words, membership of the organization being in issue, the new State cannot simply notify the depositary of its succession but must proceed by the route prescribed for membership in the constituent treaty—i.e. deposit of an instrument of acceptance.<sup>81</sup>

(12) On the other hand, when a multilateral treaty creates a weaker association of its parties, with looser community organs and no formal process of admission, it seems that the general rule prevails and that a new State may become a party and a member of the association by transmitting a notification of succession to the depositary.<sup>82</sup> Thus the Swiss Government, as depositary, has accepted notifications of succession from new States in regard to the various Conventions which form the International Union for the Protection of Literary and Artistic Works;<sup>83</sup> and it has done the same in regard to the Conventions which form the International Union for the Protection of Industrial Property.<sup>84</sup> This practice appears to have met with the approval of the other parties to the Conventions.

(13) Some constituent treaties provide expressly for a right of succession to membership, notably for States whose territory was "represented" at the conference at which the treaty was drawn up. These treaties fall under article 6 and are referred to in the commentary to that article. Succession to membership is, of course, then open to an appropriately qualified new State; but the new State's right is one conferred by the treaty rather than a true right of succession. This may possibly be the explanation of the practice in regard to membership of the Permanent Court of Arbitration.<sup>85</sup> The Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes provided that (a) States represented at or invited to the Conference might either ratify or accede, and (b) accession by other States was to form the subject of a "subsequent agreement between the Contracting Powers".<sup>86</sup> By decisions of 1955, 1957 and 1959, the Administrative Council directed the Netherlands Government, as depositary, to ask new States whether they considered themselves a party to either of the Conventions. All the Contracting Parties to the Conventions were consulted before the invitation was issued, so that this may have been a case of a subsequent

agreement to create a right of succession. If not, the case seems to belong to those mentioned in paragraph (12) above, where the element of membership is not sufficiently significant to oust the general principle giving a right of succession to multilateral treaties.

(14) In the case of some organizations the question of succession may be complicated by the fact that the constituent treaty admits the possibility of separate or associate membership for dependent territories. Examples of such organizations are UPU, UNESCO, WHO and ITU. The practice in regard to such separate or associate membership has not been entirely uniform. The two "Unions"<sup>87</sup> seem, in general, to have allowed a succession from "dependent" to "full" membership in cases where the new State already had a separate identity during its existence as a "dependent" member, but to have insisted on "admission" or "accession" where it had been merely one part of a collective "dependent" member, e.g., one of a number of dependencies grouped together as a single "associate" member. The majority of new States have therefore experienced a formal break in their membership of the two Unions during the period between the date of independence and their admission or accession to membership. On the other hand, they appear to have been dealt with *de facto* during that period as if they still continued to be within the Unions. As to the two other agencies, neither UNESCO nor WHO recognises any process of succession converting an associate into a full member on the attainment of independence.<sup>88</sup> Both Organizations require new States to comply with the normal admission procedures applicable to Members of the United Nations or, as the case may be, to other States. Both Organizations, however, have at the same time adopted the principle that a former associate member which, after independence, indicates its wish to become a member, remains subject to the obligations and entitled to the rights of an associate member during the interval before it obtains full membership.

(15) A connected category of treaties which requires mention is "treaties adopted within an international organization".<sup>89</sup> Here again membership of the organization may be a factor to be taken into account in regard to a new State's right to consider itself a party to treaties adopted within the organization. This is necessarily so when participation in the treaty is indissolubly linked with membership of the organization. The European Convention for the Protection of Human Rights and Fundamental Freedoms, for example, presupposes that all its contracting parties will be member States of the Council of Europe, so that succession to the Convention and its several Protocols is impossible without membership of the organization. Accordingly, when in 1968 Malawi asked for information regarding the status of former dependent territories in relation to the Conven-

<sup>80</sup> *Ibid.*, p. 118, para. 98; see also p. 124, para. 145.

<sup>81</sup> The International Civil Aviation Organization and the International Telecommunication Union are examples of other organizations in which the same principle is applied.

<sup>82</sup> Cf. K. Zemanek, *op. cit.*, pp. 253-254.

<sup>83</sup> *Yearbook of the International Law Commission, 1968*, vol. II, pp. 12-26, document A/CN.4/200 and Add.1 and 2, paras. 20-98.

<sup>84</sup> *Ibid.*, pp. 57-72, paras. 246-314.

<sup>85</sup> *Ibid.*, pp. 28-32, paras. 109-127.

<sup>86</sup> *Ibid.*, p. 27, para. 104.

<sup>87</sup> For the UPU practice, see International Law Association, *op. cit.*, pp. 250-252, and K. Zemanek, *op. cit.*, p. 250, footnote 32. A secretariat study of this Union, as yet unpublished, has also been made available to the Special Rapporteur.

<sup>88</sup> See International Law Association, *op. cit.*, pp. 256-258, 327-330 and 334-339.

<sup>89</sup> This is the formula used to define this category of treaties in Article 5 of the Vienna Convention.

tion, the Secretary-General of the Council of Europe pointed out the association of the Convention with membership of the Council of Europe. Malawi then notified him, as depositary, that any legal connexion with the Convention which devolved upon her by reason of the United Kingdom's ratification should now be regarded as terminated.<sup>90</sup> Clearly, in cases such as this the need for a party to be a member will operate as a bar to succession to the treaty by States not eligible for membership, the reason being that succession to the treaty by the dependent State concerned is, in the particular circumstances, really incompatible with the regional object and purpose of the treaty.<sup>91</sup>

(16) In other cases, where there is no actual incompatibility with the object and purpose of the treaty, admission to membership may be a precondition for notifying succession to multilateral treaties adopted within an organization, but the need for admission does not exclude the possibility of a new State's becoming a party by "succession" rather than by "accession". Thus, although the International Air Services Transit Agreement of 1944 is open for acceptance only by members of ICAO,<sup>92</sup> several newly independent States, after their admission to the Organization, have claimed the right to consider themselves as continuing to be parties to the Agreement, and this claim has not been questioned either by the depositary (the United States of America or by the other parties to the Agreement).<sup>93</sup> Similarly, although membership of UNESCO or of the United Nations is necessary for participation in the Agreement of 1950 on the Importation of Educational, Scientific and Cultural Materials,<sup>94</sup> this has not prevented a number of newly independent States, after acquiring membership, from notifying their succession to this Agreement.<sup>95</sup> Again, some fourteen newly independent States have transmitted notifications of succession to the 1946 Convention on the Privileges and Immunities of the United Nations which, under its Article 31, is open only to accession by Members of the Organization.

(17) Indeed, in the case of international labour conventions, which also presuppose that their contracting parties will be members of the ILO, membership has been used by the Organization as a means of bringing about

succession to labour conventions.<sup>96</sup> Beginning with Pakistan in 1947, a practice has grown up under which, on being admitted to membership, every newly independent State makes a declaration recognizing that it continues to be bound by the obligations entered into in respect of its territory by its predecessor. This practice, initiated through the Secretariat of the Organization, in its early stages had one or two exceptions;<sup>97</sup> but it has now become so invariable that it has been said to be inconceivable that a new State should ever in future become a member without recognising itself to be bound by labour conventions applicable in respect of its territory on the date of its independence.<sup>98</sup> Furthermore, although these declarations are made in connection with admission to membership and therefore some time after the date of independence, they are treated as equivalent to notifications of succession, and the labour conventions in question are considered as binding upon the new State from the date of independence.

(18) Some multilateral treaties, moreover, may be adopted within an organ of an international organization, but otherwise be no different from a treaty adopted at a diplomatic conference. Examples are the 1953 Convention on the Political Rights of Women and the 1957 Convention on the Nationality of Married Women, both of which were adopted by resolution of the General Assembly. These Conventions are, it is true, open to any Member of the United Nations; but they are also open to any member of a specialized agency or party to the Statute of the International Court of Justice and to any State invited by the General Assembly; and membership of the Organization has little significance in relation to the Conventions. *A fortiori*, therefore, the fact that the treaty has been adopted within an organization is no obstacle to a newly independent State's becoming a party by "succession" rather than "accession".<sup>99</sup>

(19) The possibility that a successor State's participation in a multilateral treaty may be incompatible with the latter's object and purpose has been mentioned above. A more general question has now to be considered: whether any distinction—analogueous to that made in Article 20, paragraph 2, of the Vienna Convention—has to be made between treaties drawn up by a limited number of States and other multilateral treaties with regard to acceptance of reservations. That provision reads:

<sup>90</sup> See M.-A. Eissen, *The British Yearbook of International Law, 1968-1969* (London, Oxford University Press, 1970), vol. 43, pp. 190-192.

<sup>91</sup> Compare the cases mentioned by the United Nations Secretariat in the passage quoted in paragraph (7) of this commentary.

<sup>92</sup> Article VI of the Agreement in United Nations, *Treaty Series*, vol. 84, p. 396.

<sup>93</sup> Pakistan (1948), Ceylon (1957), Federation of Malaya (1959), Madagascar (1962) and Dahomey (1963); see United Nations Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No.: E/F.68.V.5), pp. 224-226.

<sup>94</sup> Article IX, in United Nations, *Treaty Series*, vol. 131, p. 32. Under this Article other States may be invited to become parties, but no such invitations appear to have been issued.

<sup>95</sup> Ghana (1958), Malaysia (1959), Nigeria (1961), Congo (Democratic Republic) (1962), Sierra Leone (1962), Cyprus (1963), Rwanda (1964) and Trinidad and Tobago (1966); see *Multilateral treaties in respect of which the Secretary-General performs depositary functions* (United Nations publication, Sales No.: E.69.V.5), pp. 288-289.

<sup>96</sup> F. Wolf, "Les conventions internationales du travail et la succession d'Etats", *Annuaire français de droit international*, VII, 1961 (Paris, Centre National de la Recherche Scientifique), pp. 742-751.

<sup>97</sup> Ceylon (1948), Vietnam (1950) and Libya (1952) preferred to declare that they would give early consideration to the formal ratification of the Conventions. Indonesia (1950) at first made a similar declaration, but later decided to take the position that she considered herself as continuing to be bound by her predecessor's ratifications.

<sup>98</sup> F. Wolf, *loc. cit.*, p. 751.

<sup>99</sup> Four States have transmitted notifications of succession to the Secretary-General in respect of the 1953 Convention and four States also in respect of the 1957 Convention. See *Multilateral treaties in respect of which the Secretary-General performs depositary functions* (United Nations publications, Sales No.: E.69.V.5), pp. 297-298 and 303.

When it appears from the limited number of the negotiating States and the object and purpose of a 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.<sup>100</sup>

In the present context the question is rather whether, and if so under what conditions, the limited number of the negotiating States and the object and purpose of the treaty may make it necessary to conclude that a successor State's participation in the treaty should be subject to the consent of the other parties. In other words, the question is whether some multilateral treaties drawn up by a limited number of negotiating States should be considered as being subject to the same principles as bilateral treaties for the purpose of "succession".

(20) The question is by no means academic, since France, the United Kingdom and Belgium have been parties to numerous treaties concluded between a limited number of States, and it is out of their former dependencies that many of the new States have emerged. In some cases, the treaty may be the constituent instrument of a limited organization or one adopted within an organization and hence fall under the principles governing such treaties; in some cases the very object and purpose of the treaty may exclude the idea of the particular successor State's participation in the treaty. But in other cases the treaty may not be linked to an organization and the participation of the successor State in the treaty may not involve any *necessary* incompatibility with the object and purpose of the treaty. For example, treaties which establish a régime for neutralizing or demilitarizing a particular territory, for the free navigation of an international river or canal, for the equitable use of an international river, or for the regulation of a fishery, and certain types of political or commercial treaties, may be concluded between a small group of States and yet potentially be of interest to other States. Among such treaties are the Aland Islands,<sup>101</sup> Suez Canal<sup>102</sup> and Montreux<sup>103</sup> Conventions and the Geneva Agreements regarding Laos.<sup>104</sup>

(21) The Commission and the Vienna Conference on the Law of Treaties, in their codification of the law of reservations, took the view that the limited number of the negotiating States may be an indication that the application of the provisions of the treaty in their entirety between all the parties is intended to be an essential condition of the consent of any one of them to be bound by it. They did not think this to be by itself a conclusive indication of such an intention, but did consider that the limited number of the negotiating States combined with the object and purpose of a particular treaty would

make such an intention clear. The question is whether the limited number of the negotiating States combined with the object and purpose of a particular treaty may indicate an intention to confine the circle of possible parties to the negotiating States; if so, it would seem logical to conclude that the participation of a successor State in the treaty should be subject to the concurrence of all the parties.

(22) Practice does not throw any very clear light on this point. Questions of succession have risen mainly in the context of "dispositive" treaties concluded between a limited number of States but intended to create régimes of a general character. Moreover, the point at issue has generally been whether a dispositive treaty is automatically binding upon the successor to the territory to which the treaty relates, rather than whether a "successor" to one of the parties may be entitled to consider itself a party to the treaty in its own right. The latter question was, however, raised in 1956, when it was argued that certain States were entitled, as successor States, to be regarded as parties to the Suez Canal Convention and invited to the London Conference of Users of the Canal. No clear answer was given, the emphasis being put on use of the Canal. In a case like that of the Suez Canal Convention the general character of its object and purpose and the fact that it is open to *accession* by other States seems to justify the conclusion that successor States would be entitled to become parties by means of a notification of *succession*. But in the case of other treaties not open to accession by other States, a successor State's claim to consider itself a party regardless of the consent of the other parties may seem less justifiable.

(23) Having regard to the various considerations set out in the preceding paragraphs, the present article lays down as the *general* rule for multilateral treaties that a new State is entitled to notify the parties that it considers itself a party in its own right to any multilateral treaty in force in respect of its territory at the date of the succession. Subparagraph (a) then excepts from the general rule cases where it would be incompatible with the object and purpose of the treaty to allow the new State to become a party (see paragraphs (7) and (15) above). Subparagraph (b) also excepts from the general rule constituent instruments of international organizations which specify a particular procedure for the acquisition of membership (see paragraphs (9)-(17) above). Finally, subparagraph (c) further excepts from the general rule treaties which were drawn up between a limited number of negotiating States and the object and purpose of which indicate that the participation of any additional State (including a successor State) must be considered as requiring the consent of all the parties (paragraphs (19)-(22) above).

<sup>100</sup> *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 291.

<sup>101</sup> G. F. de Martens, ed., *Nouveau recueil général de traités* (Leipzig, Theodor Weicher, 1923), 3rd series, t. XII, p. 65.

<sup>102</sup> *Ibid.* (Göttingen, Librairie Dietrich, 1890), 2nd series, t. XV, p. 557.

<sup>103</sup> M. O. Hudson, *International Legislation* (Washington, Carnegie Endowment for Peace, 1941), vol. VII, p. 386.

<sup>104</sup> United Nations, *Treaty Series*, vol. 456, p. 301.

#### Article 8. Multilateral treaties not yet in force

1. A new State may on its own behalf establish its consent to be bound by a multilateral treaty which was not in force at the date when the succession occurred if, in respect of the territory to which the succession relates, the predecessor State had before that date:

- (a) established its consent to be bound by the treaty; or
- (b) signed the treaty subject to ratification, acceptance or approval.

2. When a treaty provides that a specified number of parties shall be necessary for its entry into force, a new State which establishes its consent to be bound by the treaty under paragraph 1 shall be reckoned as a party for the purpose of that provision.

#### Commentary

(1) A substantial interval of time not infrequently elapses between the adoption of the text of a multilateral treaty and its entry into force. This is indeed almost inevitable in the common case where the treaty provides that it shall not enter into force until a specified number of States shall have established their consent to be bound. The question therefore arises whether the right of a successor State to establish its consent to be bound by a treaty under the principles stated in article 7 extends to cases where the predecessor State was not an actual "party" to the treaty at the date when the succession occurred because the provisions concerning its entry into force had not yet been satisfied.

(2) A possible point of view might be that, the treaty not being in force, the conditions for the transmission of treaty rights and obligations from a predecessor to a successor State do not exist: the predecessor did not have any definitive rights or obligations under the treaty at the moment of succession, nor were any such rights or obligations then applicable with respect to the successor State's territory. This indeed seems to have been the view of the matter taken by the International Law Association's Committee on the Succession of States in the passage of its report which is reproduced in paragraph (9) below. The Committee conceded that a predecessor State "might have ancillary or collateral rights and duties arising from signature and/or ratification", but this was not in its eyes sufficient to generate a right of succession. The Committee presumably had in mind the principle embodied in Article 18 of the Vienna Convention, under which a predecessor State which has signed a treaty subject to ratification, acceptance or approval or which has definitively expressed its consent to be bound will find itself subject to certain restraints even though the treaty has not yet come into force. This principle is a manifestation of the fact that the acts of signing, ratifying, etc., a treaty do establish a certain legal nexus between the State concerned and the treaty. Thus, even a bare signature subject to ratification was regarded by the International Court of Justice in its Advisory Opinion on *Reservations to the Convention on Genocide*<sup>105</sup> as establishing a "provisional status" in favour of the signatory State in relation to the treaty. Consequently, grounds are not lacking upon which it would be open to the Commission to arrive at a solution of this question different from that of the Committee of the International Law Association.

(3) Furthermore, the practice in regard to multilateral treaties of which the Secretary-General is the depositary

<sup>105</sup> *I.C.J. Reports 1951*, p. 28.

is now firmly established in a sense opposite to that suggested in the report of the Committee of the International Law Association. Examples of this practice, both on the part of the Secretary-General and of successor States, are to be found in the Secretariat memorandum "Succession of States in relations to general multilateral treaties of which the Secretary-General is the depositary". In particular, the practice, as established by 1962, was summarized as follows:

The lists of treaties sent to new States have since 1958 included not only treaties which are in force, but also treaties which are not yet in force, in respect of which the predecessor State has taken final action to become bound and to extend the treaty to the territory which has later become independent. France in 1954 ratified and Belgium in 1958 acceded to the 1953 Opium Protocol, which is not yet in force; both countries also notified the Secretary-General of the extension of the Protocol to their dependent territories. Cameroon, the Central African Republic, the Congo (Brazzaville), the Congo (Leopoldville) and the Ivory Coast have recognized themselves as bound by the instruments deposited by their respective predecessors. In March 1960 the United Kingdom ratified the 1958 Conventions on the Territorial Sea and Contiguous Zone, on the High Seas, and on Fishing, which do not contain any territorial application clauses. Nigeria and Sierra Leone have recognized themselves as bound by these ratifications.<sup>106</sup> It may also be mentioned that Pakistan in 1953 spontaneously informed the Secretary-General that it was bound by the action of the United Kingdom in respect of a League treaty<sup>107</sup> which was not yet in force.<sup>108</sup>

So far as is known to the Special Rapporteur, other States have not questioned the propriety of the Secretary-General's practice in this matter or the validity of the notifications of succession in the above-mentioned cases. On the contrary, as will appear in paragraph (10) below, they must be considered to have accepted it.

(4) The practice described by the Secretariat in the passage just cited relates only to cases where the predecessor State had definitively established its consent to be bound prior to the date of the succession. There is, however, a further point as to whether a predecessor State's signature of a treaty before the occurrence of a succession, but subject to ratification, should be counted as equivalent to a signature by the successor State so as to entitle the latter afterwards to ratify the treaty in its own name. On this point the Secretariat memorandum made the following comment:

The lists of treaties sent to new States have not included any treaties which have been only signed, but not ratified, by predecessor States. No case has yet arisen in practice in which a new State, in reliance on a signature by its predecessor, has submitted for deposit an instrument of ratification to a treaty. There is considerable practice to the effect that a new State can inherit the legal consequences of a ratification by its predecessor of a treaty which is not yet in force [ . . . ]; but it is not yet clear whether

<sup>106</sup> These two States did so at dates before the Conventions in question had come into force.

<sup>107</sup> Protocol relating to a Certain Case of Statelessness (1930); see *Multilateral treaties in respect of which the Secretary-General performs Depositary functions* (United Nations publication, Sales No.: E.68.V.3), p. 346.

<sup>108</sup> *Yearbook of the International Law Commission, 1962*, vol. II, pp. 123-124, document A/CN.4/150, para. 143.

the new State can inherit the legal consequences of a simple signature of a treaty which is subject to ratification. The case presents some practical importance, since numerous League of Nations treaties, some of which were signed, but never ratified, by France, the United Kingdom, etc., are not now open to accession by new States, and new States have sometimes indicated an interest in becoming parties to those treaties. The question of opening those treaties to new States has been referred to the International Law Commission by General Assembly resolution 1766 (XVII).<sup>109</sup>

The special interest of this question in relation to certain League of Nations treaties, which the Secretariat stressed in its memorandum, disappeared not long afterwards as a result of action taken by the General Assembly on the basis of a study of this problem presented by the International Law Commission in its 1963 report to the General Assembly.<sup>110</sup> In effect, the General Assembly by its resolution 1903 (XVIII) of 18 November 1963, assumed the function, formerly entrusted by League of Nations treaties to the Council of the League, of inviting States to become parties by accession; it further requested the Secretary-General to extend invitations to any member of the United Nations, any member of a specialized agency and any party to the Statute of the International Court of Justice not already eligible under the particular treaty to become a party to it. Since 1963, therefore, the special problem to which the Secretary-General drew attention has ceased to have any importance, because successor States will almost invariably fall under one or other of the categories of States to which the Secretary-General is requested to address invitations to accede to the League of Nations treaties in question.

(5) In theory at any rate, the possibility still exists that the problem of a successor State's ratifying a treaty on the basis of its predecessor's signature may arise in connection with multilateral treaties. In its 1963 report to the General Assembly, the Commission merely noted the existence of the problem without expressing any opinion upon it. Similarly, although it has not been the practice of the Secretary-General to include in the lists of treaties sent to successor States any treaty merely signed and not ratified by the predecessor State, the passage from the Secretariat memorandum cited above seems to view the question whether a successor State is entitled to ratify such a treaty as an open one. In the absence of practice in the matter, the Commission is free to adopt the solution which seems most consonant with general principles.

(6) The view has been expressed in the commentary to article 7 that what a successor State inherits is essentially the right, if it wishes, to become a party to its predecessor's treaty in its own name in virtue of the legal nexus established between its territory and the treaty by the acts of its predecessor. If that view is correct, the question is simply what kind of legal nexus with the treaty on the part of a predecessor is sufficient to give rise to the successor's right. A well established practice already exists, as has been shown in paragraph (3) above, which

recognizes the right of a successor State to become a party on the basis simply of its predecessor's having established its consent to be bound, irrespective of whether the treaty was actually in force at the moment of succession. There is, of course, an important difference between the position of a State which has definitively committed itself to be bound by a treaty and one which has merely signed it subject to ratification. On the other hand, as pointed out in paragraph (2) above, both the Opinion of the International Court of Justice on *Reservations to the Genocide Convention* and Article 18 of the Vienna Convention recognize a signature subject to ratification as creating for the signatory State certain limited legal obligations and a certain legal nexus in relation to the treaty. Thus, it seems open to the Commission to recognize the right of a successor State to establish its consent to be bound by a treaty in virtue of its predecessor's bare signature of the treaty subject to ratification, acceptance or approval. This solution is the one most favourable both to successor States and to the effectiveness of multilateral treaties, and it is therefore the one proposed in the present article. Occasions for the exercise of this right are, however, likely to be rare; for not only is the number of possible cases likely to be very small but even in those cases the treaty will normally be open to accession by the new State. Accordingly, if the Commission were to consider a bare signature which is still subject to ratification, acceptance or approval, as insufficient to create any right in a successor State, the practical difference would be likely to be minimal.

(7) In the light of the foregoing considerations, paragraph 1 of article 8 provides that in the case of a multilateral treaty which is not in force at the date of the succession, either an act definitively establishing the predecessor State's consent to be bound or a bare signature subject to ratification, acceptance or approval will entitle the successor to establish its consent to be bound in its own name through the procedure appropriate in the particular case.

(8) Paragraph 2 of article 8 covers the special but important point whether a notification of continuity, or an "accession", by a successor State under the provisions of article 7 should be considered as equivalent to a signature, ratification, etc., for the purpose of clauses making the entry into force of a treaty dependent on a specified number of signatures, ratifications, etc. Paragraph 2 lays down that a notification of succession should count for that purpose.

(9) The International Law Association, in the resolutions which it adopted at its Buenos Aires Conference in 1968 (resolution No. 6), did no more than state that this was a question that required further study.<sup>111</sup> But its Committee on the Succession of States, in an explanatory note accompanying the draft resolution, took up a position which led it to a conclusion opposite to that proposed in the present article. The Committee there said:

6. There have been no known instances where a new State making a declaration of continuity to a multilateral convention

<sup>109</sup> *Ibid.*, p. 124, para. 151.

<sup>110</sup> *Ibid.*, 1963, vol. II, pp. 217-223, document A/5509, paras. 18-50.

<sup>111</sup> For the text of resolution 6, see *Yearbook of the International Law Commission, 1969*, vol. II, p. 48, document A/CN.4/214 and Add.1 and 2, para. 15.

has been counted for the purpose of aggregating the necessary number of parties to bring the convention into force.

The question has arisen respecting the United Nations Convention on the Reduction of Statelessness. This was ratified by the United Kingdom on 29 March 1966, and its extension to several dependent territories which have become independent since that date was notified. No other States have ratified or acceded. The Convention comes into force after an interval following the deposit of *six* ratifications or accessions. The situation might arise where five of the United Kingdom's successor States to which the Convention applied deposit declarations of continuity. Would these count, along with the United Kingdom's ratification, as the necessary number of parties to bring the treaty into force? If the answer is affirmative it would follow that only one signatory and ratifying State is a party; and if that State denounces, it would follow that the treaty is in force without any signatory or ratifying parties. Although a declaration of continuity is regarded by the Committee as having the effect of an accession for the purpose of bringing the convention into force *inter se* the predecessor and successor States, it should not have the effect of an accession for all purposes; and if a convention refers to ratifying or acceding States being counted for the purpose of bringing the convention into force a successor State is excluded by description. This is believed to be the only conclusion consistent with fundamental principles of treaty law.

7. The Committee found this a theoretically difficult question, but after examination of the practical issues involved it chose to fall back on the theoretical position that until a treaty is in force there is nothing to be succeeded to (although it is conceded that the predecessor State might have ancillary or collateral rights and duties arising from signature and/or ratification). This is consistent with the view taken respecting point 6, and indeed supports that view.<sup>113</sup>

(10) The Committee was not quite correct in saying that there was no known instance where a new State's declaration of continuity had been counted for the purpose of aggregating the necessary number of parties to bring the convention into force. The Secretariat memorandum of 1962 pointed out that in his circular note announcing the deposit of the twenty-second instrument in respect of the 1958 Convention on the High Seas, the Secretary-General had "counted the declarations of Nigeria and Sierra Leone toward the number of twenty-two".<sup>113</sup> Since then, the entry into force of the Convention on the Territorial Sea and Contiguous Zone has been notified by the Secretary-General on the basis of counting declarations of continuity by the same two States towards the required total of twenty-two; and also that of the Convention on Fishing and Conservation of the Living Resources of the High Seas on the basis of declarations of continuity by three new States. The practice of the Secretary-General as depositary therefore seems settled in favour of treating the declarations of new States as in all respects equivalent to a ratification, accession, etc., for the purpose of treaty provisions prescribing a specified number of parties for the entry into force of the treaty. So far as is known, no State has questioned the propriety

of the Secretary-General's practice with respect to these important treaties.

(11) The treaty provisions here in question normally, it is true, refer expressly to the deposit of a specified number of instruments of ratification or accession or, as the case may be, of acceptance or approval, by States to which participation is open under the terms of the treaty. Accordingly, to count notifications of succession for the purpose of arriving at the prescribed total number may be represented as modifying in some degree the application of the final clauses of the treaty. But any such modification that may occur results from the impact of the general law of succession of States upon the treaty, and this general law the negotiating States must be assumed to have accepted as supplementing the treaty. Nor is the modification involved in counting a notification of succession as relevant in connexion with these treaty clauses much greater than that involved in admitting that new States may become separate parties to the treaty by notifications for which the final clauses make no provision; and the practice of admitting notifications of succession for this purpose is now well settled. Moreover, to count the notification of a successor State as equivalent to a ratification, accession, acceptance, or approval would seem to be in conformity with the general intention of the clauses here in question, for the intention of these clauses is essentially to ensure that a certain number of States shall have definitively accepted the obligations of the treaty before they become binding on any one State. The contrary position taken by the Committee on the Succession of States seems almost to assume that a newly independent State is not to be considered as sufficiently detached from its predecessor to be counted as a separate unit in giving effect to that intention. But such an assumption hardly appears compatible with the principles of self-determination, independence and equality. For this reason the possibility noted by the Committee that Convention on the Reduction of Statelessness might be brought into force by one ratification plus the notifications of five successor States—in any case a somewhat extreme possibility—does not seem a persuasive argument for rejecting the more liberal approach of the Secretary-General to the question. Therefore, as indicated earlier, paragraph 2 of article 8 states the law in terms which accord with the depositary practice of the Secretary-General.

#### *Article 9. Succession in respect of reservations to multilateral treaties*

1. When the consent of a new State to be bound by a multilateral treaty is established by means of a notification of succession, it shall be considered as maintaining any reservations applicable in respect of the territory in question at the date of the succession unless:

(a) The State, in notifying its succession to the treaty, expressed a contrary intention or formulated reservations different from those applicable at the date of succession; or

(b) The particular reservation, by reason of its object and purpose, must be considered as appropriate only in relation to the predecessor State.

<sup>113</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* (London, published by the International Law Association, 1969), pp. 602-603.

<sup>114</sup> See *Yearbook of the International Law Commission, 1962*, vol. II, p. 124, document A/CN.4/150, para. 143.

2. In such cases, if the new State formulates reservations different from those applicable in respect of the territory at the date of succession:

(a) Any reservation formulated by its predecessor which differs from its own reservations shall be considered as withdrawn;

(b) Any provisions regarding reservations which may be contained in the treaty shall, together with Articles 19 to 23 of the Vienna Convention, apply to the successor State as from the date of its notification of its succession to the treaty.

3. (a) The rules laid down in paragraphs 1 and 2 regarding reservations apply also, *mutatis mutandis*, to objections to reservations.

(b) However, in the case of a treaty falling under Article 20, paragraph 2, of the Vienna Convention, no objection may be formulated by a new State to a reservation which has been accepted by all the parties to the treaty.

#### Commentary

(1) The general rules of international law governing reservations to multilateral treaties are now to be found stated in Articles 19-23 of the Vienna Convention. Under those articles, in the event of a succession, the predecessor State may be a State which has formulated a reservation, with or without objection from other States, or which has itself accepted or objected to the reservation of another State. Those articles at the same time provide for the withdrawal of reservations and also of objections to reservations. The question then arises as to the position of the successor State in regard to reservations, acceptances and objections.<sup>114</sup>

(2) Whenever a successor State is to be considered as a party to a multilateral treaty by "inheritance" from its predecessor, logic would seem to require that it should step into the shoes of its predecessor under the treaty in all respects *as at the date of the succession*. In other words, the successor State should inherit the reservations, acceptances and objections of its predecessor exactly as they stood at the date of succession; but it would also remain free to withdraw, *in regard to itself*, the reservation or objection which it had inherited. Conversely, whenever a successor State becomes a party not by inheritance but by an independent act establishing its consent to be bound, logic would indicate that it should be wholly responsible for its own reservations, acceptances and objections, and that its relation to any reservations, acceptances and objections of its predecessor should be the same as that of any other new party to the treaty. If such may be the rules which considerations of legal logic suggest, it remains to be seen whether and how far they are acted on in practice. In fact the practice in regard to reservations, while it corresponds in some measure to the logical principles set out in this paragraph, will be found not to be wholly consistent with them.

<sup>114</sup> For the views of the Rapporteur of the International Law Association, see the Special Rapporteur's second report on succession in respect of treaties (*ibid.*, 1969, vol. II, p. 49, document A/CN.4/214 and Add.1 and 2, para. 17).

(3) The Secretariat studies<sup>115</sup> entitled "Succession of States to multilateral treaties" draw attention to practice in regard to reservations in only two connexions. The first is the Berne Convention of 1886 for the Protection of Literary and Artistic Works and the Acts of Berlin, Rome, Brussels and Stockholm which revised it.<sup>116</sup> In brief, the United Kingdom made a reservation to the Berlin text (1908) regarding retroactivity on behalf of itself and all its dependent territories with the exception of Canada; France, on behalf of herself and all her territories, made a reservation to the same Convention regarding works of applied art; and the Netherlands also made three separate reservations to that Convention on behalf both of herself and the Netherlands East Indies. Each of these three States omitted their reservations when adhering to later texts: the United Kingdom and the Netherlands when becoming parties to the Rome Act of 1928 and France when becoming a party to the Brussels Act of 1948. In all the cases of succession occurring in respect of these three States, the Swiss Government as depositary has treated the successor State as inheriting such of its predecessor's reservations as were binding upon the successor's territory in relation to each particular Convention prior to independence. Moreover, in these cases the Swiss Government appears to have regarded the inheritance of the reservations, when it occurred, as automatic and not dependent upon any "confirmation" of the reservation by the successor State.

The second connexion is the various Geneva Humanitarian Conventions of which also the Swiss Government is the depositary. No mention is made of reservations in their final clauses, but reservations have been formulated by a considerable number of States.<sup>117</sup> Among these reservations is one made by the United Kingdom with respect to Article 68, paragraph 2, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949).<sup>118</sup> Five newly independent States, to which this Convention was formerly applicable as dependent territories of the United Kingdom, have notified the depositary that they consider themselves as continuing to be bound by that Convention in virtue of its ratification by the United Kingdom.<sup>119</sup> The notifications of these States do not, it is true, refer explicitly to the United Kingdom's reservation; and the Secretariat for that reason observed:

Examination of the cases of succession to the Geneva Conventions thus provides no example that would make it possible to say with certainty whether or not it is necessary to confirm in declarations of continuity the reservations formulated by the predecessor State in order to be able to take advantage of them.<sup>120</sup>

<sup>115</sup> *Ibid.*, 1968, vol. II, p. 1, document A/CN.4/200 and Add.1 and 2, and *ibid.*, 1969, vol. II, p. 23, document A/CN.4/210.

<sup>116</sup> *Ibid.*, 1968, vol. II, pp. 24-25, document A/CN.4/200 and Add.1 and 2, paras. 86-92.

<sup>117</sup> *Ibid.*, p. 35, para. 138.

<sup>118</sup> United Nations, *Treaty Series*, vol. 75, p. 287.

<sup>119</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, pp. 41-42, document A/CN.4/200 and Add.1 and 2, paras. 170-174.

<sup>120</sup> *Ibid.*, p. 53, para. 229.

The basis of this observation may be open to question. The point of departure for all these States was that the Convention had been made applicable to their territories by the United Kingdom prior to independence; and that application was clearly then subject to the United Kingdom's reservation. Moreover, four of the States concerned expressly referred in their notifications to the United Kingdom's ratification of the Convention, and of that "ratification" the reservation was an integral part. As a matter of law, it would seem that the States concerned, in the absence of any indication of their withdrawal of their predecessor's reservation, must be presumed to have intended the treaty to continue to apply to their territory on the same basis as it did before independence: i.e. subject to the reservation. It is also not without relevance that the same depositary Government, when acting as depositary of the Berne Convention and its related Acts for the Protection of Literary and Artistic Works, seems to have assumed that reservations are inherited automatically in cases of succession in the absence of any evidence of their withdrawal.

(4) The material transmitted by Governments to the Secretary-General of the United Nations in response to his invitation and published in *Materials on Succession of States*<sup>121</sup> does not appear to throw any light on the practice in regard to reservations. Accordingly, apart from the material mentioned in the preceding paragraph, the main evidence of practice available to the Special Rapporteur has been the Secretariat publication *Multilateral treaties in respect of which the Secretary-General performs depositary functions*,<sup>122</sup> supplemented by a number of individual precedents obtained from the Secretariat, and by reference to the United Nations *Treaty Series*.

(5) The practice of successor States in regard to treaties for which the Secretary-General is the depositary appears to have been fairly flexible. As already noted in the commentary to article 7, they have sometimes exercised their right to become a party by depositing an instrument of accession and sometimes by transmitting to the Secretary-General a "notification of succession". When becoming a party by accession, a new State has in some cases repeated a reservation made by its predecessor and applicable to the territory before independence.<sup>123</sup> In such a case the reservation is, of course, to be regarded as an entirely new reservation so far as concerns the new State, and the general law governing reservations to

multilateral treaties has to be applied to it accordingly as from the date when the reservation is made. It is a straightforward case of an accession subject to a reservation and it is only in cases of notification of succession that problems arise.

(6) Equally, when transmitting a notification of succession new States have not infrequently repeated or expressly maintained a reservation made by their predecessor; and especially in cases where their predecessor had made the reservation at the time of "extending" the treaty to their territory. Thus, Jamaica in notifying its "succession" to the Convention relating to the Status of Refugees (1951), repeated textually a reservation which had been made by the United Kingdom specifically with reference to its territory; and Cyprus and Gambia expressly confirmed their maintenance of that same reservation which had likewise been made applicable to each of their territories.<sup>124</sup> Other examples are the repetition by Malta of a United Kingdom reservation to the 1961 Vienna Convention on Diplomatic Relations;<sup>125</sup> by Trinidad and Tobago of a United Kingdom reservation to the International Convention to Facilitate the Importation of Commercial Samples and Advertising Material (1952) made specifically for Trinidad and Tobago;<sup>126</sup> and by Cyprus, Jamaica and Sierra Leone of United Kingdom reservations made to the 1949 Convention on Road Traffic, with annexes.<sup>127</sup> In the last mentioned case Cyprus and Jamaica omitted from the repeated reservation a territorial application clause irrelevant to their own circumstances.

(7) It is, no doubt, desirable that a State, on giving notice of succession, should at the same time specify its intentions in regard to its predecessor's reservations. But it would be going too far to conclude from the practice mentioned in the preceding paragraph that, if a reservation is not repeated at the time of giving notice of succession, it does not pass to the successor State. Indeed, in certain other cases successor States seem to have assumed the contrary. Thus, both Rwanda and Malta transmitted notifications of succession to the Customs Conventions on the Temporary Importation of Private Road Vehicles (1954), without referring to the reservations which had been made by their respective predecessors, Belgium and the United Kingdom. Rwanda, some two months after giving notice of succession, informed the Secretary-General that it did not intend to maintain Belgium's reservations.<sup>128</sup> Malta, also after an interval of some weeks similarly informed the Secretary-General.<sup>129</sup> Both these States acted in the same manner in regard to their predecessors' reservations to the Convention Concerning Customs Facilities for Touring (1954).<sup>130</sup> Both would therefore seem to have thought that a predecessor's reservations would continue to be applicable unless disclaimed by the successor. The same view of the law

<sup>121</sup> United Nations Legislative Series (United Nations publication, Sales No.: E/F.68.V.5).

<sup>122</sup> *Multilateral treaties in respect of which the Secretary-General performs depositary functions* (United Nations publication, Sales No.: E.68.V.3) and *idem*, *Annex: Final Clauses* (Sales No.: E.68.V.4).

The information on this question given in the literature, including D. P. O'Connell's *magnum opus* on State succession, is extremely sparse.

<sup>123</sup> For example, in acceding to the Additional Protocol to the Convention concerning Customs Facilities for Touring, relating to the Importation of Tourist Publicity Documents and Material (1954), Uganda and the United Republic of Tanzania repeated a reservation which had been made by the United Kingdom specifically for those territories. See *Multilateral treaties in respect of which the Secretary-General performs depositary functions* (United Nations publication, Sales No.: E.68.V.3), pp. 206-207.

<sup>124</sup> *Ibid.*, pp. 75-77.

<sup>125</sup> *Ibid.*, p. 46.

<sup>126</sup> *Ibid.*, p. 199.

<sup>127</sup> *Ibid.*, pp. 225-227.

<sup>128</sup> *Ibid.*, p. 210.

<sup>129</sup> *Ibid.*, p. 211.

<sup>130</sup> *Ibid.*, p. 203.

was evidently taken by the Office of Legal Affairs of the Secretariat in its Memorandum to the Regional Representative of the United Nations High Commissioner for Refugees on the succession by Jamaica to rights and obligations under the Convention relating to the Status of Refugees (1951). In paragraph 4 of that Memorandum, after setting out the text of reservations made to article 42, paragraph 1, of the Convention by the United Kingdom in respect of Jamaica, the Office of Legal Affairs continued:

Jamaica would have the right to avail itself of these reservations which were made by the United Kingdom under the terms of the Convention and it may be that in due course your office will wish to obtain a declaration by Jamaica which would withdraw these reservations. 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.<sup>131</sup>

The Swiss Government also, as pointed out in paragraph (3) above, appears to have acted on the assumption that reservations are applicable automatically with respect to a successor State in the absence of any indication of their withdrawal by it when or after giving notice of succession.

(8) Mention must now be made of some recent practice regarding reservations in which the line between "succession" and "accession" seems to have become somewhat blurred. This practice concerns cases where a State has given notice to the Secretary-General of its "succession" to a treaty and at the same time notified him of reservations which are different from or additional to those formulated by its predecessor. Thus, on 29 July 1968 Malta notified the Secretary-General<sup>132</sup> that, as successor to the United Kingdom, she considered herself bound by the Additional Protocol to the Convention concerning Customs Facilities for Touring, relating to the Importation of Tourist Publicity Documents and Material (1954),<sup>133</sup> the application of which had been extended to her territory before independence without any reservation whatever. Malta's notification nevertheless contained a reservation to article 3 of the Protocol, while article 14 provided that a reservation was not to be admissible if within a period of 90 days it had been objected to by one-third of the interested States. Accordingly, in circulating the notification of succession, the Secretary-General drew attention to the reservation and to the provision in Article 14 of the Protocol; and Poland did in fact object to the reservation. In the event, this was the only objection lodged against the reservation within the prescribed period and the Secretary-General then formally notified the interested States of the acceptance of Malta's reservation in accordance with Article 14.<sup>134</sup>

On 25 February 1969 Botswana notified the Secretary-General<sup>135</sup> that it regarded itself as "continuing to be bound" by the Convention of 1954 relating to the Status of Stateless Persons to the same extent as the United Kingdom was so bound in relation to the Bechuanaland Protectorate "subject, however, to the following additional reservations"; and it then formulated new reservations to articles 31, 12(1) and 7(2) of the Convention. In circulating the notification, the Secretary-General reproduced the text of Botswana's new reservations and at the same time informed the interested States where they would find the text of the earlier reservations made by the United Kingdom which Botswana was maintaining.

On 18 July 1969 Mauritius informed the Secretary-General<sup>136</sup> that it considered itself bound as from the date of independence by the Convention on the Political Rights of Women (1953), the application of which had been extended to its territory before independence. At the same time, without any allusion to the reservations which had been made to Article 3 by the United Kingdom, Mauritius formulated two reservations of its own to that article. One of these (recruitment and conditions of service in the armed forces) corresponded to a general reservation made by the United Kingdom; the other (jury service) had been made by the United Kingdom with respect to certain territories but not with respect to Mauritius itself. The Secretary-General, also making no allusion to the previous reservations of the United Kingdom, simply circulated the text of Mauritius's two reservations to the interested States.

The most striking example is perhaps that of Zambia's notification of its succession to the Convention relating to the Status of Refugees (1951). By letter of 24 September 1969 Zambia transmitted to the Secretary-General an instrument of *succession* to this Convention and an instrument of *accession* to another treaty, thereby underlining its intention to be considered as a successor State in relation to the 1951 Convention. In depositing its notification of succession, Zambia made no allusion to the reservations previously made by the United Kingdom in respect of the Federation of Rhodesia and Nyasaland. Instead, it referred to article 42 of the Convention, which authorized reservations to certain articles, and proceeded to formulate reservations of its own to articles 17(2), 22(1), 26 and 28 as permitted by article 42. The Secretary-General, in a letter to Zambia of 10 October 1969,<sup>137</sup> then drew attention to the fact that its reservations differed from those made by its predecessor State and continued:

Therefore, it is the understanding of the Secretary-General that the Government of Zambia, on declaring formally its succession to the Convention in the instrument in question, decided to withdraw the old reservations pursuant to paragraph 2 of article 42 of the Convention, and expressed its consent to continue to be bound henceforth by the Convention subject to the new reservations, *the latter reservations to become effective on the date when they would have done so, pursuant to the pertinent provisions of the Convention, had they been formulated on accession.\** Accord-

<sup>131</sup> See *United Nations Juridical Yearbook, 1963* (United Nations publication, Sales No.: 65.V.3), p. 182.

<sup>132</sup> Secretary-General's circular letter of 16 August 1968 (C.N.123, 1968, Treaties - 2).

<sup>133</sup> United Nations, *Treaty Series*, vol. 276, p. 191.

<sup>134</sup> Secretary-General's circular letter of 3 December 1968 (C.N.182, 1968, Treaties - 4).

<sup>135</sup> Secretary-General's circular letter of 21 May 1969 (C.N.80, 1969, Treaties - 1).

<sup>136</sup> Secretary-General's circular letter of 11 September 1969 (C.N.168, 1969, Treaties - 5).

<sup>137</sup> Supplied to the Special Rapporteur by the Secretariat.

ingly, the said reservations will take effect on the ninetieth day after the deposit of the instrument of succession by the Government of Zambia, that is to say, on 23 December 1969.

The Secretary-General further said that all interested States were being informed of the deposit of the instrument of succession and of the reservations.<sup>138</sup>

(9) The practice examined in the preceding paragraph appears to show unmistakably that the Secretary-General is now treating a newly independent State as entitled to become a party to a treaty by "succession" to its predecessor's participation in the treaty, and yet at the same time to modify the conditions of that participation by formulating new reservations. Moreover, in response to the Special Rapporteur's inquiry, the Secretariat has confirmed that the precedents in question are classified by the Secretary-General as cases of "succession", not accession.

(10) A new State's abandonment, express or implied, of its predecessor's reservations is perfectly consistent with the notion of "succession"; for a State may withdraw a reservation at any time and a successor State may equally do so at the moment of confirming its "succession" to the treaty. But the formulation of new or revised reservations is, logically, not very consistent with the notion of a "succession" to the predecessor State's rights and obligations with respect to the territory. It is compatible with the idea that a successor State, by virtue simply of the previous application of the treaty to its territory, has a right to become a separate party in its own name; but that is all. So far as is known, no objection has been taken by any State to the practice in question or to the Secretary-General's treatment of it as if it was a specialized form of accession. Nor is this surprising, since in most cases it is equally open to the newly independent State to become a party by "accession" when, subject to any relevant provisions in the treaty, it would be entirely free to formulate its own reservations. The Secretary-General's treatment of the practice has the merit of flexibility and of facilitating the participation of new States in multilateral treaties, while seeking to protect the rights of other States under the general law of reservations.

(11) The question for the Commission is whether to adhere strictly to the notion of "succession" in its treatment of reservations or to adopt a more pragmatic and flexible approach like that which seems to be found in the practice of the Secretary-General as depositary of multilateral treaties. When a newly independent State transmits a notification of succession or declaration of continuance, this may clearly be interpreted as an expression of a wish to be considered as a party to the treaty on the same conditions in all respects as its predecessor. But once it is accepted that succession in respect of treaties does not occur automatically but is dependent on an act of will by the successor State, the way is open for the law to regulate the conditions under which that act of will is to become effective. Having regard to the nature of

modern multilateral treaties and to the system of law provided in articles 19-23 of the Vienna Convention to govern reservations, the Commission may feel that a flexible and pragmatic approach to the problem of succession in respect of reservations is to be preferred.

(12) Since the general rule is that a reservation may be withdrawn unilaterally and at any time, the question whether a predecessor State's reservation attaches to a successor State would seem to be simply a matter of the latter's intention at the time of giving notice of succession. If the successor State expressly maintains them, the answer is clear. If it is silent on the point, the question is whether there should be a presumption in favour of an intention to maintain the reservations except such as by their very nature are applicable exclusively with respect to the predecessor State. The practice examined in paragraphs (3) to (8) of this commentary on balance suggest that such a presumption should be made. A further consideration is that, if a presumption in favour of maintaining reservations were not to be made, the actual intention of the successor State might be irrevocably defeated; whereas, if it were made and the presumption did not correspond to the successor State's intention, the latter could always redress the matter by withdrawing the reservations. *Paragraph 1* of the present article accordingly lays down that a notification of succession shall be considered as subject to the predecessor State's reservation, unless a contrary intention is expressed or indicated or the reservation is, by reason of its object and purpose, appropriate only in relation to the predecessor State.<sup>139</sup>

(13) *Paragraph 2* seeks to provide for the case where the successor State has formulated different reservations of its own and where, under paragraph 1, the presumption of an intention to maintain the predecessor State's reservations is in consequence to be considered as negated. Logically, as already pointed out, there may be said to be some inconsistency in claiming to become a party in virtue of the predecessor's status as a party and in the same breath to establish a position in relation to the treaty different from that of the predecessor. The alternatives would seem to be either (a) to decline to regard any notification of succession made subject to new reservations as a true instrument of succession and to treat it as in law a case of accession, or (b) to accept it as having the character of a succession but at the same time apply to it the law governing reservations as if it were a wholly new expression of consent to be bound by the treaty. The latter alternative, if a little anomalous, corresponds to the practice of the Secretary-General as depositary, and it has the advantage of making the position of a new State, anxious to continue the participation of its territory in the régime of the treaty, as flexible as possible. It may also ease the position of a new State in any case—perhaps infrequent—where the treaty is not, for technical reasons, open to its participation by any other procedure than succession. *Paragraph 2* (a) accordingly lays down that, where a successor State formulates new

<sup>138</sup> The letter also referred to a "declaration" made by Zambia provided for by the Convention.

<sup>139</sup> Examples of reservations appropriate only in relation to the predecessor State are United Kingdom reservations regarding the extension of the treaty to dependent territories.

reservations, it is to be considered as having withdrawn its predecessor's reservations. And *paragraph 2 (b)* goes on to lay down that the provisions of the treaty and, subject to them, the provisions of articles 19 to 23 of the Vienna Convention apply to the new reservations as from the date of the notification. A question may then arise as to the date from which the treaty is to be considered in force for a State which has formulated new reservations; but this question will be considered in a later article dealing with the entry into force of treaties for States which express their consent to be bound through a notification of succession.

(14) There remains the question of objections to reservations in regard to which the published practice is extremely sparse. The series of Secretariat studies, entitled "Succession of States to multilateral treaties",<sup>140</sup> apart from a single mention of the existence of this question, contains no reference to succession in respect of objections to reservations; nor is anything to be found in *Materials on succession of States*.<sup>141</sup> Even the information published in *Multilateral treaties in respect of which the Secretary-General performs depositary functions*<sup>142</sup> throws comparatively little light on the practice in regard to objections to reservations. In the case of the 1946 Convention on the Privileges and Immunities of the United Nations, the United Kingdom lodged an objection to the reservations of certain States regarding recourse to the International Court of Justice for the settlement of disputes, and subsequently a number of her former dependent territories became parties by transmitting a notification of succession. None of these newly independent States, it appears, made any allusion to the United Kingdom's objection to those reservations. Nor did the Democratic Republic of the Congo, when it notified its succession to the 1948 Convention on Genocide, make any allusion to Belgium's objection to similar reservations formulated in regard to this Convention. Again, the United Kingdom lodged a series of formal objections to reservations formulated by various States to the three 1958 Conventions on the Territorial Sea and Contiguous Zone, on the High Seas and on the Continental Shelf, and several of her former dependent territories afterwards became parties to one or other of these Conventions by transmitting a notification of succession; but none of them apparently made any allusion to any of the United Kingdom's objections. Only one case has been found in which a successor State has referred to its predecessor's comment upon another State's reservation, and even this was not, strictly speaking, a case of an "objection" to a reservation. In ratifying the Vienna Convention on Diplomatic Relations the United Kingdom declared that it did not regard statements which had been made by three Socialist States with reference to Article 11, paragraph 1 (size of a diplomatic mission), as modifying any rights or obliga-

tions under this paragraph.<sup>143</sup> Malta, the only ex-United Kingdom dependency to become a party by succession, repeated the terms of this declaration in its notification of succession.

(15) The evidence of practice is scarcely extensive enough to admit of any reliable conclusions being drawn from it; but such as it is, it does not seem to indicate any great concern on the part of newly independent States with the objections of their predecessors to reservations formulated by other States. Nevertheless, it is necessary to lay down some rule on the question and, in doing so, regard must clearly be had to the provisions of the Vienna Convention on the Law of Treaties concerning objections to reservations. Article 20, paragraph 4 (*b*), as it was finally adopted at Vienna,<sup>144</sup> contains the general rule:<sup>145</sup>

an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State.<sup>146</sup>

This rule has to be read in conjunction with Article 21, paragraph 3, which lays down that

When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.<sup>147</sup>

The net result is that, unless the objecting State has definitely indicated that by its objection it means to stop the entry into force of the treaty as between itself and the reserving State, the *legal* position created as between the two States by an objection to a reservation is much the same as if no objection had been lodged. Account must also be taken of Article 20, paragraph 5, under which a reservation is to be considered accepted by a State unless objected to within twelve months, and of Article 22, paragraph 2, under which an objection may be withdrawn at any time.

(16) No doubt, the simplest course might be to treat an objection to a reservation as particular to the objecting predecessor State and to leave it to the successor State to lodge its own objections to reservations which are already to be found in the ratifications, accessions, etc. of other States when it notifies its succession. On the other hand, where an objection has been accompanied by an indication that it is to preclude the entry into force of the treaty

<sup>140</sup> *Yearbook of the International Law Commission, 1968*, vol. II, p. 1, document A/CN.4/200 and Add.1 and 2, and *ibid.*, 1969, vol. II, p. 23, document A/CN.4/210.

<sup>141</sup> United Nations Legislative Series (United Nations publication, Sales No.: E/F.68.V.5).

<sup>142</sup> United Nations publications, Sales Nos.: E.68.V.3 and E.69.V.5.

<sup>143</sup> See *Multilateral treaties in respect of which the Secretary-General performs depositary functions* (United Nations publication, Sales No.: E.69.V.5), p. 48.

<sup>144</sup> The Commission had proposed a rule which stated the presumption the other way.

<sup>145</sup> This rule does not apply in the case of constituent instruments of international organizations or in that of treaties concluded between a "limited number of States" within the meaning of paragraph 2 of Article 20.

<sup>146</sup> *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publications, Sales No.: E.70.V.5), p. 291.

<sup>147</sup> *Ibid.*, p. 292.

as between the objecting and the reserving States, the treaty will not have been in force at all in respect of the successor State's territory at the date of succession in relation to the reserving State. Moreover, the objection may have been lodged by the predecessor State largely or partly in the interests of the territory now comprised within the successor State. Accordingly, for the better protection of the successor State, it may perhaps be desirable to lay down a presumption in favour of the maintenance of objections similar to that suggested for reservations. This will still leave the successor State free to negate the presumption by expressing or indicating a contrary intention at the time of transmitting its notification of succession or, alternatively, to adjust the position afterwards by withdrawing the objection. Paragraph 3 (a) accordingly provides that the rules laid down in paragraphs 1 and 2 for reservations apply also, *mutatis mutandis*, to objections to reservations.

(17) Article 20, paragraph 5, of the Vienna Convention contemplates that, unless the treaty otherwise provides, a State shall have the right to object to a reservation during a period of twelve months after being notified of the reservation or, if it has not by then expressed its consent to be bound, until the date on which it does so. It would seem to be in accord with the intent of this paragraph that a successor State should be considered as having a right to object to reservations, whether formulated before or after the date of succession, under the same conditions as to time-limits as are there set out. That a successor State possesses such a right has therefore been assumed by the Special Rapporteur and he has sought to give effect to the right by providing in paragraph 3 (a) that paragraph 2 shall apply also, *mutatis mutandis*, to objections to reservations. It seems necessary, however, to make a special exception in the case of a treaty of the kind dealt with in paragraph 2 of Article 20 of the Vienna Convention. This paragraph provides that

When it appears from the limited number of the negotiating States and the object and purpose of a 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.<sup>148</sup>

If in such a case the predecessor State itself has "accepted" the reservation and all the other parties have done likewise, it would seem inadmissible to allow a successor State to object to a reservation already formulated and accepted and thereby exclude the reserving State from participation in the treaty. If that were allowed, it would be to empower a successor State, in effect, to compel the withdrawal from a treaty of a State which was already a party. In order to rule out any such possibility, paragraph 3(b) specifically provides that in cases falling under Article 20, paragraph 2, of the Vienna Convention no objection may be formulated by a successor State to a reservation which has been accepted by all the parties to the treaty.

<sup>148</sup> *Ibid.*, p. 291.

**Article 10. Succession in respect of an election to be bound by part of a multilateral treaty or of a choice between differing provisions**

1. Except as provided in paragraphs 2 and 3, when the consent of a new State to be bound by a multilateral treaty is established by means of a notification of succession, it shall be considered as maintaining its predecessor's:

- (a) election, in conformity with the treaty, to be bound only by a part of its provisions; or
- (b) choice, in conformity with the treaty, between differing provisions.

2. The new State, when notifying its succession, may declare its own election in respect of parts of the treaty or its own choice between differing provisions under the conditions laid down in the treaty for making any such election or choice.

3. After having notified its succession to the treaty, the new State may exercise, under the same conditions as the other parties, any right provided for in the treaty to withdraw or modify any such election or choice.

*Commentary*

(1) Questions analogous to those dealt with in article 9 may be raised when a treaty permits a State to express its consent to be bound only in respect of part of a treaty or to make a choice between differing provisions; that is, in the situations envisaged in paragraphs 1 and 2 of Article 17 of the Vienna Convention. If its predecessor State has consented to be bound only in respect of part of a treaty or, in consenting to be bound, has declared a choice between differing provisions, what will be the position of a State which notifies its succession to the treaty?

(2) An example of a predecessor State's having consented only to part of a treaty is furnished by the 1949 Convention on Road Traffic, Article 2 (1) of which permits the exclusion of annexes 1 and 2 from the application of the Convention. The United Kingdom's instrument of ratification, deposited in 1957, contained a declaration excluding those annexes.<sup>149</sup> When extending the application of the Convention to Cyprus and Sierra Leone, the United Kingdom specifically made that extension subject to the same conclusions.<sup>150</sup> In the case of Malta, on the other hand, the declaration excluded only annex 1,<sup>151</sup> while in the case of Jamaica the declaration contained a reservation on a certain point but made no allusion to annexes 1 and 2.<sup>152</sup> On becoming independent, these four countries transmitted to the Secretary-General notifications of succession to the Convention. Three of them, Cyprus, Sierra Leone and Malta, accompanied their notifications with declarations reproducing the particular exclusions in force in respect of their territories before independence.<sup>153</sup> Jamaica, on the other hand, to which the exclu-

<sup>149</sup> *Multilateral treaties in respect of which the Secretary-General performs depositary functions* (United Nations publication, Sales No.: E.69.V.5), p. 233.

<sup>150</sup> *Ibid.*, pp. 235 and 237.

<sup>151</sup> *Ibid.*, p. 236.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*, pp. 231-233.

sions had not been applied before independence, did not content herself with simply reproducing the reservation made by the United Kingdom on her behalf; she added to it a declaration excluding annexes 1 and 2.<sup>154</sup>

(3) The 1949 Convention on Road Traffic also furnishes an example of choice of differing provisions: annex 6, section IV(b) permits a party to declare that it will allow "trailer" vehicles only under certain specified conditions, and declarations to that effect were made by the United Kingdom in respect of Cyprus and Sierra Leone.<sup>155</sup> These declarations were reproduced by both countries in their notifications of succession.<sup>156</sup> Malta, in respect of which no such declaration had been made, said nothing on the matter in her notification. Jamaica, on the other hand, in respect of which also no such declaration had been made,<sup>157</sup> added to her notification a declaration in terms similar to those of Cyprus and Sierra Leone.<sup>158</sup>

(4) Another Convention illustrating the question of choice of differing provisions is the 1951 Convention relating to the Status of Refugees, article 1, section B of which permits a choice between "events occurring in Europe before 1 January 1951" or "events occurring in Europe or elsewhere \* before 1 January 1951" for determining the scope of the obligations accepted under the Convention.<sup>159</sup> The United Kingdom's ratification specified the wider form of obligation "in Europe or elsewhere" and in this form the Convention was afterwards extended to Cyprus, Gambia and Jamaica.<sup>160</sup> When in due course these three countries notified the Secretary-General of their succession to the Convention, their notifications maintained the choice of provisions previously in force in respect of their territories.<sup>161</sup> France, in contrast with the United Kingdom, specified the narrower form of obligation "in Europe"; and it was in the narrower form that she extended the Convention to all her dependent territories, twelve of which afterwards transmitted notifications of succession to the Secretary-General.<sup>162</sup> Of these twelve countries, four accompanied their notifications with a declaration that they extended their obligations under the Convention by adopting the wider alternative "in Europe or elsewhere".<sup>163</sup> The other eight countries in the first instance all simply declared themselves "bound by the Convention the application of which had been extended to their territory before the attainment of independence"; and it is clear that they assumed this to mean that France's choice would continue to govern the application of the Convention to their territory. For not long after notifying their succession to the Secretary-General, three<sup>164</sup> of them informed him of the *extension*

of their obligations under the Convention by the adoption of the wider formula; and three others<sup>165</sup> did the same after intervals varying from eighteen months to five years. The remaining two countries<sup>166</sup> have not changed their notifications and are therefore still bound by the more restricted formula.

(5) The Convention on the Stamp Laws in connexion with Bills of Exchange and Promissory Notes (1930) did not itself offer a choice of provisions, but a Protocol to it created an analogous situation by permitting a State to ratify or accede to the Convention in a form limiting the obligation to bills presented or payable elsewhere than in the country concerned. It was subject to this limitation that on various dates between 1934 and 1939 Great Britain extended the Convention to many of her dependent territories.<sup>167</sup> In 1960 Malaysia and in 1966 Malta notified the Secretary-General<sup>168</sup> of their succession to this League of Nations treaty. Their notifications did not make mention of the limitation, but it can hardly be doubted that they intended to continue the application of the treaty in the same form as before independence.

(6) Another treaty giving rise to a case of succession in respect of choice of provisions is the Additional Protocol to the Convention on the Régime of Navigable Waterways of International Concern. Article 1 permitted the obligations of the Protocol to be accepted either "on all navigable waterways" or "on all *naturally* \* navigable waterways". The United Kingdom accepted the first, wider, formula in respect of itself and of most of its dependent territories,<sup>169</sup> including Malta, which subsequently transmitted to the Secretary-General a notification of succession. This indicated that Malta continues to consider itself bound by the Protocol in the form in which it had been extended to the territory by her predecessor.<sup>170</sup>

(7) The General Agreement on Tariffs and Trade also furnishes evidence of practice on this question. Article XIV permits a party to elect to be governed by the provisions of Annex J in lieu of certain provisions of the Article<sup>171</sup> and in 1948 this election was made by the United Kingdom. In 1957, Ghana and the Federation of Malaya became independent and, on the sponsorship of the United Kingdom, both were declared by the Contracting Parties to be deemed to be parties to the Agreement. At the same time the Contracting Parties declared that the United Kingdom's election of Annex J should be deemed to apply to both the newly independent States.<sup>172</sup> A somewhat different, but still analogous, form of election is offered to a party to GATT under Article XXXV, paragraph 1, which provides:

<sup>154</sup> *Ibid.*, p. 232.

<sup>155</sup> *Ibid.*, pp. 235 and 237.

<sup>156</sup> *Ibid.*, pp. 231 and 233.

<sup>157</sup> *Ibid.*, p. 236.

<sup>158</sup> *Ibid.*, p. 232.

<sup>159</sup> *Ibid.*, pp. 77-87.

<sup>160</sup> *Ibid.*, p. 86.

<sup>161</sup> *Ibid.*, pp. 78-81.

<sup>162</sup> *Ibid.*, pp. 77-78.

<sup>163</sup> Algeria, Guinea, Morocco and Tunisia; *ibid.*, p. 78.

<sup>164</sup> Cameroon, Central African Republic and the Togo; *ibid.*, p. 78.

<sup>165</sup> Senegal, Niger and the Ivory Coast; *ibid.*, p. 78.

<sup>166</sup> Congo (Brazzaville) and Dahomey; *ibid.*, p. 78.

<sup>167</sup> *Ibid.*, p. 381.

<sup>168</sup> The functions of the depositary had been transferred to him on the dissolution of the League of Nations.

<sup>169</sup> *Multilateral treaties in respect of which the Secretary-General performs depositary functions* (United Nations publication, Sales No.: E.69.V.5), pp. 392.

<sup>170</sup> *Ibid.*, p. 393.

<sup>171</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, p. 76, document A/CN.4/200 and Add.1 and 2, para. 330.

<sup>172</sup> *Ibid.*, p. 82, para. 362.

This Agreement, or alternatively Article II of this Agreement shall not apply as between any contracting party and any other contracting party if:

- (a) the two contracting parties have not entered into tariff negotiations with each other, and
- (b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application.

When Japan became a party to GATT in 1955, Belgium, France and the United Kingdom all invoked this provision and thereby excluded the application of GATT in their relations with Japan.<sup>173</sup> A large number of the former dependencies of those countries which have since been deemed to be parties to the Agreement have considered themselves as inheriting their predecessor's invocation of Article XXXV, paragraph 1, as against Japan. Although the three predecessor States themselves and some of their successor States have now withdrawn their invocations of that provision, it is still in force for the majority of their successors.<sup>174</sup>

(8) The same general considerations apply here, it is believed, as in the case of reservations.<sup>175</sup> If, therefore, a new State transmits a notification of succession without referring specifically to its predecessor's election or choice, and without declaring an election or choice of its own, then it should be presumed to intend to maintain the treaty in force in respect of its territory on the same basis as it was in force at the date of independence; in other words, on the basis of the election or choice made by its predecessor. The Secretary-General, it is understood, normally seeks to obtain clarification of the new State's intention in this regard when it transmits its notification of succession, and it is no doubt desirable that the State should make its position clear. But this does not always occur, and then it seems both logical and necessary (otherwise, there might be no means of determining which version of the provisions was binding on the new State) to consider the new State as maintaining the election or choice of its predecessor. *Paragraph 1* of the article accordingly states the general rule in terms of a presumption in favour of the maintenance of the predecessor's election or choice.

(9) On the other hand, for reasons similar to those given in the case of reservations, it is thought that a State notifying its succession to a multilateral treaty should have the same rights of election or choice under the terms of the treaty as are allowed to States establishing their consent to be bound by any other procedures. Once succession is conceived of not as an automatic stepping into the shoes of the predecessor but as an option to continue the territory's participation in the treaty by an act of will establishing consent to be bound, there would seem to be little objection to allowing a successor State the same rights of election or choice as it would have under the terms of the treaty if it were becoming a party by *accession*. On purely logical grounds, it is true, a stricter rule could be advocated: A successor State must

either accept the relation to the treaty established for its territory by its predecessor or abandon any claim to have a special position in relation to the treaty. But State practice seems to have been based on pragmatic considerations rather than on rigorous logic. Moreover, continuity of participation is in the general interest of the parties as a whole, not merely of the successor State, while considerations of equality and self-determination seem to justify a rule which would allow the same right of election or choice to a successor State as to other parties. *Paragraph 2* of the article accordingly permits a State, when notifying its succession, to exercise any rights of election or choice provided for in the treaty under the same conditions as the other parties.

(10) Treaties which accord a right to elect to be bound only by part of a treaty or to choose between differing provisions not infrequently provide for a power afterwards to modify the election or choice.<sup>176</sup> Indeed, where the election or choice has the effect of limiting the scope of the State's obligations under the treaty, a power to cancel the limitation by withdrawing the election is surely to be implied. As to a successor State, when it has established itself as a party to the treaty in its own right, it must clearly be considered as having the same right as any other party to withdraw or modify an election or choice in force in respect of its territory; and *paragraph 3* of the article so provides.

#### *Article 11. Procedure for notifying succession in respect of a multilateral treaty*

1. A notification of succession in respect of a multilateral treaty made under article 7 or 8 shall be in writing and shall be transmitted by the new State to the depositary, or if there is no depositary, to all the parties or, as the case may be, to all the contracting States.

2. If the notification is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State transmitting it may be called upon to produce full powers.

#### *Commentary*

(1) The present article concerns the procedure through which a new State may exercise its right to establish itself as a party to a multilateral treaty by way of "succession". The letter addressed by the Secretary-General to new States inquiring as to their intentions concerning treaties of which he is the depositary contains the following indication regarding the procedure:

Under this practice, the new States generally acknowledge themselves to be bound by such treaties *through a formal notification addressed to the Secretary-General by the Head of the State, or Government or by the Minister for Foreign Affairs*.\*<sup>177</sup>

<sup>176</sup> E.g., article 1, B (2) of the 1951 Convention relating to the Status of Refugees (United Nations, *Treaty Series*, vol. 189, p. 154); article 2 (2) of the 1949 Convention on Road Traffic (*ibid.*, vol. 125, p. 24).

<sup>177</sup> See *Yearbook of the International Law Commission, 1962*, vol. II, p. 122, document A/CN.4/150, para. 134.

<sup>173</sup> *Ibid.*, p. 75, para. 328 and p. 82, para. 359.

<sup>174</sup> *Ibid.*, p. 82, paras. 359-361.

<sup>175</sup> See paragraph (12) of the commentary to article 9.

However, although the notifications have for the most part been signed by the Head of State or Government or by the Minister for Foreign Affairs, it appears that a few States have sent communications signed by an official of the Foreign Ministry or by the Head of its Permanent Mission to the United Nations, acting under instructions,<sup>178</sup> and that these have been accepted as sufficient by the Secretary-General.

(2) Under the depositary practice of the Secretary-General, therefore, the deposit of a formal instrument, such as would be required for ratification or accession, is not considered necessary. All that is needed is a written notification in which the State expresses its will that its territory should continue to be bound by the treaty. Moreover, although the Secretary-General considers it desirable that the notification should emanate from the Head of State or Government or from the Minister for Foreign Affairs, any signature which sufficiently evidences the authority of the State to make the notification is considered adequate.

(3) The depositary practice of the Swiss Government also appears to accept as adequate any communication which expresses authoritatively the will of a new State to continue to be bound by the treaty. Thus, in the case of the several Conventions for the Protection of Literary and Artistic Works of which it is the depositary, it has accepted the communication of a "declaration of continuity" as the normal procedure for a new State to adopt today in exercising its right to become a party by "succession".<sup>179</sup> Similarly in the case of the Geneva Humanitarian Conventions of 1864, 1906, 1929 and 1949, of which the Swiss Federal Council is the depositary, the communication of a "declaration of continuity" has been the normal procedure through which new States have become parties by "succession".<sup>180</sup> Any other formula, such as "declaration of application" or "declaration of continuance of application", is accepted by the Swiss Federal Council as sufficient, provided that the new State's intention to consider itself as continuing to be bound by the treaty is clear. The Swiss Federal Council also accepts the communication of a declaration of continuity in almost any form, provided that it emanates from the competent authorities of the State: for example, a Note, a letter or even a cable; and the signature not only of a Head of State or Government and Foreign Minister but also of an authorized diplomatic representative is considered by it as sufficient evidence of authority to make the declaration on behalf of the State. Such declarations of continuity, on being received by the Swiss Federal Council, are registered by it with the United Nations Secretariat in the same way as notifications of "accession".

(4) The practice of other depositaries appears to be on similar lines. The practice of the United States, for example, has been to recognize the right of newly independent

States "... to declare themselves bound uninterruptedly by multilateral treaties of a non-organizational type concluded in their behalf by the parent State before the new State emerged to full sovereignty."<sup>181</sup> Again, as depositary of the Hague Conventions of 1899 and 1907 for the Pacific Settlement of Disputes, the Netherlands appears to have accepted as effective any expression of the new State's will to be considered as a party communicated by it in a diplomatic Note or letter.<sup>182</sup>

(5) In some instances, it seems, the Swiss Government has accepted a notification not from the new State itself but from its predecessor "parent" State. It did so before the Second World War when in 1928 the United Kingdom notified to it the desire of Australia, British India, Canada, New Zealand and South Africa to be considered as parties to the Berne Convention for the Protection of Literary and Artistic Works;<sup>183</sup> and in 1937 when the United Kingdom notified to it the participation of Burma in the Geneva Humanitarian Conventions of 1929.<sup>184</sup> It has also done so in one instance since the Second World War: namely, in 1949 when it accepted as sufficient a communication from the Netherlands Government expressing the view of that Government that the new Republic of Indonesia should be considered as a member of the Berne Union.

(6) The cases of the former British Dominions were very particular owing both to the circumstances of their emergence to independence and to their special relation to the British Crown at the time in question. Accordingly, in the view of the Special Rapporteur, it would be quite unjustified to draw any general conclusion from these cases that the notification of a "parent State" is *as such* sufficient evidence of a new State's will to be considered as continuing to be bound by a treaty. Clearly, a new State in the early days of its independence may find it convenient to employ the diplomatic services of its "parent State" for the purpose of making a communication to a depositary.<sup>185</sup> But every consideration of principle—and not least the principles of independence and self-determination—demands that the act expressing a new State's will to be considered a party to a treaty in the capacity of a successor State should be that of the new State, not of its "parent". In other words, a "notification of succession", in order to be effective, must either emanate directly from the competent authorities of the new State or be accompanied by evidence that it is communicated to the depositary expressly by direction of those authorities. If the Swiss Government's acceptance of the Netherlands Government's communication regarding Indonesia's succession to the Berne Convention, mentioned in the preceding paragraph, is to be understood

<sup>181</sup> See United Nations Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No. E/F.68.V.5), p. 224.

<sup>182</sup> See *Yearbook of the International Law Commission, 1968*, vol. III, m. 31, document A/CN.4/200 and Add.1 and 2, para. 124.

<sup>183</sup> *Ibid.*, p. 12, paras. 22-23.

<sup>184</sup> Burma, although separated from India, was not then an independent State; but it is treated as having become a party to the Conventions in 1937 (*ibid.*, p. 39, para. 160 and p. 50, para. 216).

<sup>185</sup> This was so in the case of the former British Dominions.

<sup>178</sup> *Ibid.*, p. 125, para. 162.

<sup>179</sup> *Ibid.*, 1968, vol. II, p. 22, document A/CN.4/200 and Add.1 and 2, para. 72.

<sup>180</sup> *Ibid.*, p. 50, para. 215. The Geneva Humanitarian Conventions, it should be pointed out, also allow simplified forms of "accession" (*ibid.*, para. 214).

as based upon a different view, it does not seem to the Special Rapporteur a precedent which should be endorsed by the Commission. The very fact that the Republic of Indonesia took early action to denounce the Convention confirms the desirability of requiring a notification of succession to emanate from the competent authorities of the new State.<sup>186</sup>

(7) A new State may notify its succession in respect of a treaty not only under article 7, when its predecessor is a "party" to the treaty at the date of succession, but also under article 8, when its predecessor is no more than a "contracting"<sup>187</sup> or signatory State. For this reason a "notification of succession" for the purposes of the present draft is defined in the new sub-paragraph (f) proposed for inclusion in article 1 as "... any notification or communication made by a successor State whereby on the basis of its predecessor's status as a party, contracting State, or signatory to a multilateral treaty, it expresses its consent to be bound by the treaty." This definition assumes that the deposit of a formal instrument of succession is not required, and that assumption is fully confirmed by the analysis of the practice which has been given in the preceding paragraphs of the present commentary. The question therefore is: what are the minimum formal requirements with which a notification of succession should comply? The two cases are not exactly parallel, but the Commission may, perhaps, find some guidance in article 67 of the Vienna Convention, which contains provisions regarding the instruments required for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty. That article requires that the notification of any claim to invoke a ground of invalidity, termination, etc. shall be in writing (paragraph 1); that any act declaring invalid, terminating, etc. a treaty shall be carried out through an instrument communicated to the other parties; and that if the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the production of full powers may be called for (paragraph 2). In the present instance the "notification of succession" is itself under the existing practice the instrument normally used for establishing the will of a new State to be bound by the treaty. Subject to this difference, the provisions of article 67 of the Vienna Convention can, it is suggested, serve as a useful model for the present article.

(8) *Paragraph 1* of the present article accordingly provides that a notification of succession, whether under article 7 or article 8, shall be in writing and shall be transmitted by the new State to the depositary, or if there is no depositary, to all the parties or, as the case may be, to all the contracting States. *Paragraph 2* then adds that, if the notification is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State transmitting it may be called upon to produce full powers.

<sup>186</sup> *Ibid.*, pp. 13-14, paras. 26-31.

<sup>187</sup> For the use of the terms "contracting State" and "party" see article 2, paragraph 1 (f) and (g), of the Vienna Convention [Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (United Nations publication, Sales No.: E.70.V.5), p. 289].

### *Article 12. Legal effects of a notification of succession in respect of a multilateral treaty*

1. A notification of succession establishes the consent of a new State to be bound by a multilateral treaty:

- (a) if there is a depositary, upon its receipt by the depositary;
- (b) if there is no depositary, upon its receipt by each party or, as the case may be, contracting State.

2. When, in conformity with paragraph 1, the consent of a State to be bound by a treaty is established:

- (a) on a date before the treaty has come into force, the treaty enters into force in accordance with Article 24, paragraphs 1 and 2, of the Vienna Convention and article 8, paragraph 2, of the present articles;
- (b) on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.

3. In a case falling under paragraph 2 (b), the provisions of the treaty bind the new State in relation to any act or fact which takes place or any situation which exists after the date of the succession, unless an intention that they should be binding upon it from an earlier date appears from the treaty or the notification or is otherwise established.

#### *Commentary*

(1) The present article deals with the legal effects of a notification of succession in regard to which four articles of the Vienna Convention have particularly to be borne in mind: Article 78, concerning notifications and communications; Article 16, concerning the deposit of instruments of ratification, acceptance, approval or accession; Article 24, concerning entry into force; and Article 28, concerning the non-retroactivity of treaties.

(2) Paragraph (a) of article 78 of the Vienna Convention in substance provides that any notification or communication to be made by any State under the Convention is to be transmitted to the depositary, if there is one, and, if not, direct to the States for which it is intended. This purely procedural provision is already reflected in article 11 of the present draft and needs no further statement here. Paragraph (b) of article 78 then provides that any such notification or communication is to "be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary." Paragraph (c), however, adds that, if transmitted to a depositary, it is to "... be considered as received by the State for which it was intended only when the latter State has been informed by the depositary..." Under these two paragraphs, therefore, the legal nexus between the notifying State and any other party or, as the case may be, contracting State is not finally established until the latter has itself received the notification or been informed of it by the depositary.

(3) Article 16 of the Vienna Convention, on the other hand, states that, unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by

a treaty upon their deposit with the depositary: or upon their notification to the contracting States or to the depositary, if so agreed. The effect of these provisions, as the Commission's commentary to the article (article 13 of its draft) underlines, is that under the procedure of "deposit" the consent to be bound is established at once upon the deposit of the instrument with the depositary; and that the same is true under the procedure of "notification" where the treaty in question provides for the notification to be made to the depositary. On the other hand, as the Commission's commentary again underlines, where the treaty provides for notification to the other contracting States, article 78 (article 73 of the Commission's draft) applies and the consent to be bound is established only upon the receipt of the notification by the contracting State concerned.

(4) In the present instance, the right to notify succession does not derive from any stipulation in the treaty, except in the comparatively few cases dealt with in article 5 of the present draft. It derives from customary law. Nevertheless, in every case the multilateral treaty in question will be one which either does or does not have a depositary. Furthermore, a notification of succession is an act similar in kind to the deposit or notification of an instrument. Accordingly, where a notification of succession is made in respect of a treaty for which there is a depositary, it is thought that the rules laid down in article 16, paragraphs (b) and (c), of the Vienna Convention should be applied by analogy. In short, the notification should be considered as establishing the consent of the successor State to be bound upon its receipt by the depositary. On the other hand, where there is no depositary, it would seem natural to apply by analogy the rule in article 78, paragraph (b), of the Vienna Convention; and in that event the legal nexus between the notifying State and any other interested State will not be established until the receipt of the notification by the latter.

(5) Paragraph 1 of the present article, therefore, provides that a notification of succession establishes the consent of the new State to be bound by a multilateral treaty upon its receipt by the depositary or, if there is no depositary, upon its receipt by the party or contracting State concerned.

(6) The moment of the entry into force of a multilateral treaty with respect to a State is not necessarily the same as the moment of the establishment of that State's consent to be bound; and it is on this point that reference has to be made to article 24 of the Vienna Convention. Paragraphs 1 and 2 of that article deal with the entry into force of the treaty itself. They lay down that this occurs in such manner and upon such date as the treaty may provide or the negotiating States may agree or, in the absence of any such provision or agreement, as soon as the consent of all the negotiating States to be bound has been established. Paragraph 3 adds that, after the treaty itself has once come into force, the date of its entry into force for any further individual State coincides with the date on which the latter establishes its consent to be bound, unless the treaty otherwise provides. Some multilateral treaties contemplate that they shall enter into force immediately upon the deposit (or notification) of a prescribed number of ratifications, accessions etc.,

and that afterwards they shall enter into force for any further individual State immediately upon deposit (or notification) of its instrument of ratification, accession etc. But today it is very common for a treaty to provide for a delay of thirty days or of three, or even six, months after the deposit (or notification) of the last of the number of instruments prescribed for the treaty's entry into force; and for a delay of the same period for the subsequent entry into force of the treaty for individual States. This is, indeed, the case with the great majority of the multilateral treaties of which the Secretary-General is the depositary—a category of treaties which have quite frequently been the subject of notifications of succession. The question arises, therefore, whether a treaty provision prescribing such a period of delay for instruments of ratification, accession etc., should be considered as extending by analogy to notifications of succession.

(7) The Special Rapporteur has not traced any indication in the published treaty practice of the application of such delaying provisions to notifications of succession by analogy. The treaty practice appears rather to emphasize that, on transmitting a notification of succession, a new State is to be considered as having been a party to the treaty from the date of independence. Thus, the letter sent by the Secretary-General to new States in his capacity as depositary of multilateral treaties makes no reference to the periods of delay contained in some of the treaties mentioned in his letter. It simply observes:

... the new States generally acknowledge themselves to be bound by such treaties through a formal notification addressed to the Secretary-General... The effect of such notification, which the Secretary-General, in the exercise of his depositary functions, communicates to all interested States, is to consider the new State as a party in its own name to the treaty concerned as of the date of independence, thus preserving the continuity of the application of the treaty in its territory...<sup>188</sup>

That periods of delay are not treated as relevant to notifications of succession in the depositary practice of the Secretary-General is confirmed by the Secretariat. It therefore seems as if the notion of continuity, inherent in "succession", has been regarded as excluding the application of a provision imposing a period of delay on entry into force. On the other side, it could be said that, as article 28 of the Vienna Convention clearly assumes,<sup>189</sup> the date of the entry into force of a treaty and the date from which its provisions are to apply need not coincide. Nevertheless, notifications of succession, *ex hypothesi*, presuppose a relation between the territory in question and the treaty that has already been established by the predecessor State, and it appears justifiable for that reason to regard them as not falling within the general intention of the negotiating States to make entry into force subject to a period of delay. Moreover, as previously stressed, the right to notify succession normally derives not from the treaty itself but from customary law. Accord-

<sup>188</sup> See *Yearbook of the International Law Commission, 1962*, vol. II, p. 122, document A/CN.4/150, para. 134.

<sup>189</sup> Article 28 states the principle of the "non-retroactivity of treaties" only as the general rule applicable in the absence of a different intention.

ingly, the Special Rapporteur thinks that the Commission should endorse the existing practice under which notifications of succession have not been considered as subject to treaty provisions imposing periods of delay on entry into force. Of course, if in a case falling under article 5 the treaty should not only provide in advance for notifications of succession but also prescribe a period of delay before entry into force of the treaty, the treaty provision would necessarily prevail.

(8) In the light of these considerations, and of the provisions of Article 24 of the Vienna Convention, *paragraph 2 (a)* of the present article lays down that in the case of a notification of succession made before the treaty has come into force, the treaty enters into force in accordance with Article 24, paragraphs 1 and 2 of the Vienna Convention and article 8, paragraph 2 of the present articles. In other words, entry into force is then to take place in accordance with the relevant provisions of the Vienna Convention as supplemented by the rule in the present articles that a State which makes a notification of succession is to be reckoned as a "party" for the purpose of treaty clauses prescribing a specified number of parties as necessary for entry into force. *Paragraph 2 (b)* of the present article further lays down that in the case of a notification of succession made after the treaty has come into force, the treaty enters into force *for the notifying State* on the date when its consent to be bound is established (i.e. the date of the receipt of the notification by the depositary or by the other parties). In other words, a rule analogous to that in article 24, paragraph 3, of the Vienna Convention is to apply in these cases.

(9) There remains the question whether, in the case of a notification of succession, the provisions of the treaty bind the new State only in relation to acts, facts and situations existing at or arising subsequently to the date of entry into force or bind it as from the date of independence. Article 28 of the Vienna Convention lays down the principle of non-retroactivity as the general rule to be applied in the law of treaties:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.<sup>190</sup>

However, as already noted in paragraph 7 of this commentary, the depositary practice of the Secretary-General indicates that a new State, which notifies its succession to a treaty, is considered as a party to the treaty as from the date of independence. The Secretary-General would therefore appear to regard a notification of succession either as a case where "a different intention is otherwise established" or as one constituting an exception to the general rule. An examination of the practice confirms that this is the generally accepted view of the matter.

(10) The relevant passage from the Secretary-General's

<sup>190</sup> *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 293.

letter to new States has been reproduced in paragraph 7 above. The Secretariat Memorandum "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary" contains other passages to the same effect,<sup>191</sup> and in its final paragraph it concludes:

In general, new States that have recognized that they continue to be bound by treaties have considered themselves bound from the time of the attainment of independence. With regard to international labour conventions, however, it is the custom for new States to consider themselves bound only as of the date on which they are admitted to the International Labour Organization.<sup>192</sup>

The latter statement regarding labour conventions needs a word of explanation in that it does not sufficiently distinguish between the date of the entry into force of a convention for a new State and the temporal scope of its provisions once it has entered into force. Notifications of succession to labour conventions take the form of declarations of continuity which are made in connexion with the new State's acceptance of or admission to membership of the ILO; and the date of their registration with the United Nations Secretariat is that of their acquisition of membership. Equally, the date of the entry into force of the convention for the new State is the date of its acquisition of membership since that is the date on which its declaration of continuity takes effect and establishes its consent to be bound by the convention. But the fact remains that in the practice of the ILO a State which makes a declaration of continuity is thereafter considered as a party to the convention concerned *as from the date of its independence*.<sup>193</sup>

(11) A similar view of the matter seems to be taken in regard to the multilateral treaties of which the Swiss Government is the depositary. Thus, in the case of the successive Conventions for the Protection of Literary and Artistic Works a new State which transmits a notification of succession is regarded as continuously bound by the Convention as from the date of independence. Indeed, it seems that the principle followed is that the Convention is regarded as applying uninterruptedly to the successor State as from the date when it was extended to its territory by the predecessor State.<sup>194</sup> Ceylon and Cyprus, for example, are listed as having become parties to the Rome Act on 1 October 1931, the date of its extension to these countries by Great Britain. By contrast, when a new State establishes its consent to be bound by means of *accession*, the principle of non-retroactivity is applied, and it is regarded as a party only from the date on which the instrument of accession takes effect.<sup>195</sup> The retroactive

<sup>191</sup> See *Yearbook of the International Law Commission, 1962*, vol. II, pp. 118 and 122, document A/CN.4/150, paras. 103 and 133.

<sup>192</sup> *Ibid.*, p. 126, para. 164.

<sup>193</sup> That this explanation of the practice of the ILO is correct is confirmed by information supplied by the Secretariat.

<sup>194</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, pp. 22-23, document A/CN.4/200 and Add.1 and 2, paras. 78-82.

<sup>195</sup> One month after the deposit of the instrument (*ibid.*, p. 23, para. 81).

operation of a notification of succession is also recognized by the Swiss Federal Council in the case of the Geneva Humanitarian Conventions. The rule now followed by the Swiss Federal Council is that a new State which transmits a notification of succession is to be considered as a contracting party from the date on which it attained independence; and it now usually states this when registering the notification with the United Nations Secretariat.<sup>196</sup>

(12) The Netherlands Government, as depositary of the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes, appears to adopt a position close to that of the Swiss Government in regard to the Conventions for the Protection of Literary and Artistic Works. In its table of signatures, ratifications, accessions etc., it records successor States as parties not from the dates of their own independence but from that of their predecessor State's ratification or accession.<sup>197</sup> The depositary practice of the United States, as set out in *Materials on Succession of States*, is to recognize the right of new States "to declare themselves bound uninterruptedly by multilateral treaties of a non-organizational type concluded on their behalf by the parent State . . ." <sup>198</sup> Giving examples of its practice, the United States there says with reference to the International Air Services Transit Agreement (1944): "Several newly independent States have stated they consider themselves bound by earlier acceptance by the parent State, either from the date of such prior acceptance or from the date of attainment of independence."<sup>199</sup> It mentions Ceylon and Malaya as cases where new States have explicitly taken the position that they considered themselves as parties to the Agreement as from the date of its acceptance by their predecessor, the United Kingdom;<sup>200</sup> and it lists Pakistan as a case where the new State was considered to have become a party as from the date of independence—the date of its partition from India.<sup>201</sup>

(13) The practice is therefore consistent in applying the principles of continuity and retroactivity in cases of notification of succession, but shows variation in sometimes taking the date of independence and sometimes the date when the predecessor State became a party to the treaty as the relevant date. The more general practice, and the settled practice of the Secretary-General as depositary of a large number of multilateral treaties, is to consider a State which transmits a notification of succession as a party to the treaty from the date of independence; that is, from the moment when the "succession" occurred. This practice seems logical since it is at this date that the new State attains its statehood and acquires its international responsibility for the territory to which the succession relates. The concepts of succession and continuity are fully satisfied if a new State's notification

of succession is held to relate back to the date of independence; for the result is that the new State is considered to have assumed from that date international responsibility for the performance of the treaty in respect of the territory. To relate back the notification beyond that date would be to make the new State responsible internationally for the *defaults* of its predecessor in the performance of the treaty prior to the succession. This seems excessive, and it is difficult to believe that the new States which have expressed themselves as becoming parties from the date of their predecessor's notification, accession, acceptance or approval of the treaty intended such a result. True, these new States are, for the most part, States which had entered into a "devolution agreement" with their predecessor State.<sup>202</sup> But it is equally difficult to believe that, by entering into a devolution agreement in however wide terms,<sup>203</sup> they intended to do more than assume thenceforth in respect of the territory the international responsibility for the future performance of the treaty which had previously attached to their predecessor.

(14) The expression used by depositaries and by some States, "is considered as a party to the treaty from the date of independence [or of the predecessor's ratification, accession, etc.]," even if convenient, tends to confuse the issue. As already pointed out, the date upon which the new State becomes a party to the treaty is the date upon which it establishes its consent to be bound<sup>204</sup> by communicating its notification of succession. Indeed, in the cases where the notification is related back to the predecessor's ratification it is a pure fiction to speak of a new State's being considered as a party to a treaty at a time when it did not even exist as a State. The relevant point is not the date when the new State is to be considered as having become a party but the date by reference to which the temporal scope of its obligations under the treaty is to be determined. If this date is put at the date of independence, continuity is amply secured. The new State is then considered as wholly responsible for the performance of the treaty in respect of the territory, and this responsibility necessarily covers not only its own acts and facts or situations arising after independence *but also the continuance in existence after independence of any situation which arose prior to independence*. This responsibility does not, on the other hand, cover any act or fact which took place or any situation which ceased to exist *prior to independence*.

(15) On the basis, and adapting the language of article 28 of the Vienna Convention to the different case of the retroactivity of a notification of succession, *paragraph 3* of the present article lays down as the general rule that "the provisions of the treaty bind the new State in relation to any act or fact which takes place or any situation

<sup>196</sup> *Ibid.*, pp. 51-52, paras. 219-224. Only in one early case (Transjordan), has the Swiss Federal Council treated the date of the notification as the date from which the provisions of the Convention bound the new State (*ibid.*, para. 223).

<sup>197</sup> *Ibid.*, p. 31, para. 125.

<sup>198</sup> United Nations publication, Sales No.: E/F.68.V.5, p. 224.

<sup>199</sup> *Ibid.*

<sup>200</sup> *Ibid.*, p. 225.

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

<sup>202</sup> For example, Ceylon and Cyprus.

<sup>203</sup> The usual formula found in United Kingdom devolution agreements reads: "All international obligations and responsibilities of the Government of the United Kingdom which arise from any valid international instrument shall henceforth, in so far as such instrument may be held to have application to [the new State], be assumed by the Government of [the new State]."

<sup>204</sup> Except in cases where the treaty has not yet entered into force, but those cases do not come into consideration in the present connexion.

which exists after the date of the succession". The Vienna Convention, although stating the principle of non-retroactivity as the general rule, treated its application to a particular treaty as always a matter of intention. A treaty may, therefore, be one which by intention of the parties does bind the parties in respect of matters prior to its entry into force; and it seems logical to make the present rule also give way to a different intention expressed in the treaty or otherwise established. On the other hand, unless the concept of "succession" and the principle of continuity are to be set aside, it does not seem appropriate to admit the possibility of a new State's expressing an intention in its notification that the treaty should bind it only in respect of matters arising after a date *later than that* of its independence. Paragraph 3 therefore contemplates the possibility only of a date *earlier* than the date of independence.

**Note on the question of placing a time-limit  
on the exercise of the right to notify succession**

(1) Article 7 recognizes the right of a new State to notify its succession in respect of a multilateral treaty without specifying any time-limit for the exercise of the right. Nevertheless, it will be necessary for the Commission at some stage to consider whether the right to notify succession should be made exercisable only within a certain period of time after the date of independence—after the date when the succession occurred. The Special Rapporteur has found no trace in the practice relating to multilateral treaties of any such time-limits being imposed; and, according to information supplied by the Secretariat, one State<sup>205</sup> has recently notified its succession in respect of two League of Nations Treaties nearly ten years after its independence. The practice suggests rather that in the case of multilateral treaties the right to notify succession has been viewed as analogous to a right to ratify a treaty which has been signed or to deposit an instrument of accession, acceptance or approval. Unless the treaty provides otherwise, these rights are not under the general law of treaties regarded as subject to any time-limit. This view of the matter may also be said to commend itself because it tends to promote the widest possible participation in multilateral treaties.

<sup>205</sup> Cyprus, independent as from 16 August 1960, made in 1970 notifications of succession, received by the Secretary-General on 27 March 1970, in respect of the "Convention on Certain Questions relating to the Conflict of Nationality Laws" and the "Protocol relating to Military Obligations in Certain Cases of Double Nationality". Both the Convention and the Protocol were done at The Hague on 12 April 1930. The Convention, in force since 1 July 1937, and the Protocol, in force since 25 May 1937, were ratified by the United Kingdom on 6 April 1934 and 14 January 1932, respectively. The United Kingdom's ratification was made on behalf of "Great Britain and Northern Ireland and all parts of the British Empire which are not separate Members of the League of Nations". See *Multilateral treaties in respect of which the Secretary-General performs depositary functions* (United Nations publication, Sales No.: E.69.V.5), pp. 365 and 367.

(2) On the other side, it may be urged that a very long interval between the date of the succession and the exercise of the right to claim the status of successor State is not very consistent with the notion of "succession" which implies a certain measure of continuity. Moreover, the longer the interval, the more problems may arise in practice in the application of the principle of retroactivity provided for in article 12, paragraph 3. There may be no great difficulty in considering a notification of succession as operating to bind the new State in respect of a date two, three, four or even five years previously, but more difficulty when the period is much longer.

(3) In this connexion it is of interest to recall the unilateral declarations of a number of new States which concern the provisional application of their predecessor's treaties and which are the subject of article 4. These declarations contemplate a transitional period of provisional application during which the predecessor's treaties are to be reviewed and the new State is to decide whether or not to continue them. Some of these declarations fix a period of two years for the review of all the treaties, bilateral and multilateral; others fix that period for bilateral treaties and leave the period for multilateral treaties indefinite. Many have found the period of two years insufficient and have extended it for a further period or periods of two years. Some declarations specifically state that at the end of the period of review, or of any further period extending it, any treaties which the new State has not taken steps to continue and which are not to be considered as surviving in any event under customary law are to be regarded as terminated.

(4) The practice in regard to unilateral declarations suggests two points as relevant for the Commission's consideration in reaching a conclusion on this question. First, the number of treaties, bilateral and multilateral, of its predecessor which confront a new State at its independence assumes formidable proportions, so that their review may necessarily last a substantial period of time. This is the more true in that a new State in its early years is normally occupied with many other urgent matters. Secondly, a new State may by express declaration or otherwise indicate unequivocally that it renounces its right to become a party to a treaty by succession. Indeed, one way in which this frequently occurs is when a multilateral treaty is also open to accession by the new State and it elects to accede rather than to notify its succession. Clearly, in that event the new State by implication renounces its right to become a party *by succession*.

(5) In the case of bilateral treaties the question of the loss of the right to invoke the status of a successor State is likely to prove a more complex problem requiring detailed examination by the Commission.

(6) In the light of the various considerations set out above, the Special Rapporteur suggests that for the time being no provision concerning a time-limit should be included in the draft articles dealing with multilateral treaties; and that the question should be reviewed at a later stage as part of a general consideration of the problem of the loss of the right to invoke the status of a successor State as a means of becoming a party to a treaty.

## DOCUMENT A/CN.4/225

## Succession of States to multilateral treaties; seventh study prepared by the Secretariat \*

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\* For the first five studies prepared by the Secretariat, see *Yearbook of the International Law Commission*, 1968, vol. II, p. 1, document A/CN.4/200 and Add.1 and 2; for the sixth study, *ibid.*, 1969, vol. II, p. 23, document A/CN.4/210.

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ABBREVIATIONS

GATT	General Agreement on Tariffs and Trade
ITU	International Telecommunication Union

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## Note

The present document contains the seventh study of the series "Succession of States to multilateral treaties". It relates to the 1932 Madrid and 1947 Atlantic City International Telecommunication Conventions and subsequent revised Conventions and Telegraph, Telephone, Radio and Additional Radio Regulations concluded within ITU. 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 six studies of the series are the following: "International Union for the Protection of Literary and Artistic Works: Berne Convention of 1866 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), "The General Agreement on Tariffs and Trade (GATT) and its subsidiary instruments" (Study V) and "Food and Agriculture Organization of the United Nations: Constitution and multilateral conventions and agreements concluded within the Organization and deposited with its Director-General" (Study VI).

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 or of its authorities, or concerning the delimitation of its frontiers.

## VII. International Telecommunication Union: 1932 Madrid and 1947 Atlantic City International Telecommunication Conventions and subsequent revised conventions and Telegraph, Telephone, Radio and Additional Radio Regulations \*

### A. The Union, the Conventions and the Administrative Regulations

#### 1. ESTABLISHMENT, PURPOSES AND ORGANS OF THE UNION

##### 1. The International Telegraph Conference<sup>1</sup> and the

\* The present study covers the period prior to November 1969.

<sup>1</sup> The Madrid International Telegraph Conference was the 13th International Telegraph Conference. It was preceded by the Conference of Paris (1865), Vienna (1868), Rome (1871-1872), St. Petersburg (1875), London (1879), Berlin (1885), Paris (1890), Budapest (1896), London (1903), Lisbon (1908), Paris (1925) and Brussels (1928). After the St. Petersburg Conference (1875) all the Telegraph Conferences had been "administrative conferences". The Madrid Conference was, therefore, the fifth "diplomatic telegraph conference". The 1885 Berlin Conference added to the Regulations some general paragraphs concerning telephone which were expanded by the 1903 London Conference.

International Radiotelegraph Conference<sup>2</sup> met simultaneously in Madrid<sup>3</sup> from 3 September to 10 December and from 3 September to 9 December 1932 respectively. As a result of the work of both Conferences,<sup>4</sup> the existing International Telegraph<sup>5</sup> and International Radiotelegraph<sup>6</sup> Conventions were amalgamated in a single Convention: the International Telecommunication Convention, signed at Madrid on 9 December 1932.<sup>7</sup> The Madrid International Telecommunication Convention established the International Telecommunication Union which replaced the International Telegraph Union<sup>8</sup> and the commonly called "International Radiotelegraph Union".<sup>9</sup> After the Second World War, the 1947 Atlantic City Telecommunication Conference revised the Madrid Convention and introduced major changes in the organization of the Union, embodying them in the Atlantic City Convention. Thereafter, the Convention has been successively revised by the Plenipotentiary Conference held at Buenos Aires (1952), Geneva (1959) and Montreux (1965), but the changes introduced by those Conferences in the Convention as adopted by the 1947 Atlantic City Conference have been relatively minor. Since its reorganization by the Atlantic City Convention, the

<sup>2</sup> The Madrid International Radiotelegraph Conference was the 4th International Radiotelegraph Conference. As the three preceding Conferences of Berlin (1906), London (1912) and Washington (1927), the Madrid International Radiotelegraph Conference was a "diplomatic conference".

<sup>3</sup> At the Paris International Telegraph Conference (1925) the opinion was expressed that it would be worth while to explore the possibility of merging the two Unions, as was the hope that the Radiotelegraph Conference, scheduled to meet in Washington, would make a similar recommendation. The Washington International Radiotelegraph Conference (1927) agreed to such merging to eliminate duplications and adopted a resolution calling on contracting Governments to examine the combining of the two Conventions. It was also agreed to accept an invitation from the Spanish Government and to meet in Madrid in 1932. The Brussels International Telegraph Conference (1928) agreed to hold the next Telegraph Conference at the same time and place as the next Radiotelegraph Conference.

<sup>4</sup> The two Conferences were juridically separate. A liaison was achieved by means of joint meetings of the two Plenary Assemblies and by the establishment of a Joint Convention Committee and a Joint Committee on the Right to Vote. For the consideration of matters relating to the service regulations, each Conference held separate meetings of its respective Plenary Assemblies and Committees [see G. A. Coddington, Jr., *The International Telecommunication Union: An experiment in International Cooperation* (Leiden, E. J. Brill, 1952), pp. 131-132].

<sup>5</sup> International Telegraph Conventions of Paris (1865), Vienna (1868), Rome (1872) and St. Petersburg (1875) (League of Nations, *Treaty Series*, vol. LVII, p. 201).

<sup>6</sup> International Radiotelegraph Conventions of Berlin (1906) (G. F. de Martens, ed., *Nouveau recueil général de traités* (Leipzig, Librairie Dieterich, 1910), 3rd series, t. III, p. 147), London (1912) (League of Nations, *Treaty Series*, vol. I, p. 135) and Washington (1927) (*ibid.*, vol. LXXXIV, p. 97).

<sup>7</sup> League of Nations, *Treaty Series*, vol. CLI, p. 5.

<sup>8</sup> Articles 1 and 8 of the Madrid Telecommunication Convention. The "International Telegraph Union" was established by the Paris International Telegraph Convention of 1865.

<sup>9</sup> Article 8 of the Madrid Telecommunication Convention. The term "International Radiotelegraph Union" was never used in International Radiotelegraph Conventions, but it was commonly employed before the Madrid Telecommunication Convention to denote the group of countries signatory or adherent to the various Radiotelegraph Conventions, probably because the organization established by those Conventions resembled closely that of the International Telegraph Union.

International Telecommunication Union became a specialized agency of the United Nations, an Agreement to that effect having been concluded between both Organizations.<sup>10</sup>

2. The constituent instruments which have governed the International Telecommunication Union since its establishment are, therefore, the following:

	<i>In force as from</i>
(1) Convention signed at Madrid on 9 December 1932 <sup>11</sup>	1 January 1934
(2) Convention signed at Atlantic City on 2 October 1947 <sup>12</sup>	1 January 1949
(3) Convention signed at Buenos Aires on 22 December 1952 <sup>13</sup>	1 January 1954
(4) Convention signed at Geneva on 21 December 1959 <sup>14</sup>	1 January 1961
(5) Convention signed at Montreux on 12 November 1965 <sup>15</sup>	1 January 1967

The dates of entry into force are indicated in the final provisions of the Conventions themselves. At the date of its entry into force, each Convention became effective "between countries, territories or groups of territories, in respect of which instruments of ratification or accession have been deposited before that date". Every new Convention abrogates and replaces "in relations between the Contracting Governments" the former one.<sup>16</sup> The Telecommunication Conventions laid down the principles and fundamental rules of the Union as well as the provisions dealing with its structure. "Administrative Regulations" annexed to the Conventions—Telegraph Regulations, Telephone Regulations, General Radio Regulations, and Additional Radio Regulations—set forth the details concerning the organization and operation of services in their respective fields.

<sup>10</sup> 1947 Atlantic City Convention (article 26), 1952 Buenos Aires Convention (article 26), 1959 Geneva Convention (article 28) and 1965 Montreux Convention (article 29). The Agreement was annexed to the Atlantic City and Buenos Aires Conventions. For the text of the Agreement see also *Agreements between the United Nations and the Specialized Agencies and the International Atomic Energy Agency* (United Nations publication, Sales No.: 61.X.1.), pp. 71-78.

<sup>11</sup> See footnote 7 above.

<sup>12</sup> United Nations, *Treaty Series*, vol. 193, p. 188.

<sup>13</sup> United States of America, *United States Treaties and Other International Agreements* (Washington, Government Printing Office, 1956), vol. 6, Part 2, 1955, p. 1213.

<sup>14</sup> *Ibid.* (1962), vol. 12, Part 2, 1961, p. 1761.

<sup>15</sup> *United Nations Juridical Yearbook*, 1965 (United Nations publication, Sales No.: 67.V.3), p. 173.

<sup>16</sup> 1965 Montreux Convention (article 25), 1959 Geneva Convention (article 24) and 1952 Buenos Aires Convention (article 22). Article 8 of the 1932 Madrid Convention expressly abrogated and replaced the International Telegraph Conventions of Paris (1865), Vienna (1868), Rome (1872) and St. Petersburg (1875), and the Regulations annexed thereto, as well as the International Radiotelegraph Conventions of Berlin (1906), London (1912) and Washington (1927), and the Regulations annexed thereto. The 1947 Atlantic City Convention (article 23) abrogated and replaced again all those Conventions and Regulations, the 1932 Madrid International Telecommunication Convention and the 1938 Radio Regulations and Additional Radio Regulations of Cairo.

3. As enumerated in the Telecommunication Conventions,<sup>17</sup> the purposes of the Union are: to maintain and extend international co-operation for the improvement and rational use of telecommunications<sup>18</sup> of all kinds; to promote the development of technical facilities and their most efficient operation with a view to improving the efficiency of telecommunication services, increasing their usefulness and making them, so far as possible, generally available to the public; to harmonize the actions of nations in the attainment of those common ends. Members and associate members of the Union are bound to abide by the provisions of the Convention and the Regulations annexed thereto in all telecommunication offices and stations established and operated by them which engage in international services or which are capable of causing harmful interference to radio services of other countries and to take the necessary steps to impose the observance of the provisions of the Convention and of the Regulations annexed thereto upon private operating agencies authorized by them.<sup>19</sup> The expenses of the Union are met from the contributions of its members and associate members according to a class-unit system.<sup>20</sup> Members and associate members choose freely their class of contribution for defraying the Union's expenses.

4. The organs of the Union are the Plenipotentiary Conference, Administrative Conferences, the Administrative Council and the following permanent organs: the General Secretariat, the International Frequency Registration Board (IFRB), the International Radio Consultative Committee (CCIR) and the International Telegraph and Telephone Consultative Committee (CCITT).<sup>21</sup> The

<sup>17</sup> Preamble and article 3 of the 1947 Atlantic City and 1952 Buenos Aires Conventions and Preamble and article 4 of 1959 Geneva and 1965 Montreux Conventions.

<sup>18</sup> The term "telecommunication" is defined as "any transmission, emission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio, optical or other electromagnetic systems" (see, for instance, article 52 and annex 2 of the 1965 Montreux Convention).

<sup>19</sup> 1965 Montreux Convention (article 22), 1959 Geneva Convention (article 21), 1952 Buenos Aires Convention (article 19), 1947 Atlantic City Convention (article 20) and 1932 Madrid Convention (article 9).

<sup>20</sup> 1965 Montreux Convention (article 16), 1959 Geneva Convention (article 15), 1952 Buenos Aires Convention (article 13) and 1947 Atlantic City Convention (article 14). See also articles 17 and 18 of the 1932 Madrid Convention.

<sup>21</sup> Article 5 of the 1965 Montreux Convention. See also 1947 Atlantic City Convention (article 4), 1952 Buenos Aires Convention (article 4) and 1959 Geneva Convention (article 5). The International Telegraph and Telephone Consultative Committee was created by the 1959 Geneva Convention which merged the former International Telegraph Consultative Committee (CCIT) and International Telephone Consultative Committee (CCIF) in a single consultative committee. The duties of the International Consultative Committees are to study matters concerning their respective fields and to make recommendations thereon. Administrations of all members and associate members of the Union are members of the Committees. [1965 Montreux Convention (article 14), 1959 Geneva Convention (article 13), 1952 Buenos Aires Convention (article 7), 1947 Atlantic City Convention (article 8) and 1932 Madrid Convention (article 16)]. Questions common to more than one Consultative Committee are dealt with by joint committees or joint study groups, such as the CCITT/CCIR Joint Committee for the General Plan for the Development of Telecommunication Networks.

Administrative Council<sup>22</sup> and the International Frequency Registration Board<sup>23</sup> were established by the 1947 Atlantic City Convention. Likewise, as a result of the reorganization of the Union in 1947, a General Secretariat directed by a Secretary-General<sup>24</sup> responsible to the Administrative Council replaced the Bureau of the International Telecommunication Union that had operated as a central office of the Union under the supervision of the Swiss Government in accordance with the 1932 Madrid Convention.<sup>25</sup> The Plenipotentiary Conference,<sup>26</sup> supreme organ of the Union, normally meets at the date and place decided on by the preceding Plenipotentiary Conference, in order to determine the general policies for fulfilling the purposes of the Union. One of its main functions is the revision, when necessary, of the Union Convention. Administrative Conferences<sup>27</sup> may be on a world or regional basis. The basic task of a World Administrative Conference is the partial, or exceptionally the complete, revision of one or more of the Administrative Regulations; that of a Regional Administrative Conference is to deal with telecommunication questions of a regional nature. All world conferences, plenipotentiary or administrative, are composed of delegations representing members and associate members of the Union.<sup>28</sup>

<sup>22</sup> The Administrative Council is responsible for taking all steps to facilitate the implementation of the provisions of the Convention and Regulations and of the decisions of conferences or meetings of the Union. Its present membership is of twenty-nine members elected by the Plenipotentiary Conference [article 9 of 1965 Montreux and 1959 Geneva Conventions and article 5 of 1952 Buenos Aires and 1947 Atlantic City Conventions].

<sup>23</sup> The IFRB effects a recording of frequency assignments made by different countries and gives advice to avoid harmful interferences. It is composed of independent and technical qualified nationals of members of the Union elected by the Administrative Radio Conference. Following the 1965 Montreux Convention, the number of persons members of the IFRB has been reduced from eleven to five. [1965 Montreux Convention (article 13), 1959 Geneva Convention (article 12), 1952 Buenos Aires Convention (article 6) and 1947 Atlantic City Convention (article 6)].

<sup>24</sup> 1965 Montreux Convention (article 10), 1959 Geneva Convention (article 10), 1952 Buenos Aires Convention (article 8) and 1947 Atlantic City Convention (article 9).

<sup>25</sup> Article 17 of 1932 Madrid Convention. The Bureau of the Union was located in Berne. Since 1947, the seat of the Union is at Geneva (article 2 of 1947 Atlantic City and 1952 Buenos Aires Conventions and article 3 of 1959 Geneva and 1965 Montreux Conventions).

<sup>26</sup> 1965 Montreux Convention (article 6), 1959 Geneva Convention (article 6), 1952 Buenos Aires Convention (article 9), 1947 Atlantic City Convention (article 10) and 1932 Madrid Convention (articles 18 to 21).

<sup>27</sup> 1965 Montreux Convention (article 7), 1959 Geneva Convention (article 7), 1952 Buenos Aires Convention (article 10), 1947 Atlantic City Convention (article 11) and 1932 Madrid Convention (articles 18 to 21).

<sup>28</sup> 1965 Montreux Convention (article 2), 1959 Geneva Convention (article 2), 1952 Buenos Aires Convention (article 1) and 1947 Atlantic City Convention (article 1). General Regulations annexed to the Conventions provide a basis for the adoption of the rules of procedure of the conferences. See 1965 Montreux Convention (article 8), 1959 Geneva Convention (article 8), 1952 Buenos Aires Convention (article 11) and 1947 Atlantic City Convention (article 12).

## 2. MEMBERSHIP AND PARTICIPATION IN THE TELECOMMUNICATION CONVENTIONS

5. Paragraph 1 of article 1 of the 1932 Madrid Telecommunication Convention states that "The countries, Parties to the present Convention, form the International Telecommunication Union . . ." and the second paragraph of the Preamble of the 1959 Geneva and 1965 Montreux Conventions states that "The countries and groups of territories which become parties to the present Convention constitute the International Telecommunication Union". In this connexion, it should be noted that since its establishment, one of the most salient constitutional features of the International Telecommunication Union is that a certain number of non-independent countries, territories or groups of territories have been members of the Union and separate parties to Telecommunication Conventions, together with independent sovereign States. This constitutional feature, which has some bearing on problems of succession, has been inherited by the International Telecommunication Union from its two predecessor Unions, the International Telegraph Union and the International Radiotelegraph Union. To understand it correctly it is necessary to bear in mind the historical evolution of those Unions and the solutions given within them to the interrelated questions of participation of countries in the Conventions of the Unions and the composition of, and the voting rights at, the Unions' conferences.<sup>29</sup>

### (a) *Countries of the International Telecommunication Union under the 1932 Madrid Convention*

6. The 1932 Madrid Convention did not define "membership" of ITU. According to article 1, the "countries" forming the Union were the "Parties" to the Convention which were also referred to as "Contracting Governments" in many other articles of the Convention. "Contracting Governments" were those which had signed and ratified, or acceded to, the Madrid Convention and at least one set of Regulations.<sup>30</sup> The "Contracting Governments" allowed to become Parties to the Convention by means of signature and ratification were the "Signatory Governments" named in the Convention's Preamble.<sup>31</sup> Accession was open at any time to governments of countries "on whose behalf the present Convention has not been signed". Besides, paragraph 2 of article 5 of the Convention provided for "separate accession" of "a group or a single one of these colonies, protectorates overseas territories or territories under suzerainty,

<sup>29</sup> For a historical account of that evolution see G. A. Coddington, Jr., *op. cit.*, and V. Meyer, *L'Union internationale des télécommunications et son Bureau* (Berne, Union internationale des télécommunications, 1937).

<sup>30</sup> Preamble and articles 2, 3 and 6 of the Madrid Convention.

<sup>31</sup> The Preamble began with the words "International Communication Convention concluded between the Governments of the countries named below: . . .", and ended with this sentence: "The undersigned, Plenipotentiaries of the Governments named above, being assembled in conference at Madrid, have, by common consent and subject to ratification, concluded the following Convention".

authority or mandate" of the Contracting Governments.<sup>32</sup> The ratifications or the acts of adherence were to be deposited, through diplomatic channels, in the archives of the Spanish Government,<sup>33</sup> which sent notifications or communications concerning them to the other Contracting Governments. Fourteen non-independent countries named in the Preamble became parties to the Madrid Convention by signature and ratification,<sup>34</sup> and some others became "countries" of the Union by accession.<sup>35</sup>

7. However, although under the 1932 Madrid Convention non-independent countries could become "Contracting Governments" and could thereby be entitled to participate in both plenipotentiary and administrative conferences,<sup>36</sup> only some of them or "groups" of them enjoyed, as far as the voting right was concerned, the same status at the conference as the independent "countries" of the Union. In fact, participation in the Union and its Convention was based upon criteria which differed from those governing the status of the countries of the Union at the conferences.<sup>37</sup> Following a procedure established within the former Radiotelegraph Union and with a view to limiting the number of votes which might be controlled by certain great Powers through the participation of "countries" having the status of colonies,

<sup>32</sup> Article 5 dealt also with declarations of territorial application (see para. 20 below). In practice, the article as a whole seems to have been understood and applied in different ways (see, for instance, footnotes to the table concerning the position of the different countries in relation to the 1932 Madrid Convention, in *Annual Report of the Secretary-General of the Union, 1948* \*, pp. 4-7).

\* The annual reports of ITU were published successively under the titles "Rapport de gestion" (until 1947) [French only], "Annual Report of the Secretary-General of the Union" (until 1953), and "Report on the Activities of the International Telecommunication Union in ..." (since 1954). All ITU annual reports published in English, whether before or after 1953, are herein-after referred to in the abbreviated form: *Report* ..., 19...

<sup>33</sup> Government of the country where the conference of plenipotentiaries that drew up the Convention was held.

<sup>34</sup> Belgian Congo; British India (a member of the League of Nations); Curaçao and Surinam; Cyrenaica; Eritrea; French Colonies, Protectorates and Territories under French Mandate; Italian Islands of the Aegean; Italian Somaliland; Morocco; Dutch East Indies; Portuguese Colonies; Syria and Lebanon; Tripolitania; and Tunisia. In addition, "Japan, Chosen, Taiwan, Karafuto, the Leased Territory of Kwantung and the South Sea Islands under Japanese Mandate" are named as a single "country" (League of Nations, *Treaty Series*, vol. CLI, p. 7).

<sup>35</sup> From 1932 to the beginning of the Second World War: Burma; Southern Rhodesia; Spanish Colonies; Spanish Zone of the Protectorate of Morocco (see *Report*..., 1948, pp. 4-7, and League of Nations, *Treaty Series*, vol. CLI, pp. 481 and 483).

<sup>36</sup> Article 18 of the Madrid Convention.

<sup>37</sup> For instance, a request that the right to vote be accorded to "Syria and Lebanon", a "country" of the Union and a signatory of the Madrid Convention, was not accepted at the 1938 Cairo Administrative Conference (see footnote 117 below). On the other hand, the Madrid and Cairo Conferences "exceptionally taking into account the traditions of previous conferences" granted one extra vote to Germany and the USSR (article 21 of the Rules of Procedure). (*Documents de la Conférence télégraphique et téléphonique internationale du Caire, 1938* (Berne, Bureau de l'Union internationale des télécommunications, 1938), t. I, p. 15.)

possessions or dependent territories,<sup>38</sup> it was decided to leave to each succeeding conference the drawing up of the list of those "countries" or "groups of countries or territories" which should be given the right to vote.<sup>39</sup> The list was made a part—article 21<sup>40</sup>—of the Rules of Procedure of the Madrid (1932) and Cairo (1938) Conferences.<sup>41</sup>

8. At the 1947 Atlantic City Conference, the question of the Union's membership under the 1932 Madrid Convention was indirectly raised, either in general terms or in relation to some specific cases,<sup>42</sup> in connexion with the invitations extended and the right to vote. The Government of the United States, the host Government, extended invitations to all members of the Union, as the United States understood them, to members of the United Nations which were not members of the Union, and to sovereign States which were neither members of the Union

<sup>38</sup> For instance, eighty countries were represented at the Madrid Telegraph Conference while only sixty-nine countries enjoyed voting rights at the Madrid Plenary Assemblies of the Conference.

<sup>39</sup> A proposal made by the United States in accordance with the procedure agreed upon by the 1927 Washington Radiotelegraph Conference was not retained by the Madrid Telegraph and Radiotelegraph Conferences. The United States original proposal read as follows:

"The right to vote is limited to independent countries and to territorial units possessing, to a large degree, the rights of autonomy, the said rights being established by the fact of their eligibility as members of the League of Nations, and whose delegations, sent to international conferences, are not subject to any control on the part of any other delegation".

(*Documents de la Conférence radiotélégraphique internationale de Madrid, 1932* (Berne, Bureau international de l'Union télégraphique, 1933), t. II, p. 40.)

<sup>40</sup> The non-independent countries or groups of countries or territories listed in article 21 of the Rules of Procedure of the Madrid and Cairo Conferences as having the right to vote were the following: 1. Belgian Congo and the mandate territory of Ruanda-Urundi; 2. Totality of British colonies, protectorates, overseas territories, and territories under British sovereignty or mandate; 3. British India; 4. Chosen, Taiwan, Karafuto, Kwantung leased territory and the South Sea Islands under Japanese mandate; 5. Totality of Italian colonies and Italian islands of the Aegean Sea; 6. Morocco and Tunisia; 7. Netherlands Indies; 8. Totality of Portuguese colonies; 9. Spanish Zone of Morocco and the totality of Spanish Possessions; 10. Territories of the United States of America. (*Ibid.*, pp. 53-54.)

<sup>41</sup> The second joint Plenary Assembly of Cairo Administrative Conferences (1938) approved the following procedure for voting at future telecommunication conferences: "1. That for future plenipotentiary and administrative conferences the same rules apply with regard to voting as were applied at the Madrid and Cairo Telecommunication Conferences. 2. That consequently the countries listed in article 21 of the rules of procedure of the Radio Conferences will, as a matter of right, be entitled to vote at future telecommunication conferences. 3. That at the first plenary assembly of future plenipotentiary and administrative conferences countries which are not now listed in article 21 of the said rules of procedure may ask to be included in the list of countries entitled to vote. 4. That in the case of countries whose independence and sovereignty is well recognized, such requests shall be acceded to as a matter of course by the first plenary assembly. 5. That in case of other countries making such requests they shall be referred to a special committee on the right to vote, for consideration and recommendation to the plenary assembly."

(*Documents de la Conférence télégraphique et téléphonique internationale du Caire, 1938* (Berne, Bureau de l'Union internationale des télécommunications, 1938), t. II, p. 473.)

<sup>42</sup> Baltic States, Mongolian People's Republic, Pakistan and Spain.

nor of the United Nations.<sup>43</sup> The Conference approved the invitations in the following terms: "The present Conference of Plenipotentiaries is the supreme authority and can admit countries to participate in this Conference without examining their Membership qualifications in the past".<sup>44</sup> The right to vote was given to all countries invited. Therefore, the ten invited non-independent countries or groups of countries or territories attended the Conference with voting rights.<sup>45</sup>

(b) *Members and associate members of the International Telecommunication Union under the 1947 Atlantic City and subsequent revised Conventions*

9. The 1947 Atlantic City Conference clarified the basis and status of the Union's membership by adding a new article on the "composition of the Union" to the Telecommunication Convention. Article 1 of the 1947 Atlantic City Convention made a distinction between "Members" of the Union and "Associate Members", enumerated the different categories of countries entitled to be "members" or "associate members" and indicated the rights and obligations of "members" and "associate members". The provisions of article 1 of the Atlantic City Convention were amended at the 1952 Buenos Aires, 1959 Geneva and 1965 Montreux Conferences but remained essentially as they were formulated by the Atlantic City Conference.<sup>46</sup> At present (1965 Montreux Convention) they read as follows:

*Article 1. Composition of the Union*

- 3 1. The International Telecommunication Union shall comprise Members and Associate Members.
- 4 2. A Member of the Union shall be:
  - (a) any country or group of territories listed in Annex 1 upon signature and ratification of, or accession to, this Convention by it or on its behalf;
  - 5 (b) any country, not listed in Annex 1, which becomes a Member of the United Nations and which accedes to this Convention in accordance with Article 19;
  - 6 (c) any sovereign country, not listed in Annex 1 and not a Member of the United Nations, which applies for Membership of the Union and which, after having secured approval of such application by two-thirds of the Members of the Union, accedes to this Convention in accordance with Article 19.<sup>47</sup>
- 7 3. An Associate Member of the Union shall be:
  - (a) any country which has not become a Member of the

<sup>43</sup> Statement made by the delegation of the United States in the Special Committee on Voting (see G. A. Coddington, Jr., *op. cit.*, p. 208-209).

<sup>44</sup> *Documents of the International Telecommunications Conference at Atlantic City, 1947* (Berne, Bureau of the International Telecommunication Union, 1948), pp. 113-114.

<sup>45</sup> Belgian Congo, Burma, French Colonies, India, Morocco and Tunisia, Netherlands Indies, Portuguese Colonies, Southern Rhodesia, United Kingdom Colonies, and United States Territories (Atlantic City Telecommunications Conference, 1947, document No. 40 R, p. 6).

<sup>46</sup> Article 1 of 1952 Buenos Aires Convention and articles 1 and 2 of the 1959 Geneva and 1965 Montreux Conventions.

<sup>47</sup> Paragraphs 1 and 2 are identical to paragraphs 1 and 2 of article 1 of the Atlantic City, Buenos Aires and Geneva Conventions.

Union in accordance with 4 to 6, by acceding to this Convention in accordance with Article 19, after its application for Associate Membership has received approval by a majority of the Members of the Union;

- 8 (b) any territory or group of territories not fully responsible for the conduct of its international relations, on behalf of which a Member of the Union has signed and ratified or has acceded to this Convention in accordance with Article 19 or 20, provided that its application for Associate Membership is sponsored by such a Member, after the application has received approval by a majority of the Members of the Union;
  - 9 (c) any trust territory on behalf of which the United Nations has acceded to this Convention in accordance with Article 21, and the application of which for Associate Membership has been sponsored by the United Nations.<sup>48</sup>
- 10 4. If any territory or group of territories, forming part of a group of territories constituting a Member of the Union, becomes or has become an Associate Member of the Union in accordance with 8, its rights and obligations under this Convention shall be those of an Associate Member only.<sup>49</sup>
- 11 5. For the purpose of 6, 7 and 8, if an application for Membership or Associate Membership is made, by diplomatic channel and through the intermediary of the country of the seat of the Union, during the interval between two Plenipotentiary Conferences, the Secretary-General shall consult the Members of the Union; a Member shall be deemed to have abstained if it has not replied within four months after its opinion has been requested.<sup>50</sup>

*Article 2. Rights and obligations of Members and Associate Members*

- 12 1. (1) All Members shall be entitled to participate in conferences of the Union and shall be eligible for election to any of its organs.
- 13 (2) Each Member shall have one vote at all conferences of the Union, at meetings of the International Consultative Committees in which it participates and, if it is a Member of the Administrative Council, at all sessions of that Council.
- 14 (3) Each Member shall also have one vote in all consultations carried out by correspondence.
- 15 2. Associate Members shall have the same rights and obligations as Members of the Union, except that they shall not have the right to vote in any conference or other organ of the Union or to nominate candidates for membership of the

<sup>48</sup> Paragraph 3 corresponds to paragraph 4 of article 1 of the Atlantic City and Buenos Aires Conventions and paragraph 3 of article 1 of the Geneva Convention. The 1952 Buenos Aires Convention (article 1, para. 4 (a)) and 1959 Geneva Convention (article 1, para. 3 (a)) enumerated, in addition, the following category of "associate member": "any country, territory or group of territories listed in Annex 2 upon signature and ratification of, or accession to, this Convention, by it or on its behalf;". Annex 2 of 1952 Buenos Aires Convention listed the following groups of territories: 1. British West Africa; 2. British East Africa. Annex 2 of 1959 Geneva Convention added to those groups: 1. Bermuda-British Caribbean Group; 2. Singapore-British Borneo Group; 3. Trust Territory of Somaliland under Italian Administration.

<sup>49</sup> Paragraph 4 corresponds to paragraph 5 of article 1 of the Buenos Aires Convention and paragraph 4 of article 1 of the Geneva Convention. No similar provision was contained in the Atlantic City Convention.

<sup>50</sup> Paragraph 5 corresponds to article 1, paragraph 6, of the Atlantic City Convention, article 1, paragraph 7, of the Buenos Aires Convention, and article 1, paragraph 5, of the Geneva Convention.

International Frequency Registration Board. They shall not be eligible for election to the Administrative Council.<sup>51</sup>

10. Membership and associate membership, as defined by article 1 of the Atlantic City and subsequent Conventions, have replaced the historical distinction between countries of the Union with the right to vote and countries of the Union without that right. "Associate members" do not have the right to vote in the conferences of the Union. However, non-independent countries or groups of territories admitted<sup>52</sup> to the Atlantic City Conference retained full membership within the Union and were listed in Annex 1 of the Conventions, together with sovereign countries, among those entitled to be "members" and, therefore, to vote in conferences.<sup>53</sup> Participation and voting rights in the Atlantic City Conference have been the decisive criteria followed by the Atlantic City and subsequent Conventions to grant full membership to non-independent countries or groups of territories.

11. The following non-independent countries or groups of territories listed in Annex 1 of the Atlantic City Convention<sup>54</sup> were entitled to become "members" of the Union: 1. Belgian Congo and Territory of Ruanda-Urundi;<sup>55</sup> 2. Burma; 3. Colonies, Protectorates, Overseas Territories and Territories under mandate or trusteeship of the United Kingdom of Great Britain and Northern Ireland;<sup>56</sup> 4. Colonies, Protectorates and Overseas Territories under French Mandate;<sup>57</sup> 5. French Protectorates of Morocco and Tunisia; 6. Netherlands Indies; 7. Portuguese Colonies;<sup>58</sup> 8. Southern Rhodesia;<sup>59</sup> and 9. Terri-

tories of the United States of America. With the exception of "Netherlands Indies", all those countries or groups of territories were again listed in Annex 1 of the 1952 Buenos Aires Convention<sup>60</sup> and a group called "Spanish Zone of Morocco and the totality of Spanish Possessions" was added to the list.<sup>61</sup> The "French Protectorates of Morocco and Tunisia" were no longer mentioned in Annex 1 of the 1959 Geneva Convention<sup>62</sup> and "Belgian Congo and Territories of Ruanda-Urundi" were deleted from Annex 1 of the 1965 Montreux Convention.<sup>63</sup> These modifications in Annex 1 of the successive Conventions reflect the consequences of the attainment of independence or of change of status within the Union of the countries or constituents of the groups of territories in question. It should also be noted that Annex 1 of the Atlantic City Convention listed two "groups" composed of a sovereign country and territories under its administration, namely "Netherlands, Curaçao and Surinam"<sup>64</sup> and "Union of South Africa and the mandated territory of South-west Africa".<sup>65</sup>

12. Under the 1947 Atlantic City and subsequent Conventions, each signatory government shall ratify the Convention in question.<sup>66</sup> The government of a non-signatory country may accede to the Conventions at any time subject to the provisions of article 1.<sup>67</sup> The instruments of ratification or accession shall be deposited with the Secretary-General of the Union by diplomatic channel through the intermediary of the Swiss Government.<sup>68</sup> The Secretary-General notifies members and associate members of each deposit, and in cases of accession, forwards to each of them a certified copy of the act of

<sup>51</sup> Article 2 is identical to the same article of the Geneva Convention. Paragraph 1 (1) and (2) corresponds to article 1, paragraph 3 (1) and (2), of Atlantic City and Buenos Aires Conventions. Paragraph 2 corresponds to article 1, paragraph 5, of Atlantic City Convention and article 1, paragraph 6, of Buenos Aires Convention.

<sup>52</sup> And the "Spanish Zone of Morocco and the totality of Spanish Possessions". cf. Protocol concerning Spain, the Spanish Zone of Morocco and the totality of Spanish Possessions (United Nations, *Treaty series*, vol. 193, p. 313).

<sup>53</sup> On the other hand, article 1 does not exclude the possibility that a sovereign country could become "Associate Member" (see, for instance, paragraph 3 (a) of article 1 of the Montreux Convention).

<sup>54</sup> United Nations, *Treaty Series*, vol. 193, p. 259.

<sup>55</sup> Belgian Congo's ratification of the 1932 Madrid Convention applied also to Territory of Ruanda-Urundi, joined administratively to the colony of the Belgian Congo (see "Position of the different countries in relation to the Madrid Convention, 1932", in *Report...*, 1948, p. 7, footnote 10).

<sup>56</sup> Named "Overseas Territories for the international relations of which the Government of the United Kingdom of Great Britain and Northern Ireland are responsible" in Annex 1 of 1959 Geneva and 1965 Montreux Conventions.

<sup>57</sup> Named "Overseas Territories of the French Republic and Territories administered as such" in Annex 1 of 1952 Buenos Aires Convention; "Overseas States of the French Community and French Overseas Territories" in Annex 1 of 1959 Geneva Convention; and "Group of Territories represented by the French Overseas Post and Telecommunication Agency" in Annex 1 of 1965 Montreux Convention.

<sup>58</sup> Named "Portuguese Overseas Territories" in Annex 1 of 1952 Buenos Aires Convention and "Portuguese Overseas Provinces" in Annex 1 of 1959 Geneva and 1965 Montreux Conventions.

<sup>59</sup> Named "Rhodesia and Nyasaland (Federation of)" in Annex 1 of 1959 Geneva Convention and "Rhodesia" in Annex 1 of 1965 Montreux Convention.

<sup>60</sup> United States of America, *United States Treaties and Other International Agreements* (Washington, Government Printing Office, 1956), vol. 6, Part 2, 1955, pp. 1273-1274.

<sup>61</sup> Named "Spanish Provinces in Africa" in Annex 1 of 1959 Geneva and 1965 Montreux Conventions.

<sup>62</sup> United States of America, *United States Treaties and Other International Agreements* (Washington, Government Printing Office, 1962), vol. 12, Part 2, 1961, pp. 1834-1835.

<sup>63</sup> *United Nations Juridical Yearbook, 1965* (United Nations publication, Sales No.: 67.V.3), pp. 199-200.

<sup>64</sup> Named "Netherlands, Surinam, Netherland Antilles, New Guinea" in Annex 1 of 1952 Buenos Aires Convention and "Netherlands (Kingdom of the)" in Annex 1 of 1959 Geneva and 1965 Montreux Conventions.

<sup>65</sup> Named "Union of South Africa and Territory of South-West Africa" in Annex 1 of 1952 Buenos Aires and 1959 Geneva Conventions and "South Africa (Republic of) and Territory of South-West Africa" in Annex 1 of 1965 Montreux Convention. In view of United Nations General Assembly resolution 2145 (XXI), the Administrative Council of the Union at its 22nd Session (May 1967), having consulted Members of the Union, decided that the Government of the Republic of South Africa no longer had the right to represent the Territory of South-West Africa in ITU (See *Report...*, 1966, p. 70, footnote 57).

<sup>66</sup> 1965 Montreux Convention (article 18), 1959 Geneva Convention (article 17), 1952 Buenos Aires Convention (article 15) and 1947 Atlantic City Convention (article 18). The Montreux Convention added "in accordance with the constitutional rules in force in their respective countries".

<sup>67</sup> 1965 Montreux Convention (article 19), 1959 Geneva Convention (article 18), 1952 Buenos Aires Convention (article 16) and 1947 Atlantic City Convention (article 17).

<sup>68</sup> Government of the country of the seat of the Union.

accession. After the entry into force of the Convention, each instrument of ratification becomes effective on the date of its deposit. Instruments of accession become also effective upon the date of deposit unless otherwise specified therein. When accession is subject to "an application for Membership or Associate Membership",<sup>69</sup> prior approval of the application, in accordance with the provisions laid down in article 1, is required for the deposit of an instrument of accession.

13. The Conventions state that "signatory Governments" shall deposit their instruments of ratification "in as short a time as possible".<sup>70</sup> Since the 1952 Buenos Aires Convention, it is expressly provided that a signatory government continues to enjoy member's rights even though it may not have deposited an instrument of ratification. However, a signatory government which does not deposit its instrument of ratification is not entitled to vote from the end of a period of two years counted as from the date of entry into force of the Convention and until such a deposit takes place. Those provisions, which were intended to clarify the status within the Union of signatory governments which do not ratify a particular Convention, establish a distinction between membership in the Union and actual participation in its successive revised Conventions.

### 3. ADMINISTRATIVE REGULATIONS

14. As mentioned in paragraphs 2 and 4 above, the provisions of each Telecommunication Convention are completed by sets of Administrative Regulations (Telegraph Regulations; Telephone Regulations; Radio Regulations; Additional Radio Regulations) which are annexed to the Convention and which are periodically revised by Administrative Conferences.

#### (a) Administration Regulations annexed to Telecommunication Conventions and their subsequent revision

15. The Administrative Regulations annexed to a particular Telecommunication Convention are those in force at the time of the signature of the Convention in question. They remain valid until the time of entry into force of new Administrative Regulations drawn up by the competent Administrative Conference to replace them as annexes to the last Convention.<sup>71</sup> The 1932 Madrid Convention abrogated the Administrative Regulations annexed to previous International Telegraph or International Radiotelegraph Conventions.<sup>72</sup> New sets of

Telegraph and Telephone Regulations were elaborated at Madrid by the Telegraph Conference and new sets of General Radiocommunications and Additional Radiocommunication Regulations by the Radiotelegraph Conference. In 1938, the Cairo Administrative Conference adopted new Telegraph, Telephone, Radio and Additional Radio Regulations.<sup>73</sup> The 1947 Atlantic City Administrative Radio Conference<sup>74</sup> revised the Cairo Radio and Additional Radio Regulations which were abrogated, in relations between the Contracting Governments, by the Atlantic City Telecommunication Convention.<sup>75</sup> Thus, the Administrative Regulations annexed to the Atlantic City Convention at the time of the adoption of the Convention were: Cairo Telegraph and Telephone Regulations and Atlantic City Radio and Additional Radio Regulations.<sup>76</sup> Thereafter, the Administrative Regulation have been revised as follows: (i) Telegraph Regulations and Telephone Regulations revised by Administrative Telegraph and Telephone Conference held in 1949 (Paris)<sup>77</sup> and in 1958 (Geneva);<sup>78</sup> (ii) Radio Regulations and Additional Radio Regulations revised by Administrative Radio Conference held in 1959 (Geneva).<sup>79</sup>

#### (b) Binding nature of the Administrative Regulations

##### (i) Under the 1932 Madrid Convention<sup>80</sup>

16. The Madrid Convention stated that the Administrative Regulations "bind only the Contracting Governments which have undertaken to apply them, and solely in respect of the Governments which have undertaken the same obligations".<sup>81</sup> Even though contracting governments were obliged to accept at least one set of Regulations, the Regulations were not binding on them unless they approved them independently of the Convention.

##### (ii) Under the 1947 Atlantic City and subsequent revised Conventions<sup>82</sup>

17. Since the 1947 Atlantic City Convention the principle of the obligatory nature of the Regulations has been

<sup>69</sup> Came into force on 1 January 1939.

<sup>74</sup> Three conferences were held in Atlantic City in 1947: the plenipotentiary Telecommunications Conference to revise the Madrid Convention; the administrative Radiocommunications Conference to revise the Cairo Radio Regulations, and the administrative High Frequency Broadcasting Conference to consider the problems confronting high frequency broadcasting services.

<sup>75</sup> Article 23 of Atlantic City Convention (see footnote 16 above)

<sup>76</sup> Came into force on 1 January 1949.

<sup>77</sup> Came into force on 1 July 1950.

<sup>78</sup> Came into force on 1 January 1960.

<sup>79</sup> Came into force on 1 May 1961. In addition, the Radio and Additional Radio Regulations underwent the following partial revisions: Partial Revision of Radio Regulations (Geneva, 1963) (space); Partial Revision of Radio Regulations (Geneva, 1966) (aeronautical); Partial Revisions of Radio Regulations and Additional Radio Regulations (Geneva, 1967) (maritime).

<sup>80</sup> Articles 2 and 7 of the Madrid Convention.

<sup>81</sup> Additional Radio Regulations could not be the subject of signature or adherence except when the General Radio Regulations had been signed or adhered to.

<sup>82</sup> 1965 Montreux Convention (article 15), 1959 Geneva Convention (article 14), 1952 Buenos Aires Convention (article 12) and 1947 Atlantic City Convention (article 13).

<sup>69</sup> See article 1, paras. 2 (c), 3 (a) and (b) and 5 of the Montreux Convention, in para. 9 above.

<sup>70</sup> See Resolution No. 169, adopted by the Administrative Council at its fifth Session on the Application of article 1 of the Atlantic City Convention in connexion with countries shown in Annex 1 which have not yet ratified the Convention (*Report...*, 1950, pp. 4-5).

<sup>71</sup> 1965 Montreux Convention (article 26), 1959 Geneva Convention (article 25) and 1952 Buenos Aires Convention (article 23).

<sup>72</sup> Article 8 (see foot-note 16 above).

inserted in the Conventions themselves, although a certain number of members or associate members have formulated reservations with regard to particular sets of Regulations as a whole<sup>83</sup> or to some of their specific provisions.<sup>84</sup>

18. The Atlantic City, Buenos Aires and Geneva Conventions provide that the sets of Administrative Regulations completing them "shall be binding on all Members and Associate Members"<sup>85</sup> and that governments' approval is required only for the "revision of these Regulations by administrative conferences". However, certain countries continued the practice of giving express approval to Administrative Regulations even though the sets in questions were in force at the time of ratifying or acceding to the Conventions to which they were annexed. Until 1963, the list showing the status of Conventions and Administrative Regulations, reproduced by the General Secretariat in the annual *Reports*, indicates only express actions (express approvals, signatures and, by way of foot-notes, reservations) taken by a particular member or associate member with regard to each set of Administrative Regulations, leaving a blank when the country concerned had not taken any of these actions. Since 1964, this practice has been modified. In the absence of an express approval or a reservation, the General Secretariat adds now a foot-note indicating "Regulations approved *ipso facto*, since they were in force when the country concerned" ratified or acceded to the Convention.<sup>86</sup> The principle of the *ipso facto* approval of Administrative Regulations in force has been embodied in the 1965 Montreux Convention itself. The former expression that the Administrative Regulations "shall be binding on all Members and Associate Mem-

bers", quoted above, has been replaced in the Montreux Convention by the following provision: "Ratification of this Convention [. . .] or accession [. . .] involves acceptance of the [. . .] Administrative Regulations in force at the time of ratification or accession."<sup>87</sup>

#### 4. TERRITORIAL APPLICATION

19. Territorial application of the Telecommunication Conventions and Administrative Regulations annexed thereto to non-independent countries, territories or groups of territories which are not separate parties to the Conventions is optional. The sovereign country or member of the Union responsible for the international relations of such non-independent countries, territories or groups of territories may or may not extend to them the application of the Conventions and Regulations.

##### (a) Under the 1932 Madrid Convention<sup>88</sup>

20. The Madrid Convention allowed contracting governments to declare "at the time of its signature, ratification or accession, or later" that its acceptance of the Convention "includes all or a group or a single one of its colonies, protectorates, overseas territories, or territories under suzerainty, authority, or mandate". In the absence of such declaration the Convention did not apply to them. The declarations were communicated to the Spanish Government and a copy thereof was transmitted by that Government to each of the other contracting governments.<sup>89</sup> Territories to which the Convention was extended do not seem to have been considered as "parties" to the Madrid Convention, and, with few exceptions, they did not make contributions for defraying Union's expenses.<sup>90</sup>

<sup>83</sup> In the "Final Protocol" annexed to the Atlantic City Convention a certain number of countries made reservations concerning the Convention's article on the binding nature of the Regulations with reference, in particular, to Telegraph Regulations, (United Nations, *Treaty Series*, vol. 193, p. 297). See also Final Protocols annexed to successive Conventions.

<sup>84</sup> See, for instance, ratification of the 1949 Paris Telegraph Regulations by the United States and United States Territories (*Notification No. 609*, pp. 2-4).

<sup>85</sup> The Atlantic City Conference adopted a "Protocol concerning the Telegraph and Telephone Regulations" providing that, for members which have not yet approved them, the Telegraph and/or the Telephone Regulations "become binding only on the date of the signature of the Telegraph and Telephone Regulations as revised by the next telegraph and telephone administrative conference" (United Nations, *Treaty Series*, vol. 193, p. 315).

<sup>86</sup> See *Report...*, 1964, p. 64, foot-note 30; *ibid.*, 1965, p. 64, foot-note 30; *ibid.*, 1966, p. 69, foot-note 30 and p. 70, foot-note 56; *ibid.*, 1967, p. 60, foot-note 4. This practice seems to have been established following a declaration made by the Italian Administration in connexion with the ratification by Italy of the 1959 Geneva Convention. The declaration reads as follows:

"The Italian Administration declared that Italy, by ratifying the International Telecommunication Convention (Geneva, 1959), on 7 November 1962 (the instrument of ratification being deposited with the General Secretariat on 28 December 1962), had, in accordance with No. 193 [article 14, para. 2 (1)] of the Convention, approved *ipso facto* the Administrative Regulations annexed thereto which were in force on that date, i.e. the Telegraph and Telephone Regulations (Geneva, 1958), which came into force on 1 January 1960, and the Radio Regulations (Geneva, 1959) which came into force on 1 May 1961." (*Ibid.*, 1964, p. 64, foot-note 31.)

<sup>87</sup> Article 15, paragraph 2 (2) of the Convention. As in the previous Conventions, express approval is required for the revision of the Regulations by administrative conferences (paragraph 2 (3) of the same article).

<sup>88</sup> Article 5 of the Madrid Convention.

<sup>89</sup> Following a procedure similar *mutatis mutandis* to that indicated above for accession (see para. 8 above).

<sup>90</sup> Article 5 of the 1932 Madrid Convention relates also to "separate accession" of colonies, protectorates or overseas territories of contracting governments. Contribution to Union's expenses seems one of the criteria to be taken into consideration in order to see when action undertaken by contracting governments, under article 5, in connexion with specific cases was considered "separate accession" or "territorial application". (See, for instance, the territories listed under "United Kingdom of Great Britain and Northern Ireland" and declaration by the Governments of the United Kingdom and France concerning "New Hebrides" in *Report...*, 1948, pp. 4-7.) It should be pointed out, however, that although the 1932 Madrid Convention seems to have been merely extended by the United States to Alaska, Hawaii and the other American possessions in Polynesia, the Philippine Islands, Puerto Rico and the other American possessions in the Antilles and the Panama Canal Zone (see terms of the ratification of the Convention by the United States in League of Nations, *Treaty Series*, vol. CLI, p. 481, foot-note 3), each of these territories or groups of territories participated in defraying the expenses of the Union and were placed in a separate class of contribution (Class III) (see *Rapport de gestion*, 1939, p. 4, foot-note 12).

(b) *Under the 1947 Atlantic City and subsequent revised Conventions*<sup>91</sup>

21. Members of the Union may declare at any time that their acceptance of the Convention "applies to all or a group or a single one of the countries or territories for whose foreign relations they are responsible". The declarations are communicated to the Secretary-General of the Union who notifies them to members and associate members. The Convention may also be applied to "Trust Territories of the United Nations" when the United Nations accedes to the Convention "on behalf of any territory or group of territories placed under its administration in accordance with a trusteeship agreement as provided for in Article 75 of the Charter of the United Nations". The countries or territories or United Nations Trust Territories to which the Convention has been applied may become "Associate Members" upon application and in accordance with the provisions laid down in article 1. As "Associate Members" those countries, territories and trust territories assume the rights and obligations pertaining to associate members' status.

**B. Description of relevant cases concerning participation in ITU instruments (Conventions and Administrative Regulations)**

22. Cases concerning participation in ITU Conventions and Administrative Regulations are described below with a view to ascertaining any features of State succession to these instruments that may be present in the practice of the Union. Having regard to the above-mentioned constitutional reorganization of the Union which followed the adoption of the 1947 Atlantic City Convention, cases relating to the 1932 Madrid Convention are grouped in Part I, while those concerning the 1947 Atlantic City Convention and subsequent revised Conventions are described in Part II. Within each of these Parts, cases are grouped together according to the type of change involved at the international level in the legal status of the country, entity or territory concerned. Thus, Part I is subdivided into cases relating to attainment of independence (section 1) and to restoration of independence after annexation (section 2), and Part II into cases relating to attainment of independence (section 1), to formation and/or dissolution of federations or unions (section 2) and to transfer of territories to an independent member of the Union (section 3). In describing attainment of independence cases in Parts I and II, due account has been taken, as appropriate, of the former legal status within the Union of the newly independent State concerned (status of "Contracting Government", "Member", or "Associate Member"; single "country" or constituent entity of a "group of territories" having one of these forms of Union status; territory to which the application of the instruments was merely extended). The description of each particular case is based on relevant *Notifications* circulated by the Secretary-General of the Union and on his annual

<sup>91</sup> 1965 Montreux Convention (articles 20 and 21), 1959 Geneva Convention (articles 19 and 20), 1952 Buenos Aires Convention (articles 17 and 18) and 1947 Atlantic City Convention (articles 18 and 19).

*Reports* in which the status of ITU Conventions and Administrative Regulations is given.

PART I. UNDER THE 1932  
MADRID CONVENTION

1. CASES RELATING TO ATTAINMENT  
OF INDEPENDENCE

(a) *Concerning contracting Governments*

(i) *Former non-independent "country" of the Union*

*Burma*

23. On 15 September 1937, soon after it was detached from British India,<sup>92</sup> *Burma* deposited its accession to the 1932 Madrid Convention.<sup>93</sup> *Burma* attended the Cairo Administrative Conferences without voting rights and signed the 1938 Cairo Regulations, but it did not deposit its approval of those Regulations.<sup>94</sup> Invited to the 1947 Atlantic City Conferences, *Burma* participated therein with the right to vote<sup>95</sup> and signed the Atlantic City Convention.<sup>96</sup> After attaining independence on 4 January 1948, *Burma* deposited its ratification of the Atlantic City Convention on 21 January 1949.<sup>97</sup>

(ii) *Parts into which a former non-independent "country" of the Union was divided*

*India and Pakistan*

24. *British India* was one of the voting members at the 1932 Madrid Conference and was a signatory of the Madrid Acts; its ratification of the Madrid Convention was deposited on 30 April 1934 and its approval of the Madrid Regulations on 14 April 1934.<sup>98</sup> Likewise *British India* participated in the 1938 Cairo Conferences and its approval of the Cairo Regulations was deposited on 19 November 1939.<sup>99</sup>

25. On 15 August 1947, during the 1947 Atlantic City Conferences, former *British India* was divided into two States, *India* and *Pakistan*, both of which became independent as from that date.<sup>100</sup> At a plenary session of the International Telecommunication Conference held on 15 August 1947 in order to celebrate the independence of *India* and *Pakistan*, the Chairman made the following remark:

<sup>92</sup> On 1 April 1937, in accordance with the Government of *India* Act of 1935.

<sup>93</sup> *Rapport de gestion, 1939*, p. 2.

<sup>94</sup> *Ibid.*, 1947, p. 7.

<sup>95</sup> United States of America, Department of State, *International Telecommunication Conferences: Report of the United States Delegations to the International Radio Conference, the International Telecommunication Conference, and the International Conference on High Frequency Broadcasting, with Selected Documents*, Department of State publication 3177 (Washington, Government Printing Office, 1948), pp. 52-54 and Appendix 1, p. 115.

<sup>96</sup> United Nations, *Treaty Series*, vol. 193, p. 244.

<sup>97</sup> *Notification No. 568*, p. 2, and *Report...*, 1949, p. 4.

<sup>98</sup> League of Nations, *Treaty Series*, vol. CLI, p. 483.

<sup>99</sup> *Rapport de gestion, 1939*, p. 6.

<sup>100</sup> See "Indian Independence Act, 1947" in United Nations Legislative Series, *Materials on Succession of States* [United Nations publication, Sales No.: E/F.68.V.5], pp. 127-133.

While the new Dominion of India will continue to be a Member of our Union, Pakistan will apply for admission as a new Member. I am sure I express the feeling of everyone present in assuring her that we will welcome her admission as soon as possible and we will benefit by her participation in our work.<sup>101</sup>

26. When the question of admission of *Pakistan* was brought up in a subsequent plenary session held on 4 September 1947, the delegate from Argentina stated *inter alia*:

The present conference [...] is regulated exclusively by the Madrid Convention, which concretely establishes the necessary criteria which must be expressly satisfied in order to acquire Membership in the Union [...]. In effect, Article 3 establishes the procedure of adherence for all new members who have not signed the Madrid Convention, and this *adherence*, when duly effected, automatically carries with it membership in the International Telecommunication Union at once, under normal conditions, *without need of any further process of "admission"* [...].

However, we do not wish to imply [...] that Pakistan should go through the process of *admission* in order to become a member of the Union [...]. The case of Pakistan is "sui generis", which we repeat, in our judgement does not imply the necessity of a formal "*admission*" apart from the Madrid Convention, or, still less, the necessity of a precise and prescribed "*adherence*". On the contrary, the fact we must face is this: a Member [...] British India, has been divided into two neighbouring States which today form part of the Commonwealth of British Nations [...]. One of these dominions, India, retains its old constitutional and political name; the other acquires a new designation, *Pakistan*. But the two States are, in reality, the legitimate *successors* to the rights and commitments acquired by British India within the International Telecommunication Union when it signed the Madrid Convention [...].

We move, therefore, that these two new States [...] India and Pakistan, be "*recognized*" as Members of the International Telecommunication Union in their capacity as successors of the British India, without subjecting them to any process of "*admission*", which, in as far as Membership is concerned, is not authorized under normal conditions by the Madrid Convention, and for that very reason should not be adopted nor imposed.<sup>102</sup>

After this speech, the Chairman observed that "the opinion expressed by the Argentine Delegation had given rise to no objection, and that Pakistan should be considered as admitted to the Telecommunication Conference".<sup>103</sup>

27. It may be noted that before this discussion took place on 4 September 1947, *Pakistan* had already notified, by a communication received by the Bureau of the Union on 26 August 1947, its accession to the 1932 Madrid Convention and the 1938 Cairo Regulations excepting the Telephone Regulations. The following telegraphic circular of 26 August 1947 was reproduced in *Notification No. 534* of the Bureau, dated 1 September 1947:

*Pakistan*

T-c 116/26, of 26 August:

Secretary, Ministry of Foreign Affairs, Government of Pakistan, has communicated the following:

<sup>101</sup> *Documents of the International Telecommunications Conference at Atlantic City, 1947* (Berne, Bureau of the International Telecommunication Union, 1948), p. 195.

<sup>102</sup> *Ibid.*, pp. 216-217.

<sup>103</sup> *Ibid.*, p. 217.

"Pakistan, which assumed the status of a sovereign State on 15 August 1947, is acceding to the International Telecommunication Convention, Madrid, and to the Radiocommunication Regulations and Telegraph Regulations."

We should be obliged if your Administration would be good enough to communicate the above to the competent authorities of your country.

28. The Bureau listed *Pakistan* as having deposited its instrument of accession on the date of the receipt of that communication, namely on 26 August 1947.<sup>104</sup> As from 1 September 1947, Pakistan contributed to the expenses of the Bureau in the fourth class of the scale of contribution.<sup>105</sup> Pakistan signed the 1947 Atlantic City Convention and deposited its instrument of ratification of that Convention on 6 January 1949.<sup>106</sup>

29. On the other hand, *India* continued its participation in the Union as a party to the Madrid Convention and Cairo Regulations without depositing any fresh accession or approval of those instruments.<sup>107</sup> India continued to be placed in the first class of contribution as former British India, this class having been confirmed by a telegram of the Indian Administration dated 9 August 1949.<sup>108</sup> In the annual *Reports* for 1947 and 1948, the name "British India" was still used in connexion with the Madrid Convention and Cairo Regulations. After the entry into force of the Atlantic City Convention on 1 January 1949 and the deposit by India of its instrument of ratification of the Atlantic City Convention on 25 January 1949,<sup>109</sup> the name "British India" was replaced by "India" in the list of members of the Union.<sup>110</sup>

30. *Pakistan's* instruments of ratification of the 1947 Atlantic City Convention deposited on 6 January 1949 contained the following statement:

The Government of Pakistan have further decided that it is desirable in ratifying the said Convention to say that they expect that Pakistan's exceptional position as a new State will be given due and sympathetic consideration by other Members of the Union, particularly so in the allotment of radio frequencies adequate for the services in Pakistan, since Pakistan's ability to abide by the Radio Regulations and Additional Radio Regulations must depend largely upon such allotment.<sup>111</sup>

31. In a letter dated 12 May 1950, the Administration of *Pakistan* requested the General Secretariat of the Union to circulate the following statement relative to the inheritance of radioelectric frequencies and to a reservation regarding notification of frequency registrations during war-time formerly notified by British India:

The Government of British India as a Member of the ITU had regularly notified its frequencies for registration to the ITU up to the outbreak of the last war. The Government of British India,

<sup>104</sup> *Report...*, 1948, pp. 6 and 12.

<sup>105</sup> *Rapport de gestion, 1947*, pp. 3-5.

<sup>106</sup> *Report...*, 1949, p. 6.

<sup>107</sup> *Notification No. 557*, p. 2.

<sup>108</sup> *Rapport de gestion, 1947*, p. 3, and *Report...*, 1948, p. 6.

<sup>109</sup> *Notification No. 568*, p. 2.

<sup>110</sup> *Report...*, 1949, p. 5.

<sup>111</sup> *Notification No. 567*, p. 2. Reproduced also in the *Reports* (see for instance *Report...*, 1948, p. 19, foot-note 17).

in Sir Gurnath Bewoor's letter No. T.347/45 dated 4th October 1945,\* indicated the undesirability of notifying frequency registrations during war-time due to security reasons and reserved its position: vide para. 4 of the letter which reads:

"They feel bound to reserve their position with regard to the recognition of frequency registrations notified since the outbreak of war September 1st 1939".

As Members are aware, on 15th August 1947 British India was partitioned into two sovereign independent States of India and Pakistan: as such the frequencies notified by the previous British India prior to partition are the joint property of both India and Pakistan and the reservation made by the British Government of India applies to all such frequencies and registrations.

\* See *Notification No. 491* of 16 November 1945 and Supplement No. 9 (page 80) (1 February 1949) to the frequency list.<sup>112</sup>

32. In a letter dated 20 June 1951, the Administration of *India* requested communication of the following statement to all members of the Union:

The Government of India invite a reference to a letter dated the 12th May 1950 from the Administration of Pakistan to the Secretary-General of ITU, published in Notification No. 601 dated the 1st June 1950, regarding the position of frequencies registered with the ITU on behalf of British India before the partition of the country into the two Dominions of India and Pakistan in 1947.

At the time of partition of British India into the two sovereign independent States of India and Pakistan, all those frequencies which pertained to locations in the newly created State of Pakistan were automatically transferred to that State. The frequencies which now stand registered for India in the Berne Register are for stations which are situated in the territory of the Indian Union. These frequencies therefore belong exclusively to the Indian Union.<sup>113</sup>

33. The Administration of *Pakistan*, by a letter dated 29 April 1953, requested the communication of the following statement to all members of the Union:

With reference to the Government of India's letter dated 20th June, 1951, published in the Notification No. 627 dated the 1st July, 1951, I am directed to inform you that my Administration does not agree with the views expressed by the Indian Administration in their letter referred to above.

I am to point out that before the Partition of British India into the two sovereign independent States of India and Pakistan, the network of international and inland wireless services was utilized for the country as a whole and it is immaterial where the equipment working on various frequencies was situated. According to the statement made by India in their letter referred to above, all the frequencies utilized by the international wireless network would be automatically transferred to India. That would not be an equitable distribution of frequencies between the two countries.

I am therefore to re-affirm that the frequencies notified by the British India prior to Partition are the joint property of both India and Pakistan and the reservations made by the British Government of India apply to all such frequencies and registrations.<sup>114</sup>

<sup>112</sup> *Notification No. 601*, p. 8.

<sup>113</sup> *Notification No. 627*, p. 6.

<sup>114</sup> *Notification No. 673*, pp. 7-8.

(iii) *Former constituent entities of a "group of countries or territories" of the Union*

#### *Lebanon and Syria*

34. A group of countries called "Syria and Lebanon", which had been under French mandate as from 29 September 1923, was represented at the 1932 Madrid Conference, and as a group ratified the Madrid Convention and approved the Madrid Regulations.<sup>115</sup> The deposit of the instrument of ratification of the Convention and of approval of the Telephone Regulations took place on 22 May 1934 and of approval of the other sets of Madrid Regulations on 22 January 1934.<sup>116</sup> Likewise, "Syria and Lebanon" was represented by a single delegation at the 1938 Cairo Administrative Conferences. Neither at the Madrid Conferences nor at the Cairo Conferences was "Syria and Lebanon" accorded the right to vote. The majority of the Committee on the Right to Vote, established jointly by the Cairo Conferences, agreed "that Syria and Lebanon were undoubtedly separate administrative units."<sup>117</sup> Following the approval, deposited by Syria and Lebanon on 28 March 1939, of the Cairo Regulations excepting the Telephone Regulations,<sup>118</sup> the Bureau listed *Lebanon* and *Syria* as two separate entities in the table showing the status of the Cairo Regulations, published in its annual *Reports* for the years 1939-1947. On the other hand, in respect of the 1932 Madrid Convention, the Bureau continued to list Syria and Lebanon as a single country in its annual *Reports* for the same years, although Lebanon became independent on 22 November 1943 and Syria on 1 January 1944. Since 1944, however, notes were added by the Bureau to the names of Lebanon and Syria indicating "Now Lebanon Republic" and "Now Syrian Republic".<sup>119</sup>

35. Following the independence of Lebanon and Syria, the Bureau informed on 16 November 1944 that:

The effect of communications which have just reached us from Beirut and Damascus is that from 1 January 1945 the Adminis-

<sup>115</sup> See foot-note 34 above.

<sup>116</sup> League of Nations, *Treaty Series*, vol. CLI, p. 483.

<sup>117</sup> In the Committee on the Right to Vote, established jointly by the Cairo Radio-communications Conference and the Cairo Telegraph and Telephone Conference, the delegates of France and Syria and Lebanon requested that the voting right should be given to Syria and Lebanon for the following reasons: (1) although the French mandate had not yet expired, the international administrations of these two mandated territories were already independent; (2) France and the two mandated territories had already signed a treaty of friendship; (3) they had been given the right to separate votes in the Universal Postal Congress held at Cairo, 1934. The majority of the Committee, while agreeing that Syria and Lebanon were undoubtedly separate administrative units, considered that if they were accorded the right to vote it would give rise to similar requests from other non-independent countries such as Burma and Southern Rhodesia. The conclusion of the Committee was that Syria and Lebanon should be listed in the preamble with an explanatory statement that these countries had the right to participate in the Conferences but that they did not have the right to vote because of their particular provisional juridical status (see G. A. Codding, Jr., *op. cit.*, pp. 161-162, and *Documents de la Conférence télégraphique et téléphonique internationale du Caire, 1938* (Berne, Bureau de l'Union internationale des télécommunications, 1938), t. II, pp. 25-26, 67 and 168-175).

<sup>118</sup> *Rapport de gestion, 1939*, p. 7.

<sup>119</sup> *Rapport de gestion, 1944*, p. 4, and *Report...*, 1948, p. 7.

tration of the Lebanese Republic and the Administration of the Syrian Republic will each contribute separately in the 6th class to the common expenses of the telegraph and telephone division and in the same class to the expenses of the radiocommunication division of our Bureau.<sup>120</sup>

36. Furthermore, on 16 July 1946, the Bureau notified the receipt of the following communication from the Legation of Spain in Berne, dated 29 June 1946, regarding *Lebanon's* accession to the Madrid Convention and Cairo Regulations:

[. . .] The Legation of Lebanon in London informed the Spanish Embassy in that capital in a note dated 11 March 1946 that the Lebanese Office of Posts and Telegraphs, now separated from the Syrian Office, had acceded on behalf of its country to the International Telecommunication Convention, signed in Madrid in December 1932 and to the Cairo Regulations of 1938 including the Telegraph Regulations and Final Protocol, General Radio Regulations and Final Protocol and Additional Radio Regulations and Additional Protocol.<sup>121</sup>

The annual *Reports* for the years 1946 to 1948 reproduced the afore-mentioned communication in a foot-note to the lists showing the status of the Madrid Convention and the Cairo Regulations.<sup>122</sup> However, as indicated, the Bureau listed until 1948 the group "Syria and Lebanon" as a "country" having deposited the instrument of ratification of the Madrid Convention and of approval of the Cairo Regulations on the dates mentioned in paragraph 34 above.

37. Both *Lebanon* and *Syria* were among the countries invited to the 1947 Atlantic City Conferences.<sup>123</sup> As other invited countries, they participated in the Conference with the right to vote. Lebanon and Syria signed separately the Atlantic City Acts and later on became separate parties thereto on different dates. From the effective date of ratification of the Atlantic City Convention by Lebanon (15 July 1949)<sup>124</sup> to the deposit by Syria of its instrument of ratification of the said Convention (25 May 1951),<sup>125</sup> the Bureau listed the *Syrian Republic* as a party to the Madrid Convention since 22 May 1934,<sup>126</sup> namely as from the date of deposit of the instrument of ratification of the Madrid Convention by the group "Syria and Lebanon".

(iv) *Some former constituent entities or parts of constituents of certain "groups of countries or territories" of the Union*

#### *Republic of Korea*

38. As indicated above,<sup>127</sup> the group called "Japan,

<sup>120</sup> Notification No. 467, p. 1 (N. B. Notification No. 1 to No. 566 were issued in French only).

<sup>121</sup> Notification No. 507, p. 1.

<sup>122</sup> *Rapport de gestion, 1946*, p. 5; *ibid.*, 1947, p. 5 and *Report...*, 1948, p. 7.

<sup>123</sup> United States of America, Department of State, *International Telecommunication Conferences: Report of the United States Delegations...*, Department of State publication, 3177 (Washington, Government Printing Office, 1948), Appendix 1, pp. 123 and 128.

<sup>124</sup> *Report...*, 1949, p. 5.

<sup>125</sup> *Ibid.*, 1951, p. 23.

<sup>126</sup> *Ibid.*, 1949, p. 9.

<sup>127</sup> Foot-note 34.

Chosen, Taiwan, Karafuto, the Leased Territory of Kwantung and the South Sea Islands under Japanese Mandate" became a contracting party to the Acts of Madrid of 1932 and to the 1938 Cairo Regulations as a single "group".<sup>128</sup> The 1932 Madrid and 1938 Cairo Conferences gave, however, a separate vote to the overseas territories of Japan, namely "Chosen, Taiwan, Karafuto, the Leased Territory of Kwantung and the South Sea Islands under Japanese Mandate",<sup>129</sup> and each of the entities constituting the Japanese overseas territories contributed separately to the expenses of the Union.<sup>130</sup>

39. After the Second World War, the *Republic of Korea*, established in 1948 in part of the territory of former *Chosen*, did not express its position with regard to the above-mentioned multilateral instruments of the International Telecommunication Union.<sup>131</sup> The annual *Reports* for the years 1945 to 1948 continued to list among the parties to those instruments the group "Japan, Chosen, Taiwan, Karafuto, the Leased Territory of Kwantung and the South Sea Islands under Japanese Mandate".<sup>132</sup>

40. Following the entry into force of the 1947 Atlantic City Convention on 1 January 1949, the *Republic of Korea*, a non-member of the United Nations, applied in 1949 for admission "as Member" of the Union, in accordance with article 1, paragraph 2 (c), of the Convention.<sup>133</sup> The application did not meet the approval of two-thirds of the members of the Union.<sup>134</sup> A further application submitted in 1950<sup>135</sup> was approved by the required majority<sup>136</sup> and the Republic of Korea became a member of the Union by depositing its instrument of accession to the Atlantic City Convention with the General Secretariat on 31 January 1952.<sup>137</sup>

#### *Libya*

41. Enumerated separately in the Preamble of the 1932 Madrid Convention, *Cyrenaica* and *Tripolitania* also signed separately the Madrid Convention and the Telegraph, Telephone and General Radiocommunications Regulations and, jointly with Italy, the Additional Radiocommunications Regulations.<sup>138</sup> They formed part of the group of non-independent countries or territories called "Italian colonies and Italian Islands in the Aegean

<sup>128</sup> *Rapport de gestion, 1939*, pp. 3 and 7.

<sup>129</sup> Foot-note 40 above.

<sup>130</sup> In the class of contribution indicated in parenthesis: Japan (I); Chosen (IV); Karafuto (VI); Taiwan (VI); Leased Territory of Kwantung (VI); South Sea Islands under Japanese Mandate (VI) [*Rapport de gestion, 1939*, p. 4, foot-note 17].

<sup>131</sup> A delegate for the "United States Army Forces in Korea (for South Korea)" attended the 1947 Atlantic City Conferences without the right to vote. (United States of America, Department of State, *International Telecommunication Conferences: Report of the United States Delegations...*, Department of State publication 3177 (Washington, Government Printing Office, 1948), Appendix 1, p. 125, and Appendix 6.)

<sup>132</sup> *Report...*, 1948, pp. 6 and 11.

<sup>133</sup> Notification No. 589, p. 1.

<sup>134</sup> Notification No. 597, pp. 1 and 2.

<sup>135</sup> Notification No. 603, p. 1.

<sup>136</sup> Notification No. 611, pp. 1 and 2, and *Report...*, 1951, p. 27.

<sup>137</sup> Notification No. 642, p. 1, and *Report...*, 1952, p. 22.

<sup>138</sup> League of Nations, *Treaty Series*, vol. CLI, pp. 37, 45, 203, 211, 265, 273, 379, 389 and 477.

Sea<sup>139</sup> to which the Madrid Conference granted as a whole the right to vote.<sup>140</sup> The ratification of the Madrid Convention and the approval of the Madrid Regulations were deposited on their behalf by Italy on 26 December 1933.<sup>141</sup> At the 1938 Cairo Administrative Conferences, Cyrenaica and Tripolitania were represented by the Italian delegation. Italy became a party to the Cairo Regulations as from 1 December 1938.<sup>142</sup> On 31 May 1939, the Italian Administration informed the Bureau that since 1 January 1939 one of the Italian colonies was "Libya, which includes Cyrenaica and Tripolitania".<sup>143</sup>

42. Cyrenaica and Tripolitania, as part of *Libya*, were jointly administered by France and the United Kingdom during the period between 1940 and 1951. By article 23 of the Treaty of Peace with Italy, signed at Paris on 10 February 1947, Italy renounced "all right and title to the Italian territorial possessions in Africa", including Libya.<sup>144</sup> Libya, comprising Cyrenaica, Tripolitania and the Fezzan, attained independence on 24 December 1951, in accordance with General Assembly resolutions 289 A (IV) of 21 November 1949 and 387 (V) of 17 November 1950, namely after the entry into force of the 1947 Atlantic City Convention on 1 January 1949.

43. Shortly after attaining independence, the *Kingdom of Libya* applied for membership in the International Telecommunication Union<sup>145</sup> and after its application was approved by the majority required under article 1, paragraph 2 (c), of the Atlantic City Convention,<sup>146</sup> the Kingdom of Libya deposited its accession to that Convention on 3 February 1953.<sup>147</sup>

(b) *Concerning former territories or parts of territories to which application of ITU instruments was extended before attaining independence*

*Philippines*

44. The United States of America ratification of the 1932 Madrid Convention, and approval of the Madrid General Radiocommunications Regulations, included certain territorial entities under the sovereignty of the United States and among them the "Philippine Islands" called "Philippines (Federation)" in the *Rapport de gestion* for the years 1939 to 1946.<sup>148</sup> The overseas territories and other possessions of the United States were not listed among the Contracting Governments in the Preamble of

the Madrid Convention. It seems, therefore, that the extension of the Convention to the Philippine Islands and other territories under the sovereignty of the United States took place under article 5 of the Convention which dealt with "separate accession" of colonies, protectorates or overseas territories of Contracting Governments, as well as "territorial application" of the Convention to such entities.<sup>149</sup> As other territories included in the United States' ratification, the Philippine Islands contributed separately to defray the expenses of the Union and were placed in the third class of contribution. The approval by the United States of the 1938 Cairo General Radiocommunications Regulations, deposited on 25 August 1939,<sup>150</sup> included also the "Philippines (Federation)".

45. During the period between the date of independence of the *Philippines* (4 July 1946) and the date on which the Atlantic City Conferences commenced (15 May 1947), the Philippines did not become a separate Contracting Government of the Union through accession under article 3 of the Madrid Convention. However, invited by the United States' Government, the Philippines participated in the Atlantic City Conferences<sup>151</sup> with the right to vote and signed the Atlantic City Convention.<sup>152</sup>

46. By two communications dated 5 September 1947 and 13 December 1947—the first of which was, therefore, dated during the time when the Atlantic City Conferences were still in session—the *Philippines* acceded to the 1932 Madrid Convention and to the General Radiocommunications Regulations as revised at Cairo, 1938; it also chose the sixth class of contribution, effective as from 1 January 1947, the date on which the United States ceased to contribute for the Philippines.<sup>153</sup> Thereafter, the annual *Reports* listed the Philippines as a party to the Madrid Convention.<sup>154</sup> The instrument of ratification of the 1947 Atlantic City Convention was subsequently deposited by the Philippines, on 13 November 1952.<sup>155</sup>

*Jordan*

47. In accordance with article 5 of the 1932 Madrid Convention,<sup>156</sup> the United Kingdom made a declaration extending the application of the Convention to *Transjordan* which was then a part of Palestine under the United Kingdom mandate, approved by the League of Nations in July 1922 and effective as from 29 September 1923. The deposit of the declaration took place on 23 August 1935.<sup>157</sup>

<sup>139</sup> In accordance with article 14 of the Treaty of Peace with Italy signed at Paris on 10 February 1947, Italy ceded to Greece in full sovereignty the Dodecanese Islands (United Nations *Treaty Series*, vol. 39, p. 134). As far as former Italian Somaliland and Eritrea are concerned, see paragraphs 93-97 and 102-103 below.

<sup>140</sup> See foot-note 40 above.

<sup>141</sup> League of Nations, *Treaty Series*, vol. CLI, p. 481 and 483.

<sup>142</sup> *Rapport de gestion*, 1940, p. 8.

<sup>143</sup> Text of communication reproduced in paragraph 62 below.

<sup>144</sup> United Nations, *Treaty Series*, vol. 49, p. 139.

<sup>145</sup> *Notification No. 642*, p. 1.

<sup>146</sup> *Notification No. 650*, pp. 1 and 2. Libya was not at the time of its application a Member of the United Nations.

<sup>147</sup> *Report...*, 1953, p. 26.

<sup>148</sup> League of Nations, *Treaty Series*, vol. CLI, p. 481, and *Rapport de gestion*, 1939, pp. 2 and 4 (foot-note 13) and *ibid.*, 1946, pp. 3 and 5 (foot-note 13).

<sup>149</sup> See para. 20 and foot-note 90 above.

<sup>150</sup> *Rapport de gestion*, 1939, pp. 6 and 7.

<sup>151</sup> United States of America, Department of State, *International Telecommunication Conferences: Report of the United States Delegations...*, Department of State publication 3177 (Washington, Government Printing Office, 1948), Appendix 1, p. 126.

<sup>152</sup> United Nations, *Treaty Series*, vol. 193, p. 154.

<sup>153</sup> *Notification No. 542*, p. 1.

<sup>154</sup> *Report...*, 1949, p. 9.

<sup>155</sup> *Notification No. 660*, p. 1.

<sup>156</sup> See para. 20 above.

<sup>157</sup> *Rapport de gestion*, 1939, pp. 3 and 4. The United Kingdom extended the application of the Madrid Convention to the other part of its Palestine mandate separately under the name of "Palestine" (*Ibid.*, p. 3).

The application of the 1938 Cairo Telegraph Regulations was also extended to Transjordan by declaration of the United Kingdom deposited on 9 March 1940.<sup>158</sup>

48. Following the conclusion of the Treaty of Alliance of 22 March 1946 between the United Kingdom and the Kingdom of Transjordan and the proclamation of the independence of *Transjordan* on 17 July 1946, the *Hashemite Kingdom of Transjordan* deposited on 20 May 1947, by notification addressed to the Bureau, its accession to the 1932 Madrid Convention and to the 1938 Cairo Telegraph Regulations and General Radiocommunications Regulations.<sup>159</sup> Transjordan, however, does not seem to have been invited to participate in the Atlantic City Conferences.<sup>160</sup> In fact, its name does not appear among the signatories of the Atlantic City Acts or in Annex 1 of the Atlantic City Convention.<sup>161</sup>

49. In connexion with the Madrid Convention and Cairo Regulations, the Bureau continued to list *Transjordan*, in the annual *Reports* for the years 1947 and 1948, among the United Kingdom territories with a note indicating "see also 'Transjordan (Hashemite Kingdom of)'" and at the same time added to the list of countries of the Union "Transjordan (Hashemite Kingdom of)", as having deposited on 20 May 1947 its accession to the Madrid Convention and Cairo Regulations as indicated above.<sup>162</sup> The Bureau also stated that the Transjordan Administration had informed it that it would participate in defraying the expenses of the Union in the eighth class of contribution mentioned in article 14 of the Atlantic City Convention.<sup>163</sup> The name of "Transjordan (Hashemite Kingdom of)" does not appear, however, in the *Report* for 1949. In this connexion, it should be pointed out that after the entry into force of the Atlantic City Convention, on 1 January 1949, the General Secretariat listed only the countries parties to the Madrid Convention which figured in Annex 1 of the Atlantic City Convention and which had not yet become parties to the latter.<sup>164</sup>

50. On 14 September 1949, the Secretary-General communicated to the members of the Union the receipt by diplomatic channel and through the intermediary of the Swiss Government of an application for admission "as a Member" of the Union from the Government of the Hashemite Kingdom of the Jordan.<sup>165</sup> Subsequently, the *Hashemite Kingdom of Jordan* went through admission procedure in accordance with article 1, paragraph 2 (c) of the Atlantic City Convention,<sup>166</sup> and upon approval of the application for admission by two-thirds of the mem-

bers of ITU,<sup>167</sup> it acceded to that Convention. The communication of accession was received by the Secretary-General of the Union on 25 September 1950. The Secretary-General informed that the communication in question "was submitted to the Administrative Council and on 30 September the Council agreed that the *Hashemite Kingdom of Jordan* is now to be considered as a Member of the Union".<sup>168</sup> The approval by Jordan of the 1949 Paris Telegraph Regulations and Telephone Regulations was received by the Secretary-General on 22 September 1950.<sup>169</sup>

51. Prior to the admission of the Hashemite Kingdom of Jordan, the following communication from the *Jordan Administration*, dated 8 May 1950 and relating to telegraph services in Arab localities in former Palestine which came under Transjordan Administration as from 1 April 1949, was circulated by the General Secretariat:

With reference to the information published under 'Transjordan' in Notification No. 572 of 1 April 1949 (page 10), the Administration of Jordan announces that all telegraph offices in Arab localities in former Palestine previously under its jurisdiction and which were published in the above mentioned Notification have become part and parcel of this service, in accordance with this Government's official declaration of the Union of Eastern and Western Jordan.<sup>170</sup>

#### *Israel*

52. In accordance with article 5 of the Madrid Convention,<sup>171</sup> the United Kingdom made the Convention applicable to *Palestine* as from 23 August 1935.<sup>172</sup> The application of the 1938 Cairo Telegraph Regulations, General Radio Regulations and Additional Radio Regulations was likewise extended to Palestine on 9 March 1940.<sup>173</sup>

53. The State of *Israel* which was established on 15 May 1948, namely before the entry into force on 1 January 1949 of the instruments adopted at the 1947 Atlantic City Conferences, acceded on 24 June 1948 to the Madrid Convention and to all the Cairo Regulations. The accession was notified by Israel to the Bureau which informed the countries of the Union as follows:

Communication received on 24 June 1948 from the Director-General of Posts, Telegraphs and Telephones of the State of Israel, who has communicated to us credentials signed by the Minister of Transport and Communications of that State:

"I have the honour to inform you, in my capacity as Director-General of Posts, Telegraphs and Telephones of the State of

<sup>158</sup> *Rapport de gestion, 1940*, pp. 7 and 9 (foot-notes 11 and 12).

<sup>159</sup> *Rapport de gestion, 1947*, pp. 4, 5, 9 and 10.

<sup>160</sup> United States of America, Department of State, *International Telecommunication Conferences: Report of the United States Delegations...*, Department of State publication 3177 (Washington, Government Printing Office, 1948), Appendix 9, pp. 185-186.

<sup>161</sup> United Nations, *Treaty Series*, vol. 193, pp. 243 and 259.

<sup>162</sup> *Rapport de gestion, 1947*, pp. 3-5 and 8-10, and *Report...*, 1948, pp. 5-7 and 11-13.

<sup>163</sup> *Notification No. 557*, p. 2.

<sup>164</sup> *Report...*, 1949, p. 9.

<sup>165</sup> *Notification No. 584*, p. 2.

<sup>166</sup> See para. 9 above. The Hashemite Kingdom of Jordan was not at the time of its application a Member of the United Nations.

<sup>167</sup> *Notification No. 592*, pp. 1-2.

<sup>168</sup> *Notification No. 609*, p. 1 (Italics supplied).

<sup>169</sup> *Ibid.*, p. 4.

<sup>170</sup> *Notification No. 601*, p. 8.

<sup>171</sup> See para. 20 above.

<sup>172</sup> Palestine was under the United Kingdom mandate, approved by the League of Nations in July 1922 and effective as from 29 September 1923. As mentioned in paragraph 47 and foot-note 157 above, "Palestine" and "Transjordan" were listed separately in the communication made by the United Kingdom under article 5 of the Madrid Convention (*Rapport de gestion, 1939*, pp. 3 and 4).

<sup>173</sup> *Notification No. 354*, pp. 1-2 and *Rapport de gestion, 1940*, p. 7.

Israel, holding the appropriate powers conferred upon me by the Ministry of Transport and Communications of the Provisional Government of Israel on 15 June 1948, and on behalf of the said Government, that the Provisional Government of the State of Israel wishes to accede to the International Telecommunication Convention, Madrid, 1932 and to the three Regulations of that Convention, namely, the Telegraph Regulations, the Telephone Regulations and the Radiocommunication Regulations (General Regulations and Additional Regulations), in accordance with article 3, paragraph 2 of that Convention.<sup>174</sup>

"I request you to regard this letter as an instrument of accession and to be good enough to communicate it to all the States members of the Union."

In addition, the Administration of Posts, Telephones and Telegraphs of the State of Israel has declared its willingness to contribute three units to the common expenses of the two divisions of the Bureau of the Union from 1 July 1948.<sup>175</sup>

54. After its entry into force, the State of *Israel* acceded to the 1947 Atlantic City Convention. *Israel* being a Member of the United Nations, the accession took place in accordance with article 1, paragraph 2 (b) of the Convention.<sup>176</sup> The instrument of accession of *Israel* to the Atlantic City Convention was received by the General Secretariat on 10 June 1949.<sup>177</sup>

#### Ceylon

55. Prior to the attainment of independence by *Ceylon* on 4 February 1948, the United Kingdom had extended to it the application of the 1932 Madrid Convention, as from 23 August 1935,<sup>178</sup> and the 1938 Cairo Regulations excepting the Telephone Regulations, as from 9 March 1940.<sup>179</sup> The instruments were extended by declarations made in accordance with article 5 of the Madrid Convention.<sup>180</sup> After attaining independence, *Ceylon* did not express its position with regard to the said instruments. The *Report* for 1948<sup>181</sup> continued to list *Ceylon* among the territories to which the United Kingdom extended the application of the instruments concerned.

56. After the entry into force of the 1947 Atlantic City Convention, on 1 January 1949, *Ceylon* submitted to the Secretary-General a request for admission "as member" of the Union. Transmitting the request, the High Commissioner for *Ceylon* in the United Kingdom added "Instrument of accession under article 17 of the Convention will be forwarded as soon as *Ceylon's* application for membership secures the approval of two-thirds of the Members of the Union".<sup>182</sup> Upon the approval of the application by the required majority,<sup>183</sup> *Ceylon* deposited

<sup>174</sup> The Bureau understood that *Israel's* accession was to the Regulations as revised at Cairo in 1938 and, accordingly, listed *Israel* as a party to them (*Report...*, 1948, p. 11).

<sup>175</sup> *Notification No. 554*, p. 1.

<sup>176</sup> See para. 9 above.

<sup>177</sup> *Notification No. 577*, p. 1.

<sup>178</sup> *Rapport de gestion, 1939*, p. 2.

<sup>179</sup> *Ibid.*, 1940, p. 7.

<sup>180</sup> See para. 20 above.

<sup>181</sup> *Report...*, 1948, pp. 5 and 10.

<sup>182</sup> *Notification No. 570*, p. 1. At that time *Ceylon* was not a Member of the United Nations.

<sup>183</sup> *Notification No. 579*, pp. 1 and 2.

on 1 August 1949 its instrument of accession to the Atlantic City Convention, in accordance with the provisions of article 1, paragraph 2 (c) of the Convention.<sup>184</sup>

## 2. CASES RELATING TO RESTORATION OF INDEPENDENCE AFTER ANNEXATION

### Austria

57. *Austria* was one of the countries signatories of all Acts of Madrid, 1932, and its ratification of the Convention and its approval of the Regulations were deposited with the Spanish Government on 23 March 1934 and 14 March 1934, respectively.<sup>185</sup> *Austria* was represented at the 1938 Cairo Administrative Conferences but it did not sign the Cairo Acts revising the Regulations.<sup>186</sup> *Germany*, which deposited its ratification of the Madrid Convention on 29 June 1934,<sup>187</sup> became a party to the 1938 Cairo Regulations as from 17 December 1938.<sup>188</sup>

58. The *Rapport de gestion* for 1939, namely the year following the *Anschluss*, continued to list *Austria* among the countries of the Union parties to the Madrid Convention. The class of budgetary contribution in respect of *Austria* was, however, left blank and the Bureau added as a foot-note to the table showing the status of the Madrid Convention:<sup>189</sup>

According to a communication from the German Administration, *Austria* as a result of its reunification with the Reich (13 March 1938), is no longer a member of the International Telecommunication Union.<sup>190</sup>

The annual *Rapport de gestion* published in the years 1940 to 1944 continued, however, to list *Austria* among the

<sup>184</sup> *Notification No. 581*, p. 1.

<sup>185</sup> League of Nations, *Treaty Series*, vol. CLI, p. 481.

<sup>186</sup> *Documents de la Conférence internationale des radiocommunications du Caire, 1938* (Berne, Bureau de l'Union internationale des télécommunications, 1938), t. II, p. XLI, and *Documents de la Conférence télégraphique et téléphonique internationale du Caire, 1938* (Berne, Bureau de l'Union internationale des télécommunications, 1938), t. II, p. XXXV.

<sup>187</sup> League of Nations, *Treaty Series*, vol. CLI, p. 481.

<sup>188</sup> *Rapport de gestion, 1939*, p. 6.

<sup>189</sup> *Ibid.*, p. 2.

<sup>190</sup> In 1940, the Bureau reproduced the following letter, dated 12 January 1940, received from *Germany* [*Notification No. 351*, pp. 2 and 3 (translation)]:

"According to your telegraphic circular No. 4/8, the Administration of the Union of South Africa has announced, *inter alia*, that communications with *Austria* [...] have been suspended. Presented in this way, the information issued by the Union of South Africa is misleading.

"Since *Austria* became part of the German Reich, it has ceased to be an independent member of the Union. The contributions to the expenses of the Bureau terminated on 1 July 1938 (see my letter III 3000-2 of 28 September 1938). In most of the Union's printed documents the name of *Austria* no longer appears.

"[...]

"I therefore request you to be so good as to draw the attention of member administrations of the Union in an appropriate manner, referring to telegraphic circular No. 4/8, to the fact that *Austria* [...] [is no longer a member] of the Union. To refer to [this territory] as an [independent] country is not in accordance with the facts. I should be grateful if you would take the necessary steps to see that notifications of this kind are not circulated in future."

countries of the Union parties to the Madrid Convention, although the afore-quoted foot-note was always added to its name.<sup>191</sup>

59. Following the restoration of *Austria* as an independent State, the Bureau communicated on 1 February 1946, the following information to the members of the Union:

In a letter received on 18 June 1946, the Austrian Administration has informed us as follows:

"On the basis of article 4 of the [Madrid]<sup>192</sup> International Telecommunication Convention, the Austrian Republic accedes to the Telegraph Regulations (Cairo Revision, 1938) to the Telephone Regulations (Cairo Revision, 1938) to the General Radio Regulations (Cairo Revision, 1938) to the Additional Radio Regulations (Cairo Revision, 1938). "I should be grateful if you would notify the governments concerned."

(The members of the Union were notified of these accessions in our telegraphic circular 21/18 of 18 January 1946.)

Furthermore, the Austrian Administration will contribute in the 5th class to the common expenses of the telegraph and telephone division of the Bureau of the Union and in the 6th class to the expenses of the radiocommunication division.<sup>193</sup>

60. The *Rapport de gestion* for 1945 listed *Austria* as a party to the Madrid Convention as from 23 March 1934 without the foot-note referred to above and as a party to the Cairo Regulations as from 18 January 1946.<sup>194</sup> *Austria* was invited to<sup>195</sup> and attended the 1947 Atlantic City Conferences. Listed in Annex I of the Atlantic City Convention, *Austria* signed the Convention and became a party thereto by depositing its instrument of ratification on 22 May 1950.<sup>196</sup>

### *Ethiopia*

61. The Empire of *Ethiopia* deposited its instrument of ratification of the 1932 Madrid Convention and its approval of the Madrid Telegraph Regulations on 14 November 1934.<sup>197</sup> At the Cairo Conferences, 1938—which took place after the military occupation and annexation of *Ethiopia* in 1935—*Ethiopia* was not represented. *Italy*, a party to the 1932 Madrid Acts as from 26 December 1933,<sup>198</sup> became a party to the 1938 Cairo Regulations on 1 December 1938.<sup>199</sup>

62. The *Rapports de gestion* published after the occupation took place continued to list the Empire of *Ethiopia* as a party to the 1932 Madrid Convention. However, in the annual *Reports* for the years 1939 to 1942 the foot-note reproduced below was added with regard to *Ethiopia* whose class of contribution was left blank:

On 31 May 1939, the Italian Administration sent the following notification to the Bureau of the Union: "With reference to article 5 of the International Telecommunication Convention and to your *Rapport de gestion* for 1938, I have the honour to inform you that as from 1 January 1939 the Italian colonies are:

1. "Italian East Africa", comprising Eritrea, the Empire of *Ethiopia* and Italian Somaliland.

2. "Libya", comprising Cyrenaica and Tripolitania.

With regard to the contribution to the common expenses of your services (article 17, § 3 of the Convention), Italian East Africa wishes to contribute to these expenses from the above-mentioned date in the 5th class for both the telegraph and telephone services and the radio service, and Libya in the 6th class for both the telegraph and telephone services and the radio service. (Notification No. 334, page 4).<sup>200</sup>

63. After the termination of the occupation, the Bureau notified on 1 August 1943 that: "In a letter of 16 March 1943, received on 19 July, the Minister of Posts, Telegraphs and Telephones of the Empire of *Ethiopia* has notified us of the accession of his country to the Cairo Regulations, 1938. The Empire of *Ethiopia* is placing itself in the 6th class for its contribution to the common expenses of each of the two divisions of the Bureau of the Union."<sup>201</sup> *Ethiopia's* contribution was said to have taken effect as from 1 July 1943.<sup>202</sup> The *Rapport de gestion* listed the Empire of *Ethiopia* as a party to the 1932 Madrid Convention and to the 1938 Cairo Regulations as from 14 November 1934 and as from 19 July 1943 respectively.<sup>203</sup>

64. *Ethiopia* was invited to and participated in the 1947 Atlantic City Conferences.<sup>204</sup> Listed in Annex 1 of the Atlantic City Convention, *Ethiopia* signed the Acts of Atlantic City, with a temporary reservation in relation to Protocol concerning the transitional arrangements, and deposited on 18 February 1949 its instrument of ratification of the Atlantic City Convention.<sup>205</sup>

<sup>191</sup> *Rapport de gestion*, 1944, p. 2.

<sup>192</sup> Article 4 of the Madrid Convention reads as follows: "The Government of a country signatory or acceding to the present Convention may accede at any time to any set or sets of Regulations to which it has not bound itself, subject to the provisions of § 2 of Article 2. This accession is notified to the Bureau of the Union, which informs the other Governments concerned."

<sup>193</sup> Notification No. 496, p. 1.

<sup>194</sup> *Rapport de gestion*, 1945, pp. 2 and 6.

<sup>195</sup> United States of America, Department of State, *International Telecommunication Conferences: Report of the United States Delegations...*, Department of State publication 3177 (Washington, Government Printing Office, 1948), Appendix 1, p. 114.

<sup>196</sup> *Report...*, 1950, p. 6.

<sup>197</sup> League of Nations, *Treaty Series*, vol. CLI, p. 481.

<sup>198</sup> *Ibid.*, p. 483.

<sup>199</sup> *Rapport de gestion*, 1939, p. 7.

<sup>200</sup> *Ibid.*, p. 4, foot-note 27.

<sup>201</sup> Notification No. 436, p. 1.

<sup>202</sup> *Rapport de gestion*, 1943, pp. 3 and 5.

<sup>203</sup> *Ibid.*, pp. 3 and 7. In this connexion it should be remembered that by articles 33 and 35 of the Treaty of Peace with Italy, signed at Paris, on 10 February 1947, Italy "recognises and undertakes to respect the sovereignty and independence of the State of *Ethiopia*" and "recognises the legality of all measures which the Government of *Ethiopia* has taken or may hereafter take in order to annul Italian measures respecting *Ethiopia* taken after October 3, 1935, and the effects of such measures" (United Nations, *Treaty Series*, vol. 49, p. 141).

<sup>204</sup> United States of America, Department of State, *International Telecommunication Conferences: Report of the United States Delegations...*, Department of State publication 3177 (Washington, Government Printing Office, 1948), Appendix 1, p. 119.

<sup>205</sup> *Report...*, 1949, pp. 5 and 8.

PART II. UNDER THE 1947 ATLANTIC CITY CONVENTION AND SUBSEQUENT REVISED CONVENTIONS

1. CASES RELATING TO ATTAINMENT OF INDEPENDENCE \*

(a) Concerning members (parties)

(i) Former non-independent "country" of the Union

*Indonesia*

65. *Netherlands Indies*, a country of the Union under the 1932 Madrid Convention,<sup>208</sup> was represented at the Atlantic City Conferences separately from the Netherlands, and its delegation signed the 1947 Convention.<sup>207</sup> On 31 December 1948, the instrument of ratification "by the Netherlands, the Netherlands West Indies, Indonesia and Surinam" of the 1947 Atlantic City Convention, with its annexes, was received by the Secretary-General of the Union.<sup>208</sup>

66. No fresh ratification or accession to the Atlantic City Convention was deposited by *Indonesia* following the draft agreement on transitional measures of the Round Table Conference between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia of 2 November 1949.<sup>209</sup> In 1950, the General Secretariat reported that in reply to a query from it "a communication has been received from Gentel Bandoeng, announcing that the Member 'Indonesia' has adopted the title 'Republic of the United States of Indonesia', and that its territory comprises that hitherto called Indonesia, with the exception of New Guinea".<sup>210</sup>

67. Further, *Indonesia* changed its federal system back to its original unitary system and its name from "Republic of the United States of Indonesia" to "Republic of Indonesia".<sup>211</sup> The list of countries of the Union reproduced

\* For *Singapore* see "Formation of Malaysia and separation of Singapore" (paras. 113-116 below) and for *Malawi* and *Zambia* "Formation and dissolution of the Federation of Rhodesia and Nyasaland and independence of Malawi and Zambia" (paras. 117-126 below).

<sup>208</sup> A signatory of the Acts adopted at Madrid in 1932, *Netherlands Indies* instruments of ratification of the Convention and of approval of the Madrid Regulations were deposited on 23 December 1933 and on 16 December 1933 respectively. (League of Nations, *Treaty Series*, vol. CLI, p. 473). "Netherlands" and "Curaçao and Surinam" deposited separately instruments of ratification of the Madrid Convention and of approval of the Madrid Regulations on the same dates. Netherlands Indies also signed the 1938 Cairo Regulations and approved them effective as from 10 January 1939 (*Rapport de gestion, 1939*, p. 6). Netherlands deposited its instrument of approval of the 1938 Cairo Regulations on 21 December 1938 and "Curaçao and Surinam" on 17 February 1939.

<sup>207</sup> United Nations, *Treaty Series*, vol. 193, p. 250.

<sup>208</sup> *Notification No. 567*, p. 2.

<sup>209</sup> United Nations, *Treaty Series*, vol. 69, p. 200. The Agreement came into force on 27 December 1949. It was later abrogated by the Republic of Indonesia as of 15 February 1956 (See United Nations Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No.: E/F.68.V.5), p. 36). For Indonesia's interpretation of the "1949 Transitional Agreement", *ibid.*, p. 37.

<sup>210</sup> *Notification No. 594*, p. 1.

<sup>211</sup> *Notification No. 609*, p. 9.

in the annual *Reports* for 1948 to 1950 mentions the following:

Netherlands Indies \*  
United States of Indonesia (Republic of the) (see under Netherlands Indies)  
Netherlands, Surinam, Netherlands Antilles, New Guinea \*

\* According to communications received in October 1948 by the General Secretariat from the Curaçao and the Netherlands Indies Administrations, respectively, the name "Curaçao" has been changed to "Netherlands West Indies" and the name "Netherlands Indies" to "Indonesia", then to "Republic of the United States of Indonesia" and then to "Republic of Indonesia". The Member "Netherlands, Surinam and Netherlands Antilles" becomes known as "Netherlands, Surinam, Netherlands Antilles, New Guinea".

The Instrument of Ratification of the Convention and Annexes deposited with the General Secretariat is valid for the Netherlands, the Netherlands Antilles, the Republic of the United States of Indonesia, Surinam and New Guinea.<sup>212</sup>

68. The name "Netherlands Indies" was definitely dropped in the annual *Reports* as from 1951 and footnote [\*] was added to "Indonesia (Republic of)". *Indonesia* and "Netherlands, Netherlands Antilles, Surinam and New Guinea" deposited separately their approval of the 1949 Paris Telegraph Regulations and Telephone Regulations on 19 July 1950 and 27 June 1950, respectively.<sup>213</sup> Annex 1 of the 1952 Buenos Aires Convention listed separately the country "Indonesia (Republic of)" and the group "Netherlands, Netherlands Antilles, Surinam, New Guinea".<sup>214</sup>

(ii) Former constituent entities of a "group of territories" of the Union

*Morocco and Tunisia*

69. Prior to the Atlantic City Conference, 1947, the French Protectorates of *Morocco* and *Tunisia* used to be separately represented at the ITU Conferences. Under the 1932 Madrid Convention each country was a separate "Contracting Government" and contributed separately to the expenses of the Union.<sup>215</sup> Having participated at the Atlantic City Conferences as a group called "French Protectorates of Morocco and Tunisia", they became a single member of the Union and a single party to the 1947 Atlantic City and 1952 Buenos Aires Conventions.<sup>216</sup> The French Government, acting on behalf of the group,

<sup>212</sup> *Report...*, 1950, pp. 7, 8 and 10.

<sup>213</sup> *Notification No. 606*, p. 1 and *No. 605*, p. 2.

<sup>214</sup> For the transfer of Western New Guinea (West Irian) to Indonesia, see paras. 132-133 below.

<sup>215</sup> Listed separately in the Preamble of the Madrid Convention, Morocco and Tunisia became parties to that Convention by signature (League of Nations, *Treaty Series*, vol. CLI, pp. 7, 43 and 45) and ratification. The instrument of ratification concerning Morocco was deposited on 23 February 1934 and that of Tunisia on 5 May 1938 (*Rapport de gestion, 1939*, p. 3; *ibid.*, 1944, p. 4). The approval of the 1938 Cairo Regulations became effective for Morocco on 4 January 1939 and for Tunisia on 3 June 1947 (*ibid.*, 1940, p. 8; *ibid.*, 1947, p. 9).

<sup>216</sup> See United Nations, *Treaty Series*, vol. 193, p. 259 (1947 Atlantic City Convention) and United States of America, *United States Treaties and other International Agreements* (Washington, Government Printing Office, 1956), vol. 6, Part 2, 1955, p. 1274 (1952 Buenos Aires Convention). See also a table showing the status of the Conventions in the annual *Reports* for the years 1947 to 1953.

ratified the Atlantic City Convention effective as from 17 March 1950<sup>217</sup> and the Buenos Aires Convention as from 3 May 1955.<sup>218</sup> The member "French Protectorates of Morocco and Tunisia" contributed to the expenses of the Union in the eighth class. On the other hand, the competent authorities of the Protectorate of Morocco and of the Protectorate of Tunisia, acting separately, approved during 1950-1952 the Telegraph and Telephone Regulations as revised at Paris, 1949,<sup>219</sup> and the Agreement adopted at an Extraordinary Administrative Radio Conference held at Geneva in 1951.<sup>220</sup>

70. After an independent Moroccan State was formed in 1956 out of three territorial entities formerly called the "French Protectorate of Morocco", the "Zone of the Spanish Protectorate in Morocco"<sup>221</sup> and the "Inter-

<sup>217</sup> Notification No. 597, p. 2.

<sup>218</sup> Notification No. 721, p. 1. The Notification indicates that: "The French Government has ratified the International Telecommunication Convention of Buenos Aires (1952) on behalf of the *French Protectorates of Morocco and Tunisia*, in accordance with the provisions of Article 15, paragraph 1, of that Convention. The instruments of ratification, dated 21 March 1955, were deposited with the General Secretariat on 3 May 1955".

<sup>219</sup> See Notifications No. 611, p. 3, and No. 654, p. 1. Notification No. 611 states that: "In accordance with Article 13, paragraph 3, of the International Telecommunication Convention, Atlantic City (1947), I have the honour to inform you that, on 17 October 1950, I received a communication from the Shereefian Administration notifying me that it has approved the Telegraph and Telephone Regulations, signed at Paris on 5 August 1949". And Notification No. 654 states that: "In accordance with Article 13, paragraph 3, of the International Telecommunication Convention (Atlantic City, 1947), the Minister Plenipotentiary at the French Residency has informed me, in a communication received on 4 August 1952, that Tunisia has approved the Telegraph and Telephone Regulations (Paris, 1949)".

<sup>220</sup> "Agreement for the preparation and adoption of the new International Frequency List for the various services in the bands between 14 kc/s and 27 500 kc/s with a view to bringing into force the Atlantic City Table of Frequency Allocations, Geneva, 1951" [hereinafter referred to as the "Geneva Agreement, 1951"]. Notification 660, p. 3, says that: "To avoid confusion, we wish to make it clear that the above signatory [French Protectorates of Morocco and Tunisia] of the Agreement announced approval of the Agreement on behalf of Morocco by letter dated 7 June 1952 (Notification No. 651 of 1 July 1952) and on behalf of Tunisia by letter dated 25 July 1952 (Notification No. 654 of 16 August 1952)".

<sup>221</sup> Like Spain, the "Spanish Zone of the Protectorate of Morocco", a "Contracting Government" under the 1932 Madrid Convention (instrument of accession deposited on 27 June 1934, see League of Nations, *Treaty Series*, vol. CLI, p. 483) and a party to the 1938 Cairo Regulations, (see *Rapport de gestion, 1939*, p. 7) was not invited to the Atlantic City Conferences owing to General Assembly resolution 39 (I) of 12 December 1946 regarding relations of Members of the United Nations with Spain (see United States of America, Department of State, *International Telecommunication Conferences: Report of the United States Delegations...*, Department of State publication 3177 (Washington, Government Printing Office, 1948), pp. 2-3). The Spanish Government acceded to the 1947 Atlantic City Convention on behalf of "Spanish Zone of the Protectorate of Morocco and the totality of Spanish Possessions", effective as from 2 May 1951 (Notification No. 624, p. 1). The Group as a member of the Union was a signatory of the 1952 Buenos Aires Convention and ratification of the Convention on its behalf was deposited by Spain on 16 September 1955 (Notification No. 729, p. 1). Spain also approved in 1952, on this member's behalf, the Geneva Agreement, 1951 (Notification No. 663, p. 1) but not the Telegraph and Telephone Regulations as revised at Paris, 1949. In 1954, the Spanish Government communicated that the Group should be called "Zone of Spanish Protectorate in Morocco and Spanish Possessions" (Notification No. 704, p. 2). France objected to this denomination (Notification No. 715, p. 4).

national Zone of Tangier",<sup>222</sup> Morocco deposited on 12 November 1956, the day on which it was admitted to the United Nations, fresh accession to the 1952 Buenos Aires Convention, in accordance with articles 1, paragraph 2 (b) and 16, paragraph 1, of the Convention.<sup>223</sup> Foot-note 53 on page 37 of the *Report... 1956*, indicates that:

The instrument of accession of Morocco to the Buenos Aires Convention (1952) shows that Morocco, as an independent sovereign State, has succeeded the former French Protectorate of Morocco (so far included in the Member designated "French Protectorates of Morocco and Tunisia", ratifications for which had been registered on 3 May 1955) and the Zone of Spanish Protectorate in Morocco (so far included in the Member designated "Zone of Spanish Protectorate in Morocco and Spanish Possessions", for which the ratification had been registered on 16 September 1955.

71. Following attainment of independence on 20 March 1956 and admission to the United Nations on 12 November 1956, Tunisia, like Morocco, deposited on 14 December 1956, fresh accession to the 1952 Buenos Aires Convention, in accordance with articles 1, paragraph 2 (b), and 16, paragraph 1, of the Convention.<sup>224</sup>

72. The *Report... 1956*, summarized the change of status of Morocco and Tunisia within the Union in the following terms:

In 1956, Morocco and Tunisia became Members of the United Nations and acceded to the Convention [Buenos Aires, 1952], in accordance with the provisions of Article 1, paragraph 2 (b). These countries have become two separate Members of the Union, replacing the Member which appears as "French Protectorates of Morocco and Tunisia" in Annex 1 to the Convention. At the same time, the Spanish Government announces that, as a result of the inclusion of the former "Zone of the Spanish Protectorate in Morocco" in the territory of the new Member "Morocco", the denomination of the Member "Zone of Spanish Protectorate in Morocco and Spanish Possessions" is changed to "Spanish Provinces in Africa".<sup>225</sup>

The General Secretariat listed Morocco and Tunisia as parties to the Buenos Aires Convention as from the date of deposit of their respective fresh accession and not as from 3 May 1955, the date on which ratification given on behalf of the "French Protectorates of Morocco and Tunisia" had taken effect.<sup>226</sup> Although Morocco and

<sup>222</sup> Upon relinquishing administrative powers of the French Zone, France recognized Moroccan independence as of 2 March 1956. Administrative powers of Spain in the Spanish Zone were transferred to Morocco as of 7 April 1956. Following the Fedala Conference held on 8 October 1956, the International Zone of Tangier came under Moroccan control as of 29 October 1956.

<sup>223</sup> Notification No. 758, p. 1. A subsequent communication from Morocco modified the text of this instrument of accession in connexion with the transfer of the *Spanish Southern Zone of Morocco* to Morocco (see para. 131 below). By a letter dated 28 November 1956, the Spanish Administration advised the General Secretariat that the territories formerly included in the "Zone of the Spanish Protectorate in Morocco" were no longer within its responsibility and that the member which formerly comprised the Spanish Zone would be designated "Spanish Provinces in Africa" (Notification No. 760, p. 1).

<sup>224</sup> Notification No. 759, p. 1.

<sup>225</sup> *Report... 1956*, p. 4.

<sup>226</sup> *Ibid.*, pp. 34-35 and 37.

Tunisia did not refer to the Telegraph and Telephone Regulations as revised at Paris, 1949, and the Geneva Agreement, 1951, the General Secretariat continued to list both countries as having approved these instruments.<sup>227</sup>

(iii) *Some former constituent entities of certain "groups of territories" of the Union*

*Cambodia, Laos and Viet-Nam*

73. *French Indochina* was a part of a group of territories called "French Colonies, Protectorates and Territories under French Mandate" which was represented at the ITU Conferences of Madrid (1932) and Cairo (1938). The group, listed in the Preamble of the 1932 Madrid Convention, signed the Acts adopted at these Conferences.<sup>228</sup> France, on behalf of the group, deposited on 5 May 1938 the instrument of ratification of the Madrid Convention and on 23 October 1941 the approval of the approval of the Administrative Regulations adopted at Cairo excepting the Telephone Regulations.<sup>229</sup> The group, under the name "Colonies, Protectorates and Overseas Territories under French Mandate", participated at the 1947 Atlantic City Conferences, was listed in Annex 1 of the Atlantic City Convention and signed separately the Atlantic City Acts.<sup>230</sup>

74. On differing dates in 1951 *Viet-Nam* (24 April), *Laos* (12 July) and *Cambodia* (30 July), which had formerly constituted French Indochina, applied for membership in the Union<sup>231</sup> before the deposit by France of the ratification of the Atlantic City Convention (15 August 1951)<sup>232</sup> and of the approval of the Administrative Regulations annexed to that Convention (28 September 1951)<sup>233</sup> on behalf of the Group known at that time as "Overseas Territories of the French Republic and Territories administered as such". Consultations on the applications submitted by Viet-Nam, Laos and Cambodia, undertaken in accordance with article 1, paragraphs 2 (c) and 6, of the Atlantic City Convention and Administrative Council resolution No. 90,<sup>234</sup> took in each case some four months. After the applications were approved by two-thirds of members of the Union,<sup>235</sup> the instrument of accession to the Atlantic City Convention was deposited by Viet-

Nam on 24 September 1951,<sup>236</sup> by Laos on 3 April 1952<sup>237</sup> and by Cambodia on 10 April 1952.<sup>238</sup>

*Cameroon, Central African Republic, Chad, Congo (Brazzaville), Dahomey, Gabon, Guinea, Ivory Coast, Madagascar, Mali, Mauritania, Niger, Senegal, Togo and Upper Volta*

75. Before their independence, all these fifteen States were territories comprised in the member of the Union known as "Group of Territories represented by the French Overseas Postal and Telecommunication Agency".<sup>239</sup> Between 1951 and 1960, year in which all these former territories became independent, France ratified or approved on behalf of the group the following ITU Conventions and Administrative Regulations:

	<i>Effective date</i>	<i>Notification No.</i>
Atlantic City Convention, 1947	15 Aug. 1951	630
Radio Regulations and Additional Regulations (Atlantic City, 1947)	28 Sept. 1951	633
Telegraph Regulations and Telephone Regulations (Paris, 1949)	28 Sept. 1951	633
Buenos Aires Convention, 1952	19 Aug. 1954	704
Telephone Regulations and Telephone Regulations (Geneva, 1958)	8 April 1959	816

76. The deposit of the ratification and approval by France, on behalf of the group, of the 1959 Geneva Convention and 1959 Geneva Radio Regulations and Additional Radio Regulations took place on 19 November 1962, namely after the new States referred to above had already attained independence and ceased to be territories comprised in the group.<sup>240</sup>

77. After attaining independence all States mentioned above became separate members of the Union by accession. Ten acceded to the 1952 Buenos Aires Convention and five to the 1959 Geneva Convention which came into force on 1 January 1961. All but two acceded after being admitted to the United Nations. *Cameroon* and *Mauritania* applied for membership in the Union some months before their admission to the United Nations, Cameroon under article 1, paragraphs 2 (c) and 7, of the Buenos Aires Convention,<sup>241</sup> and Mauritania under article 1, paragraphs 2 (c) and 5, of the Geneva Convention.<sup>242</sup> Following the approval of their applications,<sup>243</sup> Cameroon acceded to the Buenos Aires Convention in accordance with its article 16 and Mauritania acceded to the Geneva Convention in accordance with its article 18. The effective dates of accession to the 1952 Buenos Aires Convention or to the 1959 Geneva Convention of the fifteen States referred to above are the following:

<sup>236</sup> *Notification No. 633*, p. 1.

<sup>237</sup> *Notification No. 646*, p. 1.

<sup>238</sup> *Ibid.*

<sup>239</sup> *Notification No. 783*, p. 1. Previously called "Overseas Territories of the French Republic and Territories administered as such" (see paras. 73 and 74 above). For the list of territories comprised in the group, see *Notification No. 704*, p. 1, and *No. 826*, p. 2.

<sup>240</sup> *Report . . . , 1962*, p. 45.

<sup>241</sup> *Notification No. 838*, p. 1.

<sup>242</sup> *Notification No. 864*, p. 1.

<sup>243</sup> *Notification No. 846*, pp. 1-2, and *No. 873*, pp. 1-2.

<sup>227</sup> *Ibid.* Later on Morocco (*Notification No. 818*, p. 1) and Tunisia (*Notification No. 829*, p. 4) approved the Telegraph and Telephone Regulations as revised at Geneva, 1958.

<sup>228</sup> League of Nations, *Treaty Series*, vol. CLI, pp. 7 and 35; *Rapport de gestion, 1939*, pp. 2 and 6.

<sup>229</sup> *Report . . . , 1948*, pp. 4, 7 and 9.

<sup>230</sup> United Nations, *Treaty Series*, vol. 193, pp. 247 and 259; United States of America, Department of State, *International Telecommunication Conferences: Report of the United States Delegations . . .*, Department of State publication 3177 (Washington, Government Printing Office, 1948), Appendix 6, pp. 163, 168 and 175.

<sup>231</sup> *Notification No. 623*, p. 1; *No. 628*, p. 1, and *No. 629*, p. 1.

<sup>232</sup> *Notification No. 630*, p. 1.

<sup>233</sup> *Notification No. 633*, p. 2. The Administrative Regulations in question were: Radio Regulations; Additional Radio Regulations; Telegraph Regulations (Paris, 1949); Telephone Regulations (Paris, 1949).

<sup>234</sup> Resolution No. 90 reads *inter alia*: "The countries listed in Annex 1 to the Convention which have not ratified the Convention at the time of the consultation, but which ratify within four months, may express their opinion on their application".

<sup>235</sup> *Notification No. 631*, p. 1, *No. 636*, p. 1, and *No. 637*, p. 1.

1952 Buenos Aires Convention	Effective date	Notification
Guinea .....	9 March 1959	814
Mali (Republic of) <sup>244</sup> .....	21 Oct. 1960	853
Niger .....	14 Nov. 1960	854
Senegal <sup>244</sup> .....	15 Nov. 1960	854
Chad .....	25 Nov. 1960	855
Central African Republic .....	2 Dec. 1960	856
Congo (Brazzaville) .....	13 Dec. 1960	856
Cameroon .....	22 Dec. 1960	857
Ivory Coast <sup>245</sup> .....	23 Dec. 1960	857
Gabon .....	28 Dec. 1960	857
<i>1959 Geneva Convention</i>		
Dahomey .....	1 Jan. 1961 <sup>246</sup>	853
Madagascar .....	11 May 1961	866
Togo .....	14 Sept. 1961	875
Upper Volta .....	16 Jan. 1962	883
Mauritania .....	18 April 1962	890

78. In acceding to the Buenos Aires Convention, 1952, or to the Geneva Convention, 1959, none of the above-mentioned fifteen States referred to the four sets of Administrative Regulations which had previously been made applicable to their territories by France.<sup>247</sup> In the table showing the status of these Administrative Regulations, published in the annual *Reports* for 1959 to 1963, only signature, express approval and reservations relating to the Administrative Regulations were indicated.<sup>248</sup> Following the practice described in paragraph 18 above, as from 1964 the annual *Reports* reproduce an editorial note indicating that the Telegraph and Telephone Regulations (Geneva, 1958)<sup>249</sup> have been approved *ipso facto* by each of those fifteen States and the 1959 Geneva Radio Regulations and Additional Radio Regulations by five of them (*Guinea, Madagascar, Mauritania, Togo and Upper Volta*) "since they were in force when the country concerned acceded to the International Telecommunica-

<sup>244</sup> After attaining independence on 20 June 1960, the Federation of Mali applied for membership in the Union (*Notification No. 849*, p. 1). However, before the consultation period was over, the Federation was divided into two independent States on 20 August 1960, namely the *Republic of Mali and Senegal*. The Federation having ceased to exist, the Secretary-General of the Union declared that the consultation on the Federation's application had become null and void (*Notification No. 854*, p. 1).

<sup>245</sup> *Ivory Coast* deposited its instrument of accession to the 1959 Geneva Convention at the same date.

<sup>246</sup> *Dahomey's* instrument of accession was deposited on 28 October 1960, but it did not take effect until the date of entry into force of the 1959 Geneva Convention (*Report . . . , 1964*, p. 29).

<sup>247</sup> See para. 76 above. In the case of Guinea, Radio Regulations and Additional Radio Regulations (Atlantic City, 1947) and Telegraph and Telephone Regulations (Paris, 1949) had been made applicable. In all other fourteen cases, Radio Regulations and Additional Radio Regulations (Atlantic City, 1947) and Telegraph Regulations and Telephone Regulations (Geneva, 1958) had been made applicable. Some time after becoming members of the Union, most of these fifteen countries expressly approved Radio Regulations and Additional Radio Regulations (Geneva, 1959) which had not been made applicable to their territories prior to their independence. (See table in the annual *Reports* for 1964 to 1967).

<sup>248</sup> See annual *Reports* for 1959 to 1963, Annex 1.

<sup>249</sup> As from the annual *Report* for 1961, the General Secretariat did not reproduce the status of the Radio Regulations and Additional Radio Regulations (Atlantic City, 1947) which were replaced by new sets of Regulations adopted at Geneva, 1959.

tion Convention (Geneva, 1959)".<sup>250</sup> In 1964, the ten States which became members of the Union by acceding to the 1952 Buenos Aires Convention had already acceded likewise to the 1959 Geneva Convention.<sup>251</sup>

#### *Democratic Republic of the Congo*

79. A group of territories called "Belgian Congo and Territories of Ruanda-Urundi" was listed in Annex 1 of the 1947 Atlantic City Convention, 1952 Buenos Aires Convention and 1959 Geneva Convention. Its ratification of the Atlantic City Convention was given by the Government of Belgium effective as from 9 September 1949<sup>252</sup> and in 1956 the Belgian Government informed the General Secretariat that its ratification of the 1952 Convention, deposited on 10 August 1955,<sup>253</sup> "is also valid" for the "Belgian Congo and the Trust Territory of Ruanda Urundi".<sup>254</sup> The 1958 Geneva Telegraph Regulations and Telephone Regulations, as well as the 1951 Geneva Agreement,<sup>255</sup> were also made applicable to the group by Belgium.<sup>256</sup>

80. The *Democratic Republic of the Congo* became independent on 30 June 1960 and, after being admitted to the United Nations on 20 September 1960, acceded to the 1959 Geneva Convention, effective as from 6 December 1961, in accordance with articles 1, paragraph 2 (b), and 18 of the Convention.<sup>257</sup> As from 1964, the annual *Reports* indicate that the 1958 Geneva Telegraph Regulations and Telephone Regulations were approved *ipso facto* by the Democratic Republic of the Congo "since they were in force when the country concerned acceded to the 1959 Geneva Convention".<sup>258</sup>

#### *Barbados, Botswana, Cyprus, Guyana, Lesotho, Malta, Mauritius and Southern Yemen*

81. Before attaining independence the above-mentioned eight States formed part of a "group of territories" member of the Union called "Overseas Territories for the international relations of which the Government of the United Kingdom of Great Britain and Northern Ireland are responsible".<sup>259</sup> Between 1949 and 1968 the United

<sup>250</sup> *Report . . . , 1964*, p. 64, foot-note 30.

<sup>251</sup> It should be noticed, however, that the 1959 Geneva Convention did not contain a provision similar to article 15, para. 2 (2), of the 1965 Montreux Convention (see para. 18 and foot-note 87 above).

<sup>252</sup> *Notification No. 584*, p. 1.

<sup>253</sup> *Notification No. 727*, p. 1.

<sup>254</sup> *Notification No. 742*, p. 1. For Burundi and Rwanda see paras. 87 and 88 below.

<sup>255</sup> See foot-note 220 above.

<sup>256</sup> *Notifications No. 660*, p. 3, and *No. 816*, p. 1.

<sup>257</sup> *Notification No. 881*, p. 2.

<sup>258</sup> See para. 18 above.

<sup>259</sup> *Barbados and Guyana* had been part of the associate member "Bermuda-British Caribbean Group" until 31 December 1962 when that associate member was dissolved (see foot-note 277 below). They were then placed in this "group of territories" member of the Union (*Notification No. 899*, p. 1). The denomination of the group called in Annex 1 of the Atlantic City Convention "Colonies, Protectorates, Overseas territories and territories under Mandate or Trusteeship of the United Kingdom of Great Britain and Northern Ireland", and its composition, underwent alterations several times (see *Notification No. 686*, p. 3; *No. 829*, p. 1; *No. 881*, pp. 2-3; *No. 967*, p. 1; and *No. 1004*, pp. 1-2).

Kingdom ratified, acceded to or approved, on behalf of the group, the following ITU Conventions and Administrative Regulations:

	Effective date	Notification No.
Atlantic City Convention, 1947	20 July 1949	581
Telegraph Regulations and Telephone Regulations (Paris, 1949)	(by letter dated 10 June 1950)	603
Buenos Aires Convention, 1952	16 Nov. 1953	686
Telegraph Regulations and Telephone Regulations (Geneva, 1958)	(by letter dated 29 July 1960)	847
Geneva Convention, 1959	9 Dec. 1961	881
Radio Regulations and Additional Radio Regulations (Geneva, 1959)	(by letter dated 30 July 1962)	897
Montreux Convention, 1965	7 March 1968	1004

82. After being admitted to the United Nations, two out of these eight States acceded to the 1959 Geneva Convention and six to the 1965 Montreux Convention, in accordance with the relevant provisions of the said Conventions, as follows:

1959 Geneva Convention	Effective date of accession	Notification No.
Cyprus .....	24 April 1961	865
Malta .....	22 March 1965	960
<i>1965 Montreux Convention</i>		
Barbados .....	16 Aug. 1967	998
Botswana .....	2 April 1968	1005
Guyana .....	8 March 1967	992
Lesotho .....	26 May 1967	995
Mauritius .....	30 July 1969	1021
Souther Yemen .....	15 Aug. 1968	1010

83. In February 1963, *Cyprus* approved expressly the 1958 Geneva Telegraph Regulations and Telephone Regulations as well as the 1959 Geneva Radio and Additional Radio Regulations.<sup>260</sup> With regard to the other States referred to in the preceding paragraph, the annual *Reports*, as from 1965, indicate that certain sets of Administrative Regulations were approved *ipso facto* by them "since they were in force when the country concerned acceded to" the 1959 Geneva Convention or the 1965 Montreux Convention.<sup>261</sup>

*Gambia and Swaziland*

84. As the countries mentioned in paragraphs 81 to 83 above, *Gambia* and *Swaziland* had been a part of the "group of territories" member of the Union called "Overseas Territories for the international relations of which the Government of the United Kingdom of Great Britain and Northern Ireland are responsible" when they attained independence.<sup>262</sup> *Gambia* attained independence on 18 February 1965 and *Swaziland* on 8 September 1968. Since independence, neither of these States has expressed its position with regard to the ITU Conventions and Administrative Regulations.

<sup>260</sup> Notification No. 911, p. 2.  
<sup>261</sup> See para. 18 above.  
<sup>262</sup> For previous status within the Union of *Gambia*, see footnote 275 below.

*Equatorial Guinea*

85. Before attaining independence, *Equatorial Guinea* was a part of the "group of territories" member of the Union known as "Spanish Provinces in Africa".<sup>263</sup> On 6 June 1967, Spain, on behalf of the group, deposited the instrument of ratification of the 1965 Montreux Convention. Independent as from 12 October 1968, *Equatorial Guinea* has not yet expressed its position with regard to the ITU Conventions and Administrative Regulations.

(iv) Former department of an independent "country" of the Union

*Algeria*

86. When *Algeria* became independent in 1962, the 1952 Buenos Aires Convention, the Telegraph Regulations and Telephone Regulations (Geneva, 1958) and the Radio Regulations and Additional Radio Regulations (Geneva, 1959) were applicable to its territory by virtue of the ratification or approval of these instruments by France.<sup>264</sup> France had not ratified the 1959 Geneva Convention before *Algeria's* independence.<sup>265</sup> After being admitted to the United Nations on 8 October 1962, *Algeria* acceded to the 1959 Geneva Convention effective as from 3 May 1963.<sup>266</sup> Since 1964, the annual *Reports* indicate that *Algeria* approved *ipso facto* the 1958 Geneva Telegraph Regulations and Telephone Regulations and the 1959 Geneva Radio Regulations and Additional Radio Regulations "since they were in force when" the country acceded to the 1959 Geneva Convention.<sup>267</sup>

(b) Concerning associate members (parties)

(i) Former constituent entities of a "group of territories" of the Union

*Burundi and Rwanda*

87. As indicated in paragraph 79 above, Belgium's ratification of the 1952 Buenos Aires Convention (effective as from 10 August 1955) was also valid for the "Belgian Congo and the Trust Territory of Ruanda-Urundi". Soon after the independence of the Congo (Democratic Republic of), the Belgian Government submitted an application for associate membership of the "Territory of Ruanda-Urundi" on the basis of article 1, paragraph 4 (c), of the 1952 Buenos Aires Convention.<sup>268</sup> This provision states that "any territory or group of territories not fully responsible for the conduct of its international relations, on behalf of which a Member of the Union has signed and ratified or has acceded to" the Convention shall be an

<sup>263</sup> See paras. 11 and 72 and footnotes 35, 52, 221 and 222 above.  
<sup>264</sup> The notification by the General Secretariat of the ratification of the Buenos Aires Convention expressly indicates that "the Government of the French Republic has ratified that Convention on behalf of: *France* and *Algeria*; [...]" (Notification No. 704, p. 1). The ratification was effective as from 19 August 1954. See also the annual *Reports* for 1954-1960  
<sup>265</sup> France ratified the Geneva Convention effective as from 19 November 1962 (Notification No. 904, p. 1).  
<sup>266</sup> Notification No. 915, p. 1.  
<sup>267</sup> Table showing the status of the Convention and Regulations (*Report . . . , 1964*, pp. 58 and 64, foot-note 30).  
<sup>268</sup> Notification No. 849, p. 1.

associate member "provided that its application for Associate Membership is sponsored by such a Member, after the application has received approval by a majority of the Members of the Union".<sup>269</sup> Under this provision, the territory concerned became "associate member" on the date of the approval of the application. No fresh accession to the Convention under which it is admitted to associate membership is supposed to be deposited in its behalf. Separate ratifications or accessions on behalf of such "associate members" are required only with regard to revised Conventions entered into force subsequently to their admission as "associate members". Thus, following the approval of the application on 30 December 1960 by the required majority, the Territory became an associate member of the Union as from that date, without having to submit any fresh accession to the Buenos Aires Convention.<sup>270</sup>

88. After attaining independence and being admitted to the United Nations, *Rwanda* and *Burundi* acceded to the 1959 Geneva Convention, effective as from 12 December 1962<sup>271</sup> and 16 February 1963,<sup>272</sup> respectively, in accordance with articles 1, paragraph 2 (b), and 18 of the Convention. The annual *Report* for 1964 indicates that the 1958 Geneva Telegraph and Telephone Regulations and the 1959 Geneva Radio and Additional Radio Regulations were approved *ipso facto* by *Rwanda* and *Burundi* "since they were in force when" these States acceded to the 1959 Geneva Convention.<sup>273</sup>

(ii) *Some former constituent entities of certain "groups of territories" of the Union*

*Ghana, Jamaica, Kenya, Malaya (Federation of), Nigeria, Sierra Leone, Tanganyika, Trinidad and Tobago and Uganda*

89. The territories of the above-mentioned States other than *Kenya*, which itself was a former associate member,<sup>274</sup> formed part of certain "groups" having the status of associate members of the Union when they attained independence. These groups ("British East Africa", "British West Africa",<sup>275</sup> "Malaya-British

Group"<sup>276</sup> and "Bermuda-British Caribbean Group"<sup>277</sup>) had been admitted as associate members under the 1947 Atlantic City or the 1952 Buenos Aires Conventions following *mutatis mutandis* the procedure described in paragraph 87 above.<sup>278</sup> The United Kingdom, the member of the Union responsible at that time for the conduct of the international relations of the constituent territories, sponsored the applications for associate membership of the groups concerned.<sup>279</sup> Prior to the submission of the applications, the Atlantic City Convention or the Buenos Aires Convention was applicable to these territories because they were amongst those which together constituted the member of the Union, party to the said Conventions,<sup>280</sup> known as "Colonies, Protectorates, Overseas Territories and Territories under Mandate or Trusteeship of the United Kingdom of Great Britain and Northern Ireland."

90. After their admission, the United Kingdom rati-

<sup>276</sup> The Group was originally constituted as follows: Federation of Malaya, Singapore, North Borneo and Sarawak, and Brunei (*Notification No. 665*, p. 1). Following the independence of the Federation of Malaya, the denomination was changed to "Singapore-British Borneo Group" (*Notifications No. 787*, p. 1, and *No. 881*, p. 2). In September 1964, the United Kingdom communicated to the General Secretariat that:

"it has been decided that *Brunei*, the sole remaining constituent of the Singapore/British Borneo Associate Member Group, will henceforth be included among the territories comprising the Member, Overseas territories for the international relations of which the Government of the United Kingdom of Great Britain and Northern Ireland are responsible. The Singapore/British Borneo Associate Member Group will, therefore, cease to exist" (*Notification No. 948*, p. 1).

<sup>277</sup> The Group was originally constituted as follows: Bahamas, Barbados, Bermuda, British Guiana, British Honduras, Jamaica, Leeward Islands, Trinidad and Tobago, and Windward Islands (*Notification No. 702*, pp. 1-2). By a communication dated 30 August 1962, the Administration of the United Kingdom informed:

"... that consequent upon the dissolution of the Federation of the West Indies and the attainment of independence by Jamaica on 6th August, 1962, and by Trinidad and Tobago on 31st August, 1962, it has been decided to dissolve the Associate Member, Bermuda-British Caribbean Group, as from the 31st December, 1962; its liability to contribute to the expenses of the Union will, therefore, cease from that date. The remaining constituent territories, namely [...] will be included among the territories comprising the Member, The Overseas Territories for the international relations of which the Government of the United Kingdom of Great Britain and Northern Ireland are responsible, with effect from the 31st December, 1962."

(*Notification No. 899*, p. 1).

<sup>278</sup> Associate members called "British East Africa", "British West Africa", and "Malaya-British Borneo Group" were admitted under the Atlantic City Convention. Associate member called "Bermuda-British Caribbean Group" was admitted under the Buenos Aires Convention. They became associate members at the following dates (dates of approval of applications): British East Africa, 18 April 1952 (*Notification No. 647*, pp. 2-3); British West Africa, 20 July 1952 (*Notification No. 653*, pp. 1-2); Malaya-British Borneo Group, 6 May 1953 (*Notification No. 673*, pp. 1-2); Bermuda-British Caribbean Group, 28 November 1954 (*Notification No. 710*, pp. 1-2).

<sup>279</sup> *Notification No. 639*, p. 1 (British East Africa); *No. 645*, p. 1 (British West Africa); *No. 665*, p. 1 (Malaya-British Borneo Group); and *No. 702*, pp. 1-2 (Bermuda British Caribbean Group).

<sup>280</sup> See para. 81 above.

<sup>269</sup> At present paragraph 3 (b) of Article 1 of the 1965 Montreux Convention (see para. 9 above).

<sup>270</sup> *Report . . . , 1960*, pp. 4 and 39.

<sup>271</sup> *Notification No. 905*, p. 1.

<sup>272</sup> *Notification No. 910*, p. 1.

<sup>273</sup> See para. 18 above.

<sup>274</sup> "Kenya" was formerly part of the associate member "British East Africa" which comprised: Kenya, Tanganyika and Uganda (*Notification No. 639*, p. 1). As a result of the accession after independence of Tanganyika and Uganda to the 1959 Geneva Convention as separate members, it was decided to replace the denomination of the associate member "British East Africa" by "Kenya" (*Notification No. 916*, p. 6).

<sup>275</sup> This Group was originally constituted as follows: Nigeria (including the Cameroons under United Kingdom trusteeship), Gold Coast (including Togoland under United Kingdom trusteeship), Sierra Leone and Gambia (*Notification No. 645*, p. 1). Following the independence and accession to the ITU Conventions of Ghana, Nigeria and Sierra Leone, *Gambia* was included again among the territories comprising the member of the Union called "Overseas Territories for the international relations of which the Government of the United Kingdom of Great Britain and Northern Ireland are responsible" and the associate member "British West Africa" was dissolved (*Notification No. 782*, p. 6, and *No. 881*, p. 1).

fied<sup>281</sup> or acceded to<sup>282</sup> subsequent ITU Conventions on behalf of the said associate members or extended the application of these revised Conventions to them.<sup>283</sup> On the other hand, approval or acceptance of certain other ITU instruments, in particular of Administrative Regulations, was frequently given by the competent local authorities or administrations of the associate members themselves.<sup>284</sup>

91. The new States referred to above which emerged from these associate members became parties to the ITU Conventions and separate independent members of the Union by accession, after being admitted to the United Nations as follows:

Associate members	New States	Effective date of accession	Notification No.
"British West Africa"	Ghana	17 May 1957	770
	Nigeria	11 Apr. 1961	864
	Sierra Leone	30 Dec. 1961	882
"British East Africa"	Tanganyika	31 Oct. 1962	902
	Uganda	8 Mar. 1963	911
"Kenya"	Kenya	11 Apr. 1964	937
"Malaya-British Borneo Group"	Malaya (Federation of)	3 Feb. 1958	787
"Bermuda-British Caribbean Group"	Jamaica	18 Feb. 1963	910
	Trinidad and Tobago	6 Mar. 1965	959

92. *Ghana* and the *Federation of Malaya* deposited fresh accessions to the 1952 Buenos Aires Convention and the other seven States to the 1959 Geneva Convention. In accordance with the relevant provisions of the said Conventions, the date of depositing their fresh accession with the Secretary-General of the Union is also regarded as the inception of their respective mem-

bership as "members" of the Union.<sup>285</sup> As noted earlier with respect to other cases, the General Secretariat indicates in the annual *Reports* for 1964 and subsequent years that the States which acceded to the 1959 Geneva Convention approved *ipso facto* some sets of Administrative Regulations "since they were in force when" the States concerned acceded to the Convention.<sup>286</sup> A general Secretariat note to the notification relating to the accession of *Kenya* indicates that as from the effective date of such accession (11 April 1964) the "associate member" "*Kenya*" no longer exists.

(c) *Concerning a former associate member and a former constituent entity of a member (parties)*

*Somalia*

93. By resolution 289 B. (IV) of 21 November 1949, the General Assembly of the United Nations recommended that former *Italian Somaliland* "shall be an independent sovereign State" and that "this independence shall become effective at the end of ten years from the date of the approval of a Trusteeship Agreement by the General Assembly".<sup>287</sup> In accordance with the resolution, Italian Somaliland was placed under the international trusteeship system for the period mentioned above with Italy as the Administering Authority.<sup>288</sup> Following the establishment of the trusteeship, the administration of the territory assumed by the United Kingdom during the Second World War ended.

94. Italy on behalf of the *Trust Territory of Somaliland* submitted an application for "associate membership" of the Territory, after the entry into force of the 1947 Atlantic City Convention. The application referred to article 1, paragraph 4 (b), of the Convention.<sup>289</sup> In view of the fact that the Atlantic City Convention had not been previously made applicable to the Territory, the General Secretariat, following the approval of the application, informed that:

<sup>281</sup> The United Kingdom signature of the 1952 Buenos Aires Convention covers also "British East Africa" (Final Protocol XXVI). The instrument of ratification of the Convention was deposited by the United Kingdom on behalf of the associate member on 23 December 1953 (*Notification No. 688*, p. 3). The United Kingdom also ratified on behalf of this associate member the 1959 Geneva Convention, effective as from 30 November 1961 (*Notification No. 880*, p. 1). This ratification continued to bind "Kenya" when the denomination of the group was modified as a result of the independence of Tanganyika and Uganda (see foot-note 274 above).

<sup>282</sup> The United Kingdom acceded on behalf of "British West Africa" to the 1952 Buenos Aires Convention, effective as from 29 December 1953 (*Notification No. 688*, p. 2) and on behalf of "Singapore-British Borneo Group" to the 1959 Geneva Convention, effective as from 9 December 1961 (*Notification No. 881*, p. 2).

<sup>283</sup> By a communication received on 23 December 1953, the United Kingdom notified that its acceptance of the 1952 Buenos Aires Convention applies to the "Malaya-British Borneo Group" (*Notification No. 688*, p. 3).

<sup>284</sup> Acceptance of the 1951 Geneva Agreement (see foot-note 220 above) by "British East Africa" (*Notification No. 667*, p. 1) and by "British West Africa" (*Notification No. 676*, p. 1), approval by these associate members of the 1958 Geneva Telegraph Regulations and Telephone Regulations (*Notification No. 878*, p. 2, and *No. 844*, p. 1) and approval by "British East Africa" of the 1959 Geneva Radio Regulations and Additional Radio Regulations (*Notification No. 868*, p. 1).

<sup>285</sup> See section entitled "Members and Associate Members of the Union" in the annual *Reports* for 1957 to 1966.

<sup>286</sup> See paras. 18, 78, 80, 83, 86 and 88 above.

<sup>287</sup> By article 23 of the Treaty of Peace with Italy, signed at Paris, on 10 February 1947, Italy had renounced "all right and title to the Italian territorial possessions in Africa" (see para. 42 above). Italian Somaliland was enumerated separately in the Preamble of the 1932 Madrid Convention. It also signed separately the Convention and the Regulations excepting the Additional Radiocommunications Regulations (League of Nations, *Treaty Series*, vol. CLI, pp. 45, 209, 271 and 387). Italian Somaliland formed part of the group of non-independent countries or territories called "Italian Colonies and Italian Islands in the Aegean Sea" to which the Madrid Conferences accorded as a whole the right to vote (see para. 41 above). The ratification of the Madrid Convention and the approval of the Madrid Regulations by Italian Somaliland were deposited on its behalf by Italy on 26 December 1933 (League of Nations, *Treaty Series*, vol. CLI, p. 483). Italian Somaliland was represented by the Italian delegation at the 1938 Cairo Administrative Conferences. Italy's approval of the Cairo Regulations was deposited on 1 December 1938 (*Rapport de gestion, 1940*, p. 8).

<sup>288</sup> By resolution 442 (V) of 2 December 1950, the General Assembly approved the Trusteeship Agreement for the Trust Territory of Somaliland.

<sup>289</sup> *Notification No. 678*, p. 1.

The instrument of ratification of the Atlantic City Convention, deposited by the Italian Government, did not mention the application of the said Convention to the Territory of Somaliland.

Consequently the General Secretariat duly informed the Italian Administration that a declaration should be made regarding the application of the Atlantic City Convention to the Territory of Somaliland (Art. 18 of the Atlantic City Convention), in order that the admission of the said Territory as an Associate Member of the ITU should be in conformity with the provisions of the Convention.

The Italian Administration has replied that its Government will supply the required declaration.<sup>290</sup>

95. By a communication dated 5 December 1953, registered with the General Secretariat on 18 December 1953, the Minister of Foreign Affairs of Italy declared "in accordance with Article 18" of the Atlantic City Convention "that the said Convention is applicable to the Trust Territory of Somaliland". The General Secretariat notified that "as from 18 December 1953, the Trust Territory of Somaliland under Italian administration is thus an Associate Member of the International Telecommunication Union", the application for admission having been approved by the required majority of the Members of the Union.<sup>291</sup> In 1955, the Italian Government, in its capacity as the Authority administering the *Trust Territory of Somaliland*, declared "in accordance with Article 17" of the 1952 Buenos Aires Convention that "the said Convention is applicable to the Trust Territory of Somaliland under Italian Administration, in which territory the provisions of the above-mentioned Convention are already being applied".<sup>292</sup>

96. On the other hand, the 1947 Atlantic City and 1952 Buenos Aires Conventions had been likewise made applicable to *Somaliland Protectorate* which before attaining independence formed part of the "group of territories" member of the Union known as "Colonies, Protectorates, Overseas Territories under Mandate or Trusteeship of the United Kingdom of Great Britain and Northern Ireland".<sup>293</sup>

97. On 1 July 1960 an independent State of *Somalia* was established as a result of a merger between the former *Trust Territory of Somaliland* under Italian administration, whose independence was proclaimed on the same day,<sup>294</sup> and the former British *Somaliland Protectorate*, which had attained independence on 26 June 1960. Somalia was admitted to the United Nations on 20 September 1960 and joined the Union two years later. In acceding to the 1959 Geneva Convention, effective as from 28 September 1962,<sup>295</sup> Somalia did not refer to the ITU instruments made applicable

to its territory before attaining independence.<sup>296</sup> The General Secretariat indicates that Somalia approved *ipso facto* the 1958 Geneva Telegraph and Telephone Regulations and the 1959 Geneva Radio Regulations and Additional Radio Regulations "since they were in force when" the country acceded to the 1959 Geneva Convention.

(d) *Concerning former territories to which application of ITU instruments was extended before attaining independence*

#### *Nauru*

98. In ratifying the 1952 Buenos Aires Convention, effective as from 22 March 1954, the Government of Australia declared that its ratification applied among others to the *Trust Territory of Nauru*.<sup>297</sup> Likewise, in communicating its ratification of the 1959 Geneva Convention and the Radio Regulations and Additional Radio Regulations (Geneva, 1959), the Australian Government declared that its ratification applied among others<sup>298</sup> to the Trust Territory of Nauru.<sup>299</sup> Following its accession to independence on 31 January 1968, the Government of *Nauru*, a State non-member of the United Nations, submitted an application for membership in the Union in October 1968.<sup>300</sup> Upon the approval of the application,<sup>301</sup> Nauru deposited on 10 June 1969 its instrument of accession to the 1965 Montreux Convention, becoming a member of the Union under article 1, paragraph 2 (c), of the Convention.<sup>302</sup>

#### *Western Samoa*

99. During the period in which *Western Samoa* was a United Nations Trust Territory under the Administration of New Zealand, namely since 1946 to the independence of Western Samoa on 1 January 1962, the Government of New Zealand extended the application of a number of ITU instruments to the territory of Western Samoa. In October 1948 the General Secretariat notified that:

<sup>296</sup> According to a communication dated 5 September 1960, from the General Post Office, London "... the *Somaliland Protectorate* ceased to be part of the Member known as 'Overseas Territories for the international relations of which the Government of the United Kingdom of Great Britain and Northern Ireland are responsible' on 1 July, 1960, "namely on the date of its merger with the former *Trust Territory of Somaliland* (Report . . . , 1960, p. 38, foot-note 10). For succession by Somalia to rights and obligations under treaties concluded under the auspices of the United Nations, see *Yearbook of the International Law Commission*, 1962, vol. II, p. 118, document A/CN.4/150, paras. 102-106. For the general question of Somalia's succession to rights and obligations, see E. Cotran, "Legal problems arising out of the formation of the Somali Republic" in *The International and Comparative Law Quarterly* (London), vol. 12, 1963, pp. 1010-1026.

<sup>297</sup> Notification No. 694, p. 1.

<sup>298</sup> Territories of Papua and Norfolk Island and Trust Territory of New Guinea.

<sup>299</sup> Notification No. 884, p. 1.

<sup>300</sup> Notification No. 1012, p. 1.

<sup>301</sup> Notification No. 1016, pp. 1-3.

<sup>302</sup> Notification No. 1019, p. 1.

<sup>290</sup> Note by the General Secretariat in *Notification No. 686*, p. 2.

<sup>291</sup> *Notification No. 688*, p. 2.

<sup>292</sup> *Notification No. 729*, p. 1.

<sup>293</sup> See para. 81 above.

<sup>294</sup> See General Assembly resolution 1418 (XIV) of 5 December 1959 concerning the date of the independence of the Trust Territory of Somaliland under Italian administration.

<sup>295</sup> *Notification No. 900*, p. 1.

In accordance with the provisions of article 16, paragraph 1, of the International Telecommunication Convention of Atlantic City (1947), we have the honour to inform you that on 21 September 1948 we received the instrument of ratification by New Zealand and Western Samoa of the International Telecommunication Convention of Atlantic City (1947).

The instrument is dated 8 July 1948.<sup>303</sup>

100. Subsequently, by letter dated 10 August 1949, the New Zealand Ministry of Foreign Affairs gave the following information in reply to a request for further details on the juridical position of *Western Samoa* with regard to the Union:

I have the honour to refer to your letter dated 24 February 1949, wherein you point out that, as the International Telecommunication Convention of Atlantic City, 1947, was signed for New Zealand but not for Western Samoa, the International Telecommunication Union is not entitled to recognise Western Samoa either as a Member or as an Associate Member in terms of the Convention.

It is not the intention of the New Zealand Government that Western Samoa should become a Member or Associate Member, but, as New Zealand is responsible for the external relations of Western Samoa, it is desired that the provisions of the International Telecommunication Convention should be applied to that territory in terms of Article 18 of the Convention. In accordance with Article 18 of the International Telecommunication Convention of Atlantic City, 1947, it is hereby declared that ratification of the International Telecommunication Convention by New Zealand and its acceptance of the Radio Regulations and Additional Radio Regulations apply to the Trust Territory of Western Samoa.<sup>304</sup>

101. About two years after the independence of *Western Samoa*, the following communication, dated 18 November 1963, from the Administration of New Zealand was circulated to members of the Union:

Communication [ . . . ] from the Administration of New Zealand:

It is confirmed that New Zealand will continue to act on behalf of Western Samoa in respect of telecommunication matters. The arrangement is in accordance with the terms of a Treaty of Friendship between New Zealand and Western Samoa,<sup>305</sup> under which New Zealand will act for the first few years of independence as the official channel of communication between the Government of Western Samoa and

- (a) the Governments of all countries situated outside the immediate area of the South Pacific Islands and
- (b) all international organizations having their headquarters outside the area.<sup>306</sup>

<sup>303</sup> Notification No. 560, p. 1.

<sup>304</sup> Notification No. 583, pp. 2-3. For the application to Western Samoa of the 1952 Buenos Aires Convention, see *Report . . . , 1955*, p. 40, footnote 29; and for the application of the 1959 Geneva Convention, Notification No. 874, p. 1. The 1949 Paris Telegraph Regulations and Telephone Regulations were also extended to the Trust Territory of Western Samoa as from 6 March 1950 (Notification No. 596, p. 2).

<sup>305</sup> "Exchange of letters constituting an Agreement implementing Article V of the Treaty of Friendship between the Government of New Zealand and the Government of Western Samoa. Signed at Apia, on 1 August 1962. Apia, 8 March 1963" (United Nations, *Treaty Series*, vol. 485, p. 372).

<sup>306</sup> Notification No. 928, p. 4.

## 2. CASES RELATING TO FORMATION AND/OR DISSOLUTION OF FEDERATIONS OR UNIONS \*

### (a) Federation of Eritrea with Ethiopia

102. *Eritrea*<sup>307</sup> became, in September 1952, an autonomous unit federated with *Ethiopia* under the sovereignty of the Ethiopian Crown, in accordance with resolution 390 A (V) of 2 December 1950 of the General Assembly of the United Nations.<sup>308</sup> Having deposited its instrument of ratification of the 1947 Atlantic City Convention on 18 February 1949, *Ethiopia*<sup>309</sup> was already a party to the Convention when the federation with *Eritrea* took place.

103. The following communication dated 25 September 1952 from the United Kingdom Administration (the United Kingdom had acted as the Administering Power of the territory since the Second World War) was circulated to the members of the Union some days after the federation of *Eritrea* with *Ethiopia*:

As from the night of 15th-16th September 1952, when *Eritrea* became an autonomous state federated with *Ethiopia* in accordance with a resolution of the United Nations dated 2nd December, 1950, the United Kingdom Post Office (acting in conjunction with the British Administration in *Eritrea*) ceased to be responsible for the relations of that territory with the International Telecommunication Union.

As from 16th September 1952, the control of the Eritrean telecommunication services passed to the Ministry of Posts, Telegraphs and Telephones, Addis Ababa.<sup>310</sup>

\* For the merger of the former "Trust Territory of Somaliland under Italian Administration" and the former "Somaliland Protectorate", see para. 97 above.

<sup>307</sup> Enumerated separately in the Preamble of the 1932 Madrid Convention, *Eritrea* signed the Convention and the Madrid Regulations excepting the Additional Radiocommunications Regulations (League of Nations, *Treaty Series*, vol. CLI, pp. 7, 39, 205, 267 and 381). *Eritrea* formed part of the group of non-independent countries or territories called "Italian Colonies and Italian Islands of the Aegean Sea" to which the Madrid Conferences granted as a whole the right to vote (see para. 41 above). The deposit of the instrument of ratification of the Madrid Convention and of approval of all sets of Regulations related thereto was made on behalf of the group by Italy on 26 December 1933 (League of Nations, *Treaty Series*, vol. CLI, p. 481). At the 1938 Cairo Administrative Conferences, *Eritrea* was represented by the Italian delegation. Its approval of the Cairo Regulations was deposited by Italy on 1 December 1938. As indicated in paragraph 62 above, on 31 May 1939, the Italian Administration notified the Bureau that since 1 January 1939 one of the Italian colonies was "Italian East Africa, comprising *Eritrea*, the Empire of *Ethiopia* and Italian Somaliland". By article 23 of the Treaty of Peace with Italy, signed at Paris, on 10 February 1947, Italy renounced "all right and title to the Italian territorial possessions in Africa".

<sup>308</sup> The resolution recommended that the jurisdiction of the Federal Government shall extend to matters such as "external and interstate communications".

<sup>309</sup> See para. 64 above. The Emperor of *Ethiopia* on 11 September 1952, the date of ratification of the Federal Act, issued a Proclamation to the effect that all international treaties, conventions and obligations accepted by *Ethiopia* and in force on 11 September 1952 would thenceforward apply to *Eritrea* (see "Summary of the practice of the Secretary-General as depositary of multilateral agreements" (document ST/LEG/7), para. 140. See also A. Leriche, "De l'application à l'Erythée des obligations résultant des traités conclus par l'Ethiopie antérieurement à la Fédération", *Revue générale de droit international public*, (Paris), t. LVII, 1953, pp. 262-267).

<sup>310</sup> Notification No. 657, p. 4.

(b) *Formation of the United Arab Republic and separation of the Syrian Arab Republic*

104. Prior to the formation of the *United Arab Republic*, the 1952 Buenos Aires Convention had been ratified by *Egypt*, effective as from 7 December 1954, and by *Syria*, effective as from 1 May 1957. In addition, both members had signed the 1947 Atlantic City Radio and Additional Radio Regulations and signed and approved the 1949 Paris Telegraph Regulations and Telephone Regulations.<sup>311</sup>

105. Shortly after the establishment of the *United Arab Republic*, the following Note, dated 22 March 1958, was setn to the Secretary-General of the Union by the Permanent Mission of the *United Arab Republic* to the European Office of the *United Nations*:<sup>312</sup>

The Permanent Mission of the *United Arab Republic* to the European Office of the *United Nations*, Geneva, presents its compliments to the Secretary-General of the *International Telecommunication Union*, and, further to the Note dated 24 February, 1958 (Annex A to this Note) addressed to the Secretary-General of the *United Nations*, New York, by the Ministry of Foreign Affairs of the *United Arab Republic*, concerning the formation of the *United Arab Republic*, and the election of President Gamal Abdel Nasser as President of the new Republic, as well as to the Note dated 1 March, 1958 (Annex B to this Note) addressed to the Secretary-General of the *United Nations*, New York, in which the new *United Arab Republic* requested the Secretary-General of the *United Nations* to communicate the formation of the *United Arab Republic* and the election of President Abdel Nasser to all States Members of the *United Nations*, to the principal organs of the *United Nations* and to the subsidiary organs of the *United Nations*,<sup>313</sup> the Permanent Mission has the honour to inform the Secretary-General of the

*International Telecommunication Union* of the establishment of the *United Arab Republic*, with Cairo as capital, and of the election of President Gamal Abdel Nasser as President of the Republic.

Consequently, the Government of the *United Arab Republic* declares that the Union henceforth is a single Member of the *United Nations* and of the various Specialized Agencies, bound by the provisions of the Charter of the *United Nations* and the various constitutions of the Specialized Agencies, and that all international treaties and agreements concluded by *Egypt* and *Syria* with other countries will remain valid within the limits prescribed on their conclusion, and in full accordance with the principles of international law.

Finally, the Permanent Mission of the *United Arab Republic* in Geneva has the honour to inform the Secretary-General of the *International Telecommunication Union* that the Permanent Representative of the new *United Arab Republic* to the European Office of the *United Nations*, Geneva, as well as to the various Specialized and International Agencies and Organizations having their headquarters in Geneva, is His Excellency, Ambassador Abdel Fattah Hassan.

The Permanent Mission of the *United Arab Republic* takes this occasion to present to the Secretary-General of the *International Telecommunication Union* the renewed assurances of its high consideration.

*Annex A*

Permanent Mission of Egypt to the *United Nations*

Geneva, 24 February, 1958.

The plebiscite held in *Egypt* and in *Syria* on 21 February, 1958, having made clear the will of the Egyptian and Syrian people to unite their two countries in a single State, the Minister for Foreign Affairs of the *United Arab Republic* has the honour to notify the Secretary-General of the *United Nations* of the establishment of the *United Arab Republic*, having Cairo as its capital, and of the election, in the same plebiscite, of President Gamal Abdel Nasser as President of the new Republic.

*Annex B*

Permanent Mission of the *United Arab Republic* to the *United Nations*

Geneva, 1 March, 1958

The Ministry of Foreign Affairs presents its compliments to His Excellency, the Secretary-General of the *United Nations* and, in pursuance of its Note dated 24 February, 1958, regarding the formation of the *United Arab Republic* and the election of President Abdel Nasser, has the honour to request the Secretary-General to communicate the contents of the above-mentioned Note to the following:

1. All States Members of the *United Nations*
2. Other principal organs of the *United Nations*
3. Subsidiary organs of the *United Nations*, particularly those on which *Egypt* or *Syria*, or both, are represented.

It is to be noted that the Government of the *United Arab Republic* declares that the Union henceforth is a single Member of the *United Nations* bound by the provisions of the Charter, and that all international treaties and agreements concluded by *Egypt* or *Syria* with other countries will remain valid within the regional limits prescribed on their conclusion and in accordance with the principles of international law.

106. The Secretary General of the Union by letter, dated 2 April 1958, replied to the Permanent Mission of the *United Arab Republic* as follows:

I beg to acknowledge receipt of your Note dated 22 March,

<sup>311</sup> Report . . ., 1957, pp. 35 and 37. Certain other ITU instruments, such as the 1951 Geneva Agreement and the *International High-Frequency Broadcasting Agreement* (Mexico City, 1949), had been also approved by both countries.

<sup>312</sup> Notification No. 792, p. 2.

<sup>313</sup> The Secretary-General of the *United Nations* had communicated to the Secretary-General of the Union by a *note verbale*, transmitted by cable dated 7 March 1958, the text of the two notes reproduced in Annex A and B. The *note verbale* of the Secretary-General of the *United Nations* indicates *inter alia* that:

"At the request of the Government of the *United Arab Republic*, a note from that Government dated 24 February 1958, regarding the formation of the *United Arab Republic* and the election of President Gamal Abdel Nasser as President of the new Republic, together with a note dated 1 March 1958, are hereby communicated to all the States Members of the *United Nations*, to principal organs and to subsidiary organs of the *United Nations*.

"The Secretary-General has now received credentials for Mr. Omar Loutfi as permanent representative of the *United Arab Republic* to the *United Nations*, signed by the Minister for Foreign Affairs of the Republic. In accepting this letter of credentials, the Secretary-General has noted that this is an action within the limits of his authority, undertaken without prejudice to and pending such action as other organs of the *United Nations* may take on the basis of the notification of the constitution of the *United Arab Republic* and the note of 1 March 1958."

(For the *note verbale* and Annex A and B, see *Official Records of the Security Council, Thirteenth Year, Supplement for January, February and March 1958*, document S/3976, p. 31. On the actions taken by the Secretary-General of the *United Nations*, see *Yearbook of the International Law Commission, 1962*, vol. II, p. 104, document A/CN.4/149 and Add.1, paras. 17-21).

1958, in which you kindly informed me of the formation of the United Arab Republic, having Cairo as its capital, and of the election of President Gamal Abdel Nasser as President of the Republic.

You also forwarded a statement by the Government of the United Arab Republic to the effect that thenceforth the Union was a single Member of the United Nations and of the various specialized agencies, bound by the provisions of the Charter of the United Nations and the various constitutions of the specialized agencies, and that all international treaties and agreements concluded by Egypt and Syria with other countries would remain valid within the limits prescribed on their conclusion, and in full accordance with the principles of international law.

In this connection, I would point out that the constitution governing the International Telecommunication Union is the International Telecommunication Convention (Buenos Aires, 1952). I venture to assume that your Government will take the necessary steps to ensure that the situation of the United Arab Republic will be in accordance with the provisions of this Convention.

I have also taken due note of the nomination of His Excellency, Ambassador Abdel Fattah Hassan, as Permanent Representative of the new United Arab Republic to the European Office of the United Nations, Geneva, as well as to the various specialized agencies having their headquarters in Geneva.<sup>314</sup>

107. In reply to a letter addressed to the Egyptian Administration on 10 February 1958, namely before the establishment of the *United Arab Republic*, asking the name of the representative of Egypt to the 13th session of the Administrative Council of the Union, the Secretary-General of the Union received from Cairo a cable, dated 13 April 1958, namely after the establishment of the United Arab Republic, informing the appointment of a representative of the United Arab Republic for the said session of the Council.<sup>315</sup> Finally, the Secretary-General of the Union received directly from the Ministry of Foreign Affairs of the United Arab Republic the following letter:

Cairo, April 11, 1958

I have the honour to inform you that the outcome of the plebiscite held in Egypt and in Syria on 21st February, 1958, has been the merger of both in a single State: "The United Arab Republic". President Gamal Abdel Nasser has been elected President of the New Republic.

Please accept, [etc.].

(Signed) Mahmoud FAWZI,  
Minister of Foreign Affairs.<sup>316</sup>

108. All the communications mentioned in paragraphs 105-107 above were submitted to the Administrative Council of the Union. The matter was considered by the Administrative Council at its thirteenth session of May, 1958, in Geneva. Noting that both *Egypt* and *Syria* had signed and ratified the International Telecommunication Convention (Buenos Aires, 1952), prior to the date of their union, and that both States had participated in the activities of the International Telegraph and Telephone Consultative Committee and International Radio Consultative Committee, the Council adopted a proposal that the deposit with the Secretary-General of the

Union, through diplomatic channels, of a declaration by the *United Arab Republic* would suffice to settle the position of the new Republic vis-à-vis the Union.<sup>317</sup> Accordingly, by a letter, dated 17 June 1958, the Government of the United Arab Republic submitted the following declaration:

I have the honour to inform you that the Egyptian and Syrian peoples have expressed their will, through a plebiscite held in the two regions on 21 February 1958, to unite themselves into a single State, the United Arab Republic.

The new Republic will respect the obligations undertaken by Egypt and Syria when they signed and ratified the International Telecommunication Convention (Buenos Aires, 1952).

The reservations made by Egypt and Syria, which are mentioned in the Final Protocol annexed to the aforementioned Convention under XXXII, XXXIII and XXXIV<sup>318</sup> will remain valid for the new Republic.<sup>319</sup>

109. The annual *Report* for 1958 (p. 4) states:

In 1958, two countries Members of the Union, "Egypt" and "The Syrian Republic", amalgamated under the name "United Arab Republic". Both of these countries had signed and ratified the Convention. In accordance with the proposal adopted by the Council, the Government of the new Republic has deposited the requisite declaration with the General Secretariat.

The table showing the status of the Conventions and Regulations reproduced in the said *Report* listed the *United Arab Republic* among the countries of the Union, left blank the participation dates of the United Arab Republic in the Buenos Aires Convention and added in foot-note 63 (p. 36):

Union of Egypt and the Syrian Republic (see *Notification No. 792* and *No. 798*).

Egypt signed the Buenos Aires Convention and ratified it on 7.XII.1954.

The Syrian Republic signed the Buenos Aires Convention and ratified it on 1.V.1957.

Besides which, both countries:

(i) have signed the Radio Regulations and Additional Radio Regulations, Atlantic City, 1947;

(ii) have signed and approved the Paris Telegraph and Telephone Regulations (1949);

(iii) have signed the EARC [Extraordinary Administration Radio Conference] Agreement (Geneva, 1951) and the International High-Frequency Broadcasting Agreement (Mexico City, 1949).

<sup>317</sup> *Ibid.*

<sup>318</sup> The reservations read as follows: "XXXII: The undersigned Delegations declare, in the name of their respective Governments, that they accept no consequence for reserves resulting in an increase of their contributory share in the expenses of the Union. [ . . . ]; XXXIII: The above mentioned Delegations declare that the signature and possible subsequent ratification by their respective Governments to the Buenos Aires Convention, are not valid with respect to the Member appearing in Annex 1 to this Convention under the name of Israel, and in no way imply its recognition; XXXIV: The Delegations of Egypt and Syria declare on behalf of their Governments their disagreement with Article 5, paragraph 12, sub-paragraph (b) 1 and with Article 9, paragraph 1, sub-paragraph (g), which authorize the Administrative Council to conclude agreements with international organizations on behalf of the Union. Any such agreements which they will consider against their interest shall not be binding on them."

<sup>319</sup> *Notification No. 798*, p. 1.

<sup>314</sup> *Notification No. 792*, pp. 2-3.

<sup>315</sup> *Ibid.*, p. 3.

<sup>316</sup> *Ibid.*

At the conclusion of the 1959 Plenipotentiary Conference held in Geneva, the United Arab Republic signed the 1959 Convention and its ratification was later deposited with the Secretary-General of the Union on 27 July 1961.<sup>320</sup>

110. On 24 August 1962, that is, about eleven months after the union between former *Egypt* and *Syria* was dissolved on 28 September 1961, the *Syrian Arab Republic* deposited an instrument of accession to the 1959 Geneva Convention.<sup>321</sup> In acceding to the Convention the Syrian Arab Republic referred neither to the status of ITU Conventions and other multilateral instruments, which had been applicable to the *United Arab Republic* before 28 September 1961, nor to the two reservations<sup>322</sup> made by the delegation of the United Arab Republic at the time of signing the 1959 Convention. The annual *Report* for 1962 lists the Syrian Arab Republic as a party to the 1959 Geneva Convention as from 24 August 1962, namely as from the date of the deposit of its fresh accession.<sup>323</sup> Since 1964, the annual *Reports* indicate that the Syrian Arab Republic has approved *ipso facto* the 1958 Geneva Telegraph Regulations and Telephone Regulations and the 1959 Geneva Radio Regulations and Additional Radio Regulations "since they were in force when" the country acceded to the 1959 Geneva Convention.<sup>324</sup>

#### (c) Formation of the United Republic of Tanzania

111. As indicated in paragraph 91 above, *Tanganyika* acceded on 31 October 1962 to the 1959 Geneva Convention.<sup>325</sup> Having attained independence on 10 December 1963, *Zanzibar* ceased to be included in the members of the Union known as "Overseas Territories for the international relations of which the Government of the United Kingdom of Great Britain and Northern Ireland are responsible".<sup>326</sup> After a union was formed on 26 April 1964 between *Tanganyika* and *Zanzibar*, the following Note, date 1 December 1964,<sup>327</sup> was published by the General Secretariat of the Union:

#### *Tanzania (United Republic of)*

The Ministry of External Affairs of the United Republic of Tanzania announced, in a note dated 2 November, 1964, deposited with the Secretary-General through the intermediary of the Swiss Political Department, Berne, on 19 November 1964, that Articles of Union between the Republic of *Tanganyika* and the People's Republic of *Zanzibar* were signed on 22 April, 1964, and that following the ratification of the aforesaid Articles by the Parliament of *Tanganyika* and by the Revolutionary Council of the People's Republic of *Zanzibar*, the Republic of *Tanganyika* and the People's Republic of *Zanzibar* were united as one Sovereign State on 26 April, 1964, under the name of the United Republic

of *Tanganyika* and *Zanzibar* \* and under the Presidency of Mwalimu Julius K. Nyerere.

Accordingly, with effect from 26 April 1964, the Republic of *Tanganyika* has been succeeded in respect of its membership of the International Telecommunication Union by the United Republic of *Tanganyika* and *Zanzibar* \*.

\* Note by the General Secretariat: Now known as: United Republic of Tanzania.

112. In the *Report* for 1964 (p. 29) it is stated that the *United Republic of Tanzania* had replaced *Tanganyika* as member of the Union, after the union of *Tanganyika* and *Zanzibar*. The United Republic of Tanzania is listed as a party to the 1959 Geneva Convention as from 31 October 1962, namely as from the effective date of *Tanganyika's* accession to the Convention. It is likewise stated that the United Republic of Tanzania had accepted expressly the 1963 Geneva Radio Regulations (Partial Revision) and *ipso facto* the 1958 Geneva Telegraph Regulations and Telephone Regulations and the 1959 Geneva Radio Regulations and Additional Radio Regulations.

#### (d) Formation of Malaysia and separation of Singapore

113. On 16 September 1963, *North Borneo*, *Sarawak* and *Singapore*, three constituent entities of the associate member "Singapore-British Borneo Group",<sup>328</sup> were federated with the States of the Federation of Malaya, an independent member of the Union as from 3 February 1958,<sup>329</sup> in *Malaysia*. Both the Federation of Malaya and the associate member "Singapore-British Borneo Group" were parties to the 1959 Geneva Convention prior to the formation of *Malaysia*.<sup>330</sup> The Federation of Malaya<sup>331</sup> and the United Kingdom on behalf of the group<sup>332</sup> had also approved the 1959 Geneva Radio Regulations and Additional Radio Regulations.

114. The formation of *Malaysia* was explained in a communication, dated 11 November 1963, from its Administration as follows:

1. (a) because the Malaysia Act of 1963 which came into force on the 16th September, 1963, changes the name of the Federation of Malaya to Malaysia, the term "Government of Malaysia" should be used instead of "Government of the Federation of Malaya" in connection with our membership of the International Telecommunication Union;

(b) because the same Act provided for the admission into the Federation of the States of Sabah (North Borneo), Sarawak and Singapore, the interests of Singapore, Sabah and Sarawak will henceforth be represented by the National Administration of the Government of Malaysia;

(c) the National Administration of the Government of Malaysia is the Telecommunication Department, Government of Malaysia;

<sup>320</sup> Notification No. 872, p. 1.

<sup>321</sup> Notification No. 898, p. 1.

<sup>322</sup> Reservations similar to those reproduced under XXXIII and XXXIV in foot-note 318 above.

<sup>323</sup> Annual Report, 1962, p. 22.

<sup>324</sup> See para. 18 above.

<sup>325</sup> Notification No. 902, p. 2.

<sup>326</sup> For the list of ITU Conventions and Administrative Regulations made applicable to this group, see para. 81 above.

<sup>327</sup> Notification No. 952, p. 1.

<sup>328</sup> See foot-note 276 above.

<sup>329</sup> See para. 91 above.

<sup>330</sup> Ratification by the Federation of Malaya was deposited on 30 December 1960, and accession on behalf of the associate member was deposited by the United Kingdom on 9 December 1961 (*Report* . . . , 1962, pp. 47 and 49).

<sup>331</sup> Notification No. 863, p. 2.

<sup>332</sup> Report . . . , 1963, p. 55.

(d) our contribution is to be increased to 4 units in place of the 3 units previously contributed by the Federation of Malaya and this will commence with the contribution for the year 1965.

2. The following official explanation regarding the change of name of "Federation of Malaya" into "Malaysia" has reference:

Constitutionally, Malaysia as successor State to the Federation of Malaya remains one and the same entity and hence continues to be a contracting member of all international organisations, of which the Federation of Malaya was a member before Malaysia Day. The Federation of Malaya Constitution of 1957 provides that the Constitution itself could be amended by Act of Federation of Malaya Parliament and that Parliament can, by law, admit other States to the Federation.

The Malaysia Act of 1963 which came into force on 16th September, 1963, changes the name of the Federation of Malaya to Malaysia, provided for the admission to the Federation of the States of Sabah, Sarawak and Singapore and made amendments to the Constitution for and in connection with the admission of the new States, and incidentally too, consequentially upon the admission.

The Constitutional position is, therefore, that the entity of the Federation of Malaya has not been changed by the Malaysia Act. It is the same entity but simultaneous with the admission of the new States, its name has been changed.<sup>333</sup>

115. In the annual *Report* for 1963, the name of the Federation of Malaya was replaced by *Malaysia* and the associate member "Singapore-British Borneo Group" was listed with a foot-note indicating that its constituents excepting *Brunei* were represented by the National Administration of the Government of Malaysia.<sup>334</sup> Subsequently, the Administration of the United Kingdom communicated that *Brunei* was included among the territories comprising the "Overseas Territories for the international relations of which the Government of the United Kingdom of Great Britain and Northern Ireland are responsible" and that the "Singapore-British Borneo Group" was dissolved.<sup>335</sup> Malaysia was listed as a party to the 1959 Geneva Convention as from the effective date of ratification of the *Federation of Malaya* and as a party to the 1958 Geneva Telegraph and Telephone Regulations and 1959 Geneva Radio Regulations and Additional Radio Regulations expressly approved formerly by the Federation.

116. *Singapore* seceded from *Malaysia* and became an independent State on 7 August 1965 and, after being admitted to the United Nations, acceded to the 1959 Geneva Convention, effective as from 22 October 1965.<sup>336</sup> In the *Report* for 1965, *Singapore* was listed as having approved *ipso facto* five sets of Administrative Regulations, including the Radio Regulations and Additional Radio Regulations (Geneva, 1959), "since they were in force when" *Singapore* acceded to the 1959 Convention.<sup>337</sup>

(e) *Formation and dissolution of the Federation of Rhodesia and Nyasaland and independence of Malawi and Zambia*

117. The Federation was constituted on 3 September 1953 by three non-independent entities: Nyasaland, Northern Rhodesia, and Southern Rhodesia. Prior to the formation of the Federation, *Southern Rhodesia*, a "Contracting Government" under the 1932 Madrid Convention.<sup>338</sup> was listed in Annex 1 of the 1947 Atlantic City and 1952 Buenos Aires Conventions and had deposited its instrument of ratification of the Atlantic City Convention on 20 July 1949.<sup>339</sup> On the other hand, the United Kingdom had also ratified, effective as from 20 July 1949, the Atlantic City Convention on behalf of the member called "Colonies, Protectorates, Overseas Territories and Territories under mandate or trusteeship of the United Kingdom of Great Britain and Northern Ireland".<sup>340</sup>

118. Shortly after the formation of the Federation, the Government of the United Kingdom deposited separate instruments of accession<sup>341</sup> to the 1952 Buenos Aires Convention on behalf of: (1) Southern Rhodesia; (2) the Group of non-independent territories member of the Union called "Colonies, Protectorates, Overseas Territories and Territories under mandate or trusteeship of the United Kingdom of Great Britain and Northern Ireland", which included amongst its constituents "Northern Rhodesia (Protectorate)" and "Nyasaland (Protectorate)". Each of the two instruments of accession, both of which were dated 23 October 1953 and deposited on 16 November 1953, was accompanied by the following note:

*International Telecommunication Convention*

Constitutional changes in Northern and Southern Rhodesia and in Nyasaland

Legislation has recently been enacted in the United Kingdom Parliament providing for the association of Southern Rhodesia, Northern Rhodesia and Nyasaland in a federation to be known as the Federation of Rhodesia and Nyasaland. The Federal Government formally came into existence in Salisbury on 3rd September, 1953, but the setting up of the Federal administration and the transfer of powers to it will extend over a period.

2. The constitution of the new Federation provides for the transfer from the three constituent Territorial Governments to the Federal Government of responsibility for those matters covered by the International Telecommunication Convention. Moreover, as from 30th October, 1953, the Federal Government has been the authority within the Federation responsible for the implementation of international obligations affecting the individual Territories. Accordingly, since the International Telecommunication Convention provides no method whereby accession can be affected on behalf of the Federation *eo nomine*, the United Kingdom Government proposes to regard:

(i) its present accession to the International Telecommunication Convention on behalf of Southern Rhodesia, and

<sup>333</sup> Notification No. 929, p. 5.

<sup>334</sup> Report . . . , 1963, p. 57, foot-note 53.

<sup>335</sup> See foot-note 276 above.

<sup>336</sup> Notification No. 974, p. 1.

<sup>337</sup> Report . . . , 1965, p. 63. See also para. 18 above.

<sup>338</sup> Southern Rhodesia acceded to the 1932 Madrid Convention on 23 August 1935 (Report . . . , 1948, p. 6).

<sup>339</sup> Notification No. 581, p. 2.

<sup>340</sup> See para. 81 above.

<sup>341</sup> Notification No. 686, pp. 3-5.

- (ii) its accession on behalf of Northern Rhodesia and Nyasaland in the instrument deposited in respect of the Colonial Ensemble,

as constituting, without further formality, an accession on behalf of the Federation of Rhodesia and Nyasaland.

119. By a letter dated 26 February 1954, the Government of the United Kingdom further advised the General Secretariat as follows:

The Federation of Rhodesia and Nyasaland has assumed full responsibility for the implementation of international obligations affecting the component territories and I am to request that, as opportunity occurs, the name of the Member of the Union "Southern Rhodesia" should be amended wherever possible to "The Federation of Rhodesia and Nyasaland" in the publications of the Union, and that this latter title should in future be used when referring to the Member.<sup>342</sup>

Accordingly, the General Secretariat replaced "Southern Rhodesia" by "Federation of Rhodesia and Nyasaland" in the table showing the status of ITU instruments, in the annual *Reports* issued subsequently.<sup>343</sup>

120. The delegate of the Federation was not present at the Plenipotentiary Conference of the Union held at Geneva, 1959, but the Federation was listed in Annex 1 to the 1959 Convention adopted at the Conference.<sup>344</sup> The Federation later acceded to the 1959 Convention, effective as from 14 December 1960.<sup>345</sup> The Federation also notified its approval of the 1958 Geneva Telegraph Regulations<sup>346</sup> and of the 1959 Geneva Radio Regulations and Additional Radio Regulations.<sup>347</sup>

121. Shortly before the dissolution of the Federation, the Government of the United Kingdom communicated on 24 December 1963 to the General Secretariat the following:

Consequent upon the dissolution of the Federation of Rhodesia and Nyasaland on 31st December, 1963, Nyasaland and Northern Rhodesia will from 1st January, 1964, be included, as an interim measure, among the territories comprising the Member: "The Overseas Territories for the international relations of which the Government of the United Kingdom of Great Britain and Northern Ireland are responsible."

Applications for Nyasaland and Northern Rhodesia to become Associate Members of the ITU under Article 1.3. (c) of the International Telecommunication Convention, Geneva, 1959, will be submitted shortly. Southern Rhodesia will resume as a separate Member of the Union.<sup>348</sup>

122. In March 1964, further information reproduced below, relating to the resumption of membership of

<sup>342</sup> Notification No. 693, p. 6.

<sup>343</sup> See annual *Reports* for 1953 to 1963.

<sup>344</sup> *Documents of the Plenipotentiary Conference of the International Telecommunication Union, Geneva, 1959: Minutes of the Plenary Meetings* (Geneva, General Secretariat of the International Telecommunication Union, 1960). See the lists of delegations at the beginning of each of the minutes, and Annex 1.

<sup>345</sup> Notification No. 856, p. 2.

<sup>346</sup> Notification No. 834, p. 1.

<sup>347</sup> Notification No. 861, p. 1.

<sup>348</sup> Notification No. 930, p. 1 and *Report . . . , 1963*, p. 57, footnote 55.

*Southern Rhodesia*, was published by the General Secretariat of the Union:<sup>349</sup>

In a letter dated 5 March, the Federal Political Department of the Swiss Government supplied the General Secretariat with a copy of a note dated 27 February, 1964, from Her Britannic Majesty's Embassy in Berne, addressed to the Department.

The note ran as follows:

Her Britannic Majesty's Embassy present their compliments to the Federal Political Department, and, on the instructions of Her Majesty's Principal Secretary of State for Foreign Affairs, have the honour to refer to the position of Southern Rhodesia in the International Telecommunication Union.

Until the formation of the Federation of Rhodesia and Nyasaland and its entry into the International Telecommunication Union, Southern Rhodesia was a full Member of the ITU in her own right. The Embassy have now to inform the Department that the Federation was dissolved immediately before the first day of January, 1964. Her Majesty's Government in the United Kingdom assume that Southern Rhodesia's membership of the ITU will have revived with effect from that date.

Her Britannic Majesty's Embassy confirm that, while Her Majesty's Government in the United Kingdom are ultimately responsible for the international relations of Southern Rhodesia, responsibility for matters relating to international telecommunications rests with the Southern Rhodesia Government and the Southern Rhodesia Government is authorized to conduct the relations with the ITU which arise in respect of its membership.<sup>350</sup>

123. The annual *Report* for 1964, listed *Rhodesia* (former Southern Rhodesia) as a party to the 1959 Geneva Convention as from the effective date of accession

<sup>349</sup> Notification No. 935, p. 2.

<sup>350</sup> In 1965, the Administrative Council of the Union adopted a resolution (Resolution No. 599) with regard to *Rhodesia* (former Southern Rhodesia). The content of the Resolution is reproduced in *Report . . . , 1966*, p. 16, as follows:

*Situation concerning Rhodesia*

The Council examined communications from the United Kingdom of Great Britain and Northern Ireland advising that, as a result of the illegal declaration of Rhodesia's independence on 11 November 1965 and the dismissal of former ministers, the authority of the Rhodesian Delegation to the Montreux Plenipotentiary Conference ceased on 11 November 1965 and the former delegation was thus no longer empowered to sign the Final Acts when they were formally presented for signature on 12 November 1965.

After consulting the Members of the Union, the Council instructed the Secretary-General:

to delete the signatures of the former Rhodesian Delegation appended to the copy of the International Telecommunication Convention (Montreux, 1965), the Additional Protocols I, II and III, the Final Protocol and the Optional Additional Protocol deposited in the archives of the Union;

to notify all Members of the Union by Circular letter that the signatures have been deleted and invite them to amend their published copies accordingly;

to refuse acceptance of any purported instrument of ratification or accession by or on behalf of the existing illegal régime in Rhodesia.

The Secretary-General was also instructed:

to take the necessary steps so that the existing illegal régime in Rhodesia shall not be invited to take part in the work of any conference or meeting called by the Union, or under its auspices, until the Administrative Council, taking into account the decisions taken by the United Nations, shall find that the conditions for constructive cooperation have been restored.

by the former Federation, namely 14 December 1960. Since 24 October 1964, the denomination "Southern Rhodesia" was changed to "Rhodesia".<sup>351</sup>

124. Applications for associate membership separately for *Nyasaland* and for *Northern Rhodesia* submitted by the United Kingdom in March 1964 met the approval of a majority of members of the Union on 9 July 1964.<sup>352</sup> In communicating the result of the consultation the General Secretariat indicated that "the application by the British Government for Associate Membership of the Union for [name of the country concerned] is thus approved and the said country subsequently becomes Associate Member of the ITU". Thus, the admission of Nyasaland and Northern Rhodesia to associate membership followed, as far as the General Secretariat is concerned, the procedure described in paragraph 87 above. The United Kingdom, however, deposited on 11 September 1964 an instrument of accession to the 1959 Geneva Convention on behalf of the associate member Northern Rhodesia.<sup>353</sup> No similar action was taken by the United Kingdom with regard to Nyasaland because it became independent three days before its application for associate membership met the approval of the members on 9 July 1964. The inclusion of Nyasaland and Northern Rhodesia in the member representing the British overseas territories "ensemble" having been merely "an interim measure", the position taken by the United Kingdom seems more consistent with the wording of the relevant provision of the Geneva Convention (present article 1, para. 3 (b) of the 1955 Montreux Convention; see para. 9 above). Actually, it had been the "Federation of Rhodesia and Nyasaland" which had made applicable to its constituents the 1959 Geneva Convention, by virtue of its own accession to the Convention on 14 December 1960, and not the United Kingdom, namely the member responsible for the conduct of the international relations of Nyasaland and Northern Rhodesia at the time of the submission of applications for associate membership.

125. *Malawi* (former Nyasaland) became independent on 6 July 1964 and *Zambia* (former Northern Rhodesia) on 24 October 1964. Both States were admitted to the United Nations on 1 December 1964. Subsequently, Malawi (on 19 February 1965) and Zambia (on 23 August 1965) deposited fresh accessions to the 1959 Geneva Convention. In notifying the fresh accessions the General Secretariat indicated that until the dates of their respective deposits Malawi and Zambia were "associate members" of the Union.<sup>354</sup>

126. *Malawi* and *Zambia* are listed as having approved *ipso facto* the 1958 Geneva Telegraph Regulations and Telephone Regulations and the 1959 Geneva Radio Regulations and Additional Radio Regulations "since

they were in force when" the States concerned acceded to the 1959 Geneva Convention.<sup>355</sup>

### 3. CASES RELATING TO TRANSFER OF TERRITORIES TO AN INDEPENDENT MEMBER OF THE UNION

#### *French Settlements in India*

127. *French Settlements in India* were among the "Overseas territories of the French Republic and Territories administered as such", on behalf of which France ratified the 1952 Buenos Aires Convention.<sup>356</sup> By telegraph dated 28 October 1954, addressed to the General Secretariat, the Ministry of Foreign Affairs of France stated:

We have the honour to inform you, for such action as may be necessary, that the *de facto* transfer of the French Settlements in India to the Government of India will take place as from 1 November 1954.

As from this date, the Government of India, New Delhi, will take the place of the "*Commissaire de la République*", French Settlements in India, Pondichery, as regards all postal and telegraph rights and obligations.<sup>357</sup>

128. No relevant communication was received from the Government of India,<sup>358</sup> which later ratified the Buenos Aires Convention on 25 July 1955.<sup>359</sup> During the period in which the General Secretariat published the status of the 1952 Buenos Aires Convention, *French Settlements in India* continued to be listed among the "Overseas Territories" of France, with a note in parentheses "(see *Notification No. 708*, p. 1)".<sup>360</sup>

#### *Saar*

129. Following the settlement of the *Saar* question, a joint communication, dated 9 September 1957, from the Administrations of France and the Federal Republic of Germany was circulated to the members of the Union. The communication read in part:

Within the framework of the treaty signed between the French Republic and the Federal German Republic for settlement of the Saar questions, the telecommunication Administrations of France and of the Federal German Republic have agreed that from 1 October, 1957, the service of telecommunications with the Saar shall be effected in accordance with the provisions generally applicable to traffic exchanged with the Federal German Republic.<sup>361</sup>

130. At the time this joint communication was made, both France and the Federal Republic of Germany had

<sup>351</sup> *Notification No. 950*, p. 3.

<sup>352</sup> *Notification No. 935*, p. 1 and *No. 943*, pp. 1-4.

<sup>353</sup> *Notification No. 947*, p. 1.

<sup>354</sup> Notes in *Notification No. 958* and *No. 970* stating *inter alia*: "The Republic of Zambia [or Malawi] hitherto an Associate Member, has acceded to the International Telecommunication Convention, Geneva, 1959 [ . . . ]".

<sup>355</sup> See para. 18 above.

<sup>356</sup> See para. 75 above.

<sup>357</sup> *Notification No. 708*, p. 1.

<sup>358</sup> India, a member of the Union, was a party to the 1947 Atlantic City Convention as from 25 January 1949 (see para. 29 above).

<sup>359</sup> *Notification No. 726*, p. 1.

<sup>360</sup> See the relevant table in the annual *Reports* for 1954 to 1960.

<sup>361</sup> *Notification No. 777*, p. 5.

been a party to the 1952 Buenos Aires Convention, as from 19 August 1954 and 26 July 1955, respectively.<sup>362</sup>

### *Spanish Southern Zone of Morocco*

131. After the "Spanish Southern Zone of Morocco", formerly a constituent entity of the member known as "Spanish Provinces in Africa", became part of Morocco,<sup>363</sup> the Moroccan Minister of Posts, Telegraphs and Telephones addressed on 17 March 1959 the following communication to the Secretary-General of the Union:

I have the honour to inform you that the instrument of accession to the International Telecommunication Convention (1952), deposited by the Government of Morocco on 12 November 1956, should be amended as follows:

"By this accession, Morocco, as an independent and sovereign State, succeeds to:

"(1) the two former zones of Morocco which acceded to the Union under the denominations of the 'French Protectorate of Morocco' and the 'Zone of Spanish Protectorate in Morocco',

"(2) the former zone of Tangier,

"(3) the zone formerly known as Spanish South Morocco."

I should be obliged, therefore, if you would be good enough to inform the Members of the International Telecommunication Union that the jurisdiction of the Government of Morocco extends entirely over the four zones mentioned above.<sup>364</sup>

### *West New Guinea (West Irian)*

132. In 1950, the Government of the Netherlands notified the General Secretariat that the Atlantic City Convention was:

[...] considered to apply to *Netherlands New Guinea* from 28 December 1949, the date on which sovereignty was transferred to Indonesia.<sup>365</sup>

This transfer of sovereignty did not concern the territory of New Guinea which, up to the above-mentioned date, formed part of the Netherlands Oversea Territory of Indonesia—formerly known as the Netherlands Indies—and is still part of the Kingdom of the Netherlands.<sup>366</sup>

133. Since then and until the transfer of the administration of the territory of *West New Guinea (West Irian)* to Indonesia, in accordance with the "Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian) signed at the Headquarters of the United Nations, New York, on 15 August 1962",<sup>367</sup> the *Kingdom of the Neth-*

*erlands*<sup>368</sup> deposited instruments of ratification or approval, on behalf of the Kingdom in Europe, Surinam, the Netherlands Antilles and Netherlands New Guinea, relating to the following Telecommunication Conventions and Regulations: (a) 1949 Paris Telegraph and Telephone Regulations (27 June 1950);<sup>369</sup> (b) 1952 Buenos Aires Convention (9 May 1955);<sup>370</sup> (c) 1958 Geneva Telegraph and Telephone Regulations;<sup>371</sup> (d) 1959 Geneva Radio and Additional Radio Regulations;<sup>372</sup> (e) 1959 Geneva Convention (29 June 1961).<sup>373</sup> On the other hand, the *Republic of Indonesia*, which had also ratified the 1952 Buenos Aires Convention (instrument deposited on 15 July 1957)<sup>374</sup> and approved the 1949 Paris Telegraph and Telephone Regulations<sup>375</sup> before the transfer of the territory to Indonesia in accordance with the above mentioned Agreement, deposited its instrument of ratification of the 1959 Geneva Convention (13 September 1963)<sup>376</sup> and approved the 1958 Geneva Telegraph and Telephone Regulations and the 1959 Geneva Radio and Additional Radio Regulations<sup>377</sup> on dates subsequent to that transfer.<sup>378</sup>

## C. Summary

### 1. UNDER THE 1932 MADRID CONVENTION

134. Under the 1932 Madrid Convention, succession took place in three cases involving the attainment of independence of a "country" (*Burma*), of a part of a "country" (*India*) and of one of the two constituents of a "group of countries or territories" (*Syria*). The three States concerned emerged from entities which had had formerly the status of "contracting governments" of the Union. In the remaining recorded cases involving either "contracting governments", former part of a "country" (*Pakistan*) or former constituents or parts of constituents of "groups of countries or territories" (*Lebanon, Libya, Republic of Korea*), or former territories or parts of territories to which application of ITU instruments had been extended (*Ceylon, Israel, Jordan, Philippines*), the

<sup>362</sup> In 1959 the name of the member "Netherlands, Surinam, Netherlands Antilles, New Guinea" was changed to "Kingdom of the Netherlands" which constitutionally comprised the Netherlands, Surinam, the Netherlands Antilles and the non-self governing territory of Netherlands New Guinea (*Report . . . , 1959*, pp. 3, 33 and 38, foot-note 65).

<sup>363</sup> *Notification No. 605*, p. 2.

<sup>364</sup> *Report . . . , 1955*, p. 38.

<sup>365</sup> Subject to reservations appearing in Additional Protocol (*Ibid.*, 1958, p. 32).

<sup>366</sup> *Ibid.*, 1962, pp. 47, 50 and 51, foot-note 28.

<sup>367</sup> *Ibid.*, 1961, pp. 45 and 48.

<sup>368</sup> *Ibid.*, 1957, p. 35.

<sup>369</sup> With a special proviso to the effect that the reservation which appears in Section I of the Final Protocol of the Telegraph Regulations still remains in force (*Notification No. 606*, p. 1).

<sup>370</sup> *Report . . . , 1963*, p. 52.

<sup>371</sup> *Ibid.*, 1964, p. 60.

<sup>372</sup> Article XXV of the Agreement relating to the transfer of the territory reads as follows: "The present Agreement will take precedence over any previous agreement on the territory. Previous treaties and agreements regarding the territory may therefore be terminated or adjusted as necessary to conform to the terms of the present Agreement".

<sup>363</sup> *Report . . . , 1957*, pp. 35-36.

<sup>364</sup> For the constitution of Morocco as an independent State, see para. 70 above.

<sup>365</sup> *Notification No. 815*, p. 2. See also para. 70 above.

<sup>366</sup> See paras. 65-68 above.

<sup>367</sup> *Notification No. 597*, p. 2.

<sup>368</sup> United Nations, *Treaty Series*, vol. 437, p. 273. Came into force on 21 September 1962.

newly independent States became "contracting governments" or "members" of the Union by accession, in accordance with the relevant provisions of the 1932 Madrid Convention or of the 1947 Atlantic City Convention. In connexion with Libya and the Republic of Korea, it should be noticed that after the Second World War the situation within the Union of the former Italian and Japanese colonies and overseas territories remained uncertain until their status was finally settled following the conclusion of peace treaties and other relevant agreements.

135. In the three succession cases referred to above, membership and participation in ITU instruments by a former "contracting government" has been inherited by one newly independent State. It appears, however, that as from its independence until the notification of its accession, *Lebanon* continued to participate in the Union together with *Syria*, on the basis of the status of the former group "Syria and Lebanon". In all succession cases, the succession has taken place by tacit consent. Neither declarations of continuity nor any other formal notifications of succession were transmitted to the Secretary-General of the Union by the successor States or requested by the Union's organs. After attaining independence in 1948, *Burma*, a "contracting government" by accession in 1937 to the 1932 Madrid Acts, continued the participation in the Union and its instruments. Thus after independence, *Burma* ratified the 1947 Atlantic City Convention which had been signed by *Burma* before independence.

136. Former "British India" was a "contracting government" by signature and ratification in 1934 of the Madrid Convention. It also approved in 1939 the 1938 Cairo Administrative Regulations. After the Second World War "British India" was divided, in accordance with the Indian Independence Act, 1947, into two States, *India* and *Pakistan*, both of which became independent as from the date of the partition. The partition of "British India" and independence of *India* and *Pakistan* took place during the 1947 Atlantic City Conference. By an express decision of the Conference *Pakistan* was admitted to participate therein. No similar decision was taken by the Conference with regard to independent *India* which continued to participate in the Conference as a successor of former non-independent *India*. With regard to the Madrid Convention and Cairo Regulations, *Pakistan* acceded to these instruments, but *India* did not deposit any fresh accession or approval and continued to be considered a party to them as from the effective dates of participation of former "British India". In addition, *India* confirmed *before* ratifying the Atlantic City Convention, that it would continue to defray Union's expenses in the same class of contribution as former "British India".

137. The "group" known as "Syria and Lebanon" was a single "contracting government" under the Madrid Convention. The constituents of the group were considered, however, separate entities with regard to the sets of Cairo Regulations approved by the group. Following the independence of *Lebanon* and *Syria*, both States communicated to the Bureau in 1944 that they

would contribute separately to defray Union's expenses. No communications were transmitted at that time by either of the two newly independent States in connexion with their respective participation in ITU instruments. Subsequently, in 1946, *Lebanon* acceded to the Madrid Convention and all sets of Cairo Regulations. *Lebanon* and *Syria* were represented separately at the 1947 Atlantic City Conferences. All through this period, the only relevant actions taken by the Bureau with regard to the tables showing the status of ITU instruments were the addition, in 1944, of a foot-note to the names of *Lebanon* and *Syria* indicating "Now *Lebanon Republic*" and "Now *Syrian Republic*", and, in 1946, of another foot-note to the name of *Lebanon* reproducing the text of the communication relating to its accession. Following the ratification by *Lebanon* of the Atlantic City Convention, the Bureau listed the *Syrian Republic* as a party to the Madrid Convention as from the effective date of ratification of the Convention by the "group" in 1934.

138. In cases concerning the restoration of independence after annexation (*Austria*, *Ethiopia*) the legal position that the "contracting governments" concerned had had in the Union before the occupation and annexation of their respective territories was fully re-established. It implied continuity of participation in ITU instruments binding them before the occupation and annexation and discontinuity of participation in ITU instruments made applicable to them during the period of occupation and annexation. Thus, *Austria* and *Ethiopia* continued to be considered parties to the Madrid Convention, which they had ratified before the annexation and occupation, as from the original date of the deposit of their respective instruments of ratification. On the other hand, participation in the 1938 Cairo Regulations approved by the occupying Powers lapsed. Following the restoration of their independence, *Austria* and *Ethiopia* transmitted fresh notifications of approval of the Cairo Regulations.

139. *Jordan's* application for membership under the 1947 Atlantic City Convention, in spite of a prior accession of *Transjordan* to the Madrid Convention and Cairo Regulations, illustrates the constitutional reorganization of the Union achieved at the Atlantic City Conference. *Transjordan* did not attend the Atlantic City Conference, was not listed in Annex 1 of the Atlantic City Convention, and its status vis-à-vis the reorganized Union was not regulated by any protocol adopted by the Conference. Therefore, the only formal procedure open to *Jordan*, then a non-member of the United Nations, to become a "member" of the reorganized Union was to submit an application for admission followed, once the application had met with the approval of the required majority of members, by the deposit of an instrument of accession to the Atlantic City Convention. It should be noticed that only when all these requisites had been fulfilled, did the Administrative Council agree that "Jordan is now to be considered a member of the Union".

## 2. UNDER THE 1947 ATLANTIC CITY CONVENTION AND SUBSEQUENT REVISED CONVENTIONS

140. Participation by succession under the 1947 Atlantic

City Convention and subsequent revised Conventions has taken place almost exclusively in cases relating to the formation or dissolution of unions or federations. Continuity in membership and participation in Telecommunication Conventions has been secured in all recorded cases concerning the formation of such unions or federations. *Ethiopia's* membership continues without interruption after its federation with *Eritrea*. The *United Arab Republic* inherited the membership of *Egypt* and *Syria*. *Malaysia* continued the membership of the *Federation of Malaya*, the *United Republic of Tanzania* that of *Tanganyika* and the *Federation of Rhodesia and Nyasaland* that of *Southern Rhodesia*. It should be noticed that while the United Arab Republic was a union between two independent "members" of the Union (*Egypt* and *Syria*), the United Republic of Tanzania was constituted by an independent "member" (*Tanganyika*) and an independent State non member of the Union (*Zanzibar*), *Malaysia* by an independent "member" (*Federation of Malaya*) and three dependent territories (*Sabah* [*North Borneo*], *Sarawak*, *Singapore*) formerly included in a "group" having the status of "associate member", and the Federation of Rhodesia and Nyasaland by a non-independent "member" (*Southern Rhodesia*) and two territories (*Northern Rhodesia*, *Nyasaland*) formerly comprised in a "group" of non-independent territories having the status of "member". *Eritrea* was a non-independent territory when it federated with *Ethiopia*, an independent "member" of the Union.

141. *Ethiopia* did not deposit any fresh accession to the 1947 Atlantic City Convention after the federation with *Eritrea*. The Convention would seem to have been automatically extended to *Eritrea*, in accordance with the federal constitutional provisions governing the application to the territory of treaties concluded by *Ethiopia* prior to the proclamation of the federation. The Ministry of Foreign Affairs of the *United Republic of Tanzania* deposited with the Secretary-General of the Union, through diplomatic channels, a note announcing the constitution of the union between *Tanganyika* and *Zanzibar* and the succession of the new Republic to the membership of former *Tanganyika*. The United Republic of Tanzania was considered a party to the 1959 Geneva Convention as from the effective date of *Tanganyika's* accession to the Convention. Likewise, *Malaysia* was listed as a party to the 1959 Geneva Convention as from the date of the deposit by the *Federation of Malaya* of its instrument of ratification of the Convention. Previously, the Administration of *Malaysia* had transmitted to the General Secretariat a communication explaining the constitutional changes involved in the admission of *Sabah* (*North Borneo*), *Sarawak* and *Singapore* to the Federation, declaring that *Malaysia* remained the same legal person as the Federation and continued to be a contracting party to international organizations to which the Federation was formerly a party, and requesting to replace the name of the "member" *Federation of Malaya* by *Malaysia*.

142. On the formation of the *United Arab Republic*, the only case in which the memberships of two independent "members" were involved, the procedure

followed for the succession was somewhat different. The communications transmitted by the authorities of the new Republic concerning its formation and the assumption as a single State of conventional rights and obligations and memberships of former *Egypt* and *Syria* were not considered sufficient. The matter was referred to the Administrative Council. Noting that both *Egypt* and *Syria* had signed and ratified the 1952 Buenos Aires Convention, the Council considered that the deposit with the Secretary-General of the Union, through diplomatic channels, of a declaration by the United Arab Republic would suffice to settle its position in the Union. The United Arab Republic did not inherit the membership of former *Egypt* and *Syria* until the deposit by its Government, in accordance with the Council's decision, of a declaration stating that the new Republic will respect the obligations undertaken by *Egypt* and *Syria* when they signed and ratified the 1952 Buenos Aires Convention. However, as far as the Convention itself is concerned no effective date of participation of the United Arab Republic as such was established. It would seem that the Convention remained valid within the Egyptian Region as from the effective date of ratification of former *Egypt* and within the Syrian Region as from the effective date of ratification of former *Syria*.

143. The succession by the *Federation of Rhodesia and Nyasaland* to the membership of *Southern Rhodesia* also followed a particular procedure. To understand it correctly it should be remembered that the three constituent entities of the Federation were non independent countries or territories for the conduct of the international relations of which the same independent "member" of the Union, namely the United Kingdom, was responsible. Shortly after the constitution of the Federation, the Government of the United Kingdom deposited, on the same date, separate instruments of accession to the 1952 Buenos Aires Convention on behalf of *Southern Rhodesia* and of the group known as "Colonies, Protectorates, Overseas Territories and Territories under Mandate or Trusteeship of the United Kingdom of Great Britain and Northern Ireland". Both *Southern Rhodesia* and the group, which included amongst its constituents *Northern Rhodesia* and *Nyasaland*, were "members" of the Union. The two instruments of accession were accompanied by a note, drafted in identical terms, announcing the constitution of the Federation and stating that, because the Buenos Aires Convention provided no method whereby accession could be affected on behalf of the Federation *eo nomine*, the United Kingdom proposed to regard the accession by *Southern Rhodesia* and the accession of *Northern Rhodesia* and *Nyasaland* in the instrument deposited on behalf of the Colonial "ensemble", as constituting, without further formality, an accession on behalf of the Federation of *Rhodesia* and *Nyasaland*. Some months later, the United Kingdom's Government asked the General Secretariat to replace the name of the "member" *Southern Rhodesia* by *Federation of Rhodesia and Nyasaland*. No objections were made by the "members" of the Union to the described procedure. The Federation was considered to be a party to the 1952 Buenos Aires Convention as from the date of the deposit by the United Kingdom's

Government of the two instruments of accession referred to above.

144. Continuity in membership and participation in Telecommunications Conventions has been secured only partially in cases concerning the dissolution of a union (*United Arab Republic*) or a federation (*Federation of Rhodesia and Nyasaland*) and the separation from a federation (*Singapore* from *Malaysia*). After the dissolution in 1961 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 1959 Geneva Convention as from the effective date of ratification of the Convention by the former union. Syria, under the name *Syrian Arab Republic*, resumed separate membership by depositing a fresh accession to the 1959 Geneva Convention and became a party to the Convention as from the date of such deposit. *Rhodesia* (former Southern Rhodesia) inherited the membership of the Federation of Rhodesia and Nyasaland (formerly membership of Southern Rhodesia) after the dissolution of the Federation in 1963 as well as the latter's accession to the 1959 Geneva Convention. As far as the two other constituents of the former Federation (*Northern Rhodesia*, *Nyasaland*) were concerned, the United Kingdom sponsored applications for separate "associate membership", after including them provisionally in the "member" representing its overseas territories "ensemble". The independence and separation of *Singapore* from *Malaysia* in 1965 did not alter the latter's membership. Malaysia continues to be a party to the 1959 Geneva Convention as of the same date as before Singapore's separation. Singapore became a separate "member" of the Union by depositing a fresh accession to the 1959 Geneva Convention.

145. The transfer of territories (*French Settlements in India*, *Saar*, *Spanish Southern Zone of Morocco*, *West New Guinea (West Irian)*) to an independent "member" of the Union has not led to the deposit of any fresh accession to Telecommunication Conventions by the "member" concerned. *Morocco* by a communication addressed to the Secretary-General of the Union modified, however, the wording of its instrument of accession to the 1952 Buenos Aires Convention in order to make an express reference to the former "Spanish Southern Zones of Morocco" as well as to the former "International Zone of Tangier", as Zones also included under the jurisdiction of the independent State of Morocco. The "International Zone of Tangier" had not been referred to in the instrument at the time of Morocco's accession to the Buenos Aires Convention, although it was already incorporated in the independent State of Morocco. When former West New Guinea (*West Irian*) was transferred to *Indonesia*, in accordance with the agreement between the Netherlands and Indonesia signed at the United Nations Headquarters on 15 August 1962, all ITU instruments in force in the Territory were likewise in force in Indonesia.

146. In all recorded cases relating to attainment of independence except one (*Indonesia*), the newly independent States, which became "members" of the Union

after attaining independence, deposited instruments of accession under the relevant provisions of the 1947 Atlantic City Convention or of one of the subsequent revised Conventions. Accession has been, therefore, the method of participation generally followed by newly independent States to become separate "parties" to Telecommunication Conventions as sovereign States. No succession procedure to Telecommunication Conventions has been developed in the practice of the Union in order to facilitate continuity of participation in such Conventions by newly independent States.

147. In the only case of succession mentioned in the preceding paragraph (*Indonesia*) the situation was very similar to the cases of succession described under the 1932 Madrid Convention, in particular to *Burma's* case. The "country" was already a "member" of the Union before attaining independence. As in such cases, it was an implied or tacit succession. No formal declaration or notification of succession was communicated to the Secretary-General of the Union. "Netherlands Indies" was a "member" of the Union before the conclusion of the "Agreement on Transitional Measures" between the Government of the Kingdom of Netherlands and the Government of the Republic of Indonesia, at the Round Table Conference held at the Hague in 1949. Already a "contracting government" under the 1932 Madrid Convention, "Netherlands Indies" had signed the 1947 Atlantic City Convention and deposited on 31 December 1948 its instrument of ratification of the Convention. Independent Indonesia did not deposit any fresh accession to the Atlantic City Convention and continued to be listed as a party thereto as from the date of the deposit of "Netherlands Indies" instrument of ratification of the Convention. The communication received from Indonesia, in reply to a query of the General Secretariat, announcing that "the Member" Indonesia has adopted the title "Republic of the United States of Indonesia" implied that Indonesia considered itself a successor to the Union's membership of former "Netherlands Indies". This is confirmed by Indonesia's approval in July 1950 of the 1949 Paris Telegraph Regulations and Telephone Regulations and Indonesian participation in the 1952 Buenos Aires Conference.

148. Most of the newly independent States acceded to Telecommunication Conventions and became "members" of the Union after being admitted to the United Nations. Six States only (*Cambodia*, *Cameroon*, *Laos*, *Mauritania*, *Nauru*, *Viet-Nam*) needed to apply for admission before acceding. The territories of a great number of those newly independent States were, when they became independent, constituents of "groups of territories" having the status of "members" or "associate members" of the Union. Twenty-nine States were former constituents of groups "members" of the Union: *Morocco* and *Tunisia* of the "French Protectorates of Morocco and Tunisia"; the *Democratic Republic of the Congo* of the "Belgian Congo and Trust Territory of Ruanda Urundi"; *Cambodia*, *Cameroon*, *Central African Republic*, *Chad*, *Congo (Brazzaville)*, *Dahomey*, *Gabon*, *Guinea*, *Ivory Coast*, *Laos*, *Madagascar*, *Mali*, *Mauritania*, *Niger*, *Senegal*, *Togo*, *Upper Volta* and *Viet-Nam* of the group

called at present "Group of Territories represented by the French Overseas Postal Telecommunication Agency"; and *Barbados, Botswana, Cyprus, Guyana, Lesotho, Malta, Mauritius and Southern Yemen* of the group called at present "Overseas Territories for the international relations of which the Government of the United Kingdom of Great Britain and Northern Ireland are responsible." Ten States were former constituents of groups "associate members" of the Union: *Burundi* and *Rwanda* of the "Territory of Ruanda Urundi"; *Ghana, Nigeria* and *Sierra Leone* of "British West Africa"; *Tanganyika* and *Uganda* of "British East Africa"; *Federation of Malaya* of the "Malaya-British Borneo Group"; and *Jamaica* and *Trinidad and Tobago* of the "Bermuda-British Caribbean Group". As for the remaining seven cases, two States (*Algeria, Singapore*) had formed part of the territory of one independent "member" of the Union, three States (*Kenya, Malawi, Zambia*) were separate "associate members", one state (*Somalia*) was composed by the merger of a former "associate member" and a former constituent of a non-independent "member", and another State (*Nauru*) was a territory to which the Convention had been extended by a declaration of territorial application.

149. Newly independent States which do not express their position with regard to Telecommunication Conventions are not listed among the "members" of the Union, although some of these Conventions had been extended to their respective territories before attaining independence (*Equatorial Guinea, Gambia, Swaziland, Western Samoa*).

150. The annual *Reports* and the *Notifications* published by the General Secretariat do not provide any information about the situation *vis-à-vis* the Union of those newly independent States during the period between the date of independence and the date of the deposit of fresh accession. Probably the Telecommunication Administrations of the newly independent States continue to maintain relations with the Union and to apply *de facto* its instruments. Nevertheless, whatever the *de facto* situation may be, it remains that legally accession produces a formal interruption in the continuity of participation in the Union and its instruments as from the date of independence until the assumption of separate membership as sovereign States consequential on the deposit of fresh accessions. On attaining independence, a newly independent State ceased normally to be included in the "group" or entity to which it formerly belonged.<sup>379</sup> It appears, however, that the Union has not adopted the practice of requesting formally newly independent States to declare their attitude with respect to Union's instruments which had, or may have, been applicable in their territory prior to independence.

151. In a few cases, continuation of associate membership status after independence has preserved a continuous application of Telecommunication Conventions to the

Territories of newly independent States, even though these States became later on "members" of the Union by accession and not by succession. Application based on the status of "associate member" is thus extended until the date of the deposit by the newly independent State of a fresh accession making it a full "member" of the Union. In the three cases recorded (*Kenya, Malawi, Zambia*), the former "associate member" was a single "territory" and not a "group of territories".

152. In some instances, application of Union's instruments after attaining independence seems to have been secured by *de facto* or interim measures. Following the independence of *Western Samoa*, the Administration of New Zealand informed the General Secretariat that it would continue to act on behalf of Western Samoa in all telecommunication matters, in accordance with the relevant provisions of a treaty concluded between New Zealand and Western Samoa. The communication transmitted by the United Kingdom Administration following the independence of *Somalia* indicated that one of the constituents of the newly independent State, namely *Somaliland Protectorate*, ceased to be part of the "member" representing the British overseas territories "ensemble" as from the date of its merger with the former *Trust Territory of Somaliland* in the independent State of *Somalia*, in spite of the fact that *Somaliland Protectorate* had become itself independent some days before the merger.

153. The actual wording of the provisions on membership and participation embodied in the Telecommunications Conventions explains why newly independent States have almost always become "members" of the Union and parties to its instruments by accession. Considering, however, that such provisions have remained substantially the same in all successive revised Conventions, it seems reasonable to conclude that no strong need for methods of participation based on succession has been felt within the Union. The periodical revisions of the Convention every five or six years and the fact that the Conventions themselves prescribe a fixed date for their entry into force diminish the practical value of a participation based on succession. Members, including the newly independent States, are supposed to ratify or accede to each revised Convention. Consequently, the main advantage of any kind of succession procedure, namely continuity of participation in the Conventions, is considerably reduced within the Union. At the most, participation by succession to a Convention previously extended to the territory of a newly independent State could serve its purpose only for a relatively short period of time. A newly independent State shall ratify or in any case accede to the new revised Convention. On the other hand, the Convention in force when a newly independent State decides to express its consent to be bound may be one which has never been extended to its territory prior to the attainment of independence. For instance, *Cambodia, Laos* and *Viet-Nam* applied for membership under the 1947 Atlantic City Convention before the deposit by France of the instrument of ratification of the Convention on behalf of the "member" representing its overseas territories "ensemble". Accessions to the 1959 Geneva

<sup>379</sup> See, for instance, the communication on Zanzibar's independence in *Notification No. 948*, p. 2.

Conventions by *Dahomey*, *Madagascar*, *Togo*, *Upper Volta* and *Mauritania*, by the *Democratic Republic of the Congo*, and by *Cyprus* took place before the deposit of instruments of ratification or accession to the Convention on behalf respectively of the "member" representing the French overseas territories "ensemble", the member called "Belgian Congo and Trust Territory of Ruanda-Urundi", and the member representing the British overseas territories "ensemble". *Algeria* acceded to the 1959 Geneva Convention before its ratification by France and *Somalia* before it was extended to its constituents. *Burundi* and *Rwanda*, *Nigeria*, and *Jamaica* and *Trinidad and Tobago* acceded likewise to the 1959 Geneva Convention before it was ratified or acceded to on behalf of the "associate members" in which they were formerly included, namely the "Territory of Ruanda-Urundi", the "British West Africa", and the "Bermuda-British Caribbean group". The same happened with *Barbados*, *Guyana* and *Lesotho*, and with *Nauru*, in connexion with the 1965 Montreux Convention.

154. In addition, the permanency of status of "members" of the Union composed by a "group of territories" for the international relations of which an independent "member" is responsible has perhaps helped to make more difficult the development of methods whereby newly independent States might participate by succession in the Union and its instruments, because in the light of the cases studied, one of the features of the succession practice within the Union seems to be that only one newly independent State succeeded to one previous membership or one previous ratification or accession of a former non-independent member or party. The "groups of territories" having the status of "members" or "associate members", maintain their respective status within the Union notwithstanding alterations in their composition or denomination. Likewise, these "groups" continue their participation in Union's instruments in spite of the changes, without depositing any fresh ratification of, or accession to, the instruments in question. For instance, the "groups" called at present "Group of Territories represented by the French Overseas Postal and Telecommunication Agency" and "Overseas Territories for the international relations of which the Government of the United Kingdom of Great Britain and Northern Ireland are responsible" keep their status of "members" of the Union and their participation in Union's instruments previously ratified or acceded to on their behalf by France or the United Kingdom, in spite of the fact that a great number of their original constituent territories attained independence and became, thereafter, separate members of the Union and separate parties to its instruments. A "group of territories" having the status of "member" or "associate member" ceases to participate in the Union only: (a) when all its constituents attain independence ("French Protectorates of Morocco and Tunisia"; "Territory of Ruanda Urundi"); or (b) when, the independent member of the Union responsible for the conduct of the international relations of the constituent territories formally notifies the dissolution of the "group" concerned ("British West Africa"; "Malaya-British Borneo Group", later on called "Singapore-British Borneo Group"; "Bermuda-British Caribbean Group") or takes an action which

implies such dissolution (Belgium's application for associate membership of the "Territory of Ruanda-Urundi", after the independence of the Democratic Republic of the Congo, implied the dissolution of the "member" called "Belgian Congo and Trust Territory of Ruanda-Urundi").

155. There is a situation in which continuity in the application of Union's instruments is secured on the basis of a provision embodied in the Telecommunication Conventions, but the provision<sup>380</sup> relates only to non-independent territories or groups of territories for the international relations of which an independent "member" of the Union is responsible. The provision applies when a non-independent territory or group of territories is admitted as "associate member". It presupposes a prior extension of the Convention to the territory or constituents of the group applying for "associate membership" by the independent "member" of the Union responsible for their international relations. In those cases, although in the framework of the Union "associate members" are in principle parties to Telecommunication Conventions, "associate membership" becomes effective on the date of the approval of the application. No further ratification or accession on behalf of the admitted "associate member" is required for the application to its territory or constituents of the Convention. The Convention continues to apply to the territory or constituents of the "associate member" on the basis of the former ratification or accession. Thus, the 1947 Atlantic City Convention continued to be applicable to the constituents of three groups (*British East Africa*, *British West Africa*, *Malaya-British Borneo Group*) after their admission as "associate members" on the basis of the ratification of the Convention deposited formerly by the United Kingdom on behalf of the member called "Overseas Territories for the international relations of which the Government of the United Kingdom of Great Britain and Northern Ireland are responsible". The same happened with the *Bermuda-British Caribbean Group* and the 1952 Buenos Aires Convention. This Convention continued to apply likewise to an "associate member" (*Territory of Ruanda-Urundi*) as a result of a former ratification deposited by Belgium and valid for the member "Belgian Congo and the Trust Territory of Ruanda-Urundi". On the other hand, because the Convention was not previously extended to it, the *Trust Territory of Somaliland* did not become an "associate member" until a declaration of territorial application of the 1947 Atlantic City Convention was deposited by the Administering Power on behalf of the Territory. For the reasons already given,<sup>381</sup> the Government of the United Kingdom and the General Secretariat would seem to have differed in their appreciation of the position *vis-à-vis* the Union of *Nyasaland* and *Northern Rhodesia* when an application for associate membership of these territories was sponsored by the United Kingdom. The accession to the 1959 Geneva Convention deposited by the United Kingdom on behalf of Northern Rhodesia after its admission as "associate

<sup>380</sup> Article 1, paragraph 3 (b), of the 1965 Montreux Convention (see para. 9 above).

<sup>381</sup> See para. 124 above.

member” seems to imply that in the opinion of the United Kingdom’s Government the necessary preconditions for a full application of the provision cited at the beginning of the present paragraph did not exist in this particular case.

156. The existence of “members” representing overseas territories “ensembles” and the elasticity and flexibility involved in establishing their composition have facilitated likewise a continuous application of the Union’s instruments to their non-independent constituents, notwithstanding the alterations undergone by the “groups”. The independent member of the Union concerned communicates to the Secretary-General the names of the territories included in the “group”. The communications are generally transmitted at the time of depositing ratifications or accession on behalf of the “group” or at a later stage when alterations in composition take place after the deposits. The composition of such “groups” rests within the exclusive competence of the independent “members” of the Union responsible for the conduct of the international relations of the territories constituting them. Constituents of “groups of territories” to which the status of “associate member” has been granted were formerly included in the composition of “members” of the Union such as “Overseas Territories for the international relations of which the Government of the United Kingdom of Great Britain and Northern Ireland are responsible” or “Belgian Congo and Trust Territory of Ruanda-Urundi”. On the other hand, when certain groups having the status of “associate member” have been formally dissolved, the remaining non-independent constituents have been included again in the member “Overseas Territories for the international relations of which the Government of the United Kingdom of Great Britain and Northern Ireland are responsible” This was so in the cases of *Gambia* (former constituent of “British West Africa”, *Brunei* (former constituent of “Singapore-British Borneo Group”, *Bahamas*, *Barbados*, *Bermuda*, *British Guyana*, *British Honduras*, *Leeward Islands* and *Windward Islands* (former constituents of “Bermuda-British Caribbean Group”). After the dissolution of the *Federation of Rhodesia and Nyasaland*, the United Kingdom’s Government included “as an interim measure” *Northern Rhodesia* and *Nyasaland* in the “member” of the Union representing its overseas territories “ensemble”. The communication transmitted by the United Kingdom Administration following the federation of *Eritrea* with *Ethiopia*, implied that relations between Eritrea and the Union continued during the period in which the United Kingdom administered the territory. The communication, however, did not specify whether such relations were based on tele-communications instruments previously applicable to Eritrea, on instruments extended by the United Kingdom to the territory or to the British overseas territories “ensemble”, or on *de facto* transitional arrangements.

157. In the absence of a “member” representing the whole of the overseas territories of an independent “member” of the Union, the latter has communicated sometimes the constitution of a “group” between itself and its overseas territories in order to preserve the continuous application to these territories of the Union’s instruments. For instance, in 1950, following the estab-

lishment of *Indonesia* as an independent State, *Netherlands* first notified that the Atlantic City Convention “was considered to apply” to “Netherlands New Guinea”, formerly a part of “Netherlands Indies”, and subsequently ratified or approved several ITU instruments on behalf of a “group” constituted by the Kingdom in Europe and its different overseas territories, including “Netherlands New Guinea”.

158. Nevertheless, the lack of a general succession procedure by which continuity of participation in the Union’s instruments could be legally secured when the status of a given territory is modified, has frequently resulted in the same Telecommunication Convention being made applicable successively to the same territory through the deposit of several instruments of ratification or accession. The most striking example is the extension to the territory of *Zambia* (former Northern Rhodesia) of the 1959 Geneva Convention by four different instruments of accession, namely the instruments deposited by or on behalf of the member “Federation of Rhodesia and Nyasaland”, the member representing the British overseas territories “ensemble” (as an interim measure), the associate member “Northern Rhodesia”, and the member “Zambia” as an independent State.

159. So far as the Administrative Regulations are concerned, States which succeeded to Telecommunication Conventions would seem to have succeeded likewise to the signatures and express approvals of Regulations annexed thereto in force at the time of the succession. For instance, *Indonesia* succeeded to the Administrative Regulations originally annexed to the 1947 Atlantic City Convention, the *United Arab Republic* to the 1947 Atlantic City Radio Regulations and Additional Radio Regulations and the 1949 Paris Telegraph Regulations and Telephone Regulations; the *United Republic of Tanzania* to the 1963 Geneva Radio Regulations (Partial Revision) (space); and *Malaysia* continued participation in the 1958 Geneva Telegraph Regulations and Telephone Regulations and 1959 Geneva Radio Regulations and Additional Radio Regulations.

160. On the other hand, *Morocco* and *Tunisia*, although they became separate “members” of the Union and separate “parties” to the 1952 Buenos Aires Convention by accession, succeeded to the 1949 Paris Telegraph Regulations and Telephone Regulations. In this connexion, it should be noticed that the 1949 Paris Regulations were annexed to the 1952 Buenos Aires Convention, that the approval of these Regulations before independence had been made separately for the former Protectorate of Morocco and for the former Protectorate of Tunisia, notwithstanding the fact that both Protectorates were grouped in a single “member” of the Union, and that such approvals had been directly communicated to the General Secretariat by the respective competent authorities of the former Protectorates. Territorial Administrations of some groups having the status of an “associate member” sometimes transmitted directly to the General Secretariat approvals of some sets of Administrative Regulations, such as, for instance, *British West Africa* and *British East Africa* with regard to the 1958 Geneva Telegraph Regulations and Telephone Regula-

tions and British East Africa in connexion with the 1959 Geneva Radio Regulations and Additional Radio Regulations. No succession to these Regulations is recorded in the annual *Reports* following the attainment of independence of constituents of such "groups". The approvals had been given for the "groups" and not for their constituents and had been transmitted by the Territorial Administrations of the "groups" and not by those of their constituents.

161. Some newly independent States continued the practice of giving express approvals to the Administrative Regulations, but since 1964 States which acceded to the 1959 Geneva Convention or to the 1965 Montreux Convention are considered to have approved *ipso facto* the sets of Administrative Regulations in force when the country concerned acceded. Consequently, as has been mentioned in each particular case, a certain number of newly independent States which have acceded to one or another of those Conventions are listed at present as

having approved *ipso facto* different sets of Administrative Regulations. No succession is however involved in this practice which has been embodied in the Montreux Convention itself. It is a general procedure applicable to all members, new and old, of the Union. The Administrative Regulations are considered to be approved *ipso facto* by a particular State because they were in force when that State acceded to a Telecommunication Convention, and not because of any kind of prior application of the Regulations to its territory before attaining independence or before acceding.

162. Finally, it should be added that in one case of succession relating to the constitution of a union, the successor (*United Arab Republic*) succeeded likewise to identical reservations formulated by its two predecessors (*Egypt* and *Syria*) in connexion with the Buenos Aires Convention. The inheritance of the reservations was expressly mentioned in the declaration made by the successor in order to settle its position in the Union.

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## Note

To assist the International Law Commission in its work on the topic succession of States, the Secretariat has carried out research relative to succession in respect of bilateral treaties in some selected areas of inter-State relations. The materials gathered are of undoubted interest for the study of the topic, although the published practice on bilateral treaties does not allow the preparation of studies which are as comprehensive as those in the series "Succession of States to multilateral treaties".\* Since the main purpose of the research is to ascertain recent practice, only a few earlier cases, going back to the end of the First World War, have been included.

The present document collects practice relevant to extradition treaties. The results of the research in other selected areas will be published either as addenda to this document or as separate documents. The sources of the information are varied, but in most of the cases official and primary. When a private or a secondary source has been used, that fact has been indicated, as appropriate.

The designations used, 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 or the position which the States concerned may take with regard to the particular treaties or agreements mentioned.

## I. Extradition treaties

### INTRODUCTION

1. It is now generally accepted that international custom imposes no obligation on States to extradite alleged criminals to another State which wishes to prosecute them. In contemporary international law, extradition is accordingly mainly based on treaties.<sup>1</sup> In the overwhelming majority of cases, extradition treaties are concluded between two States, and the present study is limited to such bilateral treaties.

2. The great bulk of extradition treaties are very similar in content. Certain provisions have become, by reason of their uniformity and wide diffusion, "standard

clauses".<sup>2</sup> Thus, an extradition treaty typically provides for the extradition of alleged fugitive offenders convicted or charged with listed or generally defined crimes, usually includes a number of basic principles (e.g., exemption of political offences, the specialty rule, the *non bis in idem* rule, the double criminality rule) and states certain procedures, to be followed by the parties. Most extradition treaties can be terminated by the giving of one year's notice or less.<sup>3</sup>

3. A considerable number of extradition treaties concluded in the nineteenth and twentieth centuries are applicable, either automatically or by subsequent extension, to dependent territories of the parties which later became independent States. In addition, States parties to extradition treaties have sometimes undergone changes in international status (constitution of unions or federations, secession, annexation, restoration of independence, etc.) which have affected their participation in these treaties.

4. The collected cases are divided into two groups, namely "cases of independence of former non-metropolitan territories" (section A) and "cases other than cases of independence of former non-metropolitan territories" (section B). Section A is subdivided according to the State which was responsible for the international relations of the former non-metropolitan territories when they attained independence. Within each of the subdivisions, cases are generally listed chronologically. Cases in section B are listed chronologically. The grouping of the cases is made for reasons of convenience and is without prejudice to any particular situation.

5. A considerable amount of the practice set out below relates to States established in territories which were formerly administered by the United Kingdom. This is explained mainly by two factors. First, extradition is dependent, under British law—which has continued in effect in those States for at least some time after independence—or under the legislation enacted to replace that law, on the existence of a treaty. Accordingly, there is

<sup>2</sup> It has been said by one writer (Ch. de Visscher, *Théories et réalités en droit international public*, 3rd ed. [Paris, 1960], pp. 182 and 183), explaining his views on the elaboration of the rules of international law by bilateral treaties, that:

"This is the case with treaties of extradition, which are usually bilateral, but which contain typical provisions so commonly reproduced that they have become clauses of style. Their repetition proves that they express principles and not only individual and contingent considerations. For this reason they may develop into a sort of customary law on the questions with which they deal. It remains true, nevertheless, that the general preference for the merely bilateral form denotes the political interest that States attach to the matter of extradition and their will to retain a character of individuality in its regulation."

<sup>3</sup> For instance, of the eight "typical bipartite treaties of recent date" included in *American Journal of International Law*, vol. 29 (1935), Suppl. 1-2 (Harvard Law School, *Research in International Law*) "I-Extradition", appendix V, pp. 316-356, seven allow termination on the giving of six months' notice, while the eighth allows denunciation five years after the treaty's entry into force by the giving of one year's notice. The British legislation which is relevant to many of the treaties discussed in this study requires that treaties implemented by it provide for their termination by notice of no more than one year (Extradition Act 1870, s. 4 (1)).

\* See *Yearbook of the International Law Commission, 1968*, vol. II, p. 1, document A/CN.4/200 and Add. 1 and 2; *ibid.*, 1969, vol. II, p. 23, document A/CN.4/210; and p. 61 above, document A/CN.4/225.

<sup>1</sup> The domestic law of a number of States does, however, allow extradition in the absence of a treaty; in such cases, extradition may also be based on comity or reciprocity.

a greater need in these States to determine whether the treaties are still in effect than there is in those States (for instance, those established in territories formerly administered by France) where treaties only supplement the basic power to extradite which is conferred by domestic law. Secondly, for a number of reasons, many Commonwealth countries have reviewed the parallel body of law regulating the rendition of fugitive criminals within the Commonwealth. The result of this review has generally been the closer assimilation of the law relating to such rendition to that concerning regular extradition, which has accordingly also been re-examined. This process, which has often led to the consolidation of the two bodies of law, has generally required the States to take a position in their new legislation on the extradition treaties applicable to their territory before independence.

#### A. Cases of independence of former non-metropolitan territories

##### (a) FORMER NON-METROPOLITAN TERRITORIES FOR THE INTERNATIONAL RELATIONS OF WHICH THE UNITED KINGDOM WAS RESPONSIBLE<sup>4</sup>

###### 1. Australia, Canada, New Zealand and South Africa

6. *General.* Australia, Canada, New Zealand and South Africa have generally claimed to be bound by treaties concluded by the United Kingdom and applicable to their territories.<sup>5</sup> They have also taken this position in relation to British extradition treaties. Thus, Australia, New Zealand and South Africa have recently enacted extradition legislation (replacing the Imperial Extradition

Acts of 1870 and later)<sup>6</sup> which maintains in force in their domestic law the original British Orders-in-Council which give effect to the extradition treaties.<sup>7</sup> In a recent Parliamentary answer, the Australian Minister of External Affairs stated that Australia had extradition treaties with forty-three named States.<sup>8</sup> None of these were negotiated and signed independently by Australia. A Canadian Government statement made on the occasion of the signing of an extradition treaty with Austria in 1967 included the following passage:

Canada is bound by extradition treaties with approximately 40 other countries but all of them are in whole or in part older British treaties which were extended to apply to Canada in the nineteenth century or in the early part of the twentieth century.<sup>9</sup>

7. The other parties to the treaties have also generally accepted this view favouring continuity. Thus, first,

<sup>4</sup> Since a treaty is not, generally speaking, part of the law of the land in Commonwealth countries, legislation was necessary to give effect to the extradition treaties. This legislation can be divided into three groups: (a) the Extradition Acts 1870-1935 (United Kingdom) (applicable only within Her Majesty's dominions), and the Orders-in-Council made thereunder, (b) legislation enacted by legislatures of British possessions and merely modifying the details of the Imperial legislation, and (c) legislation, usually entitled Fugitive Criminals Surrender Ordinances, enacted by the legislatures of territories under British protection or jurisdiction.

The arrest of alleged criminals under this legislation and their delivery to the foreign State seeking their extradition are dependent, first, on the conclusion of an arrangement for extradition and, second, on the promulgation of an Order-in-Council applying the Act to that arrangement. Accordingly, Orders have been made under the legislation in respect of all the extradition treaties. These Orders were given the same geographic scope as the treaties they implement.

Until recently, extradition (or rendition) within the Commonwealth had a quite different basis: it depended solely on legislation which differed in several important respects from the extradition legislation. The basic statutes were the Fugitive Offenders Act 1881 and 1915 (United Kingdom), which, like the Extradition Acts, applied within Her Majesty's dominions. They could also be applied to any place outside those dominions where "her Majesty has jurisdiction" and, in fact, the legislation was extended to most British protected States, protectorates and mandated territories in Africa, the Middle East and the Pacific.

In 1966, the Commonwealth Law Ministers, taking into account the changes in the composition of the Commonwealth, drew up a Scheme relating to the Rendition of Fugitive Offenders within the Commonwealth (United Kingdom, Cmnd 3008). In accordance with the Scheme, most of the relevant legislation substantially or completely assimilates Commonwealth rendition to foreign extradition, usually with the important exception that no extradition agreement is required in the former case.

<sup>7</sup> Extradition (Foreign States) Act 1966, s. 9 (1) (Australia); Extradition Act 1965, s. 21 and Extradition Amendment Act 1967, s. 2 (relating to the United States) (New Zealand, e.g. the treaty lists, and for Canada, Department of External Affairs, *Treaties and Agreements affecting Canada in force between His Majesty and the United States of America with subsidiary Documents, 1814-1925* (1927), pp. 18, 73 and 163, and recent statements in the *Canadian Yearbook of International Law*, vol. 4 (1966), pp. 286 and 287, and vol. 5 (1967), pp. 273 and 274.

<sup>8</sup> *Australia, 1966 Parliamentary Debates, House of Representatives, No. 10*, p. 498. See also Ivan A. Shearer, "Extradition and Asylum in Australia" in D. P. O'Connell (ed.), *International Law in Australia* (1965), pp. 558, 560, 561, 583, 584, 595.

<sup>9</sup> *The Canadian Yearbook of International Law*, vol. 6 (1968), p. 269. See also the references to the treaties with Mexico and the United States of America, *ibid.*, pp. 267-269, 306.

<sup>4</sup> The United Kingdom is currently party to about forty-four extradition treaties with non-Commonwealth countries (see the list on 7 November 1955, in *Parliamentary Debates*, Fifth Series, vol. 545, *House of Commons*, col. 146. Since then, treaties have been concluded with the Federal Republic of Germany, Israel and Sweden). Those concluded before 1914 (about thirty-seven were then in force) generally applied to all the territories of the parties, including their colonies and foreign possessions. Later, provision was made in some cases for the extension of the treaties to other territories within the jurisdiction or protection of the British Crown, e.g. protectorates and mandated territories. Treaties concluded after 1914 again applied to "all His Majesty's dominions" but with the important exception of the self-governing Dominions (Canada, Australia, New Zealand, South Africa, the Irish Free State and Newfoundland) and India. They instead had the separate right of accession to and thereafter of withdrawal from the treaties. Again, provision was made for the application of the treaties to territories within the Crown's jurisdiction or protection. The end result has been that the extradition treaties concluded by the United Kingdom applied to most of the territories for the international relations of which it was responsible.

<sup>5</sup> See generally the Australian and New Zealand treaty lists (Australia, *Treaty Series, 1956, No. 1*, and New Zealand, *Treaty Series, 1948, No. 11*) and D. P. O'Connell, *State succession in Municipal Law and International Law* (1967), vol. II, pp. 122-127.

since 1919, conventions supplementing earlier extradition treaties have been concluded by the United Kingdom with six States: Austria,<sup>10</sup> Denmark,<sup>11</sup> Hungary,<sup>12</sup> Iceland,<sup>13</sup> Portugal<sup>14</sup> and Switzerland.<sup>15</sup> Five of these supplementary conventions were open to separate accession by the other "members of the Commonwealth of Nations". These members included Australia, Canada, New Zealand and South Africa.<sup>16</sup> These Dominions other than Canada were original parties to the sixth (with Portugal). Such a power of accession and such participation clearly implied that those States remained bound by the extradition treaties which the conventions amended. The power of accession was exercised on several occasions.<sup>17</sup>

8. Secondly, between 1927 and 1937, Australia, New Zealand and South Africa agreed with the other party to more than thirty of the treaties that they be extended to their mandated territories<sup>18</sup> (these treaties were with Austria, Belgium, Bolivia, Chile, Colombia, Cuba, Denmark, Ecuador, El Salvador, Germany, Greece, Guatemala, Haiti, Hungary, Iceland, Liberia, Luxembourg, Monaco, Netherlands, Nicaragua, Norway, Panama, Paraguay, Peru, Portugal, Romania, San Marino, Spain, Switzerland, Thailand and Yugoslavia<sup>19</sup>). This action also proceeded on the basis that the treaties remained in force for Australia, New Zealand and South Africa.<sup>20</sup>

<sup>10</sup> League of Nations, *Treaty Series*, vol. CLXV, p. 373. The original treaty was revived under the Treaty of St. Germain following the First World War.

<sup>11</sup> League of Nations, *Treaty Series*, vol. CLXIX, p. 337.

<sup>12</sup> *Ibid.*, vol. CLXXXI, p. 337. The original treaty was revived under the Treaty of Trianon following the First World War.

<sup>13</sup> League of Nations, *Treaty Series*, vol. CXC VIII, p. 147. In a list of Icelandic treaties published in 1964, it is stated that Iceland considers the Denmark-United Kingdom Treaty of 1873 still to be in force so far as Australia, Canada and New Zealand are concerned (see para. 111 below).

<sup>14</sup> League of Nations, *Treaty Series*, vol. CXXLI, p. 267.

<sup>15</sup> *Ibid.*, vol. CLXIII, p. 103.

<sup>16</sup> The Irish Free State (see para. 18 below) and Newfoundland were the other members at the time.

<sup>17</sup> See e.g. the Australian and New Zealand treaty lists.

<sup>18</sup> In some cases, the treaties were also extended to the other party's mandated territories.

<sup>19</sup> League of Nations, *Treaty Series*, vol. LXXXIII, p. 495, p. 385, p. 473 and p. 485; vol. CX, p. 401; vol. CXXVI, p. 201; vol. LXIX, p. 135; vol. LXXXVIII, p. 404 (and see also vol. CLXXXIV, p. 437); vol. CVII, p. 557; vol. C, p. 268; vol. LXXXIII, p. 513; vol. XCII, p. 420; vol. LXXXIII, p. 465; vol. LXXXVIII, p. 400; vol. LXIX, p. 135; vol. LXXXIII, p. 477; vol. LXIX, p. 127 (see also vol. CXCI, p. 219); vol. CXXI, p. 39; vol. LXIX, p. 131; vol. LXXXVIII, p. 410; vol. XCII, p. 427; vol. LXXXIII, pp. 505, 509 and 500; vol. CLVI, p. 282; vol. LXXXIII, p. 480; vol. CLVI, p. 377; vol. LXXXIII, p. 469; vol. XCII, p. 432; vol. LXXXIII, pp. 516 and 490.

<sup>20</sup> See also the resolution of 15 September 1925 of the Council of the League of Nations (League of Nations, *Official Journal*, 1925, No. 10, p. 1363), in which the Council recommended the mandatory Powers and all States which had concluded special treaties or conventions with the mandatory Powers to agree if possible to extend the benefits of such treaties or conventions to the mandated territories.

9. Further, some of the treaties have been invoked in practice.<sup>21</sup>

10. *Sweden and Norway—United Kingdom Treaty of 1873.*<sup>22</sup> In 1950 and 1951, Sweden gave notice of termination of the Extradition Treaty between Great Britain and Sweden and Norway signed at Stockholm on 26 June 1873 (this Treaty had remained binding on Sweden and Norway after the dissolution of their real union in 1905) and Additional Declaration of 2 July 1907<sup>23</sup> to the United Kingdom and to Canada, New Zealand, South Africa and Australia.<sup>24</sup> The relevant domestic legislation was consequentially revoked.<sup>25</sup>

11. *United Kingdom—United States Treaty of 1842.*<sup>26</sup> Since 1919, Canada and the United States have on three separate occasions amended, in their relations with each other, the article of the Webster-Ashburton Treaty of 1842 which regulates extradition.<sup>27</sup> Each amendment is stated to be an integral part of the earlier treaties.

12. The High Court of Ontario held in 1953 that the article of the 1842 Treaty relating to extradition was not affected by the enactment of the Statute of Westminster in 1931 (which removed the remaining substantial external restraints on Canada's legislative powers). The Treaty was still in force between Canada and the United States.<sup>28</sup>

13. The United Kingdom-United States Extradition Treaty of 1931, which applies to the United Kingdom and to the territories for the international relations of which it is responsible, provides that it supersedes the earlier extradition treaties "save that in the case of each of the Dominions and India those provisions [of the treaties] shall remain in force" unless these States accede to the 1931 Treaty or negotiate another one.<sup>29</sup> In fact,

<sup>21</sup> E.g., *Re Stegeman* (1966) 58 *Dominion Law Reports* (2d) 415; *U.S.A. v. Novick* (1960) 33 *Can. Cr. R.* 401; *International Law Reports*, vol. 32, p. 275 (requests by United States); *United States ex rel. Rauch v. Stockinger* (1959) 269 *F. 2d* 681; 361 *U.S.* 913 (request by Canada).

<sup>22</sup> *British and Foreign State Papers*, vol. 63, p. 175.

<sup>23</sup> *Ibid.*, vol. 100, p. 572.

<sup>24</sup> United Nations, *Treaty Series*, vol. 133, p. 380; vol. 200, p. 360.

<sup>25</sup> United Kingdom, *Statutory Instruments*, 1951, vol. I, No. 1384, p. 781; 1953, part I, No. 1220, p. 831 and No. 1221, p. 832.

<sup>26</sup> *British and Foreign State Papers*, vol. 30, p. 360.

<sup>27</sup> For a collection of the "Treaties and Conventions in force between Canada and the United States" relating to extradition see Canada, *Treaty Series*, 1952, No. 12. See also the motion of Mr. McKenzie King, the Prime Minister of Canada, that the House of Commons approve the 1925 amendment (Ridell (ed.), *Documents on Canadian Foreign Policy 1917-1939* (1962), pp. 724 and 725), and United States, *Treaties in Force* (1970), p. 37.

<sup>28</sup> *Ex parte O'Dell and Griffen* (1953), *Dominion Law Reports* 207; *International Law Reports*, vol. 19 (1952), p. 40.

<sup>29</sup> League of Nations, *Treaty Series*, vol. CLXIII, p. 59.

South Africa (which did not accede to the 1931 Convention) negotiated such an agreement in 1947. The new Agreement expressly states that the 1842 Treaty (in so far as it applies to extradition) and its subsequent amendments are to "cease to have effect" between South Africa and the United States on the coming into force of the new Treaty.<sup>30</sup>

14. Similarly, when New Zealand and the United States signed a new Extradition Treaty on 12 January 1970, it was stated that it replaced the treaty of 1842 and its subsequent amendments.<sup>31</sup>

## 2. Ireland<sup>32</sup>

15. *General.* In 1933, the Prime Minister and Minister of External Affairs of the Irish Free State, in a general statement on the State's attitude towards United Kingdom treaties, said that a new State's

acceptance or otherwise of the treaty relationships of the older State is a matter for the new State to determine by express declaration or by conduct (in the case of each individual treaty), as considerations of policy may require. The practice here has been to accept the position created by the commercial and administrative treaties and conventions of the late United Kingdom until such time as the individual treaties and conventions themselves are terminated or amended. Occasion has then been taken, where desirable, to conclude separate engagements with the States concerned.<sup>33</sup>

16. In 1965 the Irish Parliament enacted a new Extradition Act,<sup>34</sup> replacing the Imperial extradition and fugitive offenders legislation. The Act provides that any order made under the Extradition Act 1870 (giving effect to a British treaty) and in force immediately before the entry into force of the Act continues in force, unless earlier revoked, until 1 January 1972.<sup>35</sup> Between 1921,

when it became independent, and 1965, when the Act was enacted, Ireland had not negotiated any new extradition treaties, although it had acceded (along with others of the British Dominions) to a number of United Kingdom extradition treaties concluded after 1921.<sup>36</sup>

17. Forty-three extradition treaties applied to Ireland immediately before it became independent.<sup>37</sup> One author in 1957-1958 addressed inquiries to all forty-three States. Of the eleven States which expressed a view on the continued force of the treaties in relation to Ireland, three (Ecuador, Luxembourg and Hungary) seemed to consider that the treaties were in force, one (Sweden) had expressly denounced its treaty with regard to Ireland, two (Austria and Switzerland) seemed to be favourable to the treaties being in force but made this dependent on a declaration by Ireland that it was willing to consider itself bound by the treaties, and five States (Cuba, Denmark, Guatemala, Italy and the Netherlands) considered that Ireland was not bound by these treaties. Of these five, two (Italy and the Netherlands) seemed to take the view that, if Ireland wished, it could continue the treaties' operation by a declaration to that effect.

18. Further, as noted,<sup>38</sup> several conventions supplementing pre-1921 British extradition treaties were open to accession by the other "members of the British Commonwealth of Nations". Since Ireland was at the relevant time a member,<sup>39</sup> and since there would be no point in its becoming a party to the supplementary convention alone, the possibility of its succession to the original treaties seems to have been accepted by those who drafted the supplementary conventions. In fact, Ireland apparently never acceded to the supplementary conventions.<sup>40</sup>

19. *Belgium—United Kingdom Treaty of 1901.*<sup>41</sup> Belgium has invoked this Treaty. The Irish Government did not deny its general applicability and invoked Article 7 of the Treaty, which exempted from surrender those charged with political offences.<sup>42</sup>

20. *Switzerland—United Kingdom Treaty of 1880.*<sup>43</sup> Ireland has invoked this treaty.<sup>44</sup>

21. *United Kingdom—United States Treaty of 1842.*<sup>45</sup> Ireland has invoked this treaty, which is listed under its name in United States, *Treaties in Force*.<sup>46</sup>

<sup>30</sup> United Nations, *Treaty Series*, vol. 148, p. 85. The South African Government considers that South Africa's change from a monarchy to a republic had no effect on its treaties, and, in particular, on its extradition treaties (see South Africa, *House of Assembly Debates* 1962, vol. 4, col. 5557 and *Debates of the Senate* 1962, Second Session (first senate), col. 2296, in which the Minister of Justice cites sections 107 and 112 of the Republican Constitution).

<sup>31</sup> New Zealand, Department of External Affairs, press statement of 9 January 1970, and United States, *Department of State Bulletin*, vol. 62, p. 129.

<sup>32</sup> The agreement of 6 December 1921 between the Irish Free State and the United Kingdom provided that Ireland was to have the same constitutional status in the Community of Nations, known as the British Empire, as Canada, Australia, New Zealand and South Africa (League of Nations, *Treaty Series*, vol. XXVI, p. 9; also *ibid.*, vol. 27, pp. 449-450). The case of Ireland is considered in this section for reasons of convenience.

<sup>33</sup> Ireland, *Parliamentary Debates, Official Report*, vol. 48, cols. 2058-2059, as quoted by O'Higgins in "Irish Extradition Law and Practice", *British Year Book of International Law*, vol. 34 (1958); p. 297.

<sup>34</sup> Discussed by O'Higgins in *The International and Comparative Law Quarterly*, vol. 15 (1966), p. 369.

<sup>35</sup> The first and second orders made under the Act relate to the European Extradition Convention; they make no express reference to earlier bilateral treaties which that Convention replaces (Ireland, *Iris Oifigiúil*, 1966, No. 73, pp. 958-962; and 1967, No. 24, pp. 268-277).

<sup>36</sup> League of Nations, *Treaty Series*, vol. XLV, pp. 162 and 172; vol. LIX, p. 395; vol. LXIX, p. 106; and vol. LXXXIII, p. 421.

<sup>37</sup> See O'Higgins, *loc. cit.* (see foot-note 33 above), pp. 274, 296-300, 306-311.

<sup>38</sup> See para. 7 above.

<sup>39</sup> See the 1921 Agreement mentioned in foot-note 32 above; the description in the 1922 Constitution: "a co-equal member of the Community of Nations forming the British Commonwealth of Nations"; and its accession to extradition treaties concluded after 1921 as one of the six "self-governing dominions".

<sup>40</sup> See O'Higgins, *loc. cit.*, (foot-note 37 above).

<sup>41</sup> *British and Foreign State Papers*, vol. 94, p. 7. For amendments, see vol. 100, p. 472 and vol. 104, p. 131.

<sup>42</sup> See O'Higgins, *loc. cit.*, see foot-note 37 above.

<sup>43</sup> *British and Foreign State Papers*, vol. 71, p. 54. For amendments, see vol. 97, p. 92.

<sup>44</sup> See O'Higgins, *loc. cit.*, see foot-note 37 above.

<sup>45</sup> Foot-note 26 above.

<sup>46</sup> (1970), p. 117; see also O'Higgins, *loc. cit.*, see foot-note 37 above.

### 3. India

22. *General.* Most of the extradition treaties concluded by the United Kingdom also applied to India. In 1956, the Prime Minister and Minister of External Affairs of India, in answer to a Parliamentary question, tabled a "list of extradition treaties with foreign countries, concluded by the British Government on behalf of India before independence and which are still in force". Treaties with 45 countries were listed.<sup>47</sup> The question was also raised during the passage of the Extradition Bill in 1961 and 1962; the Minister of Law again took the position that the British extradition treaties remained in effect, despite some argument to the contrary.<sup>48</sup> Consistently with this, the Extradition Act, 1962,<sup>49</sup> (Chapter I, section 2 (d)), reads as follows:

"extradition treaty" means a treaty or agreement made by India with a foreign State relating to the extradition of fugitive criminals, and includes any treaty or agreement relating to the extradition of fugitive criminals made before the 15th day of August, 1947, which extends to, and is binding on, India.

The 1962 Act also applies to all Commonwealth countries, thus filling the gap created by the decision of the Supreme Court of India that, upon India becoming a "sovereign Democratic Republic", Part II of the Fugitive Offenders Act 1881 (United Kingdom), no longer applied to it.<sup>50</sup>

23. *Belgium - United Kingdom Treaty of 1901.*<sup>51</sup> By an exchange of notes of 3 August and 6 November 1954, the Belgian and Indian Governments "*se sont mis d'accord*" to consider that their relations in the matter of extradition, were regulated by the Belgium—United Kingdom Treaty of 1901, as amended in 1907 and 1911.<sup>52</sup>

24. *Denmark - United Kingdom Treaty of 1873.*<sup>53</sup> Both Iceland and India consider that this Treaty is in force between them.<sup>54</sup>

<sup>47</sup> India, *Lok Sabha Debates*, 12th session, 1956, vol. II, No. 21, part I, col. 1143; and appendix IV, annex No. 42. Also in International Law Association, *The Effect of Independence on Treaties* (1965), p. 109.

<sup>48</sup> India, *Lok Sabha Debates*, 14th session, 1961, vol. LVI, No. 8, cols. 2845-2880; 1962, 3rd series, vol. VI, No. 2, cols. 465-534; No. 3, cols. 697-711.

<sup>49</sup> Discussed by Saxena in *The International and Comparative Law Quarterly*, vol. 13, (1964), p. 116.

<sup>50</sup> *The State of Madras v. Menon and Another* (1954) *All India Reporter*, Supreme Court 517; see *International Law Reports*, vol. 21 (1954), pp. 46 and 47. Part II of the Act provided a summary procedure for the return of fugitives between groups of contiguous possessions; in this case, Singapore was seeking extradition.

<sup>51</sup> See foot-note 41 above.

<sup>52</sup> *Moniteur Belge*, 26 February 1955, p. 967. The 1901 treaty was later amended, in so far as it was applicable to relations between Belgium and India, by an exchange of notes of 30 May and 30 December 1958 (*ibid.*, 14 March 1959, p. 1866). Neither exchange was registered under Article 102 of the Charter (cf. para. 31 below), and neither exchange mentioned the amendments to the 1901 treaty in 1923 and 1928, whereby the treaty was applied to the Belgian Congo and Ruanda-Urundi.

<sup>53</sup> *British and Foreign State Papers*, vol. 63, p. 5.

<sup>54</sup> See para. 111 below.

25. *Norway and Sweden—United Kingdom Treaty of 1873.*<sup>55</sup> Sweden, in 1951, gave notice, *inter alia*, to India of the termination of this extradition treaty. This notification was, in terms of the Treaty, effective after six months.<sup>56</sup>

26. *Russia - United Kingdom Treaty of 1886.*<sup>57</sup> In one case, which occurred shortly after the entry into force of the 1962 Indian Act—the request by the USSR for the extradition of one Tarasov<sup>58</sup>—no reference was apparently made by either State to the Anglo-Russian Treaty of 1886: the magistrate, who denied extradition, decided the case as one in which no treaty was in force. The Treaty was, however, included in the 1956 Indian list,<sup>59</sup> although it was not included in lists prepared in 1955 by the United Kingdom,<sup>60</sup> in 1962 by Sierra Leone,<sup>61</sup> in 1966 by Australia,<sup>62</sup> and in 1966 by Uganda.<sup>63</sup>

27. *United Kingdom - United States Treaty of 1931.*<sup>64</sup> The above Treaty is listed under "India" in United States, *Treaties in Force*, which also reproduces the relevant provisions of the Schedule to the Indian Independence (International Arrangements) Order, 1947.<sup>65</sup>

### 4. Pakistan

28. *General.* Pakistan addressed notes to at least three States (Argentina, Belgium and Switzerland) concerning the British extradition treaties which applied to India before partition.

<sup>55</sup> See foot-note 22 above.

<sup>56</sup> United Nations, *Treaty Series*, vol. 200, p. 360.

<sup>57</sup> *British and Foreign State Papers*, vol. 77, p. 107.

<sup>58</sup> "The Tarasov Extradition Case" in the *Indian Journal of International Law*, vol. 3 (1963), No. 3, p. 323; Saxena, "Extradition of a Soviet Sailor", *The American Journal of International Law*, vol. 57 (1963), p. 883.

<sup>59</sup> The Indian list also includes the 1842 Treaty with the United States (this was replaced by the 1931 Treaty, which was also listed), the 1873 Treaty with Austria, the 1872 Treaty with Brazil, and the 1872 Treaty with Germany. None of them appear in the United Kingdom, Australian, and New Zealand lists.

<sup>60</sup> Written answer by the Secretary of State for Foreign Affairs on 7 November 1955 (*Parliamentary Debates, Fifth Series*, vol. 545, *House of Commons*, col. 146). Cf. the draft of a Proposed General Treaty between the USSR and the United Kingdom 1924, Article 3 (iii), Cmd. 2215.

<sup>61</sup> See para 58 below.

<sup>62</sup> See para. 6 above; also the Viks case, discussed by Ivan A. Shearer (see D. P. O'Connell, (Ed.) *International Law in Australia* (1965), p. 584).

<sup>63</sup> See para. 67 below. The United States also took the position that its extradition treaty with Russia of 1887 was no longer in effect; cf. United States, *Treaties in Force . . . on December 31, 1941* (ed. 1944) p. 93, with *The Department of State Bulletin*, vol. 16 (1947), p. 212; see also M. M. Whiteman, *Digest of International Law*, vol. 6, p. 733, and United States, *Treaties in Force* (1970), p. 226.

<sup>64</sup> League of Nations, *Treaty Series*, vol. CLXIII, p. 59.

<sup>65</sup> United States, *Treaties in Force* (1970), pp. 106, 108. For the Schedule, see also, United Nations Legislative Series, *Materials on Succession of States* (United Nations publication Sales No.: E/F.68/V/5), p. 138.

29. *Argentina - United Kingdom Treaty of 1889*.<sup>66</sup>  
According to the Argentine Government:

2. In 1953 it was agreed with the Government of Pakistan that the extradition treaty signed with the United Kingdom in 1889 would be regarded as being in force in relation to Pakistan. It should be explained, however, that the Argentine Ministry of Foreign Affairs had previously, in 1952, informed the Embassy of the Republic at Washington that the extradition treaty concluded between the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland could not be considered to be in force with Pakistan, because the latter was an independent State. The following year, the Government of Pakistan requested the Argentine Government to reconsider the view it had expressed concerning the validity of the extradition treaty. This approach was regarded by the Argentine Government as the expression of a wish that the treaty in question should remain in force between Pakistan and the Argentine Republic. The principle on which the Argentine Ministry of Foreign Affairs based its position was that the Government of the new independent State of Pakistan should be allowed freedom of action.

30. Referring to an earlier Pakistan inquiry, the Argentine note read in part as follows:

I have pleasure in informing you, since the *note verbale* in question implies the expression of a desire for the continuation, between the Argentine Republic and Pakistan, of the Treaty for the Mutual Extradition of Fugitive Criminals, my Government has no objection to regarding it as continued.

Pakistan, in turn, replied to this effect:

I am particularly pleased to learn from your note that the Government of the Argentine Republic has no objection to the continuation between the Argentine Republic and Pakistan of the aforementioned Treaty . . .<sup>67</sup>

31. *Belgium - United Kingdom Treaty of 1901*.<sup>68</sup> In its note to Belgium, Pakistan stated:

Since the partition of the subcontinent of India in 1947, the [above] Treaty has devolved on the Government of Pakistan, who wish to ascertain whether the Government of Belgium consider the provisions of the above-mentioned Treaty, as supplemented and amended by the Conventions of 5th March 1907 and 3rd March 1911, respectively, binding between Belgium and Pakistan.<sup>69</sup>

(The 1901 Treaty had been further amended in 1923 and 1928 by instruments extending to the Belgian Congo and Ruanda-Urundi existing Extradition Conventions between the United Kingdom and Belgium.<sup>70</sup> These instruments applied to India, but were not mentioned by Pakistan in the above note). In its reply, Belgium stated that it

considers that the Treaty of Extradition concluded on 29 October 1901 between Belgium and the United Kingdom as supplemented and amended by the Conventions of 5 March 1907 and 3 March 1911, respectively, may be considered as binding in such matters between Belgium and Pakistan, the two Governments being in agreement on this matter.

The present note and the above-mentioned note from the Legation shall be regarded as evidence of this agreement.<sup>71</sup>

The Belgian Government registered this correspondence, under Article 102 of the Charter, as an exchange of notes constituting an arrangement between Belgium and Pakistan, which entered into force on 20 February 1952, the date of the Belgian reply. In the following year, a further exchange of notes constituting an arrangement extended to the Belgian Congo and Ruanda-Urundi the "Agreement on extradition recently concluded between Belgium and Pakistan".<sup>72</sup>

32. *Norway and Sweden-United Kingdom Treaty of 1873*.<sup>73</sup> Sweden gave notice to Pakistan in 1952 of its termination of this Treaty.<sup>74</sup> (According to the terms of the Treaty, this notice was effective six months later.

33. *Switzerland-United Kingdom Treaty of 1880*.<sup>75</sup> By an exchange of notes of 11 December 1954 and 28 November 1955, Switzerland and Pakistan agreed that the (Switzerland-United Kingdom Extradition Treaty of 1880, as amended on 29 June 1904, as also the Additional Convention of 19 December 1934, continued to be applicable in the relations between Pakistan and Switzerland.<sup>76</sup>

34. *United Kingdom-United States Treaty of 1931*.<sup>77</sup> This Treaty is listed under "Pakistan" in United States, *Treaties in Force*, which also reproduces the relevant provisions of the Indian Independence (International Arrangements) Order, 1947.<sup>78</sup>

## 5. Ceylon

35. *General*. At the end of 1968, the Imperial Extradition Acts and the Fugitive Offenders Act 1881 were still in force in Ceylon.<sup>79</sup> The only relevant recent enactment is the Extradition (India) Act 1954, which makes the Fugitive Offenders Act 1881, in so far as it is part of the law of Ceylon, applicable to India as if every reference

<sup>66</sup> *British and Foreign State Papers*, vol. 81, p. 1305.

<sup>67</sup> United Nations Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No.: E/F.68.V.5), pp. 6-8.

<sup>68</sup> See foot-note 41 above.

<sup>69</sup> United Nations, *Treaty Series*, vol. 133, p. 200.

<sup>70</sup> League of Nations, *Treaty Series*, vol. XXII, p. 375; and vol. LXXXIII, p. 385.

<sup>71</sup> United Nations, *Treaty Series*, vol. 133, p. 202.

<sup>72</sup> *Ibid.*, vol. 173, p. 408.

<sup>73</sup> See foot-note 22 above.

<sup>74</sup> See foot-note 56 above.

<sup>75</sup> *British and Foreign State Papers*, vol. 71, p. 54, and vol. 97, p. 92; also League of Nations, *Treaty Series*, vol. 163, p. 103.

<sup>76</sup> Switzerland, *Recueil officiel des lois et ordonnances de la Confédération suisse, nouvelle série*, 1955, p. 1168.

<sup>77</sup> See foot-note 29 above.

<sup>78</sup> United States, *Treaties in Force* (1970), pp. 174 and 175. For the Order, see United Nations Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No.: E/F.68.V.5), p. 138.

<sup>79</sup> *The Legislative Enactments of Ceylon 1956*, Revised edition (1958), ch. 47 and 48 and *Supplements*. See also *In re Chockalingam Chettier*, 47 *All India Reporter* (Madras) 548 (1960), noted in *American Journal of International Law*, vol. 57, p. 937.

therein to a part of Her Majesty's dominions includes a reference to the territory of the Republic of India.<sup>80</sup>

36. *Denmark-United Kingdom Treaty of 1873*.<sup>81</sup> Both Ceylon and Iceland consider this Treaty to be in force between them.<sup>82</sup>

37. *United Kingdom Treaties with Finland of 1924*,<sup>83</sup> *with Hungary of 1873*,<sup>84</sup> *with Italy of 1873*<sup>85</sup> and *with Romania of 1893*.<sup>86</sup> Under the Peace Treaties signed on 10 February 1947, the Allied and Associated Powers were given the right to notify the former enemy States of the bilateral treaties which they wished to revive. Ceylon, which did not become independent until 4 February 1948, was not signatory to the treaties. Nevertheless, on 13 March 1948 the United Kingdom Ambassadors to Finland, Italy, Hungary and Romania, acting on the instructions of His Majesty's Government in Ceylon, notified the desire of the Government to bring into force or to revive several treaties and agreements which applied to Ceylon at the outbreak of war.<sup>87</sup> Included were the Extradition Treaty and declaration of 1873 with Italy, the Extradition Treaty of 1893 (amended in 1894) with Romania, the Extradition Treaty of 1924 with Finland and the Extradition Treaty of 1873 (as amended in 1936 and 1937) with Hungary. Each note concluded with the statement that

the Government of Ceylon wish to reserve the right to open negotiations to alter or revoke any of these treaties or agreements, since they were signed prior to the attainment of independence by Ceylon.

38. *Norway and Sweden-United Kingdom Treaty of 1873*.<sup>88</sup> Sweden in 1951 gave notice to Ceylon of the termination of this Treaty.<sup>89</sup>

39. *United Kingdom-United States Treaty of 1931*.<sup>90</sup> This Treaty is listed under "Ceylon" in United States, *Treaties in Force*, which also reproduces the provisions of External Affairs Agreement between Ceylon and the United Kingdom dealing with the devolution of treaty obligations.<sup>91</sup>

## 6. Israel

40. *General*. Israel has adopted the general position that treaties binding upon Palestine, or extended by the Mandatory to include Palestine, do not commit the State of Israel.<sup>92</sup> It has also adopted this position in relation to extradition treaties. Since its establishment, Israel has negotiated several new extradition treaties.<sup>93</sup>

41. *Belgium-United Kingdom Treaty of 1901*.<sup>94</sup> In a note dated 8 February 1954 to Belgium, Israel stated that

At the present time no [extradition] agreements exists between Israel and Belgium, since the extradition treaty concluded some years ago between Belgium and Great Britain is not binding upon the State of Israel.

It then referred to Israel's general position as set out above. The note went on to propose that the difficulty could be overcome by the two Governments agreeing that the 1901 Treaty between Belgium and the United Kingdom (as amended in 1911) should be provisionally reinstated, *mutatis mutandis*, as between Israel and Belgium, pending the conclusion of a new treaty. Belgium accepted this proposal, stating that the Israeli note and its reply were to "be deemed to constitute the agreement of the two Governments on the matter".<sup>95</sup> The two States concluded a formal Convention, replacing the provisional agreement (which had been extended on several occasions), in 1956.<sup>96</sup>

42. *France-United Kingdom Treaty of 1876*.<sup>97</sup> In an exchange of notes with France, in which it again adhered to its view that Israel was not bound by treaties applicable to Palestine, Israel agreed to the provisional reinstatement of the Extradition Treaty of 1876 between France and the United Kingdom.<sup>98</sup>

43. *Switzerland-United Kingdom Treaty of 1880*.<sup>99</sup> The Swiss *Recueil systématique des lois et ordonnances 1848-1947*, contains,<sup>100</sup> with reference to the Switzerland-United Kingdom Treaty of 1880 (which was extended to Palestine), the following note:

Since the end of the British mandate for Palestine, on 14 May

<sup>80</sup> *The Legislative Enactments of Ceylon 1956*, revised edition (1958), ch. 48. The Fugitive Offenders Act speaks throughout of rendition within Her Majesty's dominions. Since its change to a Republic, it was arguable that the Act would no longer be applicable to India. The Indian Supreme Court so held in respect of Part II of the Act (which had applied between India and Ceylon) in *State of Madras v. Menon and Another* (see foot-note 50 above).

<sup>81</sup> See foot-note 53 above.

<sup>82</sup> See para. 111 below.

<sup>83</sup> League of Nations, *Treaty Series*, vol. XXXIV, p. 79.

<sup>84</sup> *British and Foreign State Papers*, vol. 63, p. 213.

<sup>85</sup> United Nations, *Treaty Series*, vol. 104, pp. 48 and 60.

<sup>86</sup> *Ibid.*, pp. 132 and 154.

<sup>87</sup> *Ibid.*, pp. 29, 35, 41, 117.

<sup>88</sup> See foot-note 22 above.

<sup>89</sup> See foot-note 56 above.

<sup>90</sup> See foot-note 29 above.

<sup>91</sup> United States, *Treaties in Force* (1970), pp. 43 and 44. For the agreement, see United Nations, *Treaty Series*, vol. 86, p. 25; and United Nations Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No.: E/F.68.V.5), pp. 21 and 167.

<sup>92</sup> Memorandum of 24 January 1950 submitted in response to an International Law Commission questionnaire (*Yearbook of the International Law Commission, 1950*, vol. II, pp. 214-217, document A/CN.4/19, paras. 19-28) and United Nations Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No.: E/F.68.V.5), pp. 41-43.

<sup>93</sup> E.g., Austria (United Nations, *Treaty Series*, vol. 448, p. 161), Italy (*ibid.*, vol. 316, p. 97), the Netherlands (*ibid.*, vol. 276, p. 153), South Africa (*ibid.*, vol. 373, p. 47), the United Kingdom (*ibid.*, vol. 377, p. 331) and see those with Belgium, Switzerland and the United States mentioned below.

<sup>94</sup> See foot-note 41 above.

<sup>95</sup> United Nations, *Treaty Series*, vol. 188, p. 251. It is noted *ibid.*, p. 253, foot-note 1, that the Agreement is not applicable (unlike the pre-independence arrangements) to the Belgian Congo and Ruanda-Urundi.

<sup>96</sup> United Nations, *Treaty Series*, vol. 260, p. 3.

<sup>97</sup> *British and Foreign State Papers*, vol. 67, p. 5.

<sup>98</sup> United Nations, *Treaty Series*, vol. 219, p. 215.

<sup>99</sup> See foot-note 43 above.

<sup>100</sup> Vol. 12, p. 142, note 1 and p. 143, note 2.

1948, Israel has declared that the Switzerland-United Kingdom Treaty is no longer applicable to its territory.

Israel and Switzerland have subsequently concluded an extradition treaty.<sup>101</sup>

44. *United Kingdom-United States Treaty of 1931.*<sup>102</sup> In 1949, Israel, in reply to an inquiry from the United States concerning the extradition of a person charged with an offence in New York, stated its general position concerning treaties applicable to Palestine and accordingly denied the continued force of the Extradition Treaty of 1931 between the United Kingdom and the United States, which had been applied to Palestine.<sup>103</sup> It subsequently concluded an extradition treaty with the United States.<sup>104</sup>

### 7. Ghana

45. *General.* The Extradition Act 1959 extended the application of the Imperial Extradition Acts 1870-1932, which give effect to Britain's extradition treaties, to the whole of Ghana. The legislation had previously applied only to the former colony of the Gold Coast and not to the other territories constituting Ghana. All this legislation and the legislation relating to fugitive offenders was repealed in 1960 by a new Extradition Act.<sup>105</sup> The operation of this statute is dependent on the making of a legislative instrument which gives effect to specific extradition treaties.<sup>106</sup> Section 3 of the Act provides, however, that, in addition, it will continue to apply to (a) Commonwealth countries (formerly covered by the Imperial Fugitive Offenders Act 1881) and (b) countries with which arrangements, in force immediately before the enactment of the Act, were made under the Extradition Acts 1870-1932. According to one 1967 report, both Liberia and Switzerland accept that the British extradition treaties remain in effect, but suggest that they should be renegotiated. "So far this has not been done and extradition has in fact been carried out on the basis of the pre-independence treaties. Former French African States, on the other hand, have declined to recognize a succession to the French-British extradition treaties and have sent drafts of proposed new treaties to Ghana."<sup>107</sup>

<sup>101</sup> United Nations, *Treaty Series*, vol. 377, p. 305.

<sup>102</sup> See foot-note 29 above.

<sup>103</sup> United Nations Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No.: E/F.68.V.5), p. 229; M.M. Whiteman, *Digest of International Law* (1963), vol. 2, pp. 972 and 973 and vol. 6, pp. 762 and 763.

<sup>104</sup> United Nations, *Treaty Series*, and vol. 484, p. 283.

<sup>105</sup> The Act was amended in 1966 by the Extradition Act, 1960 (Amendment Decree), 1966 [National Liberation Council Decree 65]. It excepted political offences, and stated the principle of speciality.

<sup>106</sup> See the order made in respect of a new arrangement with the Federal Republic of Germany, Extradition Act, 1960 (Extension of Application to Federal Republic of Germany) Order, 1966, Legislative Instrument 516. The Germany-United Kingdom Treaty of 1872 had not been revived at the time Ghana became independent.

<sup>107</sup> International Law Association, Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors, Report of Study Tour of West Africa carried out on behalf of the Committee by Mr. I. A. Shearer, January-February 1967, pp. 22-23.

46. *United Kingdom-United States Treaty of 1931.*<sup>108</sup> In an exchange of notes in 1957-1958 Ghana and the United States agreed that, *inter alia*, the above treaty continued in force between them.<sup>109</sup> Ghana mentioned the inheritance agreement which it had concluded with the United Kingdom.<sup>110</sup>

### 8. Malaysia

47. *General.* Unlike much other Commonwealth legislation,<sup>111</sup> the Extradition Ordinance, 1958, which came into force on 1 December 1960,<sup>112</sup> contains no express provision keeping in effect existing orders made under the Extradition Acts 1870-1935 (which Acts are repealed by the Ordinance). In 1967, the Malaysian Legislature enacted the Commonwealth Fugitive Criminals Act, repealing the Imperial Fugitive Offenders Act 1881 and related legislation. Except in relation to Singapore, its operation is dependent on agreement with other Commonwealth countries.

48. *Thailand-United Kingdom Treaty of 1911.*<sup>113</sup> By the end of 1963, only one order had been made applying the Extradition Ordinance to a foreign State, consequent upon the conclusion of an agreement with that country. This order specified that "by an exchange of notes dated the 27th day of October 1959, an arrangement has been made between the Federation of Malaya and the Kingdom of Thailand for the mutual surrender of fugitive criminals in accordance with the provisions of the Treaty" of 1911 between the United Kingdom and Thailand, and, accordingly, applied the Ordinance to Thailand.<sup>114</sup>

49. *United Kingdom-United States Treaty of 1931.*<sup>115</sup> Malaya, in 1958, agreed with the United States that this Treaty, which had been applied before independence to its various constituent territories, was binding on it. In an *aide-mémoire* on the question, the United States mentioned the assumption by Malaya of treaty rights and

<sup>108</sup> See foot-note 29 above.

<sup>109</sup> United Nations, *Treaty Series*, vol. 442, p. 175; United Nations Legislative Series, *Materials on Succession of States* (United Nations publications, Sales No.: E/F.68.V.5), pp. 211-213.

<sup>110</sup> United Nations, *Treaty Series*, vol. 287, p. 233; United Nations Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No.: E/F.68.V.5), p. 30.

<sup>111</sup> E.g., that enacted by Australia, India, Kenya, New Zealand, Sierra Leone, the United Republic of Tanzania and Uganda. See also the Irish and South African Acts. But cf. the Malawi and Nigerian legislation.

<sup>112</sup> Federation of Malaya, *Legal Notice 304, Federal Ordinances and State Enactments passed during the year 1958*, No. 2 of 1958, p. 7.

<sup>114</sup> Legal Notice 305 of the Federation of Malaya. D. Bardonnet says that Thailand admitted that the 1911 Treaty continued to apply (see "*La Succession aux Traités à Madagascar*", *Annuaire français de Droit International*, vol. XII (1966), p. 593; p. 681, note 319); cf. D. P. O'Connell, *State Succession . . . (op. cit.)*, p. 370; International Law Association, *The Effect of Independence on Treaties* (1965), pp. 192 and 193; and Ivan A. Shearer, "*La Succession d'Etats et les traités non localisés*", *Revue Générale de Droit International Public* (Paris), vol. 68, 3rd series, t. XXV, January-March 1964, No. 1, pp. 5 and 21.

<sup>115</sup> See foot-note 29 above.

obligations under the inheritance agreement signed by Malaya and the United Kingdom.<sup>116</sup>

### 9. Cyprus

50. *Italy-United Kingdom Treaty of 1873*.<sup>117</sup> In a note of 4 October 1967, the Cypriot Government stated that this Treaty as amended and others "continue to bind the Republic of Cyprus reciprocally to Italy by virtue of the 'devolution clause' of Article 8 of the Treaty concerning the Establishment of the Republic of Cyprus and the inheritance rules of Public International Law." The note requested a formal reply, but there is no indication of the terms of the reply.<sup>118</sup>

51. *United Kingdom-United States Treaty of 1931*.<sup>119</sup> This Treaty is listed under "Cyprus" in United States, *Treaties in Force*, which also reproduces the provision of the Treaty concerning the establishment of Cyprus, relating to Cyprus' treaty rights and obligations.<sup>120</sup>

### 10. Nigeria

52. *General*. The Extradition Decree 1966 applies (a) to those countries with which an agreement has been made by Nigeria for surrender (and in respect of which an order is made), and (b), subject to the provisions of the Decree, to every separate country within the Commonwealth. The Decree repeals the Imperial and related Nigerian legislation and contains no express provision keeping orders made under the Extradition Acts 1870-1935 in effect.<sup>121</sup>

53. Nigeria concluded a devolution agreement with the United Kingdom.<sup>122</sup> According to an official Nigerian publication, there are 334 international agreements deemed to be binding on Nigeria by virtue of the agreement.

The State practice of Nigeria is to study each treaty or other

international agreement with a view to its adoption, with or without modification, or to re-negotiate it with the other contracting party or parties.<sup>123</sup>

The publication lists treaties which have been so studied and adopted. The only extradition treaties which are accordingly listed as recognized as binding "by virtue of the United Kingdom's signature or ratification", are the Liberian and United States treaties with the United Kingdom.<sup>124</sup>

54. *Liberia-United Kingdom Treaty of 1892*;<sup>125</sup> *United Kingdom-United States Treaty of 1931*.<sup>126</sup> The first two orders made under the Decree referred to above were in respect of Liberia and the United States.<sup>127</sup> Both stated that the relevant Treaty with the United Kingdom "has been recognized as binding on Nigeria, subject to the modifications" specified in the order, and accordingly applied, provided that the Decree was to apply to extradition to and from Liberia and the United States. The modifications were mainly<sup>128</sup> consequential on the changes in the status of the parties; thus, in the United Kingdom-United States treaty the phrase "High Contracting Parties" was to be read as meaning Nigeria and the United States. The orders are consistent with the official list of treaties.

55. *Federal Republic of Germany-United Kingdom Agreement of 1960*<sup>129</sup> and *Israel-United Kingdom Agreement of 1960*.<sup>130</sup> By their terms, both these Agreements, which were signed before Nigeria became independent, were applicable to Nigeria. Similarly, the Orders in Council issued, before independence, to give effect to the Agreements applied to Nigeria. The Orders were not, however, brought to the attention of the Nigerian Government until shortly after Nigeria became independent.

56. The Agreement with Israel was ratified before independence but did not enter into force until after independence. That with the Federal Republic of Germany came into force before independence.

57. The United Kingdom pointed out to the Nigerian authorities that both Agreements,

which were signed before independence, were applicable as far as the United Kingdom Government were concerned to all those territories which made up the pre-independence

<sup>116</sup> United Nations Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No.: E/F.68.V.5), pp. 229 and 230; M. M. Whiteman, *Digest of International Law*, vol. 2 (1963), p. 999 and vol. 6 (1968), pp. 763 and 764. See also United States, *Treaties in Force* (1970), p. 149.

<sup>117</sup> See foot-note 85 above.

<sup>118</sup> M. Giuliano, F. Lanfranchi and T. Treves, *Corpo-indice degli accordi bilaterali in vigore tra l'Italia e gli Stati esteri* (1968), pp. 97 and 98.

<sup>119</sup> See foot-note 29 above.

<sup>120</sup> United States, *Treaties in Force*, (1970), pp. 58 and 59. For the treaty, see United Nations, *Treaty Series*, vol. 382, p. 8; and United Nations Legislative Series, *Materials on succession of States* (United Nations publication, Sales No.: E/F.68.V.5), p. 21.

<sup>121</sup> Note, however, that orders can be made in respect of agreements in force on the date of the coming into force of the Decree.

<sup>122</sup> United Nations, *Treaty Series*, vol. 384, p. 207; United Nations Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No.: E/F.68.V.5), p. 119.

<sup>123</sup> Nigerian Federal Ministry of Justice, *Nigeria's Treaties in Force for the Period 1st October 1960 to 30th June [31st July] 1968* (1969), p. 5; see also statement by the Nigerian Minister of Justice, Mr. T. O. Elias, in *Yearbook of the International Law Commission*, 1962, vol. I, pp. 4 and 5; Nigerian Government notice No. 1881; p. 42 of the report by I. A. Shearer mentioned in foot-note 107 above.

<sup>124</sup> *Ibid.*, p. 12. The list also includes several judicial assistance agreements.

<sup>125</sup> *British and Foreign State Papers*, vol. 84, p. 103.

<sup>126</sup> See foot-note 29 above.

<sup>127</sup> Legal Notices 32 and 33 of 1967. See also United States, *Treaties in Force* (1970), p. 169.

<sup>128</sup> Cf. the modification to article X of the Liberian treaty.

<sup>129</sup> United Nations, *Treaty Series*, vol. 385, p. 39.

<sup>130</sup> *Ibid.*, vol. 377, p. 331.

Federation of Nigeria. It was further pointed out that the rights and obligations of the United Kingdom Government in relation to these Agreements, one of which had come into effect on 1 September 1960 and the other, which, although it had not into effect, had been ratified prior to independence, has been accepted by the Nigerian Government in accordance with the Exchange of Letters concerning treaty rights and obligations dated 1 October 1960 (the Inheritance Agreement).

The Nigerian authorities replied that the Anglo-Israel Agreement, which had not come into effect prior to independence, was not the type of international agreement that it was envisaged the Exchange of Letters should cover. As regards the Anglo-German Agreement, although they agreed that the Exchange of Letters provided for assumption of obligations and enjoyment of rights under existing international treaties and further that the Agreement in question fell into this class, they pointed out that the Agreement was a bilateral one under which the parties assumed obligations and became entitled to exercise rights *inter se*; it was their view that, this being so, the intention of the High Contracting Parties was that either party only should be entitled to request the return of a fugitive criminal. The conclusion they drew was that it could not have been the intention of the High Contracting Parties that an independent third party could come in and enjoy any rights under the Agreement without the consent of the parties. In the circumstances, the Nigerian authorities decided that Nigeria should give no effect to either of the Agreements under reference, but should negotiate separate extradition treaties with the two countries concerned.<sup>131</sup>

### 11. Sierra Leone

58. *General.* The Extradition Act, 1962, applies to the States listed in its three schedules. They are (a) Commonwealth countries, (b) Guinea,<sup>132</sup> and (c) forty-four listed non-Commonwealth countries. These forty-four countries are, with only a few exceptions, those in respect of which Orders-in-Council (implementing the relevant treaties) were in force under the pre-independence legislation.<sup>133</sup>

59. *United Kingdom-United States Treaty of 1931.*<sup>134</sup> This Treaty is listed under "Sierra Leone" in United States, *Treaties in Force*, which also reproduces the substance of the exchange of letters between Sierra Leone and the United Kingdom concerning Sierra Leone treaty rights and obligations.<sup>135</sup>

<sup>131</sup> United Nations Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No.: E/F.68.V.5), pp. 193 and 194.

<sup>132</sup> See also the Sierra Leone-Guinea Relations Act, 1966, which ratifies a Protocol concluded in July 1965 by the two countries relating, *inter alia*, to the procedure for extradition between them; also an earlier Agreement of 10 October 1964, ratified by Guinean Law No. 34 AN-64 of 20 November 1964 and promulgated by Décret No. 531 P.R.G. of 1 December 1964.

<sup>133</sup> Extraditions Acts 1870-1932 (U.K.) and Extradition Act and Fugitive Criminals Surrender Act (Sierra Leone).

<sup>134</sup> See foot-note 29 above.

<sup>135</sup> United States, *Treaties in Force* (1970), p. 200. For the exchange of letters, see also United Nations *Treaty Series*, vol. 420, p. 11; and United Nations Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No.: E/F.68.V.5), p. 170.

### 12. United Republic of Tanzania

60. *General.* The pre-independence legislation in Tanganyika gave effect to Orders-in-Council made under the Imperial Extradition Acts and applying to Tanganyika.<sup>136</sup> Amendments to the Ordinance, consequential on Tanganyika becoming a Republic, were enacted in 1963. And, also in that year, notices were issued applying the Ordinance to the Democratic Republic of the Congo, the Kingdom of Burundi and the Republic of Rwanda.<sup>137</sup> As required by the Ordinance, these notices were based on arrangements reached with those three States. The terms of the arrangements are not set out in the notice. The Fugitive Offenders Act 1881 (United Kingdom), was amended in 1962, in so far as it applied to Tanganyika, to exclude political offenders from its scope.<sup>138</sup>

61. The Fugitive Criminals Surrender Ordinance and the Fugitive Offenders Act were repealed in 1965 (along with the relevant Zanzibar legislation) by the Extradition Act. This Act provides for the surrender of persons sought by countries to which the Act has been applied. These countries are (a) those with which an agreement has been concluded (and in respect of which an order has been made), (b) those to which Part I of the Fugitive Offenders Act 1881 (as in force in the United Republic of Tanzania), applied immediately before the entry into force of the Act, and (c) those to which the Fugitive Criminals Surrender Ordinance (Tanganyika) applied immediately before the entry into force of the Act.

62. According to one account,<sup>139</sup> "the presumption" was that the British extradition treaties, as "non-localized" treaties, lapsed, in the case of Tanganyika two years after independence (i.e., after the end of the period fixed by the unilateral declaration):

With regard to the bulk of such treaties, the following extract is a specimen of a note sent to many countries.

"The legal advisers to the Ministry are of the opinion that under the rules of customary international law, the agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Germany for the Extradition of Fugitive Criminals, done at Bonn [on] 23rd February 1960, would not survive the two-year period. Any rights and obligations which the Government of Tanganyika had therefore terminated on 8th December, 1963. The Government of Tanganyika is willing, however, to keep the said agreement in force until such time as a new agreement can be negotiated directly between Tanganyika and Germany. If the Government of the Federal Republic of Germany is in favour of such an arrangement, the Ministry has the honour to propose that this Note and the Note of the Government of the Federal Republic of Germany confirming such an arrangement shall constitute an agreement to that effect."

<sup>136</sup> *Revised Laws of Tanganyika*, cap. 22, Fugitive Criminals Surrender Ordinance, suppl. 58 (1959).

<sup>137</sup> *Government Notices* 1963, Nos. 129-131. See also the notices made under the ordinance in 1961 in respect of Germany and Israel (*Government Notices* 1961, Nos. 7 and 8).

<sup>138</sup> *Revised Laws of Tanganyika*, cap. 453, Judicature and Application of Laws Ordinance 1961 (Amendment) Act, No. 8 of 1962.

<sup>139</sup> Seaton and Maliti, "Treaties and Succession of States and Governments in Tanzania" in African Conference on International Law and African Problems (1967), pp. 76, 86. They then go on to describe the exchanges with Switzerland; see para. 65 below.

The result in all such cases was for all practical purposes the same as if the old agreement remained in force beyond the two years, if a confirmation was so received from the other party. The interesting question is, what would be the appropriate notice for termination if it was so desired? Presumably notice according to the terms of the treaty if any or if none, then notification by either of the Governments concerned that it is no longer willing to keep the treaty in force nor to continue negotiations for a new treaty.

63. *Belgium-United Kingdom Treaty of 1901*.<sup>140</sup> By an exchange of notes of 30 November 1963, 17 March and 30 October 1964, Belgium and the United Republic of Tanganyika and Zanzibar decided to maintain provisionally in effect the Belgium-United Kingdom Treaty of 1901, as amended in 1907 and 1911.<sup>141</sup>

64. *Netherlands-United Kingdom Treaty of 1898*.<sup>142</sup> On 2 April 1968, the Netherlands addressed a note to the United Republic of Tanzania referring to the Treaty of 1898 between the Netherlands and the United Kingdom, which was extended to Tanganyika by notes of 1 December 1927 and 27 January 1928. It proposed that "an understanding be established whereby the relations between the Kingdom of the Netherlands and the United Republic of Tanzania shall, in conformity with the legislation of both countries, be governed by the provisions of the said Treaty of 26 September 1898, pending the conclusion of a new extradition treaty between them." If the proposal was acceptable, it was further proposed that the note and the reply constitute an understanding which would take effect from the date on which the Netherlands advised the United Republic of Tanzania that the formalities constitutionally required in the Netherlands had been complied with. On 9 May 1968, the United Republic of Tanzania accepted the proposal. The agreement came into force on 27 December 1968.<sup>143</sup>

65. *Switzerland-United Kingdom Treaty of 1880*.<sup>144</sup> By an exchange of notes of 25 August and 28 September 1967, Switzerland and the United Republic of Tanzania agreed to maintain in force in their mutual relations, with effect from 9 December 1963,<sup>145</sup> the Switzerland-United Kingdom Treaty of 1880 as amended by a Convention of 1904 which was extended to Tanganyika in 1929, and the Additional Convention of 1934 which also applied to Tanganyika. By an exchange of notes in 1937, the Treaty and the two Conventions had been applied to Zanzibar.<sup>146</sup>

66. *United Kingdom-United States Treaty of 1931*.<sup>147</sup> In a note of 30 November 1965, the United States referred first to the note of the Tanganyikan Prime Minister dated

9 December 1961 to the Secretary-General of the United Nations, and second to the negotiations between the two countries concerning the continued effect of treaties. The United States considered it desirable to conclude a formal undertaking and accordingly proposed

that for our mutual benefit the following United States and United Kingdom agreements and treaties be considered as remaining in force between the United States and [the United Republic of] Tanzania:

1. Extradition Treaty between the United States and the United Kingdom of December 22, 1931.

...

The United States further proposed that its note and the reply constitute an agreement effective 9 December 1963.<sup>148</sup> In its reply, the United Republic of Tanzania agreed that the listed treaties be considered as remaining in force. This reply was on the understanding that the United Republic of Tanzania intended in due course to re-open negotiations, but until such time as new arrangements were concluded the listed treaties would remain in force. The United Republic of Tanzania also agreed that the Agreement was effective 9 December 1963.<sup>149</sup>

### 13. Uganda

67. *General*. The Uganda legislature in 1964 enacted a new Extradition Act. Its operation is, with two exceptions, dependent on the conclusion of an arrangement with the country in question. The exceptions are, first, that the Act applies to those countries to which the Fugitive Offenders Act 1881, applied (i.e. Commonwealth countries) and, second, that the Act applies to countries with which an arrangement, in force immediately before the entry into force of the Act, was made under the previous legislation.<sup>150</sup> The Minister concerned can make a declaration under the Act listing these arrangements. This he has done (in accordance with a Cabinet decision), in a notice which declares that the arrangements listed with thirty-four countries are arrangements which are in force and to which the Act applies.<sup>151</sup> During the period (as extended) of the declaration which it made concerning its treaty rights and obligations, Uganda exchanged views with other interested States regarding the continued force of extradition treaties. It has been recorded that

in general, extradition treaties were the most popularly accepted treaties for outright acceptance of succession by the other

<sup>140</sup> See foot-note 41 above.

<sup>141</sup> *Moniteur Belge* of 27 January 1965, p. 847.

<sup>142</sup> *British and Foreign State Papers*, vol. 90, p. 51.

<sup>143</sup> United Nations, *Treaty Series*, vol. 676.

<sup>144</sup> See foot-note 43 above.

<sup>145</sup> This was that date on which the period fixed by the note of 9 December 1961 for reconsideration of treaties applying to Tanganyika expired.

<sup>146</sup> Switzerland. *Recueil officiel des lois et ordonnances de la Confédération Suisse*, 1968, vol. I, p. 169.

<sup>147</sup> See foot-note 29 above.

<sup>148</sup> See foot-note 145 above.

<sup>149</sup> United Nations, *Treaty Series*, vol. 592, p. 53.

<sup>150</sup> The Fugitive Criminals Surrender Ordinance, which gave effect in Uganda (which was a protectorate) to Orders made under the Imperial Extradition Acts and applying to Uganda. This Ordinance and the Acts (including that of 1881) are repealed by the 1964 Act.

<sup>151</sup> Extradition (Arrangements) (Enforcement) Instrument, 1966 (Statutory Instruments 1966 No. 103), and D. P. O'Connell, *State Succession*, *op. cit.*, p. 117.

parties. An exception was the Congo (Kinshasa) which asked for a draft of an entirely new treaty.<sup>152</sup>

68. *Netherlands-United Kingdom Treaty of 1898*.<sup>153</sup> The Netherlands, in a note of 30 September 1966, proposed that the relations between it and Uganda should, pending the conclusion of a new agreement, be governed by the Netherlands-United Kingdom Treaty of 26 September 1898, which had been extended to Uganda by a treaty of 17 August 1914. If this proposal were acceptable, the note and the Ugandan reply would constitute an agreement, entering into force on the date of the reply. This proposal was acceptable, and the agreement accordingly entered into force on 27 January 1967.<sup>154</sup>

69. *Switzerland-United Kingdom Treaty of 1880*.<sup>155</sup> By an exchange of notes of 14 January and 21 September 1965, Switzerland and Uganda agreed to maintain in force in their mutual relations with effect from 1 January 1965, the Switzerland-United Kingdom Treaty of 1880 (as amended by a Convention of 1904) which was applicable to the territory of Uganda by virtue of an exchange of notes of 1909, and the 1934 Convention, which also applied to the territory of Uganda. The Swiss Government noted that Uganda, following its independence, had first confirmed the Treaty's provisional operation until 31 December 1964.<sup>156</sup>

#### 14. Kenya

70. *General*. The Kenya Extradition Act 1966, as originally enacted,<sup>157</sup> was, for present purposes, identical with the Ugandan Act; that is, it applied (a) to countries with which an agreement is made (and in respect of which an order is in effect); (b) to countries to which the Fugitive Offenders Act 1881 applied;<sup>158</sup> and (c) to countries to which the Fugitive Criminals Surrender Act applied immediately before the entry into force of the new Act.<sup>159</sup> At that time, the Fugitive Criminals Surrender Act applied, it seems, to forty-two countries.<sup>160</sup> At the end of 1967, no declaration had been made under the new Act listing the arrangements.<sup>161</sup>

71. *Netherlands-United Kingdom Treaty of 1898*.<sup>162</sup> In a note of 10 November 1967, the Netherlands proposed

<sup>152</sup> I. A. Shearer, *loc. cit.*, (foot-note 107 above), p. 14. See also A. G. Mochi Onory, *La Succession d'Etats aux Traités* (1968), pp. 77, Nos. 30 and 122 (relating to Italy). As to the Democratic Republic of the Congo and Madagascar, see also paras. 100 and 107 below.

<sup>153</sup> See foot-note 142 above.

<sup>154</sup> United Nations, *Treaty Series*, vol. 608, p. 345.

<sup>155</sup> See foot-note 43 above.

<sup>156</sup> Switzerland, *Recueil officiel des lois et ordonnances de la Confédération Suisse*, 1966, vol. 2, p. 957.

<sup>157</sup> The only change since 1966 has been the enactment of the Extradition (Commonwealth Countries) Act. 1968.

<sup>158</sup> Now replaced by the Act referred to in the preceding footnote.

<sup>159</sup> The 1966 Act also repealed the Imperial Extradition and Fugitive Offenders Acts and the Fugitive Criminals Surrender Act.

<sup>160</sup> See *Laws of Kenya* (revised edition, 1962), Cap. 77.

<sup>161</sup> D. P. O'Connell states that the Attorney-General advised that all extradition treaties should be continued (*State Succession . . . op. cit.*, p. 118).

<sup>162</sup> See foot-note 142 above.

that the relations between Kenya and the Netherlands "shall, in conformity with their national legislation and pending the conclusion of a new treaty", be governed by this Treaty, which had been extended to Kenya by a Treaty of 17 August 1914.<sup>163</sup> If this proposal was acceptable, the agreement could enter into force when the Netherlands' constitutional requirements were satisfied. It was acceptable, and the agreement entered into force on 15 March 1968.<sup>164</sup>

72. *Switzerland-United Kingdom Treaty of 1880*.<sup>165</sup> By an exchange of notes of 19 May and 21 September 1965, Kenya and Switzerland agreed to maintain in force in their mutual relations the Swiss-United Kingdom Treaty of 1880, as amended by a Convention of 1904, which was applicable to Kenya by virtue of an exchange of letters of 1909, and the Additional Convention of 1934 which applied to the territory of Kenya. The Swiss Government has noted that, after independence, Kenya had first confirmed the Treaty's provisional operation until 12 December 1965.<sup>166</sup>

73. *United Kingdom-United States Treaty of 1931*.<sup>167</sup> In a note of 14 May 1965 to the United States, Kenya referred to this Treaty and stated

that in the interest of continuity of treaty relations with the United States of America the Government of Kenya is willing to continue the application of the [Treaty] to the territory of the Republic of Kenya beyond the two-year period stipulated in Kenya's declaration to the United Nations Secretary-General<sup>168</sup> on the devolution of pre-independence treaty rights and obligations on Kenya . . . , pending the negotiation of a new agreement on this subject. . . .

An affirmative reply to the proposals would be regarded as constituting an agreement between the two countries.

74. In its reply of 19 August 1965, the United States confirmed that the Treaty "shall continue in force between the United States and the Republic of Kenya, pending the negotiation of a new agreement . . .". The two notes constituted an agreement on the subject.<sup>169</sup>

#### 15. Malawi

75. *General*. The operation of the Extradition Act, 1968, is dependent on the making of agreements with other countries for surrender. In addition, it provides that the three countries listed in a schedule to the Act are also

<sup>163</sup> This was subject to the proviso that article XVIII (2) — relating to the procedure for requests in the case of colonial territories — was no longer applicable.

<sup>164</sup> United Nations, *Treaty Series*, vol. 645. See also *ibid.*, vol. 643 for a similar agreement relating to the judicial assistance convention of 1932.

<sup>165</sup> See foot-note 43 above.

<sup>166</sup> Switzerland, *Recueil officiel des lois et ordonnances de la Confédération Suisse*, 1966, vol. 2, p. 957. See also *ibid.*, p. 958, concerning a civil procedure convention.

<sup>167</sup> See foot-note 29 above.

<sup>168</sup> The period expired on 12 December 1965.

<sup>169</sup> United Nations, *Treaty Series*, vol. 574, p. 153.

subject to the Act. They are the United Kingdom, South Africa and Southern Rhodesia. The Act repeals the Fugitive Criminals Surrender Ordinance, the Extradition of Offenders (Republic of South Africa) Ordinance<sup>170</sup> and the Fugitive Offenders Act 1881.

76. *Federation of Rhodesia and Nyasaland-South Africa Treaty of 1962*.<sup>171</sup> In 1967, Malawi requested the extradition from South Africa of an alleged fugitive criminal. It based its request on the extradition treaty between South Africa and the Federation of Rhodesia and Nyasaland. The Federation had been dissolved in 1963, Malawi becoming independent in 1964. The South African Minister of Police and Prisons certified that the Government regarded South Africa as still bound by the treaty in relation to Malawi, notwithstanding the constitutional changes which that State had undergone. The Transvaal Provincial Division of the South African High Court agreed, and held, after noting the attitude and actions of the parties and the nature of the constitutional change, that the treaty was still in effect.<sup>172</sup>

77. *Netherlands-United Kingdom Treaty of 1898*.<sup>173</sup> The Netherlands, in a note of 21 November 1967 to Malawi, referred to the Extradition Treaty of 26 September 1898 between the Netherlands and the United Kingdom, which was extended to Nyasaland by a Treaty of 17 August 1914. The note proposed "that the relations between the two States shall, in conformity with the legislation of both countries, be governed by the provisions of the said Treaty . . . , pending the conclusion of a new extradition treaty between them". If this proposal were acceptable, the Netherlands proposed that its note and the Malawi reply constitute an agreement to that effect, which agreement would enter into force when the Netherlands advised that the formalities constitutionally required in the Netherlands had been complied with. On 28 June 1968, Malawi accepted the proposal. The exchange came into effect on 8 January 1969.<sup>174</sup>

78. *Switzerland-United Kingdom Treaty of 1880*.<sup>175</sup> By an exchange of notes of 6 January and 19 December 1967, Malawi and Switzerland agreed to maintain in force in their mutual relations, with effect from 6 January 1967, the Switzerland-United Kingdom Treaty of 1880, as amended by a Convention of 1904, which was applicable to the territory of Nyasaland by virtue of an exchange of notes of 1909, and the Additional Convention of 1934, which also applied to Nyasaland. The Swiss Government has noted that Malawi, after its accession to indepen-

dence, had first confirmed the provisional continued maintenance in force of the instruments until 6 January 1967.<sup>176</sup>

79. *United Kingdom-United States Treaty of 1931*.<sup>177</sup> On 6 January 1967, Malawi, in a note to the United States, referred to this Treaty, "which was applied to the former territory of Nyasaland by the provisions of Article 16 and inherited by Malawi upon independence", and to two notifications to the United Nations by which Malawi had agreed to extend, on a reciprocal basis, all bilateral treaties which had been applied to Nyasaland until 6 January 1967, "on which date all such treaties lapse and terminate unless extended . . . by agreement". The note went on to propose that the Treaty

shall continue in force as between the [two] Governments . . . on a reciprocal basis, that this Treaty shall be interpreted and applied in all respects as if originally concluded between the Governments of Malawi and the United States of America, and that this Treaty shall remain in force until a new agreement on extradition is concluded between the two Governments.

If this proposal was acceptable, the Malawi note and the United States reply would constitute an agreement on the matter.

80. In its reply of 4 April 1967, the United States concurred in the proposal that the Extradition Treaty, *inter alia*, "be considered as having continued in force between our two Governments".<sup>178</sup>

## 16. Malta

81. *Italy-United Kingdom Treaty of 1873*.<sup>179</sup> Malta, on 3 March 1967, declared that it remained bound by this Treaty.<sup>180</sup>

82. *United Kingdom-United States Treaty of 1931*.<sup>181</sup> This treaty is listed under Malta in United States, *Treaties in Force*, which also reproduces the terms of the exchange of letters between Malta and the United Kingdom concerning Malta's treaty rights and obligations.<sup>182</sup>

## 17. Zambia

83. *General*. A new Extradition Act, which repealed the Extradition and Fugitive Offenders Ordinance, the

<sup>170</sup> Enacted to enable effect to be given to an agreement between the Federation of Rhodesia and Nyasaland and the Republic of South Africa.

<sup>171</sup> United Nations, *Treaty Series*, vol. 458, p. 59.

<sup>172</sup> *S. v. Bull.*, 1967 (2) S.A. 636 (T), noted by C. J. R. Dugard in "Succession to Federal Treaties Revisited" in the *South African Law Journal*, vol. 84, part III (1967), p. 250. Cf. *S. v. Eliasov*, 1965 (2) S.A. 770 (T), where it was held that the same Treaty was not in force between Southern Rhodesia and South Africa; see also para. 132 below.

<sup>173</sup> See foot-note 142 above.

<sup>174</sup> United Nations, *Treaty Series*, vol. 668.

<sup>175</sup> See foot-note 43 above.

<sup>176</sup> Switzerland. *Recueil officiel des lois et ordonnances de la Confédération Suisse*, 1968, vol. 1, p. 168.

<sup>177</sup> See foot-note 29 above.

<sup>178</sup> United States, *United States, Treaties and other International Agreements* 6328, vol. 18, part 2, p. 1822.

<sup>179</sup> See foot-note 85 above.

<sup>180</sup> M. Giuliano, F. Lanfranchi and T. Sieves, *op. cit.*, p. 299; A. G. Mochi Onory, *op. cit.*, p. 123, note 107.

<sup>181</sup> See foot-note 29 above.

<sup>182</sup> United States, *Treaties in Force* (1970), pp. 150 and 151. For the exchange of letters, see also United Nations *Treaty Series*, vol. 525, p. 221; and United Nations Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No.: E/F.68.V.5), p. 176.

Fugitive Offenders Act 1881<sup>183</sup> and the Extradition Acts 1870 to 1906 in their application to Zambia,<sup>184</sup> was enacted on 17 October 1968. As at the end of 1968, its main provisions had not entered into force. The Act is dependent for its operation, so far as extradition to non-Commonwealth countries is concerned, on the making of an order which in turn requires the existence either of an extradition agreement "to which the Republic is a party" or of reciprocal facilities in the other country for surrender.<sup>185</sup> No such orders were made before the end of 1968.

84. *Federation of Rhodesia and Nyasaland-South Africa Treaty of 1962.*<sup>186</sup> According to one writer,<sup>187</sup> Zambia, after independence, expressly terminated this Treaty in its relations with South Africa.

85. *France-United Kingdom Treaty of 1876.*<sup>188</sup> Zambia has adopted a general position favouring the continuity of treaty rights and obligations.<sup>189</sup> But France has, it seems, been reluctant to acknowledge that the above Treaty continues to govern its relations with Zambia.<sup>190</sup>

86. *United Kingdom-United States Treaty of 1931.*<sup>191</sup> On the other hand, the United States District Court for the District of Columbia, at the request of Zambia, on 29 March 1966, in the case of the extradition of Zwagendaba Jere, upheld the continued application to Zambia of the 1931 Treaty between the United Kingdom and the United States.<sup>192</sup> The Treaty is also listed under "Zambia" in United States series, *Treaties in Force*.<sup>193</sup>

<sup>183</sup> See also the Fugitive Offenders (Interim Provisions) Act 1966 and the Presidential instrument issued thereunder (Statutory Instrument 371/66), suspending the operation of the Act in relation to Southern Rhodesia. It will also be repealed by the new Act.

<sup>184</sup> It appears that Orders-in-Council in respect of 43 countries are in force in Zambia under the legislation which is to be repealed (see Ch. 10 of the *Laws of Zambia*, 1965 revised edition). It is not clear whether the Orders-in-Council and gazette notices implementing the treaties would remain in effect after the repeal; see the Interpretation and General Provisions Ordinance (ch. 1 of the 1965 revised laws), s. 15 of which provides that "statutory instruments" made under repealed Acts remain in effect if not inconsistent with the repealing Act, but it is not clear whether the relevant instruments are "statutory instruments" as defined.

<sup>185</sup> An order is also required in respect of Commonwealth countries, but the Act does not expressly make the existence of an agreement or reciprocity a condition for the issue of the order.

<sup>186</sup> See also with regard to this Treaty para. 76 above and paras. 132 and 133 below.

<sup>187</sup> D. P. O'Connell, *State Succession . . .*, *op. cit.*, p. 177. Cf. C. J. R. Dugard, *loc. cit.* (foot-note 172 above), p. 253.

<sup>188</sup> See foot-note 97 above.

<sup>189</sup> See its note of 1 September 1965 to the Secretary-General of the United Nations.

<sup>190</sup> D. Bardonnat, *loc. cit.*, (see foot-note 114 above) p. 676, note 304.

<sup>191</sup> See foot-note 29 above.

<sup>192</sup> D. P. O'Connell, *State Succession . . .*, *op. cit.*, p. 115; International Law Association, *Interim Report of the Committee on the Succession of New States . . .* (1968), p. 33; Rosenne, "Succession of States and the Codification of the Law of Treaties", in *Revista Espanola de Derecho Internacional*, vol. XXI, No. 1 (January-March 1968), pp. 416-429.

<sup>193</sup> United States, *Treaties in Force* (1970), p. 255.

## 18. Singapore

87. *General.* On 30 May 1968, Singapore enacted a new Extradition Act.<sup>194</sup> It provides for extradition, *inter alia*, to foreign States<sup>195</sup> in respect of which an Order in Council, applicable to Singapore, was in force under the Imperial Extradition Acts 1870 to 1935<sup>196</sup> immediately before the coming into force of the Act. Moreover, "extradition treaty" is interpreted, for the purposes of the Act, as including an extradition treaty made before 9 August 1965 which extends to, and is binding on, Singapore. Generally, extradition to non-Commonwealth countries is dependent on the existence of a treaty.

88. *Italy-United Kingdom Treaty of 1873.*<sup>197</sup> The Italian Ministry of Foreign Affairs considers that this Treaty is in force with Singapore, since the Constitution of that State stipulates that agreements concluded by the United Kingdom and applicable to Singapore are to remain in force.<sup>198</sup>

89. *United Kingdom-United States Treaty of 1931.*<sup>199</sup> In a note of 23 April 1969 to the United States, Singapore stated that under the Extradition Act "it is in effect provided that the United States is a foreign State to which . . . the Act applies subject to such conditions as may be contained in the [above] Treaty . . .". The note went on to point out that since extradition must necessarily work on the basis of reciprocity and in view of the changed constitutional position of Singapore to that of sovereign independent State, it was necessary to have confirmation from the United States Government that the Treaty "still continued to be binding on our two countries, subject to such necessary formal amendments". On 10 June 1969, the United States replied that "the Government of the United States considers the Treaty . . . to be in full force and effect between the United States and the Republic of Singapore."<sup>200</sup>

## 19. Botswana

90. *General.* The Botswana Parliament enacted a new Extradition Act on 6 September 1968, replacing the Fugitive Offenders Act 1881 (other than Part II, which regulates rendition to neighbouring Commonwealth countries) and the Fugitive Criminals Surrender Proclamations which had given effect to the Imperial Extradition Acts and Orders. Extradition is dependent on the application of the Act to the country requesting extradition. The Act applies (a) to countries in respect of which the

<sup>194</sup> Republic of Singapore, *Government Gazette*, No. 13, 1968, Act No. 14 of 1968.

<sup>195</sup> Special provisions are made for extradition within the Commonwealth and to and from Malaysia.

<sup>196</sup> These Acts and the Fugitive Offenders Act 1881, in so far as they apply to and operate as part of the law of Singapore, are repealed.

<sup>197</sup> See foot-note 85 above.

<sup>198</sup> M. Giuliano, F. Lanfranchi and J. Treves, *op. cit.*, p. 399.

<sup>199</sup> See foot-note 29 above.

<sup>200</sup> United States, *Treaties and other International Acts Series* 6744. The Treaty had previously been listed in United States, *Treaties in Force* (1969), pp. 195 and 196, along with the constitutional provisions concerning Singapore's succession to treaties.

Minister, having regard to reciprocal provisions under the law of that country, makes an order, (b) to all Commonwealth countries, and (c) to countries with which an extradition arrangement has been made and in respect of which an order is made. No express provision is made for keeping the earlier Orders-in-Council in force.

91. *United Kingdom-United States Treaty of 1931*.<sup>201</sup> Botswana, on 30 September 1966, addressed a note to the United States reading as follows:

The Government of Botswana, wishing to maintain existing legal relationships in conformity with international law, desires to continue to apply, on a basis of reciprocity, within its territory the terms of the following treaties and agreements between the United States of America and the United Kingdom of Great Britain and of Northern Ireland for a period of 24 months from the date of independence of Botswana [30 September 1966].

...

Treaty Concerning Extradition (. . . 1931)

...

2. For this stipulated period, it is proposed that the treaties listed be considered as continuing in force between the Government of the United States of America and the Government of Botswana until terminated in accordance with their provisions or until replaced.

The United States reply of the same date stated that it concurred in the proposal and considered the treaties and agreements as continuing in force as proposed in the Botswana note.<sup>202</sup>

## 20. Lesotho

92. *United Kingdom-United States Treaty of 1931*.<sup>203</sup> On 4 October 1966, Lesotho, in a note to the United States, stated that it was

desirous of continuing to apply within its territory on a basis of reciprocity the terms of the following agreement for a period of twelve months from the date of Lesotho's independence [4 October 1966]:

...

3. Extradition Treaty

...

<sup>201</sup> See foot-note 29 above.

<sup>202</sup> United Nations Treaty registration No. 9682. "An extension of this agreement was under negotiation as of January 1, 1969" (United States, *Treaties in Force* (1969) p. 20, note 1). It should be added that on 6 October 1966 the Government of Botswana, in a note to the Secretary-General of the United Nations, stated, *inter alia*, that

"2. As regards bilateral treaties validly concluded by the Government of the United Kingdom on behalf of the former Bechuanaland Protectorate, or validly applied or extended by the said Government to the territory of the former Bechuanaland Protectorate, the Government of Botswana is willing to continue to apply within its territory, on a basis of reciprocity, the terms of all such treaties for a period of twenty-four months from the date of independence (i.e., until October 1, 1968), unless abrogated or modified earlier by mutual consent. At the expiry of that period, the Government of Botswana will regard such of these treaties [as] could not by the application of the rules of customary international law be regarded as otherwise surviving, as having terminated."

<sup>203</sup> See foot-note 29 above.

It accordingly proposed that the treaties be considered as continuing in force for that period unless terminated in accordance with their provisions or replaced by mutual agreement. The United States, in a note of the same date, concurred in the proposal and stated that it would consider the treaties as continuing in force during the twelve month period.<sup>204</sup>

93. In a note of 5 October 1967, the United States referred to the above agreement and to a note from Lesotho to the Secretary-General concerning Lesotho's treaty rights and obligations,<sup>205</sup> and advised Lesotho that the Government of the United States of America "understands that the agreements referred to in the Agreement of October 4, 1966, shall, in view of the note of March 22, 1967, continue in force until October 4, 1968, unless terminated earlier in accordance with their provisions or unless replaced by mutual agreement". In its reply of 26 October 1967, Lesotho confirmed the above understanding.<sup>206</sup>

## 21. Swaziland

94. *General*. A new Extradition Act came into effect on 9 August 1968, less than a month before independence.<sup>207</sup> The Act is dependent for its operation on the existence of an agreement between the Government of Swaziland and another State, but it is further provided that any extradition arrangement made between the United Kingdom and another State in respect of which the former Swaziland legislation<sup>208</sup> applied and which was in force at the entry into force of the Act shall be deemed to be such an agreement, to which the Act will apply without further notice. The Swaziland Independence Order<sup>209</sup> provided for the general continuance of pre-independence legislation.<sup>210</sup>

95. *South Africa-Swaziland Agreement of 1968*.<sup>211</sup> This

<sup>204</sup> United Nations Treaty registration No. 9684.

<sup>205</sup> This note, dated 22 March 1967, stated, *inter alia*, that Lesotho was "willing to continue to apply, within its territory, on a basis of reciprocity, the terms of all [bilateral] treaties [validly concluded on behalf of Basutoland or validly applied or extended to Basutoland] for a period of twenty-four months from the date of independence (i.e., until October 4, 1968), unless abrogated or modified earlier by mutual consent. At the expiry of that period, the Government of Lesotho will regard such of these treaties [as] could not by the application of the rules of customary international law be regarded as otherwise surviving, as having terminated."

<sup>206</sup> United States, *United States Treaties and Other International Agreements*, 6383, vol. 18, part 3, p. 2923. An extension of the 1966 agreement was under negotiation as at 1 January 1970 (see United States, *Treaties in Force* (1970), p. 140, note 1).

<sup>207</sup> Act No. 13 of 1968 (*Swaziland Government Gazette*, vol. VI, 9 August 1968, part B, suppl. p. S 18).

<sup>208</sup> The Fugitive Criminals Surrender Proclamation (Cap. 37), in *The Laws of Swaziland* (revised edition 1959), vol. 2, which is in all other respects repealed.

<sup>209</sup> United Kingdom, *Statutory Instruments*, 1968, Part II, sect. 2, No. 1377, p. 3838.

<sup>210</sup> So far as extradition within the Commonwealth is concerned, see the Fugitive Offenders (Commonwealth) Bill, in *Swaziland Government Gazette*, vol. VI, 29 November 1968, part A. Bill No. 46 of 1968, p. S.1.

<sup>211</sup> *Ibid.*, vol. VI, 13 September 1968, part C, Legal Notice No. 51 of 1968, p. S 27.

Agreement was signed by the Government of the Kingdom of Swaziland, acting with the authority and consent of the Government of the United Kingdom, one day before Swaziland became independent. By its terms, it entered into force on 5 October 1968 and can be terminated on six month's notice.

96. *United Kingdom-United States Treaty of 1931*.<sup>212</sup> This Treaty is listed under Swaziland in United States, *Treaties in Force*, which also reproduces part of a Swaziland note dated 22 October 1968 to the Secretary-General of the United Nations concerning Swaziland's treaty rights and obligations.<sup>213</sup>

## 22. Barbados, Burma, Gambia, Guyana, Jamaica, Mauritius and Trinidad and Tobago

97. *United Kingdom-United States Treaty of 1931*. This treaty is listed under each of the above States in United States, *Treaties in Force*.<sup>214</sup> This list also reproduces in each case the relevant provisions of either the devolution arrangements concluded by the new State (Burma, Gambia, Jamaica and Trinidad and Tobago)<sup>215</sup> or the statement made by the new State to the Secretary-General of the United Nations concerning its treaty rights and obligations (Barbados, Guyana and Mauritius). In addition, in the case of Gambia, it is noted that

The Government of the United States of America has taken cognizance of this exchange of notes between the Government of Gambia and the Government of the United Kingdom and is currently reviewing its own position on this matter.

The foreword to *Treaties in Force* states that

In the case of new countries, the absence of a listing for the country or the absence of any particular treaty should not be regarded as an absolute determination that a certain treaty or certain treaties are not in force.

## (b) FORMER NON-METROPOLITAN TERRITORIES FOR THE INTERNATIONAL RELATIONS OF WHICH FRANCE WAS RESPONSIBLE

### 23. Lebanon

98. *Syria and Lebanon-Palestine Provisional Agreement of 1921*.<sup>216</sup> In 1947, Lebanon invoked the Provisional

<sup>212</sup> See foot-note 29 above.

<sup>213</sup> United States, *Treaties in Force* (1970), pp. 210 and 209.

<sup>214</sup> *Ibid.*, pp. 14, 28, 84, 99, 126, 152 and 220. See similarly paras. 27, 34, 39, 49, 51, 54, 59, 82, 86, 90 and 96 above. The Treaty is also listed under "Nauru", which also made a statement concerning its treaty rights and obligations (*ibid.*, p. 159). M. M. Whiteman, in her *Digest of International Law*, vol. 6 (February 1968), p. 764, states that "in view of their assumption, on gaining independence, of the rights and obligations of agreements between the United Kingdom and third States the Extradition Treaty of 1931 . . . is considered by the United States as constituting an extradition treaty in force between the United States" and twenty-three named Commonwealth countries.

<sup>215</sup> The arrangements are also to be found in: (Burma) United Nations, *Treaty Series*, vol. 70, p. 183; and United Nations Legislative Series, *Materials on Succession of States* (United

Agreement signed in 1921, i.e. when all three territories were subject to the Mandates System. The Palestine Government assented to the extradition, and argued that the Agreement remained in force, notwithstanding Lebanon's change of status. The Palestine Supreme Court, sitting as a High Court, agreed that the Agreement was still in force.<sup>217</sup>

### 24. Tunisia

99. *France-United Kingdom Treaty of 1876*.<sup>218</sup>

In 1959 [the United Kingdom] Government informed the Tunisian Government that they considered the 1889 treaty [between France and the United Kingdom extending the 1876 Extradition Treaty<sup>219</sup> to Tunis] and the 1909 supplementary treaty<sup>220</sup> to be still binding on the ground that [Tunisia] was formerly a protectorate and therefore enjoyed a separate international personality.

The Tunisian Government replied in a Note dated 22 May 1959 that it did not consider itself bound by the treaties. Her Majesty's Government therefore informed [Tunisia] that they were treating the Tunisian Note as notice of termination of the agreement and waiving the requirement of six months' notice to terminate.<sup>221</sup>

### 25. Madagascar

100. *France-United Kingdom Treaty of 1876*.<sup>222</sup> In 1965, Uganda claimed that the treaty of 1876 between France and the United Kingdom (as amended in 1896 and 1908) applied to the relations between Malagasy and Uganda.<sup>223</sup> The result of this approach is not recorded but a commentator says that, in the light of the position adopted by Madagascar relevant to the treaty between France and the United States and discussed below,

it seems clear that the Malagasy position is already established and that the Malagasy Republic will not in any event agree to the continuance of the France-United Kingdom extradition convention.<sup>224</sup>

Nations publication, Sales No.: E/F.68.V.5), p. 163; (Gambia) International Law Association, *loc cit.* (see foot-note 192); (Jamaica) United Nations, *Treaty Series*, vol. 457, p. 117, and *Materials on Succession of States (op. cit.)*, p. 172; and (Trinidad and Tobago) United Nations, *Treaty Series*, vol. 457, p. 123; and *Materials on Succession of States (op. cit.)*, p. 174.

<sup>216</sup> The Agreement was signed by the High Commissioner of the French Republic for Syria and the Lebanon and by the High Commissioner of His Britannic Majesty for Palestine. For the text (as amended in 1933), see Robert H. Drayton (ed.), *Laws of Palestine 1933*, vol. 1, p. 687. See also *ibid.*, p. 689, and League of Nations, *Treaty Series*, vol. XXXVI, p. 343, for a similar provisional agreement with Egypt.

<sup>217</sup> *Shehadeh and others, v. Commissioner of Prisons, Jerusalem* (1947), in *International Law Reports*, vol. 14, p. 42; and *Yearbook of the International Law Commission, 1963*, vol. II, p. 113, document A/CN.4/157, paras. 157 and 158.

<sup>218</sup> *British and Foreign State Papers*, vol. 81, p. 55.

<sup>219</sup> See foot-note 97 above.

<sup>220</sup> *British and Foreign State Papers*, vol. 102, p. 87.

<sup>221</sup> United Nations Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No.: E/F.68.V.5), p. 184.

<sup>222</sup> See foot note 97 above.

<sup>223</sup> This was one of a set of inquiries by Uganda, which had decided to keep in force all extradition treaties. See para 67 above.

<sup>224</sup> See D. Bardonnet, *loc. cit.* foot note 114 above, pp. 678 and 679.

101. *France-United States Treaty of 1909*.<sup>225</sup> Following the attainment of its independence, Madagascar denied that this Treaty continued to bind it.<sup>226</sup> In reply to a United States inquiry,<sup>227</sup> it said that

in general there is no uniform practice with regard to the future of extradition treaties in the event of a change which affects the territory of the contracting States, although the termination of the former conventional relationship seems to be the solution most frequently applied . . . More particularly, it appears that the established tendency of the United States is not habitually to regard the treaties concluded by it with States which have undergone territorial changes as legally in force with regard to new States.

Accordingly, there was no need to give the assurance which the United States sought.

102. The United States, in its response, drew attention to the following position adopted by Madagascar on 4 December 1962 in a note to the United States:

No official act specifies, in the agreements with the French Republic, the juridical position of the Malagasy Republic with regard to the rights and obligations contracted for Madagascar in the treaties, agreements, and conventions signed by France prior to Madagascar's accession to international sovereignty. In accordance with usage, the Malagasy Republic considers itself implicitly bound by such texts unless it explicitly denounces them. The Ministry of Foreign Affairs informs the Embassy of the United States of America that, in order to avoid any ambiguity, the Malagasy Republic transmits, as soon as it is in a position to reach an affirmative decision on each of the texts in question, a formal declaration in which it declares itself bound by the Treaty, the Agreement or the Convention under consideration.<sup>228</sup>

It drew from it the following conclusion:

The Government of the United States has taken the view that the France-United States agreements on extradition remain valid between the United States and the Malagasy Republic.

The Madagascar Government, however, confirmed its refusal to be bound by the Treaty, stating again the views set out above and adding that, on the practical level, the procedures envisaged by the Treaty would cause serious difficulties, and would have to be adapted to the new conditions resulting from independence. At the same time, Madagascar renewed its suggestion that a new treaty, based on that of 1909 as modified, should be negotiated.<sup>229</sup>

<sup>225</sup> United States, *Treaty Series*, No. 561.

<sup>226</sup> See D. Bardonnet, *loc. cit.* (foot-note 114 above), pp. 671-679, on which the following account is based.

<sup>227</sup> The United States inquiry arose in part from its attempt to get assurances from those States with which it had extradition treaties that they would not attempt to effect the extradition of persons who were in the United States in response to a United Nations invitation. See *Official Records of the General Assembly, Eighteenth Session, Fourth Committee*, 1475th meeting, paras. 2-5 (the United States' statement is reproduced in full in *American Journal of International Law*, vol. 58, p. 457); and *United Nations Juridical Yearbook*, 1963, (United Nations publication, Sales No.: 65.V.3), p. 164.

<sup>228</sup> See D. Bardonnet, *loc. cit.* (foot-note 114 above), pp. 653 and 654; in English translation in United States, *Treaties in Force* (1970), p. 147.

<sup>229</sup> United States, *Treaties in Force* (1963), (1964) and (1965) listed the extradition treaty (and quoted the note of 4 December 1962) under "Madagascar". The 1966 list excludes it.

## 26. Ivory Coast

103. *France-United States Treaty of 1909*.<sup>230</sup>

The Director of Political Affairs in the Ministry of Foreign Affairs of the Ivory Coast officially stated that "France and the Ivory Coast had agreed that the Ivory Coast would assume all the rights and obligations of treaties made applicable to the Ivory Coast prior to its independence", and that "it was also agreed that the Ivory Coast would formally associate or dissociate itself from these commitments as soon as possible thereafter". Later, however, with regard to the question of extradition, the Ministry of Foreign Affairs stated: "Despite the fact that there is almost undoubtedly a Franco-American extradition treaty, which probably included the former territories of AOF within its terms, the GOIC would not feel bound by that treaty and desires that such matters be raised *de novo* . . .".<sup>231</sup>

## 27. Congo (People's Republic of the)

104. *France-United States Treaty of 1909*.<sup>232</sup> The United States lists this treaty (as amended) under "Congo ((Brazzaville))" in *Treaties in Force*.<sup>233</sup> Also listed is a Congolese-United States exchange of notes in which the Congolese Ministry of Foreign Affairs stated:

In accordance with the practices of international law and because of the circumstances under which the Republic of the Congo attained international sovereignty, the latter considers itself to be a party to the treaties and agreements signed prior to its independence by the French Republic and extended by the latter to its former overseas territories, provided that such treaties or agreements have not been expressly denounced by it or tacitly abrogated by a text replacing them.<sup>234</sup>

(c) FORMER NON-METROPOLITAN TERRITORY FOR THE INTERNATIONAL RELATIONS OF WHICH THE NETHERLANDS WAS RESPONSIBLE

## 28. Indonesia

105. *Netherlands-United Kingdom Treaty of 1898*.<sup>235</sup> Indonesia applied in February 1950 for the extradition of Westerling from Singapore. It stated then and later in 1950 that it assumed the rights and obligations of the Netherlands Government under the Extradition Treaty between the Netherlands and the United Kingdom of 1898.<sup>236</sup> The British Government also stated that

the Republic of the United States of Indonesia has succeeded to the rights and obligations of the Kingdom of the Netherlands under the . . . Treaty . . . in respect of Indonesia and that the

<sup>230</sup> See foot-note 225 above.

<sup>231</sup> M. M. Whiteman, *Digest of International Law*, vol. 2 (1963), p. 983. No extradition treaty is listed in United States, *Treaties in Force* (1970), p. 125.

<sup>232</sup> See foot-note 225 above.

<sup>233</sup> (1970), p. 55.

<sup>234</sup> United States, *United States Treaties and other International Agreements*, 5161, vol. 13, part 2, p. 2065.

<sup>235</sup> See foot-note 142 above.

<sup>236</sup> United Nations Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No.: E/F.68.V.5), pp. 185 and 186. Compare Indonesia's later general attitude, *ibid.* and p. 37.

said Treaty now applies between her Majesty's Government in the United Kingdom and the Republic of the United States of Indonesia.

The High Court of the Colony of Singapore accepted this statement as conclusive, but held that the domestic legislation relevant to the Treaty was ineffective to apply the Treaty to Indonesia and accordingly stayed the extradition proceedings.<sup>237</sup>

106. *Netherlands-United States Convention of 1887*.<sup>238</sup> United States, *Treaties in Force* (which reproduces the provision of the Round Table Agreement relating to the devolution of Netherlands treaty obligations to Indonesia) states that the above convention as extended is "deemed to be in force between the United States and Indonesia."<sup>239</sup>

(d) FORMER NON-METROPOLITAN TERRITORY FOR THE INTERNATIONAL RELATIONS OF WHICH BELGIUM WAS RESPONSIBLE

29. Congo (Democratic Republic of)

107. *Independent State of the Congo-Liberia Treaty of 1894*.<sup>240</sup> In June 1966, Liberia, requested the extradition of one Sabbe from the Democratic Republic of the Congo, basing its request on the Treaty of 21 November 1894 between itself and the Independent State of the Congo. The claim was recognized as competent by the Foreign Ministry of the Democratic Republic of the Congo.<sup>241</sup>

B. Cases other than cases of independence of former non-metropolitan territories

1. Secession of Finland, 1917

108. *Russia-Sweden Treaty of 1860*. In an exchange of notes on 11 November 1919, Finland and Sweden

declared that thirteen listed treaties concluded between Sweden and Russia "shall, after the separation of Finland from Russia, be deemed to have been valid and to continue to be valid as between Sweden and Finland . . ."<sup>242</sup> Among the treaties was a Convention regarding the reciprocal surrender of vagrants of 1860.<sup>243</sup>

109. *Russia-United Kingdom treaties*. When the Republic of Finland was established in 1917, the United Kingdom Government took the following position:

[In reply to your inquiry] whether former treaties with Russia can be held to be in force between His Majesty's Government and the Finnish Government, I am advised that in the case of a new State being formed out of part of an old State there is no succession by the new State to the treaties of the old one, though the obligations of the old State in relation to such matters as the navigation of rivers, which are in the nature of servitudes, would normally pass to the new State. Consequently there are no treaties in existence between Finland and this country.<sup>244</sup>

Accordingly, the United Kingdom and Finland negotiated and concluded new treaties relating, *inter alia*, to extradition.<sup>245</sup> Denmark, Norway, Sweden and the United States also negotiated extradition treaties with Finland;<sup>246</sup> they apparently did not consider that their extradition treaties with Russia<sup>247</sup> applied to Finland.

2. Association of Iceland with Denmark in a real union, 1918; dissolution of the union, 1944

110. *General*. In 1918, Iceland ceased to be an integral part of Denmark, and became associated with it in a real union. In 1944, the union was dissolved. The 1918 law provided that treaties between Denmark and other States which affected Iceland would continue to bind it.<sup>248</sup> This position seems to have been accepted in 1918 and 1944 both generally and so far as extradition treaties were concerned.<sup>249</sup>

111. Thus, a list published by the Icelandic Foreign Ministry of its treaties in force as at 31 December 1964<sup>250</sup> includes extradition treaties which were concluded by Denmark before 1914 with Belgium, France, Germany (listed under "Federal Republic of Germany"), Italy, Luxembourg, Netherlands, Norway, Spain, the United Kingdom (also listed under Australia, Canada, Ceylon, India and New Zealand)<sup>251</sup> and the United States. In

<sup>237</sup> *Re Westerling* (1950), *Malayan Law Reports*, vol. 1, p. 228; *International Law Reports*, vol. 17, p. 82; United Nations Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No.: E/F.68.V.5), p. 194 and *Yearbook of the International Law Commission*, 1963, vol. II, pp. 107 and 108, document A/CN.4/157, paras. 107-111.

<sup>238</sup> Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers*, vol. II, p. 1266. For the treaty of 1904 extending the convention, *ibid.*, p. 1271.

<sup>239</sup> United States, *Treaties in Force* (1970), p. 111. For the Round Table Agreement, see also United Nations, *Treaty Series*, vol. 69, p. 200; United Nations Legislative Series, *Materials on Succession of States*, (United Nations publication, Sales No.: E/F.68.V.5.), p. 34.

<sup>240</sup> *British and Foreign State Papers*, vol. 85, p. 561. Belgium, on acquiring sovereignty over the Independent State of the Congo, agreed to recognize the treaties concluded by it.

<sup>241</sup> In A. Shearer, *loc. cit.*, foot-note 107 above, pp. 14 and 15, 45-57 (judgment of Cour d'Appel of Leopoldville of 8 February 1966); International Law Association, *loc. cit.* (see foot-note 192) (1968), p. 33. There is some confusion about the final stage of this case: Shearer states that the Court, *inter alia*, on the basis of the Treaty, ordered extradition (see also D. P. O'Connell, *State Succession . . . op. cit.*, p. 140), but the judgment reproduced by Shearer rejects the request on the ground of insufficiency of evidence.

<sup>242</sup> *British and Foreign State Papers*, vol. 112, p. 1023.

<sup>243</sup> *Ibid.*, vol. 53, p. 958.

<sup>244</sup> A. D. McNair, *The Law of Treaties* (1961), p. 605.

<sup>245</sup> *Ibid.*, and League of Nations, *Treaty Series*, vol. XXXIV, p. 79.

<sup>246</sup> League of Nations, *Treaty Series*, vol. XVIII, p. 33; vol. XLIII, p. 381; vol. XXIII, p. 33; and vol. XXXIV, p. 103.

<sup>247</sup> Denmark, 1866, *British and Foreign State Papers*, vol. 58, p. 767; Sweden and Norway, 1860, *ibid.*, vol. 53, p. 958; and United States, 1887, *ibid.*, vol. 78, p. 1037.

<sup>248</sup> G. F. de Martens, ed., *Nouveau Recueil général de traités*, 3rd series, vol. XII, p. 3.

<sup>249</sup> D. P. O'Connell *State Succession . . . op. cit.*, pp. 111 and 112.

<sup>250</sup> *Sjórnartidindi C 2-1964*, pp. 86-123.

<sup>251</sup> See also the supplementary Conventions signed in 1937 and 1938. Australia and New Zealand acceded separately to the latter (League of Nations, *Treaty Series*, vol. CXC VIII, p. 147).

each case, it is also indicated that the other listed countries consider that the treaty is in force.<sup>253</sup>

### 3. Peace settlement following the First World War, 1919

#### (a) Austria and Hungary

112. *General.* Article 241 of the Treaty of Saint-Germain and article 224 of the Treaty of Trianon provided that

Each of the Allied and Associated Powers . . . shall notify to Austria [Hungary] the bilateral agreements of all kinds which were in force between [it] and the former Austro-Hungarian Monarchy, and which [it], wishes should be in force between [it] and Austria [Hungary].

Only those treaties so notified would be in effect between the Allied and Associated Powers and Austria and Hungary.<sup>253</sup> So far as bilateral treaties concluded by Austria-Hungary with other States are concerned, Austria seems to have taken a generally negative view of the question of succession or continuity, Hungary a more positive one.<sup>254</sup>

113. *Austria/Hungary-Bulgaria Treaty of 1911.*<sup>255</sup> Thus, in notes which, *mutatis mutandis*, were identical, the Bulgarian and Hungarian Governments on 17 May 1929 agreed with one another's view that this Extradition Treaty was "in force between" Bulgaria and Hungary.<sup>256</sup>

114. *Austria/Hungary-Netherlands Treaty of 1880.* It has been said that the Netherlands rejected the Austrian argument that it was a new State, but, while not resolving this difference, the two States seem to have agreed that pre-1918 treaties should remain in effect.<sup>257</sup> Thus, a convention of 1 December 1921,<sup>258</sup> which entered into force on 4 January 1922, the day following its ratification, contains the following passage in its preamble:

Her Majesty the Queen of the Netherlands and the President of the Austrian Republic, being anxious to obtain the application of the treaty for the extradition of criminals concluded on 24 November, 1880, between the Netherlands and the former Austro-Hungarian Monarchy, pending the conclusion of a new treaty between their two countries for the extradition of criminals . . .

<sup>253</sup> *Stjórnartíðindi C 2-1964*, pp. 95, 99, 107, 101, 102, 100, 103, 105, 96, 92, 102, 97 and 98, 100, 103, and 93. Sierra Leone and Uganda have also indicated that they consider the relevant treaty still to be in force between them and Iceland (see paras. 58 and 67 above).

<sup>254</sup> For the United States, see its Treaty of 24 August 1921 with Austria in United States, *Treaty Series*, No. 659, and its Treaty with Hungary in United States, *Treaty Series*, No. 660.

<sup>255</sup> As to Austria, see, e.g., Ch. Rousseau, *Droit international public* (1953), p. 283 and Udina, "La Succession d'Etats quant aux obligations internationales autres que les dettes publiques", in Académie de droit international de la Haye, *Recueil des Cours*, (1933), II, t. 44, pp. 665 and 687; as to Hungary, see particularly the statement in para. 115 below.

<sup>256</sup> *British and Foreign State Papers*, vol. 104, p. 720.

<sup>257</sup> League of Nations, *Treaty Series*, vol. XCII, p. 197.

<sup>258</sup> R. W. de Muralt, *The Problem of State Succession with Regard to Treaties* (1954), pp. 89 and 90.

<sup>259</sup> League of Nations, *Treaty Series*, vol. IX, p. 167.

and article 1 provided that

the treaty for the extradition of criminals . . . [of 1880] shall be applied by the High Contracting Parties.

115. *Austria/Hungary-Sweden and Norway Treaty of 1873.* The Swedish collection of treaties published in 1927 includes the above Treaty under "Hungary", but not under "Austria".<sup>259</sup> It also reproduces the following statement made in 1922 by the Hungarian Government:

Hungary, from the point of view of Hungarian constitutional law, is identical with the former Kingdom of Hungary, which during the period of dualism formed, with Austria, the other constituent part of the former Austro-Hungarian monarchy. Consequently, the dissolution of the monarchy, that is, the termination of the constitutional link as such between Austria and Hungary, has not altered the force of the treaties and conventions which were in force in the Kingdom of Hungary during the period of dualism.<sup>260</sup>

116. *Austria/Hungary-Switzerland Treaty of 1896.* The Swiss collection of treaties includes this 1896 Extradition Treaty under both "Austria" and "Hungary".<sup>261</sup> The collection records that the 1873 Treaty remains in effect for Hungary, according to an exchange of notes of 15 January 1921.<sup>262</sup> In the case of Austria, the two States,

both anxious to obtain the application between Switzerland and the Republic of Austria of the treaties concluded between Switzerland and the former Austro-Hungarian Monarchy concerning the regulation of conditions for establishment, the reciprocal extradition of criminals and the legalization of public acts,

concluded a treaty, which entered into force on 7 March 1926, and article 1 of which read:

The treaties concluded between Switzerland and the former Austro-Hungarian Monarchy on 7 December 1875 concerning the regulation of conditions for establishment, on 10 March 1896 concerning the reciprocal extradition of criminals, and on 21 August 1916 concerning the legalization of public acts drawn up by the Swiss or Austrian authorities shall be applied by the contracting parties.<sup>263</sup>

<sup>259</sup> Comte Sten Lewenhaupt, *Recueil des traités, conventions et autres actes diplomatiques de la Suède entièrement ou partiellement en vigueur au 1<sup>er</sup> janvier 1926*, vol. II, p. 562. It does include, under "Austria", a treaty of commerce and navigation of 1873, but see the exchange of notes with Austria of 1924: *ibid.*, pp. 87 and 93.

<sup>260</sup> *Ibid.*, p. 559, note \*.

<sup>261</sup> Switzerland, *Recueil systématique des lois et ordonnances 1848-1947*, vol. XII, pp. 72 and 175.

<sup>262</sup> *Ibid.*, vol. XII, p. 72, note 1 referring to *Feuille fédérale 1921*, vol. 1, p. 215.

<sup>263</sup> *Ibid.*, vol. II, p. 575; see also item (f) in para. 1 of the exchange of notes of 6 March 1926, *ibid.*, p. 577. Note also that the Supreme Court of Germany held in 1932 that a resolution of the Assembly of the German Confederation of 26 January 1854 relating to extradition from Austria to Prussia was not affected by the fundamental territorial and constitutional changes to which Austria was subjected in 1918 and 1919. See *Continuing Validity of Resolution of German Confederation Case. Fontes Iuris Gentium*, A. II, vol. 2, No. 62; and *Yearbook of the International Law Commission*, 1963, vol. II, p. 112, document A/CN.4/157, para. 143. See similarly a Swiss decision relating to the Hague Convention on Civil Procedure 1905, *In Re Ungarische Kriegsprodukten — Aktiengesellschaft* (1920), in *Annual Digest of Public International Law Cases*, vol. 1, p. 72, and *Yearbook of the International Law Commission*, 1963, vol. II, p. 107, document A/CN.4/157, para. 100.

(b) *Czechoslovakia and Poland*

117. *General.* The Treaties concluded after the First World War between the Allied and Associated Powers and Poland,<sup>264</sup> and Czechoslovakia<sup>265</sup> contain no pre-ambular provisions stressing the continuity or revival of bilateral treaties previously in force for the territories constituting the new States.<sup>266</sup> On the other hand, Poland and Czechoslovakia expressly undertook "to adhere" to several multilateral conventions, some at least of which would have applied to their constituent territories.

118. This suggestion of non-continuity is largely supported by practice.<sup>267</sup> The Swiss Department of Justice in 1921 advised a Swiss Court that Czechoslovakia refused to be regarded as the successor of the former Austria and held that it was not party to treaties entered into by Austria-Hungary.<sup>268</sup> The negotiations between Czechoslovakia and the United States for an extradition treaty in 1922-1925 appear to have proceeded on the footing that there was no treaty in force between them.<sup>269</sup> The United States also apparently did not consider that Poland was bound by the extradition treaties previously applicable to its territory.<sup>270</sup> Sweden and Switzerland concluded extradition treaties in 1930 and 1937 with Poland; again, neither referred to earlier treaties.<sup>271</sup>

119. *Austria/Hungary-Germany Treaty.* A German Court held in 1921 that an Extradition Treaty between Austria-Hungary and Germany was not applicable to Czechoslovakia, although its territory was largely composed of former Austrian territory; the States which had arisen on the territories of the Austro-Hungarian Empire could not be regarded as succeeding automatically to the rights and duties of that Empire.<sup>272</sup>

120. *Austria/Hungary-Switzerland Treaty.* In 1953, the Swiss *Cour de Cassation* affirmed in an *obiter dictum* that

The Extradition Treaty between Switzerland and Austria-Hungary cannot, as the Federal Council stated in 1920 in reply

<sup>264</sup> M. O. Hudson, *International Legislation*, vol. 1, p. 283.

<sup>265</sup> United Kingdom, *Treaty Series* (1919), No. 20.

<sup>266</sup> Except that they could exercise the power of revival vis-à-vis the former Central Powers, see e.g. International Law Association, *loc. cit.* (see foot-note 47 above), pp. 11-21.

<sup>267</sup> Generally, see D. P. O'Connell, *State Succession . . .*, *op. cit.*, pp. 179-182 and 346-349.

<sup>268</sup> *In re J. Z.* (1921), *Annual Digest of Public International Law Cases*, vol. 1, p. 71; and *Yearbook of the International Law Commission* 1963, vol. II, p. 106, document A/CN.4/157, para. 93.

<sup>269</sup> United States, *Foreign Relations of the United States 1925*, vol. II, pp. 32 and 33. A Treaty of Extradition between Austria-Hungary and the United States was signed on 3 July 1856 (Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers.*, vol. I, p. 36).

<sup>270</sup> Thus, no extradition treaty was included under "Poland" in Malloy's compilation. In 1927, a new treaty was concluded between Poland and the United States. It makes no reference to earlier treaties (Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers*, vol. IV, p. 4561).

<sup>271</sup> League of Nations, *Treaty Series*, vol. CXXIX, p. 283, and vol. CXCIV, p. 297.

<sup>272</sup> *Extradition (Germany and Czechoslovakia) Case (1921)*, *Annual Digest of Public International Law Cases*, vol. I, p. 259; and *Yearbook of the International Law Commission* 1963, vol. II, p. 107, document A/CN.4/157, paras. 104 and 105.

to a request for extradition, be applied [automatically] to Czechoslovakia as successor State (B.B.I. 1921, II, 350).<sup>273</sup>

(c) *Yugoslavia*

121. *General.* Article 12 of a treaty<sup>274</sup> signed on 10 September 1919 at St. Germain-en-Laye between the Principal Allied and Associated Powers (the United States of America, the British Empire, France, Italy and Japan) and the Serb-Croat-Slovene State, entitled "*Traité en vue de régler certaines questions soulevées du fait de la formation du Royaume des Serbes, Croates et Slovenes*", read as follows:

Pending the conclusion of new treaties or conventions, all treaties, conventions, agreements and obligations between Serbia, on the one hand, and any of the Principal Allied and Associated Powers, on the other hand, which were in force on the 1st August, 1914, or which have since been entered into, shall *ipso facto* be binding upon the Serb-Croat-Slovene State.

All the signatories, other than the United States, ratified or acceded to the Treaty, which entered into force on 16 July 1920. The Serb-Croat-Slovene State appears to have adopted the above position generally and not merely in relation to the parties to the Treaty. Thus, on 29 September 1921, its Chargé d'Affaires in the United States addressed a note to the Secretary of State, reading in part as follows:

... the Government of the Kingdom of the Serbs, Croats and Slovenes considers the treaties and conventions concluded between the Kingdom of Serbia and the United States as applicable to the whole territory of the Serbs, Croats and Slovenes as constituted at the present.<sup>275</sup>

122. *Serbia-Switzerland Treaty of 1887.* The Swiss Collection of Laws and Ordinances 1848-1947<sup>276</sup> includes

<sup>273</sup> *N. v. Public Prosecutor of the Canton of Aargau* (1953), in *International Law Reports*, vol. 20, p. 363; and *Yearbook of the International Law Commission*, 1963, vol. II, p. 107, document A/CN.4/157, para. 106.

<sup>274</sup> United Kingdom, *Treaty Series* (1919) No. 17; G. F. de Martens, ed., *Nouveau recueil général de traités*, 3rd. series, vol. 13, p. 521. The preamble of the Treaty reads, in part, as follows:

"Whereas since the commencement of the year 1913 extensive territories have been added to the Kingdom of Serbia, and

"Whereas the Serb, Croat and Slovene peoples of the former Austro-Hungarian Monarchy have of their own free will determined to unite with Serbia in a permanent union for the purpose of forming a single sovereign independent State under the title of the Kingdom of the Serbs, Croats and Slovenes, and

"Whereas the Prince Regent of Serbia and the Serbian Government have agreed to this union, and in consequence the Kingdom of the Serbs, Croats and Slovenes has been constituted and has assumed sovereignty over the territories inhabited by these peoples, and

"Whereas it is necessary to regulate certain matters of international concern arising out of the said additions of territory and of this union, and

"Whereas it is desired to free Serbia from certain obligations which she undertook by the Treaty of Berlin of 1878 to certain Powers and to substitute for them obligations to the League of Nations, . . ."

<sup>275</sup> G. H. Hackworth, *Digest of International Law*, vol. V, pp. 374 and 375.

<sup>276</sup> Switzerland, *Recueil systématique des lois et ordonnances 1848-1947*, vol. 12, p. 238; also *ibid.*, note 1, and *ibid.*, vol. II, pp. VII and VIII.

the Serbia-Switzerland Treaty of 1887 as a treaty in force between Switzerland and Yugoslavia. Further, in 1951, the Yugoslav Government made a request for extradition. The Swiss Federal Tribunal said, *inter alia*, that

The question whether the request for extradition must be granted must be decided in conformity with the Federal Law concerning Extradition... and the Extradition Treaty between Switzerland and Serbia of November 28, [1887]; since the Kingdom of Yugoslavia and now the Federal Republic of Yugoslavia are the successor ["*haben die Nachfolge*"] of the Kingdom of Serbia, and have taken over international conventions concluded by it.

The Tribunal went on to reject the request on the ground, prescribed in the Treaty, that the offences charged were political.<sup>277</sup>

123. *Serbia-United Kingdom Treaty of 1900*.<sup>278</sup> The United Kingdom,<sup>279</sup> Australia,<sup>280</sup> New Zealand,<sup>281</sup> India,<sup>282</sup> Sierra Leone,<sup>283</sup> and Uganda<sup>284</sup> have taken the position that the 1900 Extradition Treaty between Serbia and the United Kingdom remains in effect for Yugoslavia.

124. *Serbia-United States Treaty of 1901*.<sup>285</sup> In the course of exchanges of views about the revising and replacement of the Treaty of Commerce and Navigation and the Consular Convention between Serbia and the United States of 1901, the Government of the Kingdom of the Serbs, Croats and Slovenes suggested the negotiation of conventions relating, *inter alia*, to extradition. The United States response was that

the extradition convention between the United States and Serbia, which is regarded both by this Government and the Government of the [Kingdom of the] Serbs, Croats and Slovenes as being applicable to the whole territory of the Kingdom, is a modern and comprehensive convention.

Accordingly, pending the receipt of more specific information, the Department of State was unwilling to consider the negotiation of a new treaty on that subject.<sup>286</sup> The Government of the Kingdom of the Serbs, Croats, and Slovenes did not further press the question.

125. In 1951, the Yugoslav Government sought the extradition of one Artukovic under the 1901 Treaty. The United States Government agreed that the Treaty was still in force.<sup>287</sup> The District Court held, however, that the Treaty was not in force between Yugoslavia and the United States, because, *inter alia*, the Serb-Croat-Slovene

State was a new State.<sup>288</sup> This decision was reversed by the Court of Appeals.<sup>289</sup> The Court first recorded the agreement of the parties that the changes in title and in governmental structure in 1928 and 1945 were internal and political changes having no effect on the validity of any treaty binding on the former Government of the "Kingdom of the Serbs, Croats and Slovenes". After reviewing the historical facts surrounding the establishment of the Kingdom at the end of the First World War and after quoting the United States and Yugoslav views, the Court held that

the combination of countries into the Kingdom of the Serbs, Croats and Slovenes... was formed by a movement of the Slav people to govern themselves in one sovereign nation, with Serbia as the central or nucleus nation... the combination was not an entirely new sovereignty without parentage. But even if it is appropriate to designate the combination as a new country, the fact that it started to function under the Serbian constitution as the home government and under Serbian legations and consular service in foreign countries, and has continued to act under Serbian treaties of Commerce and Navigation and the Consular treaty, is conclusive proof that if the combination constituted a new country it was the successor of Serbia in its international rights and obligations.<sup>290</sup>

Accordingly, the case was remanded to the District Court with instructions to find that the Treaty of 1901 between the United States and Serbia was a present, valid and effective treaty between the United States and the Federal People's Republic of Yugoslavia.<sup>291</sup> The treaty is listed in United States, *Treaties in Force*.<sup>292</sup>

#### 4. Annexation of Austria (1938) and restoration of its independence

126. *General*. The State Treaty for the Re-establishment of an Independent and Democratic Austria, signed on

<sup>288</sup> *Ibid.*, especially, in pp. 30-33.

<sup>289</sup> *Ivančević v. Artukovic*, in United States, *Federal Reporter, second series*, vol. 211 F 2nd, p. 565 (1954, Court of Appeals, 9th Circuit); and *Yearbook of the International Law Commission*, 1963, vol. II, pp. 110 and 111, document A/CN.4/157, paras. 132-134.

<sup>290</sup> United States, *Federal Reporter, second series*, vol. 211 F 2nd, pp. 572 and 573 (foot-note, quoting Grotius and Crandall, omitted).

<sup>291</sup> For subsequent judicial action, which proceeded on the above basis, see United States, *United States Reports*, vol. 348, p. 818 (*certiorari* denied); vol. 348, p. 889 (rehearing denied); *Artukovic v. Boyle*, in United States, *Federal Supplement*, vol. 140, p. 245 (1956) (offences held to be of a political character); *Karadzole v. Artukovic*, in United States, *Federal Reporter, second series*, vol. 247 F 2nd, p. 198 (1957) (affirming District Court ruling); United States, *United States Reports*, vol. 355, p. 393 (1958) (judgement vacated and matter remanded for further hearing); *United States ex rel. Karadzole v. Artukovic*, in United States, *Federal Supplement*, vol. 170, p. 383 (1959) (surrender of defendant denied: insufficient evidence; offences of political character). See also M. M. Whiteman, *Digest of International Law*, vol. 2, pp. 940-949; vol. 6, pp. 819-826.

<sup>292</sup> United States, *Treaties in Force* (1970), p. 253. See also Pèritch, "Conception du droit international privé d'après la doctrine et la pratique en Yougoslavie", in Académie de droit international de la Haye, *Recueil des Cours*, (1929), t. 28, pp. 299, 402 and 403. He also discusses the significance for Yugoslavia of the earlier treaties of Austria-Hungary, Bulgaria and Turkey (*ibid.*, pp. 404-410).

<sup>277</sup> *In re Kavic, Bjelanovic and Arsenijevic* (1952), *Arrets du Tribunal Fédéral Suisse*, vol. 78, pp. 39 and 45 (text in German) (English translation in *International Law Reports*, vol. 19, p. 371).

<sup>278</sup> *British and Foreign State Papers*, vol. 92, p. 41.

<sup>279</sup> List cited in foot-note 4 above.

<sup>280</sup> List cited in foot-note 5 above.

<sup>281</sup> List cited in foot-note 5 above.

<sup>282</sup> List cited in foot-note 47 above.

<sup>283</sup> See para. 58 above.

<sup>284</sup> See para. 67 above.

<sup>285</sup> W. M. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers*, vol. II, p. 1622.

<sup>286</sup> United States, *Foreign Relations of the United States 1927*, vol. III, pp. 828-865. See also G. H. Hackworth, *loc. cit.* (foot-note 277 above), p. 375.

<sup>287</sup> *Artukovic v. Boyle*, in United States, *Federal Supplement*, vol. 107, p. 11 and p. 20, note 6 (1952, District Court, Southern District, California).

15 May 1955,<sup>293</sup> refers in the preamble, *inter alia*, to the Moscow Declaration of 1 November 1943 in which the Governments of the Union of Soviet Socialist Republics, the United Kingdom and the United States of America declared that they regarded the annexation of Austria by Germany as null and void and affirmed their wish to see Austria re-established as a free and independent State, and in article 1 provides that

The Allied and Associated Powers recognize that Austria is re-established as a sovereign, independent and democratic State.

The frontiers are those existing on a January 1938 (article 5). No comprehensive provision is made in the treaties applicable to Austria before 1938 and between 1938 and 1945, but it appears to follow from the Treaty<sup>294</sup> and to be widely accepted that the treaties concluded before 1938 are, in general, now in effect. Some specific practice also seems to support this position.<sup>295</sup>

127. The cases recorded below are concerned with the effect, as seen in 1938, of the annexion of Austria on relevant treaties.

128. *Austria/Hungary-United Kingdom and Germany-United Kingdom Treaties*. In a note of 6 May 1938, the British Ambassador at Berlin, said, with reference to "the position with regard to treaties affecting Austria, in consequence of the German law of the 13th March, 1938, relating to the union of Austria with the German Reich":

2. There are certain bilateral Treaties between the United Kingdom and Austria which correspond very closely to the similar Treaties between the United Kingdom and Germany, and where the latter Treaties are of such a kind that their provisions can be applied to Austria as a part of the Reich without the necessity of any adaptation, His Majesty's Government assume that, in accordance with the ordinary legal principles in the case of these Treaties, the Treaty between the United Kingdom and Germany may be held now to cover Austria, and the corresponding Treaty between the United Kingdom and Austria may be held to have lapsed.

3. The Treaties referred to in the preceding paragraph of this Note between the United Kingdom and Germany, which in the view of His Majesty's Government in the United Kingdom may henceforth be deemed to apply without amendment to Austria as well as to Germany, include the following:

...  
Anglo-German Treaty of Extradition of the 14th May, 1872.

Anglo-German Treaty of Extradition of the 17th August, 1911.

...

<sup>293</sup> United Nations, *Treaty Series*, vol. 217, p. 223.

<sup>294</sup> See also articles 25 (10) and 28 (2).

<sup>295</sup> See e.g.: (a) An exchange of notes between Austria and France in 1958, in which France referred to the absence of a provision in the State Treaty concerning earlier treaties and said that it considered that certain treaties (including extradition treaties) "are [at present] in force between the two States". Austria, in reply, agreed (see *Recueil des traités et accords de la France*, 1960 No. 19) (b) The listing of pre-1938 treaties under "Austria" in United States, *Treaties in Force* (1970), p. 11; (c) The similar listing in the Icelandic treaty list prepared in 1964 (see footnote 250 above). Note, however, that the United Kingdom (see para. 128 below) does not appear to adhere to this position so far as extradition is concerned; see the 1955 list (foot-note 4 above), which is reflected in the Sierra Leone and Uganda lists (paras. 58 and 67 above) and *Halsbury's Statutes of England*, (third edition) vol. 13, p. 250.

4. The corresponding Treaties between the United Kingdom and Austria, which are assumed to have been replaced by the foregoing Treaties with Germany, are the following:

...

Anglo-Austrian Treaty of Extradition of the 3rd December, 1873.

Anglo-Austrian Declaration of the 26th June, 1901, amending the Extradition Treaty of 1873.

Anglo-Austrian Supplementary Extradition Convention of the 29th October, 1934.

...

6. His Majesty's Government in the United Kingdom will be glad if the German Government will be good enough to confirm that they concur in the views expressed in the previous paragraphs of this Note.

On 10 September 1938, the Minister of Foreign Affairs of Germany replied:

(3) The German Reich Government further confirms that in place of the Anglo-Austrian Agreements regarding the extradition of criminals, viz:

(a) The State Treaty of the 3rd December, 1873, between the Austro-Hungarian monarchy and the United Kingdom of Great Britain and Ireland, regarding the Reciprocal Extradition of Criminals;

(b) The Supplementary Declaration of the 26th June, 1901, regarding the amendment of the last paragraph of Article XI of the Treaty of the 3rd December, 1873;

(c) The Supplementary Convention of the 29th October, 1934, regarding the Reciprocal Extradition of Fugitive Criminals; the corresponding Anglo-German Agreements are applicable in the State of Austria; these are:

(1) The Anglo-German Extradition Treaty of the 14th May, 1872;

(2) The Anglo-German Extradition Treaty of the 17th August, 1911;

and the following agreements (not mentioned in Your Excellency's note of the 6th May), viz:

(3) The Anglo-German Agreement of the 10th December, 1928, regarding the application of the Anglo-German Extradition Treaty of the 14th May, 1872, to certain mandated territories; and

(4) The understanding of the 28th February, 1933, regarding Extradition Facilities between the German Reich and Trans-Jordan.<sup>296</sup>

129. *Austria-United States and Germany-United States Treaties of 1930*. On 22 July 1939, the German Chargé d'Affaires in Washington, in a note to the Secretary of State, said:

The Government of the German Reich considers the Extradition Treaty between the Republic of Austria and the United States of America, of January 31, 1930,<sup>297</sup> to have ceased to exist in consequence of the reunion of Austria with the German Reich. Since that time, the German Extradition Law has been introduced into the State of Austria by the order of April 26, 1939 . . .

The Government of the German Reich therefore proposes that the operation of the Extradition Treaty of July 12, 1930,<sup>298</sup>

<sup>296</sup> League of Nations, *Treaty Series*, vol. CXCIV, p. 313.

<sup>297</sup> *Ibid.*, vol. CVI, p. 379.

<sup>298</sup> *Ibid.*, vol. CXIX, p. 247.

between the German Reich and the United States of America . . . shall now extend also to the territory in which the former Austro-American Treaty was effective.

On 2 November the United States Government agreed to the proposal.<sup>299</sup>

##### 5. Establishment of the United Arab Republic, 1958

130. *General.* The Constitution of the United Arab Republic and a letter from the Republic's Foreign Minister to the Secretary-General of the United Nations both affirmed that all international treaties and agreements concluded by Egypt and Syria would remain valid within their regional limits.<sup>300</sup>

131. *Ottoman Empire-United States Treaty of 1874.*<sup>301</sup> The United States continued to list this Treaty, which it considers to be in force between Egypt and the United States, in *Treaties in Force*, after the establishment of the United Arab Republic.<sup>302</sup> The relevant constitutional provision was also included in the 1960 and 1961 issues of *Treaties in Force*.

##### 6. Dissolution of the Federation of Rhodesia and Nyasaland, 1963

132. *Federation of Rhodesia and Nyasaland-South African Treaty of 1962.*<sup>303</sup> In notes exchanged prior to the dissolution of the Federation on 31 December 1963, South Africa and Southern Rhodesia agreed that the Treaty would continue to apply between them.<sup>304</sup> At the relevant time, this exchange had not, however, been published as required under South African law, and was of no effect in South African law. Southern Rhodesia in 1965 sought the extradition of one Eliasov and was accordingly obliged to depend, in the South African courts, solely on the treaty of 1962. The Transvaal Provincial Division of the South African High Court held that

The Federation as a whole was a State with treaty-making capacity. That State was dissolved into three territories and so

<sup>299</sup> United States *Foreign Relations of the United States 1939*, vol. II, pp. 566-567. Cf. a decision of the German Supreme Court (in Civil Matters) in 1939 that the provisions of an Austro-German Treaty concerning the administration of guardianships remained in effect after the annexation of Austria, in *Annual Digest and Reports of Public International Law Cases*, vol. 10, p. 103.

<sup>300</sup> Article 69 of the Provisional Constitution, and note, of 1 March 1958 reproduced in *Yearbook of the International Law Commission, 1962*, vol. II, p. 104, document A/CN.4/149 and Add. 1, para. 18.

<sup>301</sup> W. M. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers*, vol. II, p. 1341.

<sup>302</sup> United States, *Treaties in Force* (1958), p. 51; (1959), p. 165; (1960), p. 174; (1961), p. 180; (1962), p. 192.

<sup>303</sup> United Nations, *Treaty Series*, vol. 458, p. 59. The treaty was made necessary by South Africa's withdrawal from the Commonwealth; it was no longer part of Her Majesty's dominions for the purposes of the Fugitive Offenders Act 1881.

<sup>304</sup> For the text, see schedule to South African Proclamation No. R.151, 1965, (in South Africa, *Government Gazette Extraordinary*, No. 1156 of 25 June 1965 (Regulation Gazette, No. 507).

ceased to exist. With it ceased its treaties. That is the natural and normal sequel.<sup>305</sup>

Accordingly the request for extradition was rejected. The exchange of notes has now been published as required by South African law.<sup>306</sup>

133. On the other hand, Malawi was later held to have remained bound by the treaty after independence,<sup>307</sup> and, according to one writer, the third former member of the Federation—Zambia—expressly denounced the treaty after independence.<sup>308</sup> Further, Zambia and Malawi seem to consider themselves bound by United Kingdom extradition treaties which applied to their territories before the creation of the Federation.<sup>309</sup>

## Summary

### CASES OF INDEPENDENCE OF FORMER NON-METROPOLITAN TERRITORIES

134. At least twenty-six new States and thirty-five of the other parties have taken the position that for one reason or another, some of which are explored below, the bilateral extradition treaties in question have effect for new States to the territory of which they were applicable before independence. This continuity has been achieved or recognized on the procedural level by several devices which will now be summarized.

135. First, there have in many cases been exchanges of views on the diplomatic level. It should be noted that the views of the parties to the exchanges have not always been in precise accord as to the basis of continuity. They have taken the following forms:

(a) The interested State has taken the position that the pre-independence treaty in question is no longer in effect and has accordingly, in some cases, suggested that a completely new agreement be concluded (for instance, Israel in its notes to Belgium, and France; Tanganyika generally; Madagascar in notes to the United States and Uganda. See also Argentina-Pakistan; Belgium-Pakistan; and African States formerly administered by France-Ghana). In some of these cases, however, it was subsequently agreed that the pre-independence treaty would apply to relations between the parties or would apply provisionally between them pending the conclusion of a new treaty.

(b) The interested State, without expressly indicating what view it takes of the continued force of the pre-independence treaty, has proposed that, by an agreement constituted by the proposal and the reply, the treaty,

<sup>305</sup> *S. v. Eliasov* 1965 (2) S.A. 770 (T), 773, noted by C. J. R. Dugard, "Succession to Federal Treaties on the Dissolution of a Federation", in *The South African Law Journal*, vol. 82, part III, (1965), p. 430.

<sup>306</sup> See foot-note 304 above, and *S. v. Ellasov* 1967 (4) S.A. 583 (American Developments).

<sup>307</sup> *S. v. Bull.*, discussed in para. 76 above.

<sup>308</sup> D. P. O'Connell, *State Succession . . .*, *op. cit.*, p. 177; cf. C. J. R. Dugard, *op. cit.* (foot-note 172 above), p. 253.

<sup>309</sup> See paras. 75-80 and 83-86 above.

from some future date (the date of the reply or the date on which notice is given of compliance with constitutional formalities), should govern the relations between the parties, pending the conclusion of a new treaty (the Netherlands-Tanzania, Uganda, Kenya and Malawi).<sup>310</sup> In each case the proposal was accepted.

(c) In the bulk of the instances of an exchange of diplomatic correspondence on the question, the States concerned have, without being explicit about the prior continued effect of the pre-independence treaties,<sup>311</sup> agreed that the treaties should continue to have effect between them; in some cases, they have agreed to maintain the treaty in force (or to consider it as remaining in force), with effect from an earlier date (Tanzania-Switzerland, and the United States; Switzerland-Malawi, and Uganda; Botswana-the United States); and in others, they have agreed, with no indication of the effective date, either to consider them to be in force, or that the treaties shall regulate their relations (Belgium-India; Switzerland-Pakistan; Malaya-Thailand; Belgium-Tanzania (agreement to maintain provisionally in effect); and Kenya-Switzerland, and the United States).

(d) The States concerned have taken positions in the exchanges recognizing the continuing effect of the pre-independence treaties (Pakistan-Argentina, and Belgium, Liberia and Switzerland and Ghana; Ghana-United States;<sup>312</sup> United States-Malaya; Malawi-United States; Singapore-United States; Iceland-Australia, Canada, Ceylon, India and New Zealand; the conventions supplementary to the British treaties, to which the self-governing Dominions could accede, the instruments extending the treaties to mandated territories, the Canada-United States amendments to the British treaties and the United States treaties with New Zealand and South Africa replacing the earlier British treaties might also be mentioned here).

Some of the more formal aspects of these exchanges may also be relevant to an assessment of their legal significance; thus, in several cases the original proposal and reply were expressly stated to constitute an agreement; in other cases domestic constitutional processes may also be relevant; and some of the exchanges were registered with the Secretariat of the United Nations under Article 102 of the Charter.

136. Secondly, interested States have taken appropriate unilateral action on the international level (sometimes, by virtue of the other State's response, the action can be said to be bilateral and could be included in para. 135 above). Thus, one State has formally given notice of termination of a treaty to States to which the treaty had been extended before independence (Sweden-Australia, Canada, Ceylon, India, Ireland, New Zealand, Pakistan and South Africa, but not, it seems, Burma; also, United Kingdom-Tunisia). Others have formally invoked the treaty in question without, it appears, any relevant prior

action (Canada-United States; Ireland-Belgium, Switzerland and the United States; Malawi-South Africa; Zambia-United States; Lebanon-Palestine; Indonesia-United Kingdom; Liberia-Democratic Republic of the Congo). In other cases, a State has indicated in a note to the other interested State (apparently without response) that it considers the treaty to be still in effect (Cyprus and Malta-Italy). In another group of cases, the new State exercised rights under peace treaties to revise extradition treaties extended to it before independence (Ceylon-Finland, Hungary, Italy and Romania).

137. Thirdly, unilateral action has been taken by interested States at the national level. Thus, a number of countries have prepared treaty lists or collections which either include treaties which were applied to them before independence (Australia, Canada, India, New Zealand and Nigeria) or list treaties, to which they were original parties, having reference to some of the States to the territory of which the treaty was applicable before independence (Iceland and the United States). In many other cases, this national action has taken legislative form; several States have enacted extradition legislation the effect of which is to keep in effect the legislation implementing pre-independence extradition treaties. It appears to be assumed that the treaties themselves have remained in effect (for instance, Australia, Ghana, India, Kenya, New Zealand, Sierra Leone, Singapore, South Africa, Swaziland, Uganda; cf., however, the legislation enacted by Botswana, Malawi, Malaya, Nigeria and Zambia).<sup>313</sup> In two cases, further executive action taken under this legislation has listed the countries with which, it is considered, treaties are in force (Sierra Leone and Uganda).

138. The practice of denying continuity of the treaty, reviewed above, has occurred primarily in bilateral exchanges,<sup>314</sup> first, between the new State and the other party to the treaty (Ivory Coast and the United States; Madagascar and Uganda and the United States; France and Uganda; Tanganyika in general (but note that the United Republic of Tanzania has concluded several agreements concerning the continued force of the treaties); and Tunisia and the United Kingdom); and, secondly, between the new State and the predecessor State (Nigeria and the United Kingdom, concerning the treaties, with the Federal Republic of Germany and Israel).

139. Many of these unilateral and bilateral actions indicate only that the State in question considers that the treaty is or is not in effect. As noted, however, the actions in some instances go further and some of the relevant elements can be mentioned here.

140. First, in a few cases the intention of the interested States has been invoked. Thus, in one, case it was said that it was the intention of the parties to the extradition treaty that only either party and not an independent third party should be able to invoke it (Nigeria and the

<sup>310</sup> There were some variations in the wording of the proposals; three were subject to the legislation of the countries and one proposed that "an understanding be established".

<sup>311</sup> See, however, para. 143 below on the effect of unilateral statements concerning treaty rights and obligations.

<sup>312</sup> See also para. 142 below.

<sup>313</sup> Cf., however, also the list of orders published in the *Laws of Zambia*, 1965 revised edition.

<sup>314</sup> That unilateral negative practice which consists of acts of omission rather than of commission (e.g., non-listing in treaty lists) has not been covered in the paper.

United Kingdom, concerning the treaty with the Federal Republic of Germany). On the other hand, it would appear to have been the intention of the interested States that a treaty signed a day before the independence of one of the parties would have effect after independence (South Africa–Swaziland).

141. Secondly, in other cases there have been direct references to the rules of international law. Thus, one State has asserted that a treaty continues to bind it by virtue of a devolution clause and “the inheritance rules of public international law” (Cyprus–Italy). On the other hand, another State has declared that there is no uniform practice as to the effect on extradition treaties of modifications of the territory of a party, but the extinction of the relationship is the most common solution (Madagascar–the United States; see also the United Republic of Tanzania’s position on extradition treaties).

142. Thirdly, in several cases account has been taken of devolution agreements concluded between the new State and the State which was formerly responsible for its international relations. Thus, in one case the other party to the treaty expressed the view that “the assumption by” the new State of all obligations and responsibilities by the devolution agreement “extends the treaty into force between” it and the new State (United States–Malaya, but note Malaya’s reply; see also Italy’s view vis-à-vis Singapore). A new State, in one instance, also declared that an extradition treaty continued to bind it “by virtue of the devolution clause” of a treaty with the predecessor State and the inheritance rules of public international law (Cyprus–Italy; see also Ghana–the United States). On the other hand, one new State took the position that an extradition agreement which was signed and ratified but not in force before independence was “not the type of international agreement that it was envisaged the [devolution] agreement should cover”. It agreed that another extradition agreement which was in force fell into the class of treaties the rights and obligations of which were to be assumed, but considered, for reasons already mentioned,<sup>315</sup> that it was not bound by it (Nigeria–the United Kingdom).

143. Fourthly, interested States have, in a number of cases, taken account of the unilateral statements made by several new States concerning their treaty rights and obligations. Thus, one new State has taken the position that the extradition treaty would remain in effect only until the end of the period covered by the unilateral declaration and has proposed that the treaty be kept in force thereafter by agreement. In two cases at least, the other parties have concluded agreements whereby it is established that the treaty remains in effect from that date (United Republic of Tanzania–Switzerland, and the United States). In the case of three other new States, exchanges of diplomatic correspondence have recorded that extradition treaties remain in effect from the date on which the unilateral declaration ceases to have effect. The other States involved appear to have accepted that the treaty had continued to be in force during the prescribed period (Uganda–Switzerland; Kenya–Switzerland, and

the United States; and Malawi–Switzerland, and the United States). In at least one other case, notes were exchanged to confirm that an extradition treaty fell within the scope of a particular unilateral declaration (Lesotho–United States).

144. Fifthly, in a number of cases, the exchanges have expressly established that one of the parties could enter into negotiations about the treaty and/or that it would remain in effect until replaced by a new agreement between the parties (for instance: Ceylon; Ghana–United States; United Republic of Tanzania; Netherlands; Switzerland).

145. The introduction made the point that the extradition treaties have become composed in many respects of a set of standard clauses. This general acceptability of the substantive content of extradition treaties is reflected in new legislation enacted since independence by a large number of Commonwealth States; that legislation retains basic elements of the old scheme, often provides for the continued domestic implementation of the pre-independence treaties, and, in addition, extends that body of law to apply also to rendition within the Commonwealth.<sup>316</sup> Extradition between many of the territories formerly subject to French administration and between France and those territories is governed by a network of treaties negotiated since independence.<sup>317</sup>

#### B. CASES OTHER THAN CASES OF INDEPENDENCE OF FORMER NON-METROPOLITAN TERRITORIES

146. The practice reviewed above seems to indicate that the impact of the establishment and dissolution of unions or federations, secession, annexation, restoration of independence, etc. on pre-existing bilateral extradition treaties varied according to the intention of the States concerned, the nature of the change involved, and the circumstances surrounding the particular case in question.

147. Iceland, which moved constitutionally to independence, is generally considered to have remained bound by extradition treaties, while Czechoslovakia, Finland and Poland were generally not considered to be bound by extradition treaties applied formerly to their respective territories. The practice of Austria and Hungary with States other than Allied and Associated Powers seems to suggest, that the existing extradition treaties continue in the case of the dissolution of a union, if there is a clear continuity of the entity involved. Austria tended to deny that continuity and was generally held not to be bound by the extradition treaties of the Dual Monarchy, whereas Hungary, which considered itself the same entity as during the Dual Monarchy, did remain bound. The

<sup>316</sup> One basic difference is that the Commonwealth scheme is not dependent on the conclusion of treaties.

<sup>317</sup> See (a) the General Convention for Co-operation in Matters of Justice of 12 September 1961 (*Journal officiel de la République Malgache* of 23 December 1961, p. 2242) and (b) the bilateral agreements with France for co-operation in matters of justice, listed conveniently in D. P. O’Connell, *State Succession . . .*, *op. cit.*, vol. I, pp. 83-88.

<sup>315</sup> See para. 140 above.

extradition treaties concluded by the former Serbia were generally considered to be binding upon the Serb-Croat-Slovene State and to be applicable to the whole of the territory of the new State. Practice relating to the annexation of Austria and the restoration of its independence suggests that the extradition treaties of the new sovereign State are extended to the annexed territory and that extradition treaties applicable to that territory before the annexation do not have effect during the duration of the annexation, although they may be revived after the restoration of the independence of the annexed territory. In accordance with the position explicitly taken by the United Arab Republic, treaties applicable to Egypt or Syria were generally considered to have remained in force unaffected by the changes in 1958 and 1961. With regard to the constitution and dissolution of the former Federation of Rhodesia and Nyasaland, it should be mentioned that the changes involved territories which were not at the relevant times (1953 and 1963) independent, although Southern Rhodesia before 1953, and the Federation during its existence, did have limited treaty-making capacity.

148. In some instances, the interested States have regulated questions of succession in respect of pre-existing treaties by formal agreements. Thus, peace treaties (those of Allied and Associated Powers with Austria and Hungary) and other multilateral agreements concluded in the context of the peace settlement which followed the First World War (those of the Allied and Associated

Powers with the Serb-Croat-Slovene State) laid down general rules governing the matter between the parties. Cases are also recorded where two States concluded a bilateral treaty whereby they agreed to apply between themselves specific pre-existing extradition treaties (Austria and the Netherlands, and Switzerland). The procedure of the exchange of notes has frequently been used to ascertain the effects of a change in the international status of a given country on pre-existing extradition treaties (Hungary and Bulgaria, and Switzerland; Finland and Sweden; Germany and the United Kingdom and the United States; South Africa and Southern Rhodesia). When the States concerned acknowledge continuity, the exchanges use expressions such as "the treaty is in force", "the treaty remains in effect" or "the treaty continues to be valid".

149. The recorded unilateral official statements (Hungary; Serb-Croat-Slovene State) and decisions of national courts (Switzerland and the United States with regard to Yugoslavia), the negotiation and conclusion of new extradition treaties (for instance, Czechoslovakia, Finland, Poland) and the date contained in official national collections of treaties (Iceland, Sweden, Switzerland, the United States) seem to confirm that the position of the States concerned with regard to continuity or discontinuity in the application of a given pre-existing extradition treaty varied according to factors such as those indicated in paragraph 146 above.

## SUCCESSION OF STATES:

*(b) Succession in respect of matters other than treaties*

[Agenda item 3(b)]

## DOCUMENT A/CN.4/226

Third report on succession in respect of matters other than treaties,  
by Mr. Mohammed Bedjaoui, Special Rapporteur

*Draft articles with commentaries on succession to public property*

[Original text: French]  
[24 March 1970]

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#### EXPLANATORY NOTE: ITALICS IN QUOTATIONS

An asterisk inserted in a quotation indicates that, in the passage immediately preceding the asterisk, the italics have been supplied by the Special Rapporteur.

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**Part One****Text of draft articles on succession to public property**

The Special Rapporteur suggests the following articles to cover the subject of succession to public property:

**ARTICLE 1. DEFINITION AND DETERMINATION OF PUBLIC PROPERTY**

For the purposes of these articles, "public property" means all property, whether tangible or intangible, and rights and interests therein, belonging to the State, a territorial authority thereof or a public body.

Save in the event of serious conflict with the public policy of the successor State, the determination of what constitutes public property shall be made by reference to the municipal law which governed the territory affected by the change of sovereignty.

*Variant to article 1*

For the purposes of these articles, "public property" means all property, rights and interests which, on the date of the change of sovereignty and in accordance with the law of the predecessor State, were not under private ownership in the territory ceded by that State.

**ARTICLE 2. PROPERTY APPERTAINING TO SOVEREIGNTY**

Property appertaining to sovereignty over the territory shall devolve, automatically and without compensation, to the successor State.

Property of the territory itself shall pass within the juridical order of the successor State.

**ARTICLE 3. PUBLIC FUNDS, GOVERNMENT SECURITIES, DEBT-CLAIMS**  
[to be formulated later]**ARTICLE 4. PROPERTY OF PUBLIC ESTABLISHMENTS**  
[to be formulated later]**ARTICLE 5. PROPERTY OF LOCAL AUTHORITIES**  
[to be formulated later]**ARTICLE 6. PROPERTY OF FOUNDATIONS**  
[to be formulated later]**ARTICLE 7. ARCHIVES AND PUBLIC LIBRARIES**

Archives and public documents of every kind relating directly or belonging to the territory affected by the change of sovereignty, and public libraries of that territory, shall,

wherever they may be situated, be transferred to the successor State.

The successor State shall not refuse to hand over copies of such items to the predecessor State or to any third State concerned, upon the request and at the expense of the latter State, save where they affect the security or sovereignty of the successor State.

**ARTICLE 8. PROPERTY SITUATED OUTSIDE THE TERRITORY**

Subject to the application of the rules relating to recognition, public property of the ceded territory itself which is situated outside that territory shall pass within the juridical order of the successor State.

The ownership of such property shall devolve to the successor State in cases of total absorption or decolonization.

**Part Two****Text of draft articles with commentary****Article 1. Definition and determination of public property**

For the purposes of these articles, "public property" means all property, whether tangible or intangible, and rights and interests therein, belonging to the State, a territorial authority thereof or a public body.

Save in the event of serious conflict with the public policy of the successor State, the determination of what constitutes public property shall be made by reference to the municipal law which governed the territory affected by the change of sovereignty.

*Variant to article 1*

For the purposes of these articles, "public property" means all property, rights and interests which, on the date of the change of sovereignty and in accordance with the law of the predecessor State, were not under private ownership in the territory ceded by that State.

**COMMENTARY**

(1) The Special Rapporteur suggests two definitions of public property.

One of them simply refers to such property as being the opposite of private property. It may well be considered expedient to resort to a definition *a contrario*, since the notion of public property covers such a variety of situations and cases that it has become rather a complicated matter to arrive at a comprehensive definition.

However, the distinction between public and private property is not always absolutely rigid under some legal systems, and legal technicalities in certain countries produce situations where the right of ownership is not clearly attributed either to the public authorities or to individuals.

Despite this, a definition making public property anything that is not manifestly private property might have some merit because of the simplicity of the criterion adopted.

An alternative definition would refer to public property as being property which is of a "public" character because it belongs to the State, a territorial public authority or a public-law corporation or establishment.

(2) Whatever the definition, however, for the purposes of the following articles, it does not obviate two difficulties:

(a) In the first place, under some legal systems public property is divided into what are called the "public domain" and the "private domain" of the State. However, such terminology is not used everywhere. It is unknown, for instance, in Anglo-American law and in the law of socialist countries. It was highly regarded in the law of continental European countries and was exported to some parts of the third world, but it is tending somewhat to die out in recent times. Yet the traditional theory of State succession gives quite considerable prominence to this distinction, which is used to produce effects that vary according to the type of domain.

(b) What is encompassed by public property varies in magnitude, not only from one political system to another, but even among the members of one political family.

(3) In view of these difficulties, it did not seem appropriate, in this attempt at codification, to formulate rules based on the existence of distinctions, such as public domain and private domain, which are not applied everywhere and do not constitute the denominator common to all legal systems. The difficulty is a major one, however, since it is not easy to find such a common denominator.

(4) One is confronted with three problems:

(a) An internationalist approach to the notion of public property is hazardous, since there is in international law no autonomous criterion for determining what constitutes public property.

(b) Determination of this by treaty or by tribunals or other jurisdictions has its limits and does not resolve all problems.

(c) Whatever the circumstances, recourse to municipal law seems inevitable. The question is, however, which legislation—that of the predecessor State or that of the successor State—should be applied for this purpose.

These three points are discussed individually below.

#### I. LACK OF AN AUTONOMOUS CRITERION FOR DETERMINING WHAT CONSTITUTES PUBLIC PROPERTY

(5) Public property may be defined by its *public character*. Such property generally has three characteristics: (a) it is subject to a special legal régime governed by municipal public law; (b) it is publicly owned; (c) it is used for all purposes which come within the objectives of the State. Again, as in some international agreements, such property may simply be defined as property *belonging to a public-law corporation*.

With either of these approaches, however, recourse to municipal law is essential. This appears obvious in the

first case, if for no other reason than that the property is subject to a public-law régime. It is equally true in the second case, where the public-law corporation (e.g., a public utility undertaking or a public establishment) can be defined only by reference to municipal law. It can hardly be otherwise, since the characterization of property pertaining to a territory can only be a subject for municipal law.

(6) The fact that international law cannot be completely substituted for municipal law in this matter was emphasized by the Franco-Italian Conciliation Commission in an award relating to the property of the Order of Saint Maurice and Saint Lazarus, when it observed that "customary international law has not established any autonomous criterion for determining what constitutes State property".<sup>1</sup>

International treaty law has accordingly taken precautions against this unavoidable deficiency and provided a special definition peculiar to each case dealt with.

#### II. DETERMINATION BY TREATY OF WHAT CONSTITUTES PUBLIC PROPERTY

(7) Treaties of cession quite often describe public property, in some cases in detail.

Article 10 of the Treaty of Utrecht (11 April 1713) states:

The [...] most Christian King shall restore to the Kingdom and Queen of *Great Britain*, to be possessed in full Right for ever, the Bay and Straits of Hudson, together with all Lands, Seas, Sea-Coasts, Rivers and Places situate in the said Bay and Straits, and which belong thereunto, no Tracts of Land or of Sea being excepted, which are at present possessed by the Subjects of *France* [...] as well as any Buildings there made [...] and likewise all Fortresses there erected [...] together with all the Cannon and Cannon-Ball which are therein, as also with a Quantity of Powder, if it be there found, in proportion to the Cannon-Ball, and with the other Provision of War usually belonging to Cannon [...].<sup>2</sup>

Article 11 of the Treaty of 30 April 1803, whereby France sold Louisiana to the United States of America, provided for the transfer of "all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private property".<sup>3</sup>

The Spanish-American Treaty of Peace signed in Paris on 10 December 1898 effected the transfer of (a) property in the *public domain*, as it existed and with its legal status, (b) property in the *domain of the Crown*, and (c) movable and other property accessory to property in the public domain. Accordingly, article VIII of the Treaty required

<sup>1</sup> Franco-Italian Conciliation Commission, verdict of 26 September 1964, "Dispute regarding property belonging to the Order of St. Maurice and St. Lazarus". President: Professor P. Guggenheim. (*Annuaire français de droit international*, XI, 1965 (Paris, C.N.R.S.), p. 323).

<sup>2</sup> F. Israel, ed., *Major Peace Treaties of Modern History, 1648-1967* (New York, Chelsea House publishers in association with McGraw-Hill Book Co., 1967), vol. I, pp. 207-208. French text in M. de Clercq, *Recueil des Traités de la France* (Paris, A. Durand et Pédone-Lauriel, édit., 1880), t. I (1713-1802), pp. 5-6.

<sup>3</sup> G. F. de Martens, ed., *Recueil des principaux traités* (Göttingen, Librairie Dieterich, 1831), t. VII, p. 709.

Spain to relinquish to the United States of America, in the ceded territories,<sup>4</sup> "all the buildings, wharves, barracks, forts, structures, public highways, and other immovable property which, in conformity with law, belong to the public domain, and as such belong to the Crown of Spain".<sup>5</sup>

Article 2 of the Treaty of 9 January 1895, whereby King Leopold ceded the "Independent State of the Congo" to the Belgium State, provided that:

The cession includes all the immovable and movable assets of the Independent State, in particular:

1. The ownership of all lands belonging to its public or private domain [ . . . ]
2. Shares and founder's shares. . . .
3. All buildings, constructions, installations, plantations and properties whatsoever [ . . . ] of the Independent State [of the Congo], movable property of every kind and livestock owned by the Independent State, its ships and boats, together with their equipment, and its military arms equipment;
4. The ivory, rubber and other African products which are at present the property of the Independent State and the stores and other merchandise belonging to it.<sup>6</sup>

Article II of the Treaty of Peace of Shimonoseki of 17 April 1895 between China and Japan,<sup>7</sup> and article I of the Treaty of Retrocession of 22 September 1895 between the same States, provide for reciprocal cessions of territories "together with all fortifications, arsenals, and public property thereon".<sup>8</sup>

When the State of Cyprus became independent in 1960, the Treaties concerning its establishment indicated, in a wealth of detail and by means of annexes, schedules, plans and so forth, what public property devolved to the new Republic. For the purposes of these Treaties, a number of expressions such as "movable property" and "immovable property" were defined.<sup>9</sup>

<sup>4</sup> The territories in question were Cuba, Puerto Rico, the islands in the West Indies, the island of Guam and the Philippine archipelago.

<sup>5</sup> G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Librairie Dieterich, 1905), 2nd series, t. XXXII, p. 76. In the Philippines and Guam, however, Spain was to retain "stands of colours, uncaptured war-vessels, small-arms, guns of all calibres, with their carriages and accessories, powder, ammunition, live-stock, and materials and supplies of all kinds, belonging to the land and naval forces of Spain" [article V, last paragraph] (*ibid.*, p. 75).

<sup>6</sup> G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Librairie Dieterich, 1896), 2nd series, t. XXI, p. 693.

<sup>7</sup> *Ibid.*, p. 642.

<sup>8</sup> See also the Treaty of Portsmouth of 5 September 1905 between Japan and Russia. G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Librairie Dieterich, 1906), 2nd series, t. XXXIII, pp. 3-12.

<sup>9</sup> Treaties concerning the establishment of the Republic of Cyprus signed on 16 August 1960 at Nicosia, with annexes, schedules, plans, etc. United Nations, *Treaty Series*, vol. 382, pp. 3-252. See, in particular, annex E, section 1, paragraph 4, which provides as follows:

"4. In this Section:

"(a) 'property' means —

(i) property, whether movable or immovable, tangible or intangible; and

(ii) rights of every description;

"(b) a reference to specific property includes a reference to rights in, over, or related to that property; and

"(c) 'property of the Government of the Colony of Cyprus' means property vested in that Government or in Her Britannic

Agreements sometimes include annexes with lists of the public property transferred.<sup>10</sup>

Paragraph 1 of annex XIV to the 1947 Treaty of Peace with Italy,<sup>11</sup> after providing for the transfer of all Italian State and para-statal property to the successor State, refers in the second sub-paragraph to the criterion of ownership of the property in the following terms:

The following are considered as State or para-statal property for the purposes of this Annex: movable and immovable property of the Italian State, of local authorities and of public institutions and publicly owned companies and associations, as well as movable and immovable property formerly belonging to the Fascist Party or its auxiliary organizations.<sup>12</sup>

(8) Treaty definitions of public property are not always specific,<sup>13</sup> however, and even when they are detailed they

Majesty for the purposes of that Government or in some other person or authority on behalf of that Government immediately before the date of entry into force of this Treaty. It is understood that the property of public utility corporations does not fall within this sub-paragraph." (*Ibid.*, p. 130).

See also the various exchanges of notes in the same volume.

<sup>10</sup> See, for example, the agreement concluded after France's withdrawal from Lebanon, concerning monetary and financial relations between the two countries, signed at Paris on 24 January 1948 (United Nations, *Treaty Series*, vol. 173, pp. 117-119).

Cf. in particular the "Agreement between Italy and Ethiopia concerning the settlement of economic and financial matters issuing from the Treaty of Peace and economic collaboration", signed at Addis Ababa on 5 March 1956, which includes three annexes, A, B, and C, in the form of lists of objects of historical value that had been or were to be returned to Ethiopia (United Nations, *Treaty Series*, vol. 267, pp. 204-216).

<sup>11</sup> Treaty of Peace with Italy, signed at Paris on 10 February 1947 (United Nations, *Treaty Series*, vol. 49, annex XIV, p. 225).

<sup>12</sup> The United Nations has also provided a definition of public property in a number of cases; article I, paragraph 2, of General Assembly resolution 530 (VI) entitled "Economic and financial provisions relating to Eritrea", of 29 January 1952, provides as follows:

"The property referred to in paragraph 1 shall be taken as comprising:

"(a) The public property of the State (*demanio pubblico*);

"(b) The inalienable property of the State (*patrimonio indisponibile*);

"(c) The property of the Fascist Party and its organizations as listed in article 10 of the Italian Royal Decree No. 513 of 28 April 1938;

"(d) The alienable property of the State (*patrimonio disponibile*);

"(e) The property belonging to the autonomous agencies (*aziende autonome*) of the State which are: [ . . . ]

"(f) The rights of the Italian State in the form of shares and similar rights in the capital of institutions, companies and associations of a public character which have their *siège social* in Eritrea [ . . . ]"

See also articles I and II of General Assembly resolution 388 (V), of 15 December 1950, entitled "Economic and financial provisions relating to Libya".

<sup>13</sup> In some cases of decolonization, what constitutes public property is determined not by a treaty definition but by a constitution granted by the former metropolitan country.

Cf., for example, the Constitution of the Federation of Malaya, 1957, which provided that all property and assets in the Federation or one of the colonies which were vested in Her Britannic Majesty should on the date of proclamation of independence vest in the Federation or one of its States. The term used, being general and without restrictions or specifications, authorizes, the transfer of all the property, of whatever kind, of the predecessor State. See United Nations Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No.: E/F.68.V.5), pp. 84-85.

give rise to difficulties of interpretation which inevitably bring one back to municipal law. Accordingly, treaties or other international instruments make provision for various bodies or procedures designed to articulate the treaty law with municipal law. For instance, General Assembly resolution 388 (V) of 15 December 1950, relating to Libya, set up a United Nations Tribunal in Libya; the peace treaties which terminated the First World War set up a Reparation Commission and a number of international arbitral bodies; and the Treaty of Peace with Italy of 10 February 1947 set up a Franco-Italian Conciliation Commission.

Thus, what constitutes public property is determined not only by means of treaties, but also by *international jurisdictions*.

For example, in his award in the case relating to German reparations under article 260 of the Treaty of Versailles, the arbitrator took the view<sup>14</sup> that the term "public utility undertaking" is "not capable of precise definition" and that it was more prudent to "make a declaratory and non-exhaustive enumeration", as the Reparation Commission had done.<sup>15</sup>

However, there hardly seem to have been any cases of treaties or of special jurisdictions on which it was possible completely to avoid having recourse to municipal law. In the award relating to the property of the Order of St. Maurice and St. Lazarus,<sup>16</sup> the Franco-Italian Conciliation Commission, seeking to clarify the notion of public property for the purposes of annex XIV to the Treaty of Peace with Italy, observed that "legal theory and practice with regard to State succession, where there is no explicit rule, *allow of the applicability of the rules of the ceding State* \* which is transferring its property to the cessionary State [ . . . ]"

<sup>14</sup> Arbitral award concerning the interpretation of article 260 of the Treaty of Versailles: arbitrator M. Beichmann (*Publications de la Commission des réparations*, annex 2145 a, Paris, 1924, and *United Nations, Reports of International Arbitral Awards*, vol. I (United Nations publication, Sales No.: 1948.V.2), pp. 467-468). One of the thirteen questions put to the arbitrator — the second one — concerned the definition of the term "public utility undertaking" as used in article 260 of the Treaty of Versailles.

<sup>15</sup> Cf. the decisions of the Franco-Italian Conciliation Commission, especially on the "Dispute concerning the apportionment of the property of local authorities whose territory was divided by the frontier established under article 2 of the Treaty of Peace. Decisions Nos. 145 and 163 rendered on 20 January and 9 October 1953 respectively" (United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No.: 64.V.3), pp. 501-549).

See also the decisions of the United Nations Tribunal in Libya, especially the awards of 27 June 1955 concerning the public character of institutions, companies and associations.

Cf. also — although the problem did not arise in the same manner — the arbitral award of Professor Keller concerning the division of the Canton of Basel into two half-cantons pursuant to the decision of the Federal Diet of 1833 (P. Guggenheim: *Traité de droit international public* (Geneva, Librairie de l'Université Georg et Cie S. A., 1953), t. I, p. 467).

<sup>16</sup> Award cited in foot-note 1 above. The property in dispute between Italy and France was the Little St. Bernard Hospice and the Chanousia botanical garden, also on the Little St. Bernard Pass. Before the Second World War they were in Italian territory, which became French territory after the Treaty of Peace with Italy.

This problem of the applicability of municipal law is the next point to be discussed.

### III. RECOURSE TO MUNICIPAL LAW

(9) This raises a number of questions: (a) Is the municipal law of the successor State or the municipal law of the predecessor State to be applied? (b) Is recourse to be had to the law of the predecessor State or to the law in force in the territory affected by the change of sovereignty? (c) How much weight is to be given to cases in which the application of the law of the successor State nevertheless prevailed? (d) What effects are changes made at the last moment by the predecessor State in its legislation applicable to public property to be recognized as having?

#### A. Legislation of the precedent State or law of the successor State?

(10) The Special Rapporteur confesses that he is hard put to indicate which of the two bodies of legislation should be applied in order to determine what constitutes public property. It seems logical to opt for that of the predecessor State, but this involves the risk of formulating a rule that may be violated on many and frequent occasions because, as will be seen below, it does not sit well with prevailing practice. It would therefore mean setting up a rule that was illusory and would have no real force. On the other hand, to accept the applicability of the legislation of the successor State would in a way make any codification of the subject-matter futile, since it would mean leaving the successor State free to specify for itself what public property should devolve to it; for experience has frequently shown that it is the successor State, particularly in cases of annexation, which imposes its definition of public property. In such cases, the successor State even deviates from its own municipal public law when it considers that law too restrictive in determining what constitutes public property. Thus, the successor State has a completely free hand.

(11) In view of this, the Special Rapporteur tentatively suggests that the relevant municipal law should be that of the predecessor State. Nevertheless, he is well aware that this rule has been assailed in practice with a persistency which he will illustrate below with a number of specimen cases. This position is the only logical one, even if actual experience is to the contrary.

(12) The point is that, unless one wishes to have recourse to international law itself, which would then, by means of a norm imposable on all States, determine in a uniform manner what constituted public property—something that would be impracticable and would have consequences unacceptable to States—one must logically have recourse to the municipal law of the predecessor State; the successor is the transferee of property determined according to the "rules of the game" to which the property in question was formerly subject.

What is involved is the public property of the *predecessor State*. In order actually to identify that property,

it is both natural and inevitable to refer to the *lex rei sitae*.<sup>17</sup> The property of the predecessor State capable of transfer is property which, according to the legislation of that State, was owned by the State. This is self-evident.

(13) However, as soon as the municipal law of the predecessor State has performed its function of determining what constitutes public property, it of course gives way to the juridical order of the successor State. Once the property has been characterized for the purposes of transfer, the latter State reassumes its sovereign power to change the legal status of the property devolving to it, if it so desires.<sup>18</sup>

#### B. Legislation of the predecessor State or legislation of the territory affected by the change of sovereignty?

(14) The wording suggested in the draft articles refers to the municipal law, not of the predecessor State, but of the territory relinquished by that State. It is necessary that this should be spelt out. It can happen in the case of various types of succession that the municipal public law in force in the territory is not necessarily identical with the law in force in the predecessor State. This is clearly to be seen in the case of decolonization; the legislation which formerly governed the newly independent territory is a body of colonial legislation peculiar to itself and not in force in the metropolitan country or, in other words, in what will become at the time of independence the predecessor State. The character of public property and what comprises it in the new State must therefore be appraised on the basis of the public law in force in the colony, and not by reference to the public law applied in the metropolitan country. Substantial differences do exist, and not always to the advantage of the successor State.

(15) The same problem can likewise occur in cases of partial annexation. For instance, Alsace-Lorraine, which underwent several changes of status, came eventually to have a body of legislation of its own which the various successor States respected to some extent. Moreover, it was that legislation of the territory annexed by Germany and later recovered by France, and not the public law of either of those two successor States, that was referred

to for the purpose of appraising the legal status of certain property.

Thus, it appears more correct to have recourse to the municipal law of the territory affected by the change of sovereignty.

(16) Clearly, however, there will have to be an exception in one case. In the event of the termination of a union of States which had, perhaps, existed in the form of a federation and had left each of the States with a distinctive body of legislation, the public property left to each successor will obviously be defined not only by reference to the municipal law of each federated State (as concerns the return of the property of each State) but also by application of the public law of the federation (as concerns the division of property common to the federation). Basically, however, both bodies of legislation may be regarded as legislation of the predecessor States.

#### C. Examples of the application of the law of the successor State

(17) The Special Rapporteur is aware that in some circumstances the characterization of public property according to the legislation of the territory may not have bound the State, which instead made its own appraisal. Such cases of diplomatic practice have on some occasions even given rise to decisions of international jurisdictions. The question is whether the weight of these precedents is such that they vitiate the rule suggested by the Special Rapporteur. An account of these cases follows below.

##### 1. The case of the British Protestant mission hospitals in Madagascar<sup>19</sup>

(18) During the nineteenth century hospitals were erected in Madagascar by Protestant missions, under the sanction of a contract concluded with the Malagasy authorities. Later, towards the end of the century, following the establishment of the French protectorate (1886-1896), Queen Ranavaloa attempted to eject these missions. When the protectorate was replaced by annexation in 1896, the question of France's succession to the hospitals arose. Under the municipal law of the territory affected by the change—namely, the Malagasy public law of the day—the hospitals were not “public property”. However, the French Government took the view that it could not be bound by such a characterization because it was contrary to its municipal public policy, according to which all “religious edifices” were the property of the State.<sup>20</sup>

<sup>17</sup> An arbitral award had occasion to determine what constituted the public domain or, more precisely, to state whether certain “ponds and marshes” (in Spanish “ *pantanos* ”) in the Spanish zone of Morocco formed part of the Moroccan public domain in accordance with Moroccan law (arbitral award given by Max Huber at The Hague on 1 May 1925 in the case between Spain and the United Kingdom concerning “British property in Spanish Morocco”, Claim No. 11, United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No.: 1949.V.1), pp. 672-674).

<sup>18</sup> Judgement No. 865 of 1926 of the Court of Appeal at Athens, *Themis*, vol. 38, p. 408, and *Journal de droit international* (Paris, 1929), t. 56, p. 494. Under the Treaty of Athens of 21 June 1832 between Turkey and the Protecting Powers of Greece, the mineral springs at Aedipos, in Euboea, became the property of Greece because, according to Ottoman law, they formed part of the public domain of the Turkish State. However, according to the law of the Pandects, which was the Greek law in force after the cession, these springs form part of the private domain. Consequently, it could no longer be argued that they were inalienable and imprescriptible, as they had been under Ottoman law.

<sup>19</sup> See, *inter alia*, G. Gidel, *Des effets de l'annexion sur les concessions* (Paris, 1904) [thesis], p. 248; H. Mosler, *Wirtschaftskonzeptionen bei Änderungen der Staatshoheit* (Stuttgart, W. Kohlhammer Verlag, 1948), p. 183; D. P. O'Connell, *The Law of State Succession* (Cambridge, University Press, 1956), pp. 111-112; *id.*, *State Succession in Municipal Law and International Law* (Cambridge, University Press, 1967), vol. I: *Internal Relations*, p. 203; Ch. Rousseau [edition based on the notes and with the permission of] *Cours de droit international public: Les transformations territoriales des Etats et leurs conséquences juridiques* (Paris, Les cours de droit, 1964-1965), pp. 128-129.

<sup>20</sup> Did the term “religious edifices” mean places of worship, or did it mean edifices erected by ecclesiastics?

Two opinions were given, on 22 March 1897 and 2 February 1898, by the British Law Officers of the Crown, who had been consulted by their Government. They criticized the French position, which remained unchanged.<sup>21</sup>

## 2. "Habous" property in Algeria

(19) There was in Algeria, apart from public property and private property as in any other country, a special type of property—known as "habous property"—destined for religious endowments. An individual could place the usufruct of his property at the disposal of religious foundations for as long as he wished, and sometimes in perpetuity. This property, which was of considerable value, thus became inalienable and imprescriptible and the income from it, which was administered by the religious community, could be used only for religious works, such as the maintenance and management of religious edifices and educational establishments, or for activities connected with worship in Algeria and at the Holy Places of Islam, at Mecca and Medina. Also, in some cases, the income was used for some charitable work or for a purpose of public utility.

After the occupation of Algeria, there were promulgated a number of French laws and decrees<sup>22</sup> whereby this

<sup>21</sup> Generally speaking, the French Government in Madagascar did not consider itself bound (*vis-à-vis* either foreign States or the annexed kingdom of Madagascar) by the Malagasy public law which had formerly governed the domain of the State by means of customary or written rules (1881 Code concerning forests and public works, canals, dikes . . .). The courts subsequently had to separate the property of the State domain into various categories (see E. Coquet, *Le domaine public colonial* (Poitiers, Imprimerie "L'Union", 1905) [Law thesis], and Court of Tananarive, 17 April 1901, *Recueil général de jurisprudence, de doctrine et de législation coloniale. La Tribune des colonies et des protectorats* (1902), Part I, p. 283).

In another case—which, however, was rather more singular because it related to the return of Alsace-Lorraine to France in 1918—the Conseil d'Etat declined to apply the law of the predecessor State and ruled, in accordance exclusively with French law, that the buildings, tracks and appurtenances of a railway station were State property and that even the acquired rights of an individual were annulled (Conseil d'Etat, 5 December 1952, *Haydi* (Sirey 1954), Part 3, p. 21, annotation by Alain Plantey).

Note, however, that recourse was had to the local law of a territory when it enabled the whole of the land to be transferred: Court of appeal of French West Africa, judgement of 8 February 1907, *Daour Diop et al. v. French State* (Sirey 1908, Part 2, p. 209): "The State is now substituted in Cayor in all the rights of the Damels and it has, like them, full ownership of the territories over which its sovereignty extends [. . .]. The character of the land [. . .] as it was originally and reference must be made to the former custom in order to determine the extent of the rights of the natives\* [. . .]. The land belongs to the sovereign, and the inhabitants have only a right of precarious and revocable tenure [. . .]. [Hence] the French Government is now sole owner of all the land of this kingdom."

<sup>22</sup> See, for example, the order of the Commanding General of 8 September 1830 "defining the property of the domain" (R. Estoublon and A. Lefebure, *Code de l'Algérie annoté* [1830-1895] (Alger, A. Jourdan, édit., 1896), pp. 1-2), art. 1:

"All houses, stores, shops, gardens, lands, premises and establishments whatsoever formerly occupied by or administered on behalf of the Dey, the Beys and Turks who have quitted the territory of the Regency of Algiers, and any such property used by virtue of any right whatsoever for the purposes of Mecca and Medina, shall revert to the public domain and shall be administered for the benefit thereof.\*"

religious property passed into the domain of the successor State.<sup>23</sup>

## 3. Restoration of the Polish State

(20) The Polish State died four times but revived each time, despite conquest, occupation and partition.<sup>24</sup> After the third partition, in 1795, Poland lost its own political existence for 124 years—until 11 November 1918, when the restoration of the Polish State was proclaimed. The first action of President Pilsudski after leaving Magdeburg prison was to notify the Allies in 1918 of the *rebirth* of the Polish State.

The Polish courts have always taken the view that Poland did not succeed the various States which had dismembered it but was restored by an act of its own sovereignty. In this way, it "reassumed" possession of public property, without troubling to determine what constituted such property by referring to the legislation of the States which had preceded it in the exercise of sovereignty over its territory.<sup>25</sup> The political case of Poland is somewhat special, and this fact is reflected in these judicial decisions.

See also order of the Commanding General of 7 December 1830 "appropriating to the domain the income of all establishments used for the purposes of Mecca and Medina or of mosques or for other special purposes" (*ibid.*, p. 2); Order of the Minister of War of 23 March 1843 "providing that the income and expenditure of religious establishments shall be incorporated in the colonial budget of Algeria" (*ibid.*, pp. 48-49); Order of the Governor-General of Algeria of 30 October 1848 "incorporating in the domain of the State immovable property owned by mosques, marabouts, zaouias and all Moslem religious establishments generally" (*ibid.*, pp. 113-114); Act of 16 June 1851 "concerning the character of property in Algeria" (*ibid.*, pp. 135-142), art. 4, para. 2.

<sup>23</sup> The same situation also arose in Libya under annexation. The Italian successor State incorporated such *habous* property in its domain, and it was later returned to independent Libya; see United Nations General Assembly resolution 388 (V) of 15 December 1950, entitled "Economic and financial provisions relating to Libya".

Similarly, the various treaties ceding territories of the Ottoman Empire in Bulgaria, Greece and elsewhere during the nineteenth century did not always respect the character of such *habous* property as it existed under the municipal law of the ceding State (cf. M. Costes, *Des cessions de territoires envisagées dans leur principe et dans leurs effets relatifs au changement de souveraineté et de nationalité* (Paris, Rivière et Cie, édit., 1914) [thesis], pp. 77-91).

<sup>24</sup> First dismemberment of Poland by the Treaty of St. Petersburg (between Russia, Prussia and Austria) of 14-25 July 1772 and other Warsaw Treaties of 1773, 1775 and 1776. Second dismemberment by the Treaty of St. Petersburg of 12-23 January 1793. Third partition by the Treaty of St. Petersburg of 13-24 October 1795. (All these treaties will be found conveniently grouped together, in an English version, in F. Israel, *op. cit.*, pp. 351-424. The fourth and last demise of the Polish State was in 1939, during the Second World War. See K. Marek, *Identity and Continuity of States in Public International Law* (Geneva, Librairie E. Droz, 1954), chap. IX, pp. 417-546.

<sup>25</sup> See paras. 31 and 32 below. Poland considered even some private property to be public property and did not recognize the existence of the rights acquired during the periods of partition. Cattle of the German occupation troops on a private estate in the Warsaw region are Polish public property (Polish Supreme Court, judgement of 3 March 1923, *Graffowa and Wolanowski v. Polish Ministry of Agriculture and State Lands*, in J. Fischer and H. Lauterpacht, *Annual Digest of Public International Law Cases, 1923 to 1924* (London, Longmans, Green and Co., 1933),

#### 4. *The case of the Central Rhodopé forests, between Greece and Bulgaria*<sup>26</sup>

(21) A dispute had arisen between Greece and Bulgaria concerning the application of article 181 of the Treaty of Neuilly of 1919<sup>27</sup> to certain forests situated in a territory ceded by Turkey to Bulgaria in 1913. Article 181 stated that transfers of territory under the Treaty of Neuilly should not prejudice the *private rights* guaranteed by the earlier treaties of 1913-1914, concluded between Turkey and Bulgaria or between Turkey and Greece and Serbia. In Central Rhodope, a territory ceded to it by Turkey, the Bulgarian Government had terminated a forestry concession previously granted by the Turkish authorities to a company whose owners had become Greek nationals after the First World War. The case was submitted to arbitration.

(22) Bulgaria pleaded before the arbitrator that article 181, which dealt with private rights, was not applicable to the case, which, it argued, related to *public property*. In support of this plea, the Bulgarian Government referred to the legislation of the predecessor State as evidence of the public character of forests in the territory. It considered that no private person "could, under Ottoman law", have acquired full ownership of such forests, which would have had the character of public property of which private persons could enjoy only very limited usufruct.<sup>28</sup> The forests, which were part of the public domain of Turkey had therefore passed into the public domain of Bulgaria.<sup>29</sup>

(23) Only one aspect of this case is described here, namely, the reference by the successor State to the municipal law of its predecessor for the purpose of determining what constituted public property. As to the actual merits of the case, it is really irrelevant to the present discussion that the arbitrator did not accept—and rightly so—the Bulgarian argument.<sup>30</sup>

In this case, the international jurisdiction did not in fact rule out recourse to the municipal law of the predecessor State for the purpose of determining what consti-

tuted public property. The problem put to the arbitrator was different in substance. This was not so in the case of a decision of the United Nations Tribunal in Libya.<sup>31</sup>

#### 5. *The case of enti pubblici in Libya*

(24) Under article I of United Nations General Assembly resolution 388 (V) of 15 December 1950, Libya was to receive, "without payment, the movable and immovable property located in Libya owned by the Italian State, either in its own name or in the name of the Italian administration of Libya". The same resolution established a United Nations Tribunal, competent to decide disputes concerning its interpretation and application.

In its award of 27 June 1955, the Tribunal had to decide what property of companies, institutions or associations was of a *public character*. The agent of the Italian Government had contended that the Tribunal's decisions must relate to the character of an "*ente pubblico*" in the strict sense of the term and in conformity with Italian legislation—in other words, the law of the predecessor State.

(25) The Tribunal rejected this view, stating that it was "*not bound by Italian legislation and case law.*" The Tribunal will therefore consider this question by freely appraising the various factors in each individual case.<sup>32</sup> It adopted this position, which rejects recourse to the municipal law of the predecessor State, because the wording used in the resolution indicated "that the drafters [...] purposely chose a term with a general meaning, broader than the term '*ente pubblico*' in Italian law".<sup>33</sup>

#### 6. *The case of the property of the Order of St. Maurice and St. Lazarus on the Little St. Bernard Pass*

(26) In its decision of 26 September 1964, mentioned above,<sup>34</sup> the Franco-Italian Conciliation Commission applied the municipal law of Italy, the ceding State, in denying the transfer to France of the Little St. Bernard Hospice and the Chanousia botanical garden. However, the third member of the Commission<sup>35</sup> delivered a

case No. 26, pp. 55-57. Huts for refugees built by a private individual during the period of Austrian sovereignty were deemed to be the property of the Polish State (Polish Supreme Court, Knoll v. Polish State Treasury, in A. D. McNair and H. Lauterpacht, *Annual Digest of Public International Law Cases, 1927 and 1928* (London, Longmans, Green and Co., 1931), foot-note on p. 75).

<sup>26</sup> Case of the Central Rhodope forests, Greece v. Bulgaria, arbitrator: Osten Undén (Sweden), award of 29 March 1933 on the merits (United Nations, *Reports of International Arbitral Awards*, vol. III (United Nations publication, Sales No.: 149.V.2), pp. 1405-1436).

<sup>27</sup> Quoted in *ibid.*, pp. 1416-1417. (See also E. Parkes, J. E. Field and R. C. Thomson, eds., *British and Foreign State Papers* (London, H. M. Stationery Office, 1922), vol. 112, p. 848).

<sup>28</sup> *Ibid.*, p. 1412.

<sup>29</sup> A letter from the Minister of Agriculture of Bulgaria, dated 20 September 1918, announced the final decision to treat the disputed forests as State forests. The Bulgarian Government considered that "under Turkish legislation, the forests had the character of public lands" (*ibid.*, p. 1423).

<sup>30</sup> The arbitrator ruled that the Treaty required respect for the concession which had been granted (and which could quite well have been granted even in the case of lands recognized as public property) under the law of the predecessor and ordered Bulgaria to pay Greece 475,000 gold leva in compensation.

<sup>31</sup> Cf. M. Grawitz, "Chroniques—jurisprudence internationale: Tribunal des Nations Unies en Libye, sentence du 27 juin 1955", in *Annuaire français de droit international*, I, 1955 (Paris, C.N.R.S.), pp. 282-290. The author wrote in this connexion: "The public domain [...] passes from the annexed State to the annexing State. The difficulties start, however, with the question of definitions [...] (*ibid.*, p. 289). Definitions do not necessarily concur and, contrary to the opinion of the agent of the Italian Government, in this case it is usually the definition of the annexing State which prevails." One example was the annexation of Savoy by France. Under Sardinian law, waterways non-negotiable for craft or floats were part of the public domain. Under French law, they are not" (*ibid.*, p. 289, foot-note 4).

<sup>32</sup> "Case of the institutions, companies and associations mentioned in article 5 of the agreement concluded on 28 June 1951 between the United Kingdom and Italian Governments concerning the disposal of certain Italian property in Libya", decision of 27 June 1955 (United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No.: 63.V.3), p. 390).

<sup>33</sup> *Ibid.*

<sup>34</sup> Cf. paras. 6 and 8 above.

<sup>35</sup> Mr. G. Perier de Féral, French *conseiller d'Etat*.

dissenting opinion and emphasized "the impossibility of taking as a starting-point Italian legislation [. . .] from which nothing conclusive can be deduced", in view of the confusion which in Italian law surrounds the very subtle concept of State property and, in particular, para-statal property. He therefore considered that "one is necessarily obliged, irrespective of the Italian legislation, to make a case-by-case analysis". In this sense, the solution which he advocated was no different from the one adopted by the United Nations Tribunal in Libya in the "*enti pubblici*" case described above.<sup>36</sup>

### 7. *The Peter Pázmány University case*<sup>37</sup>

(27) On 30 December 1923, the University of Budapest, citing various provisions of the Treaty of Trianon,<sup>38</sup> brought a suit against the Czechoslovak Government before the Hungaro-Czechoslovak Mixed Arbitral Tribunal, requesting the revocation of the retention imposed by that Government on property which, according to the said University, belonged to it but was situated in territory ceded by Hungary to Czechoslovakia. An appeal from the judgement rendered by the Tribunal was submitted to the Permanent Court of International Justice.<sup>39</sup>

(28) The judgement of the Court states:

The Czechoslovak Government maintains that Article 250 [of the Treaty of Trianon] [. . .] only covers *private* \* property, rights and interests. Property, rights and interests which, according to the local law—in the present case, the Hungarian law still in force in the territory in which is situated the property in dispute before the Tribunal—are not *private* \* property, rights and interests, and do not, it is argued, come under Article 250 [. . .]

According to the observations of the Hungarian Agent in the proceedings before the Court, Hungarian law makes no distinction between public property and private property; in so far as it forms the subject of the private law right of ownership, all property is private property, even if owned by the State or by territorial corporations of public law. If this were really the case, the Czechoslovak Government's argument would automatically fall to the ground.

However, the Court has no need to reply upon this interpretation of Hungarian law.\* It is content to observe that the distinction between public and private property, in the sense of the Czechoslovak Government's argument, is neither recognized nor applied by the Treaty of Trianon.<sup>40</sup>

(29) It is a fact that the Court had to follow the Treaty on this point. Article 191 of the Treaty of Trianon determined that the property and possessions of the Hungarian Government should be transferred to the successor States

and specified that they included "the property of the former Kingdom of Hungary and the interests of that Kingdom in the joint property of the Austro-Hungarian Monarchy, as well as all the property of the Crown and the private property of members of the former Royal Family of Austria-Hungary."

While it is true that the property devolving to the successor States is thus specified by enumeration, the Court advanced an insufficient argument in rejecting the application of Hungarian law on the ground that it was superfluous. The enumeration of the property is based quite simply, according to the Court, "not on the public or private nature of the property, but solely on the category of persons to whom it belonged".<sup>41</sup>

Although the article refers to the criterion of persons enjoying these rights, in practice it is difficult, if not impossible, to ignore Hungarian law when determining, not whether a property is public property, since this is irrelevant under article 191 of the Treaty of Trianon, but whether it belongs to the Government, since article 191 adopts this personal criterion.

(30) In any case, there had to be some appraisal of Hungarian law and, despite its statement, the Court (like the Mixed Arbitral Tribunal) examined in great detail and at great length,<sup>42</sup> in the light of the law of the ceding Hungarian State, the transfer of ownership of the property claimed by the University and known as the "University Fund". The Court reached the conclusion that ownership of the property had passed to the University after a deed of donation of 13 February 1775 by Queen Maria Theresa. It was no longer public property of the Austro-Hungarian monarchy, which would have come under article 191 of the Treaty of Trianon and would accordingly have devolved to the successor State as State property.

### 8. *Position of the successor State in the case of the Oberschlesische Stickstoffwerke and Bayerische Stickstoffwerke (factory at Chorzow)*<sup>43</sup>

(31) The Polish Government, which under the Treaty of Versailles succeeded Germany in Upper Silesia, had promulgated on 14 July 1920 a law<sup>44</sup> which was subsequently introduced in Polish Upper Silesia by the law of 16 June 1922. The statement of the reasons for the 1920 law, submitted to the Warsaw Sejm, contained the following comment:

The definition of what has passed to the Polish Republic under the Treaty is not so specific as to remove all doubt about what may be classified as property and possessions [. . .]. The Prussian Government's interpretation of the term 'property and possessions' is incorrect [. . .]. The Reparation Commission will take the final decision on how the term 'property and possessions' should be understood [. . .]. However, this course would be unpractical in several respects [. . .]. Only a law passed by the Sejm can provide a radical solution.\*

<sup>41</sup> *Ibid.*, p. 237.

<sup>42</sup> *Ibid.*, pp. 222-226, 233-236, 240-242 and *passim*.

<sup>43</sup> P.C.I.J., Series A, Nos. 6 and 7.

<sup>44</sup> Law of 14 July 1920 "concerning the transfer of the rights of the German Treasury and of members of reigning German Houses to the Treasury of the State of Poland", *Legislative Gazette of the Polish Republic*, 1920, No. 62.

<sup>36</sup> See paras. 24 and 25.

<sup>37</sup> Judgement of 15 December 1933, "Appeal from a judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University v. the State of Czechoslovakia)", in P.C.I.J., Series A/B, No. 61, pp. 208-262.

<sup>38</sup> E. Parkes, J. E. Field and R. C. Thomson, eds., *British and Foreign State Papers* (London, H. M. Stationery Office, 1923), vol. 113, p. 486. See also G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Librairie Th. Weicher, 1924), 3rd series, t. XII, p. 423.

<sup>39</sup> In accordance with article X of Agreement II signed in Paris on 28 April 1930 by certain signatory Powers of the Treaty of Trianon and by Poland. For the text of that article, see P.C.I.J., Series A/B, No. 61, p. 220.

<sup>40</sup> P.C.I.J., Series A/B, No. 61, pp. 236-237.

Here, therefore, the successor State made an attempt to discard the definition of public property given in an international treaty, to claim that the definition provided by the municipal law of the predecessor State was questionable because vitiated by error and to apply exclusively, not even its own municipal law as the cessionary State, but legislation improvised *ex post facto*. In the absence of an agreement concerning interpretation between Germany and Poland, the Polish Government recognized itself competent "for the interpretation (of the Treaty of Versailles) within the boundaries of the Polish State [. . .] in accordance with the principles of sovereignty".<sup>45</sup>

(32) The substance of the case is well known. Poland's action was due to the anxiety it had felt as a result of various acts of alienation of public property effected by Germany immediately before the transfer of the territory, which it had suspected of diminishing the patrimony to be ceded.

Poland's position of principle is also well known. It did not consider itself the successor of Germany but maintained that it had been *restored* as a sovereign State after recovering its international capacity on its own. The Polish legislation reflects this belief that the State had revived spontaneously and had no umbilical connexion with the predecessor State.<sup>46</sup>

(33) One could probably find other examples of cases in which the municipal law of the successor State has been applied. However, these illustrations should suffice. It will be noted that the decisions of international jurisdictions have not always endorsed this position of the successor State. However, they have seldom discussed the actual problem of the applicability of the municipal law of the successor State, having found other grounds peculiar to the circumstances of each case for rejecting the arguments of that State. Moreover, the reason why international jurisdictions sometimes had to rule out recourse to the legislation of the predecessor State was that they were obliged to apply various treaty provisions or resolutions of international organizations which they were bound to observe.

(34) In any case, it cannot be denied that international practice is somewhat inconsistent and requires clarification. For this reason, the Special Rapporteur has tentatively suggested in his draft article that in principle recourse should be had to the legislation of the predecessor State for the purpose of determining what constitutes public property but that, if necessary, an exception should be made to the rule when it might create a serious conflict with the public policy of the successor State. While this has the advantage of better reflecting disparate practice and introducing some order into it, there remains the fact that no objective criterion of "serious conflict" or, indeed, of "public policy" exists.

(35) There is another problem. It is whether the law of the predecessor State should be applied without limitation or whether no account should be taken of changes which

that State might be tempted to make in its law immediately before the transfer of the territory. This is the problem of what the Special Rapporteur called in his first report the "*période suspecte*".<sup>47</sup>

D. *Extent to which the law of the predecessor State is applicable: fate of the legislation of the "période suspecte"*

(36) This section will consist simply of an account of the *Chorzow factory* case, which has already been mentioned, and the case of *German settlers in Upper Silesia*, followed by a very brief reference to a Danish case.

#### 1. *The Chorzow factory case*

(37) In proceedings before the Permanent Court of International Justice, neither Germany nor Poland disputed the fact that landed property situated in Upper Silesia, at Chorzow, in and around a nitrate factory were, *under Germanic public law*, the public property of the German Reich. When Upper Silesia under German jurisdiction was transferred to Poland by the Treaty of Versailles, the German Reich had just concluded with various German private companies, on 24 December 1919, contracts transferring to them the ownership of some of the factory's property.

Both the parties had taken German law—in other words, the law of the predecessor State—as the basis for determining whether the factory at Chorzow possessed the status of public property. However, the problem was whether, between the date of the armistice on 11 November 1918 and the date on which the actual cession of the territory occurred, the ceding State could make changes in its legislation which would in fact have the result of reducing the amount of public property to be ceded.<sup>48</sup> Indeed, in this particular case, it had apparently not been necessary to make any change in municipal law. All that the ceding State had to do was to perform dispositive acts relating to its patrimony. In the case under discussion, this raises the question of the conformity of an act of German private law with international law.

(38) The Polish Government had considered that the transaction effected in 1919 was an act *in fraudem* with regard to Poland. The Counter-Case of the Polish Government stated:

<sup>47</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, p. 104, document A/CN.4/204, paras. 68-69. Some past cases will be mentioned later. Among the cases involving decolonization, special attention has been given to the case of the former Belgian Congo, but it will not be discussed under this heading because it will be dealt with in the commentary on draft article 8.

<sup>48</sup> The Armistice Convention was dated 11 November 1918 and the Protocol of Spa was dated 1 December 1918. The Treaty of Versailles was signed on 28 June 1919, was ratified by Germany on 13 July 1919 and promulgated and published in the *Reichsgesetzblatt* (the German official gazette) on 16 July 1919, and entered into force on 10 January 1920. The contested acts took place on 24 December 1919—in other words, after the signature and ratification of the Treaty and a fortnight before its entry into force.

<sup>45</sup> Polish Government Counter-Case, *P.C.I.J.*, Series C, No. 11, vol. II, p. 670.

<sup>46</sup> See para. 20 above.

If the ceding State, after signing the Treaty of cession and particularly after the ratification of the said Treaty, had effected a sale of the most valuable property under State ownership situated in the territory included in the cession and if it had placed the value of this property outside this territory, its action was contrary to international law, which is essentially based on the good faith of the contracting Parties.<sup>49</sup>

The Armistice Convention<sup>50</sup>—notably article XIX, second paragraph—and the Protocol of Spa of 1 December 1918<sup>51</sup> prohibited the German Government from alienating, conceding or mortgaging the appurtenances of its public domain, including the railways, mines, canals, woods and colonial, industrial or commercial enterprises belonging to it or in which it possessed interests.

(39) The case of the German Government laid stress on the normal exercise of the attributes of sovereignty over a territory so long as it had not been transferred, and added:

It is only manifestly abusive transactions which are inadmissible—in other words, transactions for which no serious reasons are given by the ceding State and which are designed solely to harm the annexing State, such as bulk sales of State properties effected for this purpose.<sup>52</sup>

This viewpoint was expounded in the pleading for Germany by Professor Kaufmann who stated, *inter alia*:

Any transaction which is manifestly an abuse of the dismembered State is inadmissible but [...] on the other hand, transactions are certainly legitimate and unquestionably valid if the ceding State would reasonably have performed them even though no change of sovereignty was envisaged or if it performed them as a *bonus paterfamilias*, precisely with an eye to the eventual change of sovereignty, either in order to create clear and plain situations or to prevent the annexing State from damaging its interests\* or those of its nationals.<sup>53</sup>

(40) The German and Polish viewpoints would certainly be very similar, with their condemnation of fraud, had it not been for the reservation contained in the last phrase quoted above. It is natural for the State not to harm its own interests. However, the criterion of protection of interests, if it is not applied in good faith, may serve to justify any measures, since the transfer of public property is *ex hypothesi* an obligation which cannot fail to damage the interests of the ceding State.

(41) In any case, the Court rejected Poland's argument and recognized Germany's full sovereignty over the territory to be ceded, so long as the cession had not taken place. Up to the date of the cession, it was Germany that had full exercise of all powers; the Court decided that the Treaty of Versailles

contains no prohibition of alienation and does not give the State to whom territory is ceded any right to consider as null and void alienations effected by the ceding State before the transfer of sovereignty<sup>54</sup> [...]. Germany undoubtedly retained

until the actual transfer of sovereignty the right to dispose of her property, and *only a misuse of this right*\* could endow an act of alienation with the character of a breach of the Treaty; such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement<sup>55</sup> [...]. In the Court's opinion, such misuse has not taken place in the present case.<sup>56</sup>

(42) It therefore seems clear that the Court's decision was due to the fact that this eminent international jurisdiction saw in the German action no intent to defraud. Germany's international commitments did not prohibit it from discontinuing an economic activity (the operation of the factory at Chorzow) which it considered to be detrimental to its finances. Consequently, *a contrario*, the Court does not seem to rule out condemnation of a predecessor State which acts with intent to defraud.

## 2. The case of German settlers in Upper Silesia<sup>57</sup>

(43) The same problem arose in the German settlers case, which was summarized as follows in the resolution of the Council of the League of Nations of 3 February 1923 for the information of the Permanent Court of International Justice:

A number of colonists who were formerly German nationals, and who are now domiciled in Polish territory previously belonging to Germany, have acquired Polish nationality. . . They are occupying their holdings under contracts (*Rentengutsverträge*) which although concluded with the German Colonization Commission prior to the Armistice of November 11th, 1918, did not receive an "*Auflassung*" before that date. The Polish Government regards itself as the legitimate owner of these holdings under article 256 of the Treaty of Versailles, and considers itself entitled to cancel the above contracts [...]. The Polish authorities will not recognize leases conceded before November 11th, 1918, by the German Government to German nationals who have now become Polish subjects. These are leases over German State properties which have subsequently been transferred to the Polish State in virtue of the Treaty of Versailles, in particular of Article 256.<sup>58</sup>

(44) The Polish Government had passed a law on 14 July 1920 known as the "annulment law". The case differs, however, from that of the Chorzow factory, because it concerns German measures taken not during the "*période suspecte*" but well before the Armistice of 11 November 1918.

Article 1 of the law stated:

In all cases in which the Crown, the German Reich, the German States, the institutions of the Reich or of the German States, the ex-Emperor of Germany or other members of the German

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international law which attaches to statehood. There is not a "transfer" of sovereignty but a *substitution* of sovereignties by the extinction of one and the creation of another (see *Yearbook of the International Law Commission, 1969*, vol. II, p. 77, document A/CN.4/216/Rev.1, paras. 29 *et seq.*).

<sup>49</sup> *P.C.I.J.*, Series A, No. 7, p. 30. The French version of the phrase underlined, which is the authoritative text, reads as follows: "*ce n'est qu'un abus de ce droit ou un manquement au principe de la bonne foi*".

<sup>50</sup> *Ibid.*, p. 37.

<sup>51</sup> Advisory Opinion of 10 September 1923 on certain questions relating to settlers of German origin in the territory ceded by Germany to Poland, 1923, *P.C.I.J.*, Series B, No. 6, pp. 6-43.

<sup>52</sup> *Ibid.*, pp. 6-7.

<sup>49</sup> *P.C.I.J.*, Series C, No. 11, vol. II, p. 632.

<sup>50</sup> G. F. de Martens, ed., *Nouveau recueil général de traités* (Leipzig, Librairie Th. Weicher, 1923), 3rd series, t. XI, p. 172.

<sup>51</sup> *Ibid.*, p. 185.

<sup>52</sup> *P.C.I.J.*, Series C, No. 11, vol. I, p. 375.

<sup>53</sup> *Ibid.*, pp. 136-137.

<sup>54</sup> In his second report, on economic and financial acquired rights and State succession, the Special Rapporteur felt it necessary to express reservations about the appropriateness of the expression "transfer" of sovereignty. Sovereignty is an attribute of public

reigning houses, are, or were, after November 11th, 1918, inscribed in the land registers of the former Prussian provinces as owners or possessors of real rights, the Polish Courts shall, in accordance with the terms of the Treaty of Versailles of June 28th, 1919, inscribe *ex officio* in such registers, the Treasury of the Polish State, in place of the persons or persons in law above mentioned.<sup>59</sup>

(45) The Court considered that the position adopted by the Polish Government was not in conformity with its international obligations.

### 3. *The Schwerdtfeger case*

(46) In a case tried by the Danish Supreme Court, it was decided that the successor State was justified in not recognizing the validity of the renewal by the predecessor State of a lease to a farm which was State land, even if the lease was an old one. In the opinion of the Court, lease renewals granted with an eye to or in anticipation of an impending transfer of territory secure additional rights for the leaseholder at the expense of the successor State and are calculated to weaken the significance of the forthcoming cession.<sup>60</sup>

\* \* \*

(47) It will be noted that in draft article 1, at least in its initial version, the Special Rapporteur has left the matter open for discussion and has not suggested any solution. The question is therefore provisionally left pending.

(48) To conclude this commentary on draft article 1, some brief explanations should be given of the terminology used to designate the territory which passes under a new sovereignty.

#### IV. NOTION OF THE TERRITORY AFFECTED BY THE CHANGE OF SOVEREIGNTY

(49) It will be noted that an attempt has been made to choose as broad an expression as possible in order to cover all types of succession: total absorption, decolonization, partial annexation, merger and so forth.

Care has been taken, in this and the following draft articles, to avoid using the shorter, more convenient but somewhat inaccurate expression "territory ceded". In an award concerning the interpretation of article 260 of the Treaty of Versailles,<sup>61</sup> the arbitrator, Mr. Beichmann, defined the cession of a territory as the "*renunciation* \* by one State in favour of another State of the *rights and titles* \* which the first State might have to the territory in question". However, a dispute arose regarding this expression, in connexion with the interpretation of the Treaty of Peace with Italy, in which it appeared. One of the Italian Government's contentions before the Franco-

Italian Conciliation Commission was that Ethiopia, for example, had been neither "ceded" nor "transferred".<sup>62</sup>

(50) In order to forestall any discussion and to cover all types of succession, the neutral wording "territory affected by the change of sovereignty" has been used.

#### *Article 2. Property appertaining to sovereignty*

**Property appertaining to sovereignty over the territory shall devolve, automatically and without compensation, to the successor State.**

**Property of the territory itself shall pass within the juridical order of the successor State.**

#### COMMENTARY

(1) Draft article 2 raises four questions: the first concerns a definition of "property appertaining to sovereignty over the territory"; the second relates to practice with regard to the transfer of such property; the third is the question of transfer "automatically and without compensation"; the fourth has to do with property of the territory itself. These four points are discussed individually below.

##### I. PROPERTY APPERTAINING TO SOVEREIGNTY OVER THE TERRITORY

(2) The Special Rapporteur has not found any satisfactory expression to describe property of a public character, which, being linked to the *imperium* of the predecessor State over the territory, can obviously not remain the property of that State after the change of sovereignty, or, in other words, after the termination of precisely that *imperium*.

Much, if not all, of this property is referred to in some bodies of legislation as property in the "public domain". This expression is unknown in many legal systems, however, and its lack of universality makes it unsuitable for use in the draft article.

(3) The distinction between public domain and private domain is unsatisfactory, not only because it does not exist in all legal systems, but also because it does not cover public property in a uniform and identical manner from country to country. Consequently, the mind may well balk at deciding, for instance, that all property in the public domain devolves automatically and without compensation to the successor, even though the kind of property included in that domain and what constitutes it can vary to a very great degree. Even more disconcerting would be an approach whereby the predecessor State, in the view of some writers, would retain its private domain and, in the view of others, would cede it to its successor only against compensation. There does not exist a uniform criterion for dividing property into public domain and private domain. This would mean setting up rules which

<sup>59</sup> *Ibid.*, p. 14.

<sup>60</sup> Supreme Court of Denmark, Judgement of 6 December 1923, *Schwerdtfeger v. Danish Government*, in J. Fischer and H. Lauterpacht, *Annual Digest of Public International Law Cases, 1923-1924* (London, Longmans, Green and Co., 1933), case No. 40, p. 82.

<sup>61</sup> United Nations, *Reports of International Arbitral Awards*, vol. I, (United Nations publication, Sales No.: 1948.V.2), p. 443.

<sup>62</sup> Franco-Italian Conciliation Commission. Dispute regarding the interpretation and application of the provisions of article 78, paragraph 7, of the Treaty of Peace to Ethiopian territory. Decisions Nos. 176 and 201 rendered on 1 July and 16 March 1956 respectively. United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No.: 64.V.3), *passim* and in particular p. 633 and pp. 646-653.

would not be identically applied in practice and whose scope would vary from country to country.

(4) The Special Rapporteur's suggestion that the notion of public domain and private domain should be replaced by the notion of "property appertaining to sovereignty" is not, perhaps, much of an improvement and may be open to the same criticisms. This suggestion does not spare us the still difficult task of seeking a definition of such property. Yet, however difficult such a definition may be, it is nevertheless easier to express internationally than a definition which would try to encompass notions that vary and are not accepted by everyone, such as public domain and private domain.

It may be said that property appertaining to sovereignty over the territory represents the patrimonial aspects of the expression of the domestic sovereignty of the State. It is true that this expression may differ from one political system to another, but it has the characteristic of covering everything that the State, in accordance with its own guiding philosophy, regards as a "strategic" activity which cannot be entrusted to a private person.

In order to carry on this activity, the State becomes the owner of movable and immovable property. It is this property, which the State uses to manifest and exercise its sovereignty or to perform the general obligations involved in the exercise of its sovereignty (e.g., national defence, security, the promotion of public health and education, and national development), that may be regarded as property appertaining to sovereignty over the territory.

(5) How is one to determine more precisely what constitutes this property?

It will include first of all "public" property—in other words, property which is defined according to three criteria: the public character which it possesses by reason of its being governed by public law; the fact that it is not owned by a private person and therefore belongs to the State; and the fact that it is for the use, or at the service, of all the population.

In addition, it includes property which, in accordance with the legislation of the predecessor State, helps to fulfil the general interest and through which the public power expresses its sovereignty over the territory. It can, and assuredly will, happen that what constitutes such property varies from State to State and from one political system to another. That is inevitable. One State may feel that it is not expressing its sovereignty and is not fully possessed of all its attributes of public power unless it manages directly and exclusively a given sector of activity, or even all sectors of activity. Another State, by contrast, confines its activity to very limited sectors. It may regard certain roads, certain airfields, even some arms factories, as being capable of private ownership. It is the very limited range of property to which it confines its activities that will have to be regarded as property appertaining to its sovereignty. It is, in short, all the property which follows the juridical destiny of the territory and which accordingly is transferable along with it, unlike property that is not closely linked to the territory in question.

"The right and the duty to ensure the functioning of public services", wrote the French Minister of War in 1876,<sup>63</sup> "to order,

for example, major roadworks, waterworks or fortifications, and ownership of or eminent domain over such works which are an appurtenance of the public domain—this entire aggregate of duties and rights is, in the final analysis, *an attribute of sovereignty*.\* *This inseparable attribute of sovereignty moves with the sovereignty itself [ . . . ]*".

It is because political régimes have a direct influence on the establishment of this domain that reference should be made to the public law of the predecessor State in order to determine what constitutes such property in each individual case.

(6) The advantage of the suggested formula is, however, that it does not depend entirely on municipal law for its definition. It must also take into account international law, and in particular the resolutions of the United Nations on the right of peoples to dispose of their natural resources. This right is increasingly being seen as an integral part of a country's sovereignty, or even as the prime expression of that sovereignty. "Property appertaining to sovereignty over the territory affected by the change" should include these natural resources.

## II. PRACTICE WITH REGARD TO THE TRANSFER OF PUBLIC PROPERTY OF THIS KIND

(7) It is beyond question that such property devolves to the successor State. *Writers* are unanimous on this point. The rule goes back to the days when the patrimonial conception of the State prevailed in legal systems where the patrimonial rights of the State were regarded as appurtenances of the territory.

(8) The principle is extensively sanctioned in *practice*.

The instruments which will be cited do not, of course, refer *expressis verbis* to "property appertaining to sovereignty over the territory". They may speak of the "public domain" in legal systems where that institution is known, or of both the "public domain" and the "private domain" which under the terms of the instruments concerned are together transferred to the successor State—a fact which constitutes *a fortiori* a proof of the existence of the customary rule in question. In other cases, the wording of the instruments relating to State succession in countries where the distinction between public domain and private domain is not made is such as to leave no doubt that the reference is at least to "property appertaining to sovereignty".

(9) Actually, very many international instruments simply record the express relinquishment by the predecessor State, without any *quid pro quo*, of all *public property* without distinction situated in the territory.<sup>64</sup>

<sup>63</sup> In a memorial in support of an appeal to the Conseil d'Etat (Conseil d'Etat, 28 April 1876, Minister of War v. Hallet, *Recueil Lebon*, 1876, pp. 397-401).

<sup>64</sup> Cf. the case of the Federation of Malaya in 1957 cited in foot-note 13 above. See also the Malaysia Act., 1963: "... any land which [ . . . ] is vested in any of the Borneo States or in the State of Singapore, and was [ . . . ] occupied or used by the Government of the United Kingdom [ . . . ] shall [ . . . ] be occupied, used, controlled and managed by the Federal Government". (United Nations Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No.: E/F.68.V.5), p. 92.) A similar wording is used in the Constitution of the Independent State of Western Samoa, 1962: "All property which [ . . . ] is vested in Her Majesty the Queen [ . . . ] or in the Crown [ . . . ] shall [ . . . ] vest in Western Samoa" (*ibid.*, p. 117).

Other instruments refer to the cession "*in full ownership*" of the territory, thus giving sustenance to the patrimonial conception of the State.<sup>65</sup>

Lastly, there is a clause which is encountered quite as frequently, if not more so, particularly in many peace treaties, providing that the ceding State "renounces all *rights and title* \* whatsoever over or respecting the territory".<sup>66</sup>

(10) The devolution rule applies in all cases of succession. It is impossible to cite all the actual situations which have occurred. A few specimens will give some idea of the continuity of the rule, or of the custom that has been followed.

Two types of cases will be omitted from these specimens as being not sufficiently illustrative—or, perhaps one should say, as being too readily illustrative in themselves—because the fact they reflect the application of this rule is due to other causes of a peculiar and specific kind.

(11) The first type comprises *all cessions of territories against payment*. The purchase of provinces, territories and the like was an accepted practice in centuries past

See also the Treaty of cession of the territory of the Free Town of Chandernagore signed at Paris by India and France on 2 February 1951, article V: "The Government of the French Republic transfers [ . . . ] *all the properties owned by the State and the public bodies*\* lying within the territory of the Free Town" (United Nations, *Treaty Series*, vol. 203, p. 158).

By the return to Morocco of the town of Tangier, the newly independent State recovered all its property and succeeded to all the property of the International Administration of Tangier: "The Moroccan State, which recovers possession of the public and private domain entrusted to the International Administration [ . . . ] receives the latter's property [ . . . ]" (Final Declaration of the International Conference in Tangier, signed at Tangier on 29 October 1956, and annexed Protocol. United Nations, *Treaty Series*, vol. 263, p. 171, article 2 of the Protocol, etc.

<sup>65</sup> See, for example, the Franco-Annamese Treaty of 6 June 1884 (G. F. de Martens, ed., *Nouveau recueil général de traités* [Göttingen, Librairie Dieterich, 1887], 2nd series, t. XII, p. 634). Pursuant to that Treaty, the King of Annam issued an ordinance of 3 October 1888 declaring that he ceded "in full ownership" the territories of the towns of Hanoi, Haiphong and Tourane [Da Nang] to the French Government and renounced all his rights for ever. The Court of Appeal of Indochina (judgement of the Third Division of 24 June 1910, *Trân-Gia-Muu v. Nguyen-Quang-Mân*, *Journal du droit international privé et de la jurisprudence comparée* (Paris, Marchal et Godde, 1912), t. 39, pp. 881-882) took the view that "the word *ownership* is not to be interpreted in the sense of ordinary ownership under the ordinary law [ . . . ], it must be taken as being synonymous with *royal ownership*. [This] right [ . . . ] includes, under Annamese law, not only certain private rights, such as the right of personal ownership over property in the public domain [ . . . ] but also political sovereignty."

See also, by way of example, treaties of the seventeenth and eighteenth centuries sanctioning the patrimonial conception of the State, such as the Treaty of Utrecht (11 April 1713) in which France yielded a number of possessions, including Hudson Bay, Newfoundland, the island of St. Christopher, etc. In the case of St. Christopher, France delivered "Dominion, Propriety and Possession [ . . . ] And all Right whatsoever, by Treaty, or by any other way obtained [ . . . ] and that in such ample manner and form" that it included a ban on fishing within thirty leagues (article XII of the Treaty, English text in F. Israel, *op. cit.*, p. 209; French text in M. de Clercq, *op. cit.*, pp. 6-7).

<sup>66</sup> The expression appears in the Treaty of Lausanne of 24 July 1923, notably in articles 15, 16 and 17 (League of Nations, *Treaty Series*, vol. XXVIII, p. 11). It occurs as many as six times in a single article in the Treaty of Peace with Japan signed at San Francisco on 8 September 1951 (article 2, which refers to the renunciation of "all right, title and claim") (United Nations, *Treaty Series*, vol. 136, p. 45).

but has been tending towards complete extinction since the First World War, as the right of peoples to self-determination becomes more and more firmly recognized. It follows from this right that the practice of transferring the territory of a people against payment must be condemned. Clearly, these old cases of transfer are not sufficiently demonstrative. On purchasing a territory, a State purchased everything in it, or everything it wanted, or everything the other party wanted to sell there, and the transfer (or non-transfer) of public property linked to sovereignty is not an indication of the existence of a rule which in this case resulted simply from capacity to pay.<sup>67</sup>

<sup>67</sup> See, for example, the Convention between the United States and Denmark providing for the cession of the Danish West Indies, signed at New York on 4 August 1916 (English text in *Supplement to the American Journal of International Law* (New York, American Society of International Law, Oxford University Press, 1917), vol. 11, pp. 53-54; French text in *Revue générale de droit international public* (Paris, A. Pédone, édit., 1917), t. XXIV, pp. 454-458), art. 1:

"His Majesty the King of Denmark by this convention cedes to the United States *all territory, dominion and sovereignty, possessed, asserted or claimed*\* by Denmark in the West Indies including the Islands of Saint Thomas, Saint John and Saint Croix together with the adjacent islands and rocks.

"This cession includes the right of property in *all public, government or crown lands, public buildings, wharves, ports, harbors, fortifications, barracks, public funds, rights, franchises, and privileges, and all other public property of every kind or description*\* now belonging to Denmark together with all appurtenances thereto."

See also the Convention of Gastein of 14 August 1865 whereby Austria sold Lauenburg to Prussia for the sum of 2.5 million Danish rix-dollars (English text in *British and Foreign State Papers, 1865-1866* (London, William Ridgeway, 1870), vol. 56, p. 1026; French text in *Archives diplomatiques, 1865* (Paris, Aymot, édit., 1865), t. IV, p. 6); the Treaty of 30 June 1899 between Spain and Germany whereby Germany acquired the Caroline, Pellew and Mariana Islands in return for a payment of 25 million pesetas (English text in A. H. Oakes and W. Maycock, *British and Foreign State Papers* (London, H. M. Stationery Office, 1903), vol. 101, p. 69; French text in *Revue générale de droit international public* (Paris, A. Pédone, édit., 1899), t. VI, p. 303); the Treaty of Washington of 30 March 1867 whereby Russia sold its North American possessions to the United States of America for \$1.2 million (English text in W. M. Malloy, comp., *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776-1909* (Washington D.C., Government Printing Office, 1910), vol. II, p. 1521); the Convention whereby France ceded Louisiana to the United States of America for \$15 million (English and French texts in G. F. de Martens, *Recueil des principaux traités* (Göttingen, Librairie Dieterich, 1831), t. VII, pp. 706 and 707); the Convention of 1850 for the cession by Denmark to Great Britain of the Coast of Guinea for 10,000 pounds; the Franco-Swedish Treaty of 10 August 1877 for the retrocession to France of the island of Saint-Barthélemy and the Protocol of Paris of 31 October 1877 (French text of both instruments in G. F. de Martens, ed., *Nouveau recueil général de traités* (Göttingen, Librairie Dieterich, 1879), 2nd series, t. IV, pp. 366-368) [article 5 of the Protocol: "In exchange for the *State property*\* owned by the Crown of Sweden in the island of Saint-Barthélemy, the French Government shall pay to the Swedish Government the sum of 80,000 francs, representing the valuation of the said property as determined by mutual agreement"]. Cession as a result of exchanges of territory may be assimilated to cession against payment; see the Agreement of 1 July 1890 whereby Great Britain transferred the island of Heligoland to Germany in exchange for territory in East Africa (*ibid.*, [1891], 2nd series, t. XVI, p. 895); the Convention of 4 November 1911 whereby Germany and France adjusted their African possessions (*ibid.*, [Leipzig, Librairie Dieterich, 1911], 3rd series, t. V, p. 64); etc.

(12) The second type consists of *forced cessions of territories*, which are normally prohibited by international law, so that succession to public property in such cases cannot be regulated by international law.<sup>68</sup>

(13) There are numerous examples of devolution of property appertaining to sovereignty—so many, in fact, that it is difficult to make a choice. A few specimens will be given to illustrate each type of succession.<sup>69</sup>

#### A. Examples of secession or decolonization

(14) Libya, for example, received “the movable and immovable property located in Libya owned by the Italian State, either in its own name or in the name of the Italian administration”.<sup>70</sup> In particular, the following

<sup>68</sup> In former times, such forced cessions were frequent and widespread. Of the many examples which history affords, one may be cited here as documentary evidence of the way in which the notion of succession to property that was linked to sovereignty could be interpreted in those days. Article XLI of the Treaty of the Pyrenees, which gained France the places of Arras, Béthune, Lens, Bapaume, and so forth, specified that the places in question “... shall remain [...] unto the said Lord the most Christian King, and to his Successors and Assigns [...] with the same rights of Sovereignty, Propriety, Regality, Patronage, Wardianship, Jurisdiction, Nomination, Prerogatives and Preeminences upon the Bishopricks, Cathedral Churches, and other Abbys, Priories, Dignities, Parsonages, or any other Benefices whatsoever, being within the limits of the said Countrys [...] formerly belonging to the the said Lord the Catholick King [...] And for that effect, the said Lord the Catholick King [...] doth renounce [these rights] [...] together with all the Men, Vassals, Subjects, Boroughs, Villages, Hamlets, Forests [...] the said Lord the Catholick King [...] doth consent to be [...] united and incorporated to the Crown of France; all Laws, Customs, Statutes and Constitutions made to the contrary [...] notwithstanding.”

(English text in F. Israel, ed., *Major Peace Treaties of Modern History, 1648-1967* (New York, Chelsea House publishers in association with Mc Graw-Hill Book Co., 1967), vol. I, pp. 69-70; French text in J. Du Mont, *Corps universel diplomatique du droit des gens, contenant un recueil des traités d'alliance, de paix, de trêve...* (Amsterdam, P. Brunel, etc., édité., 1728), t. VI, part II, p. 269).

There was a very special conception of patrimony and domain in many European countries at that time. Cession effected transfer of the sovereign power in its entirety, involving not only property but also rights over property and over persons. Treaties of the sixteenth and seventeenth centuries contained clauses whereby the dispossessed sovereign absolved the inhabitants of the ceded territory from their oath of fidelity and the successor received their “faith, homage, service and oath of fidelity”.

See also, for example, article 47 of the 1667 Treaty of Capitulation of Lille, Douai and Orchies:

“And shall retain the said towns and the commoners aforesaid without distinction of station, and likewise the churches, chapels, public loan-offices, and all foundations, cloisters, hospitals, communities, poor-houses whether general or special, lazarets, confraternities, convents, including such as are foreign, all their movable and immovable property, rights, titles, privileges, plate, or coin, bells, pewter, lead, all other metals whether worked or unworked, rings, jewels, ornaments, sacred vessels, relics, libraries and in general all their property, offices and benefices of any kind or condition whatsoever, without any obligation of payment, and shall also recover property that has been confiscated or carried away, if such there be or if it is situated in the kingdom, whether in conquered territory or elsewhere.”

<sup>69</sup> Many examples are given in I. Paenson: *Les conséquences financières de la succession des Etats (1932-1953)* [Paris, Editions Domat-Montchrestien, 1954], *passim*.

<sup>70</sup> United Nations General Assembly resolution 388 (V) of 15 December 1950, entitled “Economic and financial provisions relating to Libya”, article I.

property was transferred immediately: “the public property of the State (*demanio pubblico*) and the inalienable property of the State (*patrimonio indisponibile*) in Libya”, as well as the public archives and “the property in Libya of the Fascist Party and its organizations”.<sup>71</sup>

Burma was to succeed to all property in the public and private domain of the colonial Government,<sup>72</sup> including fixed military assets of the United Kingdom in Burma.<sup>73</sup> In addition, the United Kingdom Government undertook to supply initial equipment for the Burmese army.

The “agreements on transitional measures” of 2 November 1949 between Indonesia and the Netherlands,<sup>74</sup> adopted at the end of the Hague Round-Table Conference (August-November 1949), provided for the devolution of all property in the Netherlands public and private domain in Indonesia. In addition, a subsequent military agreement<sup>75</sup> transferred to Indonesia some warships, military maintenance equipment of the Netherlands fleet in Indonesia and all installations and equipment used by the colonial troops.

When the Colony of Cyprus attained independence, all property of the Government of the island became the property of the Republic of Cyprus.<sup>76</sup>

#### B. Examples of partial cession

(15) The peace treaties of 1919 opted for the devolution to the successor States of all public property situated in the ceded German, Austro-Hungarian or Bulgarian territories.<sup>77</sup>

A Treaty of 29 June 1945 between Czechoslovakia and the USSR stipulated the cession to the USSR of the Sub-Carpathian Ukraine within the boundaries specified in the Treaty of Saint-Germain-en-Laye. An annexed protocol provided for “transfer without payment of the right of ownership over State property in the Sub-Carpathian Ukraine”.<sup>78</sup>

The Treaty of Peace concluded on 12 March 1940 between Finland and the USSR<sup>79</sup> provided for reciprocal

<sup>71</sup> *Ibid.* The inalienable property of the State is defined in articles 822 to 828 of the Italian Civil Code and includes, in particular, mines, quarries, forests, barracks, arms, munitions, etc.

<sup>72</sup> Government of Burma Act, 1935.

<sup>73</sup> See United Kingdom, *Treaty between the Government of the United Kingdom and the Provisional Government of Burma regarding the recognition of Burmese independence and related matters*, Annex: Defence Agreement signed on the 29th August 1947 in Rangoon, Cmd 7360 (London, H. M. Stationery Office, 1948).

<sup>74</sup> United Nations, *Treaty Series*, vol. 69, p. 266.

<sup>75</sup> *Ibid.*, p. 288.

<sup>76</sup> Treaties concerning the establishment of the Republic of Cyprus, signed at Nicosia on 16 August 1960, with annexes, schedules, maps, etc. United Nations, *Treaty Series*, vol. 382, annex E, pp. 130-138, particularly article 1, and *passim*.

<sup>77</sup> Articles 256 of the Treaty of Versailles (E. Parkes, J. E. Field and R. C. Thomson eds., *British and Foreign State Papers* [London, H. M. Stationery Office, 1922] vol. 112, p. 125), 208 of the Treaty of Saint-Germain-en-Laye (*ibid.*, pp. 412-414), 191 of the Treaty of Trianon (*ibid.* [1923], vol. 113, pp. 564-565), and 142 of the Treaty of Neuilly-sur-Seine (*ibid.* [1922], vol. 112, pp. 821-822).

<sup>78</sup> English text in *British and Foreign State Papers, 1943-1945* (London, H. M. Stationery Office, 1953), vol. 145, p. 1098.

<sup>79</sup> English text in *Supplement to the American Journal of International Law* (Concord (N. H.), American Society of International Law, Rumford Press, 1940), vol. 34, pp. 127-131.

territorial cessions and included an annex requiring that all constructions and installations of military or economic importance situated in the territories ceded by either country should be handed over intact to the successor. The protocol makes special mention of bridges, dams, aerodromes, barracks, warehouses, railway junctions, manufacturing enterprises, telegraph and electric stations.

### C. Cases of total annexation or merger

(16) After the Italo-Ethiopian war of 1936, the *debellatio* of Ethiopia permitted succession to all the rights and all the property of the predecessor State. On 9 May 1936, Legislative Decree No. 754 declared this succession to be total.<sup>80</sup>

The *Anschluss* of Austria in 1938 had the same effect on all Austrian property.

The public property of the Baltic States incorporated in the USSR did not devolve to the successor State but, rather, passed within its juridical order. The Baltic States which constituted themselves Soviet Republics retained their public property, but upon their entry into the Soviet Union this public property passed within the Soviet juridical order.

### D. Cases of dismemberment

(17) The various treaties under which Poland was dismembered at the end of the eighteenth century<sup>81</sup> contain still more radical provisions. All public property passed to the various successor States of Poland, which was absorbed by its neighbours and partitioned among them.

Yugoslavia, which was constituted after the First World War by a Serbia resuscitated and expanded into the Kingdom of the Serbs, Croats and Slovenes, was invaded by the Third Reich in April 1941 and dismembered. It was partitioned among its neighbours—mainly Hungary, Bulgaria, Italy and, of course, Germany. A treaty of 22 July 1942<sup>82</sup> was concluded between the successor States,<sup>83</sup> consisting of these neighbours plus Croatia, Serbia, Montenegro and Albania.

All property in the public and private domain of the kingdom (and some other property) devolved to each of these States in whose territory it was situated, property intersected by the new frontiers being divided between them in accordance with "the principles of equity" (article 1).

(18) Many more examples could be found in history. It will be more useful, however, to see whether there are

<sup>80</sup> Arrigho Cavaglieri had submitted to the Institute of International Law a draft containing the following article 4: "The annexing or new State automatically becomes the master of *all the property*,\* in both the public and the private domain, belonging to the State which has ceased to exist [ . . . ]." (*Annuaire de l'Institut de droit international, session de Paris, 1934* [Paris, A. Pédone, éd.], pp. 478-479). In this case, the devolution affects not only property appertaining to sovereignty but all property.

<sup>81</sup> Cf. the commentary on article 1; see para. (20) above and foot-note 24.

<sup>82</sup> G. F. De Martens, ed., *Nouveau Recueil général de traités*, (Greifswald, Librairie J. Abel, 1943), 3rd series, t. XL, p. 651.

<sup>83</sup> The term "successor States" was carefully avoided. The Italian text of the Treaty spoke of "*Stati acquirenti*" and the German text of "*Erwerberstaaten*". See I. Paenson, *op. cit.*, pp. 153-154.

any examples to the contrary which would conflict with the rule suggested by the Special Rapporteur.

One case might be mentioned in this connexion. It concerns the manner in which public property was able to devolve to some of the new French-speaking African States.<sup>84</sup> The independence agreements were followed by various protocols concerning property, under which the independent State did not succeed to the whole of the property appertaining to sovereignty. It is in France that the strongest legal tradition has sanctioned the distinction between the public domain and the private domain of the State. In the colonies, there were usually not only these two categories of property belonging to the metropolitan country but also property classified as being in the public domain or the private domain of the territory. These various distinctions between property of the State and property of the territory and between property in the public domain and property in the private domain were in several cases discarded in favour of treaty provisions designed to take into account the military, cultural or other presence of the predecessor State in these countries. In exchange for French co-operation, a limited transfer of public property was agreed upon.

(19) In some cases, the pre-independence *status quo* was provisionally maintained.<sup>85</sup> In others, devolution of the (public and private) domain of the French State was affirmed as a principle but was actually implemented only in the case of property which would not be needed for the operation of the various French military or civilian services.<sup>86</sup> Sometimes the agreement between France and the newly independent territory clearly transferred all the public and private domain to the successor, which

<sup>84</sup> See G. Fouilloux: "La succession aux biens publics français dans les Etats nouveaux d'Afrique", in *Annuaire français de droit international, XI, 1965* (Paris, C.N.R.S.), pp. 885-915. Cf. also G. Fouilloux: "La succession des Etats de l'Afrique du Nord aux biens publics français", in *Annuaire de l'Afrique du Nord, 1966*, pp. 51-79.

<sup>85</sup> "Agreement between the Government of the French Republic and the Government of the Republic of Chad concerning the transitional arrangements to be applied until the entry into force of the agreements of co-operation between the French Republic and the Republic of Chad", signed in Paris on 12 July 1960 (United Nations Legislative Series, *Materials on Succession of States* [United Nations publication, Sales No.: E/F.68.V.5], pp. 153-154), article 4: "[. . .] the statute of the Domain currently in force shall continue to be applied . . .". A protocol to a property agreement was signed later, on 25 October 1961. It met the concern of the two States to provide for "respective needs" and enabled the successor State to waive the devolution of certain public property (see Decree No. 63-271 of 15 March 1963 publishing the Protocol to the property agreement between France and the Republic of Chad of 25 October 1961 [with the text of the protocol annexed], in France, *Journal officiel de la République française, Lois et décrets* (Paris, 95th year), 21 March 1963, pp. 2721-2722).

<sup>86</sup> See Decree No. 63-270 of 15 March 1963 publishing the Convention concerning the property settlement between France and Senegal, signed on 18 September 1962 (with the text of the convention annexed), in *ibid.*, p. 2720. Article 1 establishes the principle of the transfer of "ownership of State appurtenances registered [ . . . ] in the name of the French Republic" to Senegal. However, article 2 specifies: "Nevertheless, State appurtenances shall remain under the *ownership*\* of the French Republic and be registered in its name if they are certified to be needed for the operation of its services [ . . . ] and are included in the list" given in an annex. This provision concerns not the *use* of State property for the needs of the French services but the *ownership* of such property.

incorporated them in its patrimony, but under the same agreement, retroceded parts of them either in ownership or in usufruct.<sup>87</sup> In some cases the newly independent State agreed to a division of public property between France and itself, but the criterion for this division is not apparent except in the broader context of the requirements of technical assistance and of the French presence.<sup>88</sup> Lastly, there have been cases where a treaty discarded the distinctions between public and private domains, of the territory or of the metropolitan country, and provided for a division which would satisfy "respective needs", as defined by the two States in various co-operation agreements: the Contracting Parties agree to replace the property settlement based on the nature of the appurtenances by a global settlement based on equity and *satisfying their respective needs*.\*<sup>89</sup>

(20) Is French-speaking Black Africa an isolated case,<sup>90</sup>

<sup>87</sup> A typical example is the public property Agreement between France and Mauritania of 10 May 1963 (Decree No. 63-1077 of 26 October 1963), in France, *Journal officiel de la République française, Lois et décrets* (Paris, 31 October 1963), 95th year, No. 256, pp. 9707-9708. Article 1 permanently transfers the public domain and the private domain. Article 2 grants ownership of certain public property needed for the French Services. Article 3 retrocedes to France the ownership of military premises used for residential purposes. Article 4 states that France may freely dispose of "installations needed for the performance of the defence mission entrusted to the French military forces" under a defence agreement.

<sup>88</sup> Cf. Decree No. 63-268 of 15 March 1963 publishing the Protocol to the property agreement between France and the Gabonese Republic, of 6 June 1961, in France, *Journal officiel de la République française, Lois et décrets* (Paris, 21 March 1963), 95th year, No. 69, pp. 2718-2719, and Decree No. 63-267 of the same date concerning the Central African Republic (*ibid.*, p. 2718).

<sup>89</sup> Article 31 of the Franco-Malagasy agreement of 27 June 1960 concerning economic and financial co-operation, approved by a Malagasy Act of 5 July 1960 and by a French Act of 18 July 1960 (France, *Journal officiel de la République française, Lois et décrets* [Paris, 20 July 1960], 92nd year, No. 167, p. 6615). A Franco-Malagasy protocol on property was signed later, on 18 October 1961 (Decree No. 63-269 of 15 March 1963 publishing this protocol, in France, *Journal officiel de la République française, Lois et décrets* (Paris, 21 March 1963), 95th year, No. 69, pp. 2719-2720). This confirms the situation created by another economic co-operation agreement of 27 June 1960 and acknowledges — but in this context — Madagascar's ownership of the remaining State appurtenances, although France retains the ownership of military premises and constructions.

<sup>90</sup> Cf. also the Franco-Indian agreement of 21 October 1954 concerning the French Establishments in India (English text in *Foreign Policy of India — Texts of Documents, 1947-64* (New Delhi, Lok Sabha Secretariat, 1966), p. 207; French text in *Recueil des traités et accords de la France, année 1962*, p. 537), article 32; the Franco-Cambodian agreements of 29 August 1953 (French text in *Recueil des traités et accords de la France, année 1959*, p. 39), articles 2 and 3 and of 17 October 1953, article 11.

Special treaty provisions were also adopted in the case of Algeria (Evian agreements of 19 March 1962). Article 19, first paragraph, of the Declaration of Principles concerning Economic and Financial Co-operation reads:

"Public real estate in Algeria will be transferred to the Algerian State, *except, with the agreement of the Algerian authorities,\** for the premises deemed essential to the normal functioning of temporary or permanent French services." (United Nations, *Treaty Series*, vol. 507, p. 65).

What happened was, in brief, that over the years the military domain gradually passed almost entirely to the Algerian State but the rest of the domain, including movable property and the real estate referred to in the above-mentioned article, is the subject of pending litigation. A Franco-Algerian exchange of letters of 22 August 1963 specified, for what is known as Greater Algiers, which premises were to be retained by the French services.

or are roughly similar cases to be found in the demise of other colonial empires? The Special Rapporteur has not at present all the documentation he would need to form an opinion. In any case, it seems that the only conclusion to be drawn from the foregoing cases is that they involve treaty provisions illustrating the freedom usually given to States to depart by agreement from a customary rule which would otherwise be definite.<sup>91</sup>

(21) Courts and other jurisdictions also seem to endorse unreservedly the principle of the devolution of public property, particularly when it appertains to sovereignty. This is true, firstly, of national courts. Professor Rousseau writes: "The general principle of the passing of public property to the new or annexing State is now accepted without question by national courts."<sup>92</sup> One could safely add that the principle appears to be accepted for all types of succession.<sup>93</sup>

(22) Decisions of international jurisdictions confirm this rule. In the Peter Pázmány University case,<sup>94</sup> which did not perhaps concern property appertaining to sover-

<sup>91</sup> "There is a custom [. . .] (one dare not say a principle) [. . .], one of the rare customs in the extremely diverse and confusing question of State succession; it is that the successor State inherits the public domain of the annexed State!" M. Grawitz, "Chronique — Jurisprudence internationale, Tribunal des Nations Unies en Libye", sentence du 27 juin 1955, *Annuaire français de droit international*, I, 1955 (Paris, C.N.R.S.), p. 289.

<sup>92</sup> Ch. Rousseau, *op. cit.*, p. 139. Reference is generally made to the judgement of the Berlin Court of Appeal (*Kammergericht*) of 16 May 1940 (case of the succession of States to Memel—return of the territory of Memel to the German Reich following the German-Lithuanian Treaty of 22 March 1939; see H. Lauterpacht, *Annual Digest and Reports of Public International Law Cases, 1919-1942, Supplementary Volume* (London, Butterworth and Co., Ltd., 1947), case No. 44, pp. 74-76), which refers to the "comparative law" (a mistake for what the context shows to be "the ordinary law") of the passing of public property to the successor. Reference is also made to the judgement of the Palestine Supreme Court of 31 March 1947 (case of Amine Namika Sultan v. Attorney-General, *ibid.*, 1947 (London, Butterworth and Co., Ltd, 1951), case No. 14, pp. 36-40), which recognizes the validity of the transfer of Ottoman public property to the (British) Government of Palestine, by interpretation of article 60 of the Treaty of Lausanne of 1923.

<sup>93</sup> See also judgement of the Court of Cassation, 15 March 1837, Soubise case (Sirey, 1837, part 1, p. 722); Court of Appeal of French West Africa, judgement of 8 February 1907, Daour Diop *et al.* v. French State, quoted above (Sirey, 1908, part 2, p. 209): the constant principle of public international law is that "the annexing State inherits the *rights of sovereignty and of State ownership\** vested in the sovereign of the annexed country [. . .]. It is therefore logical and lawful to consider and declare that the French Government, which has taken the place of the former chiefs of Cayor, is now sole owner of all the land of this kingdom [. . .]."

Cf. also Court of Appeal of French West Africa, judgement of 1 March 1907 (*ibid.*, p. 209); Court of Appeal of Bordeaux, judgement of 24 June 1903 (*Revue de législation, de doctrine et de jurisprudence coloniales*, 1904, part II, p. 159); Appeals Council of the French Congo, decision of 5 June 1900 (*ibid.*, 1902, part II, p. 162).

The study prepared by the Secretariat, "Digest of decisions of national courts relating to succession of States and Governments" (*Yearbook of the International Law Commission, 1963*, vol. II, pp. 131-137, document A/CN.4/157, paras. 326-374) cites a number of cases, some of which involve public property that could be regarded as appertaining to sovereignty.

<sup>94</sup> Judgement of 15 December 1953, Appeal from a judgement of the Hungaro-Czechoslovak Mixed Arbitral Tribunal Peter Pázmány University v. the State of Czechoslovakia, *P.C.I.J.*, Series A/B, No. 61, pp. 208-262.

eignty, the Permanent Court of International Justice stated in general terms (which is why the statement can be cited in this context) the principle of the devolution of public property to the successor State. According to the Court, this is a "principle of the generally accepted law of State succession".<sup>95</sup>

\* \* \*

(23) It will thus be seen that legal theory, judicial decisions and State practice generally admit devolution of the public property of the predecessor State, and not only devolution of property appertaining *stricto sensu* to sovereignty. The illustrations given by the Special Rapporteur seem in each case to be broader in scope than the rule he has suggested. Nevertheless, it was considered preferable to concentrate exclusively on finding the least common denominator, because a broader approach would have raised the problem of whether devolution is really always automatic—in other words, without compensation or indemnity. It appears to be generally agreed that, in the case of public property appertaining to sovereignty, succession does in fact take place automatically; in the case of other public property there is still some doubt, because practice is equally divided. A discussion of this problem follows below.

### III. AUTOMATIC TRANSFER

(24) The problem here is whether the cession takes place automatically and without compensation or indemnity. In the case of property which is linked to the sovereignty exercised by the predecessor State over the territory affected by the change, it is obvious that the loss of sovereignty involves the simultaneous loss of everything through which and over which that sovereignty was exercised. This seems to be a matter of simple common sense, and there is no need even to link the problem of sovereignty too closely with a problem of territory.

(25) The French Minister of War's memorial to the Conseil d'Etat cited above<sup>96</sup> stated that

... major roadworks, waterworks or fortifications, and ownership of or eminent domain over such works which are an appurtenance of the public domain—this entire aggregate of duties and rights is, in the final analysis, an attribute of sovereignty. *This inseparable attribute of sovereignty moves with the sovereignty itself, no special stipulation being required in order to transfer the attendant benefit and responsibility.*\*

The writer cited Bluntschli to support his point.<sup>97,98</sup>

<sup>95</sup> *Ibid.*, p. 237.

<sup>96</sup> See para. 5 above.

<sup>97</sup> J. K. Bluntschli, *Le droit international codifié*, translated from the German by M. C. Lardy (Paris, F. Alcan, édit., 1895), articles 47, 54, 56, 70, 77.

<sup>98</sup> French courts had on various occasions ruled that the territories which had become part of France were automatically incorporated in the public domain (Court of Cassation, Civil Chamber, judgement of 2 July 1822, Prefect of Doubs v. dame de Roussillon (Sirey, 1833), part 1, p. 540; judgement of 30 January 1866, Cabaud v. Chambéry Canal Company, M. Dalloz *et al. Recueil périodique et critique de jurisprudence, de législation et de doctrine en matière civile, commerciale, criminelle, administrative et de droit public* (Paris, Bureau de jurisprudence générale, 1866), part 1, pp. 374-376; etc.).

It is difficult to imagine that a State which has lost all sovereignty over an aerodrome, barracks, prison or police station, or even a road, school or hospital, could continue to have rights over that property which would enable it, for example, to claim compensation for such transfers, since—as shown by the above quotation—the transfers are automatic and need not be expressly stipulated.

(26) However, this position carried to extremes—and to excess—led certain countries, such as Poland after 1919, strongly to reject the merest hint of an idea of succession. Poland's entry into possession of its public property (very broadly defined, moreover) was considered by the national courts to be not the result of devolution by treaty but the expression of restored sovereignty. It was by "an act of its sovereign power" that it recovered its public property.<sup>99</sup> In a context such as this, where it is considered that the public property never ceased to be part of Poland, despite the dismemberment of the country, compensation of the predecessors is obviously out of the question.

(27) Apart from this example, several different situations are found in practice:

(a) Many diplomatic texts, treaties of transfer or other instruments make no reference to the payment of compensation to the predecessor State. It is obvious that, in the absence of such a reference, it cannot be assumed that the successor State has any obligation in this respect. This is the situation most frequently encountered.

(b) Certain instruments specifically state that public property shall be transferred without payment. The transaction takes place "without compensation",<sup>100</sup> "in full right",<sup>101</sup> "without payment",<sup>102</sup> "free",<sup>103</sup> "free of

<sup>99</sup> Supreme Court of Poland, judgement of 3 March 1923, *Graffowa and Wolanowski v. Polish Ministry of Agriculture and State Lands* (J. Fischer and H. Lauterpacht, *op. cit.*, case No. 26, pp. 55-57); judgement of 1 February 1923, *Attorney-General of Poland v. Serewicz* (*ibid.*, case No. 25, pp. 54 and 55); judgement of 1 June 1922, *Attorney-General of Poland v. Zalewski* (*ibid.*, p. 55); judgement of 2 March 1928, *Polish Treasury v. Heirs of Dietl* (A. D. McNair and H. Lauterpacht, *Annual Digest of Public International Law Cases, 1927 and 1928* (London, Longmans, Green and Co., 1931), case No. 51, p. 77).

<sup>100</sup> Agreement between the United States of America and Japan concerning the Amami Islands, signed at Tokyo on 24 December 1953 (United Nations, *Treaty Series*, vol. 222, p. 193, art. III, para. 4).

<sup>101</sup> Article 10 of the Treaty of Utrecht (11 April 1713) concerning the cession of the Bay and Straits of Hudson by France to Great Britain (see foot-note 65 above).

<sup>102</sup> Treaty of Peace of 10 February 1947 between the Allied and Associated Powers and Italy, paragraph 1 of annex X ("Economic and Financial Provisions Relating to the Free Territory of Trieste") and paragraph 1, first sub-paragraph, of annex XIV ("Economic and Financial Provisions Relating to Ceded Territories"). United Nations, *Treaty Series*, vol. 49, pp. 209 and 225. United Nations General Assembly resolutions 388 (V) of 15 December 1950, entitled "Economic and financial provisions relating to Libya", article I, paragraph 1, and 530 (VI) of 29 January 1952, entitled "Economic and financial provisions relating to Eritrea", article I, paragraph 1.

<sup>103</sup> Article 60 of the Peace Treaty signed at Lausanne on 24 July 1923 concerning the cession to the successor States of the property, natural wealth and possessions of the Ottoman Empire (G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Librairie Th. Weicher, 1925), 3rd series, t. XIII, p. 362).

cost".<sup>104,105</sup> The various property agreements concluded between France and the African States which obtained independence stated that "cessions and transfers . . . shall be free of cost" and that "the transactions involved shall be effected without payment".

(c) There have, however, been some instances of compensation of the ceding State. The treaties of peace concluded after the First World War do not adopt a uniform solution. The Treaty of Lausanne (1923) discards the principle of compensation, but the other Treaties, of Versailles, Saint-Germain-en-Laye, Trianon and Neuilly<sup>106</sup> adopt the principle, although with a number of exceptions so broad that they would further becloud the issue, were it not for the fact that they concern special cases which are actually in the majority.

The value of the ceded public property was to be fixed by a Reparation Commission and paid by the successor State into a fund for the credit of the predecessor States (Germany, Bulgaria, Hungary, Austria) on account of the sums due for reparation. For both technical and political reasons, however, this system was never put into effect.

In addition, the Treaty of Versailles made an exception to the system of compensation in the special case of Alsace-Lorraine. France had this territory transferred to it on the terms specified in article 56 of the Treaty, namely, "without any payment or credit on this account to any of the States ceding the territories." This provision applies to all movable or immovable property of public or private domain, together with all rights whatsoever belonging to the German Empire or German States or to their administrative areas.<sup>107,108</sup>

<sup>104</sup> See the various protocols to the property agreements concluded between France and the newly independent countries in French-speaking Africa (for the references, see foot-notes 85-89 above).

<sup>105</sup> See also cases of "voluntary cessions without payment", which, *ex hypothesi*, preclude any payment (e.g. cession by Great Britain to the United States in 1850 of part of the Horse-Shoe Reef in Lake Erie; decision in July 1821 by an assembly of representatives of the Uruguayan people held at Montevideo concerning the incorporation of the Cisplatina Province; voluntary incorporation in France of the free town of Mulhouse in 1798; voluntary incorporation of the Duchy of Courland in Russia in 1795; Treaty of Rio of 30 October 1909 between Brazil and Uruguay for the cession without compensation of various lagoons, islands and islets; voluntary cession of Lombardy by France to Piedmont, without payment, under the Treaty of Zurich of 10 November 1859; etc.).

<sup>106</sup> Article 256 of the Treaty of Versailles; article 208 of the Treaty of Saint-Germain-en-Laye; article 191 of the Treaty of Trianon; article 142 of the Treaty of Neuilly-sur-Seine (references in foot-note 77 above).

<sup>107</sup> G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Librairie Th. Weicher, 1923), 3rd series, t. XI, p. 382. It may be of interest to quote here from the records of the Peace Conference (Paris, 1919-1920):

[Translation from French]

"MR. SERGENT (France) said that in assuming part of the debt of the German Empire, the domain of the State was being paid for in the form of interest, because the domain was constituted and developed with the help of loans. Consequently, unless payment were to be made twice, it would be inconceivable for this domain—either the productive or the non-productive domain—to be transferred against payment. *In all cases, the transfer must be effected without payment.*"

"Mr. ARMITAGE SMITH (British Empire) [...] *The peace preliminaries would stipulate that Germany's public domain should be*

#### IV. PROPERTY OF THE TERRITORY ITSELF

(28) Writers give no attention at all to property of the territory affected by the change of sovereignty itself. The amount of such property is, however, considerable. There is no territory which does not possess property of its own.

In the colonies, the situation was not always clear and this property was often governed by a host of parallel or overlapping legal régimes.

In legal systems which recognize the concept of the public and private domain of the State, the situation is not always simple. In former French Indochina, for example, there were no less than eight different kinds of domain: (a) and (b) a "colonial" domain composed of the two domains, public and private, of the French State in Indochina; (c) and (d) a "general" domain comprising the two domains, public and private, of the former Federation of the States of Indochina; (e) and (f) "local domains" belonging to each protectorate or colony in the Federation (Tonkin, Annam, Cochin China, Cambodia, Laos) with distinctions between the public and private domain; (g) and (h) public and private domains belonging to the provincial, local and municipal authorities of each protectorate or colony in the Federation.<sup>109</sup>

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*ceded without payment.*\* The Allies would then consider whether the value of that domain should be deducted from the compensation to be made to the cessionary States.

"Mr. SERGENT [...] If the cessionary State allowed the value of this domain to be deducted from its claim against Germany, its claim will be diminished. In the case of Alsace-Lorraine, since Germany had seized French public property without compensation in 1871, the proposed method would mean that France was made to pay for State property which had been taken from it by force.

"Mr. MONTAGUE (British Empire) Suggested specifying that *the German public domain would be transferred without payment to the cessionary State\** and that the Allies would decide later how allowance should be made for this.

"Mr. SERGENT (France) said that France could pay the Allies for something it received without payment from Germany." Peace Conference (1919-1920), *Recueil des actes de la Conférence de la paix* (Paris, Imprimerie Nationale, 1922), part IV (Commissions of the Conference), B (General questions), (6) Financial Commission, First Sub-Commission, meeting of 21 March 1919, extract from the records, pp. 130-131.

This discussion shows the very modest scope of the system of compensation adopted in cases other than that of Alsace-Lorraine by the 1919 peace treaties.

<sup>108</sup> See, for example, French Court of Cassation, Civil Chamber, judgement of 11 July 1928, *Alsace-Lorraine Railway Company v. Ducreux* (Dalloz, *Recueil hebdomadaire de jurisprudence, année 1928* (Paris, Jurisprudence générale Dalloz), p. 512), which emphasizes that the cessation of Alsace-Lorraine took place without payment.

<sup>109</sup> The situation was (and probably still is) quite complicated in the former Belgian Congo. For example, the precise legal characterization of the property of the Special Committee for Katanga raised very difficult problems (Cf. J.-P. Paulus, *Droit public du Congo belge*, Université libre de Bruxelles, Institut de Sociologie Solvay, *Études coloniales*, No. 6, 1959, pp. 120 *et seq.*). The Treaty of 9 January 1895 between the "Independent State of the Congo" and the Belgian State had ceded to Belgium, under the terms of article 2,

"... all the immovable and movable assets of the Independent State, and in particular (1) the ownership of all lands belonging to its public or private domain [...] (2) shares and founder's shares [...] (3) all buildings, constructions, installations, plantations and properties whatsoever established or acquired by the Government [...], movable property of every kind and livestock [...], its ships and boats together with their equip-

(29) The reason why writers neglected this problem of property of the territory itself is, perhaps, that they did not believe such property should be affected by the change of sovereignty.

However, while it seems obvious that this property should not devolve to the successor State<sup>110</sup> and that it remains the property of the territory ceded, it is equally clear that this does not amount to maintenance of the *status quo ante*. The property does not continue to be governed by the former law or to be subject to the former sovereignty. This, of course, is part of the broader problem of succession of States in respect of legislation. However, the point must be made here that public property owned by the ceded territory in its own right continues to belong to it but follows the political and judicial destiny of the territory, which passes under another sovereignty. Such property will continue to be owned by the territory but will be governed by the legislation of the successor State. In other words, the public property belonging to the territory is not affected by the change of sovereignty so far as ownership is concerned, but it passes within the juridical order of the successor State.

(30) A resolution of the Institute of International Law laid down the same principle, stating that local corporate bodies retained the right of ownership over their property after territorial changes: "The territorial changes leave intact those patrimonial rights which were duly acquired before the change took place." The resolution specified "*These rules also apply to the patrimonial rights of municipalities or other corporate bodies belonging to the State which is affected by the territorial change*."<sup>111</sup>

(31) This plain fact is worth recalling and recording in a rule of the kind suggested by the Special Rapporteur. Although it is so obvious as to be unremarkable in the case of property situated in the territory itself, it becomes most important when a decision has to be taken on the fate of property of the territory itself which is situated outside its geographical boundaries. That specific problem will be dealt with in draft article 8 suggested below, in the context of the clear rule expressed here.

(32) This problem often arises, either because the territory possesses property of its own which may normally be situated outside its geographical boundaries or because such property comes to be situated outside its new boundaries as a result of partition of the territory, cession of part of the territory, frontier adjustments, and so forth.

The Franco-Italian Conciliation Commission established under the Treaty of Peace with Italy of 10 February 1947 had to deal with a problem of this kind.<sup>112</sup> In this case the Commission, bound by the very clear wording of paragraph 1 of annex XIV to the Treaty,<sup>113</sup> which it had to interpret, went further than is suggested here and recognized the devolution to the successor State, *in full ownership*, of the property of the ceded territory itself. This property does not merely come *within the juridical order* of the successor State.

(33) The agent of the Italian Government had argued that when paragraph 1 states that the successor State shall receive, without payment, State and para-statal property (including the property of local agencies) within territory ceded, it is not—at least in the case of the property of local agencies—referring to succession of the State to the ownership of such property but to the property's incorporation into the juridical order of the successor State.<sup>114</sup>

(34) The Commission rejected that viewpoint, since

the main argument of the Italian Government conflicts with the very clear wording of paragraph 1: it is the successor State that shall receive, without payment, not only the State property but also the para-statal property, including *biens communaux*, within the territories ceded. It is the municipal legislation of the successor State that must determine the fate (final destination and juridical régime) of the property thus transferred, in the new State context into which the property has passed following the cession of the territory.<sup>115</sup>

#### [Articles 3 to 6

Draft articles 3, 4, 5 and 6 relating respectively to "public funds, government securities and debt claims", to "property of public establishments", to "property of local authorities" and to "property of foundations", will be formulated and submitted at a later stage.]

#### Article 7. Archives and public libraries

Archives and public documents of every kind relating directly or belonging to the territory affected by the change

ment and its military arms equipment, (4) the ivory, rubber and other African products which are at present the property of the Independent State and the stores and other merchandise belonging to it".

(G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Librairie Dieterich, 1896), 2nd series, t. XXI, p. 693.)

Public property was later divided into categories. Land, for example, formed one category—"State lands", which were in turn divided into land in the public domain, land in the private domain, land for which concessions had been granted and vacant land (J.-P. Paulus, *op. cit.*, pp. 15 *et seq.*). However, there was never any generally accepted demarcation between the patrimony of the colony and that of the metropolitan country (Paulus, *op. cit.*, pp. 26 *et seq.*).

<sup>110</sup> Except in the case of the total demise of the predecessor State—in other words, when there is, *ex hypothesi*, no property of the territory itself distinct from the property of the State which has ceased to exist. The ceded territory is coextensive with the former territory.

<sup>111</sup> Paragraphs 3 and 4 of resolution II of the Institute of International Law adopted at its forty-fifth session, held at Sienna from 17 to 26 April 1952 (*Annuaire de l'Institut de droit international*, 1952, II (Bâle, Editions juridiques et sociologiques S.A.), pp. 475-476).

<sup>112</sup> Franco-Italian Conciliation Commission, "Dispute concerning the apportionment of the property of local authorities whose territory was divided by the frontier established under article 2 of the Treaty of Peace: decisions Nos. 145 and 163, rendered on 20 January and 9 October 1953 respectively" (United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No.: 64.V.3), pp. 501-549).

<sup>113</sup> United Nations, *Treaty Series*, vol. 49, p. 225.

<sup>114</sup> United Nations, *Reports of International Arbitral Awards*, vol. XIII [United Nations publication, Sales No.: 64.V.3], pp. 512-513. Annex XIV, paragraph 1, stated that "The Successor State shall receive, without payment, Italian State and para-statal property within territory ceded [ . . . ]" (*ibid.*, p. 503).

<sup>115</sup> *Ibid.*, pp. 514-515.

of sovereignty, and public libraries of that territory, shall, wherever they may be situated, be transferred to the successor State.

The successor State shall not refuse to hand over copies of such items to the predecessor State or to any third State concerned, upon the request and at the expense of the latter State, save where they affect the security or sovereignty of the successor State.

## COMMENTARY

### I. INTRODUCTION

(1) Archives, jealously preserved, are the essential instrument for the administration of a community. They both record the management of State affairs and enable it to be carried on, while at the same time embodying the ins and outs of human history; consequently, they are of value to both the researcher and the administrator. Secret or public, they constitute a heritage and a public property which the State generally makes sure is inalienable and imprescriptible. Espionage is often nothing but a paper war which enables the more successful to obtain the enemy's—or even the ally's—plans, designs, documents, secret treaties, and so forth.

The destructive hatchet and torch of the wars that have eternally afflicted mankind have seriously impaired the integrity of archival collections. The documents are sometimes of such importance that the victor hastens to remove these valuable sources of information to its own territory. Armed conflict may result not only in the occupation of a territory, but also in the plundering of its records.

(2) The Second World War, more than any other conflict, was concerned with this problem of archives. The Hitlerite régime played havoc with archives, for instance in Moravia, in the Sudetenland. The victors of 1945 gave extra attention to the question of archives and confiscated those in the possession of the Reich, wherever they were, the better to ascertain and pin-point Hitlerite responsibility. Some of these archives were later returned to the post-war German Government.<sup>116</sup> The peace treaties reflected the concern of the Allies that the important problem of archives should not be ignored, and it was found possible to include in those agreements a number of provisions which will be discussed later.

(3) Where State succession is concerned, this matter has been regulated by treaty in quite considerable detail. It is only in rare cases that the instrument setting the seal on the understanding between the two parties simply provides that arrangements for the handing over of documents, deeds and archives will be agreed on by the competent authorities of the parties.<sup>117</sup> Even less frequently

does the agreement merely legalize the *status quo*, each party retaining the archives which are in its possession.<sup>118</sup> Treaties relating to changes of sovereignty over a territory are, on the contrary, usually more specific in regulating this problem.

(4) Advances in technology have completely changed the factual background to the question of archives and, it would seem, must inevitably have an effect on State succession in this respect. The difficulties which used to arise between States because archives were indivisible and reproducing them was a very lengthy task no longer exist, owing to modern reproduction methods. In the past, the problem was resolved in a drastic manner and the archives went to whoever fared best on the field of battle. The old idea of the indivisibility of archives, which aroused fears of the breaking up of collections and was responsible in some cases for the preservation of the integrity of historical repositories, is more easily accepted by the parties because photostating, microfilming and other modern techniques make it possible to find solutions better fitted to the situations which arise. The predecessor State can without harm leave the archives to the successor, in the assurance that they can be rapidly and conveniently reproduced.

(5) In some cases, diplomatic instruments include clauses relating not only to the public archives, but even to private archives.<sup>119</sup> Generally speaking, the number of agreements which are fairly explicit as concerns archives is quite large in the case of all types of succession, except perhaps in the field of decolonization, where such instruments seem on the whole to be somewhat rare.

(6) Draft article 7, as formulated, suggests a number of questions. One is how to define the expression “archives and [ . . . ] documents of every kind”. The second concerns the principle of the transfer of archives to the successor State. A third question relates to the “archives-territory” link which enables the transfer to be limited to items belonging or relating to the territory. A fourth question, which follows from this, is the fate of archives situated outside the territory. Fifthly, there is the question whether, in consideration of total transfer to the successor State, the latter does not assume a number of special obligations. Time-limits for handing over the archives, cases where there is more than one successor, and the problem of public libraries, are other matters meriting examination.

### II. DEFINITION OF ITEMS AFFECTED BY THE TRANSFER

(7) Draft article 7 refers to “archives and [ . . . ] documents of every kind”. There does not exist—at least in French—

<sup>116</sup> Cf., for example, the exchange of letters constituting an agreement between the United States of America and the Federal Republic of Germany relating to the transfer of German files and archives, Bonn, 14 March 1956, and Bonn/Bad Godesberg, 18 April 1956 (United Nations, *Treaty Series*, vol. 271, p. 320).

<sup>117</sup> Cf., for example, article 8 of the Treaty between the Netherlands and the Federal Republic of Germany concerning certain parcels of land on the frontier, signed on 8 April 1960 (United Nations, *Treaty Series*, vol. 508, p. 154).

<sup>118</sup> Cf., for example, the agreement between France and Viet-Nam concluded by an exchange of letters dated 8 March 1949, section VI “(Cultural questions)”, sub-section “Archives” (France, *Présidence du Conseil, Secrétariat général du Gouvernement et Ministère de la France d’outre-mer, Direction des affaires politiques, La documentation française* (Paris, 20 June 1949), No. 1147, p. 7).

<sup>119</sup> Article 37 of the Treaty of Peace with Italy of 10 February 1947 required the restoration of archives and cultural or artistic objects “belonging to Ethiopia or its nationals” (United Nations, *Treaty Series*, vol. 49, p. 142).

any generic term capable of covering the great wealth of written, photographic or graphic material which the expression used is intended to suggest. It must be understood as a comprehensive expression referring to the ownership, type, character, category and nature of the items, and the article as finally formulated will have to be accompanied by a detailed commentary to provide the necessary explanations.

(8) The phrase "archives and [. . .] documents" is used here in the broadest sense, due regard being had to diplomatic practice, which is extremely consistent.

It is understood that the words "of every kind" refer in the first place to the *ownership* of the archives; it is immaterial whether they are the property of the State, of an intermediate authority or of a local public body, the essential point being that they consist of public documents. Whatever public-law corporations and administrative divisions exist in a State, their archives are what is meant.

The expression "of every kind" also refers to the *type* of archives, whether diplomatic, political or administrative, military, civil or ecclesiastical, historical or geographical, legislative or regulative, judicial, financial or other.

The *character* of the items—whether public or secret—is likewise immaterial.

The question of the *nature* or *category* of the archives relates not only to the fact that they may consist of written material, whether in manuscript or in print, or of photographs, graphic material, and so forth, or that they may be originals or copies, but also to the substance of which they are made, such as paper, parchment, fabric, leather, etc.

Lastly, the expression used is intended to cover all *varieties* of documents. It seemed to the Special Rapporteur unnecessary and pointless to enumerate all these varieties in a list which would necessarily be incomplete and would certainly be tedious. Examples of the wordings used in diplomatic instruments are "archives, registers, plans, title-deeds and documents of every kind",<sup>120</sup> "archives, documents and registers concerning the civil, military and judicial administration of the ceded territories",<sup>121</sup> "all title-deeds, plans, cadastral and other registers and papers",<sup>122</sup> "any government archives, records, papers or documents which relate to the cession or the rights and property of the inhabitants of the islands

ceded",<sup>123</sup> "archives and objects of historical value",<sup>124</sup> "all archives having a general historic interest", as opposed to "archives which are of interest to the local administration";<sup>125</sup> "all documents exclusively referring to the sovereignty relinquished or ceded [. . .], the official archives and records, executive as well as judicial";<sup>126</sup> "documents, deeds and archives [. . .], registers of births, marriages and deaths, land registers, cadastral papers [. . .]",<sup>127</sup> and so forth.

One of the most detailed definitions of the term "archives" that the Special Rapporteur has come across is the one in article 2 of the Agreement of 23 December 1950 between Italy and Yugoslavia, concluded pursuant to the Treaty of Peace of 10 February 1947. It encompasses documents relating to all the public services, to the various parts of the population, and to categories of property, situations or private juridical relations.<sup>128</sup>

<sup>120</sup> Article 1, para. 3, of the Convention between the United States of America and Denmark providing for the cession of the Danish West Indies, signed at New York on 4 August 1916 (English text in *Supplement to the American Journal of International Law* (New York, American Society of International Law, Oxford University Press, 1917), vol. 11, p. 54; French text in *Revue générale de droit international public* (Paris, A. Pédone, édit., 1917), t. XXIV, p. 454).

<sup>121</sup> Article 37 (concerning Ethiopia) of the Treaty of Peace with Italy, signed at Paris on 10 February 1947 (United Nations, *Treaty Series*, vol. 49, p. 142). On the basis of that article and article 75 (*ibid.*, p. 157), Ethiopia and Italy concluded an Agreement concerning the settlement of economic and financial matters issuing from the Treaty of Peace and economic collaboration, signed at Addis Ababa on 5 March 1956, which had three annexes, A, B and C, listing the archives and objects of historical value that had been or were to be returned to Ethiopia by Italy (*ibid.*, vol. 267, pp. 204-216).

<sup>122</sup> Article VI of the Treaty of cession of the territory of the Free Town of Chandernagore between India and France, signed at Paris on 2 February 1951 (United Nations, *Treaty Series*, vol. 203, pp. 158-160).

<sup>123</sup> Article VIII of the Treaty of Peace between Spain and the United States of America, signed at Paris on 10 December 1898 (English text in W. M. Malloy (comp.), *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776-1909* (Washington, Government Printing Office, 1910), vol. II, p. 1693).

<sup>124</sup> See foot-note 117 above.

<sup>125</sup> Agreement, signed at Rome on 23 December 1950, between the Italian Republic and the Federal People's Republic of Yugoslavia with respect to the apportionment of archives and documents of an administrative character or of historical interest relating to the territories ceded under the terms of the Treaty of Peace (United Nations, *Treaty Series*, vol. 171, p. 291). Article 2 reads as follows:

"The expression 'archives and documents of an administrative character' shall be construed as covering the documents of the central administration and those of the local public administrative authorities.

"The following [in particular shall be covered] [. . .]

"Documents [. . .] such as cadastral registers, maps and plans; blueprints, drawings, drafts, statistical and other similar documents of technical administration, concerning *inter alia* the public works, railways, mines, public waterways, seaports and naval dockyards;

"Documents of interest either to the population as a whole or to part of the population, such as those dealing with births, marriages and deaths, statistics, registers or other documentary evidence of diplomas or certificates testifying to ability to practice certain professions;

"Documents concerning certain categories of property, situations or private juridical relations, such as authenticated deeds, judicial files, including court deposits in money or other securities [. . .];

<sup>120</sup> This expression appears in several clauses of the Treaty of Versailles of 28 June 1919: part III, sect. I, art. 38, concerning Germany and Belgium; sect. V, art. 52, concerning Germany and France in respect of Alsace-Lorraine; sect. VIII, art. 158, concerning Germany and Japan in respect of Shantung (E. Parkes, J. E. Field and R. C. Thomson, eds., *British and Foreign State Papers* (London, H. M. Stationery Office, 1922), vol. 112, pp. 29-30, 42, and 81), as well as in the Treaty of Saint-Germain-en-Laye of 10 September 1919: art. 93 concerning Austria (*ibid.*, p. 361) and in the Treaty of Trianon of 4 June 1920, art. 77 concerning Hungary (*ibid.*, vol. 113, p. 518).

<sup>121</sup> Article 3 of the Treaty of Peace between the German Empire and France, signed at Frankfurt on 10 May 1871 (G.F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Librairie Dieterich, 1874), t. XIX, p. 689).

<sup>122</sup> Article 8 of the Additional Agreement to the Treaty of Peace, signed at Frankfurt on 11 December 1871 (*ibid.* [1875], t. XX, p. 854).

### III. THE PRINCIPLE OF THE TRANSFER OF ARCHIVES TO THE SUCCESSOR STATE

(9) The principle of the transfer of archives to the successor State seems to be unquestioned, irrespective of the type of succession. Writers comment only occasionally and briefly on the problem of archives and appear to be unanimous on this point, and judicial decisions, although even rarer, do not deviate from this principle. Diplomatic practice, on the other hand, is more copious and enables the scope of the principle to be pin-pointed.

#### A. Archives of every kind

(10) *Archives of every kind are generally handed over to the successor State immediately or within a very short time-limit.* The Franco-German Treaty of 1871 providing for transfer required the French Government to hand over to the German Government the archives relating to the ceded territories.<sup>129</sup> The Additional Agreement to that Treaty imposed on the two States the obligation to return to each other all the title-deeds, registers, and so forth, for municipalities on either side bounded by the new frontier line between the two countries.<sup>130</sup> After the First World War, the territories ceded in 1871 having changed hands again, the archives were dealt with in the same way and the Treaty of Versailles required the German Government to hand over without delay to the French Government the items relating to those territories.<sup>131</sup>

Under the terms of an identically worded provision of the same Treaty, the German Government contracted the same obligation towards Belgium.<sup>132</sup> Without any change in wording, other international instruments, namely, the Treaty of Saint-Germain-en-Laye and the Treaty of Trianon, imposed on Austria and Hungary respectively the same obligation towards the successor States.<sup>133</sup>

#### B. Archives as an instrument of evidence

(11) In old treaties, archives were handed over to the successor State primarily as instruments of evidence and as titles to property.

"The expression 'historical archives and documents' shall be construed as covering not only the material from archives of historical interest properly speaking but also documents, acts, plans and drafts concerning monuments of historical and cultural interest."

The enumeration given in article 6 of the same Agreement rounds off the definition of "administrative" archives.

<sup>129</sup> Article 3 of the Treaty of Peace signed at Frankfurt on 10 May 1871 (see foot-note 121 above).

<sup>130</sup> Article 8 of the Additional Agreement signed on 11 December 1871 (see foot-note 122 above).

<sup>131</sup> Treaty of Versailles of 28 June 1919, part III, sect. V (Alsace-Lorraine) article 52 (see foot-note 120 above).

<sup>132</sup> *Idem*, part III, sect. I, art. 38 (*ibid.*).

<sup>133</sup> Article 93 of the Treaty of Saint-Germain-en-Laye of 10 September 1919 (*ibid.*), and article 77 of the Treaty of Trianon of 4 June 1920 (*ibid.*).

The writings of past years seem to retain the impress of this concern for "evidence". "Archives", wrote Fauchille, "and titles to the property acquired by the annexing State," which form [. . .] part of the public domain, must also be handed over to it".<sup>134</sup> The Convention whereby the islands constituting the Danish West Indies were sold to the United States of America by Denmark in 1916 provided as follows: "In this cession shall also be included any government archives, records, papers or documents which relate to the cession or the rights and property \* of the inhabitants of the islands ceded [. . .]".<sup>135</sup> When Spain, by the Treaty of Paris of 10 December 1898, ceded to the United States of America the property in the public domain of Cuba, Puerto Rico, the islands of Guam and the Philippine archipelago, it was stated that the cession included "all documents exclusively referring to the sovereignty relinquished or ceded [. . .] and such rights \* as the Crown of Spain and its authorities possess in respect of the official archives [. . .]".<sup>136</sup>

However, the treaties in question do not seem to have implied by this that the ceding State had a right to retain other categories of archives.

#### C. Archives as an instrument of administration

(12) The simple idea has prevailed that, when territory is transferred, concern for handing over as viable a territory as possible should induce the predecessor State to relinquish to the successor all such instruments as will enable breakdowns in administration to be kept to a minimum and help to ensure that the territory is properly and easily governable. Hence the custom of leaving to the territory all the written, graphic and photographic material needed for the continuance of the proper administrative functioning of the territory.

(13) One effect of this "practice" which is encountered in some treaties of annexation, especially in Europe, was that in a few rare cases the predecessor State considered itself entitled to hand over only archives of an administrative character<sup>137</sup> and to retain those which had a historical interest. However, such instances seem to be isolated ones and become questionable with the passage of time.

(14) This distinction between types of archives was applied, apart from cases of annexation, in one case of decolonization. Article 33 of the Agreement between France and India of 21 October 1954,<sup>138</sup> concerning the French Establishments in India, provided as follows:

<sup>134</sup> P. Fauchille, *Traité de droit international public*, eighth edition of the Manuel de droit international public de H. Bonfils (Paris, Rousseau et Cie, édit., 1922), t. 1, p. 360, para. 219.

<sup>135</sup> Article 1, para. 3, of the Convention of 4 August 1916 (for reference, see foot-note 123 above).

<sup>136</sup> Article VIII of the Treaty of 10 December 1898 (see foot-note 126 above).

<sup>137</sup> This expression was understood in the broadest sense: taxation documents of all kinds, cadastral and public property registers, administrative documents, registers of births, marriages and deaths, land registers, judicial and penitentiary archives, etc.

<sup>138</sup> See foot-note 90 above. A similar provision already appeared in article VI of the Treaty of cession of the territory of the Free Town of Chandernagore (see foot-note 125 above).

The French Government shall keep in their custody the records having an historical interest, they shall leave in the hands of the Indian Government the records required for the administration of the Territory.

Clearly, if the retention of historical archives by the predecessor State is unjustified in the case of annexation, it is even less justified in the case of decolonization. Decolonization closes a parenthesis in the history of a country and should enable the country in question to link up with its past history.

In any event, the Special Rapporteur's search for other, similar diplomatic precedents was fruitless, and this does not seem to be either a rule or a custom, nor even a tendency, but rather one of those isolated cases which are probably due to special circumstances.

(15) Very much to the contrary, in the developments cited below there will be seen many examples of transfers of archives including historical documents. In some cases, indeed, only this latter category is referred to, not because it may at one time have been excluded from such transfers but simply because the tribulations of international life had not yet drawn attention to it. For instance, France, as the successor State in Savoy and Nice, was able not only to obtain from the Sardinian Government the historical archives which were in the ceded territories at the time but also, a century later, to obtain from Italy<sup>139</sup> the historical archives at Turin.<sup>140</sup> Similarly, Yugoslavia and Czechoslovakia obtained from Hungary, by the Treaty of Peace of 10 February 1947, all historical archives which had come into being under the Hungarian monarchy between 1848 and 1919 in those territories. Under the same Treaty, Yugoslavia was also to receive from Hungary the archives concerning Illyria, which dated from the eighteenth century.<sup>141</sup> It would appear very easy to find many more examples relating to this point.

Thus, it seems reasonable to lay down as a general rule for all types of succession the principle of the transfer of *archives of every kind* to the successor State. However, the draft article makes another specification which requires commentary. It refers to archives "relating [. . .] or belonging to the territory".

#### IV. THE "ARCHIVES-TERRITORY" LINK

(16) The suggested text enunciates the principle of the handing over to the successor State of archives "relating directly or belonging to the territory". It should be made clear what is meant by these words.

Obviously, the successor State cannot claim simply any archives, but only those which belong to the territory.<sup>142</sup> This must be appraised from two standpoints.

<sup>139</sup> This seems especially significant, in that Italy was itself the successor to the Sardinian Government.

<sup>140</sup> See para. 30 below.

<sup>141</sup> Article 11 of the Treaty of Peace with Hungary (United Nations, *Treaty Series*, vol. 41, p. 178).

<sup>142</sup> Article I, paragraph 2 (a), of General Assembly resolution 388 (V) entitled "Economic and financial provisions relating to Libya" stipulates that the property to be transferred immediately shall include "the relevant archives and documents of an administrative character or technical value concerning Libya or relating to property\* the transfer of which is provided for by the present resolution".

(17) First, there are archives which were acquired before the change of sovereignty by or on behalf of the territory, against payment or free of cost, and with funds of the territory or otherwise.<sup>143</sup> From this first standpoint, such archives "belong" to the territory and must follow its destiny in the change of sovereignty. In order to do so, it is not necessary that the archives should relate to the territory, since it is quite conceivable that the territory may have acquired, free of cost or against payment, historical, cultural or other documents concerning other parts of the world.

(18) Secondly, the organic link between the territory and the archives relating to it must be taken into account.<sup>144</sup> However, a difficulty arises when the strength of this link has to be appraised by category of archives. Writers agree that, where the documents in question "relate to the predecessor State as such and refer only incidentally to the ceded territory", they "remain the property of the ceding State, [but] it is generally accepted that copies will be supplied to the annexing State at its request".<sup>145</sup> The "archives-territory" link was specifically taken into account in the Rome Agreement of 23 December 1950 between Yugoslavia and Italy concerning archives.<sup>146</sup>

Attention may be drawn at this point to the decision of the Franco-Italian Conciliation Commission in which the Commission held that archives and historical documents, even if they belonged to a municipality whose territory was divided by the new frontier drawn up in the Treaty of Peace with Italy, must be assigned in their entirety to France whenever they related to the territory ceded.<sup>147</sup>

<sup>143</sup> Article 11, paragraph 2, of the Treaty of Peace with Hungary (see foot-note 141 above) rightly specifies that the successor States, Yugoslavia and Czechoslovakia, shall not have any rights over archives or objects "acquired by purchase, gift or legacy and original works of Hungarians".

<sup>144</sup> Under article 11, paragraph 1, of the Treaty of Peace of 10 February 1947 (see foot-note 141 above), Hungary handed over to the successor States, Czechoslovakia and Yugoslavia, objects "constituting [their] cultural heritage [. . .] which originated in those territories\* [. . .]".

<sup>145</sup> Ch. Rousseau, *op. cit.*, p. 136. Cf. also D. P. O'Connell, *State Succession in Municipal Law and International Law* (Cambridge, University Press, 1967), vol. I: *Internal Relations*, pp. 232-233.

<sup>146</sup> Article 6 of the Agreement (see foot-note 128 above) provides that archives which are indivisible or of common interest to both parties "shall be assigned to that Party which, in the Commission's judgement, is more interested in the possession of the documents in question, according to the extent of the territory or the number of persons, institutions or companies to which these documents relate." In this case, the other Party shall receive a copy of such documents, which shall be handed over to it by the Party holding the original."

<sup>147</sup> Decision No. 163 rendered on 9 October 1953 (United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No.: 64.V.3), p. 503). This decision includes the following passage:

"Communal property which shall be so apportioned pursuant to paragraph 18 [of annex XIV to the Treaty of Peace with Italy] should be deemed not to include 'all relevant archives and documents of an administrative character or historical value'; such archives and documents, even if they belong to a municipality whose territory is divided by a frontier established under the terms of the Treaty, pass to what is termed the successor State if they concern the territory ceded or relate to property transferred\* (annex XIV, para. 1); if these conditions are not fulfilled, they are not liable either to transfer under paragraph 1

(19) After the Franco-German war of 1870, the archives of Alsace-Lorraine were handed over to the new German authority in the territory. However, the problem of the archives of the Strasbourg educational district and of its schools was amicably settled by means of a special convention. In this case, however, the criterion of the "archives-territory" link was applied only in the case of documents considered to be "of secondary interest to the German Government".<sup>148</sup>

(20) Another problem which is touched on by the draft article as submitted and which has caused some difficulties concerns archives which, for one reason or another, are situated outside the territory affected by the change of sovereignty.

#### V. ARCHIVES SITUATED OUTSIDE THE TERRITORY

(21) The text suggested by the Special Rapporteur is of a general nature. According to the wording submitted for discussion, the successor State has the right to claim its archives, wherever they may be situated. In fact, the formulation of such a rule seems to follow inevitably from a consideration of practice, some examples of which will be given below.

A distinction may be drawn between two cases: that of archives removed from the territory concerned, and that of archives established outside the territory but relating directly to it. (There is a third case which will not be considered in this study, namely, that of documents belonging or relating to the territory which are situated outside the geographical boundaries of both the predecessor State and the successor State.)

##### A. Archives which have been removed

(22) Current practice seems to acknowledge that archives which have been removed by the predecessor State, either immediately before the transfer of sovereignty or even at a much earlier period, should be returned to the successor State.

For example, following the dissolution in 1944 of the Union between Denmark and Iceland, the High Court of Justice of Denmark ruled, in a decision of 17 November 1966,<sup>149</sup> that some 1,600 priceless parchments and manuscripts containing old Icelandic legends should be restored to Iceland. It should be noted that these parchments were not public archives, since they did not really concern the history of the Icelandic public authorities and administration, and were not the property of Iceland, since they had been collected in Denmark by an Icelander who was Professor of History at the University of Copen-

hagen. He had saved them from destruction in Iceland, where they were said to have been used on occasion to block up holes in the doors and windows of Icelandic houses. These parchments, whose value has been estimated by experts at 600 million Swiss francs, had been bequeathed in perpetuity by their owner to a university foundation in Denmark. Despite the fact that they were private property, duly bequeathed to an educational institution, and did not relate to the history of the public authorities in Iceland, these archives were finally handed over to the Reykjavik Government, which had been claiming them since the end of the Union between Denmark and Iceland, as others had been doing ever since the beginning of the century.

(23) In the case of the annexation of Ethiopia by Italy in 1935, Italy was obliged to return the archives which it had removed from Ethiopia. Article 37 of the Treaty of Peace with Italy provides as follows: "[. . .] Italy shall restore all [. . .] archives and objects of historical value belonging to Ethiopia or its nationals and removed from Ethiopia to Italy since October 3, 1935".<sup>150</sup>

(24) There is a striking similarity in the wording of the instruments which terminated the wars of 1870 and 1914. Article 3 of the Treaty of Peace between France and Germany signed at Frankfurt on 10 May 1871<sup>151</sup> provided as follows: "If any of these items [archives, documents, registers, etc.] have been removed, they will be restored by the French Government on the demand of the German Government". This statement of the principle that archives which have been removed must be returned was later incorporated, in the same wording, in article 52 of the Treaty of Versailles, article 93 of the Treaty of Saint-Germain-en-Laye and article 77 of the Treaty of Trianon, the only difference being that in these treaties it was Germany that was compelled to obey the law of which it had heartily approved when it was the victor.<sup>152</sup>

The Treaty of Versailles states the rule with even greater force in article 158, which provides that Germany shall hand over to Japan all the archives, documents and the like relating to the territory of Kiaochow, "wherever they may be".<sup>153</sup> It even gives Germany a very short period of three months in which to complete the operation, thus making the measure yet more stringent.

(25) Similar considerations prevailed in the relations between Italy and Yugoslavia. Italy was to restore to the latter administrative archives relating to the territories ceded to Yugoslavia under the treaties signed in Rapallo on 12 November 1920 and in Rome on 27 January 1924 which had been removed by Italy between 4 November 1918 and 2 March 1924 as the result of the Italian occupation, and also deeds, documents, registers and the like belonging to those territories which had been removed by the Italian Armistice Mission operating in Vienna

or to apportionment under paragraph 18, but remain the property of the Italian municipality. *What is decisive, in the case of property in a special category of this kind, is the notional link with other property or with a territory\**" (*ibid.*, pp. 516-517).

<sup>148</sup> Convention of 26 April 1872 signed at Strasbourg (G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Librairie Dieterich, 1875), t. XX, p. 875).

<sup>149</sup> *Revue générale de droit international public* (Paris, A. Pédone, éd., 1967), t. LXXI, p. 401.

<sup>150</sup> See foot-note 124 above.

<sup>151</sup> See foot-note 121 above.

<sup>152</sup> See foot-note 120 above. The Treaties of Saint-Germain-en-Laye and Trianon concerned respectively Austria and Hungary, which were to return the archives they had removed.

<sup>153</sup> G. F. de Martens, *Nouveau Recueil général de traités* (Leipzig, Librairie Th. Weicher, 1923), 3rd series, t. XI, p. 443.

after the First World War.<sup>154</sup> The agreement between Italy and Yugoslavia of 23 December 1950 is even more specific: article 1 provides for the delivery to Yugoslavia of all archives "which are in the possession, or which will come into the possession \* of the Italian State, of local authorities, of public institutions and publicly owned companies and associations" and adds that "should the material referred to *not be in Italy*,\* the Italian Government shall endeavour to recover and deliver it to the Yugoslav Government".<sup>155</sup>

(26) However, some French writers of an earlier era seemed for a time to accept a contrary rule. Referring to partial annexation, which in those days was the most common type of State succession, owing to the frequent changes in the political map of Europe, Despagnet wrote: "The dismembered State retains archives relating to the ceded territory which are preserved in a repository situated outside that territory".<sup>156</sup> Fauchille did not go so far as to support this contrary rule, but implied that distinctions could be drawn: if the archives are outside the territory affected by the change of sovereignty, exactly which of them must the dismembered State give up? As Fauchille put it: "Should it hand over only those documents that will provide the annexing Power with a means of administering the region, or should it also hand over documents of a purely historical nature?"<sup>157</sup>

(27) The fact is that these writers hesitated to support the generally accepted rule, and even went so far as to formulate a contrary rule, because they accorded excessive weight to a court decision which was not only an isolated instance but bore the stamp of the political circumstances of the time. This was a judgement rendered by the Court of Nancy on 16 May 1896, after Germany had annexed Alsace-Lorraine, ruling that "the French State, which prior to 1871 had an imprescriptible and inalienable right of ownership over all these archives, *was in no way divested of that right by the change of nationality imposed on \* a part of its territory*".<sup>158</sup> It should be noted that the main purpose in this case was not to deny Germany (which was not a party to the proceedings) a right to the archives belonging to the territories under its control at that time, but to deprive an individual of public archives which were improperly in his possession.<sup>159</sup> Hence, the scope of this isolated decision, which appeared to leave to France the right to claim from individuals archives which should or which might fall to Germany, seems to be somewhat limited.

<sup>154</sup> Article 12 of the Treaty of Peace with Italy of 10 February 1947 (United Nations, *Treaty Series*, vol. 49, p. 134). For the Rapallo Treaty, see League of Nations, *Treaty Series*, vol. XVIII, p. 387; for the Rome Treaty, *ibid.*, vol. XXIV, p. 31.

<sup>155</sup> United Nations, *Treaty Series*, vol. 171, p. 293.  
<sup>156</sup> F. Despagnet, *Cours de droit international public*, 2nd ed. (Paris, Librairie de la Société du Recueil général des lois et des arrêts fondé par J.-B. Sirey, 1899), p. 106, para. 99.

<sup>157</sup> P. Fauchille, *op. cit.*, p. 360, para. 219.  
<sup>158</sup> Judgement of the Court of Nancy of 16 May 1896, Dufresne v. the State (M. Dalloz et al., *Recueil périodique*... (Paris, Bureau de jurisprudence générale, 1896), part 1, pp. 411-412.

<sup>159</sup> The decision concerned sixteen cartons of archives which an individual had deposited with the archivist of Meurthe-et-Moselle. They related both to the ceded territories and to territories which remained French, and this provided a ground for the Court's decision.

(28) The Special Rapporteur has nevertheless mentioned this isolated school of thought because it seemed to prevail, at least for some time and in some cases, in French diplomatic practice. If we are to give credence to one interpretation of the texts at least, this practice seems to indicate that only administrative archives should be returned to the territory affected by the change of sovereignty, while historical documents relating to that territory which are situated outside or are removed from it remain the property of the predecessor State. For example, the Treaty of Zurich of 10 November 1859 between France and Austria provided that archives containing *titles to property and documents concerning administration and civil justice* relating to the territory ceded by Austria to the Emperor of the French "which may be in the archives of the Austrian Empire", including those at Vienna, should be handed over to the commissioners of the new government of Lombardy.<sup>160</sup> If there is justification for interpreting in a very strict and narrow way the expressions used, which apparently refer only to items relating to current administration, it may be concluded that the historical part of the imperial archives at Vienna relating to the ceded territories was not affected.<sup>161</sup>

Article 2 of the Treaty of the same date between France and Sardinia<sup>162</sup> refers to the aforementioned provisions of the Treaty of Zurich, while article 15 of the Treaty concluded between Austria, France and Sardinia on the same date reproduces them word for word.<sup>163</sup>

Similarly, a Convention between France and Sardinia, signed on 23 August 1860 pursuant to the Treaty of Turin of 24 March 1860 confirming the cession of Savoy and the County of Nice to France by Sardinia, includes an article 10 which is cast in the same mould as the articles cited above when it states:

Any archives containing titles to property and any administrative, religious and civil justice documents relating to Savoy and the administrative district of Nice which may be in the possession of the Sardinian Government shall be handed over to the French Government.<sup>164</sup>

(29) Here again, the Special Rapporteur is somewhat hesitant to conclude that these texts contradict the existence of a rule permitting the successor State to claim all archives, including historical archives, relating

<sup>160</sup> Article 15 of the Treaty of Peace between France and Austria, signed at Zurich on 10 November 1859 [France, *Archives diplomatiques, Recueil de diplomatie et d'histoire* (Paris, Aymot, édit., 1861), t. 1, p. 10; M. de Clercq, *op. cit.*, t. VII (1856-1859), p. 647].

<sup>161</sup> For this viewpoint, see G. May, "La saisie des archives du département de la Meurthe pendant la guerre de 1870-1871", in *Revue générale de droit international public* (Paris, A. Pédone, édit., 1911), t. XVIII, p. 35, and G. May, *Le Traité de Francfort* (Paris, Berger-Levrault et Cie, édit., 1909), p. 269, foot-note 2.

<sup>162</sup> Article 2 of the Treaty between France and Sardinia concerning the cession of Lombardy, signed at Zurich on 10 November 1859 (France, *Archives diplomatiques, Recueil de diplomatie et d'histoire* (Paris, Aymot, édit., 1861), t. I, p. 14; M. de Clercq, *op. cit.*, p. 652).

<sup>163</sup> Article 15 of the Treaty between Austria, France and Sardinia, signed at Zurich on 10 November 1859 (France, *Archives diplomatiques, Recueil de diplomatie et d'histoire* (Paris, Aymot, édit., 1861), t. I, pp. 22-23; M. de Clercq, *op. cit.*, pp. 661-662).

<sup>164</sup> M. de Clercq, *op. cit.*, t. VIII (1860-1863), p. 83; G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Librairie Dieterich, 1869), t. XVII, part II, p. 25.

to the territory affected by the change of sovereignty which are situated outside that territory. Would it, after all, be very rash to interpret the words "titles to property" in the formula "titles to property, administrative, religious and judicial documents", which is used in all these treaties, as alluding to historical documents (and not only administrative documents) that prove the ownership of the territory? The fact is that in those days, in the Europe of old, the territory itself was the property of the sovereign, so that all titles tracing the history of the region concerned and providing evidence regarding its ownership, were claimed by the successor.<sup>166</sup> If this view is correct, the texts mentioned above, no matter how isolated, do not contradict the rule concerning the general transfer of archives, including historical archives, situated outside the territory concerned. If the titles to property meant only titles to public property, they would be covered by the words "administrative and judicial documents". Such an interpretation would seem to be supported by the fact that these treaties usually include a clause which appears to create an exception to the transfer of all historical documents, in that private documents relating to the reigning house, such as marriage contracts, wills, family mementoes, and so forth, are excluded from the transfer.<sup>166</sup>

(30) What really clinches the argument, however, is the fact that these few cases which occurred in French practice were deprived of all significance when France, some ninety years later, claimed and actually obtained the remainder of the Sardinian archives, both historical and administrative, relating to the cession of Savoy and the administrative district of Nice, which were preserved in the Turin repository. The agreements of 1860 relating to that cession were supplemented by the provisions of the Treaty of Peace with Italy of 10 February 1947, article 7 of which provided that the Italian Government should hand over to the French Government

*all archives, historical and administrative, prior to 1860, which concern \* the territory ceded to France under the Treaty of March 24, 1860, and the Convention of August 23, 1860.*<sup>167</sup>

(31) Consequently, there seems to be ample justification for accepting as a rule which adequately reflects State practice the fact that the successor State should receive all the archives, historical or other, relating to the territory affected by the change of sovereignty, even if those archives have been removed or are situated outside that territory.

(32) In more recent times, in cases of decolonization, the application of such a principle would help new States to

acquire greater mastery of their internal and external problems. A better knowledge of these problems can be gained only through the possession of retired or current archives, which should be left with or returned to the States concerned. For obvious reasons, however, the former colonial Power cannot be expected to agree to hand over all archives, especially those linked to its *imperium* over the territory concerned. Many considerations relating to politics and expediency prevent such Powers from leaving to the new sovereign revealing documents on colonial administration. For that reason, the principle of the transfer of such archives—which the former metropolitan country is careful to remove before independence—is rarely applied in practice.

At this point, a distinction must be drawn between the various categories of archives which the former metropolitan country is tempted to evacuate before the termination of its sovereignty. A distinction should be made between (a) historical archives proper, which antedate the beginning of colonization of the territory, (b) archives of the colonial period, relating to the *imperium* and *dominium* of the metropolitan country and to its colonial policy generally in the territory, and (c) purely administrative and technical archives relating to the current administration of the territory.

(33) The information collected by the Special Rapporteur, which although voluminous is not sufficiently complete to permit the formation of a definitive judgement, seems to show that the problem of returning the archives removed by the former metropolitan country to the new independent State has not yet been solved satisfactorily. It may even be said that, no matter how sound and well-founded the principle of the transfer of archives may be, it would be unreasonable to expect the immediate return of all the archives referred to under (b) above. Indeed, in the interest of good relations between the predecessor State and the successor State, it may be unrealistic and undesirable for the new independent State to claim them and to start a dispute over them which is bound to be difficult.

(34) However, in the case of the archives mentioned under (a) above, which may have been removed by the former metropolitan country, the principle of transfer should be firmly and immediately applied. These archives antedate colonization, they are the product of the land and spring from its soil; they are bound up with the land where they came into existence and they contain its history and its cultural heritage.

(35) Similarly, the removal of administrative documents of all kinds mentioned under (c) above, which may have occurred in some cases, is bound to be a source of considerable inconvenience, confusion and maladministration for the young independent State, which already faces considerable difficulties owing to its inexperience and lack of trained personnel. Except in the rare cases where independence resulted from a sharp and sudden rupture of the links between the metropolitan country and the territory, which, compounded by misunderstandings or rancour, led to the malicious destruction or removal of administrative documents, the removal of these archives, which are instruments of administration, has reflected primarily the metropolitan country's desire

<sup>166</sup> As the Special Rapporteur noted above, historical documents were often claimed by the successor State as instruments of evidence (see para. 11).

<sup>166</sup> Article 10 of the Convention between France and Sardinia of 23 August 1860 (see foot-note 164 above) provided that France was to return to the Sardinian Government "titles and documents relating to the royal family", which implies that France had already taken possession of them together with the other historical archives. This clause relating to private papers, which is based on the dictates of courtesy, is also included, for example, in the Treaty of 28 August 1736 between France and Austria concerning the cession of Lorraine, article 16 of which left to the Duke of Lorraine family papers such as "marriage contracts, wills and other papers".

<sup>167</sup> United Nations, *Treaty Series*, vol. 49, p. 132.

to retain documents and titles which might concern the minority composed of its own nationals. However, reproduction techniques are now so highly developed that it would be unreasonable and unjustified to retain such administrative or technical archives, as this would entail depriving a majority in order to meet the needs of a minority, which could, moreover, be satisfied in another way.

(36) Generally speaking, it is to be hoped that the formulation of the rule of transfer will lead to better relations between States and open the way for appropriate co-operation in the field of archives. This would enable the new sovereignty to recover the items which express its history, its traditions, its heritage and its national genius and provide it with a means of improving the daily life of its inhabitants, and would also enable the former sovereignty to ease its own difficulties, intangible and material, which inevitably accompany its withdrawal from the territory.

(37) Professor Rousseau, discussing a case of decolonization, writes:

The problem is posed at present in the relations between France and Cambodia, but so far no final settlement seems to have been reached. The logical solution would be the return of all items concerning the history of Cambodia during the period in which France assumed international responsibility for its affairs (1863-1953).<sup>168</sup>

In the case of Algeria, historical archives concerning the pre-colonial period, which had been carefully catalogued by the colonial administration, were removed by the latter immediately before independence.<sup>169</sup> The negotiations between the two Governments have so far resulted in the return of some of the documents from the Turkish collection and microfilms of part of the Spanish collection.<sup>170</sup>

#### B. Archives established outside the territory

(38) This section concerns archives consisting of items and documents which relate to the territory affected by the change of sovereignty but which were established and have always been kept outside the territory. Many treaties include this category among the archives which must revert to the successor State.

The Protocol concerning retrocession by Sweden to France of St. Bartélemy in the West Indies provides that papers and documents of all kinds relating to the acts [of the Swedish Crown] which may be in the possession of the Swedish administration \* [...] shall be handed over to the French Government.<sup>171</sup>

<sup>168</sup> Ch. Rousseau, *op. cit.*, p. 136.

<sup>169</sup> These archives are commonly known as the Arab collection, the Turkish collection and the Spanish collection.

<sup>170</sup> Exchange of notes between Algeria and France, which took place at Algiers on 23 December 1966.

<sup>171</sup> Article 3, paragraph 2, of the Protocol of Paris of 31 October 1877, annexed to the Treaty between France and Sweden signed in Paris on 10 August 1877 (M. Dalloz *et al.*, *Recueil périodique* . . . (Paris, Bureau de Jurisprudence générale, 1878), 4th part, pp. 33-34; G. F. de Martens, éd., *Nouveau Recueil général de traités* (Göttingen, Librairie Dieterich, 1879), 2nd series, t. IV, p. 368.

In section VIII of the Treaty of Versailles, concerning Shantung, article 158 states that Germany shall hand over to Japan the archives and documents relating to the territory of Kiaochow, "wherever they may be".<sup>172</sup>

Article 1 of the Convention between the United States of America and Denmark concerning the cession of the Danish West Indies, signed on 4 August 1916,<sup>173</sup> provides for the transfer to the United States of any archives relating to the islands which may be in Denmark, just as article VIII of the Treaty of Peace between Spain and the United States of America of 10 December 1898 already gave the United States the same right over the documents of the archives established in Spain which referred to Cuba, Puerto Rico, the Philippines and the island of Guam.<sup>174</sup>

France was able to obtain,<sup>175</sup> through the Treaty of Peace with Italy of 10 February 1947, archives relating to Savoy and Nice established by the City of Turin.

Under the agreement signed at Craiova on 7 September 1940 concerning the cession of Southern Dobruja from Romania to Bulgaria, the latter obtained not only the archives situated in the ceded territory but also certified true copies of the documents at Bucharest relating to the region which had become Bulgarian.

(39) What if the archives relating to the territory affected by the change of sovereignty are situated neither within the territory itself nor in the predecessor State? The generality of the provisions of article 158 of the Treaty of Versailles<sup>176</sup> excluded any attenuation of the obligation laid on the predecessor State, which was to hand over the archives wherever they might be, but on the other hand article 1 of the Agreement between Italy and Yugoslavia of 23 December 1950<sup>177</sup> provided that "should the material referred to not be in Italy, the Italian Government shall endeavour \* to recover and deliver it to the Yugoslav Government \*. In other words, to use terms dear to experts in French civil law, the former is a rigorous obligation concerning the result, while the latter is a simple obligation concerning the means.

#### VI. SPECIAL OBLIGATIONS OF THE SUCCESSOR STATE

(40) The proposed draft article puts the successor State under an essential obligation which is the natural counterpart of the obligation of the predecessor State to transfer all archives to the successor. Changes of sovereignty over a territory are often accompanied by population movements (establishment of new frontier lines which divide the inhabitants on the basis of a right of choice, annexations leaving the population a choice of nationality, return of the colonizing minority to the metropolitan country when a territory becomes independent, etc.). Clearly, the populations in question cannot be governed without, at least, administrative archives. For that reason the second

<sup>172</sup> See foot-note 153 above.

<sup>173</sup> See foot-note 123 above.

<sup>174</sup> See foot-note 126 above.

<sup>175</sup> See para. 30 above.

<sup>176</sup> See foot-note 153 above.

<sup>177</sup> See foot-note 128 above.

paragraph of the draft article provides that the successor State shall not refuse to hand over to the predecessor State, upon its request, copies of any archives which it may need. Of course, this must be done at the expense of the requesting State.

It seemed useful to extend this possibility even to third States, since such States may have nationals returning from the territory affected by the change of sovereignty, where they may have constituted a relatively large minority.

(41) Clearly, however, the successor State is only obliged to hand over copies of administrative documents and other documents used for current administration. Furthermore, the handing over of these documents must not jeopardize the security or sovereignty of the successor State. For example, if the predecessor State claims the purely technical file for a base it has constructed in the territory or the judicial record of one of its nationals who has left the ceded territory, the successor State can refuse to hand over copies of either. Such cases involve elements of discretion and expediency of which the successor State, like any other State, may not be deprived.

(42) The successor State is sometimes obliged, by treaty, to preserve carefully certain archives which may be of interest to the predecessor State in the future. The aforementioned Convention of 4 August 1916 between the United States of America and Denmark for the cession of the Danish West Indies provides, in the third paragraph of article 1, that "such archives and records shall be carefully preserved, and authenticated copies thereof, as may be required, shall be at all times given to [...] the Danish Government [...] or to such properly authorized persons as may apply for them."<sup>178</sup>

The Agreement of 21 October 1954 between France and India is even more interesting, because it specifies the period of time for which the archives are to be preserved, and states that copies of the archives shall be handed over to the predecessor State whenever they exist.<sup>179</sup>

In some cases, the successor State has handed over

copies or microfilms not only of administrative archives but also of historical documents and papers.<sup>180</sup>

#### VII. CASES WHERE THERE IS MORE THAN ONE SUCCESSOR

(43) The draft article says nothing about the problem which arises when there is more than one successor State. The Special Rapporteur feels that there is no need to encumber the wording of the proposed article by making specific provision for this case. The archives can be divided on the basis of all the principles set out above. Each successor State receives the part of the archives situated in the territory over which it is now exercising its sovereignty. The central archives can be divided among all the successor States, in so far as they are divisible, each territory receiving the part relating to it. If some of the central archives are indivisible and relate to one or more of the successors, they are placed in charge of the State they concern most directly. That State is then responsible for making copies of them for the other States.

(44) Practice in this field has usually been based on these rules. In the case of India and Pakistan, the archives were left to the two Dominions,<sup>181</sup> which decided in an agreement of 1 December 1947 that documents concerning one of the two States exclusively would be given to that State, and that the others would be copied and divided between them.

When Czechoslovakia was annexed by Hitler's troops, its archives were divided among the Third Reich, the Protectorate of Bohemia-Moravia, Hungary and Slovakia.<sup>182</sup> The Treaty of Peace with Hungary of 10 February 1947 met the demands of Yugoslavia and Czechoslovakia, which recovered and divided the archives, including those relating to the two countries which were in the possession of Hungary between 1848 and 1919 (article 11 of the Treaty).<sup>183</sup>

#### VIII. TIME-LIMITS FOR HANDING OVER THE ARCHIVES

(45) The Special Rapporteur considered it unnecessary to suggest the fixing of a time-limit for the transfer or

<sup>178</sup> See foot-note 123 above.

<sup>179</sup> See foot-note 90 above. Article 10 concludes as follows:

"The records of the French courts shall be preserved in their entirety during a period of twenty years and communication of their contents shall be given to the duly accredited representatives of the French Government whenever they apply for such communications."

Article 11 reads:

"The records of the Registrars' offices shall be preserved and copies or extracts of the proceedings shall be issued to the parties or the authorities concerned upon request.

"The third copies of each of the Registrars' offices books of every commune shall be handed over to the French representative on the date of the *de facto* transfer.

"For the year 1954, the records of the Registrars' offices which concern the Ministère de la France d'outre-mer (Service de l'Etat civil et des Archives) shall be forwarded to that department at the end of the year.

"The personal judicial records of the Courts' Registries shall be preserved and copies or extracts of these records shall be issued to the French authorities upon their application."

<sup>180</sup> After France had restored to Algeria certain items from the "Turkish collection", which forms part of the historical archives removed immediately before independence, Algeria offered France microfilms of some documents from that collection following their return. It had previously allowed all the registers of births, marriages and deaths in Algeria to be microfilmed.

<sup>181</sup> The Indian Independence (Rights, Property and Liabilities) Order, 1947, article 7 (*The Gazette of India Extraordinary*, 14 August 1947, p. 915).

<sup>182</sup> Convention of 4 October 1941 between the Third Reich and the Protectorate of Bohemia-Moravia (*Reichsgesetzblatt*, Teil II [Official Gazette, part II], Berlin, 24 April 1942, No. 13, p. 195); Agreement of 13 April 1940 between the Third Reich and Slovakia (*ibid.*, 20 August 1941, No. 34, p. 305); Agreement of 21 May 1940 between the Third Reich and Hungary (*ibid.*, 6 June 1941, No. 23, p. 199).

<sup>183</sup> See foot-note 141 above.

return of archives to the successor State, although diplomatic practice often sanctions the existence of specific provisions along those lines.<sup>184</sup>

Furthermore, in most countries public archives are not only inalienable but may also be claimed at any time because they are imprescriptible. The Special Rapporteur has cited various cases in this commentary, and will recall here only the case of the Icelandic parchments which were claimed from Denmark and obtained after a century, although they had been bequeathed to the University of Copenhagen in conformity with Danish law.<sup>185</sup>

## IX. TRANSFER AND RETURN FREE OF COST

(46) The Special Rapporteur felt that there would be no point in spelling out something which goes without saying, namely, that archives must be handed over to the successor State free of cost and free of any tax or duty. The problem has already been settled in principle in draft article 2, which states that property appertaining to sovereignty over the territory shall be transferred automatically and without compensation. This property includes archives. Furthermore, this usage is firmly established in practice.

The Special Rapporteur has nevertheless included the principle of transfer free of cost implicitly and *a contrario* in draft article 7, which provides that copies of archives shall be made at the expense of the requesting State.

## X. LIBRARIES

(47) The Special Rapporteur has not yet succeeded in obtaining sufficient information on the transfer of libraries. The problem seems to brook no discussion as regards the principle that libraries should be transferred to the successor State and as regards the return of libraries removed by the predecessor State immediately before the change of sovereignty, even if some newly independent States have not yet succeeded in practice in arranging for the effective application of either of these principles. As to libraries which were not removed by the predecessor,

<sup>184</sup> The archives were to be handed over "without delay" (article 93 of the Treaty of Saint-Germain-en-Laye, article 77 of the Treaty of Trianon, articles 38 and 52 of the Treaty of Versailles [see foot-note 120 above], etc.). The *immediate* transfer of the archives was provided for in General Assembly resolution 388 (V) of 15 December 1950 relating to Libya [article I, para. 2 (a)]. Sometimes provision is made for a *time-limit of three months* (Treaty of Versailles, article 158 [see foot-note 120 above]) or *eighteen months* (Treaty of Peace with Italy, article 37 [see foot-note 119 above]). It has also been stipulated that arrangements should be made by agreement for the handing over of archives "so far as is possible, *within a period of six months\** following the entry into force of the [...] treaty" (article 8 of the Treaty of 8 April 1960 between the Netherlands and the Federal Republic of Germany [see foot-note 117 above]). Article 11 of the 1947 Treaty of Peace with Hungary is one of the most specific with regard to time-limits: it establishes a veritable time-table within the framework of a time-limit of eighteen months (see foot-note 141 above). In some cases the establishment of a time-limit is left to a joint commission, which is responsible for locating the archives and arranging for their transfer.

<sup>185</sup> See para. 22 above.

but were established outside the territory with the latter's funds. They too should be transferred to the State which is henceforth to exercise sovereignty over the territory. This point touches on the wider problem of succession to public property situated outside the territory, which will be considered below.

The two examples to which brief reference will be made are taken from the work of Professor Charles Rousseau.<sup>186</sup> The Special Rapporteur does not know whether a final solution has been found for these two cases since Professor Rousseau studied the problem in 1964.

### A. *The problem of the allocation of the India Office Library*

(48) In 1801 the British East India Company established a library which now contains about 280,000 volumes and some 20,000 unpublished manuscripts, constituting the finest treasury of Hinduism in the world. In 1858 this library was transferred to the India Office in Whitehall. After the partition in 1948, the Commonwealth Relations Office assumed responsibility for the library. On 16 May 1955 the two successor States, India and Pakistan, asked the United Kingdom Government to allow them to divide the library on the basis of the percentages (82.5 per cent for India, 17.5 per cent for Pakistan) used in 1947 for dividing all assets between the two Dominions.

The problem would assuredly be quite difficult to solve, since the Government of India Act of 1935 allocated the contents of the Library to the Crown. Since the Commonwealth Relations Office could not find a solution, the case was referred in June 1961 to arbitration by three Commonwealth jurists, who were members of the Judicial Committee of the Privy Council.<sup>187</sup>

### B. *The problem of the allocation of the Prussian Library*

(49) Difficulties having arisen with regard to the allocation of this large library which contains 1.7 million volumes and various Prussian archives, an Act of 25 July 1957 of the Federal Republic of Germany placed it in the charge of a special body, the "Foundation for the Ownership of Prussian Cultural Property". This legislative decision is at present being contested by the German Democratic Republic.

### *Article 8. Property situated outside the territory*

Subject to the application of the rules relating to recognition, public property of the ceded territory itself which is situated outside that territory shall pass within the juridical order of the successor State.

<sup>186</sup> Ch. Rousseau, *op. cit.*, pp. 137-139.

<sup>187</sup> However, both India and Pakistan had abolished from their domestic judicial systems appeals to the Judicial Committee of the Privy Council in London against decisions of their respective Supreme Courts (Indian Act No. 5 of 1949; the Pakistan Federal Court Jurisdiction Act of 12 April 1950).

The ownership of such property shall devolve to the successor State in cases of total absorption or decolonization.

## COMMENTARY

### I. EXPOSITION OF THE PROBLEM

(1) In paragraphs (23) to (34) of the commentary on article 2, the Special Rapporteur considered one aspect of the problem of property of the territory itself where such property appertains to sovereignty. In paragraphs (21) to (39) of the commentary on article 7, he also discussed this question as it relates to public archives situated outside the territory affected by the change of sovereignty. These few previous remarks on the subject under discussion need not be repeated in the present commentary.

(2) The amount of public property situated abroad is not negligible. Sometimes a great deal of property is involved. In the case of a State which ceases to exist, the State may leave behind in other countries a portfolio of securities, gold and foreign currency reserves, educational, cultural or research establishments, and so forth. The dissolution of a union may raise the problem of how much of the cash value of the union's participation in international financial institutions is to be apportioned to each of its former components. Even a territory which becomes independent may leave in what was for it the metropolitan country such property as buildings, administrative premises, appurtenances of public establishments, or rest and recreation facilities acquired with funds of the then dependent territory.

(3) The Special Rapporteur was somewhat reluctant to recommend to the International Law Commission the adoption of a special article on the problem of public property situated abroad, since he felt sure that there was nothing, *at least in the field of State succession (which is the subject of his study)*, to justify special treatment for this category of property. Such property, like other kinds which do not seem to the Special Rapporteur to differ from it in any way, should be governed by the general principles enunciated in the preceding articles.

Nevertheless, as this category of property might, owing to the fact that it is situated outside the territory affected by the change of sovereignty, be subject to other rules derived not from State succession but from other sectors of international law, the Special Rapporteur persuaded himself to consider the effects of these norms on the rules relating to State succession itself. Here, the whole problem is dominated primarily by *the question of recognition*. The Special Rapporteur did not go into this at all, because to do so would be outside his terms of reference, but he did consider the reaction, as it were, of the topic of State succession in the sphere of the problems of recognition.

(4) Professor O'Connell writes:

It would seem that in the case of partial succession, property of the predecessor State not actually located in the territory does not change its ownership. It has not come within the sovereign jurisdiction of the successor State, and the latter can claim only so much of it as it can seize or as is ceded to it. In the case of

total succession, however, the predecessor loses its competence to own property. Such of its assets, therefore, as are situated in foreign countries must either become property of the successor State or cease to have any owner. There is no reason to adopt the latter alternative. A successor State in the case of total succession acquires all the rights of its predecessor that appertain to sovereign jurisdiction. Such jurisdiction embraces the capacity to possess assets located in foreign countries. It is reasonable to conclude, therefore, that the claims of the successor State to be the owner of the assets of its predecessor located in other States must be recognized by the States concerned.<sup>188</sup>

He also cites a number of writers who admit succession to property abroad in cases of total succession.<sup>189</sup>

(5) Professor Rousseau likewise takes the view that "it is generally agreed that property abroad of a State which is dismembered or which ceases to exist should also be transferred to the successor States [. . .]. There is little difference of opinion among writers on this point." Like O'Connell, however, he cites Professor Hall, who, along with a very few other writers, maintains that in the case of land situated outside the territory the successor State has at the most a right to its value.<sup>190</sup> An obligation to sell would be imposed on it, since the right of actual possession might prove more or less impracticable for some reason arising out of the fact that the property is now in foreign territory.

(6) It does seem, however, that some ambiguities of language, which are probably due to the difficulty of finding general expressions appropriate to all types of succession, should be cleared up.

In the case of partial succession, for instance, the point is not—at least in the view of the Special Rapporteur—what becomes of "public property of the *predecessor State* which is not situated in the ceded territory". Obviously, such property remains under the ownership of that State and cannot be transferred to the successor. What is at issue is the exact opposite, namely, the fate of public property of the *ceded territory* situated outside the boundaries of the territory, and in particular in the territory of the predecessor State.

(7) In the case of partial succession, however, writers do not always consider—or do not consider clearly—what happens to property of the ceded territory which is situated either in the now foreign territory of the predecessor State or in the territory of a third State. Professor Rousseau, for instance, does not consider this at all because he is only dealing with the case of total succession or, in other words, of "a State which is dismembered or which ceases to exist".<sup>191</sup>

Yet, as was mentioned above,<sup>192</sup> the ceded territory may

<sup>188</sup> D. P. O'Connell, *State Succession . . . (op. cit.)*, p. 207.

<sup>189</sup> *Ibid.*, foot-note 2.

<sup>190</sup> W. E. Hall, *A Treatise on International Law*, 8th ed. (Oxford, Clarendon Press, 1924), p. 115.

<sup>191</sup> In a paragraph headed "Exposition of the problem", Ch. Rousseau excludes even more clearly from the matters he is considering the problem of property of the ceded territory situated in the predecessor State:

"It is equally important to know where *the property* affected by the transfer *is situated*—whether it is in the territory transferred or in the territory of *any third State*" (Ch. Rousseau, *op. cit.*, pp. 122-123).

<sup>192</sup> Cf. commentary on article 2 above, paras. 28-29.

have, and is necessarily the owner of, property of its own distinct from that the ownership of which was in the hands of the predecessor State when the territory was an integral part of that State, and such property of the ceded territory may, for one reason or another,<sup>193</sup> be situated outside its own geographical area, either in the territory remaining to the predecessor State or in a third State.

(8) In the case of total succession, which occurs as a result of the complete demise of the predecessor State through absorption or dismemberment, writers generally take the view that the predecessor State no longer has the legal capacity to own property and that its property abroad would become ownerless if it were not transferred to the successor State. Consequently, some writers feel that there would be no reason for refusing to assign such property to the successor State.

(9) For the sake of greater clarity, argumentation should in all cases be based not on the public property of the predecessor State itself (whether the latter has ceased to exist or has been curtailed) but on that belonging to the territory affected by the change of sovereignty (which can in the most extreme case be geographically identical with the entire territory of the predecessor State).

Thus, partial succession results in two situations as regards property of the ceded territory itself which is situated outside its physical boundaries: it may be situated either in the ceding State or in a third State. The sole difference in the case of total succession is that only the second alternative is possible, because the predecessor State has ceased to exist. In this case, the territory ceded and the territory of the ceding State are geographically coextensive.

(10) To say that in the case of total succession the successor receives the public property of the predecessor because the property would otherwise become abandoned and ownerless is not a fully explicative argument. Abandonment of the property is not *the reason* for the *right* to succeed; at the most, it is *the occasion* for it. After all, ownerless property may be appropriated by anyone, and not necessarily by the successor. Indeed, if abandonment were the only consideration it might seem more natural, or at least more expedient, to assign the property to the third State in whose territory it is situated.

(11) It would perhaps be simpler to specify, in the case of partial succession as in that of total succession, that State succession triggers off a process of transfers of rights<sup>194</sup> which must definitely be effected in favour of the successor State, and not at all in favour of the predecessor State or the third State. In other words, State succession cannot have the paradoxical effect of conferring on the predecessor State a right of ownership which it did not possess prior to the transfer of the territory.

In the case of partial succession, it has been suggested that what is involved is property *belonging* to the ceded territory which is situated outside that territory. If the State of which the territory was formerly an integral

part did not already own the property before the cession of the territory, it is impossible to see how it could become the owner of it once the cession has been effected. What State succession normally means for the ceding State is a loss of property rights, and not the creation of such rights.

If the property in question is to continue to belong as of right to the ceded territory—and one does not see why it should be otherwise—it will be understood that it passes, along with the territory ceded, within “the juridical order of the successor State” as defined below.<sup>195</sup> In other words, what the effects of State succession amount to in this case is that the juridical order of the cessionary State is substituted for that of the ceding State (which, not having been the owner of the property in question, had only the right to subject them to its juridical order).

In the case of total succession, the public property of the ceded territory itself is coextensive with the public property of the ceding State. The two are identical because the territory ceded is coextensive with the territory of the State which has ceased to exist.

(12) Accordingly, in this study concerning the fate of property of the territory itself which is situated outside its geographical boundaries, three comments may be made:

(a) One hardly seems to encounter any writers who have really objected to the principle of the succession of the new sovereignty to public property situated outside the territory. However, two qualifications should be attached to this statement: firstly, very few writers have discussed the problem, and then only very briefly, and, secondly, they have concentrated primarily on total succession, where the predecessor State ceases to exist. They have not considered the problem in other cases of succession, where there is public property belonging to the ceded territory which is either in the predecessor State or in a third State. Writers seem to have regarded this case as self-evident. Ownership of the property is not transferred, but remains with the ceded territory; however, as the territory falls under a new sovereignty, it is the new juridical order which governs this property also. The reason why the question is neglected in the context of succession to public property is probably that the problem it poses is not that of succession to such property but that of the substitution of one juridical order for another as applying to the property in question.

(b) Judicial decisions are even scantier than writings. Actually, they do not appear to espouse the position expressed by the writers. This did not seem to the Special Rapporteur sufficient reason to disagree with the writers and suggest a draft article reflecting the decisions of the courts, since the latter appear to have been constrained by a factor whose implications for State succession distorted their decisions; this factor, as has been mentioned, is the problem of recognition. Sometimes, in fact, the decisions went against the successor State not so much because the existence of a rule as expressed in the draft article was denied as because the successor State

<sup>193</sup> *Idem*, para. 32.

<sup>194</sup> The problem of *obligations* is not considered here, since what is under discussion is essentially an asset, namely, public property.

<sup>195</sup> See para. 16 below.

had not been recognized by the third State within whose jurisdiction the decision was rendered.

(c) Lastly, an analysis of practice shows that this is really more a matter of succession of governments than of succession of States. Nevertheless, it seemed useful to give an account of the practice because it embodies the elements of a significant trend. Moreover, it is sometimes difficult to determine the precise nature of a case which may be on the border line between the two types of succession.

(13) Clarity of exposition demands that a sharp distinction should be made between cases where the property situated outside the territory affected by the change of sovereignty is in the predecessor State and cases where it is in a third State.

## II. PROPERTY OF THE TERRITORY SITUATED IN THE PREDECESSOR STATE

(14) This case is encountered in all types of succession (e.g., decolonization or partial annexation) that leave the predecessor State in existence, although within a reduced territory.

This is a clear case: it concerns property belonging as of right to the territory affected by the change which is situated in the rest of the territory retained by the predecessor State. It applies to all types of succession except one, which is obviously excluded, namely, total succession through the demise of the predecessor State itself. It is a logical impossibility in this case that there should be property of the territory itself which is outside the ceded territory but at the same time is in the predecessor State, since the two geographical areas are identical.

Consequently, only types of succession other than that resulting from the demise of a State can be considered in the present context.

### A. *Non-transferability of ownership of property of this kind*

(15) The occurrence of State succession does not transfer the right of ownership of property of this kind. The property remains within the patrimony of the ceded territory.

(a) It cannot suddenly, merely because of the succession, become the property of the predecessor State, even if it is situated in the territory remaining to that State after curtailment. Since the predecessor State did not own this property before succession, it cannot, as a result of the succession, create new rights for itself.

(b) Nor does property of this kind pass to the successor State merely because of the succession. There is no valid reason for stripping the ceded territory of its own property.

Exceptions may, however, be made in two ways—either by treaty provisions to the contrary or by an act of the new sovereign after the transfer of the territory. In either of these cases, however, the transfer of the right of ownership to the successor is not effected on the basis of the rules relating to State succession:

(i) There may be treaty provisions to the contrary. Annex XIV to the 1947 Treaty of Peace with Italy<sup>196</sup> allowed France, the successor State of Italy in certain frontier areas, to succeed to certain para-statal property normally belonging to the municipalities affected by the new boundary line. The Italian Government had contended, to no avail, that it could not have been the intention of the contracting Powers to strip municipalities of property which ensured their actual viability and to give it to the successor State. The Franco-Italian Conciliation Commission rejected this argument and decided that the clear wording of annex XIV of the Treaty of Peace undeniably transferred such *biens communaux* to the successor State.<sup>197</sup>

(ii) The successor State has, of course, the sovereign power to modify, by an act of municipal law, the way in which ownership of the property is divided between itself and the territory it has incorporated. This operation, which can take place only after the transfer of the territory, may therefore affect the latter's right of ownership of the property which it possessed outside its geographical boundaries. It is, however, no longer covered by the rules relating to State succession and falls outside the scope of those rules.

### B. *Modification of the legal régime governing property of this kind*

(16) If property of this kind should never pass to the predecessor State—and it generally does not pass to the successor State except as otherwise provided—it can only remain the property of the ceded territory. Although the right of ownership is thus non-transferable, there is a change in the rules governing the exercise and enjoyment of this right. The change is twofold:

Firstly, the predecessor State, in which the property is situated, will now treat it as *foreign* public property, with all that this implies as regards restrictive or protective legislation. This right of ownership, which is otherwise unchanged as regards the entity in which it is vested, is thus exercised in a new setting and it is the laws, if any, relating to foreign property that will now be applied to it by the predecessor State.

Secondly, the ceded territory has passed within a new juridical order—that of the successor State. As a result, property which belongs to that territory and which naturally follows the destiny of its owner can only be placed under the protection of this new juridical order. While it is true that the successor State is not given the ownership of this property, it nevertheless becomes the subject of international law responsible for the property. As the property belongs to a territory which belongs to that State, it falls within its juridical order. For example, it is the successor State that will ensure the international protection of the property against the predecessor State in which it is situated or against any third State.

It is this idea which, in a tentative and probably not entirely suitable formulation, the Special Rapporteur

<sup>196</sup> United Nations, *Treaty Series*, vol. 49, p. 225.

<sup>197</sup> Decision No. 163, of 9 October 1953 (see foot-note 112 above).

has tried to express in the suggested rule stating that "public property of the ceded territory itself which is situated outside that territory shall pass within the juridical order of the successor State".

(17) The problem of non-recognition, which can preclude the application of this provision in practice, rarely arises in this connexion. There may, of course, be cases where the State succession occurs against the wishes of the predecessor State (e.g., violent decolonization or sudden secession), which may be reluctant to recognize the situation. In such cases all the rules relating to succession, and not only the rule relating to property situated in the territory of the ceding State, are suspended in practice. We are concerned here, however, only with the usual situation in which the predecessor State assents to the change.

(18) It should also be noted that, in the case of decolonization, the territory ceded and the territory of the successor State are identical and coextensive, so that the property of the one is also the property of the other. In this type of succession, the successor State itself enjoys the ownership of this property and does not simply receive the property into the juridical order it has created.

### C. Diplomatic practice

(19) It was difficult for the Special Rapporteur to characterize decolonization practice in the particular case of property situated abroad. While the principle of the transfer of such property to the newly independent State is not in question, it often proves difficult to put into practice because the former metropolitan country disputes not the principle but the fact of the right of ownership, because the territory which has seceded finds it difficult to know exactly how much property, and of what kind, it could rightfully claim, or because of other political or non-political considerations. For example, various colonial offices of an administrative or industrial and commercial nature, rest and recreation facilities for officials of the colonial territory and their families, administrative premises or residences may have been constructed or purchased in the metropolitan country by the detached territory, using its own funds or those of public agencies under its jurisdiction (e.g., family allowance or social security funds).

(20) The former colony of the Congo had in its patrimony a portfolio of Belgian shares situated in Belgium which in 1959, according to Professor D. P. O'Connell, were valued at \$750 million. The independent Congo does not appear to have recovered all these shares.<sup>198</sup>

On the eve of independence, during the Belgian-Congolese Conference at Brussels in May 1960, the Congolese negotiators had requested that the liquid assets, securities and property rights of the Special Committee for Katanga and of the Union Minière should be divided in proportion to the assets of the Congo and its provinces, on the one hand, and of private interests, on the other hand, so that the new State could succeed to the sizable portfolio of stocks and shares situated outside its territory.

Numerous complications ensued, in the course of which the Belgian Government, without the knowledge of the prospective Congolese Government, pronounced the premature dissolution of the Special Committee for Katanga so that its assets could be shared out and the capital of the Union Minière could be reapportioned. This was all designed to ensure that the Congo no longer had a majority holding in these entities.<sup>199</sup> This first dissolution of the Special Committee, which was the principal shareholder in the Union and in which the State held a two-thirds majority while the rest belonged to the Compagnie du Katanga, was decided on 24 June 1960 under an agreement signed by the representatives of the Belgian Congo and of the Compagnie du Katanga.<sup>200</sup> The agreement was approved by Decree of the King of the Belgians on 27 June 1960.<sup>201</sup>

As a reaction against this first dissolution by the Belgian authorities, the constitutional authorities of the independent Congo pronounced a second dissolution of the Special Committee by Legislative Decree of 29 November 1964.

(21) The Belgian-Congolese Agreements of 6 February 1965<sup>202</sup> put an end to these unilateral measures by both parties. These Agreements are partly concerned with the assets situated in Belgium—in other words, public property situated outside the territory involved in the change of sovereignty. In exchange for the cession to the Congo of the net assets administered by the Special Committee in that territory, the Congolese party recognized the devolution to the Compagnie du Katanga of the net assets situated in Belgium. Various compensations and mutual retrocessions took place in order to unravel the tangled skein of respective rights. On 8 February 1965, Mr. Tshombé accepted the first part of the portfolio of the Congo on behalf of his Government, in an official ceremony at Brussels.

This was not, however, the end of the affairs. After General Mobutu had taken office, and after various upheavals, the Union minière du Haut-Katanga was nationalized on 23 December 1966<sup>203</sup> because it had refused to transfer its headquarters from Brussels to Kinshasa, believing that the transfer would have the effect of placing under Congolese jurisdiction all the assets of the company situated outside the Congo. A compromise was finally reached on 15 February 1967.

(22) On the occasion of the disannexation of Ethiopia, articles 37 and 75 of the Treaty of Peace of 10 February 1947<sup>204</sup> required Italy to restore objects of historical value to Ethiopia, and the Agreement of 5 March 1956<sup>205</sup> between the two countries contained various annexes listing the objects concerned. Annex C allowed the return

<sup>199</sup> For an account of all these problems, see R. Kovar, "La 'congolisation' de l'Union minière du Haut-Katanga", *Annuaire français de droit international*, XIII, 1967 (Paris, C.N.R.S.), pp. 742-781.

<sup>200</sup> *Moniteur congolais*, 19 September 1960, No. 38, p. 2053.

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

<sup>202</sup> United Nations, *Treaty Series*, vol. 540, p. 227.

<sup>203</sup> Fondation nationale des sciences politiques, *Chronologie politique africaine*, November-December 1966, 23 December 1966.

<sup>204</sup> See foot-note 124 above.

<sup>205</sup> *Idem.*

<sup>198</sup> D. P. O'Connell, *State Succession . . . (op. cit.)*, p. 228.

to Ethiopia of the large Aksum obelisk, which Italy was obliged to dismount and remove from a square in Rome and transport to Naples at its expense for shipment to Ethiopia.

(23) Some treaty provisions are restrictive, authorizing succession to public property only if it is *situated in the territory*, and not if it is located elsewhere.

This was so, for example, in the case of article 191 of the Treaty of Trianon cited above<sup>206</sup> and in the case of the resolutions of the United Nations General Assembly on economic and financial provisions relating to Libya and Eritrea.<sup>207</sup>

In fact, however, such provisions do not conflict with the suggested rule, because they cover a different situation from the one with which we are concerned here. They involve public property of the *ceding State*—for example, the property of Italy in Libya or in Eritrea—whereas what is under discussion here is the exact opposite, namely, property of (formerly Italian) Libya or Eritrea themselves which is outside their geographical boundaries.

(24) There now remains to be discussed the case of property of the ceded territory itself which is in a third State. This is where the rules relating to recognition have to be considered in conjunction with those on State succession. This is also where a distinction should be drawn between total succession through the demise of the predecessor State and other types of succession.

### III. PROPERTY OF THE TERRITORY SITUATED IN A THIRD STATE

(25) The position is clear in the case of absorption of a State (dismemberment, total annexation or *debellatio*). In this case, the successor State succeeds to property of the defunct State which is situated in a third State. As will be seen, however, the courts sometimes do not seem to have followed this rule because there was a problem of recognition.

(26) With other types of succession, the property of the territory passes within the juridical order of the successor State, except in the case of decolonization, where the actual ownership reverts to the new State because the territory ceded and the territory of the successor State are physically coextensive.

We shall now see how the courts have applied these rules in the case of these different types of succession.

#### A. Cession of vessels for navigation on the Danube

(27) In the case of the cession of vessels and tugs for navigation on the Danube, which was the subject of an arbitral award,<sup>208</sup> there was no problem of recognition.

<sup>206</sup> E. Parkes, J. E. Field and R. C. Thomson, eds., *British and Foreign State Papers* (London, H. M. Stationery Office, 1923), vol. 113, pp. 564-565.

<sup>207</sup> United Nations General Assembly resolutions 388 (V) and 530 (VI) of 15 December 1950 and 29 January 1952 respectively.

<sup>208</sup> Case of the cession of vessels and tugs for navigation on the Danube, Allied Powers (Greece, Romania, Serb-Croat-Slovene

In the course of the proceedings, Czechoslovakia had submitted a claim to ownership of a part of the property of certain shipping companies which had belonged to the Hungarian monarchy and to the Austrian Empire or received a subvention from them, on the ground that

these interests were bought with money obtained from all the countries forming parts of the former Austrian Empire and of the former Hungarian Monarchy, and that such countries contributed thereto in proportion to the taxes paid by them, and therefore, are to the same proportionate extent the owners of the property.<sup>209</sup>

(28) The position of Austria and Hungary was that, in the first place, the property was not *public* property, which alone could pass to the successor States, and, in the second place, even admitting that it did have such status because of the varying degree of financial participation by the public authorities, "the Treaties themselves do not give Czecho-Slovakia the right to State property except to such property *situated in Czecho-Slovakia*"<sup>210</sup>

The arbitrator did not settle the question, on the ground that the treaty clauses did not give him jurisdiction to take cognizance of it. There is no contradiction between this decision and the principle of succession to public property situated abroad. It is obviously within the discretion of States to conclude treaties making exceptions to a principle.

#### B. Financial participation in international institutions

(29) Similarly, there is no problem of recognition in cases of succession in international organizations. One writer notes that "countries coming into existence through decolonization do not seem to have claimed any part of the subscriptions of the States which were responsible for their international relations", including, in particular, their representation in international financial institutions.<sup>211</sup> This certainly comes within the case with which we are dealing—assets situated abroad, elsewhere than in the former metropolitan country. The fact that these newly independent countries—and particularly those which were deemed in law to form an integral part of the territory of the colonial Power—did not think of claiming some of these assets, or were unable to do so, cannot logically be used to refute the principle that has been enunciated. It will also be noted that, in cases of withdrawal from a union, succession to such property has been allowed in financial institutions of this kind. When

Kingdom, Czechoslovakia) v. Germany, Austria, Hungary and Bulgaria [Decision: Paris, August 2, 1921, Arbitrator: Walker D. Hines (USA)] (United Nations, *Reports of International Arbitral Awards*, vol. I (United Nations publication, Sales No.: 1948.V.2), pp. 97-212.

<sup>209</sup> *Ibid.*, p. 120.

<sup>210</sup> *Ibid.*, pp. 120-121. The reference was to article 208 of the Treaty of Saint-Germain-en-Laye (E. Parkes, J. E. Field and R. C. Thomson, eds., *British and Foreign State Papers* (London, H. M. Stationery Office, 1922), vol. 112, pp. 412-414) and article 191 of the Treaty of Trianon (*ibid.* [1923], vol. 113, pp. 564-565).

<sup>211</sup> L. Focsaneanu, "Les banques internationales intergouvernementales", *Annuaire français de droit international*, IX, 1963 (Paris, C.N.R.S.), p. 133.

the Syrian Arab Republic seceded from the United Arab Republic, it had no difficulty, in November 1961, in recovering 200 shares in the International Bank for Reconstruction and Development out of the total of 1,266 shares held by the union.

We turn next to cases in which the problem of recognition does arise.

### C. Annexation of Ethiopia by Italy

(30) The foreign State in whose territory the property claimed by the successor State is situated usually allows the claim only if it has recognized the successor State *de jure*. This can be seen from a judgement of the Court of Appeal of England.<sup>212</sup> After the annexation of Ethiopia by Italy in 1936, Emperor Haile Selassie claimed from a cable and wireless company sums which it owed to him. The company pleaded in defence, that the debt owed to the Emperor in his sovereign capacity had passed into the patrimony of the Italian State which has succeeded the sovereign, who had been divested of all public property.

(31) In the Chancery Division, where the case had been tried, the main issue had been the effect of the United Kingdom's *de facto* recognition, on 21 December 1936, of Italy's annexation of Ethiopia, of which the Emperor was still recognized by the United Kingdom to be the *de jure* sovereign. The trial court had ruled, in a decision of 27 July 1938, that the *de facto* recognition of the annexation was not sufficient to effect the transfer to Italy of the property situated in England, and the case was taken to the Court of Appeal. However, on 16 November 1938, before the appeal was considered on its merits, the United Kingdom finally recognized the King of Italy as the *de jure* Emperor of Ethiopia. The Court of Appeal ruled, in its judgement of 6 December 1938, that the right to sue had itself become vested in the successor State since the *de facto* recognition of 21 December 1936 and that the title to the property situated in England had accordingly passed to the new sovereign. The principle of succession to public property situated abroad was thus sanctioned even in the case of *de facto* recognition.

(32) Emperor Haile Selassie was equally unsuccessful in the French courts on another occasion. In his sovereign capacity, he was the holder of 8,000 shares of the Franco-Ethiopian Djibouti-Addis Ababa Railway Company, registered in the name of the Ethiopian Government; he wanted to convert the shares into bearer securities and to cash the coupons which had matured. The Italian Government lodged an objection with the Company's head office in Paris, requesting that the Emperor should be prohibited from selling, transferring or ceding the securities, which it claimed should revert to the successor State. The *juge des référés* of the *Tribunal de la Seine*, to whom the displaced sovereign applied for an order barring the objection of the Italian Government, declared that he had no jurisdiction in the case of an act of sov-

eighty by Italy.<sup>213</sup> The practical effect of this decision was to leave the Italian Government in ownership of the securities, which reverted to it despite an appeal by Emperor Haile Selassie. The original decision was confirmed on appeal<sup>214</sup> and, although the ruling again dealt solely with the question of jurisdiction, the result was to leave to the successor State the ownership of public property of the predecessor State situated abroad. Thus, the two decisions had the indirect effect of sanctioning the principle of the transfer of public property.

### D. American War of Secession: the *McRae* case

(33) After the failure of the secession of the Southern states of the United States, the Federal Government claimed from a Southern agent who had settled in England funds which he had deposited there on the instructions of the secessionist authorities. The agent in question refused to hand over these funds to the Federal Government, arguing that he himself had various claims against the erstwhile Southern government.

(34) The judgement rendered by the Court of Equity of England in 1869 recalled the principle that the property of an insurrectionary government must, if that government is defeated, revert to the legal government as the successor. Since, however, the successor State could not have more rights than the entity in which the rights were formerly vested, the counter-claim of the agent *McRae* must be allowed and the amount of this claims, if they were justified, must be deducted from the funds claimed.

The judgement of the Court therefore confirmed the principle of the transfer to the successor State of public property situated abroad: it stated that it is

the clear public universal law that any government which *de facto* succeeds to any other government, whether by revolution or restoration, conquest or reconquest, *succeeds to all the public property* [. . .] *and to all rights in respect of the public property of the displaced power*.<sup>215</sup>

(35) According to some writers, this is a case of succession of States and not of succession of governments, since the Southern Confederate Government, which represented a number of states, had been recognized, at least as a

<sup>213</sup> One of the reasons given in the decision was:

"The *juge des référés* cannot pass judgement on the validity of the objections without resolving, at least implicitly, the dispute regarding the ownership of the securities, which is an extremely weighty matter involving principles of public international law and of private law that are manifestly outside his jurisdiction" (*Tribunal civil de la Seine, ordonnance de référé* of the President of the Tribunal, dated 2 November 1937, *Gazette du Palais*, 16 December 1937; commentary in Ch. Rousseau, "Le conflit italo-éthiopien", *Revue générale de droit international public* [Paris, A. Pédone, éd., 1938], t. XLV, pp. 98-99, and *ibid.* [1939], t. XLVI, pp. 445-447).

<sup>214</sup> Appeals Court of Paris, Haile Selassie v. Italian State, 1 February 1939; *Gazette des tribunaux*, 18 March 1939; *Gazette du Palais*, 11 April 1939; *Revue générale de droit international public* (Paris, A. Pédone, éd., 1947), t. LI, p. 248. In addition to its own statement of reasons, the Court repeated word for word the reason given by the *juge des référés* (quoted in footnote 214).

<sup>215</sup> D. P. O'Connell, *State Succession* . . . (*op. cit.*), p. 208.

<sup>212</sup> Court of Appeal of England, judgement of 6 December 1938, Emperor Haile Selassie v. Cable and Wireless, Ltd. (H. Lauterpacht, *Annual Digest and Reports of Public International Law Cases, 1938-1940* (London, Butterworth and Co., Ltd., 1942), case No. 37, pp. 94-101).

belligerent, by various foreign States because it had exercised an effective administration for a lengthy period of time over a clearly defined territory.

E. *The case of Irish funds deposited in the United States of America*<sup>216</sup>

(36) Irish revolutionary agents of the Sinn Fein movement had deposited in the United States funds collected by a republican political organization, the Dáil Éireann, which had been established at the end of the First World War with the aim of forcibly overthrowing the British authorities in Ireland and proclaiming the independence of the country. During the Irish uprising of 1920-1921, these movements brought forth a revolutionary republican *de facto* government, headed by E. De Valera.

When a Government of the "Irish Free State" was constituted by the Treaty between Great Britain and Ireland of 6 December 1921, this new authority claimed the funds from the United States, as the successor of the insurrectionary *de facto* government.

An Irish court upheld this claim, ruling that the Government of the Irish Free State was "absolutely entitled to all the property and assets of the [*de facto*] Revolutionary Government upon which as a foundation it had been established".<sup>217</sup>

(37) However, an American court dismissed the claim. The two judgements to this effect rendered by the Supreme Court of New York (New York County)<sup>218</sup> stated that, although the case involved a problem of succession of State or government, the Court considered that the Irish Free State was the successor of the British State and that consequently the Government of the Free State was not the successor of the "insurrectionary government", which was only a political organization and not a government recognized as such by the British authorities or by any foreign State.

The Supreme Court of New York therefore held that only Great Britain could be entitled to claim the funds. Although the case does not concern a succession of States, it is interesting to note that it could be deduced from the reasons stated by the Court that, if the funds had been paid over to Great Britain, the Irish Free State would in turn have been able to claim them from Great Britain as the successor State of that country.

<sup>216</sup> See E. D. Dickinson, "The case of the Irish Republic's Funds", *The American Journal of International Law* (Concord [N.H.], 1927), vol. 21, pp. 747-753; J. W. Garner, "A Question of State Succession", *ibid.*, pp. 753-757; Ch. Rousseau, *Cours de droit international public. — Les transformations territoriales . . .* (*op. cit.*), pp. 145-146; D. P. O'Connell, *State Succession . . .* (*op. cit.*), pp. 208-209; Ch. K. Uren, "The Succession of the Irish Free State", *Michigan Law Review* (Ann Arbor [Mich.], University of Michigan Law School, 1930), vol. XXVIII (1929-1930), p. 149.

<sup>217</sup> Supreme Court of the Irish Free State, *Fogarty and others v. O'Donoghue and others*, 17 December 1925. See A. D. McNair and H. Lauterpacht, *Annual Digest of Public International Law Cases, 1925-1926* (London, Longmans, Green and Co., 1929), case No. 76, pp. 98-100.

<sup>218</sup> Supreme Court of New York (New York County), *Irish Free State v. Guaranty Safe Deposit Company*. *Ibid.*, case No. 77, pp. 100-102.

F. *The case of Algerian funds deposited in Switzerland*

(38) From 1954 to 1962, the Algerian National Liberation Front (NLF) had collected funds to cover the cost of the armed struggle in Algeria. On 19 September 1958, a Provisional Government of the Algerian Republic (GPRA) was established at Cairo; it was recognized *de facto* or *de jure* by some thirty countries.<sup>219</sup> The National Liberation Front, which was the only liberation party during the war and also the only governing party after independence, stated in its statutes, adopted in 1959, that its resources did not belong to it as a movement but were "national property" in law and in fact (article 39, paragraph 2). At the end of the war, the unexpended balance of the funds intended for use in the struggle amounted to some 80 million Swiss francs; these funds were in various bank accounts in the Middle East in the name of the GPRA and in Europe in the name of the NLF. In 1962, all these funds were deposited together in a Swiss bank, in the name of Mr. Mohammed Khider, General Secretary of the NLF, acting in his official capacity.

Political differences arose between the Algerian governmental authorities and Mr. Khider, who was removed from office as General Secretary of the single party in power but refused to hand over the remaining funds which were in his possession at Geneva.

(39) To this day, various civil as well as criminal proceedings, including sequestration of the bank account, have still not enabled the Algerian State and the NLF to recover these sums. The problem was not really dealt with from the standpoint of succession of States or governments; it involved criminal matters, because the bank with which the funds were deposited had improperly allowed Mr. Khider to withdraw them quickly, although he had just been dismissed from office and no longer had authority to administer the funds. Consequently, the funds were fraudulently transferred to a destination and for a purpose which is still unknown to this day.

If this case is considered, from the civil viewpoint, as a problem of succession of governments, it has obvious similarities with the case of the Irish funds considered above. The Algerian liberation movement and its Provisional Government of the day left property to which independent Algeria should normally succeed, through its single ruling party and its new government. From the outset, this property had the status of "national property", according to the statutes of the NLF.

(40) On 16 July 1964, the Algerian authorities, represented by the leader of the NLF and the Head of the Government, brought a suit before the Swiss courts, which, however, were induced by the defence to evaluate the legitimacy of the NLF, although they were *judicial* bodies and, moreover, foreign ones. This was because the defendant had stated that he would hand over the funds only to the "legitimate" NLF. Which NLF? According to the defendant, the one that would emerge from a new national Congress of the party. A Congress had in fact

<sup>219</sup> See M. Bedjaoui, *La révolution algérienne et le droit* (Brussels, International Association of Democratic Lawyers, 1961), p. 91 and *passim*.

been held, but the defendant had not considered it "legitimate". There is no doubt that, from the strictly juridical point of view, this notion of legitimacy should have been ruled out of the proceedings. The funds had, from the outset, been "Algerian national property", and upon the attainment of independence should certainly have been returned to the Algerian public authorities, the party and the Government.

It is all the more necessary to being this case—which has its own special characteristics, although in some respects it resembles the case of the Irish funds—to a logical conclusion because Mr. Khider died at Madrid on 4 January 1967, and if the funds are not assigned to the Algerian authorities, to whom they belong, they may become "ownerless property".

G. *The case of the property abroad of the Baltic States*<sup>220</sup>

(41) The incorporation of the Baltic States in the USSR was not recognized by some countries, including the United Kingdom and the United States of America, which refused to accept the Soviet Socialist Republics as the successors to those States in the case of property situated abroad. The Western countries which did not

<sup>220</sup> Cf., in particular, K. Marek, *Identity and Continuity of States in Public International Law* (Geneva, Librairie E. Droz, 1954), pp. 369-416; M. Flory, *Le statut international des gouvernements réfugiés et le cas de la France libre, 1939-1945* (Paris, A. Pédone, édit., 1952), pp. 202-205 and *passim*, and their bibliographies.

recognize the incorporation continued for a number of years to accept the credentials of the former representatives of those States, whom they recognized as possessing the right of ownership, or at least of management, over property situated outside the frontiers of the Baltic Republics. For a long time, premises of legations and consulates, and Baltic ships,<sup>221</sup> were not recognized as being the property of the successors. The situation was normalized later.

Professor Guggenheim reports the decision of the Swiss Federal Council of 14 November 1946<sup>222</sup>

placing under the trusteeship of the Confederation the public property of the Baltic States, as well as the archives of their former diplomatic missions in Switzerland, those missions having ceased to be recognized as from 1 January 1941.<sup>223</sup>

In these cases, the problem of recognition of the successor State obscured the problem of State succession.

<sup>221</sup> Eleven ships flying the flag of the Baltic nations remained in United States ports for a long time as "refugees". Cf. H. W. Briggs, "Non-Recognition in the Courts: the Ships of the Baltic Republics", *The American Journal of International Law* (Concord [N. H.], 1943), vol. 37, pp. 585-596. The United Kingdom had requisitioned thirty-four Baltic ships during the Second World War, but entered into negotiations on the subject with the USSR, which it finally recognized as the owner of the ships.

<sup>222</sup> Switzerland, *Rapport du Conseil fédéral à l'Assemblée fédérale sur sa gestion en 1946* [Annual Report of the Federal Council to the Federal Assembly, 1946], No. 5231, 1 April 1947, p. 119.

<sup>223</sup> P. Guggenheim, *Traité de droit international public* (Geneva, Librairie de l'Université, Georg et Cie S. A., 1953), t. I, p. 466, foot-note 1.

## DOCUMENT A/CN.4/232

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## Introduction

1. In pursuance of the decision recorded in the report of the International Law Commission on the work of its twenty-first session,<sup>1</sup> the Secretariat has prepared the present document which brings up to date the "Digest of the decisions of international tribunals relating to State succession".<sup>2</sup> The document covers the pertinent decisions of international tribunals whose awards are contained in the volumes of the *Reports of International Arbitral Awards*, published since the preparation of the Digest,<sup>3</sup> and the decision of the Indo-Pakistan Western Boundary Case Tribunal which has come to the knowledge of the Secretariat.

2. Most of the cases dealt with in the present document were concerned only incidentally with questions of State succession or were largely determined in the light of particular provisions of treaties or other international instruments. In view of the purpose of the document, attention had been concentrated on those parts of the decisions which have relevance as indications of the general principles of State succession.

<sup>1</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, pp. 229, document A/7610/Rev. 1, para. 63.

<sup>2</sup> *Ibid.*, 1962, vol. II, p. 131, document A/CN.4/151.

<sup>3</sup> *Reports of International Arbitral Awards*, published by the United Nations under the following sales numbers: vol. XII: 63.V.3; vol. XIII: 64.V.3; vol. XIV: 65.V.4; vol. XVI: E/F. 69.V.1. Some arbitral awards contained in volume XII of the *Reports* were already covered by the Secretariat's Digest.

## I. General

DUFAY AND GIGANDET AND OTHER COMPANIES CLAIM  
(1962)*France v. Italy*

*Franco-Italian Conciliation Commission established under the Treaty of Peace with Italy, of 10 February 1947: Decision No. 284 of 9 July 1962*

*Reports of International Arbitral Awards*, vol. XVI, p. 197.

3. In behalf of Dufay and Gigandet and six other companies, the French Government claimed compensation for loss or damage sustained during the war by their property in the former Italian colonies in Africa, in particular, Eritrea and Italian Somalia. The Italian Government raised a preliminary objection as to the receivability of the case, contending, *inter alia*, that these former colonies did not constitute the ceded territory within the meaning of the relevant provisions of the Treaty of Peace with Italy, 1947. The Commission held that the claim must succeed.

4. In the view of the Italian Government, "cession" in the sense of international law consisted of two elements, namely, renunciation of territorial sovereignty, on the one hand, and the immediate establishment of territorial sovereignty by another State, on the other; and, since the Italian Peace Treaty reserved the definitive fate of the Italian colonies in Africa, the second element was lacking. However, the Commission said:

[Translation from French]

[. . .] this point of view cannot be accepted, in the view of the Conciliation Commission, since the term "cede" or "ceded territories" has not, in International Law, the meaning the Italian Government attaches to it. The legal phenomenon of "cession" in International Law, is characterized by the fact that an already existing State withdraws its territorial competence from a territory over which it exercised it, while another State, the cessionary State—whether already existing or new—*immediately or later* extends its territorial competence to the territory in which competence was hitherto exercised by the ceding State. In these conditions, "cession means nothing more than the undertaking to evacuate the ceded territory, so that the cessionary State may occupy it in its turn".<sup>[4]</sup> In other words, for cession to occur it is necessary that the predecessor State should definitively have "ceded" legislative and executive competence in the "ceded territory" to another State, that is to say, *should have undertaken to evacuate it*. In the case of the former Italian colonies, determination of the moment of the start of the exercise of territorial sovereignty by the cessionary States themselves, or of the transfer to another person in international law of this territorial sovereignty acquired by the States which have obtained control over the said territory, is reserved for agreements and resolutions to be concluded between the States or the United Nations, which control the ceded territory by virtue of the Peace Treaty, and the entity which is to become the ultimate exerciser of territorial sovereignty over the ceded territory; there is nothing here contrary to the notion of cession as we have stated it.

[. . .]

[. . .]

[. . .]

In conclusion, therefore, in order for there to be territorial "cession", in International Law, it is necessary that the person of the ceding State and the territory forming the subject of the cession be clearly established in the Treaty. Furthermore, the ceding State must undertake to evacuate the ceded territory in favour of the subjects of law authorized to exercise control over it. It is by no means necessary that the *ultimate recipient* of the territory should be referred to in the contractual arrangement relating to the "cession". There is accordingly room for provisional administration of the territory between its evacuation by the ceding State and the definitive transfer.<sup>5</sup>

#### RANN OF KUTCH ARBITRATION (1968)<sup>6</sup>

*Indo-Pakistan Western Boundary Case Tribunal (Gunnar Lagergren, Chairman and Aleš Bebler and Nasrollah Entezam, members), constituted pursuant to the Agreement of 30 June 1965*

5. The Tribunal was asked to determine the border between India and Pakistan in the area of the Rann of Kutch. The Tribunal held that little weight was to be given to events occurring after the independence of the parties, which in large measure also accepted this view. Thus the case was decided primarily on the basis of events prior to 1947, in particular, events before the conquest of Sind and the consequent acquisition of sovereignty

by the British in 1819 and the establishment by treaty of British suzerainty over Kutch and other neighbouring Indian States in 1843, and events after those dates and prior to 1947. These events, which the parties developed at length in the pleadings, included such matters as statements made by government officials, government publications, maps, tax and police action, the placing of boundary markers, and the use of areas for the purposes of grazing. These actions included those of the Kutch and Sind authorities and of the British Government whether acting as sovereign (in the Sind) or suzerain (in the Indian States).

6. The Chairman of the Tribunal (in whose judgement Mr. Entezam joined) held, with reference to the parties' arguments on the law, that the factual material was to be assessed in the light of the following three issues:

The first is whether the boundary in dispute is a historically recognised and well-established boundary. Both Parties submit that the boundary as claimed by each of them is of such a character.

The second main issue is whether Great Britain, acting either as territorial sovereign, or as Paramount Power, must be held by its conduct to have recognised, accepted or acquiesced in the claim of Kutch that the Rann was Kutch territory, thereby precluding or estopping Pakistan, as successor of Sind and thus of the territorial sovereign rights of Great Britain in the region, from successfully claiming any part of the disputed territory. One question which arises in considering this issue is the true meaning of "the Rann" in the context of related documents.

The third main issue is whether the British Administration in Sind and superior British authorities, acting not as Paramount Power but as territorial sovereigns, performed acts, directly or indirectly, in assertion of rights of territorial sovereignty over the disputed tract which were of such a character as to be sufficient in law to confer title to the territory, or parts thereof, upon Sind, and thereby upon its successor, Pakistan, or, conversely, whether such exercise of sovereignty on the part of Kutch and the other States abutting upon the Great Rann, to whose rights India is successor, would instead operate to confer title on India to the territory, or to parts thereof.<sup>7</sup>

7. The Chairman held that there was no historically recognized and well-established boundary. He held, however, that the absence of such boundary did not in the context of the case imply that the disputed territory was *terra nullius*. On the basis of his examination of the second and third issues and of the facts relevant to them, he concluded that the boundary lay between the lines claimed respectively by India and Pakistan.

## II. State succession in relation to treaties

### FRANCO-TUNISIAN ARBITRATION (1957)

#### *France v. Tunisia*

*Arbitrator (Vedel) President of the Mixed Franco-Tunisian Arbitral Tribunal established under the General Convention of 3 June 1955*

<sup>4</sup> P. Guggenheim, *Traité de droit international public* (Geneva, Librairie de l'Université, Georg et Cie S. A., 1953), vol. I, p. 443.

<sup>5</sup> *Reports of International Arbitral Awards*, vol. XVI, pp. 211-212.

<sup>6</sup> See *Keesing's Contemporary Archives* (London, Keesing's Publications Limited, 1968), vol. XVI (1967-1968), p. 22838, and *International Legal Materials* (Washington, D.C., American Society of International Law, 1968), vol. VII, No. 3, p. 633.

<sup>7</sup> See *Keesing's Contemporary Archives*, *op. cit.*, p. 22838, or *International Legal Materials*, *op. cit.*, p. 667.

*Reports of International Arbitral Awards*, vol. XII, p. 271

8. In December 1956, the Government of France filed an application with the Mixed Franco-Tunisian Arbitral Tribunal to determine a dispute between France and Tunisia. The Tunisian arbitrators took the view that the General Convention of 3 June 1955, under which the Tribunal had been set up, had become null and void by reason of Tunisia's accession to independence on 20 March 1956, and they refused to take their seats on the Tribunal.

9. The President of the Tribunal, in his decision of 2 April 1957, held that in the absence of a formal denunciation of the Convention by Tunisia, one of the two High Contracting Parties, the abstention of the Tunisian arbitrators must be treated as a resignation and dealt with in accordance with article 16, paragraph 2 of the Convention, which provided for the replacement of arbitrators who have resigned. Pending such replacement, the proceedings instituted by France were suspended and the rights of the parties were reserved.

#### FLEGENHEIMER CASE (1958)

##### *United States v. Italy*

*Italian-United States Conciliation Commission established under the Treaty of Peace with Italy of 10 February 1947: Decision No. 182 of 20 September 1958*

*Reports of International Arbitral Awards*, vol. XIV, p. 327.

10. In behalf of Albert Flegenheimer, the United States requested cancellation of the forced sale in 1941, at an undervalue, of certain property of the claimant in Italy. The Italian contention that the claimant was not a "United Nations national" within the meaning of article 78, paragraph 9 (a) of the Italian Peace Treaty (1947), was upheld by the Conciliation Commission, and the request was rejected on grounds of inadmissibility.

11. One of the points considered by the Commission was whether or not the claimant's legal position was governed by the Bancroft Treaties relative to acquisition and loss of nationality concluded by the United States with the Grand Duchy of Baden on 19 July 1868 and with Württemberg on 27 June 1868. In deciding that the treaties were applicable, the Commission stated:

It should not be denied that, in confederation of States and in federated States, the member States of which have maintained a limited international sovereignty permitting them to conclude agreements with foreign States in certain spheres, the treaties binding on a particular State cannot be extended to another member of the Union, even if this latter member were linked with that same foreign State by a treaty containing similar provisions.

The legal position was not modified by the establishment of the German Empire, on January 18, 1871, because the United States did not conclude similar treaties with all the members of the new federative State, but only with the States of the old Confederation of North Germany and the other four [i.e. Grand Duchy

of Baden, Bavaria, Grand Duchy of Hess and Württemberg] [..]<sup>8</sup>

### III. State succession in relation to private rights and concessions

#### COLLAS AND MICHEL CLAIMS (1953)

##### *France v. Italy*

*Franco-Italian Conciliation Commission established under the Treaty of Peace with Italy of 10 February 1947: Decision No. 146 of 21 January 1953*

*Reports of International Arbitral Awards*, vol. XIII, p. 303.

12. In 1860 the firm Collas and Michel, composed of two French nationals, obtained from the Ottoman Government a concession for the construction and service of lighthouses along the coast of the Ottoman Empire. Under the Treaty of Lausanne, 1923, the concession was kept in force with regard to the successor States of the Ottoman Empire and, in particular, Italy as exercising sovereignty over the Dodecanese, the islands which were subsequently ceded to Greece by the Treaty of Peace with Italy (1947). The French Government claimed compensation on behalf of the firm of Collas and Michel which had been placed under sequestration in 1940 by the Italian Government and whose lighthouses in the Dodecanese had been mostly destroyed as the result of warlike action.

13. The case chiefly turned on the interpretation of article 78 (7) of the Italian Peace Treaty, concerning the responsibility of Italy for the restitution of, or the compensation for loss or damage sustained by, property belonging to United Nations nationals, and paragraph 14 of annex XIV of the Peace Treaty, providing for freeing from sequestration or measures of Italian control property of United Nations nationals.

14. The Commission rejected Italy's contention that the obligation of Italy to pay compensation was limited by the fact that the claimants' property was in ceded territory and held that the claim must succeed. The Commission said:

##### [*Translation from French*]

Paragraph 14 of Annex XIV imposes on the United Nations in the capacity of successor State an obligation towards Italy—that of freeing from sequestration or measures of control taken by Italy property of United Nations citizens situated on the territory ceded to that successor State and of restoring it to its owners in its present condition. To the extent of that obligation, Italy is relieved of its responsibility towards that one of the United Nations whose national is the owner of the property in question: if the successor State does not restore the property in its present condition, Italy cannot be called upon to effect restitution or be ordered to put right damage resulting from default in restitution; but it can be proceeded against for compensation for damage or for the loss sustained by the property not restored as the result of war or by reason of special measures

<sup>8</sup> *Reports of International Arbitral Awards*, vol. XIV, p. 358.

applied before the coming into force of the Peace Treaty. That, if the full scope of the Treaty is taken into account, is the only true meaning of the last sentence of article 78 (7): the successor State replaces Italy as regards the obligation to restore the property in the condition in which it now is, and Italy cannot be held responsible for the maintenance by the successor State, after the coming into force of the Peace Treaty, of a measure of sequestration or control taken by Italy against the property in question.<sup>9</sup>

#### IV. State succession in relation to public property and public debts, including apportionment of *biens communaux*

DECISION OF 31 JANUARY 1953  
(GENERAL LIST NO. 1)

##### *Italy v. United Kingdom and Libya*

*United Nations Tribunal in Libya established by General Assembly resolution 388 (V) of 15 December 1950*

*Reports of International Arbitral Awards*, vol. XII,  
p. 363

15. Libya became independent on 24 December 1951, two days after the Italian Government instituted proceedings against the United Kingdom, claiming the restoration to Italy of the administration of properties comprised in the categories specified in article I of the United Nations General Assembly resolution 388 (V) of 15 December 1950 entitled "Economic and financial provisions relating to Libya". The Tribunal, in its decision of 18 February 1952 in the Request for Interim Measures,<sup>10</sup> considered the Government of Libya as a co-defendant and also rejected the Libyan Government's exception of lack of jurisdiction, having ruled that the instant action had been properly brought before the Tribunal.

16. One of the Italian Government's claims was that the administration of the properties constituting the *patrimonio disponibile* in Tripolitania and Cyrenaica should be returned to Italy. This claim turned on the interpretation of article I in General Assembly resolution 388 (V), which reads in part:

##### Article I

1. Libya shall receive, without payment, the movable and immovable property located in Libya owned by the Italian State, either in its own name or in the name of the Italian administration of Libya.

2. The following property shall be transferred immediately:

(a) The public property of the State (*demanio pubblico*) and the inalienable property of the State (*patrimonio indisponibile*) in Libya, as well as the relevant archives and documents of an administrative character or technical value concerning Libya or relating to property the transfer of which is provided for by the present resolution;

(b) The property in Libya of the Fascist Party and its organizations.

3. In addition, the following shall be transferred on conditions to be established by special agreement between Italy and Libya:

(a) The alienable property (*patrimonio disponibile*) of the State in Libya and the property in Libya belonging to the autonomous agencies (*aziende autonome*) of the State.

The Tribunal stated that paragraph 1 of the above-quoted article I set forth the general objective that title to all State property in Libya should be vested in the Libyan Government; that paragraph 2 established Libya's right to full and immediate ownership of its *demanio pubblico* and *patrimonio indisponibile*; and that paragraph 3 (a) made the transfer to the Libyan Government of the *patrimonio disponibile* dependent on the special agreement between Italy and Libya. In this connexion, the Tribunal referred to the following excerpts from Fauchille's *Traité de droit international public*, which it endorsed as constituting a generally accepted rule of international law, and the Tribunal said that paragraph 2 of the above-mentioned article I was in line with this rule:

##### [Translation from French]

When a dismembered State cedes a portion of its territory, property which constitutes *public* property, namely property which by its nature is used for a public service, existing on the annexed territory, passes with its inherent characteristics and legal status to the annexing State; being devoted to the public service of the ceded province, it should belong to the sovereign power which is henceforward responsible for it ...

...

As regards *private* State property, i.e., property which the State possesses in the same manner as a private person, in order to derive income from it, it must be noted that failing any special provisions it does not become part of the property of the annexing State. In spite of the loss the dismembered State has suffered, it remains the same person as before and does not, any more than a private person, cease to be the owner of the things it possesses in the annexed territory and there is no principle preventing it from having the ownership of immovable property in that territory.<sup>11</sup>

17. The Tribunal went on to examine the nature of the transfer of the *patrimonio disponibile* in Libya which should take place in accordance with article I, paragraph 3, of the General Assembly resolution, and referred to the circumstances that Italy agreed to the transfer of the *patrimonio disponibile* in Libya, as well as in Eritrea and in the territories which Italy ceded to France, Greece and Yugoslavia, and concluded that, in so far as the properties constituting the *patrimonio disponibile* in Libya were concerned, all that had yet to be transferred to Libya by means of the special agreement called for in article I, paragraph 3 (a), was title to the said properties. The Italian Government's claim was therefore rejected and, pending the special agreement, the Libyan Government was to abstain from disposing of any of the said properties and to maintain the present administrative agency entrusted with the custodianship of the said properties.

18. In this connexion, it may be relevant to recall the Tribunal's decisions of 3 July 1954 and 27 June 1955 (General List No. 2)<sup>12</sup> where disputes relating to the

<sup>11</sup> *Ibid.*, pp. 365-366. For the original French text, see P. Fauchille, *Traité de droit international public*, 8th ed. (Paris, Rousseau et Cie, Editeurs, 1922), t. I, pp. 360-361.

<sup>12</sup> *Reports of International Arbitral Awards*, vol. XII, p. 373.

<sup>9</sup> *Ibid.*, vol. XIII, pp. 306-307.

<sup>10</sup> *Ibid.*, vol. XII, p. 359.

transfer to Libya of the rights in certain Italian institutions, companies and associations were settled mainly on the basis of the interpretation of the provisions of General Assembly resolution 388 (V) aforementioned and of an Agreement of 28 June 1951 between Italy and the United Kingdom concerning the disposal of Italian property in Libya, which had been in the custody of the British Military Occupation Administration.

#### POSTAL ARBITRATION (1956)

##### *Postal Administration of Portugal v. Postal Administration of Yugoslavia*

*Arbitrators (Postal Administrations of the Netherlands and Denmark) appointed under the Universal Postal Convention of 11 July 1952*<sup>13</sup>

*Reports of International Arbitral Awards*, vol. XII, p. 339

19. The Portuguese Postal Administration claimed from the Yugoslav Postal Administration the dues for reply coupons issued in 1943 in the then independent State of Croatia a debt which had been acknowledged by the Croatian Administration in 1944—and the transit charges for mails from occupied Yugoslavia in 1941. The Yugoslav Administration refused to pay the dues and charges, contending, *inter alia*, that the actions of the former Croatian State under the patronage of the occupying Power could in no way commit the Yugoslav Administration and that during the occupation (from 18 April 1941 onwards) Yugoslavia had not been able to perform any valid act in relation with a foreign country either in its own name or on its own account. The Portuguese Administration argued that, since the territory on which the Croatian Administration and the German occupation authorities operated was an integral part of the present Yugoslavia, the latter should be held as the rightful successor to the authorities who exercised power on the same territory during the Second World War.

20. The Arbitrators decided that the claim of the Portuguese Administration must fail. They argued:

The settlement of debts through compensation is subject to certain conditions. In particular, the creditor does not have the power to replace the original debtor by another whom he considers to be the rightful successor *if this succession is not recognized either by the new debtor or by a special international arrangement or an uncontested rule of public international law.*

Since in this specific case, this rightful succession is contested by Yugoslavia and no special international arrangement or uncontested rule of public international law recognizes the succession, as the instances competent to solve questions of this kind have not yet made a judgement in this respect, compensation cannot be effected.<sup>14</sup>

#### CASE CONCERNING THE INTERPRETATION OF ARTICLE 78, PARAGRAPH 7, OF THE TREATY OF PEACE WITH ITALY (1956)

##### *France v. Italy*

*Franco-Italian Conciliation Commission established under the Treaty of Peace with Italy of 10 February 1947: Decision No. 201 of 16 March 1956*

*Reports of International Arbitral Awards*, vol. XIII, p. 636

21. The question before the Conciliation Commission was whether the provisions of article 78, paragraph 7, of the Treaty of Peace with Italy, relating to the responsibility of Italy for loss or damage sustained during the war by property in ceded territory or in the Free Territory of Trieste, were applicable to Ethiopian territory. The Commission decided on the question in the negative, almost exclusively on the basis of the interpretation of the relevant provisions of the Peace Treaty. In the course of its opinion, the Commission referred to the question of succession to State debts and said:

*[Translated from French]*

In the matter of succession to State debts where there are territorial changes, the teachings of international doctrine and practice are inconsistent (cf. Rousseau, *Droit International Public* [<sup>15</sup>] pp. 275 *et seq.*) and must in any case yield to contractual solutions when the question has, as in this case, been settled by treaty.<sup>16</sup>

#### CASE CONCERNING THE APPORTIONMENT OF PROPERTY OF FRONTIER COMMUNES (1953)

##### *France v. Italy*

*Franco-Italian Conciliation Commission established under the Treaty of Peace with Italy of 10 February 1947: Decision No. 163 of 9 October 1953*

*Reports of International Arbitral Awards*, vol. XIII, p. 503

22. By an exchange of notes of 27 September 1951,<sup>17</sup> France and Italy agreed to submit to the Franco-Italian Conciliation Commission a number of questions relating to the apportionment of the property of the frontier communes whose areas had been divided as a result of modifications of the frontier made by article 2 of the Treaty of Peace with Italy (1947). The Commission made a series of decisions regarding the exact line of the frontier and allocation of property of local authorities (*biens communaux*). The Commission also heard argument and reached certain conclusions on questions of law relating to succession to property rights.

23. Contrary to the Italian contention, the Commission held that, under annex XIV, paragraph 1, of the Italian Peace Treaty, the successor State was to receive not

<sup>13</sup> United Nations, *Treaty Series*, vol. 169, p. 3.

<sup>14</sup> *Reports of International Arbitral Awards*, vol. XII, pp. 347-348.

<sup>15</sup> Ch. Rousseau, *Droit international public* (Paris, Librairie du Recueil Sirey, 1953), t. I.

<sup>16</sup> *Reports of International Arbitral Awards*, vol. XIII, pp. 657-658.

<sup>17</sup> *Ibid.*, p. 22.

only State property but also other public property, including *biens communaux*, situated in territory ceded to it, and that it was for the successor State to determine the fate of property thus transferred, either by express municipal law enactment or by implicitly recognizing, for example, that the local authority amenable to its sovereignty which had succeeded the Italian local authority should be regarded as the owner of the property.

24. The Commission, however, found it understandable that, as regards the property of communes whose areas had been divided by the new frontier, the Allied and Associated Powers permitted, by paragraph 18 of the above-mentioned annex XIV, a derogation from the principle of annex XIV, paragraph 1, and were moreover moved by respect for acquired rights. The Commission went on to say:

*[Translation from French]*

The most authoritative doctrine, while recognizing that the effects of territorial changes upon property rights [*droits patrimoniaux*] are determined in the first instance by the Treaty which stipulated the loss of or accretion to the detriment or advantage of a State, holds that territorial changes should leave unimpaired property rights duly acquired before the change, and in particular recommends the application of that rule to the property rights of communes or other local authorities which are part of the State affected by the territorial change (see chapters 3 and 4 of

resolution II adopted by the Institute of International Law at Siena during its session of 17-26 April 1952 . . . [<sup>18</sup>]).<sup>19</sup>

25. Aethough no question concerning archives of documents had been raised in the present case, the Commission made the following statement for the record:

*[Translated from French]*

The communal property [*biens communaux*] to be apportioned under paragraph 18 should be deemed not to include archives and all relevant documents of an administrative character or historical value'; such archives and documents, even if they belong to a commune whose area is divided by a frontier established under the terms of the Treaty, pass to what is termed the successor State if they concern the territory ceded or relate to property transferred (Annex XIV, para. 1); if these conditions are not fulfilled, they [i.e. the archives and documents] are not liable either to transfer under paragraph 1 or to apportionment under paragraph 18, but remain the property of the Italian commune. What is decisive, in the case of property in a special category of this kind, is the ideal link with other property or with a territory.<sup>20</sup>

<sup>18</sup> *Annuaire de l'Institut de droit international, Siena Session (April, 1952)* [Bâle, Editions juridiques et sociologiques S. A., 1952], vol. 44, t. II, pp. 471-472.

<sup>19</sup> *Reports of International Arbitral Awards*, vol. XIII, p. 516.  
<sup>20</sup> *Ibid.*, pp. 516-517.



## STATE RESPONSIBILITY

[Agenda item 4]

## DOCUMENT A/CN.4/233

Second report on State responsibility, by Mr. Roberto Ago, Special Rapporteur

*The origin of international responsibility*

[Original text: French]

[20 April 1970]

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\* The translation for the French terms "*fait illicite international*" and "*fait internationalement illicite*", provisionally established by the Secretariat, was "international illicit act". However, during the discussion of this report at the twenty-second session of the International Law Commission the English-speaking members of the Commission expressed their preference for the term "internationally wrongful act", already used in previous reports. Accordingly, the term "internationally wrongful act" has been used throughout in the final edition of the present report.

## Introduction

1. When presenting to the International Law Commission, at its twenty-first session,<sup>1</sup> his first report on the international responsibility of States (A/CN.4/217 and Add.1),<sup>2</sup> containing a review of previous work on the

<sup>1</sup> See *Yearbook of the International Law Commission, 1969*, vol. I, p. 104, 1011th meeting.

<sup>2</sup> *Ibid.*, vol. II, p. 125. The Special Rapporteur also submitted, as an annex to this report, the main texts drafted during the previous work on codification. The Commission also had before it two documents relating to the topic of State responsibility published by the Secretariat in 1964: (a) a working paper containing a summary of the discussions in various United Nations organs and the resulting decisions (*Yearbook of the International Law Commission, 1964*, vol. II, p. 125, document A/CN.4/165); (b) a digest of the decisions of international tribunals relating to State responsibility (*ibid.*, p. 132, document A/CN.4/169).

codification of this topic, the Special Rapporteur stated that his intention was to provide the Commission with a general conspectus of that work so that it could study the past and derive from it some useful guidance for its future work. The main aim was to avoid, in the future, the obstacles which in the past had prevented the codification of this branch of international law.

2. In this context the Special Rapporteur was concerned to illustrate some of the most serious difficulties encountered when dealing with the topic of international responsibility and to bring out the reasons for those difficulties as they emerge from an examination of the various

Each of these documents was accompanied by a supplement bringing it up to date: see *Yearbook of the International Law Commission, 1969*, vol. II, p. 114, document A/CN.4/209 and p. 101, document A/CN.4/208, respectively.

attempts at codification made hitherto under the auspices of official bodies, in particular the League of Nations and the United Nations itself. On concluding this review the Special Rapporteur drew attention to the ideas which had guided the International Law Commission since the time when, having had to recognize that its previous efforts had reached a deadlock, it had decided to resume the study of the topic of responsibility from a new viewpoint; in particular, he summarized the methodological conclusions reached by the Sub-Committee on State Responsibility, created in 1962, and later by the Commission itself at its fifteenth (1963) and nineteenth (1967) sessions, on the basis of which the Commission decided to take up the work of codification again and try to achieve some positive results.

3. After this introduction, the International Law Commission discussed the Special Rapporteur's first report in detail.<sup>3</sup> All the members of the Commission present at the twenty-first session participated fully in the discussion. Replying to comments and summing up the debate, the Special Rapporteur gave an account of the views of members and in doing so was able to note that there was a great identity of ideas in the Commission as to the most appropriate way of continuing the work on State responsibility and as to the criteria that should govern the preparation of the different parts of the draft articles which the Commission proposes to draw up. The Commission's conclusions were subsequently set out in chapter IV of the report on its twenty-first session,<sup>4</sup> which was devoted to State responsibility. The summary records show that these conclusions were in the main favourably received by the members of the Sixth Committee of the General Assembly, who referred to the problem of State responsibility in their comments on the International Law Commission's report.<sup>5</sup>

4. The criteria laid down by the Commission, on the basis of which the draft articles contained in this report have been prepared, and by which future reports will also be guided, may be summarized as follows.

5. (A) Adhering to the system it has always adopted hitherto for all the topics it has undertaken to codify, the Commission intends to confine its study of international responsibility for the time being to the responsibility of States. Nevertheless, it does not underrate the importance of studying questions relating to the responsibility of subjects of international law other than States; but the overriding need to ensure clarity in the examination of the topic, and the organic nature of the draft, are obvious reasons for deferring consideration of these other questions.

6. (B) While recognizing the importance, alongside that of responsibility for internationally wrongful acts, of questions relating to responsibility arising out of the performance of certain lawful activities—such as spatial and nuclear activities—the Commission believes that questions in this latter category should not be dealt

with simultaneously with those in the former category. Owing to the entirely different basis of the so-called responsibility for risk, the different nature of the rules governing it, its content and the forms it may assume, a simultaneous examination of the two subjects could only make both of them more difficult to grasp. The Commission will therefore proceed first to consider the topic of the responsibility of States for internationally wrongful acts. It intends to consider separately the topic of responsibility arising from lawful activities, as soon as progress with its programme of work permits.

7. (C) The Commission agreed on the need to concentrate its study on the determination of the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility. A consideration of the various kinds of obligation placed on States in international law, and in particular a grading of such obligations according to their importance to the international community, may have to be regarded as a necessary element for assessing the gravity of an internationally wrongful act and as a criterion for determining the consequences it should have. But this must not obscure the essential fact that it is one thing to define a rule and the content of the obligation it imposes and another to determine whether that obligation has been violated and what should be the consequences of the violation. Only the second aspect comes within the sphere of responsibility proper; to encourage any confusion on this point would be to raise an obstacle which might once again frustrate the hope of successful codification.

8. (D) The study of the international responsibility of States to which the Commission is to devote itself comprises two broad, separate phases, the first covering the origin of international responsibility and the second the content of that responsibility. The first task is to determine what facts and what circumstances must be established in order to impute to a State the existence of an internationally wrongful act which, as such, is a source of international responsibility. The second task is to determine the consequences attached by international law to an internationally wrongful act in various cases, in order to arrive on this basis at a definition of the content, forms and degrees of responsibility. Once these two essential tasks have been accomplished, the Commission will be able to decide whether a third should be added in the same context, namely, the consideration of certain problems concerning what has been termed the "implementation" of the international responsibility of States and of questions concerning the settlement of disputes arising out of the application of rules relating to responsibility.

9. Having laid down these directives, the Commission is now in a position to consider, in succession, the many and diverse questions raised by the topic as a whole. The Special Rapporteur therefore proposes, in the first phase of the work, to focus his examination on the subjective and objective conditions for the existence of an internationally wrongful act. The first task, which may seem limited in scope, but which is particularly delicate because

<sup>3</sup> *Ibid.*, vol. I, 1011th, 1012th, 1013th and 1036th meetings.

<sup>4</sup> *Ibid.*, 1969, vol. II, p. 233, document A/7610/Rev.1, paras. 80-84.

<sup>5</sup> See *Official Records of the General Assembly, Twenty-fourth Session, Sixth Committee*, 1103rd-1111th and 1119th meetings.

of its possible implications, consists in formulating the basic general principles; it is to this specific issue that the present report is devoted. Once these principles have been established, the next step will be to deal with all the questions relating to the imputability of the State, as a subject of international law, of the conduct (action or omission) in particular circumstances, of certain persons, certain groups or certain entities. It will also be necessary to determine in what conditions the action or omission thus imputed to the State can be regarded as constituting a violation of an international legal obligation and thus having the constituent elements of an internationally wrongful act which, as such, generates State responsibility at the inter-State level. All this would be followed by an examination of the questions arising in connexion with the various circumstances which, may possibly result in the conduct imputed to the State not being wrongful: *force majeure* and act of God, consent of the injured State, legitimate application of a sanction, self-defence and state of necessity. After that, it will be possible to go on to the second phase of the work, that covering the content, forms and degrees of international responsibility.

10. In accordance with the decisions taken at the twenty-first session, the successive reports on this subject will be so conceived as to provide the Commission with a basis for the preparation of draft articles, with a view to the eventual conclusion of an international codification convention. It seemed advisable as from this report to adopt the following method: to specify the questions arising in connexion with each of the points successively considered and then to state the differences of opinion which have appeared regarding them and the ways in which they have in fact been settled in international life. Reference will therefore be made to the most important cases which have arisen in diplomatic practice and international jurisprudence. Here, a certain disparity may be noted between the different questions, owing to the fact that there are a great many precedents in some cases, but relatively few in others. In each case, too, the positions taken by international law writers will be mentioned, having particular regard to the most recent trends in different countries. In order to avoid overburdening the report, however, the references will generally be confined to the views of the very numerous writers who have dealt specifically with the points in question.<sup>6</sup> On the basis of this material the Special Rapporteur will indicate the reasons which, in his opinion, militate in favour of a particular solution, and conclude with the text of the draft article he proposes to the Commission as a basis for discussion. To make the work which will have to be completed during the first phase of the study more easily understandable, all the draft articles proposed will be reproduced together at the end.

11. One final remark seems appropriate. Responsibility differs widely, in its aspects, from the other subjects which the Commission has previously set out to codify. In its previous drafts, the Commission has generally concentrated on defining the rules of international law which,

<sup>6</sup> The Special Rapporteur intends to supply the Commission with a separate document containing as complete and up-to-date a bibliography as possible on international responsibility.

in one sector of inter-State relations or another, impose particular obligations on States, and which may, in a certain sense, be termed "primary", as opposed to the other rules—precisely those covering the field of responsibility—which may be termed "secondary", inasmuch as they are concerned with determining the consequences of failure to fulfil obligations established by the primary rules. Now the statement of primary rules often calls for the drafting of a great many articles, not all of which necessarily require very extensive commentaries. Responsibility, on the other hand, comprises relatively few principles, which often need to be formulated very concisely. But the possible brevity of the formulation is by no means indicative of simplicity in the subject-matter. On the contrary, on every point there may be a whole host of complex questions, which must all be examined, since they affect the formulation to be adopted. It should come as no surprise, therefore, that the present report contains very long passages dealing with a whole series of problems, followed by a few short articles.

## Chapter I

### General rules

#### I. THE INTERNATIONALLY WRONGFUL ACT AS A SOURCE OF RESPONSIBILITY

12. One of the principles most deeply rooted in the theory of international law and most strongly upheld by State practice and judicial decisions is the principle that any conduct of a State which international law classifies as a legally wrongful act entails the responsibility of that State in international law. In other words, whenever a State is guilty of an internationally wrongful act against another State, international responsibility is established "immediately as between the two States", as was held by the Permanent Court of International Justice in the *Phosphates in Morocco* case.<sup>7</sup> Moreover, as stated by the Italian-United States Conciliation Commission set up under article 83 of the Treaty of Peace of 10 February 1947,<sup>8</sup> no State may "escape the responsibility arising out of the exercise of an illicit action from the viewpoint of the general principles of international law".<sup>9</sup>

13. A justification for the existence of this fundamental rule has usually been found in the actual existence of an international legal order and in the *legal* nature of the obligations it imposes on its subjects.<sup>10</sup> For it is obvious that if one attempts, as certain advocates of State absolutism have done in the past, to deny the idea of State responsibility because it allegedly conflicts with the idea

<sup>7</sup> *Phosphates in Morocco* case (Preliminary Objections), 14 June 1938, *P.C.I.J.*, series A/B, No. 74, p. 28.

<sup>8</sup> United Nations, *Treaty Series*, vol. 49, p. 167.

<sup>9</sup> *Armstrong Cork Company Case*, 22 October 1953 (United Nations, *Reports of International Arbitral Awards*, vol. XIV (United Nations publication, Sales No.: 65.V.4), p. 163.

<sup>10</sup> Among the authors of classic works on the subject, see D. Anzilotti, *Teoria generale della responsabilità dello Stato nel diritto internazionale* (Florence, F. Lumachi, 1902), reprinted in *Scritti di diritto internazionale pubblico* (Padua, CEDAM, 1956), vol. II, t. 1, pp. 25 and 62, and *Corso di diritto internazionale*,

of sovereignty, one is forced to deny the existence of an international legal order. The Swiss Government pointed this out in its reply to point II of the request for information addressed to Governments by the Preparatory Committee for the 1930 Conference for the Codification of International Law:

“... the actual basis of the reciprocal responsibility of States lies in the actual existence of an international juridical order and in the need which States experience to observe certain rules of conduct *inter se*”.<sup>11</sup>

Others prefer to think that, in the international order, State responsibility derives from the fact that States mutually recognize each other as sovereign. The rule establishing responsibility would then be the necessary corollary to the principle of the equality of States.<sup>12</sup> But whatever its justification may be, the important thing to note here is that the fundamental rule, despite certain variations in its formulation, is expressly recognized, or at least clearly assumed by doctrine and practice unanimously.<sup>13</sup>

14. As regards the meaning and scope of the correlation thus established between a wrongful act and responsibility,

4th ed. (Padua, CEDAM, 1955), vol. I, p. 384; P. Schoen, “Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen”, *Zeitschrift für Völkerrecht* (Breslau, J.U. Kern's Verlag [Max Müller, 1917], *Ergänzungsheft 2*, Bd. X, p. 16; K. Strupp, “Das völkerrechtliche Delikt”, *Handbuch des Völkerrechts* (Stuttgart, Verlag von K. Kohlhammer, 1920), Bd. III, 1st abt., pp. 4 *et seq.*

Among recent affirmations of the principle, mention should be made of the very cogent statement by A. Verdross in *Völkerrecht*, 5th ed. (Vienna, Springer Verlag, 1964), p. 373: “Eine Leugnung dieses Grundsatzes würde das VR zerstören, da mit der Verneinung der Verantwortlichkeit für begangenes Unrecht auch die Pflicht der Staaten, sich völkerrechtsgemäss zu verhalten, aufgehoben würde”. [A denial of this principle would destroy international law, since the negation of responsibility for a wrongful act would also do away with the duty of States to behave in accordance with international law.] (Translation by the United Nations Secretariat.)

<sup>11</sup> League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (C.75.M.69.1929.V), p. 24. The Swiss Government's reply was based on a quotation from Anzilotti.

<sup>12</sup> Cf. Ch. de Visscher, “La responsabilité des Etats”, *Bibliotheca Visseriana* (Leyden, E.J. Brill, édit., 1924), t. II, p. 90. See also C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), pp. 5-6.

The idea that the legal basis of international responsibility is to be found in the “recognition of a political unit as a member of the community governed by international law” was expressed in point II of the request for information addressed to Governments by the Preparatory Committee for the 1930 Conference. However, some Governments criticized the idea (League of Nations, *Bases of Discussion... [op. cit.]*, pp. 20-24).

<sup>13</sup> Belief in the existence of the general rule whereby responsibility attaches to any internationally wrongful act by a State was clearly expressed in point II of the above mentioned request for information drawn up by the Preparatory Committee for the 1930 Conference. The same conviction also emerges from almost all the replies from Governments. Moreover, the Third Committee of the Conference unanimously approved article 1, which laid down that:

“International responsibility is incurred by a State if there is any failure on the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner on the territory of the State.” (See *Yearbook of the International Law Commission*, 1956, vol. II, p. 225, document A/CN.4/96, annex 3.)

ity, Grotius had already observed that in the law of nations, too, *maleficium* was an independent source of legal obligations.<sup>14</sup> Translated into terms of modern legal technique, this amounts to saying that internationally wrongful acts by States create new international legal relations characterized by subjective legal situations distinct from those which existed before the acts took place. The fact that the legal relations between States established as a result of an internationally wrongful act are new relations has been pointed out both by jurists whose writings are now legal classics<sup>15</sup> and by authors of recent works.<sup>16</sup>

15. Notwithstanding this unanimous recognition of the principle, there are serious differences of opinion on the definition of the legal relations created by an internationally wrongful act and the legal situations which occur in these relations. One conception, which may be considered classical in international law doctrine and which proceeds from certain theoretical premises—though it has some solid support in judicial decisions and State practice—describes the legal relations deriving from an internationally wrongful act in one single form: that of an obligatory bilateral relationship established between the State which committed the act and the injured State, in

Among codification drafts emanating from private institutions, the draft convention prepared by the Harvard Law School in 1961 states as a “basic principle” of State responsibility the rule that “A State is internationally responsible for an act or omission which, under international law, is wrongful...” (Italics supplied by the Special Rapporteur). (Harvard Law School, Draft convention on the international responsibility of States for injuries to aliens, art. 1 (see *Yearbook of the International Law Commission*, 1969, vol. II, p. 142, document A/CN.4/217 and Add. 1, annex VII).)

<sup>14</sup> H. Grotius, *De Jure Belli ac Pacis Libri Tres* (Amsterdam, MDCCXX), lib. II, cap. XVII, pp. 462 *et seq.*

<sup>15</sup> D. Anzilotti, *Corso di diritto internazionale (op. cit.)*, p. 383: “Al fatto illecito, cioè, in generale parlando, alla violazione di un dovere internazionale, si collega così il sorgere di un nuovo rapporto giuridico, tra lo Stato al quale è imputabile il fatto di cui si tratta [...] e lo Stato verso cui sussisteva il dovere inadempito.” [The wrongful act, that is to say, generally speaking, the violation of an international obligation, is thus accompanied by the appearance of a new legal relationship between the State to which the act is imputable [...] and the State with respect to which the unfulfilled obligation existed] (Translation by the United Nations Secretariat.)

<sup>16</sup> W. Wengler, *Völkerrecht* (Berlin, Springer Verlag, 1964), Bd. 1, p. 499: “Völkerrechtliche Unrechtsfolgen in Gestalt der Entstehung neuer konkreter Rechtspflichten, die durchweg den Völkerrechtverletzer direkt oder indirekt schlechter stellen sollen, als dies vorher der Fall war, liegen durchweg vor (...)” [Unquestionably the consequences of an internationally wrongful act which take the form of the creation of new and concrete legal obligations always aim, directly or indirectly, to place the author of the violation of international law in a more unfavourable situation than the one existing previously (...)]. G.I. Tunkin, *Droit international public - Problèmes théoriques* (Paris, A. Pédone, 1965), p. 220: “La violation par l'Etat du droit international engendre certains rapports juridiques”, [The violation by the State of international law gives rise to certain legal relations] and *Teoria mezhdunarodnogo prava* (Moscow, 1970), p. 470: “Naruszenie gosudartsvom mezhdunarodnogo prava porozhdaet opredelennye pravavogo otnoshenia” [The violation by the State of international law gives rise to the definition of legal relations]. E. Jiménez de Aréchaga, *International Responsibility - Manual of Public International Law* (London, published by Sorensen, 1968), No. 9, p. 533: “Whenever a duty established by any rule of international law has been breached by act or omission, a new legal relationship automatically comes into existence.”

which the obligations of the former State to make reparation—in the wide sense of the term, of course—is set against the subjective right of the latter State to require such reparation.<sup>17</sup> In a community like the international community, in which the relations between States and the community as such are not legally organized, the creation of an obligatory relationship of this nature would appear

<sup>17</sup> Article 36 of the Statute of the International Court of Justice, which, on this point, reproduces unchanged the corresponding provisions of the Statute of the Permanent Court of International Justice, provides that the Court may have jurisdiction with respect to an internationally wrongful act only in order to establish the existence of such an act and to determine the nature and extent of the reparation to be made. On this basis, conduct that is wrongful under international law has been judged by the Permanent Court of International Justice to give rise to a duty of the State concerned to make reparation for the injury caused; this was held as early as Judgement No. 1 of 17 August 1923 in the S.S. "Wimbledon" case (*P.C.I.J.*, series A. No. 1, pp. 30 and 33). The same Court later defined its basic attitude in the matter in its Judgements No. 8 of 26 July 1927 (Jurisdiction) and No. 13 of 13 September 1928 (Merits) in the Case concerning the factory at Chorzów (*P.C.I.J.*, Series A. No. 9, p. 21 and No. 17, p. 29). In the second of these judgements, the Court observed that:

"... it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation..."

The principle stated by the Permanent Court was expressly reaffirmed by the International Court of Justice in its Advisory Opinion of 11 April 1949 concerning Reparation for injuries suffered in the service of the United Nations (*I.C.J. Reports 1949*, p. 184). The Court also applied this principle in its Judgement of 9 April 1949 in the Corfu Channel case (*ibid.*, p. 23).

In arbitration cases, the idea that all internationally wrongful conduct uniformly gives rise to a legal relationship between the offending State and the injured State, characterized by the right of the latter State to demand adequate reparation, has been stated many times. In this connexion, it is sufficient to refer to Mr. Huber's decision of 1 May 1925, as arbitrator in the case concerning British claims in the Spanish zone of Morocco (United Nations, *Reports of International Arbitral Awards*, vol. II [United Nations publication, Sales No.: 1949.V.1], p. 641 and the decision of 22 October 1953, cited above, of the Italian-United States Conciliation Commission in the Armstrong Cork Company case (*ibid.*, vol. XIV [Sales No.: 65.V.4], p. 163) in which, quoting the opinion of Strupp, the Commission described wrongful actions as "producing the responsibility of those performing such actions and allowing the State which has suffered or whose subjects have suffered damage to demand reparation".

As to the practice of States, reference should be made first of all to the fact that article 3 of the IVth Hague Convention of 1907 respecting the Laws and Customs of War on Land provided that a belligerent which violated the provisions of the Regulations "shall, if the case demands, be liable to pay compensation". Article 12 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War (United Nations, *Treaty Series*, vol. 75, p. 146) establishes the responsibility of the State, but does not indicate what form that responsibility takes. With regard to the special sector of international responsibility for injuries to aliens, attention may be drawn once again to the general agreement on point II of the request for information addressed to States by the Preparatory Committee for the 1930 Conference for the Codification of International Law, according to which "a State which fails to comply with this obligation [...] incurs responsibility and must make reparation in such form as may be appropriate." (League of Nations, *Bases of Discussion...* [*op. cit.*], p. 20, and *Supplement to vol. III* [C. 75 (a).M.69 (a).1929.V]). According to article III, adopted on first reading by the Third Committee of the Conference, "The international responsibility of a State imports the duty to make reparation for the damage sustained [...]" (See *Yearbook of the International Law Commission, 1956*, vol. II, p. 225, document A/CN.4/96, annex 3).

It should, however, be noted that although international jurisprudence and State practice undoubtedly justify the conclu-

to be the only effect that can be attached to the wrongful act.<sup>18</sup>

16. This view does not admit of the possibility of a real sanction which the injured State itself, or possibly a third party, would have the faculty to impose upon the offending State. Although it recognizes that a coercive act may become applicable following a wrongful act, it does so only as a means of enforcement intended to ensure, by coercion, that the recalcitrant State fulfils its obligations, and not as a "sanction" in the proper sense of term, i.e. having a punitive purpose.<sup>19</sup> In conclusion, international responsibility is said to be characterized by the legal relationship created by the wrongful act:<sup>20</sup> an obligatory relationship in which the restoration or compensa-

sion that in general international law an internationally wrongful act imposes on the offending State an obligation to make reparation, it would be reading too much into this jurisprudence and State practice to try to draw the further conclusion that the creation of such an obligation is necessarily the only consequence which general international law attaches to an internationally wrongful act. In reality, this idea has its origin in a particular conception of the legal order in general and of the international legal order in particular.

<sup>18</sup> This is the well-known theory of Anzilotti (*Teoria generale...* [*op. cit.*], pp. 62 *et seq.*, and 81-82; *La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers* (Paris, A. Pédone, 1906), reprinted in *Scritti...* [*op. cit.*], p. 161; *Corso...* [*op. cit.*], pp. 385-386). A similar view is maintained in works dealing specifically with the subject although some of them are already rather old (P. Schoen, *op. rit.*, p. 22 and 122-123; K. Strupp, "Das völkerrechtliche Delikt", *Handbuch...* [*op. cit.*], p. 217; Ch. de Visscher, *op. cit.*, pp. 115-116; C. Eagleton, *op. cit.*, p. 182; R. Laís, "Die Rechtsfolgen völkerrechtliche Delikte", Institut für internationales Recht an der Universität Kiel, *Erste Reihe Vorträge und Einzelschriften* (Berlin, Verlag von Georg Stilke, 1932), Heft 18, pp. 19-20; etc.); but the same view is also to be found, with the normal variations from one writer to another, in recent treatises and monographs: for example, G. Schwarzenberger, *International Law*, 3rd ed. (London, Stevens and Sons Ltd., 1957), vol. 1, pp. 568 *et seq.*; A. Schüle, "Völkerrechtliches Delikt", *Wörterbuch des Völkerrechts* 2nd ed. (Berlin, Walter de Gruyter und Co., 1960), Bd. I, pp. 337 *et seq.*; D.P. O'Connell, *International Law* (London, Stevens and Sons Ltd., 1965), vol. II, pp. 1019 *et seq.*; and E. Jiménez de Aréchaga, *International Responsibility...* (*op. cit.*), pp. 533, 564 *et seq.*

<sup>19</sup> It follows that when the advocates of this theory deal, for example, in general international law, with an institution such as reprisals—whether peaceful or armed—they tend not to regard them as a form of sanction which may, as such, have its own punitive and repressive purpose, as is so well indicated by the term "retaliation" in English, but only as a means of coercion used to secure performance, or restoration of the impaired right, or reparation for the damage sustained. See, for example, K. Strupp, "Das völkerrechtliche Delikt", *Handbuch...* (*op. cit.*), pp. 195 *et seq.*, and *Éléments du droit international public: universel, européen et américain* (Paris, Les Editions internationales, 1930), vol. I, p. 345; Ch. de Visscher, *op. cit.*, p. 117; and G. Balladore Pallieri, "Gli effetti dell' atto illecito internazionale", *Rivista di Diritto Pubblico—La Giustizia Amministrativa*, Rome, January 1931—IX, fasc. 1, pp. 64 *et seq.*

<sup>20</sup> P. Reuter ("Principes de droit international public", *Recueil des cours de l'Académie de droit international de La Haye, 1961-II* [Leyden, Sijthoff, 1962], pp. 584 *et seq.*) emphasizes this aspect of the theory, which he calls "l'unité de la théorie de la responsabilité". In his view, "l'absence d'une distinction entre la responsabilité pénale et la responsabilité civile n'est en droit international que la conséquence de l'absence d'autorité ayant pour fonction propre de défendre les intérêts communs". [The absence of any distinction between criminal responsibility and civil responsibility in international law is essentially the result of the absence of an authority responsible for protecting the common interests.] (Translation by the United Nations Secretariat.)

tion aspects may be accompanied by punitive aspects, without the distinction being easy to make and having more than a theoretical interest.<sup>21</sup>

17. Another view, put forward by certain writers on essentially theoretical grounds, leads to a position almost diametrically opposed to that just described, despite the fact that it, too, upholds, though in an entirely different way, the idea of a single legal relationship arising from the wrongful act and thus falling within the concept of responsibility. Starting from the idea that the legal order is a coercive order, this view sees in an act of coercion not only the sole possible form of sanction, but also the sole legal consequence following directly from the wrongful act. The obligation to make reparation is—and this, according to this view, is true in any system of law—no more than a subsidiary duty placed between the wrongful act and the application of measures of coercion

<sup>21</sup> The unity of the theory which regards the creation of an obligatory relationship as the sole consequence of an internationally wrongful act is not affected by the fact that some writers refer to a penal aspect of responsibility in connexion with the particular characteristics which the content of the offending State's obligation may sometimes have and which are designated by the term "satisfaction". In reality, a separate term is used here to distinguish a form of moral reparation from a reparation which is essentially economic in character. On this point, see P.-A. Bissonnette, *La satisfaction comme mode de réparation en droit international* (thesis, Geneva University), 1952.

Similarly, the unity of the theory in question is not affected by the assertion made by certain writers—not without encountering strong opposition—that the obligation placed on a State committing a wrongful act may also include what are called "penal damages". This term is used to denote the character of a real pecuniary penalty which seems to be possessed by certain indemnities demanded and sometimes granted. Among the writers who share this view, see J. H. Ralston, *The Law and Procedure of International Tribunals* (Stanford [Calif.], Stanford University Press, 1926), pp. 267 *et seq.*; E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or The Law of International Claims* (New York, the Banks Law Publishing Co., 1928), p. 419; C. Eagleton, "Measure of Damages in International Law", *Yale Law Journal* (New Haven [Conn.], Yale Law Journal Company, Inc.), vol. XXXIX, November 1929, No. 1, p. 61 and "International Organization and the Law of Responsibility", *Recueil des cours de l'Académie de droit international de La Haye, 1950-I* (Paris, Librairie du Recueil Sirey, 1951), pp. 379-380; Briggs, "The Punitive Nature of Damages in International Law and State Responsibility...", *Essays in Political Science in Honour of W.W. Willoughby* (1937), pp. 339 *et seq.*; L. Oppenheim, *International Law: A Treatise*, 8th ed. [Lauterpacht] (London, Longmans, Green and Co., 1955), vol. I, pp. 354-355; P. Guggenheim, *Traité de droit international public* (Geneva, Librairie de l'Université, Georg et Cie S.A., 1954), t. II, p. 81; D. P. O'Connell, *op. cit.*, pp. 1205 *et seq.* The idea of attributing to these forms of "damages" a "distinctively punitive purpose" and the character of a penalty was adopted F.V. by Garcia Amador in his first report on State responsibility to the International Law Commission (*Yearbook of the International Law Commission, 1956*, vol. II, p. 182 *et seq.*, document A/CN.4/96, paras. 49 *et seq.*), in his course of lectures "State Responsibility: Some New Problems" (*Recueil des cours...*, 1958-II [Leyden, Sijthoff, 1959], pp. 396-397), and in his sixth report to the Commission (*Yearbook of the International Law Commission, 1961*, vol. II, p. 35, document A/CN.4/134 and Add.1, paras. 140 *et seq.*). The approach of C. Th. Eustathiades ("Les sujets du droit international et la responsabilité internationale — Nouvelles tendances", *Recueil des cours...*, 1953-III [Leyden, Sijthoff, 1955], pp. 434-435) is critical as regards the so-called "punitive damages", although rather cautious. For the view that international law does not recognize "penal damages", see B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (London, Stevens and Sons Ltd., 1953), pp. 234-235.

by the law in municipal law, and in international law by a possible agreement between the offending State and the injured State. Accordingly, general international law would not regard the wrongful act as creating any obligatory relationship between the offending State and the injured State, but would authorize the latter to react to the wrongful act of the former by applying to it a sanction in the proper sense of the term.<sup>22</sup>

18. Lastly there is a third view which, while not taking either of the other two extreme positions, recognizes what is sound in each of them, but stresses that they provide only a partial and incomplete description of the consequences of a wrongful act as manifested in real international life. This view, therefore, diverges from the other two in bringing out that in any system of law a wrongful act may give rise, not to a single type of legal relationship, but to a dual form of relationship, each form being characterized by the different legal situations of the subjects involved. So far as the international legal order in particular is concerned, in principle it attaches directly to an internationally wrongful act the same sort of consequences as an internal legal order generally attaches to an act of the same kind. These are consequences of different kinds which amount, according to the case, either to giving the subject of international law whose rights have been infringed by the wrongful act the subjective right to claim reparation—again in the broad sense of the term—from the author of the act or to giving that subject, or possibly a third subject, the faculty to impose a sanction on the subject which has engaged in wrongful conduct. In the first case, it is the subject which has engaged in wrongful conduct which *must* act to eliminate the consequences of the act; in the second case, it is the subject injured by the wrongful act which *may* act to punish its author. For by "sanction" here is meant the application of a measure which, although not being necessarily an act of coercion and not necessarily involving

<sup>22</sup> This view has been progressively developed by H. Kelsen. "Unrecht und Unrechtsfolge im Völkerrecht", *Zeitschrift für öffentliches Recht* (Vienna, von Julius Springer, 1932), Bd. XII, Heft 1, pp. 545-546, and 568-569; *Principles of International Law* 2nd ed. (New York, Holt, Reinhart and Winston, Inc., 1966), pp. 18-19; and "Théorie du droit international public", *Recueil des cours...*, 1953-III (Leyden, Sijthoff, 1955), pp. 19 *et seq.*, and 29 *et seq.* The sanctions provided for by classical general international law are, according to Kelsen, reprisals and war; in applying them, the injured State acts as an organ of a decentralized international community. The United Nations Charter, on the other hand, gives—in Kelsen's opinion—a monopoly of force to the Organization. Kelsen's ideas were taken up by A. Carlebach (*Le problème de la faute et sa place dans la norme du droit international* [Paris, Librairie générale de droit et de jurisprudence, 1962], pp. 2 *et seq.*). P. Guggenheim (*op. cit.*, p. 63) takes the same view in principle, but adopts a much more realistic approach. This writer, too, considers that the obligation to make reparation is not the "sanction" for the offence and that neither is it the consequence of a wrongful act under general international law. He regards reparation as an obligation to be agreed upon by special treaty. However, differing from Kelsen's opinion on this point, Guggenheim considers that the State has an obligation to submit its claim before resorting to measures of coercion such as war or reprisals. It should also be noted that according to this writer—and, incidentally to Kelsen also—acts of coercion carried out under international law cannot be regarded as "penalties" in the penal law sense, because they lack the "retributive and preventive" character of a penalty and do not differ from enforcement measures (*ibid.*, p. 83).

the use of force, is nevertheless characterized by the fact that its purpose is, in part at least, to impose a penalty. Such a purpose is not the same as an attempt to secure by coercion the fulfilment of the obligation or restoration of the right infringed or compensation for the injury.<sup>23</sup>

19. For those who hold this view it is therefore obviously correct to describe as a "subjective right" the particular legal situation of the injured subject whereby it can legitimately require reparation: this legal situation is the logical concomitant of the obligation placed on the author of the wrongful act. This is not true, however, of the other legal situation which consists in the possibility of legitimately applying a sanction and which should rather be described as a "legal faculty". In the first case, a new obligatory legal relationship is established as a result of the wrongful act; in the second case there is also a new relationship, but it is clearly of a different kind. Consequently, in so far as an internationally wrongful act is described as an act giving rise in law to international responsibility, the general term responsibility (still according to this view) should be understood to mean the situation of a subject of international law confronted either with the right of another subject to claim reparation from it, or with the faculty of another subject to impose a sanction on it—in the sense given to these terms above.<sup>24</sup>

<sup>23</sup> On the existence, in international law, of sanctions proper (meaning repressive acts which in this sense have an undeniably penal character), see in particular R. Ago, "Le délit international", *Recueil des cours...*, 1939-II (Paris, Librairie du Recueil Sirey, 1947), pp. 527 *et seq.*; C. Th. Eustathiades, "Les sujets...", *Recueil des cours...* (op. cit.), pp. 442 *et seq.*, and 448-449; G. Morelli, *Nozioni di diritto internazionale*, 7th ed. (Padua, CEDAM, 1967), p. 363. G.I. Tunkin (*Droit international...* [op. cit.], pp. 202 *et seq.*, "Alcuni nuovi problemi della responsabilità dello Stato nel diritto internazionale", Istituto di Diritto Internazionale e Straniero della Università di Milano, *Comunicazioni e Studi* [Milan, A. Giuffrè, 1963], t. XI (1960-1962), pp. 16 *et seq.*, and *Teoria...* [op. cit.], pp. 447 *et seq.*) criticizes the notion of a penal responsibility of the State as it emerges from certain works by Pella and others and, on this point, follows A.N. Trainin (*Zashchita mira i borba s prestupleniyami protiv chelovechestva* [Moscow, Izdatelstvo Akademii Nauk, 1956], pp. 41 *et seq.*). Nevertheless, Tunkin (*Droit international...* [op. cit.], pp. 224 *et seq.*, "Alcuni nuovi problemi...", *Comunicazioni e Studi* [op. cit.], pp. 45 *et seq.*, and *Teoria...* [op. cit.], pp. 476 *et seq.*) draws a clear distinction, in connexion with the legal relations resulting from the internationally wrongful act, between sanctions and the mere obligation to make reparation for damage, and severely criticizes the older theory which disregards sanctions. On this basis he is willing, though not without some reservations, to use the terms "material" responsibility and "political" responsibility to designate the two possible kinds of consequence of a wrongful act. On this point it may therefore be said that Tunkin's opinion comes very close to that stated above and that the question whether or not an international penal responsibility exists becomes merely a matter of terminology.

<sup>24</sup> This view was formulated by the author of the present report in his early research on international responsibility. See R. Ago, "Le délit international", *Recueil des cours...* (op. cit.), pp. 426-427 and 524 *et seq.* The same idea is put forward by C. Th. Eustathiades, "Les sujets...", *Recueil des cours...* [op. cit.], pp. 429 *et seq.*, by A.P. Sereni (*Diritto internazionale* [Milan, A. Giuffrè 1962], t. III, pp. 1541-1542), and by G. Morelli (op. cit., pp. 356 *et seq.* and 361 *et seq.*). Substantially analogous opinions are to be found in L. Oppenheim, (op. cit., pp. 356 *et seq.*), A. Verdross (op. cit., pp. 398 *et seq.*, 424 *et seq.*, and 647 *et seq.*), G. Dahm (*Völkerrecht* [Stuttgart, W. Kohlhammer Verlag, 1961], Bd. III, pp. 265 *et seq.*), W. Wengler (op. cit.), pp. 499 *et seq.*, and 503), and D.B. Levin (*Orvetstvennost gosudarstv v sovremenom mezhdunarodnom prave* [Moscow, Izdatelstvo Mezhdunarodnye otnosheniya, 1966], pp. 9-10).

20. The above-mentioned position of principle amounts in the last analysis to drawing a parallel between the reaction of the international legal order to a wrongful act and the reaction of other legal orders. It is nevertheless recognized that in international law, unlike municipal law, no clear distinction has been established between acts of coercion according to whether their purpose is to impose a sanction in the true sense of the term or to compel the author of the wrongful act to fulfil his obligations. These two aspects, though in theory distinct and clearly identifiable in certain specific cases, are often combined and blended in a single action. Similarly, the holders of this view themselves observe that international law—because of the nature of the international community and its members rather than because of any alleged but non-existent primitive character of international law—has not worked out a distinction between civil and penal offences comparable to that established in municipal law.<sup>25</sup>

21. It is not easy, therefore, to distinguish clearly defined classes of wrongful acts, some of which only give the injured State the right to claim reparation from the guilty State, while others also give it the "legal faculty" to impose a sanction upon that State. What can be said is that modern international law has tended progressively to deny the faculty of resorting to measures of coercion as a reaction against less serious wrongful acts, in particular those of a purely economic nature; more generally speaking, it must be recognized that there is also a clear tendency to restrict the injured State's faculty of resorting to sanctions unilaterally.<sup>26</sup> What seems to emerge clearly from the practice of States is the existence of an order of priority between the two possible consequences of an internationally wrongful act, in the sense that the claim for reparation must as a rule precede the application of the sanction, even where recourse to a sanction would be permissible in principle.<sup>27</sup> By offering adequate reparation—that is to say, by eliminating the consequences of its wrongful conduct as far as possible—the guilty State should normally be able to avoid the sanction. Of course, this principle does not preclude recognition of the fact that there may be exceptional cases in which the faculty of reacting against an internationally wrongful act by applying a sanction must necessarily be immediately exercisable and cannot be made conditional on a prior attempt to obtain reparation which, *a priori*, has no real prospect of success.<sup>28</sup> According to some writers, more-

<sup>25</sup> R. Ago, "Le délit international", *Recueil des cours...* (op. cit.), pp. 530-531.

<sup>26</sup> On this point see G. Dahm, op. cit., p. 266; W. Wengler, op. cit., pp. 504 *et seq.*

<sup>27</sup> This principle has been given clear expression in international practice and judicial decisions, especially in the arbitral award of 31 July 1928 in the case concerning the responsibility of Germany for damage caused in the Portuguese colonies in South Africa (Naulilaa incident) (United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No.: 1949.V.1), pp. 1027-1028). For an account of the practice, see L. Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (Paris, Librairie du Recueil Sirey, 1938), pp. 36 *et seq.*

<sup>28</sup> For examples of cases in which this situation may arise, especially where a state of war exists, see R. Ago, "Le délit international", *Recueil des cours...* (op. cit.), pp. 526 *et seq.*; P. Guggenheim, op. cit., pp. 65-66.

over, there are cases in which a State held to be guilty of very serious wrongful acts may have to face both sanctions and an obligation to make reparation.<sup>29</sup>

22. In spite of the divergence of the views described above, the different conceptions of responsibility nevertheless coincide in agreeing that every internationally wrongful act creates new legal relations between the State committing the act and the injured State. As has already been pointed out, this in no way precludes the establishment of other relations between the former State and other subjects of international law. What must be ruled out, it appears, at least at the present stage in international relations, is the idea that as a result of an internationally wrongful act general international law can create a legal relationship between the guilty State and the international community as such, just as municipal law creates a relationship between the person committing an offence and the State itself. International law can have no such effect, so long as it does not recognize a personification of the international community as such. But this situation has certainly not prevented international treaty law from providing that in certain cases a particular internationally wrongful act may be the source of new legal relations, not only between the guilty State and the injured State, but also between the former State and other States or, especially, between the former State and organizations of States.<sup>30</sup> The development of international organization, as early as the League of Nations but more particularly with the United Nations, has led to consideration of the possibility that a State committing an internationally wrongful act of a certain kind and of a certain importance might be placed in a new legal relationship not only with the injured State, but also with the Organization. It might thus be subject to the faculty or even the duty of the Organization and its members to react against the internationally wrongful conduct by applying sanctions collectively decided upon.

23. In connexion with this last point, attention must also be drawn to the growing tendency of certain writers to single out, within the general category of internationally wrongful acts, certain kinds of acts which are so grave and so injurious, not only to one State but to all States, that a State committing them would be automatically held responsible to all States. It is tempting to relate this view<sup>31</sup> to the recent affirmation of the Interna-

<sup>29</sup> This view is supported especially by G. I. Tunkin ("Alcuni nuovi problemi...", *Comunicazioni e Studi (op. cit.)*, p. 38) and by D.B. Levin (*Otvetstvennost gosudarstv... (op. cit.)*, p. 115).

<sup>30</sup> On this question see the comments of Guggenheim (*op. cit.*, pp. 99 *et seq.*), Eustathiades ("Les sujets...", *Recueil des cours... (op. cit.)*, p. 433), Seveni (*op. cit.*, pp. 1514-1542), Wengler (*op. cit.*, pp. 500, 506 *et seq.*, and 580 *et seq.*) and Tunkin (*Droit international... (op. cit.)*, pp. 191 and 220 *et seq.*, "Alcuni nuovi problemi...", *Comunicazioni e Studi (op. cit.)*, pp. 39 *et seq.*, and *Teoria... (op. cit.)*, pp. 430 and 470 *et seq.*), and the remarks of Mr. Ushakov during the discussion on the first report at the twenty-first session of the Commission (*Yearbook of the International Law Commission, 1969*, vol. I, p. 112, 1012th meeting, paras. 37-39).

<sup>31</sup> It has been particularly developed in Soviet doctrine, where D.B. Levin ("Problema otvetstvennosti v nauke mejdunarodnogo prava" *Izvestia, Akademii Nayk SSSR*, No. 2, 1946, p. 105, and "Ob otvetstvennosti gosudarstv v sorremennom mezhdunarodnom prave", *Sovetskoe gosudarstvo i pravo*, Moscow, No. 5,

tional Court of Justice, in its judgment of 5 February 1970 in the case concerning the Barcelona Traction, Light and Power Company, Limited, that there are certain international obligations which are obligations *erga omnes*, that is to say, obligations to the whole international community. In the terms used by the Court:

"Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".<sup>32</sup>

Ideas of this kind may perhaps be worth studying in detail, for the writers concerned do not always seem to be quite clear whether, in such cases, the relationship established with States in general would originate in a rule of general and customary international law or in a rule of treaty law, and whether it would be a relationship with States *ut singuli* or with States as members of an international organization which would alone be competent to decide on the action to be taken. In any event, these views are of particular interest, inasmuch as they reveal a trend towards incipient personification of the international community and are a factor which will make it possible gradually to outline a concept of "crime" in international law, within the general context of the internationally wrongful act. This idea appears, moreover, to be confirmed by the second paragraph of the first of the Principles of international law concerning friendly relations and co-operation among States contained in the draft declaration approved by the Drafting Committee

May 1966, pp. 75 and 76a) distinguishes between "simple violations of international law and international crimes which undermine its very foundations and most important principles". He identifies as such "genocide, aggression and colonial oppression". G.I. Tunkin (*Droit international... (op. cit.)*, pp. 220 *et seq.*, "Alcuni nuovi problemi...", *Comunicazioni e Studi (op. cit.)*, pp. 39 *et seq.*, and *Teoria... (op. cit.)*, pp. 472 *et seq.*), who refers in this connexion to the opinions of certain older writers such as Heffter and Bluntschli, especially stresses threats to peace, breaches of the peace and acts of aggression.

In the same context reference may be made to the nineteenth principle of the declaration contained in the draft resolution submitted by the Government of Czechoslovakia at the seventeenth session of the United Nations General Assembly, during the discussion on principles of international law concerning friendly relations and co-operation among States (*Official Records of the General Assembly, Seventeenth Session, Annexes*, agenda item 75, document A/C.6/L.505). The principle is worded as follows:

*"The principle of State responsibility"*

"The State shall be held responsible for a violation of rules of international law, particularly for acts endangering peace and security and friendly relations among nations, as well as for acts violating legitimate rights of other States or their nationals."

This formulation, indeed, not only shows a distinction between the acts which may incur the responsibility of the State, but implicitly contains the idea of a difference between the legal relations established in the two cases.

It should be noted that in British doctrine a writer such as Lauterpacht (see L. Oppenheim, *op. cit.*, pp. 355-356) opts for the same distinction as the Soviet and Czechoslovak writers and gives as an example of international "crimes" the massacre of aliens resident in the territory of a State and the preparation and launching of an aggressive war.

<sup>32</sup> For a summary in French, see *L'URSS et les pays de l'Est* (Paris, Editions du C.N.R.S., 1967), vol. VIII N° 2, pp. 340 *et seq.*

<sup>32</sup> *I.C.J. Reports 1970*, p. 32.

of the Special Committee and adopted by the latter in 1970. This paragraph reads: "A war of aggression constitutes a *crime* against the peace, for which there is responsibility under international law."<sup>33</sup>

24. If the various questions that arise concerning the legal relations which result from an internationally wrongful act and thus enter into the concept of international responsibility, and the existing differences of opinion about them, have been discussed in the preceding paragraphs, it is not because of any conviction that the Commission will have to take a position on these questions from the beginning of its work, when formulating the basic general rule on State responsibility. It is believed that this rule should be stated as concisely as possible and that in presenting it the Commission should not set out to distinguish different classes of wrongful acts and their consequences. The principle to be established from the outset is the unitary principle of responsibility, which it should be possible to invoke in every case. The reason for going into the details mentioned above is that it is thought necessary for the Commission to bear in mind, throughout its work on this topic, the extremely complex nature of the notion of responsibility for an internationally wrongful act—with respect to which, incidentally, the claims of progressive development of international law may assert themselves, alongside those of codification pure and simple, more forcefully than they do with respect to other notions.

25. The Commission will, of course, have to take a position on all these questions, as it decided after discussing the first report on State responsibility at its twenty-first session;<sup>34</sup> the time to do so will be in the second phase of its study of the topic, when it will have to define the content, forms and degrees of State responsibility for an internationally wrongful act. However, it is by no means impossible that the implications of these questions may already become apparent, to some extent, in the first phase, devoted to determining the notion of the internationally wrongful act as an act generating the international responsibility of a State. and indeed, when formulating the basic rule on responsibility for an internationally wrongful act, the Commission will already have to take this fact into account and adopt a text which is simple enough to avoid prejudging, one way or another, the questions it will have to settle later. But in its commentary to the rule it adopts, the Commission might well point out that it is using the term "international responsibility" to mean, globally and without taking a position, all the forms of new legal relationship which may be established in international law by a State's wrongful act—irrespective of whether they are limited to a relationship between the State which commits the wrongful act and the State directly injured, or extend to other subjects of international law as well, and irrespective of whether they are centred on the guilty State's obligation to restore the rights of the injured State and to repair

the damage caused, or whether they also involve the faculty of the injured State itself, or of other subjects, of imposing on the guilty State a sanction permitted by international law.

26. With regard to the other expression the Commission will have to use in stating the basic rule on international responsibility, i.e. that denoting the type of act generating responsibility to which the present draft refers, a question of terminology may arise. It is well known that the terms used in the practice and the literature of different countries are not the same and that different words are sometimes used in the same language, though all of them are qualified by the adjective "international".<sup>35</sup> Thus, writers in French sometimes speak of a "délit" and sometimes of an "acte illicite" or "fait illicite".<sup>36</sup> Similarly, Italian writers sometimes use the term "delitto", but more often "atto illecito" or "fatto illecito".<sup>37</sup> The literature in Spanish uses the terms "delito", "acto ilícito" and "hecho ilícito".<sup>38</sup> In English writers we find the terms "tort", "delict", "delinquency", "illegal conduct", "illegitimate", "illegal",

<sup>35</sup> On these questions of terminology see, in particular, I. von Münch, *Das Völkerrechtliche Delikt in der Modernen Entwicklung der Völkerrechtsgemeinschaft* (Frankfurt-am-Main, P. Keppler, 1963), pp. 11 *et seq.*

<sup>36</sup> The expression "délit international" is used by G. Scelle (*Précis de droit des gens — Principes et systématique* (Paris, Librairie du Recueil Sirey, 1934), part II, p. 61). It is to be found in the replies of some Governments (Switzerland, Netherlands) to the various points of the request for information sent to Governments by the Preparatory Committee for the 1930 Conference (League of Nations, *Bases of Discussion... (op. cit.)*, pp. 13 and 65), and also in the French texts of foreign writers such as: K. Strupp, *Eléments... (op. cit.)*, pp. 325 *et seq.*; R. Ago, "Le délit international", *Recueil des cours... (op. cit.)*, pp. 415 *et seq.*; Th. C. Eustathiades, "Les sujets...", *Recueil des cours... (op. cit.)*, pp. 419 *et seq.* The term "acto illicite", is used by H. Kelsen ("Théorie...", *Recueil des cours... [op. cit.]*, pp. 16 *et seq.*) as the French equivalent of the German "Unrecht" and the English "delict". The term "acte illicite" is preferred by P. Guggenheim (*op. cit.*, pp. 1 *et seq.*) and by P. Reuter (*op. cit.*, pp. 585 and 590). The term "fait illicite" is used by J. Basdevant ("Règles générales du droit de la paix", *Recueil des cours... 1936-IV* (Paris, Librairie du Recueil Sirey, 1937), pp. 665 *et seq.*), by J. L'Huillier (*Eléments de droit international public* [Paris, Editions Rousseau et Cie, 1950], pp. 354 *et seq.*) and by Ch. Rousseau (*Droit international public* (Paris, Librairie du Recueil Sirey, 1953), p. 361).

<sup>37</sup> D. Anzilotti, (*Corso ... (op. cit.)*, pp. 384 *et seq.*) speaks of "fatti illeciti internazionali". So do R. Ago ("Illecito commissivo e illecito omissivo nel diritto internazionale", *Diritto internazionale* (Milan, Istituto per gli Studi di Politica Internazionale, 1938), pp. 9 *et seq.*) and G. Morelli (*op. cit.*, pp. 340 *et seq.*). G. Balladore Pallieri (*op. cit.*, *loc. cit.*), A.P. Sereni (*op. cit.*, pp. 1503 *et seq.*) and R. Quadri (*Diritto internazionale pubblico*, 5th ed. [Naples, 1968], pp. 584 *et seq.*) speak of "atti illeciti".

<sup>38</sup> S. Planas Suárez (*Tratado de Derecho Internacional Público* [Madrid, Mijos de Reus, 1916], t. I, p. 167) and A. Ulloa (*Derecho internacional publico*, 4th ed. (Madrid, Ediciones Iberoamericanas, S.A., 1957), t. II, p. 258) prefer "hechos ilicitos"; J. Garde Castillo ("El acto ilícito internacional", *Revista española de derecho internacional* (Madrid, Consejo Superior de Investigaciones Científicas, 1950), vol. III, No. 1, pp. 121 *et seq.*) uses "acto ilícito"; Podesta Costa (*Manual de derecho internacional publico* (Buenos Aires, 1947), pp. 200 *et seq.*) uses "hechos lesivos"; L.M. Moreno Quintana and C.M. Bollini Shaw (*Derecho internacional público-Sistema nacional del derecho y política internacional* (Buenos Aires, Ediciones Librería del Colegio, 1950), p. 166) use "delito internacional". In the Portuguese literature, H. Accioly (*Tratado de direito internacional público* (Rio de Janeiro, Imprensa Nacional, 1933), t. I, p. 288) uses the term "acto ilícito".

<sup>33</sup> See *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 18 (A/8018)*, p. 64.

<sup>34</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 233, document A/7610/Rev. 1, para. 81.

"unlawful" or "wrongful" "act" and "act or omission".<sup>39</sup> German writers speak of "Unrecht", "Delikt" and "unerlaubte Handlung".<sup>40</sup> In the French translations of Russian writers we find expressions such as "délit international", "action" and "inaction" "illégal" and "illégitime".<sup>41</sup> And this list could be extended further.

27. In view of this multiplicity of terms, it seems desirable that the Commission should adhere to the terminology employed hitherto and continue to use, in French, the expression "fait illicite international", which is usually preferable to "délit" or other similar terms, as they may sometimes take on a special shade of meaning in certain systems of municipal law. The expression "fait illicite" also seems preferable to "acte illicite", mainly for the practical reason that illicit conduct often takes the form of an omission, and this is not properly conveyed by the word "acte", the etymology of which suggests the idea of action. From the point of view of legal theory, this preference seems even more justified, since the French term "acte" is ordinarily used to denote the exercise of a power, i.e. a manifestation of will intended to produce the legal consequences determined by this will, which certainly does not apply to illicit conduct.<sup>42</sup> The same reasons probably make it preferable to use the term "hecho ilícito" in Spanish. In English, the expression used previously as the equivalent of the French "fait illicite" has been "wrongful act". The English-speaking members of the Commission will say whether they still find this term the most appropriate. It is obvious, in any event, and almost goes without saying, that the choice of one particular term rather than another does not affect the determination of the conditions for, and characteristics of,

<sup>39</sup> For the term "tort", see G. Schwarzenberger (*op. cit.*, pp. 562 *et seq.*); for "delict", see H. Kelsen (*Principles... (op. cit.)*, p. 6 *et seq.*) and A. D. McNair (*International Law Opinions* (Cambridge, University Press, 1956), vol. II, p. 207); for "delinquency", see L. Oppenheim (*op. cit.*, pp. 338 *et seq.*); for "illegal conduct", see C. Eagleton, (*op. cit.*, p. 6); for "illegitimate act", see A. Ross, (*A Textbook of International Law* (London, Longmans, Green and Co., 1947), p. 242; for "illegal act", see C. C. Hyde (*International Law chiefly as Interpreted and Applied by the United States*, 2nd ed. [Boston, Little, Brown and Co., 1947], vol. 2, p. 884) and I. Brownlie (*Principles of Public International Law* (Oxford, Clarendon Press, 1966), p. 354); for "unlawful act", see B. Cheng (*op. cit.*, pp. 170 *et seq.*); for "unlawful act or omission", see E. Jiménez de Aréchaga (*op. cit.*, p. 534); and for "wrongful act or omission", see F. V. García Amador ("State Responsibility...", *Recueil des cours... [op. cit.]*, p. 377) and C. F. Amerasinghe (*State Responsibility for Injuries to Aliens* (Oxford, Clarendon Press, 1967), p. 39).

<sup>40</sup> The term "Unrecht" is that used by Kelsen ("Unrecht...", *Zeitschrift... (op. cit.)*, pp. 481 *et seq.*), Verdross (*op. cit.*, pp. 372 *et seq.*) and Wengler (*op. cit.*, pp. 489 *et seq.*). Strupp ("Das völkerrechtliche Delikt", *Handbuch... (op. cit.)*, pp. 4 *et seq.*) and most of the older German writers, followed, among the most modern, by von Münch (*op. cit.*, pp. 11 *et seq.*) and G. Dahm (*op. cit.*, pp. 177 *et seq.*), prefer the term "Delikt". The expression "unerlaubte Handlung" is used by F. Klein (*Die mittelbare Haftung im Völkerrecht* (Frankfurt-am-Main, Vittorio Klostermann, 1941), p. 2).

<sup>41</sup> The term "délit" is used by Levin ("Ob otvetstvennosti...", *Sovetskoe... (op. cit.)*, p. 339 of the French summary); the terms "acte illégal" ("nepravomerno deistvie") and "inaction illégitime" ("nepravomerno bezdeistvie") by Tunkin (*Droit international... (op. cit.)*, p. 192, and *Teoria... (op. cit.)*, p. 431).

<sup>42</sup> In this connexion, see R. Ago, "Le délit international", *Recueil des cours... (op. cit.)*, pp. 438 *et seq.*

an act generating international responsibility, with which most of the articles on this first part of this report will be concerned.

28. In arbitration cases and legal literature some definitions of the basic rule on international responsibility are to be found which, though the terms vary, all contain the statement that there can be no responsibility in international law without a prior wrongful act.<sup>43</sup> Formulations of this kind should be avoided, so as not to convey the erroneous impression that, in the Commission's opinion, responsibility can arise only from a wrongful act. Although, as is mentioned above (paragraph 6), the Commission has decided to devote itself for the time being solely to international responsibility for wrongful acts,<sup>44</sup> it has nevertheless generally recognized the existence of cases in which States may incur international responsibility by the performance of lawful acts. This is a point which several members of the Commission have stressed.<sup>45</sup> Hence, it is necessary to adopt a formula which, though stating that an internationally wrongful act is a source of responsibility, does not lend itself to an interpretation that would automatically exclude the existence of another possible source of international responsibility.

29. One final comment must be made, before passing on to the proposed formulation of the basic rule on the international responsibility of States. The normal situation which arises as the result of an internationally wrongful act involves the creation of international responsibility borne by the State which has committed the wrongful act. There are, however, some special cases—usually called cases of vicarious responsibility, or responsibility for acts of others—which constitute an exception to the normal situation mentioned above. In these cases the responsibility arising from a particular wrongful act does not attach to the State which committed the act, because it is not free to determine its conduct in the sphere in which the wrongful act was committed. The responsibility then attaches to another State, which is in a position to control the action of the first State and to restrict its freedom.

<sup>43</sup> On two occasions, for example, the Mexico United States General Claims Commission, set up under the Convention of 8 September 1923 stated that: "Under international law, apart from any convention, in order that a State may incur responsibility it is necessary that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard" (Case of *Dickson Car Wheel Company* [July 1931], United Nations, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No.: 1951.V.1.), p. 678. For a statement in similar terms, see also the case of the *International Fisheries Company* [July 1931] *ibid.*, p. 701).

In the literature, several writers support the view that international responsibility can derive only from an internationally wrongful act. L'Huillier (*op. cit.*, p. 354) is one of the most explicit, when he says that: "*La responsabilité internationale de l'Etat ne peut être mise en jeu que par un fait qui soit imputable à cet Etat et qui présente un caractère illicite au regard du droit international.*" [The international responsibility of a State can be generated only by an act imputable to that State and which is wrongful under international law.] (Translation by the United Nations Secretariat). See also Quadri (*op. cit.*, pp. 590 *et seq.*).

<sup>44</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 233, document A/7610/Rev. 1, para. 83.

<sup>45</sup> In particular Mr. Ruda, Mr. Ramangasoavina, Mr. Tammes, Mr. Albónico, Mr. Eustathiades and Mr. Castañeda.

These special situations should be studied separately and should probably be covered by a special rule. In formulating the general rule on responsibility, however, care will have to be taken not to adopt a text which might later be contradicted by the very existence of a special rule. It therefore seems preferable to provide, in general, that every internationally wrongful act gives rise to international responsibility, without specifying that this responsibility necessarily attaches to the State which commits the wrongful act.

30. In conclusion, in view of all the above considerations, the Special Rapporteur proposes that the basic rule on international responsibility should be formulated as follows:

*Article I*

*The internationally wrongful act  
as a source of responsibility*

Every internationally wrongful act by a State gives rise to international responsibility.

II. CONDITIONS FOR THE EXISTENCE  
OF AN INTERNATIONALLY WRONGFUL ACT

31. Having stated the basic general rule that every internationally wrongful act is a source of international responsibility, it is now necessary to determine, in correlation with that rule, the prerequisites for establishing the existence of an internationally wrongful act. For this purpose, the following two elements are usually distinguished, both of which must be present:

(a) An element generally called a *subjective element*, consisting of conduct which must be attributable, not to the individual or group of individuals which has actually engaged in it, but to a State as a subject of international law. This is what is meant by conduct or behaviour *imputable* to a State.

(b) An element usually called an *objective element*: the State to which the conduct in question has been legally imputed must, by that conduct, *have failed to fulfil an international obligation* incumbent on it.

32. These two elements are clearly recognizable, for example, in the passage already cited from the judgement of the Permanent Court of International Justice in the *Phosphates in Morocco Case*, in which the Court explicitly connects the creation of international responsibility with the existence of an

“act being *attributable* to the State and described as *contrary to the treaty right [s] of another State*”.<sup>46</sup>

They are also to be found in the arbitral award in the *Dickson Car Wheel Company* case, delivered in July 1931 by the Mexico/United States of America General Claims Commission, where the required condition for a State to incur international responsibility is stated to be the fact “that an unlawful international act be *imputed*, to it, that

<sup>46</sup> *Phosphates in Morocco Case* (Preliminary Objections), 14 June 1938, *P.C.I.J.*, series A/B, No. 74, p. 28. [Italics supplied by the Special Rapporteur.]

is, that there exist a *violation of a duty imposed by an international juridical standard*”.<sup>47</sup>

With regard to the practice of States, attention may be drawn to the terms in which the Austrian Government replied to Point II of the request for information addressed to Governments by the Preparatory Committee of the 1930 Conference for the Codification of International Law:

“There can be no question of a State's international responsibility unless it can be proved that the State *has violated one of the international obligations incumbent upon States under international law*.”<sup>48</sup>

33. In the literature of international law, the combined facts that a certain conduct is imputable to a State as a subject of international law and that conduct constitutes a violation of an international obligation of that State are generally considered to be the essential elements for recognition of the existence of a wrongful act giving rise to an international responsibility. Among the older formulations, that of Anzilotti remains a classic;<sup>49</sup> among the more recent, those by Sereni,<sup>50</sup> Levin,<sup>51</sup> Amerasinghe<sup>52</sup>

<sup>47</sup> United Nations, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No.: 1951.V.1), p. 678. [Italics supplied by the Special Rapporteur.]

<sup>48</sup> League of Nations, *Bases of Discussion...* (*op. cit.*), p. 21. [Italics supplied by the Special Rapporteur.]

<sup>49</sup> *Teoria generale...* (*op. cit.*), p. 83:

“La responsabilità nasce dall'*ingiusta violazione del diritto altrui* e genera l'obbligo della riparazione in quanto sia collegata con un soggetto agente, sia cioè è imputabile a questo, presa la parola *imputabilità* nel significato generale di termine che unisce il fatto o l'omissione illecita all'autore.”

[Responsibility arises from the *wrongful violation of the right of another* and generates the obligation to make reparation in so far as it is attributable to a subject which acts, that is, imputable to it, the word *imputability* being taken in its general meaning of a link between the wrongful act or omission and its author]. (Translation by the United Nations Secretariat). See also the same author's *La Responsabilité internationale...* (*op. cit.*), pp. 161-162, and *Corso...* (*op. cit.*), p. 386.

<sup>50</sup> *Diritto internazionale* (*op. cit.*), p. 1505:

“Due sono quindi gli elementi costitutivi dell'atto illecito internazionale: A) un comportamento di un soggetto di diritto internazionale; B) la violazione, che in tale comportamento si concreta, di un obbligo internazionale.”

[There are, therefore, two constituent elements of the internationally wrongful act: (A) a conduct by a subject of international law; (B) the violation of an international obligation manifested in that conduct] (Translation by the United Nations Secretariat).

<sup>51</sup> French summary of “*Ob otvetstvennosti...*” (*op. cit.*), [see foot-note 31 above], p. 340:

“Pour qu'il y ait responsabilité internationale, deux éléments doivent être réunis: un élément objectif, la violation d'une norme de droit international qui cause un préjudice; un élément subjectif, l'imputation de cette violation à l'État ou à un autre sujet du droit international.”

[For international responsibility to exist, two elements must be present: an objective element, the violation of a norm of international law which causes injury; a subjective element, the imputation of that violation to a State or to another subject of international law]. (Translation by the United Nations Secretariat).

<sup>52</sup> C. F. Amerasinghe, *op. cit.*, p. 37. In stating the first three of the four conditions he considers necessary for the existence of State responsibility for an injury to an alien, Amerasinghe expresses himself as follows:

“(1) There must be an act or omission of an individual or an organ consisting of a group of individuals;

“(2) This act or omission must be in breach of an obligation laid down by a norm of international law;

“(3) The act or omission must be imputable to the defendant State;”

and Jiménez de Aréchaga<sup>53</sup> are notable for the distinctness with which they state the rule. But generally speaking it may be said that most writers are substantially in agreement on this point, irrespective of the period in which they were writing.<sup>54</sup>

34. In the analysis of each of these two elements—namely, on the one hand the imputability of some particular conduct to the State as subject of international law and on the other the failure to fulfil an international obligation incumbent on the State, which that conduct must constitute—various aspects stand out, for some of which specific criteria have been established in general international law. The following will be devoted to a detailed examination of these aspects. They will deal, in particular, with the conditions under which international law permits some particular conduct to be imputed to a State in the different cases that may occur, and the conditions for establishing, again in the different possible cases, that the violation of an international obligation has been brought about by that conduct. However, in order to define in principle the conditions for the existence

<sup>53</sup> E. Jiménez de Aréchaga, *op. cit.*, p. 534. The first two of the three elements which this author considers essential for the establishment of international responsibility are summarized as follows:

“(i) An act or omission that violates an obligation established by a rule of international law in force between the State responsible for the act or omission and the State injured thereby.

“(ii) The unlawful act must be imputable to the State as a legal person.”

<sup>54</sup> See, among many other writers: Ch. de Visscher, *op. cit.*, pp. 90-91; R. Ago, “Le délit international”, *Recueil des cours...* (*op. cit.*), pp. 441 *et seq.*, 450 *et seq.*; J. G. Starke, “Imputability of International Delinquencies”, *The British Year Book of International Law, 1938* (London, Oxford University Press), p. 106; C. Th. Eustathiades, “Principes généraux de la responsabilité internationale des Etats”, *Etudes de droit international, 1929-1959* (Athens, Klissiannis, 1959), t. 1, p. 515, and “Les sujets...”, *Recueil des cours...* (*op. cit.*), p. 422; A. V. Freeman, *The International Responsibility of States for Denial of Justice* (London, Longmans, Green and Co., 1938), p. 22; A. Ross, *op. cit.*, p. 242; J. L’Huillier, *op. cit.*, p. 354; J. Garde Castillo, *op. cit.*, p. 124; G. Morelli, *op. cit.*, pp. 342 *et seq.*; Ch. Rousseau, *op. cit.*, p. 361; P. Guggenheim, *op. cit.*, pp. 1-2 and 4-5; B. Cheng, *op. cit.*, p. 170; T. Meron, “International Responsibility of States for Unauthorized Acts of their Officials”, *The British Year Book of International Law, 1958* (London, Oxford University Press, 1959), pp. 86-87; G. Schwarzenberger, *A Manual of International Law*, 4th ed. (London, Stevens and Sons Ltd, 1960), vol. 1, p. 163; P. Reuter, *op. cit.*, p. 585.

Some of these authors and others cited previously add a further element to the two constituent elements of an internationally wrongful act suggested here. This will be discussed later. It should also be noted that in some of the works mentioned the concept of the “wrongful act” is used to denote the objective element which must be combined with the subjective element if international responsibility is to exist. In reality, the subjective element is also a condition for the existence of an internationally wrongful act, not an extraneous condition for the creation of responsibility by a wrongful act.

In opposition to the principle according to which the possibility of attributing to the State the conduct of a person or group of persons is a decisive element for the purpose of considering that conduct as an internationally wrongful act, see A. Soldati, *La responsabilité des Etats dans le droit international* (Paris, Librairie de jurisprudence ancienne et moderne, 1934), pp. 75 *et seq.* Certain reservations regarding the applicability in international law of the notion of imputability are expressed by R. Quadri, *op. cit.*, pp. 586 *et seq.*, and by I. Brownlie, *op. cit.*, p. 356.

of an internationally wrongful act, certain aspects of the two elements in question must first be considered and clearly brought out, so that they can be formulated in a manner which will not be open to criticism. In the same connexion and with the same end in view, the question must also be raised whether these are the only two elements required for the existence of a wrongful act in international law or whether others are also necessary. We must therefore dwell for a moment here on these preliminary considerations.

35. With regard to the conduct which must be susceptible of being considered as conduct of the State, what can be said in general is that it can be either positive (action) or negative (omission). It can even be said that the cases in which the international responsibility of a State has been invoked on the basis of an omission are perhaps more numerous than those based on action taken by a State. There have been innumerable cases in which States have been held responsible for damage caused by individuals. As will be shown later, these alleged cases of State responsibility for the acts of individuals are really cases of responsibility of the State for omissions by its organs: the State is responsible for having failed to take appropriate measures to prevent or punish the individual’s act.

36. Even apart from this hypothesis, moreover, there are many cases in which an international delinquency consists in an omission, and whenever international jurisprudence has found a wrongful omission to be a source of international responsibility, it has done so in terms just as unequivocal as those used with reference to active conduct.<sup>55</sup> Similarly, the States which replied to point V of the request for information submitted to them by the Preparatory Committee for the Conference for the Codification of International Law (The Hague, 1930) expressly or implicitly recognized the principle that the responsibility of a State can be involved by the omissions as well as by the actions of officials,<sup>56</sup> and this principle is confirmed in the articles adopted by the third Committee of the Conference on first reading.<sup>57</sup> Finally, it can be said that the principle has been accepted

<sup>55</sup> The international responsibility of a State for a wrongful omission was explicitly affirmed by the International Court of Justice in the *Corfu Channel Case*. After specifying that “the obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them” and noting that Albania “neither notified the existence of the minefield nor warned the British warships of the danger they were approaching”, the Court concluded that: “*These grave omissions involve the international responsibility of Albania*” [Italics supplied by the Special Rapporteur] [*Corfu Channel Case (Merits)*, Judgment of 9 April 1949, *I.C.J. Reports 1949*, pp. 22-23]. See also the arbitral award of 10 July 1924 in the *Affaire relative à l’acquisition de la nationalité polonaise*: United Nations, *Reports of International Arbitral Awards*, vol. I (United Nations publication, Sales No.: 1948.V.2), p. 425.

<sup>56</sup> League of Nations, *Bases of Discussion...* (*op. cit.*), pp. 70 *et seq.*

<sup>57</sup> See *Yearbook of the International Law Commission, 1956*, vol. II, pp. 225-226 (articles 6, 7, 8), document A/CN.4/96, annex 3.

without question by writers<sup>58</sup> and explicitly or implicitly adopted in all the private codification drafts.<sup>59</sup> Thus, since this point is not disputed, there is no need to dwell on it further, except perhaps to stress that it seems particularly advisable to state expressly, in the statement of conditions for the existence of an internationally wrongful act, that internationally wrongful conduct imputed to a State can equally well be an omission as an action.

37. What is meant by stipulating the "imputability" of particular conduct to a State as a requirement for that conduct to be qualified as an internationally wrongful act? As Anzilotti already stressed in his first work on the subject, where international responsibility is concerned, the term "imputability" has no other meaning than the general meaning of a term linking the wrongful action or omission with its author.<sup>60</sup> To speak of imputation to a State, therefore, merely indicates that the international legal order must be able to regard the action or omission concerned as an act of the State, if it is to be allowed further to assume the creation of those new subjective legal situations which, as we have seen, are covered by the over-all, synthetic expression "international responsibility of States". And since the State, as a legal entity, is not physically capable of conduct,<sup>61</sup> it is obvious that all that can be imputed to a State is the

act or omission of an individual or of a group of individuals, whatever its composition may be.<sup>62</sup>

38. That being so, the essential question concerning imputability is when and how it can occur. The problems which arise consist precisely in determining what individual conduct can be regarded, for the purposes with which we are concerned, as the conduct of the State, and in what conditions such conduct must have taken place. The many difficult problems involved will be analysed in detail in due course; for the time being, a general outline would seem to be sufficient. The first point to be

<sup>58</sup> For studies concerning the specific character of the delict of omission in international law, see: R. Ago "Illecito commissivo . . .", *Diritto internazionale (op. cit.)*, pp. 9 et seq.; P. A. Zannas, *La responsabilité internationale des Etats pour les actes de négligence* (Montreux, Imprimerie Ganguin et Laubscher S. A., 1952); G. Perrin, "L'agression contre la Légation de Roumanie à Berne et le fondement de la responsabilité internationale dans les délits d'omission", *Revue générale de droit international public* (Paris, A. Pédone, 1957), t. LX, pp. 410 et seq.; D. Levy, "La responsabilité pour omission et la responsabilité pour risque en droit international public", *Revue générale de droit international public* (Paris, A. Pédone, 1961), t. LXV, pp. 744 et seq.

<sup>59</sup> See article I of the resolution on "international responsibility of States for injuries on their territory to the person or property of foreigners", adopted by the Institute of International Law in 1927 (*Annuaire de l'Institut de droit international, 1927 (session de Lausanne)*) (Paris, A. Pédone), t. III, p. 330; *Yearbook of the International Law Commission, 1956*, vol. II, p. 227, document A/CN.4/96, annex 8); article 1 of the draft treaty concerning the responsibility of a State for internationally illegal acts, prepared by Karl Strupp in 1927 (*ibid.*, 1969, vol. II, p. 151, document A/CN.4/217 and Add. 1, annex IX); article 1, para. 2, of the draft convention prepared by the Deutsche Gesellschaft für Völkerrecht in 1930 (*ibid.*, p. 149, annex VIII); article 1 of the draft convention on the international responsibility of States for injuries to aliens, prepared by the Harvard Law School in 1961 (*ibid.*, p. 142, annex VII); article II of the 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 (*ibid.*, p. 153, annex XIV), etc.

<sup>60</sup> D. Anzilotti, *Teoria generale . . . (op. cit.)*, pp. 83 and 121. The same author also stresses that the meaning given to the term "imputability" in international law by no means corresponds to that sometimes attached to it in municipal law, when imputability denotes the state of mind of the agent as a basis for responsibility.

<sup>61</sup> "States can act only by and through their agents and representatives" (Advisory Opinion No. 6, of February 3rd 1923, on certain questions relating to settlers of German origin in the territory ceded by Germany to Poland, *P.C.I.J.*, series B, No. 6, p. 22).

<sup>62</sup> See M. Marinoni, *La responsabilità degli Stati per gli atti dei loro rappresentanti secondo il diritto internazionale* (Rome, Arthenaem, 1913), pp. 33 et seq.: "Gli Stati, come le così dette persone giuridiche, non possono non ricorrere all'opera di individui, la cui attività debba giuridicamente valere per gli Stati medesimi [ . . . ]. Nella realtà fisica non v'è un ente Stato [ . . . ], ma vi sono soltanto azioni, voleri di individui, che l'ordine giuridico può far valere per un soggetto di diritto diverso da quella persona fisica che li ha posti in essere" [States, like so-called legal entities, cannot but have recourse to the action of individuals, whose activities must be legally attributable to the States themselves [ . . . ]. In physical reality, there is no entity "State" [ . . . ], but only actions and expressions of will of individuals, which the legal order can attribute to a subject of law other than the physical person who is their author] (Translation by the United Nations Secretariat); K. Strupp, "Das völkerrechtliche Delikt", *Handbuch . . . (op. cit.)*, pp. 35-36: "Denn der Staat [ . . . ] bedarf physischer Personen [ . . . ], deren Wollen und Handeln in der physisch-natürlichen Welt Akte von Individuen, in der juristischen solche der Gesamtheit, d. h. des Staates, sind". [For the State [ . . . ] requires physical persons [ . . . ] whose will and conduct in the physical-natural world are acts of individuals, but in the legal world are acts of the whole community, i.e. the State.] (Translation by the United Nations Secretariat); D. Anzilotti, *Corso . . . (op. cit.)*, p. 222: "ci sono atti e volizioni d'individui che valgono giuridicamente come atti e volizioni dello Stato, perchè il diritto li imputa allo Stato, ossia ne fa il presupposto di doveri e di diritti dello Stato" [There are actions and expressions of will of individuals which are in law deemed to be actions and expressions of will of the State, because the law imputes them to the State, i.e. makes them the origin of duties and rights of the State] (Translation by the United Nations Secretariat); H. Kelsen, "Unrecht . . .", *Zeitschrift . . . (op. cit.)*, p. 496-497; *Principles . . . (op. cit.)*, p. 117; and "Théorie . . .", *Recueil des cours . . . (op. cit.)*, p. 88: "L'Etat est responsable des violations du droit international qui sont le résultat de comportements individuels pouvant être interprétés comme des comportements de l'Etat. Il faut donc que les comportements de certains individus puissent être imputés à l'Etat" [The State is responsible for violation of international law resulting from individual conduct which can be interpreted as being the conduct of the State. Accordingly, the conduct of certain individuals must be imputable to the State.] (Translation by the United Nations Secretariat); and p. 78: "Quand nous disons de l'acte d'un individu déterminé qu'il est un acte de l'Etat nous imputons cet acte à une personne distincte de l'individu qui l'a accompli, à une personne qui se trouve, pour ainsi dire, derrière lui" [When we say of the act of a particular individual that it is an act of the State, we impute this act to a person other than the individual who committed it, to a person who is, so to speak, behind him.] (Translation by the United Nations Secretariat); T. Perassi, *Lezioni di diritto internazionale*, Part. 1 (Rome, Edizioni Italiane, 1942 [reprint of the 1941 edition], p. 97: "Un ente [ . . . ] in tanto può assumere la qualità di soggetto in un ordinamento giuridico in quanto mediante l'attitudine naturale di volere ed agire di determinati uomini si ponga come unità operante, cioè come unità a cui sono riferite come proprie una volontà ed una azione". [An [ . . . ] entity may assume the character of a subject of a legal order in so far as, through the natural disposition of certain men to will and act, it becomes an operative unity, that is to say, a unity to which are attributed a will and action of its own] (translation by the United Nations Secretariat).

made is that imputation to the State is necessarily, because of the very nature of the State, a legal connecting operation which has nothing in common with a link of natural causality.<sup>63</sup> One can sometimes speak of natural causality in reference to the relationship between the action of an individual and the result of that action, but not in reference to the relationship between the person of the State and the action of an individual.<sup>64</sup>

39. The second point to be made is that the State to which an individual's conduct is imputed is the State as a person, a subject of law, and not the State in the sense of a legal order or system of norms. This is true not only, and *a fortiori*, of an imputation under international law, but also of an imputation under municipal law. It is because of the failure to maintain a clear distinction between these two notions that difficulties have arisen in this connexion, even if only of a theoretical nature.<sup>65</sup>

<sup>63</sup> D. Anzilotti (*Corso . . . [op. cit.]*, p. 222) points out that: "L'imputazione giuridica si distingue così nettamente del rapporto di causalità; un fatto è giuridicamente proprio di un soggetto, non perchè prodotto o voluto da questo, nel senso che tali parole avrebbero nella fisiologia o nella psicologia, ma perchè la norma glielo attribuisce" [Legal imputation is thus clearly distinguishable from causal relationship; an act is legally deemed to be that of a subject of law not because it has been committed or willed by that subject in the physiological or psychological sense of those words, but because it is attributed to him by a rule of law.] (Translation by the United Nations Secretariat). See also J. G. Starke, *op. cit.*, p. 105: "The imputation is thus the result of the intellectual operation necessary to bridge the gap between the delinquency of the organ or official and the attribution of breach and liability to the State"; C. Th. Eustathiades, "Les sujets . . .", *Recueil des cours . . . (op. cit.)*, p. 422: "Cette imputation est le résultat d'une opération logique effectuée par une règle de droit, donc un lien juridique" [This imputation is the result of a logical operation effected by a rule of law, and is therefore a legal relationship.] (Translation by the United Nations Secretariat); and W. Wengler, *op. cit.*, pp. 425 and 490: "[ . . . ] die Völkerrechtsnorm eindeutig nur von einem bestimmten Menschen durch dessen eigenes Verhalten befolgt oder verletzt werden kann" [( . . . ) in any case, a rule of international law can be complied with or infringed only by the individual behaviour of a particular person] (Translation by the United Nations Secretariat).

<sup>64</sup> There are no activities of the State which can be called "its own" from the point of view of natural causality as distinct from that of legal attribution; it should be noted that this applies at the municipal as well as at the international level. In describing the State as a real entity—and it is such an entity, like any other legal person—one must nevertheless avoid the error of giving an anthropomorphic picture of the collective phenomenon, in which the individual-organ would have his personality absorbed and annulled in the whole and would be an inseparable part of it, rather like an organ of the human body. It is by reference to a picture of this kind that Quadri (*op. cit.*, pp. 393 *et seq.*) would like to replace the "legal" operation of connecting the individual action to the State by a simply material and natural recognition. For Wengler (*op. cit.*, p. 39), the "Zurechnung" (imputation) is a normative technical process.

<sup>65</sup> It should be noted that the identification of the legal person with a legal order led writers such as M. Kelsen ("Über Staatsunrecht", *Zeitschrift für das Privat- und öffentliche Recht der Gegenwart* [Vienna, Alfred Hölder, K.U.K. Hof- und Universitäts-Buchhändler, 1914], Bd. 40, p. 114) and W. Burckhardt (*Die völkerrechtliche Haftung der Staaten* [Berne, Paul Haupt, Akadem. Buchhandlung vorm. Max Drechsel, 1924], pp. 10 *et seq.*) to conclude that a wrongful act cannot be imputed to the legal person which is the expression of the unity of the special legal order that constituted that person. Kelsen ("Unrecht . . .", *Zeitschrift für öffentliches Recht (op. cit.)*, p. 500) later tried to overcome the difficulty by saying that an act of an organ of the partial legal order of the State, although necessarily lawful as

At the same time, it should be emphasized that the imputation to the State which is in question here is imputation to the State as a person under international law and not as a person under municipal law.

40. The last and most important of the three preliminary points to be made at this stage is that an individual's conduct can be imputed to a State as an internationally wrongful act only by international law. It is quite unthinkable that the operation of connecting an action or omission with a subject of international law so as to produce consequences in the sphere of international legal relations should take place in a framework other than that of international law itself.<sup>66</sup> The imputation of an act to the State as a subject of international law and the imputation of an act to the State as a person under municipal law are two entirely distinct operations which are necessarily governed by two different systems of law. It is possible and even normal that for such purposes international law should take account of the situation existing in municipal law, although we shall have to see in what sense and to what extent. But in any event, this taking into account of municipal law would simply be an instrument employed by the international legal order to perform an operation falling entirely within that order. We shall have occasion to see that many of the specific difficulties met with in connexion with imputation are due to an insufficiently clear grasp of this point. Its importance as a principle should be noted here and now.

regards that order, could be imputed to the State as a wrongful act by a total legal order such as the international order. All this seems both artificial and unrealistic. The internal legal order can perfectly well impute the conduct of an organ to the person of the State as a wrongful act; that person is the creation of that order and as a person has subjective legal situations like any other subject.

<sup>66</sup> Anzilotti, who in his earlier works seemed to uphold the idea that, in all cases, an individual's conduct should be imputed to the State solely by municipal law, later became a firm supporter of the opposite view. See *Corso . . . (op. cit.)*, p. 224.

For the same approach, see J. G. Starke, *op. cit.*, pp. 106-107; T. Perassi, *op. cit.*, p. 98; R. Ago, "Le délit international", *Recueil des cours . . . (op. cit.)*, pp. 461-462; A. Ross, *op. cit.*, p. 251; C. Th. Eustathiades, "Les sujets . . .", *Recueil des cours . . . (op. cit.)*, p. 417; K. Furgler, *Grundprobleme der völkerrechtlichen Verantwortlichkeit der Staaten unter besonderer Berücksichtigung der Haager Kodifikationskonferenz, sowie der Praxis der Vereinigten Staaten und der Schweiz* (Zürich, Polygraphischer Verlag, 1948), pp. 19-20; G. Morelli, *op. cit.*, p. 184; P. Reuter, *La responsabilité internationale*, Paris, 1956-1957, p. 87; T. Meron, *op. cit.*, p. 87; A. P. Sereni, *op. cit.*, p. 1506; J.-P. Quéneudec, *La responsabilité internationale de l'Etat pour les fautes personnelles de ses agents* (Paris, Librairie générale de droit et de jurisprudence, 1966), p. 119.

Kelsen's particular conception of the State and legal persons in general also led him to maintain in principle ("Théorie . . .", *Recueil des cours . . . (op. cit.)*, p. 88) that "la question de savoir si un acte accompli par un individu est un acte étatique, c'est-à-dire imputable à l'Etat, doit être examinée sur la base de l'ordre juridique national" [The question whether an act performed by an individual is an act of State, i.e. imputable to the State, must be considered on the basis of the national legal order]. (Translation by the United Nations Secretariat). However, in his more recent writing Kelsen too has sought to lay particular stress on the possibility of regarding imputation in international law as being based on international law: see *Principles . . . (op. cit.)*, pp. 197 and 198, note 13: "It remains true, however, that international law may, and does, also determine that certain acts are to be considered as acts of state, and therefore to be imputed to the state, even though the acts in question cannot be imputed to the state on the basis of national law."

41. The second condition for the existence of an internationally wrongful act was defined at the beginning of this section: the conduct imputed to the State must constitute a breach by that State of an international obligation incumbent upon it. This is what is called the *objective* element of the internationally wrongful act, the specific element which distinguishes it from the other acts of the State to which international law attaches legal consequences. The contrast between the State's actual conduct and the conduct required of it by law constitutes the essence of the wrongfulness. The wrongful act is above all a breach of a legal duty, a violation of an obligation, and it is precisely this kind of act which the legal order considers, as we saw earlier, for the purpose of attaching responsibility to it, i.e. of making it a source of new obligations and, more generally, of new legal situations whose common characteristic is that they are unfavourable to the subject to which the act in question is imputed. If we bear in mind the link between the condition and the result, between the breach of an obligation and the incurring of further obligations or of sanctions as a consequence of that breach, we shall see that, in a sense, the rules relating to State responsibility are complementary to other substantive rules of international law—to those giving rise to the legal obligations which States may be led to violate.<sup>67</sup>

42. It is widely acknowledged in judicial decisions, practice and authoritative literature that the objective element which characterizes an internationally wrongful act is represented by the violation of an international obligation incumbent upon the State. In its judgement on the jurisdiction in the Case concerning the Factory at Chorzów,<sup>68</sup> to which reference has already been made, the Permanent Court of International Justice used the

<sup>67</sup> This idea was clearly expressed by various members of the International Law Commission (in particular, Mr. Tammes and Mr. Eustathiades) during the discussion of the first report on State responsibility. It is reflected in paragraph 80 of the report on the work of the twenty-first session (*Yearbook of the International Law Commission, 1969*, vol. II, p. 233, document A/7610/Rev.1).

Among modern writers on international law, Reuter, for instance ("Principes . . . , *Recueil des cours* . . . (op. cit.), p. 595), has specifically remarked in this connexion that "un des traits dominants de la théorie de la responsabilité est son caractère *non autonome*" [one of the predominant features of the theory of responsibility is its *non-autonomous* character] (Translation by the United Nations Secretariat). In this context, he stressed the link between the previous obligation and the new obligation generated by the incurring of the responsibility. Another author (I. Brownlie, *op. cit.*, pp. 353-354) has clearly brought out the complementary nature of the rule of responsibility by comparison with the primary rules of international law:

"Today one can regard responsibility as a general principle of international law, a concomitant of substantive rules and of the supposition that acts and omissions may be categorized as illegal by reference to the rules establishing rights and duties. Shortly, the law of responsibility is concerned with the incidence and consequences of illegal acts . . ."

On the question of the need to avoid confusing a rule of law establishing an obligation the breach of which is considered an internationally wrongful act and a rule attaching responsibility to the effect of the breach, see R. Ago, "Le délit international", *Recueil des cours* . . . (op. cit.), pp. 445 et seq.

<sup>68</sup> Case concerning the factory at Chorzów (Jurisdiction), Judgement No. 8 of 26 July 1927. *P.C.I.J. series A*, No. 9, p. 21.

words "breach of an engagement". It employed the same expression in its subsequent judgement on the merits of the case.<sup>69</sup> The International Court of Justice referred explicitly to the Permanent Court's words in its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*.<sup>70</sup> In its advisory opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)* the court held that "refusal to fulfil a treaty obligation" involved international responsibility.<sup>71</sup> In the arbitration decisions, the classic definition is the one referred to above (see foot-note 43 and para. 32 above) which was given by the Mexico-United States General Claims Commission in the *Dickson Car Wheel Company Case*:

"Under international law, apart from any convention, in order that a State may incur responsibility, it is necessary that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard."<sup>72</sup>

43. In State practice, expressions such as "non-execution of international obligations", "acts incompatible with international obligations", "breach of an international obligation" and "breach of an engagement" are common; they recur frequently in the replies by Governments, particularly on point III of the request for information addressed to them by the Preparatory Committee for the 1930 Conference for the Codification of International Law.<sup>73</sup> Moreover, the article 1 unanimously adopted at the first reading by the Third Committee of the Conference contains these words: "any failure . . . to carry out the international obligations of the State".<sup>74</sup> Similar terminology was used in article 1 of the preliminary draft prepared in 1957 by Mr. Garcia Amador as the Special Rapporteur on State responsibility. This speaks of "some act or omission [. . .] which contravenes the international obligations of the State".<sup>75</sup> Those words are also to be found in article 2 of the revised preliminary draft prepared in 1961.<sup>76</sup>

44. The same consistency of terminology is to be found in the draft codifications of State responsibility prepared by private individuals and institutions. Article 1 of the draft code prepared by the Japanese Association of International Law in 1926 lays down that a State is

<sup>69</sup> Case concerning the factory at Chorzów (Merits), Judgement No. 13 of 13 September 1928. *P.C.I.J. series A*, No. 17, p. 29.

<sup>70</sup> *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion of 11 April 1949. *I.C.J. Reports 1949*, p. 184.

<sup>71</sup> *Interpretation of peace treaties with Bulgaria, Hungary and Romania (Second Phase)*, Advisory Opinion of 18 July 1950. *I.C.J. Reports 1950*, p. 228.

<sup>72</sup> *Dickson Car Wheel Company Case* (July 1931). United Nations, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No.: 1951.V.1), p. 678 [Italics supplied by the Special Rapporteur]. See also the decision in the *Affaire relative à l'acquisition de la nationalité polonaise* (10 July 1924): *ibid.*, vol. I (United Nations publication, Sales No.: 1948.V.2), p. 425.

<sup>73</sup> League of Nations, *Bases of Discussion* . . . (op. cit.), pp. 25 et seq., 30 et seq., 33 et seq.; and *Supplement to vol. III* (op. cit.), pp. 3 et seq.

<sup>74</sup> See *Yearbook of the International Law Commission, 1956*, vol. II, p. 223, document A/CN.4/96, annex 2.

<sup>75</sup> *Ibid.*, 1957, vol. II, p. 128, document A/CN.4/106, annex.

<sup>76</sup> *Ibid.*, 1961, vol. II, p. 46, document A/CN.4/134 and Add. 1.

responsible in the case of an act or default constituting a violation of an international duty incumbent upon the state;<sup>77</sup> article I of the resolution adopted by the Institute of International Law at Lausanne in 1927 speaks of "any action or omission" of the State contrary to its international obligations;<sup>78</sup> article 1 of the draft prepared in 1930 by the Deutsche Gesellschaft für Völkerrecht mentions the violation by a State of an obligation towards another State under international law;<sup>79</sup> and article 1 of the draft prepared by Strupp in 1927 refers to acts of the responsible State which conflict with its duties to the injured State.<sup>80</sup> Lastly, as far as the literature is concerned, the expression "breach of an international obligation"<sup>81</sup> or equivalents such as "violation of an obligation established by an international norm",<sup>82</sup> "failure to carry out an international obligation",<sup>83</sup> "act" or "conduct conflicting with" or "contrary to an international obligation",<sup>84</sup> and "breach of a duty" or of an "international legal duty",<sup>85</sup> are by far the most prevalent phrases in the language of the leading authors.

45. In view of this evidence of the consistency in language, it is scarcely necessary to stress the desirability of using expressions such as "failure to carry out an obligation" or "breach of an international obligation" to designate the objective element of an internationally wrongful act, in preference to the expressions "breach of a rule" or "breach of a norm of international law" employed by some authors<sup>86</sup> and occasionally mis-

<sup>77</sup> Draft code of international law adopted by the Kokusaiho Gakkwai (International Law Association of Japan) in co-operation with the Japanese branch of the International Law Association. See *Yearbook of the International Law Commission, 1969*, vol. II, p. 141, document A/CN.4/217 and Add. 1, annex II.

<sup>78</sup> *Ibid.*, 1956, vol. II, p. 227, document A/CN.4/96, annex 8.

<sup>79</sup> *Ibid.*, 1969, vol. II, p. 149, document A/CN.4/217 and Add. 1, annex VIII.

<sup>80</sup> *Ibid.*, p. 151, annex IX. •

<sup>81</sup> See J. G. Starke, *op. cit.*, p. 106; H. Kelsen, *Principles . . . (op. cit.)*, p. 196; K. Furgler, *op. cit.*, p. 16; G. Morelli, *op. cit.*, p. 347; G. Schwarzenberger, *A. Manual . . . op. cit.*, pp. 162-163; B. Cheng, *op. cit.*, pp. 170-171; F. V. García Amador, "State Responsibility . . ." *Recueil des cours . . . (op. cit.)*, p. 376; A. Schüle, *op. cit.*, p. 336; P. Reuter, "Principes . . ." *Recueil des cours . . . (op. cit.)*, p. 599; A. P. Sereni, *op. cit.*, pp. 1506 and 1512; C. F. Amerasinghe, *op. cit.*, pp. 37 *et seq.*, 41 *et seq.*; E. Jiménez de Aréchaga, *op. cit.*, p. 534. See also the working documents submitted to the Sub-Committee on State Responsibility of the International Law Commission in 1962-1963 by Mr. Tsuruoka and Mr. Ago (*Yearbook of the International Law Commission, 1963*, vol. II, pp. 247 and 251).

<sup>82</sup> See P. Guggenheim, *op. cit.*, p. 1.

<sup>83</sup> See J. Basdevant, *op. cit.*, p. 671; Ch. de Visscher, *op. cit.*, p. 91; Ch. Rousseau, *op. cit.*, p. 361; and the working paper submitted by Mr. Yasseen in 1962 (*Yearbook of the International Law Commission, 1963*, vol. II, p. 250).

<sup>84</sup> See R. Ago, *Le délit international*, *Recueil des cours . . . (op. cit.)*, pp. 441 and 445; J. L'Huillier, *op. cit.*, p. 359; R. Monaco, *Manuale di diritto internazionale pubblico* (Turin, Unione Tipografico-Editrice Torinese, 1960), p. 359.

<sup>85</sup> See D. Anzilotti, *Teoria generale . . . (op. cit.)*, p. 111, and *Corso . . . (op. cit.)*, pp. 385-386; C. C. Hyde, *op. cit.*, p. 882; L. Oppenheim, *op. cit.*, pp. 337-338; G. Balladore Pallieri, *Diritto internazionale pubblico*, 8th ed. (Milan, 1962), p. 245; H. Accioly, *op. cit.*, p. 249; A. Ulloa, *op. cit.*, p. 251; G. Dahm, *op. cit.*, p. 178; S. R. Patel, *A Textbook of International Law* (London, Asia Publishing House, 1964), p. 103.

<sup>86</sup> See K. Strupp, "Das völkerrechtliche Delikt", *Handbuch . . . (op. cit.)*, pp. 6, 8-9, and *Eléments . . . (op. cit.)*, p. 327; P. Schoen, *op. cit.*, p. 21.

employed by others as equivalents of the former.<sup>87</sup> The rule is law in the objective sense. Its function is to attribute in certain conditions subjective legal situations—rights, faculties, powers and obligations—to those to whom it is addressed. It is these situations which, as their global appellation indicates, constitute law in the subjective sense; it is in relation to these situations that the subject's conduct operates. The subject freely exercises or refrains from exercising its subjective right, faculty or power, and freely fulfils or violates its obligation, but it does not "exercise" the rule and likewise does not "violate" it. It is its duty which it fails to carry out and not the principle of objective law from which that duty flows. This does not mean that the obligation whose breach is the constituent element of an internationally wrongful act must necessarily flow from a rule, at least in the proper meaning of that term. The obligation in question may very well have been created and imposed upon a subject by a particular legal act, a decision of a judicial or arbitral tribunal, a decision of an international organization, etc. The breach of an obligation of this character and origin is just as wrongful under international law as failure to carry out an obligation established by a rule proper; and it would be totally artificial to ascribe the obligation in question to the rule which lays down certain particular proceedings as separate sources of international obligations.<sup>88</sup>

46. On the other hand, it seems perfectly legitimate, in international law, to regard the idea of the breach of an obligation as the exact equivalent of the idea of the impairment of the subjective rights of others.<sup>89</sup> The Permanent Court of International Justice, which normally uses the expression "breach of an international obligation", spoke of an "act [. . .] contrary to the treaty right of another State" in its judgment in the *Phosphates in Morocco Case*.<sup>90</sup> The correlation between a legal obligation on the one hand and a subjective right on the other

<sup>87</sup> This was the case in Anzilotti's earlier works: *Teoria generale . . . (op. cit.)*, p. 84, and *La responsabilità internazionale . . . (op. cit.)*, p. 170. The same formula is also to be found in A. Verdross ("Règles générales du droit international de la paix", *Recueil des cours . . . 1929-V* [Paris, Librairie Hachette, 1931], pp. 463 *et seq.*), G. Balladore Pallieri (*Diritto internazionale pubblico (op. cit.)*, pp. 245-246), J. Garde Castillo (*op. cit.*, pp. 126-127), P. Guggenheim (*op. cit.*, p. 3), A. Schüle (*op. cit.*, pp. 329-330), A. P. Sereni (*op. cit.*, p. 1503), and D. B. Levin (*Otvetsvennost gosudarstv . . . (op. cit.)*, p. 51).

<sup>88</sup> Quite apart from this, as far as the characterization of the wrongful act is concerned, the idea of the breach of a rule might also be misleading because there are cases of the invalid exercise of a faculty or power which have nothing to do with a wrongful act, but which nevertheless consist essentially in conduct which is at variance with what the rule would require to produce certain legal effects. In this connexion, see R. Ago, "Le délit international", *Recueil des cours . . . (op. cit.)*, pp. 434 and 441-442; and G. Morelli, *op. cit.*, p. 347.

<sup>89</sup> The equivalence in international law between failure to carry out a legal duty and violation of a subjective right of others is noted by D. Anzilotti (*Teoria generale . . . (op. cit.)*, pp. 83, 91 *et seq.*, and 121); G. Balladore Pallieri, (*Gli effetti . . .*, *Rivista di Diritto Pubblico . . . (op. cit.)*, p. 66, and *Diritto internazionale pubblico (op. cit.)*, p. 245), R. Ago ("Le délit international", *Recueil des cours . . . (op. cit.)*, p. 441), G. Morelli (*op. cit.*, p. 347), and A. P. Sereni (*op. cit.*, p. 1514).

<sup>90</sup> *Phosphates in Morocco Case* (Preliminary objections), 14 June 1938. See *P.C.I.J.*, series A/B, No. 74, p. 28.

admits of no exception; as distinct from what is said to be the situation in municipal law, there are certainly no obligations incumbent on a subject which are not matched by an international subjective right of another subject or subjects, or even, for those who take a view referred to in the previous section, of the totality of the other subjects of the law of nations. This must be borne in mind in seeking a precise interpretation of the definition proposed here of the conditions for the existence of an internationally wrongful act.

47. It is sometimes asked whether there should not be an exception to the rule that the characteristic of the internationally wrongful act consists of a failure by the State to carry out an international obligation incumbent upon it. This train of thought is prompted by the idea that in certain circumstances the abusive exercise of a right could amount to internationally wrongful conduct and thereby generate international responsibility. In other words, if, as some maintain, it is true that international law, like the municipal law of certain countries, recognizes the theory of abuse of rights, does this mean that in some cases the characteristic element of an internationally wrongful act is conduct based on a subjective right and not conduct conflicting with a legal obligation?

48. It is a well-known fact that a really clear statement on the doctrine of abuse of rights has never been made in international decisions; this is understandable in view of the dangers which both an absolute denial and a general affirmation of the principle could entail. The Permanent Court of International Justice did no more than make very guarded allusions to the theory, and in any case excluded its application to the cases contemplated and indicated in general that abuse of rights could not be presumed.<sup>91</sup> The theory of abuse of rights has also been explicitly contested in certain well-known dissenting opinions.<sup>92</sup> As regards the more recent decisions, Reuter's commentary contains a very apt summary of the criterion underlying them: "The decisions refer to the notion as a warning in cases in which they do not rely on it, whereas if they relied on the notion they would probably refrain from mentioning it."<sup>93</sup> The only clear formulation of the need to carry over the condemnation of abuse of rights into international law is that of Judge Alvarez in some

of his dissenting opinions.<sup>94</sup> Among the authors, the idea of the application of the theory of abuse of rights to international law has found and continues to find both firm supporters<sup>95</sup> and determined opponents.<sup>96</sup>

49. However, as far as the present work of the International Law Commission is concerned, there seems to be no compelling reason for taking a position on this theory, on its possible justifications and the grounds for them, on its alleged advantages for the development and progress of international law, or on the dangers it would entail for the security of international law. In actual fact, the problem of abuse of rights has no direct influence on the determination of the premises of international responsibility. The question is one of substance, concerning the existence or non-existence of a "primary" rule of international law—the rule whose effect is apparently to limit exercise by the State of its rights, or, as others would maintain, its capacities, and to prohibit their abusive exercise. Clearly, therefore, if it was recognized that existing international law should accept such a limitation and prohibition, the abusive exercise of a right by a State would inevitably constitute a violation of the obligation not to exceed certain limits in exercising that right, and not to exercise it with the sole intention of harming others or of unduly encroaching upon their sphere of competence. If the existence of an internationally wrongful act was recognized in such circumstances, the constituent element would still be represented by the violation of an obligation and not by the exercise of a

<sup>94</sup> *I.C.J. Reports 1949*, p. 48; *ibid.*, 1950, p. 15; *ibid.*, 1951, p. 149; *ibid.*, 1952, p. 128 and 133.

<sup>95</sup> See in particular N. Politis, "Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux", *Recueil des cours . . .*, 1925-I (Paris, Librairie Hachette, 1926), pp. 77 *et seq.*; S. Trifu, *La notion de l'abus de droit dans le droit international* (Paris, Domat-Montchrestien, 1940); van Bogaert, *Het Rechtsmisbruik in het Volkenrecht* (Antwerp, 1948); van der Molen, *Misbruik van Recht in het Volkenrecht—Opstellen op het gebied van Recht, Staat en Maatschappij* (Amsterdam, 1949), pp. 266 *et seq.*; M. Sibert, *Traité de droit international public* (Paris, Librairie Dalloz, 1951), t. II, p. 205 and 283; A.-Ch. Kiss, *L'abus de droit en droit international* (Paris, Librairie générale de droit et de jurisprudence, 1953), especially pp. 179 *et seq.*; and F. V. García Amador, "State Responsibility . . .", *Recueil des cours . . .* (*op. cit.*), pp. 376 *et seq.*, and fifth report on State responsibility (*Yearbook of the International Law Commission*, 1960, vol. II, pp. 57 *et seq.*, document A/CN.4/125, paras. 66 *et seq.*).

<sup>96</sup> Among many others, see M. Scerni, *L'abuso di diritto nei rapporti internazionali* (Rome, Anonima Romana Editoriale, 1930); A. Cavaglieri, *Corso di diritto internazionale*, 3rd ed. (Naples, 1934), p. 508; H. J. Schlochauer, "Die Theorie des abus de droit im Völkerrecht", *Zeitschrift für Völkerrecht* (Breslau, J. U. Kern's Verlag, 1933), Bd. XVII, pp. 373 *et seq.*; and, among the more recent writers, G. Schwarzenberger, "Uses and Abuses of the 'Abuse of Rights' in International Law", *The Grotius Society: Transactions for the Year 1956: Problems of Public and Private International Law* (London, The Grotius Society, 1957), vol. 42, pp. 47 *et seq.*; J.-D. Roulet, *Le caractère artificiel de la théorie de l'abus de droit en droit international public* (Neuchâtel, Histoire et Société d'aujourd'hui, Ed. de la Baconnière, 1958); I. Brownlie, *op. cit.*, pp. 365 *et seq.* For some circumscribed and extremely guarded approaches, see H. Lauterpacht, *The Development of International Law by the International Court* (London, Stevens and Sons Ltd., 1958), pp. 162 *et seq.*; and P. Guggenheim, "La validité et la nullité des actes juridiques internationaux", *Recueil des cours . . . 1949-I* (Paris, Librairie du Recueil Sirey, 1950), pp. 250 *et seq.*

<sup>91</sup> See the judgment in the Case concerning certain German interests in Polish Upper Silesia (Merits), 25 May 1926 (*P.C.I.J.*, series A, No. 7, pp. 30, 37-38), and the judgment in the Case of the Free Zones of Upper Savoy and the District of Gex, 7 June 1932 (*P.C.I.J.*, series A/B, No. 46, p. 167).

<sup>92</sup> See the dissenting opinion of Judge Anzilotti in the Case of the Electricity Company of Sofia and Bulgaria (Preliminary Objection), 4 April 1939 (*P.C.I.J.*, series A/B, No. 77, p. 98).

<sup>93</sup> P. Reuter, "Principes . . .", *Recueil des cours . . .* (*op. cit.*), p. 600. According to the author, an example of the first case is the Arbitral Tribunal's award of 16 December 1957 in the Lake Lanoux Case (for the text, see United Nations, *Reports of International Arbitral Awards*, vol. XII [United Nations publication, Sales No.: 1963.V.3], pp. 285 *et seq.*), and of the second, the judgment of the International Court of Justice of 12 April 1960 in the Case concerning right of passage over Indian Territory (*Portugal v. India*) [Merits] (*I.C.J. Reports 1960*, pp. 36-37). There is also an incidental reference to the subject by the International Court of Justice in its judgment of 18 December 1951 in the *Fisheries Case (United Kingdom v. Norway)* [*I.C.J. Reports 1951*, p. 142].

right.<sup>97</sup> Consequently, a reference to a failure to carry out an international legal obligation seems quite sufficient to cover even the hypothesis we have just been discussing. It seems unnecessary either to provide for an alleged exception or, in a draft on the international responsibility of States, to provide an article concerning a problem which does not relate specifically to responsibility.<sup>98</sup>

50. On the other hand, there is a further point which it may be useful to take into consideration in defining the conditions for the existence of an internationally wrongful act. An act of this kind has been said to consist, in essence, of conduct attributable to a State and constituting a failure by that State to carry out an international obligation. Two separate cases can, however, arise. On some occasions, the conduct in itself may suffice to constitute a failure to carry out an international obligation incumbent upon the State: a refusal by the State's legislative organs to pass an act which the State, by treaty, has specifically undertaken to adopt, an attack by one country's armed forces upon the territory of another country with which the former maintains peaceful relations, a refusal by a coastal State to allow the vessels of another country friendly passage through its territorial waters in peacetime, an inspection of a foreign country's diplomatic bag by a Customs official, an unauthorized entry by police into the premises of a foreign embassy, a denial of justice to an alien by judicial organs—all these are examples of the case envisaged.

51. There are nevertheless cases in which the situation is different. The mere dropping of bombs from an aircraft which is near a hospital or historic monument does not constitute a breach of the obligation to respect the enemy's health services and cultural property; the hospital or monument in question must actually have been hit. Similarly, for a State to be chargeable with having failed in its duty to provide effective protection for the premises of a foreign embassy or to safeguard the safety of aliens present in its territory during disturbances, it is insufficient to show that the State was negligent in the matter; some external event must also have taken place, for instance, the embassy premises must have been attacked by private individuals or aliens must have been killed by a mob. Consequently, in circumstances of this kind, there must be the additional element of an external event, if the State's conduct is to be regarded as a breach of an international obligation.<sup>99</sup>

<sup>97</sup> Even early on (in *Teoria generale* . . . (*op. cit.*), p. 89) Anzilotti had noted that responsibility does not flow from an excess in the exercise of the right but from the fact of acting in contravention of that right. For developments along these lines see R. Ago, "Le délit international", *Recueil des cours* . . . (*op. cit.*), pp. 443-444; B. Cheng, *op. cit.*, pp. 129 *et seq.*; E. Jiménez de Aréchaga, *op. cit.*, p. 540.

<sup>98</sup> In the revised preliminary draft which he prepared in 1961, Mr. García Amador introduced a provision in article 2, paragraph 3, to the effect that "the expression 'international obligations of the State' also includes the prohibition of the 'abuse of rights', which shall be construed to mean any action contravening the rules of international law, whether conventional or general, which govern the exercise of the rights and competence of the State". See *Yearbook of the International Law Commission, 1961*, vol. II, p. 46.

<sup>99</sup> Wrongful acts consisting in conduct alone and wrongful acts requiring, in addition, an external event can therefore be distin-

52. In this connexion, it is not sufficient for the conduct *per se* and the event to have occurred independently of each other; there must be a link between the former and the latter such that the conduct can be regarded as the direct or indirect cause of the event. In other words, there must be a certain causal relationship between the conduct and the event, which may be natural causality, as in the simplest case, or may be in other cases a "normative" causality, in which the link is established not by nature but by a rule of law, as where the State has omitted to take the safety measures and precautions which could have prevented the occurrence of the external event (for example, an attack by private persons). No more need be said on this point for the moment, since these distinctions will require further discussion when it comes to defining the particular rules relating to the different cases of failure to carry out an international obligation. It is mentioned now because it seems useful to emphasize at this stage that a State's failure to carry out an international obligation can consist either in the conduct *per se* which is imputed to it or in the joint operation of that conduct and an external event causally linked with it.

53. One last point should be mentioned before concluding. In addition to the two elements, the subjective and the objective, that have been shown to be constituent elements of an internationally wrongful act which is *per se* a source of responsibility, reference is sometimes made to a third element, which is usually termed "damage".<sup>100</sup> There is, however, some ambiguity in such references. In some instances, those who stress the requirement that a damage should exist are in fact thinking of the requirement that an external event, should have occurred; as has been noted in the preceding paragraphs, such event must in some cases be present in addition to the actual conduct of the State if that conduct is to constitute a failure to carry out an international obligation. In the case of one of those obligations to protect and safeguard which are of special importance in international law, the event in question may be an act prejudicial to certain persons. Often, however, what those who refer to a damage have in mind is not so much a prejudice caused to a State at the international level as an injury caused to an individual at the municipal level.<sup>101</sup> The importance accorded to the element of damage is thus a consequence of combining, within the framework of an analysis restricted solely to responsibility for damages to individual aliens, the consideration of the rules relating to responsibility with that of the substantive rules relating to the treatment of aliens. The essence of a State's "primary" obligations with respect to the status of aliens is that it must not injure them wrongfully by its own act. And it is clear that if the obligation itself is so defined, there can be no breach of this obligation where the individual alien has not in fact suffered any injury. Obviously, however, injury to

guished in international as well as in municipal law. See R. Ago, "Le délit international", *Recueil des cours* . . . (*op. cit.*), pp. 447 *et seq.*; G. Morelli, *op. cit.*, p. 349.

<sup>100</sup> See in particular A. V. Freeman, *op. cit.*, p. 22; A. Ross, *op. cit.*, pp. 242 and 255; K. Furgler, *op. cit.*, p. 16; P. Guggenheim, *Traité* . . . (*op. cit.*), p. 1; A. Schüle, *op. cit.*, p. 336; E. Jiménez de Aréchaga, *op. cit.*, p. 534.

<sup>101</sup> This is clear in, for example, Amerasinghe, *op. cit.*, p. 55.

an individual, which is precisely what the international obligation is designed to prevent, has nothing in common with the damage which, at the strictly international level, is said to be necessary in addition to the breach of an obligation for an internationally wrongful act to exist. Such a damage can only be a damage suffered by a State.

54. As writers have frequently pointed out, it is a mistake to attempt too direct a transposition into international law of ideas and concepts of municipal law which are very obviously linked with situations peculiar to municipal law. Every breach of an engagement *vis-à-vis* another State and every impairment of a subjective right of that State in itself constitutes a damage, material or moral, to that State. As Anzilotti stated in his first work on the topic, international responsibility derives its *raison d'être* purely from the violation of a right of another State and every violation of a right is a damage.<sup>102</sup> The extent of the material damage caused may be a decisive factor in determining the amount of the reparation to be made. But it cannot be of any assistance in establishing whether a subjective right of another State has been impaired and so whether an internationally wrongful act has occurred. It therefore seems inappropriate to take this element of damage into consideration in defining the conditions for the existence of an internationally wrongful act.

55. In view of the above comments and observations, the Special Rapporteur believes that the following formulation of the article defining the conditions for the existence of an internationally wrongful act can be proposed to the Commission:

#### Article II

##### Conditions for the existence of an internationally wrongful act

An internationally wrongful act exists where:

(a) Conduct consisting of an action or omission is imputed to a State under international law; and

(b) Such conduct, in itself or as a direct or indirect cause of an external event, constitutes a failure to carry out an international obligation of the State.

### III. CAPACITY TO COMMIT INTERNATIONALLY WRONGFUL ACTS

56. Many writers on international law agree that, in principle, any State which is a subject of international law has what they term "delictual capacity", or capacity to commit internationally wrongful acts, since it is impos-

sible to visualize a State possessing international personality but not having international obligations; and if it has such obligations, it must logically be apt to violate as much as to carry them out.

57. We must take care, though, not to be misled by use of the word "capacity", because its employment might lead us to see an analogy between the principle that in international law every State possesses the "capacity" to commit wrongful acts and the rule in article 6 of the Vienna Convention on the Law of Treaties, which provides that "every State possesses capacity to conclude treaties".<sup>103</sup> Capacity to conclude treaties and "capacity" to commit internationally wrongful acts are, however, two entirely separate notions. Capacity to conclude treaties, which is the international equivalent of capacity to contract, is the most prominent aspect of a subjective legal situation, namely, the situation which, to continue using municipal law terminology, is definable as the State's "capacity to act" in international law, i.e. power of the State to perform legal acts and to produce legal effects by manifesting its will.

58. The term "delictual capacity", on the other hand, obviously denotes neither a legal power nor yet another subjective legal situation. In fact, if we reflect carefully, we shall realize the absurdity of the idea that a legal order can endow its subjects with a "capacity", in the proper sense of the term, to conduct themselves in contravention of their legal obligations. It therefore seems impossible to support the view—apparently cherished by German jurists—that delictual capacity (*Deliktsfähigkeit*) is a sub-category of the "capacity to act" (*Handlungsfähigkeit*).<sup>104</sup> The terms "delictual capacity" and "capacity to commit wrongful acts" cannot be anything more than convenient label for denoting that the subject can in fact engage in conduct contrary to an international obligation which is incumbent upon it and thereby fulfil the requisite conditions for an internationally wrongful act to be imputed to it.

59. In the light of the above comments and the consequent assumption that every State which is a subject of international law possesses "capacity" to commit internationally wrongful acts in the sense explained above, the only problem which can arise in connexion with this "capacity" is that of its possible limitations in certain particular situations. For the problem to be clearly put, it must be fully understood that the limitations concerned are limitations of the capacity to commit wrongful acts, and not limitations of the responsibility which the law attaches to such acts.<sup>105</sup> The imputation of the wrongful

<sup>103</sup> See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 290.

<sup>104</sup> K. Strupp, "Das völkerrechtliche Delikt", *Handbuch...* (*op. cit.*), pp. 21-22; F. Klein, *op. cit.*, pp. 34-35; A. Schüle, *op. cit.*, p. 330; I. von Münch, *op. cit.*, p. 130.

<sup>105</sup> The two are often confused. Anzilotti, for example, (*La Responsabilité internationale...* (*op. cit.*), p. 180), translates the German term "Deliktsfähigkeit" (i.e. capacity to commit a delict) by the expression "capacité de répondre des actes contraires au droit" [capacity to answer for acts contrary to law] (Translation by the United Nations Secretariat). There seems to be a similar confusion in Strupp, ("Das völkerrechtliche Delikt", *Handbuch...* (*op. cit.*), pp. 21-22), and Dahm (*op. cit.*, p. 179).

<sup>102</sup> D. Anzilotti, *Teoria generale...* (*op. cit.*), p. 89, and especially *Corso...* (*op. cit.*), p. 425, in which the author stresses the importance in international law of the honour and dignity of States, which are often given more weight than their economic interests, so that injury is equated in international law with the breach of an obligation. For similar views expressed by more recent writers, see G. Schwarzenberger, *A Manual...* (*op. cit.*), p. 164; A. P. Sereni, *op. cit.*, pp. 1522-1523. Even Jiménez de Aréchaga (*op. cit.*, p. 534) states that "in inter-State relations the concept of damage does not, however, have an essentially material or patrimonial character."

act and the attribution or imputation of responsibility are not identical, nor are they necessarily addressed to the same subject. Although as a general rule every internationally wrongful act committed by a State entails the latter's international responsibility, there may be cases—as we have seen already, and shall have occasion to note again—where, because of one State's situation in relation to another State, the latter answers in place of the former for an internationally wrongful act which the former has committed. Consequently, in cases of this kind, the former State manifestly possesses “delictual capacity” even if the internationally wrongful act which it commits does not entail its responsibility.

60. Can there then be any limitations of a State's international “delictual capacity” or, to put it more accurately, to its aptitude to engage in conduct which constitutes a failure to carry out an international obligation? In answering this question, it seems unnecessary to pay special attention to the situation of a State member of a federal union. In the increasingly rare cases in which we are forced to conclude that a State member of a federation may still possess some international personality because it has retained, even within very narrow limits, the capacity to make certain agreements with States outside the federation,<sup>106</sup> we should have to presume that such a state would itself be apt to carry out or violate the undertakings it has assumed in any agreements thus concluded by it. In this sense, therefore, it would possess “delictual capacity”, which would, however, be restricted solely to the pertinent sphere.<sup>107</sup> This seems so self-evident—and such cases are so marginal—that there appears to be no need to refer to them explicitly in the definition of the general rule concerning a State's capacity to commit internationally wrongful acts, particularly in view of the evidence at the Vienna Conference on the Law of Treaties that federal States as a whole are firmly opposed to any

<sup>106</sup> In the Special Rapporteur's opinion, to state that a particular entity possesses international legal personality—or, in other words, is a subject of international law—is merely a concise way of describing the situation of an entity to which the international legal order attributes subjective legal situations, that is, subjective rights, faculties, powers and legal obligations. The Special Rapporteur (“Le délit international”, *Recueil des cours* . . . (*op. cit.*), p. 452) is in complete agreement with Mr. Eustathiades (“Les sujets . . .”, *Recueil des cours* . . . [*op. cit.*], p. 423) that international legal personality is thus to be deduced from the observed presence of subjective legal situations. But this unity of view does not extend to the possibility of deducing the international personality of a particular entity from the fact that it is held to possess international “delictual capacity”, for, as emphasized above, this capacity is not a subjective legal situation. To establish that an entity possesses international personality, it must be possible to show that it has international obligations, that is, the very obligations it will then be in a position to violate. This is what would have to be conclusively demonstrated if a positive answer were to be given to the question of the possession of international personality by individuals, which is precisely what Mr. Eustathiades seeks to affirm. The Commission does not, however, have to take any decision on this point since its present task is confined to codifying the international responsibility of States.

<sup>107</sup> We do not propose to go into the question of the tribunal before which responsibility for a wrongful act committed in this precise sphere could be claimed. It need hardly be added that the point mentioned here has no bearing whatever on the question of imputability to a federal State of acts of member States, a matter which will be dealt with in determining the special rules relating to imputability.

mention of a separate international personality for member States.<sup>108</sup>

61. But the problem may take different forms in relation to different situations. For reasons which vary from case to case, a State may be placed in a situation where another subject, or even other subjects, of international law are acting in its territory.<sup>109</sup> If a situation of this kind occurs, the other subject or subjects may, for purposes of their own or else because of the need to fill gaps in the organization of the territorial State, entrust certain activities pertaining to the legal order of that State to elements of their own organization. The organs of the territorial State, those through which it normally discharges its international obligations, are then set aside as regards functions which may vary in scope. This situation may arise not only in cases of the survival of one of those legal relationships of dependence which have often furnished the textbooks with classic examples of the situation described here,<sup>110</sup>—but which are, fortunately, now disappearing—but also, and more especially, in other cases. A particular example is that of a military occupation,<sup>111</sup> whether in time of war or in time of peace, whether partial or total, temporary or permanent, in brief, regardless of the title, reason and character of the occupation; nor is there any need, for the purposes with which we are concerned here, to draw any distinction based on whether the occupation is regarded as legitimate or illegitimate by international law.

62. In this kind of situation it may happen, for instance, that the occupant's courts are given jurisdiction in place of certain judicial organs of the occupied State that, the occupant replaces certain central or local administrative

<sup>108</sup> In article 5 (“Capacity of States to conclude treaties”) of its draft the International Law Commission proposed the inclusion of a paragraph 2 providing that “States members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down.” (*Yearbook of the International Law Commission*, 1966, vol. II, p. 191, document A/6309/Rev.1). After a long discussion, the Committee of the Whole adopted this paragraph in 1968, but in 1969, at the plenary meetings of the Conference itself, certain federal States resumed their attack on this paragraph with renewed vigour and it was finally rejected, so that it does not appear in article 6 of the Vienna Convention on the Law of Treaties (see foot-note 103 above).

<sup>109</sup> To avoid complicating the analysis of such situations still further, we shall refer here only to the case in which the other subject or subjects involved are also States. But they may be subjects of a different nature, such as an insurrectionary movement or even, to take an extreme case, an international organization.

<sup>110</sup> For a series of examples drawn from the practice concerning relationships of dependence in which elements belonging directly to the organization of the dominant State replace certain elements in the organization of the dependent State in the performance of their functions, see R. Ago, “La responsabilità indiretta nel diritto internazionale”, *Archivio di diritto pubblico*, January-April 1936-XIV (Padua, CEDAM, 1936), vol. 1, fasc. 1, pp. 27 *et seq.*; and “Le délit international”, *Recueil des cours* . . . (*op. cit.*), p. 455 *et seq.*

<sup>111</sup> See on this topic R. Ago, “Occupazione bellica dell'Italia e Trattato lateranense”, Istituto di Diritto Internazionale e Straniero della Università di Milano, *Comunicazioni e Studi* (Milan, A. Giuffrè, 1946), t. II, pp. 168 *et seq.* In general, on the problems of responsibility resulting from a military occupation, see K. Strupp, “Das völkerrechtliche Delikt”, *Handbuch* . . . (*op. cit.*), p. 114; C. Eagleton, *op. cit.*, p. 31; F. Klein, *op. cit.*, pp. 106 *et seq.*; A. Verdross, *op. cit.*, p. 390.

organs by elements belonging to its own military or civil administration, or that it entrusts frontier policing to its own forces. Many other examples could be quoted. If therefore, in exercising the activities entrusted to them within the framework of the legal order of the occupied State, these organs of the occupying State are guilty of acts or omissions in breach of an international obligation of the occupied State, those acts or omissions must be imputed to the occupant and involve its responsibility. This is clearly a direct responsibility, a responsibility for its own act.<sup>112</sup> It is scarcely necessary to add that since in these cases the organs of the occupying State are acting in place of those of the occupied State and within the framework of the latter's legal order, they are bound to act in compliance with the international obligations incumbent upon the organs of the occupied State which they are replacing.<sup>113</sup> So the conclusion is that in cases such as those described above the territorial State is obviously deprived of part of its organization, a part which previously made it apt both to discharge and violate certain of its international obligations. Its capacity to commit internationally wrongful acts is thereby automatically curtailed to that extent.

63. The question now arises whether or not the situations which have been mentioned should be taken into account in formulating a general rule with regard to the capacity of a State to commit internationally wrongful acts. The Commission may be inclined to take a negative view, owing to the attitude which was adopted in connexion with capacity to conclude treaties when the law of treaties was considered,<sup>114</sup> but some reflection seems necessary if false analogies are not to be drawn. As already pointed out (see para. 57 above), capacity to conclude treaties is a subjective legal situation, a proper legal power conferred on a State by objective law. This is not the case with what is called "capacity" to commit internationally wrongful acts, which is merely a factual condition, a material possibility of engaging in conduct contrary to, instead of consonant with, an international obligation. In connexion with the capacity of States to conclude

treaties, the Commission was quite right to take the view that the so-called cases of incapacity or even of limitation of capacity are in fact non-existent. This attitude also had a definite political connotation, since the question of incapacity to act had been discussed precisely in connexion with those relationships of dependence which had been held to be no longer acceptable under the present conditions of international society. The position is obviously quite different, however, in cases of limitation of capacity to engage in conduct contrary to legal obligations. Furthermore, these cases mainly arise in circumstances which, unfortunately, are still far from having disappeared in the practice of inter-State relations. In particular, care must be taken to avoid the mistake of thinking that a favourable attitude is being adopted towards a State which is in the position of having to suffer the presence and activities in its territory of an organization other than its own. In point of fact, an unfavourable attitude would be taken towards that State if such a situation were ignored and an internationally wrongful act were imputed to it, an act of which its organization is not guilty, because it has been committed by elements belonging to an extraneous organization. Similarly, there seems to be no reason why a State whose organs have in fact committed a wrongful act should enjoy impunity and be given a pretext for avoiding the consequences of the imputation of a wrongful act which is undisputedly its own. All these reasons tend towards the adoption of a positive solution.

64. The Commission will have ample time to take a decision on this matter after considering the various implications of the problem. The question has been raised here, and the above comments put forward, to enable it to reach a fully informed conclusion. Consequently, at the present stage, it seems appropriate that the formulation of the rule which is the subject of this section should include a paragraph whose purpose is precisely to take account of the special situations described above. The wording proposed for the formulation of the rule is therefore as follows:

### Article III

#### *Capacity to commit internationally wrongful acts*

1. Every State possesses capacity to commit internationally wrongful acts.
2. This capacity may exceptionally be limited, in particular situations, by the fact that the organs of a State have been replaced, in a given sphere of activity, by those of another subject or subjects of international law acting on its territory.

<sup>112</sup> This point needs to be emphasized for the sake of distinguishing these cases from the circumstances, which can also arise in similar situations, where a State may incur *indirect* responsibility, i.e., responsibility for another's act and not its own act.

<sup>113</sup> See R. Ago, "Occupazione bellica . . .", *Comunicazioni e Studi (op. cit.)*, p. 169.

<sup>114</sup> See the discussion on this topic at the Commission's fourteenth session: *Yearbook of the International Law Commission, 1962*, vol. I, pp. 57 *et seq.*



## MOST-FAVOURED-NATION CLAUSE

[Agenda item 5]

### DOCUMENT A/CN.4/228 and Add.1

Second report on the most-favoured-nation clause, by Mr. Endre Ustor, Special Rapporteur

[Original text: English]  
[9 March and 18 May 1970]

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## ABBREVIATIONS

AI	<i>Analytical Index (GATT)</i>
BIRPI	United International Bureaux for the Protection of Intellectual Property
BISD	<i>Basic Instruments and Selected Documents (GATT)</i>
ECA	Economic Commission for Africa
ECAFE	Economic Commission for Asia and the Far East
ECE	Economic Commission for Europe
ECLA	Economic Commission for Latin America

EEC	European Economic Community
EFTA	European Free Trade Association
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
I.C.J.	International Court of Justice
IDA	International Development Association
IFC	International Finance Corporation
IMCO	Inter-Governmental Maritime Consultative Organization
IMF	International Monetary Fund
ITO	International Trade Organization
ITU	International Telecommunication Union
LAFTA	Latin American Free Trade Association
OAS	Organization of American States
OCAM	African and Malagasy Common Organization
OECD	Organisation for Economic Co-operation and Development
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UPU	Universal Postal Union
WHO	World Health Organization
WMO	World Meteorological Organization

## Introduction

1. In the history of the most-favoured-nation clause the period after the Second World War witnesses two major developments of special significance. One is that the International Court of Justice has developed an extensive jurisprudence on the operation of the clause as it appears in bilateral treaties.

2. The other is of a wider importance. Tendencies to organize world trade on a multilateral basis employ the traditional tool of the most-favoured-nation clause and try to adapt its functioning to the requirements of a changed environment—to the necessities of a community of States belonging to different social and economic systems and standing on different levels of development.

3. The present report, the purpose of which is to continue the efforts to identify the rules of contemporary international law pertaining to the most-favoured-nation clause, will accordingly be divided into two parts. The first part attempts to present an analytical survey of the views held by the parties and the judges on the nature and function of the clause in the three cases dealt with by the International Court of Justice. The second part is based on the replies from the organizations and interested agencies consulted by the Secretary-General. A greater portion of this part will reflect the existing problems surrounding the clause as a regulator of international trade.

4. It is believed that in this way the report will conform to the instructions given to the Special Rapporteur by the International Law Commission.<sup>1</sup>

<sup>1</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 234, document A/7610/Rev.1, para. 89.

## Part I

### The jurisprudence of the International Court of Justice in respect of the most-favoured-nation clause

5. In his first report on the most-favoured-nation clause<sup>2</sup> the Special Rapporteur suggested that his next report give an account of the three cases dealt with by the International Court of Justice pertaining to the most-favoured-nation clause: the *Anglo-Iranian Oil Company Case (jurisdiction)* [1952],<sup>3</sup> the *Case concerning the rights of nationals of the United States of America in Morocco* [1952]<sup>4</sup> and the *Ambatielos Case (merits: obligation to arbitrate)* [1953].<sup>5</sup> This suggestion was adopted by the International Law Commission at its twenty-first session.<sup>6</sup>

6. The reasons for the advisability and even necessity of studying the three cases in question were given by a French author as follows:

The decisions of the International Court of Justice constitute the source of an international case law on points which have given rise to serious difficulties in the past and which involve the general theory of the clause; the solution found for their difficulties should therefore be specified as they go beyond the scope of the cases which they resolve.<sup>7</sup>

7. An English author writing on the same cases states that in respect of the rules of international law pertaining

<sup>2</sup> *Ibid.*, p. 159, document A/CN.4/213, para. 9.

<sup>3</sup> *I.C.J. Reports 1952*, p. 93.

<sup>4</sup> *Ibid.*, p. 176.

<sup>5</sup> *I.C.J. Reports 1953*, p. 10.

<sup>6</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 234, document A/7610/Rev. 1, para. 89 and foot-note 92.

<sup>7</sup> C. Rossillion, "The most-favoured-nation clause in case law of the International Court of Justice", *Journal du droit international (Paris)*, vol. 82, No. 1 (janv.-mars 1955), p. 77.

to the most-favoured-nation clause these three cases are the real *sedes materiae*.<sup>8</sup>

8. In connexion with the *Ambatielos Case* reference will be made also to the Award handed down on 6 March 1956<sup>9</sup> of the Commission of Arbitration established by the agreement of 24 February 1955 between the Governments of Greece and the United Kingdom for the arbitration of the *Ambatielos* claim.

9. A relatively large amount of legal literature has evolved around the cases in question.<sup>10</sup> In some instances reference will be made to pertinent portions of related works. Some of these works deal with the problems involved in greater detail than the present report, whose aim is limited to tracing only those aspects which could possibly lead to ascertaining the existing rules regarding the most-favoured-nation clause.

#### A. THE ANGLO-IRANIAN OIL COMPANY CASE

10. In 1933, an agreement was concluded between the Government of Iran and the Anglo-Iranian Oil Company. In 1951, laws were passed in Iran for the nationalization of the oil industry. These laws resulted in a dispute between Iran and the Anglo-Iranian Oil Company. The United Kingdom took up the case of the latter and instituted proceedings before the International Court of Justice on 26 May 1951.

11. Iran disputed the Court's jurisdiction on the following ground: according to a declaration made by Iran under article 36, paragraph 2 of the Statute of the International Court of Justice, the Court had jurisdiction only when a dispute related to the application of a treaty or convention accepted by Iran after the ratification of the declaration, which took place on 19 September 1932.

12. The United Kingdom questioned this interpretation of the Iranian declaration, but contended that even if the

Court accepted this construction it would have had jurisdiction in the case. It invoked three treaties concluded by Iran after 1932. Among these the Treaty of Friendship, Establishment and Commerce of 1934 between Iran and Denmark contained the following article IV:

[*Translation from French*] The nationals of each of the High Contracting Parties shall, in the territory of the other, be received and treated, as regards their persons and property, in accordance with the principles and practice of ordinary international law. They shall enjoy therein the most constant protection of the laws and authorities of the territory for their persons, property, rights and interests.<sup>11</sup>

The Establishment Conventions concluded by Iran with Switzerland and Turkey in 1934 and 1937, respectively, each contained a similar article.

13. The United Kingdom relied on these three treaties by virtue of the most-favoured-nation clauses contained in article IX of the Treaty concluded between the United Kingdom and Iran in 1857, and in article II of the Commercial Convention concluded between the United Kingdom and Iran in 1903. Article IX of the Treaty of 1857 read:

The High Contracting Parties engage that, in the establishment and recognition of Consuls-General, Consuls, Vice-Consuls, and Consular Agents, each shall be placed in the dominions of the other on the footing of the most-favoured nation; and that the treatment of their respective subjects, and their trade, shall also, in every respect, be placed on the footing of the treatment of the subjects and commerce of the most-favoured nation.<sup>12</sup>

Article II of the Commercial Convention of 1903 provided as follows:

[*Translation from French*] [...] It is formally stipulated that British subjects and importations in Persia, as well as Persian subjects and Persian importations in the British Empire, shall continue to enjoy in all respects, the régime of the most-favoured nation [...] <sup>13</sup>

#### 1. THE MECHANISM OF THE MOST-FAVOURLED-NATION CLAUSE: THE ORIGIN OF THE RIGHTS OF THE BENEFICIARY

14. It was argued by the United Kingdom Government that the conduct of the Iranian Government towards the Anglo-Iranian Oil Company constituted a breach of the principles and practice of international law which, by its treaty with Denmark, Iran promised to observe towards Danish nationals, and which, by the operation of the most-favoured-nation clause contained in the treaties between Iran and the United Kingdom, Iran became bound to observe towards British nationals. Consequently, the argument continued, the dispute which the United Kingdom had brought before the Court concerned situations or facts relating directly or indirectly to the application of a treaty—the Treaty of 1934 between Denmark and Iran—accepted by Iran after the ratification of her Declaration.<sup>14</sup>

<sup>8</sup> G. Schwarzenberger, *International Law as applied by International Courts and Tribunals*, 3rd ed. (London, Stevens & Sons, 1957), p. 240.

<sup>9</sup> United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No.: 1963.V.3), p. 91.

<sup>10</sup> In addition to those quoted above see, *inter alia*, the following works: J. de Soto, "Note on the judgment of the International Court of Justice of 27 August 1952", *Journal du droit international* (Paris, 1953), vol. 80, No. 3, p. 516; G. Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: Points of Substantive Law. Part II"; *British Year Book of International Law, 1955-56* (London, 1957), vol. XXXII, p. 20; B. Cheng, "Rights of United States Nationals in the French Zone of Morocco", *The International and Comparative Law Quarterly* (London, 1953), vol. 2, pp. 354-367; S. Borisov, "Dva sudebnykh dela v mezhdunarodnom sude OON v 1952 g." (Two cases before the International Court of Justice in 1952), *Sovietskoe gosudarstvo i pravo* (Soviet State and Law) [Moscow, 1953], No. 4, p. 153; G. Haraszti, *The Practice of the International Court of Justice, 1946-1956* [in Hungarian] (Budapest, 1958); J. H. W. Verzijl, *The Jurisprudence of the World Court* (Leyden, A. W. Sijthoff, 1966); E. Hambro, "The *Ambatielos* Arbitral Award", *Archiv des Völkerrechts* (Tübingen, 1957), vol. 6, No. 2, p. 152; R. Pinto, "The *Ambatielos* Award", *Journal du droit international* (Paris, 1957), vol. 84, No. 3, p. 541.

<sup>11</sup> Quoted in *I.C.J. Reports 1952*, p. 108.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, pp. 108-109.

15. The Iranian Party—through its advocate, M. Henri Rolin—strongly objected to the contention of the United Kingdom. Referring to the treaties concluded by Iran after 1932, M. Rolin said in his statement made on 11 June 1952:

[*Translation from French*] I recognize, Gentlemen, that it was ingenious to have thus assumed that these treaties could be invoked as a basis for your jurisdiction. I imagine that the reason why those ten treaties were mentioned, rather than the treaties of 1857 and 1903, was precisely so as to avoid the grounds of incompetence which I would have deduced from the date of the treaties of 1857 and 1903. But ingenious though that attempt is, I really do not think you are deceived by it, because it is not true that the United Kingdom request is based on treaties concluded between Iran and third States, to which the United Kingdom was not a party. Taken in themselves, these treaties are *res inter alios acta* for the United Kingdom. It derives absolutely no right from these treaties. It has absolutely no title to ask you for an interpretation and an application of these treaties. It can invoke these treaties only in relation to treaties to which it is itself a party, the treaties of 1857 and 1903, and this conjuring trick with the treaties of 1857 and 1903 is not sufficient for it to be able to present the necessary treaties as the basis of its request.<sup>15</sup>

16. Sir Lionel Heald, Counsel of the British Party, held the opposite view in his argument presented on 13 June 1952:

[...] A most-favoured-nation clause is in essence by itself a clause without content; it is a contingent clause. If the country granting most-favoured-nation treatment has no treaty relations at all with any third State, the most-favoured-nation clause remains without content. It acquires its content only when the grantor State enters into relations with a third State, and its content increases whenever fresh favours are granted to third States [...].<sup>16</sup>

17. To this M. Rolin had the following answer:

[*Translation from French*] [...] there is a substantial legal error in the British argument. For if a most-favoured-nation clause was really a clause without content, giving rise to no right or obligation, it would be non-existent. I do not need to tell you, Gentlemen, that that is not the case. On the contrary, it involves a commitment whose object is real. True, it is not determined and is liable to vary in extent according to the treaties concluded later, but that is enough to make it determinable. Thus the role of later treaties is not to give rise to new obligations towards the State beneficiary of the clause but to alter the scope of the former obligation. The latter nevertheless remains the root of the law, the source of the law, the origin of the law, on which the United Kingdom Government is relying in this case.<sup>17</sup>

18. The last word in this debate was said by Sir Eric Beckett on behalf of the United Kingdom as follows:

We claim to be entitled, [...] to rely upon the treaty concluded in 1934 between Persia and Denmark. It is, of course, undeniable that the United Kingdom is entitled to rely upon all the provisions of that treaty only by reason of the treaties of 1857 and 1903 between herself and Persia containing most-favoured-nation clauses. Professor Rolin is quite right in saying that those treaties are the root of the obligation. But all we are concerned with here is to show, on the assumption that we are restricted to treaties subsequent to 1932, that there is a treaty subsequent to that date

to the application of which the situations or facts giving rise to the present dispute directly or indirectly relate, and it is the application of the Danish treaty which is in dispute. There is no dispute as to the application of the treaties of 1857 and 1903. What is in issue, to use Professor Rolin's metaphor, is not the root but the branch. One can agree with almost all that Professor Rolin said [...], but it is irrelevant to the question which the Court has to consider, which is not "what are the treaties which confer on Great Britain the rights in question", but "what are the treaties whose application is now in dispute". Professor Rolin recognizes that later treaties with third States can increase the content of the most-favoured-nation clause, and, indeed, may in certain circumstances give it content which it did not have before. In the present case, the rights conferred on Denmark by the 1934 Treaty became part of the content of the most-favoured-nation clause for the first time in 1934 and it is with regard to that new content that the dispute arises; that is, the dispute relates to the application not of the clause, which has remained unaltered since 1857, but of the 1934 Treaty which gives it a new content.<sup>18</sup>

19. The majority of the members of the Court upheld the thesis of Iran. Indeed it resounded the words of Henri Rolin as follows:

The treaty containing the most-favoured-nation clause is the basic treaty upon which the United Kingdom must rely. It is this treaty which establishes the juridical link between the United Kingdom and a third-party treaty and confers upon that State the rights enjoyed by the third party. A third party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*.<sup>19</sup>

20. The dissenting Judges held otherwise. The argument of Judge Hackworth was the most detailed and explicit:

The conclusion that the treaty containing the most-favoured-nation clause is the *basic* treaty upon which the United Kingdom must rely amounts, in my judgment, to placing the emphasis on the wrong treaty, and losing sight of the principal issue. [...] The provisions with respect to the application of the principles of international law are not to be found in the most-favoured-nation clause of the earlier treaties of 1857 and 1903 between Iran and the United Kingdom, but are embodied in the later treaties between Iran and Denmark of 1934; between Iran and Switzerland of that same year, and between Iran and Turkey of 1937. It is to these treaties and not to the most-favoured-nation clause that we must look in determining the rights of British nationals in Iran. These then are the *basic* treaties. The most-favoured-nation clause in the earlier treaties is merely the operative part of the treaty structure involved in this case. It is the instrumentality through which benefits under the later treaties are derived. It is in these later treaties that we find the *ratio decidendi* of the present issue.<sup>20</sup>

21. Judge Hackworth then examined the provisions of the treaties in question and the Iranian declaration accepting the compulsory arbitration of the Court, and concluded:

All that the Declaration requires in order that the dispute shall fall within the competence of the Court, is that it shall relate to the application of treaties or conventions accepted by Iran subsequent to the ratification of the Declaration, and nothing more.

The Danish Treaty answers this description. It is in that Treaty and not in the most-favoured-nation clause that the substantive

<sup>15</sup> *I.C.J. Pleadings*, Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), p. 492.

<sup>16</sup> *Ibid.*, p. 533.

<sup>17</sup> *Ibid.*, p. 616.

<sup>18</sup> *Ibid.*, pp. 648-649.

<sup>19</sup> *I.C.J. Reports 1952*, p. 109.

<sup>20</sup> *Ibid.*, pp. 137-138.

rights of British nationals are to be found. Until that Treaty was concluded, the most-favoured-nation clauses in the British-Persian treaties were but promises, in effect, of non-discrimination, albeit binding promises. They related to rights *in futuro*. There was a right to claim something but it was an inchoate right. There was nothing to which it could attach itself unless and until favours should be granted to nationals of another country. But when Iran conferred upon Danish nationals by the Treaty of 1934 the rights to claim treatment "in accordance with the principles and practice of ordinary international law", the right thereupon *ipso facto* became available to British nationals. This new right—based on international law concepts—came into existence not by virtue of the earlier treaties alone or even primarily, but by them plus the new treaties which gave them vitality. The new treaty is, in law and in fact, the fountain-head of the newly-acquired rights.

[...] It is the later treaty, and not the most-favoured-nation clause, that embraces the assurance upon which reliance is sought to be placed.<sup>21</sup>

22. The dissenting opinions of Judge Read<sup>22</sup> and Judge Levi Carneiro<sup>23</sup> followed a similar line of thinking.

23. According to Fitzmaurice,<sup>24</sup> the view of Judge Hackworth may have been justified in relation to the rather special facts of the case. However, he continues: "there can be little doubt that the Court's was the correct view as a matter of general principle". He gives a graphic picture of the relation between the treaty containing the most-favoured-nation clause and the subsequent, third-party treaty. "If the later treaty can be compared to the hands of a clock that point to the particular hour, it is the earlier treaty which constitutes the mechanism that moves the hands round."

24. The majority view of the Court is upheld by G. Haraszti.<sup>25</sup> He considers that the opinion of Judge Hackworth put things upside down.

## 2. THE MECHANISM OF THE MOST-FAVOURED-NATION CLAUSE: THE CLAUSE AND THE "PACTA TERTIIS" RULE

25. The decision of the Court is of great theoretical importance. In the legal doctrine the operation of the most-favoured-nation clause was often presented as an exception to the rule *pacta tertiis nec nocent, nec prosunt*, i.e., that treaties only produce effects as between the contracting parties.<sup>26</sup>

26. Had the Court adopted this view it ought to have held that a legal relation between the United Kingdom and Iran came into existence at the moment when Iran concluded a treaty with a third State. In this case it could then be held that the conclusion of a treaty between two States would produce, to the benefit of a third State (the beneficiary of the most-favoured-nation clause), a direct legal title in the creation of which it took no part.<sup>27</sup>

<sup>21</sup> *Ibid.*, pp. 140-141.

<sup>22</sup> *Ibid.*, pp. 145-147.

<sup>23</sup> *Ibid.*, pp. 157-158.

<sup>24</sup> G. Fitzmaurice, *op. cit.*, pp. 87-88.

<sup>25</sup> G. Haraszti, *op. cit.*, p. 162.

<sup>26</sup> See, for example, P. Fauchille, *Traité de droit international* (Paris, Librairie Rousseau, 1926), t. I, 3rd part, p. 359, and L. Oppenheim, *International Law: A Treatise*, 8th ed. [Lauterpacht] (London, Longmans, Green and Co., 1955), vol. I, pp. 928-929, para. 522.

<sup>27</sup> Cf. C. Rossillion, *op. cit.*, p. 89.

27. The majority of the Court followed the line of thinking of those authors who held the opposite view, as for instance that of Accioly who observes:

[Translation from French] The rights or advantages of a State beneficiary of the most-favoured-nation clause are derived not from the agreement or treaty to which that State was not a party, but from the aforementioned clause to which it was a party. It is by virtue of that clause that it acquires the right to claim for itself the advantages or rights stipulated in the treaties in which it took no part.<sup>28</sup>

28. An English writer explains the relation between the *pacta tertiis* rule and the most-favoured-nation clause in the following graphic way:

In principle, treaties apply exclusively between the contracting parties. Thus, a contracting party cannot derive rights from treaties concluded between another contracting party and third States. Most-favoured-nation treaties do not form an exception to this rule. On the contrary, they confirm it. They owe their existence to this rule. Merely by way of an abbreviation it is permissible to state that a beneficiary of most-favoured-nation treatment is entitled to the benefits which the other contracting party has granted, or may grant, to third States.

In reality, the beneficiary claims only under his own treaty with the other contracting party and by virtue of the most-favoured-nation clause in his own treaty. This gives him the right to incorporate into his own treaty all rights and favours under treaties in the same field between the other contracting party and third States while such treaties happen to be operative.

The most-favoured-nation standard is an ingenious form of legal shorthand. This drafting device [...] contributes greatly to the rationalization of the treaty-making process and leads to the automatic self-revision of treaties which are based on the most-favoured-nation standard. It makes unnecessary the incorporation in the treaty between the grantor and the beneficiary of most-favoured-nation treatment of any of the relevant treaties between the grantor and third States and their deletion whenever such treaties cease to be in force. So long as this last-mentioned aspect of the matter is kept in mind, most-favoured-nation clauses are correctly described as drafting (and deletion) by reference. It depends entirely on the formulation of each particular most-favoured-nation clause whether a beneficiary is entitled not only to the advantages granted by the promisor to third States by way of treaties but also to advantages enjoyed *de facto* by third States.<sup>29</sup>

29. The International Law Commission, in its report covering the work of its sixteenth session,<sup>30</sup> pointed out that while recognizing the importance of not prejudicing in any way the operation of most-favoured-nation clauses, it did not consider that these clauses are in any way touched by those draft articles on the law of treaties which deal with the relation of treaties to third States (articles 58 to 61 of the 1964 draft). The Commission maintained this position in the report on the work of its eighteenth session.<sup>31</sup>

30. The Vienna Conference on the Law of Treaties upheld this view. At the fourteenth plenary meeting

<sup>28</sup> H. Accioly, *Traité de droit international public* (Paris, Recueil Sirey, 1941), t. II, p. 479. For a similar view, see M. Sibert, *Traité de droit international public* (Paris, Librairie Dalloz, 1951), t. II, p. 255.

<sup>29</sup> G. Schwarzenberger, *op. cit.*, p. 243.

<sup>30</sup> See *Yearbook of the International Law Commission, 1964*, vol. II, p. 176, document A/5809, para. 21.

<sup>31</sup> *Ibid.*, 1966, vol. II, p. 177, document A/6309/Rev. 1, part II, para. 32.

held on 7 May 1969, the President of the Conference pronounced that article 32, paragraph 1 [of the 1966 draft of the International Law Commission] "did not affect the interests of States under the most-favoured-nation system."<sup>32</sup>

## B. THE CASE CONCERNING RIGHTS OF NATIONALS OF THE UNITED STATES IN MOROCCO

31. On 30 December 1948, when a greater part of Morocco was still a French protectorate, the French authorities in the protectorate issued a decree which imposed a system of licence control in respect of imports not involving an official allocation of currency, and limited these imports to a number of products indispensable to the Moroccan economy. The United States protested against this measure on the ground that it affected its rights to most-favoured-nation treatment under treaties with Morocco and contended that in accordance with these treaties no Moroccan law or regulation could be applied to its nationals in Morocco without its previous consent. In the ensuing dispute the United States vindicated a number of other rights and privileges for its nationals. As protracted negotiations did not yield results, France instituted proceedings on 27 October 1950, in the course of which the United States submitted counter-claims.

32. The Court had to pronounce judgement on seven substantial counts: conformity of the Moroccan import regulations with the international régime of Morocco; extent of the American consular jurisdiction in Morocco as regards disputes between American citizens or protected persons; extent of that same jurisdiction as regards actions against such persons; existence and possible extent of the right of assent of the United States to the application to American citizens of Moroccan laws; existence and extent of fiscal immunity of United States citizens in Morocco; legality of consumption taxes as regards United States nationals; rules applicable to customs duties.

33. The most-favoured-nation clauses whose interpretation and operation was in the forefront of the controversy in the proceedings appeared in articles 14 and 24 of the Treaty between Morocco and the United States of September 16, 1836. These clauses read as follows:

Art. 14. The commerce with the United States, shall be on the same footing as is the commerce with Spain, or as that with the most favored nation for the time being; [ . . . ]

Art. 24. [ . . . ] And it is further declared, that whatever indulgence, in trade or otherwise, shall be granted to any of the Christian Powers, the citizens of the United States shall be equally entitled to them.<sup>33</sup>

<sup>32</sup> See *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No.: E.70.V.6), p. 63, para. 36.

<sup>33</sup> Morocco Case (France v. U.S.A.), *I.C.J. Pleadings, 1952* vol. I, pp. 511 and 513.

34. Several references were made also to article 17 of the twelve-Power Convention of Madrid of 3 July 1880 which reads as follows:

The right to the treatment of the most favoured nation is recognized by Morocco as belonging to all the powers represented at the Madrid conference.<sup>34</sup>

and to the Preamble of the General Act and Additional Protocol of Algeciras of 7 April 1906 in which the participants expressed their adherence to the

triple principle of the sovereignty and independence of His Majesty the Sultan [of Morocco], the integrity of his domains, and economic liberty without any inequality, [ . . . ].<sup>35</sup>

### 1. THE CONTINGENT CHARACTER OF THE MOST-FAVoured-NATION CLAUSE

[Interpretation in accordance with the intention of the parties—No special rules of construction for certain categories of States—The clause as a means to maintain fundamental equality without discrimination]

35. In respect of the rights of the United States to the consular jurisdiction in Morocco, the French Party referred to the fact that all States which possessed such rights have renounced them and subsequently abolished their consular tribunals. The last such renunciation occurred in 1937 when the United Kingdom in a treaty concluded with France in London, on 29 July 1937, renounced "all rights and privileges of a capitulatory character in the French Zone of the Shereefian Empire"<sup>36</sup> and agreed to the submission of all British subjects in the French Zone of Morocco to the jurisdiction of the courts which have jurisdiction over French citizens and companies.<sup>37</sup>

36. The French memorial of 1 March 1951 explained the position of France as follows:

[*Translation from French*] The Government of the French Republic claims that this United Kingdom renunciation has had obvious juridical consequences with regard to the status of United States nationals in Morocco. The effect has been to restore the latter to the juridical situation stemming from their own Treaty of 1836; since 1 January 1938, date of the entry into force of the Agreement of 1937, United States nationals and protected persons no longer benefit from any rights other than strictly those formally included in the Treaty of 16 September 1836.

It is indeed self-evident—and the Government of the French Republic does not think it needs to dwell on this point—that the most-favoured-nation clause cannot create any permanently acquired rights for the beneficiary; it only means that the latter can never in the future be less favoured than a third party, and hence that it may be raised to the level of a more favoured third party but only to the extent, and consequently for the period of time and within the territorial context, in which these advantages exist for that third party itself. This interpretation, which has always been accepted, of the juridical effects of the most-favoured-nation clause, is the only one compatible with the definite meaning of such a clause, which is to prevent its beneficiary from being

<sup>34</sup> Quoted in *ibid.*, p. 574.

<sup>35</sup> Quoted in *ibid.*, p. 578.

<sup>36</sup> League of Nations, *Treaty Series*, vol. CLXXXIV, p. 353.

<sup>37</sup> *Ibid.*, p. 355.

accorded treatment less favourable than that granted to other nations, but not to favour it more than others.<sup>38</sup>

37. The United States in its counter-memorial of 20 December 1951 concedes:

[*Translation from French*] that the most-favoured-nation clause theory on which the French Government predicates its argument is a valid modern theory. It agrees that, as a matter of general principle, in modern practice, the most-favoured-nation clause does not continue in force rights acquired only through its effect, after the termination of the treaty which contained such rights. The Government of the United States, however, does not consider that this principle is controlling in the analysis of the most-favoured-nation clause in the Moroccan treaties.<sup>39</sup>

Here follow lengthy references to authorities. Relying on these and mostly on an article of N. Politis, an arbitral decision dated 8 April 1901 and on an extract from E. Nys, *Le droit international*, the United States submits, accordingly, that:

in the absence of evidence to the contrary, the most-favoured-nation clause in treaties of capitulations with Mohammedan countries did not evolve, like the clause in European-American practice, into a device exclusively designed to guarantee to its beneficiary a position of equality with third States at any given time and to continue in force rights acquired through its effect only for the duration of the treaties with third States containing such rights.<sup>40</sup>

38. This American argument was rejected by the majority of the members of the Court in respect of both the question of consular jurisdiction and the question of fiscal immunities. The Court interpreted the most-favoured-nation clauses in the treaties between the United States and Morocco in accordance with the intention of the parties and the general nature and purpose of the most-favoured-nation clauses. It rejected the contention of special rules of construction.

39. In the words of the Judgement of the Court

[The contention of the United States] was based on the view that the most-favoured-nation clauses in treaties made with countries like Morocco should be regarded as a form of drafting by reference rather than as a method for the establishment and maintenance of equality of treatment without discrimination amongst the various countries concerned. According to this view, rights or privileges which a country was entitled to invoke by virtue of a most-favoured-nation clause, and which were in existence at the date of its coming into force, would be incorporated permanently by reference and enjoyed and exercised even after the abrogation of the treaty provisions from which they had been derived.

From either point of view, this contention is inconsistent with the intentions of the parties to the treaties now in question. This is shown both by the wording of the particular treaties, and by the general treaty pattern which emerges from an examination of the treaties made by Morocco with France, the Netherlands, Great Britain, Denmark, Spain, United States, Sardinia, Austria, Belgium and Germany over the period from 1631 to 1892. These treaties show that the intention of the most-favoured-nation clauses was to establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned.<sup>41</sup>

<sup>38</sup> Morocco Case (France v. U.S.A.), *I.C.J. Pleadings*, 1952, vol. I, p. 60.

<sup>39</sup> *Ibid.*, p. 372.

<sup>40</sup> *Ibid.*, p. 378.

<sup>41</sup> *I.C.J. Reports* 1952, pp. 191-192.

40. The Court rejected on the same grounds another United States contention that, as the United States most-favoured-nation clauses apply to the whole of Morocco and the British renunciation of the right of her consular jurisdiction was limited to the French Zone, juridically the United States "which still treats Morocco as a single country" was entitled to enjoy those rights in Morocco, both in the French and in the Spanish Zones. The Court repeating itself held that

This result would be contrary to the intention of the most-favoured-nation clauses to establish and maintain at all times fundamental equality without discrimination as between the countries concerned.<sup>42</sup>

41. In the matter of fiscal immunities the Court followed the same line of thought as in that of consular jurisdiction. Concerning the counter-claim of the United States relating to the question of immunity from Moroccan taxes in general and certain consumption taxes in particular, the Court held—by the same majority of 6 votes to 5 as follows:

[*Translation from French*] It is submitted on behalf of the United States that the most-favoured-nation clauses in treaties with countries like Morocco were not intended to create merely temporary or dependent rights, but were intended to incorporate permanently these rights and render them independent of the treaties by which they were originally accorded. It is consequently contended that the right to fiscal immunity accorded by the British General Treaty of 1856 and the Spanish Treaty of 1861, was incorporated in the treaties which guaranteed to the United States most-favoured-nation treatment, with the result that this right would continue even if the rights and privileges granted by the Treaties of 1856 and 1861 should come to an end.

For the reasons stated above in connexion with consular jurisdiction, the Court is unable to accept this contention. It is not established that most-favoured-nation clauses in treaties with Morocco have a meaning and effect other than such clauses in other treaties or are governed by different rules of law. When provisions granting fiscal immunity in treaties between Morocco and third States have been abrogated or renounced, these provisions can no longer be relied upon by virtue of a most-favoured-nation clause.<sup>43</sup>

42. A French author gives the following picture of the operation of the clause:

[...] the clause can be likened into a buoy which keeps the swimmer to maintain himself at the highest level of obligations accepted by the conceding State with regard to a foreign State; if he sinks the buoy cannot be transformed into a balloon to keep the beneficiary of the clause dangling as it were above the general level of rights exercised by the other States.<sup>44</sup>

## 2. THE CONTINGENT CHARACTER NOT "JUS COGENS"

43. It follows from the finding of the Court that the contingent character of the most-favoured-nation clause is but a presumption. The parties to a treaty are free to draft a clause in such a way that rights and privileges which a country is entitled to invoke by virtue of a most-

<sup>42</sup> *Ibid.*, p. 192.

<sup>43</sup> *Ibid.*, p. 204.

<sup>44</sup> Rossillion, *op. cit.*, p. 107.

favoured-nation clause, and which are in existence at the date of its coming into force, will be incorporated permanently by reference and enjoyed and exercised even after the abrogation of the treaty provisions from which they have been derived. Such intention should, however, be clearly reflected in the text of the clause, which, if drafted in this way, would rather have the nature of a preference.

44. In this sense de Soto States:

It is indeed possible that the parties intended to make the clause a determining factor but for the standard parts of one treaty to be finally incorporated in another by the effects of the clause, the exceptional demand made upon the clause would have to be clearly expressed for, admittedly, such a determining role runs counter to the classical political aim of the clause since such incorporation would involve, not equality, but latently economic or legal inequality, once the treaty under which the clause was operative lapsed: the sliding scale is thus blocked on its upward movement.<sup>45</sup>

3. THE POSITION OF THE BENEFICIARY OF A MOST-FAVOURLED-NATION CLAUSE IN CASES WHERE THE RIGHTS OF THE THIRD STATE EXIST "DE JURE" BUT CANNOT BE EXERCISED BY IT "DE FACTO"

45. The above problem is exposed in the Judgement of the Court as follows:

The third contention of the United States is based upon the nature of the arrangements which led to the termination of Spanish consular jurisdiction in the French Zone. By a Convention between France and Spain of November 27th, 1912, provision was made for the exercise by Spain of special rights and privileges in the Spanish Zone. By a bilateral Declaration between France and Spain of March 7th, 1914, Spain surrendered its jurisdictional and other extraterritorial rights in the French Zone, and provision was made for the subsequent surrender by France of similar rights in the Spanish Zone. This was accomplished by a bilateral Declaration between France and Spain of November 17th of the same year.

The United States contends that, as both the Convention of 1912 and the Declarations of 1914 were agreements between France and Spain, and as Morocco was not named as a party to either agreement, the rights of Spain under the earlier provision still exist *de jure*, notwithstanding that there may be a *de facto* situation which temporarily prevents their exercise.

Even if this contention is accepted, the position is one in which Spain has been unable to insist on the right to exercise consular jurisdiction in the French Zone since 1914. The rights which the United States would be entitled to invoke by virtue of the most-favoured-nation clauses would therefore not include the right to exercise consular jurisdiction in the year 1950. They would be limited to the contingent right of re-establishing consular jurisdiction at some later date in the event of France and Spain abrogating the agreements made by the Convention of 1912 and the Declarations of 1914.<sup>46</sup>

46. The Court found that France had the power to conclude treaties binding Morocco and held that

these agreements bound and enured to the benefit of Morocco and the Spanish rights as regards consular jurisdiction came to an end *de jure* as well as *de facto*.<sup>47</sup>

47. The Court then examined the wording of the Declarations in order to establish whether they were intended as a surrender or renunciation of all the rights and privileges arising out of the capitulatory régime or whether they must be considered as temporary undertakings not to claim those rights and privileges so long as the guarantees for judicial equality are maintained in the French Zone by the tribunals of the Protectorate and so long as the corresponding guarantees are maintained in the Spanish Zone. The Court held:

The question is academic rather than practical. Even if the words in question should be construed as meaning a temporary undertaking not to claim the rights and privileges, the fact remains that Spain, in 1950, as a result of these undertakings was not entitled to exercise consular jurisdiction in the French Zone. It follows that the United States would be equally not entitled to exercise such jurisdiction in the French Zone in the year 1950.<sup>48</sup>

Further the Court examined the Declarations as to the real intention of the Parties and came to the conclusion that they were meant as a definite surrender of the rights of Spain. Consequently the Court found that the United States was not entitled to invoke, by virtue of the most-favoured-nation clauses, those provisions of the 1861 Spanish Treaty which concerned consular jurisdiction.<sup>49</sup>

48. With regard to these points, the dissenting Judges came to a different conclusion. They held that the abrogation of the Spanish Treaty of 1861 has legally not taken place and what really happened was only a renunciation on behalf of Spain to claim the rights to jurisdiction and "to renounce claiming a right may be nothing more than the suspension of the exercise of that right".<sup>50</sup> The joint dissenting opinion held:

In these conditions, the most-favoured-nation clauses granted to the United States by the Treaty of 1836, when applied to the Treaty of 1861, viewed in the light of the 1914 Declarations, may have the effect of extending to the United States all the rights and favours granted by that Treaty, notwithstanding the suspension of their exercise by Spain.

It is recognized that the failure by a Power, to which a favour has been granted, to exercise that favour does not affect or prejudice the right of any other Power entitled to that favour by virtue of a most-favoured-nation clause. For all useful purposes, suspending the exercise of a favour is equivalent to failure to exercise it. Therefore, nothing would or should preclude the United States from exercising the capitulatory rights granted by the Treaty of 1861.<sup>51</sup>

49. As to the theoretical point involved, it is essential—according to Schwarzenberger<sup>52</sup>—to distinguish clearly between situations in which third States fail to exercise their rights although remaining entitled to do so, and others in which, by renunciation or otherwise, they have temporarily or definitively forfeited their rights in law. While in the former case, the rights of the beneficiary remain unaffected, in the latter, they are suspended or extinguished. On this point, which he considers to be uncontroversial in State practice, the same author finds

<sup>45</sup> J. de Soto, *op. cit.*, p. 539.

<sup>46</sup> *I.C.J. Reports 1952*, p. 193.

<sup>47</sup> *Ibid.*, pp. 193-194.

<sup>48</sup> *Ibid.*, p. 194.

<sup>49</sup> *Ibid.*, p. 196.

<sup>50</sup> *Ibid.*, p. 225.

<sup>51</sup> *Ibid.*, p. 226.

<sup>52</sup> G. Schwarzenberger, *op. cit.*, p. 242.

it difficult to concur with the joint Dissenting Opinion and particularly with the phrase "suspending the exercise of a favour is equivalent to failure to exercise it". The two—according to Schwarzenberger—are as "equivalent" as abstention on the ground of a legal duty and in the exercise of discretionary power.<sup>53</sup>

#### 4. THE SCOPE OF THE MOST-FAVOURLED-NATION CLAUSE CONFINED TO MATTERS TO WHICH IT APPLIES

50. The Court did not have to decide whether the most-favoured-nation clauses in question covered the privilege of consular jurisdiction. The clauses (which are quoted above in para. 33) were couched in very general terms. Since, in the opinion of the Court, the clauses lost all their value, the Court did not go into the question in detail. It did seem to imply, however, that the scope of the most-favoured-nation clause in a treaty was confined to the matters dealt with in that convention, specific intention to the contrary of course excepted.<sup>54</sup> The Court remarked:

Even if it could be assumed that Article 17 [of the Madrid Convention of 1880] operated as a general grant of most-favoured-nation rights to the United States and was not confined to the matters dealt with in the Madrid Convention, it would not follow that the United States is entitled to continue to invoke the provisions of the British and Spanish Treaties, after they have ceased to be operative as between Morocco and the two countries in question.<sup>55</sup>

#### 5. INTERPRETATION OF A MOST-FAVOURLED-NATION CLAUSE AS CONDITIONAL OR UNCONDITIONAL

51. This question was raised by the French Party in connexion with the problem of the import restriction and foreign exchange regulations in Morocco and with the fiscal immunities pretended by the United States. The dispute centred on the interpretation of the most-favoured-nation clauses contained in the 1836 treaty. M. Reuter on behalf of France pleaded on 16 July 1952 as follows:

[...] the question becomes extremely important: it is whether the most-favoured-nation clause in the treaty of 1836 is a conditional clause or an unconditional clause [...] [It] is, of course, first necessary to consider the text of the clause itself. [...] jurists have made serious mistakes concerning the interpretation of treaties because they have failed to take account of two points: the signatory States of the clause and the period when the treaty was signed, for the practice of nations has varied on that point in different States and at different times.

[...]

Who is the signatory of the treaty of 1836? The United States! Now in that respect the United States has a particular doctrine. In the nineteenth century it never accepted that the most-favoured-nation clause was unconditional. [...]

It is true that the other signatory is Morocco. And it may still be said that Morocco is a Moslem State. The argument is of little weight as regards the capitulations, but it is totally inoperative with respect to trade, for the sovereigns of Morocco

very wisely, in all their nineteenth century treaties *without exception*—we will revert to this point—contracted solely reciprocal commitments. If this treaty of 1836 did not include the conditional clause, it would be the only treaty signed by Morocco, from its origins up to the Act of Algeciras, which did not involve a measure of reciprocity.<sup>56</sup>

52. The United States Party—through Mr. Fisher—argued in the opposite sense:

The second point on which I desire to present a few remarks concerns statements made by my distinguished opponent with respect to the meaning of the most-favoured-nation clause in the treaties between the United States and Morocco. In one instance, he contends that the most-favoured-nation clause in Moroccan treaties should be interpreted by reference to the intent of the drafters at the time it was included in the treaties. Since the United States supported in the past a conditional interpretation of other most-favoured-nation clauses, in the other treaties he concludes that the most-favoured-nation clause of the United States treaties with Morocco must itself have been a conditional clause. The United States is entirely in agreement that the meaning of the clause should be determined by reference to the intent of the parties at the time. The only difference that we have with our distinguished opponents is that they would construe the clause as conditional by referring only to the practice of the United States in interpreting *other* treaties signed under *other* circumstances, and not by what the United States and Morocco intended when they signed the treaties which are in issue before this Court.<sup>57</sup>

53. Whether a given most-favoured-nation clause is of the so-called conditional or unconditional type is to be decided through treaty interpretation. The question remains whether there exists a presumption in favour of the unconditional form as suggested by the 1936 resolution of the Institute of International Law.<sup>58</sup>

#### 6. THE MOST-FAVOURLED-NATION CLAUSE AS A MEANS OF ENSURING EQUALITY OF TREATMENT IN THE FIELD OF FOREIGN TRADE

54. A decree issued by the Resident General of the French Republic in Morocco, dated 30 December 1948, concerning the regulation of imports into the French Zone of Morocco involved discrimination in favour of France. The United States contended that this discrimination contravened its treaty rights. The Court referred, in this respect, to the three principles stated in the Preamble of the General Act of Algeciras of 7 April 1906<sup>59</sup> and continued:

The last-mentioned principle of economic liberty without any inequality must, in its application to Morocco, be considered against the background of the treaty provisions relating to trade and equality of treatment in economic matters existing at that time.

By the Treaty of Commerce with Great Britain of December 9th, 1856, as well as by treaties with Spain of November 20th, 1861, and with Germany of June 1st, 1890, the Sultan of Morocco

<sup>56</sup> Morocco Case (France v. U.S.A.), *I.C.J. Pleadings*, 1952, vol. II, pp. 185-187.

<sup>57</sup> Rejoinder of 26 July 1952, *ibid.*, pp. 317-318.

<sup>58</sup> See the text of the resolution reproduced in *Yearbook of the International Law Commission*, 1969, vol. II, p. 180, document A/CN.4/213, annex II.

<sup>59</sup> See para. 34 above.

<sup>53</sup> For a similar view, see B. Cheng, *op. cit.*, p. 367.

<sup>54</sup> *Ibid.*, pp. 365-366.

<sup>55</sup> *I.C.J. Reports 1952*, p. 191.

guaranteed certain rights in matters of trade, including imports into Morocco. These States, together with a number of other States, including the United States, were guaranteed equality of treatment by virtue of most-favoured-nation clauses in their treaties with Morocco.

...  
It follows from the above considerations that the provisions of the Decree of December 30th, 1948, contravene the rights which the United States has acquired under the Act of Algeciras, because they discriminate between imports from France and other parts of the French Union on the one hand, and imports from the United States on the other. [...]

This conclusion can also be derived from the Treaty between the United States and Morocco of September 16th, 1836, Article 24, where it is "declared that whatever indulgence, in trade or otherwise, shall be granted to any of the Christian powers, the citizens of the United States shall be equally entitled to them". Having regard to the conclusion already arrived at on the basis of the Act of Algeciras, the Court will limit itself to stating as its opinion that the United States, by virtue of this most-favoured-nation clause, has the right to object to any discrimination in favour of France, in the matter of imports into the French Zone of Morocco.<sup>60</sup>

55. These findings of the Court were made unanimously. They amount to a restating of the generally accepted view that the most-favoured-nation clause represents and is the instrument of the principle of equality of treatment in the field of foreign trade. The clause is a means to an end—the end being the application of the rule of equality of treatment in commercial relations.<sup>61</sup>

### C. THE AMBATIELOS CASE

56. The origin of the claim is to be found in a contract between Ambatielos, a Greek shipowner, and the British Ministry of Shipping for the sale of nine ships which were, at the time of the agreement in 1919, under construction. Ambatielos claimed that the contract was not properly carried out by the seller and through its failure he suffered damage. The question of the breach of the contract was submitted to English Courts by common accord of the parties. The Admiralty Court gave judgement against the claimant, who appealed against the decision but subsequently abandoned his appeal.

57. The Greek Government took up the case of its national and instituted proceedings against the United Kingdom Government before the International Court of Justice on 9 April 1951. The claim of the Greek Government related to the way in which justice was administered in the proceedings in the English Courts between Ambatielos and the Board of Trade as the successor to the Ministry of Shipping. It alleged that the officials of the Board of Trade wrongly failed to produce in the Admiralty Court all the evidence available. It complained also of the refusal by the Court of Appeal to grant leave to the claimant to adduce new evidence. All this resulted in

substantial damage to Ambatielos. The Greek Government claimed that the United Kingdom was under a duty to submit the dispute to arbitration in accordance with treaties between Greece and the United Kingdom of 1886 and 1926. In the subsequent proceedings it requested the Court itself to adjudicate upon the validity of the Ambatielos claim.

58. The United Kingdom raised preliminary objections and contended that the Court lacked jurisdiction.

59. By its Judgement of 1 July 1952 the Court held that it had no jurisdiction to decide on the merits of the claim. It found at the same time that it had jurisdiction to decide whether the United Kingdom was under an obligation to submit the dispute to arbitration.<sup>62</sup> And in its Judgement of 19 May 1953 the Court gave an affirmative answer to that question.

60. The Commission of Arbitration to which the case was ultimately referred rejected by its Award of 6 March 1956 the claim definitely.<sup>63</sup>

61. In the course of the proceedings before the International Court of Justice the parties referred to a most-favoured-nation clause embodied in the treaty of commerce of 1886 and a national treatment clause of the same treaty granting "free access to the Courts of Justice". They differed widely on the scope and effect of the most-favoured-nation clause and on the meaning of the term "free access to the Courts of Justice".

62. The Court itself did not decide on the substance of the dispute. Thus no discussion of the substantive issues, which would throw light on the problems connected with the operation of a most-favoured-nation clause, is to be found in the Judgement itself of the Court. They are dealt with in great detail in the written and oral submissions of the parties and in the joint dissenting opinion of four members of the Court, Judge McNair, then President of the Court, and Judges Basdevant, Klaestad and Read.

63. The most-favoured-nation clause in dispute between the parties appears in article X of the Anglo-Greek Treaty of Commerce and Navigation of 1886. This article reads as follows:

The Contracting Parties agree that, in all matters relating to commerce and navigation, any privilege, favour or immunity whatever which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State shall be extended immediately and unconditionally to the subjects or citizens of the other Contracting Party; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most favoured nation.<sup>64</sup>

64. The national treatment clause which appears in the third paragraph of article XV reads as follows:

The subjects of each of the two Contracting Parties in the dominions and possessions of the other shall have free access

<sup>60</sup> *I.C.J. Reports 1952*, pp. 183-186.

<sup>61</sup> Cf. R. C. Snyder, *The Most-favored-Nations Clause: An Analysis with Particular Reference to Recent Treaty Practice and Tariffs* (New York, King's Crown Press, Columbia University, 1948), p. 5.

<sup>62</sup> See *I.C.J. Reports 1952*, p. 46.

<sup>63</sup> See United Nations, *Reports of International Arbitral Awards*, vol. XII, United Nations publication, Sales No.: 1963.V.3), p. 91.

<sup>64</sup> Quoted in *I.C.J. Reports 1953*, p. 19.

to the Courts of Justice for the prosecution and defence of their rights, without other conditions, restrictions or taxes beyond those imposed on native subjects, and shall, like them, be at liberty to employ, in all causes, their advocates, attorneys or agents, from among the persons admitted to the exercise of those professions according to the laws of the country.<sup>65</sup>

65. The Greek Government, relying upon the most-favoured-nation clause contained in article X of the 1886 Treaty, invoked provisions embodied in earlier treaties between the United Kingdom and third States, that is to say, Denmark, Sweden and Bolivia. These provisions were the following:<sup>66</sup>

(a) Article 16 of the Treaty of Peace and Commerce with Denmark of 1660-1661: "Each Party shall in all causes and controversies now depending, or hereafter to commence, cause justice and right to be speedily administered to the subjects and people of the other Party, according to the laws and statutes of each country without tedious and unnecessary delays and charges";

(b) Article 24 of the Treaty of Peace and Commerce with Denmark of 1670, providing that the Parties "shall cause justice and equity to be administered to the subjects and people of each other";

(c) Article 8 of the Treaties of Peace and Commerce with Sweden of 1654, and 1661, providing that "In case the people and subjects on either part . . . or those who act on their behalf before any Court of Judicature for the recovery of their debts, or for other lawful occasions, shall stand in need of the Magistrate's help, the same shall be readily, and according to the equity of their cause, in friendly manner granted them . . .";

(d) Article 10 of the Treaty of Commerce with Bolivia of 1911, reserving the right to exercise diplomatic intervention in any case in which there may be evidence of "denial of justice" or "violation of the principles of international law".

#### 1. THE "EJUSDEM GENERIS" RULE: WHAT BELONGS TO THE "IDEM GENUS"

66. There was no disagreement between the parties as to the validity of the above rule. The disagreement centred on the operation of this rule in the context of the relevant treaties.

67. M. Rolin, agent of Greece, stated that:

... In his relations with the United Kingdom administration, he [Ambatielos] was not treated in accordance with the principle of fair play and did not benefit from the treatment enjoyed by British nationals in general and by the most favoured foreigners.

And in this connexion the Greek Government invokes, in the light of Article X which I have just read out, not only the direct benefit of the treaty, but also the indirect benefit of the treaty, namely, what it finds in treaties with Denmark and Sweden, which are still in force although they are certainly old (going back to 1660, 1670, 1654 and 1661), that is, a duty of Governments to comply with equity and justice, and even, according to one of the treaties, with common right.<sup>67</sup>

68. Mr. Fitzmaurice, Counsel for the United Kingdom, invoked the *ejusdem generis* rule in the following terms:

So far as treaties are concerned, the principle involved is a well-known one: that clauses conferring most-favoured-nation rights in respect of a certain matter, or class of matter, can only attract the rights conferred by other treaties in regard to the same matter or class of matter. [ . . . ] "That is very clear, and it seems to us to furnish a conclusive answer to any suggestion that Article X of the 1886 Treaty can attract any provisions in other treaties except provisions about commerce and navigation—in short, to any suggestion that it can attract provisions in other treaties (should there be any) dealing with the administration of justice and related matters."<sup>68</sup>

69. Sir Frank Soskice, Counsel for Greece in his reply to the argument of Mr. Fitzmaurice did not deny the validity of the rule. He tried to prove that the access to courts and administration of justice in commercial matters is not outside the *genus* of the favours referred to in article X. These were his words in part:

Let us look at Article X. [ . . . ] It is the article on which we rely for the purpose of incorporating the most-favoured-nation provisions of other treaties entered into by the United Kingdom Government. The words which are relevant in that Article are these: "The Parties agree that [now these are the relevant words] in all matters relating to commerce and navigation", the words are "in all matters relating to commerce." Those words are wide. Those words include not merely the core and kernel of commerce itself, but they cover all words which, as it were, describe those things on the outside, the circumference of what may be described as commerce itself. [ . . . ] The claim is a claim which centres upon a series of transactions which form one coherent whole. [ . . . ] It begins with the breaking of the commercial contract relating to the purchase of the nine ships. [ . . . ] If the matter had rested there, of course Mr. Ambatielos could have gone to the British courts to get redress. He tried to do so, but [ . . . ] the British Government in effect (if I may summarize what took place) prevented him from getting his relief, because it withheld from him and from the Court evidence which was essential to enable him to get that relief, presenting itself a case in conflict and contradiction to that evidence which it possessed. We rely on the totality of those events and also on each of them individually. Now that is the gist of it. It is commercial from beginning to end. It centres upon a commercial contract and the breach of it, and then another action withholding the evidence closely intertwined with what had gone before, and it is each of these things and the whole totality of those things which give rise to the complaint which the Greek Government brings today. Now are those not matters relating to commerce?<sup>69</sup>

70. The four dissenting Judges, whose main concern was whether the claim could be based on the 1886 Treaty and who arrived in this respect at a negative conclusion, relied heavily on the *ejusdem generis* rule. In the interpretation of the concrete clause, however, they upheld the British view:

... having regard to its terms, Article X promises most-favoured-nation treatment only in matters of commerce and navigation; it makes no provision concerning the administration of justice; in the whole of the Treaty this matter is the subject of only one provision, of limited scope, namely, Article XV, paragraph 3, concerning free access to the Courts, and that Article contains no reference to most-favoured-nation treatment.

<sup>65</sup> Quoted in *ibid.*, p. 20.

<sup>66</sup> Quoted in *ibid.*, pp. 20-21.

<sup>67</sup> *Ambatielos Case (Greece v. United Kingdom), I.C.J. Pleadings, 1953, p. 364.*

<sup>68</sup> *Ibid.*, p. 402.

<sup>69</sup> *Ibid.*, p. 457.

The most-favoured-nation clause in Article X cannot be extended to matters other than those in respect of which it has been stipulated. We do not consider it possible to base the obligation on which the Court has been asked to adjudicate, on an extensive interpretation of this clause.<sup>70</sup>

71. According to Schwarzenberger the interpretation of the dissenting Judges is open to doubt. He observes:

It may be accepted that the *ejusdem generis* construction of most-favoured-nation clauses corresponds to normal practice in this field. Especially in the light of the evolution of the principles of freedom of commerce and navigation, this does not mean that access to courts and administration of justice in commercial matters is necessarily outside the *genus* in question. Moreover, the grant of national treatment in matters of free access to courts is hardly a self-evident argument against the cumulative application of the most-favoured-nation standard to the same subject. When, in a nineteenth century treaty national treatment was granted, the typical assumption was that such inland parity amounted to the grant of an especially privileged position. The intention was hardly to forgo rights which, under most-favoured-nation treaties, were available to third States.<sup>71</sup>

72. On the question whether the administration of justice belongs to the *genus* of "matters of commerce and navigation", the view of Fitzmaurice is exactly the opposite. He attributes a particular importance to the last sentence of that portion of the joint dissenting opinion which is quoted in paragraph 70 above, and states:

The effect of the most-favoured-nation process is, by means of the provisions of one treaty, to attract those of another. Unless this process is strictly confined to cases where there is a substantial identity between the subject-matter of the two sets of clauses concerned, the result in a number of cases may be to cause provisions not in themselves subject to an obligation of compulsory arbitration in the event of dispute, to become so by reason of their attraction by and notional incorporation into another treaty that does contain such a clause. States may thus find themselves obliged to arbitrate cases they had never contemplated submitting (and would not normally have agreed to submit) to arbitration.<sup>72</sup>

73. In its Award of 6 March 1956, the Commission of Arbitration set up for the arbitration of the Ambatielos claim affirmed the *ejusdem generis* rule; the Commission held that "the most-favoured-nation clause can only attract matters belonging to the same category of subject as that to which the clause itself relates".<sup>73</sup> As regards the definition of the *genus* in question, however, the Award held that:

... "the administration of justice", when viewed in isolation, is a subject-matter other than "commerce and navigation", but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by Treaties of commerce and navigation.

Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favoured-nation clause, when the latter includes "all matters relating to commerce and navigation".<sup>74</sup>

## 2. CAN MOST-FAVOURLED-NATION CLAUSES ATTRACT GENERAL RULES OF INTERNATIONAL LAW ?

74. This was emphatically denied by the British Party. Mr. Fitzmaurice, Counsel for the United Kingdom, stated:

[...] we think that most-favoured-nation clauses do not in principle and indeed cannot of themselves include or attract the general rules of international law at all. It is neither their normal purpose to do so nor are they framed in such a way as to accomplish it. I suggest to the Court that the true purpose of the most-favoured-nation clause is to attract rights granted to another country as a matter of favour and not as a matter of inherent obligation. A most-favoured-nation clause between two countries (call them A and B) produces no effect as between them until one of them grants some *favour* or advantage to a third country, C. That is what most-favoured-nation treatment implies. Now if B (in my example) merely promised C to treat the subjects of C in accordance with international law, that would be no *favour* at all, and therefore would not constitute a grant to which the most-favoured-nation clause could attach itself.<sup>75</sup>

75. The Greek Party did not disagree with this thesis *in abstracto* and it did so only *in concreto*. Sir Frank Soskice on behalf of Greece stated:

... I say in answer to his [Mr. Fitzmaurice's] submission that most-favoured-nation treaties only incorporate what could be regarded as a privilege and therefore cannot incorporate the provisions of international law, that international law is of itself uncertain and does not necessarily coincide with the provisions contained in specific treaties between the United Kingdom and other countries which have been entered into in the past, such as, for example, the Treaty of Peace and Commerce with Denmark of 1660 [article 16 of which reads: "Each Party shall in all causes and controversies now pending or hereafter to commence, cause justice and right to be speedily administered to the subjects and peoples of the other Party"].<sup>76</sup>

76. The issue was then raised that in the Anglo-Iranian Oil Co. Case the British Party itself invoked, through the most-favoured-nation clauses occurring in treaties between Iran and the United Kingdom, Iran's treaties with a number of countries in which treatment of nationals in accordance with the general principles and practices of international law was promised. It was submitted by the Greek Party that the United Kingdom ought not to object to a process which it had itself tried to employ in the Anglo-Iranian Oil Co. Case. Mr. Fitzmaurice endeavoured to extricate the British position from this dilemma in his oral argument<sup>77</sup> and later in his rejoinder,<sup>78</sup> but developed his ideas in greater detail in his article.<sup>79</sup>

77. While maintaining his negative answer to the theoretical question raised in our sub-heading above, Fitzmaurice admits that States may have practical reasons to invoke most-favoured-nation clauses in one treaty, in order to attract provisions of other treaties promising treatment under the general rules of international law. Such can be

<sup>70</sup> *I.C.J. Reports 1953*, p. 34.

<sup>71</sup> G. Schwarzenberger, *op. cit.*, p. 250.

<sup>72</sup> G. Fitzmaurice, *op. cit.*, p. 85, foot-note 3.

<sup>73</sup> United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No.: 1963.V.3), p. 107.

<sup>74</sup> *Ibid.*

<sup>75</sup> Ambatielos Case (Greece v. United Kingdom), *I.C.J. Pleadings, 1953*, p. 403.

<sup>76</sup> *Ibid.*, pp. 460-461.

<sup>77</sup> *Ibid.*, pp. 407-408.

<sup>78</sup> *Ibid.*, pp. 481-482.

<sup>79</sup> G. Fitzmaurice, *op. cit.*, pp. 88-96.

a case where a State wishes to claim certain rights not simply as international law rights, but (or also) as *treaty* rights. The United Kingdom did so in the Anglo-Iranian Oil Co. Case, because the Optional Clause declaration of Iran only related to disputes concerning the "application of treaties or conventions accepted by Iran".<sup>80</sup>

78. The real difference between the *Ambatielos* case and the Anglo-Iranian Oil Co. Case in this respect lay—according to Fitzmaurice—in the exceptional circumstances in which, in the Anglo-Iranian Case, the right to treatment in accordance with the general rules of international law had been granted. Because Iran unilaterally abolished the capitulatory régime about the year 1929, it could reasonably be argued that the grant of international law treatment, promised in a number of treaties concluded by Iran, subsequently constituted an actual favour to her treaty-partners under conditions where there was at least room for doubt as to the basis on which foreigners would be thenceforward treated there. It could be argued also that in so far as such treaties were concluded by Iran only with certain countries, and not others, they involved in some sense a privilege or favour to those countries.<sup>81</sup>

79. The Court itself did not pronounce on the theoretical question since the actual ground of decision turned on another issue. The point was, however, fully argued before the Commission of Arbitration in the third phase of the *Ambatielos* case, and the Award contains the following passage:

The Commission does not deem it necessary to express a view on the general question as to whether the most-favoured-nation clause can never have the effect of assuring to its beneficiaries treatment in accordance with the general rules of international law, because in the present case the effect of the clause is expressly limited to "any privilege, favour or immunity which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State", which would obviously not be the case if the sole object of those provisions were to guarantee to them treatment in accordance with the general rules of international law.<sup>82</sup>

80. The intention of this passage is made clear in a further passage reading as follows:

As stated above, the most-favoured-nation clause contained in the Treaty of 1886 applies only to privileges, favours and immunities granted to other countries, and therefore cannot incorporate the principles of international law in the said Treaty. If need be, this observation would suffice to reject the conclusion which the Greek Government considers itself entitled to draw from Article 10 of the Anglo-Bolivian Treaty.<sup>83</sup>

This therefore was a decisive rejection of the whole process, at any rate when based on this type of most-favoured-nation clauses.<sup>84</sup>

<sup>80</sup> *Ibid.*, pp. 90-91.

<sup>81</sup> *Ibid.*, pp. 95-96.

<sup>82</sup> United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No.: 1963.V.3), pp. 106-107.

<sup>83</sup> *Ibid.*, p. 108.

<sup>84</sup> See G. Fitzmaurice, *op. cit.*, pp. 93-94.

### 3. INTERTEMPORAL LAW

81. Because a most-favoured-nation clause may attract rights conferred by such other treaties which were concluded in an earlier period and under different circumstances, the problem of intertemporal law may have in this connexion a certain relevance.

82. This point was taken up by the British Party, on whose behalf Mr. Fitzmaurice made the following remarks:

The seventeenth century Treaties must be interpreted according to the condition of their own times and in the setting of the period in which they were concluded. It would be illegitimate to import into them ideas and legal concepts which either did not then exist [ . . . ]. They cannot, in our view, be regarded as incorporating references to the general rules of international law as we understand them today, for the simple reason that those rules did not then exist, or existed only in a very partial and rudimentary form. The principle involved—that of the intertemporal law—is well known and was stated by the Arbitrator, M. Huber, a former President of the Permanent Court, in the *Island of Palmas* case, as follows. He said: "A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when the dispute in regard to it arises or falls to be settled". And I think that that maxim is now accepted as an established doctrine of international law.

Now, if we transpose this dictum into the terms of the present case, the principle will be this: that the effect of a treaty must be appreciated in the light of the legal situation and concepts that existed when the treaty was entered into. Now, of course, it is not my intention to embark on a study of the state of international law in the middle of the seventeenth century. But I do not think I need to, because I do not think anyone will deny that, at that period, three hundred years ago, when the ideas of Hugo Grotius even were barely starting to gain currency, and were still largely novel, international law existed only in a relatively primitive and elementary form. Phrases which, if they occurred in a treaty drawn up today, might be read as referring to the general corpus of international law, or some particular part of it, cannot be so read in treaties framed when this general corpus scarcely existed—or, at any rate, they cannot be read as referring to parts of international law which did not then exist.

[ . . . ]

And here we encounter another aspect of the intertemporal law which was also stated by M. Huber in the *Island of Palmas* case, namely, the principle that facts which conferred a legal right at one period may not necessarily do so at a later period because of changes in the legal position that have occurred since.

Now, if we apply that principle to the present case, what do we find? Suppose, for the sake of argument, that some clause of one of these seventeenth century Treaties can be read as conferring a right to certain treatment in the courts, which is now a general international law right. But that would mean that, precisely because the treaty right in question is today a general international law right, its treaty basis, though not formally destroyed, is no longer the real foundation of the right. It has been superseded, and, so to speak, engulfed, and rendered superfluous by the emergence of general rules of international law that take its place, that include it and, indeed, go far beyond it, so that the right now depends on and results from those rules rather than the treaty. These seventeenth century Treaties are, of course, still in force as treaties. But the operative effect of many of the individual provisions of those Treaties is spent, because they have been superseded, overtaken, caught up, rendered unnecessary, by the emergence of general rules of international law on the subjects of those provisions dealt with, which now constitute the real basis of the rights and obligations existing between the parties on this matter.

[. . .]

[. . .] we submit to the Court that, even if the seventeenth century Treaties confer the sort of right which our adversaries contend they do, the clauses in question no longer have any relevance as such, because their operative effect has been swallowed up in general rules of international law to which the most-favoured-nation clause of the 1886 Treaty, on which our adversaries rely, has no application.<sup>85</sup>

83. The answer of the Greek Party did not constitute a denial of the principle involved. It contended only that the principle is not applicable in the concrete case. Sir Frank Soskice, Counsel for Greece, stated:

[. . .] I submit that Mr. Fitzmaurice's argument is ill-founded. He says that in any case the obligations imposed upon the contracting governments by those treaties to treat the subjects of the other government fairly have been swallowed up in the principles of developing modern international law. That I have already answered by pointing out that often, and in particular in the case of Article 16, the obligations on each contracting government are more specific than the somewhat imprecise obligations not always stated in identical terms which are imposed by the general principles of international law, so that I would respectfully submit that that argument of Mr. Fitzmaurice also, on examination turns out not to be sustainable.<sup>86</sup>

84. The general rule was also stated by the Arbitration Commission's Award in the following way:

The provisions of other treaties on which the Greek Government relies are concerned with the *administration of justice*. Several of them date back to the seventeenth century [. . .]. Naturally, their wording was influenced by the customs of the period, and they must obviously be interpreted in the light of this fact.<sup>87</sup>

#### 4. REFUSAL OF AN EXTENSIVE INTERPRETATION OF A NATIONAL TREATMENT CLAUSE

85. The joint dissenting opinion of the four Judges dealt with the problem of the interpretation of article XV of the 1886 Treaty. The opinion stated:

This Article promises free access to the Courts; it says nothing with regard to the production of evidence. Questions as to the production of evidence are by their nature within the province of the law of the Court dealing with the case (*lex fori*). The Treaty could have laid down certain requirements in this connection, but it did not do so. [. . .] An extensive interpretation of the free access clause which would have the effect of including in it the requirements of the proper administration of justice, in particular with regard to the production of evidence, would go beyond the words and the purpose of Article XV, paragraph 3. Free access to the Courts is one thing; the proper administration of justice is another. [. . .]

[. . .]

The complaint, as put before the Court in this case, does not allege that Mr. Ambatielos was refused access to the English Courts, or that he was denied national treatment as regards conditions, restrictions, taxes or the employment of counsel. The

<sup>85</sup> *Ambatielos Case (Greece v. United Kingdom), I.C.J. Pleadings, 1953, pp. 408-411.*

<sup>86</sup> *Ibid.*, p. 464.

<sup>87</sup> United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No.: 1963.V.3), p. 108.

Hellenic Government merely alleges that the production of evidence was effected in a manner which in its opinion was defective and detrimental to its national. Article XV, paragraph 3, is unconnected with this complaint. If any legal rule has been broken, it is not a rule contained in this Article.<sup>88</sup>

86. The Commission of Arbitration interpreted the clause similarly and held that:

[. . .] the essence of "free access" is adherence to and effectiveness of the principle of non-discrimination against foreigners who are in need of seeking justice before the courts of the land for the protection and defence of their rights.<sup>89</sup>

And further it stated:

The Commission is of opinion that "free access" is something entirely different from the question whether cases put forward in Courts by Governments are right or wrong, and that denial of "free access" can only be established by proving concrete facts which constitute a violation of that right as understood and defined in this award.<sup>90</sup>

## Part II

### The experience of international organizations and interested agencies in the application of the most-favoured-nation clause

87. This part of the report is based on the replies of international organizations and interested agencies to a circular letter of the Secretary-General. The full list of the bodies to which the circular letter has been sent is given in annex III to the present report.

88. For reasons of convenience, the present report deals separately with the information received from those organizations whose concern lies exclusively in international trade, on the one hand, and with the information from those which are concerned with matters other than trade on the other. Dividing thus the material according to the fields of application of the most-favoured-nation clause, part II begins with the survey of fields other than international trade.

#### A. FIELDS OTHER THAN INTERNATIONAL TRADE

89. Several organizations working in these fields have stated that they have no practical experience whatsoever in connexion with the application of most-favoured-nation clause. These are: IBRD, IDA, IFC, IMCO, UPU, WHO, and WMO. The information received from other organizations belonging to this group can be classified according to the following fields:

- (1) privileges and immunities of international organizations;

<sup>88</sup> *I.C.J. Reports 1953, pp. 33-34.*

<sup>89</sup> United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No.: 1963.V.3), p. 111.

<sup>90</sup> *Ibid.*, p. 117.

- (2) telecommunications;
- (3) air transport;
- (4) shipping;
- (5) international finance;
- (6) intellectual property.

## 1. PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS

### (a) "Most-favoured-organization" clauses

90. Both FAO and UNESCO have drawn attention to treaty provisions which—although not most-favoured-nation clauses proper—may be called "most-favoured-organization" clauses.

91. Article VIII, paragraph 4 of the FAO Constitution stipulates, *inter alia*:

Each Member Nation and Associate Member undertakes. [. . .] to accord to the Director-General and senior staff diplomatic privileges and immunities and to accord to other members of the staff [. . .] the immunities and facilities which may hereafter be accorded to equivalent members of the staffs of other public international organizations.<sup>91</sup>

92. Article 19, paragraph 2 of the Agreement signed on 2 July 1954 between France and UNESCO, regarding the Headquarters of UNESCO and the privileges and immunities of the organization on French territory, provides that certain officials defined in Annex B of the Agreement

shall be accorded during their residence in France the privileges, immunities and facilities and other courtesies accorded to members of foreign diplomatic missions in France.<sup>92</sup>

Annex B, after listing certain categories of officials who shall benefit from the provisions of article 19, paragraph 2, goes on to state:

(c) officials in grades corresponding to the grades of officials of any other intergovernmental institution to whom the Government of the French Republic may grant diplomatic privileges and immunities by a headquarters Agreement.<sup>93</sup>

(b) *Clauses assimilating the treatment of representatives to, and staff of, international organizations to the treatment of members of diplomatic missions*

93. One instance of such clauses is the provision of article 19, paragraph 2 of the UNESCO Headquarters Agreement, quoted in paragraph 92 above. Similar provisions are contained in the same Agreement:

- (i) In article 18 on the privileges, immunities and facilities due to representatives of member States of the Organization at sessions of the various organs of the Organization and at conferences and meetings called by it and certain other categories of delegates, who shall enjoy, during their stay in France on official duty, such privileges, immunities

and facilities as those accorded to diplomats of equal rank belonging to foreign diplomatic missions accredited to the Government of the French Republic;

- (ii) In article 19, paragraph 1 on the status of the Director-General and Deputy Director-General of the Organization who shall have the status accorded to the heads of foreign diplomatic missions accredited to the Government of the French Republic; and

- (iii) In article 22, paragraph (e), according to which the officials of the Organization shall, with regard to foreign exchange, be granted the same facilities as are granted to members of foreign diplomatic missions.<sup>94</sup>

94. The FAO Headquarters Agreement<sup>95</sup> and Regional Office agreements<sup>96</sup> contain clauses dealing with facilities regarding the application of foreign exchange regulations and repatriation in the event of international crisis. These provide for the treatment of FAO staff in a way not less favourable than that of the staff of diplomatic missions accredited to the host country.

### (c) "Most-favourable conditions"

95. A peculiar type of clause can be found in article 17, paragraph 2 of the UNESCO Headquarters Agreement. This clause, regulating financial and foreign exchange matters, stipulates, *inter alia*, as follows:

The competent French authorities shall grant all facilities and assistance to the Organization with a view to obtaining the most favourable conditions for all transfers and exchanges.

The provision may be implemented by common agreement:

Special arrangements to be made between the French Government and the Organization shall regulate, if necessary, the application of this Article.<sup>97</sup>

## 2. TELECOMMUNICATIONS

96. ITU states that the spirit of the International Telecommunication Convention (Montreux, 1965)<sup>98</sup> is that in relations governed by it all members shall enjoy equal rights and be subject to the same obligations. The Convention and the Regulations annexed to it do not contain most-favoured-nation clauses. The concept is not one that, to the knowledge of the Union, is generally applied to telecommunications.

97. The Union, however, draws attention to article IV, section 11 of the Convention on the Privileges and Immu-

<sup>94</sup> *Ibid.*, pp. 16, 18 and 20.

<sup>95</sup> See United Nations Legislative Series, *Legislative Texts and Treaty Provisions Concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. II (United Nations publication, Sales No.: 61.V.3), p. 187.

<sup>96</sup> *Ibid.*, pp. 206, 212 and 220.

<sup>97</sup> United Nations, *Treaty Series*, vol. 357, p. 16.

<sup>98</sup> *United Nations Juridical Yearbook*, 1965 (United Nations publication, Sales No.: 67.V.3), p. 173.

<sup>91</sup> FAO, *Basic Texts*, 1970 edition, p. 11.

<sup>92</sup> United Nations *Treaty Series*, vol. 357, p. 18.

<sup>93</sup> *Ibid.*, p. 26.

nities of the Specialized Agencies,<sup>99</sup> which stipulates that each specialized agency shall enjoy, in the territory of each State party to the Convention, for its official communications, treatment not less favourable than that accorded by the State to any other Government. ITU states that successive Plenipotentiary Conferences of the Union have drawn attention in resolutions to the fact that section 11 seems to conflict with the definition of Government Telegrams and Government Telephone Calls contained in annex 2 of the International Telecommunication Convention.<sup>100</sup>

A number of Governments have declared, at the time of agreeing to apply the Convention on Privileges and Immunities of the Specialized Agencies, that they could not agree to give full effect to section 11 unless and until all other Governments did so.<sup>101</sup>

98. The UNESCO Headquarters Agreement, while giving in article 4 the organization the right of free radio communication, grants in article 10 to the organization terms for communication by post, telegraph, etc., at least as favourable as those granted by the French Government to other Governments including diplomatic missions as regards priorities, tariffs, taxes and other charges.<sup>102</sup>

### 3. AIR TRANSPORT

99. ICAO, making known its experience in relation to the application of the most-favoured-nation clause, mentions three cases:

#### (a) *The Convention on International Civil Aviation (Chicago, 1944)*<sup>103</sup>

100. This constituent instrument of ICAO contains several provisions to ensure equality of treatment by a contracting State with respect to aircraft of all other contracting States. The formula employed for this purpose is to the effect that the treatment accorded to such other aircraft should not be less favourable than that which the State accords to its own aircraft engaged in similar operations. ICAO states in this regard that, while not formulated as a most-favoured-nation clause, such provisions would produce, nevertheless, like effect as such a clause, it being assumed that a State is unlikely to give some other State (for example, a State which is not a contracting State of ICAO) treatment more advantageous than that which it accords to its own national aircraft. Examples of such national treatment clauses are contained in article 9, article 11, article 15 and article 35, paragraph (b) of the Chicago Convention.

#### (b) *Bilateral air transport agreements*

101. A number of such agreements provide for most-favoured-nation treatment in respect of customs duties, inspection fees and other national duties or charges on fuel, lubricating oils, spare parts, regular equipment and aircraft stores. The clauses usually combine national and most-favoured-nation treatment.

#### (c) *A rare case*

102. According to ICAO it is rare that a bilateral air transport agreement contains a most-favoured-nation clause in regard to the exchange of traffic rights. Such a clause is found in Schedules I and II of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Greece for air services in Europe, signed at Athens on 26 November 1945.<sup>104</sup> The text of Schedule I reads as follows:

##### BRITISH ROUTES

London-Vienna-Belgrade-Athens.

London-Lyons-Marseilles-Genoa-Naples-Athens.

The above-mentioned routes may be varied by agreement between the competent aeronautical authorities of the contracting parties.

The designated airline of the United Kingdom shall be entitled, [ . . . ] to set down or pick up at places in Greece traffic embarked in or destined for places outside Greece on the routes specified in this Schedule provided that the capacity shall not exceed that agreed for the routes in question.

If the Government of Greece grants to any other airline rights more favourable than those accorded in this Schedule to the designated airlines of the United Kingdom, the Government of Greece will immediately grant to the designated airline of the United Kingdom rights not less favourable than those granted to the airline(s) of the most favoured nation.<sup>105</sup>

Schedule II, concerning the Greek Routes, contains similar provisions. (The designation of the routes was modified several times by subsequent exchanges of notes between the two Governments.)

103. ICAO remarks in this connexion that because of its rarity, the clause could hardly be called typical. ICAO has no information concerning the application of such clauses. To this the Special Rapporteur may add that the clause in question throws light on the fact that the field of application of the clause has its limits and that the clause in question is perhaps on the borderline of the field where a most-favoured-nation clause can play its role as a useful instrument. Without going into details here, it can be safely stated that one of the factors which determine the applicability and usefulness of a most-favoured-nation clause is the easy comparability of the favours in question.

### 4. SHIPPING

104. OECD—while drawing attention to clauses in several OECD instruments, which do not have direct

<sup>99</sup> United Nations, *Treaty Series*, vol. 33, p. 270.

<sup>100</sup> *United Nations Juridical Yearbook, 1965* (United Nations publication, Sales No.: 67.V.3), p. 202.

<sup>101</sup> See United Nations, *Multilateral Treaties in Respect of which the Secretary-General Performs Depositary Functions* (United Nations publication, Sales No.: E.69.V.5), chap. III, sect. 2, pp. 40-42.

<sup>102</sup> United Nations, *Treaty Series*, vol. 357, pp. 6 and 12.

<sup>103</sup> *Ibid.*, vol. 15, p. 295.

<sup>104</sup> *Ibid.*, vol. 35, p. 163.

<sup>105</sup> *Ibid.*, p. 188.

bearing on a study of the most-favoured-nation clause—made available a note, prepared by its Secretariat under the instructions of its Maritime Transport Committee, entitled “Treaty provisions to safeguard equitable treatment of shipping”.<sup>106</sup> The note was based on the papers submitted respectively by the delegations of Denmark, the Netherlands and Norway and on a list of various treaty clauses submitted by the United States delegation.

105. The study found that most-favoured-nation clauses and national treatment clauses were the two traditional types of treaty clauses to safeguard equitable treatment of shipping. In some instances national treatment and most-favoured-nation treatment were combined.

106. Most-favoured-nation and national treatment clauses in their traditional form related to such matters as access to ports, discharging and loading, taking in of supplies, payment of dues, compliance with quarantine measures and other formalities, etc. Both the most-favoured-nation and the national treatment clauses safeguarded against certain areas of possible discrimination, i.e., the former by prohibiting discrimination in relation to third countries, and the latter by prohibiting discrimination in relation to the contracting parties’ own nationals.

107. The main preoccupation of the members of the Maritime Transport Committee—or at least of the Governments, upon whose information the study of the Secretariat was based (i.e., Denmark, the Netherlands and Norway)—was the insufficiency of the traditional types of clauses to cover certain particularly sensitive areas.

108. The paper submitted by Denmark pointed out:

What must be secured [. . .] is protection against quantitative restrictions of various kinds rather than equality as regards the abstract possibility of concluding such contracts—most favoured nation or national treatment being appropriate expedients for that purpose. The discriminatory measures particularly indicated are those where a certain percentage of cargoes to and from the country concerned must be carried in ships flying the flag of that country. Such cases may also occur where state-controlled trading concerns or import and export organizations deliberately accord certain benefits to ships of a particular nationality.<sup>107</sup>

109. The Netherlands contribution gave a more detailed description of cases which may not be successfully invoked under a most-favoured-nation clause:

1. *discrimination in favour of the national flag*

It is abundantly clear that a most favoured nation clause will not stop a state from protecting its national merchant fleet in every possible way.

2. *bilateralism in shipping*

Various developing countries are doing their utmost to achieve bilateral division of the seaborne goods traffic between themselves and all their trade partners (preferably on a 50/50 basis).

3. *regional regulations governing shipping*

Certain groups of developing countries wish to achieve closer co-operation on a regional basis. The Latin American Free Trade Association is an example of such a group. The shipowners’ associations in the countries concerned are trying to persuade

their governments to reserve all or part of the regional goods traffic for ships sailing under the flags of the member states of the Free Trade Association.<sup>108</sup>

110. While the same paper pointed out that national treatment or non-discrimination clauses might be involved in the three cases mentioned above, no clause whatsoever seemed to constitute sufficient defence against the practice, especially of state-trading countries, of using national ships to carry state-owned or state-generated imports and exports: “in such cases it is virtually impossible to prove that the State in question is guilty of flag discrimination”. The Danish paper, in addition, did not believe that “national treatment is a suitable remedy in cases where 50% of the cargoes must be carried in national ships. No single country can claim the remaining 50% in this case.”<sup>109</sup>

111. Summing up, it appeared to the drafters of the note that:

[. . .] the traditional most favoured nation and national treatment clauses are insufficient safeguard against certain discriminatory practices taken—especially since the Second World War—by developing or state-trading countries, although at least the national treatment clauses might be interpreted to cover most of the recent forms of discrimination [. . .]. The shipping countries are thus faced with the problems of sufficiently wide interpretation of existing clauses on the one hand, and of formulation of adequate future clauses on the other.<sup>110</sup>

112. What remedies were envisaged against these complaints? These were summarized, in particular, by the Norwegian paper in the following way:

The principal task of today, from the OECD point of view, should be to find and formulate the arguments and measures that may be used to give the most favoured nation, national treatment and non-discrimination clauses such a broad scope of application that they cover the problem of quota regulations with respect to freight contracts. Second in importance is probably the question whether the clauses should be regarded as conditional or unconditional, and what grounds could support the latter interpretation.

As for clauses negotiated in the future, the best possible protection of OECD shipping interests seems to be to obtain a combination of all three clauses. If this is not possible, the non-discrimination formula seems to have certain advantages as compared to the others.<sup>111</sup>

113. This non-discrimination formula was considered as a third type of treaty clauses besides the most-favoured-nation and national treatment clauses. It was pointed out that from a purely logical point of view, such non-discrimination clauses were not distinct from the two traditional types. They were only wider in scope and extended to areas not traditionally dealt with by the customary formulas. The following two texts were submitted by the Netherlands. Text (a) was a clause included in an agreement on economic and technical co-operation between the Netherlands and Senegal of 1965; text (b) is a draft clause of more general character which was not yet included in any bilateral agreement.

<sup>108</sup> *Ibid.*, para. 17.

<sup>109</sup> *Ibid.*, para. 18.

<sup>110</sup> *Ibid.*, para. 19.

<sup>111</sup> *Ibid.*, para. 20.

<sup>106</sup> OECD document TP/MTC/66.33.

<sup>107</sup> OECD document TP/MTC/66.33, para. 16.

(a) Each Contracting Party shall abstain from taking discriminatory action which may prejudice the ocean-going shipping of the other Contracting Party or adversely affect the choice of flag contrary to the principles of free competition. This rule shall not apply to fishing and coastal shipping in the parts of the Kingdom of the Netherlands situated outside Europe, whose special laws shall apply exclusively in this matter or to the special advantages which the Republic of Senegal may grant to fishing and coastal shipping and harbour and coastal towing.

(b) The Contracting Parties agree to promote the development of international shipping services. In doing so they shall observe free and normal competitive conditions. They agree to refrain from discriminatory measures restricting the free participation of sea-going ships of whatever nationality in international trade.<sup>112</sup>

Both texts were followed by the customary clause on access to ports, customs formalities, charges, etc.

114. According to the information given by OECD, the Maritime Transport Committee, having considered the papers submitted to it and the summary presented by its Secretariat, agreed on 24 June 1966 to take no further action in the matter.

115. As can be seen from this material, the papers submitted by OECD reflect the one-sided views of States possessing a big and competitive shipping industry and witness their efforts to serve their interests against measures of States which may wish to protect their shipping as an "infant industry".

## 5. INTERNATIONAL FINANCE

116. IMF points out that the principle of non-discrimination—which lies at the heart of the most-favoured-nation clause—has been embodied in the Fund's law and practice as the standard of treatment among members. Details given by the Fund have been omitted from the present report as they do not involve the use of a most-favoured-nation clause.

## 6. INTELLECTUAL PROPERTY

117. BIRPI stated that the two principal multilateral treaties for whose administration BIRPI is responsible (i.e. the Paris Convention for the Protection of Industrial Property, 1883<sup>113</sup> and the Berne Convention for the Protection of Literary and Artistic Works, 1886<sup>114</sup>) are based on the principle of "national treatment", and do not contain provisions having the effect of a most-favoured-nation clause. In the opinion of BIRPI:

Member States are free to enter into new agreements relating to the protection of intellectual property with non-member States, without having bound themselves to offer any more favourable

terms contained in such agreements to other member States. Similarly, member States may make special agreements with a limited number of other member States, without having bound themselves to offer any more favourable terms contained in such agreements to other member States not parties to such agreements. (See article 15 of the Paris Convention, and article 20 of the Berne Convention.) If such agreements were in some way prevented by the application of the principle of the most-favoured-nation clause, then such desirable developments as the establishment of regional agreements (e.g. OAMPI—Office africain et malgache de la propriété industrielle) would be difficult or impossible.

118. In the view of BIRPI, therefore, the principle underlying the clause is incompatible with the purpose of treaties of the sort administered by BIRPI, and cannot, therefore, be regarded as a principle of general application without express provisions.

## B. THE FIELD OF INTERNATIONAL TRADE

### 1. INTRODUCTION

119. The following organizations and agencies working in the field of international trade replied to the circular letter of the Secretary-General: UNCTAD, ECA, ECAFE, ECE, ECLA, GATT, OAS, OCAM, EFTA and LAFTA.

120. The secretariat of UNCTAD transmitted a report which it had prepared on "International trade and the most-favoured-nation clause"<sup>115</sup> (hereinafter referred to as the UNCTAD memorandum). In its accompanying letter the secretariat pointed out that the most-favoured-nation clause is of special importance to UNCTAD; it has a direct bearing on the rules of conduct to govern world trade and, as such, it affects the trade prospects of many countries, particularly developing countries. The secretariat stated that, in drafting its report, it had taken the decision to base its interpretation of UNCTAD's position on the recommendations and resolutions adopted by the Conference at its first and second sessions. While some of these recommendations were unanimously adopted, others were only adopted by a majority vote. Moreover, some of the points covered by these recommendations were still under discussion in the different organs of UNCTAD. The UNCTAD memorandum stressed that the purpose was to bring out as clearly as possible the scope of application of the most-favoured-nation clause as well as the extent to which it should be qualified for the sake of the accelerated growth of developing countries and, indeed, of world trade at large.

121. ECA stated in its reply that it had no material from which an assessment could be readily made of the scope and practical effect of the most-favoured-nation clause. It enclosed a document entitled "Bilateral trade and payments agreements in Africa",<sup>116</sup> containing the main data on all of the trade agreements applicable to Africa concluded up to 1965, and singled out those

<sup>112</sup> *Ibid.*, para. 12.

<sup>113</sup> For the text of the 1883 Paris Convention and subsequent acts of revision, see BIRPI, *Manual of Industrial Property Conventions*, Paris Convention, Section A1.

<sup>114</sup> For the text of the 1886 Berne Convention and subsequent acts of revision, see International Union for the Protection of Literary and Artistic Works, *Le Droit d'Auteur*, 1888, p. 4; *ibid.*, 1896, p. 77; *ibid.*, 1908, p. 141; *ibid.*, 1914, p. 45; *ibid.*, 1928, p. 73; *ibid.*, 1948, p. 73; *Copyright*, 1967, pp. 165-178.

<sup>115</sup> UNCTAD, Research memorandum No. 33/Rev.1.

<sup>116</sup> E/CN.14/STC/24/Rev.1 and Corr.1.

agreements which included a most-favoured-nation clause.

122. ECAFE stated in its reply that its limited experience of the legal implications of the clause precluded it from making technical contribution to the work done in this field.

123. ECE referred in its reply to the effort which it had initiated in 1963, on the basis of its resolution 4 (XVIII), to make "an intensive examination" of the "most-favoured-nation principle and non-discriminatory treatment as applied under different economic systems, and problems concerning the effective reciprocity of obligations under the different systems".<sup>117</sup> It made available all ECE documents relating to the discussions which had taken place in ECE on the application of the most-favoured-nation clause and gave a brief summary of the situation existing with regard to the application of the clause in trade relations between ECE countries having different economic and social systems.

124. The secretariat of ECLA stated in its reply that it had participated as secretariat in the negotiations leading to the Montevideo Treaty which created LAFTA and made available the text of that treaty. It stated further that the clause forms part of almost all Latin American bilateral treaties on commerce signed in the last eighty years between Latin American countries or between them and countries outside the area.

125. The secretariat of GATT prepared and made available a paper entitled "The most-favoured-nation clause in the General Agreement on Tariffs and Trade: The rules and the exceptions" (hereinafter referred to as the GATT memorandum).

126. OAS drew attention to the Agreement on the application of the most-favoured-nation clause, opened for signature at the Pan American Union on July 15, 1934, and made available its text and the current state of ratifications.<sup>118</sup> OAS indicated that a further examination of the topic was being undertaken within the general secretariat of OAS for the purpose of transmitting the relevant information.

127. OCAM drew attention in its reply to the Association Convention between the European Economic Community and the Associated African and Malagasy States.

128. EFTA stated in its reply that it had no particular experience with the most-favoured-nation clause, as the EFTA Convention and the Agreement with Finland, which provides for a free trade area, are not based on this concept. Several of the articles of the Convention, however, were based on the principle of not less favourable treatment which had to be accorded to nationals of the other member States in certain circumstances.<sup>119</sup>

<sup>117</sup> See *Official Records of the Economic and Social Council, Thirty-sixth Session, Supplement No. 3 (E/3759)*, p. 64.

<sup>118</sup> See *Yearbook of the International Law Commission, 1969, vol. II*, pp. 174-175, document A/CN.4/213, paras. 104-105.

<sup>119</sup> See P. Pescatore, *La clause de la nation la plus favorisée dans les conventions multilatérales* (rapport provisoire présenté à l'Institut de droit international), Genève, Imprimerie de la Tribune de Genève, 1968, pp. 67-68, para. 68.

129. LAFTA drew particular attention in its reply to the problem of the compatibility of subregional arrangements with the most-favoured-nation clause of the Montevideo Treaty.<sup>120</sup>

130. The bulk of the information received came from GATT, UNCTAD, ECE and ECLA. Their contribution is, indeed, complementary.

131. The General Agreement on Tariffs and Trade applies to three fourths or more of world trade. The Agreement is based on the most-favoured-nation principle, whose application is, however, substantially restricted by numerous exceptions. Although the rules of the General Agreement are adapted primarily to the economic systems and policies of highly industrialized market economies, increasing attention has been given by GATT, particularly in recent years, to the problems and needs of the developing countries (see paras. 191-193 below). It is now generally recognized that the principle of "equal treatment" needs to be qualified by reference to the stage of development reached by a country.<sup>121</sup> It is also recognized that more action is needed in the interest of the developing countries. The main thrust in this direction comes from UNCTAD, which would like to replace in respect of the developing countries the formal equality offered by the most-favoured-nation principle, by a balanced system of preferences.

132. The problems facing ECE and ECLA are of a different magnitude, their interest being focused on one region of the world each. In ECE a special problem is the application of the most-favoured-nation principle between countries having different social and economic systems.

133. The contributions submitted by the different organizations and agencies testify to the fact that the most-favoured-nation clause was and still is an important organizer of international trade. It has been performing this function mostly in the bilateral form but in recent times it has appeared in a more ambitious multilateral form, as conspicuously exemplified by GATT and the Montevideo Treaty.

134. The field with which this part of the report is concerned presents manifold challenging problems. In the exploration of the functioning of the most-favoured-nation clause in general, shall specific rules be found which apply exclusively to clauses regulating trade? Will it be possible to deduce from the relatively short experience of GATT and LAFTA, generally valid rules pertaining to multilateral most-favoured-nation clauses? What are the rules governing the conflict of obligations arising out of the participation of a State in more than one treaty containing bilateral or multilateral clauses? Is it within

<sup>120</sup> *Ibid.*, pp. 68-72, paras. 70-74; in particular, see also J. B. Schroeder, "La compatibilidad de los Acuerdos Subregionales con el Tratado de Montevideo" and M. A. Vieira, "La cláusula de la nación mas favorecida y el Tratado de Montevideo, in *Anuario Uruguayo de Derecho Internacional (1965-1966)*, vol. 4, Montevideo, Fac. de Derecho y de Ciencias Sociales, Universidad de la República, pp. 189-238.

<sup>121</sup> See ECE, *Analytical Report on the State of Intra-European Trade* (United Nations publication, Sales No.: E.70.II.E/Mim.21), p. 25, foot-note 1.

or beyond the powers of the International Law Commission to transform at least some of the "wish principles" of UNCTAD into "reality principles" or legal rules and thereby contribute to the growth of that body of rules which some authors (Michel Virally, André Philip, Guy de Lacharrière) call "the law of development"? Will it be possible to extricate in this field legal rules from the perplexities of economic theories?

135. The present part of the report does not purport to give straight answers to these or similar questions. Based on the studies obligingly submitted by the interested organizations and agencies, it aims at giving food for further thinking on the subject. Most of the materials presented in this part can only be considered as background to the legal problems which have to be dealt with. The Special Rapporteur is, of course, aware that substantial parts of the replies from organizations and agencies which are reproduced here are not directly relevant to the "scope and effect of the clause as a legal institution".<sup>122</sup> While conscious that the problems of international trade policy are not within the domain of interest of the Commission, he nevertheless believes that a closer acquaintance with some aspects of these problems, which represent the context of the practical application of the clause, may prove useful and that their disclosure corresponds to the wish of the Commission "to base its studies on the broadest possible foundations".<sup>123</sup>

## 2. HISTORICAL NOTE

136. The UNCTAD memorandum included the following historical exposé, which can be read as a sequel to paragraphs 38-40 of the Special Rapporteur's first report on the most-favoured-nation clause:

From about the middle of the 19th century down to the Great Depression world trade was largely conducted on the basis of the most-favoured-nation (MFN) treatment. During this period, which also saw the heyday of free trade, the MFN clause served to provide the framework for the expansion of world trade. The clause appeared in most of the commercial treaties concluded by the principal trading countries. But even without explicit reference these countries adhered to the principle as a basic tenet of commercial policy.

As a consequence of this rule of behaviour it was possible to contain and keep to a minimum discrimination in world trade. Each country, in principle, provided equal conditions of access to all trading partners in its own market. In return it enjoyed equal treatment with competitors in all the export markets. On the basis of largely free and equal conditions of access the world economy could reap the benefits of international division of labour along the lines of comparative advantage.

The great depression in the early thirties marked a turning point in the world monetary and commercial system. One country after another was constrained to abandon the gold standard, thereby bringing to a close a long era of stable exchange rates and free convertibility. The world economy was thrown into a vicious circle of competitive devaluation, excessive protectionism, foreign exchange controls and bilateralism. In the field of commercial policy, quantitative restrictions rather than tariffs, became,

in a large number of countries, the principal instrument of control over the flow of trade. Under these circumstances the most-favoured-nation clause lost a great deal of its effectiveness as a means of ensuring non-discrimination in world trade.

The disintegration of the world trade and payments system was reflected in the emergence of discriminatory trading arrangements. It was in the midst of the depression that the United Kingdom, until then the champion of free trade and MFN treatment, sought with the other Commonwealth countries to solve the problems of external imbalance through the establishment of the system of Imperial and Commonwealth preferences. Under this arrangement Britain secured preferential conditions of access in the markets of the Commonwealth Countries and Colonies in return for preferential treatment accorded to these countries in its own market. Needless to say that such an arrangement represented a drastic departure from the principle of the most-favoured-nation treatment. The British example was followed by most of the colonial powers. As a result the principle of most-favoured-nation treatment was to a large extent banished from the commercial relationship between the metropolitan power and its dependencies.

### *GATT and the most-favoured-nation clause*

The post-Second World War period witnessed a far-reaching reorganization of the world economy through the United Nations and the Specialized Agencies. The Bretton Woods Agreement of 1944 resulted in the establishment of two important international institutions in the economic field, namely, the International Bank for Reconstruction and Development (IBRD) and the International Monetary Fund (IMF). The first was designed to promote and organize long-term capital movement and international investment, the second to ensure stability of exchange rates and the adoption by member countries of the appropriate monetary and foreign exchange policies. In the area of international trade an International Trade Organization (ITO) was supposed to complement the trinity of United Nations specialized agencies set up to restore economic order to the post-war world. The ITO Charter was adopted at the United Nations Conference on Trade and Employment in Havana in 1948. However, for reasons which fall outside the scope of this note, the Havana Charter failed to receive the number of ratifications required. Accordingly, it was not possible to proceed with the establishment of ITO.

While the Havana Charter was still under consideration, some of the principal trading countries decided to hold a multilateral tariff negotiation conference at Geneva in 1947. Besides agreeing on certain tariff reductions, this conference agreed upon a multilateral trade treaty incorporating in advance the commercial policy clauses of the Havana Charter. The treaty was called the General Agreement on Tariffs and Trade (GATT). The GATT was intended to be a temporary arrangement pending the establishment of ITO. When the ITO failed to appear, the GATT emerged as the only international instrument for the liberalization and multilateralization of world trade.<sup>124</sup>

137. To the foregoing description it should be added that the Soviet Union did not attend the Havana Conference, did not participate in the preparatory work which led to the establishment of GATT and did not join the organization. Of the East-European countries, only Czechoslovakia signed the Havana Charter and the General Agreement. Poland participated in the Havana Conference but did not sign the Final Act.

138. The representatives of Poland and the Soviet Union were highly critical of the results of the Conference

<sup>122</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 158, document A/CN.4/213, para. 3.

<sup>123</sup> *Ibid.*, para. 4.

<sup>124</sup> UNCTAD, Research memorandum No. 33/Rev.1, paras. 2-7.

and explained vigorously their differing views at the seventh session of the Economic and Social Council in 1948 during the discussion of the Secretary-General's report on the Havana Conference.<sup>125</sup> Referring to these statements, a paper of ECE stated:

The non-participation of virtually all east European countries in these activities designed to reach agreement on international trading relations certainly reflected differences of view as to the principles which should govern such relations. But it was also a consequence of their refusal to accept a minority role in the administration of these agreements and of the deterioration in the political climate.<sup>126</sup>

### 3. THE STRUCTURE OF THE GATT

#### 139. The GATT memorandum stated:

The General Agreement on Tariffs and Trade entered into force in 1948 as a multilateral commercial agreement accepted by twenty-three Governments. There are now 76 contracting parties, two Governments have accepted the GATT provisionally and thirteen others apply the GATT on a *de facto* basis. [. . .] A Government acceding to the Agreement acquires all the rights and assumes all the obligations of the GATT. Newly independent States, to whose territories the Agreement had been applied prior to independence, have the right to become contracting parties.

140. The basic treaty, the "General Agreement" itself, was completed in October 1947. Technically, it has never come into force, being applied by a "Protocol of Provisional Application", dated 30 October 1947, and, in addition, by the special protocols of accession agreed between the individual Governments and the CONTRACTING PARTIES.<sup>127</sup> These special protocols enter into force upon the decision taken by the CONTRACTING PARTIES by a two-thirds majority (Art. XXXIII).

141. The Protocol of Provisional Application of the General Agreement (30 October 1947) provides that contracting parties need apply Part II of the GATT (i.e. Articles III-XXIII) only "to the fullest extent not inconsistent with existing legislation."<sup>128</sup> Referring to the Protocol of Provisional Application, the GATT memorandum explained:

(i) [. . .] The CONTRACTING PARTIES agreed in 1949 that a measure not consistent with the provisions of Part II can be permitted during the period of provisional application "provided that the legislation on which it is based is by its terms or expressed intent of a mandatory character—that is, it imposes on the executive authority requirements which cannot be modified by executive action". (AI/169).<sup>129</sup>

<sup>125</sup> See *Official Records of the Economic and Social Council, Seventh Session, 195th meeting*, pp. 315 *et seq.*

<sup>126</sup> See ECE, *Analytical Report on the State of Intra-European Trade* (United Nations publication, Sales No.: E.70.II.E/Mim.21), pp. 25-26.

<sup>127</sup> In the present part of the report, as regards GATT, the words "contracting parties" refer collectively to the member nations of GATT acting in their individual capacities; when printed in capitals as above, they mean "the Contracting Parties acting jointly as provided for in Article XXV".

<sup>128</sup> GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), p. 77. (Italics supplied by the Special Rapporteurs.)

<sup>129</sup> "AI/169" signifies "page 169 of the Analytical Index (second revision)" [GATT publication, Sales No.: GATT/1970-1]. Other

(ii) This provisional application of Part II may have the consequence that some contracting parties do not fully observe the non-discrimination provisions of Articles V, IX, XIII and XVII. In accordance with a Supplementary Provision in Annex I, this applies also to the obligations incorporated in paragraph 1 of Article I by reference to paragraphs 2 and 4 of Article III which are considered as falling within Part II for the purposes of the Protocol of Provisional Application.

142. In this connexion, a learned commentator has written:

[. . .] the GATT, as applied through the Protocol of Provisional Application, has been amended a number of times and affected by other protocols and international agreements, including some not technically "in force". Thus the basic GATT treaty is a complex set of instruments applying with varying rigor to different countries. For the lawyer to ascertain at any given time the precise legal commitments between any two nations that are contracting parties to GATT is no easy task.<sup>130</sup>

### 4. THE MOST-FAVOURLED-NATION CLAUSES IN THE GATT AND IN THE MONTEVIDEO TREATY

#### 143. The GATT memorandum stated:

One of the fundamental provisions of the General Agreement is equality of treatment. This is established in an unconditional most-favoured-nation clause relating to trade.

In fact, the General Agreement contains several most-favoured-nation clauses, which are quoted in the GATT memorandum and are reproduced below. The GATT memorandum classes them among "the provisions of GATT establishing the rule of non-discrimination". The GATT memorandum states also that "during the twenty-one years that the Agreement has been in force certain interpretations have been developed" and it describes those interpretations. They are only partially reproduced below, owing to their highly technical character. The Treaty Establishing a Free-Trade Area and Instituting the Latin American Free-Trade Association, signed at Montevideo on 18 February 1960, contains some clauses which can be paralleled to the GATT clauses. The text of such LAFTA clauses is also given below.

#### (a) *The general most-favoured-nation clause in the GATT*

#### 144. The GATT memorandum stated:

(i) Paragraph 1 of Article I establishes general most-favoured-nation treatment as a rule governing trade among the contracting parties to the GATT:

"With respect to customs duties and charges of any kind imposed on or in connexion with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connexion with importation and exportation,

references in the GATT memorandum are to the volumes and supplements of the "Basic Instruments and Selected Documents" (BISD) or to other GATT documents.

<sup>130</sup> J. H. Jackson, *World Trade and the Law of GATT: A Legal Analysis of the General Agreement on Tariffs and Trade* (Indianapolis, The Bobbs-Merrill Company, 1969), p. 59.

and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." [131]

(ii) This paragraph was modelled on the standard League of Nations most-favoured-nation clause (see AI/2). Except for the exclusion of "governmental contracts for public works", the text is, substantially, that contained in the "Suggested Charter for an International Trade Organization", submitted by the Government of the United States to the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, London, October 1946. (See Report of the First Session, page 9.)

145. The contents of the principal most-favoured-nation clause of GATT have been described by one learned commentator as "[. . .] divisible into two concepts: (1) the scope of the clause, *i.e.*, to what activity does it apply? and (2) the obligation of the clause, *i.e.*, what does it require?"<sup>132</sup> These two concepts are set out in the following graphic way:

#### Scope of the clause

- (1) Customs duties and charges of any kind imposed on or in connexion with:
  - (a) importation,
  - (b) exportation, and
  - (c) international transfer of payments for imports or exports
- (2) The method of levying such duties and charges;
- (3) All rules and formalities in connection with:
  - (a) importation and
  - (b) exportation;
- (4) All matters referred to in Article III, paragraph 2, and Article III, paragraph 4 (which cover internal taxes and regulatory laws).
- (5) All of the above apply only to *products*.<sup>133</sup>

#### Obligation of the clause

[A]ny advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.<sup>134</sup>

146. Some of the explanatory notes given in the GATT memorandum are reproduced below:

In 1948 the Chairman of the CONTRACTING PARTIES ruled that "charges of any kind" cover consular taxes [and] [. . .] that the most-favoured-nation principle was applicable to "any advantage, favour, privilege or immunity" granted with respect to internal taxes, e.g. rebates of excise duties. (11/12)

The words "all matters referred to in paragraphs 2 and 4 of Article III" relate to national treatment on internal taxation and regulation; in particular, to "internal taxes or other internal charges of any kind" and to "all laws, regulations and requirements affecting their [i.e. the imported products'] internal sale, offering for sale, purchase, transportation, distribution or use."<sup>135</sup>

<sup>131</sup> GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), p. 2.

<sup>132</sup> J. H. Jackson, *op. cit.*, p. 256.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*, pp. 256-257.

<sup>135</sup> GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), p. 6.

The words "originating in" are intended to exclude the concept of "provenance", so that the application of the most-favoured-nation provision depends upon proof that the goods had in fact originated in a particular country even if they entered the importing country by way of a third country. (AI/4)

When the clause was drafted it was not thought necessary to define the phrase "like product", but it was suggested that the method of tariff classification could be used for determining whether products were "like products" or not. (AI/5)

147. A renowned expert on matters of GATT has made the following remarks on the expression "like product":

[The expression] is not altogether clear and inevitably leads to disputes over interpretation. The example of different types of flour, which are listed individually, in practically all tariffs, comes to mind. If a tariff on wheat flour is reduced, does the clause oblige a contracting party also to reduce the tariff on rye flour coming from another country?

While the text gives no answer, practice has also failed to help. One of the complaints dealt with in GATT has been that of Norway against Germany, which had granted a special concession to Portugal on sardines. Norway exported herring to Germany prepared in a "like" manner, and Norway claimed that being a "like" product it should benefit from the same concession as Portugal's product. Unfortunately for the formalists this case was settled by a compromise and left Contracting Parties without a precedent. GATT, however, remains flexible over this point and can deal with any situation as it presents itself. The absence of overt disagreement suggests that it is no major problem. Contracting Parties have indeed formally agreed to avoid the pitfall of too narrow definitions.<sup>136</sup>

148. The difficulties inherent in the expression "like product" can *ad oculos* be demonstrated in the following manner. In the working paper on the most-favoured-nation clause in the law of treaties, submitted by the Special Rapporteur on 19 June 1968, the following classical example of an unduly specialized tariff was cited under the heading "Violations of the clause".<sup>137</sup> In 1904 Germany granted a duty reduction to Switzerland on

large dappled mountain cattle or brown 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.<sup>138</sup>

Sources quoting this example generally consider a cow raised at a certain elevation "like" a cow raised at a lower level. This being so, they believe—and the working paper followed this belief—that a tariff classification based on such an extraneous consideration as the place where the cows are raised is clearly designed to discriminate in favour of a particular country, in the case in question, in favour of Switzerland and against, for example, Denmark.<sup>139</sup> However, the Food and Agriculture Organ-

<sup>136</sup> G. Curzon, *Multilateral Commercial Diplomacy* (London, Michael Joseph, 1965), p. 62-63.

<sup>137</sup> See *Yearbook of the International Law Commission*, 1968, vol. II, p. 170, document A/CN.4/L.127, para. 31.

<sup>138</sup> League of Nations, Economic and Financial Section, *Memorandum on Discriminatory Classifications* (Ser. L.o.N.P. 1927.II.27), p. 8.

<sup>139</sup> H. C. Hawkins, *Commercial Treaties and Agreements: Principles and Practice* (New York, Rinehart and Co., Inc., 1951), pp. 93-94; J. E. S. Fawcett, "Trade and Finance in International Law" (text in English) in *Recueil des cours de l'Académie de droit international de La Haye*, 1968 (Leyden, Sijthoff, 1969), vol. 123, p. 263.

ization of the United Nations, being an interested agency and having special expertise in matters of animal trade, in its reply to the circular letter of the Secretary-General made the following comment on the example given in the working paper:

In view of the background situation relating to the case cited in the example, it would seem that the specialized tariff may have been technically justified because of the genetic improvement programme which was carried out in Southern Germany at that time. At present, this specialized tariff would presumably have been worded in a different way, but in 1904 terms like Simmental or Brown Swiss were probably not recognized as legally valid characteristics [...]. Apart from this, it must be recognized that unduly specialized tariffs and other technical or sanitary specifications have been—and continue to be—used occasionally for reasons that may be regarded as discriminatory.

(b) *The general most-favoured-nation clause in the Montevideo Treaty*

149. In contradistinction to the general most-favoured-nation clause of GATT, the corresponding clause of the Montevideo Treaty is drafted in simpler language:

*Article 18*

Any advantage, benefit, franchise, immunity or privilege applied by a Contracting Party in respect of a product originating in or intended for consignment to any other country shall be immediately and unconditionally extended to the similar product originating in or intended for consignment to the territory of the other Contracting Parties.<sup>140</sup>

(c) *Special most-favoured-nation clauses*

150. The distinction between a "general" and a "special" most-favoured-nation clause is, indeed, arbitrary; what is really meant is that the first, covering a larger field, is more important, more general than the second, which relates to a more particular subject.

151. The GATT memorandum mentions the following clauses in the GATT which, in addition to the major commitment of Article I., contain obligations to most-favoured-nation treatment:

*Traffic in transit*

Most-favoured-nation treatment for traffic in transit is provided for in paragraph 5 of Article V:

With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.<sup>141</sup>

In accordance with paragraph 7, the above does not apply to the operation of aircraft in transit, but it does apply to air transit of goods (including baggage).

A Supplementary Provision in Annex I provides that, with regard to transportation charges, the principle laid down in paragraph 5 refers to "like products being transported on the same route under like conditions".<sup>142</sup>

<sup>140</sup> United Nations, *Multilateral Economic Co-operation in Latin America*, vol. I, *Text and documents* (United Nations publication, Sales No.: 62.II.G.3), p. 59.

<sup>141</sup> GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), p. 9.

<sup>142</sup> *Ibid.*, p. 64.

*Marking requirements*

Most-favoured-nation treatment is provided for in paragraph 1 of Article IX:

Each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country.<sup>143</sup>

152. The Montevideo Treaty contains a most-favoured-nation clause pertaining to a special field:

*Capital movement*

*Article 20*

Capital originating in the Area shall enjoy, in the territory of each Contracting Party, treatment not less favourable than that granted to capital originating in any other country.<sup>144</sup>

5. THE NATURE AND FUNCTIONING OF A MULTILATERAL MOST-FAVOURLED-NATION CLAUSE

153. The basic aim of the most-favoured-nation principle is to secure the benefits of multilateral trade,<sup>145</sup> and this can be achieved through bilateral most-favoured-nation clauses. What greater advantage can then be acquired by adopting a multilateral most-favoured-nation system? This is illustrated by the following example taken from an article by John H. Jackson.

If a most-favored-nation clause is generally inserted in bilateral trade treaties, then when nation A agrees with nation B to reduce tariffs on widgets, A may have to grant the same reduction to C under a prior treaty which has MFN. But A will be able to extract from B only such reciprocal tariff reductions that compensate for B's advantage received from A. C will get a windfall. This knowledge will inhibit A from offering very much to B in their negotiations, at least as to goods which are traded with nations other than B. The only way out of this dilemma is for A, B, and C to negotiate "together". This GATT attempts to allow.<sup>146</sup>

154. Another expert more passionately describes the advantage of multilateralism inherent in the GATT rule as follows:

While the most-favoured-nation clause in GATT is the direct descendant of the unconditional most-favoured-nation clause as enshrined for decades in bilateral agreements, in its multilateral context it has a significance, and perhaps even has a purpose, which goes beyond that of bilateral agreements. The original purpose behind its inclusion in bilateral agreements was simply to make sure that each signatory obtained the best possible treatment from his partner. If that treatment were better than the treatment accorded to others, so much the better. In its multilateral context, however, the significance of the clause goes deeper and is the most essential element in the basic idea that runs through the first experiment in multilateral co-operation in the field of trade. That idea is that discrimination in any form is likely to lead to more discrimination, and that in the long run all countries will suffer from the inevitable distortion of trade patterns which will arise out of discrimination, even though they may be the temporary beneficiaries. However, because there are

<sup>143</sup> *Ibid.*, p. 15.

<sup>144</sup> United Nations, *Multilateral Economic Co-operation in Latin America*, vol. I, *Text and documents* (United Nations publication, Sales No.: 62.II.G.3), p. 59.

<sup>145</sup> H. C. Hawkins, *op. cit.*, p. 185.

<sup>146</sup> J. H. Jackson, "The Puzzle of GATT", in *Journal of World Trade Law* (London, 1967), vol. I, No. 2, p. 145.

undoubted benefits that can be obtained in the short run from reciprocal discrimination, the only way to prevent a country or a pair of countries from making the move that will set off this chain reaction is to obtain the simultaneous pledge of the largest possible number of trading countries that they will not discriminate against each other.<sup>147</sup>

155. According to Patterson,<sup>148</sup> the unconditional most-favoured-nation clause which is generally regarded as the cornerstone of the GATT is a major extension of the principle because the General Agreement is a many-faceted multilateral commitment. This means that for a member to back out of its non-discriminatory obligations would threaten an unravelling of a huge package—not just a few commitments with one other country, as has been possible when the most-favoured-nation clause was only part of a bilateral accord.

156. Another scholar develops this idea a little further:

[. . .] the clause in the Agreement makes it practically impossible to cancel bilateral concessions. The only way for a contracting party to avoid most-favoured-nation treatment is to walk out of GATT. But this would mean that the Contracting Party would also lose all the other concessions negotiated, quite apart from the one it wishes to avoid. It is hardly possible to conceive any single obligation which would make a country give up all the negotiated advantages which make up the GATT package deal. Before GATT it was possible to renegotiate with just the one country with whom one had difficulties without touching one's rights and obligations with any other trading partner. This is an important new development and shows that the multilateral character of the Agreement adds up in tariff concessions to more than just a sum of bilateral concessions. In addition, the old argument of free concessions to third countries has also died with the simultaneity of the tariff negotiations with all Contracting Parties. Any presumed "free" concessions can now be made to yield their value by immediate inclusion in the negotiable list with any country likely to benefit. Moreover, the greatest objection to the most-favoured-nation clause—the non-negotiable tariff as it existed in the United States—has disappeared by definition. For GATT is an instrument to lower duties and the *sine qua non* of membership is thus a negotiable tariff.<sup>149</sup>

157. A special feature of the most-favoured-nation system of GATT is that each party to the General Agreement, in negotiating with the other parties (mostly with "principal suppliers"), makes concessions in respect of customs duties on certain products. These reductions are listed in Schedules. According to Article II of the GATT each contracting party is obliged to apply its duty reductions to all other parties. The Agreement goes beyond the most-favoured-nation principle in this respect. Each member giving a concession is directly obligated to grant the same concession to all other members in their own right; this is different from making the latter rely on continued agreement between the Party granting the concession and the Party that negotiated it.<sup>150</sup> Thus, the operation of the GATT clause differs from that of a usual bilateral most-favoured-nation clause. Because Article XXVIII of the General Agreement prescribes a

cumbersome procedure for the modification of the Schedules, the GATT clause is not as easily and automatically a "floating device" (*échelle mobile*) as bilateral clauses in general.

158. According to a French author:

[. . .] the multilateral treaty technique has made it possible to improve the mechanism of the clause and to meet certain criticisms made during the inter-war period, so that the old lady has acquired a new lease of life.<sup>151</sup>

## 6. OTHER CLAUSES AIMING AT NON-DISCRIMINATION

159. The GATT memorandum describes the most-favoured-nation clauses quoted above and the clauses on quantitative restrictions and State-trading enterprises under the same heading: "The provisions of GATT establishing the rule of non-discrimination". From a technical point of view, however, a distinction should be made between the most-favoured-nation clauses proper and the clauses included below. While aiming at a similar effect, the latter are not drafted in the form of most-favoured-nation clauses. In the provision relating to quantitative restrictions on the import of goods, the "relative" treatment represented by the most-favoured-nation clause takes a form somewhat different from the form it takes when it is applied to other matters. Similarly, the provision relating to State-trading represents a variant in the application of the principle underlying the most-favoured-nation clause.<sup>152</sup> In these instances the application of the most-favoured-nation principle demands not *equal* but *equitable* treatment.<sup>153</sup>

### (a) Quantitative restrictions in the GATT

160. Quantitative restrictions are in principle prohibited by the General Agreement (Art. XI). They are, however, authorized on account of a country's balance-of-payments difficulties (Art. XII, Art. XVIII, Sect. B) or development needs (Art. XVIII, Sect. C). The Contracting Parties are required to apply the quantitative restrictions in a non-discriminatory manner (Art. XIII). On this question the GATT memorandum has the following to say:

(i) Paragraph 1 of Article XIII provides that the administration of quantitative restrictions shall be non-discriminatory:

"No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted."<sup>154</sup>

<sup>151</sup> "[. . .] la technique du traité multilatéral a permis d'améliorer le mécanisme de la clause et de parer à certains reproches qui lui ont été adressés durant l'entre-deux-guerres. Voici donc une nouvelle jeunesse pour cette vieille dame". E. Sauvignon, *La clause de la nation la plus favorisée* (thesis, Université de Nice, 1968), p. 143.

<sup>152</sup> H. C. Hawkins, *op. cit.*, p. 12.

<sup>153</sup> *Ibid.*, p. 165.

<sup>154</sup> GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), p. 21.

<sup>147</sup> J. W. Evans, quoted by G. Curzon, *op. cit.*, pp. 67-68.

<sup>148</sup> G. Patterson, *Discrimination in International Trade: The Policy Issues, 1945-1965* (Princeton, N. J., Princeton University Press, 1966), p. 18.

<sup>149</sup> G. Curzon, *op. cit.*, p. 62.

<sup>150</sup> H. C. Hawkins, *op. cit.*, p. 226.

(ii) The rules for the non-discriminatory administration of quantitative restrictions are set out in paragraphs 2 to 5 of Article XIII. Under paragraph 2 contracting parties, in applying import restrictions to any product, are required to "[...] aim at a distribution of trade [...] approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions".<sup>155</sup> In cases in which a quota is allocated among supplying countries, the contracting party applying the restrictions "[...] may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product",<sup>156</sup> and in cases in which this method is not reasonably practicable the contracting party "shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions supplied by such contracting parties during a previous representative period".<sup>157</sup>

(b) *Quantitative restrictions  
in the Montevideo Treaty*

161. Article 23 of the Montevideo Treaty authorizes the Contracting Parties "to impose non-discriminatory restrictions upon imports" if they have, "or are liable to have, serious repercussions on specific productive activities of vital importance to the national economy".<sup>158</sup> Restrictions can also be introduced "without discrimination" under Article 24 in order to improve the balance-of-payments situation. In Article 26 the Parties undertake to initiate appropriate action with a view to eliminating the restrictions which should as a rule be introduced as transitory measures only. A special provision of Article 28 permits that under certain circumstances a Party may apply "in respect of trade in agricultural commodities of substantial importance to its economy"<sup>159</sup> non-discriminatory measures designed to limit imports to the amount required to meet the deficit in internal production.

(c) *State-trading enterprises*

162. The GATT memorandum stated in this respect:

(i) Paragraph 1 of Article XVII provides for the application of the general principles of non-discriminatory treatment to the foreign purchases and sales of State enterprises:

"(a) Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.

"(b) The provisions of sub-paragraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase

or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales."<sup>160</sup>

(ii) A supplementary provision in Annex I provides that the "operations of Marketing Boards, which are established by contracting parties and are engaged in purchasing or selling, are subject to the provisions of sub-paragraphs (a) and (b)" [of para. 1].<sup>161</sup>

(iii) A further Supplementary Provision, relating to paragraph 1 (b), provides that a country receiving a "tied loan" may take this loan into account as a "commercial consideration" when purchasing requirements abroad.<sup>162</sup>

(iv) Paragraph 2 of the Article relates to products imported for governmental use:

"The provisions of paragraph 1 of this Article shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment."<sup>163</sup>

163. The State trading provision merits some comments:

(i) The provision is based on the assumption that leaving trade in the hands of private enterprises will result in a better allocation of international resources, while State trading is necessarily uneconomic. This assumption is, however, not—or not necessarily—true. The private firm may have a significant power in the market and may, as it not infrequently does, exercise this power in such a way as to cause economic detriment instead of benefit. This was well known to the draftsmen of ITO,<sup>164</sup> who included in their draft a whole chapter on "restrictive business practices". Although this chapter died with ITO, a case can be made for holding that under Article XXIX of GATT, which makes the Havana Charter "principles" applicable, the said provisions are not altogether extinct.<sup>165</sup>

(ii) The text of Article XVII reveals that its title ("State Trading Enterprises") is misleading. The provision is not restricted to State enterprises proper, i.e. to enterprises established, owned, controlled and maintained by a State, but it covers also enterprises (whether State-owned or privately-owned) to which a State party to GATT grants "formally, or in effect, exclusive or special privileges".<sup>166</sup>

(iii) When the provision was drafted, representatives of States with active State-trading programmes (e.g. New Zealand) feared that the Agreement would place greater restrictions on State traders than on private enterprise.<sup>167</sup> That fear has not proved to have been completely unfounded;

<sup>160</sup> GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), p. 27.

<sup>161</sup> *Ibid.*, p. 69.

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

<sup>163</sup> *Ibid.*, p. 28.

<sup>164</sup> See para. 136 above.

<sup>165</sup> See J. H. Jackson, *World Trade and the Law of GATT...*, *op. cit.*, p. 330.

<sup>166</sup> GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), p. 27.

<sup>167</sup> See J. H. Jackson, *World Trade and the Law of GATT...*, *op. cit.*, p. 334.

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*, p. 22.

<sup>157</sup> *Ibid.*

<sup>158</sup> United Nations, *Multilateral Economic Co-operation in Latin America*, vol. I, *Text and documents* (United Nations publication, Sales No.: 62.II.G.3), p. 60.

<sup>159</sup> *Ibid.*

(iv) Any organization aspiring to regulate world trade as a whole has to take into account the fact that a growing segment of this trade is carried on by socialist States. Attention was drawn to this fact as early as 1946, when in the London session the delegate of France made the following statement:

France wishes to see that the organization which we are planning here extends to the rest of the world [. . .]. There does not exist, in our opinion, any necessary connexion between the form of the productive regime and the internal exchanges in one nation, on the one hand, and on her foreign economic policy, on the other. The United States may very well continue to follow the principle, the more orthodox principle, of private initiative. France and other European countries may turn towards planned economy. The USSR may uphold and maintain the Marxist ideals of collectivism without our having to refuse to be in favour of a policy of international organization based on liberty and equality [. . .].<sup>168</sup>

These and similar thoughts will have to be taken into account if arrangements are to be made for the organization of international trade on a fully universal level.

## 7. EXCEPTIONS AND ESCAPE CLAUSES IN THE GATT<sup>169</sup>

164. According to Jackson, it has sometimes been said that

GATT is "riddled with exceptions" [. . .] there are a number of provisions that relax the GATT obligations under various circumstances. But arguably these provisions are essential to an institution as new (and therefore experimental) as GATT, which purports to regulate the complex and politically sensitive subject of international trade. The escape clauses and exceptions provide the necessary flexibility without which the General Agreement might never have been concluded or might never have endured in the face of the pressures that have buffeted it.<sup>170</sup>

165. The GATT memorandum distinguishes between "exceptions provided for in the GATT to the rule of non-discrimination" and further "exceptions granted by the CONTRACTING PARTIES" which

"meet from time to time for the purpose of giving effect to those provisions of the Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of the Agreement."

166. Following the system of the GATT memorandum, the first set of exceptions is described below:

### (a) *Exceptions (provided for in the GATT) to the rule of non-discrimination*

#### (i) *Preferences in respect of import duties and charges*

Paragraph 2 of Article I provides that the rule of general most-

favoured-nation treatment does not require the elimination of certain preferences, in respect of import duties or charges, which were in force on established base dates. Corresponding exemptions for existing preferences have been provided for in the protocols of accession of certain countries (Argentina and Uruguay) and in declarations on provisional accession (United Arab Republic).

#### (ii) *Anti-dumping and countervailing duties*<sup>171</sup>

Under paragraphs 2 and 3 of Article VI a contracting party may in certain circumstances levy a special duty on any product which is introduced into its commerce from the territory of another contracting party at less than its normal value, in order to offset or prevent dumping or to offset any bounty or subsidy bestowed, directly or indirectly, upon its manufacture, production or export. By their very nature, anti-dumping and countervailing duties cannot be other than discriminatory.

In 1960 a group of experts on anti-dumping duties considered *inter alia* the relationship between the application of anti-dumping duties and the most-favoured-nation clause. They stated in their report: "In equity and having regard to the most-favoured-nation principle [. . .] where there was dumping to the same degree from more than one source and where that dumping caused or threatened material injury to the same extent, the importing country ought normally to be expected to levy anti-dumping duties equally on all the dumped imports." (*Basic Instruments and Selected Documents*, (BISD) *Ninth Supplement*, p. 198.)

In 1967 the CONTRACTING PARTIES drew up an Anti-Dumping Code "to provide for equitable and open procedures as the basis for a full examination of dumping cases" and "to interpret the provisions of Article VI of the General Agreement and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation".<sup>172</sup> The Code was incorporated in an Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade,<sup>173</sup> which entered into force on 1 July 1968 and has been accepted by eighteen contracting parties. In November 1968 the Director-General was asked for a ruling as to "whether parties to the Agreement have a legal obligation under Article I of the GATT to apply the provisions of the Anti-Dumping Code in their trade with all GATT contracting parties, or only in their trade with those GATT contracting parties which are also parties to the Agreement". The Director-General's answer was to the effect that the most-favoured-nation provisions of Article I are applicable. Basing himself on paragraph 1 of Article I, he said "for a contracting party to apply an improved set of rules for the interpretation and application of an Article of the GATT only in its trade with contracting parties which undertake to apply the same rules would introduce a conditional element into the most-favoured-nation obligations which, under Article I of GATT, are clearly unconditional". He referred also to paragraph 3 (a) of Article X of the GATT and said that these provisions "would not permit [. . .] the application of one set of regulations and procedures with respect to some contracting parties and a different set with respect to the others". (L/3149.)

#### (iii) *Retaliation for the discriminatory application of quantitative restrictions*

It is provided in paragraphs 4 (c) and (d) of Article XII and in paragraphs 12 (c) and (d) and paragraph 21 of Article XVIII that, if quantitative restrictions are imposed in a manner contrary to the rules of GATT requiring the non-discriminatory application of such restrictions, the CONTRACTING PARTIES may release a

<sup>168</sup> Document EPCT/PV.3 (1946), p. 18 (quoted by J. H. Jackson, *World Trade and the Law of GATT* . . ., *op. cit.*, pp. 361-362).

<sup>169</sup> Similar clauses in the Montevideo Treaty (e.g. Chapter VI on saving clauses, Chapter VII on special provisions concerning agriculture, Chapter VIII on measures in favour of countries at a relatively less advanced stage of economic development, article 19 concerning frontier traffic and article 53 concerning other exceptions) are not dealt with in the present report.

<sup>170</sup> J. H. Jackson, *op. cit.*, pp. 535-536.

<sup>171</sup> See *Yearbook of the International Law Commission*, 1969, vol. II, p. 171, document A/CN.4/213, para. 88.

<sup>172</sup> GATT, *Basic Instruments and Selected Documents*, *Fifteenth Supplement* (Sales No.: GATT/1968-1), p. 24.

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

contracting party whose trade is adversely affected from obligations under GATT towards the contracting party applying the restrictions.

(iv) *Exceptions to the rule of non-discrimination in the administration of quantitative restrictions*

A contracting party which is applying import restrictions to safeguard its external financial position and its balance of payments may deviate from the rule of non-discrimination in accordance with the provisions of Article XIV. The principal exception is set out in paragraph 1 of the Article which allows a contracting party to deviate "[. . .] in a manner having equivalent effect to restrictions on payments and transfers for current international transactions which that contracting party may at that time apply under Article VIII or XIV of the Articles of Agreement of the International Monetary Fund".<sup>174</sup> Minor exceptions are permitted under the other paragraphs of the Article and under paragraph 9 of Article XV.

(v) *Response to emergency action affecting imports*

Under Article XIX a contracting party may, in certain circumstances, suspend temporarily an obligation which it has assumed under the GATT. In that event the CONTRACTING PARTIES may authorize a contracting party which has a substantial interest as exporter of the product concerned to suspend substantially equivalent obligations to the trade of the contracting party taking the action.

(vi) *Sanitary and health regulations*

Article XX provides general exceptions, which have been traditional in commercial treaties, permitting a contracting party to adopt or enforce measures for certain special purposes. It is under point (b), i.e., measures "necessary to protect human, animal, or plant life or health",<sup>175</sup> that such measures are most likely to be discriminatory; but they are not to constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail".<sup>176</sup>

(vii) *Security regulations*

It is provided in Article XXI that nothing in the GATT will be construed to prevent a contracting party from taking any action which it considers necessary for the protection of its essential security interests (relating to traffic in arms, etc.) or in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

(viii) *Nullification or impairment*

Following an investigation of a complaint by a contracting party that a benefit accruing to it under the GATT is being nullified or impaired, the CONTRACTING PARTIES may authorize the complainant to suspend the application to any other contracting party of such GATT obligations as they determine to be appropriate.

(ix) *Frontier traffic*

According to paragraph 3 (a) of Article XXIV the provisions of the GATT do not prevent a "dvantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic".<sup>177</sup>

(x) *Non-application of the GATT between particular contracting parties*

Article XXXV was added to the GATT in 1948. Paragraph 1 of this Article reads: "This Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting party and any other contracting party if:

- (a) the two contracting parties have not entered into tariff negotiations with each other, and
- (b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application."<sup>178</sup>

(xi) *Customs unions and free-trade areas*

167. Important provisions of article XXIV (not quoted in the GATT memorandum) read as follows:

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that *the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.*

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided that:*

(a) with respect to a customs union, or an interim agreement leading to the formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement *shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce* applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;

(b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement *shall not be higher or more restrictive than the corresponding duties and other regulations of commerce* existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement, as the case may be; and

(c) any interim agreement referred to in sub-paragraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

[. . .]

7. (a) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.<sup>179</sup>

168. On customs unions and free-trade areas the GATT memorandum contained the following passages:

The GATT does not prevent, as between the territories of contracting parties, the formation of a customs union or of a

<sup>174</sup> GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), p. 23.

<sup>175</sup> *Ibid.*, p. 37.

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.*, p. 41.

<sup>178</sup> *Ibid.*, p. 52.

<sup>179</sup> *Ibid.*, pp. 41-42. (Italics supplied by the special Rapporteur.)

free-trade area. The definitions of a customs union and of a free-trade area, set out in paragraph 8 of Article XXIV, include the following provisions relevant to the most-favoured-nation rule:

(a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that

(i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,

(ii) [...] substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;

(b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.<sup>180</sup> The original (1947) text of the GATT recognized only customs unions as legitimate exceptions to the most-favoured-nation rule. Provision for free-trade areas was added by protocol in 1948, following the introduction of this concept in the Havana Charter for an International Trade Organization.

Certain conditions and procedures are laid down in paragraphs 5 to 9 of Article XXIV, but under paragraph 10 the CONTRACTING PARTIES may approve, by a two-thirds majority, proposals for the formation of a union or area which do not fully comply with the requirements of those paragraphs. The expression "substantially all the trade" has not been quantified by the CONTRACTING PARTIES.

The plans for customs unions and free-trade areas which have been notified to the CONTRACTING PARTIES under Article XXIV are listed in the Analytical Index (AI/128-131).

(xii) *The problems raised by article XXIV*

169. Hardly any other provisions of the General Agreement have been so vehemently criticised as those of Article XXIV on customs unions and free-trade areas. One of the critics, K. W. Dam, after a profound examination of the contents of article XXIV, has written as follows:

If a single adjective were to be chosen to describe article XXIV, that adjective would be "deceptive". First, the standards established are deceptively concrete and precise; any attempt to apply the standards to a specific situation reveals ambiguities which, to use an irresistible metaphor, go to the heart of the matter. Second, while the rule appears to be carefully conceived, the principles enunciated make little economic sense. Third, the dismaying experience of the Contracting Parties has been that no customs union or free-trade area agreement presented for review has complied with article XXIV and yet, every such agreement has been approved by a tacit or explicit waiver.

[...]

Perhaps the most troublesome ambiguity in article XXIV lies in the requirement that, in the case of a customs union, "duties and other regulations of commerce imposed [on external trade] [...] shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union [Art. XXIV, para. 5 (a)].

[...]

Further ambiguity lies in the meaning of the requirement that, in order for a regional grouping to qualify as a customs union or free-trade area under article XXIV, "duties and other restrictive regulations of commerce [must be] [...] eliminated with respect to substantially all the trade between the constituent territories".

[...]

While article XXIV does not set forth its rationale, it is not too difficult to surmise the underlying theory. The General Agreement has two grand designs: That free trade be promoted through multilateral tariff negotiation and that discrimination be eliminated by means of the most-favoured-nation principle. For the draftsmen of the General Agreement, customs unions and free-trade areas produced a conflict between those two goals. Such regional groupings seemed to be movements toward free trade to the extent that tariffs were lowered between member countries, but they also seemed to involve discrimination against non-member countries. The solution adopted by the draftsmen was to permit customs unions provided the plans went all the way toward unfettered trade by full elimination of barriers on "substantially all" intermember trade, even though, in a sense, discrimination was thus increased, but to assure through the "higher or more restrictive" criterion that creation of the customs union or free-trade area was not seized upon as an opportunity to raise tariffs against nonmembers beyond the preexisting level.

What may not have been appreciated at the time of the drafting of the General Agreement was that customs unions and free-trade areas need not involve movements toward free trade. They may just as easily be, and perhaps in view of the widespread propensity toward protectionism are more likely to be, movements away from free trade."<sup>181</sup>

170. Another expert sees the problem in a somewhat different way:

[...] at least two goals were desired by various factions of the draftsmen of GATT, namely, the goal of increasing free trade and benefiting efficient world allocation of resources and production, and the goal of less developed countries to ally themselves with neighbours so as to provide wider markets and assist in the industrial development process. It is probable that these two goals are inconsistent when applied to specific cases. In addition, it is clear that some parties of GATT have had, in supporting and promoting regional arrangements, political goals that do not accord with either of the two economic goals just mentioned. A political goal that urges economic integration of certain nations so as to more closely ally those nations for defence or other purposes may result in the advocacy of a regional arrangement that is detrimental in the economic sense.

The author concludes with resignations:

But who is to say that the political goal, or one or the other of economic goals, should prevail?<sup>182</sup>

171. Not a single customs union or free-trade area agreement which has been submitted to the contracting parties has conformed fully to the requirements of article XXIV. Yet, the contracting parties have felt compelled to grant waivers of one kind or another for every one of the proposed agreements.<sup>183</sup> The contracting parties have not been able to say whether the major schemes examined by them qualified as customs unions or free-trade areas under the GATT rules. The formal

<sup>181</sup> K. W. Dam, "Regional economic arrangements and the GATT: The legacy of a misconception", in *The University of Chicago Law Review*, vol. 30, No. 4 (Summer 1963), pp. 619-623.

<sup>182</sup> J. H. Jackson, *op. cit.*, p. 621.

<sup>183</sup> K. W. Dam, *op. cit.*, pp. 660-661.

<sup>180</sup> *Ibid.*, p. 43.

action in the case of the European Economic Community was to lay aside "for the time being" questions of law and the compatibility of the Rome Treaty with the General Agreement. In the case of the European Free Trade Association and the Latin American Free Trade Association it was concluded that the legal question "could not be fruitfully discussed further at this stage" and that "at this juncture" it would not be "appropriate to make any formal legal findings".<sup>184</sup>

(b) *Exceptions (granted by the contracting parties) to the rule of non-discrimination*

172. The GATT memorandum described these exceptions as follows:

(i) *Waivers authorizing discriminatory treatment*

Under paragraph 5 of Article XXV the CONTRACTING PARTIES in exceptional circumstances not elsewhere provided for, may, waive an obligation imposed upon a contracting party by the GATT, provided the decision is approved by a two-thirds majority of the votes cast and the majority comprises more than half of the contracting parties. In 1956 the CONTRACTING PARTIES adopted guiding principles to be followed in considering applications for waivers from Part I or other important obligations of the GATT. These include the principle that an application should not be granted unless the CONTRACTING PARTIES are satisfied "that the legitimate interests of other contracting parties are adequately safeguarded" (BISD, *Fifth Supplement*, p. 25). Acting pursuant to Article XXV, paragraph 5, the CONTRACTING PARTIES have granted some fifteen waivers involving deviations from the rule of most-favoured-nation treatment (these are listed on pages 7 and 8 of the Analytical Index).

(ii) *Preferences for developing countries*

Many of the waivers granted under Article XXV, paragraph 5, permit the application of preferential rates of customs duty to imports from developing countries. The most important is that granted to Australia in 1966 to permit the application of reduced tariff rates to imports of certain products from a long list of developing countries; this waiver itself contains an element of discrimination in that some of the preferences are explicitly withheld from one of the beneficiaries (BISD, *Fourteenth Supplement*, p. 23).

At the second session of the United Nations Conference on Trade and Development, in March 1968, the developed countries which are contracting parties to GATT participated in the adoption of resolution 21 (II) expressing agreement with the objectives of "a generalized non-reciprocal, non-discriminatory system of preferences in favour of the developing countries".<sup>185</sup> The developed countries are now engaged in discussion of the preferential treatment which they might agree to accord to goods imported from developing countries. The CONTRACTING PARTIES, in November 1968, affirmed "their readiness to take appropriate action when the scheme has been negotiated" (16S/15).

In the belief that preferential tariff treatment accorded by

developing countries to their mutual trade could make an important contribution to an expansion of trade among them, the CONTRACTING PARTIES have arranged for a multilateral negotiation and have agreed that they will look at the results "in a constructive and forward-looking spirit". Several developing countries which are not contracting parties to the GATT are participating in the negotiations (BISD, *Sixteenth Supplement*, p. 15).

In 1967 India, the United Arab Republic and Yugoslavia concluded an Agreement to grant to certain goods, imported from one another, advantages with respect to customs duties which are not accorded to like products originating in the territories of other contracting parties. The participating States announced their intention "to seek the extension of the concessions embodied in the Agreement to all other developing countries by appropriate negotiations and to make their best endeavours to integrate these concessions within the framework of multilateral arrangements [referred to in the preceding paragraph] . . . and to adapt or modify the Agreement as may be appropriate in the event of adoption of a general multilateral scheme of trade and economic co-operation among developing countries". The CONTRACTING PARTIES decided that the three participating States could implement their Agreement notwithstanding the provisions of paragraph 1 of Article I of the GATT. On the basis of a report by the participating States on the operation of the Agreement and taking account of progress achieved in the negotiations referred to [in the preceding paragraph], the CONTRACTING PARTIES at their twenty-sixth session will review their Decision "with a view to deciding on its extension, modification or termination" (BISD, *Sixteenth Supplement*, pp. 17-18).

8. TREATIES IN CONFLICT WITH A MULTILATERAL MOST-FAVOURED-NATION CLAUSE

173. Possible conflicts may be settled in advance. Thus, Article I of GATT provides for the maintenance of certain preferences existing on certain dates. These include preferential arrangements within the British Commonwealth and the French Union.<sup>186</sup>

174. On other bilateral treaties conflicting with the provisions of the General Agreement the GATT memorandum had the following to say:

In 1961 the CONTRACTING PARTIES were asked whether bilateral trade agreements, which provide for quotas or differential treatment, are compatible with the GATT. The Executive Secretary expressed the opinion that any discriminatory measures taken by a contracting party pursuant to the terms of a bilateral agreement should not go beyond the limits laid down in the relevant provisions of the GATT (L/1636). During a discussion of this question at the nineteenth session, the Executive Secretary said that "the existence of a bilateral agreement could in no circumstances be justified as a basis for non-observance of the non-discrimination provisions of the GATT (SR.19/8.)".

175. It is submitted that the same applies to conflicting multilateral treaties. The special case of treaties, whether bilateral or multilateral, establishing customs unions or free-trade areas is governed by the *lex specialis* of Article XXIV of the General Agreement (see paras. 167 above and 177 below).

<sup>184</sup> G. Patterson, *op. cit.*, pp. 157-158. For further details on these cases, see 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. 48-49.

<sup>185</sup> See *Proceedings of the United Nations Conference on Trade and Development, Second Session*, vol. I and Corr.1 and 3 and Add.1-2, *Report and Annexes* (United Nations publication, Sales No.: E.68.II.D.14), p. 38.

<sup>186</sup> Cf. article 30, paragraph 2, of the Vienna Convention on the Law of Treaties, in *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 293.

176. It may happen that two States members of GATT conclude a separate bilateral commercial treaty embodying a most-favoured-nation clause. The existence between two States of two parallel most-favoured-nation obligations poses generally no problem and is not a case of conflict. One secondary question may arise, namely whether the most-favoured-nation clause in the bilateral treaty extends the benefits also of a special preference authorized by the CONTRACTING PARTIES under Article XXV of GATT. In some such bilateral treaties this is expressly excluded.<sup>187</sup> It has been held, however, that the absence of such excluding stipulation in several other treaties indicated the belief that special benefits of the kind mentioned might not be claimed anyway.<sup>188</sup>

(a) "Regional" or "subregional" arrangements

177. The question of the compatibility of a bilateral or multilateral treaty establishing a customs union or a free-trade area with the General Agreement on Tariffs and Trade is to be decided by the CONTRACTING PARTIES. According to Article XXIV, paragraph 10, a two-thirds majority is required to approve proposals "which do not fully comply with the requirements [...] provided that such proposals lead to the formation of a customs union or a free-trade area in the sense [of the Agreement]".<sup>189</sup> The approval of such a regional arrangement leads to the result that the arrangement will prevail over the most-favoured-nation clause of the General Agreement, i.e., the contracting parties not members of the special arrangement will not be entitled to the favours which the members of such arrangements grant to each other. This applies, obviously, to all contracting parties not members of the customs union or free-trade area in question independently of whether they voted for or against the approval of the arrangement.

178. The compatibility of subregional agreements with the Treaty of Montevideo poses a special problem. The Montevideo Treaty, unlike the General Agreement, has no provisions concerning special arrangements concluded among the parties to the Treaty. How can subregional integration agreements be reconciled with the most-favoured-nation clause of the Montevideo Treaty? This question arises because of various agreements concluded among Latin American States which have the effect of granting to the signatories advantages that are not extendible to the other member countries of LAFTA (the Latin American Free Trade Association established by the Montevideo Treaty). Of course, the question of compatibility can be solved by the agreement of all parties to the Treaty. However, constitutional doubts have been

raised by commentators against such a solution on the ground that an agreement of this kind would amount to a waiver of rights of individuals and also on the ground that the agreement could not be concluded without action by the legislatures of the signatory States. In the opinion of some experts the question can be solved by a "flexible" teleological interpretation of the most-favoured-nation clause of the Montevideo Treaty.<sup>190</sup>

(b) *The 1969 resolution of the Institute of International Law*

179. In the resolution, based on the report of Pescatore, which was adopted at the Edinburgh session of the Institute on 10 September 1969, the Institute:

(Translation from French) [...] emphasizes in particular, as regards the most-favoured-nation clause in multilateral conventions on international trade, the importance of the following points:

[...]

(b) States beneficiaries of the clause shall not be able to invoke it in order to claim a treatment identical with that which States participating in an integrated regional system concede to one another on a reciprocal basis.

(c) It is important that the power of derogation from the clause should be linked with adequate guarantees of an institutional and procedural character, such as those provided by a multilateral system.<sup>191</sup>

180. Paragraph (b) of the resolution seemingly suggests that the customs union and free-trade area exception has or should have general validity. It does not clarify, however, what should be understood by an "integrated regional system". For clarification one probably would have to go back to the Pescatore report, on which the resolution is based. This report links the derogation from the clause to the condition that such systems

[...] have the nature of a truly economic integration based upon a radical, total and lasting elimination of obstacles to economic currents between the participating countries and upon the generalisation of the national treatment principle both in regard to economic activities and to the factors of production in such a way that they create, between two or more States, analogous conditions to those characterizing an internal market.<sup>192</sup> (Translation from French.)

The reference in the resolution to "adequate guarantees of an institutional and procedural character, such as those provided by a multilateral system" (see para. 179 above) expresses the desirability of a "multilateral forum"<sup>193</sup> for the settlement of disputes which may arise between the parties to the system, i.e., the multilateral treaty embodying the most-favoured-nation clause.

<sup>187</sup> For example, article XXI of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of Denmark, Copenhagen, 1951 (United Nations, *Treaty Series*, vol. 421, pp. 128 and 130), and article XXII of the Treaty of Friendship, Commerce and Navigation between the Kingdom of the Netherlands and the United States of America, The Hague, 1956 (*ibid.*, vol. 285, p. 263).

<sup>188</sup> E. Sauvignon, *op. cit.*, p. 154.

<sup>189</sup> GATT, *Basic Instruments and Selected Documents* vol. IV (Sales No.: GATT/1969-1), p. 44.

<sup>190</sup> For details of the legal questions involved and for the pertinent resolutions of the Conference of the contracting parties to the Montevideo Treaty, see J. B. Schroeder, *op. cit.*, and M. A. Vieira, *op. cit.*

<sup>191</sup> See *Annuaire de l'Institut de droit international, session d'Edimbourg, septembre 1969* (Bâle, Editions juridiques et sociologiques S.A.), t. II, p. 362.

<sup>192</sup> *Ibid.*, t. I, p. 146.

<sup>193</sup> *Ibid.*, p. 46.

(c) *Relation of free-trade area members to non-member States*

181. A conflict similar in nature to those mentioned in the present section has arisen in the case of EFTA. Member countries of EFTA—such as the United Kingdom and Sweden—have argued that the inclusion of the customs union and free-trade area exemptions to the most-favoured-nation clause in the General Agreement had established a point of accepted international commercial law and practice which allowed the setting up of free-trade areas with specific partners, in spite of most-favoured-nations obligations towards third countries. Non-member countries, such as the USSR and Hungary, have not accepted this view.<sup>194</sup>

182. The legal question involved is as follows: can the contents of a bilateral most-favoured-nation clause be emptied unilaterally through the participation of the conceding State in a multilateral most-favoured-nation agreement, like GATT or another system having similar effect? Or, putting the question in a different way, can international treaties establishing such systems violate rights of outsiders? A firmly negative answer has been given to these questions by E. T. Usenko,<sup>195</sup> who refers to the authority of Oppenheim, Schwarzenberger and V. M. Shurshalov, i.e., to their views on the effect of treaties on third States. His view is supported by the provisions of articles 34 to 38 of the Vienna Convention on the Law of Treaties.<sup>196</sup>

(d) *Relation of GATT members to States not parties to the General Agreement*

183. Article 98, paragraph 4, of the Havana Charter for an International Trade Organization (ITO) provided that

Nothing in this Charter shall be interpreted to require a Member to accord to non-Member countries treatment as favourable as that which it accords to Member countries under the provisions of the Charter, and failure to accord such treatment shall not be regarded as inconsistent with the terms or the spirit of the Charter.<sup>197</sup>

184. This provision was severely criticized as long ago as 1948. The representative of the Soviet Union, Mr. Arutiunian, stated in the Economic and Social Council that

<sup>194</sup> G. Curzon, *op. cit.*, p. 65.

<sup>195</sup> E. T. Usenko, *Formy regulirovaniya socialisticheskogo mezh-dunarodnogo razdeleniya truda* [Forms of the regulation of the socialist international division of labour] (Moscow, 1965), part III, chap. 9, para. 3. See also the German edition, E. T. Usenko, *Sozialistische internationale Arbeitsteilung und ihre rechtliche Regelung* (Berlin, Staatsverl. d. Deutschen Demokratischen Republik, 1966), p. 209.

<sup>196</sup> See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 294.

<sup>197</sup> *United Nations Conference on Trade and Employment* (Havana, Cuba, November 1947-March 1948), *Final Act and Related Documents* (United Nations publication, Sales No.: 1948.II.D.4), p. 51.

Such a provision was equivalent to authorization of a departure from the most-favoured-nation principle in reciprocal relations with non-member countries, and was in patent contradiction to the purpose of expanding world trade [ . . ].<sup>198</sup>

185. Of course, from a strictly legal point of view, paragraph 4 of article 98 of the ITO Charter is an empty provision because it states only the obvious, namely that the Charter does not impose obligations upon the members vis-à-vis non-members. The provision has, however, a certain propaganda effect even if one does not assume that it indirectly encourages the parties to the Charter to break the obligations which may exist for them under bilateral most-favoured-nation clauses with non-members. However, the ITO provision is not, and never was, in force and can hardly be considered as having any effect at present—not even through Article XXIX of the GATT, paragraph 1 of which states that:

The contracting parties undertake to observe to the fullest extent of their executive authority the general principles [ . . ] of the Havana Charter [ . . ].<sup>199</sup>

186. The idea of the provision contained in article 98 of the Havana Charter is, according to Hawkins,<sup>200</sup> reminiscent of the old conditional most-favoured-nation clause, in that countries that refuse to become parties to the General Agreement—and to make the tariff concessions that such participation would entail—may not be allowed to enjoy freely the benefits of that Agreement. To this extent there is deviation from the principle that most-favoured-nation treatment should be withheld only from countries that fail to apply that principle.

187. The absence of a provision in the General Agreement relating in general to other incompatible treaties must be taken to mean that the usual rules of international law regarding incompatible treaties must apply.<sup>201</sup> Concerning the relation of the General Agreement to treaties concluded between parties to the General Agreement and non-member States, this must mean that parties are allowed to extend unconditionally most-favoured-nation treatment to non-party States. What is not allowed is the contractual preference, i.e. that kind of agreement under which a non-party grants preferential treatment to a party and precludes similar agreements with other parties. During the negotiation of the General Agreement a proposal was considered and rejected to the effect that GATT benefits be limited to GATT parties, i.e. that Parties to the Agreement should not extend GATT benefits to countries not parties to GATT. A similar proposal submitted to the CONTRACTING PARTIES at their 1954-1955 session was likewise rejected.<sup>202</sup>

<sup>198</sup> See *Official Records of the Economic and Social Council, Seventh Session, 195th meeting*, p. 329.

<sup>199</sup> GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), p. 49. For a contrary view, see J. H. Jackson, *op. cit.*, p. 118.

<sup>200</sup> H. C. Hawkins, *op. cit.*, p. 85.

<sup>201</sup> J. H. Jackson, *op. cit.*, p. 84.

<sup>202</sup> GATT, *Basic Instruments and Selected Documents, Third Supplement* (Sales No.: GATT/1955-2), p. 243. See also J. H. Jackson, *op. cit.*, p. 118.

## 9. DEVELOPING COUNTRIES AND THE MOST-FAVOURLED-NATION CLAUSE IN GENERAL

188. Under the heading "Towards a trade policy for development" section C of the UNCTAD memorandum points out the following matters of principle:

The position of the United Nations Conference on Trade and Development with respect to the scope and limits of the most-favoured-nation clause is stated in General Principle Eight of Recommendation A.I.1. of the first session of the Conference.<sup>[203]</sup> According to this principle:

International trade should be conducted to mutual advantage on the basis of the most-favoured-nation treatment and should be free from measures detrimental to the trading interests of other countries. However, developed countries should grant concessions to all developing countries and extend to developing countries all concessions they grant to one another and should not, in granting these or other concessions, require any concessions in return from developing countries. New preferential concessions, both tariff and non-tariff, should be made to developing countries as a whole and such preferences should not be extended to developed countries. Developing countries need not extend to developed countries preferential treatment in operation amongst them. Special preferences at present enjoyed by certain developing countries in certain developed countries should be regarded as transitional and subject to progressive reduction. They should be eliminated as and when effective international measures guaranteeing at least equivalent advantages to the countries concerned come into operation.\*

\* General Principle Eight was adopted by a roll-call vote of 78 to 11, with 23 abstentions.

From General Principle Eight it is clear that the basic philosophy of UNCTAD starts from the assumption that the trade needs of a developing economy are substantially different from those of a developed one. As a consequence, the two types of economies should not be subject to the same rules in their international trade relations. To apply the most-favoured-nation clause to all countries regardless of their level of development would satisfy the conditions of formal equality, but would in fact involve implicit discrimination against the weaker members of the international community. This is not to reject on a permanent basis the most-favoured-nation clause. The opening sentence of General Principle Eight lays down that "international trade should be conducted to mutual advantage on the basis of the most-favoured-nation treatment [ . . . ]". The recognition of the trade and development needs of developing countries requires that for a certain period of time, the most-favoured-nation clause will not apply to certain types of international trade relations.\*\*

\*\* In the words of a report entitled "The developing countries in GATT", submitted to the first session of the Conference: "There is no dispute about the need for a rule of law in world trade. The question is: What should be the character of that law? Should it be a law based on the presumption that the world is essentially homogeneous, being composed of countries of equal strength and comparable levels of economic development, a law founded, therefore, on the principles of reciprocity and non-discrimination? Or should it be a law that recognizes diversity of levels of economic development and differences in economic and social systems? [204] 205"

189. The idea that unorganized free trade may be harmful to the interests of less developed countries is not

<sup>203</sup> See *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No.: 64.II.B.11), p. 20.

<sup>204</sup> *Ibid.*, vol. V, *Financing and Invisibles: Institutional Arrangements* (United Nations publication, Sales No.: 64.II.B.15), p. 468, para. 257.

<sup>205</sup> UNCTAD, Research memorandum No. 33/Rev.1, paras. 16-17.

new. The effect of such trade on the economically backward nations was poetically illustrated at the 1891 Session of the Indian National Congress:

"Of course, I know that it was pure philanthropy which flooded India with English-made goods, and surely, if slowly, killed out every indigenous industry—pure philanthropy which, to facilitate this, repealed the import duties and flung away three crores a year of revenue which the rich paid, and to balance this wicked sacrifice raised the Salt Tax, which the poor pay; [ . . . ] Free trade, fair play between nations, how I hate the sham. What fair play in trade can there be between impoverished India and the bloated capitalist England? As well talk of a fair fight between an infant and a strong man—a rabbit and a boa constrictor. No doubt it is all in accordance with high economic science, but, my friends, remember this—this, too, is starving your brethren."<sup>206</sup>

## 10. THE 1969 RESOLUTION OF THE INSTITUTE OF INTERNATIONAL LAW

190. The resolution of the Institute of International Law adopted on 10 September 1969 at its Edinburgh session expressly supports the recommendation of UNCTAD. In its resolution the Institute:

[ . . . ] emphasizes in particular, as regards the most-favoured-nation clause in multilateral conventions on international trade, the importance of the following point[s]:

(a) Preferential treatment in favour of developing countries by means of a general system of preferences based on objective criteria should not be hampered by the clause [ . . . ]<sup>207</sup>

## 11. DEVELOPING COUNTRIES AND THE GATT

191. The Havana Charter and, consequently, the General Agreement on Tariffs and Trade were largely products of American and British thinking. The draftsmen of those two instruments were principally concerned with trade in the developed world. They took little account of the problems of the developing countries.<sup>208</sup> This characteristic of the Havana Charter was attacked by the representatives of Poland and the Soviet Union already in 1948 in the Economic and Social Council.<sup>209</sup> The General Agreement has also been the subject of the continuous criticism of a growing number of developing countries, culminating in the first session of the United Nations Conference on Trade and Development, held at Geneva in 1964.<sup>210</sup>

<sup>206</sup> Address by Lala Murlidhar, quoted by T. Balogh, *Unequal Partners* (Oxford, Blackwell, 1963), vol. I, p. v.

<sup>207</sup> See *Annuaire de l'Institut de droit international, session d'Edimbourg, septembre 1969* (Bâle, Editions juridiques et sociologiques S.A.), t. II, p. 362.

<sup>208</sup> R. Gardner, *Sterling-Dollar Diplomacy* (Oxford, Clarendon Press, 1956), p. 365. See also G. P. Verbit, *op. cit.*, p. 43.

<sup>209</sup> See *Official Records of the Economic and Social Council, Seventh Session*, 195th meeting.

<sup>210</sup> See para. 188 above. See also I. Trofimova, "GATT and the Developing Countries", in *New Times* (Moscow, 1964), No. 15, pp. 6-8.

192. As regards the response of GATT to the trade needs of developing countries, i.e. the new Part IV which was added to the General Agreement, the UNCTAD memorandum stated the following:

[Part IV] came legally into effect on 27 June 1966, when it was accepted by the necessary two-thirds majority of the CONTRACTING PARTIES to the GATT. However, its provisions had previously been applied on a *de facto* basis by most developed countries since February 1965. Three new articles have thus been added to the text of the Agreement. Article XXXVI sets out the principles and objectives which should govern international trade policies in relation to developing countries, with reference to the need for improved market access for products of interest to developing countries, to price stabilization for primary products, and to diversification of the structure of their economies. It was also laid down that developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries. Article XXXVII contains undertakings by developed and developing countries designed to further these objectives, in particular, undertakings by developed contracting parties to refrain from increasing barriers to imports of products of particular interest to developing countries, and to give high priority to the reduction of existing barriers to trade in such products. Article XXXVIII provides for various forms of joint action to promote, through trade, the development of developing countries.

It is interesting to note that nowhere in Part IV is there any explicit reference to a possible departure from the MFN rule in the interest of developing countries. However, on the basis of a report by an *ad hoc* group, the Trade and Development Committee of the GATT concluded "that the establishment of preferences among less-developed countries, appropriately administered and subject to the necessary safeguards, can make an important contribution to the expansion of trade among these countries and to the attainment of the objectives of the General Agreement".<sup>211</sup> The Committee also gave consideration to the form and scope of such preferential arrangements, to the measures for safeguarding the interests of other contracting parties as well as to the legal provisions for such arrangements. In the light of this conclusion by the Trade and Development Committee it would seem that the door is open for preferential arrangements among developing countries within the framework of GATT. Still, no decision has been reached as to what are the "necessary safeguards" or the criteria which such preferences might have to obey and the contracting parties, including the developed countries, reserved their right to pronounce on the concessions or formulae that might emerge from negotiations among developing contracting parties of GATT. Developing countries cannot yet, therefore, count on an automatic approval of what they might negotiate among themselves; they might be expected to resort to the waiver procedure of Article XXV.<sup>212</sup> It is interesting, however, to note that the tripartite agreement between Yugoslavia, the United Arab Republic and India, providing for mutual tariff concessions was taken note of by the contracting parties without explicit reference to the waiver procedure under Article XXV. In a decision adopted without dissent in November 1966 the Contracting Parties recognized that it is not possible at the present time to assess fully the implications of the agreement in terms of its stated objective and its effects on the trade of other contracting parties. It was decided that, notwithstanding the provisions of Article I, the three participating countries may

implement the agreement subject to certain conditions including reporting and consultations.

In view of the spirit underlying Part IV of the General Agreement, the contracting parties can be expected not to oppose the introduction of a general, non-reciprocal scheme of preferences in favour of the developing countries in the markets of developed countries. This is more so since the developed countries, comprising all the leading contracting parties, have already accepted, within the framework of UNCTAD, the principle of a general and non-reciprocal scheme of preferences. However, the waiver procedure will have probably to be applied. In November 1968 the contracting parties noted the recommendation adopted at the second session of the United Nations Conference on Trade and Development regarding a general non-reciprocal scheme of preferences in favour of developing countries and affirmed their readiness to take appropriate action when the scheme has been negotiated.<sup>213</sup>

193. The Director-General of GATT, Mr. Olivier Long, in an interview with *The Times*, had the following to say on the possible actions which GATT may take in favour of developing countries:

Q: . . . everyone is working for one major departure from the principle of non-discrimination, with the proposal that special preference should be given to imports from developing countries. No one seems to know how this could be dealt with in GATT. Mr. Long: But there are three ways in which such special preferences could be dealt with in GATT.

The first, which I personally exclude, would be to alter or add to the present GATT articles. I exclude this because preferences in favour of developing countries would take the form of a temporary concession and I think it would be wrong to embody them, as such, permanently in the GATT. Another way would be to grant a waiver from GATT under the normal waiver procedure. And finally it would be possible and perhaps best to create a separate and temporary framework and procedure to take in what is required. It would be, if you like, a sort of temporary annex alongside the main GATT building. I am sure that this can be covered within the framework of GATT, provided that the contracting parties show the necessary political and intellectual readiness to accept that temporary preferences of this sort for developing countries are likely to be with us for some time.<sup>214</sup>

## 12. SUCCESSES AND FAILURES OF THE GATT IN ORGANIZING INTERNATIONAL TRADE ON A MOST-FAVOURED-NATION BASIS

194. As stated in the GATT memorandum, "[. . .] the Agreement at present governs the trade relations among ninety-one countries and covers more than four-fifths of world trade."

195. The UNCTAD memorandum contains the following evaluation of the achievements of the GATT:

The remarkable expansion of world trade during the post-war era must be attributed, partly at least, to the efforts and activities initiated or sponsored by GATT. In contrast to the inter-war period of chaos, GATT introduced a new code of behaviour in world trade. Within the framework of its rules and consultative machinery, it has brought about considerable reductions in the

<sup>211</sup> GATT, *Basic Instruments and Selected Documents, Fourteenth Supplement* (Sales No.: GATT/1966-1), p. 136.

<sup>212</sup> See *Trade expansion and economic integration among developing countries* (United Nations publication, Sales No.: 67.II.D.20), p. 93.

<sup>213</sup> UNCTAD, Research memorandum No. 33/Rev.1, paras. 13-15.

<sup>214</sup> *The Times* (London), 16 February 1970.

tariffs and other restrictions on world trade; the latest and most far-reaching of which are those realized through the Kennedy Round.

It is true, however, that these reductions have been of benefit mainly to the industrial countries and that the developing countries generally have obtained very little direct benefit from this process.<sup>215</sup> In most cases tariff negotiations tended to cover products of concern only to the industrial countries. Products of interest to the developing countries belonged, to a great extent, to the so-called "sensitive" products which were for the most part excluded from the scope of reductions. Moreover, tariff negotiations within the GATT framework were conducted on the basis of reciprocity of concessions. In other words, each country's offer of tariff reductions was conditional upon the receipt of roughly equal benefit from a reciprocal offer. As a consequence tariff negotiations became largely the affair of the so-called "principal suppliers" who have substantial interest in the world trade of certain items and, as such, are in a position to offer concessions. Since developing countries do not qualify as "principal suppliers" in most items they were relegated, perforce, to a position of secondary importance.<sup>216</sup>

196. An American author summarizes the legitimate complaints of the developing countries against the basic philosophy of GATT as follows:

[...] the most-favoured-nation principle actually discriminates against countries with less economic bargaining power and against a country whose producers cannot compete effectively with the most efficient foreign producers at the given most-favoured-nation tariff rates. Drawing on these arguments, the developing countries claim the most-favoured-nation provision inhibits their efforts to compete effectively in world markets. They insist that preferential tariff treatment is necessary for them to develop foreign markets for their struggling manufacturing industries [...].<sup>217</sup>

197. A high-ranking officer of the GATT secretariat holds the opposite views:

... I believe the most-favoured-nation clause, which certainly has disadvantages, protects mostly the weakest; the strongest countries do not need the clause, [...] they can live without the most-favoured-nation treatment, they will always get what they want. [...] But the weak countries, they need legal protection and the clause gives them just that.<sup>218</sup>

198. Writing in 1964 a Soviet author, in an article entitled "GATT: Illusions and reality",<sup>219</sup> while recognizing the achievements of GATT, pointed to its lack of representative character: ten out of the fourteen Socialist States do not participate in GATT although they represent one-third of world trade. This circumstance in itself undermines the international authority of GATT and unfavourably influences its activities. The author further pointed, among other things, to the following: there

<sup>215</sup> See *Towards a New Trade Policy for Development: Report by the Secretary-General of the United Nations Conference on Trade and Development* (United Nations publication, Sales No.: 64.II.B.4), pp. 27-28.

<sup>216</sup> UNCTAD, Research memorandum No. 33/Rev.1, paras. 11-12.

<sup>217</sup> G. C. Fischer, "The most-favoured-nation clause in GATT: A need for reevaluation?", in *Stanford Law Review* (April, 1967), p. 843. See also G. P. Verbit, *op. cit.*

<sup>218</sup> H. W. Dittman, in Hague Academy of International Law, *Colloquium 1968: International Trade Agreements* (Leyden, Sijthoff, 1969), p. 69.

<sup>219</sup> G. Zotov, in *Mirovaia trgovlia i ekonomicheskoe razvitie* (World trade and economic development), 1964, p. 67.

is hardly any other international agreement violated as often and with such impunity as GATT. The Agreement is being arbitrarily interpreted by the Contracting Parties. GATT has been unable to abolish quantitative restrictions. It does not stand up against cartels and restrictive trade practices. It did nothing for the development of East-West trade. In 1951 the United States of America refused to fulfil its contractual obligations towards Czechoslovakia and still maintains its economic blockade against Cuba, one of the Contracting Parties.

199. The Director-General of GATT, Mr. Olivier Long, in the interview with *The Times* mentioned above (see para. 193) gave the following evaluation:

Q: There seems to be a growing, almost headlong, retreat from the principles of the GATT. Almost all countries are turning a blind eye to it when it suits their purposes, for example to impose import quotas or import deposits or to make special arrangements for agriculture or steel and textiles. What is your reaction to the view that the GATT is developing a creeping irrelevance to the trade problems and policies of the 1970s?

Mr. Long: Imagine the disorder that trading nations would now be in if they were no longer bound by agreed principles as in the GATT on the rules of the game. The foundation-stones of GATT are the twin principles of non-discrimination and reciprocity, the most-favoured-nation principle that every country party to the GATT should trade on an equal and identical basis with all other signatories. These are the principles on which the phenomenal expansion of world trade has been based during the first post-war generation.

[...] The leading trading nations of the world must now face up to the requirement for a positive trade policy. Since 1967 they have not faced up to the need to find a positive policy for the second post-war generation. [...]

[...] My concern is to stop a process whereby regions of the world drift into separate trading groups, centred on special preferences. We are drifting towards a situation where the world could split into such groups—one centred on the present EEC would cover Europe and the greater Mediterranean area, one would be the United States with Latin America and Canada, and there could be a third zone in Asia with Japan as the central donor country.

Q: But given the present strong tendency for the EEC, the United States and other countries to entertain trade policies that offend against the spirit of the GATT, why do you think that some new declaration of support for the principle of the "most favoured nation" is likely?

Mr. Long: I am not convinced that the present deviations from the GATT are the result of a deliberate change of policy. I do not think that the consequences of what is happening have been properly thought out by the major trading nations. There is perhaps a tendency at the moment for national governments to look inwards when facing their problems, rather than to seek the solution in mutual co-operation.

Q: Apart from strengthening the resolve to abide by the principles of GATT, the next major advance towards freer trade must be on the side of reducing the so-called non-tariff barriers, things like restrictive government-buying policies, special export finance, or the Buy American legislation. Many people think that it will not be possible to reduce these barriers by negotiation in GATT in the way that was achieved for tariffs themselves. What is the position?

Mr. Long: [...]

Now our different working groups are looking at the ways in which these barriers can be tackled. We have divided those that have been identified into several categories, such as those that could be eliminated through bilateral trade-offs between individual contracting parties, those that may require some new general

code for conduct and those where the right course might be some elaboration of existing rules.

### 13. THE CASE FOR PREFERENCES IN FAVOUR OF DEVELOPING COUNTRIES IN THEIR TRADE WITH DEVELOPED COUNTRIES

200. The UNCTAD memorandum referred to preferences in the following passages:

In the relationship between developed and developing countries the most-favoured-nation clause is subject to important qualifications. These qualifications follow from the principle of generalized, non-reciprocal and non-discriminatory system of preferences. Developed market-economy countries are to accord preferential treatment in their markets to exports of manufactures and semi-manufactures from developing countries. This preferential treatment should be enjoyed only by the developing suppliers of these products. At the same time developing countries will not be required to grant developed countries reciprocal concessions.

The need for a preferential system in favour of all developing countries is referred to in a number of recommendations adopted by the first session of the United Nations Conference on Trade and Development. General Principle Eight states that "[...] developed countries should grant concessions to all developing countries [...] and should not, in granting these or other concessions, require any concessions in return from developing countries."<sup>[220]</sup> In its recommendation A.III.5. the Conference recommended "... that the Secretary-General of the United Nations make appropriate arrangements for the establishment as soon as possible of a committee of governmental representatives [...] with a view to working out the best method of implementing such preferences on the basis of non-reciprocity from the developing countries."<sup>[221]</sup>

At the second session of the Conference, the principle of preferential treatment of exports of manufactures and semi-manufactures from developing countries was unanimously accepted. According to resolution 21 (II), the Conference:

"1. *Agrees* that the objectives of the generalized non-reciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of the least advanced among the developing countries, should be:

- "(a) To increase their export earnings;
- "(b) To promote their industrialization;
- "(c) To accelerate their rates of economic growth;

"2. *Establishes*, to this end, a Special Committee on Preferences, as a subsidiary organ of the Trade and Development Board, to enable all the countries concerned to participate in the necessary consultations. [...]

"[...]

"4. *Requests* that [...] the aim should be to settle the details of the arrangements in the course of 1969 with a view to seeking legislative authority and the required waiver in the General Agreement on Tariffs and Trade as soon as possible thereafter;

"5. *Notes* the hope expressed by many countries that the arrangements should enter into effect in early 1970."<sup>[222]</sup>

<sup>220</sup> See *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No.: 64.II.B.11), p. 20.

<sup>221</sup> *Ibid.*, p. 39.

<sup>222</sup> *Ibid.*, *Second Session*, vol. I and Corr.1 and 3 and Add.1-2, *Report and Annexes* (United Nations publication, Sales No.: E.68.II.D.14), p. 38.

This is not the occasion to go at length into the reasons and considerations underlying the position of UNCTAD on the issue of preferences. Given the sluggish expansion of exports of primary products, and the limitations of inward-looking industrialization, the economic growth of developing countries depends in no small measure upon the development of export-oriented industries. It is clear, however, that to gain a foothold in the highly competitive markets of the developed countries, the developing countries need to enjoy, for a certain period, preferential conditions of access. The case for such a preferential treatment is not unlike that of the infant industry argument. It has long been accepted that, in the early stages of industrialization, domestic producers should enjoy a sheltered home market vis-à-vis foreign competitors. Such a shelter is achieved through the protection of the nascent industries in the home market. By the same token it could be argued that the promotion of export-oriented industries requires a sheltered export market. This is achieved through the establishment of preferential conditions of access in favour of developing suppliers. Preferential treatment for exports of manufactures and semi-manufactures is supposed to last until developing suppliers are adjudged to have become competitive in the world market. Upon reaching this stage conditions of access to the markets of developed countries are to be governed again by the most-favoured-nation clause.

While UNCTAD is in favour of a general non-reciprocal system of preferences from which *all* developing countries would benefit, it does not favour the so-called special or vertical preferences. Those refer to the preferential arrangements actually in force between *some* developing countries and *some* developed countries. A typical example of vertical preferences is that between the European Economic Community (EEC) and eighteen African countries most of which are former French colonies. The same is true of the preferential arrangement between the United Kingdom and developing Commonwealth countries. Such preferential arrangements differ from the general system of preferences in two important respects:

"(a) they involve discrimination in favour of some developing countries against all other developing countries. Accordingly third party developing countries stand to be adversely affected;

"(b) they are reciprocal. Thus, the associated African countries enjoy preferential conditions of access in the Common Market. In return the Common Market countries enjoy preferential access to the markets of the associated countries. Although there are some exceptions, reciprocity is also characteristic of the relationship between the United Kingdom and the Commonwealth countries.

As has been mentioned before, these special preferential arrangements were countenanced by Article I of GATT as a derogation from the most-favoured-nation clause. According to UNCTAD recommendations these preferential arrangements are to be gradually phased out against the provision of equivalent advantages to the beneficiary developing countries. General Principle Eight states that:

"Special preferences at present enjoyed by certain developing countries in certain developed countries should be regarded as transitional and subject to progressive reduction. They should be eliminated as and when effective international measures guaranteeing at least equivalent advantages to the countries concerned come into operation."<sup>[223]</sup>

The question is taken up again in recommendation A.II.1.:

"Preferential arrangements between developed countries and developing countries which involve discrimination against other developing countries, and which are essential for the maintenance and growth of the export earnings and for the economic advancement of the less developed countries at present benefiting

<sup>223</sup> *Ibid.*, [First Session], vol. I, *Final Act and Report* (United Nations publication, Sales No.: 64.II.B.11), p. 20.

therefrom, should be abolished *pari passu* with the effective application of international measures providing at least equivalent advantages for the said countries. These international measures should be introduced gradually in such a way that they become operative before the end of the United Nations Development Decade." [284]

The position of UNCTAD on the issue of special preferences is motivated by various considerations. It is believed that the existence of such preferential arrangements may act as a hindrance to the eventual establishment of a fully-integrated world economy. The privileged position of some developing countries in the markets of some developed countries is likely to create pressure on third party developing countries to seek similar exclusive privileges in the same or in other developed countries. The experience of the last decade goes a long way to vindicate this belief. The Yaoundé Convention of 1963 providing for the preferential arrangements between the EEC and the eighteen African countries has induced many other African countries (e.g., Nigeria, Kenya, Uganda, Tanzania) to seek similar association with EEC. Moreover, in Latin America there appears to be a growing feeling that, to counteract discrimination against them in the Common Market, it may be necessary to secure preferential treatment in the United States market from which the associated African countries would be excluded. Such a proliferation of special preferential arrangements between groups of countries may eventually lead to the division of the world economy into competing economic blocks.

Apart from the danger of proliferation, special preferences involve, as mentioned before, reciprocal treatment. Accordingly, some developed countries enjoy preferential access to the markets of some developing countries. Here again, the existence of the so-called reverse preferences may provide an additional inducement for the proliferation of vertical trading arrangements.

For these considerations UNCTAD has recommended the gradual phasing out of special preferences. It is recognized, however, that in the case of certain countries, the enjoyment of preferential access is essential for the maintenance and growth of their export earnings. For this reason the phasing out of special preferences was made conditional upon the application of international measures providing at least equivalent advantages for developing countries benefiting therefrom.<sup>285</sup>

201. The case for preferences in favour of developing countries has been very eloquently and convincingly stated by Gros Espiell<sup>286</sup> who feels that the operation of the most-favoured-nation clause is not an appropriate and constructive means of ensuring that international trade constitutes—as it is now unanimously agreed it should—a means of achieving advancement, with special reference to the developing countries.

#### 14. THE MOST-FAVOURLED-NATION CLAUSE IN EAST-WEST TRADE

202. Under the heading "Trade between market economies and centrally-planned economies", the GATT memorandum included the following passages:

<sup>284</sup> *Ibid.*, p. 30.

<sup>285</sup> UNCTAD, Research memorandum No.33/Rev.1, paras. 19-27.

<sup>286</sup> H. Gros Espiell, "La cláusula de la nación más favorecida: Su sentido actual en el Acuerdo General de Aranceles y Comercio" (The most-favoured-nation clause: Its present meaning in the General Agreement on Tariffs and Trade), in *Revista Española de Derecho Internacional* (Madrid, January-March 1968), vol. XXI, No. 1, pp. 37-53.

In the negotiations for the accession of Poland in 1967 the CONTRACTING PARTIES were faced with problems arising from the fact that the foreign trade of Poland is conducted mainly by State enterprises and that the Foreign Trade Plan, rather than the customs tariff, is the effective instrument of Poland's commercial policy. The customs tariff is applicable only to a part of imports effected by private persons for their personal use and is in the nature of a purchase tax rather than a customs tariff. The Government of Poland gave an undertaking that it would grant to each contracting party, in respect of imports into Poland and purchases by Polish agencies, treatment no less favourable than that accorded to any other country (BISD, *Fifteenth Supplement*, p. 110). However, the application of the most-favoured-nation provisions of the GATT vis-à-vis Poland are subject to the following exceptions.

In the Protocol of Accession, dated 30 June 1967 (*ibid.*, p. 46). Poland undertook to increase the total value of its imports from the territories of contracting parties by not less than 7 per cent per annum. Should Poland subsequently modify this commitment, without the agreement of the CONTRACTING PARTIES, contracting parties will be "free to modify equivalent commitments" (*ibid.*, p. 52). Action under this latter provision could involve discriminatory treatment for imports from Poland.

The Protocol permits contracting parties to continue to apply to imports from Poland prohibitions or quantitative restrictions which are inconsistent with Article XIII of the GATT, provided that the discriminatory element is not increased and is progressively relaxed so that at the expiry of a transitional period (the length of which has not yet been determined) any inconsistency with the provisions of article XIII will be eliminated.

The Protocol further provides that if any product is being imported from Poland into the territory of a contracting party "in such increased quantities or under such conditions as to cause or threaten serious injury to domestic producers" and if consultations do not result in agreement between Poland and the contracting party concerned, the contracting party will be free "to restrict imports from Poland of the product concerned to the extent and for such time as it is necessary to prevent or remedy the injury". In that event Poland will be free "to deviate from its obligations to the contracting party concerned in respect of substantially equivalent trade". These provisions are similar to those permitted under Article XIX of the GATT, except that under Article XIX it is only the action by the exporting country which may be discriminatory.

203. In this connexion, the following comments must be made. The conditions under which the accession of Poland to GATT took place are not necessarily a pattern to be followed in the case of the possible accession of other socialist countries, owing mainly to the difference in the autonomy of their respective trade enterprises and in the role of customs tariffs in their foreign trade. GATT has not considered it useful or advantageous to try to evolve any general formula to cover trade relations with centrally-planned economies. Its approach has been essentially pragmatic and on a country-by-country basis.<sup>287</sup> After the formal application of Hungary for accession to GATT, the contracting parties asked the secretariat to prepare a paper on the operation of the Hungarian tariff and on its role in Hungary's foreign trade.<sup>288</sup>

204. The UNCTAD memorandum, under the title

<sup>287</sup> GATT, *The Activities of GATT, 1967/68* (Sales No.: GATT/1969-2), p. 13.

<sup>288</sup> This request is recorded in GATT document C/M/56, p. 5.

"Trade among countries having different economic and social systems", had the following to say:

In the trade relations between countries having different economic and social systems the recommendations adopted by both the first and second sessions of the United Nations Conference on Trade and Development stress the importance of promoting this trade, and the need for conducting it on the basis of non-discrimination. General Principle Two lays down:

"There shall be no discrimination on the basis of differences in socio-economic systems. Adaptation of trading methods shall be consistent with this principle."<sup>229</sup>

General Principle Six states that:

"[. . .] All countries should co-operate in creating conditions of international trade conducive, in particular, to the achievement of a rapid increase in the export earnings of developing countries and, in general, to the promotion of an expansion and diversification of trade between all countries, whether at similar levels of development, at different levels of development, or having different economic and social systems."<sup>[230]</sup>

The [second session of the] Conference emphasized once more [in resolution 15(II)] "[. . .] that East-West trade is an integral part of world trade and that the expansion of this flow of trade would positively affect the expansion of international trade as a whole, including the trade of developing countries [. . .]"<sup>[231]</sup> It was also pointed out that as a "consequence of growing international interdependence [. . .] the constriction of any one channel of economic relationship tends to react adversely upon other channels as well."<sup>[232]</sup>

It was there recommended that countries participating in East-West trade:

"Continue their common efforts towards the expansion of trade and, to this end, to seek to remove the economic, administrative and trade policy obstacles to the development of trade."<sup>[233]</sup>

Moreover, it was recommended that developing countries should grant to the socialist countries "conditions for trade not inferior to those granted normally to the developed market economy countries."<sup>[234]</sup>

As to the imports of socialist countries from developing countries, the scope of the most-favoured-nation clause is not as clear-cut as it is in the case of developed market-economy countries. Evidently, the ideal situation to which the most-favoured-nation clause applies is one in which tariffs represent the only instrument of control over the flow of trade. In this case the presence or absence of discrimination is easily ascertainable. In the case of socialist countries the flow of trade is primarily determined by the quantitative targets specified in the national plans. Tariff rates play only a very secondary role.<sup>[235]</sup> Under these circumstances the application of uniform tariff rates to all suppliers does not necessarily mean that they are treated equally. To determine that, it is essential to examine how the quantitative plan targets are implemented; for instance, how import quotas are allocated between different suppliers.

According to UNCTAD recommendations, developed centrally-planned economy countries are to accord favourable treatment

<sup>229</sup> See *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No.: 64.II.B.11), p. 18.

<sup>230</sup> *Ibid.*, p. 19.

<sup>231</sup> *Ibid.*, *Second Session*, vol. I, and Corr. 1 and 3 and Add.1-2. *Report and Annexes* (United Nations publication, Sales No.: E.68.II.D.14), p. 32.

<sup>232</sup> *Ibid.*

<sup>233</sup> *Ibid.*

<sup>234</sup> *Ibid.*, p. 33.

<sup>235</sup> This does not apply to all the socialist countries. Since the introduction of the economic reform on 1 January 1968, customs tariff is an important regulator of trade in Hungary.

to imports from developing countries. Thus, in recommendation A.II.1. of the first session of the Conference it is laid down that:

"In all matters affecting decisions relating to imports [the developed centrally planned economy countries] should, within the framework of their trade system, grant such favourable terms to imports from the developing countries and to consumption of products imported from them as should result in further expansion of imports from those countries."<sup>[236]</sup>

In the field of manufactures and semi-manufactures, recommendation A.III.7 calls upon centrally planned economies to:

"(1) Within the framework of their long-term plans, take appropriate measures which would result in the diversification and significant growth of their imports of manufactures and semi-manufactures from the developing countries;

"(2) Reduce or abolish customs duties on goods imported from and originating in the developing countries."<sup>[237]</sup>

At the second session of the Conference it was recommended that the socialist countries of Eastern Europe:

"Adopt the necessary measures, taking duly into consideration the trade needs of the developing countries when quantitative targets are fixed in their long-term economic plans, to expand further their trade with developing countries and, at the same time, to promote the diversification of the structure and of the geographical basis of this trade with these countries [. . .]"  
"[. . .]"

"Abolish or reduce, on a preferential basis, tariffs on manufactures and semi-manufactures imported from developing countries;

"Accord preferential conditions in their procurement policies for products imported from developing countries, it being understood that each of them will do so in accordance with the modalities of its foreign trade system;

"Take all practical steps, within the framework of their respective national economic policies, in order to grant such favourable terms to imports from developing countries and to consumption of products imported."<sup>[238]</sup>

In the light of the above it is clear that imports of socialist countries from developing countries should enjoy preferential treatment. Preferential treatment of these imports is to take two basic forms: (a) in the field of tariffs, imports from developing countries are to be admitted duty-free or under reduced rates; (b) in fixing the quantitative targets in their long-term economic plans, socialist countries are to take into account trade needs of developing countries so as to ensure the further expansion of imports from those countries.<sup>239</sup>

205. The Executive Secretary of ECE, in his reply to the circular letter of the Secretary-General, summarily described the existing situation with regard to the application of the most-favoured-nation clause in trade relations between ECE countries having different economic and social systems as follows:

Most-favoured-nation undertakings are contained in the commercial agreements concluded between most ECE Governments of States having different economic and social systems; this is true also for agreements concluded in recent years [. . .] However, the argument put forward by some Western countries is (i) that such undertakings apply to tariff treatment only or mainly and

<sup>236</sup> See *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No.: 64.II.B.11), p. 30.

<sup>237</sup> *Ibid.*, p. 40.

<sup>238</sup> *Ibid.*, *Second Session*, vol. I and Corr.1 and 3 and Add.1-2. *Report and Annexes* (United Nations publication, Sales No.: E.68.II.D.14), p. 33.

<sup>239</sup> UNCTAD, Research memorandum No. 33/Rev.1, paras. 32-37.

not to the prohibition of discriminatory treatment under quantitative restrictions or market regulations or export discrimination on "strategic" grounds, especially in view of the fact that such restrictions and regulations are implicit in the systems of Eastern European countries and assurances of a lack of discrimination by them cannot therefore be relied upon to be effective in practice; (ii) that such undertakings, even when applied only to tariffs, require special forms of application because of the differences in economic and social systems; and (iii) that the European Economic Community is a customs union and is therefore a legitimate exception to the most-favoured-nation undertaking. On the other hand, the Eastern European countries argue (i) that most-favoured-nation undertakings apply not only to tariffs but to all forms of trade restrictions or regulations; (ii) that there is no discrimination in their own systems except in response to discrimination exercised by other countries; (iii) that they are prepared to consider with their trade partners the question of "mutual advantage" but that the principle of most-favoured-nation treatment should be the basis for trade relations; and (iv) that while they recognize a customs union as an exception to the most-favoured-nation rule the European Economic Community is not yet a full customs union.

This argument of principle has not been resolved, despite efforts in recent years in ECE to find a formula which would recognize that non-discriminatory commercial treatment is an objective to be sought and that its application in trade between countries with different economic systems requires some arrangements or understandings in the interests of "effective reciprocity" or "mutual advantage". The formula found for the recent accession of Poland to GATT (whereby most-favoured-nation treatment is promised alongside with parallel undertakings regarding quantitative trade targets and other desiderata) and the observer status accorded to Hungary, Bulgaria and Romania in GATT may provide a practical solution which could eventually lead to a general agreement of principle applicable to all ECE countries

having different economic and social systems. In fact, the adoption by ECE at its last session of resolution 1(XXIII) and of the Declaration of the ECE's Commemorative Session in 1967—without special mention of the problem of the most-favoured-nation treatment—might imply a general willingness to leave aside the question of principle or of a multilateral agreement on this problem and a desire to deal with it on a practical bilateral basis. In this connexion it is significant that in recent years Western European countries have removed a large number of discriminatory quantitative restrictions and that the United States Government (which does not apply such restrictions but does apply tariff discrimination to some Eastern European countries) has asked the Congress for authority to grant most favoured-nation treatment to all Eastern European countries.

206. The Executive Secretary of ECE drew attention in his accompanying letter to the work of an *Ad Hoc* Group of Experts set up under resolution 4 (XVIII) of ECE. In this resolution, ECE instructed the *Ad Hoc* Group to make "an intensive examination of [. . .] the most-favoured-nation principle and non-discriminatory treatment as applied under different economic systems, and problems concerning the effective reciprocity of obligations under the different systems".<sup>240</sup> The *Ad Hoc* Group met in September 1963 and December 1964.<sup>241</sup> Since that time no further studies have been made in ECE on this problem.

<sup>240</sup> See *Official Records of the Economic and Social Council, Thirty-sixth Session, Supplement No. 3 (E/3759)*, p. 64.

<sup>241</sup> For the relevant portions of the documents summarizing the deliberations and conclusions of the *Ad Hoc* Group of Experts (documents TRADE/140, paras. 16-26 and TRADE/162, paras. 6-7), see annex II below.

## ANNEXES

### ANNEX I

#### The views of UNCTAD on the rôle of the most-favoured-nation clause in trade among developed countries and in trade among developing countries <sup>242</sup>

##### *Trade among developed countries*

UNCTAD recommendations relating to trade among developed countries are set out in General Principles Eight and Nine. According to General Principle Eight:

"International trade should be conducted to mutual advantage on the basis of the most-favoured-nation treatment and should be free from measures detrimental to the trading interests of other countries. [. . .] developed countries should [. . .] extend to developing countries all concessions they grant to one another and should not, in granting these or other concessions, require any concessions in return from developing countries."<sup>243</sup>

According to General Principle Nine:

"Developed countries participating in regional economic groupings should do their utmost to ensure that their economic integration does not cause injury to, or otherwise adversely

affect, the expansion of their imports from third countries, and, in particular, from developing countries, either individually or collectively."<sup>244</sup>

These recommendations would appear to be perfectly in line with the provisions of the General Agreement on Tariffs and Trade. In other words, trade among developed countries should, in principle, be subject to the most-favoured-nation clause. Tariff or non-tariff concessions which they grant to each other should be extended to all developing countries without requiring concessions in return. This recommendation is simply a reaffirmation of the *unconditional* most-favoured-nation clause whereby concessions to trade partners extend automatically to all beneficiaries of the most-favoured-nation clause even though they may not be in a position to reciprocate. The need to reaffirm the unconditional character of the most favoured-nation clause in the trade among developed countries may be explained by the fact that the first session of the United Nations Conference on Trade and Development took place while the Kennedy Round of tariff concessions was well under way within the framework of GATT. Since tariff negotiations were being conducted on the basis of reciprocity it was important to emphasize that developing countries cannot, and should not, be expected to offer significant tariff concessions.

In line with the provisions of GATT, developed countries may depart from the most-favoured-nation rule in the context of a customs union or free trade areas. UNCTAD recommendations

<sup>242</sup> This annex reproduces paragraphs 28-31 and 38-43 of UNCTAD, Research memorandum No. 33/Rev. 1.

<sup>243</sup> See *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No.: 64.II.B.11), p. 20.

<sup>244</sup> *Ibid.*

do not stand in the way of such an arrangement among developed countries. These countries are expected, however, to ensure that their economic integration does not cause injury to, or otherwise adversely affect, the expansion of their imports from third countries, and, in particular, from developing countries. It is difficult, however, to construe this requirement as limiting in any way the process of preferential reductions of tariff (or non-tariff) barriers within the framework of a customs union or free trade area. In the first place, to determine whether the interests of third parties have or have not been adversely affected by the process of integration is far from simple. But even if injury or adverse effects could be clearly demonstrated, it is doubtful that the remedy is to be sought in halting the process of integration or in requiring the extension of tariff reductions to the injured third party. The proper interpretation of UNCTAD recommendations in this respect would seem to be that members of the integration scheme would be expected to aim at the expansion not only of their national trade, but also of world trade at large and, consequently, take some action which need not be in the domain of tariff or non-tariff concessions, in order to redress the injury or alleviate the adverse effects.

#### *Trade among developing countries*

For historical as well as economic considerations the trade of developing countries has been very largely oriented towards the developed market economies. As much as 70 per cent of the total exports and imports of the developing countries is destined to, or originates from, developed market economies. Trade among developing countries, on the other hand, does not account for more than one-fifth of their total trade. Nevertheless, it is generally agreed that there is a considerable scope for the expansion of trade among developing countries, and that such an expansion would go a long way towards accelerating their rate of growth. Accordingly, a number of recommendations were made by UNCTAD with a view to strengthening the trade and economic ties among these countries.<sup>245</sup>

General Principle Ten adopted at the first session of the United Nations Conference on Trade and Development states that:

“Regional economic groupings, integration or other forms of economic co-operation should be promoted among developing countries as a means of expanding their intra-regional and extra-regional trade and encouraging their economic growth and their industrial and agricultural diversification [..]. It will be necessary to ensure that such co-operation makes an effective contribution to the economic development of these countries, and does not inhibit the economic development of other developing countries outside such groupings.”<sup>246</sup>

Recommendation A.II.5 adopted at the first session of the Conference lays down that:

“Developing countries should provide for preferential arrangements in order to promote an increase in trade between developing countries at the regional and sub-regional level; such arrangements should not, in principle, adversely affect the exports of other developing countries;

“Developing countries should grant each other mutually in primary products the most advantageous commercial treatment which they grant to developed countries.”<sup>247</sup>

In more explicit terms recommendation A.III.8. recommends that:

“... rules governing world trade should make provision to accommodate forms of regional and sub-regional co-operation [..] taking account of the interests of third countries, especially developing countries, and, in particular, permit developing countries to grant each other concessions, not extended to developed countries, in view of the requirement to meet the needs, during a transitional period, of developing countries for the purpose of promoting their exchanges of goods and services.”<sup>248</sup>

The second session of the United Nations Conference on Trade and Development adopted without dissent a concerted declaration on trade expansion, economic co-operation and regional integration among developing countries,<sup>249</sup> incorporating a statement of intent by the developing countries and a declaration of support by the developed market-economy countries and by the socialist countries of Eastern Europe. The concerted declaration recognized the role of trade expansion and economic integration among developing countries in promoting their industrialization and economic growth, the special difficulties inherent in this kind of endeavour, and the need for international action through financial and technical measures to help developing countries overcome these difficulties. The developed market-economy countries declared “their general readiness to support initiatives of the developing countries to increase their trade and strengthen their economic co-operation”.<sup>250</sup> More specifically they declared that they “are ready, after examination and consultation within the appropriate international framework, to support particular trading arrangements among developing countries [..]. This support could include their acceptance of derogations from existing international trading obligations, including appropriate waivers of their rights to most-favoured-nation treatment”.<sup>251</sup>

Both the recommendations of the first session of the Conference and the concerted declaration adopted by the second session would seem to indicate that concessions in favour of trade among developing countries should not be subject to the most-favoured-nation clause as in the case of concessions among the developed market-economy countries. For the sake of promoting trade among developing countries departure from most-favoured-nation treatment would be tolerated although the discriminatory tariff (or non-tariff) concessions involved may fall short of a full customs union or free-trade area as envisaged in Article XXIV of GATT.

However, it is not clear to what extent developing countries can discriminate against other developing countries. For this purpose a distinction should be made between preferential tariff reductions made in connexion with a regional integration scheme and those which are not related to such a scheme. To the first type belong tariff reductions given in the context of the Central American Common Market, the Latin American Free Trade Association, the West African Customs and Economic Union, the Customs and Economic Union of Central Africa, Arab Common Market, the Maghreb Integration Scheme, and the like. Members of such schemes can grant each other tariff or non-tariff concessions which could not be claimed by non-member countries whether they are developing or developed. The assumption here is that such tariff concessions would eventually lead to full regional integration, a target that may be jeopardized by the extension of these concessions to non-member countries; unless these are willing and able to become members subject to the same rights and obligations. A different situation arises if tariff concessions were granted to developing countries which do not, and are not likely to, belong to a regional integration scheme. The Tripartite Agreement be-

<sup>245</sup> See *Trade expansion and economic integration among developing countries: Report by the secretariat of UNCTAD* (United Nations publication, Sales No.: 67.II.D.20), chap. II.

<sup>246</sup> See *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No.: 64.II.B.11), p. 20.

<sup>247</sup> *Ibid.*, p. 31.

<sup>248</sup> *Ibid.*, p. 42.

<sup>249</sup> *Ibid.*, *Second Session*, vol. I and Corr.1 and 3 and Add.1-2, *Report and Annexes* (United Nations publication, Sales No.: E.68.II.D.14), p. 51.

<sup>250</sup> *Ibid.*, p. 53.

<sup>251</sup> *Ibid.*

tween India, the United Arab Republic and Yugoslavia<sup>252</sup> is a case in point. According to the spirit, if not the letter, of UNCTAD recommendations such tariff concessions should be open to other developing countries. In fact, article IX of the Tripartite Agreement provides that it shall be open for accession by other developing countries "on a basis of mutual benefit". It is important, however, to realize that the extension of tariff concessions to other developing countries is not made in application of the unconditional most-favoured-nation clause. Third developing countries wishing to benefit from such concessions should be in a position to offer mutual concessions. Otherwise, third countries would be placed in a better position than the original members who exchanged tariff concessions with each other. Stated differently, tariff concessions made by one developing country to another outside an integration scheme should be applicable to third developing countries only as required by the *conditional* most-favoured-nation clause.

While developing countries can discriminate in favour of each other within or without integration schemes, it is doubtful that they can discriminate in favour of a developed country or a group of developed countries. This interpretation would seem to follow from UNCTAD recommendations regarding preferential arrangements between some developed countries and some developing countries (including reverse preferences enjoyed by EEC in the markets of the associated countries). As has been mentioned before, it is assumed that such preferential arrangements are destined to be phased out. The fact that UNCTAD does not favour existing trading arrangements involving discrimination among different groups of developed countries would seem to speak against the establishment of such new arrangements. Moreover, it should be noted that developing countries granting reverse preferences to some developed countries are called upon to extend the same privileged treatment to other developing countries. In the words of conference recommendation A.II.5: "Developing countries should grant each other mutually in primary products the most advantageous commercial treatment which they grant to developed countries."<sup>253</sup>

## ANNEX II

### Extracts from reports of the ECE *Ad Hoc* Group of Experts to study problems of East-West trade

FROM THE 1963 REPORT:<sup>254</sup> *Most-favoured-nation principle and problems concerning effective reciprocity—Item 5*

Under item 5 of the agenda the experts examined the most-favoured-nation principle and non-discriminatory treatment as applied in different economic systems as well as problems concerning the effective reciprocity of obligations in these systems. Views were exchanged on the juridical content and interpretation of the most-favoured-nation undertakings as well as on the application of such obligations in practice in countries with planned economies on the one hand in countries with market economies on the other.

According to the experts from the countries with market economies, undertakings among these countries to grant most-

favoured-nation treatment are embodied in bilateral agreements and in multilateral agreements, principally the GATT. Such undertakings in bilateral agreements generally apply to tariffs and other regulations. Under the GATT, in practice, the obligation extends to virtually the full range of governmental action which may affect competition between domestic production and imports. According to the GATT provisions contracting parties are required to give each other not only most-favoured-nation treatment but "national treatment" as well in regard to taxation, transport rates and certain other regulations. There are certain recognized exceptions to the obligation as contained in the GATT: customs unions and free-trade areas, purchases by government agencies for their own use, some traditional preferences as in regard to the Commonwealth, the franc zone, etc. In cases where tariff protection is low and there are no other restrictions on imports, most-favoured-nation treatment gives foreign producers an opportunity to compete on favourable terms not only with other foreign producers but also with domestic producers.

According to the experts from countries with planned economies, unconditional most-favoured-nation treatment is a basic element in international trade relations. It comprises non-discriminatory treatment in regard not only to tariffs but to other trade facilities as provided normally in existing trade agreements. In some agreements exceptions to the rule are recognized to be justified for customs unions, for frontier trade and trade between neighbouring countries, etc., but these exceptions must be specifically agreed as such. If questions arise concerning the detailed application of the most-favoured-nation principle or exceptions to the principle they should be settled by negotiation between the States concerned.

In relations between countries with market economies and countries with planned economies, undertakings to grant most-favoured-nation treatment have been regular features of the bilateral commercial agreements concluded between them and in many cases these undertakings had been in force for a long time.

The discussion on this question brought out two problems:

(a) The general problem of the significance of the most favoured-nation provision in the relations between countries with different economic systems; and

(b) The special problem of the application of this provision by certain Western European countries in connexion with their entry into the EEC and EFTA.

Regarding the general question of the meaning of the most-favoured-nation clause as it affects international trade between countries with different economic systems, experts from countries with market economies pointed out that because of the differences in systems it is difficult to define in practical terms and to verify the meaningful application in planned economies of most-favoured-nation undertakings; they also stated that certain provisions of bilateral trade and payments agreements may lead to practices difficult to reconcile with the most-favoured-nation principle.

Experts from countries with planned economies stated that there was no difficulty in applying the most-favoured-nation principle in countries with planned economies or in verifying that real benefits were granted under this principle to exporters from countries with market economies: foreign trade organizations were autonomous bodies obliged by law and regulations to operate according to commercial considerations and the planning of import policy did not discriminate between foreign suppliers or fail to take into account the availability and prices of goods which could be imported. They also pointed out that quotas and quantitative indications in bilateral trade and payments agreements did not mean that foreign trade transactions would take place under other than competitive conditions; these provisions of bilateral agreements were not in any sense discriminatory and had never been regarded as involving practices incompatible with the most-favoured-nation principle. The experts from countries with planned economies also pointed out that application to their countries of discriminatory quantitative restrictions and tariffs in certain market economies was incompatible with the principle of

<sup>252</sup> India, United Arab Republic and Yugoslavia: Trade Expansion and Economic Co-operation Agreement, signed at New Delhi, 23 December 1967. See *Indian Trade Journal*, 3 January 1968. The Agreement is also reproduced in *International Legal Materials: Current documents* (Washington, D.C., American Society of International Law, 1968), vol. VII (July 1968).

<sup>253</sup> See *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No.: 64.II.B.11), p. 31.

<sup>254</sup> "Preliminary report of *Ad Hoc* Group to twelfth session of the Committee on the Development of Trade", ECE document TRADE/140, paras. 16-26.

most-favoured-nation treatment and that such practices took place in spite of provisions in bilateral agreements or, in the case of Czechoslovakia, also of the GATT.

The experts from countries with planned economies stated that a number of countries in Western Europe which, under bilateral agreements, had undertaken to apply to countries with planned economies most-favoured-nation treatment in the matter of tariffs were unjustifiably violating those undertakings in connexion with their entry into the EEC and EFTA, thus hindering the normal development of East-West trade. The argument that, as a customs union, the EEC fell outside the régime of the most-favoured-nation clause was untenable, since the EEC could not be regarded as a customs union either in substance or in form. As to the common trade policy of the countries members of the EEC towards third countries, the experts of countries with planned economies pointed out that some points of this policy provided for discriminatory treatment towards them. The proposals made in connexion with the above considerations by a number of planned economy countries to certain Western European countries regarding the carrying out of bilateral negotiations on customs tariff questions were designed to promote the development of trade with those countries on a basis of mutual advantage and non-discrimination.

The experts from countries with market economies stated that customs unions and free-trade areas constituted rightful exceptions to the clause, on the basis either of customary international law and/or of multilateral conventional law (in particular the GATT) and bilateral agreements (many treaties, as for example the commercial agreement between France and the USSR, provide for an exception in favour of customs unions). This exception clearly applied to the measures necessary for the purpose of the establishment of those unions or areas, for otherwise their formation would in practice be prevented since such formation virtually necessitated a period of transition. Consequently, the countries members of the European Economic Community and of the European Free Trade Association were not legally bound to extend to the third countries to which they granted most-favoured-nation treatment the special régime applied between countries signatories of the Treaties of Rome and of Stockholm. The experts of countries with market economies observed that, if judgements on the legitimacy of the exception to the most-favoured-nation clause in favour of customs unions or free-trade areas would be applied in a manner which would discriminate according to the particular countries making up these groups, such action would constitute a specific violation of most-favoured-nation treatment. They noted with interest the proposal that these divergencies of views should be settled by negotiation between States. The French expert pointed out, however, that in the case of countries members of the European Economic Community a negotiation, in order to be successful, should take into account the fact that there had taken place, in tariff matters in particular, a transfer of competence from the national level to the community level. Furthermore, he stated that in his opinion the treatment which might be envisaged by the European Economic Community with respect to imports from countries with planned economies would be governed by the special features of this trade and not by the intention of applying to those countries a treatment less favourable than that applied to other third countries.

Following this discussion there was a general consensus that detailed discussions on the theoretical concept of the most-favoured-nation clause and its application in trade between countries with different economic systems would be less profitable at present than a realistic and practical approach to the subject. It was agreed that the general objective should be to achieve an equitable and mutually advantageous balance and increased trade on the basis of the principle of the most-favoured-nation concept. To this end it would be useful to work out a *quid pro quo* technique for negotiating multilaterally meaningful and balanced concessions on the basis of effective reciprocity under different economic

systems. The experts agreed that at a future date a review should take place jointly of practical problems involved in the application of the most-favoured-nation principle; such a review should concentrate on the main obstacles to trade expansion and on establishing a basis for negotiations to remove trade obstacles to the maximum extent possible under prevailing conditions.

The *Ad Hoc* Group also examined the problem of effective reciprocity in trade and trade obligations of countries with different systems. Although the experts understood and interpreted this concept somewhat differently—in the opinion of the experts of countries with planned economies this concept signifies trade conducted on the basis of mutual advantage and equality while in the opinion of the experts of countries with market economies this also signifies the practical equivalence of advantages and obligations received and granted—they agreed on the following:

(a) The aim should be to achieve effective reciprocity/mutual advantage by means of a realistic and practical approach to this problem both in intergovernmental negotiations and in joint discussions within the framework of ECE and/or other appropriate bodies;

(b) Effective reciprocity/mutual advantage should be measured in terms of concrete and comparable results, i.e. the increase in the volume and composition of trade between countries with different systems which would satisfy the trading partners and would serve as a basis for its further development on a long-term and balanced basis;

(c) The acceptance of mutual obligations with respect to the application of the most-favoured-nation treatment, non-discrimination in customs tariffs, quantitative restriction, licencing etc., will not, however important in themselves, necessarily lead to the desired development of trade. In this connexion it appears useful that these obligations, whenever possible and appropriate, be accompanied by concrete mutual commitments of the trading partners intended to result in the maximum increase of the volume and in the widening of the composition of imports (combined with a corresponding increase in exports). In endeavouring to achieve trade expansion it is necessary to give due consideration to the need for a fair degree of continuity and stability in the pattern and composition of trade.

In the opinion of experts from countries with planned economies, the most appropriate way of reaching the above-mentioned aims would be the mutual application of most-favoured-nation treatment, the removal of discriminatory obstacles to trade, the conclusion of long-term trade agreements and a more flexible payments system.

The experts agreed that a more continuous and detailed exchange of information, with due regard to security and commercial interest considerations, about the criteria and methods used for national and regional planning affecting foreign trade, and about foreign trade and market policies and practices, could substantially facilitate commercial relations between countries with different economic systems.

FROM THE 1964 REPORT:<sup>285</sup> *Practical problems involved in the application of the most-favoured-nation principle—item 3.*

6. The experts, basing their work on the agreement reached on this subject at their first session—"that a review should take place jointly of practical problems involved in the application of the most-favoured-nation principle" and that this review "should concentrate on the main obstacles to trade expansion and on establishing a basis for negotiations to remove trade obstacles to the maximum extent possible under prevailing conditions"—examined the following problems of trade between ECE countries having different economic and social systems:

<sup>285</sup> "Report of *Ad Hoc* Group to twentieth session of the Economic Commission for Europe", ECE document TRADE/162, paras. 6-7.

### A. Quantitative and other restrictions

It was pointed out by the experts of market-economy countries that quantitative restrictions applied by these countries against imports from planned-economy countries represented a minimum control retained by the market economies in dealing with countries with planned economies. For example there were apprehensions in business circles in countries having market economies that exports from countries having centrally-planned economies might in some cases disrupt markets, particularly since it was not possible to apply to these exports the same price criteria as were applied in the case of exports from market-economy sources.

Moreover, the experts of the market-economy countries stressed that the removal of quantitative restrictions by their countries immediately opened up their markets to imports from the planned economies in the sense that these would be able to compete both with imports from other countries, and—subject usually only to any tariff which might apply—with the products of their own national industries.

On the other hand, it was pointed out by the experts of the planned-economy countries that such restrictions had an immediate effect in hampering exports from countries with one system to countries with the other and that the system of restrictions introduced uncertainties which did not encourage plans for production for export to or imports from the individual markets affected.

The experts of the planned-economy countries also pointed out that exports from the planned-economy countries could not disrupt the markets of their trading partners because they conducted their trade in these markets on the basis of world market prices.

As to the remarks of the experts of the market-economy countries that the planned-economy countries could compete with the national industries of the market economies, the experts of the planned-economy countries stated that market-economy countries could take full advantage of the possibilities of the international division of labour.

It was also pointed out by experts of market-economy countries that in their view where differential tariffs were applied to countries with centrally-planned economies the reduction of these tariffs to the most-favoured-nation level posed a similar problem of how mutual advantage might be achieved in terms of equivalence in access to markets. The experts of the centrally-planned economies indicated that the above mentioned question had been discussed during the first session of the *Ad Hoc* Group and their position on it had been formulated.<sup>256</sup> In addition, they repeated that the granting to the countries with centrally-planned economies of the régime of most-favoured-nation treatment by the countries having market economies should not in their view be linked with any supplementary concessions or obligations.

### B. Increased stability

It was generally recognized that flexibility was important for expansion of trade but that increased stability would be desirable in trading relations between countries with different economic systems. This stability should be founded on reciprocity and ensure the establishment of continuity in trading relations. Such stability would strengthen confidence among the trading partners and make them more interested in the development of their economic relations on the basis of a rational international division of labour. To this end it might be useful to carry out, on the basis of reciprocity, an exchange of information as set out in paragraph 7B (iii) below. It was also recognized that long-term understandings regarding basic trading conditions could be useful in furthering stable trade relations.

### C. Verification

As regards the application of most-favoured-nation treatment, it was pointed out that there needed to be a reasonable possibility of verifying that equal treatment was in practice accorded and that this might require systematic consultations and procedures for the examination of specific questions which might arise regarding such equality of treatment. It was also indicated by experts from countries having market economies that in a number of these countries the technique was used of announcing the results of competitive bidding which made it possible for interested suppliers to ascertain the terms of bids accepted; it was further indicated by experts from countries having centrally-planned economies that in their countries the reasons for the choices made by the purchasing foreign trade corporations in relation to competitive offers were in fact made known to interested parties.

### D. Qualitative equilibrium

It was pointed out that governments irrespective of their economic systems were concerned over the commodity composition of the trade between their countries and wished to ensure that it corresponded to their national needs, possibilities and interests. From this point of view many governments sought at present to obtain a qualitative as well as a quantitative equilibrium in their countries' trade.

### E. Multilateral consultations

It was pointed out that bilateral trade negotiations and reviews had been valuable but that there seemed to be a continuing need for consultations of a multilateral character on trade policies and trade practices designed to clarify and remove obstacles to trade between countries having different systems.

7. The following paragraphs describe the views expressed in further discussion and the consensus that was reached on certain points:

A. The agreement reached at the first meeting was reaffirmed: "that the general objective should be to achieve an equitable and mutually advantageous balance and increased trade on the basis of the principle of the most-favoured-nation concept". Also reaffirmed was the agreement reached at the first meeting that "effective reciprocity/mutual advantage should be measured in terms of concrete and comparable results . . .", and achieved "by concrete mutual commitments of the trading partners intended to result in the maximum increase of the volume and in the widening of the composition of imports (combined with a corresponding increase in exports)".

B. In their efforts to attain a further expansion of trade between ECE countries having different economic systems ECE governments might in line with these objectives arrange between them for—

- (i) Removal by countries having market economies of quantitative restrictions limiting imports from ECE countries having centrally-planned economies. In this connexion, suggestions were made by experts from countries having market economies for a progressive liberalization of imports on the part of these countries provided these measures were linked with certain safeguards against the possibly harmful effects of such liberalization on the importing countries' economies. In commenting upon these suggestions experts from countries having centrally-planned economies expressed the opinion that the problem of such safeguards should be kept apart from the granting of most-favoured-nation treatment. In their opinion liberalization meant only the return to normal conditions of trade and therefore could not be linked with any obligation on the part of the planned-economy countries. The question

<sup>256</sup> ECE document TRADE/140, para. 12.

of obligations or guarantees could be considered only if the conditions of reciprocity were observed.

- (ii) Confirmation by the countries having centrally-planned economies that it remains their intention to use their best endeavours to avoid price disturbances in the domestic markets of the countries having market economies and a confirmation by governments having market economies that it remains their intention to use their best endeavours to avoid action which would interfere with the orderly expansion of the markets for exports from countries with centrally planned economies. In cases of any difficulties over trading practices in this regard, procedures agreeable to the parties concerned for consultations, bilateral and/or multilateral, might be utilized.
- (iii) The establishment, in the interests of trade stability, of long term understandings regarding basic trading conditions satisfactory to the trade partners concerned and regarding the avoidance of measures affecting the trading interests of these partners without appropriate consultation. To this end also, arrangements might be made as far as possible for the exchange on the basis of mutual benefit of information concerning economic policies, programmes and forecasts regarding economic developments, particularly in respect of their impact on foreign trade.
- (iv) The review at periodic intervals of the effects of the policies referred to above in order to determine whether the results are mutually satisfactory in bringing about the growth of total trade at the rates desired and with a satisfactory commodity composition. Such reviews might take place under appropriate multilateral procedures in the framework of the ECE Committee on the Development of Trade as well as on a bilateral basis.
- (v) Appropriate joint action along the lines indicated above as well as other suitable measures might be taken to increase the total volume of trade between countries with different social and economic systems, which although it has developed in recent years at a rather high rate is still relatively small and is clearly capable of expansion.

### ANNEX III

#### List of organizations and agencies to which the circular letter of the Secretary-General was sent

United Nations Conference on Trade and Development (UNCTAD)  
 Economic Commission for Africa (ECA)  
 Economic Commission for Asia and the Far East (ECAFE)  
 Economic Commission for Europe (ECE)  
 Economic Commission for Latin America (ECLA)  
 International Atomic Energy Agency (IAEA)  
 International Labour Organisation (ILO)  
 Food and Agriculture Organization of the United Nations (FAO)  
 United Nations Educational, Scientific and Cultural Organization (UNESCO)  
 World Health Organization (WHO)  
 International Bank for Reconstruction and Development (IBRD)  
 International Finance Corporation (IFC)  
 International Development Association (IDA)  
 International Monetary Fund (IMF)  
 International Civil Aviation Organization (ICAO)  
 Universal Postal Union (UPU)  
 International Telecommunication Union (ITU)  
 World Meteorological Organization (WMO)  
 Inter-Governmental Maritime Consultative Organization (IMCO)  
 General Agreement on Tariffs and Trade (GATT)  
 United International Bureaux for the Protection of Intellectual Property (BIRPI)  
 African and Malagasy Common Organization (OCAM)  
 Council of Europe  
 League of Arab States  
 Organization of African Unity (OAU)  
 Organization of Central American States (OCAS)  
 Organization of American States (OAS)  
 Benelux Economic Union  
 Customs and Economic Union of Central Africa (UDEAC)  
 Council of Mutual Economic Aid (CMEA)  
 Customs Co-operation Council (CCC)  
 European Economic Community (EEC)  
 European Free Trade Association (EFTA)  
 Permanent Secretariat of the General Treaty on Central American Economic Integration  
 Latin American Free Trade Association (LAFTA)  
 Organization for Economic Co-operation and Development (OECD)

## CO-OPERATION WITH OTHER BODIES

[Agenda item 6]

## DOCUMENT A/CN.4/234

Report on the eleventh session of the Asian-African Legal Consultative Committee,  
by Mr. Nikolai A. Ushakov, Observer for the Commission

[Original text: English/Russian]  
[11 May 1970]

1. In accordance with the decision taken by the International Law Commission at its twenty-first session,<sup>1</sup> I had the honour to attend as an observer for the Commission the eleventh session of the Asian-African Legal Consultative Committee, held at Accra (Ghana) from 19 to 29 January 1970.
2. I take particular pleasure in stating that, as is evident from the whole course of its work at the eleventh session, the Committee attaches very great importance to the maintenance and development of the fruitful relations which have been so felicitously established between the Committee and the Commission, to their mutual advantage and satisfaction.
3. The delegations of the following member States took part in the work of the eleventh session: Ceylon, Ghana, India, Indonesia, Iraq, Japan, Jordan, Nigeria, Pakistan and the United Arab Republic. The delegations of two associated States, the Philippines and the Republic of Korea, also took part.<sup>2</sup>
4. At the inaugural meeting, a special message was read out from Brigadier Afrifa, Chairman of the Presidential Commission of Ghana, in which he emphasised that the Asian and African countries had many problems in common and that the Asian-African Legal Consultative Committee was one forum for the discussion of those problems, its purpose being to harmonize the views of member States on important legal problems.<sup>3</sup>
5. Mr. Adade, Attorney-General and Minister of Justice of Ghana, also spoke at the inaugural meeting. He referred to the importance of the problems on the Committee's agenda for the session and wished the Committee success in its work.
6. The head of the Ghanaian delegation (Mr. Adade) and of the Nigerian delegation (Mr. Shitta-Bey) were elected President and Vice-President respectively.
7. Mr. B. Sen, the Committee's permanent secretary, acted in that capacity and was re-elected to the post for the next two years.
8. At its first meeting, the Committee adopted the following agenda for the session:
  - I. Administrative and organizational matters:
    1. Adoption of the agenda
    2. Election of the President and Vice-President
    3. Election of the Secretary for the term 1970-1972
    4. Admission of observers
    5. Consideration of the Secretary's report
    6. Consideration of the reports of the Committee's observers to the United Nations Conference on the Law of Treaties and the twenty-first session of the International Law Commission
    7. Dates and place on the twelfth session.
  - II. Matters arising out of the work done by the International Law Commission under article 3 (a) of the Statutes:
    - State succession (for preliminary discussion)
  - III. Matters referred to the Committee by the Governments of the participating countries under article 3 (b) of the Statutes:
    1. Rights of refugees (reconsideration of the Committee's report on the rights of refugees adopted at the eighth session of the Committee in the light of new developments—Subject originally referred by the Government of the United Arab Republic, referred for reconsideration by the Government of Pakistan)
    2. Law of international rivers (referred by the Governments of Iraq and Pakistan)
  - IV. Matters taken up by the Committee under article 3 (c) of the Statutes:
    1. International sale of goods (taken up by the Committee at the suggestion of the Government of India)
    2. International legislation on shipping (for preliminary discussion)
9. Apart from administrative and organizational matters, the Committee concentrated at the session on three of the items listed above: rights of refugees, international sale of goods and law of international rivers. For lack of time, the Committee did not consider the items on State succession and international legislation on shipping.

<sup>1</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 235, document A/7610/Rev.1, para. 97.

<sup>2</sup> See annex I.

<sup>3</sup> For the text of the message, see annex II.

*Rights of refugees*

10. At its eighth session at Bangkok in 1966, the Committee had approved the "Principles concerning treatment of refugees" which it had drafted.<sup>4</sup> At the suggestion of the Government of Pakistan, the Committee reconsidered this question in the light of new developments. After a lengthy and very useful discussion, the Committee approved an "Addendum to the principles concerning treatment of refugees".<sup>5</sup>

11. As indicated in the preamble to the Addendum, the principles approved at Bangkok relate to what might be called political refugees who have been deprived of the protection of their own government. The Addendum, on the other hand, deals with other classes of refugees or displaced persons.

12. At the same time, the Committee adopted a resolution providing for the inclusion of the question of the rights of refugees in the agenda of its next session, with a view to the reconsideration of that question in the light of the relevant international instruments, *inter alia*: the Protocol relating to the Status of Refugees, adopted by the General Assembly on 16 December 1966;<sup>6</sup> the Recommendations made by the Conference on African Refugee Problems held by the Organization of African Unity at Addis Ababa in October 1967, and the Convention of the Organization of African Unity Governing the Specific Aspects of Refugee Problems in Africa, adopted on 10 September 1969 at the sixth ordinary session of the Conference of Heads of State and Government, held at Addis Ababa.<sup>7</sup>

*International sale of goods*

13. A comprehensive and very valuable discussion of

<sup>4</sup> *Yearbook of the International Law Commission, 1967*, vol. II, p. 331, document A/CN.4/197, annex B.

<sup>5</sup> For the text of the Addendum, see annex III.

<sup>6</sup> United Nations, *Treaty Series*, vol. 606, p. 268.

<sup>7</sup> Organization of African Unity, document CM/267/Rev.1.

the international sale of goods took place during the session. As a result of the discussion, the Committee approved a special report on the question and decided to continue its discussion in the future.

*Law of international rivers*

14. The Committee devoted considerable attention to the question of international rivers, consideration of which was begun at the tenth session. During the discussion there was an exchange of views on the appropriate basis to be adopted for the preparation of rules governing the use of international rivers and, in particular, on the desirability of adopting the "Helsinki Rules" adopted by the International Law Association in 1966<sup>8</sup> as the basis for this work.

15. The Committee decided to transmit the relevant documents for study by the Governments of member States and to continue its examination of the question at its twelfth session.

16. The Committee secretariat prepared for the session extremely comprehensive studies on the items on the rights of refugees, the law of international rivers and the international sale of goods. These studies, which were thorough and of extremely high quality, included all the most important existing documentation on those subjects. The excellence of this work is a matter for sincere admiration.

17. In conclusion, I should like to express to the President and Secretary of the Committee my deep appreciation of the cordial welcome I received and of the great courtesy shown, through me, to the Commission.

<sup>8</sup> International Law Association, *Report of the Fifty-second Conference, held at Helsinki* (London, International Law Association, 1967), pp. 484-532.

## ANNEXES

## ANNEX I

## List of delegates and observers at the eleventh session of the Asian-African Legal Consultative Committee

[not reproduced]\*

## ANNEX II

Special message from Brigadier A.A. Afrifa  
Chairman of the Presidential Commission of Ghana

On behalf of my colleagues, the members of the Presidential Commission, the Government and people of Ghana, it is my great pleasure to welcome the distinguished delegates, advisers and

\* For the list, see the mimeographed version of this document, annex A.

observers to the Eleventh Session of the Asian-African Legal Consultative Committee to which we feel privileged to play host.

Asia and Africa share a common heritage and we have many problems in common. It is quite obvious therefore that we should meet occasionally to discuss these common problems and explore possible common solutions to them. It is because of this need to find a forum for the discussion of our common problems that I welcome the existence of the Asian-African Legal Consultative Committee as an institution which meets to harmonize the views of member States on important legal problems.

I observe that this present session has very important items on its agenda: items like rights of refugees, law of international rivers, international sale of goods and international shipping legislation. The refugee problem in many of the Asian-African countries has been the result of political upheavals or cataclysms in the wake of decolonization and the resultant international adjustments. The rights of these unfortunate refugees must be

guaranteed in order to alleviate human suffering. Any contribution therefore that this session could make towards solving this problem will be a great service to humanity.

Another area of international conflict is the use of international rivers by riparian States. If your deliberations could result in finding equitable formulae towards eliminating this area of international conflict you will have contributed greatly towards the promotion of international peace and security.

I am also happy to see that this session is directing its mind towards the study of new topics, such as the international sale of goods and international shipping legislation. As primary producing countries which contribute the bulk of the world's raw materials to international trade, we cannot better protect our own interests than by examining the legal framework within which we sell and transport these commodities in order to ensure to ourselves a fair share of the proceeds of world trade.

It is hoped that this session taking place here in Ghana will succeed in arriving at important decisions which will offer a guiding-light to a conflict-torn world and show humanity the way to peace and progress.

We wish you a very comfortable stay in Ghana.

### ANNEX III

#### Addendum to the "principles concerning treatment of refugees" approved by the Committee

*Whereas* it appears to the Committee on further consideration that the principles adopted at its eighth session held in Bangkok in 1966<sup>a</sup> mainly contemplate the status of what may be called political refugees who have been deprived of the protection of their own Government and do not provide adequately for the case of other refugees or displaced persons;

*And whereas* the Committee considers that such other refugees or displaced persons should enjoy the benefit of protection of the nature afforded by articles IV and V of those principles;

*Now therefore*, the Committee at its eleventh session held at Accra from 19-29 January 1970 resolves as follows:

1. Any person who because of foreign domination, external aggression or occupation has left his habitual place of residence, or being outside such place, desires to return thereto but is prevented from so doing by the Government or authorities in control of such a place of his habitual residence shall be entitled to return to the place of his habitual residence from which he was displaced;
2. It shall accordingly be the duty of the Government or authorities in control of such place of habitual residence to facilitate by all means at their disposal the return of all such persons as are referred to in the foregoing paragraph, and the restitution of their property to them;
3. This natural right of return shall also be enjoyed and facilitated to the same extent as stated above in respect of the dependants of all such persons as are referred to in paragraph 1 above;
4. Where such a person does not desire to return he shall be entitled to prompt and full compensation by the Government or the authorities in control of such place of habitual residence as determined in the absence of agreement by the parties concerned by an international body designated or constituted for the purpose by the Secretary-General of the United Nations at the request of either party;

<sup>a</sup> See foot-note 4.

5. If the status of such a person is disputed by the Government or authorities in control of such place of habitual residence or if any other dispute arises, such matter shall also be determined in the absence of agreement by the parties concerned by an international body designated or constituted as specified in paragraph 4 above.

### ANNEX IV

#### Resolution No. XI (8) adopted by the Committee

##### *The Committee*

*Considering* that the Government of the United Arab Republic by a reference made under article 3 (b) of the Statutes had requested the Committee to consider certain questions relating to the rights of refugees,

*Considering* that the Government of Pakistan had requested the Committee to reconsider at its tenth session 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* that it was not possible for the Committee at its tenth session to give detailed consideration to the various suggestions made and that by resolution No. X (8) the Committee had requested 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,<sup>a</sup> including particularly:

(i) the Protocol relating to the Status of Refugees, adopted by the General Assembly on 16 December 1966,<sup>b</sup>

(ii) the United Nations Declaration on Territorial Asylum, adopted by the General Assembly on 14 December 1967,<sup>c</sup>

(iii) the Recommendations made by the Conference on African Refugee Problems held by the Organization of African Unity at Addis Ababa in October 1967,

(iv) the Convention of the Organization of African Unity Governing the Specific Aspects of Refugee Problems in Africa, adopted on 10 September 1969 at the sixth ordinary session of the Conference of Heads of State and Government of the Organization, held at Addis Ababa,<sup>d</sup>

*Convinced* that the above-mentioned new instruments and recommendations made an important contribution towards further development in international law relating to refugees,

*Requests* the Secretariat to put the item "Rights of refugees" on the agenda of its twelfth session if possible for reconsideration of the Principles concerning the Treatment of Refugees, adopted at its eighth session, in the light of the above-mentioned international instruments and recommendations with a view to bringing these principles, as far as appropriate, in line with these instruments and recommendations.

<sup>a</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 194, document A/CN.4./212, annex. IV.

<sup>b</sup> See foot-note 6.

<sup>c</sup> See General Assembly resolution 2312 (XXII).

<sup>d</sup> See foot-note 7.



## ORGANIZATION OF FUTURE WORK

[Agenda item 7]

### DOCUMENT A/CN.4/230\*

**Review of the Commission's programme of work and of the topics recommended  
or suggested for inclusion in the programme**

*Working paper prepared by the Secretariat*

[Original text: English]  
[7 April 1970]

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\* Incorporating document A/CN.4/230/Corr.

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#### ABBREVIATIONS

FAO	Food and Agriculture Organization of the United Nations
IAEA	International Atomic Energy Agency
IMCO	Inter-Governmental Maritime Consultative Organization
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNITAR	United Nations Institute for Training and Research

#### Introduction

1. The International Law Commission included on its agenda at its twentieth session (1968) an item entitled "Review of the Commission's programme and methods of work". In its report on the work of its twenty-first session, 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's 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 Statutes. It asked the Secretary-General to submit a preparatory working paper with a view to facilitating this task.<sup>1</sup>

2. By resolution 2501 (XXIV) of 12 November 1969, the General Assembly noted with approval the programme and organization of work planned by the Commission, including its intention of bringing up to date its long-term programme of work before the expiry of the term of office of its present membership.

3. The present document has been prepared in response to the Commission's request that the Secretary-General

<sup>1</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 235, document A/7610/Rev.1, para. 91.

submit a preparatory working paper in order to facilitate the Commission's task. The paper has been divided in two parts: the first part deals with items which have been included in the Commission's programme of work, and the second with the topics which have been suggested or recommended at various times by the General Assembly, by Governments of Member States, or by members of the Commission, but which have not so far been included in the programme.

4. The Commission first examined the question of the selection of topics for study at its opening session in 1949. On the basis of a memorandum prepared by the Secretariat entitled "Survey of international law in relation to the work of codification of the International Law Commission",<sup>2</sup> the Commission reviewed twenty-five topics, which are listed in the report of its session.<sup>3</sup> After due deliberation, the Commission drew up a provisional list of fourteen topics selected for codification; it was understood that the list was only provisional and that additions or deletions might be made after further study by the Commission or in compliance with the wishes of the General Assembly.<sup>4</sup> This list of fourteen topics has remained the basis of the Commission's long-term programme of work. The Commission has, however, also examined other topics at the request of the General Assembly. Part I of this paper, dealing with the Commission's programme of work, covers both the items contained in the 1949 list and those included in the Commission's programme in response to a General Assembly recommendation, in order to provide as complete an account as possible of the whole range of the Commission's activities.<sup>5</sup> By way of sub-division, chapter I of Part I deals with the topics on which the Commission has submitted final drafts or recommendations to the General Assembly, and chapter II with those on which such drafts or recommendations have not been submitted. Chapter II contains two sections, the first covering the subjects currently under study by the Commission and the second dealing with the remaining six topics on which the Commission has not submitted final drafts or recommendations.

5. By way of further explanation of the organization of the paper, it may be recalled that the General Assembly, by resolution 1505 (XV) of 12 December 1960, decided

to place on the provisional agenda of its sixteenth session an item entitled "Future work in the field of codification and progressive development of international law", and also asked for the views and suggestions of Member States thereon. Various written comments were made by Member States, and other suggestions were made orally in the debates of the Sixth Committee, at the fifteenth (1960) and sixteenth (1961) sessions of the General Assembly. In operative paragraph 3 (b) of resolution 1686 (XVI) of 18 December 1961, the General Assembly requested the International Law Commission to consider at its fourteenth session its future programme of work in the light of all the suggestions made.<sup>6</sup> The Secretariat prepared a working paper entitled "Future work in the field of the codification and progressive development of international law"<sup>7</sup> summarizing what had been suggested. The Commission considered the matter at its fourteenth session (1962) and decided to limit for the time being its future programme of work to the three main topics then under study or to be studied pursuant to operative paragraph 3 (a) of resolution 1686 (XVI) (Law of treaties, State responsibility and succession of States and Governments) and to additional topics of more limited scope (special missions, relations between States and international organizations,<sup>8</sup> the right of asylum, and the juridical régime of historic waters,

<sup>6</sup> By operative paragraph 4 of the same resolution, the General Assembly decided to place on the provisional agenda of its seventeenth session the question entitled "Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations". The General Assembly, in resolution 1815 (XVII) of 18 December 1962 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 of the United Nations", with a view to their progressive development and codification, the aim of the study being the adoption by the General Assembly of a declaration containing an enunciation of the principles. Since then, the Sixth Committee and the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, established in 1963 and reconstituted in 1965, have examined the following seven principles [listed in General Assembly resolution 1815 (XVII)] (1) 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 purpose of the United Nations; (2) 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; (3) the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter; (4) the principle of sovereign equality of States; (5) the duty of States to co-operate with one another in accordance with the Charter; (6) the principle of equal rights and self-determination of peoples; and (7) the principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter.

At its sessions held in 1966, 1967, 1968 and 1969 the Special Committee has adopted or taken note of texts and elements of texts in an effort to reach an agreed formulation of the seven principles. In resolution 2533 (XXIV) of 8 December 1969, the General Assembly requested the Special Committee to endeavour to resolve at its 1970 session the remaining questions relating to the formulation of the principles, in order to complete its work, and to submit to the General Assembly at its twenty-fifth session a comprehensive report containing a draft declaration of all the seven principles.

<sup>7</sup> See *Yearbook of the International Law Commission, 1962*, vol. II, p. 84, document A/CN.4/145.

<sup>8</sup> See foot-note 42 below.

<sup>2</sup> Document A/CN.4/1/Rev.1 (United Nations publication, Sales No.: 48.V.1(1)).

<sup>3</sup> See *Yearbook of the International Law Commission, 1949*, pp. 280-281. The topics which were not selected were the following: subjects of international law; sources of international law; obligations of international law in relation to the law of States; fundamental rights and duties of States; domestic jurisdiction; recognition of acts of foreign States; obligations of territorial jurisdiction; territorial domain of States; pacific settlement of international disputes; extradition; and laws of war. The question of the preparation of a draft declaration on the rights and duties of States had been referred to the Commission by General Assembly resolution 178 (II) of 21 November 1947 (see para. 12 below).

<sup>4</sup> *Ibid.*, p. 281, paras 16-17.

<sup>5</sup> The only topic the Commission has considered which was not either included in the 1949 list or recommended by the General Assembly was the topic "Ways and means for making the evidence of customary international law more readily available" which was examined in pursuance of article 24 of the Commission's Statute (para. 15 below).

including historic bays), which had been referred to it by earlier General Assembly resolutions.<sup>9</sup>

6. As regards the suggestions made, the Commission expressed the view

that many of the topics proposed by Governments deserved study with a view to codification. In drawing up its future programme of work, however, it is obliged to take account of its resources . . . The Commission . . . considers it inadvisable for the time being to add anything further to the already long list of topics on its agenda.<sup>10</sup>

7. As indicated by this passage of its report on its fourteenth session, the Commission's decision in 1962 was based on its assessment of its immediate undertakings at that time, rather than on a definite ruling as to the suitability or otherwise of particular subjects for study at a later date. Moreover, the opportunity given to Governments in 1960 and 1961 to submit written comments and to discuss the Commission's future programme as a whole, was the main occasion they have had to express their views on the subject. For these reasons it was thought that it would be useful to include in the present paper a summary of the suggestions made at that time. Where, as in a considerable number of cases, there have been subsequent developments which need to be considered in relation to these proposals, these developments have also been noted.

8. Some of the suggestions made by Member States in 1960 and 1961 related to topics included in the 1949 list or to topics which the Commission has included in its programme in response to a request from the General Assembly. In such cases the suggestions have been referred to under the appropriate heading in Part I, so as to place all information relevant to a particular topic, so far as possible, under a single heading. Many of the suggestions made in 1960 and 1961, however, related to new topics which, in the light of the Commission's decision in 1962, were not included in its programme. It is these suggestions which are therefore listed in chapter I of Part II of the paper, together with information on subsequent developments or any later comments made. Such additional new topics as have been suggested by representatives in the Sixth Committee since the sixteenth session (1961) of the General Assembly or by members of the Commission, are contained in chapter II of Part II. Lastly, chapter III records the recommendation made by the General Assembly in its resolution 2501 (XXIV) of 12 November 1969, with respect to the question of treaties concluded between States and international organizations or between two or more international organizations.

9. The present paper has been limited to a review of the Commission's programme of work and of the topics previously recommended or suggested for inclusion in the programme. It is clear from the Commission's decision quoted in paragraph 1 above that the Commission has as its first task the bringing up to date of its long-term programme of work. As an initial step in its survey of the

whole field of international law, the Commission will therefore have to review the six topics that are already included in its programme of work and in respect of which it has so far undertaken no substantive study. Furthermore, it would seem appropriate that the Commission should give consideration to the eleven topics suggested for inclusion which are listed in chapter I of Part II, and which were brought to the Commission's attention by General Assembly resolution 1686 (XVI). The Commission must also take a decision with respect to the topic of treaties concluded between States and international organizations or between two or more international organizations, which was recommended for study by General Assembly resolution 2501 (XXIV) "as an important question", in pursuance of a resolution adopted by the United Nations Conference on the Law of Treaties. There is thus a considerable list of topics already in existence, covering a wide span of international law, which the Commission must review as a first step towards the bringing up to date of its long-term programme of work. The range of existing subjects, together with those on the Commission's present programme of work, makes it clear that the number and the nature of the additional topics to be selected by the Commission in the course of its survey of the remaining field of international law will be very much dependent on the number, and nature, of the topics chosen from amongst those covered in the present paper. For this reason, the paper has been prepared in the manner indicated. Such further assistance as the Secretariat might provide, if requested to do so in the course of the Commission's survey of the topics suitable for codification, will depend on the decisions which the Commission will take during its present session with respect to the list of topics already in existence.

## PART I

### *Topics included in the Commission's programme of work*

10. As explained in the introduction, Part I deals with all items included in the 1949 list<sup>11</sup> and with those which the Commission has considered or included in its programme following a General Assembly recommendation. In the account given below, a reference is given, after the title of the topic, either to the 1949 list, when the topic was included in that list, or to the pertinent General Assembly resolution, with the sole exception of the topic "Ways and means for making the evidence of customary international law more readily available", which was considered by the Commission pursuant to article 24 of its Statute. Topics are arranged so far as possible according to the chronological order in which the Commission completed its final draft or report.

11. As regard the fourteen topics included in the 1949 list, the present position may be summarized as follows: the Commission has submitted final drafts or reports with

<sup>9</sup> See *Yearbook of the International Law Commission, 1962*, vol. II, p. 190, document A/5209, para. 60.

<sup>10</sup> *Ibid.*, para. 61.

<sup>11</sup> See para. 4 above.

respect to seven topics (régime of the high seas; régime of territorial waters; nationality, including statelessness; law of treaties; diplomatic intercourse and immunities; consular intercourse and immunities; and arbitral procedure); and two (succession of States and Governments); and State responsibility) are currently under study. The remaining five topics, namely, those which have not been the subject of a final draft or reports and which are not currently under study, are: recognition of States and Governments; jurisdictional immunities of States and their property; jurisdiction with regard to crimes committed outside national territory; treatment of aliens; and right of asylum.

## CHAPTER I

### Topics on which the Commission has submitted final drafts or recommendations to the General Assembly

#### 1. *Draft Declaration on the Rights and Duties of States*

[General Assembly resolution 178 (II) of 21 November 1947]

12. At its first session in 1949, in accordance with the request made by the General Assembly, the Commission drew up a draft Declaration on the Rights and Duties of States,<sup>12</sup> which was submitted to the General Assembly. By resolution 375 (IV) of 6 December 1949, the General Assembly commended the draft Declaration to the continuing attention of Member States and jurists and requested Member States to comment on the draft. Because of the few comments it received, the Assembly decided, in resolution 596 (VI) of 7 December 1951, to postpone consideration of the draft Declaration until a sufficient number of States had transmitted their comments and to undertake consideration when a majority of Member States had sent their replies. By the end of 1952 eighteen States had replied. No further replies have been received since then, and the Assembly has taken no further action.

13. Several Member States referred to the topic either in their written comments submitted in response to resolution 1505 (XV) of 12 December 1960 or during the discussions held in the Sixth Committee during the sixteenth session (1961) of the General Assembly. Venezuela in its written comments suggested that priority might be given in the future work of the Commission to the fundamental rights and duties of States.<sup>13</sup> The Nicaraguan representative, speaking in the Sixth Committee during the sixteenth session (1961), included the question among those topics for which codification was urgently needed.<sup>14</sup> Similarly the Mexican representative referred to the necessity of drawing up a set of rules

concerning the rights and duties of States. He stated that developments in the past fifteen years might make it necessary to adapt the Declaration which the International Law Commission had drafted in 1949 to the new conditions now prevailing. In his view, the draft was far from perfect and the Mexican delegations had serious reservations respecting it; but it could be amended and improved. The 1949 draft and other documents, such as chapter III of the Charter of the Organization of American States, might serve as a guide. Although it did not make a formal proposal, the Mexican delegation believed that it would be appropriate to draw the attention of the International Law Commission to that problem.<sup>15</sup> The Brazilian representative on the other hand wished to avoid as far as possible the preparation of academic documents devoid of practical significance, such as the Declaration on the Rights and Duties of States.<sup>16</sup>

14. During the twenty-second (1967) session of the General Assembly the representative of Mexico in the Sixth Committee suggested that the International Law Commission might study the possibility of revising the draft Declaration after the Commission had completed its examination of priority issues or in the intervals between its work; failing that, the General Assembly should decide to take up the issue again.<sup>17</sup> Speaking at the twenty-third (1968) session, the delegate of Mexico referred again to the topic and

wondered whether in the next few years it might not be advisable to turn again to the question of a declaration on the rights and duties of States in the light of the seven principles which were to be formulated by the Committee specially established for that purpose.<sup>18</sup>

#### 2. *Ways and means for making the evidence of customary international law more readily available*

(Article 24 of the Commission's Statute)

15. At its second session in 1950 the Commission prepared its report to the General Assembly containing various specific suggestions on the subject.<sup>19</sup> Since the submission of these recommendations, the General Assembly has authorized the Secretary-General to issue most of the publications suggested by the Commission and certain other publications relevant to the Commission's recommendations.

#### 3. *Formulation of the Nürnberg principles*

[General Assembly resolution 177 (II) of 21 November 1947]

16. At its second session (1950) the Commission completed its work on the formulation of the principles of

<sup>12</sup> See *Yearbook of the International Law Commission, 1949*, p. 287.

<sup>13</sup> See *Official Records of the General Assembly, Sixteenth Session, Annexes*, agenda item 70, document A/4796 and Add. 1-8, annex, section 14.

<sup>14</sup> *Ibid.*, Sixth Committee, 722nd meeting, para. 23.

<sup>15</sup> *Ibid.*, para. 42.

<sup>16</sup> *Ibid.*, 721st meeting, para. 21.

<sup>17</sup> *Ibid.*, Twenty-second Session, Sixth Committee, 961st meeting, para. 8.

<sup>18</sup> *Ibid.*, Twenty-third Session, Sixth Committee, 1033rd meeting, para. 33. For a list of the seven principles and reference to the Special Committee concerned, see foot-note 6 above.

<sup>19</sup> See *Yearbook of the International Law Commission, 1950*, vol. II, pp. 367-374.

international law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal.<sup>20</sup> By resolution 488 (V) of 12 December 1950, the General Assembly decided to send the formulation to the Governments of Member States for comments, and requested the Commission, in preparing the draft Code of Offences against the Peace and Security of Mankind (see para. 24 below), to take account of the observations made on this formulation by delegations and Governments.

#### 4. *Question of an international criminal jurisdiction*

[General Assembly resolution 260 B (III)  
of 9 December 1948]

17. The Commission concluded at its second session (1950) that the establishment of an international juridical organ for the trial of persons charged with genocide or other crimes was both desirable and possible.<sup>21</sup> It recommended against such an organ being set up as a chamber of the International Court of Justice.<sup>22</sup> The task of preparing concrete proposals relating to the creation and the statute of an international criminal court and of studying the implications and consequences of establishing such a court was entrusted by the General Assembly to two Committees composed of the representatives of seventeen Member States set up respectively by resolutions 489 (V) of 12 December 1950 and 687 (VII) of 5 December 1952. General Assembly resolutions 898 (IX) of 14 December 1954 and 1187 (XII) of 11 December 1957 deferred discussion of the topic until such a time as the Assembly again took up two related items, namely, the question of defining aggression and the draft Code of Offences against the Peace and Security of Mankind (see paras. 20-22 and para. 24 below).

18. In resolution 2391 (XXIII) of 26 November 1968, the General Assembly adopted a Convention on the Non-Application of Statutory Limitations to War Crimes and Crimes against Humanity. In resolution 2392 (XXIII) of the same date the General Assembly decided to take up a draft optional protocol to the Convention, which raised issues related to the question of international criminal jurisdiction, when it resumed consideration of the latter question.

#### 5. *Reservations to multilateral conventions*

[General Assembly resolution 478 (V)  
of 16 November 1950]

19. The Commission's conclusions on this topic were reported to the General Assembly in the report of the Commission covering the work of its third session (1951).<sup>23</sup> The question was the subject of General Assembly resolutions 598 (VI) of 12 January 1952 and 1452 (XIV) of 7 December 1959. The Commission returned again to the subject in the course of its preparation of draft articles on the law of treaties (see para. 35 below).

<sup>20</sup> *Ibid.*, pp. 374-378.

<sup>21</sup> *Ibid.*, p. 379, para. 140.

<sup>22</sup> *Ibid.*, para. 145.

<sup>23</sup> *Ibid.*, 1951, vol. II, pp. 130-131, document A/1858, paras. 33-34

#### 6. *Question of defining aggression*

[General Assembly resolution 378 B (V)  
of 17 November 1950]

20. The Commission considered the question at its third session (1951) but it did not draw up a definition of aggression. During the same session, however, the matter was reconsidered in connexion with the preparation of the draft Code of Offences against the Peace and Security of Mankind (see para. 24 below) and the Commission decided to include among the offences defined in the draft Code any act of aggression and any threat of aggression.<sup>24</sup>

21. Since 1952 the question of defining aggression has been under consideration by a series of special committees. By resolution 599 (VI) of 31 January 1952, the General Assembly concluded that it was "possible and desirable" to define aggression. A Special Committee composed of the representatives of fifteen Member States was established by resolution 688 (VII) of 20 December 1952 to submit to the General Assembly "draft definitions of aggression or draft statements of the notion of aggression". Another Special Committee, consisting of the representatives of nineteen Member States, was established by General Assembly resolution 895 (IX) of 4 December 1954. By resolution 1181 (XII) of 29 November 1957, the General Assembly decided to establish a new Committee, composed of the Member States which served on the General Committee of the Assembly at its most recent regular session, and entrusted the Committee with the procedural task of studying Governments' comments "for the purpose of determining when it shall be appropriate for the General Assembly to consider again the question of defining aggression". The Committee established by resolution 1181 (XII) met in 1959, 1962, 1965 and 1967, but on each occasion found itself unable to determine any particular time as appropriate for the Assembly to resume consideration of the question of defining aggression.

22. At its twenty-second session (1967), the General Assembly included in its agenda an item entitled "Need to expedite the drafting of a definition of aggression in the light of the present international situation". As a result of the consideration of that item, the General Assembly, by resolution 2330 (XXII) of 18 December 1967: (1) recognized that there is a widespread conviction of the need to expedite the definition of aggression; (2) established a Special Committee on the Question of Defining Aggression, composed of thirty-five Member States; (3) instructed the Special Committee to consider all aspects of the question so that an adequate definition of aggression may be prepared and to report to the General Assembly at its twenty-third session. The Special Committee on the Question of Defining Aggression established by resolution 2330 (XXII) met in June 1968 and, following the submission of its report<sup>25</sup> to the General Assembly and the adoption of General Assembly resolution 2420

<sup>24</sup> *Ibid.*, p. 135.

<sup>25</sup> See *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 86, document A/7185/Rev. 1.

(XXIII), was reconvened between 24 February and 3 April 1969. The Special Committee's report to the twenty-fourth session of the General Assembly<sup>26</sup> contained a summary of the views expressed on certain general aspects of the question of defining aggression and on various draft proposals submitted to the Special Committee at its 1968 and 1969 sessions. Following consideration of the matter by the Sixth Committee, the General Assembly adopted resolution 2549 (XXIV) of 12 December 1969, whereby the General Assembly decided that the Special Committee should resume its work in the second half of 1970 and that the item "Report of the Special Committee on the Question of Defining Aggression" should be included in the provisional agenda of the Assembly's twenty-fifth session.

### 7. *Arbitral procedure*

[1949 list]

23. At its fifth session (1953) the Commission adopted a draft Convention on Arbitral Procedure, which was the subject of General Assembly resolution 989 (X) of 14 December 1955. At its tenth session (1958) the Commission adopted a set of Model Rules on Arbitral Procedure, which were the subject of General Assembly resolution 1262 (XIII) of 14 November 1958.

### 8. *Draft Code of Offences against the Peace and Security of Mankind*

[General Assembly resolution 177 (II)  
of 21 November 1947]

24. The Commission, at its sixth session in 1954, adopted the text of a draft Code of Offences against the Peace and Security of Mankind<sup>27</sup> and submitted it to the General Assembly. By resolution 897 (IX) of 4 December 1954 the General Assembly postponed consideration of the draft Code until the Special Committee on the question of defining aggression established by resolution 895 (IX) had submitted its report (see para. 21 above). Resolution 1186 (XII) of 11 December 1957 transmitted the text of the draft Code to Member States for comment and further deferred the consideration of the topic until such time as the General Assembly again took up the question of defining aggression.

### 9. *Nationality, including statelessness*

[1949 list]

25. At its sixth session (1954), the Commission adopted a draft Convention on the Elimination of Future Statelessness and a draft Convention on the Reduction of Future Statelessness,<sup>28</sup> as well as certain suggestions concerning the problem of present statelessness.<sup>29</sup> At the

same session, the Commission decided to defer any further consideration of multiple nationality and other questions relating to nationality.<sup>30</sup> A conference which met in 1959 and 1961 adopted the Convention on the Reduction of Statelessness, which has not yet come into force.<sup>31</sup>

### 10. *Law of the Sea*

[1949 list]

26. In accordance with the request made by the General Assembly in resolution 899 (IX) of 14 December 1954, the Commission grouped together systematically the articles it had previously adopted concerning the high seas, the territorial sea, the continental shelf, the contiguous zone and the conservation of the living resources of the sea. A final draft on the law of the sea was submitted to the General Assembly in 1956 and referred by the Assembly to the first United Nations Conference on the Law of the Sea. The Conference<sup>32</sup> adopted four Conventions, all of which are now in force: (1) the Convention on the High Seas; (2) the Convention on Fishing and Conservation of the Living Resources of the High Seas; (3) the Convention on the Continental Shelf; and (4) the Convention on the Territorial Sea and the Contiguous Zone. The questions of the breadth of the territorial sea and the breadth of fishery limits were considered at the Second United Nations Conference on the Law of the Sea (1960), but the Conference did not adopt any decisions concerning them.

27. By resolution 2467 A (XXIII) of 21 December 1968, the General Assembly established the Committee on the Peaceful Uses of the Sea-bed and Ocean Floor beyond the Limits of National Jurisdiction, in succession to the previous *Ad Hoc* Committee on the subject. The present Committee has set up a Legal Sub-Committee and an Economic and Technical Sub-Committee. Particular issues relating to the question of the development of marine resources are also being dealt with by various specialized agencies, in particular by FAO, the Intergovernmental Oceanographic Commission of UNESCO, and by IMCO.

28. Following submission of the Committee's report and discussion of the item during the twenty-fourth session (1969), the General Assembly adopted on 15 December 1969 four resolutions grouped together under the symbol 2574 (XXIV). Operative paragraph 1 of resolution 2574 A (XXIV) requested the Secretary-General

<sup>26</sup> *Ibid.*, p. 149, para. 39.

<sup>31</sup> It should be mentioned that the nationality of married women, a topic which the Commission was requested to study by the Economic and Social Council (resolution 304 D (XI) of 17 July 1950), is the subject of a convention adopted by the General Assembly (resolution 1040 (XI) of 29 January 1957) and now in force.

<sup>32</sup> The first United Nations Conference on the Law of the Sea adopted a resolution requesting the General Assembly to arrange for the study of the juridical régime of historic waters, including historic bays. Following the adoption by the General Assembly of resolution 1453 (XIV) of 7 December 1959, and the preparation of a study by the Secretariat, the topic was included in the Commission's programme of work in 1962 (see para. 78 below).

<sup>28</sup> *Ibid.*, *Twenty-fourth Session, Supplement No. 20 (A/7620)*.

<sup>27</sup> See *Yearbook of the International Law Commission, 1954*, vol. II, p. 151, document A/2693, para. 54.

<sup>29</sup> *Ibid.*, p. 142, para. 25.

<sup>30</sup> *Ibid.*, p. 148, para. 37.

to ascertain the views of Member States on the desirability of convening at an early date a conference on the law of the sea to review the régimes of the high seas, the continental shelf, the territorial sea and contiguous zone, fishing and conservation of the living resources of the high seas, particularly in order to arrive at a clear, precise and internationally accepted definition of the area of the sea-bed and ocean floor which lies beyond national jurisdiction, in the light of the international régime to be established for that area.

The Secretary-General was asked to report on the results of his consultations to the General Assembly at its twenty-fifth session.

29. In resolution 2574 B (XXIV) the General Assembly requested the Committee to expedite its work of preparing a statement of the principles designed to promote international co-operation in the exploration and use of the area concerned, and to submit a draft declaration to the General Assembly at its twenty-fifth session; and requested the Committee to formulate recommendations regarding the economic and technical conditions and the rules for the exploitation of the resources of the area in the context of the régime to be set up. The Secretary-General was requested, in resolution 2574 C (XXIV), to prepare a further study on various types of international machinery,

particularly a study covering in depth the status, structure, functions and powers of an international machinery, having jurisdiction over the peaceful uses of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, including the power to regulate, co-ordinate, supervise and control all activities relating to the exploration and exploitation of their resources, for the benefit of mankind as a whole, irrespective of the geographical location of States, taking into account the special interests and needs of the developing countries, whether landlocked or coastal.

30. Lastly, in resolution 2574 D (XXIV) the General Assembly declared that, pending the establishment of an international régime for the area,

(a) States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction;

(b) No claim to any part of that area or its resources shall be recognized.

31. It may also be noted that in resolution 2566 (XXIV) of 13 December 1969, dealing with the promotion of effective measures for the prevention and control of marine pollution, the General Assembly requested the Secretary-General to seek "the views of Member States on the desirability and feasibility of an international treaty or treaties on the subject".

#### 11. *Diplomatic relations*

[1949 list]

32. On the basis of the final draft articles on diplomatic intercourse and immunities adopted by the Commission at its tenth session (1958),<sup>33</sup> the United Nations Conference

<sup>33</sup> See *Yearbook of the International Law Commission, 1958*, vol. II, p. 89, document A/3859, para. 53.

on Diplomatic Intercourse and Immunities (1961) adopted the Vienna Convention on Diplomatic Relations,<sup>34</sup> which is now in force.

#### 12. *Consular relations*

[1949 list]

33. Final draft articles on consular relations<sup>35</sup> were adopted by the Commission at its thirteenth session (1961). On the basis of this draft the United Nations Conference on Consular Relations (1963) adopted the Vienna Convention on Consular Relations,<sup>36</sup> which has now entered into force.

#### 13. *Extended participation in general multilateral treaties concluded under the auspices of the League of Nations*

[General Assembly resolution 1766 (XVII) of 20 November 1962]

34. The conclusions resulting from the Commission's study of this question are summarized in the report covering the work of its fifteenth session (1963).<sup>37</sup> On the basis of these conclusions the General Assembly, in resolution 1903 (XVIII) of 18 November 1963, decided that the Assembly was the appropriate organ of the United Nations to exercise the functions of the League Council under twenty-one general multilateral treaties of a technical and non-political character concluded under the auspices of the League of Nations; it also placed on record the assent to this decision by Members of the United Nations. The resolution requested the Secretary-General to invite certain States to accede to the treaties in question by depositing an instrument of accession with the Secretary-General of the United Nations. By resolution 2021 (XX) of 5 November 1965, the General Assembly recognized that nine of these treaties, listed in the annex to the resolution, might be of interest for accession by additional States within the terms of resolution 1903 (XVIII) and drew the attention of the parties to the desirability of adapting some of them to contemporary conditions.

#### 14. *Law of Treaties*

[1949 list]

35. The Commission adopted a set of draft articles on the law of treaties at its eighteenth session (1966),<sup>38</sup> which were forwarded by the General Assembly to the United Nations Conference on the Law of Treaties (1968, 1969) as the basic proposal for consideration. The Conference adopted on 22 May 1969 the Vienna Convention on the

<sup>34</sup> United Nations, *Treaty Series*, vol. 500, p. 95.

<sup>35</sup> See *Yearbook of the International Law Commission, 1961*, vol. II, p. 92, document A/4843, para. 37.

<sup>36</sup> United Nations, *Treaty Series*, vol. 596, p. 261.

<sup>37</sup> See *Yearbook of the International Law Commission, 1963*, vol. II, p. 223, document A/5509, para. 50.

<sup>38</sup> *Ibid.*, 1966, vol. II, p. 177, document A/6309/Rev.1, Part II, para. 38.

Law of Treaties.<sup>39</sup> The Convention is due to enter into force thirty days after the date of deposit of the thirty-fifth instrument of ratification or accession.

### 15. *Special missions*

[General Assembly resolution 1687 (XVI)  
of 18 December 1961]

36. By resolution 1687 (XVI) of 18 December 1961 the General Assembly made a request that the Commission should give further study to the subject of Special Missions and should report thereon to the General Assembly.<sup>40</sup> A series of draft articles on Special Missions were adopted by the Commission at its nineteenth session (1967),<sup>41</sup> and an item entitled "Draft Convention on Special Missions" was included in the agenda of the General Assembly at its twenty-third (1968) and twenty-fourth (1969) sessions. By resolution 2530 (XXIV) of 8 December 1969, the General Assembly adopted a Convention on Special Missions. The instrument is due to enter into force thirty days after the date of deposit of the twenty-second instrument of ratification or accession.

## CHAPTER II

### Topics on which the Commission has not submitted final drafts or recommendations to the General Assembly

37. The present chapter is divided in two sections, the first of which deals with the four topics currently under study by the Commission; this section is intended only as a brief summary of the main steps taken and does not attempt to give a complete account of all the views which have been expressed at different times by Member States and their representatives, or by members of the Commission, as regards the various aspects or topics which might possibly be included or studied under these headings. The second section summarizes the position with respect to the remaining six topics which were either included in the 1949 list or added to the Commission's programme in response to a request by the General Assembly, and which are not currently under study.

<sup>39</sup> See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 287. The Conference also adopted a resolution recommending to the General Assembly that the question of treaties concluded between States and international organizations or between two or more international organizations be referred to the International Law Commission (see paras. 145-146 below).

<sup>40</sup> Arising out of its work on diplomatic intercourse and immunities, the Commission prepared a brief draft on special missions for use in connexion with the United Nations Conference on Diplomatic Intercourse and Immunities. The Conference, however, recommended that the question should be left over for further study (see *Yearbook of the International Law Commission, 1961*, vol. II, p. 86, document A/CN.4/L.94, paras. 2-4).

<sup>41</sup> *Ibid.*, 1967, vol. II, p. 347, document A/6709/Rev.1 and Corr.1, para. 35.

### SECTION A. *Topics currently under study by the Commission*

#### 1. *Relations between States and international organizations*<sup>42</sup>

[General Assembly resolution 1289 (XIII)  
of 5 December 1958]

38. By its resolution 1289 (XIII) of 5 December 1958 the General Assembly invited the International Law Commission to consider the question of

relations between States and inter-governmental international organizations at the appropriate time, after study of diplomatic intercourse and immunities, consular intercourse and immunities and *ad hoc* diplomacy has been completed by the United Nations and in the light of the results of that study and of the discussion in the General Assembly.

At its eleventh session (1959) the Commission took note of the resolution and decided to consider the topic in due course. At its fourteenth session (1962) the Commission decided to place the question on the agenda of its next session and appointed Mr. Abdullah El-Erian as Special Rapporteur for the topic.

39. The Special Rapporteur submitted his first report<sup>43</sup> at the fifteenth session (1963) of the Commission, and a working paper<sup>44</sup> at the sixteenth session (1964), with a view to defining the scope of the subject and the method of treatment to be followed. The conclusion reached by the Commission, following discussion, was recorded in the report on the work of its sixteenth session in the following terms:

The majority of the Commission, while agreeing in principle that the topic had a broad scope, expressed the view that for the purpose of its immediate study the question of diplomatic law in its application to relations between States and intergovernmental organizations should receive priority.<sup>45</sup>

40. Following the submission of the Special Rapporteur's second<sup>46</sup> and third<sup>47</sup> reports, at its twentieth session (1968) the Commission adopted a provisional draft of twenty-one articles; the first five of these articles contained general provisions and the remaining articles dealt with permanent missions to international organizations. This provisional draft, together with the Commission's commentary, was transmitted to States for their observations.

41. At the Commission's twenty-first session (1969), the Special Rapporteur submitted a fourth report<sup>48</sup> containing a revised set of draft articles with commentaries, on

<sup>42</sup> Prior to the Commission's twentieth session (1968), this topic was entitled "Relations between States and Inter-governmental Organizations", but the Commission decided in 1968 to replace the word "Inter-governmental" by "International". (*Ibid.*, 1968, vol. II, p. 195, document A/7209/Rev.1, para. 23.)

<sup>43</sup> *Ibid.*, 1963, vol. II, p. 159, document A/CN.4/161 and Add. 1.

<sup>44</sup> Document A/CN.4/L.104 (mimeographed). For the substance of this paper see chapter V of the Commission's report (A/5809) [*Yearbook of the International Law Commission, 1964*, vol. II, p. 226].

<sup>45</sup> *Ibid.*, p. 227, document A/5809, para. 42.

<sup>46</sup> *Ibid.*, 1967, vol. II, p. 133, document A/CN.4/195 and Add.1.

<sup>47</sup> *Ibid.*, 1968, vol. II, p. 119, document A/CN.4/203 and Add.1-5.

<sup>48</sup> *Ibid.*, 1969, vol. II, p. 1, document A/CN.4/218 and Add.1.

representatives of States to international organizations, and a working paper<sup>49</sup> containing draft articles on permanent observers of non-members to international organizations. The Commission adopted a provisional draft of a further twenty-nine articles on permanent missions to international organizations which were transmitted to the Governments of Member States and also, together with the earlier group of draft articles, to the Government of Switzerland and to the secretariats of the United Nations, the specialized agencies and IAEA, for their observations. In its report the Commission stated its intention, as a matter of priority, of concluding at its twenty-second session (1970) the first reading of its draft on relations between States and international organizations.<sup>50</sup> In operative paragraph 4 (a) of resolution 2501 (XXIV) of 12 November 1969, the General Assembly recommended that the Commission should continue its work on relations between States and international organizations "with a view to completing in 1971 its draft articles on representatives of States to international organizations".

42. It may be noted that in the replies from Governments transmitted in response to resolution 1505 (XV) the topics proposed for study included, besides the law of treaties in respect of international organizations (see paras. 145-146 below), the following three subjects:

(a) Status of international organizations and the relations between States and international organizations;

(b) The validity of norms of international law with regard to the entrance of new members in the international community;

(c) The responsibility of international organizations.

43. The first topic was proposed by both Austria<sup>51</sup> and the Netherlands,<sup>52</sup> and the two others by Austria. These and further topics or aspects, such as the international personality of international organizations and the privileges and immunities of international civil servants, have also been referred to at various times by representatives in the Sixth Committee as matters falling under the general heading of relations between States and international organizations.<sup>53</sup>

## 2. Succession of States and Governments

[1949 list]

44. The topic of the succession of States and Governments was included in the 1949 list. In resolution 1686 (XVI) of 18 December 1961 the General Assembly recommended that the Commission should include the topic on its priority list. After the establishment by the Com-

mission of a sub-committee in 1963 and acceptance of its report, the Commission appointed Mr. Manfred Lachs as Special Rapporteur. Following the election of Mr. Lachs to the International Court of Justice, the Commission decided, at its nineteenth session (1967) to divide the topic under three headings, in accordance with the broad outline of the subject laid down in the report of the sub-committee in 1963. That Commission appointed Sir Humphrey Waldock Special Rapporteur with regard to succession in respect of treaties, and Mr. Mohammed Bedjaoui as Special Rapporteur with regard to succession in respect of matters other than treaties. The Commission decided to leave aside for the time being the third aspect, succession in respect of membership of international organizations, without assigning it to a special rapporteur. It was considered that succession in respect of membership of international organizations related both to succession in respect of treaties and to relations between States and international organizations.<sup>54</sup>

45. The Commission indicated in 1968 that it deemed it desirable, *inter alia*, to complete the study of the question of succession in respect of treaties and to make progress in 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. In the report of the work of its twenty-first session (1969), the Commission stated its intention to undertake as a matter of priority, at its twenty-second session (1970) substantive consideration of succession in respect of treaties, and to further the study of succession of States in economic and financial matters.<sup>55</sup> In resolution 2501 (XXIV) of 12 November 1969, the General Assembly repeated the recommendation contained in resolution 2400 (XXIII) of 11 December 1968, that the Commission should continue its work on the succession of States and Governments, taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) of 20 November 1962 and 1902 (XVIII) of 18 November 1963.

### (a) Succession in respect of treaties

46. The first report<sup>56</sup> of Sir Humphrey Waldock, the Special Rapporteur, was considered by the Commission during its twentieth session (1968). The Special Rapporteur's second report<sup>57</sup> was submitted in 1969; owing to lack of time during the twenty-first session (1969), the Commission did not consider this report.

### (b) Succession in respect of matters other than treaties

47. The first report<sup>58</sup> submitted by Mr. Mohammed Bedjaoui, the Special Rapporteur, was considered by the Commission at its twentieth session (1968); the Commission requested the Special Rapporteur to prepare a report on the succession of States in economic and financial

<sup>49</sup> Document A/CN.4/L.136 (mimeographed).

<sup>50</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 235, document A/7610, Rev.1, para. 93.

<sup>51</sup> See *Official Records of the General Assembly, Sixteenth Session, Annexes*, agenda item 70, document A/4796 and Add.1-8, annex, section 15.

<sup>52</sup> *Ibid.*, section 16.

<sup>53</sup> See, for example, the statement by the representative of Argentina, *ibid.*, *Seventeenth Session, Sixth Committee, 744th meeting*, para. 7.

<sup>54</sup> See *Yearbook of the International Law Commission, 1967*, vol. II, p. 368, document A/6709/Rev.1 and Corr.1., paras. 38-41.

<sup>55</sup> *Ibid.*, 1969, vol. II, p. 235, document A/7610/Rev.1, para. 93.

<sup>56</sup> *Ibid.*, 1968, vol. II, p. 87, document A/CN.4/202.

<sup>57</sup> *Ibid.*, 1969, vol. II, p. 45, document A/CN.4/214 and Add.1 and 2.

<sup>58</sup> *Ibid.*, 1968, vol. II, p. 94, document A/CN.4/204.

matters. At the Commission's twenty-first session (1969), the Special Rapporteur presented a second report,<sup>59</sup> entitled "Economic and financial acquired rights and State succession". Having examined this report, the Commission requested the Special Rapporteur to prepare a further 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 in the reports he had already submitted. The Commission took note of the Special Rapporteur's intention to devote his next report to public property and public debts.

### 3. State responsibility [1949 list]

48. In 1955 the Commission appointed Mr. F. V. García Amador as Special Rapporteur for the topic. He submitted six reports between 1956 and 1961. Following discussion in the Commission at its fourteenth session (1962) and the submission of a report by a sub-committee, Mr. Roberto Ago was appointed Special Rapporteur in 1963. At the twenty-first session (1969) of the Commission, the Special Rapporteur submitted his first report,<sup>60</sup> entitled "Review of previous work on codification of the topic of the international responsibility of States". It was agreed, following discussion, that the Special Rapporteur should prepare a report containing a first set of draft articles on the topic of the international responsibility of States, for submission at the Commission's twenty-second session (1970), the aim being, in the Commission's words,

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.<sup>61</sup>

The Commission stated also

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.<sup>62</sup>

49. In resolution 2501 (XXIV) of 12 November 1969, the General Assembly recommended that the Commission should continue its work on State responsibility, "taking into account paragraph 4 (c) of General Assembly resolution 2400 (XXIII) of 11 December 1968", wherein the Assembly requested 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).

### 4. Most-favoured-nation clause [General Assembly resolution 2272 (XXII) of 1 December 1967]

50. The Commission decided to place this topic on its

programme at its nineteenth session (1967) and appointed Mr. Endre Ustor as Special Rapporteur. The Special Rapporteur submitted a working paper<sup>63</sup> for consideration at the twentieth session (1968) of the Commission. Following the Commission's discussion of the item at that session, the Special Rapporteur prepared his first report<sup>64</sup> which was considered by the Commission during its twenty-first session (1969). The Commission accepted the Special Rapporteur's suggestion that he should prepare next a study based largely on the replies received from organizations and interested agencies and relying also on three relevant cases dealt with by the International Court of Justice. In resolution 2501 (XXIV) of 12 November 1969 the General Assembly recommended that the Commission should continue its study of the most-favoured-nation clause.

### SECTION B. Other topics on which the Commission has not submitted final drafts or recommendations

#### 1. Recognition of States and Governments [1949 list]

51. The Commission has referred to the subject of the recognition of States and Governments in three of its drafts, but without entering into an extensive examination of the question. The draft Declaration on Rights and Duties of States (see para. 12 above), adopted by the Commission at its first session (1949), refers in article 11 to a duty of States to refrain from recognizing any territorial acquisition made by illegal means by another State, but the Commission

concluded that the whole matter of recognition was too delicate and too fraught with political implications to be dealt with in a brief paragraph in this draft Declaration [ . . . ].<sup>65</sup>

Paragraph 1 of the commentary to article 60 (Severance of diplomatic relations) of the draft articles on the law of treaties (see para. 35 above) adopted by the Commission at its eighteenth session (1966) stated:

. . . any problems that may arise in the sphere of treaties from the absence of recognition of a Government do not appear to be such as should be covered in a statement of the general law of treaties. It is thought more appropriate to deal with them in the context of other topics with which they are closely related, either succession of States and Governments, which is excluded from the present discussion [ . . . ], or recognition of States and Governments, which the Commission in 1949 decided to include in its provisional list of topics selected for codification.<sup>66</sup>

Paragraph 2 of article 7 of the draft articles on special missions (see para. 36 above) adopted by the Commission at its nineteenth session (1967), stated: "A State may send a special mission to a State, or receive one from a State which it does not recognize".<sup>67</sup> As indicated in the com-

<sup>59</sup> *Ibid.*, 1969, vol. II, p. 70, document A/CN.4/216/Rev.1.

<sup>60</sup> *Ibid.*, p. 125, document A/CN.4/217 and Add.1.

<sup>61</sup> *Ibid.*, p. 233, document A/7610/Rev.1, para. 80.

<sup>62</sup> *Ibid.*, para. 84.

<sup>63</sup> *Ibid.*, 1966, vol. II, p. 260, document A/6309/Rev.1, part II, chap. II.

<sup>64</sup> *Ibid.*, 1967, vol. II, p. 350, document A/6709/Rev.1 and Corr.1, chap. II, D.

mentary to the draft article, the Commission did not, however, decide the question whether the sending or reception of a special mission prejudices the solution of the problem of recognition, as that problem lies outside the scope of the topic of special missions. The Sixth Committee, which considered the draft articles at the twenty-third session of the General Assembly in 1968, decided to delete the paragraph quoted and the Convention on Special Missions adopted by the General Assembly 8 December 1969 [resolution 2530 (XXIV)] does not refer to the existence or absence of recognition on the part of the States concerned. Finally, it may be noted that during its twenty-first session (1969), the Commission briefly considered in connexion with the topic entitled "Relations between States and International Organizations", the desirability of dealing, in separate articles, with the possible effects of various exceptional situations, such as absence of recognition, on the representation of States in international organizations. The Commission decided, in view of the delicate and complex nature of the questions concerned, to resume examination of the matter at a future session and to postpone any decision.<sup>68</sup>

52. Of the Governments which submitted written comments in pursuance of resolution 1505 (XV) of 12 December 1960, three expressed support for a study of the question of the recognition of States and Governments: Ghana,<sup>69</sup> Venezuela<sup>70</sup> and Yugoslavia.<sup>71</sup>

53. In its observations, Colombia pointed out:

The Charter of the Organization of American States in article 9 refer incidentally to the recognition of States. Furthermore, in so far as the question of recognition of Governments is concerned, the antecedents for relations between American States include the Tobar (Secretary for External Relations of Ecuador, 1908) doctrine and the Estrada (Secretary for External Relations of Mexico, 1930) doctrine. Also relevant are resolutions 35 and 36 of the Ninth International Conference of American States dealing with the Right of Legation and the Recognition of *de facto* Governments, as well as the work done on this latter topic by the Inter-American Juridical Committee and the Inter-American Council of Jurists and reported on in the records of the four meetings of the latter body.<sup>72</sup>

54. The Netherlands considered that discussion of the topic "might [...] be postponed for the time being because a number of basic questions are interwoven with political considerations".<sup>73</sup>

55. During the discussion in the Sixth Committee, the representatives of Denmark,<sup>74</sup> Nicaragua,<sup>75</sup> Mexico<sup>76</sup> and Yugoslavia<sup>77</sup> expressed themselves in favour of a study of the topic.

<sup>68</sup> *Ibid.*, 1969, vol. II, p. 206 document A/7610/Rev.1, para. 18.

<sup>69</sup> See *Official Records of the General Assembly, Sixteenth Session, Annexes*, agenda item 70, document A/4796 and Add.1-8, annex, section 9.

<sup>70</sup> *Ibid.*, section 14.

<sup>71</sup> *Ibid.*, section 7.

<sup>72</sup> *Ibid.*, section 3, para. 8.

<sup>73</sup> *Ibid.*, section 16, para. 5.

<sup>74</sup> *Ibid.*, *Sixteenth Session, Sixth Committee*, 725th meeting, para. 12.

<sup>75</sup> *Ibid.*, 722nd meeting, para. 20.

<sup>76</sup> *Ibid.*, para. 46.

<sup>77</sup> *Ibid.*, 714th meeting, para. 16.

56. The representative of Yugoslavia, enlarging on the ideas contained in his Government's reply, stated *inter alia* that it was not so much a matter of

seeking to find an answer to the classical question of the relationship between the declarative and constitutive theories of recognition, although that matter, too, would have to be treated within the framework of the codification of the general topic.

The main point was

to ascertain the criteria that had recently governed the recognition of States and Governments and to find out whether certain general rules might be established on that basis. In addition, the legal significance of the admission of a State to membership in the United Nations and in other international organizations, more especially as regards collective recognition, should be defined. Of no less urgency was the question of the recognition of insurgents and of Governments. The uniformity of practice which could be achieved through the codification of those rules would be of considerable interest from the point of view of establishing more stable relations among States and of facilitating the position of the newly independent States.<sup>78</sup>

57. On the other hand, the representative of Brazil included the topic among those which were essentially dominated by political considerations. In his view

The Commission was unlikely to succeed in attempts to deal with subjects of that type for while it might produce clever formulations, it would not achieve effective solutions.<sup>79</sup>

58. Speaking in the Sixth Committee during the twenty-third session (1968) of the General Assembly, the representative of Mongolia expressed the hope that, after considering the questions to which priority had been given, the Commission would set about studying the problem of the recognition of States and Governments and would be able to prepare a set of rules, which might take the form of a Convention.<sup>80</sup>

59. Lastly, it may be noted that the topic of unilateral acts, proposed during the Commission's nineteenth session (1967) for possible study by the Commission, may include certain aspects of the question of recognition (see para. 137 below).

## 2. Jurisdictional immunities of States and their property [1949 list]

60. Particular aspects of this question have been touched on in a number of the conventions concluded on the basis of the Commission's drafts, but no specific study or report has been made on the subject itself. The immunities of State-owned ships and warships are referred to in the Convention on the Territorial Sea and Contiguous Zone and in the Convention on the High Seas. The immunities of State property used in connexion with diplomatic and special missions, and consular posts, are regulated in the respective Conventions on those topics. The draft articles on "Relations between States and International Organiza-

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*, 721st meeting, para. 14.

<sup>80</sup> *Ibid.*, *Twenty-third Session, Sixth Committee*, 1035th meeting, para. 2. The representative of Mexico also drew attention to the topic: *ibid.*, 1033rd meeting, para. 34.

tions", some of which were adopted at the Commission's twenty-first session (1969), also contain provisions on the immunity of State property used in connexion with representation in international organizations. One main aspect of the topic which has not yet been touched by the Commission is the immunities, if any, of State-owned property used for commercial purposes.

61. In the written comments submitted by States in pursuance of resolution 1505 (XV), two States, Belgium<sup>81</sup> and the Netherlands,<sup>82</sup> suggested that the topic should be studied. Belgium stated that

it would seem logical, after the consideration of these problems [succession of States, special missions and right of asylum], to examine the question of the jurisdictional immunities of States and of their property.

Ceylon<sup>83</sup> proposed the codification of a more limited aspect of the topic, namely the question of the jurisdictional immunities of States with respect to commercial transactions.

62. In the course of the discussion in the Sixth Committee during the sixteenth session (1961), the representatives of Belgium,<sup>84</sup> Denmark,<sup>85</sup> Ireland<sup>86</sup> and New Zealand<sup>87</sup> expressed themselves in favour of a study of the topic. The representative of Brazil<sup>88</sup> said that a sensible solution of some aspects of that problem would encourage trade between countries with different social systems. Although his delegations realized that the subject was a controversial one it would not oppose its reference to the International Law Commission for study.

63. The representative of Mexico<sup>89</sup> in the Sixth Committee drew attention to the topic during the twenty-third session (1968) of the General Assembly.

### 3. Jurisdiction with regard to crimes committed outside national territory [1949 list]

64. The Convention on the Territorial Sea and the Contiguous Zone and the Convention on the High Seas contain provisions concerning crimes committed at sea. The Commission has not, however, dealt with the question of jurisdiction with respect to crimes committed on land in foreign countries, except as regards the specific case of crimes committed by persons falling within the scope of the Conventions on Diplomatic and Consular Relations and Special Missions. The draft articles on Relations between States and International Organizations", some of which were adopted by the Commission in 1969, include

<sup>81</sup> *Ibid.*, Sixteenth Session, Annexes, agenda item 70, document A/4796 and Add.1-8, annex, section 13.

<sup>82</sup> *Ibid.*, section 16.

<sup>83</sup> *Ibid.*, section 17.

<sup>84</sup> *Ibid.*, Sixteenth Session, Sixth Committee, 721st meeting, para. 2.

<sup>85</sup> *Ibid.*, 725th meeting, para. 12.

<sup>86</sup> *Ibid.*, 727th meeting, para. 6.

<sup>87</sup> *Ibid.*, 719th meeting, para. 26.

<sup>88</sup> *Ibid.*, 721st meeting, para. 18.

<sup>89</sup> *Ibid.*, Twenty-third Session, Sixth Committee, 1033rd meeting, para. 34.

provisions relating to the position in this regard of State representatives to international organizations.

65. In their written comments submitted in pursuance of resolution 1505 (XV), the Netherlands<sup>90</sup> and Venezuela<sup>91</sup> expressed the view that the subject should be studied.

66. The representative of Mexico in the Sixth Committee drew attention to the topic during the twenty-third session (1968) of the General Assembly.<sup>92</sup>

### 4. Treatment of aliens [1949 list]

67. From its eighth (1956) to its thirteenth (1961) sessions, the Commission had before it a series of six reports on State responsibility which were mainly devoted to the development and explanation of a draft on the responsibility of a State for injuries caused in its territory to the person or property of aliens. The Commission, which was occupied with other work, was unable to give full consideration to these reports. After considering at its fifteenth session (1963) a report of a Sub-Committee on State responsibility, the Commission agreed

(1) [. . .] that, in an attempt to codify the topic of State responsibility, priority should be given to the definitions of the general rules governing the international responsibility of the State, and (2) that in defining these general rules the experience and material gathered in certain special sectors, especially that of responsibility for injuries to the persons or property of aliens, should not be overlooked . . .<sup>93</sup>

68. Information with respect to the Commission's subsequent consideration of the topic of State responsibility is given in paragraph 48 above. The Commission has continued to give attention to the question of the relation between the topic of the treatment of aliens and that of State responsibility.<sup>94</sup>

69. In the written comments submitted in pursuance of resolution 1505 (XV), Ceylon,<sup>95</sup> Ghana<sup>96</sup> and Venezuela<sup>97</sup> proposed that the question of the treatment of aliens should be studied. During the discussions in the Sixth Committee, the representative of New Zealand<sup>98</sup> supported the proposal.

<sup>90</sup> *Ibid.*, Sixteenth Session, Annexes, agenda item 70, document A/4796 and Add.1-8, annex, section 16.

<sup>91</sup> *Ibid.*, section 14.

<sup>92</sup> See foot-note 89 above.

<sup>93</sup> See *Yearbook of the International Law Commission, 1963*, vol. II, p. 224, document A/5509, para. 52. The Sub-Committee was established following extensive discussion at the Commission's fourteenth session (1962) of the question whether consideration of the topic of treatment of aliens falls within the topic of State responsibility.

<sup>94</sup> *Ibid.*, 1969, vol. II, p. 233, document A/7610/Rev.1, paras. 80-82 and 84.

<sup>95</sup> See *Official Records of the General Assembly, Sixteenth Session, Annexes*, agenda item 70, document A/4796 and Add.1-8, annex, section 17.

<sup>96</sup> *Ibid.*, section 9.

<sup>97</sup> *Ibid.*, section 14.

<sup>98</sup> *Ibid.*, Sixteenth Session, Sixth Committee, 719th meeting, para. 26.

### 5. Right of asylum [1949 list]

70. This topic, which was included in the 1949 list, was referred to in resolution 1400 (XIV) of 21 November 1959, whereby the General Assembly requested "the International Law Commission, as soon as it considers it advisable, to undertake the codification of the principles and rules of international law relating to the right of asylum". The Commission, at its twelfth session (1960), took note of the resolution and decided to defer further consideration of the question to a future session.<sup>99</sup>

71. In the written comments submitted in pursuance of resolution 1505 (XV), five countries proposed that the question should be studied: Belgium,<sup>100</sup> Ceylon,<sup>101</sup> Colombia,<sup>102</sup> Ghana<sup>103</sup> and Venezuela.<sup>104</sup>

72. During the discussions in the Sixth Committee, the representative of Colombia<sup>105</sup> proposed, *inter alia*, in a draft resolution that the International Law Commission should include the topic of the right of asylum on its priority list. The representative of the United Arab Republic,<sup>106</sup> the representative of Nicaragua<sup>107</sup> and the representative of Belgium<sup>108</sup> were in favour of study of the subject. However, the Colombian proposal met with some opposition on the ground, not that the question of the right of asylum was unworthy of United Nations attention, but that it was already on the agenda of the International Law Commission, which would study it in due course. As a result, the Colombian representative later withdrew his proposal on the understanding that his views and those of the representatives<sup>109</sup> who supported them would be brought to the attention of the International Law Commission.

73. At its fourteenth session (1962), the International Law Commission decided to include the topic in its future programme of work, but without setting any date for the start of its consideration. The Commission took similar action with respect to a second topic, entitled "Juridical régime of historic waters, including historic bays", whose codification had earlier been requested by the General Assembly (see para. 78 below).

74. The advisability of proceeding actively in the near future with the study of these topics was examined by the Commission in 1967 at its nineteenth session. The Commission's report on that session summarized the views expressed on the matter as follows:

<sup>99</sup> See *Yearbook of the International Law Commission, 1960*, vol. II, p. 180, document A/4425, para. 39.

<sup>100</sup> See *Official Records of the General Assembly, Sixteenth Session, Annexes*, agenda item 70, document A/4796 and Add.1-8, annex, section 13.

<sup>101</sup> *Ibid.*, section 17.

<sup>102</sup> *Ibid.*, section 3.

<sup>103</sup> *Ibid.*, section 9.

<sup>104</sup> *Ibid.*, section 14.

<sup>105</sup> *Ibid.*, *Sixteenth Session, Sixth Committee, 727th meeting*, para. 23.

<sup>106</sup> *Ibid.*, 723rd meeting, para. 3.

<sup>107</sup> *Ibid.*, 722nd meeting, para. 23.

<sup>108</sup> *Ibid.*, 721st meeting, para. 2.

<sup>109</sup> Ecuador and Nicaragua, *ibid.*, 730th meeting, paras. 19, 28; Venezuela, *ibid.*, 729th meeting, para. 13.

The Commission considered in the first place two topics which the General Assembly had requested it to take up as it considered it advisable, and which had been included in its programme of work, though no Special Rapporteur had ever been appointed to deal with them. These were the right of asylum, referred to the Commission by General Assembly resolution 1400 (XIV) of 21 November 1959, and historic waters, including historic bays, referred by General Assembly resolution 1453 (XIV) of 7 December 1959. Most members doubted whether the time had yet come to proceed actively with either of these topics. Both were of considerable scope and raised some political problems, and to undertake either of them at the present time might seriously delay the completion of work on the important topics already under study, on which several resolutions of the General Assembly had recommended that the Commission should continue its work.<sup>110</sup>

75. Since the Commission's consideration of the matter at its nineteenth session (1967), the General Assembly has adopted, by resolution 2312 (XXII) of 14 December 1967, a Declaration on Territorial Asylum. The culmination of many years of effort by the Commission on Human Rights (1957-1960), the Third Committee (1962-1964), and the Sixth Committee (1965-1967), the Declaration constitutes an elaboration of article 14 of the Universal Declaration on Human Rights. Resolution 2312 (XXII) contains a preambular part which reads as follows:

*The General Assembly,*

*Recalling* its resolutions 1839 (XVII) of 19 December 1962, 2100 (XX) of 20 December 1965 and 2203 (XXI) of 16 December 1966 concerning a declaration on the right of asylum,

*Considering* the work of codification to be undertaken by the International Law Commission in accordance with General Assembly resolution 1400 (XIV) of 21 November 1959,

*Adopts* the following Declaration.

76. In this connexion the Sixth Committee's report indicates:

It was further explained that the sponsors had found it necessary, in order to stress that the adoption of a declaration on territorial asylum would not bring to an end the work of the United Nations in codifying the rules and principles relating to the institution of asylum, to make a reference at the very beginning of the draft resolution, in a preambular paragraph to the proposed declaration, to the work of codification on the right of asylum to be undertaken by the International Law Commission pursuant to General Assembly resolution 1400 (XIV) of 21 November 1959.

Some other delegations, while accepting such a reference, recorded their understanding that the preambular paragraph in question should not be understood as modifying or prejudicing in any way the order of priorities for the consideration of items already established by the International Law Commission and by the General Assembly.<sup>111</sup>

77. The views expressed on the meaning of the Declaration on Territorial Asylum for the future codification of legal rules relating to the rights of asylum are summarized in the Sixth Committee's report as follows:

It was also said that the practical effect given to the declaration by States would help to indicate whether or not the time was ripe for the final step of elaborating and codifying precise legal rules relating to asylum. In this respect, many representatives expressed the conviction that the declaration, when adopted, should be

<sup>110</sup> See *Yearbook of the International Law Commission, 1967*, vol. II, p. 369, document A/6709/Rev.1 and Corr.1, para. 45.

<sup>111</sup> See *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 89, document A/6912, paras. 64 and 65.

regarded as a transitional step, which should lead in the future to the adoption of binding rules of law in an international convention. They drew attention to the fact that asylum was on the programme of work of the International Law Commission pursuant to General Assembly resolution 1400 (XIV) of 21 November 1959. The declaration now to be adopted would be one of the elements to be considered by the Commission in its work. Certain of these representatives expressed the hope that, when it took up the codification of the institution of asylum, the Commission would correct some of the ambiguities in the terms of the Declaration and would also extend the subject to cover other forms of asylum, such as diplomatic asylum, on which there was extensive treaty law in Latin America and an extensive practice, both in Latin America and elsewhere. It was also said that the existence of the Declaration should not in any way diminish the scope or depth of the work to be undertaken when the International Law Commission took up the subject of asylum.<sup>112</sup>

6. *Juridical régime of historic waters, including historic bays*

[General Assembly resolution 1453 (XIV) of 7 December 1959]

78. The first United Nations Conference on the Law of the Sea (1958) adopted, in paragraph 6 of article 7 of the Convention of the Territorial Sea and Contiguous Zone, a provision to the effect that its rules on bays "shall not apply to so-called 'historic' bays".<sup>113</sup> The Conference also adopted on 27 April 1958 a resolution requesting the General Assembly to arrange for the study of the juridical régime of historic waters, including historic bays.<sup>114</sup> The General Assembly thereafter adopted resolution 1453 (XIV) of 7 December 1959, which requested the International Law Commission, as soon as it considers it advisable, to undertake the study of the question of the juridical régime of historic waters, including historic bays, and to make such recommendations regarding the matter as the Commission deems appropriate.

The Commission, at its twelfth session (1960) requested the Secretariat to undertake a study of the topic, and deferred further consideration to a future session.<sup>115</sup> A study prepared by the Secretariat was published in 1962.<sup>116</sup> Also in 1962, the Commission, at its fourteenth session, decided to include the topic in its programme, but without setting any date for the start of its consideration.<sup>117</sup> At its nineteenth session (1967), the Commission examined the advisability of proceeding actively with the study of this topic; the views expressed, as recorded in the Commission's report, are reproduced in paragraph 74 above.

79. During the General Assembly's twenty-third session (1968) the representatives of Australia,<sup>118</sup> Canada<sup>119</sup> and

Mexico<sup>120</sup> in the Sixth Committee referred to the topic in connexion with the future work of the Commission, the Canadian representative in particular stressing the importance his delegation attached to the subject.

## PART II

### *Topics suggested or recommended for inclusion in the Commission's programme of work*

#### CHAPTER I

#### **Topics suggested by Member States in response to resolution 1505 (XV) of 12 December 1960 or by representatives in the Sixth Committee during the fifteenth (1960) and sixteenth (1961) sessions of the General Assembly**

80. A summary is given below of the written comments made by Member States in response to resolution 1505 (XV) of 12 December 1960, and of the suggestions made by representatives in the Sixth Committee during the fifteenth (1960) and sixteenth (1961) sessions of the General Assembly, with respect to topics which have not been included, either at that time or subsequently, in the Commission's programme. It may be recalled that, in accordance with the provisions of resolution 1686 (XVI), the International Law Commission considered these topics at its fourteenth session (1962) and adopted the decisions summarized in paragraphs 5 to 7 above. Indications have been given where appropriate of any subsequent developments relating to the topics in question.

#### 1. *Sources of international law*<sup>121</sup>

81. In its written comments Mexico requested that this question should be studied. It stated its grounds for the request in the following terms:

There is need for a re-examination of this question in the light of the many and varied decisions and resolutions of all kinds, some of doubtful legal validity, which have been adopted by the various international organizations. The actions of these organizations undoubtedly have a strong impact on international affairs and contribute in one form or another to the creation of international law. As the creation of international law in this manner is becoming daily more important, this might be a profitable topic of study for the International Law Commission.<sup>122</sup>

The Mexican representative in the Sixth Committee reiterated his Government's observations.<sup>123</sup>

<sup>112</sup> *Ibid.*, para. 16.

<sup>113</sup> United Nations, *Treaty Series*, vol. 516, p. 210.

<sup>114</sup> *Official Records of the United Nations Conference on the Law of the Sea*, vol. II, *Plenary Meetings*, (United Nations publication, Sales No.: 58.V.4, vol. II), p. 145.

<sup>115</sup> See *Yearbook of the International Law Commission, 1960*, vol. II, p. 180, document A/4425, para. 40.

<sup>116</sup> *Ibid.*, 1962, vol. II, p. 1, document A/CN.4/143.

<sup>117</sup> *Ibid.*, p. 190, document A/5209, para. 60.

<sup>118</sup> See *Official Records of the General Assembly, Twenty-third Session, Sixth Committee*, 1036th meeting, para. 12.

<sup>119</sup> *Ibid.*, 1031st meeting, para. 26.

<sup>120</sup> *Ibid.*, 1033rd meeting, para. 34.

<sup>121</sup> This topic, together with recognition of the acts of foreign States (para. 82 below), the territorial domain of States (para. 83), the pacific settlement of international disputes (paras. 84-100) and the law of war and neutrality (paras. 101-103), was amongst those considered by the Commission at its first session (1949) but not included in the 1949 list.

<sup>122</sup> See *Official Records of the General Assembly, Sixteenth Session, Annexes*, agenda item 70, document A/4796 and Add.1-8, annex, section 10, para. 3.

<sup>123</sup> *Ibid.*, *Sixth Committee*, 722nd meeting, para. 46.

## 2. Recognition of acts of foreign States

82. Venezuela requested in its written comments that the topic should be studied.<sup>124</sup>

## 3. Territorial domain of States

83. This question was also proposed by Venezuela.<sup>125</sup> 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

is amongst those which have been examined by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, established in 1963 and reconstituted in 1965 (see foot-note 6 above).

## 4. Pacific settlement of international disputes

84. The subject covers the very wide field of prohibition of war, procedures for investigation, mediation and conciliation, the arbitral or judicial settlement of disputes and the obligatory jurisdiction of the International Court of Justice.

### (a) General remarks

85. At the Assembly's sixteenth session (1961), the representative of Israel stated in the Sixth Committee<sup>126</sup> that the time had come to pass under review all the established machinery for the peaceful settlement of international disputes. There was no assurance that the existing procedures for settlement were really reliable, and their overhaul and adaptation to the contemporary patterns and conceptions of international intercourse were long overdue. The delegation of Israel considered that, if complete machinery for the peaceful settlement of international disputes was to be established, it would be worth instructing the Sixth Committee to undertake a legal study on the same lines as that being made at the political level by the First Committee, particularly in the field of disarmament.

86. Similarly, the representative of Argentina stated that it was essential to attempt, by both codification and progressive development, to establish a complete legal system of methods for securing the peaceful solution of international disputes.<sup>127</sup> The representative of Indonesia also spoke in favour of a study of the question by the International Law Commission.<sup>128</sup>

87. Since 1961, an item entitled "Peaceful Settlement of Disputes" had been discussed at the twentieth (item 99) and twenty-first (item 36) sessions of the General Assem-

bly, held in 1965 and 1966, but no resolution on the subject had been adopted. It may also be noted that the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, established in 1963, has examined, amongst others, 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 (see foot-note 6 above).

88. The representative of Romania, speaking in the Sixth Committee during the twenty-third session (1968) of the General Assembly, expressed the hope that the Commission would undertake as soon as possible a study of the peaceful settlement of international disputes.<sup>129</sup>

89. Current UNITAR research projects include a large-scale inquiry into the topic of the peaceful settlement of disputes.

### (b) Prohibition of war

90. In its written comments Afghanistan suggested the preparation of a declaration on the prohibition of war, in line with the Declaration of St. Petersburg of 1868 and the Brussels Conference of 1874, and the Geneva Protocol of 1925.<sup>130</sup>

91. Czechoslovakia proposed in its written comments the elaboration of legal principles to govern the prohibition of wars of aggression and the determination of the responsibility for the violation of peace (definition of aggression, prohibition of the use of weapons of mass destruction, consequences of the responsibility for a violation of peace and security).<sup>131</sup>

### (c) Recourse to procedures for investigation, mediation and conciliation

92. The written comments submitted by Colombia included the following passage:

The International Law Commission has already examined the topic of arbitral procedure and produced a set of model rules which is submitted to the General Assembly and which the latter transmitted to Governments in November 1958 for comments and for their use in drawing up treaties of arbitration. The Commission, as the codifying organ of the United Nations has still, however, to consider the other procedures for pacific settlement provided for both in Article 33 of the Charter of the United Nations and in article 21 of the Charter of the Organization of American States, *viz.*, good offices, mediation, investigation and conciliation—judicial procedure being regulated by the Statute of the International Court of Justice annexed to the Charter of the United Nations. With regard to such procedures for the pacific settlement of international disputes, there are many inter-American precedents having a bearing on codification (Treaty to Avoid or Prevent Conflicts between the American States (Gondra Treaty), approved at the fifth International Conference of American States and centred around the investigation procedure; General Convention on Inter-American Conciliation, General Treaty of Inter-American Arbitration and Protocol of Progressive Arbitration, all approved at the International Conference of American States on Conciliation and Arbitration held at Washing-

<sup>124</sup> *Ibid.*, Sixteenth Session, Annexes, agenda item 70, document A/4796 and Add.1-8, annex, section 14.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*, Sixth Committee, 726th meeting, para. 38.

<sup>127</sup> *Ibid.*, 720th meeting, para. 14.

<sup>128</sup> *Ibid.*, 726th meeting, para. 13.

<sup>129</sup> *Ibid.*, Twenty-third Session, Sixth Committee, 1031st meeting, para. 16.

<sup>130</sup> *Ibid.*, Sixteenth Session, Annexes, agenda item 70, document A/4796 and Add.1-8, annex, section 1, para. 2.

<sup>131</sup> *Ibid.*, section 12 (a). The question of defining aggression is referred to in paragraphs 20-22 above.

ton in 1929; Anti-War Treaty of Non-Aggression and Conciliation (Saavedra Lamas Treaty), concluded at Rio de Janeiro in 1933; American Treaty on Good Office and Mediation, adopted by the Inter-American Conference for the Maintenance of Peace at Buenos Aires in 1936; Inter-American Treaty on Pacific Settlement (Pact of Bogotá), approved at the ninth International Conference of American States.

Consequently the Colombian Government proposed the study of the following question: "Pacific settlement of international disputes; procedures for investigation, mediation and conciliation".<sup>182</sup>

93. The representative of Indonesia expressed the view that the Commission should take up the subject of the peaceful settlement of disputes.<sup>183</sup>

(d) *More frequent recourse to arbitral and judicial settlement*<sup>184</sup>

94. In its written comments, Denmark stated that it could not but

welcome any proposal tending to enlarge the scope of arbitral and judicial procedures in international relations. Far from being met with criticism, the International Law Commission ought to be encouraged to pursue its efforts in this direction.<sup>185</sup>

95. In the view of Sweden

... one of the most important questions of the day is that of strengthening the role of international law in the settlement of conflicts between States.

Under Article 2 of the Charter of the United Nations, Member States are enjoined to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. Nowadays, however, many disputes which lend themselves to settlement by the International Court of Justice or by other international judicial or arbitral bodies are not submitted for such settlement, with the result that they continue to burden relations between the States concerned. In view of this state of affairs, consideration should be given to the means by which States might be induced to resort more frequently to a judicial or arbitral settlement of their disputes. The Swedish Government considers that this question is of such importance that it should be given priority on the list of topics to be studied by the International Law Commission.<sup>186</sup>

96. During the Sixth Committee's debates at the sixteenth session of the General Assembly, the Swedish representative<sup>187</sup> expanded his Government's arguments. He was supported by the representatives of Ireland<sup>188</sup> and Pakistan.<sup>189</sup>

(e) *Obligatory jurisdiction of the International Court of Justice*

97. During the Sixth Committee's debates at the fifteenth session (1960) of the General Assembly, the represen-

tatives of Aghanistan,<sup>140</sup> Canada<sup>141</sup> and the United Kingdom<sup>142</sup> put forward the question of the obligatory competence of the International Court of Justice as one of the topics to be studied by the International Law Commission. The representative of Burma stated that

adequate measures should be taken [ . . . ] to educate world public opinion to accept the United Nations as the organ for laying down international law and the International Court of Justice as the forum for the determination of international disputes.<sup>143</sup>

98. In its written comments Denmark stated:

Codification and development of international law should be contemplated as only one aspect of the rule of law in international relations, and should—in addition to the purposes immediately served—contribute towards the creation of conditions in which the compulsory jurisdiction of the International Court of Justice may gain extended recognition.<sup>144</sup>

The Danish representative in the Sixth Committee stated during the debates at the sixteenth session that his delegation considered that the Sixth Committee would be "the appropriate forum for a thorough debate on that well-defined and vital field of international law".<sup>145</sup> The Swedish representative also hoped that the Sixth Committee would take up the question "unless the International Law Commission inserted it in its list of priority topics".<sup>146</sup>

99. In its written comments the Netherlands expressed the view that "a further development in this field is urgently called for "but that the preparatory work should be left to bodies other than the International Law Commission.<sup>147</sup>

100. The representative of Ghana suggested that the Court should be permitted to decide what was within the domestic jurisdiction of a State, just as domestic courts decided whether or not they had jurisdiction in a particular matter. He stated that he was in favour of the obligatory jurisdiction of the Court.<sup>148</sup> The Israel representative supported that proposal.<sup>149</sup>

##### 5. Law of war and neutrality

101. At the fifteenth session (1960) of the General Assembly, the representative of Ceylon proposed that the law of neutrality should be codified.<sup>150</sup>

102. In its written comments, Austria proposed the codification of the laws of war and neutrality. The Austrian Government observed that the

<sup>140</sup> *Ibid.*, Fifteenth Session, Sixth Committee, 66th meeting, para. 3.

<sup>141</sup> *Ibid.*, 656th meeting, para. 10.

<sup>142</sup> *Ibid.*, 652nd meeting, para. 2.

<sup>143</sup> *Ibid.*, 653rd meeting, para. 2.

<sup>144</sup> *Ibid.*, Sixteenth Session, Annexes, agenda item 70, document A/4796 and Add.1-8, annex, section 8, para. VII (3).

<sup>145</sup> *Ibid.*, Sixth Committee, 725th meeting, para. 14.

<sup>146</sup> *Ibid.*, 724th meeting, para. 29.

<sup>147</sup> *Ibid.*, Sixteenth Session, Annexes, agenda item 70, document A/4796 and Add.1-8, annex, section 16, para. 3.

<sup>148</sup> *Ibid.*, Sixth Committee, 723rd meeting, para. 35.

<sup>149</sup> *Ibid.*, 726th meeting, para. 37.

<sup>150</sup> *Ibid.*, Fifteenth Session, Sixth Committee, 658th meeting, paras. 19-20.

<sup>182</sup> *Ibid.*, document A/4796 and Add.1-8, annex, section 3.

<sup>183</sup> *Ibid.*, Sixth Committee, 726th meeting, para. 13.

<sup>184</sup> The Commission's activities with respect to the question of arbitral procedure are referred to in paragraph 23 above.

<sup>185</sup> See *Official Records of the General Assembly, Sixteenth Session, Annexes*, agenda item 70, document A/4796 and Add.1-8, annex, section 8, para. III.

<sup>186</sup> *Ibid.*, document A/4796 and Add.1-8, annex, section 6.

<sup>187</sup> *Ibid.*, Sixth Committee, 724th meeting, paras. 28-29.

<sup>188</sup> *Ibid.*, 727th meeting, para. 6.

<sup>189</sup> *Ibid.*, 720th meeting, para. 37.

provisions of the Charter may have had an effect other than abrogation on traditional norms of international law. Some norms, for instance, may have to be modified in order to correspond to the regulations of the Charter. This is especially true for the laws of war and neutrality which reflect the State practice for the nineteenth century and do, therefore, not provide for military actions of a world organization of States.<sup>151</sup>

103. On the other hand, the Netherlands expressed the view

that the laws of war—though their adaptation to modern methods of warfare is an urgent necessity—are not susceptible of codification, since this topic is closely connected with problems of disarmament which are under discussion in other bodies of the United Nations.<sup>152</sup>

### 6. Law of space

104. In the written comments of Governments submitted in accordance with resolution 1505 (XV), and in the statements of representatives during discussions in the Sixth Committee at the fifteenth (1960) and sixteenth (1961) sessions of the General Assembly, a number of suggestions were made that the International Law Commission should examine the legal aspects of the use of outer space, although different views were expressed as to whether this subject would be suitable for the Commission to study.<sup>153</sup>

105. At the present time space law is being examined by the General Assembly's Committee on the Peaceful Uses of Outer Space, in particular by its Legal Sub-Committee. At its twenty-first session the General Assembly adopted resolution 2222 (XXI) of 19 December 1966, relating to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. By resolution 2260 (XXII) of 3 November 1967, the General Assembly requested the Committee on the Peaceful Uses of Outer Space

in the further progressive development of the law of outer space, to continue with a sense of urgency its work on the elaboration of an agreement on liability for damage caused by the launching of objects into outer space and an agreement on assistance to and return of astronauts and space vehicles, and to pursue actively its work on questions relative to the definition of outer space and the utilization of outer space and celestial bodies, including the various implications of space communications.

At its twenty-second session the General Assembly also adopted resolution 2345 (XXII) of 19 December 1967, commending the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, which was annexed to that resolution.

106. At its following session the General Assembly adopted resolution 2453 B (XXIII) of 20 December 1968,

<sup>151</sup> *Ibid.*, Sixteenth Session, Annexes, agenda item 70, document A/4796 and Add.1-8, annex, section 15.

<sup>152</sup> *Ibid.*, section 16, para. 3.

<sup>153</sup> For a summary of these proposals, see *Yearbook of the International Law Commission, 1962*, vol. II, p. 96, document A/CN.4/145, para. 162.

requesting the Committee on the Peaceful Uses of Outer Space to complete urgently the preparation of a draft agreement on liability for damage caused by the launching of objects into outer space and to continue to study questions relative to the definition of outer space and the utilization of outer space and celestial bodies, including various implications of space communications. In resolution 2601 B (XXIV) of 16 December 1969, the General Assembly expressed its regret that the Committee had not yet been able to complete the drafting of a liability convention and urged it to do so in time for final consideration by the Assembly during its twenty-fifth session.

### 7. Human rights and defence of democracy

(a) *Preparation of a draft Convention for the defence of democracy, to be co-ordinated with the work currently being done along those lines by the Organization of American States and the Inter-American Commission on Human Rights*

107. The preparation of a draft convention was proposed by Venezuela in its written comments.<sup>154</sup>

108. Colombia in its written comments stated:

Another topic studied by the Inter-American Council of Jurists is the effective exercise of representative democracy, which has been placed on the agenda of the eleventh Inter-American Conference. Since, however, this topic is relatively political in nature and within the inter-American regional organization comes directly under article 5 (d) of the Charter of Bogotá, it might for the moment be regarded as exclusively inter-American. The same would seem to apply to the topic of the juridical relationship between respect for human rights and the exercise of representative democracy, which is also a subject of study by the Inter-American Council of Jurists and of a report to the eleventh Inter-American Conference.<sup>155</sup>

(b) *International protection of human rights through the creation of a special international court*

109. The subject was proposed by Colombia in its written comments.<sup>156</sup> During the sixteenth session (1961) of the General Assembly the representative of Colombia submitted a draft resolution,<sup>157</sup> the operative part of which provided for the inclusion in the agenda of the seventeenth session of the Assembly of the question of the establishment of an international tribunal for the protection of human rights. That draft was subsequently replaced by an amendment.<sup>158</sup> In the course of the debate the representative of Colombia withdrew his amendment, accepting the fact that most representatives, while recognizing the importance of the question, felt that its inclusion in the agenda of the next session of the General Assembly was inappropriate, since it had already for some years been on the agenda of the Commission on Human Rights.<sup>159</sup>

<sup>154</sup> See *Official Records of the General Assembly, Sixteenth Session, Annexes*, agenda item 70, document A/4796 and Add.1-8, annex, section 14.

<sup>155</sup> *Ibid.*, section 3, para. 11.

<sup>156</sup> *Ibid.*, section 3.

<sup>157</sup> *Ibid.*, document A/C.6/L.493.

<sup>158</sup> *Ibid.*, document A/5036, para. 12.

<sup>159</sup> *Ibid.*, para. 37.

(c) *Jurisdiction of international courts and organizations with special reference to the plea of exclusion by the domestic jurisdiction in relation to questions affecting human rights*

110. This question was proposed by Ceylon in its written comments.<sup>160</sup>

(d) *Preparation of multilateral instruments relating to human rights since 1962*

111. In recent years the General Assembly has adopted the following instruments: the International Convention on the Elimination of all Forms of Racial Discrimination (resolution 2106 A (XX) of 21 December 1965); the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights (resolution 2200 A (XXI) of 16 December 1966); the Declaration on the Elimination of Discrimination against Women (resolution 2263 (XXII) of 7 November 1967); and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (resolution 2391 (XXIII) of 26 November 1968). Some of the provisions of the Draft Declaration of the Elimination of All Forms of Religious Intolerance and the Draft International Convention on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief were considered by the General Assembly during its twenty-third session, in 1968; at its twenty-fourth session the General Assembly postponed further consideration of these instruments until its twenty-fifth session, in 1970.

## 8. Independence and sovereignty of States

(a) *The acquisition of statehood*

112. This question was proposed by Ghana in its written comments.<sup>161</sup> At the sixteenth session of the General Assembly, the representative of Ghana stated in the Sixth Committee that the matter was "obviously important", as the expansion of the international society by the emergence of new States was fast being relegated to history; in fact, after General Assembly resolution 1514 (XV) on the granting of independence to colonial countries and peoples had been fully implemented, new States would come into being only by the disintegration, disruption or total extinction of the existing States and the formation of new groupings through fission or fusion. Then the birth of a new State and its recognition would be linked inextricably to the problem of State succession.<sup>162</sup>

(b) *The right of a State, in particular a new State, to determine, to implement and to perfect in its political form, socially and economically, in conformity with its professed ideology and to take all necessary steps to accomplish this, e.g. decolonization, normalization, nationalization, and also steps to control all its natural*

*resources and to ensure that those resources are utilized for the interests of the State and the people*  
and

(c) *The right of every State to take steps which, in its opinion, are necessary to safeguard its national unity, its territorial integrity and for its self-defence*

113. These two topics were proposed by Indonesia in its written comments.<sup>163</sup>

(d) *Elaboration of legal principles ensuring the granting of independence to colonial countries and peoples*

114. This topic was proposed by Czechoslovakia in its written comments.<sup>164</sup> It related particularly to the right of nations, to self-determination, ensuring to nations full sovereignty over their natural resources, the complex of problems of recognition, State succession and others.

(e) *Acts of one State in the territory of another State*

115. The Netherlands referred in its written comments to the possibility that the Commission might deal with the question of the acts of one State in the territory of another.<sup>165</sup> Speaking in the Commission during its nineteenth session (1967), Mr. Tammes suggested that

the question whether acts of foreign States could, under international law, be directly subjected to the judgement and scrutiny of national courts, might well be studied.<sup>166</sup>

(f) *The principle of non-intervention*

116. Study of this topic was proposed by Mexico in its written comments.<sup>167</sup> At the inter-American level, a Convention containing five articles, signed at Havana in 1928, sets out the obligations and rights of States in cases of civil war. In the view of Mexico, consideration should be given to the desirability of extending the provisions of that Convention to all countries or perhaps of formulating new provisions that would be in keeping with present conditions and be universally applicable.

117. At the sixteenth session of the General Assembly, the representative of the Union of Soviet Socialist Republics on the Sixth Committee suggested the codification of the question of the sovereignty of States and the principle of non-interference.<sup>168</sup>

118. The representative of Mexico pointed out that, in view of the current importance of the question of non-intervention, its study should be undertaken as soon as possible.<sup>169</sup>

<sup>163</sup> *Ibid.*, Sixteenth Session, Annexes, agenda item 70, document A/4796, and Add.1-8, annex, section 11.

<sup>164</sup> *Ibid.*, section 12.

<sup>165</sup> *Ibid.*, section 16.

<sup>166</sup> *Yearbook of the International Law Commission, 1967*, vol. I, p. 179, 928th meeting, para. 8.

<sup>167</sup> *Official Records of the General Assembly, Sixteenth Session, Annexes*, agenda item 70, document A/4796 and Add.1-8, annex, section 10.

<sup>168</sup> *Ibid.*, Sixth Committee, 717th meeting, para. 33.

<sup>169</sup> *Ibid.*, 722nd meeting, para. 46.

<sup>160</sup> *Ibid.*, document A/4796 and Add.1-8, annex, section 17.

<sup>161</sup> *Ibid.*, section 9.

<sup>162</sup> *Ibid.*, Sixth Committee, 723rd meeting, para. 38.

(g) *The principle of self-determination of peoples*

119. Study of this topic was proposed by Austria in its written comments.<sup>170</sup>

(h) *Work of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States*

120. The Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States has been engaged since 1963 in a study of the following principles, amongst others: the duty not to intervene in matters within the domestic jurisdiction of any State in accordance with the Charter; and the principle of equal rights and self-determination of peoples (see foot-note 6 above).

9. *Enforcement of international law*

121. The topic was proposed by Ghana in its written comments.<sup>171</sup> In a statement in the Sixth Committee during the sixteenth session of the General Assembly, the representative of Ghana said that this topic was closely related to the acceptance by all States of the compulsory jurisdiction of the International Court of Justice. If it were possible to enforce international law against all nations in all cases, many of the difficulties at present confronting the world would be obviated. His delegation hoped that the topic would receive early attention.<sup>172</sup>

122. The representative of Argentina stated that his Government considered it essential to attempt, by both codification and progressive development, to establish a complete legal system of methods for securing the peaceful solution of international disputes and to create additional means of ensuring peace through the rule of law.<sup>173</sup>

10. *Utilization of international rivers*

123. At the fourteenth session (1959) of the General Assembly, the representative of Bolivia in the Sixth Committee pointed out that the utilization of international rivers was governed by law was purely customary, ill-defined and lacking in uniformity. He therefore suggested that the International Law Commission should include in its agenda the question of the utilization and exploitation of international waterways.<sup>174</sup>

124. Several representatives emphasized the complexity of the problem, which would necessarily require suitable technical knowledge. Other representatives were of the opinion that an attempt to codify the matter would be premature and could do more harm than good. It would be better to leave it to the International Law Commission to decide whether the utilization of international rivers was an appropriate subject for codification.

125. Following the Sixth Committee's discussion the General Assembly adopted resolution 1401 (XIV) of 21 November 1959, whereby the General Assembly, considering it desirable to initiate preliminary studies on this topic "with a view to determining whether the subject is appropriate for codification", requested the Secretary-General to submit a report on legal problems relating to the utilization and use of international rivers. The Secretary-General accordingly prepared and circulated to Member States a report (A/5409) as requested by the General Assembly's resolution. A collection of legislative texts and treaty provisions on the subject has been printed in the United Nations Legislative Series.<sup>175</sup>

126. In its written comments the Netherlands requested that the subject of the utilization of international rivers should be studied by the International Law Commission.<sup>176</sup>

127. At the sixteenth session (1961) of the General Assembly, the representative of Iran in the Sixth Committee suggested that the International Law Commission could well use the research accomplished by the Secretariat as a starting point for an international convention. Such a convention would serve to regulate the use of international rivers by riparian States on the basis of well-defined rules and thus put an end to numerous disputes on the subject.<sup>177</sup>

128. At the twenty-second session (1967) of the General Assembly the representative of Mexico in the Sixth Committee expressed the hope that after dealing with the topics now being studied, the International Law Commission would consider taking up the legal problem relating to the utilization and use of international rivers, a topic on which it could take into consideration the opinion adopted several years by the Inter-American Juridical Committee.<sup>178</sup>

129. The topic was also mentioned by members of the Commission during its nineteenth session (1967). Mr. Tammes suggested that it might be appropriate to lend the authority of the Commission and of plenipotentiary conferences to what had already been done in this sphere by such private bodies as the International Law Association.<sup>179</sup> The Chairman of the nineteenth session, Sir Humphrey Waldock, expressed the view that the topic was too extensive to be undertaken at the same time as the Commission's current work.<sup>180</sup> Mr. Kearney said that he would support the inclusion of the topic in the Commission's programme, subject to the demands of its existing work.<sup>181</sup> Mr. Bartoš stated that

<sup>175</sup> *Legislative texts and treaty provisions concerning the utilization of international rivers for other purposes than navigation* (United Nations publication, Sales No.: 63.V.4).

<sup>176</sup> See *Official Records of the General Assembly, Sixteenth Session, Annexes*, agenda item 70, document A/4796 and Add.1-8, annex, section 16.

<sup>177</sup> *Ibid.*, Sixth Committee, 725th meeting, para. 22.

<sup>178</sup> *Ibid.*, Twenty-Second Session, Sixth Committee, 961st meeting, para. 7.

<sup>179</sup> See *Yearbook of the International Law Commission, 1967*, vol. I, p. 179, 928th meeting, para. 8.

<sup>180</sup> *Ibid.*, p. 248, 938th meeting, para. 78.

<sup>181</sup> *Ibid.*, p. 189, 929th meeting, para. 80 and p. 251, 939th meeting, para. 18.

<sup>170</sup> *Ibid.*, Sixteenth Session, Annexes, agenda item 70, document A/4796 and Add.1-8, annex, section 15.

<sup>171</sup> *Ibid.*, section 9.

<sup>172</sup> *Ibid.*, Sixth Committee, 723rd meeting, para. 36.

<sup>173</sup> *Ibid.*, 720th meeting, para. 14.

<sup>174</sup> *Ibid.*, Fourteenth Session, Annexes, agenda item 55, document A/4253, paras. 33 *et seq.*

the General Assembly had never proposed the topic of international rivers for study, since the developing countries regarded the formulation of rules for navigation on such waterways as likely to infringe their sovereignty.<sup>182</sup>

## 11. Economic and trade relations

### (a) *The rules governing multilateral trade*

130. In proposing the study of this topic, Yugoslavia stated in its written comments that

the rules governing international trade, and more especially trade among States with different economic and social systems, raise a number of novel problems to which satisfactory legal solutions should now be sought in the interest of the normal development of both economic and political relations in a particularly sensitive area of world affairs. What we have in mind are not, of course, the technical aspects of the legal regulation of international trade, but the new institutions and rules that have arisen since the Second World and which make the general pattern of international trade very much different from what it had previously been.<sup>183</sup>

At the sixteenth session of the General Assembly, the Yugoslav representative developed the ideas in a statement in the Sixth Committee.<sup>184</sup>

### (b) *The rules pertaining to the various forms of economic assistance to under-developed countries*

131. This topic was also proposed by Yugoslavia. In its observations the Yugoslav Government stated that:

The question of promoting the economic development of the hitherto under-developed countries is generally recognized to be one of the foremost international problems of our time. The various forms of assistance that are now given to the development of these countries—economic and technical, multilateral and bilateral—have considerable legal implications and call for the determination of the principles of international law that should govern their application, if they are to achieve their basic purposes.<sup>185</sup>

132. In the Sixth Committee, the Yugoslav representative argued that

in codifying the legal rules concerning economic and technical assistance, the [International Law] Commission should not enter into technical questions, but should seek to define, in the light of general international law, the respective positions of the States and organizations concerned. His delegation was convinced that existing legal standards could provide a basis for establishing some rules which had been reaffirmed many times in the practice of the post-war period. For example, the requirement that no political or other conditions should be attached to the aid extended to under-developed countries was now a generally recognized legal rule.<sup>186</sup>

133. On the other hand, the representative of the United Kingdom, referring to the two topics suggested by Yugoslavia, stated in the Sixth Committee that both tasks

seemed more appropriate for an economic body than for the International Law Commission. He further stated that some aspect of international trade might be covered by other subjects, such as the jurisdictional immunities of States.<sup>187</sup>

134. By resolution 2205 (XXI) of 17 December 1966 the General Assembly established the United Nations Commission on International Trade Law (UNCITRAL). At the first session (1968) of UNCITRAL a great number of delegations considered that the following, non-exhaustive, list of topics should form the future work programme of UNCITRAL: (1) international sale of goods; (2) commercial arbitration; (3) transportation; (4) insurance; (5) international payments; (6) intellectual property; (7) elimination of discrimination in laws affecting international trade; (8) agency; and (9) legalization of documents. UNCITRAL decided that priority should be given to three topics: international sale of goods; international payments; and international commercial arbitration.<sup>188</sup> At its second session (1969) UNCITRAL decided to take up also the topic of international shipping legislation, in response to a request by UNCTAD.<sup>189</sup>

## CHAPTER II

### Topics subsequently suggested by representatives in the Sixth Committee or by members of the International Law Commission

#### SECTION A. *Topics subsequently suggested by representatives in the Sixth Committee*

135. Since the sixteenth session (1961) of the General Assembly the Sixth Committee has not examined the question of future work in the field of the codification and progressive development of international law, as a separate item on its agenda. The comments of representatives in the Sixth Committee with respect to the work of the International Law Commission have therefore been largely devoted to the topics dealt with in the Commission's annual reports. Such comments or suggestions as have been made relating to the other topics on the Commission's programme, or to the proposals made by Member States in 1960 and 1961, have been noted earlier in the present paper. The only specific new proposals which appear to have been made were those put forward at the twenty-fourth session (1969) of the General Assembly by the representative of El Salvador, who stated that, in his view, the Commission

... should concentrate on the topics of greatest practical importance, such as the law of State development and community law, which were so vital today in the light of the economic and social development problems of the non-industrialized countries and

<sup>182</sup> *Ibid.*, p. 248, 938th meeting, para. 51.

<sup>183</sup> See *Official Records of the General Assembly, Sixteenth Session, Annexes*, agenda item 70, document A/4796 and Add.1-8, annex, section 7, para. 4.

<sup>184</sup> *Ibid.*, *Sixth Committee*, 714th meeting, para. 21.

<sup>185</sup> *Ibid.*, *Sixteenth Session, Annexes*, agenda item 70, document A/4796 and Add.1-8, annex, section 7, para. 4.

<sup>186</sup> *Ibid.*, *Sixth Committee*, 714th meeting, para. 22.

<sup>187</sup> *Ibid.*, 717th meeting, para. 9.

<sup>188</sup> *Ibid.*, *Twenty-third Session, Supplement No. 16 (A/7216)*, para. 40.

<sup>189</sup> *Ibid.*, *Twenty-fourth Session, Supplement No. 18 (A/7618)*, para. 133.

the present trend towards economic integration. Another topic which had not been fully studied under the law of treaties was that of conflicts between treaties and domestic law, especially national constitutions.<sup>190</sup>

#### SECTION B. *Topics subsequently suggested by members of the International Law Commission*

136. At its fourteenth session (1962) the Commission considered the proposals which Governments had suggested in response to General Assembly resolution 1505 (XV) and in the Sixth Committee at the fifteenth (1960) and sixteenth (1961) sessions of the General Assembly, and decided to limit, for the time being, the future programme of work to the topics already under study or to be studied pursuant to earlier General Assembly resolutions (see paras. 5-6 above). Since that session the main occasion on which new topics for study have been suggested, additional to those previously proposed or included in the Commission's programme, was at the Commission's nineteenth session (1967).

##### 1. *Unilateral acts*

137. The possibility of the Commission's examining the topic of unilateral acts was mentioned during the nineteenth session (1967) by Mr. Tammes. He stated that ample research and practice were available concerning the topic, which greatly needed clarification and systematization.

The topic covered recognition as a positive act acknowledging a given situation to be a legal situation and, conversely, protests rejecting changes in a legal situation. It also included the principle of estoppel applied by the International Court of Justice. Other unilateral acts which might possibly be dealt with in a systematic draft were proclamations, waivers and renunciations.<sup>191</sup>

This suggestion was also referred to by Mr. Ago,<sup>192</sup> Sir Humphrey Waldock,<sup>193</sup> Mr. Bartoš<sup>194</sup> and Mr. Castrén.<sup>195</sup>

##### 2. *Status of international organizations before the International Court of Justice*

138. Mr. Tammes, referring to the general question of the implementation of international law, stated that

... a specific question of practical significance had arisen in connexion with the South West Africa case and the Commission might well take up the problem of enabling the United Nations and other international organizations to have the status of litigating parties before the International Court of Justice.<sup>196</sup>

<sup>190</sup> A/C.6/SR.1106, p. 13.

<sup>191</sup> See *Yearbook of the International Law Commission, 1967*, vol. I, p. 179, 928th meeting, para. 6. See also p. 187, 929th meeting, para. 63.

<sup>192</sup> *Ibid.*, p. 182, 928th meeting, para. 32.

<sup>193</sup> *Ibid.*, p. 248, 938th meeting, para. 78.

<sup>194</sup> *Ibid.*, para. 81.

<sup>195</sup> *Ibid.*, p. 250, 939th meeting, para. 11.

<sup>196</sup> *Ibid.*, p. 179, 928th meeting, para. 9. See also, p. 187, 929th meeting, para. 65.

### 3. *Statute of a new United Nations body for fact-finding*

139. Mr. Tammes also expressed the view

... that it would not be contrary to the Commission's terms of reference for it to draw up a statute for a new auxiliary body of the United Nations to study, for instance, methods of fact-finding, which the General Assembly had unanimously decided to place on the agenda for its twenty-second session. The Commission might well give the General Assembly guidance on certain underlying legal and institutional principles of fact-finding, as a contribution to the instrumentality of peace independent of other means of peaceful settlement, such as arbitration, conciliation and judicial settlement, referred to in Article 33 of the Charter.<sup>197</sup>

140. General Assembly resolution 2329 (XXII) of 18 December 1967, relating to fact-finding, did not establish any new body for that purpose. Operative paragraph 4 requested the Secretary-General

to prepare a register of experts in legal and other fields, whose services the States parties to a dispute may use by agreement for fact-finding in relation to the dispute, and requests Member States to nominate up to five of their nationals to be included in such a register.

A first version of the register was issued in 1968 (A/7240) and a second version, containing summaries of biographical data supplied by Member States in respect of their nationals, was issued in 1969 (A/7751).

### 4. *Law of international economic co-operation*

141. At the Commission's nineteenth session (1967) Mr. Castañeda stated:

Another matter which the Commission should consider in the distant future was the law of international economic co-operation, which was continually developing within the United Nations, the specialized agencies and the regional and world-wide economic organizations.<sup>198</sup>

However, it was necessary to wait until practice had become established and ideas on the subject had crystallized.

142. During the Commission's twentieth session (1968) a related proposal was made by Mr. Albónico, who suggested that the topic of the legal principles of reciprocal assistance between States was one which required urgent study:

The topic had become particularly important since the Second World War. The work of the Economic and Social Council of the United Nations, the Marshall Plan, the organization in Europe of three economic communities, the progress made towards economic integration in Central America, the establishment of a Latin American free trade area, and the late President Kennedy's Alliance for Progress, were all expressions of the duty of States to render assistance to one another in economic matters. The first and second sessions of the United Nations Conference on Trade and Development at Geneva in 1964 and at New Delhi in 1968, pointed in the same direction. The time had now come to consider the question whether there was a legal obligation on the

<sup>197</sup> *Ibid.*, p. 179, 928th meeting, para. 10. See also p. 187, 929th meeting, para. 64.

<sup>198</sup> *Ibid.*, p. 188, 929th meeting, para. 70.

richly endowed countries to render assistance to those countries which needed it and if so, what was the scope of that obligation. Simultaneously, the parallel question should be considered of the corresponding obligations of States and peoples whom it was intended to help, particularly the obligation to carry out the structural changes which were essential if they were to benefit from the assistance of the wealthier countries.<sup>199</sup>

#### 5. Model rules on conciliation

143. Mr. Eustathiades suggested that the Commission might consider drawing up a set of model rules on conciliation, on the same lines as the model draft on arbitral procedure (para. 23 above) which it had adopted at its tenth session (1958).<sup>200</sup>

#### 6. International bays and international straits

144. During the Commission's nineteenth session (1967) Mr. Ago expressed the view that the Commission might be requested by an appropriate organ of the United Nations to give its opinion on topics such as international bays and international straits.<sup>201</sup>

### CHAPTER III

#### **Recommendation by the General Assembly concerning the question of treaties concluded between states and international organizations or between two or more international organizations**

145. In operative paragraph 5 of resolution 2501 (XXIV) of 12 November 1969, the General Assembly recommended

that the International Law Commission should study, in consultation with the principal international organizations, as it may consider appropriate in accordance with its practice, the question of treaties concluded between States and international organizations or between two or more international organizations, as an important question.

146. The General Assembly's recommendation follows that contained in a resolution adopted by the United Nations Conference on the Law of Treaties. The summary of the discussion in the Sixth Committee states in part as follows:

Several representatives supported the proposal to refer the question to the International Law Commission, on the understanding that that would not alter the order of priority of the topics currently being studied, especially State responsibility and the succession of States and Governments. Other representatives considered that it would be advisable for the Commission to take up the question in the near future and give it a measure of priority, taking due account of the other items on its current programme of work. Other representatives felt that for the time being the Commission should simply include the question in its long-term programme of work. Lastly, some representatives stressed that it was for the Commission itself to decide when would be the best time to begin its study of the question and what degree of priority it should be given in the light of its current programme of work and the conclusions resulting from the envisaged updating of its long-term programme of work.<sup>202</sup>

<sup>199</sup> *Ibid.*, 1968, vol. I, p. 193, 977th meeting, para. 27.

<sup>200</sup> *Ibid.*, 1967, vol. I, p. 188, 929th meeting, para. 73.

<sup>201</sup> *Ibid.*, p. 182, 928th meeting, para. 32.

<sup>202</sup> See *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, para. 114. For the text of the resolution adopted by the United Nations Conference on the Law of Treaties, *ibid.*, para. 5.



## REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

## DOCUMENT A/8010/REV.1

Report of the International Law Commission on the work of its twenty-second session,  
4 May-10 July 1970

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## 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-second session at the United Nations Office at Geneva from 4 May to 10 July 1970. 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 66 additional draft articles on representatives of States to international organizations, consisting of provisions on permanent observer missions to international organizations and delegations of States to organs and to conferences, and commentaries thereon. Chapter III, on succession of States, contains a description of the Commission's work on one of the headings of the topic, namely succession in respect of treaties. Chapter IV, on State responsibility, contains a description of the Commission's work on that topic. Chapter V deals with the organization of the Commission's future work and a number of administrative and other questions.

## A. MEMBERSHIP AND ATTENDANCE

2. The Commission consists of the following members:

Mr. Roberto AGO (Italy);  
 Mr. Fernando ALBÓNICO (Chile);  
 Mr. Gonzalo ALCÍVAR (Ecuador);  
 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. 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. José SETTE CÂMARA (Brazil);  
 Mr. Abdul Hakim TABIBI (Afghanistan);  
 Mr. Arnold J. P. TAMMES (Netherlands);  
 Mr. Doudou THIAM (Senegal);  
 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).

3. At its 1046th meeting, held on 11 May 1970, the Commission paid tribute to the memory of Mr. Gilberto Amado, who had served continuously as a member of the Commission since he was first elected in 1948.

4. On 21 May 1970, the Commission elected Mr. José Sette Câmara (Brazil), Mr. Gonzalo Alcívar (Ecuador), and Mr. Doudou Thiam (Senegal) to fill the vacancies caused by the death of Mr. Gilberto Amado and by the resignations of Mr. Eduardo Jiménez de Aréchaga and Mr. Louis Ignacio-Pinto on their election to the International Court of Justice.

5. All members attended meetings of the 22nd session of the Commission. The newly elected members attended the meetings of the Commission as follows: Mr. Sette Câmara from 27 May, Mr. Alcívar from 2 June and Mr. Thiam from 3 June onwards.

## B. OFFICERS

6. At its 1042nd meeting, held on 4 May 1970, the Commission elected the following officers:

*Chairman:* Mr. Taslim O. Elias;  
*First Vice-Chairman:* Mr. Richard D. Kearney;  
*Second Vice-Chairman:* Mr. Fernando Albónico;  
*Rapporteur:* Mr. Milan Bartoš.

## C. DRAFTING COMMITTEE

7. At its 1046th meeting, held on 11 May 1970, the Commission appointed a Drafting Committee composed as follows:

*Chairman:* Mr. Richard D. Kearney;

*Members:* Mr. Roberto Ago; Mr. Jorge Castañeda; Mr. Erik Castrén; Mr. Nagendra Singh; Mr. Alfred Ramangasoavina; Mr. Paul Reuter; Mr. José María Ruda; Mr. Nikolai Ushakov; Mr. Endre Ustor and Sir Humphrey Waldock. Mr. Abdullah El-Erian took part in the Committee's work on relations between States and international organizations in his capacity as Special Rapporteur for that topic. Mr. Milan Bartoš also took part in the Committee's work in his capacity as Rapporteur of the Commission.

#### D. SECRETARIAT

8. Mr. Constantin A. Stavropoulos, Legal Counsel, attended the 1065th to 1969th meetings held from 8 to 12 June 1970, 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 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, Mr. Eduardo Valencia-Ospina and Miss Jacqueline Dauchy served as assistant secretaries.

#### E. AGENDA

9. The Commission adopted an agenda for the twenty-second session, consisting of the following items:

1. Filling of casual vacancies in the Commission (article 11 of the Statute).
2. Relations between States and international organizations.
3. Succession of States:
  - (a) Succession in respect of treaties;
  - (b) Succession in respect of matters other than treaties.
4. State responsibility.
5. Most-favoured-nation clause.
6. Co-operation with other bodies.
7. Organization of future work.
8. Date and place of the twenty-third session.
9. Other business.

10. In the course of the session, the Commission held forty-five public meetings (1042nd to 1086th meetings) and two private meetings (on 21 May and 1 July 1970, respectively). In addition, the Drafting Committee held fourteen meetings and the Sub-Committee on treaties concluded between States and international organizations or between two or more international organizations (see para. 89 below) held two meetings. The Commission considered all the items on its agenda with the exception of sub-item 3 (b) (Succession of States: succession in respect of matters other than treaties) and item 5 (Most-favoured-nation clause).

#### F. EXCHANGE OF LETTERS CONCERNING THE PROBLEM OF THE PROTECTION AND INVIOLABILITY OF DIPLOMATIC AGENTS

11. The Commission received from the President of the Security Council a letter dated 14 May 1970 (A/CN.4/235)

transmitting a copy of document S/9789 which reproduced the text of a letter addressed to him by the representative of the Netherlands to the United Nations concerning the problem of the protection and inviolability of diplomatic agents. The Chairman of the Commission replied to the foregoing communication by a letter dated 12 June 1970 (A/CN.4/236). The texts of the above-mentioned letters were as follows:

#### *Letter dated 14 May 1970 from the President of the Security Council addressed to the Chairman of the International Law Commission*

I have the honour to transmit to you herewith a copy of document S/9789 which reproduces the text of a letter addressed to me by the Netherlands representative to the United Nations on 5 May concerning the problem of the protection and inviolability of diplomatic agents.

In the fourth paragraph of that letter, the Netherlands Government requests me to inform not only the members of the Security Council, but also appropriate organs of the United Nations, of its concern at recent infringements of the inviolability of diplomatic agents.

To meet that request, I have decided to transmit the text of the letter to the President of the International Court of Justice and to the Chairman of the International Law Commission for such purposes as may be desirable.

Accept, Sir, the assurances of my highest consideration.

(Signed) Jacques KOSCIUSKO-MORIZET  
President of the Security Council

#### ANNEX

#### *Letter dated 5 May 1970 from the Permanent Representative of the Netherlands to the United Nations addressed to the President of the Security Council*

Upon instructions from my Government, I have the honour to bring the following to your attention in relation to the protection and inviolability of diplomatic agents.

The Government of the Netherlands wishes to recall that from ancient times peoples of all nations have recognized the status of diplomatic agents. Their immunity and inviolability have clearly been established by time-honoured rules of international law.

The increasing number of attacks on diplomats which have inflicted great danger and hardship and have, in some cases, resulted in loss of life, is a cause of alarm to the Netherlands Government. My Government is of the opinion that such incidents may endanger the conduct of friendly relations between States, and that attacks on the person, the freedom or dignity of diplomats could lead to situations which might give rise to a dispute and as such even could endanger the maintenance of international peace and security.

In view of these considerations, the Netherlands Government deems it proper to draw attention to the question raised above and expresses the hope that Your Excellency will inform members of the Security Council, as well as appropriate organs of the United Nations, of the existing preoccupations.

I kindly request Your Excellency that my letter be circulated as an official document of the Security Council.

Please accept, etc.

(Signed) R. FACK  
Permanent Representative of the Kingdom of  
the Netherlands to the United Nations

*Letter dated 12 June 1970 from the Chairman of the International Law Commission addressed to the President of the Security Council*

I have the honour to acknowledge the receipt of your letter dated 14 May 1970, transmitting a copy of document S/9789 which reproduces the text of a letter addressed to you by the Netherlands representative to the United Nations on 5 May 1970 concerning the problem of the protection and inviolability of diplomatic agents. Both letters were brought to the attention of the Commission and were circulated to members as document A/CN.4/235.

The question of the protection and inviolability of diplomatic agents has been of concern to the Commission in several instances of its work of codification and progressive development of international law. The Commission included provisions to that effect in its draft articles on diplomatic intercourse and immunities, which formed the basis for the Vienna Convention on Diplomatic Relations adopted in 1961. On that occasion the Commission stated in the commentary to Article 27 of its final draft:

"This article confirms the principle of the personal inviolability of the diplomatic agent. From the receiving State's point of view, this inviolability implies, as in the case of the mission's premises, the obligation to respect, and to ensure respect for, the person of the diplomatic agent. The receiving State must take all reasonable steps to that end, possibly including the provision of a special guard where circumstances so required. Being inviolable, the diplomatic agent is exempted from measures that would amount to direct coercion. This principle does not exclude in respect of the diplomatic agent either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing crimes or offences."<sup>1</sup>

In addition, provisions concerning the protection and inviolability of the representatives of the Sending State in a special mission and of the members of the diplomatic staff of the mission were included in the Commission's final draft articles on special missions, which formed the basis for the Convention on Special Missions adopted by the General Assembly in 1969. At the present time, the Commission is considering once again the question of inviolability and protection in the context of the relations between States and international organizations. The Commission expects to continue being concerned with this problem in the future.

Accept, Sir, the assurances of my highest consideration.

(Signed) T. O. ELIAS  
Chairman of the  
International Law Commission

<sup>1</sup> *Yearbook of the International Law Commission, 1958, vol. II, p. 97, document A/3859.*

CHAPTER II

Relations between States  
and international organizations

A. INTRODUCTION

1. *Summary of the Commission's proceedings*<sup>2</sup>

12. At its twentieth and twenty-first sessions, the Commission adopted parts I and II of its provisional draft on representatives of States to international organizations, consisting of a first group of twenty-one articles on general provisions (part I) and permanent missions to international organizations in general (part II, section 1)<sup>3</sup> and of a second group of twenty-nine articles on facilities, privileges and immunities of permanent missions to international organizations; conduct of the permanent mission and its members; and end of functions of the permanent representative (part II, sections 2, 3 and 4)<sup>4</sup> The Commission decided, in accordance with articles 16 and 21 of its Statute, to submit the first and second groups of articles, through the Secretary-General, to governments for their observations. It also decided to transmit them 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.

13. At its twenty-first session in 1969 the Commission expressed its intention, as a matter of priority, to conclude at its twenty-second session in 1970 the first reading of its draft on relations between States and international organizations by considering draft articles on permanent observers of non-member States and on delegations to sessions of organs of international organizations and to conferences convened by such organizations.<sup>5</sup> Also in 1969, the General Assembly, at its twenty-fourth session, adopted resolution 2501 (XXIV) which, *inter alia*, recommended that the Commission should "continue its work on relations between States and international organizations, with a view to completing in 1971 its draft articles on representatives of States to international organizations".

14. At the present session of the Commission, the Special Rapporteur, Mr. Abdullah El-Erian, submitted a fifth report (A/CN.4/227 and Add.1 and 2) containing draft articles, with commentaries, on permanent observers of non-member States to international organizations (part III) and delegations to organs of international

<sup>2</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, pp. 193-194, document A/7209/Rev.1, paras. 9-20.*

<sup>3</sup> *Ibid.*, p. 194, para. 21.

<sup>4</sup> *Ibid.*, 1969, vol. II, p. 206, document A/7610/Rev.1, para. 13.

<sup>5</sup> *Ibid.*, p. 206, para. 17 and p. 235, para. 93.

organizations and to conferences convened by international organizations (part IV). The Special Rapporteur also submitted a working paper on temporary observer delegations and conferences not convened by international organizations (A/CN.4/L.151) but the Commission did not consider that it should take up the matter at this time.

15. The fifth report also contained a summary of that part of the discussion in the Sixth Committee during the twenty-fourth session of the General Assembly on the agenda items entitled "Report of the International Law Commission on the work of its twenty-first session" (item 86)<sup>6</sup> and "Draft Convention on Special Missions" (item 87)<sup>7</sup> which touched on certain questions which may present some interest concerning representatives of States to international organizations and conferences.

16. The Commission considered the fifth report of the Special Rapporteur at its 1043rd to 1045th and 1047th to 1061st meetings and referred the draft articles contained therein to the Drafting Committee. At its 1061st to 1065th, 1067th, 1073rd, 1077th and 1078th meetings, the Commission considered the reports of the Drafting Committee. At those meetings and at its 1084th meeting the Commission adopted a provisional draft of articles on the subjects included in sections 1 (Permanent observer missions in general), 2 (Facilities, privileges and immunities of permanent observer missions), 3 (Conduct of the permanent observer mission and its members) and 4 (End of functions) of part III (Permanent observer missions to international organizations) and sections 1 (Delegations in general), 2 (Facilities, privileges and immunities of delegations), 3 (Conduct of the delegation and its members) and 4 (End of functions) of part IV (Delegations of States to organs and to conferences). The provisional draft of articles, together with commentaries, is reproduced below in part B of the present chapter. 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 51.

## 2. Arrangement of the draft articles

17. As indicated above, the draft articles on permanent observer missions to international organizations follow immediately those on permanent missions to international organizations. Having the character of permanent missions rather than of special missions, permanent observer missions to international organizations should logically be dealt with after permanent missions of Member States.

18. In formulating the present group of articles the Commission gave careful consideration to the method of drafting the articles on facilities, privileges and immunities for both parts III and IV. Some members of the Commission were in favour of the preparation of general articles which would extend, *mutatis mutandis*, to permanent observer missions and to delegations of States to

organs and to conferences the relevant provisions of part II relating to permanent missions. Other members preferred for the purposes of the first reading the preparation of only those articles which were essential to permanent observer missions and to delegations of States to organs and to conferences, and to refer to the applicable provisions of part II in an explanatory passage in the Commission's report. As will be seen in the corresponding sections below, the Commission adopted a provisional solution which falls in between the two positions outlined above.

19. In the course of the preparation of the articles on facilities, privileges and immunities, the Commission developed a set of draft articles for part III based mainly on the provisions concerning permanent missions and a set of draft articles for part IV based mainly on the pertinent provisions of the Convention on Special Missions<sup>8</sup> and part II of the present draft articles. In doing so, it examined each individual facility, privilege and immunity with reference to both permanent observer missions and delegations to organs of international organizations or to conferences convened by international organizations. In its review, the Commission was particularly concerned with determining what distinctions should be drawn, in specific cases, between special missions, permanent missions, permanent observer missions and delegations of States to organs and to conferences. It satisfied itself, in several instances, that such distinctions need not be drawn and, accordingly, concluded that it was not necessary to repeat in both parts III and IV the substance of the analogous articles, on permanent missions. Consequently, in parts III and IV, there are both specific articles, in those cases in which changes were required to take into account the differences existing between permanent missions and permanent observer missions or delegations of States to organs and to conferences, and articles which employ the technique of "drafting by reference".

20. In adopting the method described above for the purposes of its first reading of the present group of articles, the Commission also kept in mind the fact that two groups of articles, dealing with general principles and with permanent missions to international organizations, had already been transmitted to governments and international organizations for their observations. The Commission intends, during the second reading of the whole draft, to determine whether it would be possible to reduce the number of articles by combining provisions which are susceptible of uniform treatment.

21. The articles of the present group do not include provisions analogous to those of article 50 on consultations between the sending State, the host State and the Organization. In its report on the work of its twenty-first session<sup>9</sup> the Commission stated that article 50 had been put provisionally at the end of the group of articles adopted at that session, its place in the draft as a whole

<sup>6</sup> *Official Records of the General Assembly, Twenty-fourth Session, Sixth Committee, 1103rd to 1111th meetings.*

<sup>7</sup> *Ibid.*, 1142nd, 1143rd and 1148th meetings.

<sup>8</sup> *Ibid.*, *Twenty-fourth Session, Supplement No. 30 (A/7630)*, pp. 99 *et seq.*

<sup>9</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 221, document A/7610/Rev.1, foot-note 44.

to be determined by the Commission at a later stage. The Commission intends article 50 to apply also to the articles on permanent observer missions and on delegations to organs and to conferences, and during the second reading will decide on a suitable place for the article.

22. The Commission also briefly considered the desirability of dealing, in separate articles within the present group, with the possible effects of exceptional situations—such as absence of recognition, absence or severance of diplomatic relations or armed conflict—on permanent observer missions and on delegations to organs of international organizations and to conferences convened by international organizations. In view of the decision taken at the twenty-first session,<sup>10</sup> the Commission decided to examine at its second reading the question of the possible effects of exceptional situations on the representation of States in international organizations in general and to postpone for the time being any decision in the context of parts III and IV.

23. In preparing the present group of articles, the Commission has sought to codify the modern international law concerning permanent observer missions to international organizations and delegations of States to organs of international organizations and to conferences convened by international organizations. The articles formulated by the Commission contain elements of progressive development as well as of codification of the law.

24. 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 of Member States for their observations. It also decided to transmit it to the secretariats of the United Nations, the specialized agencies and the International Atomic Energy Agency (IAEA) for their observations. Again 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 the group of articles also to that Government for its observations.

25. As stated in paragraph 86 below, the Commission, at its present session, has once again reaffirmed 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, and its aim to conclude its work on this topic at its twenty-third session in 1971. Consequently, the Commission has instructed the Secretariat to request the governments and the international organizations to which the present group of draft articles will be transmitted, in pursuance of paragraph 24 above, to submit their observations not later than 15 January 1971.

26. The text of articles 51 to 116, with commentaries, as adopted by the Commission at the present session on the proposal of the Special Rapporteur, is reproduced below.

## B. DRAFT ARTICLES ON REPRESENTATIVES OF STATES TO INTERNATIONAL ORGANIZATIONS

### *Part III. Permanent observer missions to international organizations*

#### SECTION I. PERMANENT OBSERVER MISSIONS IN GENERAL

##### *General comments*

(1) The establishment of permanent observer missions by non-member States of international organizations is well known in practice. Thus, at the present time, the following States non-members of the United Nations maintain permanent observer missions at Headquarters in New York: the Federal Republic of Germany, the Holy See, the Republic of Korea, Monaco, Switzerland and the Republic of Viet-Nam. Permanent observer missions at the United Nations Office at Geneva are maintained by the Federal Republic of Germany, the Holy See, the Republic of Korea, San Marino, Switzerland and the Republic of Viet-Nam. Austria, Finland, Italy and Japan sent permanent observer missions to the United Nations before they became members of the Organization. Permanent observer missions have also been sent to specialized agencies, for instance, by the Holy See to the Food and Agriculture Organization of the United Nations (FAO) and by San Marino to the International Labour Organization (ILO) and on some occasions to the United Nations Educational, Scientific and Cultural Organization (UNESCO).

(2) There are no provisions relating to permanent observer missions of non-member States in the United Nations Charter or the Headquarters Agreements or in General Assembly resolution 257 (III) of 3 December 1948 which deals with permanent missions of Member States. However, the Secretary-General referred to permanent observer missions of non-member States in his report on permanent missions to the fourth session of the General Assembly,<sup>11</sup> but no resolution made any mention of permanent observer missions. Their status, therefore, has been determined by practice.<sup>12</sup>

(3) In the Introduction to his Annual Report on the Work of the Organization covering the period 16 June 1965—15 June 1966, the Secretary-General of the United Nations stated:

... I feel that all countries should be encouraged and enabled, if they wish to do so, to follow the work of the Organization more closely. It could only be of benefit to them and to the United Nations as a whole to enable them to maintain observers at Headquarters, at the United Nations Office at Geneva and in the regional economic commissions, and to expose them to the impact of the work of the Organization and to the currents and

<sup>11</sup> *Official Records of the General Assembly, Fourth Session, Sixth Committee, Annex*, document A/939/Rev.1 and Rev.1/Add.1.

<sup>12</sup> See the memorandum dated 22 August 1962 of the Legal Counsel to the then Acting Secretary-General, reproduced in *Yearbook of the International Law Commission, 1967*, vol. II, p. 190, document A/CN.4/L.118 and Add.1 and 2, Part one, para. 169.

<sup>10</sup> *Ibid.*, p. 206, para. 18.

cross-currents of opinion that prevail within it, as well as to give them some opportunity to contribute to that exchange. Such contacts and inter-communication would surely lead to a better understanding of the problems of the world and a more realistic approach to their solution. In this matter I have felt myself obliged to follow the established tradition by which only certain Governments have been enabled to maintain observers. I commend this question for further examination by the General Assembly so that the Secretary-General may be given a clear directive as to the policy to be followed in the future in the light, I would hope, of these observations.<sup>13</sup>

(4) A similar statement was again included in the Introduction to the Annual Report of the Secretary-General on the Work of the Organization covering the period 16 June 1966-15 June 1967.<sup>14</sup>

(5) Reference should also be made to the message of the Secretary-General of the United Nations to the twenty-third session of the Economic Commission for Europe,<sup>15</sup> in which he stated:

It seems to me that the advances so far achieved in the field of economic development in Europe, laudable as they have been, would be even greater if the United Nations and its agencies could achieve the goal of universality of membership. As the attainment of this objective may, however, take some time, I should like to reiterate what I have underscored in the introduction to my last two Annual Reports to the General Assembly that all countries should be encouraged and enabled, if they so wish, to follow the work of the Organization more closely at the Headquarters and regional levels.

(6) The position of permanent observer missions as regards their privileges and immunities was stated as follows in the memorandum, dated 22 August 1962, sent by the Legal Counsel:<sup>16</sup>

Permanent observers are not entitled to diplomatic privileges or immunities under the Headquarters Agreement or under other statutory provisions of the host State. Those among them who form part of the diplomatic missions of their Governments to the Government of the United States may enjoy immunities in the United States for that reason. If they are not listed in the United States diplomatic list, whatever facilities they may be given in the United States are merely gestures of courtesy by the United States authorities.

(7) A number of States have not become members of the United Nations and, to a lesser degree, of the specialized agencies, notwithstanding the fact that the Charter of the United Nations and the constitutions of the specialized agencies are based on the principle of universality of membership. There are various reasons for such situation. Some States, like Switzerland, have chosen not to become members of the United Nations, although they became members of several specialized agencies. The "package deal" arrangement of simultaneous admission of eighteen States in 1955 which resolved the membership crisis in the United Nations did not include the "divided

countries" of Germany, Korea and Viet-Nam. Some of the constituent parts of those "divided countries" became members of specialized agencies, others did not.

(8) The establishment of permanent observer missions has been mentioned in recent years as one of the possible solutions for the problem of "micro-States". In the introduction to his Annual Report on the Work of the Organization covering the period 16 June 1966—15 June 1967, the Secretary-General of the United Nations stated:

... "micro-States" should ... be permitted to establish permanent observer missions at United Nations Headquarters and at the United Nations Office at Geneva, if they so wish, as is already the case in one or two instances. Measures of this nature would permit the "micro-States" to benefit fully from the United Nations system without straining their resources and potential through assuming the full burdens of United Nations membership which they are not, through lack of human and economic resources, in a position to assume.<sup>17</sup>

The Secretary-General reiterated that position in the Introduction to his Annual Report covering the period 16 June 1967—15 June 1968 when he stated:

I drew attention last year to the problem of the "micro-States". I can well understand the reluctance of the principal organs of the United Nations to grapple with this problem, but I believe it is a problem that does require urgent attention. The question has been considered by many scholars and also by the United Nations Institute for Training and Research. It seems to me that several of the objectives which micro-States hope to achieve by membership in the United Nations could be gained by some other form of association with the Organization, such as the status of observers. In this connexion, I should like to reiterate the suggestion that I made last year that the question of observer status in general, and the criteria for such status, require consideration by the General Assembly so that the present institutional arrangements, which are based solely on practice, could be put on a firm legal footing.<sup>18</sup>

The matter is under consideration by the Security Council following the initiative of the Permanent Representative of the United States of America to the United Nations in his letter of 18 August 1969 to the President of the Security Council.<sup>19</sup> An interim report<sup>20</sup> of a Committee of experts established by the Council at its 1506th meeting has recently been submitted,<sup>21</sup> but no recommendations have yet been made by that Committee.

#### Article 51. Use of terms

For the purposes of the present part:

(a) a "permanent observer mission" is a mission of

<sup>13</sup> See *Official Records of the General Assembly, Twenty-first Session, Supplement No. 1 A* (A/6301/Add.1), p. 14.

<sup>14</sup> *Ibid.*, *Twenty-second Session, Supplement No. 1 A* (A/6701/Add.1), pp. 20-21.

<sup>15</sup> See *Official Records of the Economic and Social Council, Forty-fifth Session, Supplement No. 3* (E/4491), annex II, pp. 114-115.

<sup>16</sup> See foot-note 12.

<sup>17</sup> See *Official Records of the General Assembly, Twenty-second Session, Supplement No. 1 A* (A/6701/Add.1), para. 166.

<sup>18</sup> *Ibid.*, *Twenty-third Session, Supplement No. 1 A* (A/7201/Add.1), para. 172.

<sup>19</sup> *Official Records of the Security Council, Twenty-fourth Year, Supplement for July, August and September 1969*, document S/9397.

<sup>20</sup> *Ibid.*, *Twenty-fifth Year, Supplement for April, May and June 1970*, document S/9836.

<sup>21</sup> See also the study by the United Nations Institute for Training and Research entitled *Status and Problems of Very Small States and Territories*, UNITAR, Series No. 3, New York, 1969.

representative and permanent character sent to an international organization by a State not member of that organization;

(b) the "permanent observer" is the person charged by the sending State with the duty of acting as the head of the permanent observer mission;

(c) the "members of the permanent observer mission" are the permanent observer and the members of the staff of the permanent observer mission;

(d) the "members of the staff of the permanent observer mission" are the members of the diplomatic staff, the administrative and technical staff and the service staff of the permanent observer mission;

(e) the "members of the diplomatic staff" are the members of the staff of the permanent observer mission, including experts and advisers, who have diplomatic status;

(f) the "members of the administrative and technical staff" are the members of the staff of the permanent observer mission employed in the administrative and technical service of the permanent observer mission;

(g) the "members of the service staff" are the members of the staff of the permanent observer mission employed by it as household workers or for similar tasks;

(h) the "private staff" are persons employed exclusively in the private service of the members of the permanent observer mission;

(i) the "host State" is the State in whose territory the Organization has its seat, or an office, at which permanent observer missions are established;

(j) the "premises of the permanent observer mission" are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the permanent observer mission, including the residence of the permanent observer;

(k) an "organ of an international organization" means a principal or subsidiary organ and any commission, committee or sub-group of any of those bodies.

#### Commentary

(1) Since the article on the use of terms previously adopted by the Commission—article 1—cannot be applied to part III of the draft without modification, and certain additional terms used in this part require clarification, the Commission has placed at the beginning of the present part article 51 which states the meanings with which terms are used in part III. Those terms in article 1 which are not repeated in article 51—such as "international organization"—are used in the same sense when they appear in part III. Any exceptions are noted in the commentary. Being aware of a possible overlapping with article 1, the Commission will examine at the second reading whether and to what extent that overlapping can be eliminated. The Commission will also review what adjustments may be required in other articles in part I, such as article 2, in order to clarify their applicability to part III.

(2) Paragraph (a) of article 51 defines the permanent observer mission. The remaining paragraphs of the article

are based on paragraphs (e) to (m) and (k bis)<sup>22</sup> of article 1.

#### Article 52. Establishment of permanent observer missions

Non-member States may, in accordance with the rules or practice of the Organization, establish permanent observer missions for the performance of the functions set forth in article 53.

#### Commentary

(1) This article lays down a general rule in accordance with which non-member States may establish permanent observer missions to effect the necessary association with an international organization when such establishment is permitted by the rules or practice of the organization.

(2) Underlying such a general rule is the assumption that the organization is one of universal character. As defined in article 1 (b), "an 'international organization of universal character' means an organization whose membership and responsibilities are on a world-wide scale". Paragraph (4) of the commentary on article 1 states that:

The definition of the term "international organization of universal character" in sub-paragraph (b) flows from Article 57 of the Charter which refers to the "various specialized agencies established by intergovernmental agreement and having wide international responsibility".

Given the central positions which organizations of universal character occupy in the present day international order and the world-wide character of their activities and responsibilities, it is of vital interest to non-member States to be able to follow the work of those organizations more closely. The association of non-member States with international organizations could also be of benefit to the organizations of universal character and conducive to the fulfilment of their principles and purposes.

(3) During the discussion of article 52, certain members of the Commission stated that it should be understood that "the rules or practice of the Organization" referred to in that provision must be in conformity with the principles of sovereign equality of States and of universality. Others, however, considered that no State was entitled to send an observer mission to an organization when the rules or practice of the organization did not provide for such a possibility.

#### Article 53. Functions of a permanent observer mission

The functions of a permanent observer mission consist *inter alia* in maintaining liaison and promoting co-operation between the sending State and the Organization, ascertaining activities and developments in the Organization and reporting thereon to the Government of the sending State,

<sup>22</sup> Paragraph (k bis) relating to the term "premises of the permanent mission" was added to article 1 by the Commission at its twenty-first session (*Yearbook of the International Law Commission*, 1969, vol. II, p. 206, document A/7610/Rev.1, para. 14).

**negotiating with the Organization when required and representing the sending State at the Organization.**

*Commentary*

(1) The main function of a permanent observer mission is to ensure the necessary liaison between the sending State and the organization. In paragraph 168 of the Introduction to his Annual Report on the work of the Organization covering the period 16 June 1966-15 June 1967, the Secretary-General of the United Nations stated:

In my introduction to last year's annual report as well as in previous years, I have already expressed my strong feeling that all countries should be encouraged and enabled, if they wish to do so, to follow the work of the Organization more closely by maintaining observers at the Headquarters of the United Nations, at Geneva, and in the regional economic commissions. They will thus be exposed to the impact of the work of the Organization and the currents and cross-currents of opinion that prevail within it, besides gaining opportunities to contribute to that exchange.<sup>23</sup>

(2) Permanent observers, being representatives of States non-members of the organization, do not perform functions identical with those of permanent missions of member States as set forth in article 7. They do not, in particular, represent the State "in" the Organization as stated in article 7 (a) in the case of permanent missions. Rather they represent it "at" the Organization. They may, however, perform some of the functions of permanent missions on an *ad hoc* basis; and article 53 accordingly provides that permanent observer missions may, besides ensuring the necessary liaison between their respective governments and the organization to which they are assigned, perform certain other functions of permanent missions. In particular, the function of negotiation can be exercised by permanent observers when an agreement with the international organization is under consideration. However, as such negotiation is not a regularly recurrent part of a permanent observer mission's activity, the Commission added in the text of article 53 the expression "when required" after the words "negotiating with the Organization".

**Article 54. Accreditation to two or more international organizations or assignment to two or more permanent observer missions**

1. The sending State may accredit the same person as permanent observer to two or more international organizations or assign a permanent observer as a member of another of its permanent observer missions.

2. The sending State may accredit a member of the staff of a permanent observer mission to an international organization as permanent observer to other international organizations or assign him as a member of another of its permanent observer missions.

*Commentary*

Article 54 is based on article 8 relating to the accredita-

tion of the same person or of a member of the staff of a permanent mission as permanent representative to two or more international organizations or the assignment of a permanent representative or of a member of the staff of a permanent mission to two or more permanent missions.<sup>24</sup>

**Article 55. Appointment of the members of the permanent observer mission**

Subject to the provisions of articles 56 and 60, the sending State may freely appoint the members of the permanent observer mission.

**Article 56. Nationality of the members of the permanent observer mission**

The permanent observer and the members of the diplomatic staff of the permanent observer mission should in principle be of the nationality of the sending State. They may not be appointed from among persons having the nationality of the host State, except with the consent of that State which may be withdrawn at any time.

*Commentary*

(1) Article 55 is based on the provisions of article 10 relating to the appointment of the members of the permanent mission. It emphasizes the principle of the freedom of choice by the sending State of the members of the permanent observer mission. Article 55 expressly provides for two exceptions to that principle. The first is embodied in article 56 which requires the consent of the host State for the appointment of one of its nationals as a permanent observer or as a member of the diplomatic staff of the permanent observer mission of another State. The second exception relates to the size of the mission; that question is regulated by article 60.

(2) In paragraphs (2) and (3) of its commentary on article 10, the Commission stated that:

Unlike the relevant articles of the Vienna Convention on Diplomatic Relations and the draft articles on special missions, article 10 does not make the freedom of choice by the sending State of the members of its permanent mission to an international organization subject to the *agrément* of either the organization or the host State as regards the appointment of the permanent representative, the head of the permanent mission.

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. As regards the United Nations, the Legal Counsel pointed out at the 1016th meeting of the Sixth Committee, on 6 December 1967, that:

<sup>23</sup> Official Records of the General Assembly, Twenty-second Session, Supplement No. 1 A (A/6701/Add.1).

<sup>24</sup> See above document A/CN.4/227 and Add.1 and 2, section II, Part III, "Note on assignment to two or more international organizations or to functions unrelated to permanent missions".

"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."

(3) Article 56 is based on article 11 which states that the permanent representative and the members of the diplomatic staff of the permanent mission should in principle be of the nationality of the sending State, and that they may not be appointed from among persons having the nationality of the host State, except with the consent of that State. The Commission decided to limit the scope of the provision to nationals of the host State and not to extend it to nationals of a third State. It therefore did not include in article 11 the rule laid down in paragraph 3 of article 8 of the Vienna Convention on Diplomatic Relations. The highly technical character of some international organizations makes it desirable not to restrict unduly the free selection of members of the mission since the sending State may find it necessary to appoint as members of its permanent mission nationals of a third State who possess the required training and experience.

(4) The Commission decided to take a similar approach in dealing with the problem of nationality of the members of the permanent observer mission and article 56 reflects this decision.

#### *Article 57. Credentials of the permanent observer*

1. The credentials of the permanent observer shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or by another competent minister if that is allowed by the practice followed in the Organization, and shall be transmitted to the competent organ of the Organization.

2. A non-member State may specify in the credentials submitted in accordance with paragraph 1 of this article that its permanent observer shall represent it as an observer in one or more organs of the Organization when such representation is permitted.

#### *Commentary*

(1) The study prepared by the Secretariat<sup>25</sup> refers only indirectly to the question of credentials of permanent observers, in the context of facilities accorded to them. In that respect, the study quotes the above-mentioned memorandum, dated 22 August 1962, sent by the Legal Counsel to the then Acting Secretary-General,<sup>26</sup> paragraph 4 of which states *inter alia*:

[...] Communications informing the Secretary-General of their [the permanent observers] appointment are merely acknowledged by the Secretary-General or on his behalf and they are not

<sup>25</sup> See *Yearbook of the International Law Commission, 1967*, vol. II, p. 154, document A/CN.4/L.118 and Add.1 and 2.

<sup>26</sup> See foot-note 12 above.

received by the Secretary-General for the purpose of presentation of credentials as is the case for Permanent Representatives of States Members of the Organization.

(2) Unlike permanent representatives of Member States, permanent observers of non-member States do not present credentials to the Secretary-General. The non-member State which wishes to maintain a permanent observer to the United Nations simply addresses a letter to the Secretary-General informing him of the name of its permanent observer.

(3) During the discussion of this question in the Commission some members were in favour of adhering to the present United Nations informal practice in accordance with which permanent observers do not present credentials. The majority of the members thought, however, that it would be preferable to provide, in the draft articles, for the submission of credentials. Moreover, inclusion of such a provision would help make as complete as possible the legal regulation of the institution of permanent observers to international organizations.

(4) Paragraph 1 of article 57 is based on article 12 relating to credentials of the permanent representatives, since the Commission believes that permanent observers should be able to present credentials in substantially the same form as permanent representatives.

(5) Paragraph 2 of the article is based on paragraph 1 of article 13 relating to permanent representatives. No provisions similar to those of paragraph 2 of article 13 (concerning the right of the permanent representative to represent the State in the organs of the organization for which there are no special requirements as regards representation) were included in part III of the draft, since there was no general rule in international practice that non-member States could be represented by permanent observers at meetings of organs of international organizations. The Commission will consider, at its second reading, the question of replacing the word "*préciser*" in the French text by the word "*spécifier*" both in this provision and in paragraph 1 of article 13.

#### *Article 58. Full powers to represent the State in the conclusion of treaties*

1. A permanent observer in virtue of his functions and without having to produce full powers is considered as representing his State for the purpose of adopting the text of a treaty between that State and the international organization to which he is accredited.

2. A permanent observer is not considered in virtue of his functions as representing his State for the purpose of signing a treaty (whether in full or *ad referendum*) between that State and the international organization to which he is accredited unless it appears from the circumstances that the intention of the Parties was to dispense with full powers.

#### *Commentary*

It is recognized in article 53 that one of the functions of the permanent observer mission is negotiating, when required, with the Organization. Since there are some

instances of agreements negotiated with organizations by permanent observers on behalf of the States they represented, the majority of the Commission thought it desirable to include in part III a provision similar to article 14 concerning permanent representatives.

**Article 59. Composition of the permanent observer mission**

1. In addition to the permanent observer, a permanent observer mission may include members of the diplomatic staff, the administrative and technical staff and the service staff.

2. When members of a permanent diplomatic mission, a consular post or a permanent mission, in the host State, are included in a permanent observer mission, their privileges and immunities as members of their respective missions or consular post shall not be affected.

**Article 60. Size of the permanent observer mission**

The size of the permanent observer mission shall not exceed what is reasonable and normal, having regard to the functions of the Organization, the needs of the particular mission and the circumstances and conditions in the host State.

**Article 61. Notifications**

1. The sending State shall notify the Organization of:

(a) The appointment of the members of the permanent observer mission, their position, title and order of precedence, their arrival and final departure or the termination of their functions with the permanent observer mission;

(b) The arrival and final departure of a person belonging to the family of a member of the permanent observer mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the permanent observer mission;

(c) The arrival and final departure of persons employed on the private staff of members of the permanent observer mission and the fact that they are leaving that employment;

(d) The engagement and discharge of persons resident in the host State as members of the permanent observer mission or persons employed on the private staff entitled to privileges and immunities.

2. Whenever possible, prior notification of arrival and final departure shall also be given.

3. The Organization shall transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.

4. The sending State may also transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.

*Commentary*

(1) Paragraph 1 of article 59 is based on article 15 relating to the composition of the permanent mission. It provides

that every permanent observer mission must include a permanent observer of the sending State, that is to say, a person to whom that State has assigned the task of being its representative in the mission.

(2) Paragraph 2 of article 59 is based on paragraph 2 of article 9 of the Convention on Special Missions. The provision is designed to deal with the frequent practice of permanent observers being at the same time members of diplomatic missions and of members of permanent observer missions being drawn from consular staff. No similar provision has been included in part II of the draft relating to permanent missions but it is the intention of the Commission to consider the inclusion of such a provision during its second reading of that part.

(3) The Commission reserved the question of the place in part III of paragraph 2 of article 59 and the question whether the final words of the French version should read "*n'en sont pas affectés*" rather than "*ne sont pas affectés*".

(4) Article 60 is based on article 16 relating to the size of the permanent mission. During the discussion in the Commission, concern has been expressed at the reference in article 60 to the "functions of the Organization". The Commission, however, came to the conclusion that those functions had some part in determining the proper size of a permanent observer mission.

(5) The provisions of article 61 are based on those of article 17. Some members of the Commission suggested that the references in both articles 17 and 61 to the host State, should, following the conventions on diplomatic relations, consular relations and special missions, be more precise and specify the Ministry of Foreign Affairs or such other Ministry as may be agreed. The Commission decided to consider this further at its second reading.

**Article 62. Chargé d'affaires ad interim**

If the post of permanent observer is vacant, or if the permanent observer is unable to perform his functions, a *chargé d'affaires ad interim* may act as head of the permanent observer mission. The name of the *chargé d'affaires ad interim* shall be notified to the Organization either by the permanent observer or, in case he is unable to do so, by the Minister for Foreign Affairs or by another competent minister if that is allowed by the practice followed in the Organization.

*Commentary*

(1) It is the practice of a number of permanent observer missions, in particular in Geneva, to appoint members of their staff to be *chargé d'affaires ad interim* in the case of a prolonged absence of the permanent observer. Accordingly it was thought desirable, again in order to make the regulation of the institution of permanent observers as complete as possible, to include a provision on this topic.

(2) The wording of the provision is based on that of article 18 relating to permanent representatives. There are two differences. The first is that, since non-member States are not obliged to send permanent observers, the first

sentence provides a faculty rather than imposes an obligation. In this connexion, the question was raised whether article 18 should be correspondingly revised in the second reading. Secondly, the expression "by the Minister for Foreign Affairs or by another competent minister if that is allowed by the practice followed in the Organization" replaces the words "by the sending State" appearing in article 18. At its second reading of part II, the Commission will consider the possibility of using the same expression in article 18.

(3) Some doubts were expressed about the appropriateness of the term "*chargé d'affaires ad interim*" when used in connexion with permanent observer missions. It was decided, however, that it was reasonable to use the term because of the representative functions performed by observers albeit on a limited scale. Moreover, as indicated above, the term is used, on occasion, in practice.

### *Article 63. Offices of permanent observer missions*

1. The sending State may not, without the prior consent of the host State, establish offices of the permanent observer mission in localities other than that in which the seat or an office of the Organization is established.

2. The sending State may not establish offices of the permanent observer mission in the territory of a State other than the host State, except with the prior consent of such a State.

#### *Commentary*

(1) Article 63 is based on article 20 relating to the offices of permanent missions. In paragraph (1) of its commentary on article 20, the Commission stated:

The provisions of article 20 have been included in the draft to avoid the awkward situation which would result for the host State if an office of a permanent mission was established in a locality other than that in which the seat or an office of the Organization is established. The article deals also with the rare cases in which sending States wish to establish offices of their permanent missions outside the territory of the host State.

(2) Some members suggested that the Commission should consider during its second reading whether the word "localities" should be replaced by "a locality".

### *Article 64. Use of [flag and] emblem*

1. The permanent observer mission shall have the right to use the [flag and] emblem of the sending State on its premises.

2. In the exercise of the right accorded by this article, regard shall be had to the laws, regulations and usages of the host State.

#### *Commentary*

(1) Article 21 provides that the permanent mission may use the flag and emblem on its premises and that the permanent representative has the same right as regards his

residence and means of transport. Some members argued that from a functional point of view these stipulations should also apply to permanent observer missions. They held that the value of the flag on the premises and means of transport was considerable, especially in the case of observers functioning in unsettled areas. Others considered, however, that permanent observer missions could not be fully equated for all purposes with permanent missions and, thus, in effect with diplomatic missions. Since their functions were different from those of permanent missions some reduction in the visible signs of their presence might be appropriate. Moreover, there was no established custom regarding the display of the flag either on the residence or the vehicles of permanent observers.

(2) Because of this division of views, the Commission placed between brackets the words "flag and" in article 64 in order to draw the attention of governments to the matter and to elicit their views. Furthermore, the Commission did not include in article 64 the second sentence of paragraph 1 of article 21. That sentence reads: "The permanent representative shall have the same right as regards his residence and means of transport".

(3) Some members suggested that the Commission should consider during its second reading whether the expression "regulations and usages of the host State" should be replaced by "regulations and usages in the host State".

## SECTION 2. FACILITIES, PRIVILEGES AND IMMUNITIES OF PERMANENT OBSERVER MISSIONS

### *General comments*

(1) The position as regards facilities accorded to permanent observers at United Nations Headquarters is summarized as follows in paragraphs 3 and 4, of the above-mentioned memorandum of the Legal Counsel:<sup>27</sup>

Since Permanent Observers of non-Member States do not have an officially recognized status, facilities which are provided them by the Secretariat are strictly confined to those which relate to their attendance at public meetings and are generally of the same nature as those extended to distinguished visitors at United Nations Headquarters. The Protocol Section arranges for their seating at such meetings in the public gallery and for the distribution to them of the relevant unrestricted documentation. A list of their names is appended, for convenience of reference, to the List of Permanent Missions to the United Nations published monthly by the Secretariat, as Permanent Observers often represent their Governments at sessions of United Nations organs at which their Governments have been invited to participate.

No other formal recognition or protocol assistance is extended to Permanent Observers by the Secretariat. Thus no special steps are taken to facilitate the granting of United States visas to them and their personnel nor for facilitating the establishment of their offices in New York. Communications informing the Secretary-General of their appointment are merely acknowledged by the Secretary-General or on his behalf and they are not received by the Secretary-General for the purpose of presentation of credentials as is the case for Permanent Representatives of States Members of the Organization.

<sup>27</sup> See foot-note 12 above.

(2) The position as regards diplomatic privileges and immunities for permanent observers at United Nations Headquarters is summarized as follows in paragraph 5 of the above-mentioned memorandum:<sup>28</sup>

Permanent Observers are not entitled to diplomatic privileges or immunities under the Headquarters Agreement or under other statutory provisions of the host State. Those among them who form part of the diplomatic missions of their Governments to the Government of the United States may enjoy immunities in the United States for that reason. If they are not listed in the United States diplomatic list, whatever facilities they may be given in the United States are merely gestures of courtesy by the United States authorities.

(3) At the Office of the United Nations at Geneva, the Federal Republic of Germany, the Holy See, the Republic of Korea, San Marino and the Republic of Viet-Nam maintain permanent observer missions. Their permanent observers enjoy *de facto* the same privileges and immunities as permanent representatives, except in the case of the permanent observer of San Marino, who is a Swiss citizen. In addition, Switzerland appointed in 1966 an "observateur permanent du Département politique fédéral auprès de l'Office des Nations Unies à Genève".

(4) In *Pappas v. Francisci*,<sup>29</sup> a claim by a member of the staff of the then Italian observer mission to the United Nations at Headquarters to immunity from giving evidence was rejected. The Court referred to the fact that the Department of State had not recognized the defendant as possessing immunity under any applicable statute or treaty. The Court referred in its decision to a letter of the Acting Chief of Protocol of the United Nations concerning the status of representatives of non-member nations maintaining observers' offices in New York, in which it was stated that the "Headquarters Agreement does not mention the observers' category and up until now the agreement has not been interpreted to confer diplomatic immunity on such persons and/or members of their staff". The Court remarked that the benefits of the International Organizations Immunities Act of the United States of America (i.e. functional privileges and immunities) are, however, granted to persons designated by foreign Governments to serve as their representatives "in or to" international organizations.

(5) Some members of the Commission pointed out that since permanent observer missions do not participate directly in the activities of the Organization, they do not have the relationship which permanent missions have with the Organization. As their functions differ, they should not be equated with permanent missions for the purposes of determining the facilities, privileges and immunities to be accorded to them.

(6) The majority of the members considered, however, that, notwithstanding the fact that permanent observer missions to international organizations are established by non-member States while permanent missions are established by member States, they both have a representative and permanent character. This is reflected in article 51 (a),

which defines a "permanent observer mission" as "a mission of representative and permanent character sent to an international organization by a State not a member of that organization". This definition is identical in substance with the definition of the permanent mission in article 1 (d), according to which a "permanent mission" is a "mission of representative and permanent character sent by a State member of an international organization to the Organization". Facilities, privileges and immunities are to be determined by reference not only to the functions of the permanent observer mission but also by reference to its representative character. On this view, the facilities, privileges and immunities to be accorded to permanent observer missions should be substantially the same as those accorded to permanent missions, with such differences as are dictated by differences in function.

(7) On the basis of the view reflected in the preceding paragraph, the Commission decided to draft provisionally all but two of the articles contained in the present section following the technique of "drafting by reference". Consequently, and in order to avoid unnecessary repetition, the commentaries on particular articles in this section, except those on articles 65 and 75, do no more than indicate the content of the corresponding provisions of part II referred to therein, on the assumption that reference will also be made to the text of the commentaries on the relevant articles of part II.

#### *Article 65. General facilities*

The host State shall accord to the permanent observer mission the facilities required for the performance of its functions. The Organization shall assist the permanent observer mission in obtaining those facilities and shall accord to the mission such facilities as lie within its own competence.

#### *Commentary*

Article 65 reproduces the provisions of article 22 except as regards the words "full facilities", which have been replaced by the words "facilities required" in the first sentence. In introducing this change, the Commission has sought to reflect the difference, both in nature and scope, between the functions, obligations and needs of permanent missions, on the one hand, and those of permanent observer missions, on the other, which makes it unnecessary for the latter to be given the same facilities as the former.

#### *Article 66. Accommodation and assistance*

The provisions of articles 23 and 24 shall apply also in the case of permanent observer missions.

#### *Commentary*

Article 23 concerns the accommodation of the permanent mission and its members. Article 24 refers to the assistance by the Organization in respect of privileges and immunities.

<sup>28</sup> *Idem.*

<sup>29</sup> *Supreme Court of the State of New York, Special Term, King's County, Part. V, 6 February 1953, 119 N.Y.S. 2d. 69.*

**Article 67. Privileges and immunities of the permanent observer mission**

The provisions of articles 25, 26, 27, 29 and 38, paragraph 1 (a), shall apply also in the case of permanent observer missions.

*Commentary*

Articles 25, 26, 27, 29 and 38, paragraph 1 (a), provide respectively for inviolability of the premises of the permanent mission, exemption of the premises of the permanent mission from taxation, inviolability of archives and documents, freedom of communication, and exemption from customs duties and inspection of articles for the official use of the permanent mission.

**Article 68. Freedom of movement**

The provisions of article 28 shall apply also in the case of members of the permanent observer mission and members of their families forming part of their respective households.

*No commentary*

**Article 69. Personal privileges and immunities**

1. The provisions of articles 30, 31, 32, 35, 36, 37 and 38, paragraphs 1 (b) and 2, shall apply also in the case of the permanent observer and the members of the diplomatic staff of the permanent observer mission.

2. The provisions of article 40, paragraph 1, shall apply also in the case of members of the family of the permanent observer forming part of his household and the members of the family of a member of the diplomatic staff of the permanent observer mission forming part of his household.

3. The provisions of article 40, paragraph 2, shall apply also in the case of members of the administrative and technical staff of the permanent observer mission, together with members of their families forming part of their respective households.

4. The provisions of article 40, paragraph 3, shall apply also in the case of members of the service staff of the permanent observer mission.

5. The provisions of article 40, paragraph 4, shall apply also in the case of the private staff of members of the permanent observer mission.

*Commentary*

Articles 30, 31, 32, 35, 36, 37 and 38, paragraphs 1 (b) and 2, provide respectively, as regards the persons of the permanent representative and of the members of the diplomatic staff of the permanent mission, for: personal inviolability; inviolability of residence and property; immunity from jurisdiction; exemption from social security legislation; exemption from dues and taxes; exemption from personal services; and exemption from customs duties and inspection as regards articles for personal use

and personal baggage. Article 40, paragraphs 1, 2, 3 and 4, regulate respectively the privileges and immunities of the following persons: members of the family of the permanent representative and of the diplomatic staff of the permanent mission; members of the administrative and technical staff of the permanent mission and their families; members of the service staff of the permanent mission; and the private staff of members of the permanent mission.

**Article 70. Nationals of the host State and persons permanently resident in the host State**

The provisions of article 41 shall apply also in the case of members of the permanent observer mission and persons on the private staff who are nationals of or permanently resident in the host State.

*No commentary*

**Article 71. Waiver of immunity and settlement of civil claims**

The provisions of articles 33 and 34 shall apply also in the case of persons enjoying immunity under article 69.

*No commentary*

**Article 72. Exemption from laws concerning acquisition of nationality**

The provisions of article 39 shall apply also in the case of members of the permanent observer mission not being nationals of the host State and members of their families forming part of their household.

*No commentary*

**Article 73. Duration of privileges and immunities**

The provisions of article 42 shall apply also in the case of every person entitled to privileges and immunities under the present section.

*No commentary*

**Article 74. Transit through the territory of a third State**

The provisions of article 43 shall apply also in the case of the members of the permanent observer mission and members of their families, and the couriers, official correspondence, other official communications and bags of the permanent observer mission.

*No commentary*

**Article 75. Non-discrimination**

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

*Commentary*

Article 75 reproduces the provision of article 44 except as regards the word "articles" which has been replaced by the word "part". In making this change, the Commission wishes to indicate its intention to consider at its second reading whether that provision should be included in a general part covering all of the different parts of the draft articles.

SECTION 3. CONDUCT OF THE PERMANENT  
OBSERVER MISSION AND ITS MEMBERS

**Article 76. Conduct of the permanent observer mission and its members**

The provisions of articles 45 and 46 shall apply also in the case of permanent observer missions.

*Commentary*

Articles 45 and 46 refer, respectively, to respect for the laws and regulations of the host State and professional activity.

SECTION 4. END OF FUNCTIONS

**Article 77. End of functions**

The provisions of articles 47, 48 and 49 shall apply also in the case of permanent observer missions.

*Commentary*

Articles 47, 48 and 49 regulate, respectively, the end of functions of the permanent representative or of a member of the diplomatic staff of the permanent mission, facilities for departure, and protection of premises and archives.

**Part IV. Delegations of States to organs and to conferences**

SECTION 1. DELEGATIONS IN GENERAL

**Article 78. Use of terms**

For the purposes of the present part:

(a) An "organ" means a principal or subsidiary organ of an international organization and any commission, committee or sub-group of any such organ, in which States are members;

(b) A "conference" means a conference of States convened by or under the auspices of an international organization, other than a meeting of an organ;

(c) A "delegation to an organ" means the delegation designated by a State member of the organ to represent it therein;

(d) A "delegation to a conference" means the delegation sent by a participating State to represent it at the conference;

(e) A "representative" means any person designated by a State to represent it in an organ or at a conference;

(f) The "members of the delegation" are the representatives and the members of the Staff of the delegation to an organ or to a conference, as the case may be;

(g) The "members of the staff of the delegation" are the members of the diplomatic staff, the administrative and technical staff and the service staff of the delegation to an organ or to a conference, as the case may be;

(h) The "members of the diplomatic staff" are the members of the delegation, including experts and advisers, who have been given diplomatic status by the sending State for the purposes of the delegation;

(i) The "members of the administrative and technical staff" are the members of the staff of the delegation to an organ or to a conference, as the case may be, employed in the administrative and technical service of the delegation;

(j) The "members of the service staff" are the members of the staff of the delegation to an organ or to a conference, as the case may be, employed by it as household workers or for similar tasks;

(k) The "private staff" are persons employed exclusively in the private service of the members of the delegation to an organ or to a conference, as the case may be;

(l) The "host State" is the State in whose territory a conference or a meeting of an organ is held.

*Commentary*

(1) Considerations similar to those stated in paragraph (1) of the commentary to article 51 apply in the case of article 78. The Commission has, therefore, placed at the beginning of the present part article 78 which states the meanings with which terms are used in part IV. As is the case with article 51, there is a possible overlapping with article 1. The Commission will also examine at the second reading whether and to what extent that overlapping can be eliminated.

(2) Paragraph (a), regarding the term "organ", reproduces in substance the definitions of the term contained in articles 1 and 51 with the addition of the expression "in which States are members". That expression excludes from the scope of part IV bodies composed of individual experts who serve in a personal capacity. In order to concentrate on the major aspects of the topic, the Commission considered it preferable to deal in part IV only with organs in which States form part or all of the membership. The term, as defined, would not exclude the somewhat unusual case of an organ in which individuals as well as States serve as members. The articles in part IV, however, deal only with the aspects of State participation.

(3) Paragraph (b), regarding the term "conference", uses the phrase "convened by or under the auspices of an international organization". This formulation is designed to include a conference to which a host State issues the invitations on behalf of an international organization.

(4) Paragraphs (c) to (e) define respectively the terms "delegation to an organ", "delegation to a conference" and "representative". The Commission wishes to point out that in paragraph (d) the word "participating" is used in the same general sense as that word is used in article 9 of the Vienna Convention on the Law of Treaties.<sup>80</sup>

(5) Paragraphs (f) to (l) are based on the corresponding paragraphs of article 1.

(6) The article does not include a definition of the term "premises" along the lines contained in paragraph (j) of article 51 because the presence of a delegation in a host State is for a limited period of time and the nature of the accommodation reflects this.

#### *Article 79. Derogation from the present part*

**Nothing in the present part shall preclude the conclusion of other international agreements having different provisions concerning delegations to an organ or a conference.**

#### *Commentary*

Article 79 is supplementary to article 5 of part I. Since the latter article applies only to "representatives of States to an international organization" the Commission has included in part IV a similar provision concerning "delegations to an organ or a conference". The general provisions in articles 3 and 4, relating to relevant rules of international organizations and relationship with other existing international agreements, are applicable to part IV. Consequently, the articles in part IV should be considered as not affecting existing international agreement or any relevant rules of international organizations that may be in force now or in the future.

#### *Article 80. Conference rules of procedure*

**The provisions contained in articles 81, 83, 86, 88 and 90 shall apply to the extent that the rules of procedure of a conference do not provide otherwise.**

#### *Commentary*

Article 80 extends to the rules of procedure of conferences the general reservation stated in article 3 as regards the rules of international organizations. There is, however, an important difference in substance between the two provisions. While article 3 applies to all the articles of the present draft, article 80 concerns only some of the provisions of part IV. The Commission is of the opinion that, in view of their nature, rules of procedure should

not derogate from certain provisions, such as those relating to privileges and immunities or upon which the host State may have relied in making arrangements for the conference.

#### *Article 81. Composition of the delegation*

**A delegation to an organ or to a conference shall consist of one or more representatives of the sending State from among whom the sending State may appoint a head. It may also include diplomatic staff, administrative and technical staff and service staff.**

#### *Commentary*

(1) Article 81 makes it mandatory for the sending State to appoint at least one representative in every delegation which it sends to an organ or to a conference. Some members of the Commission thought that the appointment of a representative should be made permissive by substituting, in the first sentence of the article, the word "may" for "shall" before "consist". The majority of the Commission, however, was of the opinion that every delegation should include at least one person to whom the sending State has entrusted the task of representing it. Otherwise the delegation would be without a member who could speak on behalf of the State or cast its vote.

(2) While the appointment of at least one representative is mandatory under article 81, the appointment of other members, and in particular of the head of the delegation, is permissive.

#### *Article 82. Size of the delegation*

**The size of a delegation to an organ or to a conference shall not exceed what is reasonable or normal, having regard to the functions of the organ or, as the case may be, the tasks of the conference, as well as the needs of the particular delegation and the circumstances and conditions in the host State.**

#### *Commentary*

Like article 60 relating to the size of the permanent observer mission, article 82 is based on article 16 relating to the size of the permanent mission. There is, however, one difference between article 82, on the one hand, and articles 16 and 60 on the other. The latter refer to the "functions" of the Organization. While article 82 uses that term as regards organs, it uses the word "tasks" in referring to conferences. The Commission was of the opinion that the word "tasks" was more appropriate than "functions" in relation to conferences.

#### *Article 83. Principle of single representation*

**A delegation to an organ or to a conference may represent only one State.**

#### *Commentary*

(1) The majority of the Commission was of the opinion that the residual rule laid down in article 83 reflected the

<sup>80</sup> See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 290.

practice of international organizations, as described by the Special Rapporteur in his fifth report.<sup>31</sup> Some members, however, expressed reservations concerning the article. They pointed out that for reasons of economy or convenience a State may wish to be represented by another State in an organ or at a conference. The Commission will review the matter at the second reading of the draft articles in the light of the observations which it receives from governments and international organizations.

(2) The Commission considered whether a second paragraph should be added to article 83 providing that, in certain conditions, a member of a delegation might represent another State. It came to the conclusion that the situations envisaged were so varied that a general rule could well be only a complicating factor and that the subject should be left to the rules and practices of the various international organizations.

#### *Article 84. Appointment of the members of the delegation*

Subject to the provisions of articles 82 and 85, the sending State may freely appoint the members of its delegation to an organ or to a conference.

##### *Commentary*

Like article 55 relating to permanent observer missions, article 84 is based on article 10 relating to permanent missions. The basis for the rule as set out in the commentaries on articles 10 and 55 is likewise applicable with respect to delegations and the requirement of an *agrément* is eliminated for delegations to organs or conferences.

#### *Article 85. Nationality of the members of the delegation*

The representatives and members of the diplomatic staff of a delegation to an organ or to a conference should in principle be of the nationality of the sending State. They may not be appointed from among persons having the nationality of the host State, except with the consent of that State which may be withdrawn at any time.

##### *Commentary*

(1) Article 85 is based on article 11 relating to permanent missions, on which article 56 relating to permanent observer missions is also based.

(2) In its final clause reading: "except with the consent of that [the host] State which may be withdrawn at any time", article 11 lays down the requirement of the advance consent of the host State for the appointment to the permanent mission by the sending State of one of its nationals. Some members of the Commission thought that this requirement should be dispensed with in the case of dele-

gations in view of the temporary nature of those bodies. They therefore suggested that the final clause of article 85 should read: "if the [host] State objects, which it may do at any time". Other members expressed the view that article 85 should make it clear that the consent of the host State could be withdrawn only if that would not seriously inconvenience the delegation in carrying out its functions. The majority of the Commission, however, was of the opinion that no substantive change should be made in the language of article 11. The Commission therefore decided to reproduce the final clause of that article in article 85 without any modification. At the same time it expressed the view that the host State should withdraw its consent to the appointment of one of its nationals to a delegation only in the most serious circumstances and that every effort should be made not to disrupt the work of the delegation.

#### *Article 86. Acting head of the delegation*

1. If the head of a delegation to an organ or to a conference is absent or unable to perform his functions, an acting head may be designated from among the other representatives in the delegation by the head of the delegation or, in case he is unable to do so, by a competent authority of the sending State. The name of the acting head shall be notified to the Organization or to the conference.

2. If a delegation does not have another representative available to serve as acting head, another person may be designated as in paragraph 1 of this article. In such case credentials must be issued and transmitted in accordance with article 87.

##### *Commentary*

(1) Paragraph 1 of article 86 is based on article 18 concerning permanent missions. There are, however, two differences between that paragraph and article 18. In the first place, the expression "*chargé d'affaires ad interim*" appearing in article 18 has been replaced by "acting head" in order to conform to the terminology normally used in delegations. In the second place, since meetings of conferences and organs are sometimes of a very short duration, the second sentence of article 18 has been changed in order to provide the opportunity for more speed and flexibility in the notification of the appointment of an acting head of delegation.

(2) Paragraph 2, which corresponds to paragraph 2 of article 19 of the Vienna Convention on Diplomatic Relations,<sup>32</sup> deals with the case in which no representative is available to replace the head of the delegation. It provides that in such a case "another person may be designated as in paragraph 1 of this article". However, because a delegation cannot function as a delegation in the absence of a representative empowered to act on behalf of the sending State, paragraph 2 of article 86 contains a requirement that such person must be designated as a representative through the issuance and transmittal of credentials in accordance with article 87.

<sup>31</sup> See above document A/CN.4/227 and Add.1 and 2, section II, article 63. See also *Yearbook of the International Law Commission, 1967*, vol. II, p. 169, document A/CN.4/L.118 and Add.1 and 2, para. 40.

<sup>32</sup> United Nations, *Treaty Series*, vol. 500, p. 95.

### *Article 87. Credentials of representatives*

1. The credentials of a representative to an organ shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or by another competent authority if that is allowed by the practice followed in the Organization, and shall be transmitted to the Organization.

2. The credentials of a representative in the delegation to a conference shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or by another competent authority if that is allowed in relation to the conference in question, and shall be transmitted to the conference.

#### *Commentary*

(1) Paragraph 1 of article 87 concerns the credentials of representatives to an organ and paragraph 2 those of representatives to a conference. Both paragraphs are based on article 12 relating to permanent missions on which paragraph 1 of article 57, concerning permanent observer missions, is also based.

(2) It should be noted that the expression "another competent minister" in article 12 has been replaced in article 87 by "another competent authority". The Commission made this change in order to take into account the practice whereby credentials of representatives to organs or to conferences dealing with technical matters may be issued not by a minister but by the authority in the sending State directly concerned with those matters or by the permanent representative.

### *Article 88. Full powers to represent the State in the conclusion of treaties*

1. Heads of State, Heads of Government and Ministers for Foreign Affairs, in virtue of their functions and without having to produce full powers, are considered as representing their State for the purpose of performing all acts relating to the conclusion of a treaty in a conference or in an organ.

2. A representative to an organ or in a delegation to a conference, in virtue of his functions and without having to produce full powers, is considered as representing his State for the purpose of adopting the text of a treaty in that organ or conference.

3. A representative to an organ or in a delegation to a conference is not considered in virtue of his functions as representing his State for the purpose of signing a treaty (whether in full or *ad referendum*) concluded in that organ or conference unless it appears from the circumstances that the intention of the Parties was to dispense with full powers.

#### *Commentary*

(1) The substance of article 88 is derived from article 7 of the Vienna Convention on the Law of Treaties. The Commission incorporated into article 88 those principles in article 7 which, in its view, are required to deal with the normal problems arising in connexion with the authority

of representatives to act on behalf of their States in the conclusion of treaties and the adoption of the treaty text.

(2) During the discussion of article 88, some members drew the attention of the Commission to the clause in paragraph 3 stating that a representative "... is not considered in virtue of his functions as representing his State for the purpose of signing a treaty...". They held that that clause, and hence the whole of paragraph 3, was redundant, since it was clear from paragraph 2 that the competence of a representative acting without full powers was limited to the adoption of the text of a treaty unless paragraph 1 (b) of article 7 of the Vienna Convention was applicable. The Commission, however, decided to retain paragraph 3 in order to elicit views of governments and international organizations regarding the value of this additional clarification for the purposes of its second reading of the draft articles.

(3) The Commission noted that in United Nations practice the credentials to participate in a conference had always been considered sufficient for the signature of the final act which had invariably been of a purely formal character. When the instruments adopted at a United Nations conference had been incorporated in the final act, those instruments had been signed separately and full powers had been required for their signature.

### *Article 89. Notifications*

1. The sending State, with regard to its delegation to an organ or to a conference, shall notify the Organization or, as the case may be, the conference, of:

(a) The appointment, position, title and order of precedence of the members of the delegation, their arrival and final departure or the termination of their functions with the delegation;

(b) The arrival and final departure of a person belonging to the family of a member of the delegation and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the delegation;

(c) The arrival and final departure of persons employed on the private staff of members of the delegation and the fact that they are leaving that employment;

(d) The engagement and discharge of persons resident in the host State as members of the delegation or persons employed on the private staff entitled to privileges and immunities;

(e) The location of the premises occupied by the delegation and of the private accommodation enjoying inviolability under articles 94 and 99, as well as any other information that may be necessary to identify such premises and accommodation.

2. Whenever possible, prior notification of arrival and final departure shall also be given.

3. The Organization or, as the case may be, the conference, shall transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.

4. The sending State may also transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.

*Commentary*

(1) All the provisions of article 89, with the exception of paragraph 1 (e), are based on article 17 relating to permanent missions on which article 61, relating to permanent observer missions, is also based.

(2) Paragraph 1 (e) is based on paragraph 1 (f) of article 11 of the Convention on Special Missions. The reason for inclusion of this information is the desirability of giving the host State all information that will be valuable in connexion with its responsibilities toward the delegation. At the second reading of the draft, the Commission intends to consider the inclusion in articles 17 and 61 of a similar paragraph.

*Article 90. Precedence*

**Precedence among delegations to an organ or to a conference shall be determined by the alphabetical order used in the host State.**

*Commentary*

(1) Unlike article 19 which relates to precedence among permanent representatives, article 90 relates to precedence among delegations. Article 19 provides for two alternative methods of determining precedence: the first is the alphabetical order and the second the order of time and date of submission of credentials, in accordance with the practice established in the organization. The Commission retained only the first alternative for article 90. The second method would be of little, if any, assistance for delegations to organs or conferences since most of those delegations submit their credentials simultaneously, or at very short intervals on the first day of the conference or of the meeting of the organ.

(2) During the discussion of article 90 some members of the Commission criticized the use of the word "precedence" which in their view raised questions regarding the principle of sovereign equality of States. The Commission decided, however, to retain that word, as it had been used in the Vienna conventions on diplomatic and consular relations<sup>33</sup> and in the Convention on special missions. The word has thus acquired a special connotation, in conventions of this character, with respect to matters of etiquette and protocol.

**SECTION 2. FACILITIES, PRIVILEGES  
AND IMMUNITIES OF DELEGATIONS**

*General comments*

(1) A substantial body of rules has developed in relation to privileges and immunities of representatives to organs of international organizations and to conferences convened by international organizations, based on the provisions of

Article 105 of the Charter. Paragraphs 2 and 3 of that Article provide as follows:

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

(2) At the San Francisco Conference, the Committee on Legal Questions stated that Article 105 "sets forth a rule obligatory for all members as soon as the Charter becomes operative".<sup>34</sup> Similarly, the Executive Committee on Legal Problems of the Preparatory Commission of the United Nations reported in 1945 that Article 105 is "applicable even before the General Assembly has made the recommendations referred to in paragraph (3) of the article, or the conventions there mentioned have been concluded".<sup>35</sup>

(3) The Preparatory Commission of the United Nations instructed the Executive Secretary to invite the attention of the Members of the United Nations to the fact that, under Article 105 of the Charter, the obligation of all Members to accord to the United Nations, its officials and the representatives of its Members such privileges and immunities as are necessary for the fulfilment of its purposes, operated from the coming into force of the Charter. It recommended that "the General Assembly, at its First Session, should make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of Article 105 of the Charter, or propose conventions to the Members of the United Nations for this purpose."<sup>36</sup> It transmitted for the consideration of the General Assembly a study on privileges and immunities and, as working papers, a draft convention on privileges and immunities and a draft treaty to be concluded by the United Nations Organization with the United States of America, the country in which the headquarters of the Organization was to be located. It considered that the details of the prerogatives to be accorded to members of the International Court of Justice should be determined after the Court had been consulted, and that until further action had been taken the "rules applicable to the members of the Permanent Court of International Justice should be followed."<sup>37</sup> It recommended that the privileges and immunities of specialized agencies contained in their respective constitutions should be reconsidered and negotiations opened "for their co-ordination"<sup>38</sup> in the light of any convention ultimately adopted by the United Nations.

(4) The documents of the Preparatory Commission were considered by the Sixth Committee of the General Assembly at the first part of its session in January-February 1946.

<sup>34</sup> See *Documents of the United Nations Conference on International Organization*, IV/2/42 (2), vol. XIII, p. 704.

<sup>35</sup> Preparatory Commission of the United Nations, *Report by the Executive Committee* (PC/EX/113/Rev.1), Part III, chap. V, sect. 5, para. 2.

<sup>36</sup> *Report of the Preparatory Commission of the United Nations* (PC/20), chap. VII, sect. 1, para. 2.

<sup>37</sup> *Ibid.*, para. 4.

<sup>38</sup> *Ibid.*, para. 5.

<sup>33</sup> *Ibid.*, vol. 596, p. 261.

On the recommendation of the Sixth Committee, the General Assembly adopted the following resolutions concerning the privileges and immunities of the United Nations.

(a) A resolution relating to the adoption of the General Convention on Privileges and Immunities of the United Nations, to which the text of the convention is annexed [Resolution 22 A (I)];

(b) A resolution relating to negotiations with the competent authorities of the United States of America concerning the arrangements required as a result of the establishment of the seat of the United Nations in the United States of America, and text of a draft convention to be transmitted as a basis for discussion for these negotiations [Resolution 22 B (I)];

(c) A resolution on the privileges and immunities of the International Court of Justice [Resolution 22 C (I)];

(d) A resolution on the co-ordination of the privileges and immunities of the United Nations and the specialized agencies [Resolution 22 D (I)].

(5) The General Convention on the Privileges and Immunities of the United Nations<sup>39</sup> (hereinafter referred to as the General Convention) was approved by the General Assembly on 13 February 1946. On 1 July 1970 it was in force as regards 102 States.<sup>40</sup> A Convention on the Privileges and Immunities of the Specialized Agencies<sup>41</sup> (hereinafter referred to as the Specialized Agencies Convention) was approved by the General Assembly on 21 November 1947. On 1 July 1970 it was in force as regards 70 States.

(6) The Specialized Agencies Convention is applicable, subject to variations set forth in a special annex for each agency, the final form of which is determined by the agency concerned, to nine specialized agencies expressly designated in the Convention—namely, the International Labour Organisation (ILO), the Food and Agricultural Organization of the United Nations (FAO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Civil Aviation Organization (ICAO), the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD), the World Health Organization (WHO), the Universal Postal Union (UPU), and the International Telecommunication Union (ITU), and to any other agency subsequently brought into relationship with the United Nations in accordance with Articles 57 and 63 of the Charter. In accordance with that last provision, the Convention has been applied to the World Meteorological Organization (WMO), the Intergovernmental Maritime Consultative Organization (IMCO) and the International Finance Corporation (IFC). An agreement on the privileges and immunities of the International Atomic Energy Agency (IAEA) was approved by the Board of Governors of the Agency on 1 July 1959, which “in general follows the Convention on the Privileges and Immunities of the Specialized Agencies”.<sup>42</sup>

<sup>39</sup> United Nations, *Treaty Series*, vol. 1, p. 15.

<sup>40</sup> The most recent significant development has been the accession, on 29 April 1970, of the Government of the United States of America—the host country to the headquarters of the United Nations.

<sup>41</sup> *Ibid.*, vol. 33, p. 261.

<sup>42</sup> United Nations, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. II (United Nations publication, Sales No.: 61.V.3), p. 358.

(7) In addition to the General Convention, headquarters agreements have been concluded between the United Nations or the concerned specialized agency on the one hand, and the various States on whose territory headquarters are maintained on the other hand. Headquarters agreements have been concluded by the United Nations with the United States of America<sup>43</sup> and Switzerland,<sup>44</sup> by ICAO with Canada,<sup>45</sup> by UNESCO with France,<sup>46</sup> by FAO with Italy,<sup>47</sup> by IAEA with Austria,<sup>48</sup> and by the ILO,<sup>49</sup> WHO,<sup>50</sup> WMO,<sup>51</sup> ITU<sup>52</sup> and UPU<sup>53</sup> with Switzerland.

(8) Constitutional instruments of regional organizations also usually contain provisions relating to privileges and immunities of the organization. Such provisions are found, for instance, in article 106 of the Charter of the Organization of American States signed at Bogota on 30 April 1948; article 40 of the Statute of the Council of Europe of 5 May 1949; article 14 of the Pact of the League of Arab States of 22 March 1945; article XIII of the Statutes of the Council for Mutual Economic Assistance signed at Sofia on 14 December 1959; and article XXXI of the Charter of the Organization of African Unity of 25 May 1963. These constitutional provisions have been implemented by general conventions on privileges and immunities, largely inspired by the General Convention and the Specialized Agencies Convention, as is illustrated by the following agreements: the Agreement on Privileges and Immunities of the Organization of American States, opened for signature on 15 May 1949; the General Agreement on Privileges and Immunities of the Council of Europe, signed at Paris on 2 September 1949; the *Protocole sur les privilèges et immunités de la Communauté européenne du charbon et de l'acier*, signed at Paris on 18 April 1951; the Convention on the Privileges and Immunities of the League of Arab States approved by the Council of the League of Arab States on 10 May 1953; and the Convention concerning the juridical personality, privileges and immunities of the Council for Mutual Economic Assistance, signed at Sofia on 14 December 1959. A number of headquarters and host agreements have been also concluded by regional organizations with States on whose territory they maintain headquarters or other offices.

(9) Pursuant to Article 105 of the Charter and corresponding provisions applicable to the specialized agencies, the privileges and immunities of representatives to organs

<sup>43</sup> United Nations, *Treaty Series*, vol. 11, p. 11.

<sup>44</sup> *Ibid.*, vol. 1, p. 163.

<sup>45</sup> *Ibid.*, vol. 96, p. 155.

<sup>46</sup> United Nations, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. II (United Nations publication, Sales No.: 61.V.3), p. 240.

<sup>47</sup> *Ibid.*, p. 187.

<sup>48</sup> United Nations, *Treaty Series*, vol. 339, p. 110.

<sup>49</sup> *Ibid.*, vol. 15, p. 377.

<sup>50</sup> *Ibid.*, vol. 26, p. 331.

<sup>51</sup> *Ibid.*, vol. 211, p. 277.

<sup>52</sup> United Nations, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. II (United Nations publication, Sales No.: 61.V.3), p. 319.

<sup>53</sup> *Ibid.*, p. 321.

of the United Nations and the specialized agencies and to conferences convened by those international organizations are regulated by provisions in the General Convention, the Specialized Agencies Convention and the headquarters agreements referred to in paragraph (7) above.

(10) Article V, section 13, on "Representatives of members", of the Specialized Agencies Convention and article IV, section 9, on "The representatives of Members of the United Nations", of the Interim Arrangement concluded between the Secretary-General of the United Nations and the Swiss Federal Council<sup>54</sup> are modelled on article IV, section 11, of the General Convention, which reads as follows:

Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during their journey to and from the place of meeting, enjoy the following privileges and immunities:

(a) Immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind;

(b) Inviolability for all papers and documents;

(c) The right to use codes and to receive papers or correspondence by courier or in sealed bags;

(d) Exemption in respect of themselves and their spouses from immigration restrictions, aliens registration or national service obligations in the State they are visiting or through which they are passing in the exercise of their functions;

(e) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(f) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys; and also,

(g) Such other privileges, immunities and facilities, not inconsistent with the foregoing, as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales taxes.

(11) It is noteworthy that among the privileges and immunities listed in article IV, section 11 of the General Convention, immunity from jurisdiction is limited to words spoken or written and all acts done in the exercise of functions and during the journey to and from the place of meeting. This limited immunity from jurisdiction is in contrast with the full diplomatic immunities accorded by the General and Specialized Agencies Conventions to the Secretary-General (e.g. article V, section 19, of the General Convention). It is also in contrast with the full diplomatic immunities which the members of the permanent missions to the United Nations and the specialized agencies enjoy in accordance with the provisions of the Headquarters Agreement concluded between the United Nations and the United States of America on 26 June 1947 and with the decision of the Swiss Federal Council dated 31 March 1948.

(12) As regards the nature of the privileges and immunities envisaged in Article 105 of the Charter, at the San Francisco Conference the Committee on Legal Questions stated expressly that it had "seen fit to avoid the term

"diplomatic", in describing the nature of the privileges and immunities conferred under Article 105, and had "preferred to substitute a more appropriate standard, based . . . in the case of . . . representatives . . . , on providing for the independent exercise of their functions".<sup>55</sup>

(13) Article 7, paragraph 4, of the Covenant of the League of Nations provided that:

Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities.<sup>56</sup>

(14) The Pan-American Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928<sup>57</sup> contains the following provisions:

*Article 1.* States have the right of being represented before each other through diplomatic officers.

*Article 2.* Diplomatic officers are classed as ordinary and extraordinary.

Those who permanently represent the Government of one State before that of another are ordinary.

Those entrusted with a special mission or those who are accredited to represent the Government in international conferences and congresses or other international bodies are extraordinary.

*Article 3.* Except as concerns precedence and etiquette, diplomatic officers, whatever their category, have the same rights, prerogatives and immunities.

Etiquette depends upon diplomatic usages in general as well as upon the laws and regulations of the country to which the officers are accredited.

...

*Article 9.* Extraordinary diplomatic officers enjoy the same prerogatives and immunities as ordinary ones.

(15) Authors generally agree that representatives to international conferences enjoy full diplomatic status. The foundation of this position is sometimes given as being the diplomatic character of the representative's mission. Hesitation on the part of some writers to concede full diplomatic immunities to representatives to international conferences is prompted by the fact that as some of these conferences are of purely technical and of relatively secondary importance, such treatment would place them on a level higher than that of representatives of States to organs of the United Nations.

(16) As regards the nature and extent of privileges and immunities of members of delegations to organs of inter-

<sup>55</sup> See foot-note 34 above.

<sup>56</sup> Detailed arrangements concerning the privileges and immunities of the League of Nations were worked out between the Secretary-General of the League and the Swiss Government in the form of the "Modus Vivendi" of 1921 as supplemented by the "Modus Vivendi" of 1926. The "Modus Vivendi" of 1921 was embodied in a letter of 19 July 1921 from the Head of the Federal Political Department of the Swiss Government to the Secretary-General of the League of Nations on behalf of the Secretariat of the League and also of the International Labour Office. The "Modus Vivendi" of 1926 was submitted to the Council of the League for approval. For an account of the negotiations which led to the conclusion of these two agreements, see M. Hill, *Immunities and Privileges of International Officials—The Experience of the League of Nations* (Washington, Carnegie Endowment for International Peace, 1947), pp. 14-23.

<sup>57</sup> League of Nations, *Treaty Series*, vol. CLV (1934-1935), No. 3581, p. 259.

<sup>54</sup> United Nations, *Treaty Series*, vol. 1, p. 163.

national organizations and to conferences convened by international organizations, the Commission takes the position that these should be based upon a selective merger of the pertinent provisions of the Convention on Special Missions and the provisions regarding permanent missions to international organizations provided for in Part II of these articles. This position is derived from a number of recent developments which have taken place in the codification of diplomatic law. One of these developments is the evolution of the institution of permanent missions to international organizations and the assimilation of their status and immunities to diplomatic status and immunities. Another factor is that during the discussion and in the formulation of its provisional draft articles on special missions, the Commission expressed itself in favour of: (a) making the basis and extent of the immunities and privileges of special missions more or less the same as that of permanent diplomatic missions, and (b) taking the position that it was impossible to make a distinction between special missions of a political nature and those of a technical nature; every special mission represented a sovereign State in its relations with another State. The Commission is of the view that, owing to the temporary character of their task, delegations to organs of international organizations and to conferences convened by international organizations occupy, in the system of diplomatic law of international organizations, a position similar to that of special missions within the framework of bilateral diplomacy. It follows that the determination of their privileges and immunities should be made in the light of those of special missions. However, after taking into account adjustments required by the fact that their task is temporary, privileges and immunities of these delegations should reflect the essential role that the law of international organizations must play in their formulation.

**Article 91. Status of the Head of State and persons of high rank**

1. The Head of the sending State, when he leads a delegation to an organ or to a conference, shall enjoy in the host State or in a third State 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 delegation of the sending State to an organ or to a conference, shall enjoy in the host State or in a third State, in addition to what is granted by the present part, the facilities, privileges and immunities accorded by international law.

*Commentary*

Article 91 is based on article 21 of the Convention on Special Missions. It provides that a person belonging to one of the categories referred to in the article who becomes a member of a delegation to an organ or to a conference retains the facilities, privileges and immunities accorded to him by international law. The Commission felt it desirable to include this principle in the present part of the draft articles because on numerous occasions a delegation to an

organ or to a conference is headed or includes among its members a Head of State, a Head of Government, a Minister for Foreign Affairs or "other persons of high rank". For instance, such high level representation is quite common in delegations to the General Assembly of the United Nations and corresponding general representative organs of the specialized agencies. Also, Article 28, paragraph 2, of the Charter provides as follows:

The Security Council shall hold periodic meetings at which each of its members may, if it so desires, be represented by a member of the government or by some other specially designated representative.

The Security Council approved recently a statement expressing the consensus of the Council

that the holding of periodic meetings, at which each member of the Council would be represented by a member of the Government or by some other specially designated representative, could enhance the authority of the Security Council and make it a more effective instrument for the maintenance of international peace and security.<sup>58</sup>

**Article 92. General facilities, assistance by the Organization and inviolability of archives and documents**

The provisions of articles 22, 24 and 27 shall apply also in the case of a delegation to an organ or to a conference.

*Commentary*

Articles 22, 24 and 27 provide respectively for general facilities, assistance by the Organization in respect of privileges and immunities and inviolability of archives and documents.

**Article 93. Premises and accommodation**

The host State shall assist a delegation to an organ or to a conference, if it so requests, in procuring the necessary premises and obtaining suitable accommodation for its members. The Organization shall, where necessary, assist the delegation in this regard.

*Commentary*

The first sentence of article 93 is based on article 23 of the Convention on Special Missions and the second sentence on paragraph 2 of article 23 of the present draft articles. The Commission has based the first sentence on the corresponding provision of the Convention on Special Missions because the temporary nature of a delegation to an organ or to a conference raises the same considerations with regard to premises and accommodation as in the case of a special mission. The second sentence of the article refers both to a delegation to an organ and a delegation to a conference. The Organization concerned with convening a conference should assist delegations to the extent of its ability.

<sup>58</sup> Statement approved in connexion with the question of initiating periodic meetings of the Security Council in accordance with article 28 (2) of the Charter. See *Official Records of the Security Council, Twenty-fifth Year, 1544th meeting.*

*Article 94. Inviolability of the premises*

1. The premises where a delegation to an organ or to a conference is established shall be inviolable. The agents of the host State may not enter the said premises, except with the consent of the head of the delegation or, if appropriate, of the head of the permanent diplomatic mission of the sending State accredited to the host State. 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 head of the delegation or of the head of the permanent diplomatic mission.

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

3. The premises of the delegation, their furnishings, other property used in the operation of the delegation and its means of transport shall be immune from search, requisition, attachment or execution.

*Commentary*

Article 94 is based on article 25 of the Convention on Special Missions. The problems involved in the inviolability of the premises of delegations and those of the inviolability of the premises of special missions are identical since both are usually housed in hotels or other temporary quarters such as office space in the premises of a permanent diplomatic mission. Some members of the Commission, however, reserved their position with regard to the last sentence of paragraph 1. At the second reading, the Commission will consider whether to add to article 78 a definition of the "premises of the delegation".<sup>59</sup>

*Article 95. Exemption of the premises of the delegation from taxation*

1. To the extent compatible with the nature and duration of the functions performed by a delegation to an organ or to a conference, the sending State and the members of the delegation acting on behalf of the delegation shall be exempt from all national, regional or municipal dues and taxes in respect of the premises occupied by the delegation, 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 with a member of the delegation.

*Commentary*

Article 95 is based on article 24 of the Convention on

<sup>59</sup> Such a decision was taken by the Commission at its twenty-first session in connexion with the definition of the "premises of the permanent mission", as indicated in paragraph 4 of the commentary to article 25 of the present draft articles. In article 51 a definition of the "premises of a permanent observer mission" is found in sub-paragraph (j).

Special Missions. It differs from article 26 on permanent missions in that the exemption from taxation is related to the nature and duration of the functions performed by the delegation.

*Article 96. 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 a delegation to an organ or to a conference such freedom of movement and travel in its territory as is necessary for the performance of the functions of the delegation.

*Commentary*

Article 96 is based on article 27 of the Convention on Special Missions. Freedom of movement for members of a delegation is granted for travel necessary for the performance of delegation's functions.

*Article 97. Freedom of communication*

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

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

3. Where practicable, the delegation shall use the means of communication, including the bag and the courier, of the permanent diplomatic mission, of the permanent mission or of the permanent observer mission of the sending State.

4. The bag of the delegation shall not be opened or detained.

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

6. The courier of the delegation, 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.

7. The sending State or the delegation may designate couriers *ad hoc* of the delegation. In such cases the provisions of paragraph 6 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 delegation's bag in his charge.

8. The bag of the delegation may be entrusted to the captain of a ship or of a commercial aircraft scheduled to

land at an authorized port of entry. The captain 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 delegation. By arrangement with the appropriate authorities, the delegation 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*

Article 97 is based on article 28 of the Convention on Special Missions. In view of the limited requirements of a delegation, it differs from article 29 on permanent missions in that the Commission considered it advisable to insert, as paragraph 3, a provision similar to paragraph 3 of article 28 of the Convention on Special Missions. One difference between this article and article 28 of the Convention on Special Missions is the addition in paragraphs 1 and 3 of the words "permanent mission(s)" and "permanent observer mission(s)" in order to co-ordinate the article with the corresponding provisions of Parts II and III of the present draft articles. Another is the addition in paragraph 1 of the word "delegations", in order to enable the delegations of the sending State to communicate with each other. The Commission wishes to reiterate that the word "delegation", as used throughout the article, means a delegation to an organ or to a conference.

#### *Article 98. Personal inviolability*

The persons of the representatives in a delegation to an organ or to a conference and of the members of its diplomatic staff 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.

#### *Commentary*

Article 98 is based on article 29 of the Convention on Special Missions, and article 30 on permanent missions.

#### *Article 99. Inviolability of the private accommodation*

1. The private accommodation of the representatives in a delegation to an organ or to a conference and of the members of its diplomatic staff shall enjoy the same inviolability and protection as the premises of the delegation.

2. Their papers, their correspondence and, except as provided in paragraph . . . of article 100, their property shall likewise enjoy inviolability.

#### *Commentary*

Article 99 is based on article 30 of the Convention on Special Missions. The blank space in paragraph 2 can be filled in only after a decision is reached on the alternative solutions as to jurisdiction proposed in article 100.

#### *Article 100. Immunity from jurisdiction*

##### ALTERNATIVE A

1. The representatives in a delegation to an organ or to a conference and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the host State.

2. They shall also enjoy immunity from the civil and administrative jurisdiction of the host State, 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 concerned holds it on behalf of the sending State for the purposes of the delegation;

(b) An action relating to succession in which the person concerned 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 concerned 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 concerned.

3. The representatives in the delegation and the members of its diplomatic staff are not obliged to give evidence as witnesses.

4. No measures of execution may be taken in respect of a representative in the delegation or a member of its diplomatic staff except in the cases coming under subparagraphs (a), (b), (c), and (d) of paragraph 2 of this article and provided that the measures concerned can be taken without infringing the inviolability of his person or his accommodation.

5. The immunity from jurisdiction of the representatives in the delegation and of the members of its diplomatic staff does not exempt them from the jurisdiction of the sending State.

##### ALTERNATIVE B

1. The representatives in a delegation to an organ or to a conference and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the host State.

2. (a) The representatives and members of the diplomatic staff of the delegation shall enjoy immunity from the civil and administrative jurisdiction of the host State in respect of all acts performed in the exercise of their official functions.

(b) No measures of execution may be taken in respect of a representative or a member of the diplomatic staff of the delegation unless the measures concerned can be taken without infringing the inviolability of his person or his accommodation.

3. The representatives and members of the diplomatic staff of the delegation are not obliged to give evidence as witnesses.

**4. The immunity from jurisdiction of the representatives and members of the diplomatic staff of the delegation does not exempt them from the jurisdiction of the sending State.**

*Commentary*

(1) The Commission decided to bring to the attention of governments the foregoing alternatives for article 100. Alternative A is modelled directly on article 31 of the Convention on Special Missions. Alternative B is based on article IV, section 11, of the General Convention [see paragraph (10) of the General comments, above]; it follows that section in limiting immunity from the civil and administrative jurisdiction to acts performed in the exercise of official functions but goes beyond it in providing, as in alternative A, for full immunity from the criminal jurisdiction of the host State.

(2) The provisions concerning measures of execution laid down in paragraph 2 (b) of alternative B provide that such measures cannot be taken unless they would not infringe the inviolability of the person or accommodation of the representative in question. In alternative A, on the other hand, measures of execution can be taken only, subject to the same limitations, in the case of the four specific exemptions to the immunity from civil jurisdiction described in sub-paragraphs (a), (b), (c) and (d) of paragraph 2.

(3) A provision like that of paragraph 2 (d) of alternative A was placed in brackets by the Commission in article 32, concerning the immunity from jurisdiction of the permanent representative and the members of the diplomatic staff of the permanent mission. The different position taken by the Commission in the present instance is a result of the inclusion of a similar provision by the General Assembly in article 31 of the Convention on Special Missions. The Commission intends at the second reading to review its earlier decision taken in the context of Part II.

(4) The Commission did not reach any decision regarding inclusion of an article on settlement of civil claims similar to article 34 on permanent missions, pending a decision on alternative A or B at the second reading.

*Article 101. Waiver of immunity*

**1. The immunity from jurisdiction of the representatives in a delegation to an organ or to a conference, of the members of its diplomatic staff and of persons enjoying immunity under article 105 may be waived by the sending State.**

**2. Waiver must always be express.**

**3. The initiation of proceedings by any of the persons referred to in paragraph 1 of this article shall preclude them 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*

Article 101 follows the pattern of article 41 of the Convention on Special Missions and article 33 of the present draft articles. Paragraph 3 follows more closely paragraph 3 of article 41 of the Convention on Special Missions because it is thought that that formulation is clearer and more precise than paragraph 3 of article 33 of the present draft articles. When the Commission reviews article 33 at its next session it will consider making a similar change in it.

*Article 102. Exemption from dues and taxes*

**The representatives in a delegation to an organ or to a conference and the members of its diplomatic staff 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 foods 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 delegation;**

**(c) Estate, succession or inheritance duties levied by the host State, subject to the provisions of article 109;**

**(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, subject to the provisions of article 95.**

*Commentary*

Article 102 is based on article 34 of the Vienna Convention on Diplomatic Relations, article 33 of the Convention on Special Missions and article 36 of the present draft articles. The Commission considered whether to insert a sub-paragraph which would add "excise duties or sales taxes" to the list of exclusions from exemption. Some members considered that such addition would be desirable because it would accord with the existing provision in the United Nations Convention on Privileges and Immunities and would reduce administrative difficulties in the host States. Other members considered that the nature and level of "sales taxes" varied according to the country concerned. Some members were of the opinion that "excise duties or sales taxes" were, at least to some extent, covered by sub-paragraph (a) of the article. The Commission decided it was desirable to adhere to the pattern originally laid down in the Convention on Diplomatic Relations.

*Article 103. Exemption from customs duties and inspection*

**1. Within the limits of such laws and regulations as it may adopt, the host State shall 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 a delegation to an organ or to a conference;

(b) Articles for the personal use of the representatives in the delegation and the members of its diplomatic staff.

2. The personal baggage of the representatives in a delegation to an organ or to a conference and of the members of its diplomatic staff 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. In such cases, inspection shall be conducted only in the presence of the person concerned or of his authorized representative.

*Commentary*

Article 103 is based on article 35 of the Convention on Special Missions. There are certain differences in formulation from article 38 on permanent missions which will be the subject of review in the course of the second reading.

**Article 104. Exemption from social security legislation, personal services and laws concerning acquisition of nationality**

The provisions of articles 35, 37 and 39 shall apply also in the case of a delegation to an organ or to a conference.

*Commentary*

Articles 35, 37 and 39 provide respectively for exemption from social security legislation, exemption from personal services and exemption from laws concerning acquisition of nationality.

**Article 105.\* Privileges and immunities of other persons**

1. If representatives in a delegation to an organ or to a conference or members of its diplomatic staff are accompanied by members of their families, the latter shall enjoy the privileges and immunities specified in articles 98, 99, 100, 101, 102, 103 and 104 provided they are not nationals of or permanently resident in the host State.

2. Members of the administrative and technical staff of the delegation shall enjoy the privileges and immunities specified in articles 98, 99, 100, 101, 102 and 104, except that the immunities specified in paragraph 2 of article 100 from the civil and administrative jurisdiction of the host State, shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges mentioned in paragraph 1 of article 103 in respect of articles imported at the time of their entry into the territory of the host State to attend the meeting of the organ or conference. Members of their families who accompany

\* Paragraph 2 will require revision if alternative B of article 100 is adopted.

them and who are not nationals of or permanently resident in the host State shall enjoy the same privileges and immunities.

3. Members of the service staff of the delegation shall enjoy immunity from the jurisdiction of the host State 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 exemption from social security legislation as provided in article 104.

4. Private staff of the members of the delegation shall be exempt from dues and taxes on the emoluments they receive by reason of their employment. In all other respects, they may enjoy privileges and immunities only to the extent permitted 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 delegation.

*Commentary*

Article 105 is based on articles 36 to 39 of the Convention on Special Missions and article 40 of the present draft articles. The final version of the article will depend on whether the Commission adopts alternative A or alternative B of article 100. For this reason, some members of the Commission suggested that two alternatives should be drafted for the present article. It was, however, considered sufficient to add to the article a footnote explaining that if alternative B of article 100 is adopted, paragraph 2 of the present article will require revision.

**Article 106. Nationals of the host State and persons permanently resident in the host State**

The provisions of article 41 shall apply also in the case of a delegation to an organ or to a conference.

*No commentary*

**Article 107. Privileges and immunities in case of multiple functions**

When members of a permanent diplomatic mission, a consular post, a permanent mission or a permanent observer mission, in the host State, are included in a delegation to an organ or to a conference, their privileges and immunities as members of their respective missions or consular post shall not be affected.

*Commentary*

Article 107 is based on paragraph 2 of article 9 of the Convention on Special Missions. It reproduces, with the necessary drafting changes, the provisions of paragraph 2 of article 59 on permanent observer missions.

**Article 108. Duration of privileges and immunities**

1. Every person entitled to privileges and immunities under the provisions of this part shall enjoy such privileges

and immunities from the moment he enters the territory of the host State in connexion with the meeting of an organ or conference or, if he is already in its territory, from the moment when his appointment is notified to the host State by the Organization, by the conference or by the sending State.

2. When the functions of a person entitled to privileges and immunities under this part have come to an end, the privileges and immunities of such person shall normally cease at the moment when he leaves the territory of the host State, or on the expiry of a reasonable period in which to do so, but shall subsist until that time. However, with respect to acts performed by such a person in the exercise of his functions as a member of a delegation to an organ or to a conference, immunity shall continue to subsist.

3. In the event of the death of a member of a delegation, 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 territory of the host State.

*Commentary*

(1) Article 108 is based on article 43 of the Convention on Special Missions.

(2) A change has been made, however, in the final sentence of paragraph 1 along the lines of the corresponding sentence of article 42, paragraph 1, of the present draft articles. The words "by the conference" have been added in order to cover the case when notification is made by the conference itself and not by the Organization responsible for convening it or directly by the sending State.

(3) Because States sometimes notify the appointment of members of their delegations several months ahead of the beginning of a conference or a session of an organ, the Commission will examine at the second reading the possibility of inserting in the last part of paragraph 1 a reasonable time limit for the enjoyment of the privileges and immunities. The Commission does not intend that persons so appointed who were already in the territory of the host State should enjoy privileges and immunities for a long period when this is not justified by the functions of the delegation.

(4) The expression "even in case of armed conflict" used in paragraph 2 of article 43 of the Convention on Special Missions has not been included in the present article in view of the Commission's decision to examine at its second reading the possible effects of exceptional situations, such as an armed conflict, on the representation of States in international organizations in general and in the specific context of Parts III and IV of the present draft articles (see para. 22 of the present report).

*Article 109. Property of a member of a delegation or of a member of his family in the event of death*

1. In the event of the death of a member of a delegation to an organ or to a conference or of a member of his family accompanying him, if the deceased was not a national of or permanently resident in the host State, 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.

2. Estate, succession and inheritance duties shall not be levied on movable property which is in the host State solely because of the presence there of the deceased as a member of the delegation or of the family of a member of the delegation.

*Commentary*

Article 109 is based on article 44 of the Convention on Special Missions. The corresponding provisions in Part II of the present draft articles are paragraphs 3 and 4 of article 42. In view of the fact that the General Assembly, after considering articles 44 and 45 of the draft articles on special missions, decided to keep each of them as a separate article in the Convention on Special Missions, the Commission has followed the same presentation in the present part. At the second reading it will also make paragraphs 3 and 4 of article 42 the subject of a separate article.

*Article 110. Transit through the territory of a third State*

1. If a representative in a delegation to an organ or to a conference or a member of its diplomatic staff passes through or is in the territory of a third State while proceeding to take up his functions or returning to the sending State, 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 person referred to in this paragraph, whether travelling with him 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 transit of members of the administrative and technical or service staff of the delegation, or 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 the host State is bound to accord under the present part. Subject to the provisions of paragraph 4 of this article, they shall accord to the couriers and bags of the delegation in transit the same inviolability and protection as the host State is bound to accord under the present part.

4. The third State shall be bound to comply with its obligations in respect of the persons mentioned in paragraphs 1, 2 and 3 of this article only if it has been informed in advance, either in the visa application or by notification, of the transit of those persons as members of the delegation, members of their families or couriers, and has raised no objection to it.

5. 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 the bags of the delegation, when the use of the territory of the third State is due to *force majeure*.

*Commentary*

Article 110 is based on article 42 of the Convention on Special Missions. The question of the possible effects of an armed conflict arises also in the context of the present article. The Commission will study it at the second reading in accordance with the decision recorded in paragraph 22 of the present report.

**Article 111. Non-discrimination**

**In the application of the provisions of the present part, no discrimination shall be made between States.**

*Commentary*

Article 111 is based on article 44 of the present draft articles.

SECTION 3. CONDUCT OF THE DELEGATION  
AND ITS MEMBERS

**Article 112. 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 delegation 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 delegation in the premises where the organ or conference is meeting or the premises of the delegation.

3. The premises of the delegation shall not be used in any manner incompatible with the exercise of the functions of the delegation.

*Commentary*

Article 112 is based on article 45 of the present draft articles. The only difference between the two provisions is that the words "in carrying out the functions of the permanent mission within either the Organization or the premises of a permanent mission" used in the second sentence of paragraph 2 of article 45, have been replaced by the words "in carrying out the functions of the delegation in the premises where the organ or conference is meeting or the premises of the delegation". Several members of the Commission reserved their position with regard to the words in question. The Commission adopted the

present text on the basis that paragraph 2 of article 112 and paragraph 2 of article 45, will be reviewed at the second reading.

**Article 113. Professional activity**

**The provisions of article 46 shall apply also in the case of a delegation to an organ or to a conference.**

*Commentary*

Under this article, representatives and members of the diplomatic staff of a delegation will be prohibited from practising for profit any professional or commercial activity in the host State.

SECTION 4. END OF FUNCTIONS

**Article 114. End of the functions of a member  
of a delegation**

**The functions of a member of a delegation to an organ or to a conference shall come to an end, *inter alia*:**

(a) On notification to this effect by the sending State to the Organization or the conference;

(b) Upon the conclusion of the meeting of the organ or the conference.

*Commentary*

(1) Article 114 is based on article 47 of the present draft articles. The differences are the addition of the words "or the conference" in sub-paragraph (a), the new formulation of sub-paragraph (b) and the use of the expression "a member of a delegation" in the introductory sentence and the title of the article.

(2) The formula used in sub-paragraph (b) of article 47 has been replaced by "upon the conclusion of the meeting of the organ or the conference". Some members of the Commission pointed out that in the English text the word "meeting" should be replaced by another word because, in the context of the rules and procedures and practice of organs and conferences, it normally has a particular meaning somewhat narrower than the words *réunion* and *reunion* used in the French and Spanish texts respectively. The Commission will review this question at the second reading.

(3) The expression "a member of a delegation" has been deliberately used in order to broaden the scope of the provision by covering all members of the delegation. A similar change will probably be necessary in article 47 when the Commission proceeds to revise it at its next session.

**Article 115. Facilities for departure**

**The provisions of article 48 shall apply also in the case of a delegation to an organ or to a conference.**

### Commentary

The Commission considered the possibility of including in the draft, as a counterpart to article 115, a provision on the obligation of the host State to allow members of delegations to enter its territory to take up their posts. However, in view of the decision taken at the twenty-first session,<sup>60</sup> the Commission postponed its decision on this matter, in the context of part IV, until the second reading of the draft.

#### *Article 116. Protection of premises and archives*

**1. When the meeting of an organ or a conference comes to an end, the host State must respect and protect the premises of a delegation so long as they are assigned to it, as well as the property and archives of the delegation. 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 delegation from the territory of the host State.**

### Commentary

Article 116 is based on article 49 of the present draft articles. The only differences are in paragraph 1, where the words "When the meeting of an organ or a conference comes to an end," replace the words "When the permanent mission is temporarily or finally recalled" and the words "so long as they are assigned to it" have been inserted after the words "the premises of a delegation". If the word "meeting" were changed in article 114 it also might have to be changed in this article.

## CHAPTER III

### Succession of States

#### A. INTRODUCTION

27. At its nineteenth session in 1967, the International Law Commission made new arrangements for dealing with the topic "Succession of States and Governments".<sup>61</sup> It decided to divide the topic among more than one special rapporteur, the basis for the division being the three main headings of the broad outline of the subject laid down in the report submitted in 1963 by the Sub-Committee on

<sup>60</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, pp. 220-221, document A/7610/Rev.1, commentary to article 48.

<sup>61</sup> For a detailed account of the historical background of the topic, see *Yearbook of the International Law Commission, 1968*, vol. II, pp. 213-216, document A/7209/Rev.1, paras. 29-42, and *ibid.*, 1969, vol. II, pp. 222-225, document A/7610/Rev. 1, paras. 20-34.

Succession of States and Governments and agreed to by the Commission the same year, namely: (i) succession in respect of treaties, (ii) succession in respect of rights and duties resulting from sources other than treaties,<sup>62</sup> and (iii) succession in respect of membership of international organizations. Likewise, in 1967, the Commission appointed Sir Humphrey Waldock, Special Rapporteur for succession in respect of treaties and Mr. Mohammed Bedjaoui, Special Rapporteur for succession in respect of matters other than treaties. The Commission decided to leave aside, for the time being, the third heading of the division, namely "succession in respect of membership of international organizations", and did not appoint a special rapporteur for this heading.

28. The Commission's decisions referred to above received general support in the Sixth Committee at the General Assembly's twenty-second session. By its resolution 2272 (XXII) of 1 December 1967, the General Assembly, 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 resolution 1765 (XVII) and 1902 (XVIII)". Subsequently, the General Assembly made the same recommendation in its resolutions 2400 (XXIII) of 11 December 1968 and 2501 (XXIV) of 12 November 1969.

29. In 1968, at its twentieth session, the Commission had before it a first report (A/CN.4/204) submitted by Mr. Mohammed Bedjaoui, Special Rapporteur for succession in respect of matters other than treaties, and a first report (A/CN.4/202) submitted by Sir Humphrey Waldock, Special Rapporteur for succession in respect of treaties. The Commission decided to have a preliminary discussion of the two reports, beginning with the report on succession in respect of matters other than treaties.

30. The Commission considered the report 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. The Commission adopted a number of conclusions on the points listed in the Special Rapporteur's questionnaire which were reproduced in the Commission's report on its twentieth session together with a summary of the views expressed by the members of the Commission during the discussion preceding their adoption.<sup>63</sup> It decided to begin the study of succession

<sup>62</sup> This title was modified by the Commission at its twentieth session to read: "succession in respect of matters other than treaties" (see *Yearbook of the International Law Commission, 1968*, vol. II, p. 216, document A/7209/Rev.1, para. 46).

<sup>63</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, pp. 216-221, document A/7209/Rev.1, paras. 45-79.

in respect of matters other than treaties with the aspect of the topic relating to "succession of States in economic and financial matters" and instructed the Special Rapporteur to prepare a report on it for the twenty-first session of the Commission.

31. The Commission considered the first report on succession in respect of treaties by Sir Humphrey Waldock, the Special Rapporteur, at its 965th to 968th meetings. The report, which was of a preliminary character, included four introductory articles designed to define the use of certain terms, notably the use of the term "succession" in the draft, and the relation of the draft to certain categories of international agreements. The Commission endorsed the suggestion of the Special Rapporteur that it was unnecessary to repeat the general debate which had taken place on the several aspects of succession in respect of 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. Following the discussion of Sir Humphrey Waldock's report, the Commission concluded that it was not called upon to take any formal decision in regard to succession in respect of treaties. 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 were, however, included for information in the Commission's report on the session.<sup>64</sup>

32. At the twenty-first session of the Commission in 1969, Mr. Mohammed Bedjaoui submitted a second report (A/CN.4/216/Rev.1) on succession in matters other than treaties 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) containing an introduction and four draft articles designed to be a first group of substantive articles setting out general rules on succession in respect of treaties. Owing to the lack of time the Commission considered only the report submitted by Mr. Bedjaoui.

33. The Commission devoted nine meetings, from 1000th to 1003rd and 1005th to 1009th meetings, to the consideration of Mr. Bedjaoui's second report. As recorded in paragraphs 61 and 62 of the report of the Commission on its twenty-first session, at the end of the debate on Mr. Bedjaoui's second report, 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. 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, and took note of the Special Rapporteur's intention to devote his next report to public property and public debts. The Commission's report on the session gave likewise an account of the views expressed by the Special Rapporteur and other members of the Commission during the consideration of Mr. Bedjaoui's report.<sup>65</sup>

34. At the present session of the Commission, Sir Humphrey Waldock submitted a third report (A/CN.4/224 and Add.1) on succession in respect of treaties which assumed the form of a continuation of the Special Rapporteur's previous report on the topic. It contained additional provisions on use of terms and eight new draft articles with commentaries on succession in respect of multilateral treaties. The Commission considered together, in a preliminary manner, certain draft articles contained in the second and third reports on succession in respect of treaties submitted by Sir Humphrey Waldock, at its 1067th, 1068th and 1070th to 1072nd meetings.

35. Mr. Mohammed Bedjaoui also submitted a third report (A/CN.4/226) on succession in respect of matters other than treaties, containing four draft articles with commentaries concerning certain aspects of the subject of succession to public property. Unfortunately, the Commission was unable to further its study of succession in respect of matters other than treaties.

36. The Secretariat circulated, at the present session of the Commission,<sup>66</sup> the following documents relating to

<sup>65</sup> *Ibid.*, 1969, vol. II, pp. 225-228, document A/7610/Rev.1, paras. 36-60.

<sup>66</sup> The Secretariat had previously prepared and distributed, in accordance with the Commission's requests, the following documents and publications relating to the topic: (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, p. 101, document A/CN.4/149 and Add.1); (b) a memorandum on "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary" (*ibid.*, p. 106, document A/CN.4/150); (c) a study entitled "Digest of the decisions of international tribunals relating to State Succession" (*ibid.*, p. 131, document A/CN.4/151); (d) a study entitled "Digest of decisions of national courts relating to succession of States and Governments" (*ibid.*, 1963, vol. II, p. 95, document A/CN.4/157); (e) six studies in the series "Succession of States to multilateral treaties", entitled respectively "International Union for the Protection of Literary and Artistic Works: 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;

<sup>64</sup> *Ibid.*, pp. 221-222, paras. 80-91.

succession of States: (a) the seventh study of the series "Succession of States to multilateral treaties" entitled "International Telecommunication Union: 1932 Madrid and 1947 Atlantic City International Telecommunication Conventions and subsequent revised Conventions and Telegraph, Telephone, Radio and Additional Radio Regulations" (A/CN.4/225); (b) a first study in the series "Succession of States in respect of bilateral treaties" entitled "Extradition treaties" (A/CN.4/229); (c) a supplement (A/CN.4/232) to the "Digest of the decisions of international tribunals relating to State succession" published in 1962,<sup>67</sup> in accordance with the decision taken by the Commission at its twenty-first session.<sup>68</sup>

## B. SUCCESSION IN RESPECT OF TREATIES

### 1. Summary of proposals of the Special Rapporteur

37. The Commission, as already stated, had before it the second and third reports on this topic (A/CN.4/214 and Add.1 and 2 and A/CN.4/224 and Add.1) by Sir Humphrey Waldock, the Special Rapporteur. The two reports combined contained twelve articles, with commentaries, which covered the use of certain terms, the case of territory passing from one State to another (the so-called principle of "moving treaty—frontiers"), devolution agreements, unilateral declarations by successor States, and the rules governing the position of "new States"<sup>69</sup> in regard to multilateral treaties. The Special Rapporteur stated that in his next report these articles would be followed by further articles dealing with the position of "new States" in regard to bilateral treaties, with certain particular categories of treaties (such as "dispositive" and "localized" treaties) and with certain particular cases of succession (such as federations, unions of States, protected States, etc.).

38. The Special Rapporteur explained that his draft was based on the thesis that in regard to treaties the question of "succession" should be considered as a particular problem within the general framework of the law of treaties. This thesis was founded on a close examination of State practice which, in his view, afforded no convincing evidence of any general doctrine of succession of States

by reference to which the various problems of succession to treaties could find their appropriate solution. He further stated that in State practice the matter appeared rather as one of determining the impact of the occurrence of a change in the sovereignty of a territory on existing treaties which affected the territory and which were necessarily subject to the general law of treaties. This meant that, in approaching questions of succession in respect of treaties, the implications of the general law of treaties had constantly to be borne in mind. Today the most authoritative statement of the general law of treaties was that contained in the Convention adopted at Vienna in 1969. Accordingly, he had felt bound to take the provisions of that Convention as an integral part of the legal foundations of the law relating to succession in respect of treaties.

39. The Special Rapporteur also drew attention to the meanings which were given to the expressions "succession" and "new State" in his draft and which were set out in article 1. The term "succession", as provided in paragraph 1 (a) of that article, was used simply to denote "the replacement of one State by another in the sovereignty of territory or in the competence to conclude treaties with respect to territory." It thus concerned exclusively the fact of the replacement of one State by another in the sovereignty of territory or in the treaty-making competence with respect to it. Admittedly, in internal law the term "succession" had a different meaning, denoting the transmission of rights and obligations by operation of law; and in the past, writers had not infrequently sought to transfer the internal law concept on succession by analogy into international law. But such a theoretical approach to the subject derived from internal law did not correspond to the legal principles apparently acted upon in State practice, and above all in the State practice of today. The use of the term "succession" in connexion with the changes of sovereignty was almost inevitable for drafting purposes, and, in consequence, the Special Rapporteur had considered it advisable to make clear at the outset that the word "succession", as used in the draft, denoted only the fact of the replacement of one State by another and did not necessarily connote any transmission of rights or obligations in respect of treaties. Otherwise, it would hardly be possible to avoid confusions resulting from internal analogies. When the Commission had examined the subject in detail and had determined to what extent, if at all, the automatic transmission of rights or obligations upon a change of sovereignty was recognized in international law, it could review the use of the term "succession" in the draft.

40. As to the expression "new State", the Special Rapporteur pointed out that the meaning given to it in paragraph 1 (e) of article 1 was a "succession where a territory which previously formed part of an existing State has become an independent State;" and that this expression had been used in the draft purely as a term of art for convenience of drafting and to facilitate the Commission's study of the subject as a whole. He explained that the object was to enable the Commission to examine the applicable principles of law first in the context of succession in its purest form—i.e. where part of the territory of an existing State attained independence—and then to consider the possible effect of special factors in particular

Paris Convention of 1883 and subsequent Acts of revision and special agreements" (study IV), "The General Agreement on Tariffs and Trade (GATT) and its subsidiary instruments (study V) [*Ibid.*, 1968, vol. II, doc. A/CN.4/200 and Add.1 and 2] and "Food and Agriculture Organization of the United Nations: Constitution and multilateral conventions and agreements concluded within the Organization and deposited with its Director-General" (study VI) [*ibid.*, 1969, vol. II, doc. A/CN.4/210]; (f) a volume of the *United Nations Legislative Series* entitled *Materials on succession of States* (United Nations publication, Sales No.: E/F.68.V.5), containing the information provided or indicated by Governments of Member States in response to the Secretary-General's request.

<sup>67</sup> *Yearbook of the International Law Commission*, 1962, vol. II, p. 131, document A/CN.4/151.

<sup>68</sup> *Ibid.*, 1969, vol. II, p. 229, document A/7610/Rev.1, para. 63.

<sup>69</sup> For the meaning given by the Special Rapporteur to the expression "new States", see paragraph 40 below.

cases of succession such as unions of States, federations, protected States, mandates and trusteeships. If the Commission then concluded that some of these particular cases did not differ in any material way from the case of a "new State" in its purest form, the use of that term in the draft could be reviewed.

41. Other preliminary matters to which the Special Rapporteur drew attention were the scope of the treaties to be covered by the draft and the need to reserve the application of any relevant rules of international organizations governing succession to constituent instruments or to treaties adopted within the organization. He explained that for the time being he had been assuming that the present draft, like the Vienna Convention on the Law of Treaties, would be limited to treaties between States. He had also assumed that it would contain an article similar to article 5 of the Vienna Convention reserving the application of any relevant rules of international organizations to the categories of treaties which he had mentioned. In due course, the necessary drafts on these matters would be submitted to the Commission.

42. In addition, the Special Rapporteur stressed certain points in the substantive articles where the Commission would find his proposals on a number of questions which were of cardinal importance in his treatment of the whole topic. One such point was article 3 which dealt with the legal implications of agreements concluded between a predecessor State (the former sovereign of the territory) and its successor regarding the devolution of the treaty obligations and rights of the former to the latter. The position taken by the Special Rapporteur in that article was that the predecessor State's treaties would not become applicable as between the successor State and any third State party to them in consequence only of the conclusion of such a devolution agreement; and that the treaty obligations and rights of the successor State in relation to the third States would be determined by reference to the rules set out in the other articles of the draft. The contrary view, that such an agreement would by itself establish treaty relations between the successor State and third States, appeared to the Special Rapporteur neither to be in harmony with articles 34 to 36 of the Vienna Convention of the Law of Treaties nor to be supported by the general evidence of State practice in matters of succession.

43. Another point singled out by the Special Rapporteur was article 4 which dealt with unilateral declarations by successor States expressing their wills with regard to the maintenance in force of their predecessors' treaties. In his article also, the position taken by the Special Rapporteur was that such a general declaration would not by itself have the effect of rendering the predecessor State's treaties applicable as between a successor State and third States parties to them. Except in the case of such treaties as might pass automatically to a successor State under customary law, a predecessor State's treaty would become applicable as between the successor State and any third State party to it only in conformity with the specific provisions of this article and of other articles of the draft.

44. Among the provisions regarding "new States", the Special Rapporteur asked the Commission particularly to note article 6. This laid down as a fundamental rule

that a new State was not be considered as bound by any treaty by reason only of the fact that the treaty had been concluded by its predecessor and had been in force in respect of the territory at the date of the succession; nor as under any obligation to become a party to such a treaty. By terms of article 6, that fundamental rule had been made subject to the provisions of the other articles of the draft, for the reason that in due course the Commission would have to consider whether any particular categories of treaties constituted exceptions to it; e.g. so-called "dispositive", "territorial", "localized" treaties, etc. But, subject to such possible exceptions, State practice appeared to the Special Rapporteur strongly to confirm that the rule set out in article 6 was the fundamental rule applicable to new States in respect both of bilateral and multilateral treaties.

45. The final point on which the Special Rapporteur laid stress was the rights accorded to new States by articles 7 and 8 of his draft in regard to multilateral treaties. The principal provision was that in article 7, which recognized as the general rule that a new State had the right to consider itself a party to multilateral treaties in force in respect of its territory at the date of succession. This article laid down the principle that, subject to certain exceptions mentioned in paragraph 46 below, a new State was entitled in relation to any such multilateral treaty to notify the parties that it considered itself a party to the treaty in its own right. The Special Rapporteur explained that, while modern treaty practice did not support the thesis that a new State was under any *obligation* to become a party to multilateral treaties, it did support the view that a new State had a *right* to notify its succession to such treaties. The practice showed that both new States and depositaries acted upon the assumption that new States possessed that right, and also that the correctness of this assumption was not questioned by the other parties to the treaties. In his view, therefore, it was justifiable to deduce from the practice the existence to-day of a general rule of customary law entitling a new State to notify its will to be a party to any multilateral treaty in force in respect of its territory at the date of succession, other than one of the excepted categories of treaties. Moreover, this right appeared in the practice to spring automatically from the legal nexus existing between the treaty and the territory at the date of the succession and not to be dependent on whether it was otherwise open to the new State to become a party to the treaty under a specific provision of its final clauses. The practice relating to multilateral treaties of which the Secretary-General was the depositary further indicated that this right was recognized also in cases where the treaty was not yet in force at the date of succession but the predecessor State had either established its consent to be bound or signed the treaty subject to ratification in relation to the territory of the new State. Accordingly, article 8 of the draft proposed that the right should be considered as extending to such cases.

46. The practice at the same time indicated that a new State's right to notify its "succession"<sup>70</sup> did not, and could not, apply to three categories of multilateral treaties which

<sup>70</sup> As to the meaning given by the Special Rapporteur to the term "succession", see para. 39 above.

were, therefore, expressly excepted from the rule laid down in article 7. Those exceptions were: (a) treaties of such a kind that the participation of the new State in question would be incompatible with the object and purpose of the particular treaty; (b) constituent instruments of international organizations to which a State could become a party only by the procedure prescribed for the acquisition of membership; and (c) treaties in regard to which, by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any additional State must be considered as requiring the consent of all the parties.

47. The Special Rapporteur summed up the concept of succession as it had so far emerged from the study of the topic in his reports as follows. This concept was characterized in the first place by the fact of the replacement of one State by another in the sovereignty of a territory or in the competence to conclude treaties in respect of it; and, secondly, by a distinction between the fact of a succession and the transmission of treaty rights and obligations on its occurrence. A further element in the concept was that a consent to be bound, or a signature, given by the predecessor State in relation to a territory prior to the succession, established a certain legal nexus between the territory and the treaty to which certain legal incidents attached. One such legal incident was the new State's right, in the case of a multilateral treaty, to notify its will to be considered a party. As to bilateral treaties, which he had not yet dealt with in his reports, the legal nexus appeared to give rise to a legally recognized process for bringing about the entry into force of the treaty between the successor State and the other party by novation. Thus, it gave rise to a faculty to renew the treaty in respect of the territory by mutual consent, but no more. In addition, the Commission would in due course have to consider whether in the case of "dispositive" or "localized" treaties the legal nexus gave rise to an obligation for the successor State to consider itself as bound by its predecessor's treaty. It would also have to consider the implications of the legal nexus in the case of particular forms of succession, such as federations, unions of States, etc. But each of the cases in which the legal nexus existing between the territory and the treaty at the date of succession might possibly give rise to legal incidents attaching to the successor State had to be examined on its own merits. In the modern law there did not appear to be any general doctrine of the succession of a new State to its predecessor's treaties; nor any legal presumption as to the continuity of treaties on the occurrence of a succession, however desirable continuity might be as a matter of policy. On the latter point—the absence of a presumption of continuity—the Special Rapporteur drew the Commission's attention to the fact that his treatment of the topic differed from that of the International Law Association which, at its Buenos Aires conference, had endorsed the existence of such a presumption.<sup>71</sup> In his view, quite apart from the contrary indications in State practice, the principle of self-determination

militated against the recognition of a legal presumption of continuity.

48. In presenting his reports the Special Rapporteur emphasized that, at this stage, he would not expect members of the Commission to give their views on other provisions of his draft which he had not mentioned or to go into details on those which he had. On the other hand, the points which he had singled out constituted essential elements in his treatment of the whole topic, and it was important for him to know whether or not the Commission was broadly in agreement with the solutions adopted on those points in his reports. Accordingly, he hoped that members would confine their comments for the most part to those points, and would also state whether, in general, they considered his treatment of the matters so far dealt with in his reports afforded a sound basis for the Commission's work on the topic.

## 2. Summary of the Commission's debate

49. The members of the Commission who took part in the discussion of the reports on succession in respect of treaties were unanimous in endorsing the Special Rapporteur's general approach to the topic and in considering that the drafts provided a good working basis for its study by the Commission. As to the points singled out by the Special Rapporteur as basic elements in the drafts, some members voiced doubts or reservations on one or other point. But on these basic points also the discussion showed a large measure of general agreement in the Commission as to the broad substance of the solutions adopted in the reports.

50. The use of the word "succession" in the drafts as a term of art meaning the fact of the replacement of one State by another in the international relations of a territory, rather than the transmission of rights and obligations, was endorsed by most members. Several members, however, voiced doubts as to whether it would be satisfactory in article 1 to express this meaning in the form "replacement of one State by another in the sovereignty of territory or in the competence to conclude treaties with respect to territory." Some pointed out that the two alternatives overlapped. Others, while appreciating that the second alternative was designed to cover particular forms of succession where the question of sovereignty might be controversial, felt that these particular forms (e.g. protected States, mandates and trusteeships) belonged to the past. Certain members felt hesitation as to whether the element of transmission of rights and obligations could be wholly excluded from the definition of "succession".

51. A particular point was raised by one member as to possible cases where the competence to conclude treaties might subsist but the practical possibility to apply them had disappeared. He had in mind certain cases of occupation of territory, and these might occur even in peace time. If these might not be instances of "succession", they might raise analogous problems. Some other members, however, felt that the problem presented by such cases fell somewhat outside succession in respect of treaties, and that the appropriate solution would be to include in the

<sup>71</sup> Resolution No. 1 (b) (iv) adopted at the fifty-third Conference of the International Law Association (Buenos Aires, September 1968). Text reproduced in the Special Rapporteur's second report (*Yearbook of the International Law Commission, 1969*, vol. II, p. 48, document A/CN.4/214 and Add.1 and 2, para. 15).

draft articles a general reservation of the question of military occupation, just as the special cases of "aggression" and the "outbreak of hostilities" had been reserved from the Vienna Convention on the Law of Treaties.

52. As to the expression "new State" in article 1, its use as a term of art, denoting a succession where a territory which previously formed part of an existing State had become an independent State, was also generally accepted for working purposes on the provisional basis indicated in the reports. One member, however, drew attention to the fact that some newly independent States regarded themselves as having recovered, rather than acquired, their independence and statehood. Certain other members stressed that, although in the present era decolonization had been the main cause of the birth of new States, it was necessary also to have regard to the future when new States might more commonly arise from associations and mergers as well as to the case in which several States arose from a single predecessor State.

53. Many members expressed their concurrence in the Special Rapporteur's treatment of devolution agreements and unilateral declarations in articles 3 and 4 respectively. A few members at the same time suggested that it would be desirable to formulate article 3 in such a way as not to discourage the use of devolution agreements. Another underlined the possibility of devolution agreements having the effect of assigning rights and obligations as a result of the creation of *vincula juris* with the other parties to treaties through the process of tacit consent or novation. A number of members, on the other hand, underlined the principle of self-determination and the need to ensure the reality of the emancipation of the new State.

54. Many members stressed the key character of article 6 which laid down the absence of any general obligation on a new State to take over the treaties of its predecessor, some suggesting that it should have a more prominent position in the draft. A number of members, in giving their approval to the principle embodied in this article, stated that they regarded it as being more consistent both with State practice and with the principle of self-determination than the legal presumption of continuity which had been favoured by the International Law Association.

55. While fully accepting the principle laid down in article 6 as the general rule, many members indicated that their acceptance of that rule was subject to the reservation of the question of so-called "dispositive" or "territorial" or "localized" treaties. A number, moreover, drew attention to the relevance of this question also in connexion with the "moving treaty-frontier" rule contained in article 2 of the draft. One member expressed opposition to the idea that boundary treaties should be considered as included in the categories of treaties constituting possible exceptions to the rule laid down in article 6. The Commission, however, recognized that the whole question of so-called "dispositive" or "territorial" or "localized" treaties would fall to be examined by the Special Rapporteur in his next report.

56. As to articles 7 and 8, members of the Commission were nearly unanimous in endorsing the principle that, subject to the exceptions mentioned in article 7, a new

State had the right to notify its will to be considered as a party to a multilateral treaty in force in respect of its territory at the date of the succession. One member doubted whether a proper construction of the modern practice necessarily led to the conclusion that a new State had the right to consider itself a party to the multilateral treaties in question without the consent, express or implied, of the other parties to the treaty. He understood that practice as establishing that the formalities and temporal effect of participation laid down in the treaty could be supplemented by the new procedure of succession whenever the new State would be entitled to become a party to the treaty under its participation clause, and that participation by succession would have retroactive effect to the date of independence. That interpretation of the practice, he considered, would respect the principle of the autonomy of the parties. It would not attribute to depositaries larger powers than they normally possessed and it was, moreover, in conformity with the Vienna Convention on the Law of Treaties (particularly article 11) and, like the Vienna Convention itself, rendered unnecessary a distinction of substance between bilateral and multilateral treaties. Two other members suggested that the right of a new State to consider itself a party as from the moment of succession was limited to cases where either it would also be open to that State to become a party to the treaty under the final clauses or the participation provisions were very wide. But the majority of the Commission concluded that the modern treaty practice of States and depositaries did justify the conclusion that a customary right had emerged for a new State, independently of the terms of the final clauses, to notify its will to be considered as a party to a multilateral treaty as from the date of succession. The Special Rapporteur further pointed out that, if this view was correct, there was no question of disregarding the autonomy of the parties or of depositaries exceeding their powers. The parties must be taken to have given their consent in assenting to the customary rule, while the rule itself had developed from the interaction of the practice of States and depositaries.

57. Certain members queried whether there was any need for the extension of this principle to the cases covered in article 8, where the treaty was not in force as the date of succession but the predecessor State had either established its consent to be bound by the treaty in relation to the territory or signed in subject to ratification. Others, while endorsing that extension, noted that the exceptions to the general rule in article 7 would necessarily have to apply also in connexion with article 8. In regard to these exceptions, one member also said that it might be necessary to consider whether the three categories of treaties specified in article 7 were wholly exhaustive of the exceptions to the rule.

58. Certain other questions were touched on during the discussion. Some members, for example, suggested that in laying down the rule in article 6 that a new State was under no obligation to take over its predecessor's treaties, it might be desirable to make clear that this rule applied only to the treaty as such; for the rule in article 6 would not preclude the new State from being bound by rules in the treaty which were generally accepted customary law. In regard to this question, the Special Rapporteur

explained that he had in mind a general provision on the lines of article 43 of the Vienna Convention of the Law of Treaties. This would cover any case of the cessation of the application of a treaty to a territory under article 6, and also under article 2, and would make a reservation similar to that in article 43 of the Vienna Convention which proclaimed "the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty". Another question raised in connexion with the cessation of the application of the predecessor State's treaties to a territory was the possible need for some form of transitional provision to obviate difficulties which might result from an abrupt termination of a treaty régime applicable to the territory.

59. As to the Special Rapporteur's treatment of succession in respect of treaties as a particular topic within the framework of the law of treaties, this met with the general approval of members of the Commission. Two points regarding the relation between the present topic and the topic of "Succession in respect of matters other than treaties", were, however, made during the discussion. First, if "succession" were treated as referring primarily to the fact of a change of sovereignty, as the Commission seems to think advisable, it would still be desirable to have uniformity in regard to the elements of fact constituting cases of "succession" in the two topics of succession of States entrusted to different rapporteurs. Secondly, in connexion with the question of "dispositive" or "territorial" or "localized" treaties, attention should be given to the distinction between the treaty itself and the situation of régime established by it. It was not a question simply of succession in respect of treaties but also of succession in respect of the situation or régime; and in consequence there might be a certain overlap between the present topic and "succession in respect of matters other than treaties".

60. Summing up the results of the discussion, the Special Rapporteur said that he was much encouraged by the Commission's endorsement of his general approach to this difficult topic; and he interpreted the discussion which had taken place as authorizing him to complete the drafts of the lines indicated by him in the reports and in his opening observations. No doubt, there were points in the draft articles already submitted which might call for modification or refinement in the light of the comments made by members in the discussion. However, he would probably not submit revised texts of the present articles in his next report, but would instead examine comments of members when the Commission took up the study of each article in detail. This was because he considered that his first task was to complete the draft in order that the Commission might be in a position to see the topic as a whole. Although the discussion of his first twelve articles at the present session had given him valuable guidance as to the views of the Commission, he did not regard members of the Commission or himself as in any way committed on particular points at this stage. It was essential to see the whole draft before taking up final positions. Accordingly, in his next report he would give priority to dealing with all the remaining aspects of the topic.

61. The Special Rapporteur observed that among the matters which remained to be covered in his next report was that of the particular forms of "succession", which included protected States, mandates and trusteeships. Some members had suggested that those cases could now be regarded as belonging to the past. Without taking any position yet on that question, he felt that it was his duty, as Special Rapporteur, to put a full study of these forms of succession before the Commission in his next report so that it might be in a position to take its decisions regarding them in full knowledge of all the relevant considerations.

62. Another difficult matter which remained to be dealt with, he said, was the important question of "dispositive" or "territorial" or "localized" treaties, which also involved the problem of boundaries. He reminded the Commission that in its work on the law of treaties (eighteenth session) it had considered the analagous question of treaties establishing "objective" régimes in the context of "treaties and third States"; and that although there had been substantial support in the Commission for the concept of "objective" treaty régimes, it had not been included in the draft. However, it seemed to him that the question presented itself from a somewhat different angle in the case of succession of States. At any rate, it was clear that the question had now to be examined *de novo* on its own merits in dealing with succession in respect of treaties.

63. In conclusion, the Special Rapporteur underlined that the discussion had been most valuable, and that the comments of members showed a large measure of solidarity in their approach to the topic. In his view, this gave the Commission the assurance that it had within itself a sufficient basis of general agreement to bring its work on the present topic to a fruitful conclusion.

## CHAPTER IV

### State responsibility

64. In 1969, at the Commission's twenty-first session, Mr. Roberto Ago, the Special Rapporteur, submitted his first report (A/CN.4/217 and Add.1) on the international responsibility of States.<sup>72</sup> This report contained a review of previous work on the codification of the topic and reproduced, as annexes, the most important texts prepared in the course of the earlier codification work. It was intended to provide the Commission with a full account of that

<sup>72</sup> For the historical background of this topic and the reports submitted by Mr. F. V. García Amador, the former Special Rapporteur, see *Yearbook of the International Law Commission, 1969*, vol. II, pp. 218-221, document A/7610/Rev.1, paras. 64-77. At its twenty-first session the Commission also had before it two papers prepared by the Secretariat supplementing two documents issued in 1964, namely, a supplement (A/CN.4/209) to a working paper containing a summary of the discussions in various United Nations organs and the resulting decisions (A/CN.4/165) and a supplement (A/CN.4/208) to the "Digest of the decisions of international tribunals relating to State responsibility" (A/CN.4/169) (*Yearbook of the International Law Commission, 1964*, vol. II, pp. 125-132 and 132-171).

work, from which it could derive useful guidance for its own future work on the substance of the topic, with a view to avoiding the obstacles which have hitherto impeded the codification of this branch of international law. The first report also summarized the methodological conclusions reached by the Sub-Committee on State Responsibility set up in 1962, and later by the Commission itself at its fifteenth (1963) and nineteenth (1967) sessions, on the basis of which the Commission decided to resume the study of the topic from a fresh viewpoint and to try to achieve positive results in accordance with the recommendations made by the General Assembly in its resolutions 1765 (XVII), 1902 (XVIII), 2045 (XX), 2167 (XXI), 2272 (XXII) and 2400 (XXIII).

65. The Commission examined the Special Rapporteur's first report in detail at its 1011th to 1013th meetings and at its 1036th meeting. Replying to comments and summing up the debate, the Special Rapporteur summarized the views expressed by members and noted that there was a remarkable identity of ideas in the Commission as to the best way of continuing the work on State responsibility and as to the criteria which should govern the preparation of the various parts of the draft articles which the Commission proposes to draw up on the topic. The Commission's conclusions were set out in paragraphs 80 to 84 of its report on the work of its twenty-first session.<sup>73</sup>

66. The criteria laid down by the Commission as a guide for its future work on the topic may be summarized as follows:

(a) The Commission intends to confine its study of international responsibility, for the time being, to the responsibility of States. It does not underrate the importance of studying questions relating to the responsibility of subjects of international law other than States, but the overriding need to ensure clarity in the study undertaken, and the organic nature of the draft, clearly make it necessary to defer consideration of these other questions.

(b) The Commission will first proceed to examine the question of the responsibility of States for internationally wrongful acts. It intends to consider separately the question of responsibility arising from certain lawful acts, such as space and nuclear activities, as soon as its programme of work permits. Owing to the entirely different basis of the so-called responsibility for risk, the different nature of the rules governing it, its content and the forms it may assume, a simultaneous examination of the two subjects could only make them more difficult to grasp.

(c) The Commission agreed on the need to concentrate its study on the determination of the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility. Consideration of the various kinds of obligations placed on States in international law and, in particular, a grading of such obligations according to their importance to the international community, may have to be treated as a necessary element in assessing the gravity

of an internationally wrongful act and as a criterion for determining the consequences it should have. But this must not obscure the essential fact that it is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation. Only the second aspect of the matter comes within the sphere of responsibility proper; to encourage any confusion on this point would be to raise an obstacle which might once again frustrate the hope of a successful codification of the topic.

(d) The study of the international responsibility of States will comprise two broad separate phases, the first covering the origin of international responsibility and the second the content of that responsibility. The first task is to determine what facts and circumstances must be established in order to be able to impute to a State the existence of an internationally wrongful act which, as such, is a source of international responsibility. The second task is to determine the consequences attached by international law to an internationally wrongful act in different cases, in order to arrive, on this basis, at a definition of the content, forms and degrees of responsibility. Once these two essential tasks have been accomplished, the Commission will be able to decide whether a third phase should be added in the same context, covering the examination of certain problems relating to what has been termed the "implementation" of the international responsibility of States and questions concerning the settlement of disputes with regard to the application of the rules on responsibility.

67. The conclusions reached by the Commission in 1969 were, on the whole, favourably received by the Sixth Committee of the General Assembly.<sup>74</sup> The plan for the study of the topic, the successive stages in the execution of this plan and the criteria to be applied to the different parts of the draft, as laid down by the Commission, received general approval. In resolution 2501 (XXIV) of 12 November 1969, the General Assembly recommended that the International Law Commission should "continue its work on State responsibility, taking into account paragraph 4 (c) of General Assembly resolution 2400 (XXIII) of 11 December 1968".<sup>75</sup>

68. At the session of the Commission covered by the present report, Mr. Roberto Ago, the Special Rapporteur, submitted a second report on State responsibility entitled "The origin of international responsibility" (A/CN.4/233). This report, which was prepared in accordance with the decision taken by the Commission at its twenty-first session, contains a general introduction dealing with certain questions of method, and a first chapter devoted to the general fundamental rules governing the topic as a whole.

<sup>74</sup> See *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 b, document A/7746, paras. 86-89.

<sup>75</sup> In operative paragraph 4 (c) of resolution 2400 (XXIII) the General Assembly recommends that the Commission should 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)".

<sup>73</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 221, document A/7610/Rev.1.

It begins by discussing the principle of the internationally wrongful act as a source of responsibility, then goes on to define the essential conditions for the existence of an internationally wrongful act, and lastly considers the general question of what is described as the "capacity" of States to commit internationally wrongful acts. The various problems which arise in connexion with each point are stated and discussed. The numerous requirements that must be met in defining the rule are indicated. Finally, draft articles are submitted as a basis for the Commission's discussion. The Special Rapporteur did not go further for the time being, because of the very large number of preliminary questions which have to be settled before the basic rules can be defined and because he needed to be sure that the method he had adopted had the Commission's approval and support, before proceeding to the analysis and definition of the more specific rules which are to follow.

69. The Special Rapporteur presented his second report at the 1074th and 1075th meetings of the Commission. At the same time, he submitted a questionnaire listing a number of points on which he particularly wished to know the views of members of the Commission. The Commission had a general discussion on the Special Rapporteur's report by way of a first broad review, postponing a more detailed discussion of specific points to its twenty-third session. The discussion took place at the 1075th, 1076th, 1079th and 1080th meetings. At the 1081st meeting, the Special Rapporteur dealt with a number of points on which questions had been raised during the discussion and summarized the main conclusions to be drawn from the Commission's broad review.

70. With regard to the question of method, the Commission considered it desirable, at least in the early stages of the work, that the presentation of each draft article should be preceded by a full explanation of the reasons which had led the Special Rapporteur to propose a particular wording, as well as of the practical and theoretical date on which his arguments were based. The Commission also agreed, in principle, that the more general questions should be treated first and that there should be a gradual transition from the general to the particular. That obviously does not preclude the inclusion of rules of a very general character in the body of the draft, as in other drafts adopted by the Commission. In that connexion, the Special Rapporteur emphasized the concrete character of the rules concerning responsibility, even where they were general and their formulation might at first appear abstract. In conformity with the opinion expressed by some members of the Commission, the Special Rapporteur indicated his preference for an essentially inductive method rather than for the deduction of theoretical premises, whenever consideration of State practice and jurisprudence made it possible to follow such a method. It was known, moreover, that the precedents offered by practice and jurisprudence were not equally numerous on the different subjects, being abundant on some and relatively scarce on others. The Special Rapporteur also pointed out that, despite the extra work it involved, it had often been necessary—and would be necessary in the future—to take account of a very large number of opinions of writers. That method met the double requirement

of ascertaining and harmonizing the approaches adopted in the different legal systems and also of deciding which of the views expressed were supported by the majority of writers and which were merely the expression of an individual point of view.

71. The Commission agreed that the topic of the international responsibility of States was one of those in which progressive development could be particularly important, especially as regards the determination of the content and degrees of responsibility. The relative importance of progressive development and codification of accepted principles respectively could not, however, be fixed in accordance with some pre-established plan; it would have to emerge in concrete terms from the pragmatic solutions adopted for the various points.

72. With regard to the desirability of prefacing the draft by a definitions article or by an article indicating what matters were excluded from its scope, the Commission agreed that it would be better to postpone any decision until later. When solutions to the different problems had reached a more advanced stage, it would be easier to see whether or not such preliminary clauses were needed in the general economy of the draft.

73. As regards the substance of the report, some members of the Commission emphasized that they were giving purely provisional views on some points in the questionnaire since they could not give a more definite opinion until they had seen more of the draft. But the Commission appreciated the fact that, already, in defining the general rule which constituted the starting point and basis of the whole draft, the Special Rapporteur had made a number of suggestions regarding possible solutions to certain problems concerning the content of international responsibility. The Special Rapporteur also indicated his preference for solutions based on progressive development. Members of the Commission particularly stressed the need, in defining the initial general rules, to avoid formulae which might prejudice solutions to be adopted later, when the Commission would be dealing with the determination of the content and degrees of responsibility. The work had therefore been based, and for the time being would continue to be based, on a general notion of international responsibility, meaning thereby the set of legal relationships to which an internationally wrongful act by a State may give rise in the various possible cases. Such relationships may arise between that State and the injured State or between the injured State and other subjects of international law, or possibly even with the international community as a whole.

74. The Commission also agreed that, in defining the general rule concerning the principle of responsibility for internationally wrongful acts, it was necessary to adopt a formula which did not prejudice the existence of responsibility for lawful acts. Some members of the Commission reverted to the idea that this second matter should also be studied and suggested that an initial article might perhaps be included in the present draft to indicate the two possible sources of international responsibility. However, the Special Rapporteur, with the support of several members

of the Commission, stressed the desirability of adhering to the already accepted criterion that one and the same draft should not cover two matters which, though possessing certain common aspects and characteristics, were nevertheless quite distinct. That does not, of course, prevent the Commission from undertaking, if it sees fit, a study of this other form of responsibility, which is in reality a safeguard against the risks of certain lawful activities. It could do so after the study on responsibility for wrongful acts has been completed or it could even do so simultaneously but separately.

75. With regard to "indirect" responsibility or responsibility for the acts of others, the great majority of the members recognized the existence of this special concept and the need to give it a place in the draft as a whole. That does not necessarily mean that it will now have to be taken specifically into account in defining the basic general rule on responsibility for wrongful acts. Certain members expressed doubts as regards the existence of that notion in international law.

76. On the question of terminology, the French-speaking members of the Commission agreed with the Special Rapporteur on the desirability of using the expression "*fait illicite international*" or its equivalent "*fait internationalement illicite*". The word "*fait*" avoided the possible ambiguities of the word "*acte*", which had a special connotation in law and in any case conveyed less satisfactorily the idea of an act of commission as well as of an act of omission. The majority of Spanish-speaking members also expressed themselves in favour of the expression "*hecho ilicito internacional*". For the purposes of the Russian version, the Commission decided to rely on the Russian-speaking members to select the terms which best conveyed the same idea. The English-speaking members said that they preferred the expression "internationally wrongful act", since the term "*fait*" did not have a real equivalent in English and the adjective "wrongful" was preferable to "illicit". When the work is continued, therefore, this is the terminology that the Commission intends to employ. If any definitions are adopted when the examination of the draft is completed, it will then be possible to see whether any further simplifications can be introduced.

77. The Commission confirmed the agreement, already reached when approving the over-all general plan for the study of the subject, that every internationally wrongful act contains both a subjective element and an objective element. It is recognized that these two elements remain logically distinct even though indissolubly linked in any concrete situation. To designate the essential aspect of the subjective element—that is to say, the existence of positive conduct or of an omission which, in the specific case under consideration, must be ascribable to the State and thus figure as an act or omission by the State itself—the Commission chose, on the suggestion of some of its members, to speak of "attribution" instead of "imputation", the term used by many writers. This will obviate the ambiguities inherent in the notions of "imputation" and "imputability", which are used in an entirely different sense in certain systems of internal criminal law. At the same time, the Commission emphasized that the attribution of an act or omission to the State as an international

legal person is an operation which of necessity falls within the scope of international law. As such it is distinct from the parallel operation which may, but need not necessarily, take place under internal law. The Commission considered it particularly important to make this point clear in relation to certain cases which will be studied in detail in the next chapter of the draft and which are concerned *inter alia* with acts performed by organs of the State outside their competence or in violation of internal law, acts of organs or public institutions distinct from the State, etc.

78. As to the objective element, the Commission was in general agreement that the most appropriate way to define it was in terms of a violation or breach of an international obligation or of failure to fulfil such an obligation. This idea, which is established usage both in jurisprudence and in practice, is the best calculated to convey that the essence of an internationally wrongful act giving rise to responsibility resides in the fact that the State has not done what it was internationally bound to do, or has done what it ought not to have done under international law.

79. In the same context, several members of the Commission expressed interest in the notion of abuse of right. The Commission will accordingly return to his question later and then decide whether or not abuse of right should be given a place in the draft. However, with regard to the definition of the conditions for the existence of an internationally wrongful act, it was recognized that failure to fulfil an international obligation would also cover the case where the obligation in question was specifically an obligation not to exercise certain of the State's own rights in an abusive or unreasonable manner.

80. The Commission also discussed the distinction between the cases where the conduct of an organ of the State is held to be sufficient in itself to constitute complete failure to fulfil an international obligation and the cases where such failure comes to light only when the conduct as such is followed by an act or event connected with it but not included in it. Some members of the Commission preferred to reserve their position with regard to this distinction for the time being, while recognizing that it deserves more thorough study when the report is examined in greater detail.

81. The Commission examined the question whether there is a further constituent element of an internationally wrongful act, in the form of what some writers call the element of "injury". However, after some misunderstandings due to difficulties of translation had been disposed of, most members of the Commission recognized that the economic element of injury referred to by certain writers was not inherent in the definition of an internationally wrongful act as a source or responsibility, but might be part of the rule which lays upon States the obligation not to cause certain injuries to aliens. As to the determination of a condition which is indispensable for the existence of an internationally wrongful act, it is recognized that under international law an injury, material or moral, is necessarily inherent in every impairment of an international right of a State. Hence the notion of failure to fulfil an international legal obligation to another State seems to the Commission sufficient to cover this aspect, without the addition of anything further. The economic injury, if any, sustained by the injured State

may be taken into consideration *inter alia* for the purpose of determining the amount of reparation but is not a prerequisite for the determination that an internationally wrongful act has been committed.

82. With regard to what several writers term the "capacity" of States to commit internationally wrongful acts and the possible limits of such "capacity" in certain circumstances, the Commission agreed with the Special Rapporteur that this notion has nothing to do with capacity to conclude treaties or, more generally, to act internationally. What is really meant is a physical ability rather than a legal capacity to perform certain acts. Indeed, some members of the Commission had misgivings about the use of the term "capacity", which they considered might lead to misunderstanding. The Special Rapporteur will explore the possibility of using a different formula, perhaps negative rather than positive. When it takes up this point, the Commission may also decide whether or not to mention the possible existence of limits to the notion here mentioned.

83. At the close of the discussion on his report, the Commission strongly encouraged the Special Rapporteur to continue his study of the topic and the preparation of the draft articles. It was accordingly agreed that the Special Rapporteur should include in a third, more extensive report the part which had been examined at the present session, revised in the light of the discussion. In accordance with the over-all plan approved by the Commission and reproduced in paragraph 91 of the first report submitted by the Special Rapporteur (A/CN.4/217 and Corr.1 and Add.1), this new report will include a detailed analysis of the various subjective and objective conditions which must be met if an internationally wrongful act is to be attributed to a State as an act giving rise to international responsibility. The Commission hopes to be able to examine this new report at its twenty-third session.

## CHAPTER V

### Other decisions and conclusions of the Commission

#### A. CELEBRATION OF THE TWENTY-FIFTH ANNIVERSARY OF THE UNITED NATIONS

84. By a letter dated 23 March 1970 (A/CN.4/231) addressed to the Chairman of the International Law Commission, the Secretary-General brought to its attention the text of General Assembly resolution 2499 A (XXIV) of 31 October 1969, on the celebration of the twenty-fifth anniversary of the United Nations, and in particular, operative paragraphs 17 and 18 of the said resolution. Wishing to associate itself with this celebration in as constructive a manner as possible, the Commission completed its first reading of the set of draft articles on relations between States and international organizations so as to fulfil its task of codification and progressive development of the whole body of diplomatic and consular law. It also adopted a very intensive programme of work for

its twenty-third session, as outlined below, having regard to the need to complete as early as possible the consideration of important drafts in accordance with paragraph 18 of the said resolution.

85. The Commission further decided to ask the Secretary-General to instruct the Office of Public Information to produce as soon as possible a new edition of the publication entitled *The Work of the International Law Commission*<sup>76</sup> and to incorporate therein a summary of the latest developments of the work of the Commission as well as the texts of new Commission drafts and codification conventions recently adopted, such as the Vienna Convention on the Law of Treaties and the Convention on Special Missions.

#### B. ORGANIZATION OF FUTURE WORK

86. In order substantially to advance its work in 1971 as recommended by the General Assembly [Resolution 2501 (XXIV) of 12 November 1969] the Commission requests a fourteen-week session for 1971. In that session it intends to complete the second reading of the draft articles on relations between States and international organizations as well as the first reading of the entire draft articles on succession of States in respect of treaties. It also intends to begin its discussion of the first series of draft articles on State responsibility. In addition, the Commission wishes to devote some time to the consideration of succession of States in respect of matters other than treaties and the most-favoured-nation clause, two subjects on its agenda to which the Commission has not, in view of its other commitments, found time to consider at the present session. It is quite clear to the Commission that it must have a minimum of fourteen weeks for its twenty-third session if it is to be in a position to accomplish the programme just outlined.

#### C. REVIEW OF THE COMMISSION'S PROGRAMME OF WORK

87. At the present session, the Secretariat submitted a preparatory working paper (A/CN.4/230) concerning the review of the Commission's programme of work in accordance with the request made by the Commission at its twenty-first session.<sup>77</sup> Confirming its intention of bringing up to date in 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, the Commission asked the Secretary-General to submit at its twenty-third session a new working paper as a basis for the Commission to select a list of topics which may be included in its long-term programme of work.

<sup>76</sup> United Nations publication, Sales No.: 67.V.4.

<sup>77</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 222, document A/7610/Rev.1, para. 91.

D. THE QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

88. By operative paragraph 5 of resolution 2501 (XXIV) of 12 November 1969, the General Assembly, following the recommendation contained in the resolution relating to article 1 of the Vienna Convention on the Law of Treaties adopted by the United Nations Conference on the Law of Treaties, recommended:

that the International Law Commission should study, in consultation with the principal international organizations, as it may consider appropriate in accordance with its practice, the question of treaties concluded between States and international organizations or between two or more international organizations, as an important question.

89. The Commission decided to include the question recommended by the General Assembly in its general programme of work and, at its 1069th meeting, set up a Sub-Committee composed of the following thirteen members: Mr. Reuter (Chairman), Mr. Alcívar, Mr. Castién, Mr. El-Erian, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ustor and Sir Humphrey Waldock. The Commission entrusted the Sub-Committee on treaties concluded between States and international organizations or between two or more international organizations with the task of considering preliminary problems involved in the study of this new topic. The Sub-Committee met during the Commission's session and submitted a report (A/CN.4/L.155) to the Commission. At its 1078th meeting, the Commission considered the Sub-Committee's report and adopted it with minor drafting changes. The Sub-Committee's report as adopted by the Commission reads as follows:

The Sub-Committee took note of the two decisions of the International Law Commission: the first to include in its general programme of work the question of treaties concluded between States and international organizations or between two or more international organizations, and the second to set up a Sub-Committee to prepare the work on that subject immediately.

After a discussion, the Sub-Committee decided to submit the following proposals to the Commission:

1. That the Secretary-General be requested to prepare a number of documents for the use of members of the Commission, viz.:

(i) As soon as possible (preferably by 1 January 1971) a working paper on the subject containing: a short bibliography, a historical survey of the question, and a preliminary list of the relevant treaties published in the United Nations *Treaty Series*.

(ii) Later, in one or more parts, a document containing; as full a bibliography as possible, an account of the practice of the United Nations and the principal international organizations (treaties between the United Nations and States, between the United Nations and other international organizations, problems encountered by the United Nations when contemplating becoming a party to a treaty, statistics, and particularly a complete list of the treaties in question published in the United Nations *Treaty Series*, etc.). For the time being, the Secretary-General might consider as the principal international organizations for the purposes of the present topic those which were invited to send observers to the Vienna Conference on the Law of Treaties.

2. That, by 1 November 1970, the Chairman submit to members of the Sub-Committee a questionnaire regarding the method of treating the topic and its scope, accompanied by an introduction. Members would be asked to send their replies to this questionnaire together with any other comments they might wish to make, to the Sub-Committee, if possible by 1 February 1971. All replies, prefaced by an introduction by the Chairman, would be circulated as a working paper at the Commission's next session.

E. MOST-FAVOURED-NATION CLAUSE

90. At the present session of the Commission, Mr. Endre Ustor, Special Rapporteur, submitted his second report (A/CN.4/228 and Add.1) on the most-favoured-nation clause. Owing to the lack of time, the Commission postponed the consideration of the topic until its next session.

F. PREPARATION OF A NEW EDITION OF THE "SUMMARY OF THE PRACTICE OF THE SECRETARY-GENERAL AS DEPOSITARY OF MULTILATERAL AGREEMENTS"

91. In view of its extreme usefulness for Special Rapporteurs and for its own future work on several topics of its programme, the Commission decided to ask the Secretary-General to prepare a new edition, brought up to date, of the document entitled "Summary of the practice of the Secretary-General as depositary of multilateral agreements" (ST/LEG/7), published in 1959.

G. RELATIONS WITH THE INTERNATIONAL COURT OF JUSTICE

92. At its 1068th meeting, the Commission heard a statement by Mr. André Gros, Judge of the International Court of Justice. He addressed himself to the question of the present state of international justice, after expressing his understanding that the principle of contacts between the Court and the Commission, which had been unanimously accepted by the Court three years previously, concerned mainly those legal problems which were of common interest to the judges of the Court and the members of the Commission.

H. CO-OPERATION WITH OTHER BODIES

1. *Asian-African Legal Consultative Committee*

93. Mr. Nikolai Ushakov submitted a report (A/CN.4/234) on the eleventh session of the Asian-African Legal Consultative Committee, held at Accra from 19 to 29 January 1970, which he had attended as an observer for the Commission.

94. The Asian-African Legal Consultative Committee was represented before the Commission by Mr. N. Y. B. Adade, President of the eleventh session of that Committee, who addressed the Commission at the 1074th meeting. He commented that, in anticipation of the Commission's discussion of the topic of State succession, the Committee had placed that same topic on its agenda for preliminary

discussion at its eleventh session, with a view to giving member States the opportunity to define their positions on the matter. Although, unfortunately, time had not permitted the Committee to deal with that item, it would continue to follow the Commission's discussion of the topic with the keenest interest. He indicated that, at its eleventh session, the Committee had discussed three main items, namely, the rights of refugees, the law of international rivers and the international sale of goods. However, owing to lack of time, it had been unable to discuss the topic of international shipping law. He stated that every effort was being made to increase the number of the Committee's member States. Thus, at the eleventh session, Nigeria had been admitted as a full member and the Republic of Korea as an associate member. The Committee was particularly anxious to attract as many of the French-speaking African States as possible, in view of the fact that it did not yet have a single one of them among its members. Since that situation might be due, in part, to the fact that English was so far the only official language used at its meetings, the Committee intended to adopt French as an alternative language as soon as it had a sufficient number of French-speaking States. Efforts were also being made to persuade some of the East African States to join the Committee.

95. The Commission requested its Chairman, Mr. T. O. Elias, to attend the next session of the Committee, to which it has a standing invitation to send an observer, 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*

96. The European Committee on Legal Co-operation was represented by Mr. H. Golsong, Director of Legal Affairs of the Council of Europe, who addressed the Commission at the 1069th meeting. He also submitted for the information of the Commission a report circulated to members as document ILC (XXII) Misc. 1.

97. In his address he underlined the ever-increasing interest which the Committee was taking in the work of the Commission, as evidence by the special meetings organized to consider parts of the Commission's work. In particular, he stressed the interest with which the Committee followed the Commission's discussion on the topic of relations between States and international organizations, on some of whose aspects the approach taken by the member Governments of the Committee differed from that of the Commission. He pointed out that the Committee had prepared a report of its own on the privileges and immunities of international organizations which had been transmitted to both the United Nations and the Commission. With regard to the Committee's recent work, he indicated that the Consultative Assembly of the Council of Europe had recently recommended that it prepare a draft for a treaty on the subject of pollution of international rivers. Also, a European draft convention on State immunity was almost completed. With respect to the development of the European Convention on Human Rights, he drew attention to the Committee's agreed view that the most important objective was to reach complete

identity of definition between that instrument and the United Nations Covenants on human rights, in the sense that the standards of the European Convention should be aligned with those of the world-wide covenants. As to other fields, proposals had been made for the uniform interpretation of European treaties, for the publication of a digest of State practice in the field of public international law, and for support of an initiative for a unified collection of international treaties. Also, the Committee had established a close working relationship with the United Nations Commission on International Trade Law (UNCITRAL), and a number of instruments in the field of commercial law had either been completed or were in their final stage; for example, there had been drawn up a draft European convention on international patent classification, which would be the subject of a diplomatic conference at Strasbourg in 1971. Recently, a European convention on the international validity of criminal judgements had been opened for signature at The Hague; that convention dealt with the recognition and enforcement of foreign penal judgements and would be supplemented by another instrument on the settlement of conflicts of jurisdiction in criminal matters and the transfer of criminal proceedings. Among the items under consideration for its future work, he referred to the problem of hi-jacking, which the Committee proposed to consider under the general heading of jurisdiction with regard to crimes committed outside national territory and to which one of its draft conventions dealing with radio broadcasts might prove relevant. He also referred to the problem of the protection of members of diplomatic and consular missions against acts of violence and to the judicial settlement of international disputes.

98. 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 November 1970. The Commission requested its Chairman, Mr. T. O. Elias, to attend the session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

## 3. *Inter-American Juridical Committee*

99. The Inter-American Juridical Committee was represented by Mr. José Joaquín Caicedo Castilla, who addressed the Commission at its 1064th meeting.

100. He drew attention to the entry into force of the Protocol of Amendment to the Charter of the Organization of American States (OAS), the Bogotá Charter,<sup>78</sup> which had been adopted by the Third Special Inter-American Conference held at Buenos Aires.<sup>79</sup> As a result, the juridical machinery of the Organization had been rendered more flexible since of the two previous legal organs the revised Charter had retained only the Inter-American Juridical Committee. In this connexion, and referring to the opinion of some commentators to the effect that the OAS would henceforth deal only with economic and financial matters, he stressed that legal rules such as non-intervention continued to be basic to

<sup>78</sup> United Nations, *Treaty Series*, vol. 119, p. 48.

<sup>79</sup> *OAS Official Records*, OEA/Ser.A/2/Add. (Washington D.C., Pan American Union, 1967), pp. 49-96.

the inter-American system. Also, many draft juridical conventions were under consideration by the OAS, such as the draft convention on human rights prepared at the end of 1969 by a specialized inter-American Conference held at San José in Costa Rica.

101. With regard to the work of the Committee in 1969, he mentioned the extensive report it had submitted to the first General Assembly of the OAS on the Committee's past achievements and future work,<sup>80</sup> and the decisions adopted on government-owned international companies and on violations of international "standstill" (*status quo*) commitments. On the first question, the conclusions adopted included the requirement that such companies should be formed by means of treaties which would contain the articles of association and specify the law that would govern the company's activities. Also, the companies should enjoy extra-territorial legal personality and be entitled to certain immunities and privileges. Provision should likewise be made for the submission of all disputes to some means of judicial settlement. On the second question, which arose in connexion with article XXXVII (Commitments) of the General Agreement on Tariffs and Trade (GATT), the Committee had concluded that it was both necessary and desirable to prepare a new legal formulation of the standstill system; that the definition of international standstill commitments contained in that article was acceptable; that the escape clause should be deleted because in practice the expressions "to the fullest extent possible", "compelling reasons" and "legal reasons" made it possible for developed countries to evade compliance with the basic commitment and to act as they pleased; that recommendation A.II.1 of the first session of the United Nations Conference on Trade and Development should be embodied in a protocol in order to give it the character of a binding obligation; and that where a developed State proposed to change its taxes on products covered by a standstill commitment, notification of its intention should be given to the other contracting parties, especially those interested in the products concerned.

102. Among the topics to be dealt with by the Committee at its next session, he mentioned the draft conventions on cheques and bills of exchange negotiated internationally; the inter-American peace system in order to secure unanimity as regards the American Treaty on Pacific Settlement or Bogotá Pact of 1948, which had been ratified by only fourteen States; the legal status of foreign guerilla fighters in the territory of member States; the treatment of foreign investments; and the revision and modernization of various inter-American conventions. In this respect, the Committee intended to review the position in respect of no less than sixty-four instruments. Some had become obsolete owing to changing conditions, such as those on patents and civil aviation. In particular, the Convention on Treaties, signed at Havana on 20 February 1928, had become obsolete because of regional support for the Vienna Convention on the Law of Treaties (1969) which had been signed by no less than sixteen Latin American States. Also, other conventions had only been ratified by a few American States and therefore stood in need of revision.

<sup>80</sup> *Ibid.*, OEA/Ser.I/VI.1 (Washington D.C.), document CIJ-99.

103. The Commission was informed that the 1970 session of the Committee, to which it has a standing invitation to send an observer, would be held at Rio de Janeiro from 16 June to 15 September. The Commission requested its Chairman, Mr. T. O. Elias, to attend the Committee's session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

#### I. DATE AND PLACE OF THE TWENTY-THIRD SESSION

104. The Commission decided to hold its next session at the United Nations Office at Geneva from 26 April to 30 July 1971.

#### J. REPRESENTATION AT THE TWENTY-FIFTH SESSION OF THE GENERAL ASSEMBLY

105. The Commission decided that it would be represented at the twenty-fifth session of the General Assembly by its Chairman, Mr. T. O. Elias.

#### K. SEMINAR ON INTERNATIONAL LAW

106. In pursuance of General Assembly resolution 2501 (XXIV) of 12 November 1969, the United Nations Office at Geneva organized during the twenty-second session of the Commission a sixth session of the Seminar on International Law intended for advanced students of that discipline and young government officials whose functions habitually include a consideration of questions of international law. In order to associate the Seminar with the tribute paid by the Commission to the memory of Gilberto Amado, the present session was called the "Gilberto Amado session".

107. Between 25 May and 12 June 1970, the Seminar held twelve meetings devoted to lectures followed by discussion. It was attended by twenty-four students 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. Bartoš, Mr. Castañeda, Mr. El-Erian, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Sir Humphrey Waldock and Mr. Ustor), a professor from the University of Geneva (Mr. Virally) and one member of the Secretariat (Mr. Raton, Senior Officer, Office of the Director General of the United Nations Office at Geneva). The lectures were given on various subjects connected with the past and present work of the International Law Commission, including the Convention on Special Missions, the question of permanent missions to the international organizations, the most-favoured-nation clause, succession in respect of treaties, the outer limit of the continental shelf and recent legal aspects of the sea-bed. Other lectures dealt with the role of custom in international law, the International Law Commission and the twenty-fifth anniversary of the United Nations, the "Barcelona Traction, Light and Power Co., Ltd." case and the Inter-

national Court of Justice judgment of 5 February 1970, and principles of international law concerning friendly relations and co-operation between States.

108. The Seminar was held without cost to the United Nations, which assumed no responsibility for the travel or living expenses of the participants. The Governments of Denmark, Finland, the Federal Republic of Germany, Israel, the Netherlands, Norway and Sweden offered scholarships for participants from developing countries. Thirteen candidates were chosen to be beneficiaries of the scholarships. Four students holding scholarships granted by the United Nations Institute for Training and Research (UNITAR) were also admitted to the Seminar, but two were unable to attend the session. 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. The higher number of scholarship-holders at the sixth session was partly due to the fact that a Netherlands Government scholarship not used at the fifth session was transferred to the scholarships budget of the present session, and partly to the use of what was left over from various scholarships for earlier sessions. If it is desired to maintain a high level of participation by nationals of developing countries, it is not only essential to be able to rely on the continuing generosity of the above-men-

tioned Governments, but also desirable that one or two more scholarships should be offered for the next session.

109. The experience gained during the six sessions proves that it would be useful to make Spanish a working language of the Seminar on the same footing as English and French. Moreover, it is necessary that participants should have free access to adequate documentation relating to the work of the Commission, especially reports, yearbooks and other printed Commission documents, so as to ensure that the greatest benefit can be derived from their participation in the Seminar.

110. The Commission expressed appreciation, in particular to Mr. Raton, for the manner in which the Seminar was organized, the high level of discussion and the results achieved. The Commission recommended that seminars should continue to be held in conjunction with its sessions.

#### L. INDEX OF THE COMMISSION'S DOCUMENTS

111. The United Nations Library at Geneva published and circulated the guide (ST/GENEVA/LIB/SER.B/Ref.2) to the main documents of the Commission issued from 1949 to 1969 referred to in paragraph 110 of the Commission's report on its twenty-first session.<sup>81</sup>

<sup>81</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 225, document A/7610/Rev.1.



## 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/5409	Legal problems relating to the utilization and use of international rivers: report of the Secretary-General (summary of legislative texts and treaty provisions)	Mimeographed. For the full text of the legislative texts and treaty provisions, see United Nations publication, Sales No.: 63.V.4.
A/7240	Question of methods of fact-finding—Register of experts in legal and other fields, prepared in pursuance of General Assembly resolution 2329 (XXII): note by the Secretary-General	Mimeographed.
A/7631	Permanent missions to the United Nations: report by the Secretary-General	Mimeographed.
A/7751	Question of methods of fact-finding—Revised register of experts in legal and other fields, prepared in pursuance of General Assembly resolution 2329 (XXII): note by the Secretary-General	Final offset.
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, 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.4/202	First report on succession of States and Governments in respect of treaties, by Sir Humphrey Waldock, Special Rapporteur	<i>Ibid.</i> , 1968, vol. II, p. 87.
A/CN.4/204	First report on succession of States in respect of rights and duties resulting from sources other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur	<i>Ibid.</i> , p. 94.
A/CN.4/208	Supplement, prepared by the Secretariat, to the "Digest of the decisions of international tribunals relating to State responsibility"	<i>Ibid.</i> , 1969, vol. II, 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>Ibid.</i> , p. 114.
A/CN.4/214 and Add.1 and 2	Succession of States and Governments: second report on succession in respect of treaties, by Sir Humphrey Waldock, Special Rapporteur	<i>Ibid.</i> , p. 45.
A/CN.4/216/Rev.1	<i>Idem</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	<i>Ibid.</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>Ibid.</i> , p. 125.
A/CN.224 and Add.1	Third report on succession in respect of treaties, by Sir Humphrey Waldock, Special Rapporteur	Reproduced in this volume, p. 25.
A/CN.4/225	Succession of States to multilateral treaties: seventh study prepared by the Secretariat	<i>Idem</i> , p. 61.

A/CN.4/226	Third report on succession in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur—Draft articles with commentaries on succession to public property	<i>Idem</i> , p. 131.
A/CN.4/227 and Add.1 and 2	Fifth report on relations between States and international organizations, by Mr. Abdullah El-Erian, Special Rapporteur	<i>Idem</i> , p. 1.
A/CN.4/228 and Add.1	Second report on the most-favoured nation clause, by Mr. Endre Ustor, Special Rapporteur	<i>Idem</i> , p. 199.
A/CN.4/229	Succession of States in respect of bilateral treaties: study prepared by the Secretariat	<i>Idem</i> , p. 102.
A/CN.4/230	Review of the Commission's programme of work and of the topics recommended or suggested for inclusion in the programme: working paper prepared by the Secretariat	<i>Idem</i> , p. 247.
A/CN.4/231	Letter dated 23 March 1970 from the Secretary-General to the Chairman of the International Law Commission	Mimeographed.
A/CN.4/232	Supplement, prepared by the Secretariat, to the "Digest of the decisions of international tribunals relating to State succession"	Reproduced in this volume, p. 170.
A/CN.4/233	Second report on State responsibility, by Mr. Roberto Ago, Special Rapporteur—The origin of international responsibility	<i>Idem</i> , p. 177.
A/CN.4/234	Report on the eleventh session of the Asian-African Legal Consultative Committee, by Mr. Nikolai, A. Ushakov, Observer for the Commission	<i>Idem</i> , p. 243.
A/CN.4/235	Letter dated 14 May 1970 from the President of the Security Council addressed to the Chairman of the International Law Commission	See p. 273 above (A/8010/Rev.1, para. 11).
A/CN.4/236	Letter dated 12 June 1970 from the Chairman of the International Law Commission addressed to the President of the Security Council	<i>Idem</i> .
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NOT REPRODUCED IN THIS VOLUME**

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
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A/CN.4/222	Provisional agenda	Mimeographed. For the agenda as adopted, see p. 273 above (A/8010/Rev.1, para. 9).
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A/CN.4/236	Letter dated 12 June 1970 from the Chairman of the International Law Commission addressed to the President of the Security Council	<i>Idem</i> .
A/CN.4/237	Report of the International Law Commission on the work of its twenty-second session	Reproduced as document A/8010/Rev.1 (see p. 271 above).
A/CN.4/L.150 and Add.1-5, 6 [and Corr.1], 7-8	Relations between States and international organizations—Draft articles on representatives of States to international organizations (parts III and IV): text of articles 0 and 51 to 83 adopted by the Drafting Committee	Mimeographed.
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A/CN.4/L.153	<i>Idem</i> —(part III): text of article 57bis adopted by the Drafting Committee on third reading	Mimeographed.
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A/CN.4/L.156-L.160	Draft report of the International Law Commission on the work of its twenty-second session	Mimeographed. For the final text, see A/8010/Rev.1 (p. 271 above).
A/CN.4/SR.1042-SR.1086	Provisional summary records of the 1042nd to the 1086th meetings of the Commission	Mimeographed. For the final text, see vol. I.









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