

YEARBOOK
OF THE
INTERNATIONAL
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1972

Volume II

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

UNITED NATIONS



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SUCCESSION OF STATES

(a) Succession in respect of treaties

[Agenda item 1(a)]

DOCUMENT A/CN.4/256 AND ADD.1-4

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

[Original text: English]
[10 April, 29 May and 8, 16 and 28 June 1972]

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ABBREVIATIONS

BENELUX	Belgium-Netherlands-Luxembourg Treaty
EEC	European Economic Community
GATT	General Agreement on Tariffs and Trade
I.C.J.	International Court of Justice
<i>I.C.J. Pleadings</i>	<i>I.C.J., Pleadings, Oral Arguments, Documents</i>
<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
P.C.I.J.	Permanent Court of International Justice
IAEA	International Atomic Energy Agency
OAU	Organization of African Unity
WHO	World Health Organization
WIPO	World Intellectual Property 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

THE BASIS OF THE PRESENT REPORT

1. The present report takes the form of a continuation of the Special Rapporteur's second,¹ third² and fourth³ reports on this topic, and is designed to complete the series of draft articles presented in those reports.⁴ The basis on which these reports, including the present one, are being prepared and the scheme of the draft articles are thought to have been sufficiently explained in the "Introductions" to the previous reports and in chapter III of the Commission's report to the General Assembly on the work of its twenty-third session.⁵ Accordingly, it is not thought that it would serve any purpose to repeat those explanations here, more especially when both the basis of the work and the scheme of the draft must remain entirely provisional until some of the more fundamental aspects of the topic have been considered by the Commission.

2. The Special Rapporteur therefore confines himself to mentioning a minor change in the arrangement of the draft articles from that envisaged by him at the twenty-third session.⁶ He then indicated that any provisions concerning "dispositive", "localized" or "territorial" treaties would be included in the series of articles in part II dealing with the position of "new States" as defined in article 1, paragraph (e).⁷ It is now thought more convenient to consider the problems raised by these treaties separately and after dealing with the rules applicable to particular categories of succession. The reason is that, as some members of the Commission emphasized at the twenty-second session,⁸ the problem of "dispositive", "localized" or "territorial" treaties arises in connexion with cases of simple transfer of territory as well as in cases of new States, protected States, unions of States, etc. Accordingly, in the present report this problem is not treated in part II, which deals with "new States", but will be dealt with separately in a part IV, while part III is devoted to the rules applicable to the various particular categories of succession.

¹ *Yearbook of the International Law Commission, 1969*, vol. II, p. 45, document A/CN.4/214 and Add.1 and 2.

² *Ibid.*, 1970, vol. II, p. 25, document A/CN.4/224 and Add.1.

³ *Ibid.*, 1971, vol. II (Part One), p. 143, document A/CN.4/249.

⁴ Reference may also be made to the Special Rapporteur's first report, which, however, was of a preliminary character (see *Yearbook of the International Law Commission, 1968*, vol. II, p. 87, document A/CN.4/202).

⁵ *Ibid.*, 1971, vol. II (Part One), p. 275, document A/8410/Rev.1.

⁶ *Ibid.*, p. 339, document A/8410/Rev.1, para. 66.

⁷ "'New State' means a succession where a territory which previously formed part of an existing State has become an independent State" (see *Yearbook of the International Law Commission, 1970*, vol. II, p. 28, document A/CN.4/224 and Add.1, article 1 and paragraph 2 of the commentary thereon).

⁸ *Ibid.*, p. 271, document A/8010/Rev.1, para. 55.

II. Text of draft articles with commentaries⁹

PART III. PARTICULAR CATEGORIES OF SUCCESSION

3. Part II contains the general rules proposed by the Special Rapporteur concerning succession of "new States" in respect of treaties.¹⁰ In addition, the term "new States" has for the purpose of the present articles been defined in article 1, paragraph (e) as covering any succession "where a territory which previously formed part of an existing State has become an independent State". Nevertheless, it is necessary for the Commission to consider what, if any, modifications or additions to the general rules in part II may be required for particular types of new States. The cases calling for examination in this connexion appear to be: (1) dependent territories, comprising (a) "protected States", (b) mandates and trusteeships, (c) colonies and (d) associated territories; (2) a union of States; and (3) a separation of a State into two or more States.

Article 18. — Former protected States, trusteeships and other dependencies

1. Where the succession has occurred in respect of a former protected State, Trusteeship, or other dependent territory, the rules set out in the present draft articles apply subject to the provisions of paragraph 2.

2. Unless terminated or suspended in conformity with its own provisions or with the general rules of international law:

(a) A treaty to which a State was a party prior to its becoming a protected State continues in force with respect to that State;

(b) A treaty to which a State, when a protected State, became a party in its own name and by its own will continues in force with respect to that State after its attainment of independence.

COMMENTARY

(1) A preliminary question may arise as to whether a codification of the law of succession of States in the 1970s should include any provisions regarding dependent territories. A treaty setting out the rules of succession in respect of treaties would 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".¹¹ In regard to any

⁹ The texts of the previous draft articles, together with the commentaries, have been published as follows:

Article 1 (para. 1 (a), (b) and (c)) and articles 2-4: *Yearbook of the International Law Commission, 1961*, vol. II, pp. 50 *et seq.*, document A/CN.4/214 and Add.1 and 2;

Article 1 (para. 1 (d), (e) and (f)) and articles 5-12: *ibid.*, 1970 vol. II, pp. 28 *et seq.*, document A/CN.4/224 and Add.1;

Article 1 (para. 1 (g)) and articles 13-17: *ibid.*, 1971, vol. II (Part One), p. 143 *et seq.*, document A/CN.4/249.

¹⁰ See *Yearbook of the International Law Commission, 1970*, vol. II, p. 25, document A/CN.4/224 and Add.1, and *ibid.*, 1971, vol. II (Part One), p. 143, document A/CN.4/249.

¹¹ Unless a contrary intention to make the treaty retroactive were established; see Vienna Convention on the Law of Treaties, article 28 (*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).

previous act, fact or situation the parties would be bound only by rules to which they would be subject under international law independently of the Convention.¹² Having regard, therefore, to the progressive disappearance of dependent territories, and to the modern law regarding self-determination enshrined in the Charter, the omission of provisions concerning dependent territories may be argued to be at once legally justifiable and politically preferable.

(2) On the other side, however, it may be urged that a number of considerations make it desirable that any codification of the present topic should deal specifically with the questions raised by particular types of dependent territories. First, the law applicable to succession with regard to dependent territories may be relevant historically for determining the status to-day of a treaty claimed still to be in force; e.g. in the case of a former "protected State" or Class A Mandate. Hence there may be advantage in attempting to provide an authoritative statement of that law, certain points in which may otherwise give rise to controversy. Secondly, in some cases, e.g. treaties of a "dispositive" or territorial character, where customary law may impose an *obligation* on a successor State to accept the treaty (or the situation established by it), it may be important to determine whether the particular status of the territory prior to independence is to be regarded as negating the existence of such an obligation.¹³ Thirdly, dependency with regard to external relations has not completely disappeared from the international scene and the emergence of some States to independence is very recent, so that the law governing succession in the case of dependent territories is still of present importance. A further consideration is that the differences between the various types of dependencies are much discussed in all the literature, including the most modern literature, concerning succession in respect of treaties; and there may, in consequence, be advantage in covering this aspect of the topic in the present draft, however briefly.

(3) In any event, the Special Rapporteur thinks incumbent upon him to provide the Commission with a study of the possible implications of a new State's former "protected", "mandate", "trusteeship", "colonial" or "associated" status for its succession in respect of treaties. Without such a study, the Commission may lack the material to enable it to decide whether or not to include in the draft articles any provisions on this aspect of the topic. As will appear in the ensuing paragraphs of this commentary, the Special Rapporteur believes that for the most part the special characteristics of the various types of dependent territories do not modify the application of the general rules governing a new State's succession in respect of treaties. Once a clear distinction is made, as it has to be made, between an *obligation* and a *right*¹⁴

¹² Vienna Convention on the Law of Treaties, article 4 (*ibid.*, p. 290).

¹³ A view advanced by Tanganyika in relation to the Belbases Agreements (see para. 33 of the commentary to article 22 *bis*).

¹⁴ See commentary to article 6 in the Special Rapporteur's third report (*Yearbook of the International Law Commission, 1970*, vol. II, pp. 31-37, document A/CN.4/224 and Add.1).

to continue a predecessor State's treaties, those special characteristics do not appear to call for different rules, except upon the points indicated in the present article.

(a) *Protected States*

(4) This category of dependencies comprises territories which retained in some measure a separate international personality during the period of their dependency upon another State. It thus includes protected States but not so-called colonial protectorates, which fall into the category of colonies. Admittedly, it may not always be possible to draw a clear line between a protected State, as so defined, and a colonial protectorate. As the Permanent Court of International Justice once said:

The extent of the powers of a protecting State in the territory of a protected State depends, first, upon the treaties between the protecting State and the protected State establishing the Protectorate, and, secondly, upon the conditions under which the Protectorate has been recognized by third Powers as against whom there is an intention to rely on the provisions of these Treaties. In spite of common features possessed by Protectorates under international law, they have individual legal characteristics resulting from the special conditions under which they were created, and the stage of their development.¹⁵

Thus, there may be different shades of "protection", and the precise point at which "protection" pure and simple ends and turns into annexation may be a matter of nice appreciation. In a later case,¹⁶ it is true, the International Court of Justice referred to the French protectorate over Morocco, established by the Treaty of Fez, in terms which might seem to imply that only a "protected" territory which remained a *sovereign* State would have the character of a protected State:

Under this Treaty, Morocco remained a sovereign State but it made an arrangement of a contractual character whereby France undertook to exercise certain sovereign powers in the name and on behalf of Morocco.

But the term "sovereign State" must have been there used by the Court in a qualified sense, because in several respects Morocco was clearly not a fully sovereign State under the Protectorate. Closer to the mark seems a previous observation of the Court in the same judgment:

It is not disputed by the French Government that Morocco, even under the Protectorate, has retained its personality as a State in international law.¹⁷

Thus, the essence of a protected State for present purposes seems to be a territory organized as a State and retaining a distinct identity as such, though the power to conduct its external relations is vested in another State.

(5) For present purposes it must in any event suffice to consider whether, given an admitted case of a protected State, this constitutes a special situation governed by particular rules regarding succession in respect of treaties. The problem has two aspects: (1) Do treaties concluded

by a protected State with third States prior to its entry into protection continue in force notwithstanding this change in its status? (2) Do treaties concluded by the protecting Power on behalf of or with reference to the protected State continue *ipso jure* to be binding on the latter after independence?

(6) The first question was answered by the Court with a clear affirmative in the *Case concerning rights of nationals of the United States of America in Morocco*. After observing, in the passage quoted above, that under the Treaty of Fez Morocco had "remained a sovereign State" though entrusting the exercise of all its international relations to France, the Court went on:

France in the exercise of this function, is bound not only by the provisions of the Treaty of Fez, but also by all treaty obligations to which Morocco had been subject before the Protectorate and which have not since been terminated or suspended by arrangement with the interested States.¹⁸

Moreover, it then gave effect to a number of pre-protectorate treaties as being still in force with respect to Morocco. This decision accords with the opinion of Mr. Max Huber in his report on the *British Claims in the Spanish Zone of Morocco* (Rio Martin),¹⁹ where he held that a Treaty of 1783 made between Great Britain and the Maghzen of Morocco prior to the establishment of the Spanish protectorate was binding upon Spain. Further support for this principle is to be found both in earlier State practice²⁰ and in the practice of Morocco since her resumption of her independence.²¹ The principle appears also to have been applied by the Kingdom of Tonga on the termination of its status as a protected State in 1970. In a notification to the Secretary-General concerning its position after independence in regard to existing treaties Tonga *inter alia* declared:

With respect to duly ratified treaties which were entered into by the Kingdom of Tonga before the United Kingdom undertook the responsibility for the foreign relations thereof, the Government of the Kingdom of Tonga acknowledges that they remain in force to the extent to which their provisions were unaffected in virtue of international law by the above recited instruments entered into between the United Kingdom and the Kingdom of Tonga or by other events.²²

(7) In practice, no doubt, some pre-protectorate treaties will have terminated through the application of their own provisions, by consent or through the application of the general law of treaties. In principle, however, treaties concluded by a State before it accepts protection are generally regarded as continuing to bind it both during

¹⁵ *Nationality Decrees issued in Tunis and Morocco; P.C.I.J., Series B., No. 4, p. 27.*

¹⁶ *Case concerning rights of nationals of the United States of America in Morocco; I.C.J. Reports 1952, p. 188.*

¹⁷ *Ibid.*, p. 185; see also K. Zemanek, "State succession after decolonization", *Recueil des cours de l'Académie de droit international de La Haye, 1965-III* (Leyden, Sijthoff, 1965), vol. 116, pp. 195-196.

¹⁸ *I.C.J. Reports 1952, p. 188.*

¹⁹ United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No. 1949.V.1), p. 725.

²⁰ A. D. McNair, *The Law of Treaties*, rev. ed., (Oxford, Clarendon Press, 1961), pp. 627-628. This writer suggests that annexation might sometimes be resorted to instead of protection for the very purpose of putting an end to inconvenient prior treaties affecting the territory (*ibid.*, p. 628).

²¹ See diplomatic correspondence of Morocco with Italy, the United Kingdom and the United States (*Yearbook of the International Law Commission, 1971*, vol. II (Part Two), p. 161, document A/CN.243/Add.1, paras. 62-64).

²² Document A/CN.4/263, United Kingdom of Great Britain and Northern Ireland, Treaties, Tonga.

the protectorate and after its resumption of independence. The reason is that these treaties were from the outset treaties of the protected State itself, whose separate international personality remained in being notwithstanding its temporary "protection" by the other State.

(8) Logically, it may be urged, the same reasoning should be applied to treaties concluded with reference to a protected territory *during the period of protection*. In other words, if a treaty had been concluded by the protecting Power *on behalf of or in the name of* the protected State, the treaty should be considered as a treaty of the protected State itself and be binding upon it after independence. But if a treaty had been concluded by the protecting Power simply in its own name, and merely "extended" to the protected State, the treaty should not be considered as a treaty of the protected State itself, and the question of succession should be governed by the same rules as in the case of a treaty "extended" to a colonial territory. Such an approach to succession in respect of treaties concluded during a protectorate, if logical enough, is not without its difficulties.²³

(9) One difficulty is the somewhat formal nature of the distinction between a treaty concluded on behalf or in the name of a protected State and one extended to it. Thus, there are many examples of treaties concluded by the United Kingdom and France which were accompanied by declarations that ratification or accession did not include any of their dependent territories, of whatever category. Then at later dates, under an authorization contained or implied in the treaty and after consultation with the local authorities, they notified the extension of the treaty to particular named dependencies. Moreover, in these cases the dependencies in question are recorded in *Multilateral treaties in respect of which the Secretary-General performs depositary functions*²⁴ as having acceded to the treaty on the respective dates of their notifications. True, the names of dependencies are printed in italics and subsumed under Great Britain or, as the case may be, France in order to show that they are not separate *parties* to the treaty. But the treaty was in each instance extended to the dependency by an act of consent specifically related to that dependency.²⁵ A good example is the Geneva Convention of 12 September 1923 for the Suppression of the Circulation of and Traffic in Obscene Publications: specific acts of consent were notified by Great Britain for numerous dependencies of various categories, while France did so for Morocco.²⁶

(10) Another difficulty is that, *ex hypothesi*, a "protected State" is one that has entrusted its treaty-making power to the protecting State, so that the subsequent

conclusion by the latter of any treaty having application to the protected State may be said to be a treaty made on its behalf. This is not to deny that some treaties may have been concluded specifically in the name and for the purposes of the protected State,²⁷ while others may have been concluded by the protecting State primarily on its own behalf, even although "extended" to the protected State. But it remains a question whether this difference in the form of the protecting State's exercise of the treaty-making power with reference to the protected State leads to different results in regard to "succession". In this connexion it may be recalled that Cambodia contended in the *Temple* case²⁸ that France had "represented" her in concluding with Siam a Treaty of Friendship, Commerce and Navigation in 1937; and claimed to invoke that treaty on the basis not of any principle of succession but of her "representation" by France in its conclusion. Thailand disputed the validity of this theory of the continuity of treaties concluded on behalf of a protected State.²⁹ The Court, however, did not find it necessary to decide the issue.

(11) A further point to take into account is that the inheritance of a treaty may in any event occur (by notification of succession in the case of multilateral treaties and "novation" in the case of bilateral treaties) although the treaty had been merely "extended" to the protected State. Whether the new State was formerly a protected State or a colony, all that is required to open up the possibility of succession under articles 7 and 13 of the present draft is that the treaty should have been applicable in respect of the territory at the date of the succession. The only question, therefore, is whether, in the case of a treaty concluded "in the name of" a protected State, the treaty automatically continues in force as a treaty already binding on the new State or whether its continuance in force is a matter of "succession" governed by the general rules set out in the present draft.

(12) Morocco, in her "devolution agreement"³⁰ with France, appears to have distinguished between treaties concluded specifically in her name and treaties merely "extended" to her. She there agreed to "assume the obligations arising out of international treaties concluded by France on behalf of Morocco and out of such international instruments relating to Morocco as have not given rise to observations on its part". Similarly, in clarifying her position with respect to general multilateral treaties of which the Secretary-General is the depositary, Morocco seems to have made notifications of "succession" for treaties which had merely been "extended" to her by France but not to have done so for treaties in regard to which, prior to independence, her separate "accession"

²³ The case for this approach is cogently argued by K. Zemanek, *loc. cit.*, pp. 196-202.

²⁴ United Nations, *Multilateral treaties in respect of which the Secretary-General performs depositary functions: List of signatures, ratifications, accessions, etc., as at 31 December 1968* (United Nations publication, Sales, No. E.69.V.5) (referred to hereafter as *Multilateral treaties . . . 1968*).

²⁵ Cf. J. E. S. Fawcett, "Treaty relations of British overseas Territories" *British Year Book of International Law* (1949), (London), vol. 26, 1950, p. 102.

²⁶ United Nations, *Multilateral treaties . . . 1968*, p. 158.

²⁷ e.g., the Arbitration Agreement of 1954 concluded between "the Government of the United Kingdom (acting on behalf of the Ruler of Abu Dhabi)" and the Government of Saudi Arabia (United Kingdom Treaty Series, No. 65 Cmd. 9272, (London, H.M. Stationery Office, 1954).

²⁸ I.J.C. *Pleadings, Temple of Preah Vihear*, vol. I, pp. 165-166.

²⁹ *Ibid.*, vol. II, p. 38.

³⁰ See *Yearbook of the International Law Commission, 1962*, vol. II, p. 127, document A/CN.4/150, annex, section No. 6.

had been communicated by France.³¹ Again, no notification or other act was considered necessary either by Morocco herself or by Switzerland, as depositary of the relevant treaties, to bring about the continuance of Morocco's membership of the International Union for the Protection of Literary and Artistic Works³² or of the International Union for the Protection of Industrial Property.³³ In both these cases France had separately notified Morocco's accession to the treaties in question during the period of protection and, on independence, Morocco was simply regarded as having been a party to the treaties in her own name and as remaining so after the termination of her protected status. In the case of the 1929 Geneva Humanitarian Conventions, on the other hand, which had merely been "extended" to Morocco, she became a party after independence by a notification of accession in July 1956, which came into effect only six months later in accordance with the provisions of the 1929 treaties.³⁴ (It seems that the Moroccan Government used the procedure of accession rather than "succession" in the case of these treaties by inadvertence and considered itself bound by all treaties validly contracted with respect to the Moroccan protectorate by France.)³⁵ Evidence of Morocco's practice in regard to bilateral treaties is less readily available, but her attitude towards her succession in respect of bilateral treaties is thought to be the same as in the case of multilateral treaties. This is borne out by the fact that in her devolution agreement with France she made no distinction between bilateral and multilateral treaties; and she seems to have considered herself as in principle bound by all protectorate treaties concluded prior to independence, since she expressly excepted from the devolution agreement only one treaty, the treaty granting military bases to the United States.

(13) Tunisia's attitude after independence appears to have been less favourable to the continuity of treaties concluded during her period of protection.³⁶ She did not conclude any devolution agreement with France; and she made no reply to the Secretary-General's inquiry as to whether she considered herself bound by five general multilateral treaties of which he was the depositary and which had been extended to Tunisia by France. It is true that, like Morocco, Tunisia was considered as having been a member of the International Unions for the Protection of Literary and Artistic Works and for the Protection of Industrial Property prior to independence, and as automatically remaining such upon independence.³⁷ It is also true that prior to independence Tunisia was considered

as a party to the Agreement for the Establishment of a General Fisheries Council for the Mediterranean and as remaining a party to that Agreement upon independence, without any fresh act of acceptance.³⁸ Again, she is listed by the Secretary-General as a party to the Convention and Protocol of 3 November 1923 relating to the Simplification of Customs Formalities simply in virtue of her ratification of that Convention during her period of protection.³⁹ In the case of the GATT, however, she did not maintain the commitments entered into by France on her behalf but, after a period of *de facto* application, negotiated her own accession to GATT.⁴⁰ Similarly, she notified her *accession*, not *succession*, to the Geneva Humanitarian Conventions of 1949 and there is no indication that she did this by mere inadvertence. Indeed, whereas Morocco notified her "succession" to the Convention on Road Traffic of 19 September 1949, Tunisia proceeded to become a party to it by way of "accession";⁴¹ and she deposited a new "acceptance" of the International Air Services Transit Agreement of 7 December 1944 on her own account, without regard to France's acceptance of the Agreement during the period of protection.⁴² She seems, moreover, to have taken the same position in regard to bilateral treaties. In 1959 the United Kingdom Government informed Tunisia that it considered a Franco-British Treaty of 1889 which extended an earlier extradition treaty specifically to Tunisia to be still in force on the express ground that Tunis had formerly been a protectorate with a separate international personality. Tunisia replied that she did not consider herself as bound by the treaty.⁴³ The United Kingdom, it is true, insisted upon treating the Tunisian reply merely as a notice of termination; but it remains clear that Tunisia herself rejected the thesis of her automatic succession to the protectorate treaties. In the case of trade agreements Tunisia accepted a measure of continuity; but the treaties in question were short-term and renewable, and the continuity appears to be referable to Tunisia's assent to their remaining in force, rather than to any theory of a protectorate's succession to its predecessor's treaties.⁴⁴

(14) Cambodia, Laos and the Republic of Viet-Nam, formerly three separate parts of French Indo-China, are commonly referred to as examples of "protected States";⁴⁵ and, as already recalled, Cambodia in the *Temple Case* specifically invoked her prior "representation" in international relations by France as the basis of her claim to

³¹ *Ibid.*, pp. 111-112, paras. 38-39; cf. United Nations, *Multilateral Treaties . . . 1968*, pp. 125, 126, 158 and 399.

³² *Yearbook of the International Law Commission, 1968*, vol. II, p. 17, document A/CN.4/200 and Add.1 and 2, paras. 42-44.

³³ *Ibid.*, pp. 66-67, paras. 293-295.

³⁴ *Ibid.*, p. 44, para. 183.

³⁵ See D. P. O'Connell, *State Succession in Municipal Law and International Law* (Cambridge, University Press, 1967), vol. II, *International Relations* (referred to hereafter as "D.P. O'Connell, *State Succession . . .*, vol. II"), p. 142.

³⁶ See generally P. Louis-Ducas, *Journal du droit international* (Paris), 88th year, No. 1 (January-March 1961), pp. 86-119.

³⁷ *Yearbook of the International Law Commission, 1968*, vol. II, p. 17, document A/CN.4/200 and Add.1 and 2, paras. 42-44.

³⁸ *Ibid.*, 1969, vol. II, p. 43, document A/CN.4/210, para. 77.

³⁹ United Nations, *Multilateral Treaties . . . 1968*, p. 399.

⁴⁰ *Yearbook of the International Law Commission, 1968*, vol. II, p. 81, document A/CN.4/200 and Add.1 and 2, paras. 353-355.

⁴¹ United Nations, *Multilateral Treaties . . . 31 December 1968*, p. 230.

⁴² United Nations, *Materials on Succession of States* (United Nations publication, Sales No. E/F.68.V.5), p. 226.

⁴³ *Ibid.*, p. 184.

⁴⁴ *Yearbook of the International Law Commission, 1971*, vol. II (Part Two), pp. 162-163, document A/CN.4/243 Add.1, paras. 66-71.

⁴⁵ For the view of the Legal Committee of the French Union, see International Law Association, *The Effect of Independence on Treaties: A Handbook* (London, Stevens, 1965), pp. 168-169.

be entitled to invoke a 1937 Franco-Siamese Treaty of Friendship, Commerce and Navigation. The practice of these three States after independence does not, however, appear to differ materially from that of other dependent territories. Two of them, Laos and Viet-Nam, entered into devolution agreements with France which stated that they were substituted for France in all the rights and obligations resulting from all international treaties and particular conventions contracted by France in their name.⁴⁶ These agreements do not, however, appear to be based on any doctrine of the continuity of protectorate treaties. When the United Kingdom denied that there could be any *automatic* succession by Laos to a civil procedure convention or to bilateral treaties of a similar nature, Laos accepted this view of her legal position.⁴⁷ In the case of certain narcotic conventions of which the Secretary-General is the depositary, joint notifications were made by France and each of the three States, informing him of the transfer from France to the new State of the duties and obligations arising from the application of those Conventions to their country.⁴⁸ These notifications relate to only a very small number of the multilateral treaties of which the Secretary-General is the Depositary and speak not of the continuity of protectorate treaties but of the *transfer* of obligations from France to the new States. With respect to many of the multilateral treaties of which the Secretary-General is the depositary, Cambodia, Laos and the Republic of Viet-Nam have taken no action vis-à-vis the depositary and are not listed as parties. At the same time, it may be noted that in one instance, where France had made separate acceptances of the treaty specifically for Viet-Nam and Laos, these two States did not rely on the acceptance given on their behalf during the protectorate but deposited their own acceptances of the treaty after independence.⁴⁹ In another instance, where France had made a separate accession to a League of Nations Treaty specifically on behalf of French Colonies, Protectorates and Territories under French Mandate, Laos again deposited her own instrument of accession,⁵⁰ and did not rely on any doctrine of continuity or succession.

(15) Cambodia, Laos and Viet-Nam, unlike Morocco and Tunisia, were not considered as separate parties to the Conventions for the Protection of Literary and Artistic Works prior to independence or to the Conventions for the Protection of Industrial Property. These Conventions had merely been extended separately to France's overseas departments and territories.⁵¹ After independence Cambodia and Viet-Nam informed the depositary that they no longer considered themselves as bound by the Conventions concerning literary and artistic works;⁵²

Laos did not notify her decision to the depositary, and was equally not considered a party.⁵³ In the case of the Conventions concerning industrial property, Cambodia did not notify the depositary of her decision and was not considered as having become a party.⁵⁴ Laos, on the other hand, notified her *succession* to the London text of the Paris Convention, while Viet-Nam's "accession" to the Conventions was treated by the depositary as a declaration of continuity without apparent objection from the Republic.⁵⁵ As to the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes, the Administrative Council of the Permanent Court of Arbitration invited States, formerly dependent territories of a contracting party, to consider themselves as parties to the Conventions. Cambodia and Laos then notified the depositary that they wished to be considered as parties; but the Republic of Viet-Nam did not accept succession to these Conventions.⁵⁶ Accession, not succession, was the procedure adopted by all these States when becoming parties to the Geneva Humanitarian Conventions of 1949.⁵⁷ In the case of GATT, none of these States elected to consider itself a party by succession to France.⁵⁸

(16) Accordingly, so far as multilateral treaties are concerned, the evidence does not indicate that the question of the succession of Cambodia, Laos and Viet-Nam to treaties concluded by France during the period of their protection has been dealt with on any different basis from that of the succession of other dependent territories in respect of pre-independence treaties. Nor does there seem to be any substantial body of evidence indicating the application of a special principle, derived from their former status as protected States, with respect to their succession to bilateral treaties concluded prior to their independence. If Cambodia invoked such a principle in the *Temple* case, Thailand, objected that there was no difference between the legal position of an ex-protectorate and other dependent territories with regard to succession to treaties.⁵⁹ Laos, as already noted,⁶⁰ agreed with the United Kingdom that there was no automatic succession to civil procedure and similar bilateral treaties. In general, and leaving aside the question of treaties of a "territorial" or "dispositive" character, these three ex-protectorates appear to have considered themselves as having the same freedom either to discontinue or to "novate" bilateral treaties as other dependent territories. This is borne out

⁴⁶ United Nations, *Materials on Succession of States (op. cit.)*, pp. 188 and 189.

⁴⁷ *Ibid.*

⁴⁸ *Yearbook of the International Law Commission, 1962*, vol. II, p. 111, document A/CN.4/150, paras. 34 and 35.

⁴⁹ United Nations, *Multilateral Treaties . . . 1968*, pp. 125-126.

⁵⁰ *Ibid.*, pp. 361 and 362.

⁵¹ *Yearbook of the International Law Commission, 1968*, vol. II, p. 10, document A/CN.4/200 and Add.1 and 2, para. 10, footnote 28.

⁵² *Ibid.*, p. 21, para. 69.

⁵³ *Ibid.*, p. 26, para. 98 and foot-note 196. Laos was not included in the list of members of the Berne Union published by WIPO in January 1972 (*Copyright (Geneva)*, 8th year, No. 1, January 1972, pp. 8-9).

⁵⁴ *Yearbook of the International Law Commission, 1968*, vol. II, p. 71, document A/CN.4/200 and Add.1 and 2, para. 310.

⁵⁵ *Ibid.*, pp. 61-62, para. 269.

⁵⁶ *Ibid.*, pp. 29-30, paras. 115-117 and 127, foot-notes 242 and 243.

⁵⁷ *Ibid.*, pp. 44-45, paras. 183 and 185.

⁵⁸ *Ibid.*, pp. 81-82, paras. 353, 354, 357 and 358.

⁵⁹ I.C.J. *Pleadings, Temple of Preah Vihear*, vol. II, p. 38.

⁶⁰ See paragraph 14 above.

by the fact that the official United States publication, *Treaties in Force*,⁶¹ does not list any bilateral treaty earlier in date than 1951 as still being in force with respect to any of these three States; and by 1951 they had already recovered their autonomy in treaty-making and were on the verge of full independence.⁶² It is true that, in 1950, the Legal Committee of the French Union expressed the view that "treaties regularly concluded under the previous régime and which were hitherto applicable to these States continued to bind them as a matter of law despite subsequent changes".⁶³ But, as indicated in the preceding paragraphs, the subsequent treaty practice with respect to these States does not appear to be compatible with that view of the law.

(17) As to former British protected States, Kuwait did not enter into any devolution agreement with the United Kingdom or make any unilateral declaration. Nor does she seem to have based her treaty practice on any special theory regarding treaties concluded by a protecting Power during the period of protection. The evidence is comparatively sparse, probably because the number of treaties concluded by the United Kingdom specifically on behalf of Kuwait or "extended" to her was not very large. In general, however, Kuwait seems to have preferred to become a party to pre-independence treaties by "accession" in her own name. Thus, she deposited her own instrument of accession to the Supplementary Convention of 7 September 1956 on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, although in 1957 the United Kingdom had transmitted to the depositary a separate notification of its application to Kuwait in a note referring specifically and exclusively to Kuwait.⁶⁴ Again, she became a party by accession to the Geneva Humanitarian Conventions of 1949 which the United Kingdom had undertaken to apply to Kuwait to the extent of its powers in relation to that territory.⁶⁵ As for bilateral treaties, the United States publication *Treaties in Force* lists a British-United States Consular Convention of 1951 and a Visa Convention of 1960 as still in force. But there is no indication that this has been done on any different basis from that applicable to other forms of dependent territories. The emergence of the other British-protected Persian Gulf States to independence is too recent for their position in regard to treaties to be apparent. But, like Kuwait, they have not entered into any devolution agreement, or made any declaration.

(18) Tonga, on the other hand, whose emergence as an independent State is also very recent, transmitted to the Secretary-General a unilateral declaration setting out in some detail her position in regard to treaties in force with

respect to Tonga at the date of independence; and she asked that this declaration should be circulated to all Members of the United Nations so that they might "be effected with notice of the Government's attitude". Earlier in this commentary reference has been made to the clause in the declaration recognizing the continued validity of treaties concluded by Tonga *prior* to the protectorate to the extent that they were unaffected by subsequent acts or events. As to treaties concluded during the period of protection, paragraphs 9 to 12 of the declaration stated:

The Government of the Kingdom of Tonga, conscious of the desirability of maintaining existing legal relationships, and conscious of its obligations under international law to honour its treaty commitments, acknowledges that treaties validly made on behalf of the Kingdom of Tonga by the Government of the United Kingdom pursuant to and within the powers of the United Kingdom derived from the above recited instruments and subject to the conditions thereof bound the Kingdom of Tonga as a Protected State and in principle continue to bind it in virtue of customary international law after 4 June 1970 and until validly terminated.

However, until the treaties which the United Kingdom purported to make on behalf of the Kingdom of Tonga have been examined by it, the Government of the Kingdom of Tonga cannot state with finality its conclusions respecting which, if any, such treaties were not validly made by the United Kingdom within the powers derived from and the conditions agreed to in the above recited instruments, and respecting which, if any, such treaties are so affected by this termination of the arrangements whereby the United Kingdom exercised responsibility, for the international relations of the Kingdom of Tonga, or by other events, as no longer to be in force in virtue of international law.

It therefore seems essential that each treaty should be subjected to legal examination. It is proposed, after this examination has been completed, to indicate which, if any, of the treaties which the United Kingdom purported to make on behalf of the Kingdom of Tonga in the view of the Government thereof do not create rights and obligations for the Kingdom of Tonga by virtue of the above mentioned circumstances and in virtue of international law.

It is desired that it be presumed that each treaty continues to create rights and obligations and that action be based on this presumption until a decision is reached that the treaty should be regarded as not having been validly made for the Kingdom of Tonga or as having lapsed. Should the Government of the Kingdom of Tonga be of the opinion that it continues to be legally bound by the treaty, and wishes to terminate the operation of the treaty, it will in due course give notice of termination in the terms thereof.⁶⁶

In these paragraphs Tonga appears to have taken the position that under customary law *all* treaties validly made by the United Kingdom on behalf of Tonga in principle continue to be binding upon her; and for this purpose she does not seem to distinguish between treaties made "in the name of" Tonga and those "extended" to Tonga. Admittedly, the declaration reserves to Tonga a considerable power of appreciation with regard both to the validity of the United Kingdom's exercise of its treaty-making powers and to the effect on any particular treaty of the termination of the protectorate or of other subsequent events. But in principle Tonga appears to consider herself as *ipso jure* bound by all treaties concluded by the United Kingdom with reference to Tonga.

⁶¹ United States, Department of State, *Treaties in Force—A List of Treaties and other International Agreements of the United States in Force* (Washington, D.C., U.S. Government Printing Office).

⁶² D. P. O'Connell, *State Succession . . .*, vol. II, pp. 144-145.

⁶³ International Law Association, *The Effect . . . (op. cit.)*, p. 168.

⁶⁴ United Nations, *Multilateral Treaties . . . 1968*, pp. 315-317.

⁶⁵ *Yearbook of the International Law Commission, 1968*, vol. II, pp. 34 and 44, document A/CN.4/200 and Add.1 and 2, para. 137, foot-note 261, and para. 182.

⁶⁶ Document A/CN.4/263, United Kingdom of Great Britain and Northern Ireland, Tonga.

(19) The modern treaty practice examined in the present commentary is not thought to bear out the proposition that all treaties validly concluded by a protecting State within the scope of the powers conferred upon it continue *ipso jure* to bind the protected State after independence. Nor does Tonga appear to regard herself as simply taking over the treaty relations established on her behalf by the United Kingdom. When she notified the Secretary-General that she considered herself bound by the four Geneva Conventions on the Law of the Sea, which had been extended to her prior to independence, she withdrew certain United Kingdom observations concerning an Indonesian reservation and substituted for them a new observation of her own. It seems, moreover, from the correspondence⁶⁷ that both Tonga and the Secretary-General regarded the Tongan notification as a "notification of succession" similar in character to the notifications of succession made by ex-colonial new States; and this appears also from correspondence relating to other general multilateral treaties. The Tongan declaration does not differentiate between multilateral and bilateral treaties, so that the position taken by Tonga in paragraphs 9 to 12 presumably applies equally to bilateral treaties. In this connection it may be noted that the United States publication *Treaties in Force* lists six treaties as still in force, one of which dates from before Tonga's acceptance of British protection.⁶⁸ It does not, however, specify whether Tonga herself has been consulted as to the continuance in force of these particular treaties⁶⁹ merely stating that a further study is to be made of other agreements in order to determine which would continue in effect under the Tongan declaration.

(20) Tanzania, formed from the union of Tanganyika and Zanzibar, seems to have taken the view that British treaties applicable to Zanzibar when a British protectorate would, in principle, have continued to bind Zanzibar after independence, on the hypothesis that such was the rule of customary law with respect to protectorates.⁷⁰ Whether or not customary law should be considered as laying down such a rule for "protected States", the view that Zanzibar succeeded *ipso jure* to treaties extended to her by the United Kingdom seems open to question. Zanzibar had in practice⁷¹ been treated as a colonial protectorate rather than a "protected State"; for example, the United Kingdom had extended numerous multilateral treaties to the Zanzibar protectorate apparently on the

same basis as for colonial protectorates.⁷² Again, Switzerland in correspondence with Tanzania concerning the status of a British extradition treaty does not appear to have placed reliance on any special rule applicable to protected States. She merely suggested that it would be possible, by an exchange of notes, mutually to confirm the maintenance in force of the treaty, seeing that in 1937 it had been extended by the United Kingdom to the then protectorate of Zanzibar.⁷³

(21) Although some other possible cases of protected States might be investigated, the practice examined in the preceding paragraphs is thought sufficient for the Commission's consideration of the present problem. This practice is somewhat inconsistent, except on one point: namely, that a treaty entered into by a protected State prior to the establishment of the protectorate in principle remains binding upon it both during the period of protection and on reversion to independence.⁷⁴ The divergence is as to whether treaties concluded by the protecting Power and applicable to the protected State during the protectorate are to be considered as binding the latter *ipso jure* after its resumption of its independence. Two newly independent States, Morocco and Tonga, appear to have recognized that, as former protected States, it is incumbent upon them to take over their protecting Power's treaties or, at least, those made specifically in their name or on their behalf. Tunisia and other former protected States do not, however, appear to have regarded themselves as in any different position from other new States; i.e. they do not appear to have considered themselves as bound automatically to accept the continued application of the treaties concluded by the protecting State. The question then is as to what should be the rule adopted by the Commission.

(22) The Special Rapporteur doubts whether either practice or principle demands that, for the purpose of succession in respect of treaties, a basic distinction should be made between the case of an ex-protected State and that of an ex-colonial territory. The practice, as already indicated, is divergent. If in some instances ex-protected States seem to have been regarded as bound automatically to take over treaties concluded by their protecting Power, in many other instances this has not been so and the practice followed has been the same as that in the case of ex-colonial States. As to principle, while there may be a difference in the fact that prior to independence the protected State was regarded as having a measure of separate personality, the conditions under which the treaties in question were concluded or made applicable in respect of the protected State appear to be a more crucial factor. It is true that in some instances—comparatively few—the protecting Power did indeed act purely as the representative of the protected State which was then considered to be a party to the treaty on its own

⁶⁷ Information supplied by the Secretariat.

⁶⁸ Treaty of Friendship, Commerce and Navigation of 2 October 1886.

⁶⁹ The Treaty of 1886, for example, appears to have been terminated in 1919 by a British notice of termination given under article 14 on behalf of Tonga, except for article 6 (see *British and Foreign State Papers, 1919*, vol. 112 (London, H.M. Stationery Office, 1922), p. 580 and *ibid.*, 1920, vol. 113 (London, H.M. Stationery Office, 1923), p. 192; and G. H. Hackworth, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1940), vol. I, p. 83.

⁷⁰ E. E. Seaton and S. T. M. Maliti, "Treaties and Succession of States and Governments in Tanzania", in *African Conference on International Law and African Problems* (Lagos, Nigerian National Press, 1967).

⁷¹ See J. E. S. Fawcett, *The British Commonwealth in International Law* (London, Stevens, 1963), p. 117.

⁷² See United Nations, *Multilateral Treaties . . . 1968*, pp. 141, 102, 114, 117, 127, 140, etc.

⁷³ *Yearbook of the International Law Commission, 1970*, vol. II, p. 115, document A/CN.4/229, para. 65; see also E. E. Seaton and S. T. M. Maliti, *loc. cit.*, paras. 71-73.

⁷⁴ Such a treaty may have otherwise expired under its own provisions or been terminated under the general law of treaties.

behalf;⁷⁵ and that in other more numerous instances the protecting Power in varying measure consulted the protected State regarding the treaty. But not infrequently the protecting Power concluded or applied the treaty in respect of the protected State with no, or only token, consultation with the latter.⁷⁶ Accordingly, the question how far it might be legitimate to consider treaties concluded by a protecting Power as actually treaties of the protected State itself is one that could be answered only by a separate examination of the circumstances in which the treaties were concluded or applied in respect of the latter. Having regard to the difficulty which such an examination would present and to the fact that in practice ex-protected States not infrequently seem to have been dealt with on the same basis as ex-colonial States, the Special Rapporteur suggests that the general rules regarding new States should be regarded as applying to ex-protected States, subject to one point. This concerns treaties to which the protected State had become a party in its own name during the period of protection. In the case of these treaties, as the instances cited⁷⁷ indicate, the practice appears to have been to regard the protected State as automatically remaining a party to such treaties.

(23) In the light of the various considerations set out in the foregoing paragraphs, it is suggested that the general rules proposed in parts I and II of the present draft should apply to ex-protected States with the addition of two particular rules: one to provide for the continuance in force of pre-protectorate treaties, and the second to provide for the continuance in force of treaties made during the period of protection but to which the protected State was a party in its own name and by its own will. In both cases the rule would, of course, be subject to the proviso that the treaty had not been terminated in accordance with its own provisions or under general international law. Paragraph 1 of the present article is, therefore, so formulated.

(b) *Mandates and trusteeships*

(24) In the present connexion the essence of both a mandate and a trusteeship may be taken to be a territory the external relations of which are temporarily administered by a sovereign State on behalf of the international community and under a trust for the people of the territory. Neither a mandate (according to the preponderant view) nor a trusteeship agreement vested the sovereignty of the territory in the administering Power. Under both forms of international trusteeship, however, responsibility for the international (including treaty) relations of the territory did vest in the administering Power subject to the trust. Moreover, several mandate and trusteeship agreements included specific provisions regarding the treaty relations of the territories concerned. It is therefore necessary to examine these provisions together with

the treaty practice concerning mandated and trusteeship territories.

(25) *Mandates.* The four Pacific Ocean mandates and the South West Africa mandate were in a short form and contained no provision regarding treaties.⁷⁸ Article 8 of the *British mandates for Togoland and the Cameroons* and of the French mandates for Togoland and the Cameroons, and article 9 of the Belgian East African Mandate provided:

The Mandatory shall apply to the territory any general international conventions applicable to his contiguous territories.⁷⁹ but were otherwise silent upon the question of treaties. The British East African Mandate had a provision regarding general international conventions, but in a different, and more elaborate, form:

The Mandatory shall apply to the territory any general international conventions already existing, or which may be concluded hereafter with the approval of the League of Nations, respecting the slave trade, the traffic in arms and ammunition, the liquor traffic and the traffic in drugs, or relating to commercial equality, freedom of transit and navigation, aerial navigation, railways, postal, telegraphic and wireless communication, and industrial, literary and artistic property.⁸⁰

A similar article appeared in the British mandates for Palestine and Transjordan⁸¹ and in the French mandate for Syria and the Lebanon.⁸² In all these cases, however, as the mandates were "Class A" mandates, the opening words of the article were phrased: "The Mandatory shall adhere, on behalf of Palestine (or Transjordan or Syria and the Lebanon) to any general international conventions already existing . . . etc." The mandate for Syria and the Lebanon and for Palestine and Transjordan, also contained a separate article on extradition agreements:

Pending the conclusion of special extradition agreements, the extradition treaties at present in force between foreign Powers and the Mandatory shall apply within the territory of Syria and the Lebanon (Palestine).⁸³

Finally, these mandates had a further provision concerning capitulations:

The privileges and immunities of foreigners, including the benefits of consular jurisdiction and protection as formerly enjoyed by capitulation or usage in the Ottoman Empire, shall not be applicable in Palestine.

Unless the Powers whose nationals enjoyed the afore-mentioned privileges and immunities on August 1, 1914 shall have previously renounced the right to their re-establishment, or shall have agreed to their non-application for a specified period, these privileges and immunities shall, at the expiration of the mandate, be immediately re-established in their entirety or with such modifications as may have been agreed upon between the Powers concerned.⁸⁴

⁷⁸ See A. Wright, *Mandates under the League of Nations* (Chicago, University of Chicago Press, 1930), appendix II, pp. 618-621.

⁷⁹ *Ibid.*, pp. 615-618.

⁸⁰ Article 9 (*ibid.*, pp. 614-615).

⁸¹ *Ibid.*, pp. 600-607.

⁸² *Ibid.*, pp. 607-611.

⁸³ Article 7 (Syria and Lebanon); article 10 (Palestine and Transjordan).

⁸⁴ Article 8 (Palestine and Transjordan); article 5 (Syria and the Lebanon).

⁷⁵ e.g. some of the treaties mentioned in paragraphs 12 and 13 of the present commentary.

⁷⁶ See K. Zemanek, *loc. cit.*, pp. 197-198; and the observations of Mr. Bartoš (*Yearbook of the International Law Commission, 1963*, vol. II, pp. 293-294, document A/5509, annex II, appendix II).

⁷⁷ See paragraphs 13 and 14 above.

The other Class A mandate, the British mandate for Iraq,⁸⁵ was in a somewhat special form, as it was linked to the 1922 Anglo-Iraq Treaty of Alliance. The League Council in its resolution "decided" that any capitulations should be suspended while the Treaty of Alliance was in force. Otherwise, the only relevant provision was in article 10 of the Treaty, under which the parties bound themselves to conclude separate agreements to secure the execution of any treaties, agreements or undertakings which Great Britain was under obligation to see carried out in respect to Iraq. Such agreements, it was said, were to be communicated to the League Council.

(26) Despite the heterogeneous character of the various provisions in the mandates, the broad principles acted on with regard to the treaty relations of the mandated territories seem reasonably clear. First, treaties previously applied in respect of the territory were, in general, considered as no longer applicable. It seems, however, to have been recognized that "dispositive" treaties were an exception to this general rule and would continue to be binding with respect to a mandated territory. The United States insisted that treaty "capitulations" previously granted by Turkey in principle continued in force with respect to the territories of the Class A mandates unless renounced by the interested parties; and this seems to have been on the theory that the treaty obligations attached permanently to the territories concerned.⁸⁶ Moreover, this claim seems to have been recognized in the above-mentioned provisions of the Class A mandates, which merely *suspended* the operation of capitulations during the mandatory régime. The same theory would seem to be the explanation also of the continued application of the Congo Basin "open door" conventions with respect to the territories of certain of the Class B mandates.⁸⁷ It may be that an opinion given by the British Law Officers in 1924 regarding the application of a Convention of 1899 to the Class C mandate of Western Samoa reflects the same theory.⁸⁸ But the circumstances were somewhat special, as the Mandatory Power was one of the parties to the Convention in question. Be that as it may, the evidence of the League of Nations period seems to indicate a recognition that certain types of dispositive or localized treaties continued to apply after the establishment of the mandate.

(27) Secondly, although the territory did not pass into the sovereignty of the Mandatory, the treaty-power in relation to the territory was exercisable by the Mandatory. The power both to conclude new treaties on behalf of the territory and to extend the Mandatory's treaties to the territory was thus vested in the Mandatory. The

exercise of this power was, however, subject to the terms of the mandate and to supervision by the Permanent Mandates Commission. The latter was active in promoting the extension of general international conventions to mandates both in fulfilment of the specific provisions of particular mandates and on general grounds; and many general conventions were so extended. It further made a recommendation, which was endorsed by the Council and Assembly of the League, that bilateral treaties should also be applied for the benefit of mandated territories so far as was consistent with the terms of their mandates. Extension of bilateral treaties to mandates required the consent of the other party, but in many cases relevant bilateral treaties were extended to mandated territories on the same basis as for other dependent territories of the Mandatory.⁸⁹

(28) The Class B and Class C mandates, apart from the special case of South West Africa,⁹⁰ underwent a further period of tutelage as trusteeship territories and the effect of independence on their treaty relations will therefore be examined later in connexion with termination of trusteeships. The Class A mandates, on the other hand, all terminated without passing through trusteeship, so that the effect of independence on their treaty relations requires separate consideration. In 1931, in view of the coming independence of Iraq, the Permanent Mandates Commission drew up a memorandum, which was approved by the League Council, setting out "general conditions which must be fulfilled before the mandates régime can be brought to an end". This memorandum, *inter alia*, suggested that the undertaking to be obtained from the new State should ensure and guarantee:

...

(g) The maintenance in force for their respective duration and subject to the right of denunciation by the parties concerned of the international conventions, both general and special, to which during the mandate, the Mandatory Power acceded on behalf of the mandated territory.⁹¹

(29) This formula was reproduced, with minor differences of language, in the Declaration made by Iraq in 1932 in connexion with the termination of the mandatory régime and her admission as a member of the League.⁹² In addition, Iraq had concluded a fresh Treaty of Alliance with Great Britain in 1930 in which there appeared a "devolution agreement" (indeed the first example of such an agreement):

It is also recognised that all responsibilities devolving upon His Britannic Majesty in respect of Iraq under any other interna-

⁸⁵ Q. Wright, *op. cit.*, pp. 593-600.

⁸⁶ Q. Wright, *op. cit.*, pp. 482-484. A more recent writer says that the United States argued in favour of a total succession in respect of *all* prior treaties; but seems to go beyond the view of Quincy Wright and the position taken by the United States in the diplomatic correspondence. See *Foreign Relations of the United States (1920)* (Washington, D.C., U.S. Government Printing Office, 1936), vol. II, see also A. D. McNair, *op. cit.*, p. 662.

⁸⁷ Q. Wright, *op. cit.*, p. 206.

⁸⁸ *Yearbook of the International Law Commission, 1971*, vol. II (Part Two), pp. 174-175, document A/CN.4/243/Add.1, para. 127.

⁸⁹ Q. Wright, *op. cit.*, pp. 467-469; See also League of Nations, Permanent Mandates Commission, *Annexes to the Minutes of the Third Session*, (A.19. (Annexes) 1923.VI), pp. 309 and 310 and *ibid.*, *Minutes of the Sixth Session* (C.386.M.132,1925.VI), pp. 169 and 170.

⁹⁰ See para. 41 below.

⁹¹ League of Nations, *Official Journal*, 12th year, No. 10 (October 1931), p. 2055; see also L. H. Evans, "The general principles governing the termination of a mandate", *American Journal of International Law* (Washington, D.C.), vol. 26, No. 4 (October 1932), pp. 735-758.

⁹² M. Hudson, *International Legislation* (Washington, D.C., Carnegie Endowment for International Peace, 1937), vol. VI, p. 39.

tional instrument, in so far as they continue at all, should similarly devolve upon His Majesty the King of Iraq alone and the high contracting parties shall immediately take such steps as may be necessary to secure the transference to His Majesty the King of Iraq of these responsibilities.⁹³

Jordan did not become independent until 1946, when the League of Nations had ceased all normal functioning and was about to arrange for its own demise. It is true that in its resolution of 18 April 1946 the final Assembly of the League formally took note of the termination of the mandate and of Jordan's new status as an independent State.⁹⁴ But, unlike Iraq, Jordan was not required to sign a declaration regarding the maintenance in force of treaties. On the other hand, at the time of becoming independent Jordan did conclude a Treaty of Alliance with Great Britain which, *inter alia*, contained a devolution agreement limited to general treaties, in the following form:

Any general international treaty, convention or agreement which has been made applicable to Trans-Jordan by His Majesty the King (or by his Government in the United Kingdom) as mandatory shall continue to be observed by His Highness the Amir until His Highness the Amir (or his Government) becomes a separate contracting party thereto or the instrument in question is legally terminated in respect of Trans-Jordan.⁹⁵

The emergence of Syria and Lebanon to independence began with a proclamation by General Catroux on behalf of the Free French authorities in 1941 and was an accomplished fact before the final meeting of the League Assembly in 1946, the two countries having already become original members of the United Nations.⁹⁶ Nor was any treaty concluded between either of them and France, the administering Power, in connexion with their attainment of independence. There was, it is true, a statement in the 1941 Free French proclamation "En accédant à la vie internationale indépendante, la Syrie succède naturellement aux droits et obligations souscrits jusqu'ici en son nom"⁹⁷ But this was a purely unilateral expression of the legal views of the Free French authorities which, however, may have been a reflection of the position taken on this question earlier by the Permanent Mandates Commission and the Council of the League.

(30) The circumstances of the termination of the mandate for Palestine were very special. After the Second World War Great Britain continued as Mandatory for a period while the United Nations attempted to work out a settlement of the problem of Palestine. In 1947 the General Assembly adopted resolution 181 (II) recommending the partition of the territory into two States containing the following provision concerning treaties, which would be applicable to each State:

⁹³ *British and Foreign State Papers, 1930 Part I* (London, H.M. Stationery Office, 1935), vol. 132, p. 208, article 8.

⁹⁴ League of Nations, *Official Journal, Special Supplement No. 194*, p. 278.

⁹⁵ United Nations, *Treaty Series*, vol. 6, p. 146.

⁹⁶ The League resolution of 18 April 1946 therefore merely welcomes their achievement of independence (*Official Journal, Special Supplement No. 194*, p. 278).

⁹⁷ R. W. G. de Muralt, *The Problem of State Succession with regard to Treaties* (The Hague, van Stockum, 1954), p. 122.

The State shall be bound by all the international agreements and conventions, both general and special, to which Palestine has become a party. Subject to any right of denunciation provided for therein, such agreements and conventions shall be respected by the State throughout the period for which they were concluded.⁹⁸

Elsewhere in the resolution there was also a provision which recommended States enjoying capitulation privileges in Palestine to renounce any right pertaining to them to re-establish them—a provision which seemed to imply the continuance of capitulation treaties, unless such a renunciation took place. The partition plan, however, was never implemented, the Mandatory withdrew from the mandate, one or the proposed States never came into existence, and the other, Israel, attained independence unilaterally in 1948. A year later she was admitted as a Member of the United Nations. When her application for admission was before the Security Council she offered to make a declaration regarding the maintenance of treaties but was not required to do so, and she was admitted without having made any such declaration.⁹⁹ The Israel Government has since taken the position that the State of Israel arose in 1948 as an entirely new international personality, which neither in fact nor in law was to be considered a successor State to the mandated territory of Palestine.¹⁰⁰

(31) In practice Israel's disclaimer of the character of a successor State has meant that in the case of multilateral treaties she has consistently refrained from any claim to consider herself a party to a treaty by reason of its previous application in respect of Palestine. Instead, she has in each case become a party by accession.¹⁰¹ In four instances, where continuity was particularly desirable, Israel sought to achieve it by specifying that her accession was to be retroactive to the date of the proclamation of her independence; and in doing so, she made a point of the fact that Palestine had formerly been a party to the treaties in question.¹⁰² Her attempt to give retroactive operation to her accession was, however, objected to by some of the existing parties, and the depositary accepted Israel as a party only from the date of her accession. Similarly, in the case of bilateral treaties Israel has consistently denied that treaties previously applicable to

⁹⁸ There was a further clause providing that any dispute concerning the continued application and validity of treaties should be referred to the International Court.

⁹⁹ See the reply of the Israel Government to a questionnaire from the International Law Commission concerning topics for codification in *Yearbook of the International Law Commission, 1950*, vol. II, p. 215, document A/CN.4/19, part I, sect. A, 5, para. 23.

¹⁰⁰ See United Nations, *Materials on Succession of States (op. cit.)*, pp. 38-42.

¹⁰¹ *Yearbook of the International Law Commission, 1950*, vol. II, p. 216, document A/CN.4/19, Part I, sect. A, 5, para. 26.

¹⁰² The Berne Convention of 1928 for the Protection of Literary and Artistic Works, the Paris Convention for the Protection of Industrial Property, the Madrid Agreement for the prevention of false indications of origin on goods, and the Neuchâtel Agreement for the maintenance or restoration of industrial property rights affected by the Second World War (see *Yearbook of the International Law Commission, 1968*, vol. II, pp. 15-16 and 63-64, document A/CN.4/200 and Add.1 and 2, paras. 34-37 and 276-279).

Palestine are binding upon her.¹⁰³ This she has done equally in the case of the Anglo-French Agreement of 1923 concerning the use of the waters of the river Jordan, which, would seem to rank as a treaty of a dispositive or territorial character. At any rate, when this treaty was invoked by Syria in the Security Council as an obstacle to a hydroelectric project of Israel, the latter's representative replied: "The fact that the United Kingdom signed a treaty with France in 1923 does not constitute a mandatory legal obligation on my Government, which has not signed such a treaty"¹⁰⁴ Whether this reply was or was not legally correct would seem to depend on the view to be taken of the law governing treaties of a dispositive or territorial character, a matter which is examined in the commentary to article 22 *bis*. In general, however, Israel's claim to be a wholly new State, not legally a "successor" to the Mandatory Power, seems not to have met with serious challenge in treaty practice.

(32) Iraq, Lebanon, Syria and Jordan, on the other hand, already existed as embryo States during the period of their mandates and, on attaining independence, were clearly "successors" to the Mandatory Power concerned. Exactly what were the implications of this for their treaty relations is not quite so clear. As regards multilateral treaties, the Secretary-General inquired of these four States in 1946 whether they considered themselves to be parties to six successive League of Nations Conventions on Narcotics.¹⁰⁵ This it was necessary for him to ascertain in connexion with the United Nations Protocol of 1946 amending those treaties. The actual position was that during the League period France had extended these treaties to Syria and Lebanon, and Great Britain to Jordan (Trans-Jordan); one convention had been "extended" to Iraq, which had also become a party to others in her own name. The Secretary-General is stated to have satisfied himself that all four States "considered themselves bound by the treaties which had formerly been made applicable to their territories", and to have treated them as parties to the League of Nations Conventions by sending them copies of the amending Protocol.¹⁰⁶ Three of them—Syria, Lebanon and Iraq—duly became parties to the Protocol, thereby confirming their recognition of their character as parties to the earlier conventions. Jordan, however, elected to *accede* directly to individual conventions (as amended by the Protocol), thereby disclaiming the rights of a successor State in relation to those conventions. Consequently, the practice in regard to the narcotics conventions is unclear as to whether, in the case of an ex-Class A mandate, the character of a successor State was regarded as placing

an obligation or merely conferring a right on the new State to consider itself a party to treaties concluded by the Mandatory Power with reference to the mandated territory.

(33) Again, Jordan notified the Swiss Government in 1949 of her "accession" to the two Geneva Red Cross Conventions of 1929, at the same time stating that these Conventions had been made applicable to Jordan in 1932.¹⁰⁷ The Swiss Government in circulating these notifications to the contracting parties referred to them as "in the nature of a declaration of continuity". Moreover, it treated the notifications as effective on the date of their receipt and not as subject to the six months' time-lag prescribed by the Conventions in cases of "accession". Even so, the Swiss Government does not seem to have regarded Jordan as *bound* to consider itself a party to the two Conventions, or it would surely have treated the notifications as merely confirmatory and retroactive to the date of Jordan's independence. Syria and Lebanon, it may be added, both became parties to one of the 1929 Conventions by the process of accession pure and simple.¹⁰⁸

(34) As to bilateral treaties, the practice is unclear.¹⁰⁹ According to one writer "Jordanian authorities have privately expressed the opinion that the thirty-five conventions extended to Transjordan by the United Kingdom are, except where subsequent action has been taken, still in force; and it is reported that no question of their not being implemented has ever arisen."¹¹⁰ Speaking of the practice of Syria and Lebanon, on the other hand, another writer has said: "As far as the present writer could ascertain from this practice of present day Governments, the Syrian and Lebanese States do not generally speaking continue the obligations of the treaties concluded by the Mandatory."¹¹¹ The 1971 edition of the United States publication *Treaties in Force* does not list any treaties of the mandate periods against the names of either Iraq or Jordan. Against the names of Lebanon and Syria it lists only two treaties from the mandate period, and the continuance of the rights conferred by those treaties after independence was the subject of express confirmation, in notes exchanged with each country in 1944.¹¹² Apart from the foregoing, the three Secretariat studies on Succession of States in respect of bilateral treaties (extradition, air transport and trade agreements) mention only four further treaties from the mandate period.¹¹³ Two of these were made, in 1921 and 1923 respectively, by represent-

¹⁰³ *Ibid.*, 1970 vol. II, p. 111, document A/CN.4/229, paras. 40-44 (extradition treaties); *ibid.*, 1971, vol. II (Part Two), p. 123, document A/CN.4/243 paras. 21-24 (air transport agreements); United Nations, *Materials on Succession of States (op. cit.)* pp. 41-42.

¹⁰⁴ *Official Records of the Security Council, Eighth Year, 639th meeting*, para. 83.

¹⁰⁵ *Yearbook of the International Law Commission, 1962*, vol. II, p. 108, document A/CN.4/150, para. 11.

¹⁰⁶ Syria and Lebanon made declarations of the same kind in connexion with certain other conventions (*ibid.*, paras. 12 and 13).

¹⁰⁷ *Yearbook of the International Law Commission, 1968*, vol. II, p. 40, document A/CN.4/200 and Add.1 and 2, para. 161.

¹⁰⁸ *Ibid.*, para. 168.

¹⁰⁹ United Nations, *Materials on Succession of States (op. cit.)* does not contain any information supplied by the ex-Class A Mandate States.

¹¹⁰ D. P. O'Connell, *State Succession . . .*, vol. II, p. 155.

¹¹¹ R. W. G. de Muralt, *op. cit.*, p. 124.

¹¹² See United Nations, *Materials on Succession of States (op. cit.)* pp. 204-6; see also *Yearbook of the International Law Commission, 1971*, vol. II (Part Two), p. 160, document A/CN.4/243/Add.1, paras. 57-59.

¹¹³ *Ibid.*, 1970, vol. II, p. 120, document A/CN.4/229, para. 98; and *ibid.*, 1971 vol. II (Part Two), p. 134, document A/CN.4/243/Add.1, para. 22.

atives acting expressly for "Palestine", on the one hand, and "Syria and Lebanon", on the other; and these treaties appear after independence to have been regarded by the States concerned as remaining in force.¹¹⁴ The other two treaties are the Anglo-French San Remo Oil Agreement of 25 April 1920¹¹⁵ and the Anglo-French Convention of 23 December 1920 concerning the Mandates for Syria and the Lebanon, Palestine and Mesopotamia,¹¹⁶ as to which the Secretariat study simply notes that in 1932 a protocol was signed between Iraq, the United Kingdom and France recognizing the transfer to Iraq of the United Kingdom's obligations to France under those treaties.

(35) As the institution of Class A Mandates came to an end over a quarter of a century ago, any specific provision regarding this category of succession in the present draft would seem superfluous. In general, as others have pointed out,¹¹⁷ there was a certain analogy between the institution of Class A Mandates and that of protected States, the main difference being that in the case of Class A Mandates the Administering Power's right of representation was derived from the international community. Writers tend to take the view that treaties concluded by the Mandatory on behalf of a Class A Mandate were to be considered as automatically binding on the latter after independence.¹¹⁸ But it is not clear how far this view finds expression in the actual practice with regard to ex-Class A Mandates after independence. Accordingly, if rules were to be stated for ex-Class A Mandates, it would seem safer to frame them along the lines proposed for ex-protected States.

(36) *Trusteeships*. The trusteeship territories, with the exception of the "strategic" Territory of the Pacific Islands, were all territories previously held under a mandate by the same administering Power as was afterwards to be invested with the trusteeship. The territory of the Pacific Islands, formerly a mandate under Japan, was transferred to the United States as a "strategic area" trusteeship. All the Trusteeship Agreements contained a provision regarding treaties, though in varying terms. The most specific was the form of provision found in the French Agreements for Togoland (article 6) and the Cameroons (article 6)¹¹⁹ and in the Italian Agreement for Somaliland (article 12):

The Administering Authority undertakes to maintain the application to the Territory of the international agreements and conventions which are at present, in force there, and to apply therein any conventions and recommendations made by the United Nations or the specialized agencies referred to in Article 57 of the Charter, the application of which would be in the interests of the population and consistent with the basic objectives of the trusteeship system and the terms of the present Agreement.

¹¹⁴ *Ibid.*, see also *Shehadeh et al. v. Commissioner of Prisons, Jerusalem, International Law Reports 1947*, vol. 14, p. 42.

¹¹⁵ United Kingdom, *British and Foreign State Papers, 1920*, vol. 113 (London, H.M. Stationery Office, 1923), p. 350.

¹¹⁶ *Ibid.*, p. 355.

¹¹⁷ e.g., K. Zemanek, *loc. cit.*, pp. 202-206.

¹¹⁸ D. P. O'Connell, *State Succession . . .*, vol. II, p. 151.

¹¹⁹ For the full text of these agreements, see H. Duncan Hall, *Mandates, Dependencies and Trusteeships* (Washington, D.C., Carnegie Endowment for International Peace, 1948), pp. 347-352.

The corresponding articles in the British Agreements for Tanganyika, Togoland and the Cameroons, if less clearly drafted, seem to have been intended to have the same general effect.¹²⁰ The provision in the Belgian Agreement for Ruanda-Urundi (article 7)¹²¹ apart from omitting any reference to "recommendations", is in very general terms:

The Administering Authority undertakes to apply to Ruanda-Urundi the provisions of all present or future international conventions and recommendations which may be appropriate to the particular conditions of the Territory and which would be conducive to the achievement of the basic objectives of the International Trusteeship System.

The articles in the Agreements for the Pacific trusteeships of Western Samoa (article 7)¹²² (New Zealand), New Guinea (article 6)¹²³ (Australia) and Nauru (article 6)¹²⁴ (United Kingdom, Australia and New Zealand) did not refer explicitly to *existing* or future conventions and recommendations, but were otherwise similar to the articles found in the British Agreements for Tanganyika, Togoland and the Cameroons. Article 14 of the United States Agreement for the "strategic" Territory of the Pacific Islands¹²⁵ also made no reference to *existing* conventions, and in this case the omission of that reference was more deliberate; for the United States was not willing to recognize the continued application to the territory of treaties applied to it by Japan during the latter's mandate. Instead, the United States applied its own treaty régime to the territory.¹²⁶

(37) Apart from the last-mentioned case of the ex-Japanese mandate, treaties in force with respect to a territory prior to the trusteeship have been considered as applicable during the trusteeship, whether or not the Agreement contained a provision to that effect. This can hardly, however, be taken as any indication of a general principle that treaties made by an administering Power with respect to a territory remain binding upon the latter after the termination of a mandate (or trusteeship). All these cases concerned a simple transition from mandate to trusteeship, the territory remaining under the same

¹²⁰ Article 7, in each case; (*ibid.*, pp. 340-347). After the opening words these articles read: "any international conventions and recommendations already existing or hereafter drawn up by the United Nations or by the specialized agencies referred to in Article 57 of the Charter, which may be appropriate to the particular circumstances of the Territory and which would conduce to the achievement of the basic objectives of the International Trusteeship System".

¹²¹ *Ibid.*, pp. 353-358.

¹²² *Ibid.*, pp. 358-362.

¹²³ *Ibid.*, pp. 362-364.

¹²⁴ *Ibid.*, pp. 364-366.

¹²⁵ *Ibid.*, pp. 367-370.

¹²⁶ See, for example, a communication made by the United States to the International Labour Office in 1961: "When the Trust Territory of the Pacific Islands came under the jurisdiction of the United States in 1947, the treaties and agreements applicable generally to territories under the jurisdiction of the United States were considered by this Government to become applicable to the Trust Territory without necessity of a declaration to that effect in any given case"; M. M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, vol. 1, p. 831).

administering Power as before. Accordingly, the "succession", if such it may be called, was of a somewhat special kind, from which it would be unsafe to draw any general conclusion. Equally, it would be unsafe to draw any general conclusion in the opposite sense from the United States refusal to consider any treaties made by Japan as continuing in force with respect to the Territory of the Pacific Islands. Although in that instance there was a change in the administering Power as well as in the character of the trust, there was also the special factor of the termination of the Japanese mandate in consequence of her part in the Second World War.

(38) Nine out of the eleven trusteeships have already been terminated, the territories in question having either emerged as independent States or opted to join with a neighbouring State. None of the General Assembly resolutions terminating these trusteeships contains any provision regarding the treaty relations of the territory concerned. It is true that in some instances "devolution agreements" have been concluded with reference to a trust territory, as in the cases of Western Samoa,¹²⁷ Somalia¹²⁸ and British Togoland.¹²⁹ But these agreements were bilateral acts between the Administering Authority and the territory rather than an expression of United Nations policy with respect to trusteeships; and they do not seem to differ in their legal character and effects from the "devolution agreements" concluded with reference to colonial territories.¹³⁰ Furthermore, Tanganyika declined to enter into any devolution agreement with her Administering Power, the United Kingdom, and instead made a unilateral declaration by which, *inter alia*, she reserved the right to decide within a stated period whether existing treaties applicable to the territory should be continued or terminated. Burundi made a unilateral declaration on similar lines, and Rwanda a shorter declaration also reserving to herself a right of decision.¹³¹ As to France, she did not conclude any devolution agreements with reference to her trusteeships.

(39) Nor does any difference seem to have been made between a trust territory and other dependent territories in treaty practice after termination of the trusteeship. In 1961, when the Southern and Northern Cameroons opted to join respectively the Republic of Cameroon and the Federation of Nigeria, the moving treaty frontier principle was applied automatically, and each Trust Territory

was simply absorbed into the treaty régime of the State of which it had become part. As to the trust territories which have themselves become new States, neither in regard to multilateral treaties nor in regard to bilateral treaties has any distinction been drawn in treaty practice between ex-colonial and ex-trust territories. The Secretary-General of the United Nations and other depositaries of multilateral treaties in dealing with questions of succession have applied precisely the same principles to both categories of new State.¹³² Similarly, States appear to have dealt with ex-trusteeship and ex-colonial States on the same footing for purposes of succession in respect of bilateral treaties.¹³³

(40) The broad conclusion which emerges from the foregoing, therefore, is that the general rules governing the succession of a new State in respect of treaties do not require modification in the case of a new State whose territory, or part of whose territory, was previously administered as a trusteeship territory. The previous trusteeship may in certain instances be historically relevant in determining whether a particular treaty was or was not applicable in respect of the territory at the date of independence; and this may affect succession in respect of that treaty.¹³⁴ But that is its only significance, subject to one qualification. This is that, when the question of treaties of a "territorial", "dispositive" or "localized" character comes to be examined, it may be necessary to consider whether the limited nature of the Administering Power's tenure of a trusteeship modifies, in the case of an ex-trust territory, the general rules governing such treaties.

(41) *South West Africa (Namibia)*. There remains the case of South West Africa (Namibia) the one Class C Mandate that was not converted into a trusteeship under Article 77 of the Charter of the United Nations. Other things being equal, the position of an ex-Class C Mandate concerning succession would seem analogous to that of an ex-trust territory. But the situation regarding this particular Class C Mandate is so abnormal that, for the time being at any rate, ordinary rules can hardly apply. Considering the Mandatory, South Africa, to be in breach of the conditions of the Mandate, the United Nations has terminated the latter and assumed "direct responsibility" for Namibia. The International Court in its advisory opinion of 21 June 1971 and the Security Council in its

¹²⁷ See United Nations, *Materials on Succession of States* (*op. cit.*), pp. 115-116.

¹²⁸ *Ibid.*, pp. 169-170.

¹²⁹ Covered by the agreement for Ghana, of which the Trust Territory formed a constituent part (*ibid.*, p. 30).

¹³⁰ True, the Ghana devolution agreement makes a curious distinction between succession to obligations and responsibilities under international instruments previously applicable to Ghana (which would include British Togoland) and rights and benefits enjoyed under international instruments previously applicable to the Gold Coast (which would not include the trust territory). But such a distinction between rights and obligations seems irrational and has no place in the Western Samoa devolution agreement.

¹³¹ See the Special Rapporteur's second report (*Yearbook of the International Law Commission*, 1969, vol. II, pp. 62 and 65, document A/CN.4/214 and Add.1 and 2), paras. (1), (10) and (11) of the commentary on article 4.

¹³² See the Secretariat memorandum "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary" (*ibid.*, 1962, vol. II, p. 106, document A/CN.4/150); and the series of Secretariat studies on "Succession of States to multilateral treaties" (*ibid.*, 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 *ibid.* 1970, vol. II, p. 61, document A/CN.4/225).

¹³³ See the series of Secretariat studies on "Succession of States in respect of bilateral treaties" covering extradition, air transport and trade treaties (*ibid.*, 1970, vol. II, p. 102, document A/CN.4/229; and *ibid.*, 1971, vol. II (Part Two), p. 111, document A/CN.4/243 and Add.1).

¹³⁴ e.g., the distinction drawn by Somalia, in her notification to the Secretary-General, between treaties previously applicable to British Somaliland and those formerly applicable to the Trust Territory (*ibid.*, 1962, vol. II, pp. 118-119, document A/CN.4/150, paras. 102-106).

resolution 301 (1971) of 20 October 1971 have stated that amongst the legal consequences for other States are obligations:

(a) To abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia;

(b) To abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental co-operation.¹³⁵

In the case of multilateral treaties, however, the Court made the qualification that "the same rule cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia".¹³⁶ It may perhaps be of interest in this connexion to recall the United States refusal to consider any treaties made by Japan as continuing in force with respect to the Pacific Islands Territory.¹³⁷ But the circumstances of the former South West Africa Mandate appear to be altogether too special to be taken into a count in the present draft.

(c) Colonies

(42) In recent years the typical example of "new State" has been one arising from decolonization, and it may therefore be wondered why any special mention of colonies should be thought necessary. The reason is that some writers make a point of the fact that in the United Nations era decolonization has in most cases been an evolutionary process of emergence to independence, in the latter stages of which the territory had already begun to acquire the lineaments of a State and a measure of separate personality prior to independence.¹³⁸ The suggestion is made that the position of these new States, which have reached independence by evolution and consensus, is analogous to that of the older British Dominions, in regard to which the continued application of British treaties has, in general, been accepted. On this basis, it is further suggested that in the case of such ex-colonial new States the modern law of State succession may recognize some form of legal "hypothesis" or presumption of the continuance of their predecessors' treaties (except incompatible treaties).¹³⁹

(43) It is certainly the fact that in the past quarter of a century many new States have emerged to independence through a process of evolution rather than secession. It is also the fact that in a number of cases a colonial territory has even entered into an intergovernmental agreement with a foreign government prior to independence

or become a separate or associate member of an international organization.¹⁴⁰ These facts have no doubt played an important part in favouring the adoption by new States of a *policy* of continuing in force treaties applicable in respect of their territories prior to independence. But it does not follow that they at the same time gave rise to a *legal* "hypothesis" or presumption of continuity. As already pointed out in the commentary to article 6, the general conclusion to be drawn from modern treaty practice is to the contrary.¹⁴¹ Indeed, even in the case of the older British Dominions, it is not clear whether the continuance of the predecessor's treaties occurred *ipso jure* under principles of State succession or as a matter of the will of the interested States. At any rate, in a memorandum in 1963 one member of the Commission¹⁴² seems to have regarded the practice in question as susceptible of interpretation in terms of tacit consent. Be that as it may, the relevance of the evolutionary character of decolonization in the case of many new States appears to the Special Rapporteur to be its effect on the will of new States to continue their predecessor's treaties rather than on their legal position in this regard.

(44) The older British Dominions had advanced far in the recognition of their separate statehood and personality by the international community and had really lost their character as colonies prior to their emergence as wholly independent States. In the more recent era of decolonization the new States, however well advanced their development, were not internationally in a position comparable to that of the older British Dominions and had not attained to the same measure of separate international personality. Accordingly, whatever view may be taken of the question of succession in regard to the older British Dominions, the fact that in some instances and in greater or lesser degree the territories of new States may have enjoyed self-government prior to independence, hardly suffices to deprive them for purposes of succession of their essential character as colonies. Nor does any general distinction appear to have been drawn in practice, for purposes of succession, between a colony in a well-advanced and less well-advanced condition of self-government prior to independence.

(45) The broad conclusion, therefore, is that colonial territories do not call for any special provision and should be regarded as subject to the general rules contained in the draft articles, and notably those dealing with "new States".¹⁴³ To state this conclusion is not to overlook that in some instances treaties, such as technical assistance agreements, may be concluded on behalf of colonial territories only shortly before independence, when the

¹³⁵ *I.C.J. Reports 1971*, p. 55.

¹³⁶ *Ibid.*

¹³⁷ See paragraphs 36 and 37 above.

¹³⁸ D. P. O'Connell, *State Succession . . .*, vol. II, pp. 131-134; cf. R. Hone, "International Legal Problems of Emergent Territories", *Report of International Law Conference* (London, The David Davies Memorial Institute of International Studies, 1960), p. 16.

¹³⁹ D. P. O'Connell, *State Succession . . .*, vol. II, p. 140; G. V. La Forest, "Towards a Reformulation of the Law of State Succession", *Proceedings of the American Society of International Law at its Sixtieth Annual Meeting* (Washington, D.C., 1966), pp. 103-107.

¹⁴⁰ For the practice, see J. O. Lissitzyn, "Territorial Entities other than Independent States in the Law of Treaties", *Recueil des cours de l'Académie de droit international de La Haye, 1968-III* (Leyden, Sijthoff, 1970), vol. 125, pp. 64-82.

¹⁴¹ *Yearbook of the International Law Commission, 1970*, vol. II, p. 31, document A/CN.4/224 and Add.1.

¹⁴² Mr. T. O. Elias (*ibid.*, 1963, vol. II, p. 283, document A/5509, annex II, appendix II).

¹⁴³ While the majority of ex-colonial territories would fall under the rules for "new States", the possibility exists of an ex-colony's having joined itself to an existing State, in which case the moving treaty frontier principle would apply.

territory is already an embryo State and is concerned in the negotiations. Moreover, the terms of the treaty may be such as to indicate the existence and separate role of the local government. Even so, the local government's lack of separate international personality and treaty-making competence presents an obstacle to regarding the treaty as one to which the new State was a party prior to independence. In practice, it is usual for fresh agreements to be concluded as soon as possible after independence and, if not, for an acknowledgment of the continued application of the treaty to be made by the new State in an exchange of notes or otherwise.¹⁴⁴ This practice in itself seems to indicate that, in principle, some form of novation of the pre-independence treaty is necessary. This is probably so, even in a case like that of the United Kingdom-Venezuela Agreement of 17 February 1966. This was signed at Geneva on the eve of independence by the then Prime Minister of British Guiana and expressly provided in article VIII that on the attainment of independence by British Guiana the Government of Guyana should thereafter be a party to the Agreement in addition to the United Kingdom.¹⁴⁵ In all these cases, the fact that the treaty was concluded not long before independence with the participation of representatives of the embryo new State may well be an important element to be considered in determining whether a novation is to be implied from the circumstances. But it hardly seems possible to insert a special rule to cover such cases: one difficulty at least would be to specify the precise conditions under which participation of the representatives of the embryo State could be held to affect the binding force of the treaty after independence. It therefore seems preferable to leave the question of succession in these cases also to be governed by the general rules contained in the draft articles.

(d) *Associated States*

(46) Constitutional relationships between a State and a dependent territory vary almost infinitely and in some cases their precise categorization may be a matter of appreciation.¹⁴⁶ Among the latter are cases of dependent States "freely associated" with a sovereign State. One example is the "Commonwealth" of Puerto Rico, which began as a mere "possession" of the United States, but under its modern constitution is an autonomous political entity, voluntarily associated with the United States.¹⁴⁷ Under this constitution the conduct of Puerto Rico's foreign relations, including treaty-making and defence, is vested in the Federal Government of the United States. Another is the Caribbean territories (Antigua, St. Kitts-Nevis-Anguilla, Dominica, St. Lucia, Grenada and St. Vincent), which are designated States in Association with

the United Kingdom.¹⁴⁸ These have a large measure of autonomy in internal affairs and the right, in accordance with specified procedures, to secede; on the other hand, responsibility for external affairs and defence for the time being remains vested in the United Kingdom.¹⁴⁹ A somewhat different type of case is the Kingdom of the Netherlands which, in addition to the Netherlands itself, embraces Surinam and the Netherlands Antilles.¹⁵⁰ The Queen of the Netherlands is Head of all three countries, each of which has its own separate local Government. But the Netherlands Government is at the same time Government of the Kingdom and, as such, is responsible for the conduct of the foreign relations, including treaty-making, of the Kingdom as a whole.

(47) The above examples have been cited purely as illustrations of the variety of constitutional relationships in which States may be associated, short of a full federation or union of States; and more might be given. Clearly no issue of succession arises unless and until one of the entities in question opts to become independent or to join another State. But the Commission may still think it desirable to consider whether specific mention should be made in the draft of such forms of associated States. In this connexion it is to be noted that such dependent entities have not infrequently, under a power delegated to them, entered into local agreements with other States or become members of certain international organizations.¹⁵¹ But this, as pointed out earlier, is also true in some cases of protected States and colonial dependencies.¹⁵²

(48) As the constitutional relationships in such associations of States vary considerably and are a matter of appreciation from complex facts, it may be doubted whether they can be treated as falling within a single category. In some cases, they may appear to be analogous to a protected State, in some to a colonial territory and in others, perhaps, to a Union of States. Consequently, and in the absence of any directly relevant practice, the appropriate course seems to be to omit any specific reference to associated States and leave any future question of succession to be determined by analogy in accordance with the general rules contained in the draft articles and by reference to the particular circumstances of each association of States.

¹⁴⁴ K. J. Keith, "Succession to bilateral treaties by seceding States", *American Journal of International Law* (Washington, D.C.), vol. 61, No. 2 (April 1967), pp. 528-531. See also United Nations, *Materials on Succession of States* (*op. cit.*), p. 217.

¹⁴⁵ United Kingdom, *Treaty Series*, No. 13, Cmd 2925 (London, H.M. Stationery Office, 1966).

¹⁴⁶ See generally O. J. Lissitzyn, *loc. cit.*, pp. 5-87.

¹⁴⁷ M. M. Whiteman, *op. cit.*, vol. 1, pp. 392-406.

¹⁴⁸ M. Broderick, "Associated Statehood—a new form of decolonization", *The International and Comparative Law Quarterly* (London) vol. 17 (April, 1968), pp. 368-369.

¹⁴⁹ The constitutional relationship between the Cook Islands and New Zealand is similar; indeed, it served as a model from which the Caribbean associated States were drawn (M. Broderick, *loc. cit.*, pp. 369 and 390-392).

¹⁵⁰ H. F. van Panhuys, "The international aspects of the reconstruction of the Kingdom of the Netherlands in 1954" *Nederlands Tijdschrift voor International Recht* (1958), vol. V, p. 1; M. Broderick, *loc. cit.*, pp. 399-400.

¹⁵¹ See O. J. Lissitzyn, *loc. cit.*, pp. 20, 50, 59-60 and 82.

¹⁵² See para. 43 above.

Article 19. — Formation of unions of States

ALTERNATIVE A

1. When two or more States form a union of States, treaties in force between any of these States and other States parties prior to the formation of the union continue in force between the union of States and such other States parties unless:

(a) The object and purpose of the particular treaty are incompatible with the constituent instrument of the union; or

(b) The union of States and the other States parties to the treaty otherwise agree.

2. Treaties which continue in force in accordance with paragraph 1 are binding only in relation to that part of the union of States in respect of which the particular treaty was in force prior to the formation of the union, unless the union of States and the other States parties otherwise agree.

3. The rules in paragraphs 1 and 2 apply also when a State joins an already existing union of States.

ALTERNATIVE B

1. When two or more States form a union of States, treaties in force between any of these States and other States parties prior to the formation of the union continue in force between the union of States and such other States parties if

(a) In the case of multilateral treaties other than those referred to in article 7 (a), (b) and (c), the union of States notifies the other States parties that it considers itself a party to the treaty;

(b) In the case of other treaties, the union of States and the other States parties

(i) Expressly so agree; or

(ii) Must by reason of their conduct be considered as having agreed to or acquiesced in the treaty's being in force in their relations with each other.

2. Treaties which continue in force in accordance with paragraph 1 are binding only in relation to that part of the union of States in respect of which the particular treaty was in force prior to the formation of the union, unless the union of States and the other States parties otherwise agree.

3. The rules in paragraphs 1 and 2 apply also when a State joins an already existing union of States.

Definition of the term "Union of States"

PART I. — GENERAL PROVISIONS

Article 1. Use of terms

ADDITIONAL PROVISION

...

(h) "Union of States" means a federal or other union formed by the uniting of two or more States which thereafter constitute separate political divisions of the united State so formed, exercising within their respective territories the governmental powers prescribed by the constitution.

COMMENTARY

(1) The present article is concerned only with successions arising from the *creation* of a union of States; questions of succession arising from the *dissolution* of a union of States will be considered in the next article, dealing with the separation of a State into two or more States. Unions of States have been created in numerous forms in the past, and political and economic pressures seem certain to result in the emergence of further unions of States in both familiar and new forms. The very variety of constitutional relationships which might be considered as falling within the concept of a union of States makes it necessary at the outset to identify what is meant by this concept for the purposes of succession of States in respect of treaties.

(2) A sharp distinction has to be made between unions of States which create a new political entity only on the plane of international law and organization, and unions which also create a new political entity on the plane of internal constitutional law. Examples of the former category are the United Nations itself, the specialized agencies, the Organization of American States, the Council of Europe, the Council for Mutual Economic Assistance and similar intergovernmental organizations which fall completely outside the concept of a union of States for the purposes of succession of States. Examples of the latter category are federations of States, such as the United States of America and Switzerland, and other constitutional unions of States, such as the former union of Egypt and Syria in the United Arab Republic, the United Republic of Tanzania, and the former unions of Iceland and Denmark and of Norway and Sweden. Constitutional unions of this category fall clearly within the scope of the Commission's study of succession of States.

(3) In addition, there are some hybrid unions which may appear to have some analogy with a union of States but which do not, in the opinion of the Special Rapporteur, form part of the present topic. One such hybrid is EEC, the precise legal character of which is a matter of discussion amongst jurists. For present purposes, it must suffice to say that, while EEC is not commonly viewed as a union of States, it is at the same time not generally regarded as being simply a regional international organization. The direct effects in the national law of the member States of regulatory and judicial powers vested in Community organs gives to EEC, it is said, a semblance of a quasi-federal association of States. Be that as it may, from the point of view of succession, EEC appears without any doubt to remain on the plane of intergovernmental organization. Thus, article 234 of the Treaty of Rome¹⁵³ unmistakably approaches the question of the pre-Community treaties of member States with third countries from the angle, not of succession or of the moving treaty frontier rule, but of the rules governing the application of successive treaties relating to the same subject-matter (article 30 of the 1969 Convention on the Law of Treaties).¹⁵⁴ In other words, pre-Community

¹⁵³ United Nations, *Treaty Series*, vol. 298, p. 91.

¹⁵⁴ *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. 293.

treaties are dealt with in the Rome Treaty in the context of compatibility of treaty obligations and not of succession or moving treaty frontiers. The same is true of the instruments which established the other two European Communities.¹⁵⁵ Furthermore, the Treaty of Accession of 22 January 1972, which sets out the conditions under which four additional States may join the EEC and Euratom, deals with the pre-Accession treaties of the candidate States on the basis of compatibility of treaty obligations—of requiring them to bring their existing treaty obligations into line with the obligations arising from their accession to the Communities.¹⁵⁶ Similarly, the Treaty of Accession expressly provides for the new Member States to become bound by various categories of pre-Accession treaties concluded by the Communities or by their original members and does not rely on the operation of any principle of succession or of moving treaty frontiers.

(4) Numerous other economic unions have been created in various forms and with varying degrees of “community” machinery; e.g. the European, Latin American and other Free Trade Areas and the Benelux Economic Union.¹⁵⁷ In general, the constitutions of these economic unions leave in no doubt their essential character as “inter-governmental organizations” rather than internal “unions” of States. In the case of the Belgo-Luxembourg Economic Union, if Belgium may be expressly empowered to conclude treaties on behalf of the Union, the relationship between the two countries within the Union appears to remain definitively on the international plane.¹⁵⁸ Sometimes, as in the Liechtenstein-Swiss Customs Union, the relationship may seem to come to the very verge of what can be considered a relationship between two sovereign States.¹⁵⁹ But in practice all these economic unions have been treated as unions on the plane of international organization alone, and not as creating political unions on the plane of internal constitutional law.

(5) The topic entrusted to the present Special Rapporteur is “Succession of States in respect of treaties”; and it is his understanding that, whatever may be the problems of succession which arise in connexion with international organizations, they fall outside that topic. In consequence, it is only unions of States on the plane of internal constitutional law with which the present report is concerned.

¹⁵⁵ Treaty instituting the European Coal and Steel Community, section 17 of the Convention containing the Transitional Provisions (United Nations, *Treaty Series*, vol. 261, p. 297); Treaty establishing the European Atomic Energy Community (Euratom), articles 105 and 106 (*ibid.*, vol. 298, p. 205).

¹⁵⁶ Treaty concerning the Accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community and Act concerning the Conditions of Accession and the Adjustments to the Treaties, article 4 (*United Kingdom Treaty Series No. 1 (1973)*)—Part I, Cmnd. 5179-I (London, H.M. Stationery Office, 1973), p. 8.

¹⁵⁷ See generally D. W. Bowett, *The Law of International Institutions*, 2nd ed. (London, Stevens, 1970), pp. 150-227.

¹⁵⁸ See the Special Rapporteur’s fourth report on the law of treaties (*Yearbook of the International Law Commission, 1965*, vol. II, p. 22, document A/CN.4/177 and Add.1 and 2.)

¹⁵⁹ P. Raton, *Liechtenstein: History and Institutions of the Principality* (Vaduz, Liechtenstein-Verlag, 1970), pp. 91-101.

(6) A second distinction has to be made between a union of mere territories, or of a mere territory with a State, and a union of two States, although all three cases may fall within the topic of succession of States. The reason is that, whereas the third case—a union of two States— attracts the principles which are the subject of the present article, it is other principles in the draft articles which apply to the first two cases.

(7) Thus, a new State which results from the union of two or more territories, *not already States*, raises the issue whether it begins life with a completely clean slate in regard to treaties or whether it has any rights or obligations with respect to the continuance of the treaties formerly applicable to any of the territories of which it is composed. An example is Ghana, which was formed in 1957 from the amalgamation of two colonies, a colonial protectorate and a trust territory, previously under the same administering Power, into a single independent State. In these cases, whether the new State is given a unitary or a federal constitution, there is no question of the continuity of the international personality of the individual component territories; for the territories had none prior to the creation of the new State. The problem in these cases is to determine how far and with what effect such a composite new State may notify its “succession” to a multilateral treaty or claim “novation” of a bilateral treaty under the provisions of part II of the draft articles on the basis of the treaty’s previous application to one or more of the territories of which it is composed. This is a matter which is thought by the Special Rapporteur properly to fall under part II of the draft where it is not at present covered. At the same time there is a certain convenience in examining it in parallel with the question of unions of States. Accordingly, the problem raised by a new State composed of two or more formerly dependent territories will be taken up immediately after the present article in an “excursus” and any special provisions there found necessary for such composite new States can in due course be introduced into part II.

(8) The second type of case—the uniting of a mere territory with an existing State—also falls under an earlier provision of the draft articles, namely, the moving treaty-frontier rule set out in article 2; and this is so whether the existing State is a unitary or a federal State. A modern instance is Newfoundland’s entry into the Dominion of Canada as a new Province in 1949. Newfoundland, though a fully self-governing territory prior to its merger with Canada, was not considered as a State, and the case was dealt with as one covered by the moving treaty-frontier rule; in other words, the new Canadian Province of Newfoundland simply passed out of its previous treaty régime into the treaty régime of Canada.¹⁶⁰ Another modern instance is the uniting of the former Italian colony of Eritrea with Ethiopia as an “autonomous unit” in a constitutional relationship designated as federal; and in this instance too the territory seems to have been

¹⁶⁰ *Yearbook of the International Law Commission, 1969*, vol. II, p. 53, document A/CN.4/214 and Add.1, para. 6 of the Commentary to article 2.

regarded as simply absorbed into the treaty régime of Ethiopia.¹⁶¹

(9) The present article, therefore, is concerned only with a union where the individual units were themselves *States* having separate international personality at the date of their entry into the union. So confined, unions of States divide themselves into two main categories: (a) unions not essentially federal, and (b) federal unions. This classification is necessarily a broad one because in certain cases the question whether a union of States is to be considered a federation may be a matter of appreciation. If a modern textbook may be correct in saying that "a union of States is ordinarily distinguished from a federation in the extent to which functions of government are concentrated in the central authorities",¹⁶² there is some room for argument as to precisely how far that concentration of functions must go to constitute a federal State. The same textbook indeed takes the view that for purposes of analysing the effect on treaties "the formal distinction between union and federation is of slight relevance". Nevertheless, the majority of jurists, including the writer of the textbook in question, examine the cases of non-federal and federal unions separately. The Special Rapporteur will do likewise, beginning with non-federal unions.

(a) *Non-federal unions*

(10) The "personal unions" referred to by many writers may be left out of account, because they do not raise any question of succession. They entail no more than the possession, sometimes almost accidental, by two States of the same person as Head of State (e.g. Great Britain and Hanover between 1714 and 1837), and they in no way affect the treaty relations of the States concerned with other States. In any event, they appear to be obsolete.¹⁶³ So-called "real unions", on the other hand, entail the creation of a composite international person the particular character of which differentiates it from other types of new State for the purpose of succession. Such a union exists when two or more States, each having a separate international personality, are united under a common constitution with a common Head of State and a common organ competent to represent them in their relations with other States. A union may have some other common organs without losing its character as a "real" rather than a federal union; but the essence of the matter for present purposes is the separate identities of the individual States and the common organs competent to represent them internationally in at least some fields of activity.¹⁶⁴

(11) Amongst the older cases of real unions that are usually mentioned are the Norwegian-Swedish union under the Swedish Crown from 1814 to 1905 and the Danish-Icelandic union under the Danish Crown from 1918 to 1944. In each of these cases, however, one of the two union States (Norway and Iceland respectively) had not been independent States prior to the union, and it

is only in connexion with the *dissolution* of unions that these precedents are cited.¹⁶⁵ Even so, the practice concerning the effect of their dissolution on treaties has a certain interest in the present connexion; for it underlines the significance of the separate personalities of the individual States in the context of succession. The chief precedents regarding the effect of the *creation* of a union on treaties are the modern ones of the unions of Egypt and Syria in 1958 and of Tanganyika and Zanzibar in 1964.

(12) Egypt and Syria, each an independent State and a Member of the United Nations, proclaimed themselves in 1958 one State, to be named "The United Arab Republic".¹⁶⁶ At the same time the Provisional Constitution of the Republic laid down that the executive authority should be vested in the Head of State and the legislative authority in *one* legislative house. True, article 58 of the Constitution also provided that the Republic should consist of two regions, Egypt and Syria, in each of which there should be an executive council competent to examine and study matters pertaining to the execution of the general policy of the region. But under the Constitution the legislative power and the treaty-making power (article 56) were both entrusted to the central organs of the united State, without any mention of the regions' retaining any separate legislative or treaty-making powers of their own.¹⁶⁷ *Prima facie*, therefore, the Proclamation and Provisional Constitution designed the United Arab Republic to be a new unitary State rather than a "union", either real or federal. This is, indeed, underlined by a comparison between the language of the United Arab Republic Constitution and that of the "Charter of the United Arab States" concluded by the new Republic and by the Yemen only three days after the Constitution of the United Arab Republic had been adopted.¹⁶⁸ That Charter expressly provided that the "United Arab States" should be created as a "union" and that each member State of the Union should "preserve its international personality and its system of government". In practice, however, Egypt and Syria were generally recognized as in some measure retaining their separate identity as distinct units of the United Arab Republic.

(13) This view of the matter was, no doubt, encouraged by the terms of article 69 of the Provisional Constitution which read:

The coming into effect of the present Constitution shall not infringe upon the provisions and clauses of the international treaties and agreements concluded between each of Syria and Egypt and foreign Powers.

These treaties and agreements shall remain valid in the regional spheres for which they were intended at the time of their conclusion, according to the rules and regulations of international law.

¹⁶⁵ The union of Austria and Hungary in the Dual Monarchy is another case sometimes cited, but again only in regard to the effect of dissolution of a union on treaties.

¹⁶⁶ E. Cotran, "Some legal aspects of the formation of the United Arab Republic and the United Arab States", *International and Comparative Law Quarterly* (London), vol. 8 (April, 1959), pp. 346-390.

¹⁶⁷ For a translation of the Provisional Constitution, see *International and Comparative Law Quarterly* (*op. cit.*), pp. 374-380.

¹⁶⁸ *Ibid.*, pp. 387-390.

¹⁶¹ *Ibid.*

¹⁶² D. P. O'Connell, *State Succession* . . . , vol. II, p. 71.

¹⁶³ See generally J. H. W. Verzijl, *International Law in Historical Perspective* (Leyden, Sijthoff, 1969), pp. 132-140.

¹⁶⁴ For a historical account of real unions, see J. H. W. Verzijl, *op. cit.*, pp. 140-159.

Article 69 thus in terms provided for the continuance in force of all the pre-union treaties of both Egypt and Syria within the limits of the particular region in regard to which each treaty had been concluded. *Vis-à-vis* third States, that provision had the character of a unilateral declaration which was not, as such, binding upon them. Third States were thus under an obligation to recognize the continuance in force of their pre-union treaties with Egypt and Syria only if (a) they were bound to do so under some rule of general international law or (b) they assented, expressly or by their conduct, to the continuance in force of those treaties under the conditions specified in article 69 of the Constitution of the United Arab Republic.

(14) As to *multilateral treaties*,¹⁶⁹ the Foreign Minister of the United Arab Republic made a communication to the Secretary-General of the United Nations in the following terms:

It is to be noted that the Government of the United Arab Republic declares that the Union is a single Member of the United Nations, bound by the provisions of the Charter, and that all international treaties and agreements concluded by Egypt or Syria with other countries will remain valid within the regional limits prescribed on their conclusion and in accordance with the principles of international law.

The response of the Secretary-General to this communication was, during the existence of the Union, to list the United Arab Republic as a party to all the treaties to which Egypt or Syria had been parties before the Union was formed; and under the name of the United Arab Republic he indicated whether Egypt or Syria or both had taken action in respect of the treaty in question. Upon the basis of what legal principle the United Arab Republic was to be considered a party to the treaties respectively of Egypt and Syria the Secretary-General did not explain: i.e. whether he considered the United Arab Republic as having a right to notify its succession to multilateral treaties (cf. the rule proposed in article 7 of the present articles), or whether he considered the united State of Egypt-Syria as *ipso jure* bound to continue in force the pre-union treaties of Egypt and Syria in accordance with their terms. Some further light on the matter may, however, be obtained from the treatment accorded to the United Arab Republic in regard to *membership in the United Nations*.¹⁷⁰ The notification addressed by the United Arab Republic to the Secretary-General had requested him to communicate the information concerning the formation of the united Republic to all Member States and principal organs of the United Nations and to all subsidiary organs, particularly those on which Egypt or Syria, or both, had been represented. The Secretary-General, in his capacity as such, accepted credentials issued by the Foreign Minister of the United Arab Republic for its permanent representative, informing Member States and all principal and subsidiary organs of his action in the following terms:

... In accepting this letter of credentials the Secretary-General has noted that this is an action within the limits of his authority undertaken without prejudice to and pending such action as other Organs of the United Nations may take on the basis of notification of the constitution of the United Arab Republic and the Note of 1 March 1958 [the Foreign Minister's note informing the Secretary-General of the formation of the United Republic].

The upshot was that the representatives of the United Arab Republic "without objection took their seats in all the organs of the United Nations of which Egypt or Syria, or both, had been members"; and this occurred without the United Arab Republic's undergoing "admission" as a Member State. It seems therefore that the Secretary-General and the other organs of the United Nations, acted on the basis that the United Arab Republic united and continued in itself the international personalities of Egypt and Syria. The specialized agencies, *mutatis mutandis*, dealt with the case of the United Arab Republic in a similar way.¹⁷¹ In the case of the International Telecommunication Union it seems that the United Arab Republic was considered as a party to the constituent treaty, subject to different reservations in respect of Egypt and Syria which corresponded to those previously contained in the ratifications of those two States.¹⁷²

(15) The practice regarding bilateral treaties proceeded on similar lines, in accord with the principles stated in article 69 of the Provisional Constitution; i.e. the pre-Union bilateral treaties of Egypt and Syria were considered as continuing in force within the regional limits in respect of which they had originally been concluded. Thus, in the Secretariat's study of succession in respect of extradition treaties it is said that "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]".¹⁷³ Again, in the Secretariat's study of air transport agreements the conclusion is reached that "notwithstanding the formation of a unitary State with no relevant power reserved for constituent parts, the air transport agreements of Egypt and Syria continued to have effect".¹⁷⁴ And the practice examined in its study of trade agreements shows that in this case also the commercial treaties of Egypt and Syria were considered as continuing in force within their regional limits notwithstanding the formation of the United Arab Republic.¹⁷⁵ The same view of the position in regard to the pre-union treaties of Egypt and Syria was reflected in the lists of "treaties in force" published by other States.¹⁷⁶ The United States, for example, listed against the United Arab Republic

¹⁶⁹ See *Yearbook of the International Law Commission, 1962*, vol. II, p. 113, document A/CN.4/150, para. 48.

¹⁷⁰ *Ibid.*, p. 104, document A/CN.4/149 and Add.1, paras. 17-21.

¹⁷¹ See M. M. Whiteman, *op. cit.*, vol. 2, pp. 987-990 and 1018-1025; and D. P. O'Connell, *State Succession . . .*, vol. II, pp. 193-196.

¹⁷² *Yearbook of the International Law Commission, 1970*, vol. II, p. 89, document A/CN.4/225, para. 108.

¹⁷³ *Ibid.*, p. 130, document A/CN.4/229, para. 147; see also p. 127, paras. 130-131.

¹⁷⁴ *Ibid.*, 1971, vol. II (Part Two), p. 148, document A/CN.4/243, para. 190; see also pp. 142-146, paras. 152-175.

¹⁷⁵ *Ibid.*, pp. 179-181 and 184, document A/CN.4/243/Add.1, paras. 149-166 and 181.

¹⁷⁶ D. P. O'Connell, *State Succession . . .*, vol. II, pp. 72-73.

lic twenty-one pre-union bilateral treaties with Egypt and six with Syria.

(16) A modern writer considers the case of the United Arab Republic to be somewhat anomalous:

It is difficult to place the United Arab Republic within any of the traditional categories of composite States. It was not a real union because the Republic was a State; nor was it a personal union, because whatever international personality of the constituent States survived was of very limited character. At the same time it was not a federation since there was no classical distribution of legislative powers. In short, the arrangement was *sui generis*. This however, does not necessarily invalidate analogies with other types of association.¹⁷⁷

While agreeing in substance with this comment, the Special Rapporteur doubts whether it is necessary to differentiate the United Arab Republic from a real union because the United Arab Republic was constituted as a "State". True, one well-known authority took the position that "a Real Union is not itself a State, but merely a union of two full sovereign States which together make one single but composite International Person".¹⁷⁸ That somewhat mystical view of real unions was not, however, universally shared, another well-known authority saying bluntly: "A real union is indistinguishable for international purposes from a federal union. It occurs when States are indissolubly combined under the same monarch, *their identity being merged in that of a common State for external purposes*, though each may retain distinct internal laws and institutions."¹⁷⁹ Certainly, in the context of treaty relations, the latter view seems to express the substance of the matter. The anomaly, if there was one, in the case of the United Arab Republic lay rather in the greater degree of the fusion of the identities of the two States in the central organs provided for in the Constitution. The separate identities of Egypt and Syria, which remained a political fact, found only very limited expression in the Provisional Constitution. For present purposes, however, and in the light of the treaty practice during the existence of the united Republic, the view generally taken of the case of the United Arab Republic as one of a union of States seems reasonable and in accord with the facts.

(17) The question remains, however, as to the legal basis on which the pre-union treaties of Egypt and Syria were considered as continuing in force within their respective regional limits. Was this viewed as resulting from the consent of the other parties to the treaties concerned or as occurring *ipso jure* by reason of the particular nature of the "succession" as a union of independence? The practice appears to be susceptible of either interpretation. But the uniformity of the recognition of the continuity of the pre-union treaties, together with the uniform recognition accorded by international organizations to the continuity of the membership of Egypt and Syria in the United Arab Republic, may perhaps indicate conduct

based on the hypothesis of an actual rule of continuity in the case of such a union of independent States.

(18) The uniting of Tanganyika and Zanzibar in the Republic of Tanzania in 1964 was also a union of independent States under constituent instruments which provided for a common Head of State and a common organ responsible for the external, and therefore treaty relations of the Union.¹⁸⁰ The constituent instruments indeed provided for a Union Parliament and Executive to which various major matters were reserved. Unlike the Provisional Constitution of the United Arab Republic, however, they also provided for a separate Zanzibar legislature and executive having competence in all internal matters not reserved to the central organs of the united Republic. Although, therefore, the constituent instruments *prima facie* contain federal elements, the case is commonly classified simply as a union of States and appears to have been so regarded by Tanzania herself.¹⁸¹ On the other hand, the particular circumstances in which the union was formed complicate this case as a precedent from which to deduce principles governing the effect of the formation of a union of States upon treaties.

(19) Though both Tanganyika and Zanzibar were independent States in 1964 when they united in the Republic of Tanzania, their independence was of very recent date. Tanganyika, previously a trust territory, had become independent in 1961; Zanzibar, previously a colonial protectorate, had attained independence and become a Member of the United Nations only towards the end of 1963. In consequence, the formation of the union of Tanzania occurred in two stages, the second of which followed very rapidly after the first: (a) the emergence of each of the two individual territories to independence, and (b) the uniting of the two, now independent, States in the Republic of Tanzania. This fact has to be kept in mind in interpreting the treaty-practice after the formation of the Union for the following reasons. Tanganyika, on beginning life as a new State, had made the Nyerere declaration by which, in effect, she gave notice that pre-independence treaties would be considered by her as continuing in force only on a provisional basis during an interim period, pending a decision as to their continuance, termination or renegotiation.¹⁸² She recognized the possibility that some treaties might survive "by the application of the rules of customary international law" apparently meaning thereby boundary and other localized treaties. Otherwise, she clearly considered herself free to accept or reject pre-independence treaties. The consequence was that, when not long afterwards Tanganyika united with Zanzibar, many pre-union treaties applicable in respect of her territory had terminated or were in force only provisionally. Except for possible "localized treaties", she was bound only by such treaties as she had taken steps to continue in force. As to Zanzibar, there seems to be little doubt that, leaving aside the question

¹⁷⁷ *Ibid.*, p. 74.

¹⁷⁸ L. Oppenheim, *International Law: A Treatise* 8th ed. [Lauterpacht] (London, Longmans, Green, 1955), vol. I, p. 171.

¹⁷⁹ W. E. Hall, *A Treatise on International Law*, 8th ed., (Oxford, Clarendon Press, 1924), p. 26. Cf. P. Fauchille, *Traité de droit international public*, 8th ed. (Paris, Rousseau, 1922), vol. I, part I, pp.233-234.

¹⁸⁰ E. E. Seaton and S. T. M. Maliti, *loc. cit.*, paras. 26-28.

¹⁸¹ *Ibid.*

¹⁸² See paragraph 1 of the commentary to article 4 of the present draft: (*Yearbook of the International Law Commission, 1969, vol. II, pp.62-63, document A/CN.4/214 and Add.1 and 2*).

of localized treaties, she was not bound to consider any pre-independence treaties as in force at the moment when she joined with Tanganyika in forming the Republic of Tanzania. The Republic itself seems to have thought that treaties previously applicable to Zanzibar had survived the latter's independence by reason of a rule of customary law governing "protectorates"; but that the Zanzibar revolution at the beginning of 1964 had necessarily put an end to them.¹⁸³ The thesis that a revolutionary change of government may produce a clean slate in regard to treaties is, however, very controversial, and is therefore a doubtful basis for regarding Zanzibar as relieved of pre-independence treaties. On the other hand, Zanzibar appears in fact to have been a colonial protectorate rather than a protected State, and on this basis she was not in any event bound to consider treaties previously applicable to the protectorate as continuing in force after independence. Accordingly, as neither the original nor the revolutionary government of Zanzibar had notified her succession to multilateral treaties of indicated her acceptance of the novation of bilateral treaties, Tanzania was justified, if for different reasons, in thinking that Zanzibar had joined the Union free of any *obligation* to continue in force her pre-independence treaties.

(20) In a note of 6 May 1964, addressed to the Secretary-General, the new united Republic informed him of the uniting of the two countries as one sovereign State under the name of the United Republic of Tanganyika and Zanzibar (the subsequent change of name of Tanzania was notified on 2 November 1964). It further asked the Secretary-General:

to note that the United Republic of Tanganyika and Zanzibar declares that it is now a single Member of the United Nations bound by the provisions of the Charter, and that all international treaties and agreements in force between the Republic of Tanganyika or the People's Republic of Zanzibar and other States or international organizations will, to the extent that their implementation is consistent with the constitutional position established by the Articles of the Union, remain in force within the regional limits prescribed on their conclusion and in accordance with the principles of international law.¹⁸⁴

This declaration, except for the proviso "to the extent that their implementation is consistent with the constitutional position established by the Articles of the Union", follows the same lines as that of the United Arab Republic.¹⁸⁵ Furthermore, the position taken by the Secretary-General in communicating the declarations to other United Nations organs and to the specialized agencies was almost identical with that adopted by him in the case of the United Arab Republic¹⁸⁶ and, *mutatis mutandis*, the specialized agencies seem to have followed the precedent of the United Arab Republic in dealing with the merger of Tanganyika and Zanzibar in the United Republic of Tanzania. At any rate, the resulting union was treated as simply continuing the

membership of Tanganyika (and also of Zanzibar in those cases where the latter had become a member prior to the Union) without any need to undergo the relevant admission procedure. The treaty practice of Tanzania after the formation of the union necessarily reflected the special circumstances which have been mentioned;¹⁸⁷ even so, when closely examined, it seems to have parallels with the treaty practice in the case of the United Arab Republic.

(21) As to multilateral treaties, Tanzania confirmed to the Secretary-General that the United Republic would continue to be bound by those in respect of which the Secretary-General acts as depositary and which had been signed, ratified or acceded to *on behalf of Tanganyika*.¹⁸⁸ No doubt the United Republic's communication was expressed in those terms for the simple reason that there were no such treaties which had been signed, ratified or acceded to *on behalf of Zanzibar* during the latter's very brief period of existence as a separate independent State prior to the Union. In the light of that communication, the Secretary-General listed the United Republic as a party to a number of multilateral treaties on the basis of an act of acceptance, ratification or accession by Tanganyika prior to the Union. Moreover, he listed the date of *Tanganyika's* act of acceptance, ratification or accession as the commencing date of the United Republic's participation in the treaties in question.¹⁸⁹ Only in the cases of the Charter of the United Nations and the Constitution of the World Health Organization, to which Zanzibar had become a party by admission prior to the Union, was any mention made of Zanzibar; and in these cases under the entry for Tanzania he also gave the names of Tanganyika and Zanzibar together with the separate dates of their respective admissions to the United Nations.¹⁹⁰ In the other cases, the entry for Tanzania did not contain any indication that Tanzania's participation in the treaty was to be considered as restricted to the regional limits of Tanganyika.

(22) Tanganyika, after attaining independence, notified her succession to the four Humanitarian Geneva Conventions of 1949 and was therefore a party to them at the time of the formation of the United Republic of Tanzania.¹⁹¹ Zanzibar, on the other hand, had taken no action with respect to these treaties prior to the Union. Tanzania is now listed as a party, but it seems

¹⁸⁷ See paragraph 19 above.

¹⁸⁸ See United Nations, *Multilateral Treaties . . . 1968*, p. 7, foot-note 6.

¹⁸⁹ e.g., the 1946 Convention on the Privileges and Immunities of the United Nations; the 1947 Convention on the Privileges and Immunities of the Specialized Agencies; the 1961 Vienna Convention on Diplomatic Relations and its Optional Protocol; the Paris Agreement of 1904 and the Paris Convention of 1910 for the Suppression of the White Slave Traffic, amended by the New York Protocol of 1949; the Conventions for the Suppression of the Circulation of Obscene Publications; the 1963 Agreement establishing the African Development Bank, etc. (See United Nations, *Multilateral Treaties . . . 31 December 1968*, pp. 32, 40, 45, 51, 146, 149, 157, 162, 187, 205, 215, 303, 312, 316, 323).

¹⁹⁰ *Ibid.*, pp. 7 and 167.

¹⁹¹ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 41, document A/CN.4/200 and Add.1 and 2, para. 171.

¹⁸³ E. E. Seaton and S. T. M. Maliti, *loc. cit.*, paras. 22-24.

¹⁸⁴ See United Nations, *Multilateral treaties . . . 1968*, p. 7, foot-note 6.

¹⁸⁵ See paragraph 14 of the present commentary.

¹⁸⁶ *Ibid.*; see also United Nations, *Multilateral treaties . . . 1968*, p. 7, foot-note 6.

that the question whether Tanzania's participation embraces Zanzibar as well as Tanganyika is regarded as still undetermined.¹⁹² Similarly, the Republic of Tanganyika but not Zanzibar had become a party to the Paris Convention for the Protection of Industrial Property (Lisbon text) prior to the formation of the United Republic. After the formation of the Union the Bureau listed Tanzania as having acceded to the Paris Convention on the basis of the Lisbon text; but in this case also it was stated that the question of the application of the Convention to Zanzibar was still undetermined.¹⁹³ The situation at the moment of union differed in the case of GATT, in that Zanzibar, although she had not taken steps to become a party prior to the formation of the Union, had been an associate member of GATT before attaining independence. Otherwise it was similar, as Tanganyika had notified the Secretary-General of her succession not only to GATT but to 42 international instruments relating to GATT. After the union the United Republic of Tanzania informed GATT of its assumption of responsibility for the external trade relations of both Tanganyika and Zanzibar, and the United Republic was then regarded as a single contracting party to GATT.¹⁹⁴ In the case of FAO also, Tanganyika, before the Union, had taken steps to become a member while Zanzibar, a former associate member, had not. On being notified of the union of the two countries in a single State, the FAO Conference formally, recognized that the United Republic of Tanzania ("replaced the former member Nation, Tanganyika, and the former associate member, Zanzibar").¹⁹⁵ At the same time, the membership of the United Republic is treated by FAO as dating from the commencement of *Tanganyika's* membership; and it appears that Zanzibar is considered to have had the status of a non-member State during the brief interval between her attainment of independence and the formation of the United Republic of Tanzania.¹⁹⁶ In ITU, the effect of the Union seems to have been determined on similar lines. Again, Tanganyika had become a party to the ITU Convention before the Union, while Zanzibar, which had formerly been one unit in a "group member" of British territories, had not done so. One being notified of the Union, the General Secretariat of ITU communicated the notification to member States with the comment: "Accordingly, with effect from 26 April 1964 [the date of the formation of the Union] the Republic of Tanganyika has been succeeded in respect of its membership of the ITU by the

United Republic of Tanganyika and Zanzibar". The United Republic is listed in the Annual Report as a party to the Geneva Convention of 1959 as from the date of Tanganyika's accession, and there is nothing in the entry for Tanzania to indicate that her participation is restricted within the regional limits of Tanganyika.¹⁹⁷

(23) Bilateral treaties—leaving aside the question of localized treaties—in the case of Tanganyika were due under the terms of the Nyerere declaration to terminate two years after independence, that is on 9 December 1963 and some months before the formation of Tanzania.¹⁹⁸ The position at the date of the Union therefore was that the great majority of the bilateral treaties applicable to Tanganyika prior to her independence had terminated. In some instances, however, a pre-independence treaty had been continued in force by mutual agreement before the Union took place. This was so, for example, in the case of a number of commercial treaties, legal procedure agreements and consular treaties, the maintenance in force of which had been agreed in exchanges of notes with the interested States.¹⁹⁹ In other instances, negotiations for the maintenance in force of a pre-independence treaty which had been begun by Tanganyika prior to the date of the Union were completed by Tanzania after that date.²⁰⁰ In addition, a certain number of new treaties had been concluded by Tanganyika between the date of her independence and that of the formation of the union.²⁰¹ Zanzibar, as previously explained, was entitled to regard herself as not bound by bilateral treaties applicable in respect of her territory prior to independence, unless they had been "novated", i.e. continued by mutual agreement.²⁰² In case of visa abolition agreements, commercial treaties, extradition and legal procedure agreements, it seems that prior to the union Zanzibar had either indicated a wish to terminate the pre-independence treaties or given no indication of a wish to maintain any of them in force.²⁰³ In the case of consular treaties, seven of which treaties had been applicable in respect of Zanzibar prior to her independence, it seems that the

¹⁹² See United States, Department of State, *Treaties in Force: A List of Treaties and other International Agreements of the United States in Force on January 1, 1972* (Department of State publication 8628, Washington, D.C., U.S. Government Printing Office), (referred to hereafter as "United States, *Treaties in Force* . . . 1972") p. 364, foot-note 3.

¹⁹³ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 59, document A/CN.4/200 and Add.1 and 2, para. 258 and foot-note 466.

¹⁹⁴ *Ibid.*, pp. 84 and 86, document A/CN.4/200 and Add.1 and 2, paras. 373 and 382.

¹⁹⁵ FAO, *Report of the Thirteenth Session of the Conference (20 Nov.-9 Dec. 1965)* (Rome, 1966), para. 524.

¹⁹⁶ *Yearbook of the International Law Commission, 1969*, vol. II, pp. 38 and 42, document A/CN.4/210, paras. 52 and 70.

¹⁹⁷ *Ibid.*, 1970, vol. II, p. 90, document A/CN.225, paras. 111-112.

¹⁹⁸ E. E. Seaton and S. T. M. Maliti, *loc. cit.*, paras. 36-41.

¹⁹⁹ *Ibid.*, paras. 56, 77 and 84.

²⁰⁰ *Ibid.*, paras. 70-73 and 89-90.

²⁰¹ *Ibid.*, paras. 47 and 56.

²⁰² See para. 19 of the present commentary. Tanzania, as mentioned in that paragraph, appears to have put the termination of the treaties rather on the controversial ground of the effects of the revolution in Zanzibar.

²⁰³ The suggestion has been made that the legal procedure agreements "being so non-political" would not necessarily have failed to survive the revolution "so that, presumably, they were to be considered as in force at the date of the union" (E. E. Seaton and S. T. M. Maliti, *loc. cit.*, para. 81). However, leaving aside the controversial point as to the effects of the revolution, it would be difficult to distinguish legal procedure agreements from visa abolition, commercial and extradition treaties on the ground of "non-political character". Moreover, the word "survive" is equivocal; the treaties might well have "survived" in the sense of being capable of being "novated" without yet having been kept in force.

consuls continued at their posts up to the date of the Union, so that the treaties appear to that extent to have remained in force, at any rate provisionally.

(24) After the formation of the United Republic, Tanganyika's new Visa Abolition Agreements with Israel and the Federal Republic of Germany were, it appears, accepted as *ipso jure* continuing in force.²⁰⁴ In addition arrangements concluded by Tanganyika for continuing in force pre-independence Agreements with five countries were regarded as still in force after the union. In all those cases the treaties, having been concluded only in respect of Tanganyika, were accepted as continuing to apply only in respect of the region of Tanganyika and as not extending to Zanzibar.²⁰⁵ As to commercial treaties, the only ones in force on the eve of the Union were the three new treaties concluded by Tanganyika after her independence with Czechoslovakia, the Soviet Union and Yugoslavia. These treaties again appear to have been regarded as *ipso jure* remaining in force after the formation of the United Republic, but in only respect of the region of Tanganyika.²⁰⁶ In the case of extradition agreements, understandings were reached between Tanganyika and some countries for the maintenance in force provisionally of these agreements. It seems that after the union these understandings were continued in force and, in some cases, made the subject of express agreements by exchanges of notes.²⁰⁷ It further seems that it was accepted that, where the treaty had been applicable in respect of Zanzibar prior to her independence, the agreement for its "novation" should be considered as relating to Zanzibar as well as Tanganyika, even although it was not in force for Zanzibar at the date of the Union of the two Republics. And since these were cases of "novation" by mutual agreement, it was clearly open to the States in question so to agree. It may be added that after the union consular treaties applicable previously in relation to Tanganyika or to Zanzibar also appear to have continued in force as between the United Republic and the other contracting parties in relation to the region to which they had applied prior to the union.²⁰⁸

(25) The constitutional arrangements setting up the United Arab Republic and the United Republic of Tanzania did not in either case leave any part of the treaty-making power in the States composing the Union. On the contrary, the whole treaty-making power was in each case placed in the hands of the Government of the Union, which was also invested with a general power of legislation with respect to the territory of the union. In each case the central organs of government of the Union were established at the capital of one of the two former States. In the case of the United Arab Republic a separate executive council was provided for the other region, Syria; in the case of Tanzania a separate local legislature was provided for the other region, Zan-

zibar. These arrangements would not in themselves be sufficient to distinguish these cases from other cases of the creation of a new State or of the incorporation of one State within another. The distinguishing elements of the present cases appear to be: (1) the fact that prior to each union both its component regions were internationally recognized as fully independent sovereign States; (2) the fact that in each case the process of union was regarded not as the creation of a wholly new sovereign State or as the incorporation of one State into the other but as the merging of two existing sovereign States into one; and (3) the explicit recognition in each case of the continuance in force of the pre-union treaties of both component States in relation to, and in relation *only* to, their respective regions. As already pointed out in the present commentary,²⁰⁹ a question arises as to whether the third of these elements is merely an automatic consequence of the existence of the first two or whether it is itself an essential part of the legal basis for the continuance in force of the pre-union treaties of the component States. If the latter view is taken, these cases are simply a particular application of the process of "novation". If the former view is accepted, then these cases constitute a specific category of succession where the pre-union treaties of the component States *ipso jure* bind the union government within the regions in regard to which they were applicable prior to the union. The practice of the United Nations, the specialized agencies and other international organizations in regards to the continuity of membership in these cases, as noted above, appears to favour the existence of a rule of *ipso jure* continuity of treaties in this category of unions of States.

(26) Finally, attention is drawn to two points. The first is that in neither of the two cases did the constitutional arrangements leave any treaty-making power in the component States after the formation of the Union. It follows that the continuance of the pre-union treaties within the respective regions was wholly unrelated to the possession of treaty-making powers by the individual regions after the formation of the Union.

(27) The second is that in her declaration of 6 May 1964²¹⁰ Tanzania qualified her statement of the continuance of the pre-union treaties of Tanganyika and Zanzibar by the proviso "to the extent that their implementation is consistent with the constitutional position established by the Articles of Union". This proviso was reproduced almost word for word in the first paragraph of the second resolution adopted by the International Law Association adopted in 1968 at its Buenos Aires Conference.²¹¹ It there appears as part of a general rule covering both unions and federations of States and providing for the continuity of pre-union or pre-federa-

²⁰⁴ E. E. Seaton and S. T. M. Maliti, *loc. cit.*, para. 48.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*, paras. 64-65.

²⁰⁷ *Ibid.*, paras. 62-72.

²⁰⁸ *Ibid.*, para. 88.

²⁰⁹ See para. 17 above.

²¹⁰ For the relevant passages, see para. 20 above.

²¹¹ International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), p. 632; the text of the resolutions is also reproduced in the introduction to 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).

tion treaties "within the regional limits prescribed at the time of their conclusion". Since the proviso comes into question also in connexion with federal unions, its consideration will be deferred until after the practice in regard to federal unions has been examined. It suffices here to observe that such a proviso is consistent with a rule of continuity of pre-union treaties *ipso jure* only if it does no more than express a limitation on continuity arising from the objective incompatibility of the treaty with the union of the two States as one State; and this appears to be the sense in which the proviso was intended in Tanzania's declaration. Otherwise, such a proviso would amount to a unilateral modification of the terms of the pre-union treaties not opposable to the other contracting parties without their agreement.

(b) *Federal unions*

(28) The International Law Association, as mentioned in the preceding paragraph, proposed in its second resolution one general rule covering both "unions" and "federations of States". Furthermore, the commentary on the resolution made it clear that the term "federations of States" was intended to embrace not merely federations formed by existing States but all composite States created in federal form. Two questions therefore arise: (1) whether unions of States and federations of States are governed by the same rule; and (2) whether federations formed by two or more States and federations formed from two or more territories fall under the same principles. If the answers to these questions must be sought primarily in the treaty practice, it seems desirable first to give a fuller indication of the nature of the proposals of the International Law Association in regard to unions and federations.

(29) The relevant paragraphs of the International Law Association's resolution read:²¹²

In cases of unions or federations of States, treaties, unless they otherwise provide, remain in force within the regional limits prescribed at the time of their conclusion to the extent to which their implementation is consistent with the constitutional position established by the instrument of union or federation.

In such a case where the treaty remains in force, the question whether the union or federation becomes responsible for performance of the treaty is dependent on the extent to which the constituent governments remain competent to negotiate directly with foreign States and to become parties to arbitration proceedings therewith.

The report of the Committee responsible for drafting the resolution contained an explanatory note which ran as follows:

When a composite State is formed out of several previously separate States or territories,* the problem of continuity of treaties of those States or territories * arises. The Committee rejects the view that this continuity depends upon the form of the composition, *i.e.* federation or union, because at the present time there is a wide variation in the forms of composition, yet despite this variation there is an almost universal practice in favour of maintenance of treaties (for example the union between Egypt and Syria). It also rejects the view that continuity depends on whether

or not the constituent entities retain some faculties of international intercourse (as in the case of Bavaria between 1871 and 1918) because, in fact, continuity has occurred even in the absence of such faculties. The Committee has not taken a position on the question whether treaty continuity depends upon consistency of a treaty with the constitutional position established by the instrument of union or federation, or whether treaties continue in force irrespective of the constitutional competence to give effect to them after the formation of the new entity. On the one hand, it may be argued that a State, if it may be exonerated from treaty obligations by being annexed to another State, may also be exonerated if its relationship with that other State is less than total absorption. On the other hand, it may equally cogently be argued that, since a State may not plead constitutional incapacity as an excuse for non-compliance with a treaty, escape from treaties is not achieved by a new constitutional relationship with another State. Even if continuity of treaties depends upon the consistency of a treaty with the constitutional position established by the instrument of union or federation, the question then arises whether a treaty lapses at the moment of union or federation because the subject-matter has fallen within the exclusive legislative competence of the central government, or lapses only when the central government in fact legislates inconsistently with the treaty.

The Committee has taken the position that treaties which remain in force affect only the territorial extent of the formerly separate State or territories.* It should be pointed out that the union may be so complete that the territorial identity of the formerly separate States or territories * is substantially lost. How a treaty can separately affect a territory which has little separate administrative identity is controversial, yet this is what has occurred in the case of Somalia. The problem also arises in Ghana, Kenya and elsewhere where the new State is composed of both former Crown colonies and protectorates which were differently affected by treaties. Although no conscious decision seems to have been taken in any of these countries, the solution of the problem seems to have been to presume that the treaties applied to the Crown colony have extended to the former protectorate. It is not known if there are any British treaties which affected the protectorates and not the Crown colonies though there were many which affected the Crown colonies and not the protectorates.²¹³

Respecting responsibility for treaty-performance, the Committee acknowledges that it is controversial whether the central or local government is responsible. However, it believes that, considering the machinery of international negotiation, the central government remains responsible unless the local government remains competent to negotiate internationally within the treaty field. Any other solution is likely, in the Committee's opinion, to be administratively abortive and to frustrate the implications of treaty continuity through the process of administrative change.²¹⁴

(30) The International Law Association's rapporteur for the subject of succession is also the author of a modern textbook on succession of States which states the effect of entry into a federation on treaties in similar broad terms:

The sole test of the effect of federation on treaties is the compatibility of a treaty with the federal structure, and this incompatibility

²¹³ Here there is a parenthesis calling attention to a statement of Nigeria mentioned in annex E to the Committee's report.

²¹⁴ Note 2 in the Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors (International Law Association Report of the Fifty-third Conference, Buenos Aires, 1968 (London, 1969), pp. 600-601).

²¹² The resolution has a third paragraph dealing with the dissolution of unions or federations.

tibility may not arise until the federal instrumentalities bring it about. A federal society involves a dovetailing rather than a supersession of legal orders. The competence to transact and the competence to perform exist conjunctively in the total legal order at the international level, but exist disjunctively in the instrumentalities of government at the constitutional level. A lapse of treaties consequent upon federation is only to be presumed when a direct and constitutionally valid exercise of federal powers renders impossible the performance of the treaty obligations of the constituent States. Only in this case is there a proper analogy with the incorporation of territory in a unitary State through annexation or cession. If the federal legislature is constitutionally incompetent within the area of power affected by the treaty, no inconsistency with the treaty can occur, and therefore, there can be no question about its survival.²¹⁵

(31) The heterogeneous character of the practice in regard to federations admittedly renders difficult its analysis of legal rules. Even so, and after giving every weight to the arguments and opinions set out in the two preceding paragraphs, the Special Rapporteur doubts whether the global treatment of unions of States, federations of States and federations of territories adopted in the resolution of the International Law Association is really in accord with the practice or consistent with principle. As pointed out in the Special Rapporteur's second report,²¹⁶ the resolutions of the International Law Association on succession in respect of treaties hinge upon a presumption of continuity, and this seems to be the case with its second resolution concerning unions and federations as well as with its first resolution regarding newly independent States. Indeed, the second resolution is formulated more in terms of a *rule* of continuity. The term "continuity" tends to blur the fundamental issue of whether the maintenance in force of the treaty is a matter of right and obligation on the part of (a) the successor State and (b) the other party or parties to the treaty concerned. If the second resolution seeks to lay down an absolute of *ipso jure* continuity for all federations it is thought to go beyond State practice.

(32) As already emphasized above,²¹⁷ the commentary upon the International Law Association's second resolution indicates that the term "federations of States", as used in that resolution, covers all composite States created in federal form: i.e. it covers both federations of States, like Switzerland and federations of *territories* like Nigeria. But the basic treaty situation is not the same in both cases at the date of the formation of the federation. A sovereign State, when it joins a federation or union of States, has an existing treaty régime of its own—an existing complex of treaties to which it is a party in its own name. A mere territory may have an existing complex of treaties formerly made applicable to it by its administering Power; but in general these treaties are not treaties to which it is itself a party at the moment when it joins the federation. On the contrary, they are treaties to which the territory, if it were becoming a sovereign State instead of a unit of a federation,

would be considered a party only after notification of succession in the case of a multilateral treaty or a novation in the case of a bilateral treaty. In other words, the underlying legal situations at the moment of federation are not the same in federations of States and federations of mere territories. Consequently, the proposition that succession in respect of treaties is governed by the same rule in both cases, is something which needs to be demonstrated from the evidence of State practice; and it is not clear that such is indeed the position revealed by State practice. Accordingly, it seems desirable to examine the cases of federations of States and federations of territories separately.

(33) Cases of federations of *States* are not numerous and the treaty practice is not easy to interpret. One precedent is the formation of the German federation in 1871 the treaty practice as to which is summarized in a modern textbook as follows:

The commercial treaties of the United States with the German States survived the formation of the Empire but not the annexation of Hanover by Prussia. However, the explanation of this is unclear since they were at times regarded as affecting the whole Empire. Most of the relevant provisions concerned shipping, and since the treaties were uniform, and the German navies and merchant marine were unified, there was no need to be specific whether the treaties survived as treaties of the States or as treaties succeeded to by the Empire. Two successive United States Secretaries of State doubted the theory that the surviving treaties bound the whole of the Empire.

Treaties of commerce and navigation between the States or the Zollverein and the Netherlands, China, Chile, Siam and Turkey were regarded as in force after 1871, as were consular treaties with the United States, the Netherlands and Turkey. Extradition treaties also survived, and were given effect to in United States courts. The Bancroft treaties, which concerned the treatment to be accorded in the German States to persons who had emigrated thence to the United States and returned, and which resolved conflicts of nationality, were the subject of diplomatic and judicial action up to the outbreak of war in 1917. Private law and judicial assistance treaties were also applied in the courts. In particular, the treaty of mutual relationship of 1856 between Baden and Switzerland has been the subject of revision and administration action, culminating in a decision in 1955 of the Swiss Federal Court that its relevant provision was still in force.* Numerous frontier relations treaties have also been considered at various times to have survived the events of 1871. The impression is that those events had no effect upon any treaties of any of the German States.²¹⁸

* *Bertschinger v. Bertschinger*, I.L.R., vol. XXII, p. 141.²¹⁹

Various interpretations of this practice have been advanced but the prevailing view seems to be that the treaties of the individual German States continued either to bind the Federal State as a successor to the States within their respective regional limits or to bind the individual States through the federal State until terminated by an inconsistent exercise of federal legislative power.²²⁰ It is true that certain treaties of individual

²¹⁵ D. P. O'Connell, *State Succession* . . . , vol. II, p. 54.

²¹⁶ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 50, document A/CN.4/214 and Add.1 and 2, para. 23.

²¹⁷ See paras. 28-29 of the present commentary.

²¹⁸ D. P. O'Connell, *State Succession* . . . , vol. II, pp. 58-60.

²¹⁹ See *Yearbook of the International Law Commission, 1963*, vol. III, p. 113, document A/CN.4/157, paras. 152-156.

²²⁰ See D. P. O'Connell, *State Succession* . . . , vol. II, p. 57; E. Castrén, "On State Succession in Practice and Theory", *Nordisk Tidsskrift for International Ret* (Copenhagen), vol. 24 (1954), p. 67; A. D. McNair, *op. cit.*, p. 629.

States were regarded as applicable in respect of the federations as a whole. But these cases appear to have concerned only particular categories of treaties and in general any continuity of the treaties of the States was confined to their respective regional limits.²²¹ A further point is that under the federal constitution the individual States retained both their legislative and their treaty-making competences except in so far as the federal Government might exercise its over-riding powers in the same field.

(34) The Swiss Federal Constitution of 1848 vested the treaty-making and treaty-enforcing powers in the Federal Government. At the same time, it left in the hands of the cantons a concurrent, if subordinate, power to make treaties with foreign-States concerning "l'économie publique, les rapports de voisinage et de police".²²² The pre-federation treaties of individual cantons, it seems clear, were considered as continuing in force within their respective regional limits after the formation of the federation.²²³ At the same time, the principle of continuity does not appear to have been limited to treaties falling within the treaty-making competence still possessed by the cantons after the federation. It further appears that treaties formerly concluded by the cantons are not considered under Swiss law as abrogated by reason only of incompatibility with a subsequent federal law, but are terminated only through a subsequent exercise of the federal treaty-making power.²²⁴

(35) Another precedent, though the federation was very short-lived, is the foundation of the Greater Republic of Central America in 1895. In that instance El Salvador, Nicaragua and Honduras signed a Treaty of Federation constituting the Greater Republic, and in 1897 the Greater Republic itself concluded a further treaty of federation with Costa Rica and Guatemala, extending the federation to these two Republics. The second treaty, like the first, invested the Federation with the treaty-making power; but it also expressly provided "Former treaties entered into by the States shall still remain in force in so far as they are not opposed to the present treaty".²²⁵

(36) The notification made by the Soviet Union on 23 July 1923 concerning the existing treaties of the Russian, White Russian, Ukrainian and Transcaucasian Republics may perhaps be regarded as a precedent of a similar kind. The notification stated that "the People's Commissariat for Foreign Affairs of the USSR is charged with the execution in the name of the Union of all its international relations, including the execution of all treaties and conventions entered into by the above-

mentioned Republics with foreign States which shall remain in force in the territories of the respective Republics".²²⁶

(37) The admission of Texas, then an independent State, into the United States in 1845 also calls for consideration in the present context. Under the United States Constitution the whole treaty-making power is vested in the federal Government, and it is expressly forbidden to the individual States to conclude treaties. They may enter into agreements with foreign Powers only with the consent of Congress—which has always been taken to mean that they may not make treaties on their own behalf. The United States took the position that Texas's pre-federation treaties lapsed and that Texas fell within the treaty-régime of the United States: in other words, that it was a case for the application of the moving treaty frontier principle.²²⁷ At first, both France and Great Britain objected, the latter arguing that Texas could not, by *voluntarily* joining the United States federation, exonerate herself from her own existing treaties. Later, in 1857 Great Britain came round to the United States view that Texas's pre-federation treaties had lapsed. The reasoning of the British Law Officers seems, however, to have differed slightly from that of the United States Government:

By the Federal constitution of the United States, treaties of commerce and navigation with foreign countries belong entirely to the Federal Government; and the entering into a separate treaty of commerce and navigation by any one of the United States with a foreign Power would be incompatible with the national constitution.

It follows that if an independent American State having a separate, commercial treaty with a foreign Power is annexed to the United States, as a member of the Union, and such annexation is recognized by such foreign Power, the separate treaty merges in the general treaty of commerce (if any) subsisting between such foreign country and the Federal Union.

A General Treaty of Commerce and Navigation between Great Britain and the United States was concluded in 1815, and is still subsisting.

Since that year, several States have been added to the American Union and each has been justly considered and treated as having acceded to, and being bound by, that General Treaty.²²⁸

On this reasoning they concluded that a Texas-Great Britain Treaty of Commerce and Navigation no longer subsisted. Leaving aside the somewhat untechnical reference to the States' having "acceded" to the federal Treaty, it seems that the British Law Officers regarded the continuance of the Texas Treaty as incompatible with a constitution which reserved the treaty-making power to the federal Government. The second paragraph cited above does not, it is thought, imply that in their

²²¹ R. W. G. de Muralt, *op. cit.*, p. 78; D. P. O'Connell, "State succession and the effect upon treaties of entry into a composite relationship", *The British Year Book of International Law* 1963 (London), vol. 39 (1963), pp. 68-77.

²²² See J.-F. Aubert, *Traité de droit constitutionnel suisse* (Neuchâtel, Ides et Calendes, 1967), vol. 1, pp. 256-261.

²²³ D. P. O'Connell, *State Succession . . .*, vol. II, pp. 60-61.

²²⁴ P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1953), vol. I, p. 310.

²²⁵ See R. W. G. de Muralt, *op. cit.*, pp. 83-84.

²²⁶ D. P. O'Connell, *State Succession . . .*, vol. II, p. 60, footnote 7.

²²⁷ D. P. O'Connell, "State succession . . ." *The British Year Book (loc. cit.)*, pp. 79-82; A. D. McNair, *op. cit.*, pp. 629-632; see also a United States Note of 25 June 1897 to Japan concerning the United States annexation of Hawaii cited in J. B. Moore, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1906), vol. V, p. 349.

²²⁸ For the text of the Opinion, see A. D. McNair, *op. cit.*, pp. 630-632.

view this incompatibility would operate only when there was a federal treaty in force covering the same matter as the State treaty.

(38) The formation of the Commonwealth of Australia as a federal State in 1901, on the other hand, is not thought to come into account in the present context.²²⁹ Apart from the questions of the statehood of the Colonies and of the Dominion, the very special role of the British Crown at that date in the treaty-making of the British Empire appears to preclude the use of this precedent as a basis from which to deduce rules applicable to federal unions generally.

(c) *Conclusions regarding unions of States*

(39) The precedents concerning unions of States other than federal, if few, are comparatively recent. They appear to indicate a rule prescribing the continuance in force *ipso jure* of the pre-union treaties of the individual States within their respective regional limits and subject to their compatibility with the constitution of the Union. In the case of these precedents the continuity of the pre-union treaties was recognized although the union constitution did not envisage the possession of any treaty-making powers by the States after the union. In other words, the continuance in force of the pre-union treaties was not regarded as incompatible with the union merely by reason of the non-possession by the States after the union of any treaty-making powers under the constitution. The precedents concerning federal unions, if rather more numerous, are older and less uniform. Taken as a whole, however, and disregarding minor discrepancies, they also appear to indicate a rule prescribing the continuance in force *ipso jure* of the pre-federation treaties of the individual States within their respective regional limits. Precisely how far the principle of continuity was linked to the continued possession by the individual States of some measure of treaty-making power or international personality is not clear. That element was present in the cases of the German and Swiss federations and its absence in the case of the United States seems to have been at any rate one ground on which continuity was denied. Many authors were thus led to conclude that the continuance in force of pre-federation treaties was dependent on the possession of treaty-making powers by the individual States after joining the federation; and they tended to link the continuity of the treaties to the continued possession of treaty-making powers within the same fields as the treaties in question.²³⁰ A former member of the Commission, for example, wrote in 1951:

Treaties concluded with third States by States members of a federal State before the constitution of that federal State are terminated in so as the member States lose the right to negotiate in respect of the matter concerned. Such treaties are not *ipso jure* transferred to the federal State because as has been

shown, that State constitutes a new subject of international law. [Translation by the United Nations Secretariat.]²³¹

On the other hand, to the extent that they considered the principle of continuity to apply in these cases, writers seem to have regarded the treaties as remaining in force *ipso jure* rather than through any process of agreement.

(40) Thus, the practice as a whole does not give clear guidance as to the rules to be adopted, so that the Commission's task may have in it some elements of progressive development. The first question is whether the same rules should apply to both federal and non-federal unions of States. On this point the Special Rapporteur agrees with the Committee of the International Law Association that the variety of constitutional forms on which unions rest, with their different gradations of federation, do not make it easy to draw neat distinctions between federal and other unions. Accordingly, if possible, a single solution for unions of States may be preferable.

(41) The second question is whether, subject to certain qualifications, the basic rule should be the continuance in force of pre-union treaties *ipso jure* or through a process of agreement express or implied. This agreement would presumably derive either from a declaration of continuity made in connexion with the foundation of the union or from a constitutional provision concerning continuity, plus the assent of the other parties to the treaties in question. This is a conceivable solution and one which would, perhaps, involve the least departure from the general rules formulated in part II of the present draft (the differences would primarily be in regard to multilateral treaties). But both the treaty practice and jurists, as previously noted, appear to treat unions of States as a case of *ipso jure* continuity in so far as any continuance in force of pre-union treaties occurs. The question is delicate because it is one where the rules of international law and of the constitution of the union intersect; and the international rule is itself concerned with the effect on treaties of the constitutional change resulting from the formation of the union. The argument for treating unions of States as a special case is that, as sovereign States, they created a complex of treaty relations with other States and ought not to be able completely at will to terminate all those treaties by joining a federal or other union. In other words, the argument is that the principle of continuity should displace the "clean slate" principle in the case of the formation of a union and the moving treaty frontier principle in the case of the addition of a state to a union. Today, this argument may, perhaps, be thought to have added force in view of the growing tendency of States to group themselves in new forms of association where the line

²²⁹ See generally D. P. O'Connell, "State succession . . ." *The British Year Book* . . . (loc. cit.), pp. 82-91.

²³⁰ e.g., A. D. McNair, *op. cit.*, p. 629.

²³¹ *Les traités conclus avec des Etats tiers par les Etats membres avant la constitution de l'Etat fédéral s'éteignent pour autant que les Etats membres sont privés du droit de traiter dans le domaine en question. Ces traités ne sont pas transférés ipso jure au nom de l'Etat fédéral, celui-ci, ainsi qu'il a été indiqué, constituant un nouveau sujet du droit international.* (E. Castrén, "Aspects récents de la succession d'Etats", *Recueil des cours de l'Académie de droit international de La Haye 1951-1* (Paris, Sirey, 1952), vol. 78, p. 443.)

between international organizations and unions of States becomes somewhat blurred.

(42) The problem is to find a satisfactory formula for reconciling the principle of continuity with the new constitutional situation resulting from the formation of the union. The formula suggested by the International Law Association would allow the continuity of pre-union treaties "to the extent to which their implementation is consistent with the constitutional position established by the instrument of union or federation".²³² This formula does not make it clear whether the limitation relates to "implementation" on the part of *regional government* under powers allowed to it by the new constitution or whether it relates more generally to implementation under the constitution as a whole. Nor is the uncertainty removed by the note which the Committee of the International Law Association appended to the resolution.²³³ According to this note, the Committee had not "taken a position on the question whether treaty continuity depends upon consistency of a treaty with the constitutional position established by the instrument of union or federation, or whether treaties continue in force irrespective of the constitutional competence to give effect to them after the formation of the new entity". It may be that there was some difference of opinion in the Committee on this point, because the Rapporteur of that Committee is himself on record as considering the constituent Government's competence to perform the treaty as a crucial test of continuity. Indeed, he maintains that an exercise of federal powers by the central government *subsequent* to the federation may bring about a lapse of a pre-union treaty if its effect is to "render impossible the performance of the treaty obligations of the constituent States".²³⁴

(43) It hardly seems acceptable that the continuity of a pre-union treaty should depend upon the mere distribution of the power to *perform* the treaty as between the regional government and the federal government, if the treaty is otherwise compatible with the constitution of the union; and still less that after the Union it should remain dependent on the federal government's not rendering *performance* of the treaty by the regional government impossible through an exercise of its federal powers. Such an approach to the question is thought to go too far in introducing internal constitutional provisions into a rule of international law, and in a manner which takes insufficient account of the rights of the other States parties to the treaty. The distribution of the power to implement treaties between central and regional governments is a matter which acquired some prominence in connexion with so-called "federal State clauses". But recourse to such clauses has always been a question of special agreement and federal clauses find no place in the general law of treaties as codified in the Vienna Convention. On principle, therefore, it is not

thought appropriate to make the particular location in the constitution of the power to perform a treaty the criterion for determining its continuance in force after the formation of a union or federation.²³⁵

(44) Linked to the point just considered is another: if a pre-union treaty of a constituent region continues in force, is it thereafter to be considered as a treaty of the Union State or merely of the region? On this point the resolution of the International Law Association pronounced that "the question whether the union or federation becomes responsible for performance of the treaty is dependent on the extent to which the constituent governments remain *competent to negotiate directly with foreign States and to become parties to arbitration proceedings therewith*".* The Committee in its note acknowledged the question to be controversial but believed that "considering the machinery of international negotiation, the central government remains responsible unless the local government remains competent to negotiate internationally within the treaty field". This conclusion of the Committee has also to be read in the light of its rejection²³⁶ of the view that continuity itself depends on "whether or not the constituent entities retain some faculties of international intercourse (as in the case of Bavaria between 1871 and 1918) because in fact continuity has occurred even in the absence of such faculties". (Presumably this last reference was to Egypt and Syria, Tanganyika and Zanzibar in whose cases continuity was recognized despite their lack of any treaty-making powers after the formation respectively of the United Arab Republic and Tanzania.) In short, the retention by the constituent region of some negotiating powers vis-à-vis foreign States, which formerly was advanced by writers as the criterion of the continuity of the treaties themselves, is now adopted by the International Law Association as the criterion for determining whether the treaty continues as a union treaty or merely a treaty of the constituent region.

(45) The question of the capacity of constituent units of a federation in treaty relations with foreign States is one of considerable delicacy, as is emphasized by the difficulties experienced in this connexion in attempting to include a rule in the 1969 Convention on the Law of Treaties concerning the treaty-making capacity of federal States. Many federal States then showed a marked opposition to any recognition of any separate treaty-capacity for the constituent units of a federation.²³⁷ Moreover, it seems that in federations where some faculty of entering into certain types of agreements with outside States is allowed to constituent units there is a strong tendency today to consider the agreements as made under powers delegated by the federal Govern-

²³² The formula may have been inspired by the terms of Tanzania's notification to the Secretary-General which used almost the same phraseology (see paragraph 23 of the present commentary).

²³³ See para. 29 above.

²³⁴ See para. 30 above.

²³⁵ Nor does this criterion appear in practice to have been applied by the United Arab Republic or Tanzania in determining the continuity of pre-union treaties.

²³⁶ See the Committee's note reproduced in paragraph 29 of the present commentary.

²³⁷ At the United Nations Conference on the Law of Treaties all special reference to *federal States* was removed from what is now article 6 of the Convention which simply proclaims that "Every State possesses capacity to conclude treaties".

ment. In other words, to the extent that such agreements are international agreements they are regarded as agreements made by the constituent units as organs of the federation itself. Accordingly, the Special Rapporteur does not think that the solution proposed by the International Law Association is one that can be adopted by the Commission with any hope of its being accepted by States. Almost any rule formulated on this point may attract criticism from some quarter. But the rule most likely to meet with acceptance and most consistent with modern practice is thought to be one which considers treaties that continue in force after the formation of a union as treaties of the union State, although binding only in respect of the territory of one of its constituent units.

(46) Even so, there remains the fundamental problem of formulating the condition under which continuity of pre-union treaties in fact occurs. The incompatibility of a treaty with the constitution of a union of States may be of different kinds and degrees. It may be purely technical, as where the executive organs of the union differ from those specified in the treaty for the implementation of its provisions; or it may be fundamental as where a trade treaty cuts across the unified economic régime envisaged for the union. Another aspect of the problem is whether the principle of continuity can be considered applicable to all treaties or whether certain categories such as so-called "political" treaties have to be excepted. The difficulty here is to define the categories to be excepted. "Political" treaties, often referred to by writers as an exception are susceptible of very varying definitions; and in drafting the text which became the 1969 Vienna Convention on the Law of Treaties the Commission ultimately eschewed any division of treaties into categories on the basis of their subject-matter. In general the Special Rapporteur feels that compatibility of the object and purpose of the treaty with the constitution of the new State may be as near the Commission can get to a legal criterion for determining the limits of the principle of continuity. In dealing with questions of compatibility of treaties in general contexts the 1969 Convention refers to the "object and purpose" of the treaty. This criterion, although a broad one, is intended in the 1969 Convention to lay down an *objective* legal test of compatibility which, if applied in good faith, should provide a reasonable and practical rule. Great difficulties are likely to be encountered if an attempt is made to define in detail the conditions under which a pre-union treaty is to be considered as compatible with the constitution of the union; and it therefore seems better to use the broad formula found in the 1969 Convention.

(47) There is a further aspect of the problem. The constitution of a union may take the form of, or be based upon, a treaty; and in this case the provisions of article 30 of the 1969 Convention, which concerns the application of successive treaties relating to the same subject matter, require to be considered. Under paragraph 4 of that article, when the parties to a later treaty do not include all the parties to an earlier one, priority is given to the earlier treaty *as between the parties to that treaty*. In other words, if article 30 is applied to

a treaty establishing a union, the pre-union treaties of each of the constituent States with other States parties necessarily have priority over the constituent instrument of the union. Thus, under article 30 they would continue in force even if they were incompatible with the constitution of the union. This, as pointed out above,²³⁸ is the position in the case of unions like EEC which are intergovernmental rather than constitutional unions. The member States in these intergovernmental unions may be under an obligation *inter se* to use the best endeavours to bring their pre-union treaties into accord with their obligations as members of the union; but their pre-union treaties undoubtedly remain in force as between themselves and the other parties. Should the same principle, it may be asked, apply in the case of a constitutional "union of States" established by treaty?

(48) The question here posed is whether the formation of a "constitutional" union of States attracts a principle derived from the law of succession of States which displaces the ordinary principle in the law of treaties protecting the priority of an earlier treaty. The evidence it is thought, indicates that it is a point at which principles of succession have an impact upon the principles of the law of treaties. In the first place, the continuance in force of pre-union treaties never seems to have been approached either by States or writers simply from the point of view of the priority to be given to an earlier instrument. Although there may have been some differences as to the criterion which should determine continuity, compatibility in one form or another with the new situation resulting from the formation of the union has been advanced as the relevant criterion. Nor does any distinction ever seem to have been made in this context between a union of States established by treaty and one constituted by other instruments. Indeed, to make such a formal distinction the basis for applying different rules of succession in the two cases could hardly be justified; for a constituent instrument not in treaty form may still embody agreements negotiated between the States concerned. Accordingly, it is believed that, whether the union is established by a treaty or by other instruments, the continuance in force of pre-union treaties must depend on principles of successions; and that the problem is to determine exactly what are those principles.

(49) In the light of all the foregoing considerations the Special Rapporteur has prepared: first, a new provision concerning use of terms to be added to article 1 and designed to specify what is meant by a "union of States" for the purpose of the draft articles; and, secondly, two alternative texts of an article, one of which takes as its basis *ipso jure* continuity and the other tacit agreement.

(50) The meaning to be attributed to the term "union of States" is of critical importance since it will determine the scope of the case of succession here under consideration. In the opinion of the Special Rapporteur, the term should be so defined as to exclude confederations of States which do not result in the formation of a "united

²³⁸ See para. 3 of the present commentary.

State" and intergovernmental unions such as EEC. It is also thought necessary to include the element of "separateness" as a constituent unit *after* the formation of the union, as there does not seem to be any evidence of a principle of continuity where there is a complete absorption of the constituent States in a new unitary State.

(51) As to the two texts of article 19 prepared for the Commission's consideration, alternative A starts from the standpoint that where there is a union of States, as above defined, the treaties of each constituent State in principle continue in force *ipso jure*. At the same time, however, this text recognizes that there is a limit to the operation of this rule where the object and purpose of a pre-union treaty are incompatible with the constituent instrument of the union.

(52) Alternative B, on the other hand, starts from the standpoint that even in the case of a union of States there is no rule of *ipso jure* continuity and that, as in the case of newly independent States, continuity is a matter of consent. In other words, under alternative B constitutional provisions or declarations proclaiming continuity, as in the cases of the United Arab Republic and Tanzania, would not be regarded as an expression of a rule of continuity but as unilateral statements of intention, insufficient by themselves to effect continuity. Similarly, the older precedents of continuity (the pre-union treaties of certain German States and Swiss cantons) would be regarded as explicable on the basis of the consent of the interested States. Consequently, under alternative B the same general rules would apply in the case of a union of States as in the case of "new States". The solution in alternative B has a certain attraction in that the somewhat delicate question of compatibility of pre-union treaties with the situation resulting from the formation of the union would be left to be settled by agreement of the union of States and the other States parties; and it would clearly give a more flexible rule. But this would mean removing all *obligation* of continuity (apart from the question of "territorial" treaties) in cases of unions of States.

(53) Paragraph 2 is the same in both texts and provides that a treaty which continues in force binds the *Union of States* but *in relation only to the territory in respect of which it was in force prior to the formation of the union*. The first point in this paragraph—that the treaty binds the union—has been so stated for the reasons given above.²³⁹ The second point—that it binds only in relation to the territory in respect of which it was previously in force unless the union of States and the other States parties otherwise agree—accords with the practice discussed earlier in the present commentary.²⁴⁰

(54) Paragraph 3 also is the same in both texts and simply provides that the rules set out in the previous paragraphs for the formation of a union apply also to the case of an additional State's joining a union after its formation.

Excursus A. — States, other than unions of States, which are formed from two or more territories

Additional article for inclusion at the end of part II

[When a new State has been formed from two or more territories, not themselves States, treaties which are continued in force under the provisions of articles 7 to 17 are considered as applicable in respect of the entire territory of the successor State unless:

(a) It appears from the particular treaty or is otherwise established that such application would be incompatible with the object and purpose of the treaty;

(b) In the case of a multilateral treaty other than one referred to in article 7 (c), the notification of succession is restricted to the territory in respect of which the treaty was in force prior to the succession;

(c) In the case of a multilateral treaty of the kind referred to in article 7 (c) the successor State and the other States parties otherwise agree;

(d) In the case of a bilateral treaty, the successor State and the other State party otherwise agree.

COMMENTARY

(1) The International Law Association, as pointed out in the commentary to article 19,²⁴¹ grouped together all federations of States whether formed from a union of States or merely from two or more territories. This grouping, for the reasons there given, seems to assimilate two types of federation whose legal characteristics are essentially different from the point of view of succession of States. Although the Special Rapporteur has accordingly not thought it appropriate to deal with federations of mere territories under the head of unions of States, it is clearly necessary to take account of composite States, including federations, formed of two or more territories. As pointed out in the commentary to article 19,²⁴² the case of such composite States was not dealt with in the general articles concerning "new States" and now requires to be covered.

(2) One example of such a composite State of a federal type is Nigeria, which was created out of four former territories, namely the colony of Lagos, the two protectorates of Northern and Southern Nigeria and the northern region of the British Trust Territory of the Cameroons. The treaty situation on the eve of independence has been estimated by one writer as follows: Of the 78 multilateral treaties affecting parts of Nigeria before independence 37 applied to all territories, 31 to Lagos only, 3 to the two Protectorates only, 6 to both Lagos and the two Protectorates and 1 to the Trust Territory only. Of the 222 bilateral treaties, 151 applied equally to all four parts, 53 to Lagos only, 1 to the two Protectorates only, 13 to both Lagos and the two Protectorates, and 2 to the Trust Territory only.²⁴³ Nigeria is a State which entered into

²⁴¹ Paras. 27-29.

²⁴² Para. 7.

²⁴³ D. P. O'Connell, "State succession . . .", in *The British Year Book . . . (loc. cit)*, p. 93. The figures given by this writer for multinational and bilateral treaties add up to 300 treaties in force in respect of one or other part of Nigeria at the date of independence. Mr. Elias, in the International Law Commission, indicated a slightly larger total—334 (*Yearbook of the International Law Commission, 1962*, vol. I, p. 4, 629th meeting, para. 25).

²³⁹ Para. 45.

²⁴⁰ Paras. 12-27.

a devolution agreement with the United Kingdom prior to independence and has since notified or acknowledged her succession to a certain number of the above-mentioned multilateral and bilateral treaties. Neither in her devolution agreement²⁴⁴ nor in her notifications or acknowledgements does she seem to have distinguished between treaties previously applicable in respect of all four territories or only of some of them. Moreover, in notifying or acknowledging the continuance in force of any treaties for Nigeria, she seems to have assumed that they would apply to Nigeria as a whole and not merely within the respective regions in regard to which they had been applicable before independence. And both depositaries²⁴⁵ and other contracting Parties appear to have acquiesced in this point of view; for they also refer simply to Nigeria.²⁴⁶

(3) The federation of Malaysia is a more complex case, involving two stages. The first was the formation of the Federation of Malaya as an independent State in 1957 out of two colonies, Malacca and Penang, and nine Protectorates.²⁴⁷ The bringing of these territories together in a federal association had begun in 1948 so that post-1948 British treaties were applicable in respect of the whole Federation at the moment of independence; but the pre-1948 British treaties were applicable in respect only of the particular territories in regard to which they had been concluded. The devolution agreement entered into by Malaya²⁴⁸ referred simply to instruments which might be held to "have application to or in respect of the Federation of Malaya". On the other hand, article 169 of the Constitution,²⁴⁹ which related to the Federal Government's power to legislate for the implementation of treaties, did provide that any treaty entered into by the United Kingdom "*on behalf of the Federation or any part thereof*" should be deemed to be a treaty *between the Federation and the other country concerned*. Exactly what was intended by this provision is not clear. But in practice neither the Federation nor depositaries appear in the case of multilateral treaties to have related Malaya's participation to the particular regions of Malaya in regard to which the treaty was previously applicable.²⁵⁰ In the case of bilateral treaties the practice available to the Special Rapporteur does not indicate clearly how far continuance in force of pre-independence treaties was related to the particular regions in regard to which they were applicable. The United States *Treaties in Force* has footnotes to three United Kingdom treaties listed as in force in respect of Malaysia which state that they were made appli-

cable to parts of Malaya on certain dates; but these seem intended to justify the inclusion of the treaties rather than to indicate regional limits of application. On the other hand, in correspondence concerning the continuance in force of the Extradition Treaty of 1931, the United States recited the extension of that treaty to each several part of the Federation before stating its view that the treaty has now to be regarded as in force between the United States and the Federation.²⁵¹

(4) The second stage of the federation occurred in 1963 when, by a new agreement, Singapore, Sabah and Sarawak joined the Federation, the necessary amendments being made of the Constitution for this purpose. Article 169 continued as part of the amended Constitution and was therefore in principle applicable in internal law with respect to the new territories; but no devolution agreement was entered into between the United Kingdom and the Federation in relation to these territories. In two opinions given in 1963 the United Nations Office of Legal Affairs regarded the entry of the three territories into the Federation as an enlargement of the Federation. The first concerned Malaysia's membership of the United Nations and, after reciting the basic facts and certain precedents, the Office of Legal Affairs of the United Nations Secretariat Stated:

An examination of the Agreement relating to Malaysia of 9 July 1963 and of the constitutional amendments, therefore, confirms the conclusion that the international personality and identity of the Federation of Malaya was not affected by the changes which have taken place. Consequently Malaysia continues the membership of the Federation of Malaya in the United Nations.

Even if an examination of the constitutional changes had led to an opposite conclusion that what has taken place was not an enlargement of the existing Federation but a merger in a union or a new federation, the result would not necessarily be different as illustrated by the cases of the United Arab Republic and the Federal Republic of Cameroon . . .²⁵²

If that opinion concerned succession in relation to membership, the second concerned succession in relation to a treaty—a Special Fund Agreement. The substance of the advice given by the Office of Legal Affairs is in paragraphs 3 and 4 of the opinion:

As you know, the Agreement between the United Kingdom and the Special Fund was intended to apply to Special Fund projects in territories for the international relations of which the United Kingdom is responsible (see, e.g., the first paragraph of the preamble to the Agreement). In view of the recent changes in the international representation of Sabah (North Borneo) and Singapore, *the United Kingdom Agreement may be deemed to have ceased to apply with respect to those territories in accordance with general principles of international law*,¹⁵ and this would be true notwithstanding that the Plans of Operation for the projects technically constitute part of the Agreement with the United Kingdom under article I, paragraph 2, of that Agreement. Although the Special Fund could take the position that the United Kingdom Agreement has devolved upon Malaysia and that it continues to apply to Singapore and Sabah (North Borneo), this could well result in two separate agreements becoming

¹⁵ McNair, *Law of Treaties*, Oxford, 1961, p. 638.

²⁴⁴ For the text, see *Yearbook of the International Law Commission*, 1962, vol. II, p. 127, document A/CN.4/150, annex, sect. 10.

²⁴⁵ e.g., the Secretary-General's letter of inquiry of 28 February 1961 (*ibid.*, p. 117, document A/CN.4/150, para. 96).

²⁴⁶ e.g., United States, *Treaties in Force . . . 1971*, pp. 179-180.

²⁴⁷ See generally D. P. O'Connell, *State Succession . . .*, vol. II, pp. 78-70.

²⁴⁸ United Nations, *Materials on Succession of States (op. cit.)*, p. 76.

²⁴⁹ *Ibid.*, pp. 87-88.

²⁵⁰ See the Secretary-General's letter of inquiry of 9 December 1957 (*Yearbook of the International Law Commission*, 1962, vol. II, p. 112, document A/CN.4/150, para. 44); and United Nations, *Multilateral Treaties . . . 1968*, where reference is made simply to Malaysia as a party to certain of those treaties.

²⁵¹ United Nations, *Materials on Succession of States (op. cit.)*, pp. 229-230.

²⁵² United Nations, *Juridical Yearbook*, 1963 (United Nations publication, Sales No. 65.V.3), chap. VI, A, paras. 12-13.

ing applicable within those territories (i.e., the United Kingdom Agreement for projects already in existence and, as explained below, the Agreement with Malaya with respect to future projects), a situation which could give rise to confusion and should be avoided if possible.

As regards the Agreements between the Special Fund and Malaya, it continues in force with respect to the State now known as Malaysia since the previous international personality of the Federation of Malaya continues and has no effect on its membership in the United Nations. Similarly, the Agreement between the Special Fund and the Federation of Malaya should be deemed unaffected by the change in the name of the State in question. *Moreover, we are of the opinion that the Malayan Agreement applies of its own force and without need for any exchange of letters to the territory newly acquired by that State, and to Plans of Operation for future projects therein,*¹⁶ in the absence of any indication to the contrary from Malaysia.³⁵³

¹⁶ *Ibid.*, p. 633.

The Office of Legal Affairs thus advised that "Malaysia" constituted an enlarged "Malaya" and that "Malaya's" Special Fund Agreement, by operation of the moving treaty frontier principle, had become applicable in respect of Singapore and Sabah. This advice was certainly in accordance with the principle generally applied in cases of enlargement of territory, as is illustrated by the cases of the accession of Newfoundland to the Canadian Federation, and the "federation" of Eritrea with Ethiopia.²⁵⁴ Moreover, the same principle, that Malaya's treaties would apply automatically to the additional territories of Singapore, Sabah and Sarawak, appears to have been acted on by the Secretary-General in his capacity as depositary of multilateral treaties. Thus, in none of the many entries for "Malaysia" in *Multilateral Treaties . . . 1968* is there any indication that any of the treaties apply only in certain regions of Malaysia.

(5) Similarly, in the case of other multilateral treaties Malaysia appears to have been treated simply as an enlargement of Malaya and the treaties as automatically applicable in respect of Malaysia as a whole.²⁵⁵ An exception is the case of GATT where Malaysia notified the Director-General that certain pre-federation agreements of Singapore, Sarawak and Sabah would continue to be considered as binding in respect of those States, but would not be extended to the States of the former federation of Malaya; and that certain other agreements in respect of the latter States would for the time being not be extended to the three new States.²⁵⁶

(6) The circumstances of the federation of Rhodesia and Nyasaland in 1953, which was composed of the colony of Southern Rhodesia and the protectorates of

Northern Rhodesia and Nyasaland, were somewhat special so that it is not thought to be a useful precedent from which to draw any general conclusions in regard to the formation of composite States. The reason is that the British Crown retained certain vestigial powers with respect to the external relations of the federation and this prevents the case from being considered as a "succession" in the normal sense.²⁵⁷

(7) States composed from two or more territories may equally be created in the form of unitary States, modern instances of which are Ghana and the Republic of Somalia. Ghana consists of the former colony of the Gold Coast, Ashanti, the Northern Territories protectorate and the Trust Territory of Togoland. According to a modern writer²⁵⁸ there were no treaties, multilateral or bilateral, which were applied before independence to Ashanti, the Northern Territories or Togoland which were not also applied to the Gold Coast; on the other hand, there were some treaties which applied to the Gold Coast but not to the other parts of what is now Ghana. The latter point is confirmed by the evidence in *Multilateral Treaties . . . 1968* and in regard to bilateral treaties the above-mentioned writer states that of the nine United Kingdom treaties listed under Ghana in the United States *Treaties in Force*, three had previously applied to the Gold Coast alone, one to the Gold Coast and Ashanti alone and only five to all four parts of Ghana.²⁵⁹

(8) After independence Ghana notified her succession in respect of a number of multilateral treaties of which the Secretary-General is the depositary, some being treaties previously applicable only in respect of parts of what is now her territory. There is no indication in the Secretary-General's practice that Ghana's notifications of succession are limited to particular regions of the State; and, similarly, there is no indication in the United States *Treaties in Force* that any of the nine United Kingdom bilateral treaties specified as in force vis-à-vis Ghana are limited in their application to the particular regions in respect of which they were in force prior to independence. Nor has the Special Rapporteur found any practice to the contrary in the Secretariat studies of succession in respect of multilateral or of bilateral treaties or in *Materials on Succession*. In other words the presumption seems to have been made that Ghana's acceptance of succession was intended to apply to the whole of her territory, even although the treaty might previously have been applicable only in respect of some part the new State.

(9) The Republic of Somalia is a unitary State composed of Somalia and Somaliland. Both these Territories had become independent States before their uniting as the Somali Democratic Republic so that, technically, the case may be said to be one of a union of States. But their separate existences as independent States were very short-lived and designed merely as steps towards the creation of a unitary Republic. In consequence, from the point of succession in respect of treaties the case has some simi-

²⁵³ *Ibid.*, sect. A, 14, paras. 3 and 4.

²⁵⁴ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 53, document A/CN.4/214 and Add.1 and 2, para. 6 of the commentary to article 2.

²⁵⁵ Cf. *Yearbook of the International Law Commission, 1969*, vol. II, pp. 38 and 41, document A/CN.4/210, paras. 53 and 63 and *ibid.*, 1970, vol. II, pp. 90-91, document A/CN.4/225, paras. 114-115.

²⁵⁶ *Ibid.*, 1968, vol. II, p. 84, document A/CN.4/200 and Add.1 and 2, para. 371.

²⁵⁷ See generally D. P. O'Connell, "State succession . . .", *The British Year Book . . . (loc. cit.)*, p. 95.

²⁵⁸ *Ibid.*, p. 101.

²⁵⁹ *Ibid.*, p. 102.

larities with that of Ghana, provided that allowance is made for the double succession which the creation of (Somalia) involved. "The general attitude of the Somalia Government" it has been said, "is that treaties, when continued at all, apply only to the areas to which they territorially applied before independence."²⁶⁰ This is certainly borne out by the position taken by Somalia in regard to ILO conventions previously applicable to either or both of the Territories of which she was composed.²⁶¹ There were two such conventions previously applicable both to the Trust Territory and to British Somaliland and these Somalia recognized as continuing in force in respect of the whole Republic. Seven more conventions had previously been applicable to the Trust Territory but not to British Somaliland and a further six applicable to British Somaliland but not to the Trust Territory. These conventions also she recognized as continuing in force but only in respect of the part of her territory to which they had been applicable. It is said that Somalia adopts the same attitude in regard to extradition treaties;²⁶² and that she accordingly would refuse extradition of a person in the Trust Territory if extradition were sought under a former British extradition treaty applicable in respect of British Somaliland.

(10) In general, Somalia has been very sparing in her recognition of succession in respect of treaties, as may be seen from the extreme paucity of references to Somalia in the Secretariat studies. It is also reflected in the fact that she has not recognized her succession to any of the multilateral treaties of which the Secretary-General is the depositary.²⁶³ As to those treaties, the position taken by the Secretary-General in 1961 in his letter of enquiry to Somalia is of interest. He listed nine multilateral treaties previously applicable in respect of both the Trust Territory and British Somaliland and said that, upon being notified that Somalia recognized herself as bound by them, she would be considered as having become a party to them in her own name as from the date of independence. He then added:

The same procedure could be applied in respect of those instruments which either were made applicable only to the former Trust Territory of Somaliland by the Government of Italy or only to the Former British Somaliland by the Government of the United Kingdom, provided that your Government would recognize that their application now extends to the entire territory of the Republic of Somalia.*²⁶⁴

This passage seems to deny to Somalia the possibility of notifying her succession to the treaties in question only in respect of the territory to which they were previously applicable. If so, it may be doubted whether in the light

of later practice, it any longer expresses the position of the Secretary-General in regard to the possibility of a succession restricted to the particular territory to which the treaty was previously applicable.

(11) The composite States discussed in the present Excursus are States which, although they may have made devolution agreements, have recognized or not recognized their succession to particular treaties as they deemed fit. Thus, the practice in regard to these composite States does not support any rule of *ipso jure* continuity such as, on one view of the matter, may be suggested by the practice in regard to the formation of unions of States. The practice rather indicates that the formation of a composite State of the present kind falls generally within the principles which govern newly independent States, and that the only special question which they raise is the territorial scope to be attributed to a treaty when it is recognized as remaining in force.

(12) As is apparent from the preceding paragraphs, the question of territorial scope has been dealt with in one way in some cases and in a different way in others. Once, however, it is accepted that in this category of composite States succession is a matter of consent, the differences in the practice are reconcilable on the basis that they merely reflect differences in the intentions—in the consents—of the States concerned. The question then is whether in the case of a composite new State of this kind a treaty should be presumed to apply to its entire territory unless a contrary intention appears, or whether a treaty should be presumed to apply only in respect of the territory or territories in respect of which it was previously in force unless an intention to apply it to the entire territory of the new State appears. On balance, the Special Rapporteur thinks the former to be the more appropriate rule and the article which begins this Excursus has been drafted on that basis. At the same time, it seems necessary to except from the "entire territory" rule treaties the application of which to the new States' entire territory would be incompatible with their object and purpose.

Article 20. — Dissolution of a union of States

ALTERNATIVE A

1. When a union of States is dissolved and one or more of its constituent political divisions become separate States:

(a) Any treaty concluded by the union with reference to the union as a whole continues in force in respect of each such States;

(b) Any treaty concluded by the union with reference to any particular political division of the union which has since become a separate State continues in force in respect only of that State;

(c) Any treaty binding upon the union under article 19 in relation to any particular political division of the union which has since become a separate State continues in force only in respect of that State.

2. Sub-paragraphs (a) and (b) of paragraph 1 do not apply if the object and purpose of the treaty are compatible only with the continued existence of the union of States.

²⁶⁰ *Ibid.*, p. 101.

²⁶¹ *Yearbook of the International Law Commission, 1962*, vol. II, p. 119, document A/CN.4/150, para. 106.

²⁶² D. P. O'Connell, in *British Year Book of International Law*, vol. 39 (1963), p. 102. The Secretariat study of succession in respect of extradition treaties (*Yearbook of the International Law Commission, 1970*, vol. II, pp. 102-129, document A/CN.4/229), does not contain any evidence regarding Somalia's recognition of the continuance of extradition treaties.

²⁶³ See *Yearbook of the International Law Commission, 1962*, vol. II, p. 119, document A/CN.4/150, para. 106.

²⁶⁴ *Ibid.*, p. 118, document A/CN.4/150, para. 103.

3. When a union of States is dissolved only in respect of one of its constituent political divisions which becomes a separate State, the rules in paragraphs 1 and 2 apply also in relation to this State.

ALTERNATIVE B

1. When a union of States is dissolved and one or more of its constituent political divisions become separate States, treaties binding upon the union at the date of its dissolution continue in force between any such successor State and other States parties thereto if:

(a) In the case of multilateral treaties other than those referred to in article 7 (a), (b) and (c), the successor State notifies the other States parties that it considers itself a party to the treaty;

(b) In the case of other treaties, the successor State and the other States parties

- (i) Expressly so agree; or
- (ii) Must by reason of their conduct be considered as having agreed to or acquiesced in the treaty's being in force in their relations with each other.

2. When a union of States is dissolved only in respect of one of its constituent political divisions which becomes a separate State, the rules in paragraph 1 apply also in relation to this State.

COMMENTARY

(1) The resolution of the International Law Association on this question reads:

In cases of dissolution of unions or federations, the separate components of the composite State may invoke or have invoked against them treaties of the composite State to the extent to which these are consistent with the changed circumstances resulting from the dissolution.²⁶⁵

and the note of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors of the Association appended to this resolution comments:

The Committee finds that the practice of States supports the devolution of treaties of a composite State upon the constituent members in the event of the composite State dissolving.²⁶⁶

Thus, in the context of dissolution as in the context of formation, the Association groups together unions of States and States composed merely of two or more constituent territories. But it again seems desirable to examine these two categories separately and the present article and commentary are therefore concerned primarily with the dissolution of unions of States.

(2) The resolution also speaks without distinction of "treaties of the composite State" and it therefore presumably covers both treaties concluded by the union during its existence and any pre-union treaties of a constituent territory which continued in force after the formation of the union as treaties binding upon the union

in relation to the particular territory concerned. Moreover, the rule laid down in the resolution appears to be a rule of *ipso jure* continuity.

(3) One of the older precedents usually referred to in this connexion is the dissolution of the Union of Colombia in 1829-31. This union had been formed some ten years earlier by the three States of New Granada, Venezuela and Quito (Ecuador) and during its existence the Union had concluded certain treaties with foreign powers. Among these were treaties of amity, navigation and commerce concluded with the United States in 1824 and with Great Britain in 1825.²⁶⁷ After the dissolution, it appears that the United States and New Granada considered the Union Treaty of 1824 to continue in force as between those two countries. It further appears that Great Britain and Venezuela and Great Britain and Ecuador, if with some hesitation on the part of Great Britain, acted on the basis that the Union Treaty of 1825 continued in force in their mutual relations. In advising on the position in regard to Venezuela the British Law Officers, it is true, seem at one moment to have thought the continuance of the treaty required the confirmation of both Great Britain and Venezuela; but they also seem to have felt that Venezuela was entitled to claim the continuance of the rights under the treaty.

(4) Another of the older precedents usually referred to is the dissolution of the Union of Norway and Sweden in 1905.²⁶⁸ During the union these States had been recognized as having separate international personalities, as is illustrated by the fact that the United States had concluded separate extradition treaties with the Governments of Norway and Sweden. The King of Norway and Sweden had, moreover, concluded some treaties on behalf of the Union as a whole and others specifically on behalf of only one of them. On the dissolution of the Union, each State addressed identical notifications to foreign Powers in which they stated their view of the effect of the dissolution. The relevant passage of the Swedish Note to Great Britain ran as follows:

... The Swedish Government accordingly considers itself released from all responsibility in respect of obligations relating to Norway laid down in the said joint conventions and arrangements. With regard to treaties or other arrangements concluded separately for Norway in the name of H.M. the King of Sweden and Norway, it is clear that now that the two States are separate, H.M. Government is in no way responsible for the obligations incumbent upon Norway under such instruments.

On the other hand, the Swedish Government is of the opinion that the above-mentioned acts concluded jointly by Sweden and Norway continue to have effect in regard to relations between Sweden and the other contracting party or parties, and that the dissolution of the Union between Sweden and Norway does not

²⁶⁵ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 48, document A/CN.4/214 and Add.1 and 2, para. 15, resolution 2, third paragraph.

²⁶⁶ International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), p. 601.

²⁶⁷ See A. D. McNair, *op. cit.*, pp. 606-611; and D. P. O'Connell, "State succession . . .", *The British Year Book . . . (op. cit.)*, pp. 117-121.

²⁶⁸ See generally D. P. O'Connell in *British Year Book of International Law*, vol. 39 (1963), pp. 122-123; R. W. G. de Mural, *op. cit.*, pp. 87-88.

in any way modify the provisions which have hitherto governed those relations. [Translation by the United Nations Secretariat.]²⁶⁹

These notifications, analogous to some more recent notifications, thus informed other Powers of the position which the two States took in regard to the continuance of the Union's treaties: those made specifically with reference to one State would continue in force only as between that State and the other States parties; those made for the Union as a whole would continue in force for each State, but only in relation to itself.

(5) Great Britain accepted the continuance in force of the Union treaties vis-à-vis Sweden only "pending a further study of the subject", declaring that the dissolution of the union "undoubtedly affords his Majesty's Government the right to examine, *de novo*, the Treaty engagements by which Great Britain was bound to the Dual Monarchy".²⁷⁰ Both France and the United States, on the other hand, appear to have shared the view taken by Norway and Sweden that the treaties of the former union continued in force on the basis set out in their Notes.²⁷¹

(6) The termination of the Austro-Hungarian Empire in 1919 appears to be a case of dissolution of a union in so far as it concerns Austria and Hungary and a dismemberment in so far as it concerns the other territories of the Empire. The dissolution of the Dual Monarchy is complicated as a precedent for present purposes by the fact that it took place after the 1914-1918 war in which Austria-Hungary had been a belligerent and that the question of the fate of the Dual Monarchy's treaties was regulated by the peace treaties.²⁷² The position was summed up by one writer as follows:

It appears to be the view of the parties to the peace treaties (including Austria and Hungary themselves) that, apart from any provision to the contrary in them or in other treaties, those two countries are respectively the direct successors, of the Austro-Hungarian Empire and are entitled to the rights, and subject to obligations, of the treaties to which it was a party, and both Austria and Hungary have made declarations to this effect. This matter is, however, not free from controversy and there has been much litigation involving the question whether or not the personality of Austria and Hungary was destroyed in 1918, with the result that they started as new States free from earlier

²⁶⁹ . . . *Le Gouvernement suédois se tient donc pour dégagé de toute responsabilité du chef des obligations stipulées dans les dites Conventions et Arrangements communs, et qui concernent la Norvège. Pour ce qui est des traités ou autres arrangements conclus au nom de Sa Majesté le Roi de Suède et de Norvège séparément pour la Norvège, il est évident que le Gouvernement de Sa Majesté n'est aucunement responsable, après la séparation des deux États, des obligations qui en résultent pour la Norvège.*

*De l'autre côté, le Gouvernement suédois est d'avis que les actes susmentionnés conclus en commun par la Suède et la Norvège continuent à sortir leurs effets pour ce qui concerne les rapports entre la Suède et la ou les autres Parties Contractantes sans que la dissolution entre la Suède et la Norvège modifie en aucune manière les dispositions qui ont réglé jusqu'à présent ces rapports. (British and Foreign State Papers, vol. 98 (London, H.M. Stationery Office, 1909), pp. 833-934; reproduced in A. D. McNair, *op. cit.*, p. 614.*

²⁷⁰ A. D. McNair, *op. cit.*, p. 615.

²⁷¹ See G. H. Hackworth, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1943), vol. V, p. 362 and R. W. G. de Muralt, *op. cit.*, p. 88.

²⁷² R. W. G. de Muralt, *op. cit.*, pp. 88-91.

obligations except in so far as they might accept them by treaty . . .²⁷³

Austria in her relations with States outside the peace treaties appears to have adopted a more reserved attitude towards the question of her obligation to accept the continuance in force of Dual Monarchy treaties. According to a Netherlands writer, although in practice agreeing to the continuance of Dual Monarchy treaties in her relations with the Netherlands, Austria persisted in the view that she was a new State not *ipso jure* bound by those treaties.²⁷⁴ Hungary, on the other hand, appears generally to have accepted that she should be considered as remaining bound by the treaties *ipso jure*.

(7) The same difference of approach in the attitudes of Austria and Hungary is reflected in the Secretariat's study of succession in respect of extradition treaties. Thus in 1922 Hungary made the following statement to the Swedish 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.*²⁷⁵

Austria, on the other hand, appears to have regarded the continuity of a Dual Monarchy extradition treaty with Switzerland as dependent on the conclusion of an agreement with that country.²⁷⁶ Similarly, in the case of trade agreements the Secretariat study observes: "In so far as the question was not regulated by specific provisions in the Peace Settlement, Austria took a generally negative view of treaty continuity, and Hungary a positive one".²⁷⁷ And this observation is supported by references to the practice of the two countries in relation to the Scandinavian States, the Netherlands and Switzerland, which were not parties to the Peace Settlement. Furthermore, those differing attitudes of the two countries appear also in their practice in regard to multilateral treaties, as is shown by the Secretariat study of succession in respect of the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes.²⁷⁸

(8) Between 1918 and 1944 Iceland was associated with Denmark in a union of States under which treaties made by Denmark for the union were not to be binding upon Iceland without the latter's consent.²⁷⁹ During the union Iceland's separate identity was recognized internationally; indeed, in some cases treaties were made separately with both Denmark and Iceland. At the date of dissolution

²⁷³ A. D. McNair, *op. cit.*, p. 616.

²⁷⁴ R. W. G. de Muralt, *op. cit.*, pp. 89-91.

²⁷⁵ *Yearbook of the International Law Commission, 1970*, vol. II, p. 123, document A/CN.4/229, para. 115.

²⁷⁶ *Ibid.* para. 116.

²⁷⁷ *Ibid.* 1971, vol. II (Part Two), p. 172, document A/CN.4/243/Add.1, para. 110.

²⁷⁸ *Ibid.*, 1968, vol. II, pp. 28-29, document A/CN.4/200, paras. 110-112.

²⁷⁹ See A. D. McNair, *op. cit.*, p. 620.

there existed some pre-union treaties which had continued in force for the union with respect to Iceland as well as further treaties concluded during the union and in force with respect to Iceland. Subsequently, as a separate independent State, Iceland considered both categories of union treaties as continuing in force with respect to herself and the same view of her case appears to have been taken by the other States parties to those treaties.²⁸⁰ Thus, according to the Secretariat study of the extradition treaties:

... a list published by the Icelandic Foreign Ministry of its treaties in force as at 31 December 1964 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) and the United States. In each case it is also indicated that the other listed countries consider that the treaty is in force.²⁸¹

Again, according to the Secretariat study of trade agreements the same Icelandic list

... Includes treaties and agreements concerning trade concluded before 1914 by Denmark with Belgium, Chile, France, Hungary, Italy, Liberia, Netherlands, Norway, Sweden, Switzerland and the United Kingdom (also listed under Canada, Ceylon, India and South Africa), and trade treaties and agreements concluded between 1918 and 1944 with Austria, Bolivia, Brazil, Czechoslovakia, Finland, Greece, Haiti, Poland, Romania, Spain, the USSR and the United States. Seventeen of the twenty-seven listed States have also confirmed that the treaties in question remain in effect. The remainder appear to have taken no position.²⁸²

As to multilateral treaties, it is understood that, after the dissolution, Iceland considered herself a party to any multilateral treaty which had been applicable to her during the union. But the provision in the constitution of the union that treaties made for the union were not to be binding upon Iceland without her consent was strictly applied; and a good many multilateral treaties made by Denmark during the union, including treaties concluded under the auspices of the League of Nations, were not in fact subscribed to by Iceland. This seems to be the explanation of why Denmark is in a number of cases listed today by the United Nations Secretariat as a party to a League of Nations treaty, but not Iceland.²⁸³ In some cases, moreover, Denmark and Iceland are given separate entries indicating either that Denmark and Iceland are both bound by the treaty or that Denmark is bound and the treaty is open to accession by Iceland.²⁸⁴ The practice

in regard to multilateral treaties thus only serves to confirm the separate international personality of Iceland during the union.

(9) The effect of the formation of the United Arab Republic on the pre-union treaties of Syria and Egypt has been considered above.²⁸⁵ Some two and a half years after its formation the union was dissolved through the withdrawal of Syria. The Syrian Government then passed a decree providing that, in regard to both bilateral and multilateral treaties, any treaty concluded during the period of union with Egypt was to be considered in force with respect to the Syrian Arab Republic.²⁸⁶ It communicated the text of this decree to the Secretary-General, stating that in consequence "obligations contracted by the Syrian Arab Republic under multilateral agreements and conventions during the period of the union with Egypt remain in force in Syria". In face of this notification the Secretary-General adopted the following practice:

Accordingly, in so far as concerns any action taken by *Egypt* * or subsequently by the United Arab Republic in respect of any instrument concluded under the auspices of the United Nations, the date of such action is shown in the list of States opposite the name of the *United Arab Republic*. * The dates of actions taken by *Syria* * prior to the formation of the United Arab Republic, are shown opposite to the name of Syria, as also are the dates of receipt of instruments of accession or notification of application to the Syrian Province deposited on behalf of the United Arab Republic during the time when Syria formed part of the United Arab Republic.²⁸⁷

In other words, each State was recorded as remaining bound in relation to its own territory by treaties of the United Arab Republic concluded during the period of the union as well as by treaties to which it had itself become a party prior to the union and which had continued in force in relation to its own territory during the union.

(10) It will be observed that, prior to the formation of the United Arab Republic, Syria, as shown opposite the name of Syria, made a unilateral declaration as to the effect of the dissolution on treaties concluded by the union during its existence. At the same time, she clearly assumed that the pre-union treaties to which the former State of Syria had been a party would automatically be binding upon her and this seems also to have been the understanding of the Secretary-General. Egypt, the other half of the union, made no declaration. Retaining the name of the United Arab Republic, she apparently regarded Syria as having in effect seceded, and the continuation of her own status as a party to multilateral treaties concluded by the union as being self-evident. And she also clearly assumed that the pre-union treaties to which Egypt had been a party would automatically continue to be binding upon the United Arab Republic. This treaty practice in regard to Syria and the United Arab Republic has to be appreciated against the background of the treatment of their membership of international organizations.²⁸⁸ Syria, in a cable to the President of the General Assembly, simply requested the United Nations

²⁸⁰ D. P. O'Connell, *State Succession* . . . , vol. II, pp. 111-112.

²⁸¹ *Yearbook of the International Law Commission, 1970*, vol. II, pp. 122-123, document A/CN.4/229, para. 111.

²⁸² *Ibid.*, 1971, vol. II (Part Two), pp. 171-172, document A/CN.4/243/Add.1, para. 109.

²⁸³ e.g. Protocol of 1930 relating to Military Obligations in Certain Cases of Double Nationality, Protocol of 1923 on Arbitration Clauses, Convention of 1927 for the Execution of Foreign Arbitral Awards, etc. (*Multilateral Treaties* . . . 1968, part II, Nos. 5, 6, 7, etc.)

²⁸⁴ Signatures, ratifications and accessions in respect of agreements and conventions concluded under the auspices of the League of Nations (*League of Nations, Official Journal, Special Supplement No. 193*).

²⁸⁵ See paras. 12-17 of the commentary to article 19.

²⁸⁶ See M. M. Whiteman, *op. cit.*, vol. 2, p. 987.

²⁸⁷ *Multilateral Treaties* . . . 1968, p. 4, foot-note 3.

²⁸⁸ See above, paras. 12-17 of the commentary to article 19.

to "take note of the resumed membership in the United Nations of the Syrian Arab Republic."²⁸⁹ The President, after consulting many delegations and after ascertaining that no objection had been made, authorized Syria to take her seat again in the Assembly. Syria, perhaps because of her earlier existence as a separate Member State, was therefore accorded treatment different from that accorded in 1947 to Pakistan, which was required to undergo admission as a new State. No question was ever raised as to the United Arab Republic's right to continue her membership after the dissolution of the union. Broadly speaking, the same solution was adopted in other international organizations.

(11) Other practice in regard to multilateral treaties is in line with that followed by the Secretary-General, as can be seen from the Secretariat studies of the Conventions relative to the Protection of Literary and Artistic Works,²⁹⁰ the Conventions for the Protection of Industrial Property²⁹¹ and the Geneva Humanitarian Conventions.²⁹² This is true also of the position taken by the United States, as depositary of the Statute of IAEA, in correspondence with Syria concerning the latter's status as a member of that Agency.²⁹³ As to bilateral treaties, the Secretariat studies of air transport²⁹⁴ and trade²⁹⁵ agreements confirm that the practice was similar.

(12) The dissolution of the Mali Federation in 1960 is sometimes cited in the present connexion. But the facts concerning the dissolution of that extremely ephemeral federation are thought to be too special for it to constitute a precedent from which to derive any general rule. In 1959 representatives of four autonomous territories of the French Community adopted the text of a constitution for the "Federation of Mali," but only two of them—Soudan and Senegal—ratified the constitution.²⁹⁶ In June 1960 France, Soudan and Senegal reached agreement on the conditions of the transfer of competence from the Community to the Federation and the attainment of independence. Subsequently, seven agreements of co-operation with France were concluded in the name of the Federation of Mali. But in August Senegal annulled her ratification of the constitution and was afterwards recognized as an independent State by France; and in consequence the new-born federation was, almost with its first breath, reduced to Soudan alone. Senegal, the State which had in effect dissolved or seceded from the Federation, entered into an exchange of notes with France in which she stated her view that:

... by virtue of the principles of international law relating to the succession of States, the Republic of Senegal is subrogated,

in so far as it is concerned, to the rights and obligations deriving from the co-operation agreements of 22 June 1960 between the French Republic and the Federation of Mali, without prejudice to any adjustments which may be deemed necessary by mutual agreement.²⁹⁷

To which the French Government replied that it shared this view. Mali, on the other hand, who had contested the legality of the dissolution of the federation by Senegal and retained the name of Mali, declined to accept any succession to obligations under the co-operation agreements. Thus succession was accepted by the State which might have been expected to deny it and denied by the State which might have been expected to assume it. But in all the circumstances, as already observed, it does not seem that any useful conclusions can be drawn from the practice in regard to the dissolution of this federation.

(13) Although there are some inconsistencies in the practice (e.g. Austria and Mali), it is thought to give general support to the thesis that, on the dissolution of a union, a former constituent State remains bound by: (a) treaties concluded by the union government which have reference to that State; (b) treaties which were in force for that State when it entered the union and continued in force for it during the union. At least some of the practice, on the other hand, seems explicable on the basis of the consents of the interested States. Accordingly, as in the case of the previous article, the Special Rapporteur has prepared alternative texts for the Commission's consideration: alternative A formulated in terms of a rule of *ipso jure* continuity; and alternative B formulated in terms of continuity by consent.

Article 21. — Other dismemberments of a State into two or more States

1. When part of a State, which is not a union of States, becomes another State either by separating from it or as a result of the division of that State, the rules in paragraphs 2 and 3 govern the effects of that succession of States on treaties which at the date of the separation or division were in force in respect of that part.

2. The obligations and rights of the successor State and of other States parties under any such treaty shall be determined by application of the relevant provisions of articles 7 to 17 of the present articles.

3. In the case of a separation, any such treaty remains in force as between the predecessor State and other States parties in relation to the remaining territory of the predecessor State unless it appears from the provisions or from the object and purpose of the treaty that:

(a) It was intended to relate only to the part which has separated from the predecessor State;

(b) The effect of the separation is radically to transform the obligations and rights provided for in the treaty; or

(c) It is otherwise agreed.

²⁸⁹ *Multilateral Treaties . . . 1968*, p. 4, foot-note 3.

²⁹⁰ *Yearbook of the International Law Commission, 1968*, vol. II, p. 18, document A/CN.4/200 and Add.1 and 2, paras. 50-51.

²⁹¹ *Ibid.*, pp. 67-68, paras. 296-297.

²⁹² *Ibid.*, pp. 49-50, para. 211.

²⁹³ M. M. Whiteman, *op. cit.*, vol. 2, pp. 987-990.

²⁹⁴ *Yearbook of the International Law Commission, 1971*, vol. II (Part Two), pp. 142-146, document A/CN.4/243, paras. 152-175.

²⁹⁵ *Ibid.*, pp. 180-181, document A/CN.4/243/Add.1, paras. 161-165.

²⁹⁶ D. P. O'Connell, *State Succession. . .*, vol. II, pp. 170-172.

²⁹⁷ *Yearbook of the International Law Commission, 1971*, vol. II (Part Two), p. 146, document A/CN.4/243, para. 176.

COMMENTARY

(1) Article 2 covers the case of the separation from a State of an area of territory which joins with another State (the moving treaty frontier principle), and article 20 deals with the dissolution of a union of States. The present article is concerned with other dismemberments of States resulting in two or more States.

(2) The commonest case is where part of a State separates from it, becoming itself an independent State and leaving the State from which it has sprung to continue its existence unchanged except for its diminished territory. In this type of case the effect of the dismemberment is the emergence of a "newly independent State" by secession and the position of this newly independent State in regard to treaties previously applicable in respect of the seceded territory is governed by the articles contained in part II of the present draft.²⁹⁸ The basic rule governing the case of a newly independent State is the so-called clean slate rule formulated in article 6. Although in recent years this rule has found its application mainly in regard to the emergence of dependent territories into independent States it has its origin in practice relating to seceded States. Some references to the practice evidencing the application of this rule to seceding States will therefore be found in the Special Rapporteur's commentary to article 6.²⁹⁹ But it is necessary to recall that practice here in order to place the problem of dismembered States in its true perspective.

(3) Before the era of the United Nations, colonies were considered as being in the fullest sense territories of the colonial Power. Consequently some of the earlier precedents usually cited for the application of the "clean slate" rule in cases of secession concerned the secession of colonies; e.g. the secessions from Great Britain and Spain of their American colonies. In these cases the new States are commonly regarded as having started their existence freed from any obligation in respect of the treaties of their parent State.³⁰⁰ Another early precedent is the secession of Belgium from the Netherlands in 1830, as to which one writer has said: "Little authority is available, but it is believed to be the accepted opinion that in the matter of treaties Belgium was regarded as starting with a clean slate, except for treaties of a local or dispositive character."³⁰¹ If a somewhat different line seems to have been adopted by the Belgian courts in some cases, another writer points out that, while the Netherlands pre-1830 treaties continued in force, it was Belgium who had to conclude new ones or formalize the continuance of the old ones with a number of States.³⁰²

(4) As to more modern precedents, when Cuba seceded from Spain in 1898, Spanish treaties were not considered as binding upon her after independence. Similarly, when Panama seceded from Colombia in 1903, both Great Britain and the United States regarded Panama as having a clean slate with respect to Colombia's treaties.³⁰³ Panama herself took the same stand, though she was not apparently able to convince France that she was not bound by Franco-Colombian treaties. Colombia, for her part, continued her existence as a State after the separation of Panama, and that she remained bound by treaties concluded before the separation was never questioned. Again, when Finland seceded from Russia after the First World War, both Great Britain and the United States concluded that Russian treaties previously in force with respect to Finland would not be binding on the latter after independence.³⁰⁴ In this connexion reference may be made to a statement by the United Kingdom, where the position was firmly taken by that State that the clean slate principle applied to Finland except with respect to treaty obligations which were "in the nature of servitudes".³⁰⁵ The United Kingdom adopted the same position in regard to Estonia, Latvia and Lithuania on their recognition after the First World War as independent States.³⁰⁶

(5) The termination of the Austro-Hungarian Empire has already been discussed³⁰⁷ in the context of the dissolution of a union of States. The opinion was there expressed that it seemed to be a dissolution of a union in so far as it concerned the Dual Monarchy itself and a dismemberment in so far as it concerned other territories of the Empire. It was there noted that, even viewing the case as one of dissolution of a union, Austria had contested her obligation to assume the treaties of the Dual Monarchy, though Hungary had accepted that obligation. The other territories, which seem rather to fall into the category of dismemberment, were Czechoslovakia and Poland.³⁰⁸ Both these States were required in the Peace Settlements to undertake to accede to certain multilateral treaties as a condition of their recognition. But outside these special undertakings they were both considered as new States which started with a clean slate in respect of the treaties of the former Austro-Hungarian Empire.³⁰⁹

(6) Another precedent from the pre-United Nations era is the secession of the Irish Free State from the United Kingdom in 1922. Interpretation of the practice in this case is slightly obscured by the fact that for a period after her secession from the United Kingdom the Irish Free

²⁹⁸ To become part III in the final text of the draft articles.

²⁹⁹ *Yearbook of the International Law Commission, 1970*, vol. II, pp. 31-37, document A/CN.4/224 and Add.1, chap. II.

³⁰⁰ A. D. McNair, *op. cit.*, pp. 601-603; D. P. O'Connell, *State Succession . . .*, vol. II, pp. 90-95, who points out that the United States attitude with respect to the secession of the Spanish colonies was not consistently negative as to their succession to obligations under Spanish treaties.

³⁰¹ A. D. McNair, *op. cit.*, p. 603.

³⁰² R. W. G. de Muralt, *op. cit.*, p. 101.

³⁰³ D. P. O'Connell, *State Succession . . .*, vol. II, pp. 97-98; G. H. Hackworth, *op. cit.*, vol. V, pp. 362-363.

³⁰⁴ D. P. O'Connell, *State Succession . . .*, vol. II, pp. 99-100; A. D. McNair, *op. cit.*, p. 605.

³⁰⁵ *Yearbook of the International Law Commission, 1970*, vol. II, p. 32, document A/CN.4/224 and Add.1, paragraph 3 of the Commentary to article 6.

³⁰⁶ See also A. D. McNair, *op. cit.*, p. 605; and D. P. O'Connell, *State Succession . . .*, vol. II, pp. 99-100.

³⁰⁷ See paragraphs 6 and 7 of the commentary to article 20.

³⁰⁸ Poland was formed out of territories previously under the sovereignty of three different States—Austro-Hungarian Empire, Russia and Germany.

³⁰⁹ A. D. McNair, *op. cit.*, pp. 603-605; D. P. O'Connell, *State Succession . . .*, vol. II, pp. 178-182.

State remained within the British Commonwealth as a "Dominion". This being so, the United Kingdom Government took the position that the Irish Free State had not seceded and that, as in the case of Australia, New Zealand, and Canada, British treaties previously applicable in respect of the Irish Free State remained binding upon the new Dominion. The Irish Free State, on the other hand, considered itself to have seceded from the United Kingdom and to be a new State for the purposes of succession in respect of treaties. In 1933 the Prime Minister (Mr. De Valera) made the following statement in the Irish Parliament:

The present position of the Irish Free State with regard to treaties and conventions concluded between the late United Kingdom and other countries is based upon the general international practice in the matter when a new State is established. When a new State comes into existence, which formerly formed part of an older State, its 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 individual treaties or conventions themselves are terminated or amended. Occasion has then been taken where desirable, to conclude separate engagements with the States concerned³¹⁰

The Irish Government, as its practice shows, did not claim that a new State had a right *unilaterally* to determine its acceptance or otherwise of its predecessor's treaties. This being so, the Irish Prime Minister in 1933 was attributing to a seceded State a position not very unlike that found in the practice of the post-war period concerning newly independent States.

(7) Illustrations of the treaty practice in regard to the Irish Free State may be seen in the Secretariat studies of succession on States in respect of extradition treaties and trade agreements. The study of extradition treaties, *inter alia*, recalls:

Forty-three extradition treaties applied to Ireland immediately before it became independent. 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.³¹¹

The study also mentions three instances in which the continuance in force of the treaty was evidenced by conduct, in that either Ireland or the other State party invoked the treaty without encountering the objection that it was not in force.³¹² That the policy of the Irish Free State was to accept the position created by its prede-

cessor's commercial and administrative treaties is equally shown in the study of trade agreements which sets out a number of instances of the termination or replacement of pre-independence treaties in respect of the Free State.³¹³

(8) As to multilateral treaties, the Irish Free State seems in general to have established itself as a party by means of accession, not succession. It is true that in the case of the 1906 Red Cross Convention the Irish Free State appears to have acknowledged its status as a party on the basis of the United Kingdom's ratification of the Convention on 16 April 1907.³¹⁴ Although the *Handbook of the International Red Cross* lists the Irish Free State as a party to that Convention from 1926, without specifying the exact date or method of its participation, a communication to the International Committee from the British Consul-General in Geneva in 1956 explained the matter as follows:

... In the list of ratification of the 1906 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, it would be preferable for the date of ratification by the Commonwealth countries and the Irish Republic to be 16 April 1907, because not having repudiated them, the Commonwealth countries are bound by the international obligations deriving from the ratification of the Convention by the United Kingdom.* . . .³¹⁵

To this the Secretariat study adds the comment that according to the above communication, "the United Kingdom considers that *Australia, Canada, India, the Irish Republic* and *South Africa* become parties to the 1906 Convention by succession."³¹⁶ As the Irish Free State had a radically different view of its own position from that of the United Kingdom, this is not really conclusive. But at least the Free State seems to have acquiesced in its being considered as party to this Convention on the basis of its predecessor's ratification. In the case of the Berne Union for the Protection of Literary and Artistic Works, however, it *acceded* to the Convention, although using the United Kingdom's diplomatic services to make the notification.³¹⁷ The Swiss Government as depositary, then informed the parties to the Union of this accession and, in doing so, added the observation that the Office considered the Irish Free State's accession to the Convention as "proof that, on becoming an independent territory, it had left the Union". In other words, the Office recognized that the Free State had acted on the basis of the "clean slate" principle and had not "succeeded" to the Berne Convention. Moreover, the Republic of Ireland is listed by the United Nations Secretariat as a party to two conventions ratified by Great Britain before the former's independence and in both these cases the Republic became a party by accession.³¹⁸

³¹³ *Ibid.*, 1971, vol. II (Part Two), p. 153, document A/CN.4/243/Add.1, paras. 19-20.

³¹⁴ *Ibid.*, 1968, vol. II, pp. 38-39, document A/CN.4/200 and Add.1 and 2, paras. 154-158.

³¹⁵ *Ibid.*, p. 39, para. 157.

³¹⁶ *Ibid.*, para. 158.

³¹⁷ *Ibid.*, p. 13, para. 25.

³¹⁸ The conventions are the International Convention of 1910 for the Suppression of the White Slave Traffic and the Agreement of 1910 for the Suppression of the Circulation of Obscene Publications (see *Multilateral Treaties . . . 1968*, pp. 150 and 163).

³¹⁰ *Ibid.*, p. 123.

³¹¹ *Yearbook of the International Law Commission, 1970*, vol. II, p. 108, document A/CN.4/229, para. 17.

³¹² *Ibid.*, paras. 19-21.

(9) Thus the practice prior to the United Nations era, if there may be one or two inconsistencies, provides strong support for the "clean slate" rule in cases of "secession" in the form in which it is expressed in article 6 of the present draft: i.e. that a seceding State, as a newly independent State, is not bound to maintain in force, or to become a party to, its predecessor's treaties. Prior to the United Nations era depositary practice in regard to cases of succession of States was much less developed than it has become in the past twenty-five years owing to the very large number of cases of succession of States with which depositaries have been confronted. Consequently, it is not surprising that the earlier practice in regard to seceding States does not show any clear concept of notifying succession to multilateral treaties, such as is now familiar. With this exception, however, the position of a seceding State with respect to its predecessor's treaties seems in the League of Nations era to have been much the same as that in modern practice of a State which has emerged to independence from a previous colonial, trusteeship or protected status.

(10) During the United Nations period cases of secession resulting in the creation of a new State, as distinct from a dependent territory emerging as a sovereign State, have been comparatively few. The first such case was the somewhat special one of Pakistan which, for purposes of membership of international organizations and participation in multilateral treaties, was in general treated as having seceded from India, and, therefore, neither bound nor entitled *ipso jure* to the continuance of pre-independence treaties.³¹⁹ This is also to a large extent true in regard to bilateral treaties,³²⁰ though in some instances it seems, on the basis of the devolution arrangements embodied in the Indian Independence (International Arrangements) Order 1947, to have been assumed that Pakistan was to be considered as a party to the treaty in question. Thus, the case of Pakistan has analogies with that of the Irish Free State and, as already indicated in the commentary to article 6, appears to be an application of the principle that a seceded State has a clean slate in the sense that it is not under any *obligation* to accept the continuance in force of its predecessor's treaties. However, it will be necessary to revert later in this commentary to a particular aspect of the Pakistan case, namely whether any special considerations apply to the splitting of a State into two more or less comparable States.³²¹ But, first, two further cases of secession must be mentioned.

³¹⁹ See *Yearbook of the International Law Commission, 1970*, vol. II, pp. 32-33, document A/CN.224 and Add.1, paras. 3-5 of the commentary to article 6. See also the Secretariat studies on succession of States to multilateral treaties (*ibid.*, 1968, vol. II, pp. 16, 29 and 40, document A/CN.4/200 and Add.1 and 2, paras. 38, 115-117 and 166-167; *ibid.*, 1969, vol. II, pp. 37-38, document A/CN.4/210, para. 49; and *ibid.*, 1970, vol. II, p. 71, document A/CN.4/225, paras. 24-33).

³²⁰ See the Secretariat studies on succession of States to bilateral treaties (*ibid.*, 1970, vol. II, pp. 109-110, document A/CN.4/229, paras. 28-34; and *ibid.*, 1971, vol. II (Part Two), pp. 121-122 and 155-156, documents A/CN.4/243, paras. 11-19 and A/CN.4/243/Add.1, paras. 30-36; and United Nations, *Materials on Succession of States (op. cit.)*, pp. 1-8, 190-191 and 223).

³²¹ See para. 14 below.

(11) The first is the dismemberment of the Federation of Rhodesia and Nyasaland in 1963. Reference has already been made to the formation of this Federation in 1953³²² and it was there pointed out that, owing to the vestigial powers retained by the British Crown, the case was too special to be a useful basis from which to draw general conclusions. This is in large measure true also of the Federation in the context of the present article. After the dismemberment of the Federation in 1963, the United Kingdom retained these powers in respect of Southern Rhodesia and responsibility for the external relations of Nyasaland and Northern Rhodesia until these two territories became independent as Malawi and Zambia. Despite this complication, however, the case was dealt with somewhat on the lines of the dismemberment of a federal State. A detailed account of the practice followed in regard to the continuity of the treaties of the Federation is given in a modern textbook.³²³ This indicates some uncertainty owing to doubts as to the implications of the United Kingdom's powers and the status in international law of the Federation itself. Although in many instances treaties were continued in force, the basis upon which this occurred is not clear and frequently recourse was had to exchanges of notes to confirm their maintenance in force. The Secretariat studies of succession of States in respect of bilateral treaties³²⁴ present much the same general picture of practice and the same unclarity as to its precise basis. As to multilateral treaties, the practice hardly seems reconcilable with *ipso jure* continuity. The United Kingdom, it is true, notified the Secretary-General that the treaties would continue in force with respect to the three territories; but this merely evidences the United Kingdom's continuing responsibility for the international relations of the territories at that date. More significant is the fact that, when they became independent, neither Malawi nor Zambia considered themselves as continuing *ipso jure* to be bound by multilateral treaties. Thus in *Multilateral Treaties . . . 1968*, Malawi, when shown as a party, is listed as having become one by accession, while Zambia in the majority of cases is not shown as a party to the treaty at all. In the case of the Geneva Red Cross Conventions, Zambia became a party, but in the Secretariat studies of succession of States to multilateral treaties is included amongst the newly independent States which acceded to those Conventions; and Malawi is not shown as having become a party at all.³²⁵ Again, while both Malawi and Zambia are recorded in those studies as having become parties to the Paris Union for the Protection of Industrial Property, the former did so by transmitting a declaration of continuity and the latter by acceding.³²⁶ Both States acceded to ITU.³²⁷ Accord-

³²² See above paragraph 6 of the commentary to the article contained in Excursus A.

³²³ D. P. O'Connell, *State Succession . . .*, vol. II, pp. 172-178.

³²⁴ *Yearbook of the International Law Commission, 1970*, vol. II, p. 127, document A/CN.4/229, paras. 132-133; and *ibid.*, 1971, vol. II (Part Two), pp. 178-179, document A/CN.4/243/Add.1, paras. 144-148.

³²⁵ *Ibid.*, 1968, vol. II, p. 44, document A/CN.4/200 and Add.1 and 2, para. 182.

³²⁶ *Ibid.*, p. 70-71, paras. 306-309.

³²⁷ *Ibid.*, 1970, vol. II, p. 93, document A/CN.4/225, para. 125

ingly, whether or not the dismemberment of the Federation of Rhodesia and Nyasaland be regarded as a case of the dismemberment of a State, it seems impossible to find in it any support for a rule of *ipso jure* continuity.

(12) The adherence of Singapore to the Federation of Malaysia in 1963 is referred to in paragraphs (4) and (5) of the commentary to the article contained in Excursus A. In 1965, by agreement, Singapore separated from Malaysia, becoming an independent State. The Agreement between Malaysia and Singapore, in effect, provided that any treaties in force between Malaysia and other States at the date of Singapore's independence should, in so far as they had application to Singapore, be deemed to be a treaty between the latter and the other State or States concerned.³²⁸ Despite this "devolution agreement" Singapore subsequently adopted a posture similar to that of other newly independent States. While ready to continue Federation treaties in force, Singapore regarded that continuance as a matter of mutual consent. Even if in one or two instances other States contended that she was under an obligation to accept the continuance of a treaty, this contention was rejected by Singapore.³²⁹ Similarly, as the entries in *Multilateral Treaties . . . 1968*, show, she has notified or not notified her succession to multilateral treaties, as she has thought fit, in the same way as other newly independent States.

(13) The available evidence of practice does not therefore support the thesis that in the case of a dismemberment of a State, as distinct from the dissolution of a union of States, treaties continue in force *ipso jure* in respect of the separated territory. On the contrary, the evidence strongly indicates that any such territory which becomes a sovereign State is to be regarded as newly independent State to which in principle the rules set out in articles 7 to 17 of the present draft should apply. That this is the practice in the case of an ordinary secession of part of a State, leaving that State to continue its international existence with truncated territory hardly seems open to question. There remains, however, the point whether the position is different when there is such a radical dismemberment that it may be agreed that the original State has really disappeared and been replaced by two or more new States.

(14) Such a total disappearance of the original State is clearly a theoretical possibility. But practice does not warrant the proposition that the mere magnitude of a dismemberment will suffice to prevent the case from being considered as one of secession. Thus, the separation of East and West Pakistan from India was regarded as analogous to a secession resulting in the emergence of the newly independent State of Pakistan. Similarly, if the recent decision of WHO to admit Bangla Desh as a new member together with its acceptance of West Pakistan as continuing the personality and membership of Pakistan

are any guide, the virtual splitting of a State in two does not suffice to constitute the disappearance of the original State. Treaty practice in regard to Bangla Desh is not yet available to the Special Rapporteur. But it would seem a little anomalous if a dismembered part of a State were to be refused recognition of its share of the personality and membership of international organizations but required to accept, *ipso jure*, the treaty obligations of the dismembered State. At any rate, the Special Rapporteur knows of no practice which would justify the view that a territory, considered as having seceded from an existing State, should be treated otherwise than as a newly independent State.

(15) In practice, in most cases of dismemberment one or other part is recognized as, or claims to be, the continuation of the State which has suffered the dismemberment; and if any part is treated as still representing the former State, the other part or parts are correspondingly treated as having become independent States by secession. In such cases, therefore, what has been said in the preceding paragraphs applies. Ought the draft articles, however, to envisage the case of the total disappearance of the previous State and its replacement by two or more States? In other words, do the categories of succession include, as a special case, the mere division of a State into two or more States? And in that event is the international personality of the former State to be considered as extinguished and the State replaced by two or more *new* States, or as continuing in a divided form in the international personalities of the States resulting from the division?

(16) Practice does not throw much useful light on this question, despite the fact that among the major political problems of the post-war world have been what are sometimes called the two Germanies, the two Koreas and the two Viet-Nams. The circumstances of each of these so-called divided States are, however, altogether too special for them to provide guidance in regard to questions of succession. In all three cases the problem of succession is complicated by the fact that one of the two Governments is not recognized by a large number of States, and in all three cases one or both of the two Governments claims to represent the whole State. Further complications are the effect of the Second World War on the treaties previously affecting the territories in question, and in the cases of Korea and Viet-Nam their very recent emergence to independence when the division of their territories occurred. These various complications are, no doubt, responsible for the extreme paucity of information regarding succession by one part of these States to the treaties of the previously undivided State or territory. The German Democratic Republic, it appears, maintains the theory that it is entitled to "reactivate" treaties formerly concluded by the German Reich; but its attempts to put this theory into operation have had very limited effects owing to the non-recognition policies applied by a large number of States. In any event, the claim to "reactivation", as described in a recent book,³³⁰ seems not to be based on

³²⁸ See S. Tabata, *Japanese Annual of International Law* (Tokyo, 1968), No. 12, pp. 36-44.

³²⁹ See *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 148, document A/CN.4/249, paras. 11 and 12 of the commentary to article 13; and *ibid.*, 1970, vol. II, p. 118, document A/CN.4/229, para. 89.

³³⁰ B. R. Bot, *Non-recognition and Treaty Relations* (Leyden, Sijthoff, 1968), pp. 198-208.

any principle of *ipso jure* continuity but on a right of "option" analogous to that of newly independent States.

(17) If the question is viewed simply from the standpoint of principle, there does not seem to be any sufficient reason to differentiate between a part of a State which becomes an independent State by secession and one which does so by division. Indeed, a division of a State extinguishing altogether the predecessor State is an even more radical transformation of the situation than a secession, so that it seems to follow *a fortiori* that the parts resulting from the division, assuming their recognition as States, should be considered as in the same position as a seceded State for the purposes of the law of succession of States.

(18) The present article has therefore been drafted on the basis that no distinction should be made between cases of "separation" and "division"; and that in both cases the rules contained in articles 7 to 17 of the draft should govern the position of the new States resulting from the separation or division and of the other States parties to the treaties concerned. In the case of a separation, when the predecessor State continues in existence, the treaties previously in force in respect of its territory in principle remain in force in respect of its remaining territory. But it seems necessary to provide some safeguards because of the possible effects on the treaties of the dismemberment; and these safeguards are formulated in paragraph 3 of the article.

Article 22. — Succession of States in respect of boundary settlements

ALTERNATIVE A

1. The continuance in force of a treaty which establishes a boundary is not affected by reason only of the occurrence of a succession of States in respect of a party.

2. In such a case the treaty is considered as in force in respect of the successor State from the date of the succession of States, with the exception of any provisions which by reason of their object and purpose are to be considered as relating only to the predecessor State.

ALTERNATIVE B

1. A succession of States shall not by reason only of its occurrence affect the continuance in force of a boundary settlement which has been established by a treaty.

2. In such a case the boundary settlement is to be considered as comprising any provisions of the treaty relating to the boundary.

Article 22 (bis). — Succession in respect of certain treaties of a territorial character

ALTERNATIVE A

1. The continuance in force of a treaty is not affected by reason only of the occurrence of a succession of States in respect of a party if the treaty creates obligations and rights relating to the user or enjoyment of territory of a party and it appears from the treaty or is otherwise established that the parties intended such obligations to attach indefinitely

or for a specified period to the particular territory in question and such rights either:

(a) Correspondingly to attach indefinitely or, as the case may be, for a specified period, to the territory of the other party as a particular locality;

(b) To be accorded to a group of States or to States generally.

2. In such a case the treaty is considered as in force in respect of the succession State from the date of the succession of States.

3. "Territory" for the purposes of the present articles means all or any part of the land, internal waters, territorial sea, contiguous zone, sea-bed or air space of the party in question.

ALTERNATIVE B

1. A succession of States shall not by reason only of its occurrence affect the continuance in force of obligations and rights arising from a treaty and relating to the user or enjoyment of territory of a party if it appears from the treaty or is otherwise established that the parties intended such obligations to attach indefinitely or for a specified period to the particular territory in question and such rights either:

(a) Correspondingly to attach indefinitely or, as the case may be, for a specified period, to the territory of the other party as a particular locality;

(b) To be accorded to a group of States or to States generally.

2. In such a case the obligations and rights in question are to be considered as subject to any provisions of the treaty relating to such obligations or rights.

3. "Territory" for the purposes of the present article means all or any part of the land, internal waters, territorial sea, contiguous zone, sea-bed or air space of the party in question.

COMMENTARY (*Article*)

(1) The Special Rapporteur drew attention in his third report to certain categories of treaties often described as being of a territorial character and traditionally spoken of as possible exceptions to the general rule in article 6 that a successor State is not bound to take over treaties in force in respect of its territory at the date of the succession.³³¹ *Inter alia*, he there noted that the devolution agreements and, still more, the unilateral declarations which have featured in so many modern cases of succession, appear to assume that some of the treaties of the predecessor State would be binding upon the successor State. He further noted that, at any rate in the case of former British territories, the States in question appear to have had in mind categories of treaties variously referred to by writers as "treaties of a territorial character" or as "dispositive", "real" or "localised" treaties,

³³¹ *Yearbook of the International Law Commission, 1970*, vol. II, pp. 35-36, document A/CN.4/224 and Add.1, paras. 16-18 of the commentary to article 6; also *ibid.*, 1968, vol. II, pp. 92-93, document A/CN.4/202, commentary to article 4.

as treaties creating "servitudes". During the general debate on that report at the twenty-second session of the Commission, the majority of speakers commented upon the importance of treaties of a territorial character as an exception to the general rule that a new State is not *ipso jure* bound by the treaties concluded by its predecessor.³³² At the same time some members underlined that these categories of treaties might also constitute an exception to the "moving treaty frontiers" rule dealt with in article 2 of the draft articles contained in the Special Rapporteur's second report.³³³ The Special Rapporteur pointed out that the whole question of these special categories of treaties had been reserved by him for study in a separate article in his next report; and that the Commission's earlier discussion in its work on the law of treaties of the problem of objective treaty-régimes would then need to be borne in mind. The present article and commentary are intended to provide a basis for the Commission's study of this question, the complexity of which is shown by the diversity of opinion among jurists.

(2) The author of a well-known textbook on the law of treaties endorses the concept of "certain kinds of treaty obligations which by common consent must survive changes of sovereignty"³³⁴ and appears to regard it as covering a broad range of "treaties creating purely local obligations":

It is not easy to state the legal doctrine which attaches to this kind of treaty obligation its peculiar effect. For most of them it would suffice to say that the instrument from which they originate created rights *in rem*, against the whole world, whoever the sovereign of the territory affected might be, but this would not cover capitulations or semi-legislative provisions made as part of an international settlement. . . . In many cases it suffices to invoke such principles as *nemo dat quod non habet*, *nemo plus juris transferre quam ipse habet*, and *res transit cum suo onere*, for when a State cedes a piece of territory over which it has granted to another State a right of transit or a right of navigation on a river, or a right of fishery in territorial or national waters, it cannot cede that territory unencumbered by that obligation.³³⁵

(3) Sir Gerald Fitzmaurice, on the other hand, a former Special Rapporteur on the law of treaties, seems to take a narrower view of the treaties covered by this concept. Writing on questions of succession arising out of the territorial clauses of the Peace Treaty with Italy, he expressed the view that as a general rule treaties of the predecessor State do not pass with ceded territory, and then observed with regard to multilateral treaties:

There may however be cases where, although the receiving State is not a party to a multilateral Convention affecting the ceded territory it may nevertheless be bound to apply its provisions to the territory on the same basis as before the territory was ceded, because the convention concerned has created a sort of servitude regarding, or a sort of status attaching, to the territory, which whoever is sovereign of the territory becomes automatically bound internationally to respect and give effect to.

³³² *Ibid.*, 1970, vol. I, pp. 132-138, 139-140 and 149 *et seq.*, 1067th meeting, 1068th meeting, paras. 10-44, 1070th to 1072nd meetings.

³³³ *Ibid.* 1969, vol. II, p. 52, document A/CN.4/214 and Add.1 and 3.

³³⁴ A. D. McNair, *op. cit.*, p. 655.

³³⁵ *Ibid.*, p. 656.

But in order to determine whether this is so or not, it is necessary to look very carefully at the convention concerned in order to see whether it is one affecting the international *status* of the ceded territory or of any river, canal, etc., within it, or whether it is merely one creating *personal* obligations for a given country in *respect* of that territory or things in it. Suppose there is a treaty to which a number of States are parties which provides that a certain locality in the territory of one of them—perhaps an island—is to be and remain demilitarised. Now it may be quite plain that the true effect of this is not that the island is to acquire the permanent *status* of demilitarised territory, but merely that State A, in whose territory it now is, is not to fortify it—in other words it is a personal obligation on A rather than a question of the international status of the island. On the other hand there are cases where it is clear that although only a limited number of countries are actual parties to the relevant convention, it was nevertheless the intention to create a permanent régime in the nature of a status for the locality in question. In the field of demilitarisation the conventions respecting the Aaland Islands in the Baltic afford a good illustration. There are also conventions providing for the free navigation of international waterways such as the Panama, Suez and Kiel Canals, and the Dardanelles and Bosphorus—there are conventions providing for free access, to liberty of commerce and navigation, user, and non-discrimination with respect to international rivers, such as the Rhine and Danube, or the Congo in Africa, which pass through the territories of several States. There may be conventions providing for free transit or carriage on certain railways and so forth. In this type of case it is clear that although the matter originally arose out of a convention, it has become one of *status* and has ceased to depend purely on contract. Any State which takes territory thus situated, takes it as it is and subject to the régime it is impressed with, whether that State is actually a party to the convention which originally created that régime or not.³³⁶

A little later, turning to bilateral treaties, he added:

It is desirable to revert to the question of servitudes impressing a given territory or something in it with a status of a permanent character which it is incumbent on any one taking the territory to respect and give effect to. This question has been discussed above in relation to multilateral conventions. It does not often occur in the form of a bilateral treaty, but it can do so and can then give rise to very difficult questions. For instance statements of a general character are sometimes made by writers to the effect that *all* obligations locally connected with given territory pass to the receiving State if that territory is transferred, whereas in fact this is not always the case. Suppose that country A voluntarily cedes certain islands to country B, and there is attached to the cession a clause providing that the fishermen of country A shall continue to enjoy in the islands and its waters the same fishing rights as they enjoyed when the islands belonged to A. Such clauses are of common occurrence. There is one in the Italian Peace Treaty in reference to the Adriatic island of Pelagosa, ceded to Yugoslavia. Now suppose that a century or so later, country B in its turn cedes the islands to country C. In the absence of any express treaty provision does the obligation to grant fishing rights to the fishermen of A automatically pass from B to C, or would it come to an end on the ground that this obligation is personal to country B and does not devolve on C unless this is provided for in the treaty of cession between B and C? Some might answer that this is an obligation locally connected with the ceded territory and in the nature of a servitude on it. Subject, however, to the exact wording of the original treaty between A and B creating these rights, the better view

³³⁶ Sir G. Fitzmaurice, "The juridical clauses of the peace treaties", *Recueil des cours de l'Académie de droit international de La Haye*, 1948-II (Paris, Sirey, 1949), vol. 73, pp. 293-295.

seems to be that in a case of this kind the parties were not intending to create for the islands the character of territory permanently available for the exercise of free fishing rights in general. They really only intended to create rights for a certain category of persons, though in respect of certain territory. But the essence of the matter was an obligation on country B to permit the fishermen of A to fish in certain localities, and not, so to speak, to alter or affect the status of those localities as such. If this is so, it follows, that as this is essentially a personal obligation though its exercise may relate to certain territory it does not pass to C unless this is specifically provided for in the treaty between B and C, or unless it is provided generally that C shall assume in respect of the islands all the obligations previously incumbent on B. Of course, it may well be that by virtue of its original obligations to A, B ought not to cede the islands at all, or ought only to do so subject to an express condition reserving the rights of A; and it may well be that A has a right to call on B to act accordingly and would have a good claim for damages against B if B did not so act; but that is quite a different question. What has to be considered in all such cases is not merely whether certain obligations relate to or are locally connected with the ceded territory, but whether they are of such nature, intended to be effective universally or quasi-universally as to impress the territory or something in it with a character henceforth inherent in the territory and irrespective of whether any personal obligation in the matter has been assumed by the local sovereign. There are often to be found in the authorities statements that, on the principles of *pacta tertiis nec nocent nec prosunt* and of *res inter alios acta*, one country's right cannot be affected by what two other countries do, and that accordingly, in the type of case under discussion, the territory can only be transferred subject to that country's rights; and similarly there are the statements that, on the principles of *res transit cum onere suo* and *nemo plus juris transferre potest quam habet*, cessions of territory made in disregard of the rights of third countries cannot be effected or are illegal and invalid. Now these statements are often perfectly true, but a great deal depends on the particular facts they are applied to. Thus the statement that *res transit cum onere suo* may well beg the question, because the very issue may be whether the *onus* does in fact burden the actual *res* itself, or whether it is merely in the nature of a personal obligation incumbent on a particular State. Again, when it is said that cessions in disregard of third countries' rights are illegal or that the territory can be transferred subject to those rights, it is often not clear whether the writer means that the cession is actually null and void or whether he means that it must be read as subject to an implied condition reserving the third country's rights and binding the receiving State to go on giving effect to them; or again whether it is merely meant that the ceding State has acted wrongfully and is liable in damages to the third country. It would seem that the cession itself cannot be null and void, while the question whether it operates subject to an implied term in favour of the third country's rights does not arise since if the transfer is subject to this limitation, it will be precisely because the obligations is sufficiently bound up with the territory to have ceased to have a purely personal character, and consequently automatically to pass with it. If on the other hand the true nature of the obligation is *personal*, there is no juridical basis for reading into the transfer agreement an *implied* condition passing this obligation to the receiving State—rather the reverse because, strictly speaking, personal obligations incumbent on A in favour B cannot or ought not to be transferred to C without B's consent. The real situation in such a case is either that A ought not to effect the cession at all, or that he ought not to do so without B's consent, or alternatively that the cession does not affect his obligation i.e. he still remains bound in spite of it—which makes it incumbent on him to make the necessary arrangements with C to ensure that the obligation goes on being honoured. If he cannot or does not do this, either in the agreement of cession or by subsequent arrangement, he has got himself into a position

where he can no longer carry out his obligations, and he is therefore in breach of them and liable to make reparation.³³⁷

(4) Criticizing the term "localized treaty" as too imprecise a description of the kinds of treaty involved, the writer of a modern textbook on succession of States expresses a preference for the term "dispositive" treaty; and his analysis of dispositive treaties then seems to have affinities with the position adopted by Sir Gerald Fitzmaurice:

In the effort to cast the net more widely than the servitude conception permits, therefore, the term "dispositive" has come to be employed to designate a wide spectrum of treaties which create real rights. The criterion of dispositive character, once the argument is disengaged from the servitude conception, is admittedly elusive, but at least it can be agreed that the fundamental notion underlying the expression is that a territory is impressed with a status which is intended to be permanent (or relatively so), which is independent of the personality of the State exercising the faculties of sovereignty. The Swiss Government asserted in its counter-memorial in the case of the *Free Zones of Upper Savoy* that dispositive treaties transfer or create a real right. And real rights in international law are those which are attached to territory, and which are in essence valid *erga omnes*. The restrictions imposed by the treaty are less of contractual character than equities in favour of the beneficiary, States. A dispositive treaty is thus more of a conveyance than an agreement and as such is an instrument for the delimitation of sovereign competence within the impressed territory. The State accepting the dispositive obligations possesses for the future no more than the conveyance assigned, to it and a Power which subsequently succeeds in sovereignty to the territory can take over only what its predecessor possessed. The basis of the restrictions imposed on the territory is therefore not destroyed by the change of sovereignty.³³⁸

(5) A member of the Commission, writing in 1951, voiced doubts as to how far treaties of a territorial nature constitute a true case of succession by operation of law and how far their continued observance by the successor State is a matter of political expediency:

Most authors make the point that legal succession occurs in respect of *territorial treaties*. This quality is attributed to treaties referring to rights and obligations directly connected with the territory itself, the person of the sovereign being immaterial and the population being considered as a secondary factor. These descriptions, however, appear unsatisfactory. Are there any treaties in which the sovereignty of a territory or its population can be ignored? The transfer of rights and obligations under territorial treaties is based either on reasons of equity and expediency, or is invoked by virtue of the maxim *res transit cum suo onere*. These reasons cannot be considered as convincing. The point at issue, is how far can a State legally bind possible successor States and establish territorial and other obligations to their disadvantage? If the successor State is allowed full freedom of action with regard to other treaties concluded by the predecessor State, it may be wondered on what grounds so-called territorial treaties are to be considered as different, since they also are personal in character, their origin and nature being linked to a particular State, and the difference between them and other Treaties being doubtful.

³³⁷ *Ibid.*, pp. 296-299.

³³⁸ D. P. O'Connell, *State Succession* . . . , vol. II, pp. 14-15; and *International Law* (London, Stevens, 1965), vol. I, pp. 432-433. See also I. A. Shearer, "La succession d'États et les traités non localisés", *Revue générale de droit international public* (Paris), 3rd series, vol. XXXV, No. 1, January-March 1964, p. 6.

It is difficult to draw definite conclusions from *international practice* in this matter, as instances are infrequent and varied, the favourable attitude of States being attributable rather to expediency than to any legal obligation. [Translation by the Secretariat.]³³⁹

After referring to treaties providing for the military occupation of territory as a pledge for the territorial State's performance of obligations, he went on:

Treaties delimiting frontiers are often cited as an example of territorial treaties. Doctrine is unanimous in considering that treaties of this kind are binding upon the new sovereign of a territory. This does not, however, constitute an exception to the general rule. Treaties relating to frontiers having been executed and having established a given legal situation, that situation must be respected by the new sovereign of the territory just as much as by any foreign territorial Power.

Many writers consider that the various treaties relating to *transport, fisheries and hunting* should also be regarded as territorial in character. Such treaties are appreciably different from those relating to frontiers in that they provide for continuing action, i.e., the application of rights and the performance of obligations. Most legal authorities consider that such treaties are also binding upon successor States. International practice does in fact confirm that opinion. The continued application of such treaties by successor States is, however, most generally due to reasons of expediency.

One of the most widely discussed questions of international law is that of the existence of *international servitudes*. Such servitudes are usually understood to mean restrictions of a territorial nature which continue even if the sovereignty over the territory changes. It is generally considered that international servitudes are not constituted for reasons of general interest. They must also be considered as unilateral, as the other contracting party does not enjoy any corresponding territorial rights, and they are not to apply to the entire territory of the State in question. Servitudes may be negative or positive, according to whether a restriction is laid upon the authority of a State over a certain

part of its territory, or rights in that territory are accorded to some foreign State. Servitudes relate to certain activities or to the obligation to refrain from such, activities. They are generally divided into two classes—military or economic.

It is certain that territorial restrictions of the type mentioned above exist as between the States concerned, but it may be questioned whether they are binding upon third States in their capacity as successors. Wehberg raises the question of what reasons should prevent two States from reaching agreement on servitudes which would be binding upon the future sovereigns of the territory. The freedom to negotiate conferred by international law is certainly very extensive, but the matter under discussion involves third party rights. It accordingly seems difficult to accept international servitudes. In fact, all territorial restrictions laid down in treaties concluded between States are simply in the nature of legal obligations and their binding force limits the effects of the treaty to the domain of the contracting parties.

International practice may obviously admit purely territorial restrictions on the exercise of power over a territory. It is, however, hardly possible to adduce convincing instances of such practice in a generally recognized and binding form. Juridical cases of this nature are moreover rare and are in some instances debatable and in others clearly negative. In most of these cases, changes in the sovereignty over a territory occur as between the contracting parties themselves, and in some instances the successor State has then accepted the responsibility in question.³⁴⁰ [Translation by the Secretariat.]

³⁴⁰ *Parmi les traités d'ordre territorial, on cite souvent, à titre d'exemple, les traités réglant les frontières. La doctrine est unanime à considérer que de pareils traités engagent le nouveau souverain du territoire. Il ne s'agit cependant pas d'une exception à la règle générale. Les traités concernant les frontières ayant été mis en exécution en établissant une situation juridique déterminée, celle-ci doit être respectée par le nouveau souverain du territoire au même titre que tout pouvoir territorial étranger.*

De nombreux auteurs estiment que le caractère de traité d'ordre territorial doit être attribué également aux divers traités portant sur les transports, la pêche et la chasse. Ceux-ci diffèrent sensiblement des traités concernant les frontières ayant été mis en exécution en établissant une situation juridique déterminée, celle-ci doit être respectée par le nouveau souverain du territoire au même titre que tout pouvoir territorial étranger.

Une des questions de droit international les plus discutées est celle de savoir s'il existe des servitudes internationales. Par ces servitudes on entend habituellement les restrictions d'ordre territorial qui sont maintenues même si la souveraineté sur le territoire vient à changer. On estime généralement que des servitudes internationales ne sont pas constituées pour des raisons d'intérêt général. Il faut, en plus, leur attribuer un caractère unilatéral, l'autre partie contractante ne bénéficiant pas de droits territoriaux correspondants, et elles ne doivent pas s'appliquer au territoire entier de l'Etat en question. Les servitudes peuvent être négatives ou positives selon qu'une restriction est apportée au pouvoir exercé par un Etat sur une partie de son territoire ou que des droits y sont accordés à un Etat étranger quelconque. Les servitudes portent sur diverses activités ou sur l'obligation de s'abstenir de certaines activités. On les divise habituellement en deux catégories principales selon leur caractère militaire ou économique.

Il est certain qu'entre les Etats existent des restrictions d'ordre territorial du genre susmentionné dont bénéficie l'une des parties, mais on peut se demander si elles engagent les Etats tiers en tant qu'Etats successeurs. Wehberg se demande pour quelles raisons deux Etats seraient empêchés de convenir entre eux de servitudes qui engagent également les futurs souverains du territoire. La liberté de traiter qu'accorde le droit international est, il est vrai, fort large, mais dans le cas présent il s'agit des droits des tiers. Il semble donc difficile d'admettre des servitudes internationales. En réalité, toutes les restrictions d'ordre territorial stipulées par les traités conclus entre les Etats ont seulement le caractère d'une

(Continued on next page.)

³³⁹ *La plupart des auteurs font valoir que la succession juridique apparaît à l'occasion de traités d'ordre territorial. Ce caractère est attribué aux traités portant sur des droits et des obligations rattachés directement au territoire lui-même, la personne du souverain du territoire n'ayant pas d'importance et la population qui y habite étant considérée comme un facteur secondaire. Ces qualifications semblent cependant défectueuses. Existe-t-il des traités permettant de faire abstraction du souverain du territoire et de la population? Le transfert des droits et des obligations prévus par les traités d'ordre territorial est, ou bien basé uniquement sur des raisons d'équité et d'opportunité, ou bien se trouve invoquée derechef la devise res transit cum suo onere. Ces motifs ne sauraient être considérés comme convainquants. Il s'agit en effet de savoir dans quelle mesure un Etat peut engager légalement des Etats successeurs éventuels et établir des charges territoriales et autres à leur détriment. Du moment où l'on accorde à l'Etat successeur une pleine liberté d'action en ce qui concerne les autres traités conclus par l'Etat prédécesseur, on peut se demander pour quelles raisons les traités dits d'ordre territorial seraient considérés autrement, puisqu'ils sont également de caractère personnel, leur origine et nature étant rattachés à un Etat déterminé et la différence entre eux et d'autres traités demeurant ainsi ambiguë.*

*De la pratique internationale en cette matière, il est difficile de tirer des conclusions certaines, ses manifestations étant rares et variées, et l'attitude favorable des Etats devant être attribuée à des raisons d'opportunité et non à une obligation juridique. (E. Castrén, "Aspects récents..." *Hague Recueil* (loc. cit.) pp. 436-437; see also, by the same author, "On state succession..." *Nordisk Tidsskrift* . . . (loc. cit.), pp. 68-69.) (Cf. M. Udina, "La succession des Etats quant aux obligations internationales autres que les dettes publiques", *Recueil des cours de l'Académie de droit international de La Haye, 1933-II* (Paris, Sirey, 1933), vol. 44, pp. 704-750.)*

(6) Some other writers express hesitations in varying forms concerning a new State's automatic inheritance of this category of treaties. The author of a recent book on independence and succession in respect of treaties, for example, considers that the transmissibility of these treaties is subordinated to the principles of equality of States and self-determination and concludes: "The element of localization simply indicates a stronger probability of succession, inherent in the 'real' treaty. But it does not guarantee that the instrument is necessarily or obligatorily transferable in all cases."³⁴¹ The author of another recent book on succession in respect of treaties, while referring to "localized" treaties as "instruments which are binding most specifically upon newly-independent States", emphasizes that there have been some cases of their rejection and that the new State succeeds to possible "claims" by other States as well as to the treaties. In the case of boundary treaties, he observes that the dispute often concerns the maintenance or otherwise of rights guaranteed in connexion with and as a condition of, the settlement of the boundary and that the dispute over these rights tends to provoke the reopening of the boundary itself.³⁴² In regard to boundaries another writer indeed expresses the view that succession occurs only through the tacit agreement of the neighbouring State.³⁴³ The weight of opinion amongst modern writers, however, seems still to support the traditional doctrine that treaties of a territorial character constitute a special category which, in principle, are inherited by a new State.³⁴⁴ Thus, after reviewing some of the recent practice alleged to be inconsistent with that doctrine, a jurist lecturing at the Hague Academy in 1965 said:

(Foot-note 340 continued.)

obligation juridique et d'une force obligatoire qui limitent les effets juridiques des traités aux domaines des parties contractantes.

La pratique internationale peut évidemment admettre des restrictions purement territoriales apportées à l'exercice du pouvoir sur un territoire. Il n'est cependant guère possible de citer des cas convaincants d'une pareille pratique sous une forme généralement reconnue et obligatoire. Ces cas juridiques sont d'ailleurs rares et ils sont, d'une part, contestables, de l'autre, nettement négatifs. Dans la plupart de ces cas, les changements de souveraineté d'un territoire se sont produits entre les parties contractantes elles-mêmes et parfois, l'Etat successeur a accepté librement, par la suite, la charge en question. (E. Castrén, "Aspects récents . . .", *Hague Recueil* (loc. cit.), pp. 437-439.)

³⁴¹ M. G. Marcoff, *Accession à l'indépendance et succession d'Etats aux traités internationaux* (Arbeiten aus dem juristischen Seminar der Universität Freiburg; Fribourg, Editions universitaires, 1969), pp. 205-206.

³⁴² "Instruments qui engagent le plus spécifiquement les nouveaux Etats indépendants" (see A. G. Mochi Onory, *La succession d'Etats aux traités* (Milan, Giuffrè, 1968), pp. 128-131).

³⁴³ C. Rousseau, "Chronique des faits internationaux", *Revue générale de droit international public* (Paris), 3rd series, vol. 64 (1960), p. 616, citing M. Udina, loc. cit., pp. 748-749.

³⁴⁴ See, in addition to Lord McNair, Sir G. Fitzmaurice and D. P. O'Connell, already cited in paragraphs 2, 3 and 4 of the present commentary: F. A. Váli, *Servitudes of International Law: A study of rights in foreign territories* (London, Stevens, 1958), pp. 319-322; K. Zemanek, loc. cit., pp. 239-243; A. Ross, *A Textbook of International Law* (London, Longmans, Green, 1947), p. 127; P. Guggenheim, op. cit., vol. I, p. 226; J. Mervyn Jones, "State succession in the matter of treaties", *The British Year Book of International Law*, vol. 24 (1948), p. 262; R. Hone, op. cit., p. 18.

. . . it appears that the material tends to support the traditional theory in this respect rather than to disprove it. Deviations from the rule of automatic succession to dispositive treaties seem to be due more to political considerations or to the operation of the *clausula rebus sic stantibus* than to a rejection of the rule of automatic succession. In fact many of the arguments which have been used to question the continued validity of specific treaties imply that automatic succession is not denied in principle.

The real difficulty lies, however, in the exact determination of treaties coming under this rule . . ."³⁴⁵

(7) Another recent writer, on the other hand, while recognizing that a new State inherits the frontiers of its predecessor and also certain kinds of "real" obligations and rights, does not see in these cases an application of any principle of succession in respect of treaties. Boundary treaties, he says are executed treaties and, as far as the executed provisions are concerned, it is not a case of succession in respect of treaties. As to the other kinds of "real" treaties, State succession in his view only one of the possible explanations, and he prefers to regard them as cases of the "grafting of an international custom upon a treaty" or of a local custom or of a "good neighbour" rule. And he concludes that there is no genuine case of "succession" forming an exception to the "clean slate" rule.³⁴⁶

(8) The International Law Association, in its 1968 resolutions on succession of new States to the treaties of their predecessors,³⁴⁷ has adopted yet another approach to this question. As already pointed out in the commentary to article 7,³⁴⁸ the Association takes as its starting point a presumption of the continuity of all the predecessor State's treaties which were in force with respect to the territory at the date of the succession; and under its resolutions both bilateral and multilateral treaties are to become binding on a new State unless, within a reasonable time, the latter contracts out by declaring that the particular treaty is not regarded by it as any longer in force. For this purpose the Association makes no distinction between treaties of a territorial character and other treaties; and thus does not endorse the doctrine that treaties of a territorial character form a special class which are automatically binding *ipso jure* upon a successor State. This is underlined by its manner of dealing with the question of boundaries.³⁴⁹ When a boundary treaty has been executed in the sense that the

³⁴⁵ K. Zemanek, loc. cit., pp. 242-243.

³⁴⁶ See T. Treves, "La continuità dei trattati ed i nuovi Stati indipendenti" Istituto di Diritto internazionale e straniero della Università di Milano *Comunicazioni e Studi*, vol. XIII (Milan, Giuffrè, 1969), pp. 333-454.

³⁴⁷ For the text of the resolutions, see *Yearbook of the International Law Commission, 1969*, vol. II, p. 48, document A/CN.4/214 and Add.1 and 2, para. 15.

³⁴⁸ *Ibid.*, 1970, vol. II, p. 38, document A/CN.4/224 and Add.1, para. 4 of the commentary to article 7.

³⁴⁹ See the eighth resolution and note eight in the report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors (see International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (op. cit.), pp. 603 and 605 respectively. The text of the resolutions is also reproduced in the introduction to 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).

boundary has been delimited, the Association recognizes that a new State succeeds to the delimitation, which therefore determines the extent of its territory. But, like the writer mentioned in the preceding paragraph, it regards the treaty itself as having spent its force, so that the case is one of succession in respect of the boundary, as such, not of the treaty. On the other hand, where a boundary treaty provides for future action to delimit it, or provides for future reciprocal rights in relation to the boundary, the Association considers that the question whether the treaty is or is not succeeded to should be governed by the general presumptions of continuity envisaged by it for all treaties of the predecessor State.

(9) The diversity of opinion amongst writers makes it difficult to discern whether and, if so, to what extent and upon what basis, international law today recognizes any special category or categories of treaties of a territorial character which are inherited automatically by a successor State. It may therefore be useful to recall three other cases in the law of treaties where the question whether treaties of a "territorial" character form a special category is posed. Two of these cases came under the Commission's notice during its work on the Vienna Convention, namely treaties said to create "objective régimes" and treaties excepted from the rule in article 62 regarding a fundamental change of circumstances; the third case, the effect of war on treaties, has not been considered by the Commission.

(10) The question of treaties which provide for objective régimes was examined by the Special Rapporteur in his third report on the law of treaties with reference to the subject of treaties and third States,³⁵⁰ and subsequently by the Commission at its sixteenth session.³⁵¹ The outcome of the proceedings in the Commission on this question was summarized in its final report on the law of treaties to the General Assembly as follows:

The Commission considered whether treaties creating so-called "objective régimes", that is, obligations and rights valid *erga omnes*, should be dealt with separately as a special case. Some members of the Commission favoured this course, expressing the view that the concept of treaties creating objective régimes existed in international law and merited special treatment in the draft articles. In their view, treaties which fall within this concept are treaties for the neutralization or demilitarization of particular territories, or areas, and treaties providing for freedom of navigation in international rivers or maritime waterways; and they cited the Antarctic Treaty as a recent example of such a treaty. Other members, however, while recognizing that in certain cases treaty rights and obligations may come to be valid *erga omnes*, did not regard these cases as resulting from any special concept or institution of the law of treaties. They considered that these cases resulted either from the application of the principle in article 32 or from the grafting of an international custom upon a treaty under the process which is the subject of the reservation in the present article.³⁵²

Having regard to the difference of opinion, the Commission concluded that a provision recognizing, under certain conditions, the direct creation of an objective régime by a treaty of its own force would be unlikely to obtain general acceptance, and decided not to propose any special provision of that nature. Instead, it left the question of objective régimes to be resolved by the rules in what is now article 36 of the Vienna Convention on the Law of Treaties regarding treaties which provide for rights for third States and also by the process through which a treaty may become binding on a third State as the result of the grafting of an international custom upon the treaty. This way of dealing with the problem was accepted at the United Nations Conference on the Law of Treaties, with the result that the concept of a special category of treaties which of their own force create objective régimes does not find any place in the Vienna Convention.

(11) The treaties in question, as the above-cited passage of the Commission's report indicates, are treaties of a territorial character: treaties for the neutralization or demilitarization of particular territories or areas, treaties providing for freedom of navigation in particular international rivers or waterways and the like. And it is clear that the general law of treaties, as now formulated in the Vienna Convention, does not attribute to these treaties any special effects in relation to third States by reason merely of their territorial character. But it by no means follows that the same must be true in relation to a successor State. The very question to be resolved in cases of succession is whether a new State is to be considered as wholly a stranger—as a third State—in relation to its predecessor's treaty or whether the fact that the treaty was previously in force in respect of the State's territory creates some form of legal nexus between the new State and the predecessor's treaty.

(12) In another context, the effect of a fundamental change of circumstances, the Commission and the United Nations Conference on the Law of Treaties concluded that treaties establishing a boundary do form a special category which constitutes an exception to the general rule that such a fundamental change of circumstances may be invoked as a ground for terminating, withdrawing from or suspending the operation of a treaty.³⁵³ In consequences article 62, paragraph 2 (a), of the Convention expressly provides that the general rule does not apply in the case of a treaty which "establishes a boundary". This provision, it will be noted, confines the category of treaties falling under this exception to boundary treaties, and is not therefore expressed to cover other forms of treaties of a territorial character.³⁵⁴

(13) As to the effect of war on treaties, which has not been examined by the Commission, the modern law is uncertain, and the Special Rapporteur has no wish

³⁵⁰ *Yearbook of the International Law Commission, 1964*, vol. II, pp. 27-34, document A/CN.4/167 and Add.1-3, commentary to article 63.

³⁵¹ *Ibid.*, vol. I, pp. 96-109, 738th meeting, paras. 29-51, 739th meeting, 740th meeting, paras. 3-38.

³⁵² *Ibid.*, 1966, vol. II, p. 231, document A/6309/Rev.1, part II, chap. II, para. 4 of the commentary to article 34.

³⁵³ *Ibid.*, p. 259, para. 11 of commentary to article 59.

³⁵⁴ In his second report on the law of treaties, Sir Humphrey Waldock, as Special Rapporteur, has proposed that the exception should cover treaties effecting a "grant of territorial rights" (*ibid.*, 1963, vol. II, p. 85, document A/CN.4/156 and Add.1-3, para. 17 of the commentary to article 22).

to be thought to express any opinion of his own on that topic without a thorough examination of it. He therefore confines himself to noting that a number of modern writers appear to regard the territorial, or perhaps more often the dispositive, character of certain kinds of treaties as a reason for rejecting the thesis that they are brought to an end by the outbreak of war.³⁵⁵ These writers also appear to refer to this category in fairly broad terms, no limiting it to boundary treaties or other particular kinds of treaties of a territorial character.

(14) The proceedings of international tribunals throw some, if not an entirely clear, light on the question of territorial treaties. In its second Order in the case concerning the *Free Zones of Upper Savoy and the District of Gex*³⁵⁶ the Permanent Court of International Justice made a pronouncement which is perhaps the most weighty endorsement of the existence of a rule requiring a successor State to respect a territorial treaty affecting the territory to which a succession of States relates. The Treaty of Turin of 1816, in fixing the frontier between Switzerland and Sardinia, imposed restrictions on the levying of customs duties in the Zone of St. Gingolph. Switzerland claimed that under the Treaty the customs line should be withdrawn from St. Gingolph. Sardinia, although at first contesting this view of the Treaty, eventually agreed and gave effect to its agreement by a "Manifesto" withdrawing the customs line. In this context, the Court said:

... As this assent given by His Majesty the King of Sardinia, without any reservation, terminated an international dispute relating to the Treaty of Turin; as, accordingly, the effect of the Manifesto of the Royal Sardinian Court of Accounts, published in execution of the Sovereign's orders, laid down in a manner binding on the Kingdom of Sardinia, what the law was to be between the Parties; as the agreement thus interpreted by the Manifesto confers on the creation of the zone of St. Gingolph the character of a treaty stipulation which France is bound to respect, as she succeeded Sardinia in the sovereignty over that territory.*³⁵⁷

This pronouncement was reflected in much the same terms in the Court's final judgement in the second stage of the case.³⁵⁸ Although the territorial character of the Treaty is not particularly emphasized in the passage cited above, it is clear from other passages that the Court recognized that it was here dealing with an arrangement of a territorial character. Indeed, the Swiss Government in its pleadings had strongly emphasized the "real" character of the agreement,³⁵⁹ involving the concept

of servitudes in connexion with the Free Zones.³⁶⁰ The case has, therefore, rightly been accepted as a precedent in favour of the principle that certain treaties of a territorial character are binding *ipso jure* upon a successor State.

(15) What is not, perhaps, clear is the precise nature of the principle applied by the Court. The Free Zones, including the Sardinian Zone, were created as part of the international arrangements made at the conclusion of the Napoleonic Wars; and elsewhere in its judgments³⁶¹ the Court emphasized this aspect of the agreements concerning the Free Zones. The question, therefore, is whether the Court's pronouncement applies generally to treaties having such a territorial character or whether it is limited to treaties forming part of a territorial settlement and establishing an objective treaty régime. On this question it can only be said that the actual terms of that pronouncement were quite general. A further point frequently raised in connexion with the problem of succession in respect of territorial treaties is whether, if it occurs, the succession is in respect of the Treaty or in respect of the situation resulting from the execution of the Treaty. The Court does not seem to have addressed itself specifically to this point. But its language in the passage from its Order cited above and in the similar passage in its final judgment, whether intentionally or not refers in terms to "a *treaty stipulation*" which France is bound to respect, as she succeeded Sardinia in the sovereignty over that territory".

(16) In the early days of the League, before the Permanent Court had been established, the question of succession in respect of a territorial treaty had come before the Council of the League of Nations with reference to Finland's obligation to maintain the demilitarization of the Aaland Islands. The point arose in connexion with a dispute between Sweden and Finland concerning the allocation of the Islands after Finland's detachment from Russia at the end of the First World War. The Council referred the legal aspects of the dispute to a committee of three jurists, amongst whom was Max Huber, later to be Judge and President of the Permanent Court. The treaty in question was the Aaland Islands Convention, concluded between France, Great Britain and Russia as part of the Peace Settlement of 1856, under which the three Powers declared that "the Aaland Islands shall not be fortified, and that no military or naval base shall be maintained or created there". Two major points of treaty law were involved. The first, Sweden's right to invoke the Convention although not a party to it, was discussed by the Special Rapporteur in his third report on the law of treaties in connexion with draft articles on the effect of treaties on third States and objective régimes.³⁶² The second was the question of Finland's obligation to maintain the demilitarization of the islands. In its opinion the

³⁵⁵ e.g., Sir G. Fitzmaurice, *loc. cit.*, p. 312; McNair, *op. cit.*, p. 705; C. Rousseau, *Droit international public* (Paris, Sirey, 1953), p. 59.

³⁵⁶ Order of 6 December 1930 (*P.C.I.J.*, Series A, No. 24). The *Free Zones* Case was discussed at length by the Special Rapporteur in his third report on the law of treaties with reference to the effect of treaties on third States (see *Yearbook of the International Law Commission, 1964*, vol. II, pp. 20-24, document A/CN.4/167 and Add.1-3, paras. 1-17 of the commentary to article 62.

³⁵⁷ *P.C.I.J.*, Series A, No. 24, p. 17.

³⁵⁸ *P.C.I.J.*, Series A/B, No. 46, p. 145.

³⁵⁹ *P.C.I.J.*, Series C, No. 17-I, *Case of the Free Zones of Upper Savoy and the District of Gex*, vol. III, p. 1654.

³⁶⁰ *Ibid.*, vol. I, pp. 254 and 415.

³⁶¹ e.g., *P.C.I.J.*, Series A/B, No. 46, p. 148.

³⁶² *Yearbook of the International Law Commission, 1964*, vol. II, pp. 22-23 and 30, document A/CN.4/167 and Add.1-3, para. 12 of the commentary to article 62 and para. 11 of the commentary to article 63.

Committee of Jurists, having observed that "the existence of international servitudes, in the true technical sense of the term, is not generally admitted,"³⁶³ nevertheless found reasons for attributing special effects to the demilitarization Convention of 1856:

As concerns the position of the State having sovereign rights over the territory of the Aaland Islands, if it were admitted that the case is one "real servitude", it would be legally incumbent upon this State to recognize the provisions of 1856 and to conform to them. A similar conclusion would also be reached if the point of view enunciated above were adopted, according to which the question is one of a definite settlement of European interests and not a question of mere individual and subjective political obligations. Finland, by declaring itself independent and claiming on this ground recognition as a legal person in international law cannot escape from the obligations imposed on it by such a settlement of European interests.

The recognition of any State must always be subject to the reservation that the State recognized will respect the obligations imposed upon it either by general international law or by definite international settlements relating to territory.*³⁶⁴

Clearly, in that opinion the Committee of Jurists did not rest the successor State's obligation to maintain the demilitarization régime simply on the territorial character of the treaty. It seems rather to have based itself on the theory of the dispositive effect of an international settlement established in the general interest of the international community (or at least of a region). Thus it seems to have viewed Finland as succeeding to an established régime or situation effected by the treaty rather than to the contractual obligations of the treaty as such.

(17) The case concerning the *Temple of Preah Vihear*,³⁶⁵ cited by some writers in this connexion, is of a certain interest in regard to boundary treaties, although the question of succession was not dealt with by the International Court of Justice in its judgment. The boundary between Thailand and Cambodia had been fixed in 1904 by a treaty concluded between Thailand (Siam) and France as the then protecting Power of Cambodia. The case concerned the effects of an alleged error in the application of the treaty by the Mixed Franco-Siamese Commission which demarcated the boundary. Cambodia had in the meanwhile become independent and was therefore in the position of a newly independent successor State in relation to the boundary treaty (assuming that the emergence of a protected State to independence is a case of succession). Neither Thailand nor Cambodia disputed the continuance in force of the 1904 Treaty after Cambodia's attainment of independence, and the Court decided the case on the basis of a map resulting from the demarcation and of Thailand's acquiescence in the boundary depicted on that map. The Court was not therefore called upon to address itself to the question of Cambodia's succession to the boundary treaty. On the other hand, it is to be observed that the Court never seems to have doubted that the boundary

settlement established by the 1094 Treaty and the demarcation, if not vitiated by error, would be binding as between Thailand and Cambodia.

(18) More directly to the purpose is the position taken by the parties on the question of succession in their pleadings on the preliminary objections filed by Thailand. Concerned to deny Cambodia's succession to the rights of France under the pacific settlement provisions of a Franco-Siamese treaty of 1937, Thailand argued as follows:

Under the customary international law of State succession, if Cambodia is successor to France in regard to the tracing of frontiers, she is equally bound by treaties of a local nature which determine the methods of marking these frontiers on the spot. However, the general rules of customary law regarding State succession do not provide that, in case of succession by separation of a part of a State's territory, as in the case of Cambodia's separation from France, the new State succeeds to political provisions in treaties of the former State... The question whether Thailand is bound to Cambodia by peaceful settlement provisions in a treaty which Thailand concluded with France is very different from such problems as those of the obligations of a successor State to assume certain burdens which can be identified as connected with the territory which the successor acquires after attaining its independence. *It is equally different from the question of the applicability of the provisions of the treaty of 1904 for the identification and demarcation on the spot of the boundary which was fixed along the watershed.**³⁶⁶

Cambodia, although she primarily relied on the thesis of France's "representation" of Cambodia during the period of protection, did not dissent from Thailand's propositions regarding the succession of a new State in respect of territorial treaties. On the contrary, she argued that the peaceful settlement provisions of the 1937 Treaty were directly linked to the boundary settlement and continued:

Thailand recognises Cambodia as the successor to France in respect of treaties relating to the definition and elimination of frontiers. It cannot arbitrarily exclude from the operation of such treaties any provisions which they contain relating to the compulsory jurisdiction rule *in so far as this rule is ancillary to the definition and delimitation of frontiers.**³⁶⁷ [Translation by the Secretariat.]

Thus both parties seem to have assumed that, in the case of a newly independent State, there would be a succession not only in respect of a boundary settlement but also of treaty provisions ancillary to such settlement. Thailand considered that succession would be limited to provisions forming part of the boundary settlement itself, and Cambodia that it would extend to provisions in a subsequent treaty directly linked to it.

(19) The case concerning *Right of Passage over Indian Territory*³⁶⁸ is also of a certain interest, though it did not involve any pronouncement by the Court on succession

³⁶³ League of Nations, *Official Journal, Special Supplement No. 3* (October 1920), p. 16.

³⁶⁴ *Ibid.*, p. 18.

³⁶⁵ *I.C.J. Reports 1962*, pp. 6-146.

³⁶⁶ *I.C.J., Pleadings, Temple of Preah Vihear*, 1959, vol. I, pp. 145-146.

³⁶⁷ "La Thaïlande reconnaît que le Cambodge est successeur de la France en ce qui concerne les traités à la définition et à la délimitation des frontières. Elle ne peut exclure arbitrairement du jeu de tels traités les dispositions qu'ils renferment quant au règlement juridictionnel obligatoire, dans la mesure où ce règlement est accessoire à la définition et à la délimitation des frontières."* (*Ibid.*, p. 165.)

³⁶⁸ *I.C.J. Reports 1960*, p. 6.

in respect of *treaty* obligations. True, it was under a treaty of 1779 concluded with the Marathas that Portugal first obtained a foothold in the two enclaves which gave rise to the question of a right of passage in that case. But the majority of the Court specifically held that it was not in virtue of this treaty that Portugal was enjoying certain rights of passage for civilian personnel on the eve of India's attainment of independence; it was in virtue rather of a local custom that had afterwards become established as between Great Britain and Portugal. The right of passage derived from the consent of each State, but it was a customary right, not a treaty right, with which the Court considered itself to be confronted. The Court found that India had succeeded to the legal situation created by that bilateral custom "unaffected by the change of régime in respect of the intervening territory which occurred when India became independent".³⁶⁹

(20) State practice, and more especially modern State practice, now remains to be examined; and it is proposed to deal first with succession in respect of boundary treaties and then with the practice concerning other forms of territorial treaties.

(21) *Boundary treaties.* Attention has already been drawn earlier in this commentary to article 62, paragraph 2 (a) of the Vienna Convention on the Law of Treaties which provides that a fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty "if the treaty establishes a boundary".³⁷⁰ This provision was proposed by the Commission as a result of its study of the general law of treaties. After pointing out that this exception to the fundamental change of circumstances rule appeared to be recognized by most jurists, the Commission commented:

Paragraph 2 excepts from the operation of the article two cases. The first concerns treaties establishing a boundary, a case which both States concerned in the *Free Zones* case appear to have recognized as being outside the rule, as do most jurists. Some members of the Commission suggested that the total exclusion of these treaties from the rule might go too far, and might be inconsistent with the principle of self-determination recognized in the Charter. The Commission, however, concluded that treaties establishing a boundary should be recognized to be an exception to the rule, because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions. It also took the view that "self-determination", as envisaged in the Charter was an independent principle and that it might lead to confusion if, in the context of the law of treaties it were presented as an application of the rule contained in the present article. By excepting treaties establishing a boundary from its scope the present article would not exclude the operations of the principle of self-determination in any case where the conditions for its legitimate operation existed. The expression "treaty establishing a boundary" was substituted for "treaty fixing a boundary" by the Commission, in response to comments of Governments, as being a broader expression which would embrace treaties of cession as well as delimitation treaties.³⁷¹

³⁶⁹ *Ibid.*, p. 40.

³⁷⁰ See para. 12 of the present commentary.

³⁷¹ *Yearbook of the International Law Commission, 1966*, vol. II, p. 259, document A/6309/Rev.1, part II, chap. II, paragraph II of the commentary to article 59. (Article 59 became article 62 of the Vienna Convention on the Law of Treaties.)

The exception of treaties establishing a boundary "from the fundamental change of circumstances rule", though opposed by a few States, was endorsed by a very large majority of the States at the United Nations Conference on the Law of Treaties. The considerations which led the Commission and the Conference to make this exception to the fundamental change of circumstances appear to apply with the same force to a succession of States, even though the question of the continuance of the treaty may then present itself in a different context. Accordingly, the attitude of States towards boundary treaties at the Conference on the Law of Treaties is believed to be an extremely pertinent element of State practice equally in the present connexion.

(22) Attention has also been drawn earlier to the assumption apparently made by both Thailand and Cambodia in the *Temple* case of the latter's succession to the boundary established by the Franco-Siamese Treaty of 1904.³⁷² That this assumption reflects the general understanding concerning the position of a successor State in regard to an established boundary settlement seems clear. Tanzania, although in her unilateral declaration she strongly insisted on her freedom to maintain or terminate her predecessor's treaties, has been no less insistent that boundaries previously established by treaty remain in force. Furthermore, despite their initial feelings of reaction against the maintenance of "colonial" frontiers, the newly independent States of Africa have come to endorse the principle of respect for established boundaries. Article III, paragraph 3 of the Charter of the Organization of African Unity, it is true, merely proclaimed the principle of "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence."³⁷³ But in 1964, with reservations only from Somalia and Morocco, the Assembly of Heads of State and Government adopted a resolution which after reaffirming the principle in article III, paragraph 3, solemnly declared that "all Member States pledge themselves to respect the borders existing on their achievement of national independence".³⁷⁴ A similar resolution was adopted by the Conference of Heads of State and Government of Non-Aligned Countries held in Cairo in October 1964. This does not, of course, mean that boundary disputes have not arisen or may not arise between African States. But the legal grounds invoked must be other than the mere effect of the occurrence of a succession of States on a boundary treaty.

(23) Somalia has two boundary disputes with Ethiopia, one in respect of the former British Somaliland boundary and the other in respect of the former Italian Somaliland boundary; and a third dispute with Kenya in respect of her boundary with Kenya's Northern Frontier District.³⁷⁵ Somalia's claims in these disputes are based

³⁷² See paras. 17 and 18 of the present commentary.

³⁷³ United Nations, *Treaty Series*, vol. 479, p. 74.

³⁷⁴ OAU document AHG/Res.16 (1); see also S. Touval, "Africa's frontiers: reactions to a colonial legacy", *International Affairs* (London), vol. 42, No. 4 (October 1966), p. 643.

³⁷⁵ See D. P. O'Connell, *State Succession . . .*, vol. II, pp. 283-285; and S. Touval, *loc. cit.*, pp. 645-647.

essentially on ethnic and self-determination considerations and on alleged grounds for impeaching the validity of certain of the relevant treaties. She does not seem to have claimed that, as a successor State, she was *ipso jure* freed from any obligation to respect the boundaries established by treaties concluded by her predecessor State though she did denounce the 1897 Treaty with Ethiopia in response to the latter's unilateral withdrawal of the grazing rights mentioned below. Ethiopia and Kenya, who is herself also a successor State, take the position that the treaties in question are valid and that, being boundary settlements, they must be respected by a successor State. The Somali-Ethiopian dispute regarding the 1897 Treaty calls for more detailed comment. The boundary agreed between Ethiopia and Great Britain in 1897 separated some Somali tribes from their traditional grazing grounds and an exchange of letters annexed to the treaty provided that these tribes, from either side of the boundary, would be free to cross it to their grazing grounds. The 1897 Treaty was reaffirmed in an agreement concluded between the United Kingdom and Ethiopia in 1954, article I of this agreement reaffirming the boundary and article II the grazing rights. Article III then created a "special arrangement" for administering the use of the grazing rights by the Somali tribes. In 1960, shortly before independence, a question had been put to the British Prime Minister in Parliament concerning the continuance of the Somali grazing rights along the Ethiopian frontier to which he replied:

"Following the termination of the responsibilities of H.M. Government for the Government of the Protectorate, and in the absence of any fresh instruments, the provisions of the 1897 Anglo-Ethiopian Treaty should, in our view, be regarded as remaining in force as between Ethiopia and the successor State. On the other hand, Article III of the 1954 Agreement which comprises most of what was additional to the 1897 Treaty, would, in our opinion, lapse."³⁷⁶

The United Kingdom thus was of the view that the provisions concerning both the boundary and the Somali grazing rights would remain in force and that only the "special arrangement", which pre-supposed British administration of the adjoining Somali territory would cease. In this instance, it will be observed, the United Kingdom took the position that ancillary provisions which constituted an integral element in a boundary settlement would continue in force upon a succession of States, while accepting that particular arrangements made by the predecessor State for the carrying out of those provisions would not survive the succession of States. Ethiopia, on the other hand, while upholding the boundary settlement, declined to recognize that the ancillary provisions, though they constituted one of the conditions of that settlement, would remain binding upon her.³⁷⁷

(24) There are a number of other instances in which the United Kingdom has recognized that rights and obligations under a boundary treaty would remain in

force after a succession of States. One is the Convention of 1930 concluded between the United States and Great Britain for the delimitation of the boundary between the Philippine Archipelago and the State of North Borneo. On the Philippines becoming independent in 1946, the British Government in a diplomatic Note acknowledged that as a result "the Government of the Republic of the Philippines has succeeded to the rights and obligations of the United States under the Notes of 1930".³⁷⁸

(25) Another instance is the Treaty of Kabul concluded between Great Britain and Afghanistan in 1921 which, *inter alia*, defined the boundary between the then British Dominion of India and Afghanistan along the so-called Durand Line. On the division of the Dominion into the two States of India and Pakistan and their attainment of independence, the United Kingdom received indications that Afghanistan might question the boundary settlement on the basis of the doctrine of fundamental change of circumstances. The United Kingdom's attitude in response to this possibility, was summarized by it as follows:

The Foreign Office were advised that the splitting of the former India into two States—India and Pakistan—and the withdrawal of British rule from India had not caused the Afghan Treaty to lapse and it was hence still in force. It was nevertheless suggested that an examination of the Treaty might show that some of its provisions, being political in nature or relating to continuous exchange of diplomatic missions, were in the category of those which did not devolve where a State succession took place. *However, any executed clauses such as those providing for the establishment of an international boundary or, rather, what had been done already under executed clauses of the Treaty, could not be affected whatever the position about the treaty itself might be.*³⁷⁹

Here therefore the United Kingdom again distinguishes between provisions establishing a boundary and ancillary provisions of a political character. But it also appears here to have distinguished between the treaty provisions *as such* and the boundary resulting from their execution—a distinction made by a number of jurists. Afghanistan, on the other hand, contests altogether Pakistan's right to invoke the boundary provisions of the 1921 Treaty. She does so on various grounds, such as the alleged "unequal" character of the Treaty itself and the termination of the Treaty by Afghanistan by a notice given under the Treaty in 1953. But she also maintains that Pakistan, as a newly independent State, had a "clean slate" in 1947 and could not claim automatically to be a successor to British rights under the 1921 Treaty.³⁸⁰ In other words, she specifically denies that boundary treaties constitute an exception to the "clean slate" principle when the successor State is a "new" State.

(26) There are a number of other modern instances in which a successor State has become involved in a boundary dispute. But these appear mostly to be instances where either the boundary treaty in question

³⁷⁶ United Nations, *Materials on Succession of States (op. cit.)*, p. 185.

³⁷⁷ D. P. O'Connell, *State Succession . . .*, vol. II, pp. 302-304.

³⁷⁸ See United Nations, *Materials on Succession of States (op. cit.)*, p. 190.

³⁷⁹ *Ibid.*, p. 187.

³⁸⁰ *Ibid.*, pp. 1-5.

left the course of the boundary in doubt or its validity is challenged on one ground or another; and in those instances the succession of States merely provided the opportunity for reopening or raising grounds for revising the boundary which are independent of the law of succession. Such appears to have been the case, for example with the Moroccan-Algeria,³⁸¹ Surinam-Guyana,³⁸² and Venezuela-Guyana³⁸³ boundary disputes and, it is thought, also with the various Chinese claims in respect of Burma, India and Pakistan.³⁸⁴ True, China may have shown a disposition to reject the former "British" treaties as such; but she seems rather to challenge the treaties themselves than to invoke any general concept of a newly independent State's clean slate with respect to the treaties, including boundary treaties.³⁸⁵

(27) The weight of the evidence of State practice and of legal opinion in favour of the view that in principle a boundary settlement is unaffected by the occurrence of a succession of States is strong and powerfully reinforced by the decision of the United Nations Conference on the Law of Treaties to except from the fundamental change of circumstances rule a treaty which establishes a boundary. Consequently, it is thought that the present draft must also except boundary settlements both from the moving treaty-frontier rule and from the clean slate principle contained in article 6. Such an exception would relate exclusively to the effect of the succession of States on the boundary settlement. It would leave untouched any other ground of claiming the revision or setting aside of the boundary settlement, whether self-determination or the invalidity or termination of the treaty. Equally, of course, it would leave untouched any legal ground of defence to such a claim that may exist. In short, the mere occurrence of a succession of States would be considered neither to consecrate the existing boundary if it is open to challenge nor to deprive it of its character as a legally established boundary, if such it was at the date of the succession of States.

(28) If the view expressed in the previous paragraph is endorsed by the Commission, the question still remains as to how any rule to be adopted in regard to boundary treaties should be formulated. The analogous provision in the Vienna Convention appears in article 62 as an exception to the fundamental change of circumstances rule. Moreover, it is so framed as to relate to the treaty rather than to the boundary resulting from the treaty. For the provision reads:

A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty, (a) if the treaty establishes a boundary.

However, in the present draft the question is not the continuance in force or otherwise of a treaty between the

parties; it is what obligations and rights, if any, devolve upon a successor State. Accordingly, it does not necessarily follow that here also the rule should be framed in terms relating to the boundary treaty rather than to the legal situation established by the treaty; and the opinion of jurists, as reflected in the resolution of the International Law Association, tends to favour the latter formulation of the rule. If the rule is regarded as relating to the situation resulting from the dispositive effect of a boundary treaty, then it would not seem properly to be an exception to article 6 of the present draft. It would seem rather to be a general reservation that a succession of States is not to be considered as in itself affecting a boundary settlement established by treaty prior to that succession of States. Such a general reservation was indeed included in the draft articles in the Special Rapporteur's first report in the following form:

Nothing in the present articles shall be understood as affecting the continuance in force of a boundary established by or in conformity with a treaty prior to the occurrence of a succession.³⁸⁶

(29) Arguments can be adduced in favour of either form of provision. On the one hand, it may be said that to detach succession in respect of the boundary from succession in respect of the boundary treaty is somewhat artificial. Very often a boundary in thinly populated territory has not been fully demarcated so that its precise course in a particular area may be brought into question. In that event recourse must be had to the interpretation of the treaty as the basic criterion for ascertaining the boundary, even if other elements, such as occupation and recognition, may also come into play. Moreover, a boundary treaty may contain ancillary provisions which were intended to form a continuing part of the boundary régime created by the treaty and the suppression of which on a succession of States would materially change the boundary settlement established by the treaty. Again, if the validity of the treaty or of a demarcation under the treaty was in dispute prior to the succession of States, it may seem anomalous to separate succession in respect of the boundary from succession in respect of the treaty. On the other hand, it may be argued that a boundary treaty has constitutive effects and establishes a legal and factual situation which thereafter has its own separate existence; and that it is this situation, rather than the treaty, which passes to a successor State. In this connexion, it may also be argued that a boundary treaty may contain provisions unconnected with the boundary settlement itself, and that it is only this settlement which should form an exception to the "clean slate" principle. It may at the same time be urged that some at least of the suggested objections may be overcome if it is recognized that the legal situation constituted by the treaty comprises not only the boundary delimitation but also such ancillary provisions as were intended to form an integral part of the régime of the boundary.

(30) Having regard to the division of opinion on this point, the Special Rapporteur has prepared two alter-

³⁸¹ D. P. O'Connell, *State Succession* . . . , vol. II, pp. 289-291.

³⁸² *Ibid.*, pp. 274-275.

³⁸³ *Yearbook of the International Law Commission, 1970*, vol. II, p. 31, document A/CN.4/224 and Add.1, para. 10 of the commentary to article 5.

³⁸⁴ D. P. O'Connell, *State Succession* . . . , vol. II, pp. 277-282.

³⁸⁵ *Ibid.*

³⁸⁶ *Yearbook of the International Law Commission, 1968*, vol. II, p. 92, document A/CN.4/202, II, article 4.

native texts of article 22 on the question of the effect of a succession of States on boundaries. One is framed in terms of succession in respect of the treaty and the other in terms of succession in respect of the boundary situation. At the same time, for the sake of simplicity, he has thought it advisable to separate the question of boundary treaties from other forms of territorial treaties which, therefore, he has assigned to a separate article—article 22 (*bis*).

(31) *Other territorial treaties.* In the commentary to article 6, attention has been drawn to the assumption which appears to be made by many States, including newly independent States, that certain treaties of a territorial character are an exception to the "clean slate" principle.³⁸⁷ In British practice there are numerous statements evidencing the United Kingdom's belief that customary law recognizes the existence of such an exception to the "clean slate" principle and also to the moving treaty frontier rule. One such is a statement with reference to Finland.³⁸⁸ Another is the reply of the Commonwealth Office to the International Law Association cited in that commentary which runs 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."³⁸⁹

A further statement of a similar kind may be found in *Materials on Succession of States*³⁹⁰ the occasion being discussions with the Cyprus Government regarding article 8 of the treaty concerning the establishment of the Republic of Cyprus.

(32) The French Government appears to take a similar view. Thus, in a note addressed to the German Government in 1935, after speaking of what was in effect, the moving treaty-frontier principle, the French Government continued :

This rule is subject to an important exception in the case of conventions of a strictly non-political character, i.e., those which are not concluded in consideration of the personality of the State but which have territorial and local effect and are based on geographical situation : the successor State, whatever the reasons for its succession, is bound to perform the obligations arising from treaties of this kind in so far as it enjoys the advantages stipulated therein. [Translation by the Secretariat]³⁹¹

³⁸⁷ *Ibid.*, 1970, vol. II, pp. 36-37, document A/CN.4/224 and Add.1, para. 17 of the commentary to article 6.

³⁸⁸ *Ibid.*, p. 32, para. 3 of the commentary.

³⁸⁹ *Ibid.*, p. 36, para. 17 of the commentary.

³⁹⁰ United Nations, *Materials on Succession of States (op. cit.)*, p. 183.

³⁹¹ "Cette règle souffre une exception importante dans le cas de conventions qui n'ont aucun caractère politique, c'est-à-dire qui n'ont pas été conclues en considération de la personne même de l'Etat, mais qui sont d'application territoriale et locale, qui sont fondées sur une situation géographique: l'Etat successeur, quelle que soit la cause pour laquelle il succède, est tenu de remplir les charges qui découlent de traités de cet ordre comme il jouit des avantages qui s'y trouvent stipulés." (See D. P. O'Connell, *State Succession* . . . , vol. II, p. 233).

Canada, again in the context of the moving treaty frontier rule, has also shown that she shares the view that territorial treaties constitute an exception to it. After Newfoundland had become a new province of Canada, the Legal Division of the Department of External Affairs explained the attitude of Canada as follows:

. . . The view of the Government on the question of Newfoundland treaty succession has in the past been that Newfoundland became part of Canada by a form of cession and that consequently, in accordance with the appropriate rules of international law, agreements binding upon Newfoundland prior to union lapsed, *except for those obligations arising from agreements locally connected which had established proprietary or quasi-proprietary rights** . . .³⁹²

Some further light is thrown on the position taken by Canada on this question by the fact that Canada did not recognize air transit rights though Gander airport in Newfoundland granted in pre-union agreements as binding after Newfoundland became part of Canada.³⁹³ On the other hand, Canada did recognize as binding upon her a condition precluding the operation of commercial aircraft from certain bases in Newfoundland leased to the United States before Newfoundland became a part of Canada. Furthermore, she does not seem to have questioned the continuance in force of the fishery rights in Newfoundland waters which were accorded by Great Britain to the United States in the Treaty of Ghent in 1818 and were the subject of the North Atlantic Fisheries Arbitration in 1910, or of the fishery rights first accorded to France in the Treaty of Utrecht and dealt with in a number of further treaties.

(33) An instructive precedent involving the succession of newly independent States is the so-called Belbases Agreements of 1921 and 1951, which concern Tanzania, on the one hand and Zaire, (formerly Congo (Léopoldville)), Rwanda and Burundi, on the other.³⁹⁴ After the First World War the mandates entrusted to Great Britain and Belgium respectively had the effect of cutting off the central African territories administered by Belgium from their natural sea-port, Dar-es-Salaam. Great Britain accordingly entered into an agreement with Belgium in 1921, under which Belgium, at a rent of 1 franc per annum, was granted a lease in perpetuity of port sites at Dar-es-Salaam and Kigoma in Tanganyika. This agreement also provided for certain Customs exemptions at the leased sites and for transit facilities from the territories under Belgian mandate to those sites. In 1951, by which date the mandates had been converted into trusteeships, a further agreement between the two administering powers provided for a change in the site at Dar-es-Salaam but otherwise left the 1921 arrangements in force. The Belgian Government, it should be added, expended considerable sums in developing the port facilities at the leased sites. On the eve of independence, the Tanganyika Government informed the United

³⁹² *Yearbook of the International Law Commission*, 1971, vol. II (Part Two), p. 133, document A/CN.4/243, para. 85.

³⁹³ *Ibid.*, pp. 133-135, paras. 86-100.

³⁹⁴ See D. P. O'Connell, *State Succession* . . . , vol. II, pp. 241-243; and E. E. Seaton and S. T. M. Maliti, *loc. cit.*, paras. 118-121.

Kingdom that it intended to treat both agreements as void and to resume possession of the sites. The British Government replied that it did not subscribe to the view that the agreements were void but that, after independence, the international consequences of Tanganyika's views would not be its concern. It further informed Belgium, the Government of the Congo (Léopoldville), and, through the Belgian Government, the Governments of Rwanda and Burundi, both of Tanganyika's statement and its own reply.³⁹⁵ In the National Assembly Prime Minister Nyerere explained that in Tanganyika's view: "A lease in perpetuity of land in the territory of Tanganyika is not something which is compatible with the sovereignty of Tanganyika when made by an authority whose own rights in Tanganyika were for a limited duration."³⁹⁶ After underlining the limited character of a mandate or trusteeship, he added: "It is clear therefore, that in appearing to bind the territory of Tanganyika for all time, the United Kingdom was trying to do something which it did not have the power to do". When in 1962 Tanganyika gave notice of her request for the evacuation of the sites, Congo (Léopoldville), Rwanda and Burundi, which had all now attained independence, countered by claiming to have succeeded to Belgium's rights under the Agreements. Tanganyika then proposed that new arrangements should be negotiated for the use of the port facilities, to which the other three successor States assented; but it seems that no new arrangement has yet been concluded and that *de facto* the port facilities are being operated as before.³⁹⁷

(34) The point made by Tanganyika as to the limited character of the competence of an administering Power is clearly not one to be lightly dismissed without, however, expressing any opinion on the correctness or otherwise of the positions taken by the various interested States in this case, the Special Rapporteur thinks it sufficient here to stress that Tanganyika herself did not rest her claim to be released from the Belbase Agreements on the "clean slate" principle. On the contrary, by resting her claim specifically on the limited character of an administering Power's competence to bind a mandated or trust territory, she seems by implication to have recognized that the free port base and transit provisions of the Agreements were such as would otherwise have been binding upon a successor State.

(35) In the context, at any rate, of military bases, the relevance of the limited character of an administering Power's competence seems to have been conceded by the United States in connexion with the bases in the West Indies granted to it by the United Kingdom in 1941; and this in relation to the limited competence of a colonial administering Power. In the agreement the bases were expressed to be leased to the United States for 99 years. But on the approach of the West Indies territories to independence the United States took the view that it could not, without exposing itself to criticism, insist

that restrictions imposed upon the territory of the West Indies while it was in a colonial status would continue to bind it after independence.³⁹⁸ The West Indies for its part maintained that "on its independence it should have the right to form its own alliances generally and to determine for itself what military bases should be allowed on its soil and under whose control such bases should come".³⁹⁹ In short, it was accepted on both sides that the future of the bases must be a matter of agreement between the United States and the newly independent West Indies. In the instant case it will be observed that there were two elements: (a) the grant while in a colonial status and (b) the personal and political character of military agreements. An analogous case is the Franco-American Treaty of 1950 granting a military base to the United States in Morocco before the termination of the protectorate. In that case, quite apart from the military character of the agreement, Morocco objected that the agreement had been concluded by the protecting Power without any consultations with the protected State and could not be binding on the latter on its resumption of independence.⁴⁰⁰

(36) Treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties. Among early precedents cited is the right of navigation on the Mississippi granted to Great Britain by France in the Treaty of Paris, 1763 which on the transfer of Louisiana to Spain, the latter acknowledged to remain in force.⁴⁰¹ The provisions concerning the Shatt-el-Arab in the Treaty of Erzerum, concluded in 1847 between Turkey and Persia are also cited. Persia, it is true, disputed the validity of the treaty. But on the point of Iraq's succession to Turkey's right under the treaty no question seems to have been raised.⁴⁰² A modern precedent is Thailand's rights of navigation on the River Mekong, granted by earlier treaties and confirmed in a Franco-Siamese treaty of 1926. In connexion with the arrangements for the independence of Cambodia, Laos and Viet-Nam, it was recognized by these countries and by France that Thailand's navigational rights would remain in force.⁴⁰³

(38) As to water rights, a major modern precedent is the Nile Waters Agreement of 1929 concluded between Great Britain and Egypt which *inter alia* provided:

Save with the previous agreement of the Egyptian Government no irrigation or power works or measures are to be constructed

³⁹⁵ United Nations, *Materials on Succession of States (op. cit.)*, pp. 187-188.

³⁹⁶ E. T. Seaton and S. T. M. Maliti, *loc. cit.*, para. 119.

³⁹⁷ D. P. O'Connell, *State Succession . . .*, vol. II, p. 243.

³⁹⁸ A. J. Esgain, "Military servitudes and the new nations", in W. V. O'Brien, ed., *The New Nations in International Law and Diplomacy (The Yearbook of World Polity, vol. III)* (New York, Praeger, 1965), p. 78.

³⁹⁹ *Ibid.*, p. 79.

⁴⁰⁰ *Ibid.*, pp. 72-76.

⁴⁰¹ D. P. O'Connell, *State Succession . . .*, vol. II, p. 234. Another early precedent cited is the grant of navigation rights to Great Britain by Russia in the Treaty of 1825 relating to the Canadian-Alaska boundary, but it is hardly a very clear precedent (*ibid.*, pp. 235-237).

⁴⁰² *Ibid.*, pp. 247-248.

⁴⁰³ *Ibid.*, pp. 251-252.

or taken on the River Nile or its branches, or on the lakes from which it flows, so far as all these are in the Sudan or in countries under British administration* which would, in such a manner as to entail any prejudice to the interests of Egypt, either reduce the quantity of water arriving in Egypt, or modify the date of its arrival, or lower its level.⁴⁰⁴

The effect of this provision was to accord priority to Egypt's uses of the Nile waters in the measure that they already existed at the date of the agreement. Moreover, at that date not only the Sudan but Tanganyika, Kenya and Uganda, all riparian territories in respect of the Nile river basin, were under British administration. On attaining independence the Sudan, while not challenging Egypt's established rights of user, declined to be bound by the 1929 agreement in regard to future developments in the use of Nile waters.⁴⁰⁵ Tanganyika, on becoming independent, declined to consider herself as in any way bound by the Nile Waters Agreement. She took the view that an agreement that purported to bind Tanganyika for all time to secure the prior consent of the Egyptian Government before it undertook irrigation or power works or other similar measures on Lake Victoria or in its catchment area was incompatible with her status as an independent sovereign State. At the same time, she indicated her willingness to enter into discussions with the other interested Governments for equitable regulation and division of the use of the Nile waters. In reply to Tanganyika's Note the United Arab Republic, for its part, maintained that "pending further agreement, the 1929 Nile Waters Agreement, which has so far regulated the use of the Nile waters, remains valid and applicable." In this instance, again, there is the complication of the treaty's having been concluded by an administering Power, whose competence to bind a dependent territory in respect of territorial obligations is afterwards disputed on the territory's becoming independent.

(38) Analogous complications obscure another modern precedent, Syria's water rights with regard to the River Jordan. On the establishment of the mandates for Palestine and Syria after the First World War, Great Britain and France entered into a series of agreements dealing with the boundary régime between the mandated territories, including the use of the waters of the River Jordan. An agreement of 1923 provided for equal rights of navigation and fishing,⁴⁰⁶ while a further agreement of 1926 stated that

All rights derived from local laws or customs concerning the use of the waters, streams, canals and lakes for the purposes of irrigation or supply of water for the inhabitants shall remain as at present.⁴⁰⁷

These arrangements were confirmed in a subsequent agreement. After independence, Israel embarked on a hydro-electric project which Syria considered incom-

patible with the régime established by the above-mentioned treaties. In debates in the Security Council Syria claimed that she had established rights to waters of the Jordan in virtue of the Franco-British treaties, while Israel denied that she was in any way affected by treaties concluded by the United Kingdom. Israel, indeed, denies that she is either in fact or in law a successor State at all.⁴⁰⁸

(39) Some other examples of bilateral treaties of a territorial character are cited in the writings of jurists, but they do not seem to throw any clearer light on the law governing succession in respect of such treaties.⁴⁰⁹ Mention has, however, to be made of another category of bilateral treaties which are sometimes classified as "dispositive" or "real" treaties. These are treaties which confer specific rights of a private law character on nationals of a particular foreign State; e.g. rights to hold land. The United States, for example, has in the past regarded such treaties as dispositive in character for the purposes of the rules governing the effect of war on treaties.⁴¹⁰ Without entering into the question whether such a categorization of these treaties is valid in that context, the Special Rapporteur doubts whether there is any sufficient evidence that they are to be regarded as treaties of a dispositive or territorial character under the law governing succession of States in respect of treaties. Whatever dispositive effects such treaties may have in international law, they do not seem to have been regarded as territorial treaties for the purposes of succession.

(40) There remain, however, those treaties of a territorial character which were discussed by the Commission in 1964 at its sixteenth session under the broad designation of "treaties providing for objective régimes" in the course of its work on the general law of treaties. The Special Rapporteur's examination of those treaties from the point of view of their effects upon third States may be found in his third report on the law of treaties.⁴¹¹ It is now, however, necessary to consider how they may affect a successor State the position of which, by reason of its special link with the territory that is the subject of the treaty, is somewhat different from that of a third State. Reference has already been made to two of the principal precedents⁴¹² above in discussing the evidence on this question to be found in the proceedings of international tribunals. These are the *Free Zones Case* and the *Aaland Islands question* in both of which the tribunal considered the successor State to be bound by a treaty régime of a territorial character established as part of a "European settlement".

(41) An earlier case involving the same element of a treaty made in the general interest concerned Belgium's position, after her separation from the Netherlands, con-

⁴⁰⁴ United Nations, *Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for other Purposes than Navigation* (United Nations publication, Sales No. 63.V.4), p. 101.

⁴⁰⁵ D. P. O'Connell, *State Succession . . .*, vol. II, pp. 245-246.

⁴⁰⁶ See United Nations, *Legislative Texts and Treaty Provisions . . .* (op. cit.), p. 287.

⁴⁰⁷ *Ibid.*, p. 288.

⁴⁰⁸ D. P. O'Connell, *State Succession . . .*, vol. II, p. 249.

⁴⁰⁹ e.g., certain Finnish frontier arrangements, the demilitarization of Hünigen, the Congo leases, etc. (*ibid.*, pp. 234-262).

⁴¹⁰ See Harvard Law School, *Research in International Law: III. Law of Treaties*. Supplement to *American Journal of International Law* (Washington, D.C.), vol. 29, No. 4, October 1935.

⁴¹¹ *Yearbook of the International Law Commission, 1964*, vol. II, pp. 26-34, document A/CN.4/167 and Add.1-3, commentary to article 63.

⁴¹² See paras. 14-16 above.

cerning the obligations of the latter provided for by the Peace Settlements concluded at the Congress of Vienna with respect to frontier fortresses on the Franco-Netherlands boundary.⁴¹³ The Four Powers (Great Britain, Austria, Prussia and Russia) apparently took the position that they could not "admit that any change with respect to the interests by which these arrangements were regulated, has resulted from the separation of Belgium and Holland; and the King of the Belgians is considered by them as standing with respect to these Fortresses and in relation to the Four Powers, in the same situation, and bound by the same obligations, as the King of the Netherlands previous to the Revolution".⁴¹⁴ Although Belgium questioned whether she could be considered bound by a treaty to which she was a stranger, she seems in a treaty of 1831 to have acknowledged that she was in the same position as the Netherlands with respect to certain of the frontier fortresses. Another such case is article XCII of the Act of the Congress of Vienna,⁴¹⁵ which provided for the neutralization of Chablais and Faucigny, then under the sovereignty of Sardinia. These provisions were connected with the neutralization of Switzerland effected by the Congress and Switzerland had accepted them by a Declaration made in 1815. In 1860, when Sardinia ceded Nice and Savoy to France, both France and Sardinia recognized that the latter could only transfer to France what she herself possessed and that France would take the territory subject to the obligation to respect the neutralization provisions. France, on her side, emphasized that these provisions had formed part of a settlement made by the Powers in the general interests of Europe.⁴¹⁶ The provisions were maintained in force until abrogated by agreement between Switzerland and France after the First World War with the concurrence of the Allied and Associated Powers recorded in article 435 of the Treaty of Versailles.⁴¹⁷ France, it should be mentioned, had herself been a party to the settlements concluded at the Congress of Vienna, so that it could be argued that she was not in the position of a purely successor State. Even so, her obligation to respect the neutralization provisions seems to have been discussed simply on the basis that, as a successor to Sardinia, she could only receive the territory burdened with those provisions.

(42) The concept of international settlements is also invoked in connexion with the régimes of international rivers and canals. Thus, the Berlin Act of 1885 established régimes of free navigation on both the Rivers Congo and Niger; and in the former case the régime was regarded as binding upon Belgium after the Congo had passed to her by cession. In the Treaty of St. Germain-en-Laye of 1919 some only of the signatories of the 1885 Act abrogated it as between themselves, substituting for it a preferential régime; and this came into question before the Permanent Court of International Justice in the *Oscar Chinn* case.

⁴¹³ D. P. O'Connell, *State Succession . . .*, vol. II, pp. 263-264.

⁴¹⁴ *Ibid.*, p. 263.

⁴¹⁵ *British and Foreign State Papers, 1814-1815* (London, Foreign Office, 1839), pp. 45-46.

⁴¹⁶ D. P. O'Connell, *State Succession . . .*, vol. II, p. 239.

⁴¹⁷ *British and Foreign State Papers, 1919*, vol. 112 (London, H. M. Stationery Office, 1922), p. 206.

As pointed out in a textbook, Belgium's succession to the obligations of the 1885 Act appears to have been taken for granted by the Court in that case.⁴¹⁸ The various riparian territories of the two rivers have meanwhile become independent States, giving rise to the problem of their position in relation to the Berlin Act and the Treaty of St. Germain. In regard to the Congo the problem has manifested itself in GATT and also in connexion with association agreements with EEC. Although the States concerned may have varied in the policies which they have adopted concerning the continuance of the previous régime, they seem to have taken the general position that their emergence to independence has caused the Treaty of St. Germain and the General Act of Berlin to lapse. In regard to the Niger, the newly independent riparian States in 1963 replaced the Berlin Act and the Treaty of St. Germain with a new convention. The parties to this convention "abrogated" the previous instruments as between themselves. In the negotiations preceding its conclusion there seems to have been some difference of opinion as to whether abrogation was necessary; but it was on the basis of a fundamental change of circumstances rather than of non-succession that these doubts were expressed.⁴¹⁹

(43) The Act of the Congress of Vienna set up a Commission for the Rhine, the régime of which was further developed in 1868 by the Convention of Mannheim; and although after the First World War the Treaty of Versailles reorganized the Commission, it maintained the régime of the Convention of Mannheim in force. As to cases of succession, it appears that in connexion with membership of the Commission, when changes of sovereignty occurred, the rules of succession were applied, though not perhaps on any specific theory of succession to international régimes or to territorial treaties.

(44) The question of succession of States has also been raised in connexion with the Suez Canal Convention of 1888. Egypt herself fully accepted that, as successor to the Ottoman Empire in the sovereignty of the territory, she was under an obligation to respect the régime established by the Convention and in 1957 expressly reaffirmed that obligation. The Convention created a right of free passage through the Canal and, whether by virtue of the treaty or of the customary régime which developed from it, this right was recognized as attaching to non-signatories as well as signatories. Accordingly, although many new States have hived off from the parties to the Convention, their right to be considered successor States was not of importance in regard to the use of the Canal. In 1956, however, it did come briefly into prominence in connexion with the Suez Canal Users Conference convened in London. Complaint was there made that a number of States, who were not present, ought to have been invited to the Conference; and, *inter alia*, it was said that some of those States had the right to be present in the capacity of successor States of one or other party

⁴¹⁸ D. P. O'Connell, *State Succession . . .*, vol. II, p. 308.

⁴¹⁹ T. O. Elias, "The Berlin Treaty and the River Niger Commission", *American Journal of International Law* (Washington), vol. 57, No. 4 (October 1963), pp. 879-880.

to the Convention.⁴²⁰ The matter was not pushed to any conclusion, and the incident can at most be said to provide an indication in favour of succession in the case of an international settlement of this kind.

(45) Some further precedents of one kind or another might be examined, but it is doubtful whether they would throw any clearer light on the difficult question of territorial treaties. Running through the precedents and the opinions of writers are strong indications of a belief that certain treaties attach a régime to territory which continues to bind it in the hands of any successor States. Not infrequently other elements enter into the picture, such as an allegation of fundamental change of circumstances or the alleged limited competence of the predecessor State, and the successor State in fact claims to be free of the obligation to respect the régime. Nevertheless, the indication of the general acceptance of such a principle remain. At the same time, neither the precedents nor the opinions of writers give clear guidance as to the criteria for determining when this principle operates. The evidence does not, however, suggest that this exception to the

“clean slate” and moving treaty frontier principles, assuming that it is recognized by the Commission, should embrace a very wide range of so-called territorial treaties. On the contrary, this exception seems to be limited to cases where one State by treaty grants, in respect of its territory or a particular part, rights of user or enjoyment, or rights to restrict its own user or enjoyment, which are intended for an indefinite or for a specified period to attach to the territory or particular parts of the territory of another State rather than to the other State as such, or, alternatively, to be for the benefit of a group of States or of States generally. There must, in short, be something in the nature of a territorial settlement.

(46) In any event, the question arises here, as in the case of boundary settlements, whether, if succession seems *ipso jure*, it is succession in respect of the treaty as such or succession in respect of the factual and legal situation—the régime—established by the dispositive effects of the treaty. The evidence would, it is thought, justify either approach; but it seems preferable that whichever approach is adopted by the Commission in regard to boundary settlements should also be adopted in regard to other forms of territorial settlements. Accordingly, the Special Rapporteur has prepared alternative texts also for article 22 (*bis*).

⁴²⁰ United Nations, *Materials on Succession of States (op. cit.)*, pp. 157-158; D. P. O'Connell, *State Succession . . .*, vol. II, pp. 271-272.

DOCUMENT A/CN.4/L.184

**Draft articles on succession in respect of treaties
General article submitted by the Special Rapporteur as a possible means of covering
the question of lawfulness ***

[Original text: English]
[12 June 1972]

ALTERNATIVE A**

The provisions of the present articles shall not prejudice any question that may arise in regard to a situation brought about by means or in a manner incompatible with the Charter of the United Nations.

ALTERNATIVE B

The present articles relate only to the effects of a succession of States involving a situation brought about by means and in a manner compatible with the Charter of the United Nations.

* See *Yearbook of the International Law Commission, 1972*, vol. I, p. 156, 1177th meeting, paras. 23-24.

** Compare article 73 of the Vienna Convention on the Law of Treaties (*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. 289).

SUCCESSION OF STATES

(b) Succession in respect of matters other than treaties

[Agenda item 1 (b)]

DOCUMENT A/CN.4/259

Fifth report on succession in respect of matters other than treaties,
by Mr. Mohammed Bedjaoui, Special Rapporteur

Public property

[Original text: French]
[4 April 1972]

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Introduction

1. The Special Rapporteur devoted his third¹ and fourth reports² to the problem of succession of States to public property. The purpose of the present study is, first, to summarize the contents of those reports in order to facilitate their initial consideration by the International Law Commission at its twenty-fourth session. It also makes certain changes in the fifteen draft articles³ originally proposed to cover the whole topic of public property by means of a uniform approach, irrespective of the type of succession.

¹ *Yearbook of the International Law Commission, 1970*, vol. II, p. 131, document A/CN.4/226.

² *Ibid.*, 1971, vol. II (Part One), p. 157, document A/CN.4/247 and Add.1.

³ *Ibid.*, p. 160 (Part One).

I. Pragmatic presentation of the problem

2. In taking up in his report the topic of succession of States to public property, the Special Rapporteur did not base his approach on theory, but simply tried to state some pragmatic rules drawn from the practice of States. He therefore deliberately refrained from going into *the preliminary question* whether the transfer of public property is in fact part of the international law of State succession.

It might well be argued that since State succession consists of the replacement of one sovereignty over a territory by another, this means that the previous sovereignty automatically loses its material support and that the right of the predecessor State to public property therefore passes *ipso jure* to the successor State. The right to public property would thus be seen as an effect of the coming into existence, or of the existence, of a new subject of international law in the territory concerned, and not as a consequence of State succession *per se*.

3. Viewed in this light, the theory of State succession would not apply to the rights and obligations of the State in relation to public property. Once international law recognizes the validity of the new juridical order, this would entail for the successor State a right to all State-owned public property. More precisely, international law would simply recognize the validity of the new juridical order of the State expressed by and through the municipal legislation under which the automatic transfer of the right to public property takes place.

4. This approach reduces sovereignty to something that would be inconceivable without a set of operational and material attributes such as, for example, the public property which the State uses to meet certain essential requirements of the inhabitants of its territory. However, this approach is open to one rather serious objection. If the successor State automatically acquires public property by the mere fact of its own sovereignty and its own power, how does it come about that property situated outside the territory affected by the change, i.e. outside the successor State's sphere of territorial jurisdiction, may fall within its patrimony?

5. The Special Rapporteur accordingly abstained from any purely theoretical study of this problem and of other problems which may arise from State succession to public property, and confined himself to preparing draft articles in terms as specific as possible. Throughout his work he tried to keep in mind a concern which may be expressed in the form of three questions: (a) What is *public property*? (problems of defining and determining such property); (b) What is *transmissible* public property? (is it all public property, or property of public authorities, or State property alone? Is it all State property or only the property appertaining to sovereignty?); (c) Is the *ownership* of the property transmitted (this is a question of succession to property *stricto sensu*) or is the property merely placed under the control of the new juridical order (this brings in succession to legislation as well)?

II. Summary of the third report

6. With these questions in mind, the Special Rapporteur began for the twenty-second session and continued for the twenty-third session of the Commission a study, presented in the form of draft articles, on State succession to public property. For the twenty-second session he prepared four draft articles with commentaries and observations.⁴

7. Article 1 gave a *definition*, and also suggested methods for the *determination*, of public property. Such property was said to be "public" in character by virtue of its *belonging* to the State, a territorial authority thereof or a public body. The Special Rapporteur's commentaries stressed three points:

(a) That a purely internationalist approach to the notion of public property is impracticable, since there is in international law no autonomous criterion for determining what constitutes public property;

(b) That determination of public property by treaty or by the decisions of international tribunals has its limits and does not solve all problems; and

(c) That whatever the circumstances, recourse to municipal law for such determination seems inevitable, the essential question being which legislation—that of the predecessor State, that of the successor State or that of the territory affected by the change of sovereignty—should be applied for that purpose.

8. The Special Rapporteur, finding practice and judicial decisions somewhat contradictory, proposed that the determination of what constituted public property should be made by reference to the municipal law which governed the territory concerned, "save in the event of serious conflict with the public policy of the successor State". He explained his reasons for this, in paragraphs 9 to 13 of the commentaries on article 1 in his report to the twenty-second session. However, it stands to reason that, as soon as the municipal law of the predecessor State or of the territory affected by the change of sovereignty has performed its function of determining what constitutes public property, it gives way to the juridical order of the successor State. Once the property has been classified for purposes of transfer, the successor State resumes its sovereign power to change the legal status of the property devolving to it, if it so desires.

In the drafting of article 1, however, the Special Rapporteur left the problem open to discussion by proposing provisionally a solution making it possible to waive the application of the law of the predecessor State in favour of the legislation of the successor State if there would otherwise be a risk of serious conflict with public policy.

9. Be that as it may, the Special Rapporteur's only ambition in the draft definition was to define *public property*, whether it belongs to the State, to a territorial authority or to a public body. A further problem was whether all this public property was *transferable* to the successor State. This, indeed was the whole problem to be settled by the succeeding draft articles. Thus the definition and determination of public property were to open the way to the distinction between the actual transmittal of State property and the mere placing of public property under the control of the juridical order of the successor State.⁵

10. Bearing in mind that neither the writers nor judicial decisions have exhausted discussion on the question whether property in the *private domain* of the State is transferable *ipso jure* on the same grounds as property in its *public domain*, the Special Rapporteur sought to avoid this distinction⁶—which, indeed, is unknown to

⁴ *Ibid.*, 1971, vol. II (Part One), pp. 174-175, document A/CN.4/247 and Add.1, paras. 2-5 of the commentary to article 5.

⁵ The Sixth Committee, in its report to the General Assembly at its twenty-sixth session, states that some representatives, "recalling the principle *nemo plus juris transferre potest quam ipse habet*", expressed disagreement "with the attempt made by the Special Rapporteur to divide State property into the private domain and the public domain". (*Official Records of the General Assembly, Twenty-sixth Session, Annexes*, agenda item 88, document A/8537, para. 136). An error must have occurred, for it is clear, on the contrary, that the Special Rapporteur made every effort to avoid this distinction, which is not universal.

⁴ *Ibid.*, 1970, vol. II, p. 133, document A/CN.4/226.

some national systems of law—and proposed for discussion by the Commission, a draft article 2 under which the general principle of immediate transmittal without compensation can apply only to *property appertaining to sovereignty*. By that expression, the Special Rapporteur meant property which, in accordance with the legislation of the predecessor State, helps to serve the general interest and through which the State expresses its sovereignty over the territory. The composition of such property varies from State to State and from one political system to another. That is inevitable. All property which closely follows the legal destiny of the territory and which is necessary to public activity or to the expression of the State's sovereignty is transmissible. It is, as the French Minister for War put it in a memorial to the Conseil d'Etat "an inseparable attribute of sovereignty, which moves with it, no special stipulation being required in order to transfer the attendant benefit and responsibility".⁷

11. In this article the Special Rapporteur brought out the difference between State property appertaining to sovereignty, which is transmissible, and property of the territory ceded, which remains in that territory's patrimony. It is obvious that the latter property should not devolve to the successor State and that it remains the territory's property, except, of course, where the predecessor State is absorbed in its entirety, 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 being co-extensive with the former territory. It is no less evident, however, that this does not amount to maintenance of the *status quo ante*. The Special Rapporteur explained that public property owned by the ceded territory continues to belong to it, but must of course follow the legal and political destiny of the territory which passes under another sovereignty. It will therefore be governed henceforth by the legislation of the successor State. In brief, it is not affected by the change of sovereignty so far as ownership is concerned, but passes within the juridical order of the successor State.

12. Another draft article [article 7] dealt with the fate of archives, works of art, museums and public libraries. The Special Rapporteur noted that this matter had been regulated by treaty—at any rate in cases of what may be called traditional succession—in quite considerable detail. In his opinion, the principle of the transmittal of archives to the successor State had been accepted, irrespective of the nature of the items concerned. The link between archives and territory was not overlooked, since the proposed text stated the principle that the handing over applies to archives *relating directly or belonging to the territory*.

The Special Rapporteur held that practice authorizes the transmittal to the successor State of archives situated outside the territory because they have been either removed thither or established there. However, this does not occur without a *quid pro quo* and the imposition of responsibilities

on the successor State: in particular, the obligation to supply the predecessor State and any third State concerned with copies of these items, save where they affect the security or sovereignty of their new owner.

13. The distribution of public documents among more than one successor State raises more complex but, in view of the advances made in methods of reproduction, by no means insoluble problems. In so far as the archives are divisible, each of the successor States receives such part of the archives as is situated in the territory over which it henceforth exercises its sovereignty. If the central archives are indivisible they are placed in the charge of the State which they concern most directly, and that State is then responsible for making copies of them for the other States.

The Special Rapporteur also described the practice followed with regard to the transmittal of archives and libraries free of cost and with regard to time-limits for handing over the archives.

14. A fourth article [article 8] dealt with the fate of public property of the ceded territory which is situated outside it. Subject to the application of the rules relating to recognition, such public property passes not into the patrimony, but within the juridical order, of the successor State. The actual ownership of this property devolves to the successor State only in cases of total absorption or of decolonization: i.e. where the territory affected by the change of sovereignty no longer possesses a separate personality or legal status (absorption) or has acquired a new one (decolonization).

The Special Rapporteur considered separately the case of property of a ceded territory situated in a predecessor State which has not ceased to exist, and the case of property situated in a third State.

III. Summary of the fourth report

15. In his fourth report,⁸ for the Commission's twenty-third session, the Special Rapporteur supplemented the four articles already mentioned with further provisions, beginning with the articles listed in his third report for formulation later. These relate to:

(a) *Intangible property and rights* (currency and the privilege of issue, Treasury and public funds, public debt-claims and rights in respect of the authority to grant concessions);

(b) *Property of the State in public enterprises or public corporations* (property of enterprises; provincial and municipal property);

(c) *Property of foundations*.

16. Article 7 dealt with currency and the privilege of issue. The complex technical problem of currency concerns both succession to *public property* and succession to *public debts*. In theory, paper money constitutes a debt owed by the institution of issue to the bearer of the fiduciary currency.

⁷ France, Conseil d'Etat, 28 April 1876, *Ministre de la guerre c. Hallet et Cie, Recueil des arrêts du Conseil d'Etat* (Paris, Marchal, Billard, 1876), 2nd series, vol. 46, p. 398, foot-note.

⁸ *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 157, document A/CN.4/247 and Add.1.

The predecessor State loses its privilege of issue in the territory transmitted, and the successor State exercises its own privilege of issue. The proposed article specifies that this privilege *shall belong* to the new sovereign, signifying that it is not inherited.⁹

Monetary tokens of all kinds proper to the territory transmitted (where there was previously monetary autonomy, as in the case of former colonies) pass into the control of the successor State.

Cases of dismemberment and cases where there is more than one successor State were also contemplated, in a separate paragraph of the draft article. At that stage of his study of the question, however, the Special Rapporteur did not consider it possible to propose a general rule for the apportionment of currency that would take into account all the quantitative factors involved (the numerical size of the various populations, the level of wealth of the territory, its past contribution to the formation of central monetary reserves, the proportion of paper money in circulation in the territory, and so on).

17. In draft article 8 the Special Rapporteur dealt with the problems of the *Treasury and public funds*. Where public funds are the property of the territory transferred¹⁰ they pass under the control of the new juridical order.

So far as the remainder—i.e. the State Treasury—is concerned, the successor State, upon closure of the public accounts, receives the assets and assumes responsibility for cost relating thereto and for budgetary and Treasury deficits. It also assumes the liabilities, on such terms and in accordance with such rules as apply to succession to the public debt, which will be examined at a later stage.

The Special Rapporteur pointed out in his report that the proposed article does not contain a specific provision for cases where more than one successor State is involved.¹¹ Practice shows that, in such cases, the public funds are divided *equitably*; but a careful scrutiny of such practice reveals the extreme technical complexity and variety of the arrangements that have been adopted. In the Special Rapporteur's view, this made it impossible, at that stage, to go any further towards laying down a comprehensive and detailed rule.

18. The question of *public debt-claims*, with which the Special Rapporteur dealt in draft article 9, was presented first of all in terms of a distinction between *State debt-claims* and *territorial debt-claims*. The Special Rapporteur drew attention to the difficulty of formulating a uniform general rule on the subject of public debt-claims which would apply to all types of succession.

Leaving aside the eminently clear case of total absorption, in which the predecessor State ceases to exist and its successor may properly take over all its debt-claims as well its rights, the Special Rapporteur felt able to affirm that claims properly belonging to the territory transmitted, in respect of which the debtor, (on the title

or pledge, if any) may be situated either within or outside the territory, remain in the patrimony of that territory irrespective of the type of succession and are not affected by the change of sovereignty. If there is any change in the beneficiary or in the status of the claims, it occurs not as a result of State succession but by the will of the new State, acting not as successor but as the new sovereign in the territory.

Where State debt-claims, irrespective of their motive, are *receivable* by the predecessor State by virtue of its activity or its sovereignty in the territory transmitted, the successor State becomes the beneficiary. The Special Rapporteur stressed in his commentary the magnitude and variety of such claims, which include tax debt-claims.¹²

Cases where there is more than one successor State are always complex and are usually resolved by specific agreements dealing in detail, often through expert commissions, with the technical and financial problems involved.

19. In draft article 10, the Special Rapporteur dealt with *rights in respect of the authority to grant concessions*. The successor State is subrogated to the property rights which belonged to the predecessor State in its capacity as the conceding authority in respect of natural resources in the territory transmitted, and generally in respect of all public property covered by concessions.

This provision expresses the concern, approved by the United Nations, to secure recognition for the right of nations to their natural resources. It implies the extinction, as soon as the transfer of territory has taken place, of the competence and prerogatives of the former conceding authority and their replacement by the prerogatives of the new conceding authority, henceforth embodied in the successor State.

Draft article 10 does not approach the problem from the standpoint of *mineral rights* held by private individuals or companies, but is concerned rather with the rights exercised by the conceding authority.

20. The purpose of the four paragraphs of draft article 11 is to determine the treatment of State property in public enterprises, establishments and corporations.

Here again a distinction was drawn between the property of the predecessor State (in its enterprises, establishments and so forth) and property which belongs to the territory transmitted. The former pass to the successor State, which is subrogated to the rights, and also to the costs and obligations, pertaining thereto; the latter is not affected by the fact of the change of sovereignty.

Where the property of enterprises or establishments belonging to the territory or to the State is situated in parts of the territory falling within the jurisdiction of different sovereigns, the Special Rapporteur proposed that it should be apportioned equitably between the said parts, due regard being had to the viability of the parts and to the geographical location and origin of the property, and subject, where necessary, to equalization payments and offset.

⁹ *Ibid.*, p. 180, para. 4 of the commentary to article 7. (Italics supplied by the Special Rapporteur.)

¹⁰ *Ibid.*, p. 183, para. 1 of the commentary to article 8.

¹¹ *Ibid.*, p. 184, para. 3 of the commentary to article 8.

¹² *Ibid.*, pp. 187-190, paras. 8-14 and 15-23 of the commentary to article 9.

21. *Provincial and municipal property* form the subject of draft article 12, which consists of the following four proposals:

(a) The change of sovereignty should, as a rule, leave intact the patrimonial property rights and interests of the provinces and municipalities transferred. Strictly speaking, this is not a question of State succession, but it becomes one by virtue of the fact that the property, rights and interests in question are henceforth to be governed by the juridical order of the successor State in the same way as the communities which own them;

(b) Where the change of sovereignty has the effect of dividing a province or a municipality by attaching its several parts to two or more successor States, the property, rights and interests of the former territorial authority are to be apportioned equitably between the new territorial authorities according to criteria of viability, with due regard to the geographical location and origin of the property, and subject, where necessary, to equalization payments and offset;

(c) The successor State is subrogated to the rights and obligations of its predecessor in respect of the latter's share in the property rights and interests of provinces and municipalities;

(d) Where there are two or more successor States, the said share of the predecessor State is to be apportioned equitably between them in accordance with criteria of equity, viability, and so on.

22. Draft article 13 dealt with the treatment of religious, charitable or cultural foundations, whose legal status is not affected by the territorial change unless it seriously conflicts with public policy in the successor State.

IV. Preliminary provisions included in the fourth report

23. After completing the first draft of the above-mentioned articles, the Special Rapporteur deemed it useful to precede them by various *preliminary provisions* which appear in his fourth report. He drew up four such provisions.

Article 1 raises the preliminary problem of the treatment of property in the event of *irregular acquisition of territory*.

In article 2 the Special Rapporteur attempted to state a rule on the *transfer of territory and of public property as they exist*, firstly by placing the successor State under a duty to assume the responsibilities and obligations corresponding to its rights of succession to public property and secondly by placing on the predecessor State the obligation to maintain the public property in good faith until the date of actual transmittal, the whole being determined in accordance with the municipal law applied in the transmitted territory up to that time.

Article 3 is concerned with the *date of transfer of property*, which in practice is not always the same as the date of transfer of the territory itself.

Article 4 deals with the *limitations by treaty* on the general principle of the transfer of State-owned public property.

24. These draft rules presented as preliminary provisions are not, of course, concerned solely with the succession of States in respect of matters other than treaties or, *a fortiori*, solely with succession to public property. The Special Rapporteur made a point of emphasizing this, particularly in his fourth report.¹³ He accordingly submitted the draft rules with that reservation, since they are provisions common to several aspects of State succession, some of which fall within the competence of other special rapporteurs.

It is for the Commission to decide whether, in the last analysis, it seems wiser to plan to examine these and perhaps other articles at a later stage of its work, when sufficient progress has been made in exploring the various aspects of State succession.

25. The same observations could be made with regard, in particular, to the preliminary provision on the problem of irregular acquisition of territory, with the difference that, while deferred examination would be appropriate from the methodological standpoint, logically this provision nevertheless represents a problem preliminary to all or any succession. It is true that, in the study of State succession as in any other study, it is necessary to take a number of rules for granted, and to assume that certain conditions in other sectors of general international law are satisfied, from the outset. The Special Rapporteur nevertheless thought it appropriate that a provision in the form of an exception of "non-succession" in case of irregular transfers of territory should be included in that preliminary setting, even if the consideration of that provision had to be postponed or the drafting modified to take account of subsequent work.

26. A similar problem arose, for example, in connexion with the law of treaties when the Special Rapporteur on that subject, wishing to study the effect of the law of war on the law of treaties, thought of devoting a provision to the effect of hostilities on a treaty. It is true that he had to abandon that idea.

V. Proposed partial modifications of the third and fourth reports

27. The Special Rapporteur does not propose to adduce additional arguments, based on recent political events, in favour of retaining the draft article which states that "succession" cannot occur where there has been an irregular acquisition of territory. Recalling his previous reference to the Manchukuo case¹⁴ as one example to be found among others, provided by history, the Special Rapporteur cannot resist the temptation to stress the exceptional merit and realism of a recent statement by the Japanese Minister for Foreign Affairs, Mr. Takeo Fukuda. Speaking before a commission of the Diet on 29 February 1972, the Minister expressed the view that Japan should candidly acknowledge the mistakes made in the past and offer its apologies to China, in particular with regard to

¹³ *Ibid.*, p. 161, para. 3; p. 167, para. 2 of the commentary to article 2; and p. 170, para. 1 of the commentary to article 3.

¹⁴ *Ibid.*, p. 163, paras. 8 and 9 of the commentary to article 1.

the occupation of Manchuria. "Such an acknowledgement of the facts", Mr. Fukuda said, "should make it possible to prepare the way for normalization. We should present our self-criticism and our apologies to China".¹⁵ However, the Special Rapporteur does not intend to submit draft article 1 to the Commission as it stands.

28. He proposes that the article in question should be replaced by a more indirect formulation which could be fitted into the text at an appropriate place, for example in place of the present article 1 or as a new paragraph at the end for article 2, and could be considered at the Commission's convenience.

Such a formulation might read as follows:

The conditions for succession of States shall include respect for general international law and the provisions of the United Nations Charter concerning the territorial integrity of States and the right of peoples to self-determination.

29. With regard to the *definition of public property*, the Special Rapporteur has proposed a definition and a method for the determination of such property.¹⁶ As the commentary indicates, the problems which arise in that connexion centre on three points: the definition of public property, the determination thereof and its transferability.

30. Having reflected further on article 5 and the variant 5 *bis*, which deal with the definition of public property, the Special Rapporteur would suggest that the Commission retain only the variant, since despite the wide sphere of application of article 5, the proposed definition does not cover all forms of public property. The Special Rapporteur fears article 5 does not cover certain categories of property which are indisputably public, such as those connected with the concept of "socialist property". Thus, for example, *property of a worker-managed enterprise* cannot be covered by the proposed article 5 for it inherently belongs neither to the State nor to a "territorial authority" or "public body" thereof.

31. The problem of the law to be used as a point of reference for the purpose of determining what constitutes public property has been the subject of lengthy commentary which the Special Rapporteur does not propose to recapitulate. Examination of the many precedents shows clearly that the law of the predecessor State is not always taken into consideration. The successor State itself has often defined, in exercise of its sovereign powers, the public property which it considers should be included in its patrimony. Accordingly, the reference to the law of the predecessor State in the proposed variant (article 5 *bis*), which is not consistent in every respect with the very diversified practice in this sphere, should be modified in order to conform more closely to reality.

32. The Special Rapporteur therefore proposes the following reformulations:

¹⁵ R. Guillain, "Faisant son autocritique, le Japon se déclare prêt à reconnaître la Chine populaire", *Le Monde*, 1 March 1972, p. 1.

¹⁶ *Yearbook of the International Law Commission*, 1970, vol. II, pp. 133-143, document A/CN.4/226, article 1 and commentary; and *ibid.*, 1971, vol. II (Part One) p. 174, document A/CN.4/247 and Add.1, article 5 and 5 *bis* and commentary.

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 transferred by that State or which are necessary for the exercise of sovereignty by the successor State in the said territory.

33. This text, while allowing some scope for the application of the municipal law of the successor State in the determination of public property, omits the inherently ambiguous and dangerous reference to the "public policy of the successor State", contained in paragraph 2 of the original draft article 5.

34. It should be remembered that the succession of States involves a transfer of property, which passes from the ownership of one State to that of another. Hence, the problem of the *transferability of property to a State* is to be distinguished from the problem of transferability to authorities or groups other than the State. The latter aspect should not fall within the scope of State succession *stricto sensu*. However, it cannot be left completely out of consideration for two reasons. The first is that property which does not pass into the patrimony of the successor State does at least pass within its "juridical order" or its domestic sphere of competence. The second is that the transfer does not always occur between public bodies and their counterparts, but brings into play treaty or other procedures and rules which usually involve two subjects of international law.

35. Accordingly, the dual problem of transferability of State property, on the one hand, and the amenability to jurisdiction of other public property in relation to the juridical order of the successor State, on the other hand, should be covered by a special provision which might read:

1. All other conditions being fulfilled, public or private property of the predecessor State shall pass within the patrimony of the successor State.

2. All other conditions being fulfilled, the property of authorities or bodies other than States shall pass within the juridical order of the successor State.

36. The purpose of the foregoing provision is to clarify the issue even if it is agreed that the situation referred to in the second paragraph falls exclusively within the competence of the internal public law of each State.

37. The general principle of the transfer of all public property belonging to the State was the subject of an article entitled "Property appertaining to sovereignty", which read as follows in the third and fourth reports:

1. Property appertaining to sovereignty over the territory shall devolve, automatically and without compensation, to the successor State.

2. Property of the territory itself shall pass within the juridical order of the successor State.

38. Having reconsidered the above draft article, the Special Rapporteur is afraid that in its present form it may pose a problem which he submits for the Commission's consideration. Contrary to the intention of the Special Rapporteur, paragraph 1 may give the impression that the sovereignty of the successor State would in some way be a continuation of that of the predecessor State,

an interpretation which would have very important consequences for public debts and liabilities in general, for the validity of treaties, acquired rights, and so forth. The Special Rapporteur has expressed his views on these matters elsewhere.¹⁷ To this problem is added another very real one, namely that no hard-and-fast criterion exists for the determination of "property appertaining to sovereignty".

39. The Special Rapporteur therefore proposes that reference should be made to the property "necessary" for "the exercise" of sovereignty rather than to property appertaining to sovereignty. The paragraph would thus read:

1. Property necessary for the exercise of sovereignty over the territory shall devolve, automatically and without compensation, to the successor State.

40. Such a formulation no doubt leaves unsolved the problem raised by the paragraph under study, to wit: (a) What property is necessary for the exercise of sovereignty and (b) what authority has the power to determine such property? There is no precise answer to such questions in contemporary international law. Inevitably, recourse must be had to internal public law inasmuch as it would be difficult to avoid in all cases and at all times applying the public law of the successor State.

Indeed, it was for that reason that the proposed paragraph has been drafted in neutral language. There is no indication as to which State, the predecessor or the successor, would be used as a point of reference for the determination of the "property necessary for the exercise of sovereignty" over the territory.

41. It could be argued that the juridical order of the predecessor State should automatically be used to determine the property necessary for the exercise of sovereignty. If the successor State were to have a broader concept of the exercise of sovereignty, which required that property formerly regarded as unnecessary or non-determinant for this purpose should pass within its patrimony, logic would at least appear to require that the predecessor State should not be made to pay the price for the establishment of a different political and ideological régime or a different institutional model. The successor State should pay that price in order to express its *Weltanschauung*—its own "world view" and to assume ownership, in this instance with the payment of compensation or otherwise, of property other than that which was used for the exercise or the expression of the sovereignty of the predecessor State over the transferred territory.

42. There may be some doubts as to whether article 6, paragraph 2, should be retained in its present form. That paragraph was designed to meet the need for a form of wording which could cover all cases of succession. The *transferred territory* may be that of a State merging with others; a piece of frontier territory separated from a State and surrounded by another; an adjacent region made up of several municipalities; an overseas province

or a former colony which has achieved independence; part of a dismembered State, the pieces of which have been divided among various other States, and so forth.

The territory transferred or affected by the change of sovereignty may have within it State public property which passes to the successor and also other public property: municipal property, in particular (but not exclusively) where the transferred territory consists of one or several municipalities; provincial property; property of public services or establishments; property of bodies falling within the jurisdiction of various authorities. An overseas colony or province may have possessed its own property in its capacity as a legal person under internal public law. The Special Rapporteur had all those situations in mind when he used the term "property of the territory itself" even though in cases involving the *creation of a State* (by decolonization, secession, dismemberment, partition or division, or otherwise) such "property of the territory itself" changes its status as a result of the supervening change and becomes *State* property belonging to the newly-created subject of international law.

43. In fact, this "property of the territory itself" in any event undergoes a change with regard to its legal status. Only a part of this phenomenon is covered by international law relating to succession, the remainder being covered by the internal public law of the successor State. The most that can be said in a formulation which aims at covering all situations is that this property falls within the "legal jurisdiction" or the domestic sphere of legal competence of the new State, which can or should mean either that it becomes the property of the transferred territory itself or that it becomes State property. In the latter case the property becomes State property either by the elevation of the territory to the status of a State or by virtue of a change in the status of such property at the national level as a result of the express will of the new sovereign. This case shows clearly the extent to which the summary formulation of a rule is liable to cover situations which sometimes appertain to international law and sometimes to municipal law according to the type of succession involved (succession by creation of a State or otherwise).

44. Do the foregoing considerations justify the deletion of the proposed article 6, paragraph 2? One of two situations must obtain after the change in sovereignty: the property either continues to belong to the territory itself (it is not radically affected by the change which has taken place and the case would therefore not fall within the scope of State succession), or it becomes State property (this would result either from the creation of a State or from an internal decision taken by the successor State subsequent to the change of sovereignty; this case, too, would be outside the scope of State succession, since in the former case the event occurs just prior to, and in the latter case just after, the change of sovereignty).

45. Above all, the purpose of paragraph 2 is to stress the fact that *the property in question cannot under any circumstances remain in the hands of the predecessor State*. Therein lies the sole value of paragraph 2. The Special Rapporteur cannot say whether that is sufficient to justify the retention of the paragraph. That is for the Commission to say.

¹⁷ *Ibid.*, 1969, vol. II, pp. 77-78, document A/CN.4/216/Rev.1, paras. 29-34.

VI. Addition to the commentaries contained in the third report

46. As regards article 14, which deals with public archives and libraries, the Commission is requested to refer to the commentaries contained in the third report.¹⁸ In that connexion the Special Rapporteur would offer the following additional information:

Article 245 of the Treaty of Versailles laid upon Germany the obligation to restore to France the "trophies, archives, historical souvenirs or works of art . . . [and the] political papers" taken from a *château* belonging to the French Minister of State. Similarly, article 246 of the Treaty called upon Germany to restore to the King of the Hedjaz the "original Koran of the Caliph Othman, which was removed from Medina by the Turkish authorities and is stated to have been presented to the ex-Emperor William II".¹⁹

On the basis of article 247, Belgium obtained for the University of Louvain, "manuscripts, incunabula, printed books, maps and objects of collection corresponding in number and value to those destroyed in the burning by Germany of the Library of Louvain".²⁰ This is a case of compensation and not of restitution.

47. On the question of the basis for the obligation to return public archives, one writer²¹ has stated:

Everything which is part of the public domain in the annexed country must also become property of the public domain in the annexing State. This property is by nature imprescriptible, inalienable and intended to be used in the public interest. In France, as in most States, public archives are part of the public domain of the State, of its administrative divisions, of municipalities or of public establishments, of which they are the property. It therefore follows that the annexation of a State entails the handing over of archives . . .²²

Later he goes on to say:

Since the handing over of public archives of ceded territories is an obligatory consequence of annexation, it is not surprising that in a large number of treaties of annexation *the clause con-*

*cerning this obligation does not appear. It is understood: it results from the renunciation by the State ceding the territory of all its rights and titles thereto.** The meaning attached to these two words is *title* to occupy, to hold the country and exercise ownership over it and the *right* to administer it freely. As a corollary they impose on the dismembered State a dual obligation to leave the property in the public domain existing within the ceded territory to the new occupant and to *deliver to the latter all elements necessary or useful for the administration of the said territory.*

* Article 1 of the Treaty of Frankfurt.²³

Disregarding everything that is outmoded in the terminology used by the author and in his justification of annexation, we would simply retain the customary principle that all public archives should be handed over as instruments of "administration" in the broadest sense of the term, irrespective of whether there is a general agreement and whether that agreement contains a special clause regulating this matter.

48. The handing over of public archives to the successor State is of course possible only to the extent that the State is incontestably the successor. In the event of unjustified annexation or military occupation of the territory, international law protects public archives in particular as it protects all cultural property in general and in a still broader perspective all the property of the annexed State.²⁴

49. The Special Rapporteur is obliged to his colleague in the International Law Commission, Professor Tammes, for providing new information concerning archives claimed by Iceland from Denmark. It will be recalled²⁵ that these archives and parchments had been collected in Denmark by an Icelander who was Professor of History at the University of Copenhagen. Despite the fact that they were private property, duly bequeathed to an educational institution in Denmark, and did not relate to the history of the public authorities in Iceland, the principle of restitution had been recognized by Denmark in respect of these archives.

Among the 1,600 fragments and sheets which constitute the so-called Magnusson collection was a two-volume manuscript (the Flatey Book) written in the 14th century by two monks on the Island of Flatey, an integral part of Iceland, which traces the history of the kingdoms of Norway. The agreement reached ended a long and bitter controversy between the Danes and the Icelanders, who both felt strongly about this collection which is of the

¹⁸ *Ibid.*, 1970, vol. II, pp. 152-161, document A/CN.4/226, commentary to article 7 [which became article 14 in the fourth report].

¹⁹ The same article provided (not on the subject of archives but in regard to historic objects that "Within the same period Germany will hand over to His Britannic Majesty's Government the skull of the Sultan Mkwawa which was removed from the Protectorate of German East Africa and taken to Germany". (See E. Parkes, J. E. Field and R. C. Thompson, eds, *British and Foreign State Papers 1919*, vol. 112 (London, H. M. Stationery Office, 1922), pp. 121 *et seq.*)

²⁰ Under the same article Belgium also received the leaves of the triptych of the Mystic Lamb painted by the Van Eyck brothers (which at that time were in the Berlin Museum) as well as the leaves of the polyptych of the Last Supper painted by Dierick Bouts. Concerning the triptych of St. Ildefonse, painted by Rubens, and the Treasure of the Order of the Golden Fleece, see article 195 of the Treaty of St. Germain-en-Laye (*ibid.*, p. 400; see also the fourth report of the Special Rapporteur) (*Yearbook of the International Law Commission, 1971*, vol. II (Part One), pp. 175-178), document A/CN.4/247 and Add.1, para. 10 of the commentary to article 5 and para. 3 of the commentary to article 6).

²¹ L. Jacob, *La clause de livraison des archives publiques dans les traités d'annexion* (Paris, Giard et Brière, 1915) (Thesis).

²² *Ibid.*, pp. 14-15.

²³ *Ibid.*, p. 17 (Italics supplied by the Special Rapporteur).

²⁴ See UNESCO's work on the protection of cultural property in the event of armed conflict and the two volumes published by UNESCO entitled *Information on the Implementation of The Convention for the Protection of Cultural Property in Case of Armed Conflict, The Hague 1954* (Paris, 1967 and 1970) (SHC/MD/1 and SHC/MD/6). Concerning the documents, manuscripts and treasures in the Monastery of St. Catherine, Mount Sinai, which is currently occupied by Israeli troops, see UNESCO document 84/EX/8; concerning other cultural property in the Middle East, see addenda 1-7 to that document.

²⁵ See *Yearbook of the International Law Commission, 1970*, vol. II, p. 156, document A/CN.4/226, para. 22 of the commentary to article 7.

greatest cultural and historical value to them. On 21 April 1971 the Danish authorities returned the Flatey Book and other documents; over the next twenty-five years the entire collection of documents will join the collection of Icelandic manuscripts at the Reykjavik Institute. At the time of the official handing-over ceremony, when the

the first documents left the Royal Library at Copenhagen, the Library flew the flag at half-mast.²⁶

²⁶ See A. E. Pederson, "Scandinavian sagas sail back to Iceland", *International Herald Tribune*, 23 April 1971, p. 16.

STATE RESPONSIBILITY

[Agenda item 2]

DOCUMENT A/CN.4/264 AND ADD.1

Fourth report on State responsibility, by
Mr. Roberto Ago, Special Rapporteur

*The internationally wrongful act of the State, source of international responsibility (continued) **

[Original text: French]
[30 June 1972 and 9 April 1973]

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ABBREVIATIONS

I.C.J.	International Court of Justice
<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
P.C.I.J.	Permanent Court of International Justice
P.C.I.J., Series C	<i>P.C.I.J., Pleadings, Oral Statements and Documents</i>

* This report is the continuation of the third report on State responsibility submitted by the Special Rapporteur at the Commission's twenty-third session (*Yearbook of the International Law Commission, 1971, vol. II (Part One), p. 199, document A/CN.4/246 and Add.1-3*).

CHAPTER II

The "Act of the State" according to international law (*continued*)¹

7. ORGANS WHICH HAVE ACTED OUTSIDE THEIR COMPETENCE OR CONTRARY TO THE PROVISIONS CONCERNING THEIR ACTIVITY

1. Sections 2 to 6 of this chapter were devoted to performing the first task with a view to determining which are the "acts of the State" in international law: the establishment of the categories of persons or groups of persons whose conduct is attributable to the State as a subject of international law and hence constitutes, if the other conditions are present, the source of international responsibility of that State. An analysis of international judicial decisions, State practice and the works of the most important writers enabled us to determine the *fundamental category* in this respect, namely that of persons or groups of persons who, according to the internal legal order of a State, possess the status of organs of that State and are acting in that capacity in the case in question. We have also seen that for the purposes of determining whether the conduct of an organ of the State is an act of the State in international law, the position of that organ in the distribution of powers and in the internal hierarchy is irrelevant. Lastly, and by virtue of the same analysis, we have seen that to this as it were, "central" category, certain *additional categories* of persons (or groups of persons) must be added: (a) persons who have, under the internal legal order of the State, the character of organs of "public" institutions, though separate from the State, and who act in that capacity in the case at issue; (b) persons who, under the internal legal order of the State, do not formally possess the character of organs of the State or of a public institution separate from the State, but in fact perform public functions or in fact act on behalf of the State; and (c) persons who have the legal character of organs under the legal order of a State or of an international organization, and who have been placed at the disposal of another State provided that such persons are actually under the authority of the latter State and act in accordance with its instructions.

2. Once it has been established that the conduct of the persons or groups of persons belonging to the various categories mentioned above can be attributed to the State as a subject of international law, a new step has to be taken. As was indicated in the introduction to the third report,² the problem that arises is to determine which of the various possible types of conduct by the persons or groups in question should specifically be considered as acts of the State from the standpoint of international law. In this connexion we have already explained³ that the conduct of a person who is an organ

of the State or of another public institution obviously cannot be attributed to the State unless the person concerned was acting on that occasion as an organ and not in his private capacity as a physical person. But does this explanation alone suffice? Are we to conclude without further ado that any conduct in which an individual possessing the character of an organ appears to be acting in that capacity may, no matter what the conditions, be attributed to the State in international law? Must we really rule out such attribution only in those cases in which the individual in question is acting in a purely personal capacity unrelated to the State or to the public institution of which he is an organ? In other words, the question to be answered is precisely whether a further condition is necessary if the conduct of organs acting as such is to be considered as an act of the State internationally, that is, whether a distinction should be drawn for that purpose between the two types of conduct. Thus, we arrive at the highly controversial and much discussed question of the attribution to the State of the actions or omissions of an organ which acts outside its competence or contrary to the provisions to which it is subject,⁴ and the possible limitations of such attribution.

3. We have already had occasion to observe, when formulating the preliminary considerations in section 1 of this chapter,⁵ that the question of whether it is possible to attribute to the State the conduct of its organs which have acted in their official capacity but have exceeded their competence under municipal law or have disobeyed their instructions or, more generally, contravened the provisions of municipal law by which they

⁴ It is evident that this problem can really only arise in connexion with persons possessing under municipal law the character of organs of the State or of another public institution, that is to say persons falling within the categories considered in sections 2 to 4 of this chapter. On the other hand, the problem does not arise in the case of persons in the categories discussed in section 5. It is impossible to conceive of a situation in which a person who in law is not an organ and has occasion in fact to perform public functions only in certain circumstances could exceed the competence of an organ or contravene the provisions concerning its activities. Conversely, it is equally obvious that a person who is not an organ of the State cannot be considered to be acting on behalf of the latter if his acts are not performed on the instructions or at the instigation of the State.

With regard to the case envisaged in section 6, namely that of a person who possesses the character of an organ within the legal order of a given State or an international organization but who is placed at the disposal of another State and acts under the authority and control of the latter, the problem of that person's exceeding the competence assigned to him by that latter State or contravening the provisions to which that State has subjected his activity will necessarily be solved in the same way as would the problem of conduct engaged in similar circumstances by an organ of the State in question. The only further point that needs to be clarified is that the problem arises when the person concerned contravenes the rules laid down by the State at whose disposal he has been placed and under whose authority he is actually acting, not those laid down by the State of which he is an organ. Any failure by the person concerned to observe the provisions or instructions laid down by the State or origin is irrelevant for the purposes of attributing such an action to the State at whose disposal the person is placed.

⁵ See *Yearbook of the International Law Commission, 1971, vol. II (Part One)*, pp. 234-235, document A/CN.4/246 and Add. 1-3, paras. 111-112.

¹ For sections 1-6 of chapter II, see *Yearbook of the International Law Commission, 1971, vol. II (Part One)*, p. 199, document A/CN.4/246 and Add.1-3.

² *Ibid.*, pp. 204-205, paras. 25 and 27.

³ *Ibid.*, pp. 241 *et seq.*, paras. 129 *et seq.*

are bound, has absorbed international jurists for a very long time. At the same time, we perceived the difficulties of writers, especially the older writers, who, on the basis of the premise—in itself irrefutable—that the organization of a State is determined exclusively by the law of that State, wrongly seek to conclude that it is impossible to attribute to the State, at the international level also, the action of a person who strictly speaking does not possess the character of a State organ under municipal law or who, although possessing such character does not act in accordance with the provisions of municipal law which define that organ's scope of action. So as not to repeat, in the context of the specific question we are now considering, our general comments on this topic, we will merely recall that this question, more than any other, requires an approach free from preconceptions. In dealing with this question in particular we must bear in mind that consideration of specific conduct as an act of the State as a subject of international law must be regarded as independent from consideration of the same conduct as an act of the State in municipal law, and may quite well be based on different criteria.⁶ The reply to the question whether and in what conditions the action or omission by an organ of a State which exceeds its competence or contravenes the provisions of municipal law to which it is subject may be attributed to that State in international law can be given only in the light of an analysis of international practice and judicial decisions and there are no grounds for considering the results of such an analysis a so-called deviation from juridical logic necessitated by the specific requirements of security in international life.

4. If we acknowledge that the reply to the question dealt with in this section must, like the replies to questions raised in previous sections, be based solely on what actually happens in international life, we can eliminate from our analysis a series of obstacles of purely theoretical origin which have greatly complicated an understanding of the subject. It should not be thought, however, that all difficulties can be eliminated in this way. Unfortunately, an interpretation of State practice and the decisions of international tribunals on this point is far from easy. International incidents caused by the wrongful acts of State organs which have exceeded, or are alleged by the respondent to have exceeded their competence or which have disregarded the provisions of municipal law which they should have respected are very common in international relations. State practice, although only partially known, and international judicial decisions provide numerous examples of claims concerning incidents of this sort. Now an examination of State practice and the decisions of international tribunals does not always yield concordant results, far less clearly-etched solutions. We find, especially in relatively distant periods, statements of position that may be invoked in support of the theory of international responsibility of the State for the conduct described. but also statements of position which seem rather to support the contrary theory. The arguments used by chancelleries to support or reject certain claims may often be inter-

preted in different ways: in fact, the parties are far more interested in attaining their objectives than in invoking strict and coherent principles. An attentive study of the circumstances of each individual case is therefore necessary in order to resolve these apparent contradictions and to determine the basic principle and the possible limits to its application. There are also cases—fortunately rare—in which it is virtually impossible, at least on the basis of the information available, to establish with certainty the true significance of the precedent for our purposes. It should be added that a comprehensive analysis of existing practice in this field would not be feasible in this report; it would require far more space than is available to the Special Rapporteur. We must therefore confine our attention to those cases which appear to be most meaningful and important; as we shall see, moreover, they provide sufficient material for us to be able to establish with a fair degree of certainty the content of the customary international rule at present in force.

5. Before proceeding to a specific consideration of State practice and the decisions of international tribunals, it would be expedient to clarify a number of points in order to permit a more accurate appraisal and to avoid the errors of interpretation committed by some writers. It is these errors, moreover, which at times give rise to the differences of opinion apparent in the appraisal of the data provided by State practice and international judicial decisions. Firstly, it must be stated once again that the type of case to which we must here refer, is that in which an organ of the State or of a public institution separate from the State, although exceeding its competence or contravening the provisions of municipal law, nevertheless appears by its action or omission to be acting in the capacity of an organ and to be performing its official functions. Cases in which the individual-organ clearly acts entirely outside the scope of its functions are, as we have seen in section 2 of this chapter,⁷ cases in which attribution of the conduct of the individual to the State does not arise and the question of the possible responsibility of the State must then be raised in the same terms as it would be in the case of the acts of any other private individual. Consequently, we must guard against erroneous interpretations in cases in which the refusal of the State concerned to accept responsibility in international law for certain injurious acts has been recognized as well-founded by virtue of the fact that the authors of the alleged injury, although organs of the State, manifestly acted on that occasion outside any relationship with the State, and hence, merely as private individuals. It is obvious that it is impossible to derive from such cases any support for the theory that actions or omissions by organs acting outside their competence or contrary to the provisions to which their activities as organs are subject cannot be attributed to the State as a subject of international law.

6. On the other hand, it should also be noted that in order to be able to assert that the conduct of an organ

⁶ See *ibid.*, p. 238, para. 120.

⁷ *Ibid.*, pp. 241 *et seq.*, paras. 129-134.

of a State which has exceeded its competence or contravened the provisions of municipal law was regarded in a given case as an "act of the State", it is not sufficient to claim that the State had ultimately to make reparation at the international level for the injury actually caused by the organ in question. One must also be sure in such a case that it is in fact the conduct of the organ in question which was considered the source of the international responsibility of the State and that the act attributed to the State as the source of responsibility was not rather the conduct of other organs accused, for example, of not preventing or punishing the injurious act. When responsibility has been attributed to a State in cases where it was established that the individual-organ had in no way acted or appeared to be acting within the scope of its functions, the attribution has been made solely on the basis of the irregular conduct of other organs in the case in question. That is not the point, however, for there is no doubt that in such cases the action or omission of the individual-organ which caused the injury is in fact merely that of a private individual. The aim is rather to determine whether a similar situation has not arisen in certain specific cases in which the individual-organ acted outside its competence or contrary to the rules of law, but nevertheless acted under cover of its official character. Clearly, this question cannot be answered correctly unless an attempt is made, in each specific case, to determine which acts have been considered to be acts of the State generating responsibility, and not simply to determine whether responsibility was generated.

7. Thirdly, we must also point out that the greatest caution is called for before invoking in support of any theory "precedents" where the conduct of organs which have acted outside their competence or contrary to their instructions or the provisions of municipal law in general has later been approved or ratified by other organs possessing the authority to redress the initial wrong. There can be no doubt that the State is held responsible in such cases: international practice, decisions and literature are all unanimous on this point.⁸ But it is justifiable to cite such cases as examples of responsibility for actions or omissions which are "unauthorized or contrary to municipal law? Rather one is tempted to assimilate to acts falling within the competence of the organ which performed them or conforming to the provisions of law governing its activities, those cases in which that competence has been restored or that conformity re-established at a later stage, even if they did

⁸ In this context it may be of interest to recall the decision handed down in 1865 by the United States Court of Claims in the case of *Straughan v. United States*. A British naval officer had arrested some deserters on board a United States vessel, thus contravening rules he should have observed. However, the contradiction between the initial act of the officer and the provisions to which his activity was subject was subsequently eliminated when the British Government, which had received the prisoners, refused to restore them and released them only after five years of diplomatic negotiation. This point was stressed by the Court, which ruled that Great Britain was responsible (*Court of Claims*, 1865, vol. 1, pp. 324 *et seq.*, cited by T. Meron, "International responsibility of States for unauthorized acts of their officials", *The British Year Book of International Law*, 1957 (London, 1958), pp. 106-107).

not exist at the time of the acts in question. It can reasonably be maintained that no real difference can exist between an action performed on the basis of instructions received beforehand and an action legitimized *ex post facto*. Consequently, it follows that in order to be able to state with certainty that a State was held responsible in a given case for the act of an organ which contravened municipal law, it must be possible to ascertain that the contravention was real and was not eliminated by subsequent ratification.

8. On the other hand, one must be wary of erroneous interpretations of cases in which the party concerned has insisted, for example, on the fact that a subordinate official's illegal action had been ratified by the central authority. It is quite understandable that the claimant Government should have preferred, wherever possible, to base its case on the uncontested principle of State responsibility for the actions or omissions of organs whose authority, competence or power to act in a certain way could not be questioned. But it would be wrong to regard that fact as proof that the Government in question believed it was impossible to make the State responsible for the acts of organs which have exceeded their competence or contravened the provisions of municipal law. In this connexion it is useful to recall, that as noted in section 3 of this chapter,⁹ the question of attributing to the State, as a source of international responsibility, the acts of organs acting outside their competence or contrary to the provisions of law is linked to and in specific cases often confused with the more general question of the attribution to the State of the conduct of subordinate organs. The erroneous opinions which tend to consider that neither of these situations involves acts of the State have influenced each other and have been the origin of some of the uncertainties that can be observed in the less recent practice of States and in the interpretation of that practice.

9. Another source of erroneous interpretations—which is, moreover, linked to that mentioned above—is the role which the rule of prior exhaustion of local remedies may play in the cases considered. There have been instances in which a State or an international tribunal has dismissed a claim for compensation presented by a State on behalf of one of its nationals who has suffered an injury at the hands of an organ acting outside its competence stating that the individual concerned should have had recourse to the State courts and demanded compensation directly from the offending organ. Now this statement in no way implies that its author sought to assimilate the conduct of the incompetent organ to that of a private individual and consequently to exclude on principle the notion that the State should answer internationally for the actions or omissions of an incompetent organ. Indeed, as we have already had occasion to observe,¹⁰ there are State legal systems which, while not providing for the possibility of recourse against

⁹ See *Yearbook of the International Law Commission*, 1971, vol. II (Part One), pp. 249 *et seq.*, document A/CN.4/246 and Add.1-3. Paras. 150 *et seq.*, and especially para. 152.

¹⁰ *Ibid.*, p. 250, para. 153.

the administration itself, as some legal systems do, nevertheless provide for personal recourse against the individual-organ which has acted outside its competence or contrary to municipal law. A negative attitude vis-à-vis the claim for compensation presented to the State might in such a case signify merely that the responsibility of the State cannot be invoked until the injured private individual has exhausted the local remedies; but it should not be concluded without further ado that the conduct of an organ which has acted outside its competence cannot be attributed to the State. On the contrary, the meaning and scope of the rule relating to the prior exhaustion of local remedies, as will be seen when we specifically consider this question, suggests rather the opposite conclusion. If the competent municipal courts to which the matter has been duly referred do not redress the situation and make it conform with a given international obligation of the State, the internationally wrongful act, which then becomes complete and definitive, is not constituted by this last act alone: it is composed of all the acts of the various organs whose combined action has led to the non-fulfilment of the international obligation of the State. Hence, where an injury has been caused by an incompetent organ, the fact of invoking the necessity of prior recourse to local remedies, is in reality an indirect recognition of the principle that the State should also be responsible, at the international level, for the actions or omissions of "incompetent" organs inasmuch as such actions or omissions, like those of "competent" organs, constitute a breach of an international obligation that can no longer be remedied internally.

10. That being so, we must stress that the available information on State practice as it existed before the end of the nineteenth century does not yet permit us to reach any really definitive conclusions in the matter under review. At times the legal departments of Governments appear to have been groping in their search for a definition of principles, without necessarily always having had clear and distinct criteria in mind. Furthermore, the language used sometimes creates superficial impressions from which it would be hazardous to draw conclusions too readily. For example, the letter sent on 11 October 1893 by the United States Minister to Austria, Mr. Tripp, to a Mr. Mix, a United States national, who, it seems, complained that he had been the victim of an "outrage" committed by Austrian officials, appears at first sight, to contain a clear rejection of attribution to the State, as a source of responsibility, of the acts of organs which violate municipal law. The following is an extract :

... A Government can only be held responsible when it sanctions the action of its officials, done in violation of law; it ought not to be held responsible for unauthorized acts which it promptly disowns upon being cognizant thereof; the responsibility in such case falls upon the offending official. Your remedy lies in a private action against the municipal officers who committed the outrage upon you wilfully or through over-zeal in the performance of a supposed duty.¹¹

¹¹ This letter (United States of America, Department of State, *Foreign Relations of the United States* (Washington, D.C., U.S. Government Printing Office, 1894), p. 25) was cited by the

On reflection, however, one realizes that this case constitutes a precedent in favour of the rule concerning the exhaustion of local remedies and the impossibility of claiming international responsibility of the State until it has been determined that fulfilment of the international obligation cannot be secured by recourse to available local remedies. This being so, it is far less certain—and in this connexion, we have only to refer back to what was said in the preceding paragraph—that this case proves that the State would by no means be responsible for actions or omissions by its officials acting outside their competence or contrary to the rules of municipal law.

11. "There are other cases in which it is not easy to follow the arguments of the government services concerned. At times, they display fairly clear-sighted vision of the criteria they consider critical, but their application of such criteria in practice, in the interest of their cause, is highly questionable; at other times, they do not make full use of the criteria they have set forth, believing that in the case in point they can rest their arguments on even sounder bases. The case of the *Star and Herald*, widely referred to by writers on international law, can be cited in support of such observations. The facts are as follows. During a general six-month suspension in the publication of all newspapers decreed in 1886 following revolutionary incidents in the Republic of Colombia, the newspaper *Star and Herald*, owned and published in Panama by a United States company was given special authorization to appear under a decree of the President of Colombia. The decree stipulated, however, that the newspaper must observe strict circumspection as to political subjects. One week before the end of the general suspension, the President of Colombia ordered General Vila, the civil and military Governor of Panama, to warn the *Star and Herald* to cease its criticism of the Government and to suspend the newspaper if it persisted. Two weeks after the general freedom of the press had been restored, General Vila, citing the order received from the President, ordered a 60-day suspension of the United States newspaper, on the grounds of its unfriendly attitude towards the Government and more especially its refusal to report some important administrative acts of the Government and to publish certain documents which he himself had sent to the editor, together with a private note. After receiving protests from the United States, the central Government cabled General Vila a few days later, remonstrating against the severity of his decree and requesting him, out of regard for the United States, to reduce the period of suspension to 20 days. The General, however, while answering that he did not wish to disturb the relations between the two countries, maintained his decision until the Government, after receiving "earnest remonstrances" from the

United States Government in its reply to point V, No. 2 (b) of the request for information addressed to Governments by the Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930). See League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee, Supplement to vol. III* (document C.75(a). M.69(a).1929.V), p. 16.

United States, ordered him either to reinstate the *Star and Herald* or else to resign. General Vila then pointed out that the period of suspension set by him had now expired, but he nevertheless tendered his resignation, which was accepted.¹² A long period of diplomatic negotiations and exchanges of notes between the two Governments ensued before the Colombian Congress, in November 1898—in the face of strong opposition, it must be admitted—authorized the payment of compensation.¹³

12. For our purposes, it is interesting to note the attitudes adopted by the two Governments. The Colombian Government wished to place all responsibility in the matter on General Vila. It emphasized the pressure exerted by the central authority to induce the General to temper the severity of his decree and the fact that, in the last resort, in view of his recalcitrant attitude, his resignation had been asked for and obtained. It therefore maintained, especially at the beginning, that General Vila's action should be regarded as an offence committed by an ordinary citizen, an offence in respect of which the Treaty of 1846 between the two countries merely provided that the parties were to refrain from protecting the offender and sanctioning the offence.¹⁴ Later, in a note sent on 10 November 1896 to the Minister of the United States at Bogotá, the new Colombian Minister for Foreign Affairs, Holguin while continuing to present General Vila's action as the action of a private gentleman added, however, that :

... according to the practice of nations and national legislation. no government is responsible for acts of its agents or subalterns which are not in perfect accord with the faculties conferred upon them by law or the instructions which the government itself may have given them. For a government to share with its agents the responsibility of acts of this nature it would be necessary that, having been able to avoid them, it has not done so: that once accomplished, it has not attempted to frustrate their effects: that it had not disapproved the conduct of the agent: in a word, that it had ratified or sanctioned them in some manner.¹⁵

The position of the Colombian Government in this case is thus far from being clearly defined. On the one hand it apparently wished to base its position on the assuredly sounder principle of the non-responsibility of the State for the conduct of an organ which has acted as a private individual. But at the same time, it was unable to remain oblivious of the difficulty inherent in applying this principle to the case in point. It then attempted to take advantage of the distinction between superior organs and subordinate organs, which was advocated at the time, and above all to stretch the principle of the

non-responsibility of the State to include the act of an organ which has in fact acted as an organ, but has exceeded its competence or disobeyed its instructions.¹⁶

13. On the other hand, the arguments of the United States Government in this case cannot be said to be particularly significant as far as the question we are considering is concerned. At the outset, the United States Government genuinely believed that the incident was due solely to the personal initiative of General Vila. The State Department at that time sent instructions to the United States Minister at Bogotá, asking him to request the Colombian Government to repudiate the General's action and to punish him. It was stated in the instructions, however, that the Colombian Government could be held responsible for the injury caused to the injured persons by General Vila, *even if such actions had not been authorized and had been disavowed*.¹⁷ Subsequently, however, the United States Government, when better acquainted with the facts, believed that the suspended publication of the *Star and Herald* was indeed an act of the Colombian Government and not an unauthorized initiative of General Vila. It concluded that the Colombian Government could not take shelter behind the statement that the suspension was the mere personal act of one of its citizens within the meaning of the 1846 Treaty. Consequently, it maintained that responsibility for the action complained of lay quite simply with the central executive of that country. From that time on, there are no further allusions in the United States notes to a possible responsibility of the State for "unauthorized" acts of its organs, since it was a clear-cut case of acts "authorized" by the supreme authorities of the country. Despite the fact that certain writers have seen fit to quote this case in support of their theory, it seems difficult to allow that this "precedent" confirms the theory of the attribution to the State of the "unauthorized" acts of its organs. But it can be said, that generally speaking, the attitudes of the parties in the case appear rather to be at variance with the idea that, for the purposes of drawing an affirmative or negative conclusion regarding the attribution of an act to the State with a view to making the latter internationally responsible for it, a distinction should be drawn between the acts of organs according to whether they were performed within the limits of their competence or outside such limits. In point of fact, the United States Government expressed disapproval of such a distinction, even though its arguments were not based on that position. The Colombian Government, despite certain belated assertions, consistently strove to present the facts of the case as if convinced of the impossibility of exonerating the State from responsibility for any acts other than those committed by its organs in a personal capacity.

14. Again with reference to the practice of the United States, which is one of the better known in the period under consideration, we find rather more conclusive

¹² J. B. Moore, *A Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1906), vol. VI, pp. 775 *et seq.*

¹³ *Ibid.*, pp. 779-780.

¹⁴ See (*ibid.*, p. 778) the reply of the Minister for Foreign Affairs, Hurtado, to a note from the United States dated 31 January 1890. The Colombian Minister also asserted that the United States should not have pressed the claim diplomatically unless the claimants had proceeded against General Vila personally in the Colombian courts and the latter had exonerated him from all responsibility.

¹⁵ *Ibid.*, pp. 779-780.

¹⁶ The relationship between these arguments and the stipulation regarding prior recourse to the municipal courts by the person concerned is likewise somewhat unclear. (*Ibid.*, pp. 779-780.)

¹⁷ *Ibid.*, p. 777.

statements of position in the *Tunstall case*. In 1878, a British subject called Tunstall was killed in New Mexico by a member of an armed posse assembled by the deputy sheriff of the district for the purposes of pursuing Tunstall and seizing his livestock. The deputy sheriff himself had served the writ of seizure on Tunstall beforehand, a civil case having been brought against his associate. Some of the members of the posse, including the man responsible for the killing, were personal enemies of Tunstall. The British Government presented a claim for compensation to the Government of the United States, attributing to the sheriff ultimate responsibility for the killing, which had occurred while a trial was in process. The United States Secretary of State, Mr. Bayard, dismissed the British claim, stating that the feelings of personal animosity which had perhaps driven an agent to commit a criminal act entirely unrelated to his functions could not constitute grounds for his superior's incurring responsibility for the act, unless it could be proved that the superior himself had harboured the same feelings and had appointed the agent specifically to perform the action in question. Mr. Bayard's note contained the following remarks :

Killing, in personal malice, by an officer, of a defendant in a civil process in such officer's hands, such killing being subsequent to the execution of the writ, is as collateral to the official action of the officer as would be the commission of arson against the dwelling, or rape of a member of the family, of the party (defendant) by such an officer after the civil process has been served.¹⁸

Mr. Bayard therefore concluded that such actions could not be regarded as having seem committed within the scope of the functions of the organ and hence that the State could not be held responsible for them. He thus intended to affirm the principle that actions or omissions by agents of the State which are clearly unrelated to their functions were assimilable to the actions or omissions of private individuals and could not be attributed to the State as acts generating international responsibility. The dividing-line for the purpose of making this attribution therefore seems, in the view of the United States Government, to lie between acts committed by organs, whether or not competent in the case, but acting apparently within the scope of their functions, and acts committed by individual-organs which are clearly outside the scope of those functions.

15. The same Secretary of State, Bayard—whose name will be remembered in connexion with the determination of the principles followed by the United States in the matter—subsequently confirmed the principle indicated above—replacing the notion of the “scope of the authority” of the organ by that of the “scope of its real or apparent competence”—in a note addressed to Mr. Clark on 17 August 1885 in connexion with the *American Bible Society case*. The following is an extract :

... it is a rule of international law that sovereigns are not liable, in diplomatic procedure, for damages to a foreigner when arising from the misconduct of agents acting out of the range not only of their real but of their apparent authority.¹⁹

¹⁸ Mr. Bayard, Secretary of State, to Mr. West, British Minister, 1 June 1885), (Moore, *A. Digest* ... (op. cit.), p. 664).

¹⁹ *Ibid.*, p. 743.

16. Shortly afterwards, the Secretary of State, Mr. Adee, used the same formula in his letter of 14 August 1900 to the Ambassador of Italy at Washington, Baron de Fava :

The general rule of international law observed by the United States is that sovereigns are not liable in diplomatic procedure for damages occasioned by the misconduct of petty officials and agents acting out of the range not only of their real but of their apparent authority.²⁰

17. In European practice during the second half of the nineteenth century, the case which appears to be the most significant, since a number of Governments were called upon to express their opinion on it, is the Italian-Peruvian dispute concerning reparation for damage sustained by Italian nationals in Peru at the hands of the Peruvian civil and military authorities during the civil war of 1894-1895. In a note of 26 October 1897 addressed to the representatives of several foreign Governments, including that of Italy, the Peruvian Minister for Foreign Affairs, Mr. de la Riva-Agüero, had denied the existence of international responsibility of the State ... for damage caused by agents of the authority by virtue of acts unrelated to their legal functions, if the Government disapproves of and censures their conduct and subjects the offending official to appropriate proceedings to give effect, in accordance with the law, to the civil and criminal responsibility he has incurred ... All the principles which I regard as established serve to show that the State incurs responsibility and a diplomatic claim is justified only in cases where damage and injuries are inflicted on aliens by acts contrary to the provisions of treaties or, in the absence of these, to the law of nations, which are committed by the Government or its civil and military agents in the performance of their functions, on the orders or with the approval of the Government and, as I have said elsewhere, by an absolute denial of justice.²¹

The Italian Government expressed reservations regarding the principles set forth by Mr. de la Riva-Agüero, and asked the British and Spanish Governments for their opinions. The British Government agreed with the Italian Government in considering

... the theory that officials of the State are not responsible for acts which are not the consequence of orders directly given them by their Government to be inadmissible ... hence all Governments

²⁰ *Ibid.* See also League of Nations, *Supplement to vol. III (op. cit.)*, p. 17. We have already had occasion to mention this letter in connexion with the attribution to the State, for the purposes of responsibilities, of actions or omissions of subordinate agents: see *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 250, document A/CN.4/246 and Add.1-3, para. 152, foot-note 283.

²¹ “[...] por los [daños] que causen los agentes de la autoridad en virtud de actos ajenos a sus atribuciones legales, si el Gobierno desapruueba y condena su conducta y somete el funcionario culpable al juicio correspondiente para hacer efectiva, conforme a la ley, la responsabilidad civil y criminal en que hubiese incurrido ... Dedúcese de todos los principios que dejo establecidos, que sólo afectan la responsabilidad del Estado y pueden, por tanto, ser materia de reclamación diplomática, los daños y perjuicios causados a los extranjeros por actos contrarios a las estipulaciones de los tratados y, en defecto de éstos, al derecho de gentes, practicados por el Gobierno o sus agentes civiles y militares en el ejercicio de sus funciones, en virtud de orden suya o con su aprobación y, como he dicho en otro lugar, la denegación absoluta de justicia.” (Italy, *Archivio del Ministero degli Affari esteri italiano*, serie politica P., No. 43).

should always be held responsible for all acts committed by their agents by virtue of their official capacity.²²

The Spanish Government expressed the same opinion: . . . the Peruvian Government is guilty of an unfortunate exaggeration in maintaining that a right to compensation exists only in cases where the damage was inflicted by the government or by its agents acting in performance of their functions and upon orders received. His Majesty's Government is of the opinion that the agents of a government, whenever they are acting in the performance of their functions, commit the government as a whole, since there is no way to resist the action of these officials, because this action is based on the authority they exercise. Consequently, His Majesty's Government believes that compensation should be paid for unjustifiable damage caused by agents of a government in the performance of their functions, whether or not they were acting on orders of that government. If this were not the case, one would end by authorizing abuse, for in most cases there would be no practical way of proving that the agent had or had not acted on orders received. His Majesty's Government finds it necessary to make the fullest reservations on this point.²³

After examining the replies from the Governments consulted, the Diplomatic Disputes Board of the Italian Ministry of Foreign Affairs expressed the following views in its opinion of 19 February 1899 :

. . . we can only endorse the views of the British and Spanish Governments . . . , it is impossible to maintain that a government is not required to compensate aliens for damage occasioned by its agents in the performance of their functions, firstly because there is no way avoiding such damage, and secondly because, in practice, it would be impossible in most cases to draw a distinction between instances where the wrong was done by order of the government and other instances . . . We consider inadmissible the theory which maintains that a government should not be held responsible for the acts committed by its agents in the performance of their functions or by virtue of their official capacity when such acts are not the consequence of orders received directly from the government.²⁴

The Italian Minister for Foreign Affairs consequently instructed the Italian representative at Lima to support the claims of the injured Italian nationals.²⁵

18. The same principles had, moreover already been advocated by the Italian Government a few years previously. In a note of 3 June 1886, the Italian Minister for Foreign Affairs observed that certain decisions of the Claims Commissions composed of Italy, France and Great Britain on the one hand and Chile on the other were inconsistent with the provisions of existing international law; the writer of the note was especially opposed to the idea of exonerating a Government from responsibility whenever it was not actually proved that the actions of subsidiary organs were the result of orders from their superior. In view of the practical impossibility of providing such proof, the note concluded, one would

always end by exonerating the Government from responsibility.²⁶

19. We can therefore conclude our considerations of State practice during the second half of the nineteenth century by noting that towards the end of this period there seems to be a tendency on both sides of the Atlantic to affirm in principle the idea that the State must accept responsibility for the acts of its organs, even if the latter acted outside their competence or contravened the legal provisions to which they are subject. Of course, such an affirmation is upheld more emphatically by the claimant States, but, as we have had occasion to observe, even the respondent States are at times reluctant to take a position against that principle and endeavour to

²² Mr. Robillant to Mr. Fè d'Ostiani, 3 June 1866, in S.I.O.I. (Società Italiana per l'Organizzazione internazionale)—C.N.R. (Consiglio Nazionale delle Ricerche), *La prassi italiana di diritto internazionale* (Dobbs Ferry (N.Y.), Oceana, 1970), 1st series (1861-1887), vol. II, p. 864.

Nevertheless, the attitude of the Italian Government during the period in question does not seem to have been thoroughly consistent. In the *Lucchini case*, the Italian Consul General at Trieste had proposed that a claim for compensation should be presented for injuries inflicted on an Italian national by the Austrian police in violation of Austrian law (Mr. Bruno to Mr. Menabrea, 5 August 1868, *ibid.*, p. 860), but we do not know what action the central authorities took. In the *Bartolozzi case*, the Italian Minister for Foreign Affairs instructed the Italian Minister at Caracas not to press a claim for compensation addressed to the Venezuelan Government for injuries inflicted on an Italian national by Venezuelan soldiers acting on the orders of an officer. The Venezuelan Government had brought the offending officer to trial but had refused to grant compensation (Mr. Robillant to Mr. Bencsamoni, 27 March 1866, *ibid.*, pp. 863-864. Our knowledge of the details of this case is sketchy, but even so we have the impression that the Italian attitude was somewhat hesitant. On the other hand, despite appearances, there does not seem to be any real contradiction between the attitude of Italy in the *Poggioli case* and its position in the dispute with Peru. Some Italian nationals complained of being injured by the abusive acts of Venezuelan Government officials. The Diplomatic Disputes Board (opinions of 19 February 1899 and 15 June 1902, *Archivio del Ministero degli affari esteri italiano*, Consiglio del Contenzioso diplomatico, *Raccolta dei pareri*, serie 1857-1923, No. 5; *ibid.*, serie Z, No. 36) at the time based its attitude on the theory that the State could not evade its responsibility for damage unlawfully inflicted on an alien by an official in cases where the Government participated directly or indirectly in the acts of such officials or where it tacitly ratified such acts by not repudiating them. The Board cited the Fiore doctrine, according to which the State had to make reparation for damage when officials guilty of causing injury to aliens had acted in accordance with common criteria, implying that they were obeying instructions from their superiors, or when the Government had directly or indirectly approved the action of its subordinates. Thus when the Italian Minister for Foreign Affairs instructed the Italian Minister at Caracas to support the claims of the Poggioli brothers he alleged that in this case the injurious acts had been implicitly approved by the Venezuelan Government (*ibid.*, serie Z, No. 36). On reflection, one realizes that this case is one of those in which the injurious conduct of certain officials does not really seem to contradict the instructions received from the higher authorities, having apparently been prompted or at least approved *a posteriori* by those authorities. As we said in paragraph 7 above, such situations are outside the framework of this section and belong in fact within the framework of section 2 of this chapter. We should add that the emphasis placed by the Italian Diplomatic Disputes Board on "ratification" of the action of their subordinates by the Venezuelan authorities can be explained in this case by a desire to counter the argument of the Venezuelan Government that the Poggioli brothers should have brought an action against the offending officials before the municipal courts.

²³ Mr. Ferrero, Italian Ambassador in London, to Mr. Visconti Venosta, Italian Minister for Foreign Affairs, 1 March 1898 (*ibid.*, *loc. cit.*) (translation from Italian).

²⁴ Note verbale by Duke Almodóvar del Rio, 4 July 1898 (*ibid.*, *loc. cit.*) (translation from Italian).

²⁵ *Ibid.*, *loc. cit.* (translation from Italian).

²⁶ Mr. Canevaro to Mr. Pirrone, 11 April 1899 (*ibid.*, *loc. cit.*).

establish their defence on other bases. There is a difference, however, between the approach of the European States and that of the United States of America, in particular. In the opinion of the former, the question of the possible attribution to the State, as a source of international responsibility, of the *ultra vires* acts of officials is influenced by, and even forms part of, the general question of the possible attribution to the State of the actions and omissions of hierarchically subordinate organs. The European States are, in principle, opposed to a distinction of this kind. As claimants, their main concern is to refute a contention which their claims constantly encounter, namely that a diplomatic claim cannot be presented unless it has first been proved that the officials who inflicted the damage in question acted by order of the Government. Their objections to this contention are of an essentially practical nature: the impossibility of the injured party's providing the proof requested and the danger of affording Governments, in these conditions, with a ready loop-hole by which to evade responsibility. The concept, taking shape in the United States is both more elaborate and more closely connected with the actual question of whether the organs which committed the injury in question have acted outside their competence. In this context, the principle is advanced of the need to take account here, as in every other sphere of international life in which the action of State organs occurs, of the external appearance of the action. According to the doctrine of the Department of State, the State must acknowledge as its own, at the international level, those actions of its organs which present the external appearance of having been committed in the performance of the organs' functions. This statement of position is interesting, for although it amounts to an endorsement of the principle of the State's responsibility for the acts of organs which have acted outside their competence or disobeyed their instructions it also imposes a limitation on what might otherwise have been too absolute a criterion. According to this approach, the State could not be expected to assume responsibility for the action of an individual organ in cases where it clearly did not present even the appearance of an action performed in the discharge of the duties entrusted to the said organ by the State.

20. The further we advance into the twentieth century, the more manifest is the recognition of the basic principle that the State must acknowledge as its own, at the international level and so far as any consequences are concerned, the acts of organs which have acted outside their competence or contravened the provisions that they should have observed. In the *Shine and Milligen case*, in 1907, two United States nationals were attacked, injured and put in prison by a Guatemalan General, the Governor, of Zacapa, and certain of his aides. The Government of Guatemala itself proposed, by way of reparation, the punishment of the offenders and the payment of compensation to Mr. Shine and Mr. Milligen. The offer was accepted by the United States Government and the incident was closed.²⁷ In 1910, in the

Miller case, the Cuban Government initially refused to pay compensation for the injuries inflicted on a United States seaman by a Cuban policeman. It claimed that the State was not responsible for the acts of its agents except when these were executed by order of the Government. The United States Government refused to accept this point of view and the Cuban Government finally agreed to pay the indemnity requested.²⁸

21. It was more especially at the time of the 1930 Codification Conference, held at The Hague, that Governments found an opportunity to express their views on the subject with which we are concerned. It can be seen that by this date, the actions and omissions of organs which act outside their competence or contravene the provisions of municipal law are henceforth considered, although with some exceptions, to be acts of the State, and that the principle of the international responsibility of the State for such actions and omissions has been accepted by most States. Mr. Guerrero, the Chairman of the Committee of Experts for the Progressive Codification of International Law appointed by the League of Nations, in the report of the sub-committee on the Responsibility of States he prepared in 1926, still supported the theory that the State is not responsible for the "acts contrary to international law" of organs acting outside their competence as defined by municipal law. Such acts could not, in his view, be attributed to the State. In fact, the following conclusions are to be found in his report :

4. The State is not responsible for damage suffered by a foreigner, as a result of acts contrary to international law, if such damage is caused by an official acting outside his competence as defined by the national laws, except in the following cases:

(a) If the Government, having been informed that an official is preparing to commit an illegal act against a foreigner, does not take timely steps to prevent such act;

(b) If, when the act has been committed, the Government does not with all due speed take such disciplinary measures and inflict such penalties on the said official as the laws of the country provide;

(c) If there are no means of legal recourse available to the foreigner against the offending official, or if the municipal courts fail to proceed with the action brought by the injured foreigner under the national laws.²⁹

However, these conclusions were to be rejected by most Governments.³⁰ This is apparent, in the first place, from the replies of Governments to the request for informa-

²⁸ *Ibid.*, pp. 570-571. On another occasion the United States Government presented a claim to the Panamanian Government following a clash between United States nationals and the Panamanian police at Cocoa Grove in which two United States nationals were killed and several others injured, but it did not invoke the principle that the State must assume responsibility for the actions of its officials, even when the latter have contravened the provisions of the law. On the contrary, it emphasized the manifest complicity of the Panamanian Government which, in this case, had apparently planned and provoked the injurious action of the police (*ibid.*, pp. 568-569). However, we have only to recall, in this connexion, the considerations set out in paragraph 7 above.

²⁹ *Yearbook of the International Law Commission, 1956*, vol. II, p. 222, document A/CN.4/96, annex 1.

³⁰ The conclusions of the Guerrero report were to be severely criticized by arbitral tribunals; see below, paras. 40-41, the decisions relating to the *Youmans* and *Caire* cases.

²⁷ G. H. Hackworth, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1943), vol. V, p. 575.

tion addressed to them by the Preparatory Committee of the Conference in 1928. In point V, No. 2 (b), they were asked whether the State became responsible in the case of "Acts of officials in the national territory in their public capacity (actes de fonction) but exceeding their authority".* Of the 19 States which submitted written replies on this point, only three took a negative view, five failed to take a clear position, while 11 were clearly in favour of State responsibility.³¹ Similar replies were given to point V, No. 2 (c), which dealt with "Acts of officials in a foreign country, such as diplomatic agents or consuls acting within the apparent scope of, but in fact exceeding their authority".³² The bases of discussion prepared by the Committee reflected these views. Basis No. 13 stated that "A State is responsible for damage suffered by a foreigner as the result of acts of its officials, even if they were not authorized to perform them, if the officials purported to act within the scope of their authority . . .", and basis No. 14 stated that "Acts performed in a foreign country by officials of a State . . . acting within the apparent scope of their authority are to be deemed to be acts of the State and, as such, may involve the responsibility of the State".³³ In the discussion which took place in the Third Committee of The Hague Conference, the delegates of Egypt, Mexico, Portugal, Romania, Salvador and Uruguay proposed the deletion of basis No. 14.^{34 35} The delegate of the United States, speaking as the exponent of his country's special position proposed that basis No. 13 should be combined with basis No. 12, which dealt with responsibility for the acts of organs acting within the limits of their authority, in a single formula asserting that the State was always responsible for damage resulting from "wrongful acts or omissions of its officials within the scope of their office or functions"; the formula seemed very restrictive, but the author, Hackworth, doubtless intended, in keeping with American tradition, to refer to the "apparent" and not only the real competence of the official.³⁶ All the other delegates who spoke

* Italics supplied by the Special Rapporteur.

³¹ Negative replies were received from Hungary, Norway and Poland; no clear position was taken by Bulgaria, Czechoslovakia, Denmark, Switzerland and the United States; affirmative replies were received from Australia, Austria, Belgium, Canada, Finland, Great Britain, India, Japan, New Zealand, the Netherlands and South Africa. See 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* (document C.75.M.69.1929.V), pp. 75 *et seq.*; and *Supplement to vol. III (op. cit.)*, pp. 3, 16-17.

³² *Bases of Discussion . . . (op. cit.)*, vol. III, pp. 78 *et seq.*; and *Supplement to vol. III (op. cit.)*, pp. 3 and 17.

³³ *Yearbook of the International Law Commission, 1956*, vol. II, p. 223, document A/CN.4/96, annex 2.

³⁴ In their opinion, the State could not be held responsible for the acts of its organs when the latter were acting outside their competence. It is clear, however, that these delegates—especially the delegate of Egypt—were considering only the case of subordinate organs which acted outside their competence.

³⁵ The Conference was unable to consider basis No. 14, owing to lack of time.

³⁶ League of Nations, *Acts of the Conference for the Codification of International Law held at The Hague from 13 March to 12 April 1930*, vol. IV, *Minutes of the Third Committee* (document C.351(c) M.145(c).1930.V), p. 87.

on this point (the delegates of Austria, Belgium, France, Germany, Great Britain, Italy, Japan, South Africa and Switzerland) were in favour of retaining basis No. 13.³⁷ At the end of the discussion, a proposal to delete basis No. 13 was rejected by 19 votes to 13; Mr. Guerrero withdrew his proposal, which reverted to the idea of non-responsibility; and the proposal to adopt basis No. 13, with a few amendments submitted by the Swiss delegation was adopted by 20 votes to 6, with a few abstentions.³⁸ Basis No. 13, having thus been adopted was sent to the Drafting Committee; the latter prepared the following text, which became article 8, paragraph 2, first sub-paragraph of the articles adopted in first reading by the Third Committee of the Conference :

International responsibility is likewise incurred by a State if damage is sustained by a foreigner as a result of unauthorized acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State.³⁹

22. The criteria which prevailed at The Hague Codification Conference have not undergone any subsequent changes. Indeed, State practice from the 1930s to the present day reveals an ever-wider recognition of the principle that the State must accept international responsibility for the acts of its organs when the latter have acted in their official capacity, irrespective of whether they have remained within the limits of their competence or have observed the legal provisions to which their action is subject. Of course, such recognition is qualified by some restrictions and certainly does not automatically ensure that in every case agreement will be reached on the action to be taken with regard to the events complained of. The facts are often presented differently by the parties involved. It may also happen that Governments disagree as to the form international responsibility is to take once it has been acknowledged; the expressions of regret and apologies tendered in some circumstances are not always felt to be adequate by those to whom they are addressed, who may at times call for some more concrete form of reparation. However, the idea that the State must accept responsibility for the actions or omissions committed by its officials in discharging their functions, even if those actions or omissions contravene the law, is henceforth firmly upheld by the States that consider

³⁷ The general harmony of views concerning the basic principle was not affected by the fact that a number of delegates called for the recognition of certain limitations to that principle. Some delegations submitted proposals to that end. Among them was the proposal of the Swiss delegation, the object of which was to exclude State responsibility in cases where the organ's lack of authority was "apparent"; this proposal was approved and was finally adopted as article 8, paragraph 2, second subparagraph. We will revert to these proposals and the text adopted when dealing specifically with the subject of possible limitations to the principle of State responsibility for the actions and omissions of organs which have exceeded their competence or contravened the provisions of municipal law (see paras. 48 *et seq.*). For the discussion of basis No. 13 in the Third Committee of the Conference, see League of Nations, *Acts of the Conference . . . (op. cit.)*, pp. 85 *et seq.*

³⁸ For the voting, which took place on 25 March 1930, see *ibid.*, p. 102. See also the discussions on basis No. 12, *ibid.*, pp. 82 *et seq.*

³⁹ *Ibid.*, p. 237; and *Yearbook of the International Law Commission, 1956*, vol. II, p. 226, document A/CN.4/96, annex 3.

themselves to be injured by such actions or omissions; and it is no longer really contested by the States to which the offending officials belong. A study of a number of the most significant of these cases will bear out this observation.

23. One of the clearest and most frequently quoted statements of position is to be found in the opinion delivered in 1931 by the United States Court of Claims in the *Royal Holland Lloyd v. the United States case*. A Dutch ship was detained during the First World War by New York customs officials, who had erroneously interpreted United States law. The United States Government invoked in its defence the rule of United States municipal law which provided that it was not responsible for the unauthorized acts of its organs. However the United States court to which the case was referred, after stating that it was adjudicating on the basis of international law and not municipal law, observed that the rights of the plaintiff as a citizen of a friendly foreign Power, when considered in the light of the law of nations, were very different, from those of a plaintiff relying wholly upon the municipal laws of the United States. In its relations with foreign nations, the opinion continued:

... the United States bears what has been described as a "wide, unlimited, unrestricted and vicarious responsibility" for the acts of its administrative officials and its military and naval forces... Governments are responsible, in their international intercourse, for the acts of their authorized agents, and if such acts were mistaken, or wrongful, liability arises against the government itself for the consequences of the error or the wrong.⁴⁰

24. In another case going back to 1933, the *Colom y Piris case*, a United States national was held in goal in the Dominican Republic while awaiting trial on account of certain alleged remarks concerning the President of that Republic. He was secretly removed from prison and summarily executed by an officer of the Corps of Aides to the President of the Republic. In an instruction to the United States Legation, dated 27 March 1934, the Department of State held the Dominican Government responsible for the death of the United States citizen, which it described as "the act of an official of the Government of the Dominican Republic who was charged by that Government with the duty of protecting the life which he destroyed".⁴¹ The United States Legation was accordingly instructed to demand from the Dominican Government a disavowal of the crime complained of and a payment of an indemnity to the heirs of the victim.

25. In 1936, a member of the staff of the Belgian Embassy in Spain, *Baron de Borchgrave*, was found murdered in the suburbs of Madrid. In the light of the information on the circumstances of the crime which reached the Belgian Government, the latter became convinced that the victim had been killed by troops in the service of the Spanish Government. The case having been brought

by *compromis* before the Permanent Court of International Justice, the Belgian Government asserted, in the first place, that the Spanish State had incurred responsibility by the wrongful act of its agents. In that connexion, it endorsed the theory embodied in the resolution adopted in 1927 by the Institute of International Law, according to which the State is responsible :

... when [its] organs act outside their competence under cover of their status as organs of the State and making use of means placed at their disposal as such organs.⁴²

The Spanish Government made no attempt to refute this theory, but merely raised preliminary objections. The Court was not required to pronounce on the merits of the case as the proceedings were interrupted when an agreement was reached between the parties, under which the Spanish Government consented to pay the indemnity claimed by the Belgian Government.

26. It is useful to note, in the same context, the positions of the various Governments concerned, including the respondent Government, regarding the *aerial incident of 27 July 1955*, in which a civil aircraft belonging to El Al Israel Airlines Ltd. was destroyed by two Bulgarian air defence fighter aircraft. All the passengers—of various nationalities—and all the members of the crew were killed. When replying on 4 August 1955 to the note of protest of 29 July sent by the Government of Israel and to similar notes sent by the Governments of the victims, including the United States Government, the Bulgarian Government took care to state that the main responsibility devolved on the Israeli company and aircraft for having unlawfully penetrated Bulgarian air space. None the less, it acknowledged that :

The Bulgarian anti-aircraft defence forces displayed a certain haste and did not take all the necessary measures to compel the aircraft to obey and to land.

Consequently, the Government of Bulgaria concluded that :

The Bulgarian Government and people express once again their profound regret for this great disaster which has caused the death of completely innocent people. The Bulgarian Government ardently desires that such incidents should never happen again. It will cause to be identified and punished those guilty of causing the catastrophe to the Israeli aircraft and will take all the necessary steps to ensure that such catastrophes are not repeated on Bulgarian territory.

The Bulgarian Government sympathizes deeply with the relatives of the victims and is prepared to assume responsibility for compensation due to their families, as well as its share of compensation for material damage incurred.⁴³

⁴⁰ *The American Journal of International Law*, (Washington, D.C.), vol. 26, No. 2 (April 1932), p. 410. The decision of the Court of Claims explicitly cited the well-known theory of Oppenheim, which describes the responsibility of the State in such cases as "vicarious responsibility".

⁴¹ Hackworth, *op. cit.*, p. 570.

⁴² See P.C.I.J., series C, No. 83, 1937, *The Borchgrave case*, Memorial of the Belgian Government, p. 26. The Belgian Government based its case also on the work of Anzilotti and Charles de Visscher.

⁴³ (Translation from French.) See the text of the Bulgarian note of 4 August 1955 to the Government of Israel in I.C.J., *Memorials, Aerial Incident of 27 July 1955* (Israel v. Bulgaria; United States v. Bulgaria; United Kingdom v. Bulgaria), p. 14; and the text of an identical note, bearing the same date, to the United States Government, in M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1967), vol. VIII, p. 892.

27. It is apparent from this note that the Bulgarian Government considered that its organs had acted in violation of municipal law and had disobeyed the instructions received. It nevertheless expressed readiness to accept international responsibility for their action. It was only later, when the claimant Governments had formulated their reparation claims, that the Bulgarian Government changed its attitude somewhat and attempted to place all responsibility for the disaster on the airline. It nevertheless stated that it was prepared, as a gesture, to compensate the families of each of the victims by a specific amount (56,000 levas). The Claimant Governments were not satisfied with this offer; they reaffirmed their conviction that the disaster had been brought about by the Bulgarian anti-aircraft defence forces and that the Bulgarian Government should therefore bear the consequences, as that Government had at least partially recognized in its notes of 4 August 1955.⁴⁴

28. A more recent case which is worthy of note is the one concerning the arrest of *Mr. Lazo Vracaritch*. On 2 November 1961, Mr. Vracaritch, a Yugoslav national and a former captain in the Resistance forces, was arrested in Munich on the order of the Konstanz State Counsel's Department on the charge of having murdered some German soldiers during the occupation of Yugoslavia in 1941. Following an official Yugoslav protest on 5 November the Ministry of Foreign Affairs of the Federal Republic explained, on 6 November, that neither the Federal Ministry nor the Ministry of Justice of Baden-Württemberg had been informed of the warrant issued for Mr. Vracaritch's arrest. The latter was released the same day with the apologies of the German judicial authorities. The Federal Ministry of Justice stated that this very unfortunate incident was probably due to a bureaucratic error and that the competent authorities had taken the necessary steps to ensure that the case would not recur. The Yugoslav Government, not content with a simple release, requested that the offending officials should be subjected to administrative penalties and that Vracaritch should be compensated. The Government of the Federal Republic replied with a further apology, but this reply, too, which contained no reference to the Yugoslav claims, seems to have been considered inadequate at Belgrade.⁴⁵ Be that as it may, it is interesting to note that neither the attribution to the Federal State of the action of the official who acted in violation of the law nor the principle of international responsibility deriving therefrom were questioned in the case at issue.

29. In concluding this review of State practice, mention may be made of the positions of the Swiss and Italian

Governments in the *Mantovani case*. On 7 March 1965, three Italian police officers arrested an Italian national, Mantovani, in Lugano and took him to Italy. As a result of the intervention of the Swiss police, Mantovani was returned to Swiss territory the following day and handed over to the Ticinese authorities. Following talks between the *Procureur Général* of the Confederation and two Italian officials, the Swiss Federal Department of Justice issued a communiqué on 9 March stating that:

On the basis of the findings of the Ticinese police and the additional explanations given by two senior Italian officials, it has been established that this frontier incident is attributable to an excess of zeal on the part of a subordinate Italian police officer, the leader of a patrol which was instructed to arrest Mantovani at Campione (Italy), where he was expected to arrive.

The two senior Italian police officials have offered official apologies for the violation of Swiss territorial sovereignty committed by their subordinates; they have given their assurance that everything will be done to prevent similar incidents from recurring in the future and reserved the right to take action against the offending officials, who acted without the knowledge of their superiors. [Translation from French.]

Thus, the federal authorities regarded the matter as settled.⁴⁶

30. To an even greater extent than diplomatic practice, the decisions of international tribunals, viewed as a whole and, above all, in the perspective of their historical development, unquestionably appear to confirm the basic principle that the acts of State organs which have acted outside their competence or contravened the provisions of municipal law should be attributed to the State, as a source of international responsibility. Indeed, there are many decisions confirming this principle. It is true that neither the Permanent Court of International Justice nor the International Court of Justice have had occasion to pronounce on this specific question.⁴⁷ However, arbitral tribunals and commissions have had many opportunities to do so and international arbitral awards which touch on the subject are not lacking. The same observation applies in this connexion as was made with regard to State practice: as we pass from earlier eras to times nearer the present day, we can detect an unmistakable progression in the clarity of ideas and the definition of principles. The survival of certain old concepts, the confusion of different problems and the uncertain presentation of arguments, all of which were characteristic of earlier decisions, gradually give way with the passing of time to a clearer grasp of the issue, a more lucid awareness of the distinctions to be established and a more clear-cut determination of the criteria to be applied.

⁴⁴ See the text of the communiqué in *ibid.*, vol. XXXVI, No. 3, (July-September 1965), p. 835.

⁴⁷ It should be noted, however, that the International Court of Justice, in its Advisory Opinion concerning *Certain Expenses of the United Nations*, although not referring to a case of responsibility for a wrongful fact, stated that:

"both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent".

Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter), Advisory Opinion of 20 July 1962, *I.C.J. Reports* 1962, p. 168.

⁴⁴ The question was referred to the International Court of Justice which, however, declared in its judgement of 26 May 1959 that it was without jurisdiction in the case. See *I.C.J. Reports* 1959, *Case concerning the Aerial Incident of July 27th 1955* (Israel v. Bulgaria), *Preliminary Objections*, p. 127.

⁴⁵ For a summary of the *Vracaritch case*, see the report by Charles Rousseau in the *Revue générale de droit international public* (Paris), 3rd série, vol. XXXIII, No. 2 (April-June 1962), pp. 376 *et seq.*

31. If we look, first of all, at the period covering the whole of the second half of the nineteenth century, we are struck above all by the fact that a number of arbitral awards fail to refer to the question with which we are concerned even though they appear to relate to situations in which it is relevant. This is true of some decisions which attributed to the State responsibility for the acts of officials but neglected to note whether the officials concerned had exceeded their competence or contravened the provisions which they should have observed, or to inquire into the attitude, of the higher authorities to the case.⁴⁸ This is explained, at least partially, by the fact that the claims conventions on the basis of which the awards were made explicitly indicated the classes of injury for which the Governments should bear responsibility and, furthermore, exempted the claimants from certain obligations, including the requirement that local remedies should be exhausted before their cases could be transferred to the international level.

32. In the rare cases of the same period where the question was expressly raised and examined within the framework of general international law, the criteria adopted vary from case to case and the confused thinking which sometimes finds its way into the statement of the reasons for the decision does not make for easy interpretation. The principle that the State must bear responsibility for the decisions of subordinate officials, even if they contravene or erroneously interpret the rules of municipal law, seems to have been applied by the American-British Claims Commission set up by the Treaty of 8 May 1871 in the award in the case of the *Matilda A. Lewis*. The majority of the commissioners decided to award compensation in favour of the claimant by way of reparation for the injury done by New York customs officials despite the fact that the United States had contended: (a) that the officials in question had interpreted an order of the Secretary of the Treasury in an "unjust and forced

manner, (b) that the claimant could have caused the decision to be overruled if he had applied to the Secretary of the Treasury, (c) that the United States was not responsible for the error of judgement of a subordinate officer until proper resort had been had to some responsible and chief officer of the Government whose decision might bind the Government.⁴⁹

33. Other decisions seem to have been based on different principles. One of the most often quoted yet least clear is the award delivered on 19 March 1864 by the Arbitral Commission set up in 1863 by France and Argentina to adjudicate the *Lacaze case*. A French national of this name was arrested in 1858 and his firm was sequestered by the customs authorities at Concordia, Argentina, in conditions and by a procedure which unquestionably violated Argentine law. The decision to resort to arbitration was reached only after lengthy opposition and many vicissitudes, during which time the Argentine authorities waived their alleged claim. The claim was reintroduced personally by the former administrator of customs at Concordia, who instituted legal proceedings. The Arbitral Commission promptly agreed to recognize the principle of the responsibility of the Argentine Government⁵⁰ and the indemnity to be awarded was determined by the umpire, who found it necessary, however, to make the following remark when stating the reasons for his decision:

Whereas, although this indemnity should have been claimed before the courts of ordinary law directly from the employee who caused the injury by an abuse of his powers, the Argentine Government, by agreeing to diplomatic intervention in this case and by consenting to its referral to arbitration, has assumed responsibility for the reparation due.⁵¹

Now, this statement is somewhat ambiguous. It is difficult to say whether the umpire, in making it, merely wished to recall that in this case the Argentine Government had agreed to free the claimant from the obligation of prior recourse to the municipal courts, or whether he was influenced by the consideration that the action of the customs authorities had become, in the final analysis, a purely personal action and was no longer the action of an official, or whether he actually subscribed to the idea—widespread at the time—that the abusive and illegal action of a subordinate official merely entailed that official's personal responsibility and could not be attributed to the State as a cause of State responsibility. It is in the last sense that the decision was interpreted and criticized in the doctrinal note which accompanied its publication,⁵² but this so-called "precedent" seems, in fact, to be of little use in sustaining any theory.

34. The decision of the United States-Venezuelan Mixed Commission concerning the *William Yeaton case* could seem, at first sight, to contain a clearer statement of the principle that the *ultra vires* acts of its officials cannot be attributed to the State. The vessel *William*

⁴⁸ See, for example, the award of Umpire Bates in the case of the vessel *Only Son*, delivered in 1854 under the Convention between the United States of America and Great Britain of 8 February 1853 (J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, D.C., U.S. Government Printing Office, 1898), vol. IV, pp. 3404-3405). Under the award, the British Government was required to pay compensation to the owner of an American vessel following the action of the collector of customs at Halifax, which was very probably illegal under municipal law, although the award does not so state. In the case of the vessel *William Lee* likewise, the decision of the Mixed Commission set up under the Convention of 12 January 1863 between the United States and Peru (*ibid.*, pp. 3405 *et seq.*) fails to indicate whether the Commission, in determining that the Peruvian Government should pay compensation for the damage sustained by a United States whale ship, which had been wrongfully detained by the captain of the port of Tumbes, Peru, had considered that the action was also wrongful in the light of municipal law. Under the award of 1 April 1876 made by the British umpire, Thornton, in the Donoughho case, under the Convention of 4 July 1868 between the United States and Mexico (*ibid.*, vol. III, pp. 3012 *et seq.*), the Mexican Government was ordered to pay compensation as reparation for the injury caused by an armed attack on United States nationals carried out by a posse recruited by a judge of inferior rank. The action of the latter and that of the posse would seem to have been *ultra vires*, but the award merely stated that the acts complained of were within the scope of the 1868 Convention.

⁴⁹ *Ibid.*, vol. III, pp. 3019 *et seq.*

⁵⁰ See A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux* (Paris, Pédone, 1923), vol. II, p. 297.

⁵¹ *Ibid.*, p. 298 [translation from French].

⁵² *Ibid.*, pp. 300 *et seq.*

Yeaton, which belonged to a United States national, Forrest, was chartered by the United States Government in 1812 to carry a cargo of flour to La Guayra as a gift to the inhabitants of the province of Venezuela who had suffered as the result of an earthquake. Forrest complained about the delay in unloading the vessel, which he attributed to the Venezuelan port authorities and which had enabled the Spanish, who in the meantime, had regained possession of Caracas and La Guayra, to seize the vessel. In its decision, the Arbitral Commission established under the Convention of 5 December 1885 endorsed the opinion of the Venezuelan Commissioner, Andrade, who, in turn, invoked the Calvo doctrine, according to which the responsibility of officials is purely personal and must be established on the basis of the internal public law of each State. When such officials exceed their powers or break the law, Calvo maintains, the responsibility of the State which has appointed them is purely moral and, furthermore, may only become effective in the case of complicity or manifest denial of justice. Thus Commissioner Andrade concluded that in this case :

... even if it had been proved, which is not the fact, that the authorities of La Guayra were negligent in affording to the *William Yeaton* all the means . . . at their disposal for the speedy unloading of vessels, yet, in order that their fault might be morally imputable to Venezuela, it would be necessary to prove equally . . . that said authorities had acted in compliance with direct orders from the government, or that it, having been informed of the facts, had not taken the proper steps to arrest or prevent their consequences.⁵³

On close scrutiny, the opinion reproduced here goes well beyond the scope of the problem under discussion. Apart from the idea of attributing only "moral" responsibility to the State in cases of complicity or denial of justice, what is more important is that according to Mr. Andrade:

... it is a principle of international law, well recognized by civilized nations, that governments are not ordinarily, at least, held to be responsible, pecuniarily, for the acts of their officers in the exercise of their public duties, . . .⁵⁴

Thus, it can be seen that, according to the opinion of the Commissioner concerned, the State is exempt from responsibility, not merely for the *ultra vires* acts of its officials, but for all actions or omissions committed by them in the performance of their functions. In fact, Forrest had accused the port authorities in this case of being negligent, not of acting in violation of the law. The views of some jurists notwithstanding, therefore, the *William Yeaton case* has very little bearing on the problem considered in this section. It is not surprising, moreover, that the other two members of the Arbitral Commission, who had subscribed to Andrade's opinion in this case—probably because they did not in any case believe Forrest's accusation to be founded in fact—clearly disagreed with his views in another case submitted to the same Commission. In the *De Brissot and Others case*,⁵⁵ in which Andrade was of the same opinion as in the *William Yeaton case*, they were in the majority in concluding that the State

was responsible, even though they did not deem it necessary to justify their conclusion by presenting an argument different from that of the Venezuelan Commissioner.

35. Indeed, the only arbitral decision of the period which unmistakably asserts the principle that an action illegally committed by subordinate officials is to be assimilated to the action of private individuals seems to have been the award delivered on 30 September 1901 in the *Gadino case* by the Italian-Peruvian Arbitral Tribunal established under the Convention of 25 November 1899. Arbitrator Gil de Uríbarri rejected the claim for compensation submitted by the claimant, who had been tortured by the employees of a police station, and gave the following reasons:

Whereas it is a universally recognized principle of international law, that, when a government does not use means within its power to prevent an attack on a neutral alien who respects and observes the law of the country in which he resides, or does not punish the offenders, it becomes responsible, and that, consequently, the alien attacked is entitled to claim reparation for the injury sustained according to the case; but that the same principle relieves the government which has fulfilled one or other of these duties of all responsibility.

Whereas the Government of Peru has in fact fulfilled the second of the aforementioned obligations since, as proved by the relevant documents, criminal proceedings have as a matter of course, been initiated against the employees of the police station who committed the offences in question, rightly described as heinous . . .⁵⁶

36. The decision in the *Gadino Case* is one of the last arbitral awards involving the open application of the old criterion, according to which the actions or omissions of officials, when they prove to be illegal under municipal law, are not considered to be acts of the State, even from the standpoint of international law. In the twentieth century, the opposite principle becomes increasingly prevalent, whether adopted implicitly as the basis of a decision or affirmed explicitly.

37. The awards rendered by the various mixed commissions in the "Venezuelan arbitrations" of 1903 form a link, as it were, between the arbitral decisions of the nineteenth century—which were characterized, as we have seen, by a great deal of uncertainty and at times tended openly to reflect a disinclination to attribute to the State the conduct of its organs when they acted as organs but contravened the rules of municipal law—and

⁵⁶ United Nations, *Reports of International Arbitral Awards*, vol. XV (United Nations publication, Sales No. 66.V.3), p. 415. (Translation from French.) In another decision of the same date, that relating to the *Grocce case*, the arbitrator, who was once again Mr. Gil de Uríbarri, ordered the respondent Government to pay compensation for the illegal acts of some soldiers, commenting that:

... even allowing for the possibility that the soldiers who committed such acts were not at the time under the orders of any officer, it would be wrong to let an act deserving chastisement go unpunished" (*ibid.*, p. 449) [translation from French]. The fact that the offenders had not been punished in the latter case seems to have been the reason for the censure of the State, which was in keeping, moreover, with the principle affirmed in the *Gadino case*. It is worth noting, however, that the soldiers seem to have acted in this case in a purely personal capacity and not in the performance, even apparent, of their functions. The arbitrator himself noted this by stressing the absence of the officers,

⁵³ Moore, *History and Digest . . .*, (*op. cit.*), vol. III, p. 2947.

⁵⁴ *Ibid.*, p. 2946.

⁵⁵ *Ibid.*, pp. 2949 *et seq.*

the arbitral decisions of the twentieth century, where there is a uniform trend towards attributing such conduct to the State. None of the latter decisions contain the idea that the action of an official, even if subordinate, who has acted as an organ but has exceeded his competence or contravened the rules he should have observed, is to be identified with the action of a private individual. It is true that, in order to establish the responsibility of the State, the arbitrator may at times fall back in a particular case on the argument that the Government implicitly approved, if not expressly authorized, the conduct of the organ under its authority. Thus, in the award in the *Compagnie Générale des Asphaltes de France case*, rendered by the British-Venezuela Mixed Claims Commission, constituted under the Protocols of 13 February and 7 May 1903, Umpire Plumley held that the question of Venezuela's responsibility for certain abusive acts of the Venezuelan consul at Trinidad arose from:

... the failure of the Government of Venezuela, after knowledge thereof, to make seasonable disclaimer of his acts and seasonable correction of his mistakes. If the respondent Government authorized or directed some of these acts, or only ratified them by silence and acquiescence, its responsibility is the same.⁵⁷

However, the same arbitrator takes a different position in other awards. This is so in the decision in the *Maal case*, delivered by the Netherlands-Venezuelan Mixed Claims Commission, established under the Protocol of 28 February 1903. In ordering Venezuela to pay compensation for the maltreatment inflicted on Maal, a Dutch national, by the police on the occasion of his expulsion from Venezuelan territory, Umpire Plumley stated that he had no difficulty in acknowledging that such treatment has occurred without the knowledge of the high authorities of the Government, but that:

... the acts of their subordinates in the line of their authority, however odious their acts may be, the Government must stand sponsor for.⁵⁸

At the same time—and this attitude is very characteristic of the evolution of opinion—the arbitrator no longer sees the cause of State responsibility as residing in the fact that the Government has not reprimanded or punished the offending officials, let alone discharged them. Such measures are, in his view, forms of reparation for responsibility already acquired and if they are not carried out:

... the only way in which there can be an expression of regret on the part of the Government and a discharge of its duty toward

the subject of a sovereign and a friendly State is by making an indemnity therefor in the way of money compensation.⁵⁹

Lastly, there are some awards in the same series where the State was required to pay a pecuniary indemnity although it had already punished the offending organ. This occurred in the decision in the *Metzger case*, rendered by the German-Venezuela Mixed Claims Commission, established under the Protocols of 13 February and 7 May 1903. Metzger, a German national, while going to his office, refused to give up the mule he was riding to an officer of the Venezuelan army. He was thereupon assaulted by this officer and seriously injured by another with a sabre. Although the guilty officer had been punished by his superiors for this act, Umpire Duffield considered that Venezuela should also pay a pecuniary indemnity to the claimant.⁶⁰ He based this view more especially on the opinion of Hall that where acts or omissions of administrative officials or naval and military officers cause considerable injury to a foreign State or its subjects,

... their Government is bound to disavow them, and to inflict punishment and give reparation when necessary.⁶¹

38. A few years later, the award relating to the *La Masica case*, delivered on 7 December 1916, by Alfonso XIII, King of Spain, who was appointed as arbitrator under the *compromis* of 4 April 1914 between Great Britain and Honduras, explicitly stated the principle that the State must bear responsibility for the acts of its organs which have acted in violation of the provisions of municipal law and answer for them internationally if that was the case. The respondent State was ordered to pay an indemnity as reparation for the killing of a British national and serious injuries inflicted on two others, these crimes having been committed in violation of the law by soldiers under the command of an officer, and the award referred to the application to the case of:

... the principles of international law, in conformity with which a State is bound on certain occasions, to make good the damage caused to foreign nationals by illegal acts of omission or commission on the part of its authorities...⁶²

39. The truly important and significant decisions, however, namely those which represent, as it were, the culminating point of evolution and progressive refinement of legal thinking concerning the possibility of considering the actions or omissions of organs which have acted outside their competence or "illegally" to be "acts of the State", sources of international responsibility, do not occur until later. Their appearance in international arbitration, it is interesting to note, coincides with the statements of

⁵⁷ *Ibid.*, vol. IX (United Nations publication, Sales No. 59.V.4), p. 396. A similar opinion seems to emerge from the rather unclear terms of the award in the *Poggioli case*. Certain aspects of the diplomatic negotiation phase of this case were described above (foot-note 26). Under the Protocols of 13 February and 7 May 1903, the case was submitted to the Italian-Venezuelan Commission. Umpire Ralston, on ordering Venezuela to make reparation for the numerous injuries caused to the Poggioli brothers, saw in the wrongfully passive attitude of the local authorities towards the injurious action of certain officials an administrative "denial of justice". He added that the action of the offending officials, having remained unpunished, had become "in a legal sense" the act of the Government itself. See *ibid.*, vol. X (United Nations publication, Sales No. 60.V.5), pp. 687 *et seq.* and particularly, p. 689.

⁵⁸ *Ibid.*, pp. 732-733.

⁵⁹ *Ibid.* The decision also stated that the pecuniary compensation should be sufficient to express the Government's full realization of the indignity practised and its desire to discharge fully its obligation.

⁶⁰ It should be observed that the umpire attached importance to ascertaining that the officer had indeed acted in his official capacity, requesting that the mule be handed over for the use of the army, and not in a purely personal capacity. *Ibid.*, pp. 417-418.

⁶¹ *Ibid.*, p. 418.

⁶² *Ibid.*, vol. XI (United Nations publication, Sales No. 61.V.4), p. 560. The umpire ruled out the possibility that the soldiers had acted solely for personal motives unconnected with the performance of their duties.

position, referred to earlier,⁶³ of most States at the time of the first efforts to codify the topic of State responsibility. Two awards especially, one rendered on 23 November 1926 by the United States-Mexican General Claims Commission, constituted under the Convention of 8 September 1923, and the other on 7 June 1929 by the French-Mexican Claims Commission, set up under the Convention of 25 September 1924, provide a precise, detailed and virtually definitive formulation of the principles applicable.

40. The first of these two awards is that relating to the *Youmans case*. The Commission had to establish whether the Mexican Government should assume international responsibility for the action of a detachment of 10 soldiers and their commanding officer, who were sent to Angangueo with instructions to protect some United States nationals threatened by disturbances, but who, instead of carrying out the orders given them, shot one of the aliens dead and then took part, with the rioting mob, in the massacre of two others. The Commission, presided over by van Vollenhoven, ordered the respondent Government to make good the injury and gave the following reasons for its decision:

With respect to the question of responsibility for the acts of soldiers, there are citations in the Mexican Government's brief of extracts from a discussion of a sub-committee of the League of Nations Committee of Experts for the Progressive Codification of International Law. The passage quoted, which deals with the responsibility of a State for illegal acts of officials resulting in damages to foreigners, begins with a statement relative to the acts of an official accomplished "outside the scope of his competency, that is to say, if he has exceeded his powers". An illegal act of this kind, it is stated in the quotation, is one that cannot be imputed to the State. Apart from the question whether the acts of officials referred to in this discussion have any relation to the rule of international law with regard to responsibility for acts of soldiers, it seems clear that the passage to which particular attention is called in the Mexican Government's brief is concerned solely with the question of the authority of an officer as defined by domestic law to act for his Government with reference to some particular subject. Clearly it is not intended by the rule asserted to say that no wrongful act of an official acting in the discharge of duties entrusted to him can impose responsibility on a Government under international law because any such wrongful act must be considered to be "outside the scope of his competency". If this were the meaning intended by the rule it would follow that no wrongful acts committed by an official could be considered as acts for which his Government could be held liable. We do not consider that any of these passages from the discussion of the sub-committee quoted in the Mexican brief are at variance with the view which we take that the action of the troops in participating in the murder at Angangueo imposed a direct responsibility on the Government of Mexico.

Citation is also made in the Mexican brief to an opinion rendered by Umpire Lieber in which effect is evidently given to the well-recognized rule of international law that a Government is not responsible for malicious acts of soldiers committed in their private capacity. Awards have repeatedly been rendered for wrongful acts of soldiers acting under the command of an officer. . . . Certain cases coming before the international tribunals may have revealed some uncertainty whether the acts of soldiers should properly be regarded as private acts for which there was no liability on the State, or acts for which the State should be held responsible. But we do not consider that the participation of the

soldiers in the murder at Angangueo can be regarded as acts of soldiers committed in their private capacity when it is clear that at the time of the commission of these acts the men were on duty under the immediate supervision and in the presence of a commanding officer. Soldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience of some rules laid down by superior authority. There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts.⁶⁴

41. The second award is that relating to the *Caire case*. Two officers in the brigade of the Villist General Urbina killed Caire, a French national, whom they had taken to the local barracks when he refused to comply with their request that he give them a sum of money. The Commission found:

. . . that the two officers, even if they are deemed to have acted outside their competence . . . and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status.⁶⁵

This decision was preceded by a long statement of reasons, full of references to legal literature, by the Presiding Commissioner, Verzijl, in the course of which he declared:

I consider . . . to be perfectly correct . . . [those theories which] tend to impose on the State, in matters of international concern, responsibility for all acts committed by its officials or organs and constituting delinquencies from the standpoint of the law of nations, irrespective of whether the official or organ in question has acted within or beyond the limits of his or its competence. "We unanimously agree", Mr. Bourquin has rightly said, "to acknowledge that acts committed by officials and agents of the State involve the latter's responsibility, even if their author was without competence to perform them"

However, in order for this responsibility . . . of the State for acts of its officials or organs committed outside the limits of their competence to be acknowledged, the officials or organs concerned must have acted, apparently at least, as competent officials or organs, or else, when acting, have used authority or means pertaining to their official status. That is why the Institute of International Law, at its session held at Lausanne in August-September 1927, acknowledged the principle of the responsibility of the State for the acts of its incompetent organs or officials

⁶⁴ United Nations, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No. 1951.V.1), pp. 115-116.

The Mexico-United States General Claims Commission, under the presidency of van Vollenhoven, was subsequently to apply on many occasions the principles so carefully defined in the *Youmans case*. See, in particular, the award relating to the *Mallén case*, of 27 April 1927 (*ibid.*, pp. 176 *et seq.*), in which the State was found not to be responsible for conduct which constituted "a malevolent and unlawful act of a private individual who happened to be an official, not the act of an official" while it was concluded that the State was responsible for a second act by the same individual-organ, committed by him in the exercise of his functions but in violation of municipal law; the award in the *Stephens case*, of 15 July 1927 (*ibid.*, pp. 267-268), confirming the responsibility of the State for the acts of soldiers in conditions bearing a close similarity to those in the *Youmans case*; and the award in the *Way case*, of 18 October 1928 (*ibid.*, pp. 400-401), in which the State was found responsible for the unlawful actions committed by a judicial police official in the performance of his functions.

⁶⁵ *Ibid.*, vol. V (United Nations publication, Sales No. 1952.V.3), p. 531. [Translation from French.]

⁶³ See para. 21.

only in the following form, which, in my opinion, corresponds to the juridical thinking of our contemporary international community:

... This responsibility of the State exists even when its organizations act contrary to the law or to the order of a superior authority.

It exists likewise when these organs act outside their competence under cover of their status as organs of the State and making use of means placed at their disposal as such organs.

... That is why the contrary principle, formulated by the sub-committee of the Committee of Experts for the Progressive Codification of International Law... , could not, in my view, serve as a basis for the forthcoming codification of this important topic of international law. That codification should rather be based on the principle that, whenever an official has availed himself of his official status, the fact that he acted outside his competence does not exempt the State from international responsibility, and that non-responsibility of the State is restricted to cases where the act had no connexion with the official function and was, in fact, merely the act of a private individual.⁶⁶

42. Since the decisions of the United States-Mexican General Claims Commission and the French-Mexican Claims Commission, there have been very few international arbitral awards which have touched upon the problem with which we are concerned and which have contributed as much to the definition of the rule of international law relating to that problem. According to the award made on 21 June 1933 by the United States-Panama General Claims Commission in the *Adams case*, the respondent State was called upon to pay compensation to a United States national who had been robbed and wounded by a Panamanian police officer while on duty. The Commission, having noted that the offender had not been adequately punished, found it unnecessary to pass upon the question

whether the rule regarding liability for the acts of police applies... where the officer being on duty and in uniform does an act clearly outside of his duty and inconsistent with his duty to protect.⁶⁷

The decision concerning the *Différend Dame Mossé*, handed down on 17 January 1953 by the Franco-Italian Conciliation Commission established under article 83 of the 1947 Treaty of Peace, stated that the Italian Government was responsible for the confiscation of property belonging to a French national carried out at Milan in 1944 by police officers of the so-called "Saló Republic". The Commission considered that the injurious act had been committed by the police officers "within the statutory limits of the competence of the service". It nevertheless felt it useful to add:

"Even if it were admitted that... the officials... had acted... outside the statutory limits of the competence of their service, it should not be deduced, without further ado, that the claim is not well founded. It would still be necessary to consider a question of law... namely whether in the international order the State should be acknowledged responsible for acts performed by officials within the apparent limits of their functions, in accordance

⁶⁶ *Ibid.*, pp. 529 *et seq.* [Translation from French.]

⁶⁷ *Ibid.*, vol. VI (United Nations publication, Sales No. 1955.V.3), p. 323.

The word "clearly" seems to indicate that the Commission hesitated to state that conduct which did not even have the external appearance of an act falling within the duties of an official might be attributed to the State.

with a line of conduct which was not entirely contrary to the instructions received...⁶⁸

The Commission did not feel obliged to go beyond a simple formulation of the question, but the very fact that it posed that question in the terms reproduced above is enough to indicate its views on the matter.⁶⁹

43. It may be said that the views of writers on international law concerning the possibility of attributing to the State, as a source of international responsibility, the actions and omissions of organs which have acted outside their competence or contrary to the provisions governing their activity have followed a course parallel to that observed in the case of State practice and the decisions of international arbitration bodies. Furthermore, it has been noted that the official statements of position by certain Governments in many concrete cases, as well as the opinions of arbitrators, have often been influenced by the views of the best-known writers. The converse, is of course, equally true.

44. We have already outlined in detail, in the preliminary considerations in section 1 of this chapter,⁷⁰ the views of the older writers regarding the question under consideration and the theoretical origins of those views. Some of those writers, prompted also by the traditional tendency to consider as acts of the State only the acts of higher organs in the State hierarchy, concluded that the acts of organs acting "outside their competence" or "illegally" could not be attributed to the State and that the State was not responsible for such acts. Other writers sought to attenuate what they considered the excessive nature of that conclusion by admitting State responsibility in cases where the higher organs had as it were been accomplices in the injurious acts or at least had not done all they could to prevent them, had not disavowed them and had not punished those who committed them. However, whether the responsibility of the State in such cases was described as vicarious responsibility or qualified in other terms there is no doubt that all the proponents of this theory considered that the responsibility in question concerned the acts of organs other than those which had acted outside their competence or contrary to the provisions which they should have respected. According to the second group of writers, these acts were not themselves acts of the State and the State was therefore not answerable for them.⁷¹ The basic idea was that actions or omissions committed by organs in those circumstances could be assimilated to the actions or omissions of private individuals. We have already seen that this idea was expressed

⁶⁸ *Ibid.*, vol. XIII (United Nations publication, Sales No. 64.V.3), p. 494. [Translation from French.]

⁶⁹ The Commission's formulation of the question was accompanied by a reference to the work by Cavaré, whose opinion on this subject is, however, not very clearly defined.

⁷⁰ See *Yearbook of the International Law Commission, 1971*, vol. II (Part One), pp. 234-235, document A/CN.4/246 and Add.1-3, paras. 111-112.

⁷¹ See, for example, C. Calvo, *Le droit international théorique et pratique*, 5th ed. (Paris, Guillaumin), vol. 3, pp. 135-136; F. Despagnet, *Cours de droit international public*, 3rd ed. Paris, Laroche, 1905), p. 564; L. Oppenheim, *International Law: A Treatise*, 8th ed. [Lauterpacht] (London, Longmans, Green, 1955), vol. I, pp. 337-338, 362-363.

in various statement based on earlier diplomatic practice and judicial decisions and that one of its last appearances was in the 1926 Guerrero report.⁷²

45. However, a strong reaction was soon to develop in the works of international jurists, in State practice and in arbitral decisions against the idea that the State can avoid assuming responsibility for the conduct of its organs simply because the organs which had failed to comply with an international obligation had in that case acted outside their competence or contrary to provisions of municipal law. This reaction originated in the works of distinguished writers such as Triepel, Anzilotti, Strupp and others, who stated clearly not only that that responsibility exists, but that it originates in the action or omission of the organ concerned and not, or at least not exclusively, in the attitude towards it subsequently taken by other organs.⁷³ Subsequent clarification regarding the need to draw a clear distinction according to whether the actions and omissions of organs are attributed to the State under municipal law or under international law even eliminated the difficulty which until that stage had prevented the aforementioned writers from considering the actions or omissions in question as "acts of the State". Hence, the modern international jurists who have dealt with this subject have almost unanimously,⁷⁴ despite the

theoretical differences which still separate them,⁷⁵ come to consider as established the conclusion concerning the basic principle which can be worded as follows: actions or omissions of organs, whether committed within or outside the limits of their competence, and irrespective of whether they conform or are contrary to the legal provisions governing their conduct, must be considered as acts of the State from the standpoint of juridical relations between States. The State is responsible for such acts when they entail a breach of an international obligation.⁷⁶

cannot depend on the conduct which may subsequently be engaged in by other organs. If the action or omission of the first organ appears to be an action or omission of the State because the organ acted in its official capacity and used means available to it in that capacity, it cannot be transformed into the simple act of an individual by the mere fact that the person in question was punished afterwards. Whether followed by punishment or not, the act in question remains an act committed by an organ as an organ and is thus an act which must be attributed to the State.

This does not mean that the action subsequently taken by other organs, if it succeeds in eliminating the injurious consequences of the action or omission of the first organ, does not sometimes have the effect of preventing the State from being held responsible in that specific instance, particularly in the case of complex internationally wrongful acts, a subject which will be dealt with at the appropriate time. But it is obvious that the act, which in these circumstances does not entail responsibility, is nevertheless an act of the State. If there is no responsibility it is because in that specific case no breach of an international obligation of the State occurred, and not because that act itself was not attributed to the State.

⁷⁵ Both those who consider that the attribution of a specific act or violation to the State as a subject of international law is effected autonomously in international law but who consider that that in no way makes it necessary to attribute to international law the determination of the "organization" of the State as a subject of that law and those who consider that it is in fact necessary to do so agree in fact on the conclusion we have mentioned. The two theories are described and their principal proponents listed in the third report (see *Yearbook of the International Law Commission, 1971, vol. II (Part One)*, pp. 236-238, document A/CN.4/246 and Add.1-3, paras. 115-120 and foot-notes 204-206; and *ibid.*, pp. 235-236, para. 113 and foot-notes 199-202, respectively).

⁷⁶ This conclusion—setting aside, for the time being, the question of the limits within which it is interpreted and the restrictions imposed upon it—has gradually become predominant in the writings of jurists since the second decade of this century. We list below the principal writers who to our knowledge clearly subscribe to this idea: A. Decenièrre-Ferrandière, *La responsabilité internationale des Etats à raison des dommages subis par des étrangers* (Paris, Rousseau, 1925), p. 70; C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), p. 57; D. Anzilotti, *Corso di diritto internazionale*, 4th ed. (Padua, CEDAM, 1955), vol. I, pp. 387-388; J. G. Starke, "Imputability of international delinquencies", *The British Year Book of International Law, 1938*, London, pp. 109 *et seq.*; R. Ago, "Le délit international", *Recueil des cours de l'Académie de droit international de La Haye, 1939-II* (Paris, Sirey, 1947), vol. 68, pp. 469 *et seq.*; R. Monaco, "La responsabilità internazionale dello Stato per fatti degli individui", *Rivista di diritto internazionale*, Rome, XXXIst year, 3rd series, vol. XVIII, 1939, pp. 22 *et seq.*; and *Manuale di diritto internazionale pubblico*, 2nd revised and enlarged edition (Turin, Unione Tipografico-Editrice Torinese, 1971), pp. 560 *et seq.*; A. Ross, *A Textbook of International Law* (London, Longman's Green and Co., 1947), pp. 252-253; J. L'Huillier, *Eléments de droit international public* (Paris, Rousseau, 1950), p. 355; K. Furgler, *Grundprobleme des völkerrechtlichen Verantwortlichkeit der Staaten unter besonderer Berücksichtigung der Haager Kodifikationskonferenz, sowie der*

⁷² See para. 21 above.

⁷³ On this point, see the third report (*Yearbook of the International Law Commission, 1971, vol. II (Part One)*, p. 235, document A/CN.4/246 and Add.1-3, foot-notes 197 and 198).

⁷⁴ Among the limited number of modern writers on international law who hold that the State is not responsible for the acts committed by organs acting outside their competence, see R. Quadri, *La sudditanza nel diritto internazionale* (Padua, CEDAM, 1935), pp. 199 *et seq.*; *Diritto internazionale pubblico*, 5th ed. (Naples, 1968), pp. 587-588, 593-594; and D. B. Levin, *Otvetstvennost gosudarstv v sovremennom mezhdunarodnom prave* (Moscow, Izdatelstvo Mezhdunarodnye Otnosheniya, 1966) pp. 75 *et seq.* According to E. M. Borchard (*The Diplomatic Protection of Citizens Abroad or The Law of International Claims* (New York, Banks Law Publishing Co., 1928), pp. 185 *et seq.*, 189 *et seq.*), the State is responsible for the wrongful acts of its "superior" organs acting outside their competence, but not of its "minor" ones.

It should be noted, however, that some writers, while subscribing to the view which currently predominates and stating expressly that international law can attribute to the State, as a source of responsibility, certain activities performed by State organs in their capacity as organs but outside the limits of the competence attributed to them by municipal law or in violation of that law, also express reservations which in the final analysis amount to a contradiction of the principle and thus bring their position close to that of writers whose views they nevertheless reject. For example, G. Morelli (*Nozioni di diritto internazionale*, 7th ed. (Padua, CEDAM, 1967), p. 192) states that when the usurpation of competence by an organ is followed by an appropriate reaction on the part of other organs, the result is merely an individual act which cannot be attributed to the State even in international law. Similarly, Biscottini, in "Volontà ed attività dello Stato nell'ordinamento internazionale", *Rivista di diritto internazionale*, 1942, (Padua, XXXIVth year, 4th series, vol. XXI, 1942) pp. 30 *et seq.*, considers that the activity of organs of the State which are not competent according to municipal law should be attributed to the State, but only when that activity has not been "punished by the State in a manner corresponding to the seriousness of the act" and when the State has not "taken steps to eliminate the consequences of their wrongful activities". Now it seems obvious that the possibility of attributing to the State the conduct actually engaged in by an organ in a given situation

46. With regard to codification drafts on this subject prepared under the auspices of official bodies, only the conclusions of the 1926 Guerrero report exclude the possibility of making the State responsible for acts of its organs which have exceeded the limits of their competence according to municipal law.⁷⁷ We have seen that bases

Praxis der Vereinigten Staaten und der Schweiz (Zurich, Polygraphischer Verlag, 1948), pp. 25-26; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953), pp. 201 *et seq.*; P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1954), vol. II, pp. 5 *et seq.*; A. V. Freeman, "Responsibility of States for unlawful acts of their armed forces", *Recueil des cours . . . , 1955-II* (Leyden, Sijthoff, 1956), vol. 88, p. 290; P. Reuter, "La responsabilité internationale", *Droit international public* (cours) (Paris, Les Nouvelles Institutes, 1955-1956), pp. 87 *et seq.*; and "Principes de droit international public", *Recueil des cours . . . , 1961-II* (Leyden, Sijthoff, 1962), vol. 103, pp. 602-603; G. Dahm, *Völkerrecht* (Stuttgart, Kohlhammer, 1961), vol. III, p. 182; T. Meron, *op. cit.*, pp. 88, 93 *et seq.*, 113 and 114; G. Schwarzenberger, *International Law*, 3rd ed. (London, Stevens, 1957), vol. I, pp. 615 *et seq.*; F. V. García Amador, second report to the Commission (*Yearbook of the International Law Commission, 1957*, vol. II, pp. 124 *et seq.*, document A/CN.4/106, chap. II, paras. 6 *et seq.*); H. Accioly, "Principes généraux de la responsabilité internationale d'après la doctrine et la jurisprudence", *Recueil des cours . . . , 1959-I* (Leyden, Sijthoff, 1960), vol. 96, pp. 360 *et seq.*; G. Balladore Pallieri, *Diritto internazionale pubblico*, 8th ed. (Milan, Giuffrè, 1962), p. 130; A. P. Sereni, *Diritto internazionale* (Milan, Giuffrè, 1962), vol. III, pp. 1507-1508; L. Delbez, *Les principes généraux du droit international public*, 3rd ed. (Paris, Librairie générale de droit et de jurisprudence, 1964), pp. 363-364; 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), pp. 119-120; C. F. Amerasinghe, "Imputability in the law of State responsibility for injuries to aliens", *Revue égyptienne de droit international*, Cairo, vol. 22, 1966, pp. 104 *et seq.*; E. Jiménez de Aréchaga, "International Responsibility", in M. Sørensen ed., *Manual of Public International Law* (London, Macmillan, 1968), pp. 548 *et seq.*; C. G. Ténékidès, "Responsabilité internationale", *Répertoire de droit international* (Paris, Dalloz, 1969), vol. II, pp. 786-787; D. P. O'Connell, *International Law*, 2nd ed. (London, Stevens, 1965), vol. II, pp. 963 *et seq.*

It must be added that many writers do not state expressly that they are in favour of attributing to the State the actions or omissions of organs acting outside their competence or contrary to municipal law. They nevertheless affirm in terms which presuppose such attribution the principle that the State must assume international responsibility for such acts. See in particular C. de Visscher, "Notes sur la responsabilité internationale des Etats et la protection diplomatique d'après quelques documents récents", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. VIII, No. 3, 1927, pp. 253-254; L. Strisower, report on "La responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne ou aux biens des étrangers", *Annuaire de l'Institut de droit international, 1927* (Brussels), vol. 33, t. I, pp. 457, 460 and 461; M. Bourquin, comments on the Strisower report, *ibid.*, pp. 502-503; W. Van Hille, "Etude sur la responsabilité internationale de l'Etat", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. X, No. 3, 1929, pp. 539, 560 *et seq.*; A. de Lapradelle and N. Politis, "Affaire Lacaze—Note doctrinale", *op. cit.*, vol. II, pp. 300 *et seq.*; L. Pons, *La responsabilité internationale de l'Etat à raison de dommages causés sur son territoire aux étrangers* (Toulouse, Boisseau, 1936) (thesis), pp. 170 *et seq.*; A. S. de Bustamante y Sirvén, *Droit international public* (Paris, Sirey, 1936), vol. III, pp. 518 *et seq.*; I. von Münch, *Das völkerrechtliche Delikt in der modernen Entwicklung der Völkerrechtsgemeinschaft* (Frankfurt-am-Main, Keppler, 1963), pp. 181-182 (and also pp. 150-151); D. W. Greig, *International Law* (London, Butterworth, 1970), pp. 434 *et seq.*

⁷⁷ See para. 21 above.

of discussion Nos. 13 and 14, prepared in 1929 by the Preparatory Committee of the Hague Conference for the Codification of International Law, and article 8, paragraph 2, first sub-paragraph of the draft articles adopted in 1930 in first reading by the Third Committee of the Conference, stated clearly the principle that the State is responsible for "acts of its officials, even if they were not authorized to perform them, if the officials purported to act within the scope of their authority".⁷⁸ Mr. García Amador expressed himself firmly to the same effect in article 3, paragraph 2, of the draft which he prepared for the International Law Commission in 1957.⁷⁹ He was to reformulate the same clause in other terms, which we feel are more precise, in his revised draft of 1961, article 12, paragraph 2 of which stated:

An act or omission shall likewise be imputable to the State if the organs or officials concerned exceeded their competence but purported to be acting in their official capacity.⁸⁰

47. As to the drafts prepared by private institutions, the one prepared by the International Law Association of Japan in 1926 provided in article 1 that the State was responsible for the conduct of its organs acting "in the discharge of their official functions";⁸¹ while article 7, paragraph (a), of the draft prepared by the Harvard Law School in 1929 stated that the State is responsible for the conduct of its higher authorities "within the scope of the office or function of such authority".⁸² Although the English version of this draft—like the proposal officially submitted by the United States delegation at the Hague Conference—appears at first sight to suggest a restrictive interpretation, it would seem that those who prepared it in fact wished to affirm that the State is responsible for any action or omission by an organ acting within the *general scope* of its office or function.⁸³ All the other drafts prepared by private bodies expressly accept as a basic principle the possibility of attributing the conduct of its organs to the State as a source of international responsibility when they have acted in their official capacity, even if in the case in question they were not competent according to municipal law, had disobeyed their instructions and so on. The second and third paragraphs of article I of the draft prepared by the Institute of International Law at its 1927 session in Lausanne, which as

⁷⁸ *Ibid.*

⁷⁹ *Yearbook of the International Law Commission, 1957*, vol. II, p. 129, document A/CN.4/106, annex.

⁸⁰ *Yearbook of the International Law Commission, 1961*, vol. II, p. 47, document A/CN.4/134 and Add.1, addendum.

⁸¹ *Yearbook of the International Law Commission, 1969*, vol. II, p. 141, document A/CN.4/217 and Add.1, annex II.

⁸² *Yearbook of the International Law Commission, 1956*, vol. II, p. 229, document A/CN.4/96, annex 9. This text clearly reflected the theory of its author, Borchard, according to which only the conduct of higher authorities could be attributed to the State as a source of responsibility; article 7, paragraph (b), of the same text provided that the State would be responsible for the acts or omissions of its subordinate officers or employees only in case of denial of justice or failure to discipline the officer or employee concerned. See *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 249, document A/CN.4/246 and Add.1-3, para. 151.

⁸³ This is clear from the commentary on article 7: see Harvard Law School, *Research in International Law* (Cambridge (Mass.), 1929), especially pp. 162-163.

we have seen was quoted by Commissioner Verzijl in support of his decision in the *Caire case*,⁸⁴ stated that the responsibility of the State for the acts of its organs . . . exists even when its organizations act contrary to the law or to the order of a superior authority.

It exists likewise when these organs act outside their competence under cover of their status as organs of the State and making use of means placed at their disposal as such organs.⁸⁵

Acceptance of the principle in question may also be inferred from article 2 of the draft prepared by Karl Strupp in 1927,⁸⁶ from article 1, paragraph 4, of the draft prepared by the German International Law Association in 1930⁸⁷ and from article 1 of the draft prepared by Professor Roth in 1932.⁸⁸ Turning to more recent drafts, it may be noted that article 15 of the draft convention prepared by the Harvard Law School in 1961 reads as follows:

Circumstances of Attribution

A wrongful act or omission causing injury to an alien is "attributable to a State", as the term is used in this Convention, if it is the act or omission of any organ, agency, official, or employee of the State acting within the scope of the actual or apparent authority or within the scope of the function of such organ, agency, official, or employee."⁸⁹

Furthermore, the "general rule as to attribution" formulated in section 169 of the *Restatement of the Law* prepared by the American Law Institute in 1965 reads as follows:

Conduct of any organ or other agency of a state, or of any official, employee, or other individual agent of the state or of such agency, that causes injury to an alien, is attributable to the state within the meaning of section 164 (1) if it is within the actual or apparent authority, or within the scope of the functions, of such agency or individual agent.⁹⁰

48. We deliberately used the term "conclusion concerning the basic principle"⁹¹ when setting out the conclusion relating to the question under consideration reached almost unanimously by modern international jurists. We pointed out on that occasion that the general acceptance of this positive solution did not mean that it was accepted without reservation by everyone; on the contrary, both the authors of academic works⁹² and the authors of

codification drafts have in most cases advocated various forms of wording designed to limit the scope of the principle which they support, especially in border-line cases. We also noted above, in the section dealing with the discussions and conclusions of the 1930 Codification Conference at The Hague, that several delegates who stated they were in favour of the rule that the State is responsible for the actions or omissions of organs acting outside their competence or contrary to the provisions of municipal law also submitted proposals aimed at attenuating what they considered the potentially excessive aspects of that rule.⁹³ Going even further back, it will be remembered that the idea that some limitation was necessary appeared in the diplomatic practice of certain States at the time when it was first asserted that States were responsible for the acts of "incompetent" organs.⁹⁴ Consequently, we must now examine the complementary problem of the limits which might in exceptional cases be set to the principle whose gradual and definitive affirmation we have traced. This problem is particularly important in relation to the choice of the most appropriate form of wording to express the rule or rules on this delicate subject, a choice which the International Law Commission will have to make, taking into account also the requirements of the progressive development of international law.

49. The notes from Secretaries of State Bayard and Adee dated, respectively, 17 August 1885 and 14 August 1900⁹⁵ referred in this context to the notion of appearance. These diplomats considered that States should assume responsibility for all actions and omissions committed by organs within the general scope of the discharge of their functions and which, as far as external appearance is concerned, did not seem to go beyond that scope, even if they exceeded the limits of their competence according to municipal law or contravened the provisions of municipal law concerning their activities. On the other hand, they considered that the acts of individual-organs which not only in fact but also in external appearance were manifestly foreign to the functions entrusted to the individual-organ in question within the State organization could not be attributed to the State as acts giving rise to international responsibility. Acts of that kind should rather be assimilated to the conduct of individuals and the State should have no obligations in that respect other than those which it has in the case of the conduct of a private individual. That view, completed and clarified over the years, has been accepted in American juridical doctrine. Recently it was incorporated in both the draft convention prepared by the Harvard Law School in 1961 and the *Restatement of the Law* prepared by the American Law Institute in 1965.⁹⁶ Its influence has, however, been

⁸⁴ See para. 41 above.

⁸⁵ *Annuaire de l'Institut de droit international* (Brussels), 1927, vol. 33, t. III, p. 330; *Yearbook of the International Law Commission*, 1956, vol. II, p. 228, document A/CN.4/96, annex 8.

⁸⁶ *Yearbook of the International Law Commission*, 1969, vol. II, p. 151, document A/CN.4/217 and Add.1, annex IX.

⁸⁷ *Ibid.*, p. 149, annex VIII.

⁸⁸ *Ibid.*, p. 152, annex X.

⁸⁹ *Ibid.*, p. 145, annex VII.

⁹⁰ *Yearbook of the International Law Commission*, 1971, vol. II (Part One), p. 194, document A/CN.4/217/Add.2.

⁹¹ See para. 45 above.

⁹² Among the writers who are in favour of attributing to the State, as subject of international law, actions and omissions committed by its organs in the conditions envisaged here, or who believe that the State is responsible for such actions and omissions (the bibliographical references are given in foot-note 76), there are some, such as Anzilotti, Lapradelle, Bustamante y Sirvén, Cheng, Balladore Pallieri, and O'Connell, whose statements of the principle are not accompanied by any restrictions. One might, however, be stretching the point if one concluded without further ado that they thus intended to exclude completely any possibility of such restrictions.

⁹³ See para. 21, foot-note 37 above.

⁹⁴ See para. 19 above.

⁹⁵ See paras. 15-16 above.

⁹⁶ We have seen in paragraph 259 above that article 15 of the 1961 Harvard draft modified and completed the excessively restrictive and ambiguous wording which Borcard had inserted in the 1929 draft. Article 15 provided for attribution to the State in the case of actions and omissions of any category of organ acting "within the scope of the actual or apparent authority or

much more far-reaching, for it constituted the basis of the question put in point V, No. 2 (c), of the request for information addressed to Governments by the Preparatory Committee for the 1930 Codification Conference, and for the replies of some Governments to that question.⁹⁷ Its influence has also been noted in the decisions of both American and European arbitrators;⁹⁸ and lastly, it is to be found in the works of numerous writers belonging to different juridical systems.⁹⁹

within the scope of the function of such organ, agency, official or employee". Section 169 of the *Restatement* (see the end of para. 47 above), which is almost identical, provided for attribution to the State of the conduct of an organ if such conduct was "within the actual or apparent authority, or within the scope of the functions" of the organ.

⁹⁷ The replies of the Governments of Australia, Belgium, Great Britain and Japan to the question put in point V, No. 2 (c) (see the text in para. 21 above) reproduced word for word the wording used in the question itself and declared that the State was responsible for the acts of its diplomatic agents and consuls acting *within the apparent scope of their authority* (see League of Nations, *Bases of Discussion . . . (op. cit.)*, vol. III, pp. 78 *et seq.*). Taking those replies into account, the Preparatory Committee used this wording once again in basis of discussion No. 14 (see para. 21 above), but the Conference was unable to examine it owing to lack of time. It will have been noted that, curiously enough, the question put in point V, No. 2 (c), of the request for information, concerning the acts of officials in foreign countries, was worded differently from the question put in point V, No. 2 (b), concerning the acts of officials in their own country. Because their starting-points are different, bases of discussion No. 13 and No. 14 are likewise worded differently. As indicated in paragraph 21, footnote 37, above, the discussion of basis No. 13 in the Third Committee of the Conference led to the adoption of amendments which introduced into the final text the idea of restrictions to the principle, an idea which did not appear in the basis of discussion prepared by the Preparatory Committee.

⁹⁸ We have seen in paragraph 41 above that Commissioner Verzijl asserted, in his long statement of reasons concerning the *Caire case*, that in order for the State to be acknowledged responsible for acts performed by its officials or organs outside the limits of their competence they must have acted *at least apparently* as competent officials or organs. The wording used in the operative part of the award was slightly different. We have also recalled (para. 42 above) that the Franco-Italian Conciliation Commission, in its award concerning the *Différend Dame Mossé*, posed the question whether the State should be held responsible for acts performed by officials *within the apparent limits of their functions*, while the United States-Panama General Claims Commission, in its decision relating to the *Adams case*, excluded from the category of acts for which the State might be held responsible acts which were *clearly outside of and inconsistent with the duties of the organ concerned*.

⁹⁹ Among the jurists writing in French, Strisower (*op. cit.*, p. 461) insists that the organ must have acted "*in a manner at least apparently related to its functions*"; Monaco ("*La responsabilità internazionale . . .*", *Rivista di diritto internazionale (op. cit.)*, p. 28; and *Manuale . . . (op. cit.)*, p. 562) and Accioly (*op. cit.*, p. 361) agree with this formulation. Van Hille ("*Etude sur la responsabilité . . .*", *Revue de droit international, op. cit.*, p. 539) speaks of organs having acted "*under the appearance of their functions*". Among the jurists writing in English, Freeman says that the State is responsible "*once an agent has appeared to act in his official capacity*"* (*The International Responsibility of States for Denial of Justice* (London, Longmans, Green, 1938), p. 24) or "*under the apparent authority of his position*"* ("*Responsibility of States . . .*", *Recueil des cours, op. cit.*, p. 290). According to Ross (*op. cit.*, p. 252) the State is not responsible for acts which "*fall outside not only the actual but also the apparent competence of the organ*"*; according to Grieg (*op. cit.*, p. 435), the State is not responsible unless the acts of organs are "*within the apparent scope of their authority*".* Among the jurists writing in German, Furgler (*op. cit.*, p. 26) is of the view

50. In addition to the ideas mentioned above, it may be recalled that in replying to the question put in point V, No. 2 (b), of the request for information sent out by the Preparatory Committee for the 1930 Conference, the Austrian Government expressed its views on the subject by the following double proposal:

The State is directly responsible for damage caused to foreigners by acts contrary to international law committed by its officials when acting, effectively or apparently, within the limits of their authority.

On the other hand, the State is obviously not responsible for the acts of its officials when acting as officials, but outside the limits of their authority, if it is clear that they have exceeded their authority.¹⁰⁰

This text expresses the same idea twice: first, in a positive form, by affirming once again that the State is responsible for the acts of an organ that are *apparently*—but not in fact—performed within the limits of its competence, and secondly in a negative form, by excluding State responsibility when the lack of competence is *clear*. However, the idea of using a negative formulation, avoiding repetition, seems to have been attractive, for it was found to have definite advantages: in this form, the restriction to be expressed seemed clearer and its exceptional nature was highlighted. The idea of using a formulation of this type was taken up in an amendment proposed by the Swiss delegation and supported by other delegations during the discussion of basis No. 13, and was finally accepted in the Third Committee of the Conference; the Drafting Committee used it, adding an additional clarification in article 8, paragraph 2, second subparagraph, of the draft articles. Whereas, as already noted, paragraph 1 established the principle of the responsibility of the State for acts of its officials which were unauthorized but performed "*under cover of their official character*"¹⁰¹ paragraph 2 added:

International responsibility is, however, not incurred by a State if the official's lack of authority was so apparent that the foreigner should have been aware of it and could, in consequence, have avoided the damage.¹⁰²

Mr. Garcia Amador subsequently inserted a text based on similar criteria in article 12, paragraph 4 of his revised draft of 1961.¹⁰³ Formulations which are in part similar

that the State is responsible for acts committed by organs in violation of municipal law or outside their competence in so far as those acts *appear to be the acts of organs* ("*soweit sie als Organhandlungen erscheinen*"), while Verdross, *Volkerrecht*, 5th ed. (Vienna, Springer, 1964), p. 388, refers to the decision in the *Caire case* as indicating that the act in question must have the *external appearance of an act of the State* ("*ausserlich in der Form eines Staatsaktes aufscheinen*").

* Italics supplied by the Special Rapporteur.

¹⁰⁰ League of Nations, *Bases of Discussion . . . (op. cit.)*, p. 75.

¹⁰¹ See the end of para. 21 above.

¹⁰² See League of Nations, *Acts of the Conference . . . (op. cit.)*, p. 237, and *Yearbook of the International Law Commission, 1956*, vol. II, p. 226, document A/CN.4/96, annex 3.

¹⁰³ This text states:

... the act or omission shall not be imputable to the State if it was so manifestly outside the competence of the organ or official concerned that the alien should have been aware of the fact and could, in consequence, have avoided the injury. Article 12, paragraph 3 likewise provided that any act that was

(Continued on next page.)

are to be found in learned works by several writers.¹⁰⁴

51. The authors of some learned works or codification drafts have proposed the adoption of other formulations, which they consider especially appropriate for expressing the restrictive idea in question. Some of these authors use the notion of *general* competence for this purpose: it is specified that the State will not be held internationally responsible unless the organ acted within the *general* scope of its competence.¹⁰⁵ Other writers apply the criterion of the *use of means derived from function*:

(Foot-note 103 continued.)

“totally outside the scope of” the “functions and powers” of the officials or organs concerned should not be imputable to the State. See *Yearbook of the International Law Commission, 1961*, vol. II, p. 48, document A/CN.4/134 and Add.1, addendum.

¹⁰⁴ In this comments on the Strisower report (*Annuaire de l'Institut de droit international (op. cit.)*, p. 502), Mr. Bourquin proposed a text stating that “The State is responsible for acts performed by its officials or agents, even outside their competence, when they have acted under cover of their capacity as officials or agents. The only exception would be when the act complained of was so *manifestly foreign* to the attributions of the person committing it that there could be no reasonable misunderstanding on that subject” * (translation from French). Mr. Bourquin stressed that the non-responsibility of the State “must be quite exceptional in nature” (*ibid.*, p. 503). According to Guggenheim (*op. cit.*, p. 6), the State is not responsible “if the organ’s lack of competence was so manifest that the injured party could have been aware of it and, in consequence, have avoided the injury” (translation from French). Jiménez de Aréchaga (*op. cit.*, p. 550) reproduces the formulation adopted at The Hague and comments: “In order that the state may be held responsible, however, it is not enough that the agent has purported to act in exercise of his official authority; it is also required that his action be not so *notoriously foreign to his functions*, that the injured party could not reasonably be mistaken on the point, and therefore, by using reasonable diligence have avoided injury.” * The criterion of *manifest* lack of competence as grounds for excluding State responsibility is also emphasized by Cohn, “La théorie de la responsabilité internationale”, *Recueil des Cours . . .*, 1939-II (Paris, Sirey, 1939), vol. 68, p. 294, and by Ténékidés (*op. cit.*, p. 787).

¹⁰⁵ Article 2 of the draft prepared by Karl Strupp in 1927 (*Yearbook of the International Law Commission, 1969*, vol. II, p. 151, document A/CN.4/217 and Add.1, annex IX), stated that responsibility of the State was not relieved or avoided by the fact that the organ had “exceeded . . . its authority”, provided it had “*general jurisdiction* to undertake the act or action in question”. According to article 1 of the draft prepared by Professor Roth in 1932, the State was considered responsible for the acts “of any individuals whom or corporations which it entrusts with the performance of public functions, provided that such acts are within the *general scope of their jurisdiction*” * (*im allgemeinen Rahmen ihrer Zuständigkeit*). We have seen above (para. 47), that according to the commentary on article 7, paragraph (a) of the draft prepared by the Harvard Law School in 1929, the formulation used in this clause should be understood as meaning that the State is responsible for an injury to an alien caused by one of its higher authorities in so far as that authority acted “within the *general scope*” * of its office or function. With regard to the authors of learned works, it may be recalled that Starke (*op. cit.*, p. 110) speaks of “*general competence*”; and Fenwick (*International Law*, 3rd ed., (rev. and enl.) (New York, Appleton-Century-Crofts, 1948), p. 291, of “*general scope of authority*”. Dahm (*op. cit.*, p. 182) mentions the acts of State organs which are contrary to municipal law but which nevertheless fall within the “*general sphere* of the competence attributed to the organ” (doch noch in den *allgemeinen Bereich* * der dem Organ eingeräumten Zuständigkeit fallen) or which are objectively related to the functional activities of the organ.

* Italics supplied by the Special Rapporteur.

the State should be responsible for the wrongful conduct of an organ which, acting under cover of its status as an organ, uses means placed at its disposal by the State for the performance of its functions.¹⁰⁶ Some writers combine two or more of the notions we have mentioned.¹⁰⁷

52. With the provision of the information relating to the specific question of the limitations to be set, in the form of exceptions, to the general principle of attribution to the State as a subject of international law of the actions or omissions of organs acting outside their competence or contrary to the provisions of municipal law, the analysis of the problem as a whole in State practice, the decisions of international tribunals and the writings of jurists may be considered complete. The long and detailed analysis required has made it possible to trace the progressive development of the principles governing the subject dealt with in the present section. Throughout the analysis, we have observed the emergence of certain basic ideas around which that development has crystallized. We have noted the existence of certain established points, long recognized and generally accepted in previous official attempts at codification. At the same time, we have noted that on some points—points of secondary importance perhaps—there was still some uncertainty, reflected in a multiplicity of formulations which sometimes originate

¹⁰⁶ As noted in paragraph 47 above, the formulation “under cover of their status as organs of the State and making use of means placed at their disposal as such organs” was used in the third paragraph of rule 1 of the Lausanne resolution adopted by the Institute of International Law in 1927. The replies of Belgium and Finland to the question put in point V, No. 2 (b) of the request for information prepared by the Preparatory Committee of the 1930 Conference were clearly based on this model. The Belgian reply read as follows: “The State is responsible if an official has used the means at his disposal in his capacity as an organ of the State.” (League of Nations, *Bases of Discussion . . .*, *op. cit.*, pp. 75-76.) Article 1, paragraph 4 of the draft prepared by the German International Law Association in 1930 used the wording “provided that [the authority acting beyond its competence] purports to be acting in its official capacity and is employing the official machinery” (sofern sie als solche auftritt und sich des amtlichen Apparates bedient). The wording proposed by de Visscher (*op. cit.*, p. 253) is somewhat different. According to the Belgian international jurist, State responsibility “is generally acknowledged, at least . . . when the injurious act was committed by means of the authority or the physical force that the guilty agent possessed by virtue of his functions” [translation from French]. Other international jurists, such as Reuter, “La responsabilité internationale”, *Droit international public, op. cit.*, p. 88 and Sereni (*op. cit.*, p. 1507) use the same formulation.

¹⁰⁷ Redflob, in *Traité de droit des gens* (Paris, Sirey, 1950), p. 231, considers that the State is responsible if the organ remained within the “generic scope” of its attributions and if it was “apparently qualified” to act. Brownlie, *Principles of Public International Law* (Oxford, Clarendon Press, 1966), p. 371, considers that the State is responsible for acts performed by its organs “within their apparent authority or general scope of authority”. According to T. Meron (*op. cit.*, p. 113) and J.-P. Quéneudec (*op. cit.*, p. 120), the writers who have made the most extensive study of this question, the State is responsible for the *ultra vires* acts of its organs if those acts were performed: (a) within the apparent scope of their competence, or (b) outside the apparent scope of their competence, but using means which the State had made available to the organ for the discharge of its functions, unless the injured party could have avoided the damage by reason of the organ’s apparent lack of competence. Amerasinghe (*op. cit.*, pp. 106 *et seq.*) agrees with this view. On this point, see also L. Mons, *op. cit.*, pp. 175 *et seq.*

in differences of opinion which are more than purely formal. It is in this context that the Commission must now define the rule relating to this particularly delicate subject. The task is relatively easy so long as it consists merely of defining in codified form a basic criterion already solidly rooted in the juridical beliefs of the members of international society. The task becomes more complicated, however, when it consists of determining the most appropriate formulation for indicating how and to what extent that basic criterion should be applied, especially in certain situations.

53. In point of fact, there seems to be no need to reopen the discussion on this basic criterion, especially since the examination of international practice and the decisions of international tribunals—particularly recent practice and decisions—produces results which concur perfectly with the conclusions we have drawn from the preliminary considerations we formulated before embarking upon the long and complex task of determining what is meant by an “act of the State” according to international law.¹⁰⁸ With regard to the relationship between the two legal orders, we noted that the attribution or non-attribution of certain conduct to the State as a subject of international law is decided in a manner which is autonomous and entirely independent of the attribution or non-attribution of the same conduct to the State as a subject of municipal law.¹⁰⁹ Our study has shown that that autonomy and independence are fully confirmed in practice and that moreover the criteria for such attribution are in fact different in the case of municipal law and international law. When it comes to deciding whether a given action or omission should or should not be attributed to the State as an eventual source of international responsibility, the reply is not necessarily dictated by the criteria used to determine whether that action or omission should or should not be attributed to the State as a source of administrative responsibility. It should always be remembered that the State machinery and the internal rules which regulate the activity of its components are merely facts for international law, which take them for granted and takes them into account, but only in so far as that is consonant with its own requirements.

54. In international law, the criteria used to determine whether the conduct of a State organ should be considered an act of the State itself, with all the consequences which follow therefrom, seem to be based essentially on the need for clarity and security in international relations which has so often been mentioned in the works of jurists, statements of position by States and the reasons given for arbitral decisions. The increasing insistence with which the notion of appearance has been invoked in connexion with the subject with which we are concerned and the opposition between real competence and apparent competence, which has so often been noted in order to stress that the latter alone counts in international relations, all demonstrate the extent to which that need is recognized.

The deciding factor in determining whether certain acts should be considered acts of the State as a subject of international law is not the provisions of a given rule of municipal law but the criteria imposed by the requirements of international life. At the international level, the State must recognize that it acts whenever persons or groups of persons whom it has instructed to act in its name in a given area of activity appear to be acting effectively in its name within that sector. Even when in so doing those persons or groups exceed the formal limits of their competence according to municipal law or contravene the provisions of that law or of administrative ordinances or internal instructions issued by their superiors they are nevertheless acting, even though improperly, within the scope of the discharge of their functions. The State cannot take refuge behind the notion that, according to the provisions of its legal system, those actions or omissions should not have occurred or should have taken a different form. They have occurred and, hence, from the international point of view they are actions or omissions of the State. The latter is obliged to assume responsibility for them and to bear the consequences provided for in international law.

55. Nevertheless, we consider—and we have not failed to mention the fact in passing—that this criterion contains an indication of the limitations of its application. It is quite logical that any action or omission which unquestionably appears, in international relations, to be an action or omission of the State as a subject of international law should be considered an act of the State. But there is no reason to follow the same course with regard to conduct that no one, from the point of view of such relations, could reasonably attribute to the State. This is true primarily when the individual organ obviously acts in an individual capacity and commits acts which have nothing to do with its place in the State machinery. As we have seen, in that case there is no problem. But it may also be true, exceptionally, in some cases where the individual organ is manifestly acting in the discharge of State functions and not in a purely personal capacity. This is what happens when the acts committed by an official, although allegedly committed in the name of the State, are so completely and manifestly outside his competence, or fall within the scope of State functions so visibly different from those of the official in question, that no one could be mistaken on that score. The clarity and security of international relations cannot be jeopardized by these extreme cases, where there is no actual or apparent State action. There is thus no need to require the State to assume responsibility for such acts. Of course, this does not mean that the State may not, where necessary, incur international responsibility for situations of this type, too. Clearly, however, that responsibility must derive from the acts of organs other than the one which committed the injurious act.

56. We are aware that the aforementioned criteria for determining the basic principle relating to the subject under discussion and the limitations which that principle must almost automatically entail, will not always be easy to apply. On the basis of these criteria it will sometimes be difficult to determine, in a given situation, whether an action or omission by an organ of the State or a separate

¹⁰⁸ See *Yearbook of the International Law Commission, 1971*, vol. II (Part One), pp. 233 *et seq.*, document A/CN.4/246 and Add.1-3, chap. II, sect. I, and particularly paras. 120-121.

¹⁰⁹ *Ibid.*, p. 238, para. 120.

public institution is one of those which should be attributed to the State as a subject of international law, or one of the small number for which this is not the case. However, application problems are certainly not confined to a rule such as the one we propose to define, concerning a subject which is already so complex and multiform. In any case, these problems do not seem to be of a kind that would lead us to reject a conclusion which constitutes both the outcome of the long effort which has characterized the progressive evolution of international law in that sphere and the criterion which best meets the requirements of justice and of the balanced development of international life. It should be added that the solution to the problem of determining the conditions for the attribution to the State of an internationally wrongful act corresponds to that adopted, in codifying the law of treaties, for determining the conditions for the attribution to the State of a manifestation of will valid in international relations.

57. Having thus clarified the ideas on which the definition of the rule of international law concerning our subject must be based, we need only seek the formulation best suited to express those ideas correctly. The choice should be based on the desire to present those ideas in the manner which is most strictly faithful to their substance, most exhaustive and least likely to give rise to misunderstanding. We do not think, for example, that the desired result would be obtained by using some of the formulations which have already been proposed, particularly the one adopted by the Institute of International Law. It will be remembered that according to that formulation the distinguishing characteristic of acts to be attributed to the State for the purpose of international responsibility would be that the organs having committed them, in addition to having acted under cover of their status as organs, had made use of means placed at their disposal by the State for the discharge of their functions.¹¹⁰ In some cases, drawing a distinction on the basis of this criterion among acts committed by an organ under cover of its official status would produce an unacceptable result. It would be absurd, for example, to conclude that a State should assume responsibility for the act of a police officer who, disobeying his instructions, killed an alien placed in his custody by using a weapon provided by the State, but that the same act should not be attributed to the State if committed by the same police officer using a weapon provided by a private individual, or even if the same officer arranged for or allowed the murder to be committed by a private individual. We feel it is equally difficult to use, word for word, one of those formulations used in various private codification drafts which provide for attribution to the State, as a source of international responsibility, of actions or omissions committed by its organs within the scope of their "general competence" or within the "general scope of their functions".¹¹¹ We consider such a notion not only vague but inaccurate. The organ is either competent according to the juridical systems to which it belongs, or it is not: there is no "general" or "generic" competence as opposed to "specific" competence. Nothing would be more erroneous than to

envisage a "general competence" which would be attributed by international law in cases where municipal law denied its existence. Nevertheless, the idea on which these formulations are based should not be rejected entirely, provided that it is expressed in a negative rather than a positive form, so as to indicate an exceptional restriction to the basic principle. The purpose would then be to provide for an exception to the general rule of attributing to the State, as a source of international responsibility, acts committed by organs acting outside their competence or contrary to the provisions of municipal law: an exception that would state that acts committed entirely outside the scope of the functions entrusted to the organs in question would not be considered as acts of the State generating international responsibility. Acts performed in such conditions give an external, objective and unquestionable indication of complete lack of competence.

58. These comments bring us closer to our goal. We feel, for the reasons already stated on several occasions, that the formulations most likely to provide us with a model are those which stress external appearance and what is obviously manifest in international relations. We have seen, however, that these formulations are of two types. On the one hand, there are the formulations to be found, in particular, in certain arbitral decisions in, the 1961 Harvard draft and in the *Restatement* by the American Law Institute, which provide that actions and omissions of organs performed within the limits of their "actual or apparent competence"¹¹² shall be attributed to the State for the purpose of international responsibility. On the other hand there are the formulations contained in article 8, paragraph 2, second sub-paragraph of the draft articles adopted in first reading at The Hague in 1930 and in article 12, paragraph 4 of Mr. García Amador's revised draft of 1961, which in a negative form and by opposition to the basic principle of attribution to the State of actions or omissions committed by organs outside their competence but under cover of their official status, provided for the exceptional exclusion of such attribution in cases where the lack of competence was "apparent" or "manifest".¹¹³ We would be very hesitant to propose the adoption of a single formulation stating that the acts of an organ falling within the scope of its "actual or apparent competence" should be considered as an act of the State for the purpose of international responsibility. The expression "apparent competence" also lends itself to criticism; in any case, it would be better to speak of an "appearance of competence", in order to stress that competence which is merely apparent does not exist; where there is merely appearance we are dealing with a lack of competence. But we think above all that, in order to be consistent with the results of the progressive evolution of principles in this sphere, the main rule must be separated from the subsidiary rule in order to stress the limitative and exceptional nature of the latter as opposed to the former. The wording which we consider the most apt would thus be a formulation that mentioned

¹¹⁰ See para. 51 above.

¹¹¹ *Ibid.*

¹¹² Or of their "actual or apparent authority": see foot-note 96 above.

¹¹³ See para. 50 above.

the case of "evident" or "manifest" lack of competence to justify, on an exceptional basis, a restriction to the basic principle of attribution to the State of the acts of its organs, including those committed outside their competence or in contradiction with the rules relating to their activity.

59. It follows from these considerations that the Commission might profitably consider adopting an article consisting of two clauses. The first would state the fundamental principle mentioned above. The second would provide for restrictions to that principle, based on the clearest and most objective criteria possible. In the restrictive clause it would be necessary to mention, first and foremost, cases in which the action or omission of an organ is entirely foreign to the functions which it is supposed to perform.¹¹⁴ There is no doubt that in such cases the organ's lack of competence is complete and objectively evident. That reference might then be completed by reference to other cases where, in different conditions perhaps, the organ's lack of competence would be equally "manifest".¹¹⁵ The use of the notion of manifest

¹¹⁴ See the consideration mentioned at the end of paragraph 57. It will be recalled that some of the writers who advocate the adoption of formulations such as those that we prefer likewise provide that acts which are wholly foreign to the functions of organs of the State shall constitute an exception to the rule that all acts of State organs are attributed to the State the purposes of international responsibility. See para. 50, foot-notes 103 and 104, above.

¹¹⁵ What is designated by the adjective "manifest" should be understood as a quality which emerges objectively from a specific situation. This clarification is important, for some of the texts mentioned—particularly the text of article 8, paragraph 2, second sub-paragraph of the articles adopted in 1930 and the text of article 12, paragraph 4 of Mr. García Amador's revised draft, introduced a supplementary and typically subjective element in this regard. Exclusion of attribution to the State as a source of responsibility was provided for only in cases where the lack of competence of the organ which committed the injurious act was so manifest that the injured party should have been aware of it and could therefore have avoided the injury. We do not think an idea of this kind should be introduced into the rule we are to define. It might if necessary be understandable that it should be included in drafts which, like the two mentioned above, were concerned solely with problems relating to international responsibility for damage caused to individual aliens, but its presence could not be justified in a draft such as ours, which is designed to cover the whole subject of the internationally wrongful act and international responsibility. In any event, however, it is rather difficult to concede that the fact that the injured party, being aware of the lack of competence, was or was not able in a given instance to avoid the injury can be considered a determining factor for the purpose of attributing the conduct of the organ to the State as a subject of international law. The injured party, being aware of the organ's complete lack of competence, may or may not have been able, thanks to that awareness, to prevent the injurious action from being committed. However, setting aside the difficulty of speculating on that hypothetical ability, it would be illogical to consider the injurious action as an act of the State entailing responsibility in the second case but not in the first. If it is decided not to attribute to the State the act of an organ which is manifestly acting outside its competence, that decision should apply to both cases. It must be stated once again that this has nothing to do with the possibility that the State may incur responsibility, not for the act of the organ in question but for the act of another organ which, for example, failed to prevent the injurious action when it could have done so. It is in the latter case that the injured party's possible ability to avoid the injury might be taken into consideration as a circumstance that could exclude or attenuate the responsibility of the State.

lack of competence would also have the advantage of bringing the wording of the article on this subject in line with that of article 46 of the Vienna Convention on the Law of Treaties.¹¹⁶

60. In conclusion, for the definition of the rule of international law relating to the subject dealt with in this section, we think we may propose the following formulation:

Article 10. — Conduct of organs acting outside their competence or contrary to the provisions concerning their activity

1. The conduct of an organ of the State or of a public institution separate from the State which, while acting in its official capacity, exceeds its competence according to municipal law or contravenes the provisions of that law concerning its activity is nevertheless considered to be an act of the State in international law.

2. However, such conduct is not considered to be an act of the State if, by its very nature, it was wholly foreign to the specific functions of the organ or if, even from other aspects, the organ's lack of competence was manifest.

8. CONDUCT OF PRIVATE INDIVIDUALS

61. The preceding sections of this chapter cover the determination of the various categories of persons or groups of persons whose conduct may be considered as an act of the state under international law and therefore involves the international responsibility of the State concerned, provided that the other conditions are fulfilled. As we have seen, the persons or groups of persons in question always belong permanently, or even sometimes purely incidentally, to the machinery of the State or of separate public institutions, and act by virtue of that relationship. Lastly, an explanation was given of the criteria to be used in solving the problem of attributing to the State as a subject of international law the actions or omissions of persons belonging to the organization of the State or of other public institutions, when such actions or omissions are committed in the name of the body to which they belong, but are contrary to the provisions of municipal law. It must now be established whether in fact the subject has thus really been exhausted. In other words, can it rightly be concluded that no action or omission committed by a person or a group which is not in any of the situations referred to can be attributed to the State as a source of international responsibility?

62. This additional question must be posed because a State has frequently been held internationally responsible in connexion with an act committed by an individual acting as such, that is to say without even an incidental link with the machinery of the State or of a public institution. Could this responsibility be explained

¹¹⁶ Article 46 of the Convention reads as follows:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

by the fact that, for the purposes of international law, the acts of individuals who have no connexion with the State itself, other than, for example, the simple fact that they are in its territory, might also be attributed to the State as a possible source of responsibility? In the observations made at the beginning of this chapter, it was noted that it would not really be impossible, theoretically, to accept such an argument.¹¹⁷ However, it is difficult to see how, in practice, such a conclusion could be reconciled with what has already emerged from the analysis of practice and the decisions of tribunals in the preceding sections of this chapter, which showed that the action or omission of an individual belonging to the State machinery was consistently not attributed to the State, when it was, apparent that the individual had acted in a purely personal capacity. Furthermore, it is known that there are other possible explanations for the cases of international responsibility referred to which involve different conclusions. Moreover, international jurists have often enjoyed tilting at this subject; consequently, in addition to the conventional and most widely accepted explanations, attempts have been made to give other explanations in which the speculative spirit sometimes prevails over the intention to stick to the facts. If the facts are to be adhered to, it is once again evident that a careful and objective study of international practice will constitute a better basis for finding an answer to the question under consideration than a prolonged discussion of certain theoretical positions.

63. Once again, however, we feel that certain preliminary clarifications are needed as a guide for this analysis if there are to be no errors in interpreting its results. In the first place, it must be stated that a conclusion whereby acts committed solely by private individuals may be considered as "acts of the State", with a view to the possible international responsibility of the latter, would only be acceptable on one specific condition. The study of international practice must make it abundantly clear: (a) that, in the cases in point, the State as a subject of international law has been held responsible for the acts of an individual acting as such and, consequently, (b) that any international responsibility of the State is the result of a breach of an international obligation caused by this same act. Let us imagine, for example, that an individual has managed to enter the premises of a foreign embassy and has destroyed objects or purloined documents. In order to be able to conclude that the act of the individual should be attributed to the State as a source of responsibility, it must be established that, in the case in question, the State has in fact been accused of having violated, by its own action, the obligation to respect the inviolability of the embassy premises and archives. In that case, it would only be necessary to take note of that finding and to draw the inferences, however surprising they might appear. It would be useless to object, as writers have often done, that only States are subjects of international law and that therefore only they can violate the obligations imposed by that law. Apart

¹¹⁷ See *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 233, document A/CN.4/246 and Add.1-3, para. 107.

from the fact that such an objection would be begging the question, the cases referred to here are not cases of so-called international responsibility of individuals, but cases of international responsibility of the State. Since the action of the private individual would be attributed to the State, it would be the State, acting through the individual, which would breach an international obligation.

64. The study of international practice could, however, show that the acts of private individuals are never taken into account in determining the international responsibility of the State unless they are accompanied by certain actions or omissions of organs of the State. This should not automatically lead us to exclude the possibility of attributing the action of an individual to the State. Indeed, it could be so attributed, but only in cases where it is specifically characterized by a measure of participation or complicity on the part of State organs. There is no need, at this juncture, to establish the forms that such "participation" or "complicity" should take, but only to emphasize that the acts in question should, of course, really conform to such definitions.¹¹⁸ Nor should time be spent discussing the objection, already referred to above, that, since a private individual cannot violate an international obligation, complicity between the individual and the State for the purpose of such a violation would be inconceivable. As has already been shown, when the State endorses the act of an individual it is the State itself which acts, both through the individual and through the organs which are "accomplices"; the idea of such complicity would thus be quite conceivable.¹¹⁹ What should really be pointed out however, is that the conclusion envisaged should always include the idea that the State endorses the act of the individual as such, where certain State organs have in some way connived at that act. The action of an individual would be the basis of the internationally wrongful conduct of the State, and the State would violate an international obligation through the action of an individual in which certain organs were merely accomplices. The condition, referred to in the preceding paragraph, for a conclusion attributing the action of an individual to the State would therefore remain unchanged: the examination of cases which have actually occurred should always lead to the

¹¹⁸ It would be otherwise if the term "complicity" were used absolutely incorrectly, as in sometimes the case, and was no more than a fiction used to denote something else. For example, it is obvious that a court cannot correctly be defined as "an accomplice" in the crime of an individual because it does not impose an appropriate sentence on that individual.

¹¹⁹ It goes without saying that, in the cases envisaged here, the action of an individual should in no way be considered as the action of an organ. The possible "participation" or "complicity" of organs of the State in the action of an individual do not have the effect of making that individual a member—even an incidental or *de facto* member—of the machinery of the State. This is therefore a totally different field from that of action committed by certain individuals at the instigation and on behalf of the State: i.e. the cases, referred to previously, of persons who, without really being organs of the State, act on behalf of the State in certain circumstances, so that their actions would then be attributed to the State in the same way as those of organs in the strict sense of the term. See *Yearbook of the International Law Commission . . . 1971*, vol. II, pp. 264-266, paras. 193-196.

same conclusion, namely that the internationally wrongful act with which the State is charged is the violation of an international obligation perpetrated through the action of the individual concerned and not, for example, some other delinquency committed by someone else.

65. On the other hand, if the situations examined indicated that, in fact, the State has been accused of a breach of international obligations other than that which could have been breached by the action of the individual, a different conclusion would have to be drawn. The condition required for acknowledging attribution of the act of the individual to the State would evidently be lacking. It would no longer be a question of maintaining that the State had committed the violation of an international obligation complained of through the action of an individual which the State has endorsed. Nor could there be any question of describing the organs which had committed actions or omissions on that occasion as "accomplices" in the violation of an international obligation brought about by the action of the individual concerned, even if the individual and this conduct had been treated with leniency. On the contrary, it would have to be concluded that if there was a breach of an international obligation it was committed directly and solely by those same organs of the State and that the "act of the State" which might result in international responsibility could only have been the action or omission of those organs. Let us return to the example of the individual who succeeds in entering the premises of a foreign embassy and causing damage or committing burglary. There is no doubt that if the offender, was for example, a police officer acting in his official capacity, the State would have been specifically accused of having violated its obligation to respect the inviolability of the embassy premises and archives. If it was established that, since the offender was a private individual, the State was not accused of having violated the inviolability of the embassy but of having breached a totally different obligation—namely to ensure, with due diligence, that such crimes do not occur—the inferences of that finding should be coherently drawn. The State would not be held responsible for the action of the individual but for the omission committed in connexion with that action by the organs responsible for surveillance. The act of the individual could not be considered as an act of the State, either in itself or because of the alleged participation or complicity of organs of the State. It would merely be an external event distinct from the act of the State. This does not mean that such an event would not affect the determination of the State's responsibility. On the contrary, it could be a condition for the existence of such responsibility acting externally as a catalyst on the wrongfulness of the conduct of the State organs in this particular case.¹²⁰ But in any case, it would not constitute

a condition for attributing to the State the conduct of its organs—there being no doubt about such attribution even without the external event. The possibility of considering the act of the State, in the case in point, as constituting a breach of an international obligation—and therefore as being the source of international responsibility—would, however, depend on the external event in question. In other words, such a condition would obviously have a bearing on the objective element of the internationally wrongful act. The subjective element, which is now under consideration, namely the attribution of specific conduct to the State as a subject of international law, would in no way be dependent on the external event.

66. The criterion which should serve as a guide in the research to be carried out therefore basically consists in determining, in each specific case, for which delinquency the State has been held responsible under international law. If it is found that, in a given situation, the State is claimed to have violated a particular international obligation, and that the State could only have committed such a violation through the action of an individual, it must be acknowledged that, in the situation in question, it is obviously this action which has been attributed to the State. If, on the other hand, it appears that the State could only have committed the violation of which it is accused through the action or omission of an organ, even if it was committed in connexion with the acts of an individual, it must be concluded that such an action or omission alone has been considered as the act of the State. If the latter finding were to be repeated in connexion with all the cases in which international responsibility of the State has been acknowledged with regard to acts of individuals, it would have to be concluded that the actions or omissions of individuals could not be considered to be acts of State at the international level.

67. The fact that the nature of the delinquency of which the State is accused is considered a deciding factor in the problem under consideration should not result in a totally different element, namely the reparation that the State may be called upon to pay as a result of that delinquency, being considered as a deciding factor of equal importance. The amount of reparation which, in a given situation, is requested by the claimant State, or fixed by an international tribunal, will not provide any clarification as to whether, in that situation, the act attributed to the State as the source of responsibility was that of an individual or that of an organ. In our opinion, writers have erred in allowing themselves to be influenced by the fact that, in certain cases, the amount of the reparation that the State has had to pay has been calculated on the basis of the damage actually caused by the action of the individual, and in thinking that they should therefore conclude that the State, in the

¹²⁰ In the third report (*ibid.*, pp. 222-223, paras. 70-72), reference was made, in connexion with the objective element of the internationally wrongful act, to the distinction to be made between two cases: the first where the conduct connected to the State as a subject of international law in itself constitutes a breach of a State obligation, and the second where such a breach is completed only when an external event is combined with the conduct of the State. A typical example of the second case is the breach of one

of the international obligations intended primarily to prevent, as far as possible, any attacks by individuals against specified aliens or aliens in general. A breach of this kind of obligation only occurs if an attack is actually committed. It is precisely in this sense that the action of the individual can be said to act as a catalyst for the wrongfulness of the conduct of the State organs which have not taken the necessary steps to prevent the occurrence of such an action.

situation in question would not be answerable for the act of its organs but for the act of the individual.¹²¹ Such an inference, in so far as it really means that the act of the individual would be considered as an act of the State, in no way follows from the findings of these writers. If, in the consideration of a particular case, it was concluded, on the basis of the elements which have stated are decisive, that the act attributed to the State as the source of international responsibility was not the action committed by the individual but the action or omission committed by certain organs in connexion with the action of the individual there would be no reason to reopen the discussion on this conclusion at a later stage. The fact that certain criteria rather than others are used as the basis for fixing the amount of reparation, once responsibility has been established, does not necessarily mean that the principle of the conclusion in question can be reconsidered. Without undertaking to provide precise details on the matter which are not necessary here, we may take it to be generally acknowledged that every State must, under international law, ensure that foreign States, their appointed representatives and, to a lesser degree, their individual nationals, are effectively protected against attacks by individuals. That being so, there is no reason why a State which, through its organs, has failed, in a given circumstance, to respect that obligation should not be called upon to pay an indemnity commensurate with the damage caused by the individual to his victim, in order to discharge its responsibility. It has already been pointed out that the action of an individual, even if it is regarded as only a simple external event in relation to the act for which the State assumes responsibility, could constitute a necessary condition for proving, in a specific case, the wrongfulness of the conduct of the State organs and for making the State responsible. It would therefore be normal for the injurious consequences resulting from that action to constitute, at least in certain cases, a criterion for determining the amount of the reparation owed by the States as a result of the delinquency committed on that occasion by its organs.¹²² From this point of view, there is no need to draw a distinction according to whether the breach represented by the omission of the

organ for which responsibility is assumed by the State took place in connexion with the prevention or punishment of the act of an individual. Prevention and punishment are simply two aspects of the same obligation to provide protection and both have a common aim, namely to discourage potential attackers of protected persons from carrying out such attacks. The system of protection that the State must provide therefore includes not only the adoption of measures to avoid certain acts being committed but also provision for, and application of, sanctions against the authors of acts which the implementation of preventive measures has failed to avert. In omitting to punish the individual who, despite the surveillance exercised, has succeeded in attacking a particular person, the State commits a violation of this obligation that is no less serious than that committed by a State which neglects to take the appropriate preventive action.

68. The idea that the answer to the question whether the conduct of private individuals can or cannot be attributed to the State depends on the criteria used to determine the amount of reparation to be paid by the State in cases where it has incurred responsibility in connexion with such conduct is linked to another idea. According to this idea, which we have previously criticized and rejected, there is a further condition for the existence of an internationally wrongful act, in addition to the existence of conduct which could be attributed to the State and the fact that such conduct constitutes a breach of an international obligation of that State. According to this view a third condition should be added to the other two: the existence of "damage" linked to this failure by a causal connexion.¹²³ It is understandable that those who hold the view that damage should be one of the three constituent elements of an internationally wrongful act should identify the responsibility deriving from such an act with the obligation to make reparation for such damage. It is also understandable that they should find it difficult to agree that the amount of the reparation claimed from a State which is only held responsible for having failed to prevent or, more particularly, to punish the action of an individual guilty of an attack on a particular alien, should be calculated on the basis of the "damage" caused by the action of the individual rather than that resulting from the failure on the part of the State. To re-establish this causal connexion between the delinquency committed and the damage to be redressed, they are forced to choose between two alternatives. Either they do not worry about a possible contradiction with the factual evidence and maintain that the State endorses the action of the individual and is assumed to have committed the violation of an international obligation through that action—the damage caused by the action then becomes damage caused by the State itself and there is no further difficulty in agreeing that it is this damage that must be redressed; or they acknowledge that the act of the individual is not considered to be an act of the State, and

¹²¹ Similar terms are frequently found, and are, moreover, somewhat equivocal, because they can be interpreted to mean either attribution to the State of the act of an individual, or merely determination of the indemnity owed by the State on the basis of the material consequences of the act of the individual, which is obviously quite different.

¹²² Consideration of State practice and the decision of international tribunals will show that this criterion has sometimes, and even frequently, been followed in cases of attacks by individuals on private foreign nationals. It is not appropriate to express an opinion here on the claims made in many specific situations which have, moreover, often been settled on the basis of the special criteria laid down in certain conventions. But, in principle, it may be said that it does not appear to be so abnormal for the responsibility which the State must assume as a result of the wrongful passive attitude adopted by its organs on that occasion, to take the form of a financial obligation commensurate with the seriousness of the attack perpetrated by the individual and its material consequences for the victim. In any case, that is a question to be considered when defining the criteria for determining the amount of reparation due for an internationally wrongful act, not the conditions for the existence of such an act.

¹²³ See *Yearbook of the International Law Commission, 1971, vol. II (Part One)*, p. 223, document A/CN.4/246 and Add.1-3, para. 73.

then they have no alternative but to assume arbitrarily that the extent of the damage caused by the individual and that caused by the State organs by failing to prevent or punish the action of the individual appropriately, are identical.¹²⁴

69. These imaginary problems cease to exist when it is realized that "damage" is not a constituent element of an internationally wrongful act. At most, it is no more than a material effect of such an act, and is not even automatic, especially in so far as it is an effect translatable in terms of financial loss. In the case of a State committing, through an action or omission attributed to it, a breach of an obligation of international law towards another State, and not inflicting damage on that State. The act is wrongful, even though there is no damage, particularly damage of a financial nature. In any case, when the responsibility which results from an internationally wrongful act entails an obligation to make reparation, the State which is the author of the act complained of must make reparation for the delinquency itself, for the disturbance caused in international legal relations by the breach of its own legal obligations towards another State, and not the "damage" which that delinquency may have caused. It is perfectly understandable that, in certain cases, when financial damage has in fact resulted from the delinquency, the scope of the damage may be materially taken into account in fixing the amount of the reparation due for the delinquency in question. But this in no way affects the validity of the basic statement just made, namely that it is the delinquency for which reparation is made and not the damage which may result therefrom. Moreover, it is in no way stated that the amount of the reparation for the delinquency must necessarily be linked, even from a material point of view, with the financial damage which might result. The delinquency itself may prove to be much more serious than the financial damage caused and may require more reparation or *vice versa*. There are many cases in which the reparation due can only be fixed according to criteria other than a reference to the damage caused by the action or omission of the State, either because such damage is not proportionate to the delinquency, or because, in the case in question, no damage has been caused that can really be evaluated in financial terms.

70. Let us admit now that, in examining what in fact occurs in international legal relations, it is generally acknowledged that the State assumes responsibility not for the action of the individual, but for the conduct, usually omissive, of some of its organs in connexion

¹²⁴ There is another point. A further problem arises for those who chose the second alternative: should it be the damage caused by the conduct of the State organs to the foreign individual or the damage that such conduct might inflict on the national State of the individual, that is taken into account? A solution to this problem can often be found in special conventions which provide expressly for compensation for damage suffered by the injured persons. But, generally speaking, the problem remains unsolved and in theory the opinion prevails that the "damage" for which compensation is to be provided is that suffered by the State. Then there is a further assumption that the extent of the damage suffered by the State and that suffered by the injured person must or can be the same.

with the action of the individual. If such an acknowledgement is valid, it would be useless, at least in certain cases, to spend time seeking to determine the damage allegedly caused by those organs and determining the financial content of that financial content of that "damage" in order to fix the reparation owed by a State on that basis. The position of those who erroneously contend that the damage caused by omitting to prevent or punish an injurious action is equal to that caused by the action of the individual seems to be no less arbitrary than that of those who hold that it should automatically always be different. In fact, at least in certain cases, there may be no point in seeking to determine the financial "damage" that the State has caused by not punishing the individual who has injured an alien, for example, or by punishing him inadequately. In many cases, this will not provide a firm basis for determining the amount of the reparation due for a delinquency committed by the State. However, if the financial harm actually caused is to be taken as a point of reference and considered in determining the amount of reparation for that delinquency, there is no reason why such harm should necessarily be that allegedly caused by the conduct adopted by the State organs on that occasion. As already indicated,¹²⁵ it is not unusual for a State which has failed in its duty to protect the nationals of another State against the risk of injurious acts by individuals to be required to redress its error by paying an indemnity calculated on the basis of the financial loss actually incurred by such persons as a result of the action committed in its territory by an individual. In many cases this would be a more logical solution than that of taking the damage caused by the State organs themselves—which is so difficult to evaluate—as a point of reference. But, in conclusion, it should be reiterated that the adoption of this solution does not in any way lead automatically to the conclusion that the State has endorsed the action of the individual, in that particular case, any more than it can lead to a pure and simple acknowledgement that the acts of private individuals can also be considered as acts of the State at the international level.

71. The fact that, as far as the subject under consideration is concerned, reference is frequently made to breaches of international obligations whereby the State guarantees to protect aliens should not lead to another error. Within the framework of our project, the aim must still be to seek to define the principles governing the international responsibility of States for internationally wrongful acts. As has been stated, it is a question of determining the rules which define conditions in which a State's violation of an international obligation is acknowledged and the legal consequences of such a violation. We must not yield to the facile temptation to seek to define, within the same study, other rules which are only relevant to our purpose from the aspect of a failure to fulfil the obligations they prescribe. In the third report, in paragraph 6 of the introduction to this chapter, attention has already been drawn to the

¹²⁵ See para. 67 above.

possible dangers of an error of this kind. On the one hand, matters which are not pertinent to international responsibility would be introduced, as has often been the case in the past, and, once again, the opportunity for a clear, over-all and executive view of the matter to be codified would be lost. On the other hand, there would be an even more serious risk, because all the difficulties involved in determining the rules relating to the other subjects would be added to the already complex problem of codifying international responsibility. The 1930 attempt at codification failed largely because those involved sought to include a definition of the rules governing the treatment of aliens in the determination of the rules concerning responsibility. It was precisely in connexion with the article on the subject dealt with in this section that the League of Nations encountered an insurmountable obstacle in its work. That is a lesson which should not be forgotten, if the current efforts are to be any more successful.

72. It is perhaps appropriate to mention two additional points in order to complete these preliminary considerations. First, it must be emphasized that the responsibility which the State may incur as a result of the acts of individuals is, and can only be, direct responsibility. The idea of indirect or vicarious responsibility, or responsibility for "acts other than their own" to which a well-known writer has referred in describing the international responsibility of States in the situations dealt with here, cannot contribute in any way to an understanding of these situations or a solution to the problems deriving from them. It is particularly irrelevant to speak of indirect responsibility in referring to cases concerning the responsibility of a State in connexion with the acts of individuals, since this can lead to serious confusion with cases where it is more appropriate to use this term. In any legal system, the responsibility which a subject of that juridical order incurs for the wrongful act of another subject of the same juridical order is defined as "indirect" responsibility or responsibility "for an act other than its own". International law does not constitute an exception in this regard. This anomalous form of responsibility leads to a division, which occurs only in exceptional situations, between the subject which commits an internationally wrongful act and the subject which assumes responsibility for that act. However, in cases where the State is held internationally responsible for the actions of individuals, it would be inconceivable to consider these individuals as separate subjects of international law. The conditions for indirect responsibility are therefore entirely lacking. From this point of view, whether the State assumes responsibility for the action of the individual or for the conduct of an organ in connexion with the action of the individual, the situation remains the same; the State is still considered to be the author of the internationally wrongful act and to be responsible for it. In both cases it answers for its own act and its international responsibility is a direct responsibility.

73. The second point concerns the idea whereby, in situations involving acts of individuals that are detrimental to foreign States or their nationals, particularly in the case of riots or public disturbances in general,

the State is responsible in any case, whether the acts of either individuals or organs can be attributed to it or not. If that were so, obviously something entirely foreign to the sphere of State responsibility for internationally wrongful acts would be involved, something which, for example, would not be covered by the subject dealt with in this chapter, namely the determination of the various cases in which the existence, at the international level, of an "act of the State" must be acknowledged. In the last analysis, what would be called international responsibility for the acts of individuals would only be a guarantee provided by the State, at the international level, in connexion with injurious actions committed in its territory, under certain conditions, by individuals. A suggestion to this effect was made at one time, particularly *de jure condendo*, but without success, and it appears that it has not been taken up again recently. It is sufficient then, at this juncture, merely to have referred to it.

74. Bearing in mind the foregoing general observations, we can proceed to the analysis of specific cases which have actually occurred in international relations, so as to establish the trends in legal views among members of the international community with regard to the questions considered in this section. It would be useful to begin, this time, by examining the decisions of arbitration bodies, because it may be appropriate to refer to the more distant past for that purpose. Indeed, we must begin by examining certain cases from the second half of the last century in order to realize the progress made over a longer period of time towards clarifying ideas and defining principles. With regard to State practice, which provides a wealth of material but is basically not very well known and not always conclusive as far as the most distant past is concerned, it will suffice to start from the point when Governments adopted official positions at the time of the first attempt to codify this topic and when the most well-known incidents occurred after the League of Nations was established.

75. An old award is sometimes recalled in connexion with our subject, namely that relating to the *Ruden case*¹²⁶ rendered by the umpire of the Mixed Commission of the United States and Peru established under the Convention of 4 December 1868, which is well-known to international lawyers because of other very interesting aspects. The buildings and fences of a plantation belonging to the American national Ruden were attacked and burned in 1868. It was not known exactly whether this was done by individuals who had taken advantage of a total lack of surveillance or by the armed forces. Ruden never managed to obtain justice, either from the administrative authorities or from the courts. Umpire Valenzuela considered that Peru was responsible for this denial of justice with regard to Ruden and for having participated directly in the attack on the plantation. He based his second conclusion largely on the report of the consular body, which indicated that armed forces under the command of an officer had started the fires

¹²⁶ See Moore, *History and Digest... (op. cit.)*, vol. II, pp. 1654-1655.

at the time and place in question. This decision is only of interest to us from a negative point of view, that is to say because it is not appropriate to invoke it in support of the idea that injurious actions committed by individuals should be attributed to the State.

76. *Glenn's case*, decided by Umpire Thornton on the basis of the Convention of 4 July 1868 between the United States and Mexico,¹²⁷ seems to be more interesting from our point of view. Mrs. Glenn, a widow, presented a claim in which she stated that soldiers, allegedly under the orders of a sergeant and a corporal—who in turn were under the orders of a deputy in the Mexican National Congress—had murdered her husband and son and taken the bodies away. The Commission considered that the participation of the deputy had not been sufficiently proved and was inclined to consider the soldiers' action as being carried out by them as individuals. However, it attributed to the Mexican State a denial of justice committed by the judicial authorities, which had failed to bring to trial those who had committed the acts of violence complained of. On the basis of that omission, it sentenced Mexico to pay an indemnity of 20,000 Mexican dollars. It seems very clear that, according to the Commission, the injurious actions committed by individuals could not be considered an internationally wrongful act of the State and that only the actions or omissions of organs could be taken into consideration for that purpose.

77. An arbitral award which has frequently been referred to, as a result of the declarations of principle it contains, is that relating to the *Cotesworth and Powell case*, rendered on 5 November 1875 by the British-Colombian Mixed Commission established under the Convention of 14 December 1872. The following passage is to be noted:

One nation is not responsible to another for the acts of its individual citizens, except when it approves or ratifies them. It then becomes a public concern, and the injured party may consider the nation itself the real author of the injury. And this approval, it is apprehended, need not be in express terms; but may fairly be inferred from a refusal to provide means of reparation when such means are possible; or from its pardon of the offender when such pardon necessarily deprives the injured party of all redress.¹²⁸

In examining this passage, the first conclusion seems evident: the arbitral Commission was of the opinion that there could be no question of attributing the act of an individual to the State as a source of responsibility, if that act was not accompanied by actions or omissions by State organs. However, if that condition were fulfilled, this award would appear to support the argument

for attributing the act of the individual itself to the State as a source of responsibility, once that act has been approved or ratified by the State. The phrase indicating that the injured party may "consider the nation itself the real author of the injury" would imply that such was the Commission's opinion. However, the following sentences give rise to some doubts. Did the Commission really intend to state that the failure to punish a private crime, or the amnesty granted subsequently for such a crime, were sufficient to make the act in question a public act of the State rather than a private act, for the sole reason that they would deprive the injured party of the possibility of obtaining any redress for the injury suffered? Or did it simply mean to state that in the case of crimes committed against aliens failure to punish and the granting of amnesty were actions contrary to the international duties of the State and therefore involved its international responsibility? It is doubtful whether the Commission intended to carry its assertion to its logical extreme and state that amnesty for the crime of an individual would have the effect of making the State itself appear in retrospect as the author of the said crime and therefore of an international delinquency having nothing to do with the breach of the obligation to impose a punishment. In any case, we can only take note of the statements in the passage quoted, which are in any event an indication of the influence of concepts that were still widely held at the time the award was made.

78. *The De Brissot and others case*, already referred to,¹²⁹ which was decided by the United States-Venezuelan Claims Commission established under the Convention of 5 December 1885, was probably the last case before the beginning of the twentieth century which provided an opportunity for an airing of views on the matters considered in the present report. In his opinion, Presiding Commissioner Little stated the following:

Venezuela's responsibility and liability in the matter are to be determined and measured by her conduct in ascertaining and bringing to justice the guilty parties. If she did all that could reasonably be required in that behalf, she is to be held blameless; otherwise not.¹³⁰

Having established this basic criterion, the arbitrator pointed out failings in Venezuela's conduct: the authorities had apparently not taken all necessary action to arrest the leaders, at least of the lawless band who had committed the offences complained of. He therefore concluded that Venezuela had in that respect been derelict in its duty. However, the arbitrator ruled that, since that failure had not been flagrant, reparation should be reduced in proportion to the remaining element of doubt. From these various arguments, it can be concluded that the arbitrator considered that only the conduct of State organs could be attributed to the State and, further, that he deemed it necessary to take into account, in determining the amount of reparation, certain specific aspects of the delinquency committed by those organs.

¹²⁷ *Ibid.*, vol. III, p. 3138.

¹²⁸ See Moore, *History and Digest . . . (op. cit.)*, vol. II, p. 2082; for the French, see A. de Lapradelle and N. Politis, *op. cit.*, 1954, t. III, p. 725. The Commission indicated that it based the responsibility of Colombia solely on the consequences of the amnesty granted by that country to the guilty parties, thus adhering "to the well-established principle in international polity, that, by pardoning a criminal, a nation assumes the responsibility for his past acts". Moore, *History and Digest . . . (op. cit.)*, vol. II, p. 2085; for the French, see Lapradelle and Politis, *op. cit.*, 1954, t. III, p. 728.

¹²⁹ See para. 34 above.

¹³⁰ Moore, *History and Digest . . . (op. cit.)*, vol. III, p. 2968.

79. At the beginning of the twentieth century (on 30 September 1901, to be precise) there was published a series of awards—some of which have already been referred to in other connexions—by the arbitrator Ramiro Gil de Urbarri who, under the Italian-Peruvian Convention of 25 November 1899, was entrusted with the task of ruling on the claims of Italian nationals residing in Peru. These awards proclaim clearly the principle of the impossibility of attributing the act of an individual to the State as a source of responsibility. In his decision on the *Capelleti case*, the arbitrator rejected the claim for indemnity which had been submitted, commenting:

It is an established fact that the theft of furniture and objects belonging to the claimant cannot be imputed either to the forces of the Government or to any official or authority and that, such being the case, they cannot incur any liability therefor. This case involves an offence under general law which must be punished in accordance with Peruvian law, not damage sustained as a result of the civil war of 1894-1895, particularly as the consular agent of Italy had been handed the keys of the house by the claimant and was thus responsible for ensuring that it was properly protected.¹³¹

80. Prior reference has also been made, in connexion with matters relating to actions and omissions of organs acting outside their competence or in violation of municipal law, to the complex *Poggioli case*, which was decided by the Italian-Venezuelan Commission established under the Protocols of 13 February and 7 May 1903. One of the claims considered related to the actions of four individuals who, among other things, had attempted to murder one of the Poggioli brothers. In his decision, Umpire Ralston commented as follows:

It appears that in 1891 an attempt was made upon the life of Silvio Poggioli by four people who were subsequently recruited into the Venezuelan army, and who have to this day escaped punishment, although guilt appears to have been completely established and although repeated requests were made of the higher officials in the State, judicial and administrative, that they be rearrested and subjected to proper punishment for their act. We find that one of these requests was made within two weeks after the wrongful arrest of the Poggiolis, and occasioned by the fact that these criminals were then engaged in ravaging their properties and driving off their employees.¹³²

The umpire then went on to describe the offences which the criminals continued to commit, even after the Poggiolis were released, with the connivance of the local authorities, who warned them when they were in danger of arrest so that they could conceal themselves. He pointed out that that situation had endured for more than two years and that, as late as 1894, notwithstanding express orders given by the Central Government at Caracas, the local authorities had failed to arrest any of the culprits. On the basis of those considerations, he drew the following conclusions:

It seems to the umpire that under these circumstances the local authorities of Venezuela were derelict in their duty and were

guilty of a denial of justice, for justice may as well be denied by administrative authority as by judicial. And it further appears to him that when the authorities of the State of Los Andes have acted in apparent conjunction with criminals, and have with them and under the circumstances heretofore detailed joined in the commission of offences against private individuals, and no one has been punished therefor and no attempt made to insure punishment, the act has become in a legal sense the act of the government itself. One can not consider that the acts were the acts of a well-ordered State, but rather that for the time being some of the instrumentalities of government had failed to exercise properly their functions, and for this lack the Government of Venezuela must be held responsible.¹³³

These findings were certainly not very clear, and the same could be said of a number of subsequent commentaries. However, many apparent uncertainties were probably attributable quite as much to the complexity of the *de facto* situation considered as to the persistent influence of certain theories which were still current at the time. It was probably the umpire's intention to bring out two different aspects of the actions of the local government. Firstly, he denounced the complicity of the local government in the acts of the individuals who had committed the crimes. However, in the case in question it was not a legal fiction to speak of "complicity"; the term was not used merely to indicate an attitude adopted *ex post facto* in failing to mete out appropriate punishment to the perpetrators of a crime. Later on, the umpire made it clear that the misfortunes of the Poggiolis derived from the bad feeling engendered in the local authorities by the refusal to surrender to them, without compensation, mules and other animals for use by the Army. That was probably the origin of the order for the arrest of the Poggiolis which was issued without good cause by the general in command in the area and which enabled the criminals to ravage the Poggioli plantation in the owner's absence. That was also the origin of the subsequent connivance of the local authorities with the criminals, the repeated refusal to arrest them and the assistance given to them to enable them to evade measures for their arrest, when such measures were decided upon as a matter of pure form in order to avoid going too far in disobeying the orders of the central Government. It was those considerations which led the umpire to state that, in the case in question, the injurious acts complained of should be regarded as having become acts of the Government. It would even have been justifiable to ask whether, in such circumstances, the local authorities had not gone beyond "complicity" and mere participation in the acts of individuals and whether those individuals were not in fact government agents, persons acting at the instigation and on behalf of the Government, so that in the last analysis their acts were acts of the Government. The umpire went on to emphasize that one fact at any rate was certain: the local government authorities were guilty of failing either to punish or to attempt to punish the perpetrators of the crimes. The umpire saw in that omission a denial of justice, a delinquency undoubtedly committed by the Government, the indisputable source of the international responsibility of the State. In other words, the umpire only reached the conclusion that the offences

¹³¹ United Nations, *Reports of International Arbitral Awards*, vol. XV (United Nations publication, Sales No. 66.V.3), p. 439. [Translation from French.] See *ibid.*, p. 410, for a decision to the same effect in the *Serra case*, in which the claim presented in respect of a fire "caused by the people" was disallowed.

¹³² *Ibid.*, vol. X (United Nations publication, Sales No. 60.V.4), p. 689.

¹³³ *Ibid.*

committed derived from the State because State organs had participated directly in them. It did not occur to him to admit acts of individuals as such being attributable to the State: the internationally wrongful act of the State in relation to those acts was the denial of justice, the failure to carry out the duty to protect the victims, punish the culprits and prevent them from committing further offences.

81. Ideas on this subject received more precise definition and greater clarification during the second half of the 1920s. On 1 May 1925, Max Huber, who had been appointed as arbitrator under the Anglo-Spanish Agreement of 29 April 1923, rendered the well-known award concerning the various claims comprised in the *British Property in Spanish Morocco case*. He referred, *inter alia*, to Spain's possible responsibility for a series of wrongful acts committed in the international zone by inhabitants of the Spanish zone and in that connexion rejected in principle the idea that a State could incur international responsibility for acts committed by its inhabitants abroad.¹³⁴ Even more interesting, however, was the fact that, during the specific examination of the British claim in the *Menebhi case* concerning a ransom exacted and thefts committed by some 30 persons from the uplands of the Spanish zone who had crossed the border in both directions during the raid, the arbitrator felt obliged to consider the question of a possible failure by the Spanish authorities to carry out their duty to ensure prevention. Pointing out that, in view of the circumstances, the Spanish authorities could not be blamed for having failed to maintain the necessary surveillance at the frontier posts, he settled that question by concluding that if any authorities could be held responsible for failing in their duty to ensure prevention, those authorities could only have been those of the international zone. He then went on to state:

Responsibility, if any, could therefore be based only on the attitude of the Spanish authorities with respect to the prosecution of the robbers in the Protectorate zone and the measures designed to ensure the return of the ransom by those who had collected it.¹³⁵

On that point, the arbitrator drew attention to the fact that the Spanish authorities had:

... done nothing to induce the offenders to return the money or to punish them... It is justifiable to regard this inaction as a breach of an international obligation.¹³⁶

Proceeding, on the basis of that finding, to determine the reparation payable by Spain for that breach, the arbitrator noted:

It would, however, in no circumstances be justifiable to attribute responsibility for the entire damage to a Government which, although perhaps negligent in that respect, was certainly not responsible for the events which were the immediate cause of the damage... Spain's responsibility is based only on the conditions of judicial assistance and not on the circumstances of the actual event which caused the damage.¹³⁷

It is thus clear that, by this decision, the eminent Swiss jurist contributed in several respects to the definition of the principles relating to the subject under review. It is apparent from his arguments that: (a) in cases involving acts by individuals injurious to aliens, he regarded as an act of the State and a potential source of international responsibility only the possible failure in the part of State organs to prevent such acts or to punish their perpetrators; (b) he flatly ruled out the possibility that the act of an individual could in any way be a source of State responsibility; (c) he regarded the act of the individual as an injurious act distinct from the conduct which could be attributed to the State in the case in question; and (d) even for the purpose of determining the amount of reparation, he was concerned to emphasize that the responsibility of the State derived solely from its breach of an international obligation in the case in question and not from the circumstances and effects of the acts of individuals.

82. After this case, it was decisions of the Claims Commissions established between various countries and Mexico which provided the principal opportunity for a fresh and more comprehensive analysis of the problems of State responsibility for acts of individuals. The Mexico-United States General Claims Commission established by the Convention of 8 September 1923 on several occasions made an important contribution to the definitive affirmation of the principle that the responsibility of the State for acts of individuals, where established, is based solely on the conduct of the State in failing to prevent or punish such acts.

83. In this respect, the most noteworthy award is the one rendered by that Commission, presided over by Van Vollenhoven, on 16 November 1925 in the *Janes case*. The Commission was called upon to decide a claim presented to Mexico by the United States following the murder of a United States national, the superintendent of the El Tigre Mines, in 1918 by a discharged employee of Mexican nationality. The claim was based on the fact that the Mexican authorities at El Tigre had failed to take proper steps to apprehend the culprit, who had gone unpunished. The United States agent stressed the "complicity" of the Mexican State in the case. He argued that the State, by failing to apprehend and punish the culprit, had condoned and ratified his crime, thereby making it its own. However, the Commission, having established to its satisfaction that the Mexican authorities had been guilty of negligence, reasoned as follows:

... there remains to be determined for what they [the Mexican Government] are liable and to what amount. At times international awards have held that, if a State shows serious lack of diligence in apprehending and/or punishing culprits, its liability is a derivative liability, assuming the character of some kind of complicity with the perpetrator himself and rendering the State responsible for the very consequences of the individual's misdemeanor... The reasons upon which such finding of complicity is usually based in cases in which a Government could not possibly have prevented the crime, is that the nonpunishment must be deemed to disclose some kind of approval of what has occurred, especially so if the Government has permitted the guilty parties to escape or has remitted the punishment by granting either pardon or amnesty... A reasoning based on presumed complicity may have some sound foundation in cases of nonprevention where a

¹³⁴ *Ibid.*, vol. II (United Nations publication, Sales No. 1949.V.1), p. 636.

¹³⁵ *Ibid.*, p. 709 (translation from French).

¹³⁶ *Ibid.*, p. 710 (translation from French).

¹³⁷ *Ibid.*, pp. 709-710 (translation from French).

Government knows of an *intended* injurious crime, might have averted it, but for some reason constituting its liability did not do so. The present case is different; it is one of nonrepression. Nobody contends either that the Mexican Government might have prevented the murder of Janes, or that it acted in any other form of connivance with the murderer. The international delinquency in this case is one of its own specific type, separate from the private delinquency of the culprit. The culprit is liable for having killed or murdered an American national; the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender. The culprit has transgressed the penal code of his country; the State . . . has transgressed a provision of international law as to State duties Even if the nonpunishment were conceived as some kind of approval—which in the Commission's view is doubtful—still approving of a crime has never been deemed identical with being an accomplice to that crime¹³⁸

The matter could hardly have been put more clearly. The Commission went to the heart of the problem and did not hesitate to spell out its opinion: (a) that the act of the individual is attributed to him alone and that the only acts which can be attributed to the State are those of its organs; (b) that the two kinds of acts should be considered at two quite different levels—the first at the level of municipal law and the second and the second alone at the level of international law; and (c) that the notion of complicity inherent in the failure to take punitive action was purely fictitious and in any event could not be used as a basis for reversing the conclusions and attributing to the State responsibility for the acts of the individual.

84. For the purpose of determining the damages payable by Mexico in respect of the omissions attributed to it, the Commission also deemed it necessary to take into account the distinction which it had drawn between the delinquency committed by the individual and the delinquency charged to the State. It emphasized that the two delinquencies were different “in their origin, character and effect”.¹³⁹ It therefore believed that the State was bound to remedy its internationally wrongful omission by compensating the foreign nationals injured by that omission. However, the damage caused by the omission could not, in the Commission's view be assessed on the basis of the damage caused by the murderer, which was different and inflicted on different individuals. After recalling a series of decisions and legal opinions running counter to the idea of a common yardstick for assessing the two kinds of damage, the Commission applied itself to the task (a task which was not, in its opinion, more difficult than in other cases of denial of justice) of computing the amount of damages payable by Mexico. It indicated that it would take into account both the “indignity” caused to the family of the victim by the Government's attitude and the general mistrust and lack of safety resulting from that attitude. It emphasized the desirability of taking into account, in each specific situation, the seriousness of the omission of which the State is accused and also the occasional or repeated nature of the State's failure to carry out its duties with respect to

the administration of justice.¹⁴⁰ It is once again evident from the statements of the Commission that, even as far as the amount of reparation was concerned, it wished to emphasize that it was taking into account only the omission of the State organs and not the act of the individual.

85. The United States member of the Commission, Nielsen, dissented from the majority opinion with respect to the criteria to be applied in determining the damages to be paid. He maintained that a State whose authorities had failed to take prompt and effective measures to apprehend and punish the guilty individuals was in fact obliged to compensate for the damage caused by the acts of such individuals. To bear out this conclusion, he sought support in the old concept whereby a State which did not take adequate steps to punish the perpetrator of an offence against aliens could be deemed thereby to have “condoned” the wrong committed by the individual and to have become responsible for it.¹⁴¹ Did the United States arbitrator really mean that the Mexican State should be regarded as the perpetrator of the killing in the case under consideration? Or did he—and this is a more likely interpretation—simply wish to affirm that the wrongful act constituted by the “condonation” accorded by State organs should be remedied by compensating for the damage originally caused by the murder committed by the individual? The only international obligation referred to in Nielsen's separate statement as having been violated was the obligation “to take appropriate steps to prevent the infliction of wrongs upon aliens and to employ prompt and effective measures to apprehend and punish persons who have committed such wrongs”.¹⁴² In any event, it is necessary only to refer, on this point, to the preliminary considerations set forth earlier, particularly those where we attempted to bring out the distinction between reparation for a delinquency, on the one hand, and compensation for damage, on the other. There is no need to express any opinion on the possible appropriateness or inappropriateness of taking as a point of reference, in the case in question, the damage caused by the private criminal act in determining the

¹⁴⁰ This aspect of the award has attracted particular attention from writers, especially American writers, who have noted that the amount of damages established was an arbitrary figure, while at the same time emphasizing that such a figure was justified because of the “punitive” nature of the reparation for the delinquency committed by the State, the reparation acting as a penalty designed to induce the State to abandon an inadequate system for the administration of justice. On this point, see E. M. Borchard, “Important Decisions of the Mixed Claims Commission United States and Mexico”, *American Journal of International Law*, (Washington, D.C.), vol. 21, No. 3 (July 1927), pp. 516 *et seq.*; C. Eagleton, “Measure of damages in international law”, *Yale Law Journal*, (New Haven, Conn.), vol. XXXIX, No. 1, November 1929, pp. 54 *et seq.*; F. S. Dunn, *The Protection of Nationals: A Study in the Application of International Law* (London, Oxford University Press, 1932), pp. 175 *et seq.*; J. G. de Beus, *The Jurisprudence of the General Claims Commission United States and Mexico under the Convention of September 8, 1923* (The Hague, Nijhoff, 1938), pp. 165 *et seq.*; A. V. Freeman, *The International Responsibility of States . . .* (*op. cit.*), pp. 607 *et seq.*

¹⁴¹ United Nations, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No. 1951.V.1), pp. 90 *et seq.* In his opinion Nielsen made many references to the writings of jurists and legal precedents.

¹⁴² *Ibid.*, p. 91.

¹³⁸ *Ibid.*, vol. IV (United Nations publication, Sales No. 1951.V.1), pp. 86 *et seq.*

¹³⁹ *Ibid.*, p. 89.

amount of reparation for the delinquency committed by the State in failing to punish the perpetrator of that act. All that needs to be emphasized is that, even if such an approach had been adopted, it would in no way have entailed the need to draw the retrospective conclusion of attributing the private act as such to the State and thus holding the State responsible for a delinquency other than the omission indicated. It is significant that, despite his long statement the United States member of the Commission finally associated himself with the majority of the Commission in the determination of the actual amount of damages payable by Mexico.¹⁴³ In any event, it is important to note, in concluding our consideration of this important case, that the ideas expressed by Nielsen in no way influenced the majority of the Commission, but rather, as we have seen, induced it to develop and enunciate, with reference to the matters of concern to us in this study, an opinion which undoubtedly represents a milestone in this domain in the history of international arbitral decisions.

86. The Mexico-United States General Claims Commission again applied the criteria set forth in the *Janes case* in its decisions on other cases: in particular, the *Kennedy case*, decided on 6 May 1927;¹⁴⁴ the *Venable case*, decided on 8 July 1927;¹⁴⁵ and the *Canahl case*, decided on 15 October 1928.¹⁴⁶ After the beginning of the 1930s, there are no further international arbitral decisions of an interest comparable to that of the *Janes case*. However, it is evident that, after that date, the principle of the non-attribution to the State of the acts of individuals was finally accepted, the negative conclusion embodied in that principle not being susceptible of modification by the attitude taken by the public authorities with regard to such acts. Subsequent arbitral commissions have therefore confined themselves to establishing whether, in a particular situation, the State could be held guilty of a breach of its international obligations to ensure prevention and punishment and to deciding, on the basis of that finding, whether an internationally wrongful act constituted solely by such breach has been committed by the State. For instance, in its award in the *Kidd case* rendered on 23 April 1931, the British-Mexican Commission established under the Special Agreement of 19 November 1926 considered this very point and reached a negative conclusion.¹⁴⁷

87. A series of more or less contemporaneous decisions by the United States-Panama General Claims Commission

established under the Convention of 28 July 1926¹⁴⁸ are also of some interest. In the *Noyes case*, decided on 22 May 1933, the claim presented on behalf of a United States national who had sustained bodily harm and other injury at the hands of a crowd acting under the influence of liquor was based on a failure to provide protection to the injured party and a failure to punish the culprits. Having emphasized that, in the case in question, Panama could not be held guilty of either failure, the Commission rejected any claim for damages, commenting that State responsibility could not arise from the fact that an alien had suffered an aggression at the hands of private persons but only from one of the following two circumstances, whose existence needed to be specifically established:

either their [the authorities'] behavior in connection with the particular occurrence, or a general failure to comply with their duty to maintain order, to prevent crimes or to prosecute and punish criminals.¹⁴⁹

88. The situation in the *Denham case*, decided by the same Commission on 22 May 1933, was more unusual. The murderer of a United States national had been arrested promptly by the Panamanian authorities and sentenced to a term of imprisonment of 18 years and four months, a penalty which the Commission considered to be adequate. In its opinion, therefore, Panama had, at the outset, fulfilled its international obligations in relation to the specific situation. However, after three and half years of imprisonment the murderer's sentence was commuted for a variety of reasons, first and foremost an amnesty granted by law. In view of those circumstances, the Commission concluded that the culprit had not been punished adequately and that Panama had consequently incurred liability. There is absolutely no question in the decision of the State's having ratified the individual's crime: the State was censured only for the conduct of its organs, including the legislature, which brought about the release of the culprit before he had served an adequate sentence. It may also be emphasized that, in determining the amount of reparation payable by Panama, the Commission took no account of the over-all damage caused by the individual's crime and referred exclusively to the relative seriousness of the delinquency committed by the State. The amount to be paid was actually established taking into account the fact that the State had partly, if not wholly, fulfilled its obligation.¹⁵⁰ The Commission was later to recall the criteria set forth in this case in another decision, namely, that rendered on 21 June 1933 in the *Adams case*, in which it held Panama liable for having failed to inflict adequate punishment on a policeman guilty of robbing and wounding a United States national. In the latter case, too, it may be noted that the amount of reparation was established taking into con-

¹⁴³ *Ibid.*, p. 98.

¹⁴⁴ *Ibid.*, pp. 194 *et seq.*

¹⁴⁵ *Ibid.*, p. 219 *et seq.*

¹⁴⁶ *Ibid.*, pp. 389 *et seq.* It is significant that in this case the Commission reached a unanimous decision (and it was the United States arbitrator, Nielsen, who wrote the decision), in which the indemnity charged to Mexico as a result of its violation, by omission, of the obligation to seek out and apprehend the perpetrators of a murder was reduced because of the difficulties caused by the revolutionary disturbances to the administration of justice.

¹⁴⁷ United Nations, *Reports of International Arbitral Awards*, vol. V (United Nations publication, Sales No. 1952.V.3), pp. 142 *et seq.*

¹⁴⁸ These decisions have also been examined, from the point of view of the determination of the amount of reparation, by Freeman, *The International Responsibility of States . . . (op. cit.)*, pp. 619 *et seq.*

¹⁴⁹ United Nations, *Reports of International Arbitral Awards*, vol. VI (United Nations publications, Sales No. 1955.V.3), p. 311.

¹⁵⁰ *Ibid.*, pp. 312-313.

sideration the partial punishment which had been inflicted on the culprit.¹⁵¹

89. Another statement of principle relevant to the subject under review—probably the last such statement before the Second World War—appears in the decision of the arbitrator Algot Bagge relating to the case of the *Finnish Shipowners against Great Britain in respect of the Use of Certain Finnish Vessels during the War*, rendered on 9 May 1934 on the basis of the Great Britain-Finland Agreement of 30 September 1932. Referring to the application of the rule of prior exhaustion of local remedies, the arbitrator indicated that the two parties agreed in recognizing that there might be cases where it could be said that a breach of international law had been committed by the very acts complained of and, consequently, before any recourse had been had to the municipal tribunal. He went on to state:

These acts must be committed by the respondent Government or its officials, since it has no direct responsibility under international law for the acts of private individuals.¹⁵²

We are not aware of any arbitral awards rendered since the Second World War involving a statement of position on specific questions relating to the international responsibility of the State with respect to acts of individuals.¹⁵³

90. Among arbitral awards relevant to the matters under consideration in this report, decisions relating to injuries inflicted upon aliens by individuals in the course of riots, revolts and disturbances in general which the public authorities were unable to prevent or control have often been regarded as a separate category. The principle of the non-attribution to the State, as a source of responsibility, of the acts of the individual perpetrators of such injuries is once again brought out clearly in these decisions. The award rendered by the United States-Chile Claims Commission established under the Convention of 7 August 1892 in the *Lovett case*, involving acts committed against aliens by rebels who had killed the governor of the colony and slaughtered the local garrison states the following:

All the authorities on international law are a unit as regards the principle that an injury done by one of the subjects of a nation is not to be considered as done by the nation itself.¹⁵⁴

¹⁵¹ *Ibid.*, pp. 322-323. The Commission also indicated that it found it unnecessary to pass upon the question whether a State was liable for the act of a police officer, irrespective of failure to punish, or whether such liability arose when the officer, while in uniform, clearly acted outside the scope of his functions. This statement does not appear to us to mean that if, despite the circumstances, the Commission had attributed the act of the police officer to the State, its decision regarding the amount of reparation payable would have been the same. Freeman, *The International Responsibility of States . . . (op. cit.)*, pp. 619-620, seeks to draw this inference from the statement. Taken as a whole, however, it seems to mean only that the Commission felt it was not called upon to consider those matters because it regarded the act of the police officer as an act committed in a personal capacity.

¹⁵² United Nations, *Reports of International Arbitral Awards*, vol. III (United Nations publication, Sales No. 1949.V.2), p. 1501.

¹⁵³ Nevertheless, authoritative confirmation of the principle that the State is not necessarily answerable for all wrongful acts perpetrated in its territory may be found in the Judgment rendered by the International Court of Justice on 9 April 1949 in the *Corfu Channel Case (Merits)*, *I.C.J. Reports 1949*, p. 18.

¹⁵⁴ Moore, *History and Digest . . . (op. cit.)*, vol. III, p. 2991.

A few years later, the United States-Venezuelan Mixed Claims Commission established under the Protocol of 17 February 1903 emphasized, in its decision relating to the *Underhill case*, that the local authorities had been guilty of no unlawful act, omission or negligence in connexion with the acts of an exasperated mob in a riot and that a government could incur responsibility only in respect of actions or omissions of that kind attributable to its officials.¹⁵⁵ More recently, the Great Britain-United States Mixed Commission established under the Agreement of 18 August 1910 observed, in its decision of 18 December 1920 relating to the case of the *Home Frontier and Foreign Missionary Society of the United Brethren in Christ*, that no Government could be held responsible for the act of rebels committed in violation of its authority "where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection".¹⁵⁶

Finally, the fundamental principle of the non-responsibility of the State for damage caused in its territory in connexion with events such as riots, revolts, civil wars or international wars was reaffirmed by the arbitrator Max Huber in his aforementioned decision of 1 May 1925 in the *British Property in Spanish Morocco case*. Going on to analyse the grounds on which a State could nevertheless incur international responsibility for events of that kind, the arbitrator noted that, without prejudice to the basic principle indicated, the State:

. . . may nevertheless be responsible for what the authorities do or fail to do in order, as far as possible, to avert the consequences of such acts. *Responsibility for the action or inaction of the public authorities is quite different from responsibility for acts imputable to individuals outside the influence of or openly hostile to the authorities . . .* The State is obliged to exercise a certain vigilance . . . a State cannot require another State, the interests of whose nationals have been injured to remain indifferent if possibilities of providing assistance are, without good cause, clearly neglected or if the authorities, having been alerted in good time, fail to take preventive action or, again, if protection is not granted to nationals of all countries on an equal footing . . .

. . .

In short, the State may incur responsibility in such situations not only through a lack of vigilance in preventing injurious acts but also through a lack of diligence in prosecuting the culprits criminally and applying the requisite civil sanctions.¹⁵⁷

91. As has been said above,¹⁵⁸ the starting point for an analysis of State practice should be the positions adopted by Governments during the preparatory work for the 1930 Hague Codification Conference and the discussions at the Conference itself. One of the advantages of this approach is that consideration may be given to the opinions of States other than those whose views are set forth relatively frequently in existing repertoires of diplomatic practice and in the information provided from time

¹⁵⁵ United Nations, *Reports of International Arbitral Awards*, vol. IX (United Nations publication, Sales No. 59.V.5), p. 159.

¹⁵⁶ *Ibid.*, vol. II (United Nations publication, Sales No. 1955.V.3), p. 144.

¹⁵⁷ United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No. 1949.V.1), pp. 642 and 645. [Translation from French.] (Italics supplied by the Special Rapporteur.) The arbitrator Huber was to apply these principles in a special manner in the *Ziat, Ben Kiran case (ibid., p. 730)*.

¹⁵⁸ See para. 74.

to time by the more authoritative international law reviews.

92. Points VII (a), (b) and (c) of the request for information addressed to Governments by the Preparatory Committee for the Conference were worded as follows:

VII. Circumstances in which the acts of private persons causing damage to the person or property of a foreigner in the territory of a State may be the occasion of liability on the part of the State, and grounds on which such liability arises, if it does arise:

(a) Failure on the part of the State authorities to do what is in their power to preserve order and prevent crime, or to confer reasonable protection on the person or property of a foreigner.

(b) Failure to exercise reasonable diligence in punishing persons committing offences against the person or property of a foreigner.

(c) If the acts were directed against a foreigner as such, should this fact be taken into account?¹⁵⁹

93. The actual way in which the Committee worded the questions concerning the matters raised in points VII (a) and (b) showed clearly that, in its opinion, the act of an individual as such could in no case be attributed to the State as a source of international responsibility, but merely furnished an occasion when State organs might engage in conduct that could constitute an internationally wrongful act. The 23 States which replied to these points were in general agreement that States could not be held responsible for the acts of individuals. They stressed that such responsibility could only arise when organs violated an international obligation in connexion with the act of an individual, in particular by failing to fulfil the obligation to prevent or the obligation to punish.¹⁶⁰ Of the 23

¹⁵⁹ League of Nations, *Bases of discussion . . . (op. cit.)*, pp. 93, 96, 99-100.

¹⁶⁰ See the text of the replies from Governments to the question raised under sub-paragraph (a) in *Bases of discussion . . . (op. cit.)*, pp. 93 *et seq.* and in the *Supplement to Volume III (op. cit.)*, pp. 3 and 18; and to the question raised in sub-paragraph (b) *Bases of discussion . . . (op. cit.)*, pp. 96 *et seq.*; and in the *Supplement to Volume III (op. cit.)*, pp. 3 and 18-19. These replies are not all equally notable for their precision and clarity. Among the more significant is that of Germany (*Bases of discussion . . . (op. cit.)*, pp. 93 and 97), of which the first paragraph reads as follows:

"According to the principle that the international responsibility of a State is a responsibility the State incurs by its own disregard of international law, it follows that the responsibility of a State can only be involved by the acts or omissions of its officials and never by the action of private persons. When a private individual causes unlawful damage to the person or property of a foreigner, international responsibility only comes into play when the organs of the State have in this connection wrongfully disregarded their public duty. In this case also, responsibility does not originate in the action of the private person, but in the fact that the organs of the State have not exercised sufficient care and have thus indirectly caused the damage";

that of Finland (*ibid.*, pp. 94 and 97):

"The State is only responsible when the damage is due to the fact that its proper officials have omitted to take the steps that they should, in all due diligence, have taken to prevent or punish such acts";

that of Poland (*ibid.*, p. 95), which stressed that:

" . . . the State can never be held responsible, from the international point of view, for the acts of private individuals"; and that of the United States of America (*Supplement to Volume III*, p. 18), which reads:

"The State is not responsible for the wrongful acts of individuals directed against aliens. . . . A delinquency on the part of the State, independent of the act of a private citizen, is essential to raise responsibility."

States which replied, 11 combined their reply concerning point VII (c) with their replies relating to points VII (a) and (b).¹⁶¹ Ten adopted a position, but merely indicated that in the case in question States had a more specific obligation to provide protection, it being understood, once again, that international responsibility could arise only in the event of a breach of that obligation by State organs.¹⁶² Two States merely indicated that the particular circumstance mentioned in the question should be taken into account.¹⁶³

94. On the basis of the replies received the Committee worked out the following bases of discussion:

Basis of discussion No. 17

A State is responsible for damage caused by a private individual to the person or property of a foreigner if it has failed to show in the protection of such foreigner's person or property such diligence as, having regard to the circumstances and to any special status possessed by him, could be expected from a civilized State.¹⁶⁴

Basis of discussion No. 18

A State is responsible for damage caused by a private individual to the person or property of a foreigner if it has failed to show such diligence in detecting and punishing the author of the damage as, having regard to the circumstances, could be expected from a civilized State.¹⁶⁵

Basis of discussion No. 19

The extent of the State's responsibility depends upon all the circumstances and, in particular, upon whether the act of the private individual was directed against a foreigner as such¹⁶⁶

95. The belief of Governments in the principle that the State is responsible for the acts of individuals only in the event that State organs breach an international obligation to provide protection, however that may be defined, also emerged indirectly from the replies given by Governments to point V, 1 (c) of the request for information addressed to them by the Preparatory Committee for the Conference. The question raised under this point was worded as follows:

Does the State become responsible in the following circumstances, and, if so, on what grounds does liability rest:

¹⁶¹ The Governments concerned were those of Belgium, Bulgaria, Canada, Czechoslovakia, Denmark, Egypt, Finland, Hungary, Italy, Sweden and Switzerland. See *Bases of discussion . . . (op. cit.)*, pp. 99 *et seq.* and *Supplement to Volume III (op. cit.)*, p. 3.

¹⁶² The Governments in question were those of Australia, Austria, Germany, Great Britain, India, the Netherlands, New Zealand, Poland, South Africa and the United States of America (League of Nations, *Bases of discussion . . . (op. cit.)*, *loc. cit.*; and *Supplement to Volume III (op. cit.)*, p. 19). These States too felt that in such circumstances no exception could be made to the general rule that acts of individuals could not be attributed to the State as a source of international responsibility.

¹⁶³ The Governments concerned were those of Japan and Norway (League of Nations, *Bases of discussion (op. cit.)*, *loc. cit.*)

¹⁶⁴ *Ibid.*, p. 96; and *Yearbook of the International Law Commission, 1956*, vol. II, p. 224, document A/CN.4/96, annex 2.

¹⁶⁵ League of Nations, *Bases of discussion . . . (op. cit.)*, p. 99; and *Yearbook of the International Law Commission, 1956*, vol. II, *loc. cit.*

¹⁶⁶ League of Nations, *Bases of discussion . . . (op. cit.)*, p. 102; and *Yearbook of the International Law Commission, 1956*, vol. II, *loc. cit.*

(c) Failure to exercise due diligence to protect individuals, more particularly those in respect of whom a special obligation of protection is recognized—for example: persons invested with a public character recognized by the State?¹⁶⁷

The 18 States which replied to this question agreed with the Preparatory Committee that in case of injury inflicted on a person of a recognized public character, the only ground for possible State responsibility would be a failure on the part of State organs to exercise due diligence in providing the special protection they were required to give such persons.¹⁶⁸ Some States specified that acts of individuals constituting an attack on such a person could not generate international responsibility on the part of the State. Switzerland, in particular, included in its reply the following passage, which is of interest for the question under discussion:

... it may be admitted that the responsibility of the State towards foreign States on account of acts committed by individuals in its territory can only be established if the State has not, in good faith, taken all steps in its power to prevent the damage or to render the aggressors incapable of doing any harm provided it received due warning of the aggression... *We cannot, however, share the views of certain publicists who hold that a State which has not exercised all proper diligence becomes, so to speak, the accomplice of the offenders. In reality, the State is responsible internationally, not for the acts of any particular individual, but for its own omission, its negligence, which in this case would amount to an act contrary to international law.*¹⁶⁹

96. On the basis of the replies received, the Preparatory Committee for the Conference formulated basis of discussion No. 10, which reads as follows:

A State is responsible for damage suffered by a foreigner as the result of failure on the part of the executive power to show such diligence in the protection of foreigners as, having regard to the circumstances and to the status of the persons concerned, could be expected from a civilized State. The fact that a foreigner is invested with a recognized public status imposes upon the State a special duty of vigilance.¹⁷⁰

97. In its request for information addressed to Governments, the Preparatory Committee for the Conference included a further question relating to the matter with which we are concerned, namely that formulated in point IX (d), which reads as follows:

IX. Damage done to the person or property of foreigners by persons engaged in insurrections or riots, or through mob violence. Is, in general, the State liable, or not liable, in such cases?

What is the position:

(d) Where the movement is directed against foreigners as such or against persons of a particular nationality?¹⁷¹

Fourteen States replied to this question. Six of them¹⁷² merely applied to this specific case the principle that

¹⁶⁷ League of Nations, *Bases of discussion*... (op. cit.), p. 62.

¹⁶⁸ *Ibid.*, pp. 68 et seq.; and *Supplement to Volume III* (op. cit.), pp. 2, 13-14.

¹⁶⁹ League of Nations, *Bases of discussion*... (op. cit.), pp. 65-66. (Italics supplied by the Special Rapporteur.)

¹⁷⁰ *Ibid.*, p. 67; and *Yearbook of the International Law Commission*, 1956, vol. II, p. 224; document A/CN.4/96, annex 2.

¹⁷¹ League of Nations, *Bases of discussion*... (op. cit.), pp. 108 and 119.

¹⁷² Canada, Hungary, Netherlands, Poland, Switzerland, United States. (*Ibid.*, pp. 119-120; and *Supplement to Volume III* (op. cit.), pp. 3 and 21.)

had been set forth in general in reply to point VII. Six other States¹⁷³ expressed the same opinion but reversed the burden of proof because they presumed that the State was responsible unless it could establish that there had been no negligence on the part of its organs in taking the measures required to protect foreigners. One State¹⁷⁴ said that in the case in point the State should be held responsible whatever action had been taken by its organs. In the light of the replies received, the Preparatory Committee formulated basis of discussion No. 22 (d), which reads as follows:

A State is responsible for damage caused to the person or property of a foreigner by persons taking part in a riot or by mob violence if the movement was directed against foreigners as such, or against persons of a particular nationality, unless the Government proves that there was no negligence on its part or on the part of its officials.¹⁷⁵

98. When the Third Committee of the Conference examined the bases of discussion, it suppressed basis No. 19 on the grounds that it was a useless annex to basis No. 18. Furthermore, owing to lack of time, the Conference was not able to consider basis of discussion No. 22 (d). By so doing, it must have avoided obstacles which it would inevitably have met in a discussion of these texts, which clearly went beyond the subject of responsibility and ventured into the realm of the definition of controversial rules concerning the treatment of foreigners. Even then, the bases of discussion which the Conference had time to consider still gave rise to serious difficulties, simply because an attempt was made to solve at the same time the problem of attributing to the State, as a source of responsibility, breaches of existing international obligations in a specific field, and the more controversial problem of defining the content of the rules from which such obligations derived.

99. During the meetings of the Conference, the Second Sub-Committee of the Third Committee, whose Rapporteur was Charles de Visscher, merged bases of discussion Nos. 10, 17 and 18 in a single text. The text submitted for consideration by the Third Committee thus read as follows:

A State is responsible for damage caused by a private person to the person or property of a foreigner if it has failed to take such preventive or punitive measures as in the circumstances might properly be expected of it.¹⁷⁶

The text gave rise to a long and highly animated debate during which a clear division appeared between two groups of States: some, which in principle were in favour of the proposed text, believed that in certain circumstances States were required to provide foreigners with greater protection than that which they afforded their own nationals; the others, which were opposed to the text under discussion, were not ready to accept

¹⁷³ Finland, Great Britain, India, New Zealand, Norway, South Africa. (League of Nations, *Bases of discussion*... (op. cit.), pp. 119-120.)

¹⁷⁴ Japan (*ibid.*, p. 120); Denmark did not adopt any position on this matter in its reply.

¹⁷⁵ *Ibid.*; and *Yearbook of the International Law Commission*, 1956, vol. II, p. 224; document A/CN.4/96, annex 2.

¹⁷⁶ *Acts of the Conference*... (op. cit.), p. 143.

anything more than the possibility of requiring that foreigners be given the same treatment as nationals. The traditional quarrel between those who, in the question of the treatment of foreigners, supported the so-called standard minimum thesis and those who supported the principle of equal treatment with nationals, thus entered into the discussion, and it became impossible to reach a solution which would receive maximum support. A compromise proposal was submitted by Mr. Giannini, the Italian representative, who suggested the adoption of a negative formula stressing the extraordinary nature of the State's responsibility in the circumstances under consideration.¹⁷⁷ However, that did not solve the problem, and the Giannini proposal, which had been endorsed by the Sub-Committee, had to be withdrawn when, like the first proposal, it was opposed by the Latin American countries, whose spokesman was Mr. Guerrero. After being suspended the discussion was resumed on the basis of a new text drafted by the delegations of Greece, Italy, Great Britain, France and the United States of America, which read as follows :

As regards damage caused to foreigners or their property by private persons, the State is only responsible where the damage sustained by the foreigners results from the fact that the State has failed to take such measures as in the circumstances should normally have been taken to prevent, make reparation or inflict punishment for the acts causing the damage.¹⁷⁸

Even so, this text, which was based on the one adopted by the Institute of International law at its Lausanne meeting, could not satisfy the proponents of the more restrictive approach to the law relating to foreigners. When it was put to the vote after having been endorsed by the Sub-Committee, there were 21 votes in favour, 17 against and 2 abstentions.¹⁷⁹ It then became article 10 of the draft adopted by the Conference in first reading, but in view of the result of the vote there was little hope of its being adopted definitively.

100. It is appropriate to dwell on this result. Firstly, there is a lesson to be learned from this experience, to which we have frequently drawn attention, namely that, if such arduous work as the codification of State responsibility for internationally wrongful acts is to be successful, care must be taken to avoid any simultaneous attempt to settle within this context, other aspects of international law, particularly such controversial ones as the treatment of foreigners. Secondly, it may be noted that without this difficulty, which in fact is extraneous to the question of responsibility *per se*, and if, for example,

the discussion has centred on a text which remained neutral concerning the definition of the scope of the obligations of States with regard to the protection of foreigners, a fairly positive result on the question of responsibility could easily have been achieved. This can be seen from the fact that all the States which finally opposed the Sub-Committee's proposal had previously voted in favour of a proposal submitted by China which differed from the majority proposal only in that it accepted the principle of equal treatment for foreigners and nationals.¹⁸⁰ In conclusion it may be noted that the States which took part in the 1930 Conference recognized virtually unanimously that the acts of private individuals causing injury to foreigners of whatever rank, could never be attributed to the State as a source of international responsibility, and that, in relation to such acts, the State was responsible only in the event of actions or omissions on the part of its own organs which were contrary to its international obligations.

101. In order to give a complete picture of the questions considered by the 1930 Hague Conference, mention must be made of the question set forth in point XIV of the Preparatory Committee's requests for information, entitled "Reparation for the damage caused", in which Governments were asked to state, in general, which factors they considered should be taken into account in calculating the indemnity to be paid by the State in the case of "pecuniary reparation". More specifically, the following question was asked in paragraph (d):

When the responsibility of the State arises only from a failure to take proper measures after the act causing damage had been committed (for example: failure to prosecute the guilty individual), is any pecuniary reparation due from it to be limited to making good the loss occasioned by such omission?¹⁸¹

Among the 24 replies received, a good number indicated that provisions concerning the form and amount of reparation were beyond the scope of the Conference;¹⁸² a larger number did not express any opinion on the problem raised in paragraph (d).¹⁸³ Among those in which specific position was adopted or which, although worded in general terms, covered the point in question, six stated that in such circumstances, a State was re-

¹⁸⁰ The Chinese proposal (*ibid.*, p. 185) differed from the one submitted by Mr. Giannini (and endorsed by the Sub-Committee) only in the last part, which read as follows:

"... if [the State] has manifestly failed to take such preventive or punitive measures as in the circumstances might reasonably be expected of it had the persons injured been its own nationals" The result of the vote on this proposal was as follows: 17 votes in favour (Brazil, Chile, China, Colombia, Czechoslovakia, Free City of Danzig, Egypt, Mexico, Nicaragua, Persia, Poland, Portugal, Romania, Salvador, Turkey, Uruguay, Yugoslavia); 23 votes against (Australia, Austria, Belgium, Canada, Denmark, Estonia, Finland, France, Germany, Great Britain, Greece, Hungary, India, Ireland, Italy, Japan, Netherlands, Norway, South Africa, Spain, Sweden, Switzerland, United States of America); 2 abstentions (Cuba, Latvia) (*ibid.*, p. 188).

¹⁸¹ League of Nations, *Bases of discussion . . . (op. cit.)*, p. 146.

¹⁸² These were the replies of Australia, Canada, Egypt, Great Britain, Hungary, India, Italy, Netherlands, New Zealand and South Africa. They replied, however, as can be seen, to paragraph (d). (*Ibid.*, p. 146 *et seq.*)

¹⁸³ Belgium, Bulgaria, Czechoslovakia, France, Norway, Poland, Sweden. (*Ibid.*)

¹⁷⁷ The text of the Giannini proposal was as follows:

"A State is only responsible for damage caused by a private person to the person or property of a foreigner if it has manifestly failed to take such preventive or punitive measures as in the circumstances might reasonably be expected of it."

(*Ibid.*, p. 146.)

¹⁷⁸ *Ibid.*, p. 175.

¹⁷⁹ *Those in favour*: Australia, Austria, Belgium, Canada, Estonia, Finland, France, Germany, Great Britain, Greece, India, Irish Free State, Italy, Japan, Netherlands, Norway, South Africa, Spain, Sweden, Switzerland, United States of America. *Those against*: Brazil, Chile, China, Colombia, Czechoslovakia, Free City of Danzig, Hungary, Mexico, Nicaragua, Persia, Poland, Portugal, Romania, Salvador, Turkey, Uruguay, Yugoslavia. *Abstentions*: Denmark, Latvia. (*Ibid.*, p. 190.)

quired to make reparation only for the damage caused by its own omission;¹⁸⁴ one also reserved the possibility of granting pecuniary reparation for the damage caused.¹⁸⁵ The United States reply, which was received later, was based on a position adopted by the State Department in 1873 and on the personal opinion of the United States Commissioner in the decision relating to the *Janes case*. It maintained that the State which refused to punish those guilty of causing damage to foreigners could be regarded as virtually a sharer in the injury and as responsible therefor.¹⁸⁶ In the light of these replies, the Preparatory Committee included in basis of discussion No. 29 a third paragraph, which reads :

Where the State's responsibility arises solely from failure to take proper measures after the act causing the damage has occurred, it is only bound to make good the damage due to its having failed, totally or partially, to take such measures.¹⁸⁷

During the work of the Conference the United States, represented by Borchard, recognized that the question of the damage to be taken into account in establishing the amount of reparation was extremely controversial and, far from insisting on the position it had taken in its reply, proposed that basis No. 29 should be omitted, noting, *inter alia*, that the question of punishing the guilty persons in appropriate cases was covered by basis No. 18.¹⁸⁸ The Sub-Committee which considered basis No. 29 in any case proposed that everything following the first sentence of that basis should be struck out because in its opinion, the matters dealt with were not yet ripe for consideration.¹⁸⁹ The text which it submitted to the Committee¹⁹⁰ and which, after having been adopted by the latter by 32 votes and undergoing some stylistic changes, became article 3 of the draft approved in first reading by the Conference, mentioned reparation for the damage sustained only in so far as it results from failure to comply with an international obligation.¹⁹¹

102. One aspect which seems essential for a proper understanding of the problem under consideration was stressed in the preliminary observations at the beginning of this section.¹⁹² The criteria eventually used to determine the amount of reparation due from a State should it breach its international obligations with regard to protection in connexion with acts of individuals causing injury to aliens should not, in our view, have any bearing on the solution to the problem of identifying

the act which in these circumstances is attributed to the State as a source of international responsibility. We feel that this belief is confirmed by the attitude of most States towards the question raised by the Preparatory Committee for the 1930 Conference in point XIV (*d*) of its request for information. These states had already adopted a position on the question raised earlier concerning possible grounds for State responsibility in the event of an individual causing injury to an alien. Generally speaking, they had indicated very clearly that the grounds could not be the conduct of an individual but only a failure by State organs to comply with their obligation to protect the alien by preventing or punishing such conduct. If they had believed that the absence of an expressly affirmative reply to the question raised under point XIV (*d*) might compromise the results they hoped to attain with their reply to point VII, they would certainly not have refrained from replying, as so many did, nor would they have maintained, like many others, that the question was beyond the scope of the Conference. A good number of them thus believed that there was no intrinsic link between the two questions. Those which held the opposite opinion either felt that it was not necessary to reply to the Preparatory Committee's second question because in their opinion the reply followed automatically from that given to the first question, or were careful to reply affirmatively to point XIV (*d*), indicating that in their opinion the amount of reparation could not be established on the basis of the damage caused by the act of the individual.¹⁹³ Lastly, only two States took a different position on this matter, and only one of them sought to establish a link between identification of the amount of reparation and identification of the act attributed to the State. It is interesting to note, furthermore, that Governments finally agreed at the Conference to adopt a formula for reparation which, while not the more precise one which the Preparatory Committee had proposed in basis of discussion No. 29, still does not seem to lend itself to an interpretation that would make it possible to take into account, in assessing the amount of reparation, damage other than that incurred in the circumstances under consideration by internationally wrongful omission on the part of State organs.

103. The position adopted by Governments in specific situations are generally of less interest than the official opinions expressed, for example, at plenipotentiary conferences for the codification of a specific sector of international law. As has already been stated, copious information about State practice is available for only few States. Nevertheless, the positions adopted by some Governments on certain occasions are significant, for example, when they have refrained from presenting

¹⁸⁴ Austria, Denmark, Finland, Germany, Japan, Switzerland. (*Ibid.*)

¹⁸⁵ This was the reply from the Netherlands, mentioned in foot-note 182. (*Ibid.*, p. 149.)

¹⁸⁶ League of Nations, *Supplement to Volume III (op. cit.)*, p. 26. There was some contradiction between this reply and that given by the United States for point VII.

¹⁸⁷ League of Nations, *Bases of discussion . . . (op. cit.)*, p. 152; and *Yearbook of the International Law Commission, 1956*, vol. II, p. 225, document A/CN.4/96, annex 2.

¹⁸⁸ League of Nations, *Acts of the Conference (op. cit.)*, p. 233.

¹⁸⁹ *Ibid.*, p. 234.

¹⁹⁰ Borchard himself was called upon to introduce the Sub-Committee's report on this matter in the Third Committee (*ibid.*, pp. 129-130).

¹⁹¹ *Ibid.*, p. 236.

¹⁹² See paras. 67 *et seq.*

¹⁹³ In "Quelques observations sur la mesure de la réparation due en certains cas par l'Etat responsable", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. XI, No. 3, 1930, p. 666, C. L. Bouvé—writing, it is true before the Conference took place—criticized the Preparatory Committee for having based basis of discussion No. 29 on the replies of only six States. He does not seem to have taken into account the true meaning of the fact that the majority of replies did not mention this point.

a claim because they believed that it was not justifiable under the principle of international law. Attention may therefore usefully be paid to the opinions expressed or the attitude adopted in some of the better-known cases in which chancelleries or other State institutions have been faced with the problems under consideration here. As has been said, the analysis will be limited to the period beginning with the 1920s. In order to be in a better position, to ascertain the position adopted by Governments in the various circumstances, the various categories of situations should be considered individually. We shall first consider what might be called the more simple situations, namely, those in which individuals have inflicted injury on individual aliens. We shall then proceed to examine special situations, such as injurious acts committed against individual aliens during popular uprisings, demonstrations, riots and disturbances in general. An analysis will then be made of the situation in the event of attacks on victims who are not merely private individuals but persons entitled to special, protection, in particular representatives of foreign States.

104. In the case of the first category of situations, the practice, of the United States, is as usual, one of the best known and one of the richest. On various occasions the United States Government has expressed the belief that a State can only incur international responsibility in connexion with the acts of individuals if it has failed to fulfil its international obligations to provide protection. In specific cases, however, this Government has focused its attention primarily on a question which exceeds the scope of the subject with which we are presently concerned, namely that of defining the content and scope of those obligations, particularly with regard to the protection of individual aliens. Nevertheless, it has adopted positions which specifically concern the questions under consideration.

105. The American-Mexican Claims Commission, established by the Mexican Claims Act of 1942 was not, despite its name, an international one or mixed commission. It was a domestic United States agency established to consider the claims of United States nationals for whom Mexico had disbursed a lump sum. In relation to the *Texas Cattle Claims*, an important series of cases, the Commission set forth in principle eight categories of wrongful acts for which it considered that Mexico would incur responsibility. These categories covered the active and direct participation of civil and military officials in the pillaging, thefts and illegal appropriations involved in the cases in question, and denials of justice and failure to comply with the obligation to punish the guilty person.¹⁹⁴ Concerning the *Dexter claim*, in which the Mexican authorities were accused of failing to apprehend and prosecute the murderers of a United States national, the Commission stated that the responsibility of the Mexican Government and the reparation owed by the latter were the consequence of the international delinquency Mexico had committed by virtue of those omissions.¹⁹⁵

106. Mention may also be made of two opinions rendered by Assistant Legal Advisers of the State Department on 28 May 1952 and 17 July 1957 respectively. In the first, which referred to the killing of a civilian employee of the Department of the United States Army in Japan by persons unknown, it was stated that only "Failure on the part of the authorities of a Government to employ adequate measures for the apprehension and punishment of such persons may give rise to a claim".¹⁹⁶ The second contained the following passage :

It is generally recognized under principles of international law that a Government is not responsible for injuries caused by private persons to aliens unless it can be shown that the respondent government has failed to exercise reasonable care to prevent such injuries in the first instance or it has failed to take suitable steps to punish the offenders.¹⁹⁷

The wording of the second opinion leaves certain doubts. The language used might give the impression that, in the opinion of the Assistant Legal Adviser, the Government would be responsible for injury caused by individuals if the government authorities had not shown due diligence. But it is difficult to say whether that meant that the individual's act would be attributed to the State, or merely that the reparation due from the State by reason of the omission of its organs should cover the damage caused by the act of the individual.

107. Lastly, mention should be made of the instructions sent by the State Department to the United States Embassy in San Salvador in 1959. They contained a refusal to support the claim of an United States national against El Salvador concerning injury inflicted by a Salvadorian national in United States territory. In support of the refusal it was stressed that :

It has long been the policy of the United States Government not to espouse claims of its nationals against foreign governments which are based upon injuries received as a result of the negligent actions committed by a foreign national acting in a private capacity. This policy is based upon the generally accepted principle of international law that a state cannot be held liable to another state without an *injury being caused by the respondent state to the claimant state*.¹⁹⁸

108. With regard to the practice of other States for which there are repertoires of diplomatic practice or on which information is provided in specialized reviews, we know of no cases involving special analysis of the problem of the possible causes of international responsibility of States for acts of individuals committed in normal external conditions against individual aliens. There are, however, cases in which a clear distinction has been drawn between the acts of individuals and those of State organs, and which have emphasized the principle that the acts of private individuals can in no way be attributed to the State as a source of international responsibility. Reference may be made in that connexion to a note from the Governing Commission of the Saar concerning the acts of German nationals who had abducted three Saar nationals in Saar territory and had

¹⁹⁴ Whiteman, *op. cit.*, pp. 752-753.

¹⁹⁵ *Ibid.*, pp. 755-756.

¹⁹⁶ *Ibid.*, p. 757.

¹⁹⁷ *Ibid.*, p. 738.

¹⁹⁸ *Ibid.*, p. 816. (Italics supplied by the Special Rapporteur.)

taken them to Germany to have them arrested.¹⁹⁹ More specifically, there is the reply given on 11 July 1962 by the United Kingdom Minister of State to a question in Parliament referring to the *Diboku case* concerning a citizen of the British Protectorate of Bechuanaland who had been maltreated by his employer in South Africa.²⁰⁰

109. Concerning acts causing injury to aliens committed during riots, popular demonstrations or other disturbances, there is one interesting case which dates from the mid-1920s but which gave rise to detailed and significant statements of position. During a popular demonstration at Florence in October 1925 a crowd attacked the building where the office of a United States national named *Cutler* was located and destroyed the furnishings of the office. The State Department, in its instructions of 3 December 1926 to the United States Embassy at Rome, told the Embassy to contest the opinion of the Italian Government that it could not be held liable for the results of popular demonstrations. According to the State Department nations were responsible under international law for losses sustained by aliens in their territory, due to acts of individuals unless appropriate steps had been taken to apprehend and punish the guilty persons. The Italian Minister for Foreign Affairs replied as follows in his note verbale of 28 January 1927 :

The Royal Italian Government does not intend in any way to reject the international principle concerning a State's responsibility in the case of losses sustained by foreigners; on the contrary, it desires to apply rigorously that principle according to the accepted rules of international law. The Italian Government therefore holds that (Anzilotti, *Revue générale de droit international public*, Year 1906, page 19) each State is obliged to recognize in the respective citizens of other States their quality of subjects of the law and to accord them that juridical protection which the recognition of that quality entails. In according this protection, the Royal Government holds (Anzilotti, *Revue générale de droit international public*, Year 1906, page 291) itself obligated, not absolutely to prevent certain occurrences from taking place, but to exercise in order to obviate them ordinary vigilance for the protection of foreigners and citizens alike . . . but on the other hand the Royal Government cannot fail to point again that, according to the existing doctrine (Fauchille, *Traité de droit international public*, page 515) the question of the juridical responsibility of a State may be raised

¹⁹⁹ The German Government in power at that time claimed that in actual fact a German national had acted on his own initiative and with the motive of personal revenge, assisted by a few friends, but that no police or party official had known about it. It accordingly stressed that "the German Government can accept no responsibility for the spontaneous acts of private individuals". At the same time it stated that the three Saar nationals who had been arrested would be liberated forthwith and taken to the Saar frontier and that criminal proceedings would be instituted against the guilty person. The German note, which was communicated to the Secretary-General of the League of Nations is reproduced in the League of Nations *Official Journal*, 14th Year, No. 8 (August 1933), p. 1050.

²⁰⁰ On that occasion the United Kingdom Minister of State stressed the importance of distinguishing between the action of an individual and that of a Government. He also announced that the South African authorities had co-operated in the apprehension of the guilty person and in bringing him to justice. See E. Lauterpacht, *The Contemporary Practice of the United Kingdom in the Field of International Law* (London, The British Institute of International and Comparative Law, 1962), pp. 195-196.

only when: (1) the damage has been caused by the State itself; (2) it is the consequence of an illicit act by the State; (3) it is imputable to the State. Now, none of the foregoing conditions is applicable to the case of the damages sustained by Mr. Marshall Cutler following popular demonstrations. In this instance, the doctrine is still more explicit. Fauchille . . . declares . . . on page 526 "It would be . . . unfair to charge the State with all the harmful acts of the citizens . . . On principle, the private acts of nationals do not involve the State's responsibility" . . . Finally, the Royal Government must repeat to the American Embassy that the competent authorities have endeavoured and are still endeavouring to bring to justice the persons responsible for the damage in question.²⁰¹

In the light of this note verbale, the State Department informed the Embassy at Rome, in further instructions of 5 July 1927, that the United States Government could not :

. . . ask the Italian Government, or the local authorities to indemnify . . . for the losses which [Mr. Cutler] has sustained unless the authorities had knowledge, or should have had knowledge of the impending attack and failed to take proper precautions to thwart it, or, after the event occurred, failed to take the proper steps to find the perpetrators of the acts and to prosecute them.²⁰²

These statements of position indicate that the two Governments agreed in substance to acknowledge that only actions or omissions on the part of the official authorities of the State could be attributed to the latter as internationally wrongful acts involving its international responsibility. Neither Government endeavoured to attribute the individual's act to the State. The only point on which any divergence might remain would again be that of the criteria to be used, if necessary, to determine the amount of reparation in the event of an internationally wrongful omission on the part of the authorities. The United States Government appeared to think that the State should then pay compensation for the losses caused by the act of the individual whereas at first sight the Italian Government apparently did not endorse this conclusion. But, as has frequently been pointed out, this divergence is not relevant to the main point, namely the impossibility of considering the act of the individual to be an act of the State.

110. During the 1930s and the 1950s, recognition of the impossibility of attributing to the State acts committed by individuals on the occasion of public disturbances or demonstrations by an unruly mob can be found twice in the instructions given by the State Department to its embassies on the subject of injuries sustained by United States nationals in such circumstances. This occurred, firstly, in Cuba in 1933²⁰³ and then

²⁰¹ Hackworth, *op. cit.*, pp. 659-660. The Italian Government also pointed out that the principle that the acts of individuals could not constitute grounds for State responsibility appeared to have been confirmed by the Congress of the United States which, by voting funds for the indemnification of families of Italians killed in popular demonstrations, desired to make clear that the United States did not recognize its true responsibility and that it adhered to the requests of the Italian Government only for reasons of humanity. The Italian note went on to state, however, that such considerations were not applicable to the damages sustained by Mr. Cutler.

²⁰² *Ibid.*, pp. 660-661.

²⁰³ *Ibid.*, p. 658.

in Libya in 1956.²⁰⁴ In both cases, the State Department refused to support the Claims of the United States nationals, on the basis of the principle that State responsibility could arise in such cases only as a result of negligence by the government authorities in preventing or punishing the injurious acts. The instructions given with respect to the events in Libya are the most detailed. They state :

... it may be pointed out in general that to establish the responsibility of a respondent government under principles of international law in cases of this character, it must be shown that the authorities failed to employ all reasonable means at their disposal to prevent the unlawful acts resulting in loss or injury to aliens or failed to take proper steps to apprehend and punish the wrongdoers. It is also a well-established principle of international law that governments are not responsible for losses suffered by aliens on account of acts of mobs out of control and where no negligence is attributable to the authorities either before or after the wrongful acts resulting in the losses occurred.²⁰⁵

111. The fact that three years later the State Department submitted to the Iraqi Government a request for compensation for the families of three United States nationals who were killed at Baghdad on 14 July 1958, in a mob attack, should not be interpreted as a negation of the principles stated above. The State Department invoked in support of its request the fact that, at the time of the attack which had caused their deaths, the persons concerned were in a vehicle of the Iraqi armed police and in the custody of the Iraqi police. A note dated 23 February 1959 from the American Embassy stated that :

The United States Government has concluded that the circumstances under which the decedents were taken into custody by Iraqi authorities and were subsequently killed by a mob ... obligates the Government of Iraq under generally accepted principles of international law to provide compensation for the families ...²⁰⁶

Although the American note invoked the principles of international law, it did not actually cite any omission on the part of the Iraqi authorities and, indeed, never mentioned the term "responsibility". It would therefore seem that the request was made on grounds of equity and humanity rather than of law. In any case, that was how it was interpreted by the Iraqi Government which, while agreeing to pay compensation to the families of the dead Americans, stressed that :

the Government of Iraq has taken this decision in consideration of justice ... notwithstanding our country's view regarding responsibility for compensation for losses which occur in a revolution [no evidence that the deaths had been the responsibility of the Iraqi authorities] ...²⁰⁷

112. The reply by the French Secretary of State for Foreign Affairs to a parliamentary question concerning the assassination of certain French nationals in Morocco contains one of the most categorical expressions of the

opinion of a Government on the matters under consideration. It states:

On each occasion, we have insisted on the responsibility of the Government, not so much because of any direct complicity on its part as because of the elementary duty incumbent upon any independent Government to maintain order in its territory.²⁰⁸

The French Government was therefore clearly of the opinion that the only act attributable to the State as a source of responsibilities was one emanating in the case concerned, from the government authorities.

113. Lastly, to conclude on this specific point, it should be recalled that, during a debate in the British Parliament on the subject of the injury caused to British subjects following disturbances in Indonesia, the Foreign Secretary was asked whether the Government was bearing in mind in its negotiations with Indonesia the fact that the Indonesian authorities had appeared passively to condone the actions of the mob. Replying in the affirmative, the Foreign Secretary explained that it was precisely because of that fact that the British Government was negotiating in order to make the Indonesian Government admit its responsibility.²⁰⁹

114. Special consideration must be given to cases in which acts of individuals were directed against aliens invested by their State with representative status, for whom that State was therefore entitled to demand special protection. From this viewpoint, acts committed by individuals against the property of a foreign State, such as an embassy building or consulate premises, may be considered as acts against foreign officials. Such situations should, perhaps, constitute an exception to the general rule which—it can now be stated without hesitation—clearly emerges from State practice as well as from arbitration cases and according to which the acts of individuals cannot be attributed to the State as a source of international State responsibility. It is therefore particularly interesting to see whether in cases of this type a situation has not arisen in which the State in whose territory the injurious acts had been committed was considered to be responsible, irrespective of the conduct of the organs responsible for the special protection of the injured persons. But care will have to be exercised: one should not conclude, for example, that the State has been held responsible purely and simply for the act of individuals in cases where, in fact, a particularly severe view was taken of the performance of the obligation incumbent on the State organs to provide increased protection for the official representatives of foreign Powers. In addition, it should not be forgotten that situations such as those under discussion are sometimes the result and, still more frequently, the cause of acute political tensions in such a climate, it may happen that assertions of a political rather than a juridical nature sometimes take precedence, in the

²⁰⁴ Whiteman, *op. cit.*, pp. 831-832.

²⁰⁵ These words also seem to convey the idea that, when on such occasions the State is guilty of an omission constituting an internationally wrongful act, the reparation for that act should consist of material compensation for the damage caused by the acts of individuals.

²⁰⁶ Whiteman, *op. cit.*, p. 832.

²⁰⁷ *Ibid.*, pp. 832-833.

²⁰⁸ A. Ch. Kiss, *Répertoire de la pratique française en matière de droit international public* (Paris, C.N.R.S., 1965, vol. III, p. 636 [translation from French]).

²⁰⁹ E. Lauterpacht, *British Practice in International Law* (London, The British Institute of International and Comparative Law, 1963), p. 120.

controversy between the States concerned, over strictly legal arguments.

115. In this connexion, consideration should first be given to an international incident which is of interest for the purposes of this report mainly because of the positions and the discussions to which it gave rise in the Council of the League of Nations and in other international bodies: the *Janina incident* or incident of the *murder of the Italian members of the Tellini mission*. On 27 August 1923, General Tellini, the Chairman of the international Commission entrusted by the Conference of Ambassadors with the task of delimiting the Greek-Albanian frontier, and the members of the Italian delegation in the Commission were assassinated by unknown persons near Janina, in Greek territory. On 29 August, the Italian Government sent the Greek Government a note which presented a series of demands, ranging from punishment of the culprits to various forms of reparation for the moral and material injury caused to Italy.²¹⁰ The Greek Government replied the next day, denying its responsibility for what had happened and stating that it was prepared to accept only some of the demands of the Rome Government, including the demand concerning the payment of compensation to the families of the victims.²¹¹ Italy then proceeded to occupy Corfu, as a pledge for Greece's performance of its obligations, whereupon Greece referred the dispute to the Council of the League of Nations on 1 September.²¹² At that stage, the attitude of the Italian Government seemed to indicate that, in view of the nature of the crime and the identity of the victims, it considered that the responsibility of the Greek State arose simply from the fact that the crime had been committed in Greek territory and not from any attitude on the part of the organs of the territorial State in relation to what had occurred. The Italian note did not refer to any failure by the Greek authorities to perform their duties of vigilance and protection. Similarly, at the meeting of the Council of the League of Nations on 5 September, the Italian representative, Salandra, insisted on the double offence inflicted by the murder as such and by its underlying motives against the Conference of Ambassadors, in the first place, and then against the dignity and honour of the Italian nation.²¹³ He did not dwell on the conduct of the Greek authorities in the circumstances. On the other hand, the Greek representative, Politis, after stating that he realized that reparations were due to the Italian Government for the disgraceful crime, protested forcibly against the suggestion that the Greek Government was morally and materially responsible for the crime, since no proof had been forthcoming that it had failed in its own duties.²¹⁴

116. In the meantime, the Conference of Ambassadors had also intervened by handing to the Greek Govern-

ment, on 31 August, a note in which it requested that Government to conduct an immediate inquiry into the events and reserved the right to impose sanctions, if necessary. Greece had replied on 2 September, proposing the establishment of an international commission of inquiry. The Conference of Ambassadors therefore adopted the following resolution, on 5 September, which it transmitted by telegram to the Council of the League of Nations:

The Conference of Ambassadors has considered the reply from Greece to its note regarding the murder of the Chairman of the Inter-Allied Greco-Albanian Delimitation Commission and of the other members of the Italian Military Mission in the Janina district. It has noted, in particular, that Greece declares her willingness, if her responsibility is proved, to agree to make any reparation which the Conference may regard as just and that the Greek Government suggests the appointment of a commission of enquiry, consisting of the delegates of the three Powers represented on the Delimitation Commission, to assist actively in the work of discovering the guilty parties. The Conference of Ambassadors, recognising that it is a principle of international law that States are responsible for political crimes and outrages committed within their territory, at once considered how the enquiry should be conducted.²¹⁵

This resolution was in some respects contradictory. On the one hand, it accepted the Greek proposal for the establishment of a commission of inquiry, responsible for shedding light on the circumstances surrounding the event and thus on the existence or otherwise of responsibility on the part of Greece. But, on the other hand, it affirmed as a principle of international law the automatic responsibility of States for political crimes and outrages committed within their territory, thus echoing the position adopted at that time by the Italian Government.

117. A discussion ensued in the Council of the League of Nations on the reply to be sent to the communication received from the Conference of Ambassadors. A text was proposed which was designed to submit to the Conference suggestions concerning the reparations to be obtained from Greece. The first paragraph of that text contained an endorsement by the Council of the "principle of international law" affirmed by the Conference of Ambassadors:

... according to which States are responsible for the political crimes and outrages committed within their territory.²¹⁶

But reservations were expressed about the statement of this principle by the Conference. The representative of France, Hanotaux, said that the text received was "quite contrary to the opinion held by jurists" and that it should be understood to mean that the State bore responsibility not for political crimes as such but "for the repression" of such crimes.²¹⁷ He cited historical examples in support of that theory, which clearly amounted to a return to the idea that the State was not responsible, even in the case of outrages committed by individuals within its territory against foreign public figures in respect of whom a special obligation to provide

²¹⁰ League of Nations, *Official Journal*, 4th Year, No. 11 (November 1923), p. 1413.

²¹¹ *Ibid.*, pp. 1413-1414.

²¹² *Ibid.*, pp. 1412-1413.

²¹³ *Ibid.*, pp. 1287-1288.

²¹⁴ *Ibid.*, pp. 1288-1289

²¹⁵ *Ibid.*, p. 1294.

²¹⁶ *Ibid.*, pp. 1294-1295.

²¹⁷ *Ibid.*, pp. 1296-1297; and Kiss, *op. cit.*, pp. 615-616.

protection existed, unless it was established that the organs of the State had failed to fulfil that obligation and the obligation to punish actions of that kind severely. In addition, it is interesting to note that a certain modification of the position initially adopted was apparent in the comment made by the representative of Italy at the same meeting, to the effect that the responsibility of Greece would have been more seriously involved if "the soldiers who were close to the scene of the crime [had] not [watched] the safety of their Italian colleagues as it was their duty to do".²¹⁸

118. The incident was settled by the Conference of Ambassadors which, on 13 September, adopted a resolution taking note of the undertaking of the Greek Government to present apologies and offer other solemn forms of satisfaction and of the payment made by that Government to the Swiss National Bank of a sum as security for any indemnity that might be fixed in the event that the guilty parties were not traced. The resolution also took note of the undertaking of the Italian Government to evacuate the island of Corfu.²¹⁹

119. The Council of the League of Nations took note of the settlement of the case at its meeting on 17 September.²²⁰ On 28 September, however, it decided to refer to a special Committee of Jurists five questions concerning the problems of international law raised by the incident between Italy[†] and Greece.²²¹ Question 5 was worded as follows:

In what circumstances and to what extent is the responsibility of a State involved by the commission of a political crime in its territory?

The Committee of Jurists gave the following reply:

The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.

The recognised public character of a foreigner and the circumstances in which he is present in its territory entail upon the State a corresponding duty of special vigilance on his behalf.²²²

The opinion of the Committee of Jurists thus clearly departed from that of the Conference of Ambassadors in 1923. The responsibility of the States arises, according to the Committee, only if the organs of the State fail in their duty to give special protection to the persons injured by an attack committed by individuals.²²³ The Council of the League of Nations considered the reply

of the Committee of Jurists and its members, including Italy, approved it unanimously on 13 March 1924.²²⁴ The following year, the Council transmitted that reply to the Members of the League and requested their comments. Between November 1925 and February 1926, it received 21 replies: all the replies which dealt with this point unanimously expressed the view that the State incurs responsibility only when the constituted authority was negligent in the performance of its duties.²²⁵ In addition, the *Janina* murder case was still very much in the minds of Governments when, shortly afterwards, they were required again to state their views on the same question, which this time was posed in point V, No. 1 (c) of the request for information made by the Preparatory Committee of the Codification Conference. We have seen that the replies were unanimous on this subject.²²⁶

120. At this stage, therefore, one fact may be established in connexion with this incident, which is of particular importance for the problems under consideration because it had a decisive influence on the definition of the relevant legal principles. Even if, at the height of the emotion and tension aroused by the event, the injured State—followed, moreover, by an authoritative international organ—had the reaction described above, that same State eventually reconsidered its position, upon calmer reflection and in the light of the opinion objectively expressed by the jurists consulted. In displaying agreement with the conclusions of the jurists, that State joined other countries in general recognition of the principle that, even in the special cases envisaged, the State is finally responsible only for the actions or omissions of its organs.

121. The incident in question had given rise to discussions in the most important international organization of the time. But a number of incidents provoked interesting discussions at the diplomatic level. On 10 May 1923, the envoy of the Soviet Government to the Lausanne Peace Conference, *Worowski*, was killed by a certain Conradi, a Swiss of Russian origin. Other members of the Soviet delegation were wounded on the same occasion. The assassin was arrested and the Federal Council was of the opinion that the crime, committed by an individual against an individual, should be tried under cantonal criminal law. In an official statement of 11 May, the Federal Council expressed its disapproval of the murder, as an attack on the ethics and the laws

²¹⁸ League of Nations, *Official Journal*, 4th Year, No. 11 (November 1923), p. 1296.

²¹⁹ *Ibid.*, pp. 1305-1306.

²²⁰ *Ibid.*, pp. 1306 *et seq.*

²²¹ *Ibid.*, pp. 1349 *et seq.*

²²² *Ibid.*, 5th Year, No. 4 (April 1924), p. 524.

²²³ It should be noted that the comma (which does not appear in the English text) placed by the Committee in the French text between the words "*La responsabilité d'un Etat*" and the words "*pour crime politique commis sur la personne des étrangers sur son territoire*" indicated that in the Committee's view the State was answerable not for the crime committed by individuals but for the omission, particularly serious in such cases, of which its organs had been guilty in connexion with such a crime.

²²⁴ League of Nations, *Official Journal*, 5th Year, No. 4 (April 1924), pp. 523 *et seq.*

²²⁵ *Ibid.*, pp. 597 *et seq.* The replies of Cuba, Hungary, Poland and Switzerland are particularly noteworthy.

²²⁶ See above, paras. 95 *et seq.*, where the most significant replies are noted. It has also been recalled that the Preparatory Committee, undoubtedly influenced by the conclusions of the Committee of Jurists established after the *Janina* incident, drafted basis of discussion No. 10, whose wording was particularly specific, in the light of the replies received. As has been seen, at the Conference this basis of discussion was incorporated into a single principle, drawing no distinction between the case of injury caused to foreign individuals and the case of injury caused to foreign persons with public status, from the standpoint of the nature and origin of the acts which in both cases may be attributed to the State and make it responsible.

which safeguard the democratic order. It also sent a high official of the Political Department to Lausanne to present the condolences of the Federal Council to Worowski's widow and to the other persons who had been wounded.²²⁷

122. But the Soviet Government accused the Swiss Government of not having given the Russian representative adequate protection. The People's Commissioner for Foreign Affairs, Chicherin, sent the Federal Council a telegram on 16 May stating:

The last communications from Worowski have proved beyond any doubt that the Swiss authorities completely neglected to take the most elementary precautionary measures to protect the Russian delegate and his colleagues... the Russian Government... declares that the attitude... of the Swiss authorities must be clearly designated as "tolerance" (*Duldung*) of one of the most serious crimes—the assassination of a plenipotentiary representative of another country.²²⁸

The Soviet Government therefore requested the Swiss Government, in view of its "heavy and obvious responsibility" to order a most meticulous inquiry and inform it of the results. It also requested, as satisfaction (*Genugtuung*) for Russia, the dismissal and prosecution of all the officials who had been guilty of the slightest misconduct in the matter.

123. Following this telegram, tension mounted between the two countries. The Federal Council felt that the accusation levelled against it was an insult to its dignity. It replied, in a telegram of 13 May, recalling that it had publicly condemned the crime as soon as it had learnt of it and had contacted the victim's relatives. It wished, above all, to bring out certain aspects of the case which it considered to be important: at the time of the incident, Worowski did not have in Switzerland a mission which could be regarded as official, since the inviting Powers at the Conference had not yet officially invited the USSR to the second session of the Conference. The Secretary-General of the Conference had even informed the Federal Council, in a note of 4 May, that Worowski should not be considered as a participant in the Conference. Mr. Worowski, for his part, had told the Vaud authorities on the occasion of the first session of the Conference that he was not asking for any special protection and had returned for the second session without even notifying those authorities. The telegram went on to say that the Vaud authorities:

nevertheless surrounded your Delegation with a discreet security service, but never had any inkling of a plot against it. When the Swiss authorities learnt that members of a Vaud association had made representations urging your Delegation to leave Swiss territory, the authorities intervened immediately to halt those doings. The members of the Vaud association concerned were told to behave properly. There was not the least clue to indicate that they had had dealings with the murderer. There is no link of direct causality whatsoever between their representations and the occurrence of the incident. Conradi was arrested as soon as the crime had been committed. He says that he was seeking revenge for the terrible sufferings which his family had to endure in Russia. He is in the hands of the Vaud cantonal justice which, in accordance with Swiss judicial arrangements, is competent to prepare

and try the case. Justice will be done with complete independence... The Federal Council does have one right: the right to demand from the Soviet Government reparation for outrageous acts of violence and plunder which it committed or allowed to be committed against millions of Swiss citizens; but the Federal Council owes nobody any satisfaction other than that prescribed by the duty to guarantee the impartial enforcement of the laws in force in the country.²²⁹

124. In another telegram of 8 June, People's Commissioner Chicherin stated that the reply of the Federal Council could not be considered satisfactory and that it was calculated to evoke profound indignation among the Russian general public. He added:

The Swiss Government, not content with peremptorily refusing to give the Russian people and Government any satisfaction for the serious insults proffered to them and condoning its own passiveness, which made possible the tragic death of Plenipotentiary Delegate Worowski, is even resorting to the slander used by the assassin against the people whose representative he killed and can find nothing better to do in the circumstances than also to insult the Russian Government in the same manner. The Swiss Government disregards all the statements made in the Russian note of 16 May... The Swiss Government has therefore gone beyond its former tolerance with regard to the crime... its present attitude, as revealed by its telegram, must be described as moral complicity (*Beihilfe*) in the crime. The Russian Government... reserves the right to demand full and entire satisfaction.²³⁰

When the Federal Government declined to reply to this last telegram, the Soviet Government decided to introduce a boycott against Switzerland and to break off all trade and other relations. The situation remained tense and the search for a solution was not facilitated by the acquittal of Conradi by the Lausanne *Cour d'assises* on 16 November 1923. When, in March 1926, the Secretary-General of the League of Nations invited the USSR to participate in the meeting at Geneva of the Preparatory Committee for the Disarmament Conference, People's Commissioner Chicherin protested, in his letter of 7 April 1926, against the choice of a Swiss city for the proposed meeting and emphasized that on the occasion of the 1923 incident:

the Swiss Government, although warned in good time of the threats openly made in extremist circles against M. Worowski, the Soviet delegate, not only took none of the necessary steps to prevent a crime but, once the crime had been committed, did all in its power to allow the criminals to escape with impunity. The fact that the Swiss Government obstinately refused to fulfil its elementary international duties and to mark its disapproval of the crime committed by suitable official action, deprives the assurances given by it to the League of Nations of all value... The Soviet delegates could therefore not expect any more effective protection than in 1922 from the Swiss authorities.²³¹

125. The incident was finally settled in 1927, by the exchange between the Minister of Switzerland and the

²²⁷ Furgler, *op. cit.*, p. 58.

²²⁸ *Ibid.*, pp. 58-59 [translation from German].

²²⁹ *Ibid.*, pp. 59-60 [translation from German].

²³⁰ *Ibid.*, p. 60 [translation from German].

²³¹ League of Nations, *Official Journal*, 7th Year, No. 5 (May 1926), p. 661. See also the notes quoted in: Institute of the State and of Law of the Academy of Sciences of the Soviet Union, *Kurs mezhdunarodnogo prava* [Course in international law], edited by F. I. Kozhevnikov *et al.* (Moscow, Nauka, 1969), vol. V: *Osnovnye instituty y otrasli sovremennogo mezhdunarodnogo prava* [Principal institutions and branches of international law], p. 430, foot-notes 62 and 63, and p. 438, foot-note 81.

Soviet Ambassador in Berlin of the following joint declaration :

In view of the desire of the Governments of the Union of the Soviet States of Russia and of the Swiss Confederation to settle the dispute existing between the two States, which arose following the murder of Mr. Worowski and the attacks on Mr. Arens and Mr. Diwilkowski during the Lausanne Conference, the Swiss Federal Council once again declares that it utterly condemns and very much regrets that criminal action. In addition, with a view to achieving a reconciliation, it will be prepared, once negotiations have been initiated between the Governments of the Union of Soviet Republics and the Swiss Confederation on all the matters pending between the two countries, to grant Mr. Worowski's daughter material assistance of a nature and on conditions to be discussed at the same time as the pending matters.²³²

When this case is reduced to its essential elements, the conviction of the two States regarding the points of law involved in the dispute emerges quite clearly, the differences relate not to the principles but to the facts. Here too, one must not be misled by certain expressions, such as "moral complicity", which appeared at a time when the tension was at its height in one of the telegrams from the Soviet Government. That Government did not find the basis for the international responsibility which it attributed to Switzerland in the criminal act committed in Swiss territory by an individual. It found it in the attitude adopted with regard to that act by the Swiss official authorities. According to the Soviet Government, those authorities had been guilty of a breach of their obligation to provide protection, both from the viewpoint of prevention and from that of punishment. For its part, the Swiss Government specifically denied that it had been guilty of failing to provide protection and in this connexion it stressed what it considered to be Mr. Worowski's "unofficial" character, because in its view that tempered its obligation to provide protection. The discussion therefore did not concern the question whether, in the case of injurious actions committed by individuals, anything other than the conduct of the organs of the State with regard to those actions could be legally invoked as a basis for State responsibility. The two parties clearly held the same view on that question. The discussion related solely on the point of fact of whether or not in the case under consideration, the organs of the Swiss State had failed to fulfil its obligation to provide protection.

126. In 1932, three United States consular officers, travelling by car between Baghdad and Teheran, were assaulted, robbed and kidnapped in Persian territory, by a band of brigands. They were freed by the Government forces, which attacked the band and captured some of the brigands, who were subsequently sentenced to death. Following these events, the State Department decided that all reasonable measures of protection had been taken in that instance and informed the United States Legation at Teheran on 16 November 1932 that there was no basis for requesting compensation, since the Persian authorities had fully performed their obligations.²³³

²³² Furgler, *op. cit.*, p. 61 [translation from German].

²³³ Hackworth, *op. cit.*, pp. 656-657.

127. Reference has already been made, in section 7 (paragraph 25), the case of Baron de *Borchgrave*, a Belgian diplomat, who was assassinated in Spain in 1936. The Belgian Government maintained that the murder had been committed by organs of the State; the Spanish Government denied this. But the Belgian Government also argued that, even if the Spanish version of the case had been accurate, Spain would have incurred international responsibility because the Spanish authorities had failed in their duty adequately to protect a member of the staff of a foreign embassy and had then failed in their duty diligently to pursue and punish the culprits.²³⁴

128. After the *Italian consul at Chambéry* had been attacked by individuals, the French judicial authorities had instituted proceedings against the wrongdoers. But no judicial decision followed and the proceedings were suspended in view of the proposed adoption of an amnesty law. The Italian Embassy protested. The Ministry of Foreign Affairs then asked the Legal Department whether a reply should be sent to the Italian Embassy on the basis of the information provided by the *Garde des sceaux*. The Department's legal expert, approaching the question from the viewpoint of the rules of international law, made the following observations, which showed clearly what were the international obligations that France had to respect and what could have been, in that instance, the internationally wrongful act that could make France incur responsibility:

It is a well-established principle of international law, confirmed by many arbitral awards, that a State has the duty to ensure the punishment of offences committed against aliens in its territory. This obligation is particularly strict when the victim is an official required by his functions to be present in the territory of the State where he was the victim of an offence: this was stated by a Committee of Jurists in a report approved by the Council of the League of Nations on 13 March 1924; this special duty naturally arises with respect to a consul, as was decided on 27 April 1927 in the *Mallén* case between the United States and Mexico.

A State cannot evade this obligation under international law by invoking its legislation—for example, an amnesty law... still less a draft amnesty law and a ministerial circular.

If a reply along the lines indicated in the letter from the *Garde des sceaux* were sent to the Italian Embassy, the Italian Government would be entitled to consider that France had failed to perform its international obligations. It would be entitled to propose to us that the dispute be submitted to arbitration and we should be unable to refuse without contradicting our general policy. Indeed, if we were to refuse, the Italian Government would be entitled to bring the dispute unilaterally before the Permanent Court of International Justice. The outcome of such an action would undoubtedly be unfavourable to France.

Consequently, the legal expert of the Department considers that effective measures should be taken to: (1) bring the offenders before the competent court without delay; (2) ensure that the sentences handed down are enforced as soon as possible...²³⁵

²³⁴ See the Memorandum of the Belgian Government of 15 May 1937, in P.C.I.J., Series C, No. 83, pp. 23 *et seq.*, and particularly pp. 28-32; the Memorandum introducing preliminary objections submitted by the Spanish Government on 29 June 1937, *ibid.*, pp. 55 *et seq.* See also the notes annexed to the two memoranda.

²³⁵ Kiss, *op. cit.*, p. 615 [translation from French].

129. The *Bernadotte case* may also be recalled in this context, even though it involved not two States but one State and the United Nations. On 17 September 1948, Count Bernadotte, the United Nations Mediator for Palestine, and Colonel Sérot, a United Nations observer, were assassinated in Israeli territory by the members of the Stern gang. The Secretary-General of the United Nations sent a protest to the State of Israel, requesting a formal apology, the intensification of efforts to bring to justice the perpetrators of the crime, and payment of monetary reparation. In his report on the question he indicated, in addition to the fact that the Israeli Government should be considered responsible for the acts of armed forces, even irregular ones, operating in Israel, two other facts which meant that Israel was responsible in that instance: failure to exercise due diligence and to take all reasonable measures for the prevention of the assassination, and failure to take all the measures required by international law and by the Security Council resolution 59 (1948) of 19 October 1948 to bring the culprits to justice.²³⁶ The United Nations sent similar protests to the Jordanian Government, following the murder of *Bakke*, a staff member of the Organization, committed on 13 July 1948 in Jordanian territory²³⁷ and to the Egyptian Government, following the murder of two United Nations observers, Lieutenant-Colonel *Quéru* and Captain *Jeannel*, committed in Egyptian territory on 28 August the same year by irregulars from Saudi Arabia.²³⁸

130. There have been many cases involving attacks on diplomatic missions or foreign consulates in recent practice. It may be noted that in those cases where the problems of concern to us specifically arose, the parties either affirmed or denied the international responsibility of the receiving State on the basis of the conduct of the organs of that State. For example, in 1954, in the case of *the attack on the Romanian legation at Berne* by Romanian refugees from Germany, the Bucharest Government addressed a series of notes to the Swiss Government requesting compensation for the material and moral damage sustained, on the grounds that: (a) the Swiss authorities had not anticipated the attack as they were required to do by virtue of the obligation of the receiving State under the rules of international law, to protect the diplomatic mission of the sending State; (b) contrary to the same obligation, they had delayed in putting an end to the occupation of the legation and in arresting the offenders; and (c) they had not immediately assisted the chauffeur of the legation, who had been wounded.²³⁹ In its notes in reply to the Romanian notes, the Federal Council rejected the claims presented to it, pointing out that: (a) it had been impossible either to anticipate or prevent the aggression; (b) as soon as they had been alerted,

the police had taken all steps which the circumstances had required; and (c) as soon as he had been found, the chauffeur had been taken to hospital.²⁴⁰ The Swiss authorities also stated that they would prosecute the perpetrators of the attack, who were in fact sentenced to rigorous imprisonment, deprivation of civic rights and expulsion from Swiss territory.²⁴¹ The Federal Council requested an opinion from the Legal Division of the Political Department regarding the incident. The Division gave its opinion on 28 February 1955, offering the following considerations, which merit inclusion in view of their general bearing on the subject with which we are concerned:

. . . What acts involve the responsibility of the State? In principle, acts which contravene international law, in this case, acts contravening the local State's duty to protect diplomatic missions.

In the present case, is the Confederation responsible for the acts of the perpetrators of the attack, who are private individuals? The State of residence has the obligation to prevent acts by individuals which contravene international law and to impose a penal sanction against the perpetrators of those acts after they have been committed (reference: Guggenheim) . . .

The Swiss position (reference: Salis-Burckhardt) is that responsibility for preventing acts that contravene international law is limited, in close relation to the surveillance which the State exercises over the territory it controls and in which it exercises its legislative and executive power. The State must prevent and punish acts directed from its territory against the external and internal integrity of foreign States with which it maintains peaceful relations, the emblems of such States and the inviolability of the diplomatic representatives to whom it grants immunity. However, neither the obligation to prevent nor the obligation to punish is absolute. The first exists only within the context of a general standard, the responsibility for negligence. It depends on the domestic situation prevailing in each country at a given time. The State must exercise due diligence; it is not required to prevent every incident without exception, something which would in fact be impossible. The obligation to punish is spelled out in municipal law and more particularly in penal law. International law needs to be supplemented in this way and allows municipal law considerable discretionary latitude regarding the punishment to be imposed. Nevertheless, when the State fails to perform its duties to prevent and punish, or perform them incompletely, it becomes internationally responsible . . .²⁴²

131. In 1958, the *Hungarian legation at Berne* was attacked in similar circumstances. Once again, in order to affirm and deny, respectively, the existence of Switzerland's international responsibility, the two parties referred to the conduct of the Swiss authorities regarding the case.²⁴³ Similarly, when the *Soviet pavilion at the Izmir fair* was destroyed in 1964, the Soviet Government protested to the Turkish Government and demanded compensation for the damage sustained, contending that the Turkish authorities had failed in their duty to provide protection.²⁴⁴

²³⁶ Whiteman, *op. cit.*, pp. 742 *et seq.*

²³⁷ *Ibid.*, p. 744 *et seq.*

²³⁸ *Ibid.*, pp. 746-747.

²³⁹ See the commentary on the Romanian Government's note of 15, 16 and 28 February and 24 April 1955 by 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), 3rd series, vol. XXVIII, No. 3 (July-September 1957), p. 414.

²⁴⁰ See the commentary on the Swiss notes of 15 and 18 February and 23 March 1955 (*ibid.*, p. 415).

²⁴¹ *Ibid.*, p. 416.

²⁴² *Annuaire suisse de droit international*, 1959 (Zurich, 1960), p. 225 [translation from French].

²⁴³ *Revue générale de droit international public* (Paris), 3rd series, vol. XXX, No. 1 (January-March 1959), pp. 115 *et seq.*

²⁴⁴ *Pravda*, 31 August 1964; Institute of the State and of Law of the Academy of Sciences of the Soviet Union, *op. cit.*, p. 438.

132. Violent demonstrations occurred on 28 November 1964 and 9 February 1965 at the *United States Embassy in Moscow*. The first of these incidents was the work of students, mostly Africans, who were protesting against American activities in the Congo; the second demonstration was also carried out by students, mostly Asians, who were protesting against the bombing of North Vietnam. There was considerable damage and the United States Ambassador in both cases protested that the Embassy had been given inadequate protection. On 9 February the White House issued the following communiqué:

The President takes a most serious view of the fact that police protection furnished the American Embassy in Moscow . . . was wholly inadequate despite prior notification to the Soviet Government of an impending demonstration.

The United States Government must insist that its diplomatic establishments and personnel be given the protection which is required by international law and custom and which is necessary for the conduct of diplomatic relations between States.

Expressions of regret and compensation are no substitute for adequate protection.²⁴⁵

Another, more violent, demonstration organized by some 5,000 students from the same countries occurred on 4 March. Although more ample protection measures had been taken on that occasion, they proved inadequate given the number of attackers, and in order to restore order, it was necessary to send in 500 soldiers from the Moscow garrison, who dispersed the rioters and arrested some of them. Nevertheless, another attack came later in the day, causing further damage. In a protest note to the Soviet Minister for Foreign Affairs, the United States Ambassador praised the "courageous efforts" of the mounted police and the army, but described the protection provided the Embassy as "grossly inadequate". The Soviet Minister in turn expressed regret and promised compensation for the damage to the Embassy, adding that in the future the Soviet authorities would take supplementary measures to protect the Embassy.²⁴⁶

133. Finally, yet another case of the same type involved the *demonstration against the USSR Embassy at Peking*. These demonstrations occurred for the most part in August 1966, and some of them prompted the Soviet Government to send a note of protest to the Chinese Government on 26 August. After describing the events, which, it was alleged, had seriously disturbed the regular work of the Embassy and had endangered the safety of its personnel, the note continued as follows:

It should be pointed out that the rioting in front of the Soviet Embassy was witnessed by the Chinese police, who nevertheless did nothing to stop it.

The following incident demonstrates the attitude adopted by the Chinese authorities with respect to the provocative acts directed against the Soviet Embassy. On 22 August, the representative of the Chinese Ministry of Foreign Affairs refused to accept the protest formulated by the Soviet Chargé d'affaires a.i. regarding the fact that hooligans had stopped an Embassy car.

The Ministry representative also defended the perpetrators of the provocative acts. . . . Indeed, the representative . . . stated that the Chinese authorities were not discounting the possibility that the rioting in front of the Soviet Embassy would continue.²⁴⁷

134. Incidents such as those just described are all too frequent in contemporary international life, and if we probed further we could find others which have occurred even more recently. However, those we have cited serve amply to confirm with certainty the principle which henceforth can be considered well-established in international practice. Cases of acts of individuals directed against foreign persons or property that States are obliged to provide with special protection do not give rise to an exception to the general rule regarding the possible determination of the State's international responsibility in connexion with the acts of individuals; in those cases too, such acts are not attributed to the State as a source of international responsibility. The State is responsible only for the conduct of its organs with respect to acts committed by private individuals. The fact that in such cases the international responsibility of the territorial State is more frequently alleged by claimant Governments and even more frequently acknowledged by the respondent Governments, arises simply from the much more compelling obligation of the State to protect the persons or property in question.

135. It might also be asked whether acts committed in the territory of a State by persons, and in particular by groups or bands, having prepared their activity in the territory of a neighbouring State, should not be viewed as constituting a special category of acts of individuals which might give rise to questions of international responsibility. Recent and past history is replete with examples of incidents provoked by such activities, protests addressed to the Governments accused of harbouring and supporting the groups which carried out the activities, indignant rebuttals of those accusations, and so on. We need not cite specific cases, as there would be only too many to choose from.²⁴⁸ However, it is important to note that the responsibility alleged in such cases is not necessarily always defined as a responsibility arising from acts of individuals. There are doubtless situations involving actions by groups which are and remain private entities, or which at least are entirely outside the machinery of the State in whose territory they reside. They are there as refugees; if they organize themselves, they do so on their own account, even clandestinely, although they may receive sympathy and support from certain quarters in the country. If that is the case, the actions which such groups may carry out in the territory of another State do not constitute a separate category distinct from other hypothetical acts of individuals. They cannot be viewed in a different light: they are not actions which may be considered acts of the State in whose territory they were

²⁴⁷ *Revue générale de droit international public* (Paris), 3rd series, vol. XXXVIII, No. 1 (January-March 1967), pp. 182 et seq. [translation from French].

²⁴⁸ A detailed analysis of State practice with respect to disputes provoked by the activities of armed bands organized in foreign countries is provided in I. Brownlie, "International law and the activities of armed bands", *International and Comparative Law Quarterly* (London), vol. 7 (October 1958), pp. 724 et seq.

²⁴⁵ *The New York Times*, 11 February 1965; *Revue générale de droit international public* (Paris), 3rd series, vol. XXX, No. 1 (January-March 1965), pp. 159 et seq.

²⁴⁶ *The New York Times*, 5, 6, 7 and 8 March 1965; *Revue générale de droit international public*, loc. cit.

conceived and prepared. That State may incur international responsibility with respect to such actions, but always for one of the reasons already noted which entail responsibility in similar circumstances. The Government of that State will be accused of having failed to fulfil its international obligations with respect to vigilance, protection and control, of having failed in its specific duty not to tolerate the preparation in its territory of actions which are directed against a foreign Government or which might endanger the latter's security,²⁴⁹ and so on. In other words, it will always be a question of the same internationally wrongful acts of omission²⁵⁰—of which we have seen numerous examples—which are habitually attributed to States with respect to the acts of individuals.

136. In order for the State to incur responsibility arising from other causes—responsibility arising directly from actions by the groups or bands in question—the situation must be different. Such groups must maintain different and closer relations with the Government of the country where they are based. Where it can be seen that that Government encourages and even promotes the organization of such groups, that it provides them with financial assistance, training and weapons, and co-ordinates their activities with those of its own forces for the purpose of conducting operations, and so on, the groups in question cease to be individuals from the standpoint of international law. They become entities which act in concert with, and at the instigation of, the State, and perform missions authorized by or even entrusted to them by that State. Such groups then fall into the category of those organs which are linked, in fact if not formally, with the State machinery, and frequently called “*de facto* organs”,

²⁴⁹ In this context, it is interesting to quote the following passage from a note by the Legal Division of the French Ministry of Foreign Affairs of 25 February 1935:

“France would incur international responsibility if the French Government were to tolerate in its territory action which might endanger the Government of a neighbouring friendly State. That is a long-standing rule of international law which France has always scrupulously observed. In this connexion, it will suffice to recall the fact that, following the Carlist insurrection, Spanish refugees were compelled to settle north of the Loire, the transfer to south-west France of many refugees from the Saar, the measures taken at the time regarding Colonel Macia...” (Kiss, *op. cit.*, p. 591) [translation from French].

²⁵⁰ For example, accusations of having violated, by omission, the obligation to exercise due control and vigilance, were contained in the remonstrances which the French Government addressed to the Tunisian Government early in 1958 in order to underscore the latter's responsibility with regard to the traffic in men and supplies at the Algerian-Tunisian frontier (statement of Mr. C. Pineau to the National Assembly on 22 January 1958 (Kiss, *op. cit.*, p. 558). The remonstrances addressed to the United States by Spain with regard to the attack on the Spanish cargo vessel *Sierra Aranzazu* by anti-Castro motor-boats in the Caribbean Sea on 14 September 1964 (*Revue générale de droit international public* (Paris), 3rd series, vol. XXXVI, No. 1 (January-March 1965), pp. 126 *et seq.*) fall into the same category. Similarly, accusations of inadmissible tolerance are contained in the protests concerning attacks against airports or commercial aircraft or other criminal attempts often addressed by the Governments of the countries where the incidents took place to the Governments of the States where they were prepared by organizations enjoying the latter States' hospitality.

and were dealt with in section 5 of this chapter.²⁵¹ When such groups carry out the activities planned, those activities are attributed to the State and constitute internationally wrongful acts of the State: wrongful acts of commission rather than omission, which by virtue of that fact render the State concerned internationally responsible. Such situations are thus clearly quite different from cases involving State responsibility for the acts of individuals.

137. We have thus concluded²⁵¹ the long analysis of judicial decision and practice which was necessary in order to determine, with suitable documentation, the criteria actually applied in international relations in solving the problems posed at the beginning of this section. It now remains to consider the opinion of writers who have dealt with the subject. We hope to be able to discharge the task ahead concisely, despite the fact that here, too, we are faced with an imposing series of monographs, articles and pages of manuals. However, the views of the vast majority of writers can easily be grouped into two or three basic schools of thought, according to which of the various theoretically possible solution to the problems at hand they favour in principle. Differences regarding any given detail and the many nuances of opinion are unimportant in so far as they concern matters unlikely to affect the formulation of the rule or rules to be established on the subject. Moreover, in the context of this report, it seems unnecessary to enter into a critical review of these abstract statements of position, since an evaluation thereof emerges implicitly from the results of the research we conducted in order to discover the principles which correspond concretely to the juridical beliefs of the members of the international community. Lastly, it should be recalled that the considerations formulated at the outset to serve as guidelines have by now enabled us to formulate a set of established concepts,²⁵² which provide answers to the problems raised by a given writer or group of writers and valid reasons for considering certain solutions well-founded and rejecting others.

138. Let us therefore turn to the various schools of thought. Firstly, although they are essentially of theoretical interest, we might mention those views which, in

²⁵¹ (See *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 262, document A/CN.4/246 and Add.1-3, paras.186 *et seq.*). If the State which is the object of such complaints denies responsibility, it normally does so by contesting the existence of links with the groups or bands in question, not by contesting the consequences which would result from such ties should they be proved to exist. In this connexion, it is enlightening to read the note of 21 February 1934 by the Legal Division of the French Ministry of Foreign Affairs (Kiss, *Répertoire . . .*, *op. cit.*, III, p. 585) concerning the debate between the German and Austrian Governments regarding the establishment in Germany of the *Kampfring der Deutschösterreicher im Reiche* and the activities of the *Kampfring*. Furthermore, the annals of complaints regarding cases of this type show that discussions between the countries concerned have focused primarily on the existence and proof of links between the Government and the supposedly private bodies carrying out activities which are injurious to neighbouring States. Regarding cases of “indirect aggression” through “private” armed groups, see the recent article by S. G. Kahn, “Private Armed Groups and World Order”, *Netherlands Yearbook of International Law*, 1970 (Leyden), vol. I, 1971, pp. 32 *et seq.*

²⁵² See paras. 63-73 above.

one way or another, eventually attribute the acts of individuals to the State as a source of international responsibility, completely irrespective of the attitude which the organs of the State may take towards those acts. In this context there are two ideas that are to some extent opposite. On the one hand, there is the view, dating back to the height of the Middle Ages, which, on the basis of the "solidarity of the social group", holds the latter responsible for the acts of all members of the group. On the other hand, there is the view which holds that the State must offer some sort of guarantee regarding everything that occurs in its territory.²⁵³ The first idea has tempted some modern writers,²⁵⁴ but it has no true adherents at present. The second idea has rarely been supported as a generally applicable criterion.²⁵⁵ Rather, it has had adherents, particularly in the past, who have defended it as being applicable to special situations, ranging from that occasioned by acts committed during riots, civil wars and xenophobic demonstrations,²⁵⁶ to

²⁵³ On this subject, see the considerations set out in para. 73 above.

²⁵⁴ Arangio-Ruiz at one point appears to take up this idea in a new form in *Gli enti soggetti dell' ordinamento internazionale* (Milan, Giuffrè, 1951), vol. I, p. 366, note 468; and "Stati e altri enti (Soggettività internazionale)" *Novissimo Digesto Italiano*, vol. XVII (Turin, 1971), p. 154, note 9, when he states that it is necessary to revert to the concept of "solidarity of the group in the Germanic sense". G. Pau, "Responsabilità internazionale dello Stato per atti di giurisdizione", Istituto di scienze giuridiche, economiche e politiche dell' Università di Cagliari, *Studi economico-giuridici*, vol. XXXIII (1949-1950) (Rome, Pinnaro, 1950), pp. 284-285, considers that the individuals organized in a specific territory constitute a basic element of the State and believes that the State should be held accountable for the acts of all the individuals who are the members of a constituent element of the State.

²⁵⁵ Only A. Soldati, *La responsabilité des Etats dans le droit international* (Paris, Librairie de jurisprudence ancienne et moderne, 1934), pp. 83-84, maintains that the State, in order to guarantee that it will fulfil its obligations, must generally assume responsibility for any person's conduct.

²⁵⁶ The criterion by virtue of which the State is responsible in such cases for the acts of individuals, the attitude of the organs of the State vis-à-vis those acts notwithstanding, was supported by Brusa in his 1898 report to the Institute of International Law. See E. Brusa, "Responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d'émeute ou de guerre civile", *Annuaire de l'Institut de droit international*, 1898 (Paris), vol. 17, pp. 96 *et seq.* This theory was supported by Fauchille (*ibid.*, 1900, vol. 18, pp. 234-235), but encountered some objections. It reappeared, but within much more restricted limits (that is to say, having in mind in particular the injuries caused by outbursts of xenophobia directed against aliens as such), in a new report prepared jointly by Brusa and von Bar ("Nouvelles thèses", *ibid.*, pp. 47 *et seq.*). This report was approved by the majority of the Institute (*ibid.*, pp. 254 *et seq.*). Nevertheless, such views not well received by writers. Only J. Goebel, "The International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence, Insurrections and Civil Wars", *American Journal of International Law* (Washington, D.C.), vol. 8, No. 4 (October 1914), pp. 802 *et seq.*, sought a few years later to defend Brusa's ideas. However, his analysis of practice and judicial decisions in support of his theory was hardly convincing. This being the case, other writers more recently have advocated the adoption of a solution envisaging State responsibility for all damage to aliens resulting from the movements of xenophobic mobs, although they do not claim that that was the solution already applied in international relations. See J. W. Garner, "Responsibility of States for injuries suffered by foreigners within their territories on account of mob violence, riots and insurrec-

tion arising from acts directed against persons or property entitled to special protection.²⁵⁷

139. The second set of theories is advanced by those who, while differing on many other aspects, are more or less in agreement on one basic point. In their view, an action committed by an individual can be attributed to the State as a source of international responsibility, provided that other factors were involved in its commission, particularly failure to prevent the act or to react *a posteriori* and that such omissions derived directly from the State, i.e., from its organs. This type of theory derives from Grotius' idea that the collectivity participated in a crime committed by an individual if nothing was done to prevent the crime (*patientia*) or to punish or hand over the offender (*receptus*).²⁵⁸ Vattel subsequently expressed this idea in what has remained a classic formulation. "If the nation, or its ruler, approve and ratify the act of the citizen, it takes upon itself the act, and may then be regarded by the injured party as the real author of the affront of which the citizen was perhaps only the instrument."²⁵⁹ This theory, known as the "theory of complicity", prevailed in the writings of nineteenth-century international jurists; its influence was also discernible in certain arbitral decisions of the same period. Generally abandoned after the first decade of the twentieth century, it nevertheless again received full support in Borchard's

tion", *Proceedings of the American Society of International Law*, Twenty-first annual meeting, Washington D.C., 1927, pp. 27-58 and 62; H. V. Evatt, "The international responsibility of States in the case of riots or mob violence—A study of the Kalgoorlie Riots Case, 1934", *Australian Law Journal, Supplement to volume 9* (Sydney), 15 November 1935, pp. 13 *et seq.*

²⁵⁷ The responsibility of the State for all acts perpetrated by individuals in such circumstances has been advocated by Decenière-Ferrandière (*op. cit.*, p. 129); Eagleton (*The Responsibility of States . . . op. cit.*, pp. 80-81 and 93); J. Dumas ("La responsabilité des Etats à raison des crimes et délits commis sur leur territoire au préjudice d'étrangers", *Recueil des cours . . .*, 1931-II (Paris, Sirey, 1932), vol. 36, p. 254; Cavaré (*Le droit international public positif* (Paris, Pédone, 1962), vol. II, pp. 496-497); Greig (*op. cit.*, p. 444). In the same connexion it might be noted that M. R. García-Mora, *International Responsibility for Hostile Acts of Private Persons against Foreign States* (The Hague, Nijhoff, 1962), pp. 28-29, 35, favours the adoption of a rule which would replace the one presently in force and would make the State automatically responsible for all acts committed by individuals in its territory where such acts constitute a threat to international peace and security.

²⁵⁸ H. Grotius, *De Jure Belli ac Pacis Libri Tres* (Amsterdam, MDCXLI), lib. II, pp. 366 *et seq.*

²⁵⁹ E. de Vattel, *Le droit des gens, ou Principes de la loi naturelle* (Lyons, Robert et Gauthier, 1802), vol. II, p. 72. (Translation from the original French of the 1758 edition by Charles G. Fenwick, Washington, 1916.) He described as follows the two ways whereby the State might ratify the act of a citizen (pp. 71 and 75):

"If a sovereign who has the power to see that his subjects act in a just and peaceable manner permits them to injure a foreign nation, either the State itself or its citizens, he does no less a wrong to that nation than if he injured it himself . . .

"A sovereign who refuses to repair the evil done by one of his subjects, or to punish the criminal, or, finally, to deliver him up, makes himself in a way an accessory to the deed, and becomes responsible for it . . ."

classic work,²⁶⁰ although he, too, moved away from it in more recent writings.²⁶¹ Subsequently, referring to Nielsen's separate opinion regarding the *Janes case*,²⁶² other writers, including Hyde²⁶³ and Brierly²⁶⁴ sought to revive the earlier concept by replacing the term "complicity", which was considered too strong, by the term "condonation". Their intention, in keeping with Nielsen's position, was primarily to facilitate the computation of compensation in cases of "non-punishment" on the basis of the injury caused by the individual's action.²⁶⁵ In any event, these writers apparently did not consider that the factor which must be taken into account to determine the act attributable to the State as a source of international responsibility was the delinquency of which the State was accused, rather than the extent of the reparation it was required to pay as a result of the delinquency.²⁶⁶ Lastly, this category of opinions includes more modern theories formulated by recent Italian writers. It should be emphasized, however, that these theories resemble those already mentioned in certain aspects only and that they are characterized in particular by the logical connexion between them and specific concepts of the organization and nature of the State as a subject of international law. Thus, their common feature is that they place less

emphasis on, or indeed eliminate, the distinction between acts of individuals and acts of organs for the purpose of establishing individual conduct as an act of the State. According to Biscottini, the act of an individual is attributable to the State on the same basis as is the act of an organ, provided, however, that those acts were not adequately repressed by the other members of the society concerned, i.e., to be clear, that the State did not punish them.²⁶⁷ Arangio-Ruiz, on the other hand, considers that both the act of an individual and the act of an organ are "materially" acts of the State. In the situations under review, the two would be grouped together as material components of a whole, of a complex act. This complex act, which includes the action of the individual and the omission of the organ, would be viewed as a whole and as constituting the internationally wrongful act of the State, for which the State would bear responsibility.²⁶⁸

140. The third school of thought is the one to which the very large majority of modern writers belong. Its main advantage is that, as far as academic formulations is concerned, it reflects the results obtained by analysing arbitration cases and State practice. This is not the place to list the numerous divergencies on particular aspects or to discuss the theoretical premises which some writers

²⁶⁰ E. M. Borchard, *The Diplomatic Protection . . .* (*op. cit.*), p. 217. He maintained that the State would be responsible for the acts of individuals in cases of "manifestations of the actual or implied complicity of the government in the act, before or after it, either by directly ratifying or approving it, or by . . . the negligent failure to prevent the injury, or to investigate the case, or to punish the . . . individual, or to enable the victim to pursue his civil remedies against the offender".

²⁶¹ Borchard, "Important Decisions . . .", *American Journal of International Law* (*op. cit.*), p. 518. While maintaining that the theory that the State is responsible for the conduct of the individual would receive the most support in State practice and would simplify the calculation of the damages to be awarded, the writer then acknowledged that the theory that the State is responsible only for the failure of its organs to prevent or punish an action of an individual was "useful . . . because it [was] correct and because it [recognized] various degrees of governmental delinquency".

²⁶² See para. 85 above.

²⁶³ C. C. Hyde, "Concerning Damages Arising from Neglect to Prosecute", *American Journal of International Law*, Washington, D.C., vol. 22, No. 1 (January 1928), pp. 140 *et seq.*; and *International Law chiefly as Interpreted and Applied by the United States*, 2nd rev. ed. (Boston, Little, Brown, 1951), vol. 2, pp. 941 *et seq.*

²⁶⁴ J. L. Brierly, "The Theory of Implied State Complicity in International Claims", *British Year Book of International Law*, 1928, London, vol. 9, pp. 42 *et seq.*; and *The Law of Nations*, 6th ed., rev. Waldock (Oxford, Clarendon Press, 1963), pp. 289-290.

²⁶⁵ Brierly was in fact criticizing the substance of rule XI, paragraph 2, of the draft adopted by the Institute of International Law at its Lausanne session in 1927, which stated that:

"When the responsibility of the State results solely from the fact that it has not taken the required steps after the accomplishment of the injurious act, it is only bound to make reparation for the injury resulting from the total or partial omission of these measures."

(*Yearbook of the International Law Commission*, 1956, vol. II, p. 228, document A/CN.4/96, annex 8.)

Other writers, such as Bouvé (*op. cit.*, pp. 661 *et seq.*) while not expressing support for the "theory of complicity", nevertheless embrace it to some extent, again in connexion with the question of the extent of reparation.

²⁶⁶ In this connexion, see the observations in paras. 64 and 66-70 above.

²⁶⁷ Biscottini, *op. cit.*, pp. 19 *et seq.*, and pp. 31 *et seq.* The imposition of adequate punishment would therefore have the effect at the international level of eliminating the wrongfulness of any action by a member of given society, whether an organ or a private individual. The writer does not seem to have considered whether international practice did not invalidate such a conclusion or, in a more general context, the very idea that the decision as to whether an action or omission constitutes an internationally wrongful act would always depend on the conduct of the collectivity after the action or omission occurred. In any event, in the cases reviewed, Biscottini concluded that it is the unpunished act of the individual itself which is attributed to the State as a source of international responsibility. Like adherents to Vattel's classic concept, he is then confronted with the possibility that the act which in a given situation is supposedly an act of the State and the international delinquency which the State supposedly committed in the same situation may not correspond.

²⁶⁸ G. Arangio-Ruiz, *Gli enti soggetti . . .* (*op. cit.*), pp. 363 *et seq.*, and, in particular, "Stati e altri enti . . .", *Novissimo Digesto Italiano* (*op. cit.*), pp. 153-154. He does not indicate which "material component" of the complex juridical act in question would be the determining factor in establishing, in a specific case, which international obligation the State has supposedly violated by that complex act. As we emphasized above (paras. 63-64), the action of the individual and the possible omission of the organ in connexion with that act are in contradiction to quite different international obligations of the State. Consequently, to maintain that the State simultaneously committed two entirely distinct delinquencies would amount to separating the "complex act" into two distinct internationally wrongful acts, one committed by the individual and the other by the organ—not to mention the fact that the existence, in the case in question, of this dual delinquency would by no means correspond to what actually happens in international practice. However, the situation would be different if the determining factor were more realistically considered to be the organ's omissive conduct. The practical result would then closely approximate the conclusion of the theory which views an action of an individual not as an act of the State or a component thereof, but rather as an external event which in a given case would have the effect of causing the wrongfulness of the act. The concept of a "wrongful act consisting of two different elements: the act of the individual plus the omission of the State" also appears in Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (Paris, Sirey, 1938), p. 206.

take as starting-points and which they often give as postulates before having proved them.²⁶⁹ Such premises are not at all essential in order to reach the conclusion drawn from them: this result is much more soundly based when the writers concerned achieve it by induction from observed facts than when they deduce it from one or more *a priori*. The scientific finding supported in various ways by these different writers, which must be defined here as precisely as possible, is the following: actions and omissions by individuals who are and remain individuals are not attributed to the State under international law and do not become "acts of the State" which, as such, may involve its responsibility towards other States. The acts of private individuals which cause injury to foreign States, to their representatives or to their subjects are often the occasion of an internationally wrongful act of the State, but of a wrongful act which is represented by the conduct of State organs. Moreover, they often constitute an external event which assumes the value of a catalyst causing the wrongfulness of the conduct of those organs with respect to the actual situation.²⁷⁰ But the State is internationally responsible only for the action, and more often for the omission, of its organs which are guilty of not having done everything within their power to prevent the individual's injurious action or to punish it suitably in the event that it has nevertheless occurred. It is responsible for having violated not the international obligation with which the individual's action might be in contradiction, but the general or special obligation imposing on its organs a duty to provide protection, and it is not necessary to define here the exact tenor and scope of that obligation.

141. Triepel had already demonstrated that the State, when it remains passive towards the individual who injures another State, does not become an accomplice of the individual but is responsible for its own passivity, so that the responsibility of the State cannot in any way be described as responsibility for the act of the individual.²⁷¹

²⁶⁹ See the remarks made at the end of para. 63 above.

²⁷⁰ See what has been said on this subject in para. 65 above.

²⁷¹ Triepel, *Völkerrecht und Landesrecht* (Leipzig, Mohr (Siebeck), 1899), pp. 333-334.

"But . . . this responsibility is quite different from responsibility for the act of the individual. The State 'is responsible' because it does not react . . . The State does not become, as is always said, responsible for the act (of the individual) just because of its passivity; it was and remains responsible if it neglects to do what it is obliged to do by reason of that act" [translation from German].

Triepel nevertheless seems to contradict himself when he describes the obligation to punish the culprit as one of the forms of the responsibility of the State in the case of acts by individuals. This idea of Triepel probably served as a starting-point for Oppenheim, who as early as 1905 evolved his theory in which he defines the obligation to punish as a "vicarious" responsibility. See Oppenheim, *op. cit.*, pp. 337-338. In fact, according to Oppenheim, the "vicarious" responsibility of the State for acts of individuals—or also of subordinate organs—would consist only of the obligation to give the injured State "satisfaction and reparation" by punishing the culprits. On the other hand, the "original" responsibility incurred by the State in the case of acts by government organs as such would also include the obligation to pay compensation for material damage caused by such acts. The Special Rapporteur has already indicated above, in paragraph 72, what he thinks of this concept and of the definitions which it involves. It should,

But the theory in question has principally been supplemented and defined by Anzilotti in terms which have been used subsequently by a large number of writers: . . . the acts committed by the subjects of a State against aliens do not, as such, involve the responsibility of the State: this is true unless the State has itself performed an act contrary to international law by not forbidding the acts in question, by being unable or unwilling to take action against the guilty individuals, by not giving the aliens concerned the means of obtaining justice and so on. In such cases, however, the punishment of the culprits is not, as has been said, the manifestation or effect of the responsibility of the State: it is rather the performance of the duty imposed on the State by international law; failure to punish is a breach of that duty.²⁷²

142. The writers who belong, in principle at least, to this school of thought are so numerous that mention can be made here only of the principal works in which support is expressed for the ideas indicated. Without any pretention to give an exhaustive list, reference may be made, among the specialized studies on the subject of State responsibility, to those by Schoen,²⁷³ Jess,²⁷⁴

however, be added here that what Oppenheim calls "vicarious responsibility" is in fact much more like a "primary" obligation than an obligation arising from responsibility in the strict sense of the term, i.e. from the violation by a State of a pre-existing international obligation. Indeed, Oppenheim notes that only a breach by the competent organs of the obligation to punish the culprit can give rise to original responsibility of the State following an injurious action by an individual. Despite the differences of terminology, his theory therefore remains very similar to that of Triepel: this is another reason for rejecting definitions which are merely confusing. Kelsen (*Principles of International Law* (New York, Rinehart, 1952), pp. 119 *et seq.*) is right—although still in the context of his special concept of responsibility—when he criticizes the idea of vicarious responsibility of the State for acts of individuals and notes that "in all the cases of so-called indirect or vicarious responsibility, the state is responsible only for its own conduct; for the state makes itself responsible in the true sense of the term . . . only if it does not fulfil by its own conduct the obligation to prevent or repair the wrong committed by acts not imputable to the state" (*ibid.*, p. 121). In the same vein as Oppenheim, reference may be made to E. Ullmann, *Völkerrecht* (Tübingen, Mohr (Siebeck), 1908), pp. 149 *et seq.*; A. S. Hershey, *The Essentials of International Public Law and Organization* (New York, Macmillan, 1930), pp. 253-254; and, more recently, O. Svarlien, *An Introduction to the Law of Nations* (New York, McGraw-Hill, 1955), pp. 133 *et seq.*

²⁷² D. Anzilotti, "La responsabilità internazionale des Etats à raison des dommages soufferts par des étrangers", *Revue générale de droit international public* (Paris), vol. XIII, Nos. 1 and 3 (1906), reprinted in *Scritti di diritto internazionale pubblico* (Padua, CEDAM, 1956), vol. II, t. 1, p. 195 [translation from French]. See also, by the same author, *Teoria generale della responsabilità dello Stato nel diritto internazionale* (Florence, Lumachi, 1902), reprinted in *Scritti . . . (op. cit.)*, pp. 96 *et seq.*; and *Corso . . . (op. cit.)*, pp. 401 *et seq.*

²⁷³ P. Schoen, "Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen", *Zeitschrift für Völkerrecht* (Breslau, J. U. Kem's Verlag, 1917), Supplement 2 to vol. X, pp. 36 *et seq.* and 63 *et seq.*

²⁷⁴ A. Jess, *Politische Handlungen Privater gegen das Ausland und das Völkerrecht* (Breslau, Marcus, 1923), pp. 22 *et seq.*

²⁷⁵ K. Strupp, "Das völkerrechtliche Delikt", *Handbuch des Völkerrechts* (Stuttgart, Kohlhammer, 1920), vol. III, part one, pp. 33 *et seq.*, 102 *et seq.*; and "Die völkerrechtliche Haftung des Staates, insbesondere beim Handlungen Privater", *Abhandlungen zur fortschreitenden Kodifikation des internationalen Rechts* (Kiel, Verlag Instituts für Internationales Recht an der Universität Kiel, 1927, vol. I, pp. 8 *et seq.*, 23 *et seq.*

Strupp,²⁷⁵ Charles de Visscher,²⁷⁶ Burckhardt,²⁷⁷ Ruegger,²⁷⁸ Decencièrre-Ferrendière,²⁷⁹ Strisower,²⁸⁰ Eagleton,²⁸¹ Roth,²⁸² Freemann,²⁸³ Starke,²⁸⁴ Ago,²⁸⁵ Monaco,²⁸⁶ Personnaz,²⁸⁷ Furgler,²⁸⁸ García Amador,²⁸⁹ Accioly,²⁹⁰ Schüle,²⁹¹ Münch,²⁹² Levin,²⁹³ Amerasinghe,²⁹⁴ Jiménez de Aréchaga,²⁹⁵ and Ténékidés.²⁹⁶ It may also be noted that the basic theory of this school of thought is defended in many works of a general nature.²⁹⁷

143. To complete these academic references, mention may be made briefly of the attitude adopted by the large majority of international jurists towards actions committed by individuals in special situations, such as riots, mob demonstrations and xenophobic disturbances, or towards actions constituting attacks on persons enjoying special protection or even on the security of foreign

²⁷⁶ Ch. de Visscher, "La responsabilité des Etats", *Bibliotheca Visseriana* (Leyden, Brill, 1924), vol. II, pp. 102 *et seq.*

²⁷⁷ W. Burckhardt, *Die völkerrechtliche Verantwortlichkeit des Staates für die auf seinem Gebiete begangenen Verbrechen*, Société suisse de droit international, publ. No. 17 (Zurich, Orell Füssli, 1924), p. 25.

²⁷⁸ P. Ruegger, *ibid.*, p. 12.

²⁷⁹ *Op. cit.*, pp. 62-63 and 118.

²⁸⁰ *Op. cit.*, pp. 472 *et seq.*, 481 *et seq.*, 491.

²⁸¹ *The Responsibility of States . . . (op. cit.)*, pp. 77 and 79.

²⁸² A. Roth, *Das völkerrechtliche Delikt vor und in den Verhandlungen auf der Haager Kodifikationskonferenz 1930* (Leipzig, Noske, 1932), pp. 23 *et seq.*; and *Schadenersatz für Verletzungen Privater bei völkerrechtlichen Delikten* (Berlin, Heymann, 1934), pp. 28 *et seq.*

²⁸³ *The International Responsibility of States . . . (op. cit.)*, pp. 20, 27, 367 *et seq.*

²⁸⁴ *Op. cit.*, pp. 112 *et seq.*

²⁸⁵ *Op. cit.*, pp. 473 *et seq.*

²⁸⁶ "La responsabilité internationale . . ." *Rivista di diritto internazionale (op. cit.)*, pp. 225 *et seq.*

²⁸⁷ J. Personnaz, *La réparation du préjudice en droit international public* (Paris, Sirey, 1939), pp. 56, 262 *et seq.*

²⁸⁸ *Op. cit.*, pp. 53 *et seq.*

²⁸⁹ Second report to the International Law Commission: *Yearbook of the International Law Commission, 1957*, vol. II, pp. 121 *et seq.*, document A/CN.4/106, chap. V.

²⁹⁰ *Op. cit.*, pp. 395 *et seq.* and 404 *et seq.*

²⁹¹ A. Schüle, "Völkerrechtliches Delikt", *Wörterbuch des Völkerrechts*, 2nd ed. (Berlin, de Gruyter, 1960), vol. I, p. 333.

²⁹² *Op. cit.*, pp. 224 *et seq.*

²⁹³ *Op. cit.*, pp. 81 *et seq.*

²⁹⁴ C. F. Amcrasinghe, *State Responsibility for Injuries to Aliens* (Oxford, Clarendon Press, 1967), pp. 49 *et seq.*; and "Imputability . . .", *Revue égyptienne . . . (op. cit.)*, pp. 92 *et seq.*

²⁹⁵ *Op. cit.*, pp. 558 *et seq.*

²⁹⁶ *Op. cit.*, p. 788.

²⁹⁷ See, *inter alia*, Ross, *op. cit.*, p. 254; Redslob, *op. cit.*, pp. 235 *et seq.*; Ch. Rousseau, *Droit international public* (Paris, Sirey, 1953), pp. 376-377; Verdross, *op. cit.*, pp. 393 *et seq.*; Cheng, *op. cit.*, pp. 184-185, and 208 *et seq.*; Guggenheim, *op. cit.*, pp. 18 *et seq.*; Balladore Pallieri, *op. cit.*, pp. 350 *et seq.*; Morelli, *op. cit.*, pp. 343-344; Quadri, *Diritto internazionale pubblico (op. cit.)*, p. 609; Dahm, *op. cit.*, pp. 195 *et seq.*; S. Sørensen, "Principes de droit international public", *Recueil des cours . . . 1960-III* (Leyden, Sijthoff, 1961), vol. 101, pp. 224-225; Sereni, *op. cit.*, pp. 1510 *et seq.*; Delbez, *op. cit.*, pp. 362-363; Monaco, *Manuale . . . (op. cit.)*, pp. 564 *et seq.*; Institute of the State and of Law of the Academy of Sciences of the Soviet Union, *op. cit.*, pp. 429-430; M. Akehurst, *A Modern Introduction to International Law* (London, Allen and Unwin, 1970), pp. 112-113.

Governments. Most of the writers who have devoted their attention *ex professo* to these specific problems have taken a different view from those who advocate adoption of the criterion of automatic responsibility of the State²⁹⁸ for any action committed, even by private individuals, in such circumstances. They have therefore reaffirmed, in this context also, the validity of the general rule which in their opinion should cover all cases of acts by individuals: such actions are not, as such, attributable to the State as a source of international responsibility. Even in the case of crimes perpetrated during a riot, of attacks on representatives or property of a foreign State, or of acts endangering the security of Governments of neighbouring countries, the State is answerable only for the wrongful attitude adopted by its organs with respect to such acts. On the subject of riots and similar disturbances, reference should be made to the studies by Arias,²⁹⁹ Strupp,³⁰⁰ Maúrtua and Scott³⁰¹ Podestá Costa,³⁰² and, on the subject of attacks on foreign representatives, property and Governments, references should be made to the articles by Delbez³⁰³ and by Wright.³⁰⁴ Lastly, it should be noted that almost all the writers mentioned in the preceding paragraph adopt a similar attitude in the works and at the places cited.

144. The codification drafts are not of very much help in the formulation of the rule which we are trying to define in this section. It is true that these drafts—whether they are the work of private academic associations or individual authors or have been prepared under the auspices and on behalf of official bodies—generally seem to be unanimous in stating, or at least implying, that the conduct of the individual as such is not attributable to the State as a source of international responsibility. In any case, they all agree that, in the case of individuals' acts which cause injury to aliens, responsibility of the State is involved only if organs of the State have been guilty of internationally wrongful omissions in the prevention or punishment of such acts, or of refusing to

²⁹⁸ The opinions in favour of the adoption of this criterion were mentioned in para. 138, foot-notes 256 and 257, above.

²⁹⁹ H. Arias, "The non-liability of States for Damages Suffered by Foreigners in the Course of a Riot, an Insurrection or a Civil War", *American Journal of International Law* (Washington, D.C.), vol. 7, No. 4 (October 1913), pp. 724 *et seq.*

³⁰⁰ K. Strupp, "Responsabilité internationale de l'Etat en cas de dommages causés aux ressortissants d'un Etat étranger en cas de troubles, d'émeutes ou de guerres civiles", *International Law Association, Report of the Thirty-first Conference*, held at the Palace of Justice, Buenos Aires, 24th August-30th August, 1922, vol. I (London, Sweet and Maxwell, 1923), pp. 133 *et seq.*

³⁰¹ V. M. Maúrtua and J. B. Scott, *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (New York, Oxford University Press, 1930), pp. 60-61.

³⁰² L. A. Podestá Costa, "La responsabilidad del Estado por daños irrogados a la persona o a los bienes de extranjeros en luchas civiles", *Revista de derecho internacional* (Havana), vol. 34, No. 67 (September 1938) and No. 68 (December 1938), pp. 220 *et seq.*

³⁰³ L. Delbez, "La responsabilité internationale pour crimes commis sur le territoire d'un Etat et dirigé contre la sûreté d'un Etat étranger", *Revue générale de droit international public* (Paris), 3rd series, vol. IV (1930), pp. 469 *et seq.*

³⁰⁴ Q. Wright, "Responsibility for injuries to United Nations officials", *American Journal of International Law* (Washington, D.C.), vol. 43, No. 1 (January 1949), pp. 98-99.

grant the remedy legitimately sought by the injured persons. Yet these drafts are often unclear on essential points or concerned with matters other than the one under consideration here. Such drafts are rarely prepared with a view to covering all cases of responsibility on account of internationally wrongful acts.³⁰⁵ Most of them envisage only responsibility for damage caused to foreign individuals, so that the aim of defining, even indirectly, the "primary" obligation incumbent on the State with regard to the treatment of aliens sometimes prevails over the aim of accurately formulating the rule governing responsibility as such. In some cases—even frequently—these drafts use vague terms such as "responsibility for damage" caused by individuals. This often reflects the desire to solve, in one way or another, the problem of the extent of reparation. Precisely because of this, however, the wording used is once again confusing and does not always clearly reveal what is, in the view of the authors of these drafts, the act finally attributed to the State as a source of responsibility. These defects are found in almost all the texts from private sources which appeared during the preparatory period of the first official attempt at codification of the subject: the draft adopted in 1927 at Lausanne by the Institute of International Law,³⁰⁶ which influenced the wording of many of the texts, both private and official, drafted subsequently; the draft code prepared in 1926 by the International Law Association of Japan;³⁰⁷ the draft articles prepared in 1929 by the Harvard Law School³⁰⁸ and in 1930 by the German Inter-

³⁰⁵ It has already been mentioned that only the individual drafts of Professors Strupp (1927) and Roth (1932) had this general coverage. The draft by Professor Roth (*Yearbook of the International Law Commission, 1969*, vol. II, p. 152, document A/CN.4/217 and Add.1, annex X) contained in article 2 a very concise clause stating simply that the State is not liable for the acts of private persons. On the other hand, article 3 of the Strupp draft (*ibid.*, annex IX), which was designed also to cover instances of acts committed on the occasion of riots, was worded in somewhat obscure terms.

³⁰⁶ Rule III of this draft specified:

"The State is not responsible for injurious acts committed by individuals except when the injury results from the fact that it has omitted to take the measures to which, under the circumstances, it was proper normally to resort in order to prevent or check such actions."

Rule VII added:

"The State is not responsible for injuries caused in case of mob, riot, insurrection or civil war, unless it has not sought to prevent the injurious acts with the diligence proper to employ normally in such circumstances, or unless it has not acted with like diligence against these acts or unless it does not apply to foreigners the same measures of protection as to nationals..." (*Ibid. 1956*, vol. II, p. 228, document A/CN.4/96, annex 8.)

³⁰⁷ See articles 2 and 3 of this text in *Yearbook of the International Law Commission, 1969*, vol. II, p. 141, document A/CN.4/217 and Add.1, annex II.

³⁰⁸ See article 11 of the draft in *ibid.*, 1956, vol. II, p. 229, document A/CN.4/96, annex 9:

"A state is responsible if an injury to an alien results from an act of an individual or from mob violence, if the state has failed to exercise due diligence to prevent such injury and if local remedies have been exhausted without adequate redress for such failure, or if there has been a denial of justice."

The commentary which accompanied this article revealed that it was the intention to propose the injury caused by the individual's action as a criterion for determining the extent of the reparation. See Harvard Law School, *Research in International Law* (Cambridge, Mass., 1929), p. 189.

national Law Association.³⁰⁹ Indeed, the same may be said of the more recent texts, such as the new draft prepared in 1961 by the Harvard Law School³¹⁰ and the 1965 *Restatement of the Law* by the American Law Institute,³¹¹ even if the principle of the non-attribution to the State of an individual's act is more clearly specified therein. With regard to the drafts of an official nature, there is no need—since they have already been analysed in detail³¹²—to review either the bases of discussion drafted by the Preparatory Committee for the Hague Codification Conference³¹³ or the text of article 10 of the final draft, copied almost exactly from article III of the 1927 Lausanne resolution and adopted, as has been seen, by a very small majority at the 1930 Conference.³¹⁴ The articles dealing with the same subject which appeared in the preliminary draft prepared in 1957 and in 1961 by Mr. García Amador, were based more closely on a text proposed at the Hague Conference at an earlier stage in the discussion and were certainly not free from the

³⁰⁹ See articles 5 and 6 of this draft in *Yearbook of the International Law Commission, 1969*, vol. II, p. 150, document A/CN.4/217 and Add.1, annex VIII.

³¹⁰ Article 13 of this draft was worded as follows:

"1. Failure to exercise due diligence to afford protection to an alien, by way of preventive or deterrent measures, against any act wrongfully committed by any person, acting singly or in concert with others, is wrongful: . . .

"2. Failure to exercise due diligence to apprehend, or to hold after apprehension as required by the laws of the State, a person who has committed against an alien any act referred to in paragraph 1 of this Article is wrongful, to the extent that such conduct deprives that alien or any other alien of the opportunity to recover damages from the person who has committed the act."

(*Ibid.*, p. 145, document A/CN.4/217 and Add.1, annex VII.) It should be noted that the 1961 draft followed, with regard to the "extent of reparation", the opposite criterion from the one which the 1929 draft appeared to advocate.

³¹¹ Section 183 (Responsibility for failure to protect) indicates that:

"A state is responsible under international law for injury to the person or property of an alien caused by conduct that is not itself attributable to the state, if . . .

. . .

"(b) Either (i) the injury results from the failure of the state to take reasonable measures to prevent the conduct causing the injury, or (ii) the state fails to take reasonable steps to detect, prosecute, and impose an appropriate penalty on the person or persons responsible for the conduct if it falls within clause (a) (i)."

(*Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 195, document A/CN.4/217/Add.2).

³¹² See paras. 92 *et seq.* above.

³¹³ It may, however, be useful to mention that conclusion 5 of the 1926 Guerrero report (*Yearbook of the International Law Commission, 1956*, vol. II, p. 222, document A/CN.4/96, annex 1) stated simply that:

"Losses occasioned to foreigners by the acts of private individuals, whether they be nationals or strangers, do not involve the responsibility of the State."

Article 2 of the Convention relative to the rights of aliens, signed at Mexico City in 1902, specified that:

"... the States are not responsible for damages sustained by aliens through acts of rebels or individuals... except in the case of failure on the part of the constituted authorities to comply with their duties." (*Ibid.*, p. 226, document A/CN.4/96, annex 5.)

³¹⁴ See para. 99 above.

disadvantages noted.³¹⁵ The text appearing in article V of the "Principles of international law that govern the responsibility of the State in the opinion of the United States of America"³¹⁶ was undoubtedly simpler and clearer; but, there again, it was not made sufficiently obvious what was the act attributed, in certain circumstances, to the State as an act giving rise or responsibility. Indeed, the question was once again considered from the viewpoint of the treatment of aliens rather than from that of actual responsibility.

145. At this stage, the criteria which should, in our view, guide the Commission in the formulation of the rule of international law concerning the subject considered in this section seem to be well established. There is no need to dwell on the fact that the rule in question should be defined *in toto* and not only in relation to a specific topic, such as that of acts causing injury to aliens. It also seems obvious that this rule should not be formulated in terms that would not resolve the specific problem at issue which—it should not be forgotten—is related to the definition of conduct which may at the international level constitute "acts of the State" and as such give rise to international responsibility. The problem in this case is not what form the responsibility of the State should take but whether or not one of the conditions exists for responsibility to be incurred. Thus the first prerequisite for our definition is that it should affirm as clearly as possible that acts of private individuals or groups of individuals are not attributed to the State as a source of international responsibility. That is the situation in the international law currently in force: we have seen that, according to the principles currently applied in international judicial decisions and State practice, acts of private individuals are not attributed to the State as

a subject of international law. They are not so attributed in any form—neither as isolated acts nor as elements of more complex acts which would also involve the conduct of State organs. Indeed, if we are to take into account in this connexion a factor of progressive development of international law, this factor could, in our view, be represented only by the desire to eliminate from this subject any possible uncertainty, any trace of ambiguity. The second prerequisite will be to say that the strictly negative finding regarding the attribution to the State of the acts of private individuals in no way signifies that the State cannot otherwise incur international responsibility with regard to such actions. But the rule must spell out that this responsibility can derive only from an act by State organs which, by their passive attitude towards the action of individuals, have failed to fulfil an international obligation of the State. All that we have to do at this stage is to express this reservation. Subsequently, when consideration is given to the objective element of the internationally wrongful act, i.e. the international violation, it may, as we have indicated, be necessary to demonstrate the importance which the action of individuals may assume as an external event, constituting the catalyst of the wrongfulness of the State's conduct. In conclusion, it should be added that, when this reservation is expressed, no attempt whatsoever must be made to define, in this context, the content of the various obligations of protection incumbent upon the State with regard to foreign States, their official representatives or simply their nationals. It is only—let it be repeated—by keeping strictly to the subject of international responsibility that we can hope to achieve the goal of its codification.

146. In the light of the foregoing, the adoption of the following text is suggested:

Article 11. — Conduct of private individuals

1. The conduct of a private individual or group of individuals, acting in that capacity, is not considered to be an act of the State in international law.

2. However, the rule enunciated in the preceding paragraph is without prejudice to the attribution to the State of any omission on the part of its organs, where the latter ought to have acted to prevent or punish the conduct of the individual or group of individuals and failed to do so.

9. CONDUCT OF ORGANS OF OTHER SUBJECTS
OF INTERNATIONAL LAW

147. The lengthy analysis made in the preceding section has led us to rule out any attribution to the State, as a subject of international law, of acts committed by private individuals, where they are acting in a private capacity and not, as may happen in exceptional circumstances, as *de facto* or occasional organs of the State. However, earlier on, in section 6 of this chapter, we concluded in favour of attributing to the State, as a possible source of international responsibility, acts committed by organs of another subject of international law—either a State or an international organization—which that State or organization has placed at the disposal of the first-mentioned State. But, as we emphasized, one essential condition must be fulfilled if acts or omissions by persons

³¹⁵ See article 10 of the 1957 preliminary draft in *Yearbook of the International Law Commission, 1957*, vol. II, p. 130, document A/CN.4/106, annex; and article 7 of the 1961 revised preliminary draft in *ibid.*, 1961, vol. II, p. 47, document A/CN.4/134 and Add.1, addendum. The latter article was worded as follows:

"1. The State is responsible for the injuries caused to an alien by illegal acts of individuals, whether isolated or committed in the course of internal disturbances (riots, mob violence or civil war), if the authorities were manifestly negligent in taking the measures which, in view of the circumstances, are normally taken to prevent the commission of such acts.

"2. The circumstances mentioned in the foregoing paragraph shall include, in particular, the extent to which the injurious act could have been foreseen and the physical possibility of preventing its commission with resources available to the State.

"3. The State is also responsible if the inexcusable negligence of the authorities in apprehending the individuals who committed the injurious act deprives the alien of the opportunity to bring a claim against the said individuals for compensation for the loss or injury or if he is deprived of such opportunity by virtue of a general or specific amnesty."

³¹⁶ "The State is not responsible for the acts of private persons since international responsibility of the State must be attributable to an official or agency of the government.

"The State, however, is responsible for:

"(a) A failure to exercise due diligence to protect the life and property of foreigners.

"(b) A failure to exercise due diligence to apprehend and punish private individuals who injure foreigners."

(*Ibid.*, 1969, vol. II, p. 154, document A/CN.4/217 and Add.1, annex XV.)

with the status of organs of another subject of international law are to be attributed to the State, with a view to imputing international responsibility to it. These acts or omissions must be committed in the actual performance of a function of the State to which the organs were "lent" and, most important of all, they must have been committed on its instructions and under its genuine and exclusive authority.³¹⁷ If, on the other hand, as we pointed out, the persons concerned, although acting in the territory of another State, are still under the orders and exclusive authority of their own State or of the organization to which they belong, any acts or omissions by them are, and remain, acts of that State or organization. In no circumstances can they be attributed to the territorial State or involve its international responsibility.

148. However, the question again arises whether a State could still incur international responsibility in connexion with acts committed in its territory by persons or groups of persons who are organs of another subject of international law not, of course, for the conduct of the organs of that other subject, but for the conduct of its own organs, which might have adopted an unduly passive attitude towards the acts in question. Actually, there is no doubt that, from the point of view which concerns us, the actions or omissions of such persons, even where they are acting in their official capacity, could only be considered by the territorial State as acts of individuals. The possibility of international responsibility being incurred by the territorial State as acts of individuals. The possibility of international responsibility being incurred by the territorial State could therefore only arise if organs of that State had been guilty, in connexion with these acts of organs of other subjects of international law on its territory, of failure to discharge an obligation to afford protection to third States and their representatives or nationals, as in the situations described in the preceding section. In the light of these situations, the nature and scope of the action to be taken to ensure the necessary protection can certainly vary. The actual possibility of discharging the obligation can differ widely, and due account must be taken of the implications of the privileges and immunities enjoyed by the organs of a foreign subject of international law, of any special status they enjoy, of the fact that the subject in question may have opted for the exclusive exercise of certain functions connected with surveillance or punishment, and so forth. But this has to do with defining the content and extent of the obligation involved, and not with the fact that international responsibility on the part of the territorial State could only arise out of a violation of such an obligation.³¹⁸ It must also be borne in mind that there is

³¹⁷ *Ibid.*, 1971, vol. II (Part One), pp. 267-269, document A/CN.4/246 and Add.1-3, paras. 201-202.

³¹⁸ The situation would alter only if, in that particular case, there proved to have been real complicity on the part of the organs of the territorial State in the wrongful act of the organs of a foreign State. There would then be a case of participation by a State in an internationally wrongful situation created by another State, or an internationally wrongful act committed jointly by two States. The action committed by the organs of the territorial State and attributed to it as a source of responsibility—quite apart from the action attributed simultaneously to the State to which the foreign organs belonged—would then be something different from mere negligence in exercising vigilance and affording the protection normally due to third States.

another important difference between the situations we are considering here and situations in which the territorial State could incur international responsibility with regard to acts by private individuals. Where persons who are organs of a State or of an international organization commit, in that capacity, in the territory of another State, acts injurious to a third State, the first obvious conclusion is that those acts involve the responsibility of the State or organization of which the persons in question are organs. Indeed, as we have pointed out, actions or omissions by organs of a State are attributed to the latter, as possible sources of international responsibility, regardless of whether such actions or omissions have been committed in national or in foreign territory. The responsibility of the State to which the organs belong inevitably takes precedence over any responsibility that the territorial State might incur on account of any negligence by its own organs in ensuring, where they were genuinely in a position to do so, that such acts were prevented. This clearly explains why, in State practice, the responsibility of the territorial State has only rarely been invoked in cases of this kind. Klein lists a number of such cases, largely dating from the last century, contending that they constituted cases of indirect responsibility.³¹⁹ Analysing these cases, Verdross points out that in some instances the problems involved were really problems of State succession, while in others responsibility on the part of the territorial State had only been considered to arise in so far as its organs had failed to perform their duty to protect foreign nationals.³²⁰ Furthermore, such responsibility had been invoked in situations where the perpetrator of the injurious action committed in the territory of a State, although an organ of a foreign State, had acted only in a personal capacity,³²¹ or in other situations where the State whose organs had occasioned the injury could not be held responsible because they had acted while engaging in legitimate acts of war.³²²

³¹⁹ F. Klein, *Die mittelbare Haftung im Völkerrecht* (Frankfurt-am-Main, Klostermann, 1941), pp. 265 *et seq.* and 299 *et seq.*

³²⁰ Verdross, "Theorie der mittelbaren Staatenhaftung", *Österreichische Zeitschrift für öffentliches Recht* (Vienna), vol. I (new series), 1948, pp. 405 *et seq.* In this connexion, see also Quadri, *Diritto internazionale pubblico* (*op. cit.*), pp. 602-603. The two writers rightly dispute Klein's theory. In fact, in all the cases, what was considered to be the act giving rise to the responsibility of the territorial State was not the action committed in the territory of that State by the foreign organ but the negligent attitude taken by the organs of that State towards that action.

³²¹ This was the situation regarding the claim presented in 1852 by Great Britain to the Tuscan Government as a result of the ill-treatment inflicted on a British national named *Mather* by an Austrian officer who was stationed in Tuscany and had acted in a private capacity. It is clear that, when acts by foreign organs in the territory of a particular State are committed by these organs, not in their official capacity but in a personal capacity, the acts are to be considered the conduct of private individuals, both as concerns the State to which they belong and the territorial State. In such cases, one of these two States can be held responsible only for possible failure to perform the duty to afford protection. It would have to be established, in the light of the circumstances, which of the two States had actually been in a position to take action to prevent or punish such acts, and consequently, which of the two bore responsibility for any default in this respect.

³²² This was the situation regarding the claims for damage inflicted respectively on French and United States nationals at the time of the bombardment of *Greytown* (1854) and *Valparaiso* (1865).

149. Nearer to our own times, we may mention two recent cases, which are interconnected because occasioned by the same type of activity on the part of organs of the same Government in the territory of two other countries. On 6 February 1956 the Government of the Soviet Union addressed a protest note to the Government of the Federal Republic of Germany complaining that the United States armed forces stationed in Germany had launched sounding balloons, equipped with automatic cameras and radio transmitters, from the territory of the Federal Republic. The balloons had been intercepted in Soviet air space. Two days earlier, on 4 February, a Soviet protest concerning similar activities had been addressed to the Government of Turkey. The Government of the Federal Republic of Germany and the Turkish Government were accused of having allowed their territory to be used by United States organs for the purpose of committing wrongful acts. Moreover, in a separate note addressed to the United States Government, that Government was held responsible for the activities of its own military organs, which had carried out the launching operations. In its reply of 6 March 1956 the Government of the Federal Republic referred to a note received on 8 February from the United States Government, in which the latter gave its assurance that it would try, for the time being, to avoid launching any more balloons, even though their purpose had been only to gather meteorological information. The Government of the Federal Republic accordingly considered the question closed. Its note added that investigations had been carried out and had shown that no balloons had been launched from the territory of the Federal Republic for the purpose of dropping political propaganda leaflets. But the Soviet Government replied, in a further note dated 24 March 1956, contesting the truth of the statements contained in the reply to its first note and again blaming the Government of the Federal Republic for allowing wrongful acts to be committed by United States forces stationed in Germany.³²³ Quite apart from the substantive issue involved, it is perfectly plain from this exchange of notes that the protests addressed to the "territorial" State were quite different from the principal protests addressed to the State of origin of the organs which perpetrated the acts complained of. The territorial State was blamed only for a breach of its own obligations to take preventive measures and afford protection.

150. In the same context, we may recall an incident which occurred during the visit to Austria, from 30 June to 8 July 1960, of the Chairman of the Council of Ministers of the USSR, Mr. Khrushchev. The Soviet Premier made a number of speeches, in which he accused the United States Government of seeking to torpedo the planned summit conference by organizing flights of U-2 "pirate planes". He also violently attacked the militarism of the Western countries, and particularly West German revanchism. At a press conference he compared Chancellor Adenauer to Hitler. The Government of the Federal Republic considered those remarks to be an affront to

its honour. But at the same time the Ambassador of the Federal Republic in Vienna made representations to the Austrian Government, stressing the unusual nature of the situation in that the insults directed against the Government of the Federal Republic had been uttered in the presence of the Austrian Minister for Foreign Affairs. On the same day the United States Ambassador protested over the fact that the Austrian Government had not seen fit to dissociate itself from the "slandorous attack" against his country. The Austrian Chancellor, Dr. Raab, then took the opportunity to signal such dissociation in the course of his farewell speech. A note appeared simultaneously in the *Wiener Zeitung*, stating, that the Austrian Government had no connexion whatsoever with the remarks that had been made, and pointing out that a Government could only be responsible for what was said at a press conference if that Government itself held the conference. The note also stated that the speech by the Soviet premier had been delivered at the headquarters of the Austro-Soviet association, which was a private institution, and that the presence of the Austrian Minister for Foreign Affairs had merely been intended as a courtesy to the guest.³²⁴ Here, too, there is no need to enter into the substance of the case, and we may merely note that it provides further confirmation of the fact that what is alleged in such cases to be a source of responsibility of the "territorial" State is certainly not the act committed by foreign organs but the passive or negligent attitude considered to have been adopted by the organs of that State towards the acts committed.

151. The authors of various codification drafts have sometimes made special reference to the situations considered here. The Harvard Law School did so in article 14 of its 1929 draft, which reads:

A State is responsible if an injury to an alien results from an act, committed within its territory, which is attributable to another state, only if it has failed to use due diligence to prevent such injury.³²⁵

Mr. García Amador inserted a similar provision in article 14 of his revised preliminary draft of 1961, which reads as follows:

Acts and omissions of a third State or of an international organization shall be imputable to the State in whose territory they were committed only if the latter could have avoided the injurious act and did not exercise such diligence as was possible in the circumstances.³²⁶

Although some of the wording used in the latter text is not entirely appropriate, there is no doubt that these two drafts are based on the principles outlined in the preceding paragraphs. It therefore seems to be clearly established that actions emanating from organs of other subjects of international law, acting as such in the territory of a particular State, are not attributable to that State under international law and do not involve its international responsibility. As in the case of acts of

³²³ The details of this case are to be found in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Stuttgart), vol. 18 (1957-1958), pp. 723-724.

³²⁴ *Ibid.*, vol. 23 (1963), pp. 348-349.

³²⁵ *Yearbook of the International Law Commission, 1956*, vol. II, p. 229, document A/CN.4/96, annex 9.

³²⁶ *Ibid.*, 1961, vol. II, p. 48, document A/CN.4/134 and Add.1, addendum.

private individuals, responsibility can be incurred by that State, on such occasions, only on account of the conduct of its own organs in respect of the action of foreign organs, and it is that conduct as such which would constitute the violation of an international obligation. This conclusion certainly applies, and applies primarily to acts of organs of full subjects of international law, namely States. It also applies, no doubt, to the acts of organs of the other category of subject constituted by official international organizations. Does it also apply in the case of actions committed by the further, anomalous, category of subject constituted by insurrectional movements and, in particular, insurrectional movements working against the "territorial" State? If we are to be consistent, the answer to this question would seem to be in the affirmative.

152. The question still requires a certain amount of study, however. We must first view it in its true perspective, avoiding any confusion between situations which, while similar from certain points of view, differ in one important aspect. It must also be borne in mind that such a question can only arise in our present line of inquiry if a particular condition is fulfilled. Let us suppose that an act injurious to a third State or to one of its nationals has been committed by a member of the organization of an insurrectional movement, endowed as such with international personality: a problem of attribution or non-attribution to the State of an act by organs of another subject of international law could only arise if, at the time when the injured State presented a claim to the "territorial" State in respect of the act committed, the insurrectional movement was still in existence as a separate subject of international law or possibly even if it had ceased to exist and its structures and organization had vanished with it. On the other hand, as we shall see further on, there are problems of quite a different kind which arise when an insurrectional movement ceases to exist as such only because it has emerged victorious and its structures have become the new structures of the pre-existing State, or the structures of a new State separate from the first. It is worth giving closer study to the two aspects discussed in the present paragraph.

153. The question of possible State responsibility in respect of acts committed by organs of an insurrectional movement proper is often dealt with in conjunction with other questions—for example, the question of State responsibility concerning acts committed by private individuals in the course of riots, mass demonstrations, or other disturbances and disorders, and even in the course of an insurrection which has not, or has not yet, resulted in the formation of a movement endowed with separate international personality. There is really not only a simple quantitative difference—determined by the intensity of the disruption—between these latter cases and those in which an insurrectional movement assumes power over a portion of the State's territory or dependent territory and establishes itself, if only as between belligerents, as a separate subject of international law. Actually, individuals and groups belonging to the organization of an insurrectional movement and acting in its name and on its behalf, are no more organs

of the State than the individuals taking part in a disturbance, a riot or even in revolutionary action. The conclusions reached in section 8 of this chapter concerning the acts of such persons would thus seem sufficient in themselves to support the conclusion that the actions of individuals who are organs of an insurrectional movement which has reached a stage of development making it a separate subject of international law, cannot be attributed to the State against which the movement fought. In other words it would be logical, if only for these reasons, to contend that responsibility on the part of that State concerning actions of this kind can only arise out of failure, by State organs, to fulfil an obligation assumed by the State itself to exercise vigilance and afford protection. But, as we have just noted, there is also a qualitative difference between the two cases mentioned—a difference which makes these situations similar to the others dealt with in the opening paragraphs of this section, and would seem to call for an identical solution. What, in fact, characterizes the situation created by the emergence of an insurrectional movement as defined in international law is the very existence, parallel with the State and in a portion of the territory under its sovereignty of a separate subject of international law. To the extent allowed by its limited international capacity, this subject is perfectly capable of committing internationally wrongful acts. The actions of persons belonging to its organization", like those of the organs of another State or of an international organization acting within the State's territory are the actions of a subject of international law, which can involve the latter's responsibility where they constitute a violation of an international obligation assumed by that subject.³²⁷ Any responsibility which the so-called "legitimate" State might incur for not having exercised vigilance or taken preventive or punitive action, where it was in a position to do so, would be of a far more exceptional nature than the responsibility it could incur through failure to exercise vigilance or afford protection in the event of a mere riot, mass demonstration or other internal disturbance. In fact, it would be quite marginal compared with the main responsibility falling on the insurrectional movement itself, that is, the subject of international law of which the perpetrators of the acts are organs.

154. At the same time we must concede that the international responsibility of an insurrectional movement is usually harder to make effective than that of a State or an international organization. The movement is essentially a "provisional" subject of international law.³²⁸ The duration of its existence coincides with the

³²⁷ See Kelsen, *op. cit.*, p. 292: "By the effective control of the insurgent government over part of the territory and people of the State involved in civil war an entity is formed which indeed resembles a state in the sense of international law." See also Arangio-Ruiz, "Stati e altri enti . . .", *Novissimo Digesto Italiano (op. cit.)*, p. 165.

³²⁸ C. Arangio-Ruiz (*Sulla dinamica della base sociale nel diritto internazionale* (Milan, Giuffrè, 1954), pp. 129-130; and "Stati e altri enti . . .", *Novissimo Digesto Italiano (op. cit.)*, pp. 165-166) considers that the fact of being "provisional" is not a "necessary" characteristic of an insurrectional movement as a subject

duration of its fight against the pre-existing State or its Government. At the conclusion of that fight it must, in any event, cease to exist as such. If it is defeated, its existence comes to an end and its organization is dissolved. If it wins, it can as we have pointed out, either transfer its organizational structures to the pre-existing State or become a new State. Making the international responsibility engendered by an internationally wrongful act effective is an operation which often takes quite a long time, and frequently lasts longer than the temporary situation connected with the conflict. Moreover, the extent and size of the insurrectional movement may vary with the vicissitudes of the civil war, and the territory over which it exercises authority may shrink or expand. All this creates uncertainty regarding the prospects of obtaining reparation from the movement, during the conflict, for an internationally wrongful act, especially as it may have no property which, when the need arises, could afford a means of compensation. We may add that, if the State which complains of injuries caused by wrongful acts of agents of an insurrectional movement does not recognize or intend to recognize the movement, with which it maintains no relations, presenting a claim and making responsibility effective could entail further difficulties, either in fact or in law, since there is a risk that the presentation of a claim could imply recognition. Normally, therefore, the State which has suffered an injury itself or in the person of its nationals has very limited chances of obtaining from the insurrectional movement the satisfaction or reparation to which it considers itself entitled. On the other hand, the State against which the insurrectional movement has been fighting can only rarely be accused of having failed to fulfil its obligations to exercise vigilance and afford protection with respect to the activities of organs of that movement. More often than not, the activities in question are completely beyond its control.³²⁹

155. For these reasons, States which are victims of internationally wrongful acts committed by organs of insurrectional movements sometimes find it expedient to wait until the situation becomes clearer before presenting claims. Depending on the outcome of the conflict, claims may be presented to the legitimate Government of the pre-existing State, where the latter has defeated the insurrectional movement and restored its authority over the entire territory, to the new Govern-

(Foot-note 328 continued.)

of international law. But, although it is true that the State itself, like the insurgents, can in fact cease to exist as a subject of international law, the difference between these two categories of subjects, from the point of view of the aims which they respectively pursue, must not be forgotten. The aim of the State is to continue indefinitely as such. The insurrectional movement, on the other hand, does not intend to perpetuate itself as such, and its purpose is to transform itself into a subject of international law in the full sense, in other words to become itself a state. Consequently it is a category of subject that is provisional from the institutional standpoint.

³²⁹ This is the feature which distinguishes the situation created as a result of actions of organs of an insurrectional movement from a situation created by actions of organs of a foreign State or an international organization. In the last two cases, the State normally retains its authority over the territory in which the actions occur, whereas it often no longer has any authority over the territory controlled by the insurrectional movement.

ment which replaces the previous Government where the insurrection is successful, or to the Government of the new State formed through the secession of part of the territory of the pre-existing State or through the decolonization of a former dependent territory of that State. As we have already mentioned, however, these situations differ radically from one another and the basis of the claims presented cannot be the same.

156. Where the Government of the pre-existing State defeats the insurrectional movement, the ephemeral existence of this movement as a separate subject of international law will have come to an end, and there will no longer be a subject that can be considered, at the international level, to be the perpetrator of the acts injurious to foreign States or individuals committed by organs of the insurgents at the time of the conflict. It is hard to see how the acts committed in the course of the civil strife by insurgents fighting against it could be attributed, as a source of international responsibility, to the State which defeated the insurgents. Even at the time when it was fighting the insurrection, it seemed normal that the State should be held responsible only for any wrongful negligence on its part in preventing or punishing the wrongful acts of organs belonging to the insurgents. This conclusion will be all the more valid when the perpetrators of the acts had reverted to the status of private individuals.³³⁰ We should also add that it makes no difference whether the negligence on the part of the State occurred before the insurrectional movement ceased active existence or afterwards, when, for example, after peace has been restored internally, the State authorities neglect adequately, to punish the perpetrators of the injurious acts committed during the civil war. This is, in fact, the basis on which State responsibility is most often invoked since, as we have emphasized, the cases in which the "legitimate" Government was really in a position, during the civil war, to prevent or punish injurious acts committed by the person who is an organ of the insurrectional movement and failed to do so are very rare.³³¹ Of course, the State which put

³³⁰ Some writers, however, consider that a State which succeeds in crushing an insurrectional movement should be held responsible for certain acts committed by the organs of the insurrectional movement while it was in existence—that is, acts connected with "routine activities". Quite apart from the extreme vagueness of this description, it seems clear that, in such cases, there can be no question of any *a posteriori* attribution to the State, as a source of international responsibility, of acts by organs of the insurrectional movement which no one thought of attributing to it when the movement was still active. Actually, the problem arising in such cases is the problem of possible "succession" by the subject of international law constituted by the State to various obligations incurred by the subject constituted by the insurrectional movement. This is a problem that must be solved on the basis of the principles governing succession as between subjects of international law and not on the basis of the principles governing State responsibility. Moreover, judging by the examples given by these writers, the existence of such "succession" seems to have been affirmed in respect of obligations arising out of contracts and not obligations arising out of wrongful acts.

³³¹ Incidentally, the fact that the source of State responsibility resides not in the act committed by the person who, at the time of acting, was an organ of the insurrectional movement, but in the omission by the State organs in respect of such an act, need not necessarily have a decisive influence on the choice of criteria for

down the insurrection could agree, for example through a special convention, to assume the responsibility which would have fallen on the insurrectional movement and which could not be invoked against the latter by the third State. Such a solution represents a clear departure from general international law. In this case it is obviously not a question of attribution to the State, as a source of responsibility, of acts committed earlier by another subject of international law, but a question of succession by a State to the *ex delicto* obligations which another subject of international law, having at one time exercised exclusive authority over a portion of State territory, incurred as a result of its actions.

157. The situation is quite different where an insurrectional movement has triumphed. The favourable outcome of its struggle might result in the replacement of the previous régime or Government of the State by the structures of the insurrectional movement, as a new régime or Government, while the territorial area remains unchanged. In such a case the revolutionary change in the State structures might be so far-reaching as to affect the very continuity and identity of the State. Then it is not only the previous Government which disappears: it is the pre-existing State itself which ceases to exist while another State, endowed with a different international personality from that of the former, succeeds it in the same territory. Problems might then arise regarding the succession of States in respect of international obligations incurred for wrongful acts committed by the pre-existing State, but solely problems of that nature.³³² It would, in fact be inconceivable to attribute to the new State, as acts of that State, acts committed by the organs of the pre-existing State. On the contrary, the new State will in general appear at the international level as the continuation, in a more stable and more perfected form, of the insurrectional movement, whose true nature as an embryo State will then be revealed and whose structures and organization will have become those of the newly emerged State. In that case, the attribution to such a State, as a potential source of responsibility, of acts which were formerly attributed to the insurrectional movement, because they had been committed by its organs, would be only natural. It would not be a question of attributing to a subject of international law the conduct of organs of another subject, but merely of continuing to attribute to the

same subject—which would only have reached the final stage of its progressive evolution the acts of its own organs.

158. That is not to say, however, that a situation of this kind must necessarily occur. The victory of an insurrection may simply result in a change of Government without any interruption in the continuity of the State.³³³ The ruling organization of the insurrectional movement then seizes power in the State and becomes the ruling organization of the latter, but the State as a subject of international law remains unchanged. The question arises in such a case whether or not it is possible to attribute to the State the acts committed by the organs of the insurrectional movement during the period between the beginning of the revolutionary uprising and the final seizure of power. The purpose of this question is not, however, to determine whether or not one can attribute to the State, as a source of responsibility, the acts of organs of a separate subject of international law. The question is quite independent of the situation in which the persons whose acts come under consideration might have been, at a given moment, as organs of another subject of international law. The proof of this lies in the fact that the question arises in exactly the same terms in cases where revolutionaries have in no way, during the intermediate period, constituted an insurrectional movement endowed with its own international personality and have therefore never been the organs of a separate subject of international law. The purpose of the question is quite different: it is to determine whether or not we should admit the possibility of considering as acts of the State, in certain circumstances, the acts of the members of an organization which, at the time those acts were committed, was striving to become the organization of the State or, in modifying it, to merge with it, but had not yet achieved that goal. It is not for us to pronounce at this stage on that problem, which will be considered later. For the moment, we shall merely point out that it lies outside the scope of our present concerns.

159. The other possible outcome of the victory of an insurrectional movement, is as we have said, the constitution of a new State in part of the territory formerly under the sovereignty of the pre-existing State. The structures of the organization of the insurrectional movement then become those of the organization of the new State. In such a case, the affirmation of the responsibility of the newly-formed State for any wrongful acts committed by the organs of the insurrectional movement which preceded it would be justified by virtue of the continuity which would exist between the personality of the insurrectional movement and that of the State to which it has given birth.³³⁴ Once again, an existing subject of international law would merely change category: from a mere embryo State it would become a State proper, without any interruption in its international

determining the extent of reparation in each specific case. This aspect of the question has already been dealt with at length in section 8, when we considered the question of State responsibility in connexion with the acts of individuals. Similarly, there is no reason why, in the case we are now considering, the amount of reparation due as a result of a breach by the State of an obligation to prevent or punish should not be established on the basis of the material damage caused by the action of the individual serving as an organ of the insurrectional movement. The application of this criterion can sometimes be provided for in a special convention.

³³² On this subject, see R. Quadri, "Stato (Diritto internazionale)", *Nuovo Digesto Italiano* (Turin), vol. XII, part. 1, 1940, p. 816; and *Diritto internazionale pubblico (op. cit.)*, pp. 457 *et seq.* and 500 *et seq.*; M. Giuliano, *La comunità internazionale e il diritto* (Padua, CEDAM, 1950), pp. 248 and 290; G. Arangio-Ruiz, *Sulla dinamica . . . (op. cit.)*, pp. 19, 131 *et seq.*; and "Stati e altri enti . . .", *Novissimo Digesto Italiano (op. cit.)*, p. 167.

³³³ See Arangio-Ruiz, "Stati e altri enti . . .", *Novissimo Digesto Italiano (op. cit.)*, p. 167.

³³⁴ *Ibid.*; and R. Barsotti, "Insorti", *Enciclopedia del diritto* (Milan, Giuffrè, 1971), vol. XXI, pp. 824-825.

personality resulting from the change. The attribution to the new State of the acts of organs of the insurrectional movement would therefore be only a normal application of the general rule providing for the attribution to any subject of international law of the conduct of its organs. If we were to exclude the idea of continuity between the international personality of the insurrectional movement and that of the new State, it would only remain for us to raise here also the question of the possible succession of the State in respect of the obligations arising out of delinquencies committed by the subject of international law whose place it has taken.

160. The foregoing reflections would seem to confirm that it is in no way our function here to inquire into situations connected with the various situations involving "successful insurgents". We have dealt with them in some detail³³⁵ solely in order to show that they are outside the scope of our current objectives and in order thus to define more clearly the limits of the questions with which we should deal in this section. This section, it should be repeated, is devoted to examining, from the standpoint of international responsibility, the situation of a State in relation to acts committed in its territory but emanating from organs of other subjects of international law. As we suggested at the beginning,³³⁶ as far as the acts of insurgents are concerned, we can refer here only to situations where, at the time of the wrongful action, the insurrectional movement existed as a separate subject of international law and is still such at the time a claim is presented to the pre-existing State, or has at that time ceased to exist together with its structures and its organization. Only two questions can therefore be raised. The first is obviously whether or not it is possible to attribute to a State, as a source of responsibility, acts committed by organs of an insurrectional movement directed against that State. The second question, which presupposes a negative reply to the first, is whether it is nevertheless possible for a State to incur international responsibility because of the conduct of its own organs in respect of the acts of organs of an insurrectional movement, either before or after the end of the struggle against that movement, and the restoration of the authority of the State over the whole of its territory. Logic and the need for consistency with the statements made in preceding sections would alone suffice to dictate our reply: the acts committed by the organs of an insurrectional movement—apart from situations where the latter is transformed into something else following the favourable outcome of its struggle—cannot be attributed to the State against which the movement is, or has been, directed. Responsibility can be attached to that State only because of some possible failure by its own organs to discharge the habitual obligations of vigilance, prevention and, in particular, punishment. We shall now see that an analysis of international arbitral cases and of State practice provides final confirmation of the soundness of that conclusion.

161. As far back as the nineteenth century, many mixed commissions affirmed on several occasions—on the basis, moreover, of explicit clauses in the treaties under which they had been established—the principle that as a general rule a Government was not responsible for injuries caused to aliens by the members of an armed insurrection which was beyond the control of the said Government. The United States-Mexican Claims Commission established under the Convention of 4 July 1868 followed that principle in decisions relating to claims for injuries caused either by insurgents in Mexico or by the organs of the Confederate States in their struggle against the Federal Government in the United States of America.³³⁷ The American-British Mixed Claims Commission established under the Treaty of 8 May 1871 applied that principle also in connexion with claims arising out of the acts of the Confederate States during the War of Secession.³³⁸ The Spanish-American Mixed Commission established in 1871 likewise applied it in connexion with claims concerning injuries caused by the Cuban insurgents.³³⁹ To confine ourselves to this century, it should be noted that in international arbitral cases, an organic series of rulings relating to the questions dealt with in this section was handed down in the decision adopted between 1903 and 1905 by the claims commissions established under the Paris (1902) and Washington (1903) Protocols between Venezuela and other Powers. The latter had complained of injuries caused to their nationals, in particular in connexion with acts committed by revolutionary movements. The most significant decision is perhaps that handed down by the Italian-Venezuelan Mixed Claims Commission in the *Sambiaggio* case concerning money extorted and property forcibly requisitioned from an Italian national in 1902 by the revolutionary forces of Colonel Guevara. Umpire Ralston first examined from the standpoint of abstract right the question of the possibility of holding a Government responsible for losses and damages caused by revolutionaries who had failed to achieve their goal. On that subject, he observed:

The ordinary rule is that a government . . . is only to be held responsible for the acts of its agents or for acts the responsibility for which is expressly assumed by it. To apply another doctrine . . . would be unnatural and illogical . . .

But . . . are revolutionists and government so related that as between them a general exception should exist to the foregoing apparently axiomatic principle?

...

... Governments are responsible, as a general principle, for the acts of those they control. But the very existence of a flagrant revolution presupposes that a certain set of men have gone temporarily or permanently beyond the power of the authorities; and unless it clearly appear that the government has failed to use promptly and with appropriate force its constituted authority, it cannot reasonably be said that it should be responsible for a condition of affairs created without its volition . . .

³³⁷ See the cases reported in Moore, *History and Digest* . . . (*op. cit.*), vol. III, pp. 2873 *et seq.*, 2881 *et seq.*, 2886 *et seq.*, 2902 *et seq.*, and 2973-2981.

³³⁸ *Ibid.*, pp. 2900-2901, 2982-2990.

³³⁹ *Ibid.*, pp. 2981-2982.

³³⁵ See paras. 157-159 above.

³³⁶ See para. 152 above.

We find ourselves therefore obliged to conclude, from the standpoint of general principle, that, save under . . . exceptional circumstances . . . , the Government should not be held responsible for the acts of revolutionists because—

1. Revolutionists are not the agents of government, and a natural responsibility does not exist.

2. Their acts are committed to destroy the government, and no one should be held responsible for the acts of an enemy attempting his life.

3. The revolutionists were beyond governmental control, and the Government cannot be held responsible for injuries committed by those who have escaped its restraint.³⁴⁰

Having then examined in detail the precedents provided by earlier cases, the opinions of writers and the clauses of treaties then in force between Italy and Venezuela, the umpire finally concluded that Venezuela could be held responsible only if it had been alleged and proved that the authorities of the country had failed to exercise due diligence to prevent damages from being inflicted by the revolutionaries. He therefore dismissed the Italian Claim, after noting that no want of diligence had been alleged or proved in the case in question.³⁴¹ The Italian-Venezuelan Mixed Claims Commission applied the same principles and reached similar conclusions, in particular in the *Revesno et al*³⁴² and the *Guastini* cases.³⁴³

162. Umpire Plumley, in the decision concerning the *Aroa Mines case*, which was submitted to the British-Venezuelan Mixed Claims Commission, also referred to numerous precedents and, *inter alia*, quoted *in extenso* the opinion handed down by Ralston in the decision relating to the *Sambiaggio case*, endorsing his ideas. He therefore disallowed the claim presented by the British Government for injuries caused to British nationals by the armed forces of the insurgents, noting that in the case in question no want of diligence had been proved on the part of the Venezuelan Government, which had in the end overcome the insurrectional movement.³⁴⁴ The same umpire, Plumley, for the same reasons and on the basis of the same precedents, reached decisions disallowing claims in the *Henriquez* and *Salas cases*, which had been submitted to the Netherlands-Venezuelan Mixed Claims Commission.³⁴⁵ In both cases, the injuries to Netherlands nationals had been caused by insurgents who were subsequently overcome but who at the time of their action were completely beyond the control of

the Government, against which no proof of any negligence had been adduced. Umpire Plumley also applied the same principles in his decision concerning the *French Company of Venezuelan Railroads case*, which was submitted to the French-Venezuelan Mixed Claims Commission set up under the Protocol of 19 February 1902.³⁴⁶ Umpire Duffield applied practically, the same criteria in his decision concerning the *Kummerov, Redles, Fulda, Fischback and Friedericy cases*, which were submitted to the German-Venezuelan Mixed Claims Commission, although the clarity of the language used in defining the ruling principle in the matter left something to be desired.³⁴⁷ Umpire Gutierrez-Otero, in his decision concerning the *Padrón case* which was submitted to the Spanish-Venezuelan Mixed Claims Commission, affirmed as an accepted principle of international law that States were not responsible for acts injurious to aliens committed by insurgents, but only where there was “negligence of the constituted authorities” in the adoption of proper measures to provide protection against, or to punish, the acts of rebels.³⁴⁸ He confirmed this principle in the *Mena case*.³⁴⁹ Lastly, to complete the series, mention should be made of the documented opinion of Commissioner Paúl in the *Acquatella, Bianchi, et al., case*, which was submitted to the French-Venezuelan Mixed Claims Commission of 1903, an opinion in which he was at pains to provide proof, on the basis of precedents from earlier cases and writings on the subject, of the existence of the rule of the non-responsibility of the State for the acts of insurgents who have temporarily withdrawn from obedience to the constituted authority. Commissioner Paúl concluded by observing that:

. . . only when it appears that the Government has failed to make prompt and efficient use of its authority to cause a return of said dissatisfied party to obedience, and to protect, within the measure of its ability, the property and persons threatened by the revolutionary disturbance, may it be considered as liable for the consequences of such abnormal condition.³⁵⁰

163. When, in the preceding section of this chapter, we retraced the history of the progressive affirmation in international arbitral decisions of the principle of the non-responsibility of the State for damages caused in its territory as a result of riots or other internal disturbances, we emphasized the importance of the decision handed

³⁴⁰ United Nations, *Reports of International Arbitral Awards*, vol. X (United Nations publication, Sales No. 60.V.4), pp. 512-513.

³⁴¹ *Ibid.*, p. 524.

³⁴² *Ibid.*, pp. 582-583.

³⁴³ *Ibid.*, pp. 577 *et seq.*

³⁴⁴ *Ibid.*, vol. IX (United Nations publication, Sales No. 59.V.5), pp. 408 *et seq.*, and in particular pp. 439 *et seq.* On page 439 it was observed that:

“The position of all international law writers was in substantial accord touching this matter of nonresponsibility of nations for the acts of unsuccessful revolutionists at the time this protocol was signed when those revolutionists had been beyond their control.”

³⁴⁵ *Ibid.*, vol. X (United Nations publication, Sales No. 60.V.4), pp. 714 *et seq.* and 720-721. In the decision concerning the first of the two cases mentioned, the umpire reproduced once again the key passage from the decision relating to the *Sambiaggio case*.

³⁴⁶ *Ibid.*, p. 354. In the decision it was stated:

“When revolution laid waste both country and village, or seized the railroad and its material, or placed its hands upon the boats and wrought serious injury to all, it is regrettable, deplorable, but it is not chargeable upon the respondent Government, unless the revolution was successful . . .”

³⁴⁷ *Ibid.*, pp. 397-398. The decision contained the following passage:

“ . . . all the authorities on international law agree that a nation is responsible for acts of revolutionists under certain conditions—such as lack of diligence, or negligence in failing to prevent such acts, when possible, or as far as possible to punish the wrongdoer and make reparation for the injury.”

³⁴⁸ *Ibid.*, pp. 742-743.

³⁴⁹ *Ibid.*, p. 749.

³⁵⁰ *Ibid.*, p. 6. Umpire Filtz, it seems, did not question the soundness of that opinion in any way, but based his decision on the powers given to the Commission under the Protocol of 27 February 1903 to grant compensation to the French nationals who had sustained injuries in the case in question.

down on 1 May 1925 by arbitrator Huber in the case of *British Property in Spanish Morocco*. In report III, which examined in a general way the responsibilities of the State in all the situations covered by the British claims, the arbitrator referred to situations involving popular riots, revolts, civil wars and even international wars, without making any distinction between them. Cases of injuries caused by persons who were organs of insurrectional movements were therefore included. And we have noted that in the opinion of the Swiss jurist it was undeniable that the State was not responsible for the injuries caused on such occasions, although that did not exclude the fact that the State could:

nevertheless be responsible for any action or failure to take action by the authorities to guard against the consequences as far as possible. Responsibility for the action or inaction of the public authority is quite a different matter from responsibility for acts attributable to persons beyond the influence of the authorities or openly hostile to them.³⁵¹

Lack of vigilance by the legitimate authorities in the matter of prevention and lack of diligence in the matter of punishment, in so far as prevention and punishment are possible, are, according to arbitrator Huber, the two acts which might be attributed to the State as a source of responsibility in cases of injurious acts committed by rebels and, in particular, by organs of insurrectional movements. Another application of the same principles, going back to more or less the same time, can be noted in the decision handed down on 19 November 1925 by the Great Britain-United States Arbitral Tribunal, established under the Special Agreement of 18 August 1910 in connexion with the *Several British Subjects (Iloilo Claims) case*. Property belonging to British subjects had been burned and destroyed by Philippine insurgents who had attacked the United States forces after Spain had signed the treaty ceding the Philippines to the United States: this occurred following the occupation of the town of Iloilo by the United States troops. The Tribunal, presided over by Nerinx, rejected the British claims, having been unable to establish any negligence attributable to the United States forces either at the time of their landing in the town or subsequently while they were trying to put out the fire and stop the looting.³⁵²

164. Apart from these two cases, at about the same time a further series of decisions was handed down which are extremely interesting in connexion with the questions examined here: they are to be found in the reports of the decisions of the various claims commissions established under the agreements concluded between Mexico and various Powers following the events which took place in Mexico between 1910 and the middle of the 1920s. During that period, after the Government of Porfirio Díaz had been overthrown in 1911 by the insurrectional movement constituted in 1910 by Francisco Madero, the Government installed by the latter was in turn overthrown in 1913 by General Victoriano Huerta, who soon clashed with the constitutionalist forces of

Carranza, Villa and Zapata. Carranza managed to seize the executive power in December 1914 and was elected President in March 1915, but he had to struggle for a year against his two former companions before triumphing. Finally, in 1920, General Obregón's movement overthrew the Carranza Government and Obregón was elected President of Mexico. He, in turn, in 1923, had to deal with the insurrection of Adolfo de la Huerta, who had established a provisional government at Veracruz and who was not finally overcome until April 1924. These continual disturbances resulted in many cases of injury to foreign nationals and their property. Long negotiations with the United States Government led to the signing of the General Claims Convention between the two countries on 8 September 1923 and to the signing on 10 September of the same year of the Special Claims Convention concerning injuries caused from 1910 to 1920 by the acts of the revolutionary forces. The latter Convention was the model for the claims conventions concluded subsequently between Mexico, on the one hand, and Great Britain, France, Italy, Germany, Spain and Belgium, on the other.

165. The Mexico-United States General Claims Commission had occasion to deal with the questions under discussion here in the *Home Insurance Company case*, decided on 31 March 1926.³⁵³ The Commission found that the Mexican Government was not responsible for an act committed at Puerto México, to the detriment of a United States firm, by the local commander of the de la Huerta revolutionary forces. The Commission had reached the preliminary conclusion that the Government of President Obregón could not be accused of any negligence in connexion with that act by the insurgents. This same General Claims Commission made its views on the subject more specific in its ruling of 3 October 1928 on the *Solis case*. The decision, written for the Commission by Commissioner Nielsen, found insufficient the evidence of alleged failure to protect of which the Mexican Government's forces were accused by the claimant, a United States national who had had his cattle taken by the de la Huerta revolutionary armed forces.³⁵⁴ The Commissioner cited earlier arbitral awards upholding the "well-established principle of international law that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection".³⁵⁵ After considering the precedents, Commissioner Nielsen noted that:

... in dealing with the question of responsibility for acts of insurgents two pertinent points have been stressed, namely, the capacity to give protection, and the disposition of authorities to employ proper, available measures to do so. Irrespective of the facts of any given case, the character and extent of an insurrectionary movement must be an important factor in relation to the question of power to give protection.³⁵⁶

³⁵¹ *Ibid.*, vol. II (United Nations publication, Sales No. 1949.V.1), p. 642 [translation from French].

³⁵² *Ibid.*, vol. VI (United Nations publication, Sales No. 1955.V.3), pp. 159-160.

³⁵³ *Ibid.*, vol. IV (United Nations publication, Sales No. 1951.V.1), pp. 48 *et seq.*, especially p. 52.

³⁵⁴ *Ibid.*, pp. 358 *et seq.*

³⁵⁵ *Ibid.*, p. 361. The passage cited was from the award of the Great Britain-United States Arbitral Tribunal established under the Agreement of 18 August 1910 in the *Home Frontier and Foreign Missionary Society case*.

³⁵⁶ *Ibid.*, p. 362.

It is clear that the Commission's main concern was to define the extent of the obligation of the State to protect aliens in the circumstances involved and to indicate the criteria for such a definition. It was manifestly of the opinion, however, that only failure on the part of the lawful authorities of the State to discharge that duty to protect could constitute the source of State responsibility in case of injury caused to aliens by organs of an insurrectional movement. The same Commission proceeded to apply the criteria enunciated in its findings on the *Solis case* in another decision, namely the decision of 3 October 1928 concerning the *Bond Coleman case*.³⁵⁷ In the Mexico-United States Special Claims Commission, Commissioner Nielsen, in his opinion on the *Russel case* (decided on 24 April 1931), referred to the decision in the *Solis case*, and observed:

There would be no responsibility in cases in which the respondent government was not chargeable with negligence.³⁵⁸

The other members of the Commission did not dispute the correctness of this statement.

166. The principle that States are not responsible for wrongful acts committed by insurrectional movements was also evident in the opinion of the Presiding Commissioner Verzijl in the *Georges Pinson case*, decided on 19 October 1928 by the French-Mexican Claims Commission established under the Convention of 25 September 1924.³⁵⁹ Some of the decisions of the British-Mexican Claims Commission established under the Convention of 19 November 1926 are of particular interest, in that they take special account of possible failure to suppress insurrection or to punish the guilty parties. They even attempt to provide criteria for evidencing such failure. In the ruling of 15 February 1930 on the *Mexico City Bombardment Claims case*, the Commission stated:

In a great many cases it will be extremely difficult to establish beyond any doubt the omission or the absence of suppressive or punitive measures. The Commission realizes that the evidence of negative facts can hardly ever be given in an absolutely convincing manner. But a strong *prima facie* evidence can be assumed to exist in these cases in which *first* the British Agent will be able to make it acceptable that the facts were known to the competent authorities, either because they were of public notoriety or because they were brought to their knowledge in due time, and *second* the Mexican Agent does not show any evidence as to action taken by the authorities.³⁶⁰

³⁵⁷ *Ibid.*, pp. 364 *et seq.*, especially pp. 366-367.

³⁵⁸ *Ibid.*, p. 831.

³⁵⁹ United Nations, *Reports of International Arbitral Awards*, vol. V (United Nations publication, Sales No. 1952.V.3), pp. 352-353. The decision invoked the authority of Anzilotti in stating that "there is at present no principle of international law which obliges States to make reparation for injuries suffered by aliens in cases of riot, revolution or civil war" [translation from French]. The Commissioner took pains to emphasize that the principle which he endorsed was valid only in the case of unsuccessful revolutionaries.

³⁶⁰ *Ibid.*, p. 80. On this basis, the majority of the Commissioners held the Mexican Government responsible, noting in particular that the Mexican Agent had failed to produce any evidence as to action taken by the authorities to investigate, suppress or prosecute, despite the fact that, having been duly informed of the facts, they could have taken such action.

The Commission applied the same criteria in its decision of 15 February 1930 on the *William E. Bowerman and Messrs. Burberry's case*³⁶¹ and in that of the same date concerning the *Santa Gertrudis Jute Mill Co. case*.³⁶² It held that no responsibility on the part of the Mexican Government for injurious acts by rebel forces could be presumed unless the constituted authorities were blameable. These findings were again recalled in the decision of 19 May 1931 in the *John Gill case*, together with the following observation:

The majority fully realise that there may be a number of cases, in which absence of action is not due to negligence or omission but to the impossibility of taking immediate and decisive measures... They are also aware that authorities cannot be blamed for omission or negligence, when the action taken by them has not resulted in the *entire* suppression of the insurrections... or has not led to the punishment of *all* the individuals responsible. In those cases no responsibility will be admitted.³⁶³

167. It would thus appear that international arbitration bodies—whose precedents in the matter under discussion here were largely developed by the mid-1930s—show remarkable uniformity in their opinions. The same may be said of diplomatic practice. Quite a number of years ago, State chancelleries had already endorsed the principle that a State could not be held responsible for acts committed by an insurrectional movement in revolt against the lawful government and that, in such situations, there could be no question of responsibility on the part of the State unless its organs were in a position to take appropriate preventive and punitive action but omitted to do so. Thus, the views of Governments coincided with those expressed at the time by arbitration bodies, often in connexion with the same situations. This can be seen in a number of cases, whether the injury done to aliens by organs of insurrectional movements occurred during the war of secession of 1861-1865 in the United States,³⁶⁴ the Paris Commune of 1871 in France,³⁶⁵ the 1874 Carlist insurrection in Spain,³⁶⁶ the 1882 revolt of Arabi Pasha in Egypt,³⁶⁷ the two insurrections of 1868-1878 and 1895-1898 for the independence of Cuba,³⁶⁸ or the various

³⁶¹ *Ibid.*, p. 106.

³⁶² *Ibid.*, pp. 112-113. The majority of the Commissioners held that the Mexican authorities had been negligent in failing to take reasonable preventive or punitive measures in connexion with an attack on the railway between Mexico City and Veracruz by rebel forces.

³⁶³ *Ibid.*, p. 159. The majority of the Commissioners nevertheless held the Mexican Government responsible, for the same reasons as were stated in the *Mexico City Bombardment Claims* decision.

³⁶⁴ For cases included in the digests of United States practice, see Moore, *History and Digest... (op. cit.)*, vol. II, pp. 1621-1624, and *A Digest... (op. cit.)*, vol. VI, pp. 957-958; for opinions of the Law Officers of the British Crown, see A. D. McNair, *International Law Opinions* (Cambridge, University Press, 1956), vol. II, pp. 256-257.

³⁶⁵ McNair, *op. cit.*, pp. 261 *et seq.*

³⁶⁶ *Ibid.*, p. 265.

³⁶⁷ *Ibid.*, pp. 267-268.

³⁶⁸ Moore, *A Digest... (op. cit.)*, pp. 961 *et seq.* and 966 *et seq.*

insurrections against the Governments of other Latin American nations.³⁶⁹

Of the most frequently cited and most significant opinions, mention may be made of three which date from the first 15 years of this century. The first appears in general conclusion No. 3 of the Commission established in the United States by the Act of 2 March 1901 to adjudicate claims under the Treaty with Spain of 10 December 1898 terminating the war in Cuba. The text of the conclusion was as follows:

But where an armed insurrection has gone beyond the control of the parent government, the general rule is that such government is not responsible for damages done to foreigners by the insurgents. If, however, it be alleged and proved in any particular case before this Commission that the Spanish authorities by the exercise of due diligence might have prevented the damages done, Spain will be held liable in that case.³⁷⁰

A few years later, the Acting Secretary of State (Adee) reproduced the first part of the above finding word for word in his letter of 7 November 1911 to the United States Ambassador in Mexico City.³⁷¹ The British Foreign Office also sent to its consular officers abroad the following instruction, which was transmitted to the United States Ambassador in Mexico City by the British Minister in 1913:

Where claims are made for compensation for damages done by insurgents in armed insurrections against a government which was unable to control them, claimants should be reminded that His Majesty's Government do not regard a government as liable in such cases unless that government were negligent and might have prevented the damage arising.³⁷²

The terms of these opinions must not, of course, be taken absolutely literally;³⁷³ despite the wording used in some cases, the sense is clear, namely, that in the situations in question the State can be held responsible only as a result of omissions by its own organs.

³⁶⁹ See Moore, *A Digest . . . (op. cit.)*, pp. 966 (insurrection of 1893 in Brazil), 980-981 (temporary installation in power in Mexico of Emperor Maximilian), 981-984 (insurrection of 1873 in Venezuela); Hackworth, *op. cit.*, p. 673 (insurrection of 1926 in Honduras); McNair, *op. cit.*, pp. 259-260 (insurrection in Venezuela), 271 (insurrection in Brazil); S.I.O.I.-C.N.R., *op. cit.*, vol. I, p. 300, and vol. II, p. 853 (insurrection in Venezuela). See also letter of 17 August 1894 from the Italian Minister for Foreign Affairs (Blanc) to the Italian Chargé d'Affaires at Rio de Janeiro, in the Green Book presented to the Chamber of Deputies on 6 December 1894 (Italy, *Atti parlamentari, Camera dei deputati, Documenti diplomatici presentati al Parlamento italiano dal Ministro degli Affari esteri, document No. VII bis, Brasile: Reclami italiani, Rome, 1895*).

³⁷⁰ Moore, *A Digest . . . (op. cit.)*, pp. 971-972. The Commission applied the principle stated in the *Rodriguez and Thorne* cases (Hackworth, *op. cit.*, pp. 670-671).

³⁷¹ Hackworth, *op. cit.*, p. 668.

³⁷² *Ibid.*

³⁷³ It is only natural that at a time when it was customary to speak of responsibility on the part of a State "for acts of individuals", whereas in fact responsibility was considered to arise only from failure by organs of the State to discharge their duties or prevention or punishment, the same terminology should have been used with regard to acts of persons acting on behalf of insurrectional movements against the State. For the same reasons, the fact that the word "complicity" is used in some cases should not cause any surprise; one might add that the notion of actual complicity of organs of the State in acts of insurgents may be more plausible than in the case of acts of private individuals.

168. Following the above review, we believe that we may again take as the starting-point for a more detailed study of State practice the occasion which Governments were given to express their views in reply to the request for information addressed to them by the Preparatory Committee for the Codification Conference of 1930. We have already indicated a number of times the reasons why these replies, given without any reference whatever to a specific case, seem to us to be particularly significant and, in view of their number, to represent a broad consensus. It may be added that, in the present context, statements of views by individual Governments are of particular interest from a certain date onwards, owing to the fact that arbitral decisions become few and far between; in recent times agreements to submit to arbitration disputes arising out of injury caused during insurrections have been much less frequent than in the past.

169. As was noted previously, the above-mentioned request for information referred to the problem of international responsibility without distinguishing between damage caused by insurrection movements in the strict sense and that done by individuals participating in mere riots or other similar internal disturbances. This would make the replies less relevant to the subject under consideration here and would shed no light on some aspects of it, including, in particular, the question of a separate subject of international law having the capacity itself to assume responsibility for the acts of its own agents and organs. In any event, point IX of the request for information was worded as follows:

Damage done to the person or property of foreigners by persons engaged in insurrections or riots, or through mob violence. Is, in general, the State liable, or not liable, in such cases?³⁷⁴

What is the position:

(a) Where negligence on the part of the Government or its officials can be established or where connivance on the part of the latter can be shown?"

. . .³⁷⁵

Governments thus had to give a single answer to the two problems referred to in the request.³⁷⁶ Twenty-two States gave their views on the question under consideration here; all asserted that, in general, the State was not liable in the case of damage done by insurgents.³⁷⁷ Nineteen of them added that in the case referred to under (a) the State did not incur international responsibility unless it had failed to take the preventive or punitive measures which it was bound to take. Some of them took particular care to make it clear that, in this case also, the basis for establishing responsibility was the conduct of the organs of the State. The reply from the German

³⁷⁴ League of Nations, *Bases of discussion . . . (op. cit.)*, p. 108.

³⁷⁵ *Ibid.*, p. 111. Points IX (b) and (c) referred respectively to the question, deriving from a completely different sphere, of equal treatment for foreigners and nationals if the State pays compensation to the latter for damage caused by insurgents, and to the separate case of "successful insurgents".

³⁷⁶ However, South Africa, Australia and Great Britain (*ibid.*, pp. 108-109) dealt with them separately.

³⁷⁷ *Ibid.*, pp. 108 *et seq.*; and *Supplement to Volume III (op. cit.)*, pp. 3 and 20.

Government was particularly noteworthy in its concern for precision:

The responsibility of the State in the case of damage caused to foreigners in the case of insurrections, riots or mob violence can neither be upheld nor be repudiated as a general thesis. In this case also, we should simply apply the general principles outlined above. The State is not responsible for the conduct of insurgents *qua* private individuals. Its responsibility only arises if its organs have acted contrary to international law: if, for instance, they have not afforded sufficient protection to foreigners or have not taken all steps that the circumstances allow to enable foreigners who have suffered damage at the hands of individuals to make good their claims.³⁷⁸

Attention should also be drawn in this connexion to the replies of Poland³⁷⁹ and Sweden.³⁸⁰

170. On the basis of the replies received, the Preparatory Committee for the Conference drew up the following two bases of discussion:

Basis of discussion No. 22

A State is, in principle, not responsible for damage caused to the person or property of a foreigner by persons taking part in an insurrection or riot or by mob violence.

Basis of discussion No. 22 (a)

Nevertheless, a State is responsible for damage caused to the person or property of a foreigner by persons taking part in an insurrection or riot or by mob violence if it failed to use such diligence as due in the circumstances in preventing the damage and punishing its authors.³⁸¹

The Hague Conference had to end its work before it had had an opportunity to consider these bases. In our view, however, it is clear from the replies given by Governments to the request formulated by the Preparatory Committee that in 1930 there was substantial agreement among States that: (a) the conduct of organs of an insurrectional movement acting in the territory of the State against which it is in revolt cannot be attributed as such to the State or cause it to incur international responsibility; (b) only conduct engaged in by organs of the State in connexion with the injurious acts of the insurgents could be attributed to the State and cause it to incur inter-

national responsibility if such conduct constituted a breach of an international obligation.³⁸²

171. The views expressed by Governments at the time of the attempt at codification in 1930 appear to be fully confirmed by those which some of them subsequently expressed in connexion with actual situations. Mention may be made first of a few cases from before the outbreak of the Second World War. In 1929 an aircraft owned by an American company was requisitioned by the revolutionary authorities in Mexico. The United States Department of State declined to present a claim against the Government of Mexico, stating in a letter dated 12 February 1930:

In reply to your suggestion that it may be possible to present this claim to the Mexican Government on the basis that Mexico had failed in its duty to extend appropriate protection to this American concern, the Department would invite your attention to the following rule in relation to the legal liability of governments in cases of this sort:

It is a well established principle of international law maintained by this Government in the consideration of claims of its citizens against foreign states and of foreigners against the United States, that no government can be held responsible for the acts of rebellious bodies of men, committed in violation of its authority, where it is itself guilty of no breach of good faith or of no negligence in suppressing insurrection," (Mr. Seward, Sec. of State, to Mr. Smith, July 9, 1868 . . .).³⁸³

172. In the following year, the Acting Secretary of State of the United States (Castle), in an instruction to the American Ambassador to Cuba (Guggenheim), stated the position of his country as follows:

. . . the responsibility of an established Government for the acts of insurgents is engaged when the constituted authorities, knowing of the imminence of the danger and being in a position to protect the property, fail to exercise due diligence for its protection."³⁸⁴

173. Among the buildings destroyed by revolutionists at Oviedo, in northern Spain, in 1934 was one occupied by a Spanish corporation, all of the capital stock of which was owned by an American corporation. With reference to a request by the latter that the Department of State should present a claim against the Spanish Government of the day, the Department in an instruction of 9 January 1935 to the American Ambassador at Madrid said:

In view of the well-established principle of international practice that a state is not responsible for injuries sustained by aliens at the hands of insurgents unless there is a want of due

³⁷⁸ *Bases of discussion . . . (op. cit.)*, p. 108.

³⁷⁹ *Ibid.*, p. 110:

"There is no reason to treat damage done to a foreigner by persons engaged in insurrections or riots in a different manner from damage caused in general to a foreigner by a private person . . . The State will only incur international responsibility in the event of neglect or omission on its part in regard to these obligations."

³⁸⁰ *Ibid.*, p. 111:

"The State should be held responsible only when the damage is due to the fact that it has omitted to take the steps which, under the circumstances, should normally have been taken to prevent or punish the acts in question."

It will also be noted that on this point Denmark (*ibid.*, p. 112), Norway (*ibid.*, p. 113) and Canada (*Supplement to Volume III (op. cit.)*, p. 3), referred to their replies to point V of the request for information. Point V related to the responsibility of the State for actions by its executive bodies.

³⁸¹ *Yearbook of the International Law Commission, 1956*, vol. II, p. 224, document A/CN.4/96, annex 2.

³⁸² The Preparatory Committee's request was worded in such a way as to elicit replies in terms of whether or not the State was responsible for damage done to foreigners by insurgents, rather than whether or not the acts of insurgents could be attributed to the State as acts rendering it responsible. Nevertheless, this did not prevent some States from replying in a manner intended to prevent any ambiguity. It can at least be legitimately stated that the replies, taken as a whole, make one point quite clear: Governments did not in any way consider that unlawful omissions on the part of organs of the State really justified a departure from the principle that acts of insurrectional movements could not be attributed to the State. Nor did they contemplate any attribution to the State of the action of the insurgents combined with the omission of the State organs; only the latter conduct was regarded as an "act of the State".

³⁸³ Hackworth, *op. cit.*, vol. V, pp. 671-672.

³⁸⁴ *Ibid.*, p. 670.

diligence on the part of the government in preventing the injuries, the evidence submitted indicates no basis for the presentation of a normal diplomatic claim, even though the claimant company were American.³⁸⁵

174. Later, in 1938, an interesting statement of position is to be found in the note of 27 September of that year from the Legal Department of the French Ministry of Foreign Affairs, which stated:

It is . . . generally accepted, particularly by arbitral tribunals which have dealt with questions of this kind, that in case of civil war a government is not responsible for damage sustained by aliens at the hands of insurgents. The only circumstances in which this would not apply would be where it was established that the regular government had committed a fault or had not done everything in its power to prevent the damage or to put down the revolution.³⁸⁶

175. Following the Second World War, the same principles were affirmed in the decisions rendered by the national commissions set up in the United States to distribute among the claimants the lump-sum amounts paid to the United States Government in settlement of disputes concerning damage done to United States nationals. Reference will be made here to the decisions of the American-Mexican Claims Commission established under the Act of 18 December 1942 (i.e., under domestic law, and not to be confused with the international arbitral tribunals bearing similar names) in the *Batopilas Mining Company case* and in the *Simpson case*. In the first decision, the Commission denied the claim for compensation on the ground that the losses had been caused by revolutionary forces and that:

Said revolution having terminated unsuccessfully, no claim for the loss alleged may be properly asserted against the Mexican Government without at the same time showing a want of due diligence on the part of the authorities in preventing the injury or in suppressing the revolution.³⁸⁷

In the second decision, the Commission stated:

It is an established principle of international law that the regularly constituted government of a country is not liable for the actions of unsuccessful revolutionists unless there is a showing that such government was not diligent in its efforts to suppress the revolution.³⁸⁸

176. The problem we are discussing was considered incidentally, in the context of the elimination of the after-effects of war, by the International Claims Commission—another internal United States agency, set up in 1949 to distribute funds paid as a lump sum by the Yugoslav Government—in its decision on the *Socony Vacuum Oil Company claim*. The problem facing the Commission did not in fact relate to the acts of a true insurrectional movement but to those of a government established during the war by the occupying forces. The point at issue was whether the Yugoslav Government could be held responsible for the wrongful conduct of organs of the State of Croatia, established by the occupying forces during the war in a part of Yugoslav territory. In examining this question, however, the Commission likened the situation

to that arising in the case of unsuccessful insurrectional movements, and denied responsibility on the part of the Yugoslav Government, commenting that:

A “puppet state” or local *de facto* government such as Croatia also possesses characteristics of “unsuccessful revolutionists” and “belligerent occupants”. It is also settled that a state has no international legal responsibility to compensate for damage to or confiscation of property by either. There are, of course, exceptions to the general rule, as for example where there is fault or lack of diligence on the part of the state in the suppression of the revolution.³⁸⁹

177. More recently, in 1958, during the war against the Indonesian dissidents, the merchant vessels *San Flaviano* and *Daronia*, and later the submarine *Aurochs*, all British, were bombed by aircraft in Indonesian territorial waters, and one of the merchant vessels was destroyed. When questioned in the House of Commons on the action taken by the Government, the British Under-Secretary of State stated on 11 June 1958 that:

In both cases Her Majesty's Ambassador at Djakarta made inquiries of the Indonesian Government, as a result of which Her Majesty's Government are satisfied that the action was not carried out by the armed forces of the Indonesian Government. It is presumed that the attacking aircraft were under the orders of the Indonesian dissident forces in North Celebes.³⁹⁰

The British Government therefore did not feel it possible to attribute the wrongful acts of the insurgent armed forces to the Indonesian State as a source of responsibility on its part. We may add that on 28 November of the same year, the United States Department of State dispatched to the United States Embassy in Cuba instructions reproducing word for word the formula used in 1868 by Secretary of State Seward, which we have already seen reproduced once in 1930, in the case concerning the requisitioning in Mexico of an aircraft belonging to an American company.³⁹¹

178. Events worth noting from the past decade include the instructions issued on 18 May 1967 by the Canadian Department of External Affairs, defining the cases in which the Canadian Government is prepared to espouse claims. Paragraph 3 of these instructions stated that:

A State is under no obligation to repair damage sustained by private persons through the actions of rioters except where it can be shown that the State by exercising due diligence could have prevented, or immediately crushed, the insurrection or riot.³⁹²

We may also recall here the position taken by the Belgian Government in connexion with reparation for the damage suffered by Belgian nationals in the Democratic Republic of the Congo during the civil war. On 10 December 1969, the Belgian Minister for Foreign Affairs, replying to a question in the legislature, asserted that “wrongful and injurious acts committed by rioters or insurgents” could be the object of reparation only “if the forces responsible

³⁸⁹ *International Law Reports*, 1954 (Sir Hersch Lauterpacht, ed.) (London, Butterworth, 1957), p. 61.

³⁹⁰ British Institute of International and Comparative Law. *International and Comparative Law Quarterly* (London), vol. 7 (July 1958), p. 552.

³⁹¹ Whiteman, *op. cit.*, p. 819, and para. 171 above.

³⁹² *Canadian Yearbook of International Law*, 1968 (Vancouver, B.C.), vol. VI, p. 265.

³⁸⁵ *Ibid.*

³⁸⁶ Kiss, *op. cit.*, p. 637 (translation from French).

³⁸⁷ Whiteman, *op. cit.*, p. 822.

³⁸⁸ *Ibid.*, p. 823.

for maintaining order were culpably negligent in the performance of their duties".³⁹³

179. In reflecting on these different statements of position, we should note above all that most of them appear particularly significant in that they result in a negative decision with regard to the presentation of a claim. Let us recall again what we noted above, at the end of paragraph 167, in commenting on earlier examples of the views of States, and also in paragraph 170 (foot-note 382), when considering the replies of Governments to the questionnaire of the Preparatory Committee for the 1930 Conference. Ministerial services cannot always be expected to express themselves in accordance with the requirements of the strictest clarity. The fact that reference is sometimes made to negligence on the part of public authorities "in repressing insurrection" certainly does not mean that the State is regarded as responsible in the event of injuries caused by the organs of an insurrectional movement to a foreign State or to one of its nationals on the grounds that the effort to crush the insurrection has not in general been conducted vigorously. The lack of vigilance and failure to intervene on the part of the State authorities must obviously have occurred in connexion with the protection of the foreign States or individuals harmed by certain acts committed by the insurgents, and what is more, it must have occurred specifically in relation to those acts. Likewise, as we have already pointed out, the fact that the State is said not to be responsible "for the damage" caused by insurgents "unless" the State organs have in a specific case failed to provide protection in no way means that such negligence would suddenly make it possible to attribute to the State the acts of the insurrectional movement, in principle denied. The most that this could mean would be that in such cases the State, being responsible for the omission on the part of its organs, is required to compensate for the damage caused by the acts of the insurgents, in reparation for that omission. However, the internationally wrongful act of the State still remains nothing more than the omission itself. In relation to the conduct of the State, the act committed by the organs of the insurgents is nothing more than the external event which serves as a catalyst for the wrongfulness of that conduct. This aspect of the matter has, incidentally, been made sufficiently clear in the section dealing with State responsibility for the acts of individuals to render it unnecessary to dwell on it. We shall therefore confine ourselves to noting that the analysis of State practice, too, confirms the correctness of the principle as we have defined it.

180. From the outset, we have been careful to stress³⁹⁴ that injurious actions committed by the organs of an insurrectional movement, in the sense in which this term is used in international law, are different from those committed by individuals or groups of individuals during a riot or demonstrations by a rebellious mob. In the first case, those who commit the acts are not private

individuals, but organs of a subject of international law other than the State. It is this subject to which the acts of its own organs should normally be attributed, and which may be called upon to answer for them. Before concluding this analysis of practice, we should note that despite the difficulties involved, States have in fact sometimes presented claims to an insurrectional movement for injuries caused to them or their nationals by organs of that movement. This is clearly yet another proof that the States making such claims are convinced that the injurious actions in question cannot be attributed to the "legitimate" Government.

181. In this context, we may note three examples from widely separated periods. The first consists of the note of 26 November 1861 from the British Secretary of State for Foreign Affairs, Earl Russell, to United States Ambassador Adams, referring to complaints by the United States concerning the relations Great Britain maintained with the Confederate insurgents against the Federal Government. Earl Russell justified the need for these relations, pointing out *inter alia* that :

Her Majesty's Government hold it to be an undoubted principle of international law, that when the persons or the property of the subjects or citizens of a state are injured by a *de facto* government, the state so aggrieved has a right to claim from the *de facto* government redress and reparation.³⁹⁵

Later, on 9 April 1914, members of the crew of the United States vessel *Dolphin*, anchored at Tampico in Mexico, were arrested by an armed band belonging to the forces of General Huerta, head of the Government which had then temporarily seized power. On 11 April the United States admiral in command requested various forms of reparation from the authorities of that Government. The Department of State supported his request in instructions sent on 14 April to the United States Chargé d'Affaires in Mexico. Since General Huerta had not given satisfaction, United States forces proceeded on 21 April to occupy Veracruz.³⁹⁶ Finally, and these are by far the most important cases, the British Government on three occasions during the Spanish Civil War presented claims to the Nationalist Government, which was then located at Burgos or Salamanca. These occasions were after the loss of the destroyer *Hunter*, blown up on 13 May 1937 by a mine laid by the Nationalists four miles off Almeria, after the destruction of the steamer *Alcyra*, sunk 20 miles from Barcelona on 4 February 1938 by two seaplanes from the Nationalist base in Majorca, and after the attack on the British merchant vessel *Stanwell* by a Nationalist aircraft, on 15 March 1938, in the port of Tarragona. In all three cases, a formal request for reparation was addressed to the Nationalist authorities.³⁹⁷

³⁹⁵ Moore, *A. Digest . . . (op. cit.)*, vol. I, p. 209.

³⁹⁶ Hackworth, *op. cit.*, 1941, vol. II, pp. 420-421.

³⁹⁷ These cases are described in Ch. Rousseau's article, "La non-intervention en Espagne", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. XIX, No. 2 (1938), pp. 277-278. The author also recalls that the National Defence Junta at Burgos accepted a Portuguese claim for events which had taken place before the Nationalist forces occupied the area in which they had occurred (*ibid.*, pp. 278 *et seq.*), but that it did so rather as the "successor" of the Government of the Spanish

(Continued on next page.)

³⁹³ *Revue belge de droit international* (Brussels), vol. VIII, No. 1 (1972), p. 372.

³⁹⁴ See para. 153 above.

182. The question of State responsibility for injuries caused to foreign States or their nationals in the event of civil war takes up a considerable amount of space in writings on international law. Many articles have been written on the subject, and most general works on State responsibility devote several pages to it. It is in this broader context that writers have most often dealt with the specific question with which we are exclusively concerned at this stage, namely that of the attribution or non-attribution to the State, as a source of international responsibility, of the conduct of the organs of an insurrectional movement possessing its own international personality. We may add that, here as elsewhere, the writer's main concern seems to have been to define the content of the obligations to protect foreign States and their nationals which international law imposes on the State in the event of civil war. The discussions have centred on this definition, much more than on the problems of responsibility resulting from a breach of the obligations concerned, and in particular on the problems of whether or not acts committed by certain persons can be attributed to the State as acts giving rise to responsibility on its part. Consequently, if an examination of the opinions of jurists is to be useful in this context, it must be confined to those which in fact relate to the problem we are discussing. In the first place, we must—and there is no further need to state the reasons for doing so—set aside the theoretical divergencies which in reality concern only law relating to aliens. We must also avoid entering into a discussion of questions which, as we have already pointed out, relate to succession between subjects of international law rather than to international responsibility.³⁹⁸ Moreover, we feel we should leave aside the question referred to above, the examination of which we have postponed because strictly speaking it concerns not the possible attribution to a State of acts committed by the organs of another subject of international law, but rather the retroactive attribution to that State of acts committed by persons who are now its organs, even if those acts were committed by the persons concerned during their victorious struggle for power.³⁹⁹ In other words, even where the opinions of jurists are concerned, we must confine our analysis to those which really relate to the case of persons who, between the time of the conduct complained of and the time when a claim is presented in that connexion, have never been anything other than organs of another subject of international law.

183. Confining ourselves strictly to this framework, we find that international jurists, too, are remarkably unanimous in their views. They have long agreed in recognizing that the actions committed by the organs of an insurrectional movement cannot be considered as acts of the State, involving its international responsibility. They acknowledge that State responsibility cannot be

spoken of in relation to such actions unless they have occasioned by failure on the part of the State's organs to fulfil an international obligation incumbent on it. As far back as the nineteenth century, some writers had expressed this view in clear terms.⁴⁰⁰ Furthermore, we do not see any need to revert yet again to the attempt made in the Institute of International Law between 1898 and 1900 to bring about the acceptance of a kind of objective guarantee on the part of the State for all injurious events caused by riots or civil wars. We have already described the successive stages of this attempt in the previous section of this chapter, in discussing the problem of State responsibility for acts committed by individuals during riots and other internal disturbances.⁴⁰¹ It should moreover be noted that the primary aim of those responsible for the attempt was to bring about the acceptance of the principle that the State has an obligation of objective responsibility for the acts of government forces in their military operations against insurgents, notwithstanding the prevailing principle of total exemption from responsibility for acts of war. The acceptance by the State of responsibility for the actions of insurgents was even then much less categorical. Moreover—and this is the point which should be stressed—the principle as affirmed completely excluded State responsibility for acts committed by insurgents when the State had recognized the insurrectional movement as a belligerent.⁴⁰² At that time, recognition was generally regarded as conferring international personality on a State or insurrectional movement, and even if, as we believe, it should not be so regarded, the fact remains that the element of recognition is largely decisive in ascertaining such personality. Hence we may assume that the Brusca-Fauchille and von Bar proposals were posited essentially on the assumption that revolutionaries are nothing more than private individuals. There is therefore no reason to spend further time on this proposal, which in any case was soon abandoned.

⁴⁰⁰ See, for example, C. Calvo, "De la non-responsabilité de l'Etat à raison des pertes et dommages éprouvés par les étrangers en temps de troubles intérieurs ou de guerres civiles", *Revue de droit international et de législation comparée*, Brussels, 1st series, vol. 1, 1869, pp. 417 et seq.; V. Pennetti, *Responsabilità internazionale in caso di rivolte o di guerra civile* (Naples, Cozzolino, 1899), pp. 12-13.

⁴⁰¹ See para. 138, foot-note 256, above.

⁴⁰² Article II, paragraphs 2 and 3 of the resolution adopted in 1900 by the Institute of International Law (*Annuaire de l'Institut de droit international*, 1900, Paris, vol. 18, 1900, pp. 236 et seq.) made it clear that if the "insurrectional government" had been recognized as a "belligerent power", and therefore as a separate subject of international law, it was to that government that injured States should address their claims for reparation of the injuries sustained. L. von Bar expressed the same view ("De la responsabilité des Etats à raison des dommages soufferts par des étrangers en cas de troubles, d'émeute ou de guerre civile", *Revue de droit international et de législation comparée*, Brussels, 2nd series, vol. 1, 1899, p. 475). Writers who later supported the proposition that, given certain circumstances, the State was responsible for acts committed by insurgents, all nevertheless excluded that responsibility in cases where the State has recognized the insurgents as "belligerents". See A. Rougier, *Les guerres civiles et le droit des gens* (Paris, Larosc, 1903), p. 462; Goebel, *op. cit.*, pp. 317 et seq. Soldati (*op. cit.*, pp. 72 et seq.) still appears to regard insurgents as private individuals and, consistent with his ideas, he therefore attributes responsibility for their acts to the State.

(Foot-note 397 continued.)

Republic. See also the position taken by the United States Government in connexion with the attack on the United States destroyer *Kane* (Hackworth, *op. cit.*, 1940, vol. 1, pp. 362-363; *ibid.*, 1943, vol. VII, pp. 172-173).

³⁹⁸ See above, at the end of para. 156, para. 157 and at the end of para. 159.

³⁹⁹ See para. 158 above.

184. Where modern writers are concerned, it may be said that, while their positions are sometimes at variance on other points, they agree almost unanimously that, under the rules now prevailing,⁴⁰³ injurious acts by the organs of an insurrectional movement are not attributed to the State and thus do not cause it to incur international responsibility. At most, such responsibility can arise only where the organs of the State have failed to meet recognized obligations to exercise diligence in preventing or punishing the injurious acts in question. Moreover, even this does not seem to follow automatically, according to some less recent writers, in the specific case of "recognized insurgents" who, as such, possess international personality.⁴⁰⁴ Thus, the idea of non-responsibility predominates. Among the writers of studies dealing specifically with the problem of State responsibility in case of civil war against insurgents, mention may be made—the list is not, of course, exhaustive—of Arias,⁴⁰⁵ Strupp,⁴⁰⁶ Podestá Costa,⁴⁰⁷ Spiropoulos,⁴⁰⁸ Garner,⁴⁰⁹ Berlia,⁴¹⁰ Rousseau,⁴¹¹ Silvanie,⁴¹² and Akehurst;⁴¹³

⁴⁰³ There are, however, some writers—like O'Connell (*op. cit.*, pp. 969-970) and E. Castrén ("Civil War", *Annales Academiae Scientiarum Fennicae*, series B, vol. 142, fasc. 2 (Helsinki, Suomalainen Tiedeakatemia, 1966), p. 232—who would argue *de jure condendo* that the State should always be held responsible, when the revolution is over, for the acts of insurgents acting on behalf of a local *de facto* government.

⁴⁰⁴ Spiropoulos, like Schoen and Strupp before him (see bibliographical references in foot-notes 408, 415 and 416), argues that recognition of the "insurrectional government as a belligerent party" should release the lawful government from all responsibility, even in case of wrongful negligence. The idea seems strange, however. It is difficult to see why the State, which is unquestionably responsible in the event of wrongful failure to give protection against acts emanating from organs of another subject of international law, that subject being a State, should cease to be responsible when the subject in question is an insurrectional movement.

⁴⁰⁵ *Op. cit.*, pp. 724 *et seq.*

⁴⁰⁶ "Responsabilité internationale de l'Etat . . .", International Law Association, *Report of the Thirty-first Conference . . .* (*op. cit.*), pp. 133 *et seq.*

⁴⁰⁷ "International Responsibility of the State for damages suffered by aliens during civil war", International Law Association, *Report of the Thirty-first Conference . . .* (*op. cit.*), p. 123; and "La responsabilidad del Estado . . ." *Revista de derecho internacional*, *op. cit.*, pp. 220-221.

⁴⁰⁸ J. Spiropoulos, *Die de facto-Regierung im Völkerrecht* (*Beiträge zur Reform und Kodifikation des Völkerrechts*, No. 2) (Kiel, Verlag des Instituts für Internationales Recht an der Universität Kiel, 1926), pp. 180 *et seq.*

⁴⁰⁹ *Op. cit.*, pp. 58 *et seq.*

⁴¹⁰ G. Berlia, "La guerre civile et la responsabilité internationale de l'Etat", *Revue générale de droit international public*, Paris, 3rd series, vol. XI, No. 1 (January-February 1937), pp. 55 *et seq.*

⁴¹¹ "La non-intervention en Espagne", *Revue de droit international et de législation comparée* (*op. cit.*), pp. 275 *et seq.*

⁴¹² H. Silvanie, "Responsibility of States for Acts of Insurgent Governments", *American Journal of International Law*, Washington, D.C., vol. 33, No. 1 (January 1939), pp. 90 *et seq.*; *Responsibility of States for Acts of Unsuccessful Insurgent Governments* (New York, Columbia University Press, 1939), pp. 5 13 *et seq.*, 159 *et seq.*

⁴¹³ M. Akehurst, "State responsibility for the wrongful acts of rebels. An aspect of the Southern Rhodesian problem", *The British Year Book of International Law, 1968-1969*, London, vol. 43, 1970, pp. 49 *et seq.*

among the writers of broader works on the subject of the international responsibility of States: Borchard,⁴¹⁴ Schoen,⁴¹⁵ Strupp,⁴¹⁶ Decencière-Ferrandière,⁴¹⁷ Guerrero,⁴¹⁸ Strisower,⁴¹⁹ Eagleton,⁴²⁰ Maúrtua and Scott,⁴²¹ Pons,⁴²² Reuter,⁴²³ García Amador,⁴²⁴ Accioly,⁴²⁵ Münch,⁴²⁶ Amerasinghe,⁴²⁷ Jiménez de Aréchaga⁴²⁸ and Ténékidès;⁴²⁹ among the writers of studies dealing with the problem of recognition: H. Lauterpacht⁴³⁰ and Chen;⁴³¹ lastly, among the writers of general treatises: Hyde,⁴³² Fenwick,⁴³³ Rousseau,⁴³⁴ Oppenheim,⁴³⁵ Schwarzenberger,⁴³⁶ Brownlie,⁴³⁷ Cavaré,⁴³⁸ O'Connell⁴³⁹ and Von Glahn.⁴⁴⁰

185. There follow a few over-all comments on these writings as a whole. As has been emphasized, most of the writers refer to the case of individuals. This means that they express no opinion at all on whether the solution they advocate should also apply where the authors of the acts complained of were the organs of an insurrectional movement possessing international personality. Logically, however, it should follow automatically from the position taken on the problem in general that the answer, to this question is the affirmative. It is necessary at this point to repeat, and to apply to the writers of learned

⁴¹⁴ *The Diplomatic Protection . . .* (*op. cit.*), pp. 228 *et seq.*

⁴¹⁵ *Op. cit.*, p. 78.

⁴¹⁶ "Das völkerrechtliche Delikt", *Handbuck . . .* (*op. cit.*), p. 103.

⁴¹⁷ *Op. cit.*, pp. 158 *et seq.*

⁴¹⁸ M. G. Guerrero, "La responsabilité internationale des Etats dans les faits et dans sa règle", *Académie diplomatique internationale, Dictionnaire diplomatique*, Paris (n. d.), vol. II, pp. 567 *et seq.*

⁴¹⁹ *Op. cit.*, pp. 481 *et seq.*

⁴²⁰ *The Responsibility of States . . .* (*op. cit.*), pp. 138 *et seq.*

⁴²¹ *Op. cit.*, pp. 55 *et seq.*

⁴²² *Op. cit.*, especially pp. 154-155.

⁴²³ "La responsabilité internationale", *Droit international public* (*op. cit.*), pp. 93-94.

⁴²⁴ Second report to the International Law Commission (*Yearbook of the International Law Commission, 1957*, vol. II, pp. 125 *et seq.*, document A/CN.4/106, chap. V, paras. 19 *et seq.*).

⁴²⁵ *Op. cit.*, pp. 395 *et seq.*

⁴²⁶ *Op. cit.*, p. 232.

⁴²⁷ "Imputability . . .", *Revue égyptienne . . .* (*op. cit.*), p. 127-128.

⁴²⁸ *Op. cit.*, pp. 562 *et seq.*

⁴²⁹ *Op. cit.*, p. 788.

⁴³⁰ H. Lauterpacht, *Recognition in International Law* (Cambridge, University Press, 1947), pp. 247 *et seq.*

⁴³¹ B. Chen, *The International Law of Recognition* (New York, Praeger, 1951), pp. 327 *et seq.*

⁴³² *International Law . . .* (*op. cit.*), pp. 979 *et seq.*

⁴³³ *Op. cit.*, pp. 284 *et seq.*

⁴³⁴ *Droit international public* (*op. cit.*), pp. 379-380.

⁴³⁵ *Op. cit.*, pp. 366 *et seq.*

⁴³⁶ *Op. cit.*, pp. 629-630.

⁴³⁷ *Principles . . .* (*op. cit.*), pp. 373 *et seq.*

⁴³⁸ *Op. cit.*, pp. 548 *et seq.*

⁴³⁹ *Op. cit.*, pp. 969 *et seq.*

⁴⁴⁰ G. Von Glahn, *Law among Nations: An Introduction to Public International Law*, 2nd ed. (London, Macmillan, 1970), pp. 242 *et seq.*

works, our earlier observation on certain views expressed by chancelleries, namely that the terminology used is sometimes lacking in precision. Care must be taken, however, not to draw hasty conclusions from this. For example, we do not believe that the writers cited—or at least the great majority of them—have ever contemplated, in case of wrongful negligence on the part of organs of the State, attributing to the State in question an internationally wrongful act comprising a combination of injurious action by the agents of the insurrectional movement and failure by the organs of the State engaged in combating the insurgents to provide protection against such action. An idea of this kind would appear to be even less acceptable in the case of acts of insurrectional movements than in that of acts of private individuals.⁴⁴¹

186. It should also be recalled that, according to some of the writers cited above, such as Silvanie, Reuter, Schwarzenberger and O'Connell, an exception ought to be provided to the general rule that the acts of insurgents cannot be attributed to the State as a source of responsibility; the exception would apply to any routine administrative acts performed by the organs of the insurrectional movement in that part of the State territory which is under their control and administration. Actually, as has already been noted, this "exception" is not an exception at all. In the first place, while a State might conceivably acknowledge that it is bound by certain obligations deriving from lawful routine acts of administration performed by the organs of an insurrectional government in territory formerly under its administration, it is much harder to conceive that it would do likewise in the case of obligations arising out of wrongful acts by the same organs; it is not surprising that there is not a single case to be cited in practice. Secondly, even if it agreed that in some cases the State would be willing, or would be required, to assume *in proprio* certain obligations incurred by the insurrectional movement, this would be done by virtue of the succession of one subject of international law to the obligations of another subject and not by virtue of the attribution to the former of the actions of the latter.⁴⁴²

187. Another supposed exception to the general rule which seems to call for a negative conclusion is the attribution to a State of wrongful acts committed by an unsuccessful insurrectional movement, in the event of a grant of amnesty by the State concerned. Some writers would regard the granting of pardon to the insurgents as a kind of ratification of their acts.⁴⁴³ However, it

⁴⁴¹ See, in this connexion, our comments in para. 140.

⁴⁴² See Chen, *op. cit.*, p. 332.

⁴⁴³ Reuter ("La responsabilité internationale", *Droit international public (op. cit.)*), states that "in principle it does not seem possible to impute to the State the acts of insurgents". But he adds: "However, this principle allows of some relaxation". Referring to the case of amnesty for defeated insurgents, he observes: "In this case it, as it were, morally ratifies their conduct and appropriates their acts; consequently, it is accepted in international judicial practice that in such a case the government has rendered itself responsible for acts committed by the rebels in the same manner as it would be responsible for its own actions" [translation from French]. Others writers, such as Ténékidès

seems rather strange to say that the mere fact of not punishing the acts of others when they ought to be punished constitutes endorsement of those acts. It may happen that the State, in granting amnesty, is contravening an international obligation to punish which it should have fulfilled; but, if so, it is that breach which will be attributed to it as a source of responsibility, and not the acts committed in the past by the organs of the insurrectional movement. It may be noted once again that this does not necessarily affect the question of determining the amount of compensation which the State may be required to pay in reparation for the breach with which it is charged.⁴⁴⁴

188. As a final comment, it may be noted that writers only seldom express their views on whether or not the acts of organs of an insurrectional movement can be attributed as a source of responsibility to the movement itself, where the movement is a separate subject of international law. This again is probably due to the failure to distinguish between insurgents possessing international personality and insurgents not possessing it. However, those who have made such a distinction have all agreed that the actions and omissions of organs of an "insurrectional movement" which is a subject of international law may be attributed to the movement and that action may be taken to make its international responsibility effective.⁴⁴⁵

189. With regard to codification drafts, we have already had occasion to reproduce in section 8⁴⁴⁶ the opening sentence of the first paragraph of rule VII of the draft adopted in 1927 at Lausanne by the Institute of International Law. This clause related to "injuries caused in case of mob, riot, insurrection or civil war", and the State was held responsible in cases of lack of diligence in preventing or punishing the injurious acts. Among the other drafts of private origin, the one prepared in 1930 by the German International Law Association was noteworthy for the way in which it considered recognition of the insurrectional movement as a belligerent party to be a decisive factor. While article 6, para-

(*op. cit.*, p. 788), Brownlie (*Principles . . . (op. cit.)*, p. 375) and Berlia (*op. cit.*, p. 58) also regard amnesty as ratification or "acceptance" after the event of the past acts of the insurgents.

⁴⁴⁴ Akehurst ("State responsibility . . .", *The British Year Book . . . (op. cit.)*, p. 58) remarks that in case of the granting of full amnesty—i.e., exoneration from all liability, criminal or civil—to insurgents for their past acts, the State is depriving the victims of their right to sue the rebels. This would accordingly constitute a ground for requiring the State to pay, in reparation for the wrongful amnesty, compensation in the amount of the damage done by the rebels.

⁴⁴⁵ Apart from the writers who agree with the thesis advanced in 1900 by the Institute of International Law (para. 183, footnote 402, above), it may be noted that Rousseau ("La non-intervention en Espagne", *Revue de droit international et de législation comparée (op. cit.)*, pp. 275 *et seq.*), O'Connell (*op. cit.*, p. 972) and J. A. Frowein (*Das de facto-Regime im Völkerrecht (Cologne, Heymann, 1968)*, pp. 71 *et seq.*) cite actual cases to show that action may be taken against an insurrectional movement to obtain reparation for an internationally wrongful act. See also H. Lauterpacht, *Recognition . . . (op. cit.)*, p. 278; Kelsen, *op. cit.*, p. 292; McNair, *op. cit.*, p. 272; Cavaré, *op. cit.*, p. 552.

⁴⁴⁶ See foot-note 306 above.

graph 1, provided that a State was responsible for injury caused on the occasion of insurrections and civil war if it had failed to apply such diligent care as the circumstances required, paragraph 3 of the same article stated:

If the State recognizes the insurgents as a belligerent party, its responsibility terminates in respect of injuries caused after such recognition. Its responsibility towards States which have recognized the insurgents as a belligerent party terminates in respect of injuries caused after such recognition.⁴⁴⁷

The two drafts prepared by the Harvard Law School, on the other hand, were noteworthy for the fact that they introduced a distinction between unsuccessful and successful revolutions. With regard to unsuccessful revolution, article 13 (a) of the 1929 draft provided as follows:

In the event of an unsuccessful revolution, a state is not responsible when an injury to an alien results from an act of the revolutionists committed after their recognition as belligerents either by itself or by the state of which the alien is a national.⁴⁴⁸

Article 18, paragraph 2, of the 1961 draft was more precise, specifying as follows :

In the event of an unsuccessful revolution or insurrection, an act or omission of an organ, agency, official, or employee of a revolutionary or insurrectionary group is not for the purposes of this Convention, attributable to the State.⁴⁴⁹

190. Among the drafts emanating from official sources, the two texts prepared by the Inter-American Juridical Committee—one expressing the views of the Latin American countries (article V) and the other giving the views of the United States (article VI)—both followed the same criteria with regard to injurious acts committed by insurgents as were adopted with regard to injurious acts committed by individuals.⁴⁵⁰ With respect to the drafts prepared under League of Nations or United Nations auspices, the 1926 Guerrero report also followed, in conclusion 8, the criteria laid down in conclusion 5, in connexion with the acts of private individuals; conclusion 9, however, introduced a reservation in case of seizures or confiscations by the revolutionaries, in which event the State must place all necessary legal means at the disposal of foreigners who suffered loss.⁴⁵¹ The text of bases of discussion Nos. 22 and 22 (a) drawn up by the Preparatory Committee for the Conference was reproduced earlier. Lastly, as regards the drafts prepared for the International Law Commission by Mr. García Amador, it may be recalled that article 11 of the 1957 draft provided as follows:

The State is responsible for injuries caused to an alien in consequence of riots, civil strife or other internal disturbances, if the constituted authority was manifestly negligent in taking the measures which, in such circumstances, are normally taken to prevent or punish the acts in question.⁴⁵²

⁴⁴⁷ *Yearbook of the International Law Commission, 1969*, vol. II, p. 150, document A/CN.4/217 and Add.1, annex VIII.

⁴⁴⁸ *Ibid.*, 1956, vol. II, p. 229, document A/CN.4/96, annex 9.

⁴⁴⁹ *Ibid.*, 1969, vol. II, p. 146, document A/CN.4/217 and Add.1, annex VII.

⁴⁵⁰ *Ibid.*, pp. 153 and 154, document A/CN.4/217 and Add.1, annexes XIV and XV.

⁴⁵¹ *Ibid.*, 1956, vol. II, p. 222, document A/CN.4/96, annex 1.

⁴⁵² *Ibid.*, 1957, vol. II, p. 130, document A/CN.4/106, annex.

Article 7, paragraph 1, of the 1961 revised draft used the same text with a few drafting changes.⁴⁵³

191. It remains for us to draw up, on the basis of the analysis made in this section, the rule for those special situations in which the question of possible international responsibility of the State arises in connexion with the conduct of organs of other subjects of international law. The earlier codification drafts can offer us some useful suggestions on certain aspects; they cannot provide us with a ready-made model. However, we now have everything we need to produce the desired formulation. The criteria applied by prevailing international law have been shown; we have no reason to make any changes in them, but must simply try to express them in the most appropriate and most rigorous manner. For this purpose, it would seem desirable to deal separately, within the same article, with the case in which the other subject of international law involved is a State or an international organization and the case in which that subject is an insurrectional movement possessing international personality, since from at least one aspect they call for different specifications. It will be necessary first, in relation to both cases, to state the basic principle that the conduct of organs of another subject of international law cannot be attributed to a State. Next, still in relation to both cases, we shall have to include the two reservations concerning (a) the possibility of failure on the part of organs of the State to discharge its own duties of protection or punishment in case of acts emanating from organs of another subject of international law, and (b) the possibility of attributing such acts to that other subject, as a source of international responsibility on its part. With specific reference to the case of acts of organs of an insurrectional movement, however, there will have to be an additional reservation concerning the situation which arises where the pre-existing State or a newly created State has inherited the structures and organization of the successful insurrectional movement.

192. In the light of the foregoing we believe that we may suggest the adoption of the following text:

Article 12. — Conduct of other subjects of international law

1. The conduct of a person or group of persons acting in the territory of a State as organs of another State or of an international organization is not considered to be an act of the first-mentioned State in international law.

2. Similarly, the conduct of a person or group of persons acting in the territory of a State as organs of an insurrectional movement directed against that State and possessing separate international personality is not considered to be an act of that State in international law.

3. However, the rules enunciated in paragraphs 1 and 2 are without prejudice to the attribution to the State of any omission on the part of its organs, where the latter ought to have acted to prevent or punish the conduct of the person or group of persons in question and failed to do so.

4. Similarly, the rules enunciated in paragraphs 1 and 2 are without prejudice to the attribution of the conduct of the person or group of persons in question to the subject of international law of which they are the organs.

⁴⁵³ *Ibid.*, 1961, vol. II, p. 47, document A/CN.4/134 and Add.1, addendum.

5. The rule enunciated in paragraph 2 is without prejudice to the situation which would arise if the structures of the insurrectional movement were subsequently to become, with the success of that movement, the new structures of the pre-existing State or the structures of another, newly constituted State.

10. CONDUCT OF ORGANS OF AN INSURRECTIONAL MOVEMENT WHOSE STRUCTURES HAVE SUBSEQUENTLY BECOME, IN WHOLE OR IN PART, THE STRUCTURES OF A STATE

193. Section 9 was devoted to consideration of the question whether or not the conduct of other subjects of international law can be attributed to the State. Our conclusion was that the conduct of a person or group of persons acting in the territory of a State as organs of another State, or of an international organization, or of an insurrectional movement possessing separate international personality, is not considered to be an act of that State in international law. However, we felt it necessary to add a clarification regarding, in particular, the case of an act injurious to a third State committed by a member of the organization of an insurrectional movement: there must be a reservation, we said, regarding the situation which would arise if an insurrectional movement were to be successful and if its structures were to become the structures of a new State constituted within the same territorial boundaries as the pre-existing State, or were merely to be integrated with the structures of the latter, or were to be transformed into those of a new State constituted in part of the territory formerly under the sovereignty of the pre-existing State.

194. The case of the constitution of a new State in part of the territory formerly under the sovereignty of the pre-existing State was considered briefly in the preceding section.⁴⁵⁴ It was shown there that the structures of the insurrectional movement become, after its victory, the structures of the newly independent State and that the organization of what was only an embryo State, a potential State, becomes the organization of a fully and definitively formed State. Because of the continuity between the two, it is therefore normal to attribute to the new State, as a potential source of international responsibility, the acts of agents of the insurrectional movement. It should also be noted that such attribution is in no way brought into question by the fact that, in cases where the insurrectional movement, as such, at a given time possessed international personality, the acts of organs of that movement could be attributed by third States to the movement itself as a separate subject of international law. It is in fact the same structural entity which formerly had the features of an insurrectional movement and now has the features of a State proper.

195. A successful revolution can nevertheless cause a change affecting the pre-existing State itself, without the territorial area and unity of the latter being affected. Two situations may arise in this context, and we referred to them successively in section 9.⁴⁵⁵ The success of the

insurrectional movement may result in the complete breakdown of the State organization against which the movement had directed its struggle, and that result may affect the continuity of the State by causing a change in its identity.⁴⁵⁶ The pre-existing State then ceases to exist with its own structures and its apparatus, and in the same territory a new State, endowed as such with an international personality different from that of the former one, is constituted. In that case, as we have seen, there can be no question of considering the previous acts of organs of the pre-existing State to be acts of the new State, since two separate subjects of international law, succeeding each other in time, are involved. At the most, one might consider the possible succession of the new State to certain *ex delicto* obligations of the pre-existing State, but it is evident that the new State then assumes such obligations as a matter of State succession, not of international responsibility for its own acts. Where, on the other hand, there is continuity, such continuity is once again between the organization with which the insurrectional movement had provided itself before taking power and the organization with which it has endowed the new State resulting from the success of the revolution. It should be noted that this applies both in the situation where an insurrectional movement, at a given time, constituted a separate subject of international law, liable as such to have international responsibility attributed to it, and in the situation where what we might call this "intermediate" phase did not occur. In both cases, the organization of the insurrectional movement is, prospectively, the organization of the new State which that movement sought to install. When that happens, the organization of the revolutionary movement automatically becomes the organization of the State, without any break in continuity between the two, even though changes, adjustments, and some integration necessarily ensue. It is precisely this continuity between the real entity of the new State and that of the movement which led to its emergence which justifies once again, and without derogation from the principles habitually ap-

⁴⁵⁶ Quadri ("Stato . . .", *Nuovo Digesto Italiano, op. cit.*, p. 816) observes that "When an insurrectional government gets the upper hand over the legitimate government, causing the disintegration and destruction of the organization on which the latter is based, it must be said that the sovereign entity, the subject possessing the sovereign power, has changed" [translation from Italian]. This passage implies, *a contrario*, and quite rightly in our opinion, that where there is no "destruction" of the organization of the pre-existing State, there is no interruption in the continuity of the State as a subject of international law. In other passages in this work and in others by the same author, the idea seems to be extolled, however, that whenever an insurrectional movement is successful the State will "cease to exist" and be "replaced by another State". See *Diritto internazionale pubblico (op. cit.)*, p. 500.

See also, on this subject, Giuliano (*op. cit.*, p. 248), who affirms the "newness" of the sovereign entity that is constituted where a revolution destroys the pre-existing entity; and Arangio Ruiz (*Sulla dinamica . . . (op. cit.)*, pp. 132 *et seq.*, and "Stati e altri enti . . .", *Novissimo Digesto Italiano (op. cit.)*, p. 167). This author uses the term "revolution" to describe a situation where the entity resulting from the change presents such markedly different characteristics by comparison with the pre-existing entity that its "newness" must be acknowledged. On the other hand, the same author rightly emphasizes that, in the most common case, the pre-existing personality does not cease to exist but is only modified "materially".

⁴⁵⁴ See para. 159 above.

⁴⁵⁵ See paras. 157-158 above.

plied, the attribution to the new State, as a potential source of international responsibility, of acts committed by agents of the insurrectional movement during its struggle to overthrow the pre-existing structures.

196. But we showed that another situation might occur at the time of the success of an insurrectional movement, and this is the most frequent case. The success of the insurrection may simply lead to changes, sometimes radical changes, particularly at the summit of the organization of the State, without the entire State organization collapsing and, above all, without the continuity of the State being affected.⁴⁵⁷ The leadership organization of the insurrectional movement installs itself in power, certain institutions are replaced, others are added, still others are reformed or reorganized, but the State remains the same, both at the internal level and at the international level. It is with regard to such a situation that there arises the question whether or not it is possible to attribute retroactively to the State, as a source of State responsibility, the acts or omissions of agents of the revolutionary movement before the organization of that movement was integrated with the State organization and thus became identified with it. It should be noted, in this connexion, that references are often made to international responsibility of the State for the wrongful acts of a successful insurrectional movement, whereas what is in fact involved is the attribution of those acts to the State, as a source of the latter's responsibility. There is no question, here, of succession of the State to whatever obligations the insurrectional movement, as a separate subject of international law, may have incurred as a result of such acts. We have already seen that the question arose in the same manner when the revolutionaries had in no way constituted a movement possessing its own international personality during the intermediate period, so that no succession between two separate subjects of international law could be conceived of.

197. The difficulties which arise in connexion with the attribution to the State of the acts of agents of a successful insurrectional movement are due to two causes. First, there is the fact that, at the time when the acts complained of occurred, those who committed them belonged to an organization which was not to be integrated with that of the State until later and which, at the time in question, was opposed to the organization that was termed legitimate. Secondly, in the case referred to, the State does not cease to exist and its organization persists, even if it undergoes some alterations, with the result that, after the success of the insurrectional movement, the previous acts or omissions of members of that organization will continue to be attributed to the State. The possibility then arises of the State's being called upon to answer at the same time for acts emanating from two different organizations.

198. Despite these difficulties, authors of scholarly works and arbitrators called upon to rule on specific cases have vied in the search for the "justification" of an affirmative solution to the question. It has been argued

that the justification for attributing to the State, as a source of responsibility, acts committed during the revolution by insurgents who were subsequently victorious should be sought in the fact that at that time, already, the insurgents were exercising their authority as a "*de facto* government" in at least part of the territory of the State. But it will be seen that in practice a distinction is not made, for the purpose of attributing acts to the State, according as the acts of the insurgents precede or follow their acquisition of effective power over a given region. At the same time, as we have seen, the acts committed by insurgents are not considered to be acts of the State when the final outcome of the civil war is unfavourable to them, even if they were able to exercise *de facto* authority over some portion of the territory of the State; this proves that the attribution or non-attribution to the State of the acts of insurgents is quite independent of the exercise of *de facto* power by the insurgents in question. The idea has also been put forward that, where the action of the insurgents was successful, the insurgents would be regarded as having represented the true national will ever since their uprising against the constituted power. But the very concept of "national will" is to be treated with caution, quite apart from the fact that, in general, international law is not greatly concerned with whether a given government is or is not the representative of the "true" national will. Even leaving that aside, it is difficult to maintain that the outcome of the fighting in a civil war should, like a judgement of God, establish retrospectively that those who triumphed were, from the outset of the civil war, more representative of the true national will than those who lost. Furthermore, the idea that an insurrectional movement which is subsequently successful was from the outset the "true" government of the State because it embodied the "true" national will would involve the consequence that only the acts of organs of that movement could be considered retroactively to be acts of the State. This, however, is clearly contradicted by the practice which holds the State responsible also for acts committed during the struggle by the "legitimate" government which is subsequently overthrown.

199. In truth, the point is not so much to find a justification for the possible attribution to the State, as a source of international responsibility, of acts committed by the organs of an insurrectional movement before the latter has taken power. What is important is to determine whether that attribution is or is not made in the real world of international relations, and it is to this that we shall devote ourselves. If we do wish to find a justification of principle for such an attribution, we must seek it, once again, in the idea of continuity which appears, indeed, to be the determining criterion for the solution of the various problems envisaged here. During a civil war, two organizations are opposed to each other and are fighting for final victory. Each of the two wishes to be the organization of the State; at the outset, one is so in fact and the other potentially. In the event of the struggle's ending in victory for the pre-existing power, the insurrectional organization is dissolved and only the established apparatus remains. It is logical that one should attribute to the State only the acts or omissions of the members of that apparatus, which continues, and not the acts of members of the organ-

⁴⁵⁷ See Arangio-Ruiz, "Stati e altri enti . . .", *Novissimo Digesto Italiano* (op. cit.), p. 167.

ization which has ceased to exist without ever having succeeded in being the actual organization of the State or at least participating in it. On the other hand, when the victory falls to the insurgents and this leads to the total demise of the pre-existing State organization to the point of causing an interruption in the continuity of the State, it is normal to attribute to the newly constituted State only the acts of members of the one organization of which its own organization is the effective continuation, namely, the revolutionary organization. Lastly, if the insurgents triumph but this does not lead to the total collapse of the pre-existing State organization—if, in other words, the revolutionary structures are integrated within the framework of the previous organization—the State apparatus which results is in reality the continuation of both the organizations which confronted each other during the civil war. In that case, there is therefore nothing surprising in the attribution to the State of the acts not only of members of its preceding organization but also of members of the organization that grew up during the insurrection and is subsequently united with the preceding organization, which is thereby transformed to a greater or lesser extent. It should be added that this conclusion appears to be justified both in the case of total victory for the insurrectional movement, which then modifies the structures of the State apparatus to its liking, and in the case of an agreement between the legitimate government and the insurrectional government under which members of the insurrection are called upon to participate in the government of the State.

200. In international arbitral cases some instances can be found where the international responsibility of the State for acts committed during a civil war by agents of an insurrectional movement which was subsequently successful is recognized in principle. Such declarations are less numerous than those which could be cited in connexion with the questions discussed in the preceding section;⁴⁵⁸ but this can be explained precisely by the fact that there is no divergence of views, no doubt whatsoever, as to the validity of the principle in question. Consequently, we can confine ourselves to drawing attention to the statements contained in arbitral awards made during the twentieth century. The most interesting are to be found in certain decisions of the mixed commissions established in respect of Venezuela in 1903 and Mexico in 1920-1930. Both cases involved disputes arising out of injuries inflicted on foreign nationals during the revolutionary events which had occurred in those countries.

201. As regards the "Venezuelan arbitrations", the best-known declaration of principle, to the authority of which many authors have referred, is that which appears in the decision concerning the *Bolivar Railway Company case*. This decision came from the pen of Umpire Plumley of the British-Venezuelan Mixed Claims Commission of 1903, already mentioned. The case in question in fact

⁴⁵⁸ On the other hand, several arbitral decisions can be found which considered lawful acts committed during a civil war by successful insurgents, particularly contracts, to be acts of the State. But such decisions cannot generally be produced in support of the principle of State responsibility for the wrongful acts of the insurgents in question.

involved the attribution to the State not of an internationally wrongful act but of a lawful act, a debt contracted by the insurgents. However, the principle stated by the umpire is formulated in terms which are perfectly suited also to the case of the attribution to the State of a wrongful act. He states:

The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented *ab initio* a changing national will, crystallizing in the finally successful result.⁴⁵⁹

The principle affirmed in that decision was applied in cases of wrongful acts by the same umpire, Plumley, in the decision relating to the *Puerto Cabello and Valencia Railway Company case*, which involved precisely injuries caused to foreigners by wrongful acts of the insurgents. The umpire gave the following reason for his decision, which placed on Venezuela the obligation to make reparation for the injuries in question:

It was settled for this Commission by the opinion of the umpire in the claim of the Bolivar Company that the respondent Government, subject to certain exceptions, was liable for the acts of successful revolutionists.⁴⁶⁰

202. In the same context, reference may be made to two decisions rendered by the United States-Venezuelan Mixed Claims Commission, established under the Protocol of 17 February 1903; in these cases, claims were being considered for injuries caused by the armed forces of revolutionary movements which were subsequently successful. In the statement of reasons for the decision concerning the *Dix case*, written on behalf of the Commission by the United States Commissioner, Bainbridge, it is stated that:

The revolution of 1899, led by General Cipriano Castro, proved successful and its acts, under a well-established rule of international law, are to be regarded as the acts of a *de facto* government. Its administrative and military officers were engaged in carrying out the policy of that Government under the control of its executive. The same liability attaches for encroachments upon the rights of neutrals in the case of a successful revolutionary government, as in the case of any other *de facto* government.⁴⁶¹

Secondly, in the statement of reasons for the decision relating to the *Henry case*, written by Umpire Barge, we read:

... the revolution proved ultimately successful in establishing itself as the *de facto* Government so that the liability of the Venezuelan Government for these acts can not be denied.⁴⁶²

⁴⁵⁹ United Nations, *Reports of International Arbitral Awards*, vol. IX (United Nations publication, Sales No. 59.V.5), p. 453. The justification given by Plumley for the solution adopted is, as we have seen, open to criticism, and while some authors have repeated it, others have criticized it strongly. But what is interesting is the principle stated, not the justification given for it.

⁴⁶⁰ *Ibid.*, p. 513.

⁴⁶¹ *Ibid.*, p. 120. Note in this connexion the "justification" referred to in paragraph 198 above, according to which the acts of an insurrectional movement that is subsequently successful should be attributed to the State, since at the time when the injuries were caused by its agents it was already exercising the authority of a *de facto* government.

⁴⁶² *Ibid.*, p. 133.

Lastly, it should be noted that the same principle is set forth in the decision rendered by Umpire Plumley of the French-Venezuelan Mixed Claims Commission of 1902 in the *French Company of Venezuelan Railroads case*, a decision which we have already cited in the preceding section. This decision affirms the principle that the State cannot be held responsible for the acts of revolutionaries "unless the revolution was successful", since such acts then involve the responsibility of the State "under the well-recognized rules of public law". In the case in question, the decision therefore concluded that, since the revolution had been successful, the respondent Government was rightly held responsible for the injuries caused.⁴⁶³

203. Among the decisions rendered by the claims commissions set up between various countries and Mexico, attention should be drawn above all to the principle affirmed in the decision concerning the *Pinson case*, rendered on 19 October 1928 by the French-Mexican Claims Commission of 1924. The President of the Commission, Verzijl, who wrote the decision, ruled that: "... if the injuries originated, for example, in requisitions or forced contributions demanded... by revolutionaries before their final success, or if they were caused... by offences committed by successful revolutionary forces, the responsibility of the State, in my opinion, cannot be denied."⁴⁶⁴

Next, mention should be made of the fact that the principle of State responsibility for the acts of successful insurgents was subsequently affirmed by Nielsen in two opinions given by him, as United States Commissioner, in the Mexico-United States General Claims Commission established under the Convention of 8 September 1923 and the Mexico-United States Special Claims Commission established under the Convention of 10 September of the same year. In the first opinion, dissenting from the decision in the *Pomeroy's El Paso Transfer Company case* rendered on 8 October 1930 by the General Claims Commission, Nielsen points out that:

International tribunals have repeatedly held a government responsible for acts of successful revolutionist.⁴⁶⁵

In the second opinion, referring to the decision in the *Russel case*, rendered on 24 April 1931 by the Special Claims Commission, Nielsen maintains explicitly that, according to general international law, "a government is responsible for the acts of successful revolutionists".⁴⁶⁶ In both cases, moreover, the other members of the Commission in no way defended a principle differing from that propounded by Nielsen. They simply refrained from touching on the question, because they deemed it irrelevant to the decision in the cases considered.

204. An analysis of the practice of States makes it clear, in turn, that Governments have taken a position on the problem which concerns us similar to that taken by the arbitrators responsible for ruling on certain claims. The

⁴⁶³ *Ibid.*, vol. X (United Nations publication, Sales No. 60.V.4), p. 354.

⁴⁶⁴ *Ibid.*, vol. V (United Nations publication, Sales No. 1952.V.3), p. 353 [translation from French].

⁴⁶⁵ *Ibid.*, vol. IV (United Nations publication, Sales No. 1951.V.1), p. 563.

⁴⁶⁶ *Ibid.*, p. 831.

principle that a State could be held responsible for the wrongful acts of insurrectional movements which were successful already appeared in an opinion given by the Law Officers of the British Crown in the early days of the American Civil War, on the possibility of obtaining compensation for the injuries caused to British subjects by the insurgents. In this opinion, dated 21 October 1861, we read that:

"... should the party by whose officers or troops, or under whose authority, such losses or destruction have been inflicted, ultimately succeed in acquiring power, and be recognized by Her Majesty's Government as the Sovereign Government, it may be open to Her Majesty to insist upon compensation in respect of such losses and injuries".⁴⁶⁷

205. During the revolutionary events which took place in Mexico following the restoration of the Republic and which led to the assumption of power by the insurgents and, subsequently, to the appointment of General Porfirio Díaz as President, Secretary of State Evarts sent to the United States Minister to Mexico, on 4 April 1879, instructions in which he declared himself convinced that the Mexican Government would not reject the claims of United States nationals for injuries sustained during the revolution as a result of acts of the insurgents. The Secretary of State believed that the usual objection that the State was not responsible for the acts of an insurrectional movement would not "be pleaded in this case, as the insurgent has become the regular government". He therefore directed the Minister to Mexico to urge the claims in question with the Mexican Government.⁴⁶⁸

206. Later, in 1913, there were a number of interesting opinions given; these related to the question of compensation for injuries caused to foreigners in Mexico in 1910, first by agents of the successful revolutionary movement of Francisco Madero and later by supporters of abortive insurrectional attempts against the Madero Government. The distinction made between the two situations stands out very clearly. The British Minister to Mexico, who was consulted by his United States colleague, referred in his reply to the instructions sent by the British Foreign Office to its consular officers. In those instructions, it was pointed out that:

⁴⁶⁷ McNair, *op. cit.*, p. 255. Subsequently, at the height of the War of Secession, the Law Officers of the Crown, in an opinion given on 16 February 1863, considered the possibility that the Confederates might succeed in their separatist aims and assert their sovereignty over the Southern territories by constituting there a State independent of the Union. Thus, the situation envisaged was that of the formation of a new State by secession from the pre-existing State, a situation to which we referred in the preceding section (para. 159) and again in paragraph 194 above. Referring to this specific situation, therefore, the Law Officers of the British Crown observed that:

"In the event of the war having ceased, and the authority of the Confederate State being *de jure* as well as *de facto* established, it will be competent to Her Majesty's Government to urge the payment of a compensation for the losses inflicted on Her Majesty's Subjects by the Confederate Authorities during the War..." (*ibid.*, p. 257).

⁴⁶⁸ Moore, *A. Digest... (op. cit.)*, vol. VI, pp. 991-992. Similar arguments were behind the claims for compensation submitted by the United States to the Governments established following successful revolutions in Honduras (*Oteri case, ibid.*, pp. 992-993) and Peru (*Fowks case, ibid.*, pp. 993-994).

Where claims are made for compensation for damages done by insurgents in armed insurrections against a government which was unable to control them, claimants should be reminded that His Majesty's Government do not regard a government as liable in such cases unless that government were negligent and might have prevented the damage arising... or unless the rebellion has been successful and the insurgent party has been installed in power.⁴⁶⁹

In another note to the United States Ambassador, the same British Minister to Mexico explained that:

... if the principles laid down in the British instructions are admitted, it must also be admitted that the claims for damages by rebels since the accession of the present Government to power are in [on] a different footing from those resulting from damages by rebels during the previous period. This difference, as I see it, is especially dealt with in the British instructions for it is expressly stated that except under certain conditions, which are duly specified, His Majesty's Government do not regard a government as liable for compensation for damage done by insurgents in armed insurrection *unless the rebellion has been successful*.

Now, the rebellion against General Diaz' Government was successful and the quondam insurgent chief, Francisco Madero, is now the President. On the other hand, the various revolutionary movements directed against the present Government have, so far, entirely failed.

Whatever view our Governments may take of claims for damages by rebels during the present disturbances I think it will be impossible to ignore this distinction. It may be that they will hold that the present Government has shown such negligence in protecting the foreign interests that it must be held liable... This consideration does not, however, affect the distinction which can, and I think must, be drawn between the present and former claims.⁴⁷⁰

The United States Ambassador did not share the view of his British counterpart and informed him that his Government recognized "no difference in the character of claims growing out of the Madero revolution from those growing out of the more recent revolutionary disturbances".⁴⁷¹ He reiterated his opinion in a subsequent note.⁴⁷² However, he was flatly overruled by the Department of State, which sent him a dispatch, signed by J. B. Moore for the Secretary of State, referring to the correspondence exchanged between the Ambassador, the Mexican Ministry of Foreign Affairs and the British Minister and commenting as follows:

It being assumed that the so-called Madero revolution was successful, it would appear that, under the generally accepted rules of international law, claimants seeking compensation for damages caused during that revolution would, as a class, be in a better legal position than would persons whose claims arose out of an unsuccessful revolution.

The statement in your notes to the Mexican Foreign Office and the British Minister, that the Government of the United States perceived no distinction between the two classes of claims,

⁴⁶⁹ Those instructions are reproduced in a note of 27 January 1913 from the United States Ambassador to Mexico to the British Minister (United States of America, Department of State, *Papers relating to the Foreign Relations of the United States, 1913* (Washington, D.C., U.S. Government Printing Office, 1920), p. 937; Hackworth, *op. cit.*, 1943, vol. V, p. 668.

⁴⁷⁰ Note of 28 January 1913 (United States of America, *Papers relating to the Foreign Relations*... (*op. cit.*), p. 938.

⁴⁷¹ Note of 27 January 1913 (*ibid.*, p. 938).

⁴⁷² Letter of 3 February 1913 (*ibid.*, p. 939).

appears to have been made upon your own responsibility and without instructions from the Department. Probably it was intended to convey the opinion that claims arising out of the late revolutionary movements were valid; but it might, on the other hand, be construed as involving a renunciation or waiver of the benefit of the rule which imposes upon successful revolutionists liability for their acts. You will therefore take occasion to inform the appropriate authorities that the statements contained in your note of January 21, 1913, were made on your own responsibility, and were not intended to admit a doubt as to any of the established grounds of international liability; and you should make a similar expression to the British Minister with relation to the statements contained in your letter to him of January 27, 1913".⁴⁷³

207. The preparatory work for the Conference for the Codification of International Law held at The Hague in 1930 is, once again, the main source for ascertaining the views of Governments. The request for information on the point with which we are concerned addressed to Governments by the Preparatory Committee was formulated—as mentioned in the preceding section⁴⁷⁴—under the general heading of point IX, concerning "damage done to the person or property of foreigners by persons engaged in insurrections or riots, or through mob violence". But the question on whether a State could be held responsible for acts of organs of an insurrectional movement where the latter has subsequently been successful was clearly and aptly worded:

Is, in general the State liable, or not liable, in such cases?

...

What is the position :

...

(c) Where a rebellion is successful and the insurgent party which did the damage is installed in power and becomes the Government?⁴⁷⁵

Fifteen Governments replied giving their views explicitly on the question put to them.⁴⁷⁶ The replies sent by three of them (Hungary, the Netherlands and Czechoslovakia) are vague and no definite conclusions can be drawn from them.⁴⁷⁷ Two others, those of Denmark and Finland, seem to hold the State liable in the circumstances given in the request; they too, however, are not clear.⁴⁷⁸ But the other 10 Governments all state flatly that, where an insurrection is successful and the insurrectionist party, having taken power, has become the Government of the State, the latter must be liable for injuries caused by the insurgents during the civil war to the person or

⁴⁷³ *Ibid.*, pp. 948-949.

⁴⁷⁴ See para. 169 above.

⁴⁷⁵ League of Nations, *Bases of discussion*... (*op. cit.*), pp. 108 and 116.

⁴⁷⁶ There were in all 17 replies to point IX (c) but two of them, those of Poland and Canada (*Bases of discussion*... (*op. cit.*), p. 118; and *Supplement to Volume III* (*op. cit.*), p. 3) related to a different problem from that mentioned in the request and affirmed the principle of the responsibility of the Government which resulted from the revolution for the wrongful acts committed by organs of the preceding government.

⁴⁷⁷ *Bases of discussion*... (*op. cit.*), pp. 117-118.

⁴⁷⁸ *Ibid.*, p. 117.

property of foreigners.⁴⁷⁹ On the basis of the replies received, the Preparatory Committee for the Conference drew up basis of discussion No. 22 (c) in the following terms :

A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government *de jure* or its officials or troops.⁴⁸⁰

The Conference had to end its work before it had had an opportunity to consider this basis of discussion, so that, unfortunately, we do not have as a later source of information concerning the views of States on the subject the statements which their representatives would have made at the Conference. However, as a whole, the replies sent by Governments to the Preparatory Committee's questionnaire seem to be sufficient to confirm the widely recognized existence of a general principle of international law: a principle providing precisely for attribution to the State resulting from a successful revolution of acts committed by the insurgents during their struggle to take power, as a source of responsibility.

208. On the question which concerns us, we know very little of the practice of States after 1930. But there is no reason to think that there has been any change from the principle generally accepted at the time of the Hague Conference. The only recent opinion which we have been able to find is along the lines of those mentioned previously. This is in the instruction sent on 26 January 1959 by the Department of State to the United States Embassy in Cuba:

... a government which becomes the legitimate government of a state by a successful revolution, such as the present Government of Cuba ... is internationally responsible as a general rule for damages caused by acts of forces or authorities of both the former government and the revolutionists which were not legitimate from a military standpoint or sanctioned by the rules of warfare, such as wanton or unnecessary injury to persons or property and pillage. The government of the successful revolutionists is also internationally obligated to pay for property which was requisitioned by either the former government or the revolutionists.⁴⁸¹

209. We said above⁴⁸² that the principle that it is legitimate to attribute to a government resulting from a successful revolution the injurious acts committed earlier by the revolutionaries must also apply to the case of a coalition government formed following an agreement between the "legitimate" authorities and the leaders of the revolutionary movement. This situation has occurred very rarely.⁴⁸³ Nevertheless, there are precedents of

some interest connected with the Peruvian civil war, which was terminated by an agreement signed on 2 December 1885 by the Head of State, General Iglesias, and the leader of the insurrectional movement, General Caceres. Pursuant to that agreement, a provisional government was constituted, composed of representatives of the two parties, and that government held elections. On 3 June 1886, the Congress which was elected as a result of that popular consultation proclaimed Caceres President of the Republic. After these events, the United States Government presented certain claims to Peru in connexion with acts committed during the revolution by supporters of General Caceres's insurrectional movement. The first claim concerned the seizure by the insurgent forces, in 1884, of a quantity of guano belonging to a United States firm. The Secretary of State, Bayard, explained that it was not his intention to question the principle that a State is not ordinarily responsible for the acts of insurgents whom it could not control. The case, he observed, rested on the ground that:

The guano which was seized was appropriated to sustain a cause which has become national by the voluntary action of the people of Peru, its chief representative being at the present time the duly elected and installed constitutional executive of the Republic.⁴⁸⁴

A second and more significant claim concerned the ill-treatment inflicted in 1885 on a United States consular agent at Mollendo, named *MacCord*. The Peruvian Government at first rejected the claim, arguing that the acts complained of had been committed by "a chief in arms against the government then recognized as legitimate by all nations"; the Peruvian State could therefore not be held responsible. But the United States Minister to Peru, Buck, replied that the Peruvian Government now in office was the successor of the provisional government of Iglesias and Caceres and that therefore it was responsible for the acts of the officials of both. The Peruvian Government thereupon abandoned its earlier argument and acknowledged that the measures taken against *MacCord* emanated from a "legitimate authority": it therefore recognized them as its own. While it continued nevertheless to deny any responsibility, it did so by contesting the objectively wrongful character of the measures in question.⁴⁸⁵

210. Writers on international law in our time, while they differ in details of their individual approaches, are in principle agreed in affirming that a State whose government is the expression of a successful insurrectional

government is still the "legitimate" government. As indicated in the preceding section, the State can then be held responsible only for the acts of its own organs, and any amnesty which the latter may have granted to the insurgents may constitute a source of responsibility if it represents a failure in their duty to punish those guilty of acts injurious to foreigners.

⁴⁸⁴ Mr. Bayard to Mr. Buck, 13 August 1886 (Moore, *A Digest* ... (op. cit.), p. 992.

⁴⁸⁵ *Ibid.*, pp. 985 *et seq.* See in particular the notes from Alzamora to Buck of 28 August 1888, from Buck to Alzamora of 3 September 1888, and again from Alzamora to Buck of 6 November 1888.

The United States presented a similar claim to Peru in connexion with a series of injuries done by the troops of General Caceres to a United States consular agent at Chimbote, named *Hayball* (*ibid.*, pp. 990-991).

⁴⁷⁹ These were the Governments of Australia, Austria, Great Britain, India, Japan, Norway, New Zealand, South Africa, Switzerland and the United States (*Bases of discussion* ... (op. cit.), pp. 116 *et seq.*; and *Supplement to Volume III* (op. cit.), p. 21).

⁴⁸⁰ *Bases of discussion* ... (op. cit.), p. 118.; and *Yearbook of the International Law Commission, 1956*, vol. II, p. 224, document A/CN.4/96, annex 2.

⁴⁸¹ Whiteman, op. cit., p. 819.

⁴⁸² See para. 199, *in fine*.

⁴⁸³ It is not to be confused with that of a "legitimate" government which, after having overcome an insurrection, grants an amnesty to the insurgents. In a case of that kind, the only existing

movement must be answerable for the acts committed by agents of that movement during the revolution.⁴⁸⁶ In that connexion, they make no distinction between the situation where the insurgents have asserted their authority as a new government or new régime over the whole of the territory of the pre-existing State and the situation where they have, on the contrary, caused the formation of a new State in a portion of the territory of the pre-existing State, which is therefore detached from the latter. The international scholars are also generally agreed in affirming that in the former situation the fact that the State is held responsible for wrongful acts committed by insurgents during the revolution in no way precludes the possibility of attributing to it, at the same time, responsibility for the acts or omissions of organs of the preceding government. In truth, the writers who have touched on this question have not perhaps always sensed the distinction to be made between the case where the success of an insurrectional movement does not entirely destroy the pre-existing organization of the State and does not therefore cause any interruption in the continuity of the latter and the case where, on the contrary, a State actually ceases to exist and a new State is formed in the same territory.⁴⁸⁷ But while this distinction may have consequences with regard to the attribution or non-attribution to a State of the acts of the pre-existing government, it can certainly have none with regard to the attribution to a State of the acts of the insurrectional movement itself;⁴⁸⁸ such an attribution is, in any event, certain. Lastly, it should be noted that a reading of the various works shows that their authors explicitly or

implicitly express the opinion that the responsibility of the State for the acts of successful insurgents extends retroactively to acts committed from the beginning of the insurrectional movement's existence, whether or not that movement, at a later stage, acquired international personality.

211. We have just said that international scholars almost uniformly extol the principle of the responsibility of a State endowed with a government resulting from a successful revolution for the acts committed by organs of the revolutionary movement before the final triumph of the latter. We might specify that those who have gone most deeply into the question do not hesitate to speak explicitly, and rightly, of "attribution to the State" of the acts of the insurrectional movement.⁴⁸⁹ or, at least, imply that they view the situation in that light, since, in one way or another most of them assimilate, *a posteriori*, the organs of the insurrectional movement which has become successful to organs of the State. There is no doubt, therefore, that, with a few exceptions, the authors of theoretical works on international law generally sub-

⁴⁸⁶ See, on this subject, the following works devoted specifically to the subject of insurrections, civil wars and *de facto* governments: Goebel, *op. cit.*, p. 818; Spiropoulos, *op. cit.*, pp. 176-177; Silvanie, "Responsibility of States . . .", *American Journal of International Law (op. cit.)*, pp. 78 *et seq.*; Berlia, *op. cit.*, p. 59; J. Charpentier, *La reconnaissance internationale et l'évolution du droit des gens* (Paris, Pédone, 1956), pp. 52-53; Castrén, *op. cit.*, pp. 236 *et seq.*; Frowein, *op. cit.*, pp. 85-86; Barsotti, *op. cit.*, pp. 824-825.

See also the following works devoted in general to responsibility: Borchard, *The Diplomatic Protection . . . (op. cit.)*, pp. 241-242; Schoen, *op. cit.*, p. 80; Strupp, "Das völkerrechtliche Delikt", *Handbuch . . . (op. cit.)*, pp. 91-92; Decenièrre-Ferrandière, *op. cit.*, p. 166; Eagleton, *The Responsibility of States . . . (op. cit.)*, p. 147; Maürtua et Scott, *op. cit.*, pp. 57 *et seq.*; Reuter, "La responsabilité internationale", *Droit international public (op. cit.)*, pp. 94-95; Schüle, *op. cit.*, p. 334; Amerasinghe, "Imputability . . .", *Revue égyptienne . . . (op. cit.)*, pp. 123 *et seq.*; Jiménez de Aréchaga, *op. cit.*, pp. 563-564; Ténékidès, *op. cit.*, p. 788.

Lastly, see the following general works and manuals of international law: J. H. Ralston, *The Law and Procedure of International Tribunals* (Stanford, Calif., Stanford University Press, 1926), pp. 343 *et seq.*; Hyde, *International Law . . . (op. cit.)*, pp. 987-988; Cheng, *op. cit.*, pp. 190-191; Rousseau, *Droit international public (op. cit.)*, p. 380; Schwarzenberger, *op. cit.*, pp. 627 *et seq.*; Dahm, *op. cit.*, p. 202; Delbez, *Les principes généraux du droit international public (op. cit.)*, p. 364; Sereni, *op. cit.*, p. 1509; W. Wengler, *Völkerrecht* (Berlin, Springer, 1964), vol. II, p. 1020; Brownlie, *Principles . . . (op. cit.)*, p. 375; Cavaré, *op. cit.*, pp. 547-548; O'Connell, *op. cit.*, p. 968; Von Glahn, *op. cit.*, p. 245.

⁴⁸⁷ In fact, the writers in question had before their eyes the best-known actual cases, which generally fall within the first category rather than the second.

⁴⁸⁸ Reference may be made to the considerations set out in paragraph 195 above.

⁴⁸⁹ According to Goebel (*op. cit.*, p. 818), the State is answerable "for its own acts, heretofore the acts of rebels".* In the opinion of Eagleton, *The Responsibility of States . . . (op. cit.)*, p. 147, "the acts of the insurgents have now become the acts of the government".* According to Ralston (*op. cit.*, p. 343), "the revolutionists having succeeded, their acts from the beginning are rightfully to be considered as those of a titular government, and the final triumph of their authority should properly be given a retroactive effect, confirming and ratifying antecedent steps".* Again, for Hyde, *International Law . . . (op. cit.)*, pp. 987-988, "the acts of successful revolutionists" must be "regarded as those of the government which they have established . . .".* Cavaré (*op. cit.*, p. 547) affirms very explicitly that "The acts committed by the revolutionaries from the outset of the revolution are regarded, retroactively, as being those of the government . . . The revolution having succeeded, the revolutionary authorities can be regarded as genuine governmental authorities. We thus come back to the principle that the State is responsible for its organs" [translation from French]. According to Cheng (*op. cit.*, p. 190), "the acts of revolutionaries who are ultimately successful are imputable to the State".* Reuter ("La responsabilité internationale", *Droit international public (op. cit.)*, p. 94) is very categorical: "The acts imputable to the rebels are imputable to the State if the rebels should succeed" [translation from French]. Schwarzenberger (*op. cit.*, pp. 628-629) affirms that "Acts of successful revolutionaries can be equated retrospectively" with the acts of the government of the State "because the revolutionary government is estopped from asserting the true position". Lastly, in the opinion of Amerasinghe ("Imputability . . .", *Revue égyptienne . . . (op. cit.)*, pp. 127-128, "acts or omissions of successful insurgents are imputable to the State as from the beginning of the revolution".*

It may also be pointed out that all those writers, like Borchard, Berlia, Rousseau, Verdross, Castrén, who subscribe to the idea that successful insurgents are regarded as having from the outset represented the *true national will* must necessarily consider the organs of the insurrectional movement as being already organs of the State at the time when they committed the injurious acts.

Of all the writers consulted, only Strupp and, following in his footsteps, Decenièrre-Ferrandière appear to be negative regarding the attribution to the State of the conduct of organs of an insurrectional movement during the revolution. Their conception that, in international law, only the acts of persons vested under municipal law with the legal status of organs of the State can be "acts of the State" forces them to take such a position.

* Italics supplied by the Special Rapporteur.

scribe to the idea that the acts in question are to be regarded, retroactively, as "acts of the State". We do not feel that it is necessary to revert, on this subject, to the question of the "justifications" for that idea; we have already indicated⁴⁹⁰ above, the justifications most frequently invoked and the comments which they call for.

212. Basis of discussion No. 22 (c) drawn up by the Preparatory Committee for the 1930 Conference, has been considered above.⁴⁹¹ Apart from that text, the question of the attribution to the State, as a source of responsibility, of the acts of organs of insurrectional movements which have subsequently become the government of a State has been explicitly taken into consideration in five codification drafts: the two emanating from Harvard Law School, that of the Inter-American Juridical Committee reflecting the concept of the United States, and the two drawn up by García Amador for the International Law Commission. The Harvard draft of 1929,⁴⁹² that of the Inter-American Juridical Committee of 1965,⁴⁹³ and that of García Amador of 1958⁴⁹⁴ speak in general of State responsibility for the acts of a successful insurrection. The Harvard draft of 1961 expresses more precisely the idea of attributing to a State the acts of organs of an insurrectional movement which has subsequently become the government of that State.⁴⁹⁵ Only García Amador's revised draft of 1961 departs inexpli-

cably from the others, since it seems to try to limit—in very obscure terms, moreover—the attribution to the State of the acts or omissions of revolutionaries during a civil war, even where the revolution is successful, to cases in which there has been negligence on the part of the "legitimate" organs of the State.⁴⁹⁶

213. On the basis of the analysis made in the preceding paragraphs, we can now apply ourselves to the definition of the rule governing the situations examined in this section. The principle to be established is clear; all that remains is to find a sufficiently precise formula to encompass the different situations likely to arise in the context of the success of a revolutionary or insurrectional movement: (a) the installation, or even merely the participation of the said movement in the government of the State, whose continuity is not affected; (b) the establishment of a new State within the same territorial boundaries as the pre-existing State; (c) the establishment, following a successful insurrection, of a new State in part of the territory formerly under the sovereignty of the pre-existing State. It might be useful, in order to avoid any possible confusion, to adopt a text consisting of two separate paragraphs. It is also necessary to ensure that the wording of the rule shows that there is no other condition for attribution to the State, as a potential source of international responsibility, of the conduct of organs of the insurrectional movement than the mere existence of that movement. It is in no way required, although such is frequently the case, that the movement in question should possess international personality.⁴⁹⁷ Accordingly, attribution to the State is retroactive to the very first moment of the movement's existence. Lastly, it appears essential to indicate explicitly that, where a subversive movement only achieves the installation of a new government of a State, whose identity does not in itself change, the retroactive attribution to that State of the conduct of organs of the movement in question in no way precludes the parallel attribution to that State of the conduct engaged in during the same period by organs of the government which was then regarded as "legitimate".

214. In the light of the foregoing, we believe that we may suggest the adoption of the following text :

Article 13. — Retroactive attribution to a State of the acts of organs of a successful insurrectional movement

1. The conduct of a person or group of persons who, at the time when such conduct was engaged in, were organs of an insurrectional movement whose structures have subsequently become the structures

⁴⁹⁰ See para. 198 above.

⁴⁹¹ See para. 207 above.

⁴⁹² Article 13 (b) of this draft reads as follows:

"In the event of a successful revolution, the state whose government is established thereby is responsible under article 7, if an injury to an alien has resulted from a wrongful act or omission of the revolutionists committed at any time after the inception of the revolution."

(*Yearbook of the International Law Commission, 1956*, vol. II, p. 229, document A/CN.4/96, annex 9). See also the commentary on the article in Harvard Law School, *op. cit.*, p. 195.

⁴⁹³ According to paragraph VI of this draft:

"For damage done to the person or property of foreigners by persons engaged in insurrections . . . in general the State is not responsible in such cases, except:

"(c) Where a rebellion is successful and the insurgent party which did the damage is installed in power and becomes the Government."

(*Yearbook of the International Law Commission, 1969*, vol. II, p. 154, document A/CN.4/217 and Add.1, annex XV).

⁴⁹⁴ Article 12, paragraph 2, of this draft provides that:

"In the case of a successful insurrection, the international responsibility of the State is involved in respect of injuries caused to an alien if the injuries were the consequences of measures which were taken by the revolutionaries and which were analogous to the measures referred to in the foregoing paragraph."

(*Ibid.*, 1957, vol. II, p. 130, document A/CN.4/106, annex). See also the commentary on the article (*ibid.*, p. 128, document A/CN.4/106, chap. V, para. 31).

⁴⁹⁵ Article 18, paragraph 1, reads as follows:

"In the event of a revolution or insurrection which brings about a change in the government of a State or the establishment of a new State, an act or omission of an organ, agency, official, or employee of a revolutionary or insurrectionary group is, for the purposes of this Convention, attributable to the State in which the group established itself as the government."

(*Ibid.*, 1969, vol. II, p. 146, document A/CN.4/217 and Add.1, annex VII).

⁴⁹⁶ According to article 16 of that draft:

"The imputability of acts and omissions committed by insurgents during the conflict shall, if the insurrection is successful and a new government is installed, be determined in conformity with the provisions of articles 7 and 8 of this draft." (*Ibid.*, 1961, vol. II, p. 48, document A/CN.4/134 and Add.1, addendum. See also the commentary on the article (*ibid.*, p. 53).

⁴⁹⁷ This is what distinguishes the situations to which the rule we are seeking to define refers from those governed by the preceding rule concerning the consequences for a State of acts of "other subjects of international law".

of a new State constituted in all or part of the territory formerly under the sovereignty of the pre-existing State is retroactively considered to be an act of the newly constituted State.

2. The conduct of a person or group of persons who, at the time when such conduct was engaged in, were organs of an insurrectional movement whose structures have subsequently been

integrated, in whole or in part, with those of the pre-existing State is retroactively considered to be an act of that State. However, such attribution does not preclude the parallel attribution to the said State of the conduct of a person or group of persons who, at the aforementioned time, were organs of the government which was at that time considered to be legitimate.

ANNEX I

Articles proposed in chapter II*

Article 5. — Attribution to the State, as a subject of international law, of the acts of its organs

For the purposes of these articles, the conduct of a person or group of persons who, according to the internal legal order of a State, possess the status of organs of that State and are acting in that capacity in the case in question, is considered as an act of that State from the standpoint of international law.

Article 6. — Irrelevance of the position of an organ of the State in the distribution of powers and in the internal hierarchy

For the purposes of determining whether the conduct of an organ of the State is an act of the State in international law, the questions whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in the hierarchy of the State, are irrelevant.

Article 7. — Attribution to the State, as a subject of international law, of the acts of organs of public institutions separate from the State

The conduct of a person or group of persons who, having under the internal legal order of a State, the status of an organ of a public corporation or other autonomous public institution or of a territorial public entity (municipality, province, region, canton, member state of a federal State, autonomous administration of a dependent territory, etc.) and acting in that capacity in the case in question, is also considered to be an act of the State in international law.

Article 8. — Attribution to the State, as a subject of international law, of the acts of private persons in fact performing public functions or in fact acting on behalf of the State

The conduct of a person or group of persons who, under the internal legal order of a State, do not formally possess the status of organs of that State or of a public institution separate from the State, but in fact perform public functions or in fact act on behalf of the State, is also considered to be an act of the State in international law.

Article 9. — Attribution to the State, as a subject of international law, of the acts of organs placed at its disposal by another State or by an international organization

The conduct of a person or group of persons who, according to the legal order of a state or of an international organization, possess the status of organs and who have been placed at the disposal of another State, is considered to be an act of that State in international law, provided that those organs are actually under the authority of the State at whose disposal they have been placed and act in accordance with its instructions.

Article 10. — Conduct of organs acting outside their competence or contrary to the provisions concerning their activity

1. The conduct of an organ of the State or of a public institution separate from the State which, while acting in its official capacity, exceeds its competence according to municipal law or contravenes the provisions of that law concerning its activity is nevertheless considered to be an act of the State in international law.

2. However, such conduct is not considered to be an act of the State if, by its very nature, it was wholly foreign to the specific functions of the organ or if, even from other aspects, the organ's lack of competence was manifest.

Article 11. — Conduct of private individuals

1. The conduct of a private individual or group of individuals, acting in that capacity, is not considered to be an act of the State in international law.

2. However, the rule enunciated in the preceding paragraph is without prejudice to the attribution to the State of any omission on the part of its organs, where the latter ought to have acted to prevent or punish the conduct of the individual or group of individuals and failed to do so.

Article 12. — Conduct of other subjects of international law

1. The conduct of a person or group of persons acting in the territory of a State as organs of another State or of an international organization is not considered to be an act of the first-mentioned State in international law.

2. Similarly, the conduct of a person or group of persons acting in the territory of a State as organs of an insurrectional movement directed against that State and possessing separate personality is not considered to be an act of that State in international law.

3. However, the rules enunciated in paragraphs 1 and 2 are without prejudice to the attribution to the State of any omission on the part of its organs, where the latter ought to have acted to prevent or punish the conduct of the person or group of persons in question and failed to do so.

4. Similarly, the rules enunciated in paragraphs 1 and 2 are without prejudice to the attribution of the conduct of the person or group of persons in question to the subject of international law of which they are the organs.

5. The rule enunciated in paragraph 2 is without prejudice to the situation which would arise if the structures of the insurrectional movement were subsequently to become, with the success of that movement, the new structures of the pre-existing State or the structures of another, newly constituted State.

Article 13. — Retroactive attribution to a State of the acts of organs of a successful insurrectional movement

1. The conduct of a person or group of persons who, at the time when such conduct was engaged in, were organs of an insurrectional movement whose structures have subsequently become the structures of a new State constituted in all or part of the territory formerly under the sovereignty of the pre-existing State is retroactively considered to be an act of the newly constituted State.

2. The conduct of a person or group of persons, who at the time when such conduct was engaged in, were organs of an insurrectional movement whose structures have subsequently been integrated, in whole or in part, with those of the pre-existing State is retroactively considered to be an act of that State. However, such attribution does not preclude the parallel attribution to the said State of the conduct of a person or group of persons who, at the aforementioned time, were organs of the government which was at that time considered to be legitimate.

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MOST-FAVOURED-NATION CLAUSE

[Agenda item 3]

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Third report on the most-favoured-nation clause,
by Mr. Endre Ustor, Special Rapporteur

Draft articles with commentaries

[Original text: English]
[31 March and 8 May 1972]

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ABBREVIATIONS

GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
<i>I.C.J. Pleadings</i>	<i>I.C.J., Pleadings, Oral Arguments, Documents</i>
<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
UNCTAD	United Nations Conference on Trade and Development

Article 1. — Use of terms

For the purpose of the present articles:

(a) "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "Contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(c) "Party" means a State which has consented to be bound by the treaty and for which the treaty is in force;

(d) "Granting State" means a contracting State which has consented to accord most-favoured-nation treatment;

(e) "Beneficiary State" means a contracting State which has consented to accept most-favoured-nation treatment;

(f) "Third State" means a State not a party to the treaty in question.

COMMENTARY

(1) Because the most-favoured-nation clause is a treaty provision and because in most, but not all, cases¹ a collateral treaty (one concluded between the "granting State" and a "third State") is also involved, it is necessary to define in what sense the term "treaty" will be used in this context. Paragraph (a) of article 1 reproduces the definition contained in article 2, paragraph 1 (a) of the 1969 Vienna Convention on the Law of Treaties.² This has the obvious advantage that the term as it is used in one study of the Commission will not have a different meaning from that attributed to the same term in the Commission's earlier work and in the Convention adopted on that basis. As a result, the draft articles will not apply to cases where most-favoured-nation treatment is promised orally by one State to another—cases which hardly if ever occur. This restriction is perhaps already inherent in the expression "clause" which probably implies that it is part of a written agreement. The collateral treaty, if there is one,³ is in practically all cases also concluded in written form and the other possible cases, extremely rare, can be covered by appropriate drafting.

The proposed wording will also exclude cases where States make contractual promises in "Headquarters agreements" to accord to international organizations and their staffs treatment similar to that granted to other organizations or to diplomatic missions.⁴ Such cases are, however, rather rare and, furthermore, they do not constitute "most-favoured-nation" clauses in the strictest

¹ See article 3, paragraph 2 below.

² For the text of the Convention, 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. 289.

³ See article 3, paragraph 2 below.

⁴ See *Yearbook of the International Law Commission, 1970*, vol. II, p. 214, document A/CN.4/228 and Add.1, paras. 90-92.

sense of the term. These are the reasons why the Special Rapporteur suggests that, at least for the time being, the definition of the term "treaty" in the wording proposed in sub-paragraph (a) should be retained.

(2) The terms "contracting State" and "party" and their meanings are also borrowed from the Convention on the Law of Treaties for the same reasons as stated above. It may be seen later whether the use of both terms and the fine distinction drawn between their meanings will be warranted also for the purpose of the draft articles on the most-favoured-nation clause.

(3) The term "third State" is likewise defined on the line of article 2, paragraph 1 (h) of the 1969 Convention, with the addition of the words "in question". These have been added because in the context of the topic under consideration the third State, although not a party to the treaty in question, i.e., the one which contains the clause, is in most cases a party to another treaty concluded with the granting State (the collateral treaty).

(4) The terms "granting State" and "beneficiary State" and their meanings do not seem to be in need of explanation. Although the original intention was to refer in the commentary to the obvious fact that when States reciprocally grant each other most-favoured-nation treatment, which is the usual case, each contracting State becomes both granting State and beneficiary State *uno actu*, the statement has been made in the article itself (article 2, paragraph 2).

(5) The definitions of other terms will be added to the list contained in article 1 if in the course of further work the need arises.

Article 2. — Most-favoured-nation clause

1. "Most-favoured-nation clause" means a treaty provision whereby an obligation is undertaken by one or more granting States to accord most-favoured-nation treatment to one or more beneficiary States.

2. When, as is the usual case, the contracting States undertake to accord most-favoured-nation treatment to each other, each of them becomes thereby a granting and a beneficiary State simultaneously.

Article 3. — Most-favoured-nation treatment

1. "Most-favoured-nation treatment" means treatment upon terms not less favourable than the terms of the treatment accorded by the granting State to any third State in a defined sphere of international relations with respect to determined persons or things.

2. Unless otherwise agreed, paragraph 1 applies irrespective of the fact whether the treatment accorded by the granting State to any third State is based upon treaty, other agreement, autonomous legislative act or practice.

COMMENTARY TO ARTICLES 2 AND 3

1) Articles 2 and 3 attempt to define the notions of most-favoured-nation clause and most-favoured-nation treatment respectively. Although the character of the

articles is similar to that of article 1 on the use of terms, it was considered more convenient to treat these matters, around which all the other articles will be centred, in articles separate from article 1.

(2) Legal literature abounds in definitions of the most-favoured-nation clause. The few examples quoted below are classified under two headings: (a) definitions restricted to clauses as they appear in commercial treaties and (b) definitions of a general character, not restricted to commerce.⁵

(a) *Definitions restricted to clauses, as they appear in commercial treaties*

- (i) A most-favoured-nation clause is a provision, generally inserted in a commercial agreement between two States, which obligates the contracting parties to extend all concessions or favours made by each in the past, or which might be made in the future, to the articles, agents or instruments of commerce of any other State in such a way that their mutual trade will never be on a less favourable basis than is enjoyed by that State whose commercial relations with each is on the most favourable basis. The fundamental point is equality based upon the treatment received by any third country...⁶
- (ii) Briefly defined, the most-favoured-nation clause is simply a pledge of non-discrimination against the commerce of the other party to the treaty, or a pledge to make the other party equally favoured with any third country. The customary wording, however, has been a pledge to grant to the other party treatment not less favourable than may be granted to the "most favoured" among other countries...⁷

⁵ For other definitions, see C. Calvo, *Le droit international théorique et pratique*, 4th ed. (Paris, Guillaumin, 1887), vol. III, p. 365; N. Ito, *La clause de la nation la plus favorisée* (Paris, Les Editions internationales, 1930); D. Anzilotti, *Cours de droit international*, translated from the Italian of the 3rd edition by G. Gidel (Paris, Sirey, 1929), p. 432; P. Guggenheim, *Traité de droit international public*, 2nd ed., rev. and augmented (Geneva, Georg, 1967), vol. I, p. 205; L. Oppenheim, *International Law: A Treatise*, 8th ed. [Lauterpacht] (London, Longmans, Green, 1955), vol. I, p. 971; D. M. Genkin, "Printsip naibolshego blago-priyatsvovania v torgovykh dogovorakh gosudarstv", [The most-favoured-nation principle in trade treaties between States], *Sovetskoe gosudarstvo i pravo* [The Soviet State and Law], (Moscow), No. 9, September 1958, p. 22; A.S. Korolenko, *Torgovye dogovory i soglasenia SSSR s inostrannymi gosudarstvami* [Trade treaties and agreements concluded between the USSR and foreign countries] (Moscow, Vnechtorgizdat, 1953); P. Level, "Clause de la nation la plus favorisée" in *Encyclopédie Dalloz—Droit international* (Paris, Dalloz, 1968), vol. I, p. 332; M. A. Vieira, "La Cláusula de la nación más favorecida y el Tratado de Montevideo", in *Anuario Uruguayo de Derecho Internacional* (Montevideo, Facultad de Derecho y Ciencias Sociales, Universidad de la República), vol. 4 (1965-1966), p. 189.

⁶ R. C. Snyder, *The Most-Favored-Nation Clause: An Analysis with Particular Reference to Recent Treaty Practice and Tariffs* (New York, King's Crown Press, Columbia University, 1948) p. 10.

⁷ C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 2nd rev. ed. (Boston, Little, Brown, 1947), vol. II, p. 1503, citing a statement made by the United States Tariff Commission in 1933.

(iii) The term "most-favoured-nation clause" refers, in its general application, to "a treaty provision whereby two contracting parties A and B agree that if one of them subsequently concludes with a third State C a trade treaty granting C special trade advantages, those advantages will *ipso facto* be granted to the earlier contracting party."⁸ [Translation from French]

(b) *Definitions of a general character, not restricted to commerce*

- (i) The most-favoured-nation clause is a provision, generally contained in an agreement between States, whereby the contracting parties grant each other all such advantages, greater than they have previously enjoyed, as they have already granted or may subsequently grant to a third Power, without the need for the conclusion of a new agreement between them for that purpose."⁹ [Translation from French]
- (ii) The most-favoured-nation clause may be defined as a provision whereby two Governments arrange for their—in principle—mutual participation in any more advantageous legal system which they may already have established, or may subsequently establish, in agreement with other Governments.¹⁰
- (iii) The most-favoured-nation clause is an agreed provision under which a nation pledges itself to grant another, i.e., the favoured nation, all the rights and privileges it guarantees to other nations under different agreements. To give this clause meaning it is necessary to grant some privilege to a third nation.¹¹
- (iv) The most-favoured-nation clause... is the obligation embodied in bilateral or multilateral treaties under international law to grant the other contracting party most-favoured-nation treatment. A State grants another State most-favoured-nation treatment, when, in its legislative or administrative measures, it treats the other State, or the latter's nationals, vessels, goods and products, in a manner corresponding to the most favourable treatment which it accords in the same regard and under the same conditions to any third State.¹²
- (v) Under the most-favoured-nation principle is understood the stipulation contained in international treaties according to which each contracting party is obliged to grant the other contracting

⁸ T. Flory, *Le G.A.T.T., droit international et commerce mondial* (Paris, Librairie générale de droit et de jurisprudence, 1968) p. 14, quoting from C.-A. Colliard, *Institutions internationales*, 4th ed. (Paris, Dalloz, 1967), p. 248.

⁹ S. Basdevant, "Clause de la nation la plus favorisée", in A. G. de Lapradelle et J.-P. Niboyet, *Répertoire de droit international* (Paris, Sirey, 1929), vol. III, p. 464.

¹⁰ G. Scelle, *Précis de droit des gens—Principes et systématique* (Paris, Sirey, 1934), vol. II, p. 384.

¹¹ M. Bartoš, "The most-favoured-nation clause in international law", *Review of International Affairs* (Belgrade), vol. 13, No. 303 (1962), p. 11.

¹² K. Strupp, *Wörterbuch des Völkerrechts*, 2nd ed. [Schlochauer] (Berlin, de Gruyter, 1961), vol. II, p. 497.

party in a certain domain of their mutual relations defined in the treaty the same rights, advantages, privileges and favours as it grants or will grant in the future to any third State.¹³

(vi) The most-favoured-nation clause is a provision in a treaty whereby a State grants another State such advantages as it has already granted or may subsequently grant to any other State.¹⁴

(3) The definitions proposed in articles 2 and 3 do not purport to contain all the elements which characterize the clause and its operation. They should be read, therefore, in the context of the whole draft, in conjunction with the other articles of the draft.

(4) According to article 2, paragraph 1, "most-favoured nation treatment" is the aim and purpose of the clause. No mention is made of such related notions as the "most-favoured-nation principle", the "most-favoured-nation régime" and the "most-favoured-nation standard". While all these expressions may have their merits in particular contexts, their inclusion in the definition of the clause was not considered necessary. As to the last quoted expression, supported by Schwarzenberger,¹⁵ it is believed that it means really the "standard of most-favoured-nation treatment".¹⁶

(5) When attempting to define the notion of most-favoured-nation clause the warning of McNair was kept in mind: "although it is customary to speak of *the* most-favoured-nation clause, there are many forms of the clause, so that any attempt to generalize upon the meaning and effect of such clauses must be made, and accepted, with caution."¹⁷ Expressed in other words: "Speaking strictly, there is no such thing as *the* most-favoured-nation clause: every treaty requires independent examination",¹⁸ and further there are innumerable most-favoured-nation clauses, but there is only *one* most-favoured-nation [treatment] standard.¹⁹ These considerations were taken into account when choosing that form of definition of the clause in which stress is laid upon most-favoured-nation treatment, the essence of the definition being that any treaty stipulation according most-favoured-nation treatment is a most-favoured-nation clause.

¹³ E. Usenko, "Formy regulirovaniia sotsialisticheskogo mezhdunarodnogo razdeleniia truda" [Forms of the regulation of the Socialist International Division of Labour], *Mezhdunarodnye otnosheniia* [International relations] (Moscow, 1965), p. 226 (German edition: *Sozialistische internationale Arbeitsteilung und ihre rechtliche Regelung* (Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1966), p. 191).

¹⁴ D. Vignes, "La clause de la nation la plus favorisée et sa pratique contemporaine", *Recueil des cours de l'Académie de droit international de La Haye, 1970-II* (Leyden, Sijthoff, 1971), vol. 130, p. 213.

¹⁵ G. Schwarzenberger, *International Law and Order* (London, Stevens, 1971), p. 129.

¹⁶ Schwarzenberger denominates other kinds of standard, such as those of "preferential treatment", "identical treatment" and "equitable treatment" (*ibid.*, pp. 156-157). [Italics supplied by the Special Rapporteur.]

¹⁷ A. D. McNair, *The Law of Treaties* (Oxford, Clarendon Press, 1961), p. 273.

¹⁸ D. Anzilotti and A. D. McNair, quoted in Schwarzenberger, *op. cit.*, p. 138.

¹⁹ *Ibid.*, p. 159.

(6) It follows from the definition given in article 2, paragraph 1 that the undertaking to accord most-favoured nation treatment is a constitutive element of a most-favoured-nation clause. Consequently, clauses not containing this element will fall outside the scope of the present study even if they aim at an effect similar to that of a most-favoured-nation clause. A case in point is article XVII, paragraph 2 of the General Agreement on Tariffs and Trade where "fair and equitable treatment" is demanded from the contracting parties with respect to imports of products for immediate governmental use.²⁰ Another example is article XIII, paragraph 1 of the General Agreement which requires that the administration of quantitative restrictions shall be "non-discriminatory";²¹ similarly article 23 of the Treaty establishing a Free-Trade Area and Instituting the Latin American Free-Trade Association ("Montevideo Treaty") of 18 February 1960.²² While a most-favoured-nation clause assures the beneficiary against discrimination, a clause promising non-discrimination will not necessarily yield the same advantages as a most-favoured-nation clause.²³ Whether a given treaty provision falls within the purview of a most-favoured-nation clause is a matter of interpretation.

(7) Article 2, paragraph 1 is intended to cover clauses inserted in both bilateral and multilateral treaties. It covers also the admittedly rare cases of "unilateral most-favoured-nation treatment grants" embodied in such treaties. This is believed to be advisable for a number of reasons. When it was stated in paragraph 8 of the Special Rapporteur's working paper of 19 June 1968 that "a clause containing a unilateral promise is only of historical significance"²⁴ it was the capitulations that the writer had in mind. The statement that "today the clause is never unilateral"²⁵ refers to the so-called "general most-favoured-nation clauses" usually embodied in commercial and establishment treaties. Indeed, a unilateral grant in treaties of this type would make the treaty clearly unequal and possibly void. One can also subscribe to the view that in such cases "it is a matter of interpretation of the... instrument concerned whether... a unilateral grant of m.f.n. treatment is intended to be legally binding. In any case, it may be revoked on reasonable notice."²⁶

A unilateral promise, or rather a *pactum de contrahendo* concerning future agreements on unilateral most-favoured-nation grants is stipulated in Annex F, Part II of the treaty concerning the establishment of the Republic

²⁰ United Nations, *Treaty Series*, vol. 55, p. 252. See also *Yearbook of the International Law Commission, 1970*, vol. II, p. 224, document A/CN.4/228 and Add.1, para. 162.

²¹ *Ibid.*, p. 223, document A/CN.4/228 and Add.1, para. 160.

²² United Nations, *Multilateral Economic Co-operation in Latin America*, vol. I, *Text and documents* (United Nations publication, Sales No. E.62.II.G.3), p. 60; see also *Yearbook of the International Law Commission, 1970*, vol. II, p. 224, document A/CN.4/228 and Add.1, para. 161.

²³ See para. 13 below.

²⁴ *Yearbook of the International Law Commission, 1968*, vol. II, p. 166, document A/CN.4/L.127, para. 8.

²⁵ *Ibid.*

²⁶ Schwarzenberger, *op. cit.*, p. 138.

of Cyprus, signed at Nicosia on 16 August 1960: "The Republic of Cyprus shall, by agreement on appropriate terms, accord most-favoured-nation treatment to the United Kingdom, Greece and Turkey in connexion with all agreements whatever their nature."²⁷

There are however, exceptional situations in which, in the nature of things, only one of the contracting parties is in the position to offer most-favoured-nation treatment in a "specialized most-favoured-nation clause", possibly against a different type of compensation. A case in point is the treaty of 13 October 1909 in which Switzerland granted unilaterally most-favoured-nation treatment to Germany and Italy regarding the use of the railway built on the Gotthard in Switzerland.²⁸ Such a unilateral clause can occur, for example, in a treaty by which most-favoured-nation treatment is accorded to the ships of a land-locked State in the ports and harbours of the granting State. The land-locked State not being in the position to reciprocate in kind, the clause remains unilateral; the same treaty may of course provide for another type of compensation for the granting of most-favoured-nation treatment. Thus in article 11 of the Treaty of Trade and Navigation between the Czechoslovak Republic and the German Democratic Republic of 25 November 1959, the latter State granted unilaterally most-favoured-nation treatment to "Czechoslovak merchant vessels and their cargoes... on entering and leaving, and while lying in, the ports of the German Democratic Republic."²⁹ A similar situation may arise if the treaty regulates specifically the trade and the customs tariff regarding one particular kind of product only (e.g., oranges) in respect of which there is but one-way traffic between the two contracting parties.

(8) It is obviously desirable that any definition of most-favoured-nation clauses embraces also those inserted in multilateral treaties. The topic under consideration by the Commission is not confined to bilateral treaties. Traditionally, most-favoured-nation clauses appear in bilateral treaties. With the increase of multilateralism in international relations such clauses have found their way into multilateral treaties.³⁰ Among the more recent

ones are the General Agreement on Tariffs and Trade, the Montevideo Treaty, the Convention relating to the Status of Refugees (Geneva, 28 July 1951)³¹ and the Convention relating to the Status of Stateless Persons (New York, 28 September 1954)³² In this connexion reference must be made to the important study recently undertaken on the most-favoured-nation clause in multilateral treaties by the Institute of International Law.³³

(9) Paragraph 2 of article 2 is intended merely to complete paragraph 1, and to elucidate the situation in cases where, as usual, obligations to grant most-favoured-nation treatment are undertaken by the contracting States reciprocally.

(10) In paragraph 1 of article 2, the adjective "equal" could have been used to denote the relation between the terms of the treatment enjoyed by any third State and those promised by the granting State to the beneficiary State. The word "equal", however, does not fit exactly. It is certainly not as rigid as "identical" and not as vague as "similar" and these are arguments in its favour. Against it, a number of considerations may be made: most-favoured-nation treatment does not exclude the possibility of the granting State according to the beneficiary State additional advantages beyond those conceded to the most-favoured third State. In other words, while most-favoured-nation treatment excludes preferential treatment of third States by the granting State it is fully compatible with preferential treatment of the beneficiary State by the granting State.³⁴ Thus, instead of qualifying the terms of the treatment due to the beneficiary State under a most-favoured-nation clause as "equal" to those of the treatment accorded to the third State, the expression "not less favourable" was found to be more adequate.

(11) Notwithstanding the foregoing considerations there are arguments militating in favour of the use of the word "equal". However true it may be that the beneficiary may be treated above the level of the treatment of the most-favoured third State, this is a rather remote, more theoretical than practical, possibility. On the other hand, "equality of treatment" seems to be particularly closely attached to the operation of the most-favoured-nation clause. It has been held that the clause represents, hand is the instrument of, the principle of equality of treatment in the field of foreign trade and that the clause is a means to an end: the application of the rule of equality of treatment in commercial relations.³⁵ It is submitted that this characteristic of the clause is not restricted to the field of commercial relations.

(12) Indeed, the International Court of Justice considered this feature of the clause a general one, stating that the intention of most-favoured-nation clauses is "to establish and to maintain at all times fundamental

²⁷ United Nations, *Treaty Series*, vol. 382, p. 144.

²⁸ Guggenheim, *op. cit.*, p. 207.

²⁹ United Nations, *Treaty Series*, vol. 374, p. 120.

³⁰ As the earliest examples of multilateral treaties embodying stipulations for most-favoured-nation treatment the following treaties are quoted by Schwarzenberger, *op. cit.*, p. 138: Protocol between Great Britain, Spain and Germany regarding the Sulu Archipelago of 11 March 1877, article 3 (*Hertslet's Commercial Treaties* (London, Butterworth, 1880), vol. XIV, pp. 515-516); Convention of 3 July 1880 between Austria-Hungary, Belgium, Great Britain, etc., for the Settlement of the Right of Diplomatic Protection in Morocco (*British and Foreign State Papers, 1879-1880* (London, H.M. Stationery Office, 1887), p. 644); Convention and Statute on the International Régime of Maritime Ports of 9 December 1923, articles 2 and 5 (League of Nations, *Treaty Series*, vol. LVIII, p. 301). Also, the Ouchy Convention on the Lowering of Economic Barriers of 18 July 1932, between Belgium, Luxembourg and the Netherlands, open to all States, provides in article 5: "The High Contracting Parties undertake to apply to their reciprocal exchanges the unconditional and unlimited régime of the most-favoured-nation." (M. O. Hudson, *International Legislation* (Washington, D.C., Carnegie Endowment for International Peace, 1932-1934), vol. VI, p. 98.) The last convention mentioned has not entered into force.

³¹ United Nations, *Treaty Series*, vol. 189, p. 150.

³² *Ibid.*, vol. 360, p. 130. See, however, para. 26 below.

³³ *Annuaire de l'Institut de droit international, 1969* (Basle), vol. 53 (1969), t. 1, pp. 1-292 (P. Pescatore, Rapporteur).

³⁴ Schwarzenberger, *op. cit.*, p. 129.

³⁵ See *Yearbook of the International Law Commission, 1970*, vol. II, p. 209, document A/CN.4/228 and Add.1, para. 55.

equality without discrimination among all of the countries concerned".³⁶ Also, a former chairman of the International Law Commission has stated:

Fundamentally, therefore, its effect is to generalize the advantages which one of the contracting Parties might grant, either generally or in certain particular respects, to a third State. Hence, it is an important means of achieving the purpose expressed in Article I, paragraph 2, of the Charter of the United Nations, viz. "To develop friendly relations among nations based on the respect for the principle of equal rights. . . of peoples".³⁷

(13) Another authority warns us against identifying the principle of most-favoured-nation treatment with the principle of non-discrimination. The latter is much more general in character and governs the political, economic, cultural and other relations of States. The principle of most-favoured-nation treatment is preponderantly confined to economic relations and notably to those in respect of which it has been conventionally stipulated. This means that States can expect equal treatment in their international relations from their partners, within a general, non-discriminatory régime. In the régime of the most-favoured-nation, that of the most advantageous conditions can be claimed only on the ground of appropriate treaty obligations. The existence of these two kinds of régimes can be best illustrated by that system of customs tariffs which applies one column of lower tariffs to imports from States enjoying most-favoured-nation treatment and a different one, of higher tariff, to imports from all others.³⁸ Incidentally, the International Law Commission has already had opportunities to pronounce itself on the general character of the principle of non-discrimination. It stated that the rule of non-discrimination "is a general rule which follows from the equality of States",³⁹ and that non-discrimination is "a general rule inherent in the sovereign equality of States."⁴⁰

(14) Because of the special nature of the most-favoured-nation clause (and particularly its unconditional form) it has been widely and perhaps generally recognized as the fundamental basis on which international trade should be conducted. This is expressed by General Principle Eight adopted at the first session of UNCTAD.⁴¹ However, a very important qualification was embodied in the text of the General Principle itself and explained elsewhere as follows: "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 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."⁴² A further elaboration on these problems has been omitted here.⁴³ It is intended to revert to them in connexion with the possible exceptions to the clause without going into the depths of the matter. These problems do not so much pertain to the legal aspects of the clause but rather to the vast question of the organization of international trade. These problems have been handled with restraint, in the belief that it was in conformity with the intentions of the Commission to "clarify the scope and effect of the clause as a legal institution without, however, entering into fields outside its [the Commission's] functions."⁴⁴

(15) In some definitions of the most-favoured-nation treatment it is stressed that it must be equal or not inferior to that which "has been or will in the future be granted" to any third State. While this is perfectly correct, the text proposed in article 3, paragraph 1, employs instead the word "accorded", believing that it covers the same idea without making the wording too heavy.

(16) The reference in article 3, paragraph 1 to "any third State" is without prejudice to any exceptions upon which the contracting States may agree. The problem of exceptions will be dealt with later.

(17) Article 3, paragraph 1, requires that the most-favoured-nation treatment be confined to "a defined sphere of international relations with respect to determined persons or things". This seems at first sight to be in contradiction with the idea that a most-favoured-nation clause should not necessarily be, as in most cases it is, a so-called "specialized" clause, i.e. one which clearly circumscribes the field of its application (e.g., commerce, navigation, establishment, etc.) and its object (e.g., goods imported from the beneficiary country, ships sailing under its flag, its nationals, etc.), but that it can be drafted also as a "general clause". The latter has been described as one whose field of application "is not restricted by any terms of the provisions".⁴⁵ It may be that in the past there have been clauses which corresponded to

³⁶ Case concerning Rights of Nationals of the United States of America in Morocco, Judgment of 27 August 1952, *I.C.J. Reports*, 1952, p. 192.

³⁷ Second report on consular intercourse and immunities by Mr. Jaroslav Zourek, Special Rapporteur. See *Yearbook of the International Law Commission*, 1960, vol. II, p. 19, document A/CN.4/131, part II, para. 3.

³⁸ E. Usenko, *op. cit.*, p. 238 (p. 200 of German edition).

³⁹ *Yearbook of the International Law Commission*, 1958, vol. II, p. 105, document A/3859, chap. III, draft articles on diplomatic intercourse and immunities, commentary to article 44.

⁴⁰ *Ibid.*, 1961, vol. II, p. 128, document A/4843, chap. II, draft articles on consular relations, commentary to article 70.

⁴¹ Adopted by a roll-call vote of 78 to 11, with 23 abstentions (*ibid.*, 1970, vol. II, p. 231, document A/CN.4/228 and Add.1, para. 188).

⁴² *Ibid.* The quotation is from a memorandum submitted by UNCTAD in reply to a circular letter of the Secretary-General. For more details on the views of UNCTAD on the most-favoured-nation clause in trade among developed countries and among developing countries, see *ibid.*, pp. 237-239, document A/CN.4/228 and Add.1, annex I.

⁴³ For a scholarly treatment of trade problems of developing countries, see K. Hyder (Hasan), *Equality of Treatment and Trade Discrimination in International Law* (The Hague, Nijhoff, 1968). See also H. Gros Espiell, "The most-favoured-nation clause: its present significance in GATT", *Journal of International Trade Law* (Twickenham), vol. 5, No. 1 (Jan.-Feb. 1971), p. 29.

⁴⁴ *Yearbook of the International Law Commission*, 1969, vol. II, p. 234, document A/7610/Rev.1, para. 87.

⁴⁵ Basdevant, *op. cit.*, para. 34.

this description.⁴⁶ Even such kinds of clauses are evidently limited by the object of the treaty itself (e.g., commerce, establishment, etc.).⁴⁷ When the Economic Committee of the League of Nations pleaded for a clause unrestricted, it did so under the heading "The most-favoured-nation clause in customs matters" and the essence of the plea was that the clause "must apply to the whole of the tariffs of the contracting countries".⁴⁸

(18) The Special Rapporteur tried to define the spheres of inter-nation relations where States may agree on most-favoured-nation treatment, in other words, to find a comprehensive expression for the fields in which most-favoured-nation clauses may be applied.⁴⁹ "Commerce is the principal sphere of most-favoured-nation clauses but that term has been liberally construed", states McNair,⁵⁰ and indeed the word "commerce" would be the closest to what is sought for, particularly if it could be given the meaning of the latin *commercium* which encompasses not only trade, but also intercourse, communication and all kinds of contact. It was felt, however, that the ordinary meaning of the word cannot be strained so far as to embrace all fields of international relations in which most-favoured-nation clauses have been included in treaties.

(19) In this connexion it should be noted that the present study is not based on exhaustive research on treaties containing most-favoured-nation clauses. Such research, comparable to Laokoon's struggle with the serpents, has been undertaken by R. C. Snyder in respect of 600 economic treaties published in the League of Nations *Treaty Series*.⁵¹ According to Pescatore, "With the exception of the agreements concluded within the framework of GATT, there can be found in the United Nations *Treaty Series* only some 30 international treaties which include the m.f.n.c. [most-favoured-nation clause]."⁵² Admitting that not necessarily all are registered with the United Nations Secretariat, he ascribes this decrease in the number of such treaties to the fact that States parties to the General Agreement on Tariffs and Trade have no need to conclude bilateral agreements on most-favoured-treatment with respect to customs tariffs as between themselves. Thirty seems to the Special Rapporteur a very low estimate. However it may be, the number of treaties published in the United Nations *Treaty Series* containing a most-favoured-nation clause is a fraction

of the number mentioned above in relation to the League of Nations *Treaty Series*, hence this smaller number would lend itself more easily to classification and research. It is believed that the United Nations *Treaty Series* is essentially a faithful reflexion of the treaty relations of States and that the conclusions drawn from its examination could be relied upon.

(20) The fields of application of the clause are extremely varied. Trade and particularly customs matters are the fields where the clause is most frequently applied. Some treaties contain a so-called "general clause" which stipulates most-favoured-nation treatment" in all matters relating to trade, navigation and all other economic relations . . ." ⁵³ In customs matters the "general clause" or article I, paragraph 1, of GATT is the best known example.⁵⁴ Clauses in this field are sometimes drafted in a negative form promising not the "most-favourable" but the "least unfavourable" treatment. Thus, in article 4 of the treaty between Czechoslovakia and the German Democratic Republic, quoted above, it is stated:

. . . natural and manufactured products imported from the territory of one Contracting Party . . . shall not be liable to any duties, taxes or similar charges other or higher, or to regulations other or formalities more burdensome, than those imposed on similar natural and manufactured products of any third State.

(21) Transport in general and navigation in particular are again important fields where the clause is applied. Articles 2 and 5 of the Convention and Statute on the International Régime of Maritime Ports of 9 December 1923 ⁵⁵ assure national treatment and most-favoured-nation treatment for the vessels of the contracting States in the ports of their treaty partners. The same treatment should apply to the vessels of land-locked States as regards access to seaports and the use of such ports of States situated between the sea and the land-locked State, according to the principle III embodied in the Preamble to the Convention on Transit Trade of Land-locked States of 8 July 1965.⁵⁶ The "transport of goods, passengers and baggage by domestic roads and waterways and by rail" can also be a field for a most-favoured-nation stipulation as included in the treaty between Czechoslovakia-the German Democratic Republic quoted above, "in all matters relating to the acceptance of consignments for transport, to the type and means of transport, and to transport costs and charges" (article 15).

(22) With respect to treatment of aliens, the Treaty of Friendship, Commerce and Navigation between the United States of America and Nicaragua ⁵⁷ has been quoted by a French author ⁵⁸ to demonstrate the variety

⁴⁶ Thus the *Dictionnaire diplomatique* of the Académie diplomatique internationale (published under the direction of A.-F. Frangulis (Paris, 1933), vol. I), at p. 470 quotes the following provision from an 1881 treaty concluded between the United States and Serbia: "Also every favour or immunity which shall be later granted to a third Power shall be immediately extended and without condition, and by this very fact to the other Contracting Party."

⁴⁷ "The object of the clause is here confused with that of the treaty which contains it" (P. Level, *op. cit.*, p. 333, para. 6).

⁴⁸ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 176, document A/CN.4/213, annex I.

⁴⁹ *Ibid.*, 1968, vol. II, p. 167, document A/CN.4/L.127, sect. VII.

⁵⁰ A. D. McNair, *op. cit.*, p. 273.

⁵¹ R. C. Snyder, *op. cit.*

⁵² *Annuaire de l'Institut de droit international*, vol. 53 (1969), t. 1, p. 16.

⁵³ Treaty of Trade and Navigation between Czechoslovakia and the German Democratic Republic, signed at Berlin on 25 November 1959 (United Nations, *Treaty Series*, vol. 374, p. 101), article 2.

⁵⁴ For the text of the paragraph and the explanation concerning it, see *Yearbook of the International Law Commission, 1970*, vol. II, pp. 220-221, document A/CN.4/228 and Add.1, para. 144.

⁵⁵ For reference, see foot-note 30.

⁵⁶ United Nations, *Treaty Series*, vol. 597, p. 3.

⁵⁷ *Ibid.*, vol. 367, p. 3.

⁵⁸ E. Sauvignon, *La clause de la nation la plus favorisée* (Grenoble, Presses Universitaires de Grenoble, 1972), p. 29, note 7.

of situations to which most-favoured-nation clauses are applied, i.e. the resourcefulness of treaty-drafters in finding fields for such stipulations. Most-favoured-nation treatment is accorded by the parties to this treaty reciprocally (often combined with national treatment) to nationals and companies of either party with respect to access to the courts of justice and to administrative tribunals and agencies in all degrees of jurisdiction, both in pursuit and in defence of their rights (article V), with respect to conditions regarding official searches and examinations of dwellings, offices and other premises of nationals and companies (article VI, paragraph 2), with respect to conditions of expropriation of property and of the taking of privately-owned enterprises into public ownership and to the placing of enterprises under public control (article VI, paragraphs 4-5), with respect to engaging in scientific, educational, religious and philanthropic activities (article VIII), with respect to rights in trademarks, trade names, trade labels and industrial property of every kind (article X), with respect to payments, remittances and transfers of funds or financial instruments (article XII), with respect to commercial travellers, upon their entry into and departure from the territory of the parties and during their sojourn therein concerning customs, taxes and charges applicable to them and regulations governing the exercise of their functions (article XIII).

(23) Some treaties stipulate most-favoured-nation treatment regarding military service of aliens. Thus Japan and Yugoslavia in their Treaty of Commerce and Navigation of 28 February 1959, agreed that "With respect to the . . . exemption [from any military service in the National Guard or Militia and from all taxes and military charges in replacement of such personal services] and all forced war-loans and any military exaction, requisition or compulsory billeting, nationals of either High Contracting Party shall be accorded treatment no less favourable than that accorded to nationals of any third country."⁵⁹

(24) As to most-favoured-nation clauses regarding literary and artistic rights and, in some cases, to rights in industrial property, the author of a useful recent publication⁶⁰ lists 28 treaties containing such clauses. Of these, 11 were concluded in the nineteenth century and 17 in the present century, the most recent being dated 1937. The study of these treaties yields interesting results, particularly when they are compared with the multilateral treaties in the field.

(25) In respect of most-favoured-nation clauses in treaties on consular intercourse and immunities, the report by Mr. Zourek⁶¹ provides a useful source.

(26) In the field of treatment of aliens, the clauses appearing on the 1951 Convention relating to the Status of Refugees⁶² and those in the 1954 Convention relating to the Status of Stateless Persons, borrowed largely from the former, deserve special attention. The contracting

States in the first named Convention accord to a refugee "treatment as favourable as possible and in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property" (article 13).⁶³ Refugees are accorded "the most favourable treatment accorded to nationals of a foreign country" as regards non-political and non-profit-making associations and trade unions (article 15)⁶⁴ and as regards the right to engage in wage earning employment (article 17). They receive "treatment . . . not less favourable than that accorded to aliens generally in the same circumstances as regards the right to engage on [their] own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies" (article 18),⁶⁵ as regards the practising of a liberal profession by refugees holding diplomas recognized by the receiving State (article 19), as regards "housing . . . in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities" (article 21) and finally "with respect to education other than elementary education and, in particular, as regards access to studies, recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships" (article 22).⁶⁶ The particular feature of these clauses consists not in the designation of the fields in which the treatment in question is due to refugees and stateless persons respectively, but in the construction of the clauses. The beneficiary of the clauses is not one particular State to which the person in question belongs by the tie of nationality but all States in treaty relationship with the granting State. The *tertium comparationis*, the treatment to which the treatment of the object of the clause is compared, is not that accorded to a third State (except in articles 15 and 17 where *nationals of a foreign country* are mentioned) but to *aliens* who need not be nationals of any country (if they are stateless persons). Hence these clauses are not covered by the definition given in article 2 if this definition is strictly interpreted.

Article 4. — Legal basis of most-favoured-nation treatment

A State may claim most-favoured-nation treatment from another State solely on the ground of a most-favoured-nation clause in force between them.

COMMENTARY

(1) This is a generally accepted and well established rule.⁶⁷ While article 2 provides that there is no most-favoured-nation clause without a promise of most-favoured-nation treatment, the rule set out in article 4 means that

⁵⁹ United Nations, *Treaty Series*, vol. 341, p. 182.

⁶⁰ F. Majoros, *Les arrangements bilatéraux en matière de droit d'auteur* (Paris, Pedone, 1971).

⁶¹ *Yearbook of the International Law Commission, 1960*, vol. II, pp. 19-26, document A/CN.4/131, part II.

⁶² For reference, see foot-note 31.

⁶³ Italics supplied by the Special Rapporteur.

⁶⁴ *Idem*.

⁶⁵ *Idem*.

⁶⁶ The corresponding articles of the Convention relating to the Status of Stateless Persons (for reference, see foot-note 32), bear the same numbers.

⁶⁷ Usenko, *op. cit.*, p. 238 (German edition, p. 200); Vignes, *op. cit.*, p. 224; E. Sauvignon, *op. cit.*, p. 2; K. Hyder, *op. cit.*, p. 33.

States have no right to claim most-favoured-nation treatment without being entitled to it by a most-favoured-nation clause.

(2) The question whether States can claim most-favoured-nation treatment from each other as a right was discussed in the Economic Committee of the League of Nations but only with respect to customs tariffs.⁶⁸ The Economic Committee did not reach agreement in the matter except that it declared that "... the grant of most-favoured-nation treatment ought to be the normal...". Although the grant of most-favoured-nation treatment is frequent in commercial treaties, evidence is lacking that this has developed into a rule of customary international law. Hence only treaties are the foundation of most-favoured-nation treatment.⁶⁹

(3) In fields other than trade the question whether States can claim most-favoured-nation treatment from each other in the absence of a treaty stipulation has never been raised.

(4) Of a different order (and wider in scope than that dealt with in the article) is the question whether States under the general rule of non-discrimination are not bound to treat their partners on an equal footing or, in other words, whether a State granting most-favoured-nation treatment to most of its partners in a certain field and refusing to make similar agreements with others would not violate its international obligations under the general prohibition of discrimination.⁷⁰

Article 5. — The source of the right of the beneficiary State

The right of the beneficiary State to claim the advantages accorded by the granting State to a third State under a collateral treaty or by autonomous action arises from the most-favoured-nation clause: the treaty containing the clause creates the legal bond between the granting State and the beneficiary State.

COMMENTARY

(1) Where no collateral treaty between the granting State and the third State exists and where the beneficiary State claims from the granting State favours which the latter has accorded to the third State by autonomous legislative act or mere practice, the truth of the statement of article 5 is obvious. There being no other treaty among the parties than the one containing the most-favoured-nation clause, the right of the beneficiary to claim the advantages extended to the third State by the granting State cannot originate from any other source but from that treaty i.e. from its provision which entitles the beneficiary State to most-favoured-nation treatment.

(2) A problem arises only in cases where a treaty has come into being between the granting State and a third State (a collateral treaty), according certain rights to the third State, rights which the beneficiary State is automati-

cally entitled to claim on the basis of the most-favoured-nation clause. In cases of this kind two treaties coexist among the three parties and the question can be raised: which of the two treaties creates the right of the beneficiary State to demand from the granting State the favours it accorded to the third State.

(3) Two opposing views came into conflict on this question before and within the International Court of Justice in the Anglo-Iranian Oil Company Case (Jurisdiction) (1952). One view (as presented by the British party) was that:

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.⁷¹

According to the opposite view (held by the Iranian party), the most-favoured-nation clause:

... 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 rôle 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.⁷²

(4) The majority of the members of the Court—as is well known—upheld this latter view. In the words of the Court:

The treaty containing the most-favoured-nation clause is the basic treaty... It is this treaty which establishes the juridical link between the United Kingdom [i.e. the beneficiary State] 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 [the beneficiary State] and Iran [the granting State]: it is *res inter alios acta*.⁷³

(5) The minority view was forcefully expressed in the dissenting opinion of Judge Hackworth who held that the most-favoured-nation clauses in question:

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... [The] 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.⁷⁴

(6) The same line of thought was expounded by Judge Levi Carneiro. The relevant part of his dissenting opinion reads as follows:

The manner in which a most-favoured-nation clause operates is well known. It does not take effect by itself alone; it operates in due course upon the later treaty which grants some advantage

⁶⁸ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 175, document A/CN.4/213, annex I.

⁶⁹ Cf. G. Schwarzenberger, *op. cit.*, p. 138.

⁷⁰ See p. 166 above, para. 13 of the commentary to articles 2 and 3, and *Yearbook of the International Law Commission, 1969*, vol. I, p. 245, 1036th meeting, para. 69.

⁷¹ Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), *I.C.J. Pleadings*, p. 533.

⁷² *Ibid.*, p. 616.

⁷³ *I.C.J. Reports, 1952*, p. 109.

⁷⁴ *Ibid.*, pp. 140-141.

to another nation, and it immediately extends the same advantage to the favoured nation.

The effect of the clause is, therefore, as Visser has said, complementary (Ito, *La clause de la nation la plus favorisée*, p. 36). By itself it confers no rights; it can have no application and remains useless. Rights or advantages granted to a third State do not exist, either for the benefit of that State itself or for that of the favoured State before they are expressly conceded. Again, the rights or advantages do not subsist for the favoured State if the concession made to another State should be abrogated (Raphael A. Farra, *Les effets de la clause*, etc. p. 67; Josef Ebner, *La clause de la nation*, etc. pp. 149-150; Marcel Sibert, *Traité de droit international public*, II, p. 255). That is, the clause does not have any permanent effect—its effect is merely contingent and is dependent on the continued existence of another treaty the scope of which it enlarges.

Oppenheim considers it a legal rule, “but a legal rule the content of which is uncertain, because dependent upon a future event, namely concessions to be granted to third States” (*La clause de la nation*, etc. p. 26). The clause is merely a conditional guarantee of a future concession, a promise or an engagement to grant to a State or to its nationals the same advantages as are granted or may be granted to other States and to the nationals of other States.⁷⁵

(7) While the contingent character of the clause is beyond doubt and not contested by anyone, the conclusions drawn from this by the dissenting judges do not seem to have been accepted by legal writers. Literature seems unanimous in endorsing the findings of the majority of the members of the Court.⁷⁶

(8) The solution given by the judgement of the Court seems to be in concordance with the rules of the law of treaties relating to the effect of treaties on States not parties to a particular treaty.

The view that the third party (the treaty by which the granting State accords favours to a third State) is the origin of the rights of the beneficiary of the clause (a State not party to the “third party treaty”) runs counter to the rule embodied in article 36, paragraph 1 of the Vienna Convention on the Law of Treaties. As explained in paragraph 7 of the Commission’s Commentary to article 32 of the 1966 draft (which, with insignificant drafting changes, has become article 36 of the Convention): *Paragraph 1* lays down that a right may arise for a State from a provision of a treaty to which it is not a party under two conditions. First, the parties must intend the provision to accord the right either to the particular State in question, or to a group of States to which it belongs, or to States generally. *The intention to accord the right is of cardinal importance*, since it is only when the parties have such an intention that a legal right, as distinct from a mere benefit, may arise from the provision.⁷⁷

It seems to be evident that the parties to a “third party treaty” do not have such an intention. They may be aware of the fact that their agreement can have an indirect effect through the operation of the most-favoured-nation clause (to the profit of the State beneficiary of the clause)

⁷⁵ *Ibid.*, pp. 157-158.

⁷⁶ See e.g., P. Guggenheim, *op. cit.*, vol. I, pp. 208 and 209; E. Sauvignon, *op. cit.*, p. 80; G. Schwarzenberger, *International Law*, 3rd ed. (London, Stevens, 1957), vol. 1, p. 243.

⁷⁷ *Yearbook of the International Law Commission, 1966*, vol. II, p. 229, document A/7309/Rev.1, part II, chap. II. [Italics supplied by the Special Rapporteur.]

but their intention is never to achieve this side effect. It follows that the right of the beneficiary State to a certain advantageous treatment does not derive from the treaty concluded between the granting State and the third State and that the provision of article 36 of the Vienna Convention is not applicable to that treaty. Hence the beneficiary State cannot base its claim against the granting State but on the treaty containing the clause.⁷⁸

(9) This is the same conclusion which was reached well before the Anglo-Iranian Oil Company case by Sibert, who explained the situation as follows:

... ultimately, we see the effects of a treaty between one State (State C) and one of the stipulators of the clause (State A) benefit the other State signatory to the clause, State B, which is a *third party vis-à-vis* A and C. Does this not infringe the principle that treaties produce their effects only between the contracting parties? To affirm this would be a serious error. Let us apply the hypothesis: if the advantages granted to State C by one of the stipulators of the clause, State A, are extended to the other beneficiary of the clause, State B, this is by no means because C and A have agreed to confine themselves to the establishment of a certain régime applicable *solely* to relations between C and A. On the other hand, *vis-à-vis* State B and State A, the signatories to the clause, the agreement by which A has granted certain advantages to C is nothing more than an *act applying a condition*. The supervision of this act is the element—and only the element—through which the wishes freely agreed between the two signatories to the clause, State A and State B, can be made effective: if the act applying the condition is performed, the convention between A and B will produce its effects: B will benefit from the favours granted to C, but only because this was the common wish of A and B. The agreement between A and C creating obligations in their mutual relations does not create obligations in the relations between A and B...⁷⁹ [Translation by the United Nations Secretariat.]

(10) The Special Rapporteur, who has been advised to give careful consideration to the point in question,⁸⁰ believes that the reasons put forward in the commentary sufficiently warrant his proposal to adopt the proposed article 5.

⁷⁸ See Sauvignon, *op. cit.*, p. 117.

⁷⁹ ... *on voit, en fin de compte, les effets d'un traité entre un Etat (Etat C) et l'un des stipulants de la clause (Etat A) profiter à l'autre Etat signataire de la clause, l'Etat B, lequel est un tiers vis-à-vis de A et de C. N'y aurait-il pas là atteinte au principe d'après lequel les traités ne produisent leurs conséquences qu'entre parties contractantes? L'admettre constituerait une erreur grave. Appliquons l'hypothèse: si les avantages concédés à l'Etat C par l'un des stipulants de la clause, l'Etat A, sont étendus à l'autre bénéficiaire de cette clause, l'Etat B, ce n'est pas du tout parce que les volontés concordantes de l'Etat C et de l'Etat A ont entendu qu'il en fût ainsi. Les volontés concordantes de C et A se sont bornées à établir un certain régime valable pour les seuls rapports de C et de A. Par contre, vis-à-vis de l'Etat B et de l'Etat A, signataires de la clause, l'accord par lequel A a concédé à C certains avantages n'est rien de plus qu'un acte-condition. La survenance de cet acte-condition est l'élément—et n'est que l'élément—grâce auquel il pourra être donné efficacité aux volontés librement échangées entre les deux signataires de la clause, l'Etat A et l'Etat B [..]; si l'acte-condition se réalise, la convention entre A et B sortira ses conséquences: B bénéficiera des faveurs accordées à C, mais uniquement parce que telle aura été la volonté commune de A et de B. L'accord entre A et C qui crée des obligations dans leurs rapports mutuels n'en crée pas dans les relations de A avec B... (M. Sibert, *Traité de droit international public* (Paris, Dalloz, 1951), vol. II, pp. 254-255.)*

⁸⁰ *Yearbook of the International Law Commission, 1968*, vol. I, p. 186, 976th meeting, para. 12.

QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

[Agenda item 4]

DOCUMENT A/CN.4/258

First report on the question of treaties concluded between States and international organizations or between two or more international organizations by Mr. Paul Reuter, Special Rapporteur

[Original text: French]
[3 April 1972]

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ABBREVIATIONS

BIRPI	United International Bureaux for the Protection of Intellectual Property
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
I.C.J.	International Court of Justice
<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
IDA	International Development Association
IFC	International Finance Corporation
ILO	International Labour Organisation
ITU	International Telecommunication Union
OAS	Organization of American States
UNDP	United Nations Development Programme
UPU	Universal Postal Union
WHO	World Health Organization

PREFACE

1. In accordance with the usual practice, the purpose of this first report is to sketch in the main lines of the subject and to present the guidelines for the subsequent work of the International Law Commission that emerge therefrom.

2. In the present case, the preliminary character of the report is accentuated by a fortuitous circumstance and also by a question of substance. A Special Rapporteur was appointed on 5 July 1971¹ and as the term of office of the members of the Commission had expired in the meantime, it was necessary to await the election of new members by the General Assembly before starting work on a report on which the newly-elected Commission will have to decide its position and possibly confirm the decisions and directives previously adopted. But quite apart from the problems arising out of the expiry of the five-year term of office of the Commission members, the research and reflections in which the Special Rapporteur engaged very soon convinced him of the inherent difficulties of a subject about which little is yet known, despite the remarkable studies that have been made on it, and which is still in a state of flux, despite several decades of rapidly growing practice.

3. As to information on practice, it will not be possible to make an in-depth study, to analyse all the problems, and particularly to propose solutions for those which have matured sufficiently to permit codification, until ample information has been obtained from the organizations concerned. There have been consultations on this point between the Special Rapporteur and the United

Nations Secretariat pursuant to previous decisions of the International Law Commission² and the research will be carried on as well as circumstances permit, but no substantial results can be expected before the twenty-fourth session.

Some useful clarifications are already possible, however. Although the question of agreements concluded by international organizations³ has not been thoroughly studied, it has been much discussed and many positions of principle have been taken on it; it has been examined by the Commission; observations have been made on it by Governments and international organizations; and it has been discussed in the Sixth Committee and at the United Nations Conference on the Law of Treaties. Besides all the information which became available during the drafting of the Vienna Convention on the Law of Treaties, comparable data have been collected during the preparation of other conventions, such as the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space,⁴ the Convention on International Liability for Damage Caused by Space Objects⁵ and the draft articles on the represen-

² *Ibid.*, 1970, vol. II, p. 310, document A/8010/Rev.1, para. 89.

³ For the sake of brevity, the expression "agreements concluded by international organizations" will be used for the fuller expression adopted by the United Nations Conference on the Law of Treaties, i.e., "treaties concluded between States and international organizations or between two or more international organizations" (*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. 285, document A/CONF.39/26, annex, resolution relating to article 1 of the Vienna Convention on the Law of Treaties).

⁴ General Assembly resolution 2345 (XXII), annex.

⁵ General Assembly resolution 2777 (XXVI), annex.

¹ See *Yearbook of the International Law Commission, 1971*, vol. I, p. 287, 1129th meeting, para. 53.

tation of States in their relations with international organizations,⁶ adopted by the International Law Commission at its twenty-third session.

4. It is not necessary to give the whole history of the work that has been done⁷ but some of the more significant data on the source and the nature of the difficulties which have made the Commission postpone the preparation of the relevant provisions must be mentioned. Of course, other problems, as yet unperceived, may emerge from the studies and the work yet to be done on treaties concluded by international organizations; but it would be surprising if a question which has been on the agenda of the International Law Commission and of the competent departments of Governments and international organizations had not been explored far enough to give an idea of most of the problems connected with it. It is therefore essential that an effort should be made to identify the trends that can be seen in the work done by the United Nations on this subject, taken as a whole. The Special Rapporteur is convinced that his and the Commission's task will be greatly facilitated by this approach. If the Commission goes through the records of the items discussed, particularly over the past 10 years, and compares the work it has done with whatever work may have been done on the subject elsewhere, it will remain entirely free to lay down guidelines for the Special Rapporteur and, if necessary and if it so wishes, to correct some of the positions already taken or some of the conclusions already reached. In some respects, at least, it may become evident that the question on which it will have to decide is not quite so new as it might seem at first sight.

5. In that spirit, the present report will first present, by way of introduction, two brief sketches of the historical development of the agreements concluded by international organizations and of the legal writings relating to them. One of the next two parts will be devoted to the Commission's work on the law of treaties up to its final report of 1966, and the other to the Conference on the Law of Treaties and its results. No attempt will be made to give a detailed account of the discussions, which has been done already in the Secretary-General's working paper mentioned above, but an effort will be made to trace, against this background, the progressive emergence of certain fundamental problems. In order to make the account more logical and cohesive, it will be necessary at times to abandon the chronological succession of events and either go back or jump forward; but the essential thing is to follow the main developments in this field—of what may be called an historical process of emergence—which, taken as a whole, cannot fail to have a strong impact on the Commission's future work. Lastly, at the end of the report, an attempt will be made to present the alternatives which are already open to the Commission.

⁶ *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 284, document A/8410/Rev.1, chap. II, D.

⁷ The spadework was done by the Secretary-General in the excellent working paper approved by the Commission (A/CN.4/L.161 and Add.1 and 2).

Introduction

1. PAST DEVELOPMENT OF AGREEMENTS CONCLUDED BY INTERNATIONAL ORGANIZATIONS

6. In a remarkable study on agreements concluded by international organizations,⁸ the first example of an agreement of this kind that the author could give was the agreement, signed on 4 October 1875, by which the International Bureau of Weights and Measures established by the Convention of 20 May 1875 settled with France certain administrative matters relating to the Bureau's headquarters in Paris.⁹ In any case, other examples of such agreements appeared in the League of Nations days; they were still few and far between, but they were incontestably international agreements; the best known are those relating to the Seat of the League of Nations;¹⁰ but it has been possible to cite others also, such as the agreements concluded by the Saar Basin Governing Commission, the Agreement of the International Commission of the Danube relating to the Setting up of Special Services at the Iron Gates, signed on 28 June 1932,¹¹ and the participation of the International Commission of the Cape Spartel Lighthouse in a regional arrangement on maritime telecommunications signed on 28 April 1934.¹²

But of course it is since 1945 that an increasing number of such agreements have been concluded—it might almost be called an "agreement explosion".

7. Figures have often been cited in this connexion. To take only those given in connexion with the work of the International Law Commission, one of its members stated in 1965 that there were about 200 agreements concluded between international organizations and over 1,000 between international organizations and States.¹³ During the debate at the United Nations Conference on the Law of Treaties, the observer for IBRD recalled once again that IBRD and IDA alone were parties to more than 700 international agreements.¹⁴ In 1969 the report of the

⁸ H. Chiu, *The Capacity of International Organizations to Conclude Treaties and the Special Legal Aspects of the Treaties so Concluded* (The Hague, Nijhoff, 1966), p. 7.

⁹ This information was provided on a personal basis. In view of the legal concepts of the period regarding international "bureaux", there is some doubt as to whether this really is an international agreement.

¹⁰ Provisional *modus vivendi* of 19 July and 24 October 1921, *modus vivendi* submitted by the Secretary-General to the Council of the League of Nations on 20 September 1926, agreement of 21 May 1930 concerning the establishment of a wireless station (H. Chiu, *op. cit.*, p. 12). Other examples are sometimes cited (Ch. Rousseau, *Principes généraux de droit international public* (Paris, Pédone, 1944), vol. I, p. 148), in connexion with a declaration on a minority régime, but they have been questioned, particularly as far as the mandates were concerned; the legal régime applying to them gave rise to divided opinions in the International Court of Justice in 1962 and 1966.

¹¹ League of Nations, *Treaty Series*, vol. CXL, p. 191.

¹² M. Hudson, ed. *International Legislation—A Collection of the Texts of Multipartite International Instruments of General Interest* (Washington, D.C., Carnegie Endowment for International Peace, 1937), vol. VI (1932-1934), pp. 851-856.

¹³ See *Yearbook of the International Law Commission, 1965*, vol. I, p. 10, 777th meeting, para. 7.

¹⁴ A/CONF.39/7/Add.1 and Add.1/Corr.1, para. 5.

Sixth Committee indicated that agreements to which international organizations were parties amounted to about 20 per cent of the multilateral treaties in force.¹⁵ Obviously, those figures are only approximate, and despite their greater accuracy, the figures published in the different numerical studies of treaties cannot be regarded as more than a statistical indication.¹⁶

8. The agreements concluded are characterized even more by their variety than by their number.

At the present stage of the study, it is impossible to give a systematic account of the range of these treaties, that is to say, to seek principles by which they may be grouped in categories, and this would, in any event, produce legal consequences. Even if it were possible or even necessary to attempt such a thing, it would obviously be premature to undertake it now.¹⁷ On the other hand it is possible to indicate the main subjects of these agreements; they fall roughly into two groups: agreements relating to the administrative functioning of the organization, and agreements on its operational activities.

9. The former are concerned mainly with questions arising out of the territorial framework in which the organization carries on its activities, that is to say, the geographical location of its headquarters. Although there have been other solutions, nearly all the headquarters agreements, and the innumerable arrangements required for activities away from headquarters, are concluded by organizations. All questions relating to the immunities, privileges and other facilities to which the organizations are entitled to protect the international character of their activities are settled in this manner. As these agree-

ments meet needs common to all the organizations, they vary very little from one organization to another.

Other administrative agreements may also be included in this group, although they have certain specific aspects and some of them are much wider in scope. These are succession agreements under which an organization takes over the property, responsibilities and sometimes the powers of another, by a decision of the States members; these are generally agreements between organizations. In the same category are the agreements on co-operation between international organizations.¹⁸ Such agreements are usually dictated by a nobler principle than the settlement of routine administrative matters, namely the principle that, since international organizations all have the same ideal, they should co-ordinate their efforts the better to safeguard that ideal. But in practice, these agreements are usually administrative in character: harmonization of programmes, exchanges of observers and documentation, and so on. There are few agreements by which one organization takes over from another, but that is not true of co-operation agreements, which meet a need that no organization can escape.

10. There are some international organizations which have no operational function and whose activity is defined in relation to the framework they provide for meetings, studies, agreements and possible decisions. Many organizations have probably been conceived by their founders as a means of reaching administrative objectives, in the narrow sense of the term. Other organizations, on the other hand, have been established to do other tasks: to produce specific articles, offer services, provide certain benefits, in short, to carry on an activity which is rather less bureaucratic in character and more like that of an enterprise. But with the passage of time, even organizations which are essentially administrative in character have been called upon to widen their sphere of activity, particularly in order to respond to the world-wide movement of solidarity which has made all forms of aid and assistance one of the most important aims of international action. Lending and borrowing, the provision of experts, the distribution of fellowships, studies, and the financing of projects have all been added to the original administrative activities and for all or nearly all of these organizations they bring with them the need to conclude an unceasing stream of international agreements. The fact that an international agreement concluded by international organizations is the essential instrument for this operational activity has many explanations, the simplest of which is that international organizations must carry on their activities with strict respect for the sovereignty of the States concerned; it is the consent, the free commitment, of the States which provides the mainspring for all action by the organization.

The same explanation applies with even greater force to the fact that all the operations of an international

¹⁵ *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, para. 110.

¹⁶ The studies referred to are mainly: those by an American professor, P. H. Rohn, "The United Nations Treaty Series Project", in *International Studies Quarterly* (Detroit, Mich.), vol. 12, No. 2 (June 1968), p. 174; *Treaty Profiles*, 1969; *Users Manual for Treaty Profiles*, 1969 and *Institutions in Treaties: A Global Survey of Magnitudes and Trends from 1945 to 1965*, 1970, works mentioned and used by G. Hartmann for "The capacity of international organizations to conclude treaties", in K. Zemanek, ed., *Agreements of international organizations and the Vienna Convention on the Law of Treaties* (Österreichische Zeitschrift für öffentliches Recht, Suppl. 1) (Vienna, Springer, 1971), pp. 155 *et seq.* A count through volumes 1 to 598 of the United Nations *Treaty Series* gives, for the period 1 January 1946 to 31 December 1965, a total of 1,686 agreements, 1,317 of which were bilateral with one State, 176 between organizations, 135 between a State and several organizations, 47 between several States and one organization and 10 between a State and two organizations.

¹⁷ Those who have attempted the task have come up against great difficulties (see, for instance, K. Karuntilleke, "Essai d'une classification des accords conclus par les organisations internationales, entre elles ou avec les Etats", *Revue générale de droit international public* (Paris), 3rd series, vol. XL, No. 1 (Jan.-March 1971), p. 12. The report of the Sub-Committee on treaties concluded between States and international organizations or between two or more international organizations pointed out that, since the Vienna Convention had avoided a classification of treaties concluded by States, it would not be desirable to prepare a classification of treaties concluded by international organizations (*Yearbook of the International Law Commission*, 1971, vol. II (Part One), p. 349, document A/8410, Rev. 1, chap. IV, annex, para. 11).

¹⁸ C. W. Jenks, "Co-ordination: a new problem of international organizations; a preliminary survey of the law and practice of interorganizational relationship", *Recueil des cours de l'Académie de droit international de La Haye, 1950-II* (Paris, Sirey, 1951), vol. 77, p. 157.

organization in the political sector, especially for the maintenance of peace, have required the free consent of the parties concerned, leading to the conclusion of many international agreements.¹⁹ International agreements concluded by the United Nations have produced the very complex situation which now obtains with regard to what are called "peace-keeping operations"; to launch operations on a scale as large as those undertaken in the Middle East or the Congo, it was necessary to have recourse to many different agreements, mostly in written form. In this connexion, the intervention of IAEA in the field of nuclear safety and particularly in the application of the Treaty on the Non-Proliferation of Nuclear Weapons, rests on an extensive network of treaty commitments to which the Organization is a party.²⁰

11. The agreements concluded by international organizations within the field of their operational activities will therefore provide a rich mine of information and cover a wide range; depending on whether they relate to financial operations, international enterprise, economic assistance, agreed military intervention, or security supervision, the types of agreement will be extremely varied as regards both their structure and the number and nature of the partners. It is sometimes necessary for several organizations to co-operate in a joint activity; in other cases, some activities can only be successful if several States are involved. Even for agreements whose objective is roughly the same, there are sometimes important differences between the activities of one organization and another: special considerations, differing legal traditions and varying political needs, mean that differences from one organization to another are the rule.

12. In all this great host of agreements, there is an omission which was pointed out long ago by research workers: ²¹ international organizations are almost never parties to general multilateral treaties, i.e., to treaties laying down rules to safeguard the general interests of the international community. That is a very remarkable fact. It is not a minor point; on the contrary, it raises one of the fundamental problems in this field. Much more will be said about this point in this report, particularly at the end of part two.

2. DEVELOPMENT OF LEGAL WRITING

13. The development of legal writing has paralleled the expansion of agreements concluded by international organizations; comments at first were incidental and almost accidental; later a considerable number of works, many of them of major significance, were written on the subject.

¹⁹ Ph. Manin, *L'Organisation des Nations Unies et le maintien de la paix—Le respect du consentement de l'Etat* (Paris, Librairie générale de droit et de jurisprudence, 1971). See also the comments of Member States on the question of peace-keeping operations (*Official Records of the General Assembly, Twentieth Session, Annexes*, agenda item 101, document A/6026, annexes I and II).

²⁰ Like the Mandates System (see foot-note 10), the Trusteeship System has been much discussed, and cannot be cited without some reservations.

²¹ K. Karunatilke, *op. cit.*, p. 61.

Fiore's *International Law Codified* has been quoted by Sir Hersch Lauterpacht and others; article 748 lays down that the capacity to conclude treaties may be "possessed by associations to which international personality has been attributed".²² In his lectures on the law of treaties Professor Basdevant²³ allowed that it was possible for an international organization to be a party to a treaty, as did Anzilotti, at least implicitly, in his course of lectures.²⁴ In 1944 this possibility was recorded as a *fait accompli* by Charles Rousseau in regard to the International Commission of the Danube, the Reparation Commission established under the Treaty of Versailles, the Commission of the Cape Spartel Lighthouse, and of course the League of Nations, but he did not indicate what particular problems were involved in such international agreements.²⁵

14. As soon as the end of the Second World War was in sight, well-documented studies quickly appeared, some concerned mainly with precedents,²⁶ and others with solutions for the future;²⁷ but all revealing the broad scope of this new source of international law. In this connexion, the text of the Charter of the United Nations opened up new possibilities and the Regulations adopted by the General Assembly in resolution 97 (I) of 14 December 1946 on the registration and publication of treaties and international agreements expressly included agreements concluded by international organizations.²⁸ The International Court of Justice in its opinion on reparation for injuries suffered in the service of the United Nations²⁹ used the agreements concluded by the United Nations to establish the principle of its international personality; that was the signal for a tremendous increase in legal writing, consisting of works of varying scope and extent, but on the whole favourable to a significant expansion

²² P. Fiore, *International law codified and its legal sanction*, translation from the 5th Italian edition by E. M. Borchard (New York, Baker, Voorhis, 1918), p. 329. The fifth Italian edition appeared in 1915. See H. Chiu, *op. cit.*, p. 6. Article 748 is quoted in the first report by Lauterpacht (*Yearbook of the International Law Commission, 1953*, vol. II, p. 96, document A/CN.4/63, foot-note 8).

²³ J. Basdevant, "La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités", *Recueil des cours* . . . 1926-V (Paris, Hachette, 1926), vol. 15, p. 597.

²⁴ D. Anzilotti, *Cours de droit international*, French translation from the 3rd Italian edition by G. Gidel (Paris, Sirey, 1929). The author allows that confederations have the right to make treaties (p. 192), and regards the League of Nations as a confederation (p. 195).

²⁵ Ch. Rousseau, *op. cit.*

²⁶ J. M. Jones, "International agreements other than inter-State treaties: Modern developments", *The British Year Book of International Law, 1944* (London, 1945), p. 111.

²⁷ C. W. Jenks, "The legal personality of international organizations", *ibid.*, 1945 (London, 1946), p. 267. The author has frequently written about the role of agreements concluded by international organizations, for example, in *Corporate Personality for International Purposes* (London, 1963).

²⁸ In his first report on the law of treaties, Sir Humphrey Waldock used this text to put forward an argument in favour of extending the envisaged articles to agreements concluded by international organizations (*Yearbook of the International Law Commission, 1962*, vol. II, p. 32, document A/CN.4/144, para. 3 of the commentary to article 1).

²⁹ *I.C.J. Reports, 1949*, p. 174.

of previous perspectives. There were general works on international law,³⁰ books and courses of lectures on international organizations,³¹ articles,³² and monographs.³³ In general, this writing concentrated mainly on the form of agreements and the organic and constitutional problems which each organization faced in concluding international agreements; questions relating more directly to the theory of international agreements were studied less, except, perhaps, for research based directly on practice.³⁴

15. Since that first proliferation of legal writing, similar problems arising from the development of certain regional organizations have no doubt helped to maintain a regular flow of very useful works on the law of international organizations and particularly on the agreements concluded by them.³⁵ The preparations for the United Nations Conference on the Law of Treaties and the work of the Conference itself led to the production of more studies, including those carried out under the supervision of

Professors P. Cahier and K. Zemanek at the Centre for Study and Research attached to The Hague Academy of International Law.³⁶

These works, a few of which are mentioned above, are merely examples selected from the vast literature on the subject; a complete bibliography will be produced later on the basis of the research carried out for the International Law Commission on the instructions of the Secretary-General of the United Nations. The existing literature shows that the subject is not a new one, and would even be well known, were it not for the fact that it sometimes develops at a faster pace than the relevant research.

16. This is not to say that the views expressed in the studies on the subject tend towards unanimous conclusions—quite the contrary. The aspects on which the authors have concentrated are those that involve principles and are to some extent of a constitutional nature: the personality and capacity of international organizations, and the development of the treaty-making power of these organizations and their organs. It is quite natural that different trends should emerge in dealing with questions that are of interest both because of the general ideas they embody and because of the immediate political issues at stake. To what extent can rules common to all international organizations be formulated in this field? How should international organizations be defined in this context? Do their nature and their functions give them inherent international personality? What powers do they have in this field as compared to their member States? These questions involve the fundamental principles of international law, but they may also lead to disagreement, even among those who entertain the same hopes for the development of international institutions, between those who prefer a cautious and steady approach and those who are not afraid to open up to these organizations a wide and undefined range of initiatives and responsibilities. The extremely interesting discussions on this question will no doubt always remain inconclusive.

It is for the Commission, fully cognizant of all the prospects opened up by legal writers, to find a reasonable and probably empirical course, and to provide simple and practical solutions to problems ripe for solution.

Part one. — The work of the International Law Commission

17. Two aspects of the history of the Commission's work since its inception are worthy of attention.

³⁰ For example, P. Jessup, *A modern law of nations—An Introduction* (New York, Macmillan, 1948), p. 127; L. Oppenheim, *International Law: A Treatise*, 8th ed. [Lauterpacht] (London, Stevens, 1955), vol. I, p. 26; P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1953), vol. I, p. 60; H. Kelsen, *The Law of the United Nations* (London, Stevens, 1950), p. 335; G. Tunkin, *The bases of modern international law* (in Russian) (Moscow, 1956), p. 11, and *Droit international public* (Paris, Pédone, 1965), p. 74.

³¹ S. Bastid, *Cours de droit international public—Le droit des organisations internationales* (Paris, Pédone, 1952); A. P. Sereni, *Diritto internazionale*, vol. II, *Organizzazioni internazionali* (Milan, Giuffrè, 1958); P. Reuter, *Institutions internationales* (Paris, P.U.F., 1955).

³² C. Parry, "The treaty-making power of the United Nations", *The British Year Book of International Law*, 1949 (London), vol. 26 (1950), p. 108; I. I. Lukashuk, "The international organization party to international treaties", *Soviet Yearbook of International Law*, 1960 (Moscow, 1961), p. 144 (Russian text).

³³ J. Huber, *Le droit de conclure des traités internationaux* (Montreux, Ganguin et Laubscher, 1951); J. Carroz, *La personnalité juridique internationale de l'Organisation des Nations Unies* (Paris, 1952 (thesis)); J. Carroz and Y. Probst, *Personnalité juridique internationale et capacité de conclure des traités de l'Organisation des Nations Unies et des institutions spécialisées* (Paris, Pédone, 1954); K. Zemanek, *Das Vertragsrecht der internationalen Organisationen* (Vienna, Springer, 1957); P. Cahier, *Etude des accords de siège conclus entre les organisations internationales et les Etats où elles résident* (Milan, Giuffrè, 1959); J. W. Schneider, *Treaty-making Power of International Organizations* (Geneva, Droz, 1959); B. Kasme, *La capacité de l'Organisation des Nations Unies de conclure des traités* (Paris, Librairie générale de droit et de jurisprudence, 1960).

³⁴ For example, the numerous studies by C. W. Jenks, O. Schachter and S. Rosenne, particularly S. Rosenne's monumental work "United Nations treaty practice", *Recueil des cours... 1954-II* (Leyden, Sijthoff, 1955), vol. 86, p. 281.

³⁵ R. J. Dupuy, "Le droit des relations entre les organisations internationales", *Recueil des cours... 1960-II* (Leyden, Sijthoff, 1961), vol. 100, p. 457; P. Pescatore, "Les relations extérieures des communautés européennes—Contribution à la doctrine de la personnalité des organisations internationales", *Recueil des cours... 1961-II* (Leyden, Sijthoff, 1962), vol. 103, p. 1; F. Seyfersted, *International personality of Intergovernmental Organizations—Its Scope and its Validity vis-à-vis Non-Members: Do the Capacities Really Depend upon the Constitutions?* Offprint from the *Indian Journal of International Law* (New Delhi), vol. IV, No. 1 (January 1964), p. 1, and No. 2 (April 1964), p. 233; and *Objective International Personality of Intergovernmental Organizations—Do their Capacities Really depend upon the Conventions Establishing Them?* (Copenhagen, Krohns, 1963), p. 3.

³⁶ Part of this work has been published in one volume (K. Zemanek, ed., *Agreements of International Organizations... (op. cit.)*) and part separately (K. Zemanek, *University of Toledo Law Review* (Toledo, Oh.), 1971, Nos. 1 and 2; T. Modeen, *The Deposit and Registration of Treaties of International Organizations*, Acta Academiæ Aboensis, series A, vol. 39, No. 3 (Turku (Finland), Åbo Akademi, 1971). As a study based on the work of the International Law Commission, we can cite L. Valki, "The juristic personality and treaty-making power of international organizations", *Questions of International Law*, 1968 (Budapest), p. 285.

First, when the Commission originally took up the question of the law of treaties, and on several subsequent occasions, it hesitated between two opposing trends: the first was to include agreements concluded by international organizations in the draft articles on international treaties, while the second led the Commission, after a few tentative efforts, to restrict the immediate object of its work exclusively to treaties between States. On several occasions the Commission has hesitated between including and excluding agreements concluded by international organizations.

Secondly, perhaps because of these hesitations—and certainly because of the difficulty of establishing watertight divisions for such a subject—the International Law Commission has considered and discussed some of the most characteristic aspects of agreements concluded by international organizations.

For these two reasons it is necessary to review the work of the Commission.

1. THE CHANGING PLACE OF AGREEMENTS
CONCLUDED BY INTERNATIONAL ORGANIZATIONS
IN THE DRAFT ARTICLES ON THE LAW OF TREATIES:
FROM INCLUSION TO EXCLUSION

18. An initial expansion and restriction of the work of the International Law Commission occurred in connexion with Mr. Brierly's reports. In his first report, article 1 on the use of the term "treaty" provided that:

As the term is used in this Convention

(a) A treaty is an agreement recorded in writing between two or more States or international organizations which establishes a relation under international law between the parties thereto.³⁷

Articles 2 and 3 likewise covered matters relating both to treaties between States and to agreements concluded by international organizations; in paragraph 26 of his report,³⁸ the Special Rapporteur said his opinion differed from that of the authors of the Harvard Draft Convention on the law of treaties in that he felt the difficulty of finding rules common to the treaties of States and to those of international organizations was not insuperable. After a short discussion, the Commission decided by a large majority to include agreements concluded by international organizations in its draft.³⁹ In its report the Commission referred to its decision;⁴⁰ the following year Mr. Brierly, in his second report,⁴¹ restricted his study to treaties between States. At the Commission's 98th meeting, on 7 June 1951, he proposed, without any explanation:

that [the Commission] should draft the articles with reference to States only and that it should examine later whether they could be applied to international organizations as they stood or whether they required modification.⁴²

The Commission adopted Mr. Brierly's proposal without discussion. There are two reasons that could justify that decision: the desire to facilitate the drafting, and the fear of coming up against difficulties of substance prematurely, if it turned out that the two kinds of treaties did not follow the same rules. In this situation the first reason seems to have been the main one; in any case on 7 June 1951 the previous decision to include forthwith agreements concluded by international organizations was reversed.

19. In article 1 of his first report⁴³ Sir Hersch Lauterpacht defined treaties so as to include agreements concluded by international organizations. The Special Rapporteur intended to draft the most general rules that could be applied equally to the two groups of treaties; however he also intended to write a part VII entitled "Rules and principles applicable to particular types of treaties",⁴⁴ containing any modifications that proved necessary. He saw no reason for treating the two separately and he was much impressed by the number and volume of agreements concluded by international organizations. However, it cannot be said that his position was different from that the International Law Commission was to adopt later, for the real scope of his intentions could have been revealed only if he had written part VII of his draft, which he never did.

20. The same development described above appeared for a second time in the work of the Special Rapporteur who succeeded Sir Hersch Lauterpacht, namely Sir Gerald Fitzmaurice. In his first report, submitted in 1956,⁴⁵ he stated that the provisions relating to treaties between States would be applicable, *mutatis mutandis*, to agreements concluded by international organizations unless the contrary was indicated or resulted necessarily from the context;⁴⁶ but that solution was regarded as a provisional one. A debate on this point at the 368th and 369th meetings⁴⁷ revealed that members of the Commission were more divided on the question of procedure than on the substance of the issue. The Commission eventually confirmed the position it had taken on 7 June 1951 by deciding:

first to deal with treaties among States and then to examine to what extent the articles were applicable to treaties concluded between international organizations and between them and States.⁴⁸

21. The same situation developed for a third time in connexion with Sir Humphrey Waldock's reports. The initial definition given by the new Special Rapporteur in article 1 of his first report was very broad and applied to agreements between subjects of international law,⁴⁹ which covered *inter alia* agreements concluded by international organizations but he did not discard the idea of dealing with them in a separate chapter⁵⁰ although he did include

³⁷ *Yearbook of the International Law Commission, 1950*, vol. II, p. 223, document A/CN.4/23.

³⁸ *Ibid.*, p. 228.

³⁹ *Ibid. 1950*, vol. I, p. 80, 51st meeting, para. 75.

⁴⁰ *Ibid.*, 1950, vol. II, p. 381, document A/1316, para. 162.

⁴¹ *Ibid.*, 1951, vol. II, p. 70, document A/CN.4/43.

⁴² *Ibid.*, vol. I, p. 136, 98th meeting, para. 1.

⁴³ *Ibid.*, 1953, vol. II, p. 90, document A/CN.4/63.

⁴⁴ *Ibid.*, para. 1.

⁴⁵ *Ibid.*, 1956, vol. II, p. 104, document A/CN.4/101.

⁴⁶ *Ibid.*, p. 107, document A/CN.4/101, article 1, para. 3.

⁴⁷ *Ibid.*, vol. I, p. 216, 368th meeting, para. 47 and pp. 219 *et seq.*; 369th meeting, paras. 6, 16, 23, 27, 32, 48, 57 and 66.

⁴⁸ *Ibid.*, 1959, vol. I, p. 9, 481st meeting, para. 28.

⁴⁹ *Ibid.*, 1962, vol. II, p. 31, document A/CN.4/144, article 1 (a).

⁵⁰ *Ibid.*, document A/CN.4/144, para. 11.

the definitions and the question of capacity in the provisions common to all agreements.⁵¹ The International Law Commission approved this position at its meeting on 7 May 1962⁵² and in its report reaffirmed its previous decisions of 1951 and 1959:

To defer examination of the treaties entered into by international organizations until it had made further progress with its draft on treaties concluded by States.⁵³

The Commission then discussed the articles on definitions and capacity, highlighting problems which will be considered later. After considering Sir Humphrey Waldock's second⁵⁴ and third⁵⁵ reports, the International Law Commission found itself faced with articles which, as the Secretary-General very pertinently remarked in the working paper already mentioned, could be divided into two categories: those which, if interpreted literally, could be applied to treaties concluded by any subject of international law having treaty-making capacity, and those—more numerous—which on account of their wording could be applied only to treaties concluded between States.⁵⁶

22. Governments, however, in written observations (Finland and Netherlands) and orally in the Sixth Committee suggested that the last links connecting agreements concluded by international organizations with the draft articles, namely the provisions on definitions and capacity, should be severed.⁵⁷ In his fourth report,⁵⁸ Sir Humphrey Waldock interpreted the Commission's previous attitude in a very restrictive way and proposed that the last references to agreements concluded by international organizations still to be found in articles 1 and 3 should be deleted. The International Law Commission accepted the Special Rapporteur's suggestion without much comment; the basic point is that these agreements were not studied.⁵⁹

23. That was the Commission's final decision; it had always entertained the same hopes and doubts and in the last resort decided, not without veiled regrets, to be cautious. But why did the Commission disregard its Special Rapporteur's proposal that a special chapter be devoted to the subject? Was it purely a question of time? Or was it the result of an undefined feeling that the problems were more extensive than they seemed at first

⁵¹ *Ibid.*, p. 37, document A/CN.4/144, para. 6 of the commentary to article 3.

⁵² *Ibid.*, vol. I, p. 47, 637th meeting, para. 28.

⁵³ *Ibid.*, vol. II, p. 161, document A/5209, para. 21.

⁵⁴ *Ibid.*, 1963, vol. II, p. 36, document A/CN.4/156 and Add. 1-3.

⁵⁵ *Ibid.*, 1964, vol. II, p. 5, document A/CN.4/167 and Add. 1-3.

⁵⁶ See A/CN.4/L.161, paras. 99 and 112.

⁵⁷ *Yearbook of the International Law Commission, 1966*, vol. II, pp. 291 and 313, document A/6309/Rev.1, part II, annex, sections 10 and 19; and *Official Records of the General Assembly, Seventeenth Session, Sixth Committee*, 741st meeting, para. 5.

⁵⁸ *Yearbook of the International Law Commission, 1965*, vol. II, p. 3, document A/CN.4/177 and Add.1 and 2.

⁵⁹ *Ibid.*, vol. I, pp. 3 *et seq.*, 776th and 777th meetings, and the final decision made at the 811th meeting (*ibid.*, p. 256, 811th meeting, para. 104). See also the report of the Commission (*ibid.*, 1966, vol. II, p. 177, document A/6309/Rev.1, part II, chap. II, article 1).

sight and that on the whole they were not ready to be dealt with? It may be difficult to answer these questions, but the doubts that prompted them were voiced during the Sixth Committee's debates in 1966⁶⁰ and 1967,⁶¹ and the written observations submitted by some Governments on the final draft articles also referred to them.⁶² In 1967 the Special Rapporteur gave the Sixth Committee an explanation of the International Law Commission's position based on drafting considerations: the draft articles should not be unnecessarily long or complicated; once the main section of the law of treaties, relating to treaties between States, was codified it would be simple to expand the text and amend it so that it could be extended to agreements concluded by international organizations.⁶³ However, some substantive difficulties have already arisen during the Commission's work.

2. EMERGENCE OF BASIC PROBLEMS

24. Without claiming to exhaust the examples that could be drawn from the work of the International Law Commission, it must be pointed out that the Commission had on several occasions come up against difficult problems of substance relating to agreements concluded by international organizations; an account will be given here of two interesting cases dealing respectively with the treaty-making capacity of international organizations and with representation in the conclusion of treaties.

(a) *The capacity of international organizations*

25. This was discussed widely by the International Law Commission because Sir Humphrey Waldock, in his first report, proposed an article 3 on the capacity to become a party to treaties, reading as follows:

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

...

4. International capacity to become a party to treaties is also possessed by international organizations and agencies which have a separate legal personality under international law if, and to the extent that, such treaty-making capacity is expressly created, or necessarily implied, in the instrument prescribing the constitution and functions of the organization or agency in question.⁶⁴

The Drafting Committee amended the text to read:

1. Capacity to conclude treaties under international law is possessed by States and by other subjects of international law.

⁶⁰ See *Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 84, document A/6516, paras. 43, 51 and 52.

⁶¹ *Ibid.*, *Twenty-second Session, Annexes*, agenda item 86, document A/6913, para. 16 *et seq.*

⁶² See A/CONF.39/5 (Vol. I).

⁶³ See *Official Records of the General Assembly, Twenty-second Session, Sixth Committee*, 964th meeting, paras. 1-14.

⁶⁴ *Yearbook of the International Law Commission, 1962*, vol. II, pp. 35 and 36, document A/CN.4/144, article 3.

...

4. In the case of international organizations, the capacity to conclude treaties depends on the instrument by which the organization concerned was constituted.⁶⁵

The Drafting Committee subsequently further amended paragraph 4 to read:

4. In the case of international organizations capacity to conclude treaties depends on the constitution of the organization concerned.⁶⁶

26. The Commission's discussion covered several important problems: the need to define the term "international organization", the extent to which third States were obliged to recognize the capacity of the international organization, and, above all, the sources of this capacity; this last topic will require more detailed consideration.

The problem of defining international organizations arose as a direct result of the view expressed by several members of the Commission that international organizations did not all have the same degree of international capacity, and that it was not even certain that all organizations had that capacity.⁶⁷ Accordingly, it was necessary to select a specific level of capacity and to define the organizations which possessed capacity at that level.

The question of the extent to which third States were obliged to recognize the capacity of an organization arose because the International Court of Justice had given an opinion stating that the United Nations possessed *objective* international personality.⁶⁸ According to that opinion the United Nations was an international person and could bring an international claim against States which were not Members. But could that conclusion be extended to cover any international organization and any field? The validity of such extension, particularly to organizations composed of only a few States, was denied in the Commission.⁶⁹ It was difficult to dismiss that problem, for States incontestably have a much more definite and more extensive international capacity than international organizations, and yet it has never been acknowledged in international practice that a State possesses international personality with regard to other States unless it has been recognized by them.

27. However, the International Law Commission naturally spent the most time on the question of the *sources*

of the international capacity of organizations. The question was put the following way: is the right of an international organization to conclude a treaty inherent in its status as an international organization, or must it derive from a special legal rule for each international organization? It was tempting to choose the first alternative; but, as has been said, that meant taking an approach requiring great precision. Since it can hardly be denied that there are entities called "intergovernmental international organizations" which do not possess international personality, the term "international organization" must be defined in the terms of the rule being laid down. If, furthermore, it is agreed that all organizations with treaty-making capacity do not have it to the same degree, it will be necessary to define at least a "minimum capacity" which will be possessed by all organizations thus defined, even if it is also established that some have more capacity than others.⁷⁰ From the very beginning of its work the Commission tended to have reservations about any formula which was unduly broad in scope. The first formula, in Mr. Brierly's first report (article 3, entitled "Capacity in general") read:

All States and international organizations have capacity to make treaties, but the capacity of some States or organizations to enter into certain treaties may be limited.⁷¹

This was changed as follows when an amendment submitted by Mr. Hudson was adopted without discussion:

An international organization may be endowed with the capacity to make treaties.⁷²

In its report on its second session, the Commission summarized its position on this issue as follows:

There was general agreement that, while the treaty-making power of certain organizations is clear, the determination of the other organizations which possess capacity for making treaties would need further consideration.⁷³

28. In his first report, however, Sir Hersch Lauterpacht adopted a wider concept of the treaty-making capacity of international organizations,⁷⁴ although this attitude was perhaps qualified by his view that the international organization is simply a means of collective action by States; this view will be referred to later.⁷⁵ These doubts were again expressed in the International Law Commission when it was considering Sir Humphrey Waldock's draft article 3, and seeking in vain to agree on the versions

⁶⁵ *Ibid.*, vol. I, p. 193, 658th meeting, para. 87.

⁶⁶ *Ibid.*, p. 240, 666th meeting, para. 16.

⁶⁷ *Ibid.*, p. 193, 658th meeting, para. 90 and pp. 240 and 241, 666th meeting, paras. 17 and 20.

⁶⁸ See para. 14 above.

⁶⁹ *Yearbook of the International Law Commission, 1962*, vol. I, p. 58, 639th meeting, para. 17. Mr. Jiménez de Aréchaga spoke of the problem of recognition, and Mr. Tunkin and Mr. Bartoš (*ibid.*, p. 60, 639th meeting, para. 47), felt that they had to stress that point, deriving from the fact that treaties, even if they were constituent instruments, had no effect as far as third parties were concerned (*ibid.*, p. 241, 666th meeting, paras. 24, 25 and 31). Moreover, the Japanese Government in its observations also pointed out that article 3 "does not refer to the other element of international capacity to conclude international agreements—the requirement of recognition of such constitutional capacity by the other contracting party or parties concerned" (*ibid.*, 1966, vol. II, p. 302, document A/6309/Rev.1, part II, annex, section 14, observations on article 3).

⁷⁰ In any case the provisions of the treaty, which have decisive force in establishing who can become party to it, must also be taken into account; this point was highlighted in Sir Hersch Lauterpacht's first report: article 7, para. 2 provides that: "Accession is admissible only subject to the provisions of the treaty" (*Yearbook of the International Law Commission, 1953*, vol. II, p. 91, document A/CN.4/63).

⁷¹ *Ibid.*, 1950, vol. II, p. 223, document A/CN.4/23.

⁷² *Ibid.*, 1950, vol. I, p. 88, 52nd meeting, para. 72.

⁷³ *Ibid.*, vol. II, p. 381, document A/1316, para. 162.

⁷⁴ Sir Hersch Lauterpacht was apparently in favour of considerably extending the conclusions of the analysis of the International Court of Justice regarding the United Nations: "The capacity to conclude treaties is both a corollary of international personality and a condition of the effective fulfilment of their functions on the part of the international organizations." (Quoted in A/CN.4/L.161, p. 28, para. 32.)

⁷⁵ See para. 39 below.

quoted above.⁷⁶ The problem of the sources of the international capacity of international organizations was for a long time a stumbling block for the Commission. From the very beginning the Special Rapporteur had linked the capacity of the organization to its constitution, whether the capacity was expressly created or necessarily implied in that instrument. He thus rejected the concept of an inherent right, and although the terms "constitution", "constituent instrument" and "statute" implied slight differences in meaning, they did not affect the basic conclusion.

The various formulations used in the Commission reflected an attempt to describe a situation which, in the view of all members, was characterized by two elements:

The competence of an international organization to conclude international agreements was limited, in principle by its constitutional rules.

This competence was not necessarily limited by its written constitutional rules.

The aim was to find a formulation that would embody, in the most felicitous way, the results of a practice which had often enlarged the provisions of the constituent instruments, but to do so without being arbitrary or controversial. However, the long discussions during the meetings at which the problems of federalism and international organizations were considered together did not give any great impression of unanimity or even of clarity.⁷⁷ The members of the Commission could not decide whether to adopt precise wording or simply to use a very general formula. The Special Rapporteur's justification of the version finally adopted was reported as follows in the summary record of the 666th meeting:

The expression "the constitution of the organization concerned" had been chosen because it was broader than "constituent instrument"; it covered also the rules in force in the organization. In most organizations, the treaty-making capacity had been limited by the practice instituted by those who had operated the organization under its constitution.⁷⁸

29. The Commission's doubts were reflected in the vote on draft article 3, paragraph 4, relating specifically to international organizations: it was adopted by 9 votes to 8. The Commission's report, while devoting considerable attention to the 1949 advisory opinion of the International Court of Justice and stressing, in accordance with a formula used throughout the draft, the importance of the subject and aim of the treaty establishing the organization, none the less summarized the Commission's position in the following terms:

Accordingly, important although the provisions of the constituent treaty of an organization may be in determining the proper limits of its treaty-making activity, it is the constitution as a whole—the constituent treaty together with the rules in force

in the organization—that determine the capacity of an international organization to conclude treaties.⁷⁹

30. The question of the treaty-making capacity of international organizations was considered by several Governments in their observations in 1965, and Austria, in a rather liberal spirit, took a position in favour of very broad competence for international organizations, as the following extracts show:

... capacity to conclude treaties must be an inherent right of any international organization, if it is at the same time a subject of international law.

... the constitutions of many international organizations do not mention the question of the capacity of the organization in question to conclude treaties. In most of these cases, however, the organs of the organization in question have considered themselves competent to conclude treaties on behalf of the organization... If, on the other hand, the constitutions do contain provisions concerning the conclusion of treaties, they either relate to the question which organs are competent for the purpose—in which case they are of a procedural nature—or limit the extent of *freedom* to conclude treaties, which in principle is all-embracing, by stipulating that only treaties on certain subjects are permitted.⁸⁰

31. The United States, more cautious, likewise quoted the 1949 opinion of the ICJ; but its main request was for a change in wording whereby "constitution" would be replaced by a less limiting word, for example "authority"; the United States Government also suggested that article 3, paragraph 3, should be worded "so that its meaning would be clear without reference to the commentary. It would be desirable, for example, to be more specific as to what 'international organizations' are being referred to".⁸¹

32. Following these comments, the Special Rapporteur proposed that the article on capacity to conclude treaties should be deleted.⁸² That proposal quickly won general support without giving rise to any important comments, with the exception of those made by Mr. Lachs, who expressed opposition to the concept of an inherent right of international organizations to conclude treaties but seemed to be in favour of a flexible interpretation of the source of the capacity of organizations.⁸³ The question

⁷⁹ *Ibid.*, 1962, vol. II, p. 164, document A/5209, chap. II, para. 4 of the commentary to article 3.

⁸⁰ *Ibid.*, 1966, vol. II, p. 281, document A/6309/Rev.1, part II, annex, section 3, 3.

⁸¹ *Ibid.*, pp. 346 and 347, document A/6309/Rev.1, part II, annex, section 9, comments on article 3.

⁸² *Ibid.*, 1965, p. 18, document A/CN.4/177 and Add.1 and 2, observations and proposals of the Special Rapporteur on article 3; and *ibid.*, vol. I, p. 23, 779th meeting, paras. 3 and 7.

⁸³ *Ibid.*, vol. I, p. 24, 779th meeting, paras. 23 and 26. The comments of Mr. Lachs are summarized as follows in the summary record of the meeting:

"The right to conclude treaties could be an inherent right or a delegated right. States had an inherent right; an international organization could have the right to conclude treaties conferred upon it by States." (*Ibid.*, para. 26).

"the... treaty-making power of an international organization could be derived from any of three sources. The first, which was the only one mentioned in paragraph 3, was the constitution of the organization. The second was interpretation and practice, which gave rise to a customary rule; capacity was in that case acquired by virtue of the development of the law of an international organization, even if there was no constitutional provision on the subject. The third possibility was that the organization could acquire treaty-making power by virtue of a decision of one of its organs." (*Ibid.*, para. 23.)

⁷⁶ See para. 25 above.

⁷⁷ The discussion took place at the 639th, 640th, 658th and 666th meetings (see *Yearbook of the International Law Commission*, 1962, vol. I, pp. 57 *et seq.*, 64 *et seq.*, 187 *et seq.* and 239 *et seq.*); the theory of the functional competence of the organization was shown to be a basis both for extending and restricting the competence of the organization.

⁷⁸ *Ibid.*, p. 242, 666th meeting, para. 39.

of the capacity of international organizations to conclude treaties was thus definitively dropped from the draft articles and the Commission's debates.⁸⁴

33. The discussion had, however, brought to the fore a problem, of even greater magnitude than that of capacity, which by reason of its capital importance deserves further consideration at this point: namely the problem of the law of each international organization.

The Commission came up against this problem on several occasions, in particular when seeking to determine the place to be accorded in the draft articles to treaties between States establishing an international organization or treaties between States adopted in or under the auspices of an international organization, a question to which we shall revert later. However, this problem arose directly with regard to the capacity of organizations in connexion with the choice between the theory that organizations possess inherent rights and the theory that they possess only the powers delegated to them by States.

If the concept of inherent rights had been chosen, it would nevertheless have been necessary to formulate a *general* rule on that subject. If, on the contrary, that concept had been rejected in favour of the view that the capacity of international organizations derives from delegation by the States members of the organization, it follows that this delegation is variable and has a content proper to each international organization. Hence, international capacity, like the other powers of the organization, involves a law which is proper to the organization concerned, no matter what term is used to designate it—special international law, internal law of the organization and so on—and at first sight, at least, there are no rules common to all organizations on international capacity or any other subject.⁸⁵

34. At that point the scope and great practical importance of the problem became apparent: how could a general rule on a question concerning international organizations be formulated when each organization has its own special set of rules? The Commission is now thoroughly familiar with this problem, which arises as soon as an attempt is made to codify the rules which call in question on any point the juridical régime of international organizations. At the time of the discussion the problem was perhaps made even more sensitive by the concurrent debate on federal structures at the seventeenth session of the Commission.⁸⁶ In seeking to formulate a rule on treaty-making capacity within a federal structure which would make it possible to distinguish between the elements which derive from the constitutional law of that structure and those which derive from general international law, the Commission was faced with a problem similar to that relating to the international capacity of organizations. With regard to federal structures,

the Commission finally lent its support to the idea that there was indeed a rule of general public international law on that subject, but that under that rule each federal constitution had full competence to distribute capacity to conclude international treaties between the federation and its member States.⁸⁷ This rule of general public international law became article 5, paragraph 2 of the final version of the draft articles; the Vienna Conference deleted the provision at its second session after a long and difficult discussion.⁸⁸ But the position defined in article 5, paragraph 2 implied *a fortiori* that the provision was also applicable to international organizations and that it was the law of each organization which governed the question of international capacity; that consequence was stressed during the debate.⁸⁹

35. Nevertheless, the wording of article 3 relating to the capacity of international organizations remains somewhat awkward, since the term "the constitution of the organization"⁹⁰ did not seem clear to all Governments. The Commission would certainly have had to remedy that defect if it had not decided to omit the question of the international capacity of organizations from the draft articles. As already noted, it did in fact come up against the problem of the law of the organization when seeking to safeguard that law while at the same time subjecting it to the rules of the draft treaties which are constituent instruments of international organizations or which are adopted within international organizations. As is well known, such treaties were brought within the scope of the draft articles by article 4 (which became article 5 in the Vienna Convention) "subject to any relevant rules of the organization".⁹¹

It was this sober and elegant expression which was finally used to designate the law of each organization. If the reservation thus formulated applies to a special type of treaty between States (treaties which are constituent instruments of international organizations or which are adopted within international organizations) it is applicable *a fortiori* to agreements to which an organization is a party, for the law of the organization is clearly more directly involved in such a treaty than in treaties adopted by States within the organization. It may thus be concluded from this long analysis that the reservation "subject to any relevant rules of the organization" is a minimum requirement for any general provision designed to codify the law of international organizations.⁹²

⁸⁷ This point was explained very clearly by Mr. Bartoš (*ibid.*, p. 29, 779th meeting, para. 83).

⁸⁸ 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), pp. 6-10, 7th meeting, paras. 34-80, and pp. 10-16, paras. 1-55.

⁸⁹ *Yearbook of the International Law Commission, 1965*, vol. I, p. 25, 779th meeting, para. 34.

⁹⁰ *Ibid.*, 1962, vol. II, p. 164, document A/5209, chap. II, II, article 2.

⁹¹ *Ibid.*, 1966, vol. II, p. 178, document A/6309/Rcv.1, part II, chap. II, article 4.

⁹² We shall revert later to the explanation given on this point in connexion with the draft articles on the representation of States in their relations with international organizations. Article 3

(Continued on next page.)

⁸⁴ *Ibid.*, p. 31, 780th meeting, para. 16.

⁸⁵ The term "internal law" was used, concurrently with other terms, in the course of the Commission's work, seemingly without any particular import being attached to it.

⁸⁶ In particular at the 778th, 779th and 780th meetings (see *Yearbook of the International Law Commission, 1965*, vol. I, pp. 16 *et seq.*

36. The wording of this reservation, i.e. "subject to any relevant rules of the organization", seems to have been accepted at the time by the International Law Commission without any real difficulties, for it was proposed by the Drafting Committee and was neither explained nor discussed.⁹³ Not until later, following the observations of the organizations concerned, did the question arise whether a reservation encompassing only the pertinent rules of the organization would suffice to safeguard the autonomy of the organizations in question; this is an important point which we shall examine in connexion with the Conference on the Law of Treaties.

(b) *The question of representation*

37. As has already been noted on several occasions, the International Law Commission, in its codification work, cannot include unduly theoretical notions in the texts it prepares for the use of Governments, judges, administrators and practitioners. Concepts such as "subject of law", "juridical personality" or "representation" are undoubtedly highly abstract and hence give rise to recurring controversy.⁹⁴ However, the importance attached both by the Commission and by Governments to the advisory opinion given in 1949 by the International Court of Justice on reparation for injuries suffered in the service of the United Nations is a good example of the role played by certain principles, which exert a decisive influence on the development of practice. The question whether an international organization, in concluding, treaties really acts as an entity distinct from its States member is one such principle.

38. At first sight, the question appears to have been settled very clearly by legal writers, by court decisions and by practice. When, for example, the United Nations concludes an agreement, it does so in its own name and not in the name and on behalf of another entity. This is, however, a formal and abstract view of the matter. It would be difficult to imagine an absolute separation between the juridical personality of the organization and the personalities of its members, whatever the circumstances. No legal system in the world provides for such separation between the personality of commercial

companies and the personalities of their members; why should the situation be different for international organizations, whose sociological foundations are still rather superficial? International law cannot separate the juridical personality of an organization from the personalities of its members in a general and absolute manner. This is a very general observation and we shall subsequently have occasion to refer to some of its consequences, which are recognized by the law currently in force.

This problem, which the Commission has already encountered several times in the course of its existence, may be posed in many ways. One of the most interesting is to place it within the context of representation: to what extent does an international organization, in concluding a treaty, represent its member States? In order to retain the relative unity of the matter as a whole, and subject to the essential distinctions which will be introduced subsequently, it must be understood that in this formulation of the question the term "represent" should be interpreted in the broadest possible sense.

39. The International Law Commission seems to have been seized of this problem twice, in very different conditions: first in a report by Sir Hersch Lauterpacht, which it did not consider, and secondly in a proposal by Sir Humphrey Waldock, which it did not adopt.

In his first report, Sir Hersch Lauterpacht used the following wording: "Treaties are agreements between States including organizations of States..."⁹⁵ This wording is somewhat unusual,⁹⁶ but when used by such an eminent jurist it cannot be the result of improvisation; elsewhere in the same report he classified treaties between States and the agreements concluded by international organizations in a more general category which he termed "the collective activities of States", using this as an argument in favour of submitting them to the same rules.⁹⁷ Although the Special Rapporteur gave no explanation on this point, there is no indication that he was unaware of the fact that above and beyond juridical forms, all treaty commitments are governed by the same political reality, that of States, and that there is nothing to prevent formal juridical concepts from being tempered, where appropriate, by social realities.

40. However, Sir Hersch Lauterpacht was not the only person to express himself in this way; similar views were for a long time expressed by many writers and in parti-

(Foot-note 92 continued.)

of this text deals with the reservation concerning the relevant rules of the organization, while article 4 adds a reservation relating to international agreements which have already been concluded or may be concluded in the future, including agreements between States and international organizations. (*Ibid.*, 1971, vol. II (Part One), p. 284, document A/8410/Rev. I, chap. II, D.)

⁹³ The expression "established rules of the organization concerned" (*ibid.*, 1963, vol. II, p. 213, document A/5509, chap. II, B, article 48) was thus replaced successively by "rules of the organization in question" (*ibid.*, 1965, vol. II, p. 160, document A/6009, chap. II, B, article 3 bis) and by "any relevant rules of the organization" (*ibid.*, 1966, vol. II, p. 178, document A/6309/Rev. I, part II, chap. II, article 4), although these changes of wording do not seem to imply any weakening of the idea of the "established rules". At the 887th meeting it was merely observed that "it would be noted that the new formulation provided the necessary saving clause to cover cases when there was no relevant rule". (*Ibid.*, 1966, vol. I, part II, p. 294, 887th meeting, para. 80.)

⁹⁴ See in this connexion the comments of the Secretary of the Commission at the 639th meeting (*ibid.*, 1962, vol. I, p. 63, 639th meeting, para. 70).

⁹⁵ *Ibid.*, 1953, vol. II, p. 90, document A/CN.4/63, article 1.

⁹⁶ In 1956, the Secretary of the Commission expressed reservations about a form of wording which in his view did not draw a sufficient distinction between distinct entities (*ibid.*, 1956, vol. I, pp. 225-226, 369th meeting, para. 66).

⁹⁷ "... it would seem desirable to direct political and juristic effort to making available, in the interest of the progressive integration of international society on a functional basis, the experience of the law of treaties to the collective activities of States in their manifold manifestations." (*Ibid.*, 1953, vol. II, p. 96, document A/CN.4/63, para. 3 of the comment on article I). In his edition of L. Oppenheim (*op. cit.*, para. 494 a), p. 883) Lauterpacht observed "States can exercise their capacity to conclude treaties either individually or, when acting collectively, through public international organizations—i.e. organizations of States created by treaty".

cular, until about 1958, by most Soviet writers.⁹⁸ This view may have important consequences, particularly with regard to the effect of an international agreement concluded by an organization on the latter's member States, a question to which the Commission subsequently devoted its attention.

Since the Commission did not consider the report by Sir Hersch Lauterpacht it did not express any view on the formulation he used to qualify the agreements concluded by international organizations. However, it subsequently faced the same question in a very technical and concrete form in connexion with the proposals submitted by Sir Humphrey Waldock in his third report.⁹⁹

41. The Special Rapporteur had observed, first, that a treaty could become applicable to a territory of a State even if the latter was not itself a party to the treaty and he had tried to establish in his draft article 59 the conditions in which such a result might occur. In the first case, according to the Special Rapporteur, the operation was based on the principle of the territorial extension of the treaty. The examples given in the commentary involved international organizations. Secondly, the Special Rapporteur changed to a slightly different ground in considering cases involving a problem of representation; according to him, this problem arose when a State concluded a treaty on behalf and in the name of another State and when an international organization concluded a treaty with a non-member State in the name both of the organization and of its member States; those cases were dealt with in draft article 60.¹⁰⁰

Technical and political considerations prevented the International Law Commission from considering the cases dealt with in draft articles 59 and 60 proposed by the Special Rapporteur, and the problems raised by those draft articles were not dealt with in the final version of the draft articles or in the 1969 Convention on the Law of Treaties. However, the Special Rapporteur's proposals and the discussion to which they gave rise touched upon—sometimes almost in a prophetic manner—some of the basic problems concerning agreements concluded by international organizations.

42. A.—First of all, in draft article 29, the Special Rapporteur posed the principle that provision should be made for cases in which a treaty could be applied to the territory of a State without the latter being a party to the treaty in question. In addition to the political considerations which prompted some members of the Com-

mission to adopt the view that it would be inadvisable to retain such a principle, a technical objection was raised, namely how could a State be bound by a treaty without becoming a party to it?¹⁰¹ Since this discussion took place it has become clear that it would be possible and useful to consider that a subject of international law might be bound by a treaty without being a party to it; this is particularly true in the case where the subject of international law concerned is an international organization. The organization would be bound by the rules laid down in a treaty without being a party to it if it agreed, in a capacity other than that of party, to be bound by those rules. This was the machinery provided for in various conventions concerning space law, including the Agreement of 19 December 1967 on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space¹⁰² and the Convention of 29 November 1971 on International Liability For Damage Caused by Space Objects.¹⁰³ These texts provide that the rules which they formulate shall be extended to international organizations which fulfil certain conditions and declare their acceptance of the rules, without becoming parties to the treaty. This is only one of the devices which makes it possible to extend to international organizations the rules laid down in a treaty to which they are not parties. Such a system, however, has important implications: it opens up new prospects concerning the position of subjects of international law with regard to a treaty. There is traditional concept of the "party" to a treaty which was retained in the draft articles and subsequently in the Vienna Convention on the Law of Treaties (article 2, paragraph 1 (g)). This concept is no doubt suitable for normal situations in relations between States, although even there it has not been shown that it is appropriate in every case, but it has already been demonstrated that it does not permit the successful solution of all problems raised by the relations between international organizations and treaties. Draft article 59 proposed by Sir Humphrey Waldock had the merit of opening up—perhaps prematurely—new and practical prospects.

43. B.—One point emerged clearly from the texts proposed and the discussions to which they gave rise: a subject of international law may enter into a commitment on behalf and in the name of a person. Various examples were cited. Even if the juridical machinery brought into play by such an operation is somewhat uncertain, even if the analyses of it retain the imprint of the great diversity which reigns among the municipal laws of the various countries with regard to similar institutions, it must be acknowledged that there is room in international law for wide recourse to *representation*. What is the relationship between representation and the agreements con-

⁹⁸ This was the view held by D. Anzilotti (*op. cit.*, pp. 190 and 283). Soviet writers such as L. A. Modzhoryan, (*Subyekty mezhdunarodnogo prava* (Moscow, Gossudarstvennoye Izdatelstvo Yuridicheskoi Literatury, 1958)) and V. M. Shurshalov (*Osnovnye voprosy teorii mezhdunarodnogo dogovora* (Moscow, 1959)), have analysed agreements concluded by international organizations as being concluded by delegation by States. See also L. Valki, *loc. cit.*, p. 255.

⁹⁹ *Yearbook of the International Law Commission, 1964*, vol. II, p. 5, document A/CN.4/167 and Add.1-3.

¹⁰⁰ *Ibid.*, pp. 15 and 16, document A/CN.4/167 and Add.1-3 (article 59 and commentary) and pp. 16 and 17 (article 60 and commentary).

¹⁰¹ "Thus the concept of being bound by a treaty was an integral part of the concept of being a party to a treaty." (*Ibid.*, vol. I, p. 55, 732nd meeting, para. 24.)

¹⁰² General Assembly resolution 2345 (XXII), annex.

¹⁰³ General Assembly resolution 2777 (XXVI), annex. At the 733rd meeting of the Commission, Professor Tunkin alluded to the work which finally resulted in the Convention (*Yearbook of the International Law Commission, 1964*, vol. I, p. 62, 733rd meeting, para. 21).

cluded by international organizations? The Commission's debates do not, perhaps, permit a precise answer to this question, but they have at least posed the problem. Now that treaties between States are governed by the Vienna Convention on the Law of Treaties, a simple question immediately comes to mind: which system of rules, those of the Vienna Convention or the rules relating to agreements concluded by international organizations, would govern a treaty concluded between a State and an international organization acting on behalf and in the name of another State? The problem of the juridical nature of such treaties was raised in 1964 in the International Law Commission; these treaties are not figments of the imagination, for examples do exist, and the Commission should once again turn its attention to this question.

44. C.—What obligations are imposed on the States members of an international organization by reason of the agreements concluded by that organization? This difficult and important question, which has already been mentioned several times, was raised expressly during the debate on articles 59 and 60.¹⁰⁴ The adoption of a very formal position with regard to the distinction between the personality of the States members of an organization and the personality of the organization itself would at this point entail the application of a fundamental principle of the law of treaties, according to which treaties have no effect on third parties. But how could this principle be applied, generally and strictly, to the relations between the organizations and its own members? This question, which probably requires qualified answers, has not attracted much notice; the discussion in the International Law Commission performed a service by drawing attention to it.

45. These are some of the aspects of the problem of agreements concluded by the international organizations which have already been mentioned in the Commission. They are difficult, and there are others which we shall have occasion to mention later. Those which have just been outlined will suffice to show that the Commission and its Special Rapporteur perceived from the beginning that bringing international organizations within the scope of the law of treaties would entail not only drafting problems but also entirely new difficulties. This demonstrates both the wisdom of the Commission to defer consideration of the régime applicable to such agreements and the scope of the work still to be done by the Commission.

Part II. — The United Nations Conference on the Law of Treaties and its results

I. BASICS FACTS

46. The Commission's report on the work of its eighteenth session was considered by the Sixth Committee of the General Assembly at two sessions and led the

¹⁰⁴ At the 733rd meeting of the Commission, Professor Tunkin stated: "Where an international organization entered into a treaty, there would always be the problem of responsibility for the treaty with regard to both the organization and the member States" (*ibid.*).

General Assembly to adopt, in 1966 and 1967, two resolutions which gradually established the machinery for the United Nations Conference on the Law of Treaties.¹⁰⁵ Governments thus had the opportunity to express their opinions orally during the debates in the Sixth Committee. Furthermore, they were invited, in paragraph 9 of General Assembly resolution 2166 (XXI), to submit written comments not later than 1 July 1967. In the following year, the General Assembly in resolution 2287 (XXII), invited States participating in the Conference to submit their additional comments and draft amendments not later than 15 February 1968. In resolution 2166 (XXI), the Assembly also invited the Secretary-General and the Directors-General of those specialized agencies which acts as depositaries of treaties to submit their written comments. In fact, in addition to comments from States, observations were received from the Secretary-General of the United Nations, the ILO, FAO, WHO, ITU and IAEA,¹⁰⁶ and later from ICAO and (in two parts) from IBRD, as well as from BIRPI, the Asian-African Legal Consultative Committee, the Council of Europe and OAS.¹⁰⁷

In accordance with paragraph 6 of resolution 2166 (XXI), in which the Assembly invited the specialized agencies and the interested intergovernmental organizations to send observers to the Conference, the debates at the Conference gave an opportunity to hear, in addition to the government delegates, the observers for the international agencies and, in particular, those for ILO and IBRD.¹⁰⁸ It is well known that the highlight of the debates so far as the subject matter of this report is concerned was the taking of a definitive decision on the scope of the articles submitted to the Conference. By deciding that the Convention under discussion would apply to treaties which were the constituent instrument of an international organization and to those adopted within an organization, but only "without prejudice to any relevant rules of the organization" (article 5 of the Vienna Convention on the Law of Treaties),¹⁰⁹ the Conference adopted a decision of considerable importance, not only because it allayed the strongest apprehensions of the international organizations, which had prompted most of their comments, but also because it represented a solemn undertaking for the future in respect of agreements concluded by the international organizations

¹⁰⁵ *Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 84, document A/6516 and *ibid.*, *Twenty-second Session, Annexes*, agenda item 86, document A/6913.

¹⁰⁶ *Ibid.*, agenda item 86, pp. 13 *et seq.*, document A/6827 and Add.1 and 2.

¹⁰⁷ See A/CONF.39/7 and Add.1 and Add.1/Corr.1 and Add.2.

¹⁰⁸ 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. 33, 6th meeting of the Committee of the Whole, para. 24 (IBRD); p. 36, 7th meeting, para. 2 (ILO); p. 42, 8th meeting, para. 1 (FAO); p. 47, 9th meeting, para. 11 (Council of Europe); p. 48, 9th meeting, para. 22 (League of Arab States) and para. 25 (BIRPI).

¹⁰⁹ Hereafter referred to as the "1969 Convention" (*ibid.*, *First and second sessions, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 290.

themselves. It is worth repeating that it would hardly be acceptable to establish for agreements concluded by the organizations themselves a régime less liberal than that applying to treaties which are the constituent instruments of organizations or to treaties adopted within organizations. Similarly, the provisions of the 1969 Convention on treaties establishing an international organization or treaties adopted within international organizations concern, in relation to points of detail, questions of principle which also arise in respect of agreements concluded by such organizations.

47. With regard to these agreements, the discussion was based principally on amendments to the effect that the Committee's final proposals should be rejected and that such agreements should be made subject to the régime of the future Convention by revising its text and adding the necessary special provisions.¹¹⁰ Although those amendments were finally rejected, they none the less had two results: they gave an opportunity for further discussion of the matter, and, following a compromise, they led to the adoption of a resolution of the Conference in which it:

... *Recommends* to the General Assembly of the United Nations that it refer to the International Law Commission the study, in consultation with the principal international organizations, of the questions of treaties concluded between States and international organizations or between two or more international organizations.¹¹¹

It was on this basis that the Sixth Committee studied the above-mentioned resolution¹¹² at the twenty-fourth session of the General Assembly and adopted a draft resolution to the same end which the General Assembly adopted as resolution 2501 (XXIV).¹¹³ Pursuant to that resolution, the International Law Commission, at its twenty-second session, included the question in its general programme of work and set up a Sub-Committee to consider preliminary problems involved in the study of this new topic. After considering and adopting at its twenty-second session a preliminary report by this Sub-Committee,¹¹⁴ the Commission at its twenty-third session took note of a working paper, prepared by the Secretary-General at the Commission's request, which contained a short bibliography, a historical survey of the question, and a preliminary list of the relevant treaties published in the United Nations *Treaty Series*.¹¹⁵ During the same session, the Sub-Committee met twice and submitted to the Committee a report containing a summary of the views expressed by members of the Sub-Committee in response to the questionnaire prepared by its Chairman,

¹¹⁰ *Ibid.*, p. 110, document A/CONF.39/14, para. 24 (b), (d) and (e).

¹¹¹ *Ibid.*, p. 285, document A/CONF.39/26, annex, resolution relating to article 1 of the Vienna Convention on the Law of Treaties.

¹¹² *Official Records of the General Assembly, Twenty-fourth Session, Sixth Committee*, 1103rd to 1111th and 1119th meetings, and *ibid.*, Annexes, agenda items 86 and 94 (b), document A/7746, paras. 109-115.

¹¹³ *Ibid.*, para. 118.

¹¹⁴ See *Yearbook of the International Law Commission, 1970*, vol. II, p. 310, document A/8010/Rev.1, para. 89.

¹¹⁵ A/CN.4/L.161 and Add.1 and 2.

to which were annexed the questionnaire and the complete texts of the individual replies.¹¹⁶ The report was studied and adopted without change by the International Law Commission.¹¹⁷ General trends became clear on certain important points and they remain valid today: they will serve to guide the work of the Commission and its Special Rapporteur. The Sixth Committee approved the work of the International Law Commission on this item. In particular, the Committee, in the draft resolution it approved, invited the Assembly to recommend that the International Law Commission:

Continue its consideration of the question of treaties concluded between States and international organizations or between two or more international organizations.

The General Assembly adopted this recommendation.¹¹⁸

48. The above remarks constitute the background to the present report. It none the less seems necessary to add details of the results of the work which preceded the preparation of *the draft articles on the representation of States in their relations with international organizations*. Those articles constitute the first draft prepared by the International Law Commission in which the law of international organizations is the principal subject. On that occasion the Commission had of necessity to take a position on certain very general matters, such as the scope of the draft, the notion of an international organization, and the relationship between the rules in the draft and the internal rules of each organizations concerned. Questions of a similar nature will inevitably arise in connexion with any draft on agreements concluded by international organizations. But the main question raised and discussed was that of the form under which the draft articles on representation of States could be binding upon the organizations to which they refer; that is a question which is *very closely linked with that of the agreements concluded by international organizations*. Thus subsequent work on the latter subject will have to include mention of certain comments made on the first point.

2. THE OPINION OF GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS

49. As early as 1966, again in 1967 the representatives of Governments became divided into two groups, both influenced by a complex of contradictory considerations; but differing in the importance which they attached to each individual consideration. It was felt on the one hand that it would be wise to limit the Convention to treaties between States, and on the other that it would be regrettable not to include international agreements which were continually increasing in both numbers and importance in the régime of a future convention. The

¹¹⁶ See *Yearbook of the International Law Commission, 1971*, vol. II (Part Two), p. 185, document A/CN.4/250.

¹¹⁷ *Ibid.*, vol. I, p. 287, 1129th meeting, para. 52.

¹¹⁸ General Assembly resolution 2780 (XXVI). See also *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee*, 1255th to 1265th to 1280th meetings, and *ibid.*, Annexes, agenda item 88, document A/8537.

developing countries were alert to the importance of such agreements in the sphere of assistance; the United States was concerned about agreements concluded by IAEA for the control of fissionable products.¹¹⁹

50. The problem was to recur for the last time in 1968 in the Committee of the Whole of the Conference on the Law of Treaties with the amendments of the United States and Viet-Nam, which sought to extend the scope of the draft Convention to all agreements concluded between two or more States or other subjects of international law; this was aimed specifically at agreements concluded by international organizations.¹²⁰ Before being withdrawn, the amendments were the subject of a long discussion in the Committee of the Whole.¹²¹ A great many views were submitted on that occasion by the various Governments.¹²² The most interesting question raised related to the following point: does the adaptation of the text of the draft articles to cover agreements concluded by international organizations involve merely questions of drafting, or more delicate questions of substance, which require thorough investigation? To answer that question the United States proposed the establishment of a working group which would comprise, in addition to delegates, representatives of selected international organizations, and would operate within the framework of the Conference. The United States felt, however, together with the States which supported its proposal, that the question was mainly one of drafting. Those who were opposed to the extension of the scope of the draft articles made certain detailed comments which is of interest to note here. Some representatives asserted that the question of agreements concluded by international organizations was not ripe for codification.¹²³ For others, agreements concluded by international organizations had many special characteristics:¹²⁴ not only was the process by which they were drawn up different, but they were not of the same nature.¹²⁵ A further source of difficulty lay in the profound differences that existed between one organization and another;¹²⁶ moreover, the changing practice of organizations tended to depart from the traditional rules applicable to relations

between States.¹²⁷ Going further into the technical problems, some speakers pointed out that the juridical personality of international organizations was involved; their competence and their power to conclude international agreements were always confined to and depended closely, on their purpose and functions as set out in their constituent instruments.¹²⁸ Moreover, the question of the procedures by which rules relating to agreements concluded by international organizations could be implemented in such a manner as to be binding on those organizations raised difficult problems.¹²⁹ Reference was made to a question which had already been raised in the International Law Commission and which, as will be seen below, was to lead to an amendment of the draft articles, namely the question of agreements known as "trilateral" agreements because they are concluded between two States A and B and an organization C.

51. The most valuable comments, were however, those submitted by the international organizations and they deserve careful study. The international organizations had in mind two contradictory concerns: on the one hand, a strong desire to see the same juridical régime applied to treaties between States and to agreements concluded by international organizations, and on the other hand the desire to avoid confining the creative freedom of international organizations within rules which would not be fully adapted to their needs as those needs became progressively clearer with the development of their activities. There is no lack of justification for the first point: when rules are too diversified, their authority is diminished by their very multiplicity, and in many cases it is difficult to distinguish between their respective areas in which they apply; for example that is the case when one attempts to determine the régime to be applied to treaties concluded between more than one State and an international organization.¹³⁰ But the dominant feeling was one of fear lest a process of change essential for the future of the organizations be interrupted. This last concern was forcefully revealed in connexion with a question which the Conference settled by deciding to make the draft article under discussion applicable to the constituent treaties of an international organization and to treaties concluded within such an organization. As is known, the rules drawn up the International Law Commission and confirmed by the Conference apply to such treaties only in so far as that is possible "without prejudice to any relevant rules of the organization".

The representatives of the international organizations showed keen concern about this matter. They either tried to make the wording less restrictive,¹³¹ or specified

¹¹⁹ See A/CONF.39/5 (Vol. I) and A/CONF.39/5 (Vol. II). It does not seem that agreements concluded by organizations were mentioned in the comments on and amendments to the final draft articles on the law of treaties which were submitted in 1968 in advance of the Conference (A/CONF.39/6 and Add.1 and 2).

¹²⁰ See *Official Records of the United Nations Conference on the Law of Treaties, First and second sessions; Documents of the Conference (op. cit.)*, p. 110, document E/CONF.39/14, para. 24 (b) and (d).

¹²¹ *Ibid.*, First Session (op. cit.), pp. 11 et seq., 2nd and 3rd meetings of the Committee of the Whole.

¹²² See A/CN.4/L.161/Add.1, paras. 29-59.

¹²³ See *Official Records of the United Nations Conference on the Law of Treaties, First Session, . . . (op. cit.)*, p. 12, 2nd meeting of the Committee of the Whole, para. 16 (Ceylon); p. 15, 3rd meeting, para. 12 (Uruguay); p. 19, para. 62 (Japan).

¹²⁴ *Ibid.*, p. 11, 2nd meeting, para. 7 (India); p. 12, para. 17 (Ceylon); p. 13, para. 26 (USSR); p. 16, 3rd meeting, para. 18 (Czechoslovakia); p. 18, para. 38 (Finland).

¹²⁵ *Ibid.*, p. 17, 3rd meeting, para. 29 (Afghanistan).

¹²⁶ *Ibid.*, pp. 16-17, 3rd meeting, para. 22 (Ghana); p. 18, para. 43 (Switzerland).

¹²⁷ *Ibid.*, p. 12, 2nd meeting, paras. 15 and 18 (Ceylon).

¹²⁸ *Ibid.*, p. 17, 3rd meeting, para. 30 (Poland); p. 18, para. 43 (Switzerland).

¹²⁹ *Ibid.*, p. 13, 2nd meeting, para. 22 (Jamaica); p. 15, 3rd meeting, para. 12 (Uruguay).

¹³⁰ On this point see the position of FAO (A/CONF.39/5 (Vol. I), p. 62), and especially that of IBRD (A/CONF.39/7/Add.1 and Corr.1, para. 3 and A/CONF.39/7/Add.2, para. 3).

¹³¹ From the outset, the Secretary-General of the United Nations requested that, in draft article 4 (article 5 of the 1969 Convention) the words "are adopted within an international

(Continued on next page.)

that they interpreted it very liberally,¹³² or else declared that the reservation would be very hard to apply.¹³³ Their efforts, were above all directed towards determining what were the relevant rules of the organization: in their view the phrase applied not only to the existing rules, but also to those which might be established in the future.¹³⁴ For some the main difficulty was to determine what constituted the "practice" of international organizations; was "practice" contained in the notion of "relevant rules of the organization"? There was no doubt about the reply in respect of "established practice", i.e. "practice" which had given rise to a customary rule which thereby became one of the "relevant rules of the organization".¹³⁵ However, there was likewise no doubt that the representatives of the organizations also wished to reserve their right to institute new practices, i.e. to follow certain procedures which, prior to their acceptance as custom, were not "established rules" but would mean that the organization had departed from the terms of the proposed articles.¹³⁶ To refuse to accord this last concession to the organization would lead to a distressing situation where the provisions of the 1969 Convention could be set aside by a formal legal act in written form constituting a "relevant rule of the organization", but not by a customary process. It is probably for this reason that the international organizations made far more precise and demanding claims in respect of the draft articles on the representation of States in their relations

with international organizations than in respect of the 1969 Convention on the Law of Treaties.¹³⁷

52. This matter will be discussed further below, but the preceding brief remarks show that all the international organizations which submitted observations concerning the draft articles on the law of treaties were fully aware of what was at stake and of the difficulties caused by many questions of principle, one of the most important of which was that of determining how rules drawn up during a process of codification could become binding upon the organizations.¹³⁸ Furthermore, there can be no doubt that at the time of the Conference on the Law of Treaties, and in respect of the possible extension of the draft articles to agreements concluded by international organizations, it was the rules for forms of conclusion which gave rise to the greatest number of reservations; on the other hand, generally speaking, the rules for the basic régime of treaties did not attract the same attention. None the less, the international organizations were extremely cautious on this point, as is shown by the following statement from an organization which showed particular concern about this matter:

In addition to these "procedural" points, due consideration should be given the application of many of the even more important "substantive" provisions of the Draft Articles to the agreements of international organizations. While in the event it may be determined that no more than an adaptation of the text of the Articles as they relate to States will be required no such determination can be made until a careful examination of the character and subjects of the agreements of international organizations has been undertaken.¹³⁹

(Foot-note 131 continued.)

organization" should be replaced by "concluded under the auspices of or deposited with an international organization" (A/CONF.39/5 (Vol. I), p. 83, and *Official Records of the Conference on the Law of Treaties, First Session . . . (op. cit.)*, p. 56, Committee of the Whole, 10th meeting, para. 32; see also comments by FAO (A/CONF.39/5 (Vol. I), p. 88).)

¹³² See the ILO (A/CONF.39/5 (Vol. I), p. 89) and *Official Records of the Conference on the Law of Treaties, First Session . . . (op. cit.)*, p. 37, Committee of the Whole, 7th meeting, para. 17: "an international organization might have a *lex specialis* that could be modified by regular procedures in accordance with established constitutional process". IBRD (A/CONF.39/7/Add.1, para. 2) agreed that treaties concluded under the auspices of an organization should be subject to the above-mentioned reservation.

¹³³ See Council of Europe (A/CONF.39/7, p. 15).

¹³⁴ See FAO (A/CONF.39/5 (Vol. I), p. 88); Council of Europe (A/CONF.39/7, p. 17); the ILO (*Official Records of the Conference on the Law of Treaties, First Session* (p. 37), Committee of the Whole, 7th meeting, (para. 17).

¹³⁵ See Sir H. Waldock: "With regard to the established practices of international organizations, the International Law Commission had considered that the words 'any relevant rules', covered that aspect of the matter. That phrase was intended to include both rules laid down in the constituent instrument and rules established in the practice of the organization as binding." (*Official Records of the United Nations Conference on the Law of Treaties, First Session . . . (op. cit.)*, p. 57, Committee of the Whole, 10th meeting, para. 40); see also the statement by the Chairman of the Drafting Committee: "... article 4 did not apply to mere procedures which had not reached the stage of mandatory legal rules". (*Ibid.*, p. 147, 28th meeting, para. 15.)

¹³⁶ Council of Europe (A/CONF.39/7, p. 17, para. 2 (b)); FAO proposed extending the notion of relevant rules to include "the practice of the organization" (*Official Records of the United Nations Conference on the Law of Treaties, First Session . . . (op. cit.)*, p. 43, Committee of the Whole, 8th meeting, para. 8).

3. CONSIDERATION OF THE PROBLEMS IN DEPTH

53. There has been little technical comment on specific aspects of agreements concluded by international organizations, since such comment would have immediately and unnecessarily obliged those making it to go deeply into the subject. A few points are worthy of note, however, since they add to or correct some of the analyses advanced in the International Law Commission. This further study shows that the international organizations most concerned already had access to a considerable body of thought on the problems that the Commission will now have to resolve. This report will examine three

¹³⁷ With regard to the "relevant rules of the organization", UPU calls for respect for its "autonomous development", and for the "de jure and de facto situation" (*Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 424, document A/8410/Rev.1, annex I,C, sect. 10) and refers to "paragraph 20 in fine of the report of the Sixth Committee to the General Assembly" (*Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147); see also the observations of the ILO (*Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 413, document A/8410/Rev.1, annex I,C, sect. 2).

¹³⁸ The ILO (*Official Records of the United Nations Conference on the Law of Treaties, First Session, . . . (op. cit.)*, p. 36, Committee of the Whole, 7th meeting, para. 2) was particularly anxious that a solution be found to the question of "how any codification of such rules was to become binding on the international organizations concerned".

¹³⁹ IBRD, in A/CONF.39/7/Add.1, para. 4 in fine.

questions: forms of conclusion, acceptance by an organization of functions specified in an agreement between States, and the régime of "trilateral" agreements.

(a) *Forms of conclusion*

54. When the question arose of giving examples of areas in which there were substantial differences between agreements concluded by international organizations and treaties between States, at least in respect of their régime as laid down in the draft articles on the law of treaties, it appeared that one could easily be found in:

The entry into force of an agreement occurring directly as a consequence of the separate actions of the legislative organs of the organizations concerned, without the exchange of any signatures or ratifications.¹⁴⁰

55. That observation to the Conference was quite correct at the time when it was made. Nevertheless, a new article, based on an amendment submitted by Poland and the United States of America (which became article 11), was adopted by the Conference. It reads as follows:

The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments, constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.¹⁴¹

56. While it is not necessary to examine here the origin and all the aspects of a text which, by summarizing and, where necessary, evading them, had a radical effect on a number of other articles that were retained in the Convention, note must be taken of the fact that article 11 establishes the absence of any conditions as to form and the validity of simple agreement as principles of treaty law; consent is binding regardless of any form, or—it might be better to say—the force of mutual consent is such that it is free to choose its own manner of expression. If the text is read with the term "a State" replaced by "an international organization", the result will be a rule which provides in advance a legal basis for all the present and future practice of organizations; organizations will bind themselves by their consent as they themselves understand it.

The corollary to this is rather important: all the problems which international organizations quite legitimately thought they discerned in the draft articles on the law of treaties as prepared by the International Law Com-

mission in 1966 have for the most part been completely eliminated from the 1969 Convention on the Law of Treaties. The work of the Special Rapporteur and the Commission has to that extent been made considerably easier.

57. The same cannot be said, however, for certain problems which are also connected with the *conclusion* of agreements, but which relate to *delegation* or to *juridical personality*. These problems have already been raised before the International Law Commission,¹⁴² which shelved them even where treaties between States were concerned. But one international organization very rightly pointed out, at the time of the Conference on the Law of Treaties, that it was customary for one international organization to delegate to another, implicitly or explicitly, the power to sign agreements in its name.¹⁴³ Thus, a problem would seem to exist which, at least in magnitude, is peculiar to international organizations. It is true that there is nothing to prevent such delegation of powers where treaties between States are concerned, and such delegation is quite common when it is only a question of granting powers to the representative of another State for the purposes of an *individual* treaty. Perhaps for the international organizations there are special aspects to the problems which in any case need to be examined anew.

Onec stated on an investigation of this kind, however, it is difficult not to go further. A deeper study of the various aspects of the representation of international organizations brings one of necessity face to face with problems which lead, by way of the administrative arrangements, to questions of international personality. Certain organizations, for example, have created subsidiary bodies which conclude numerous international agreements in order to carry out their operational tasks; on the face of it, those agreements are concluded under the considerable autonomy enjoyed by the subsidiary body and are binding only on that body.¹⁴⁴ But it might be asked whether such agreements are not also binding on the organization which created the subsidiary body by a unilateral decision, particularly, if it should be dissolved by another unilateral decision of the organization which brought it into existence. Although the situation is very different from that prevailing within confederations and federations of States, there are certain similarities. The International Law Commission is aware of the great difficulties involved in submitting proposals on inter-State federalism and in getting them accepted by an international conference.¹⁴⁵ It is only with great caution

¹⁴⁰ IBRD, in A/CONF.39/7/Add.1, para. 4 (a). IBRD cites as familiar examples the agreements customarily concluded by organizations to govern the relations between them (cf. ST/SG/14).

¹⁴¹ *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (op. cit.)*, p. 124, document A/CONF.38/14, paras. 103, 104 and 105-108; *ibid.*, *First Session . . . (op. cit.)*, pp. 83-84, Committee of the Whole, 15th meeting, paras. 42-56 and p. 344, 59th meeting, paras. 67-71; *ibid.*, *Second Session, Summary records of plenary meetings and of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), pp. 23-24, 9th plenary meeting, paras. 55, 57 and 60-74 and p. 159, 29th plenary meeting, para. 7. Explanations concerning the amendment are given in the comments submitted in advance of the Conference by Poland (A/CONF.39/6/Add.1, p. 14) and in the statement made by the representative of Poland in the Committee of the Whole (*Official Records of the United Nations Conference on the Law of Treaties, First Session . . . (op. cit.)*, p. 84, Committee of the Whole, 15th meeting, paras. 44-48).

¹⁴² See para. 41 above.

¹⁴³ This refers to IBRD which mentions as examples the statutory delegation of powers to IBRD under the Articles of Agreement of IFC (article IV, section 7) and of IDA (article VI, section 7) and also the implicit delegation which is customary among organizations participating in UNDP (A/CONF.39/7/Add.1, para. 4 (c)).

¹⁴⁴ K. Karunatileke, *Le Fonds des Nations Unies pour l'enfance* (Paris, Pédone, 1967), p. 145.

¹⁴⁵ See article 5, paragraph 2 of the draft articles on the law of treaties (*Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (op. cit.)*, pp. 116-118, document A/CONF.39/14, paras. 58-66) which was rejected in plenary (*ibid.*, *Second Session . . . (op. cit.)*, p. 15, 8th plenary meeting, para. 50).

and reserve, therefore, that the Commission will try to explore some of the aspects of the administrative and financial federalism of international organizations.

(b) *Acceptance by an organization of functions specified in a treaty between States*

58. Reference was made to this problem in relation to draft article 31 (which became article 35 of the 1969 Convention), dealing with the effect of treaties vis-à-vis third parties.¹⁴⁶ Thus, the problem touched on here is one of the most serious and most delicate, namely, the effect vis-à-vis international organizations of certain treaties to which they are not parties. There is a vast, albeit somewhat confused, body of practice of such organizations with regard to functions conferred on them by a treaty between States to which they are not parties. Some comment, with the benefit of further studies that have since been made, is called for on both the theoretical problems and the practice followed by organizations.

The theoretical problem may be approached by first posing a somewhat naive question, but one which provides a good starting-point for the analysis: is an international organization a third party in relation to the treaty which created it? All the essential rights and obligations of the organization are based on the text of its constituent charter; the organization not only *may* invoke its constituent charter, but *must* base its every action on that text. Thus, it is not a third party in relation to its constituent charter; that, it will be said, is obvious. But once that approach is adopted, there may be some difficulty in stopping at the constituent charters. There may be other treaties which are linked to the charters and are to some extent merely instruments of execution, such as collective agreements concerning the privileges and immunities of the organizations. It may be necessary to consider later whether the formula should not be extended generally to such treaties, and whether it should not be said that, in relation to those treaties also, the organization is not a third party.

59. The hypothesis discussed above obviously relates to treaties covered by the 1969 Convention. It is necessary, however, to go a little further and consider the case of an existing organization which, as a result of a new treaty between States, has been given a new function not provided for in its constituent charter. Many variations in the modalities of the operation are possible; the States parties to the new agreement may be different from the States members of the organization; the new agreement may confer some new power on an existing organ of the organization, or it may establish a completely new organ which it attaches to the organization previously existing. Obviously many legal difficulties that might arise in such cases could be mentioned. So far as the Special Rapporteur

is aware, studies on situations of that kind are few and rather summary.¹⁴⁷

Reasoning on the lines of the articles of the 1969 Convention, the following conclusion might be drawn: if it were desired to ensure the implementation of such new agreements as a matter of course, the constituent charter of the organization would have to be amended in accordance with a regular procedure; for the new agreement cannot have effect vis-à-vis the organization when the latter is a third party in relation to it. However, amending the constituent charter of the organization concerned is a very laborious process; apparently it is never done. Another method, less correct procedurally but more practical, would be not to undertake such innovations without the consent of the parties concerned; where an existing organ is given new functions, that organ should be asked to give its consent; where a new organ is attached to an organization already in existence, that organization should also give its consent.

60. International practice would certainly show cases where formal consultation took place with a view to obtaining the consent of the organ or organization concerned.¹⁴⁸ That is not the general rule, however, since the new agreement is always one prepared and concluded under the auspices of an organization and either the organs whose powers will be modified belong to that organization or it will be the latter that will acquire a new organ. Consequently, there is no formal consultation, perhaps because it is felt that the modifications are a matter of course. Can it be said that the organ or the organization, as the case may be, implicitly accepts the functions conferred on it? And, if so, should this be looked on as a collateral act of agreement which makes the organization a party, not to the new treaty between States, but to an agreement concluded between the organization on the one hand and the States parties to the new agreement on the other hand?

There are more than purely theoretical aspects to difficulties of this kind; they may arise during the discussion of administrative or financial questions. They have arisen in connexion with the procedures of certain international

¹⁴⁷ The ILO presents the problem in its observations on the draft articles on representatives of States to international organizations (adopted in 1968, 1969 and 1970): "It is true that certain international conventions, such as the constitutions of international organizations, impose certain obligations on those organizations. However, in such cases the situation is different from the one we are dealing with here, for what those constitutions define is in fact the functions and purposes of the organizations, whereas in the present case the obligations imposed on the organization are not part of the latter's constitutional functions." (*Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 413, document A/8410/Rev.1, annex I, C, sect. 2.) UPU states even more emphatically that "in the case of an international organization for which no link has been established (in accordance with its constitutional rules) in relation to the treaty, the provisions of the treaty are *res inter alios acta*", (*ibid.*, p. 424, document A/8410/Rev.1, annex I, C, sect. 10).

¹⁴⁸ In 1953 the Permanent Central Opium Board, which was established by the 1925 Convention and was itself an organ "attached" to the United Nations, was consulted on whether it would agree to exercise functions the creation of which under a new treaty was being considered; that practice has not subsequently been followed.

¹⁴⁶ IBRD referred in this connexion to "the custom whereby international organizations frequently accept by implication (rather than expressly as foreseen in Draft Article 31) obligations or functions with respect to treaties to which they are not parties (but which they may have sponsored)", (A/CONF.39/7/Add.1, para. 4 (b)).

organizations. Some of these organizations, for example, play a decisive part in the preparation of certain conventions between States and *append their signature* to draft treaties formulated in that way without, however, considering that they thereby become parties to that treaty. Is the purpose of such signature only to authenticate the text of the treaty, or does it amount to acceptance by the organization of the rights and obligations set out therein? In the latter case, is that procedure to be interpreted as a unilateral act or as acceptance of the collateral agreement which will exist between the organization and future States parties to the convention? Questions of this kind emerge naturally from the observations submitted by international organizations at the time of the Conference on the Law of Treaties.¹⁴⁹ What is needed, finally, is an exploration, on as wide a basis as possible, of *what the positions of an organization may be with respect to a convention to which it is not a party in the way that a State may be*.

Extensive information needs to be gathered on a subject of this nature, but a broad area of research has already been outlined in the observations collected.

(c) "Trilateral" agreements

61. As has already been mentioned,¹⁵⁰ the characteristic feature of a treaty of this kind is not simply that there are three parties to it but that the parties are two (or more) States and one or more international organizations, the positions of the three parties or groups of parties not being the same in relation to the treaty. The classic example of this is the agreements concluded for the supply of fissionable material between two States (one supplying and the other receiving) and IAEA (which supervises); those agreements played a definite part in the decision of the United States to seek extension of the scope of application of the draft articles on the law of treaties to include agreements concluded by international organizations. Such agreements pose rather a difficult problem

¹⁴⁹ IBRD stated the following:

"Sometimes the sponsoring organization assumes such functions explicitly by signing the treaty (without, however, becoming a party to it), as the Bank did, for example, with respect to the three Agreements cited in foot-note 2 [Articles of Agreement of IFC, Articles of Agreement of IDA, Convention on the Settlement of Investment Disputes Between States and Nationals of other States]: more frequently this is not done—for example, the International Atomic Energy Agency assumed several functions under or in connexion with the Vienna Convention on Civil Liability for Nuclear Damage, without signing it or the Final Act of the Conference at which it was formulated (see IAEA Legal Series No. 2)" (A/CONF.39/7/Add.1, foot-note 5, also reproduced in A/CN.4/L.161/Add.1, p. 12, foot-note 22). It will be noted that it is common practice for an organization to sign a text adopted within the organization, for purposes of authentication (see, for example, the Convention on the Illicit Movement of Art Treasures of 14 November 1970 (UNESCO document 16 C/17). The practice of an organization's assuming new powers without there having been explicit consent by an organ competent for the purpose is becoming general at higher and higher levels (see, for instance, the Convention of 28 September 1971 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction (General Assembly resolution 2826 (XXVI), annex), which confers powers of decision on the Security Council).

¹⁵⁰ See para. 50 above.

with respect to the application of the 1969 Convention on the Law of Treaties in its final form.

In principle, agreements of that kind are indeed agreements concluded by international organizations.

The problem had not escaped the notice of the International Law Commission and it had been proposed that trilateral agreements should be subject to the rules set out in the draft articles.¹⁵¹ However, the Commission opted for a more general formula which simply allowed for the possibility of applying to agreements concluded by international organizations "any of the rules set forth in the present articles to which they would be subject independently of these articles".¹⁵² However, after the question had been raised again by the United States,¹⁵³ FAO,¹⁵⁴ Australia, Canada and Sweden,¹⁵⁵ the Expert Consultant to the Vienna Conference stated that agreements of that kind were not covered by the draft articles.¹⁵⁶ It was at that point, following a quite spontaneous initiative, but "in order to clarify a point, as appeared to be desired by certain delegations",¹⁵⁷ that the Drafting Committee added to the text of article 3 of the draft Convention a provision reading as follows:

[The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:]

...

(c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.¹⁵⁸

Although one representative expressed some reservations concerning an addition which went beyond a drafting change,¹⁵⁹ the article as a whole was approved in the plenary Conference by 102 votes to none.¹⁶⁰

62. The effect of a provision of this sort is, however, open to question. How it is applied depends on the nature of the treaty concerned. To hold that relations solely between States can be dissociated from the other relations is *possible* and *useful* only under certain conditions. For

¹⁵¹ *Yearbook of the International Law Commission, 1965*, vol. I, p. 12, 777th meeting, para. 24 (Mr. Reuter).

¹⁵² *Ibid.*, 1966, vol. II, p. 190, document A/6309/Rev.1, part II, chap. II, article 3.

¹⁵³ *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 86, document A/6827/Add.2; A/CONF.39/5 (vol. I), p. 61; *United Nations Conference on the Law of Treaties, First Session . . . (op. cit.)*, p. 11, Committee of the Whole, 2nd meeting, para. 2.

¹⁵⁴ "In our opinion, it would be desirable to avoid a situation in which two different sets of rules would be applied to one and the same international instrument, the choice depending on whether a given problem arising in connexion with the instrument concerns relations between States or between States and international organizations." (A/CONF.39/5 (Vol. I), p. 62).

¹⁵⁵ *United Nations Conference on the Law of Treaties, First Session . . . (op. cit.)*, p. 14, Committee of the Whole, 2nd meeting, para. 31, and pp. 15 and 20, 3rd meeting, paras. 4 and 66.

¹⁵⁶ *Ibid.*, p. 20, 3rd meeting, para. 78.

¹⁵⁷ *Ibid.*, p. 147, 28th meeting, para. 7.

¹⁵⁸ *Ibid.*, p. 146, 28th meeting, para. 4.

¹⁵⁹ *Ibid.*, p. 147, 28th meeting, para. 8.

¹⁶⁰ *Ibid.*, *Second Session . . . (op. cit.)*, p. 4, 7th plenary meeting.

such dissociation to be *possible*, the legal relations must not be interdependent, in the meaning given to this term in the law of treaties; the separation must not be contrary to the object or to the purpose of the treaty. If it is to be *useful*, the organizations must be parties to the treaty in precisely the same way as an ordinary party, i.e. a State. In fact, this second condition will seldom be fulfilled, because organizations are seldom in the same position as member States. Usually, they undertake to perform specific functions, as when they are responsible for *supervising* some transaction or when they act as intermediary in providing aid or assistance. In this case, the bonds created by a trilateral agreement could quite easily be taken separately and regrouped in two agreements: a treaty between States and a treaty between States and the international organization; in the second treaty the organization agrees to play a certain role which has been stipulated for it in the treaty between States. This really comes closer to the case previously examined of a treaty between States entrusting new functions to an international organization. The difference between the two mechanisms is based mainly on practical considerations. In the case of a multilateral treaty that is open to many States (all States members of the organization and sometimes non-member States as well), the organization will perform the functions provided for in the treaty, usually without any specific act of acceptance; this practical arrangement is accounted for by the role of the organization in the preparation of this type of convention and by the broad intersection of the two circles of States in question: the States members of the organization and the States intending to become parties to the treaty. On the other hand, where the organization is concerned with a very narrow circle of States, in principle two or a few more, and its role is precisely defined for this particular case, a specific and formal expression of its acceptance is required, and the most direct and simple way of obtaining it is for the organization to become a party to the treaty in question and thus make it a "trilateral" treaty as defined above. But in this case another solution is also possible: to conclude an inter-State treaty and then a "collateral" treaty between the States parties to the first treaty, on the one hand, and the organization, on the other, this arrangement would not be so simple, however.

63. Whatever the legal analysis of the "trilateral" agreement may be, the makeshift solution belatedly embodied in article 3 (c) of the 1969 Convention does not remove all the difficulties. Consequently, it would be very useful to bring the rules on treaties of international organizations into line with the rules on treaties between States adopted in the 1969 Convention. These few remarks on trilateral treaties also suggest that the positions in which international organizations may be placed with respect to treaties concluded mainly between States should be further examined.

4. PARTICIPATION OF INTERNATIONAL ORGANIZATIONS IN MULTILATERAL CONVENTIONS

64. As we have already observed several times,¹⁶¹ one of the major problems in the law of agreements of inter-

¹⁶¹ See paras. 3, 12, 42 and 58 above.

national organizations is to establish the conditions under which an international organization can become a party to a treaty open to a wide circle of States, with the intention of being treated, for the purposes of that treaty, like any other party, that is to say, like a State.

When the International Law Commission began preparing the draft articles on the law of treaties in 1962, the problem was not unknown; but there were only a few remarks on it in the literature and the practice in that connexion was very limited. As the Commission did not devote much time to the problems raised by the treaties of international organizations and finally decided to exclude this subject from its draft articles on the law of treaties as far as possible, the matter was examined, not in the course of the Commission's work, but in the observations elicited by its draft. Though the proposed convention might be silent on this point, its very existence raised the problem. For some of its articles were intended to produce effects with respect to international organizations, and how could they be effective with respect to international organizations which would not be parties to the proposed convention? Once posed in these terms, the question necessarily became broader: how, *a fortiori*, could another convention relating to the treaties of international organizations bind the international organizations concerned if they could not become parties to it? How, even more generally, could any convention dealing with an element of the law of international organizations bind international organizations which could not become parties to it?

The problem which the 1969 Convention declined to deal with as a matter of general principle thus arose in the form of a particular case in connexion with the Convention itself and with the conventions that were to follow.

65. In several of its provisions the 1969 Convention referred incidentally to questions of the law of international organizations, concerning which the express consent of the international organizations consequently appeared to be required. Examples can easily be given.

The Convention applies, "without prejudice to any relevant rules of the organization", to any treaty which is the constituent instrument of an international organization and to any treaty adopted "within an international organization" (article 5); the same reservation of "any relevant rules of the organization" does not apply to treaties concluded "under the auspices of the organization"; but how could it bind, in this respect, organizations which follow rules different from those laid down in the Convention for treaties concluded under their auspices? The representatives of the international organizations, and especially the representative of the Secretary-General of the United Nations, advanced this objection forcefully,¹⁶² though Governments on the whole, did not give it much attention.¹⁶³

¹⁶² See A/CONF.39/5 (Vol. I) and *Official Records of the United Nations Conference on the Law of Treaties, First Session . . . (op. cit.)*, p. 56, Committee of the Whole, 10th meeting, para. 32; see also para. 51 above.

¹⁶³ From the United States reply it appears that that delegation distinguished mainly between the internal affairs of an organ-

(Continued on next page.)

66. Reference must also be made to article 20, paragraph 3 of the 1969 Convention (article 17, paragraph 3 of the draft articles) which provides that:

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

It appears from the Special Rapporteur's explanation that this provision originated in an observation by the Secretary-General on United Nations practice; document ST/LEG/7, quoted by the Special Rapporteur, says that:

... The organization alone would be competent to interpret its constitution and to determine the compatibility of any reservation with its provisions.¹⁶⁴

The adoption of article 20, paragraph 3 gave rise to no discussion either in the Commission or at the Conference; but as a *treaty provision* the paragraph does raise some difficulties. For whatever the reasoning used, it seems difficult to apply as treaty law. Leaving aside the legal personality of the international organization and regarding the matter solely from the standpoint of the law of treaties, for this provision to be applicable, all States members of the organization concerned would have to have ratified the 1969 Convention. On the other hand, considering the fact that an organization is a subject of law distinct from the member States composing it, article 20, paragraph 3 cannot, as a conventional instrument, produce any effect with respect to an international organization which is not a party to the Convention. Hence the rule laid down in article 20, paragraph 3 could not have any direct conventional effect. It might therefore be maintained that this provision is no more than the recognition of a customary rule.¹⁶⁵ This would be a good example of extension of a treaty rule by the effect of custom—a mechanism provided for in article 38 of the Convention, but which operates here with special features: the initial recognition comes from States taking advantage of the opportunity provided by a convention, but the rule will only come into being through recognition emanating from the international organizations.

67. Other examples of similar problems are to be found in the text of the articles adopted by the Conference, and

(Foot-note 163 continued)

ization, such as the procedure for the formation of agreements, which should be subject to its own rule-making, and treaty relations between States, which involved matters such as the principles relating to invalidity and were beyond the rule-making competence of international organizations (*Official Records of the United Nations Conference on the Law of Treaties, First Session . . . (op. cit.)*, p. 43, Committee of the Whole, 8th meeting, para. 20). The representative of Sweden adopted a very liberal interpretation of the organizations' freedom to develop autonomous practices (*ibid.*, p. 45, para. 35). The Expert Consultant replied to the Secretary-General's objections that "The problems raised in that connexion had a different legal explanation and should not be dealt with in connexion with article 4" (*Ibid.*, p. 57, 10th meeting, para. 39).

¹⁶⁴ *Yearbook of the International Law Commission, 1962*, vol. II, p. 66, document A/CN.4/144, para. 12 of the commentary to articles 17, 18 and 19.

¹⁶⁵ A number of Governments intimated, in or outside the Conference, that the provisions of the Convention had, in any case, an assured future as customary rules.

the question of principle was raised in the observations of the international organizations.¹⁶⁶ But these problems were to come even more to the fore in connexion with the draft articles on the representation of States in their relations with international organizations, the final text of which was to be adopted by the Commission at its twenty-third session, in 1971. In their observations, several international organizations directly asked the question by what process the proposed rules could become binding on them; here we shall only quote a passage from the observations of IBRD:¹⁶⁷

Even more important than any arrangements for the effective participation of international organizations in the formulation of the proposed instrument, is to devise some procedure whereby each organizations (i.e. its member States) could choose whether or not, or how, it should be covered by such instrument—which, as now formulated, would place several direct obligations on the organization covered (see, for example, draft articles 22-24). While various means to this end could be proposed, it would seem that the pertinent provisions of the Convention on the Privileges and Immunities of the Specialized Agencies present the most useful model, which, with minor changes, could be incorporated into the proposed instrument as well as into subsequent ones having a similar scope . . .

68. This problem was considered by the Sixth Committee in the same connexion. Like IBRD, speakers made a distinction between the preparation and the acceptance of the texts; as to preparation, the right of the organizations to be heard was accepted in the broadest sense;¹⁶⁸ as to bringing the text into force, the idea was again put forward of taking as a model the 1947 Convention on the Privileges and Immunities of the Specialized Agencies,¹⁶⁹ so that organizations could participate in the preparatory work and become associated with States Parties to the convention by means of a procedure based on article X of the 1947 Convention.¹⁷⁰

¹⁶⁶ See foot-note 137 above. Several provisions of the 1969 Convention concerning depositaries directly concern international organizations when they perform the functions of a depositary (e.g. article 77 and article 80, para. 2). Where the depositary is an international organization, how can the text become applicable to it? Some government representatives, strange to say, argue as though organizations had no legal personality of their own; thus the representative of the United States of America said that "the United Nations Secretariat was in favour of the registration of treaties by depositaries, but in some instances certain technical difficulties stood in the way of such a procedure. For example, many treaties for which the Organization of American States (OAS) was depositary did not contain any provision regarding their registration, and in order for them to be registered with the United Nations, the OAS had first to obtain the agreement of all parties". (*Official Records of the United Nations Conference on the Law of Treaties, First Session . . . (op. cit.)*, p. 470, Committee of the Whole, 79th meeting, para. 4.) How could the proposed rule affect OAS, which is not a party to the 1969 Convention, except by a process of customary law?

¹⁶⁷ The point was also raised by the ILO and UPU. The observations quoted were published in the report of the International Law Commission on the work of its twenty-third session (*Yearbook of the International Law Commission, 1970*, vol. II (Part One), para. 421, document A/3410/Rev.1, annex I, C, sect. 6).

¹⁶⁸ Israel: *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee*, 1256th meeting, para. 15.

¹⁶⁹ Netherlands: *ibid.*, 1256th meeting, para. 31 and India: *ibid.*, 1261st meeting, para. 33. For the text of the Convention, see United Nations, *Treaty Series*, vol. 33, p. 261.

¹⁷⁰ Ceylon: *ibid.*, 1257th meeting, para. 26.

69. The question whether an international organization can become a party to a multilateral treaty between States was thus raised in connexion with treaties codifying the law of international organizations in a far more direct way than before.¹⁷¹ Previously, it had only been noted that certain international organizations had been allowed to participate in some of these treaties, in particular on behalf of territories administered by them; there had been discussion, but no settlement, of the question whether certain organizations should not be permitted to become parties to certain treaties when they had interests to protect which were comparable in every respect to those of a State, such as patrimonial rights (copyright) or moral rights (application of the Geneva Conventions and other conventions to actions by contingents placed under the responsibility of the United Nations)¹⁷² and economic interests.¹⁷³

70. The starting point of the principles applicable at present is simple: hitherto there has been no rule of general international law determining what subjects of law may become parties to a multilateral treaty between States, and every treaty determines the subjects of law which may become parties to it.¹⁷⁴ The reason why international organizations are not parties to such treaties is that hardly any treaties grant them this right, but it is technically possible to conceive that a treaty might grant it to certain organizations. If this approach were adopted, the question would arise whether any special difficulties would be encountered; such difficulties were mentioned, but not specified, during the debates at the Conference on the Law of Treaties.¹⁷⁵ From the purely legal standpoint, the importance of the following comment might perhaps be stressed. If the personality of organizations was fully recognized and if their capacities were clearly defined and quite separate from those of States, there would be no major obstacles; but this condition is not fulfilled in practice. States are often inclined to regard an organiz-

ation as a framework for collective action rather than as a legal person distinct from its member States; the dividing line between the capacities of organizations and those of States is often uncertain and even unstable, and the member States play a fundamental role in the pursuit of an organization's purposes and the execution of its resolutions. Perhaps these considerations make States reluctant to recognize that an organization can become a party to a treaty between States, when they themselves would refuse to do so. Some States also wish to exercise their right not to recognize certain organizations, and in order to safeguard that right more effectively, refuse to open treaties too widely to accession. Lastly, organizations are not always in fact in a position to assume the responsibilities likely to result from their activities. These seem to be the reasons why States have hitherto strictly limited access to the multilateral treaties they intend to draw up and to revise, by exercising the monopoly of their sovereign rights. The International Law Commission can only note this situation which may change at any time.

71. So long as this is so, and it is felt at the same time that there is a pressing need to extend certain rules laid down in multilateral treaties between States to the activities of international organizations, indirect procedures will have to be adopted to achieve this result. What are these procedures? Some of them have already been mentioned incidentally, but it is not certain that full information is yet available or that the use of these means is sufficiently well established for reliable legal conclusions to be drawn from them. However, some provisional observations on them can nevertheless be submitted to the members of the Commission for their consideration and for the Commission to work on later.

72. We must first set aside the case already presented in connexion with an example,¹⁷⁶ in which the rule laid down in a treaty between States subsequently acquires the character of a customary rule and thus becomes applicable to an international organization. This is a mechanism of ordinary law; it has the disadvantage, among others, of being a process which may sometimes be uncertain and slow.

73. The other mechanisms on which we must dwell for a moment have one general feature in common: they confer on the organization concerned a status which differs, more or less radically, from that of a "party" to a treaty as generally defined in the law of treaties between States. According to the 1969 Convention (art. 2, para. 1 (g)):

"party" means a State which has consented to be bound by the treaty and for which the treaty is in force.

But it is not enough to consider the definition; we must also take into account all the rights and obligations attached to the status of a party by all the other articles of the 1969 Convention. It is through the enjoyment of all these rights and obligations that a State possesses the full status of a "party to a treaty". It is conceivable that for some States some of these rights and obligations

¹⁷¹ See para. 12 above.

¹⁷² The International Committee of the Red Cross has tried several times (most recently in 1972) to strengthen the position of the United Nations with regard to the Geneva Conventions by securing its accession to the Conventions (P. de Visscher, "Les conditions d'application des lois de la guerre aux opérations militaires des Nations Unies", *Annuaire de l'Institut de droit international*, 1971 (Basle), vol. 54, t. D).

¹⁷³ The question of the eligibility of an organization for technical assistance under United Nations programmes is discussed in a memorandum by the United Nations Office of Legal Affairs, dated 25 August 1969, reproduced in the *United Nations Juridical Yearbook, 1969* (United Nations publication, Sales No. E.71.V.4) the problems raised by the participation of an organization in commodity conferences and agreements have given rise to numerous discussions and are evolving fast; see the opinion of the United Nations Office of Legal Affairs (*ibid.*, 1968 (United Nations publication, Sales No. E.70.V.2), p. 201), references in the economic law reports published in the *Annuaire français de droit international, 1969* (Paris), vol. XV, 1970, pp. 617-619, and *ibid.*, 1970 (Paris), vol. XVI, 1971, p. 695, and in the study by R. Kovar, "La mise en place d'une politique commerciale et les compétences des Etats membres de la Communauté économique européenne en matière de relations internationales et de conclusion des traités" (*ibid.*, p. 783).

¹⁷⁴ See foot-note 70.

¹⁷⁵ See para. 66 above.

¹⁷⁶ *Ibid.*

may be attenuated; without losing, the status of a "party" in all respects, such States have looser ties with the régime established by the treaty. Does this situation often arise? At first sight, the temptation is to reply in the negative, because such a situation is incompatible with the sovereign equality of States and is reminiscent of colonial situations which have now disappeared. But, as has been observed in a remarkable study, which refers to many kinds of situation other than those connected with colonization—in particular, federal structures—there are many cases in which the status of a "party to a treaty" is less strictly defined than usual.¹⁷⁷ Whatever the position may be with regard to treaties between States, this is the technical device which appears to be favoured in the case of international organizations. By alternating, to a greater or lesser extent, the rights and obligations which constitute the status of a "party to a treaty", it is possible to define a status for an organization which allows it some degree of "participation" in a treaty, without being on the same footing as a State which is a full party. And this is how a place has been found for international organizations in some general treaties.¹⁷⁸ Should it then be said that the organization is a "party" to the treaty or, more cautiously, that it is "associated" with or "participates" in the treaty? There is no need to settle this question of terminology; the important point is to use an expression which does not cause misunderstanding; in any event, the organization is in a special situation.

74. But this observation, which, intellectually at least, connects the status of an organization in regard to a treaty with that of a party to a treaty by comparison and differentiation, is not sufficient to cover all the facts. There are cases in which a very different procedure is used to

¹⁷⁷ O. J. Lissitzyn, "Territorial entities other than independent States in the law of treaties", *Recueil des cours... 1968-III* (Leyden, Sijthoff, 1970), vol. 125, pp. 83 and 84: "The very term 'party' needs more analysis. It is, after all, but a shorthand expression to describe a number of different legal phenomena. These phenomena do not always come in neat packages. The suggestion may be ventured that it is not inconceivable for an entity to be a 'party' for one purpose but not for another. It is dangerous to assume that by characterizing an entity as a 'party' we can escape the necessity of analysing the various specific legal consequences of its seeming participation in treaty relations."

¹⁷⁸ It would be easy to give examples of treaties in which it seems that the position of an organization can be defined as an attenuation of the rights of a full party; for instance, the position of the United Nations in ITU (article 1, para. 3 (c) and articles 21 and 29 of the International Telecommunication Convention (Montreux, 1965) (United Nations, *Juridical Yearbook, 1965* (United Nations publication, Sales No. 67.V.3), p. 173)), which is the constituent instrument of ITU, and article XVI of the Agreement between the United Nations and ITU approved by the ITU Plenipotentiary Conference on 4 September 1947 and by the United Nations General Assembly on 15 November 1947 (United Nations, *Treaty Series*, vol. 30, p. 315). Examples are also to be found in the commodity agreements mentioned in foot-note 173 above: thus, in article 50 of the Fourth International Tin Agreement, 1971:

An intergovernmental organization having responsibilities in respect of the negotiation of international Agreements may participate in the International Tin Agreement. Such an organization shall not itself have the right to vote. On matters within its competence the voting rights of its member States may be exercised collectively. (*United Nations Tin Conference 1970: Summary of Proceedings* (United Nations publication, Sales No. E.70.II.D.10), pp. 21-22.)

give an organization some of the rights and some of the obligations of a party to a treaty, the purpose being to keep the organization even more definitely outside the treaty. Such is the case when the States parties to a treaty and the organization conclude an *agreement collateral* to the inter-State treaty, whereby the benefits and the obligations of the substantive rules contained in the treaty are extended to the organization. Subject to more thorough study, this certainly seems to be the solution adopted in some recent conventions concerning space law.¹⁷⁹ In these cases the mechanism appears to be similar to that provided for in articles 35 and 36 of the 1969 Convention on the Law of Treaties with respect to third States.¹⁸⁰

75. It may be questioned whether practice will consolidate and define formulations such as those outlined above. It might also be held that these are transitional solutions¹⁸¹ Be that as it may, the Commission may have to consider whether it would be useful or feasible to pursue studies in this field in order to define the various positions in which an international organization may be placed in regard to a multilateral treaty between States, the rules of which are extended to it as the result of an expression of its will, although it does not enjoy the status of a party in the ordinary and full sense of the term. As we have briefly shown, this is a practical question which in fact conditions the whole development of the codification of the law of international organizations and increasingly concerns all general multilateral treaties.

Conclusion

76. From the studies and discussions of the United Nations, and more particularly of the International Law Commission, it is possible to draw useful lessons concerning the régime of agreements of international organizations and even to deduce some general tendencies.

¹⁷⁹ See paras. 3 and 42 above.

¹⁸⁰ The Agreement of 19 December 1967 provides (article 6) that the organization may declare "its acceptance of the rights and obligations provided for in this Agreement". The Convention of 29 November 1971 (article XXII) reproduces this wording, but provides that organizations accept only the substantive rules and have no part in the legislative procedures (final clauses), which are reserved to the States Parties.

¹⁸¹ Reference to the very special mechanism of the Convention on the Privileges and Immunities of the Specialized Agencies, of 21 November 1947 (see foot-note 169) shows that it did not appreciably diminish the rights of international organizations as "parties". True, the organizations do not seem to be designated as parties to the Convention itself, and hence would not participate, like States, in the revision of the Convention (article XI, section 48). But the Convention is only a framework; its provisions take effect for an organization only if it accepts them, with any necessary amendments, and States on their side accept the Convention, with reservations regarding specified organizations, if necessary, so that bilateral agreements are concluded between each State and each organization, to which the international organizations are full parties. This analysis is confirmed by the arrangement subsequently adopted for IAEA on 12 February 1959 (United Nations, *Treaty Series*, vol. 374, p. 147). In this Agreement, based on the 1947 Convention, all ambiguity has disappeared: the Agreement is in force as between IAEA and every State that has accepted the Agreement (article XII, section 39); amendments are made by the Board of Governors of IAEA and are accepted or are not accepted by each State, with or without reservations (section 40).

Although this matter is now being raised in connexion with a great deal of legislative work, the main source material remains the work of the International Law Commission on the law of treaties and the debates of the Conference on the Law of Treaties in which that work culminated. Practically and historically, a study of the law of the treaties of international organizations takes the form of a complement to, and continuation of, the 1969 Convention, which provides the basis and starting point for research. An important consequence, which must be presented as a preliminary, naturally follows: we must be reluctant to follow any course which is not in line with the 1969 Convention and would not form a harmonious whole with it. Where the treaties of international organizations call for special provisions or adjustments of the articles of the 1969 Convention, it is desirable that such provisions and adjustments should be few in number and as simple as possible, and that they should not create more problems than they solve. In particular, the field of application of new articles must be clearly delimited and the number of special régimes must not be increased unduly.

The survey made in this report confirms, in this respect, the conclusions of the Sub-Committee previously set up by the International Law Commission.¹⁸²

77. Perhaps the practical consequences of this general position now appear more clearly on some points. To give an immediate example (it relates to the field of application of the future draft articles on our subject); to which international organizations will the Commission's proposals apply? It is certainly not possible to say at present whether they will apply to all international organizations, or to a small group of them. But two points stand out fairly clearly. First, it is to be hoped that the proposals will be applicable to all international organizations, so as to avoid creating, in connexion with the law of treaties, three different régimes: that of the 1969 Convention, that of the new proposals and that which will be left to the spontaneous formation of customary rules, not to mention the rules needed to settle any conflicts which may arise between the three régimes. If this view is accepted, it will be necessary to eliminate problems which can be solved only for one particular group of organizations, and the whole set of proposals will have to be kept very general. Secondly, there will be a temptation to answer the question whether a more precise definition, of an "international organization" should be sought than the definition in article 2, paragraph 1 (*i*) of the 1969 Convention, which merely specifies the intergovernmental character of such organizations. It is clearly desirable that no new definition should be drafted unless it is necessary for other reasons. In the various drafts of articles it has prepared so far, the Commission has, indeed, always felt able to avoid such a definition and its reasons for so doing are still valid; moreover, it is of the highest importance to use the same terminology as the 1969 Convention itself, so as to avoid increasing the

number of régimes which would take away the chief value of the codification.

78. In the light of these preliminary observations, the work to be undertaken falls into two parts. First, all the provisions of the 1969 Convention must be examined article by article, in order to determine which of them would require drafting changes to adapt them to the agreements of international organizations. Secondly, bases must be sought on which the substantial difficulties characteristic of the régime of agreements of international organizations can be overcome. This report contains no systematic list of the drafting changes required to adapt the 1969 Convention to its new purpose; to prepare one is a delicate task involving great attention to detail, but by its very nature it is not likely to give rise to any formidable information problems or fundamental difficulties of principle; moreover, recent studies are bound to be helpful;¹⁸³ this work has therefore been deferred to a later stage. It is, however, the purpose of this report to make a preliminary examination of the *essential* problems, drawing on the work already done by the United Nations and more particularly by the Commission. Has any essential difficulty escaped those who have worked on this subject for many years? That possibility cannot be discarded with certainty; but it is reasonable to assume that the inventory already made is fairly complete and provides a sound starting-point for the Commission's future work.

79. To summarize the report from this point of view, we may take the following points from among the matters discussed: the forms of consent, the capacity of organizations, representation, the effect of treaties and the law of each organization. These matters will be considered in succession.

Form of consent

80. Nothing in the study which the Special Rapporteur has had to make challenges one of the conclusions previously reached by the Sub-Committee and approved by the International Law Commission, namely, that the study should be confined to the written agreements of international organizations and should not cover oral or tacit agreements;¹⁸⁴ in addition to all the reasons already given, there is the need to follow the provisions of the 1969 Convention as closely as possible. It is true that that Convention does not give a strict definition of "written form".¹⁸⁵ It does not seem advisable to open

¹⁸² Reproduced in the report of the International Law Commission on the work of its twenty-third session (*Yearbook of the International Law Commission, 1971*, vol. II (Part One), pp. 348-349, document A/8410/Rev.1, chap. IV, annex).

¹⁸³ e.g., K. Zemanek, "Agreements concluded by international organizations and the Vienna Convention on the Law of Treaties", *University of Toledo, Law Review* (Toledo, Oh.), 1971, Nos. 1 and 2, p. 145.

¹⁸⁴ See *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 349, document A/8410/Rev.1, chap. IV, annex, para. 7.

¹⁸⁵ The problem of the distinction between a treaty concluded "in written form" and a treaty merely "expressed" in writing has been referred to on several occasions by special rapporteurs, including particularly Sir Gerald Fitzmaurice and Sir Humphrey Waldock; at the Conference on the Law of Treaties it was referred to by the USSR representative (*Official Records of the United Nations Conference on the Law of Treaties, First Session . . . (op. cit.)*, p. 41, Committee of the Whole, 7th meeting, para. 69).

now, in connexion with the agreements of international organizations, a debate on a matter with which the International Law Commission did not deal in its work on treaties between States, when the Commission was perhaps less flexible in its definition of the forms of consent than the Conference on the Law of Treaties, which adopted article II in the very broad terms now familiar to us. There is no need to propose, for the relevant articles of the 1969 Convention, an interpretation which it is no longer for the Commission to provide; but the Commission may perhaps recognize that article II, in its present form, authorizes all forms of consent for treaties between States. The rule laid down by that article gives full freedom to international organizations, which seems to meet needs strongly felt by them. Subject to any observations which the organizations may wish to submit on this point, the problem of the forms of consent in the conclusion of treaties is therefore no longer acute: many obstacles which might have impeded assimilation of the agreements of international organizations to treaties between States if the Commission's original drafting had been adopted at the Conference on the Law of Treaties, have now disappeared.

81. But this observation goes beyond the question of *forms of consent*. For the 1969 Convention, endorsing international practice, is entirely built on an essential general principle: the value of pure consensus. When put with such force at such a general level, the principle here goes beyond the characteristics of a particular subject of law; it is as valid for organizations as for States. But in that case there is no *a priori* valid reason not to think that the definitions and elucidations of that principle provided by the 1969 Convention, particularly in regard to the validity of consent, must in theory be as valid for international organizations as for States. *A priori* it is difficult to see, in view of the content and basis of these provisions, what is to prevent articles 42-65 of the 1969 Convention, in particular, from being applicable to the agreements of international organizations.¹⁸⁶

Capacity of international organizations

82. The difficulties previously encountered by the International Law Commission in this connexion enjoin caution. Just as it was easy to declare that States have the capacity to conclude treaties (1969 Convention, article 6), because that capacity is merely the expression of their "sovereign equality", so it is difficult to deal with the same question in relation to international organizations, which are characterized by a fundamental inequality. If it had been decided to consider only the large international organizations of the United Nations family, it would have been relatively easy to lay down a few general principles recognizing, in fairly broad terms, their capacity to conclude certain treaties. But if it is intended to consider all organizations and to retain the definition of them given, after the Charter, by the 1969 Convention, is it possible to propose texts which accord

the same rights as those of the United Nations to organizations which are not qualified for such facilities either by the intentions of their founders or even by their present needs? A problem of definition would then arise and it would be necessary to deny the status of an international organization to all entities which do not possess some capacity to conclude treaties. In fact, however, international practice in the matter is very flexible, and this has great advantages; in particular, the term "international organization" is used extremely freely. Does this not make it easier for some entities to claim certain rights of international organizations without, however, enjoying the right to conclude treaties? Does it not even make it easier to expect an extension of the practice which will recognize this capacity to negotiate when it has become necessary, provided that no doubt has been cast on the status of the entity in question as an international organization?

Although insufficient to justify adoption of a final position, these considerations point in the following direction. International law refers to the rules of each organization not only for the distribution of powers between its various organs, but also for the nature and extent of those powers. Just as the 1969 Convention did not seek to encroach on the freedom of each State's constitution, there is no need to encroach on the freedom of the States which set up organizations or on the freedom of the practice which adjusts the status of such organizations, with the consent of their member States, to their emerging needs. Even if we cannot recognize the sovereignty of organizations, why should we deny them the freedom which counters uniformity? If these arguments were endorsed by the Commission, it would be possible to avoid dealing with the capacity of international organizations by general formulas, which it is very difficult to make adequate to varied and changing situations.

Representation

83. The question of representation may be considered at two very different levels. First, it may be asked how the status which authorizes a natural person to negotiate on behalf of the organization is established and proved vis-à-vis other contracting parties. In the 1969 Convention, article 2, paragraph 1 (c), and articles 7, 8 and 47 settle this question as regards the representation of States; it is not certain that symmetrical texts for international organizations can be prepared by a simple drafting transposition—only more thorough study of the practice would provide an answer to that question. But there is a problem of representation at a different level, which is less common but more delicate: it has to be considered whether an organization as such can represent another organization or a State, and whether a State can represent an organization. The International Law Commission tried unsuccessfully to deal with this problem when preparing the draft articles on the law of treaties; will it be necessary to revert to it in connexion with the agreements of international organizations? No absolute answer can be given. If there were an abundant practice in the matter, it would show both the extent of the needs met and the possibility of working out certain formulas which would consolidate the practice. In the

¹⁸⁶ Of course, article 63 concerning the severance of diplomatic or consular relations must be excepted and certain special considerations might have to be introduced into articles 46 and 47.

absence of any substantial practice and despite the existence of certain well-known cases, however, it would perhaps be better not to deal with this problem for the time being, despite its theoretical interest.

Effects of treaties

84. The agreements of international organizations have effects some of which are specific and merit special attention. Among these, two have been noted which involve the concept of a "party" and of a "third party" in relation to a treaty. There are many examples of treaties in which an international organization is called upon to "participate" without being exactly in the position of a "party": the organization is bound by some of the rules set out in the treaty and hence enjoys certain rights and assumes certain obligations, but it does not enjoy all the rights of States "parties" to the treaty; in most cases, the substantive rules laid down in the treaty apply to it, but it has no part in the procedures for entry into force and revision of the treaty. Various technical procedures have been applied in practice to arrange "participation" by organizations; the legal problems raised by these procedures have not, as a whole, been dealt with in published studies. The question for the Commission is to decide, after having obtained more information, whether it is possible and advisable to specify the legal régime of some of the procedures used.

85. Another question has arisen: there is no reason, in dealing with the agreements of international organizations to set aside the basic rule laid down by article 34 of the 1969 Convention:

A treaty does not create either obligations or rights for a third State without its consent.

However, the determination of the status of a "third" party or State in relation to a treaty does not always go unchallenged, particularly in a case relevant to the subject now under study: are the States members of an international organization "third States" in relation to the treaties to which the organization is a party? One would be tempted to say that the States members of an organization may be "more or less" third States in relation to the treaties concluded by the organization, just as we have explained that there are treaties to which organizations are "more or less" parties. In other words, more flexibility must be introduced into the concept of "third", as into the concept of "party". International practice has certainly felt these problems rather acutely, since it has had recourse to various technical mechanisms to solve them.¹⁸⁷

The whole question of the effects of the agreements of international organizations is one of the matters which would be studied by the Special Rapporteur and the International Law Commission in the hope of finding at least some general directives.

The law of each organization

86. In the International Law Commission and at the Conference on the Law of Treaties, the question of the law of each international organization has been examined and discussed at length. This question is absolutely fundamental, since the very possibility of establishing any general rules in the law of international organizations ultimately depends on it. The desire to safeguard the original individuality of each organization in accordance with its own needs led, in the 1969 Convention, to the adoption of a form of words reserving the application of "any relevant rules of the organization" for certain kinds of treaty which, although concluded between States, concern certain international organizations in a special way, namely, treaties establishing an organization and treaties concluded within an organization. It is clear that for treaties to which one or more international organizations are parties *at least* the same reservation must be made, since such treaties concern the organization more directly than treaties between States concluded within one of its organs. But it will probably be necessary to go still further, or at least elucidate the exact meaning of the formula "any relevant rules of the organization".

87. The question has been examined and discussed both in the International Law Commission and at the Conference on the Law of Treaties. It was considered afresh when the Commission was drafting article 3 of the draft articles on the representation of States in their relations with international organizations.¹⁸⁸ All this work gives some indication, not only of the meaning to be ascribed to an identical formula inserted in draft articles on the law of treaties of international organizations, but also of the actual scope of the problem raised. There can be no doubt, however, that the scope varies according to the subject-matter of each convention. When, in the 1969 Convention on the Law of Treaties, a reservation regarding "any relevant rules of the organization" was made for certain treaties, it was mainly the formal rules relating to the conclusion of treaties that were being considered; in the draft articles on the representation of States in their relations with international organizations, the scope of the reservation is clearly wider: there may, indeed, be specific provisions for each organizations regarding *all* the provisions of the draft articles; this is so particularly in view of the fact that these provisions may not be only in the "relevant rules of the organization", but also in "other international agreements in force between States or between States and international organizations", since article 4 of the draft contains a reservation concerning them too.¹⁸⁹ Hence an attempt must first be made to determine what might be the *field of application* of such a reservation. Then it will be necessary to define, perhaps in the light of the earlier debates, the *content* of the notion of "relevant rules of the organization", in particular, having regard to the "practice of the organization".

¹⁸⁷ Thus, to the procedures, already mentioned, we should add that of listing an international organization and its member States jointly as parties ("mixed agreements" of certain regional organizations) in relation to the other contracting party.

¹⁸⁸ See *Yearbook of the International Law Commission, 1971*, vol. II (Part One), pp. 287-288, document A/8410/Rev.1, chap. II, D, article 3 and commentary, in particular para. 5 of the commentary. See also para. 48 above.

¹⁸⁹ *Ibid.*, p. 288, document A/8410/Rev.1, chap. II, D, article 4.

88. The "relevant rules" of each organization will probably deal exclusively with the procedure governing the conclusion of treaties; this will simplify the problem, especially as the rules of the 1969 Convention on the conclusion of treaties are extremely flexible for all treaties without exception, in particular by reason of article 11.¹⁹⁰ But it is not possible to be absolutely certain that questions other than those relating to the conclusion of treaties will not be involved; they may be, if the rules of an international organization form a sufficiently systematic whole to constitute what has sometimes been called, rightly or wrongly, an "internal law of the organization". That situation might, for example, give rise to questions of the same kind as those covered by article 30 of the 1969 Convention, if certain treaties between the organization and its member States (or even between its member States) are considered to form part of the organization's internal law" and merely constitute measures giving effect to other treaties. The Special Rapporteur is therefore obliged to reserve these hypotheses but naturally in the hope that they can be left out of account if they prove to be too theoretical and confined to very special cases.¹⁹¹

89. Another more important problem relates to the content of the notion of "relevant rules of the organization". It obviously includes the constituent instrument of the organization and the various unilateral regulations which the organizations draws up if it has obtained authority to do so.¹⁹² As regards the "practice of the organization", the International Law Commission, in the course of its previous work, has taken the view that only an "established practice" was part of the "relevant rules of the organization". This clarification would certainly seem to suggest that the "practice" thus re-

cognized must be the subject of a *rule*, either because it is considered that in this case the rule is the subject of a tacit agreement.¹⁹³ or because the practice has become consolidated as a customary rule. But if this so, there is room for "practices" which are not sufficiently "established" to constitute a "relevant rule of the organization". If general rules are in any way established which will be valid for the agreements of organizations, reserving only the "relevant rules of the organization", these general rules will take precedence over "unestablished practices"; in other words, the organization will lose the right to seek, by new practices, to change the law applicable to it when the matter has been the subject of a formal rule; as to the rules which would be established by draft articles on the law of the treaties of international organizations, the organization will have lost the right to change them by a customary process, but will still be free to amend them by a legal process in writing. It may be desired to preclude such a consequence and to decide, as some organizations have requested, that the practice to be included in the notion of "relevant rules of the organization" should comprise any practice, even if it is not "established".¹⁹⁴ It may indeed, be preferred to keep intact in all its forms the creative power of the international organizations with respect to the legal rules relating to them. But the consequences of this choice must be carefully weighed: it means that even as residuary rules the provisions of a draft of articles would no longer be in any way mandatory for international organizations; they would merely be guidelines for the organizations or, at best, principles so general that their binding force would be very limited in practice. But draft articles thus conceived would still be very valuable because they would help, although by a very flexible process, to bring a little clarity (and perhaps order) into a sphere where they are lacking. This is the alternative which must be clearly understood today; both possibilities are equally worthy of consideration; moreover, they are valid for the whole of the law of international organizations, and any preferences which may be felt for either of them should be based on practical considerations; it may change according to the subject-matter to be covered in draft articles. Thus, for the representation of States in their relations with international organizations, a subject which is covered by precise and detailed provisions in the proposals of the International Law Commission, the possibility of subsequent development through mere practice has been ruled out, although a reservation has been made not only for already established practices, but also for the possibility of subsequent change by a legal process in writing (express conventions, other relevant rules of the organization); this really means that after an attempt at codification such as that represented by these draft articles, the subject should be regarded as having gone beyond an experimental stage

¹⁹⁰ See para. 79 above.

¹⁹¹ We have no intention of starting a theoretical controversy here, which would be both out of place and premature; but the special rapporteurs of the International Law Commission have used the expression "internal law of the organization" on several occasions. There is all the more reason to question the possible consequences of using this expression because a rule is being prepared which is to apply both to an organization and to a State, for which the expression "internal law" has a precise meaning (1969 Convention, article 2, paragraph 2 and article 27) and because certain States have made declarations which are summarized as follows in the report of the Sixth Committee to the General Assembly at its twenty-fourth session on the resolution relating to article 1 of the Vienna Convention on the Law of Treaties "... it should be acknowledged from the outset that fundamental differences existed between treaties in the sense of the Vienna Convention and the agreements to which international organizations were parties. The matter related to both international law and domestic law and in both contexts raised extremely difficult and delicate questions." (See *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94 (b)*, document A/7746, paras. 109-115.)

¹⁹² It might also be accepted that the "relevant rules of the organization" include all agreements and treaties concluded by the organization or by member States on matters concerning the organization, unless, in order to avoid all ambiguity, it is preferred to mention them separately from the "relevant rules", as is done in the draft articles on the representation of States in their relations with international organizations (see para. 86 above). Of course, if the "internal" aspect of the law of each organization is to be considered, perhaps only certain kinds of treaty will be taken into account, as has been suggested.

¹⁹³ It may be recalled that the conclusion of a tacit agreement through "practice" is expressly provided for in article 31, paragraph 3 (b) of the 1969 Convention.

¹⁹⁴ See the very interesting discussion which took place in the International Law Commission on 15 June 1971 (*Yearbook of the International Law Commission, 1971*, vol. I, pp. 211 *et seq.*, 1118th meeting).

of tentative effort and spontaneous creation by way of "practice". It is not certain that the same solution is needed for draft articles on the treaties of international organizations. If it were considered that for the treaties of international organizations it is necessary to extend the present period and maintain the great freedom of action of the international organizations, even at the risk of some uncertainty and confusion, the work of the Commission would have to be arranged accordingly.

While retaining the final objective of the proposal for draft articles, with all the characteristics of legislative work, the Commission would have to accept that such a draft would be merely a guide for subsequent developments. This is an eventuality which, at the present stage of the Commission's work, the Special Rapporteur cannot regard as probable, still less as inevitable, but which, together with others, should henceforth be borne in mind by the members of the Commission.

QUESTION OF THE PROTECTION AND INVIOABILITY OF DIPLOMATIC AGENTS AND OTHER PERSONS ENTITLED TO SPECIAL PROTECTION UNDER INTERNATIONAL LAW (PARA. 2 OF SECTION III OF GENERAL ASSEMBLY RESOLUTION 2780 (XXVI))

[Agenda item 5]

DOCUMENT A/CN.4/L.182

**Draft articles concerning crimes against persons entitled to special protection under international law
Working paper prepared by Mr. Richard D. Kearney**

[Original text: English]
[28 February 1972]

ARTICLE 1

1. It shall be an international crime to:

(a) Murder, kidnap, or inflict grievous bodily harm upon a person entitled to special protection under international law; or

(b) Extort anything of value, or affect governmental actions or decisions in any State, through the commission of or threat to commit any of the acts described in subparagraph (a); or

(c) Attempt to commit any of the acts referred to in subparagraphs (a) and (b); or

(d) Participate in any of the acts referred to in subparagraphs (a), (b) and (c) as an accessory or an accomplice.

2. An act described in paragraph 1 of this article shall not constitute a crime under the present articles if:

(a) The person against whom the act is committed, attempted or threatened is a national or permanent resident of the State wherein the act is committed, attempted or threatened; or

(b) Both the perpetrators of the act and the person against whom the act is committed, attempted or threatened, are nationals of the same State and persons entitled to special protection under international law.

ARTICLE 2

An international crime described in article 1 shall not be considered as a political offence or as an act connected with such an offence.

ARTICLE 3

1. For the purposes of the present articles the phrase "person entitled to special protection under international law" shall mean:

(a) A Chief of State;

(b) A Head of Government;

(c) Any other public official holding at least cabinet rank or its equivalent; whenever the official is in any foreign country, as well as members of his family who are accompanying him.

2. The phrase shall also mean any person:

(a) Who is entitled to personal inviolability under articles 29 or 37 of the Vienna Convention on Diplomatic Relations.¹

(b) Who is entitled to protection under article 40 of the Vienna Convention on Consular Relations² as well as members of the family of any such person who form part of his household;

(c) Who is entitled to personal inviolability under articles 29, 36 or 39 of the Convention on Special Missions;³

(d) Who is entitled to personal inviolability under articles . . . of the Convention on the Representation of States in their Relations with International Organizations;⁴

(e) Whose name has been made known to Members of the United Nations or members of a specialized agency of the United Nations as an official in accordance with article V of the Convention on the Privileges and Immunities of the United Nations⁵ or article VI of the Convention on the Privileges and Immunities of the Specialized Agencies⁶ as well as members of the family of any such person who form part of his household;

¹ United Nations, *Treaty Series*, vol. 500, p. 95.

² *Ibid.*, vol. 596, p. 261.

³ General Assembly resolution 2530 (XXIV), annex.

⁴ For the draft articles on the representation of States in their relations with international organizations, see *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 284, document A/CN.4/8410/Rev.1, chap. II, D.

⁵ United Nations, *Treaty Series*, vol. I, p. 15.

⁶ *Ibid.*, vol. 33, p. 261.

(f) Whose name has been made known to Members of the United Nations as an expert performing a mission for the United Nations as well as members of the family of any such person who accompany him on his mission;

(g) Who is present within the territory of a State for the performance of official business of another State or of an international organization and who is being accorded by agreement or otherwise personal inviolability, or protection of the character described in article 40 of the Vienna Convention on Consular Relations, and members of his family who are being accorded such personal inviolability or protection;

provided that the person is within the receiving State or the host State, or is passing through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary while such person is proceeding to take up or to resume his functions or is returning to his own country.

3. For the purposes of the present articles the phrase "accused person" shall mean a person as to whom there are reasonable grounds to believe that he has committed an international crime described in article 1.

4. The present articles shall be applied by each of the Parties whether or not it is party to any of the conventions referred to in paragraph 2 of this article.

ARTICLE 4

1. Any State wherein an accused person may be found shall have jurisdiction to try him for the international crimes described in article 1.

2. Each Party shall enact such legislation as may be necessary to permit the trial of persons subject to its jurisdiction under paragraph 1 of this article.

ARTICLE 5

There shall be no limitation as to the time within which prosecution may be instituted for international crimes described in article 1.

ARTICLE 6

In order to further the prevention of the international crimes described in article 1 of the present articles the Parties shall:

(a) Take measures within their respective territories to prevent preparation for or the commission of crimes described in article 1 whether they are to be carried out in their own territory or in the territory of another State;

(b) Exchange information and co-ordinate the taking of effective administrative measures to prevent such crimes.

ARTICLE 7

Each Party undertakes to make the international crimes described in article 1 punishable by severe penalties.

ARTICLE 8

Each Party shall search for an accused person who it has reason to believe is within its territory.

ARTICLE 9

1. A Party in whose territory an accused person may be found shall, if the circumstances warrant, either detain him or take such other measures as may be necessary to ensure his presence for trial or extradition. Such State shall immediately inform the appropriate authorities of the State in which the offence occurred, the State of which the protected person was a national, and the State of nationality of the accused person.

2. Any accused person who is detained pursuant to paragraph 1 of this article shall be permitted to communicate immediately with the nearest representative of the State of which he is a national and to be visited by a representative of that State.

ARTICLE 10

A Party in whose territory an accused person is found shall bring him promptly before its courts in accordance with the procedure applicable in the case of an offence of a serious nature under the law of that State. If the State where an accused person is found is not the State where the alleged international crime occurred, the obligation of the former State to bring the accused before its courts is terminated if he is duly extradited to the State where the offence was committed, to the State whose protected person was the object of the international crime, or to any other Party.

ARTICLE 11

1. A Party in whose territory an accused person is found shall, upon request, extradite him to the State where the alleged offence was committed, to the State of which the protected person who was the subject of the international crime was a national, or to any other Party, unless paragraph 2 of this article applies.

2. A Party in whose territory an accused person is found may decline to comply with a request for extradition if it proceeds promptly to bring him before its own courts.

3. The present articles shall constitute the legal basis for extradition in States that make extradition conditional on the existence of a treaty.

4. The procedures for extradition shall be carried out in accordance with any extradition treaty in effect between the Party in whose territory an accused person is found and the requesting State, or in the absence of such a treaty, the legislation regarding extradition in force in the Party in whose territory the accused person is found.

5. An extradition request from the State in which the international crime was committed shall have priority if made within three months of the receipt of notification of the location of the alleged offender. Upon expiration of that period the extradition request first received by the State in whose territory an accused person has been found shall have priority.

ARTICLE 12

The State in which an accused person is extradited shall promptly proceed to bring him before its courts for the international crime or crimes of which he is accused in accordance with the procedure applicable in the case of an offence of a serious nature under the law of that State.

ARTICLE 13

An accused person shall at all stages in proceedings carried out with respect to an international crime under the present articles be guaranteed fair and impartial administration of justice.

ARTICLE 14

The result of the court proceedings regarding the international crime described in article 1 and of any appeals therefrom shall be communicated by the State within whose territory they are conducted to the Secretary-General of the United Nations, who shall transmit the information to the other Parties.

ARTICLE 15

The obligations of Parties under articles 9, 10 and 11 shall terminate when the accused person has been tried for the international crime or crimes of which he has been accused and either acquitted or convicted.

ARTICLE 16

The Parties undertake to deal as expeditiously as possible with requests for extradition concerning the offences defined in article 1.

ARTICLE 17

The Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of the offences defined in article 1.

ARTICLE 18

1. Any dispute between the Parties arising out of the application or interpretation of the present articles that is not settled through consultations may be brought by any State Party to the dispute before a conciliation commission to be constituted in accordance with the provisions of this article by the giving of written notice to the other State or States Party to the dispute and to the Secretary-General of the United Nations.

2. A conciliation commission will be composed of three members. One member shall be appointed by each party to the dispute. If there is more than one party on either side of the dispute they shall jointly appoint a member of the conciliation commission. These two appointments shall be made within two months of the written notice referred to in paragraph 1. The third member, the Chairman, shall be chosen by the other two members.

3. If either side has failed to appoint its member within the time-limit referred to in paragraph 2, the Secretary-General shall appoint such member within a further period of two months. If no agreement is reached on the choice of the Chairman within five months of the written notice referred to in paragraph 1, the Secretary-General shall within the further period of one month appoint as the Chairman a qualified jurist who is not a national of any State party to the dispute.

4. Any vacancy shall be filled in the same manner as the original appointment was made.

5. The commission shall establish its own rules of procedure and shall reach its decisions and recommendations by a majority vote. It shall be competent to ask any organ that is authorized by or in accordance with the Charter of the United Nations to request an advisory opinion from the International Court of Justice to make such a request regarding the interpretation or application of the present Convention.

6. If the commission is unable to obtain an agreement among the parties on a settlement of the dispute within six months of its initial meeting, it shall prepare as soon as possible a report of its proceeding and transmit it to the parties and to the Secretary-General. The report shall include the commission's conclusions upon the facts and questions of law and the recommendations it has submitted to the parties in order to facilitate a settlement of the dispute. The six months time-limit may be extended by decision of the commission.

7. This article is without prejudice to provisions concerning the settlement of disputes contained in international agreements in force between States.

REVIEW OF THE COMMISSION'S LONG-TERM PROGRAMME OF WORK: "SURVEY OF INTERNATIONAL LAW" PREPARED BY THE SECRETARY-GENERAL (A/CN.4/245)

[Agenda item 6 (a)]

DOCUMENT A/CN.4/254

Observations of members of the International Law Commission on the Commission's long-term programme of work

[Original text: English and French]
[3 April 1972]

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ABBREVIATIONS

GATT	General Agreement on Tariffs and Trade
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
IMCO	Inter-Governmental Maritime Consultative Organization
IMF	International Monetary Fund
UNCITRAL	United Nations Commission for International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNIDO	United Nations Industrial Development Organization
UNIDROIT	International Institute for the Unification of Private Law

NOTE BY THE SECRETARY OF THE COMMISSION

1. As can be seen from paragraph 128 of its report on the work of its twenty-third session,¹ the International Law Commission decided:

(a) To place on the provisional agenda of its twenty-fourth session an item entitled "Review of the Commission's long-term programme of work: *Survey of International Law* prepared by the Secretary-General (A/CN.4/245)";

(b) To invite members of the Commission to submit written statements on the review of the Commission's long-term programme of work to be circulated at the beginning of the twenty-fourth session of the Commission.

2. In a note dated 23 December 1971, the Secretary of the Commission drew the attention of members of the Commission to this decision and requested them to send him before 1 March 1972 the statements referred to in paragraph 128 (b) of the report quoted above. The statements received by the Secretary before 1 April 1972 are reproduced below. Any statements received after this date will be reproduced in an addendum to the present document.

3. The statements have been arranged in the order in which they were received by the Secretariat. The date on which they were received is given in square brackets under the indication of the original language.

1. *Observations of Mr. Reuter*

[Original text: French]
[28 February 1972]

1. The document prepared by the Secretary-General and entitled *Survey of International Law*² is, from all points of view, a remarkable document, not only on account of the very reliable and detailed information it supplies on work relating to international law carried out under the auspices of the United Nations, but also on account of the lucidity, intelligence and wisdom of the suggestions it makes for the benefit of members of the Commission.

2. It is well worth reading it carefully and reflecting on it at length. This is not the place to make all the observations it calls for or even all those that come to mind; we can simply take this document as a basis for answering some questions that the Commission will have to consider at its next session.

3. The most important question of all—the focal question—which provides the frame of reference for the *Survey*, is whether the Commission should prepare an over-all programme of work to cover a period of time similar to that which has elapsed since the Commission was first established, that is, roughly speaking, 20 years or more. Without any hesitation I would answer this question with a firm "yes".

4. This does not of course involve any rigid or centralized planning; it simply means making forecasts which will have to be continually adjusted to take account of any different factors. It is also true that the final decision rests with the General Assembly, whose servants we are, and which, for various reasons—some of which may completely elude us—might choose solutions different from those we would have favoured, or upset forecasts that have been made.

5. Nevertheless it is strictly our duty to submit rational proposals based on as full as possible an analysis of the experience of the past 20 years.

6. It is clear that, of the various kinds of work the Commission has undertaken or might undertake, the kind that has been the most important and useful and has established the authority of the Commission more effectively than any other is the preparation of draft articles to provide the raw material for international conventions. The Commission would become a completely different institution if, in the future, its activities no longer included work similar to that which engendered the conventions on the *law of the sea*, on *diplomatic and consular relations*, on *special missions*, and on the *law of treaties*.

7. This reflection still leaves open the question whether the Commission's work should be based on a different approach and different methods, and relate to different subjects from those that would normally result in general conventions as broad in scope as those mentioned above. I shall return later to this question, which is an important one, but secondary to the basic reflection just made.

8. If we consider the length of time that should normally elapse between the time when the Commission appoints a special rapporteur and the point at which a convention is about to be concluded, we must reckon on seven to nine years. Even if the Commission's working methods could be somewhat improved, it is still unlikely—for reasons too well known to be repeated here—that these periods of time could be appreciably reduced. After all, rapporteurs must be given time to carry out their research, Governments must be given time to submit comments, and the Commission must be given time to accomplish the task of collective criticism and reflexion which makes its work worth while.

9. In these circumstances we can see that programming for a period of 20 years is a modest undertaking. When we take into account the fact that the Commission is reconstituted every five years and its work on any given subject has to be spread, as regards the collective phase of preparing draft articles, over a period of some five years, the problem amounts to choosing four or five general topics on which we might expect to produce a general convention after five years of work. These four or five subjects should constitute the framework for the programme of work.

10. The choice of topics presents difficult problems. It entails not only a technical evaluation of the scope of the subject-matter, but also a practical evaluation of the interest it might have for Governments and a political evaluation of the chances of reaching a wide consensus on the basic issues. Members of the Commission are

¹ *Yearbook of the International Law Commission, 1971*, vol. II, (Part One), p. 275, document A/8410/Rev.1.

² *Ibid.*, vol. II (Part Two), p. 1, document A/CN.4/245.

clearly qualified to make the first of those three evaluations, but they might try to express themselves cautiously on the other two points.

11. For my part, I have no hesitation in stating that the subject of *international responsibility* should be a priority subject for the conclusion of a convention over the next five years. First of all, the work that has already been accomplished will save time; secondly the subject-matter is an extensive one, so that other undertakings may arise out of the research done on it. The topics of *responsibility for lawful acts*, *international penal responsibility* and *special applications* can cover a vast area of research.

12. With regard to other topics, however, I must admit that I would be hesitant and cautious about expressing an opinion, because the observations of my colleagues might lead me to reconsider some of my views.

13. Subject to that reservation, I must say first of all that the topic of *State succession* would seem to have the same advantages as *international responsibility*. However, I very much doubt whether an international convention on this subject could be concluded within the next five or more years given the conditions described above. The draft articles on *the succession of States in respect of treaties* have more to do with *the law of treaties* than *the succession of States*; and *succession in respect of property* has up to now been considered in the context of the problem of decolonization in the historically and geographically limited sense in which the term is understood at the United Nations. Decolonization has, however, practically been completed and the last traces may well be eliminated under quite special conditions. Moreover, it is against a background very different from that of decolonization that changes are now taking place through secession (particularly in Asia), or changes of Government (also in Asia) or federation (which is occurring in various parts of the world), and I have some doubts as to the chances a convention on *the succession of States* might have in these circumstances.

14. Although useful, I doubt if the work in progress on *the most-favoured-nation clause* and on *agreements between international organizations*, even if reinforced by the topic of *the succession of States in respect of treaties*, could constitute a corpus that could form an extension of the 1969 Convention in the field of treaty law.

15. We therefore have to look for major topics among those not yet taken up by the Commission.

16. Before embarking on the process of elimination, we may first note an important point concerning the work of the Commission. When, as a result of developments in modern technology, a new field opens up which calls for rules of international law, the General Assembly does not turn to the International Law Commission, but rather to intergovernmental commissions or governmental experts. This has happened in the case of nuclear questions, outer space and the sea-bed. Also, when a subject is connected primarily with some specific technical field, the Commission is not asked to consider it or else it declines to do so. For example, the Commission had nothing to do with the codification work involved in the Single Convention on Narcotic Drugs (1961), and it also

stated that it was not competent to deal with matters relating to international trade law.

17. That is why we do not think that the *law relating to development* is a suitable topic for the International Law Commission. However there are three new topics which the Commission might consider for a major project: *immunities of foreign States and bodies corporate*, *the law relating to watercourses* for uses other than navigation, and the *territorial competence of States*.

18. Of all these subjects, the one that probably has the best prospects of being "profitable" is *immunities of foreign States and bodies corporate*, and on this point we cannot but refer to the very fair and sensible comments of the Secretariat. The other two topics could each encompass a number of fairly varied questions. The *territorial competence of States* not only covers matters referred to in paragraphs 38 to 54 of the *Survey*, but also those matters dealt with in paragraphs 81 to 95 and possibly paragraphs 96 to 99; some questions relating to environment or responsibility might possibly also be dealt with under this heading. Regarding the question of *watercourses* we think that, on the basis of the positions already taken in the General Assembly, and excluding specific questions of navigation, there is material for the preparation of drafts relating to both industrial use and pollution.

19. Naturally some of the topics mentioned in the Secretary-General's study could also be studied. We would certainly hesitate to undertake a general study of *international organizations* in the hope of reaching a general convention; the rules governing international organizations are very varied and the preparation of texts applicable only to the "United Nations family" could probably not extend beyond the scope of what has already been undertaken or achieved in the field of *privileges and immunities* and *international agreements*. The *law relating to armed conflicts* has been entrusted to the Red Cross and the *law relating to individuals* has been absorbed by the machinery for the protection of human rights and the prevention of discrimination.

20. But even if we selected four or five main topics for codification to form the framework for a 20-year programme, that still would not mean that the Commission's programme would be complete.

21. In fact, experience has shown that, in addition to large-scale priority tasks, the Commission could devote itself to more limited but extremely useful projects. Furthermore, if a session is to be properly organized, there should be several projects on the agenda at the same time. Experience has also shown that the Commission cannot deal simultaneously with two major projects of equal priority (treaties and the law of the sea, international responsibility and treaties), and it would therefore be as well if other more limited projects were undertaken.

22. This question would need to be considered in conjunction with another which can only be alluded to in passing here, namely the Commission's working methods. The Commission's work could probably be made far more profitable if certain reforms were carried out; one of the more simple reforms would be to request members to transmit, in advance, written notes on agenda items or

on texts which have been submitted (as is being done in this case for the *Survey*).

23. The Commission would therefore have to deal with a number of less important subjects over a number of years.

24. First of all, the General Assembly might wish to refer a relatively simple but urgent question to the Commission. Such tasks should have first priority and should be dealt with by an accelerated procedure; but, by definition, such questions cannot be placed within a particular planning framework in advance.

25. But the Commission should also consider types of activity different from those it has rightly concentrated on so far. Although we can see why it abandoned the formula of the "guide" or "code" 10 years ago, there is no reason why that formula should not be quite appropriate for certain types of question. The *Survey* rightly suggests that the problem of *unilateral acts* should be approached by preparing a series of definitions. That is a very apt example.

26. The Commission might also follow a procedure that has already been adopted by the United Nations (and the League of Nations) and prepare "model treaties" on arbitration and tax matters, particularly in the case of problems that should ultimately be the subject of bilateral treaties.

27. Lastly, when over 20 years have passed since a codification treaty was concluded, it should be brought up to date in the light of international practice. The Commission should undertake a systematic revision of conventions it has prepared. The reason why it has not even been consulted on the law of the sea is that the items on the agenda for the 1973 conference refer to completely new aspects of the law; but it would be quite appropriate if, in a year or two, arrangements were made to review the 1958 Conventions with a view to supplementing or amending them in the light of the conference.

28. Among the topics surveyed by the Secretary-General which should be dealt with by the Commission in some way still to be discussed, we will find some topics which have been "pending" for a long time, such as the question of *historical waters*, which is clearly connected with the question of territorial jurisdiction and deserves to be considered; in particular we would urge the Commission to consider *agreements not in written form*. It would be a pity to let such a topic fall into oblivion, when we have devoted so much time and effort to the law of treaties and complementary aspects of this law (agreements with international organizations, the most-favoured-nation clause, succession of States in respect of treaties); however, it is quite possible that the usual method of preparing draft articles for a convention would not be the most appropriate treatment for this topic.

29. We might also contemplate considering the question of *extradition* as it stands now in connexion with the topic of *international penal responsibility*.

30. All these topics should be classified according to their degree of maturity and urgency, and should be spread out over a period of 20 years.

2. Observations of Mr. Kearney

[Original text: English]
[20 March 1972]

1. The present work programme of the International Law Commission is an impressive one. The subjects of State responsibility, State succession to treaties, State succession in respect of matters other than treaties, and the law of treaties with respect to international organizations are of sufficient complexity to occupy the attention of the Commission for the next six to eight years. The question can legitimately be raised whether there is any point in attempting to choose additional fields of work when that cannot be started for a number of years or brought to conclusion perhaps within the next ten to fifteen year.

2. The answer to such a question would be difficult if the objective of a review of the Commission's work were directed solely to the end of selecting items for future consideration. This would amount to nothing more than a kind of insurance that the Commission would not on some occasion or other find itself without some subject to take up.

3. The major objective in considering the future programme of work, however, should be to determine what the needs of the international community are with regard to the codification and progressive development of international law during the next 15 to 20 years. Once those needs have been established as the programme of work which the Commission should accomplish during such a period it will be possible to consider the further and equally important question of the means by which such a programme of work can be carried through. This means a review of the work patterns which have evolved in the Commission and the nature and extent of the resources currently and prospectively available to the Commission in carrying out its work. If those work patterns and those resources will not permit the Commission to meet the reasonable needs of the world community, then it will be necessary to consider what changes may be required in the Commission's practices and procedures and what additional resources should be sought.

4. Consideration of a programme of work is thus the first step in a larger process. The *Survey of International Law* produced by the Secretary-General is admirably suited for the type of review suggested above because of its wide-ranging scope. While the *Survey* may not include every existing and prospective topic for work in the field of international law it does achieve substantially universal coverage. Accordingly, these comments are based upon the same plan of organization as is contained in the table of contents of the *Survey*.

I. THE POSITION OF STATES IN INTERNATIONAL LAW

1. *Sovereignty, Independence and Equality of States*

5. Any codification effort with regard to the principles of sovereignty, independence, and equality of States would require interpreting the Charter of the United Nations. The Commission should not volunteer to assume a role as the interpreter of the Charter. In addition, the effort

would largely duplicate that involved in preparing the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.³

2. *Fulfilment in good faith of the obligations of international law assumed by States*

6. Nothing more than some variety of exhortation is likely to result from a codification exercise in this area.

3. *The territorial domain of the State*

7. Codification of this topic faces formidable obstacles. With regard to acquisition of territory, for codification to be of substantial value it should be directed to the selection of rules for the purpose of settling existing territorial disputes. The adoption of such rules could result in disposing of a substantial number of long-standing and vexatious disputes among nations. However, if the rules were drafted with sufficient particularity to dispose of the disputes it is doubtful that they would be adopted on a broad enough basis to have any substantial effect upon existing trouble areas. For example, a very effective provision from the standpoint of settling disputes would be the establishment of a prescriptive period with regard to claims to territory. A party in possession of territory would be conclusively considered as sovereign over that territory upon expiration of some fixed number of years. Would it be possible ever to obtain general international agreement upon the length of time that should be controlling? Or upon the underlying assumption that the manner of acquisition was immaterial? The subject undoubtedly deserves consideration for inclusion in a long-term work programme for the Commission but the obstacles to producing a generally acceptable set of rules seem so great as to shift the balance against a decision to include it.

8. With regard to specific limits on the exercise of territorial sovereignty, the conclusion in the *Survey* that most of the problems in this area fall within the scope of the law of treaties, including succession to treaties, justifies the conclusion that no action be taken with respect to it.

4. *Recognition of States and Governments*

9. The basic issue, as the *Survey* points out in paragraph 65, is whether recognition is to be treated as a political decision or whether a requirement should be laid down that recognition must be accorded if certain criteria are met. In the present state of world politics agreement upon the latter point and upon what criteria should be governing does not appear attainable. Given this situation there does not seem to be any great advantage in attempting to define the legal consequences of recognition and non-recognition. If recognition is to remain fundamentally a political decision it would seem desirable to permit States a substantial degree of tolerance in the range of actions which may be taken vis-à-vis the non-recognized State without attempting

to specify specific legal consequences that follow upon such acts. The absence of conventional requirements in this area would tend to permit mitigation of the consequences, whatever they may be, of non-recognition and thus contribute to reduction of international tensions rather than exacerbate them.

5. *Jurisdictional immunities of foreign States and of their organs, agencies and property*

10. Paragraph 68 of the *Survey* tends to understate the existing confusion with respect to State immunity when it remarks that the contents and application of the doctrine are far from clear. In practice there appears to have been little consistency between what one State may do and what another State may do in similar circumstances and, on occasion, inconsistency in what the same State may do in two cases involving substantially identical facts.

11. Existing uncertainties regarding the scope and application of the doctrine of sovereign immunity give rise to friction among States that could be reduced, even if not completely avoided, by codification of the law in this field. The problem is basically a legal one in that it concerns claims that would normally be subject to juridical determination. The subject should be included in the future work programme of the Commission.

12. The subject, however, should not include the question of immunities granted with respect to the armed forces of one State which are stationed in the territory of another State discussed in paragraphs 77 *et seq.* of the *Survey*. As the *Survey* points out, problems of this character are almost invariably covered by treaty arrangements.

6. *Extraterritorial questions involved in the exercise of jurisdiction by States*

13. Paragraph 90 of the *Survey* raises the question to what extent a codification instrument would assist in dealing with matters having an extraterritorial element that has been generally accepted by the international community as a basis for exercising jurisdiction; e.g., war crimes, trafficking in narcotics, and the like. The question might be phrased more pertinently as whether it is more efficacious to deal with these subjects on an *ad hoc* basis. Any effort to draw up such a code would entail attempting to forecast the international requirements for protection against criminal activities for a substantial period of time in the future. Ten years ago it would have been difficult to predict the dramatic upsurge in regard to the hijacking of airplanes or the politically-motivated attacks upon diplomats which have now become of great concern to the world community. In addition to this problem of foretelling the future there are advantages to tailoring protective measures to the specific international crimes that are being dealt with. Thus the question of applicability of statutes of limitation or the principle of asylum may well vary from one species of crime to another. Consequently it does not appear desirable at this stage to contemplate the development of the general codification instrument put forward in paragraph 90.

³ General Assembly resolution 2625 (XXV), annex.

14. The reasons put forward in paragraph 95 against the Commission's taking up such matters as the extra-territorial effects of tax legislation and of "anti-trust legislation" support the conclusion that these subjects should not be taken up. Bilateral or multilateral conventions with a limited number of parties appear more likely to produce efficacious results than an endeavour to draft a general codification convention.

15. The activities of various international organizations such as the Hague Conference on Private International Law in the field of judicial assistance, and in particular the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (1964) and on the Taking of Evidence Abroad in Civil and Commercial Matters (1968); indicate that there is no pressing need for the Commission to move into this field. This is underscored by the interest displayed by regional organizations in promoting wide acceptance of conventions along these lines.

II. THE LAW RELATING TO INTERNATIONAL PEACE AND SECURITY

1. *Charter provisions and adoption of the Declaration on the Strengthening of International Security and of the Declaration on Principles of International Law*

16. This item involves consideration of the desirability of Charter interpretation by the Commission and duplication of work that has been done in other bodies. The objections to the Commission's taking such action that were raised regarding section I. 1. are equally valid here.

2. *The prohibition of the threat or use of force*

17. In so far as an attempt to deal with the threat or use of force is concerned, the record of attempts to define aggression under the aegis of the United Nations indicates the wisdom of leaving the task to the Special Committee currently charged with the problem.

3. *The law relating to the peaceful settlement of disputes*

18. Item 3 regarding the law relating to the peaceful settlement of disputes clearly concerns a matter with substantial legal content and of fundamental importance. The issue, however, is not whether the Commission should take action to promote the peaceful settlement of disputes but the manner in which it should do so.

19. The record relating to the Commission's proposals with respect to arbitral procedure set forth in paragraph 134 of the *Survey* as well as the existing impasse in the General Assembly with respect to the item "review of the role of the International Court of Justice"⁴ underline the difficulties of attempting to deal with this subject as a separate problem. The sharp split in view-

⁴ See the report of the Sixth Committee on the item (*Official Records of the General Assembly, Twenty-sixth Session, Annexes, agenda item 90, document A/8568*).

points regarding the extent to which third-party settlement procedures should be used in the settlement of international disputes argues against the Commission's dealing with the matter as a separate topic.

20. Nevertheless, the Commission would pursue the objective of promoting the peaceful settlement of disputes. With this purpose in mind the Commission should, as a matter of standard procedure, take up in each of the draft conventions which it prepares the question of what methods of dispute-settlement would be best suited to the particular topic dealt with in the draft convention. The Commission should then include such provisions in the draft.

21. For any disputes-settlement procedure to be effective in a convention that is designed for world-wide acceptance the proposed procedure should represent a substantial consensus of view. Conciliation procedures along the lines of those contained in the Commission's draft articles on the representation of States in their relations with international organizations⁵ are illustrative of the manner in which procedures to promote disputes-settlement can be tailored to the requirements of a particular set of problems. It would be desirable for the Commission to maintain a flexible approach to the procedures that might be adopted with respect to any particular topic. In this respect the compromise solution of limited recourse to the International Court of Justice plus generally applicable conciliation procedures contained in article 66 of the Vienna Convention on the Law of Treaties and the annex thereto⁶ furnish a precedent of substantial value.

III. THE LAW RELATING TO ECONOMIC DEVELOPMENT

22. As the Secretary-General's *Survey* points out, this topic was not discussed in the *Survey* prepared by Mr. Lauterpacht in 1948.⁷ The discussion in the 1971 *Survey* points out the growing emphasis upon economic development law and the desirability of taking an overall look at this field as the basis for inclusion. The *Survey*, however, indicates that basic responsibilities in this field have been allotted to a variety of other international agencies and United Nations organs including UNCTAD, UNIDO, UNCITRAL, IBRD and its associated agencies, IMF, and GATT. In addition to these organizations, of course, there are regional economic organizations and other specialized international organizations such as IMCO and UNIDROIT which are active in various aspects of what might be called international economic law. There does not appear to be, therefore, any demon-

⁵ See *Yearbook of the International Law Commission, 1971, vol. II (Part One)*, p. 333, document A/8410/Rev.1, chap. II, D, art. 82.

⁶ 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. 298.

⁷ *Survey of international law in relation to the work of codification of the International Law Commission: memorandum submitted by the Secretary-General* (United Nations publication, Sales No. 1948.V.1(I)).

strable need for the Commission to enter into a field that has been pre-empted by other organizations, particularly when, in the field which is traditionally its own, there remain so many unsatisfied demands.

IV. STATE RESPONSIBILITY

23. The law of State responsibility is actively under study by the Commission, which in accordance with its decision in 1963⁸ is defining the general rules governing the international responsibility of States. In considering a long-range programme of work, the major considerations that should be borne in mind is that completion of a convention on the general principles giving rise to responsibility will only be the foundation for the Commission's work in the field. It will be necessary to build on this foundation more specific rules relating to State responsibility in specific areas. It is at this stage that the Commission may find it necessary to consider those aspects of subjects such as limitations on the exercise of territorial sovereignty and prohibition of the threat or use of force which relate specifically to responsibility. It would be premature to attempt to draw up a list of such areas at this stage in the consideration of the general principles of responsibility but, as part of its long-range work programme, the Commission should plan for further activities in the field of State responsibility as soon as the codification of general principles has reached an advanced stage.

V. SUCCESSION OF STATES AND GOVERNMENTS

24. The Secretary-General's *Survey* suggests in addition to the present work regarding succession of States in respect of treaties and in respect of matters other than treaties, future work on succession with regard to treaties concluded between States and other subjects of international law. The subject certainly should be included in the long-term work programme of the Commission. The basic issue is whether it would be desirable to have the matter dealt with in connexion with the existing project on the law of treaties with respect to international organizations or as a separate topic. A decision on this point might be appropriate after receipt of the comments of States on the draft articles on succession of States in respect of treaties.

25. With regard to other aspects of the law of succession the suggestion in paragraph 218 of the *Survey* that the topic of "succession of States and Governments" be retained on the long-term work programme is a sound one which will permit later consideration of the need, if any, to take up the topic "succession of Governments".

VI. DIPLOMATIC AND CONSULAR LAW

26. Except for the special subject of a draft convention concerning crimes against persons entitled to special

protection under international law, the work of the Commission in the field of diplomatic and consular law is substantially complete. However, the continued review of the 1961 Convention on Diplomatic Relations⁹ and the 1963 Convention on Consular Relations¹⁰ in the course of the Commission's work on special missions and representation of States in their relations with international organizations established the presence of a substantial number of minor problems in the formulation of those conventions and the possible existence of major omissions or flaws. Nevertheless, in the absence of a showing of substantial difficulties arising in the implementation of the conventions there would not be sufficient reason to incorporate a proposed revision of those conventions in the long-term work programme.

27. On the other hand, the rate of change in the area of international relationships is such as to eliminate any possibility that the rules contained in the Conventions of 1961 and 1963 could enjoy more than a fraction of the immutability accorded to the Regulation on the classification of diplomatic agents (*Vienna Règlement*) of 1815. The same factors are bound to affect any other convention that the Commission has fathered, to a greater or lesser degree. It seems reasonable to consider as an element of the Commission's long-term programme of work the establishment of a system for reviewing conventions on a regular basis in order to determine whether there is an existing need for study and possible revision.

28. One method of achieving this reconsideration would be to charge the United Nations Secretariat with the duty of carrying out a survey at fixed intervals in order to determine whether there was need for some action by the Commission. Thus the Secretariat could, after a treaty had been in effect for possibly 10 years, send out a questionnaire to all the Parties to determine whether any problems had been encountered in its interpretation or implementation. Such questionnaires could be thereafter sent out on a five—or ten—year basis. The results of the questionnaire should, of course, be supplemented by Secretariat research with respect to particular convention. The Commission could then as part of its regular agenda consider the Secretariat reports and reach a conclusion as to whether any remedial action would be required.

VII. THE LAW OF TREATIES

29. As the question of treaties concluded between States and international organizations or between two or more international organizations and the most-favoured-nation clause are both on the active agenda of the Commission the only subject raised in the *Survey* which requires comment is the question of participation in a treaty. This question, as illustrated by developments at the United Nations Conference on the Law of Treaties, is primarily political rather than legal. As the matter is currently before the General Assembly, hopefully it will be settled in that context.

⁸ *Yearbook of the International Law Commission, 1963*, vol. II, p. 224, document A/5509, para. 52.

⁹ United Nations, *Treaty Series*, vol. 500, p. 95.

¹⁰ *Ibid.*, vol. 596, p. 261.

VIII. UNILATERAL ACTS

30. A decision to take up the topic of unilateral acts would require consideration of the entire subject of the sources of international law. This is so because it would be necessary to express the relationship of unilateral acts to the accepted sources of international law that appear in Article 38, paragraph 1 of the Statute of the International Court of Justice. Difficulties might be expected to arise in expressing the relationship of unilateral acts not only to "international custom, as evidence of a general practice accepted as law" but also to "the general principles of law . . .".

31. The Commission decided in 1949 that the topic of the sources of international law ought not to be placed on the list of topics suitable for codification.¹¹ This decision appears as valid now as it did in 1949.

32. The *Survey* raises in paragraph 282 the more specific question whether the subject of unilateral acts should be taken up by the Commission, in the context of "unilateral acts with definite legal consequences emanating from a single subject of international law, and of which the main examples are recognition, protests, estoppel, proclamations or declarations, waivers and renunciations . . .". The *Survey* continues by suggesting in paragraph 283 that the product of the Commission might well not be draft articles but in effect a legal study, and points out that no such study currently exists to which reference can easily be made. Accepting the importance of the subject, the final decision as to inclusion in a long-term programme involves whether such a study could not be undertaken by some other organization than the Commission such as the International Law Association of the Institut de droit international. It would then be possible to determine whether additional work by the Commission itself was necessary in this field.

IX. THE LAW RELATING TO INTERNATIONAL WATERCOURSES

33. The subject of the "Law of the non-navigable uses of international watercourses" has been referred to the Commission by the General Assembly and may thus be considered to be part of the Commission's agenda.¹² The formulation of the General Assembly resolution, however, raises substantial practical problems.

34. The exclusion of navigable uses from the Commission's consideration prevents a balanced study of this subject. For example, if a downstream riparian decides to use a navigable river for hydroelectric production, the construction of the necessary dam will eliminate navigation for upstream riparians unless that construction is accompanied by building locks to carry vessels around the dam. Contrariwise, if an upstream riparian decides to use waters for irrigation purposes it may well reduce stream flows to an extent that interferes with the established navigational uses by downstream riparians.

35. Apart from the foregoing practical problem there is a serious question whether it is possible to produce a draft set of provisions regarding the uses of international watercourses that would not be at such a level of generality as to be of extremely limited utility. The variations between river basins are sufficiently substantial so as to make what would be a reasonable set of rules for the control of one river basin unreasonable for that of another. An example would be the difference between the Rhine River basin and the Tigris and Euphrates system.

36. This may well account for the very general character of the provisions in the Helsinki Rules¹³ on equitable utilization of the waters of an international drainage basin. The two key rules are contained in article VI, which denies preference to any use or category of uses and article VIII which provides that an existing reasonable use may continue in operation unless on balance it is reasonable to conclude that it should be modified or terminated so as to accommodate a competing incompatible use. These principles do not afford any great assistance in resolving disputes between upstream and downstream riparians.

37. In three areas the Helsinki Rules provide reasonably detailed and effective provisions—in chapter 3 with respect to pollution, chapter 4 with respect to navigation and chapter 5 with respect to timber floating. This greater degree of definition undoubtedly stems from the fact that differences among river basins do not substantially affect the rules which are required to ensure a reasonable régime to prevent pollution and to control navigation and timber floating.

38. As the General Assembly has expressed a preference that the Commission not take up navigational uses at the first stage of its study of international waterways, and as it would be fruitless to consider timber floating without taking navigational uses into account, the area in which the Commission could perform some useful work would be that with respect to pollution of international waterways. The ever-increasing concern which is being demonstrated with respect to environmental problems generally emphasizes the over-all importance of the topic of water pollution. Intensive international, regional and national efforts are being made to deal with the subject. The International Law Commission, with its character as a body of independent experts, would be an excellent forum in which to seek to work out legal principles for application to the problems of the pollution of international watercourses.

39. The task would be a complicated one because the problems of pollution are complex and their solution even more complex. Economic, financial and scientific studies are an essential adjunct to the formulation of workable legal requirements in this area. As a consequence of the United Nation Conference on the Human Environment, however, it may be anticipated that United Nations studies will be carried out in these fields that

¹¹ See *Yearbook of the International Law Commission, 1949*, document A/925, para. 16.

¹² General Assembly resolution 2780 (XXVI), section I, para. 5.

¹³ International Law Association, *Helsinki Rules on the Uses of Waters of International Rivers* (London, 1967).

will supply the necessary technical information for the Commission's consideration of river pollution. It may well be necessary for the Commission to set up working arrangements with other United Nations bodies in order to secure appropriate technical advice and assistance. Despite all the complications that may arise in dealing with the subject, however, the Commission should include it on the long-term agenda and should give it substantial priority among the items on that agenda.

X. THE LAW OF THE SEA

40. As the law of the sea is currently within the purview of a special committee, the Commission need not take any decisions with respect to the subject at the present time.

XI. THE LAW OF THE AIR

41. ICAO has established its jurisdiction with respect to the law of the air and it would be inappropriate for the Commission to take up subjects normally handled by that body.

XII. THE LAW OF OUTER SPACE

42. The Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space has been dealing satisfactorily with the law of outer space in general and there would not appear to be any need at present for proposing changes in this method of dealing with the subject.

XIII. THE LAW RELATING TO THE ENVIRONMENT

43. One aspect of environmental problems has already been touched upon in the discussion regarding pollution of international waterways.¹⁴ From the broader point of view, the efforts to preserve reasonable environmental living conditions will require the co-operation of every competent international agency. Whether or not the fears of universal disaster expressed by some ecologists are accurate there can be no doubt that enormous international action will be required to safeguard against the possibility of disaster. The Commission should participate in this work. Taking up the problem of river pollution will be a substantial first step. Participation in the development of world environmental law should be included in the long-term agenda of the Commission.

XIV. THE LAW RELATING TO INTERNATIONAL ORGANIZATIONS

44. This is a topic that has special significance for the Commission in view of its own nature. The work now

being carried on with respect to the application of the law of treaties to international organizations should serve as a foundation for future consideration of other fundamental legal problems in this area. Possibly the subject raised under point 2 chapter XIV in the *Survey* (Privileges and immunities of international organizations, and of entities and officials under their authority), should be taken up as the next subject in this field when the work on treaties is completed, followed possibly by a study of responsibility of such organizations. This aspect might be broadened to include certain of the problems raised under point 1 of this subject (Legal status of international organizations), such as contractual capacity, capacity to engage in legal proceedings, and the like.

XV. INTERNATIONAL LAW RELATING TO INDIVIDUALS

45. The *Survey* suggests four headings for this topic. As to the first, the law of nationality, it appears unlikely that substantial progress could be made in this area given the past history recounted in the *Survey*.

46. With regard to point 2 (extradition) of chapter XV, the *Survey* suggests that it may be possible to agree to multilateral treaty provisions on extradition in respect of certain offences. It is true that in the context of specific conventions dealing with specific offences of general concern to the international community it has been possible to incorporate provisions regarding extradition. It seems doubtful, however, whether this fact supports the conclusion that consequently it would be possible to conclude a general extradition treaty. The substantial obstacles to such a treaty which led the Commission not to include this subject on its agenda in 1949 have not disappeared. The Commission should not devote scarce time and resources to the subject until more favourable prospects appear.

47. The third subject, right of asylum, appears too controversial to take up at this time. The difficulties are implicit in article 14, paragraph 2 of the Universal Declaration of Human Rights,¹⁵ which specifies that a right of asylum may not be invoked in case of prosecutions for non-political crimes or for acts contrary to the purposes and principles of the United Nations. This formulation leaves any State substantially free to grant or not grant asylum as it sees fit and there is little likelihood that any more meaningful definition that might be proposed by the Commission would be widely accepted.

48. Point 4 in chapter XV of the *Survey* on the general subject of human rights is generally within the purview of the Commission on Human Rights. There does not appear to be any urgent reason for the International Law Commission to move into this area.

XVI. THE LAW RELATING TO ARMED CONFLICTS

49. As the *Survey* points out, the Commission considered whether the laws of war should be included on its original

¹⁴ See para. 38 above.

¹⁵ General Assembly resolution 217 A (III).

agenda and decided against taking up the subject. While the reason for that decision (that such action might indicate lack of confidence in the ability of the United Nations to maintain peace), may not at the present moment appear overly persuasive, there are substantial reasons for not reversing the decision. Principal among these is that the International Committee of the Red Cross is currently dealing with most important aspects of this subject and a major international diplomatic conference may be expected on the basis of the preparatory work initiated by the International Committee. In so far as matters not being dealt with in this context are concerned, other major issues are being dealt with in the

Conference of the Committee on Disarmament. There are minor issues, such as have surfaced in the course of the Commission's consideration of the law of treaties and of the 1961 Convention on Diplomatic Relations. To the extent they have not been settled in such conventions, they are not of sufficient urgency to be placed on the long-term agenda of the Commission.

XVII. INTERNATIONAL CRIMINAL LAW

50. The discussion of this subject in the *Survey* establishes that topics in this area are best dealt with on an *ad hoc* basis as the need arises.

CO-OPERATION WITH OTHER BODIES

[Agenda item 8]

DOCUMENT A/CN.4/262

Report on the thirteenth session of the Asian-African Legal Consultative Committee
by Mr. Senjin Tsuruoka, observer for the Commission¹

[Original text: English]
[17 May 1972]

ABBREVIATIONS

FAO	Food and Agriculture Organization of the United Nations
OAY	Organization of African Unity
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

1. In accordance with the decision taken by the International Law Commission at its twenty-third session,² I had the honour to attend, as an observer for the Commission, the thirteenth session of the Asian-African Legal Consultative Committee which was held at Lagos (Nigeria) from 19 to 25 January 1972.

2. The delegations of the following member States attended the session: Ceylon, Egypt, Ghana, India, Indonesia, Iran, Iraq, Japan, Kenya, Malaysia, Nepal, Nigeria, Pakistan, Philippines, Syrian Arab Republic and Thailand. The delegation of the Republic of Korea, an associate member State, also attended the session. The fifteen non-member States of Asia and Africa were represented by observers. Australia, Austria, Brazil, Canada, Iceland, Norway, Peru, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics and the United States of America were also represented

¹ Mr. Tsuruoka attached to his report (1) a full list of the delegates and observers who attended the thirteenth session of the Committee and (2) the draft standard form of contract and the report of the Sub-Committee on the law relating to the international sale of goods, referred to in paragraph 19 below. These documents are being kept in the files of the secretariat of the International Law Commission.

² *Yearbook of the International Law Commission, 1971* (Part One), p. 352, document A/8410/Rev.1, para. 141.

by observers. In addition, representatives of the United Nations, FAO, UNCITRAL, the Commonwealth Secretariat, the League of Arab States, OAU and UNIDROIT attended as observers.

3. At its first meeting on 20 January 1972, the Committee adopted the following agenda:

- I. Administrative and organizational matters:
 1. Adoption of the agenda
 2. Election of the President, the Vice-President and the Secretary-General
 3. Admission of observers
 4. Consideration of the Secretary-General's report on policy and administrative matters and the Committee's programme of work
 5. Dates and place for the fourteenth session
- II. Matters referred to the Committee by the Governments of the participating countries under article 3 (b) of the Statutes:
 1. Law of the sea including questions relating to sea-bed and ocean-floor (referred by the Government of Indonesia)
 2. Law of international rivers (referred by the Governments of Iraq and Pakistan)
- III. Matters taken up by the Committee under Article 3 (c) of the Statutes:

International sale of goods (taken up by the Committee at the suggestion of the Governments of Ghana and India)

4. At the same meeting, Mr. T. O. Elias, Attorney-General of Nigeria and Mr. Mustapha Kamil Yasseen of Iraq were elected respectively President and Vice-President for the session. Mr. B. Sen, present Secretary-General of the Committee, was re-elected for a further term of three years. Following the admission of observers, the President invited me to make a statement on the work of the International Law Commission at its twenty-third session, the text of which is annexed to this report.

5. The Committee started the discussion on the subject of the law of the sea at its very first business meeting held on 20 January 1972. Throughout the session, the emphasis was placed on the law of the sea as had been done at the previous session.

The law of the sea

6. The Committee had started consideration of the question of the law of the sea at its twelfth session held in Colombo, Ceylon, in January 1971. At that session, a fairly extensive discussion of a general nature had taken place on several major topics. The Lagos session of the Committee was therefore the second occasion on which the Committee had taken up the law of the sea, reverting to it for a fuller consideration of the subject. This was in keeping with the recent important development in this field in the United Nations and elsewhere. The United Nations Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction (which, in accordance with the decision taken by the General Assembly at its twenty-sixth session,³ is now composed of ninety-one Member States), is currently undertaking the preparatory work for a comprehensive conference on the law of the sea, tentatively scheduled for 1973 under General Assembly resolution 2750 C (XXV). The work of the Asian-African Legal Consultative Committee on the law of the sea has therefore an important bearing on the work carried on in the United Nations Committee. Also, there have been gatherings of representatives of States on the law of the sea on a regional basis, in Africa, Latin America and elsewhere, such as, for example, the one that recently took place within OAU, an account of which was given to the Committee by the observer for that body.

7. A wide participation of observers, of which there were 38, from non-member countries both from within and from without the continents of Africa and Asia, is worth mentioning, and it seemed to testify to the acute interest which the subject matter arouses in the community of nations in general, and in particular, in the developing nations. This was significant in view of the fact that the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction is now about to enter into a more important phase of its work in the preparation of the forthcoming conference on the law of the sea.

8. The topics discussed at the thirteenth session of the Committee included nearly all important subjects and issues that are likely to be dealt with by the forthcoming

conference on the law of the sea, namely: (a) international régime for the sea-bed, (b) exclusive economic zone, (c) territorial sea and straits, (d) regional arrangements, (e) archipelago and (f) position of land-locked countries.

9. In the afternoon of 20 January, in plenary, the Committee commenced deliberations on the law of the sea by hearing brief statements of members of the Working Group on certain topics on which they had prepared working documents. This Working Group, which consists of seven members, was originally established at the twelfth session, with the main task, *inter alia*, of preparing one or more working papers on any specific topics on the law of the sea. The working papers presented at the thirteenth session were the following: (1) "Preliminary draft and outline of a convention on the sea-bed and the ocean floor and the sub-soil thereof beyond national jurisdiction", prepared by the Rapporteur of the Sub-Committee on the Law of the Sea, Mr. C. W. Pinto of Ceylon, and introduced, in his absence, by the delegate of India; (2) "Proposed régime concerning fisheries on the high seas", prepared by Japan; (3) "The exclusive economic zone concept", prepared by Kenya. Also available were the working papers on the "Concept of archipelago" and on "International straits", which had been submitted earlier by Indonesia and Malaysia, respectively, both as members of the Working Group.

10. On 21 and 22 January, the Committee heard in three plenary sessions general statements by States members of the Committee, observers, and the representatives of international organizations including FAO and OAU. Observers from major maritime nations, such as the United States of America, the USSR, and the United Kingdom, also took part in the general debate, in which they set out the position of their respective Governments. The Committee thereafter continued discussion of the subject in the Sub-Committee on the Law of the Sea, which is an assembly of the whole, on the basis of the various working papers to which I have just referred.

11. Of the various topics and issues, the question of fisheries and the concept of exclusive economic zone were undoubtedly the two principal subjects on which the debate focused for the most part. The view was expressed, with force, by several delegates and observers of developing countries, that there was a need to depart from the traditional concept of the law of the sea and to find new ideas to resolve the existing conflict of interests so that a fair and equitable framework for the use of the sea and the exploitation of its resources could be established. The working paper on fisheries submitted by Japan, which attempted to set out in considerable detail the concept of preferential fishing rights of coastal States with special reference to developing coastal countries, was considered insufficient by many participants, for the reason that the proposal therein contained did not go far enough adequately to protect their interests. It was felt in general that while there appeared to be a growing consensus on according the coastal States an increasing share of fisheries adjacent to their territorial sea under concepts of economic, exclusive or preferential zones, the crucial question was one of jurisdiction. The view was also expressed in this connexion that the concept of exclusive fishing zone was separate from the concept of territorial sea jurisdic-

³ Resolution 2881 (XXVI).

tion, and that outer limits for the two should therefore be separately defined.

12. Regarding the economic zone, a great majority of developing countries, both member States and observers, expressed themselves in favour of the concept. It was felt however that there was need for greater clarity in defining the jurisdictional aspects of the concept in such matters as resources control, prevention and control of the pollution of the sea, scientific research and national security. Emphasis was laid by those wedded to the concept that the interests of land-locked countries could be protected by regional arrangements providing national treatment for land-locked countries in the region concerned.

13. The concept of archipelago was forcibly expounded by the two most important archipelagic countries, the Philippines and Indonesia, and there were a certain number of questions and answers on such related questions as the baseline criteria and the status of the waters within the archipelago in relation to navigation rights of foreign ships.

14. With regard to the international régime for the seabed beyond the limits of national jurisdiction, it was argued that if the limits of national jurisdiction were too wide, for example, at 200 miles from the coast, as advocated by some Latin American countries, the resources in the international area left for exploitation for the common benefit of the international community would only be of insignificant value and consequently the international machinery to be established for the management of the area and its resources would be of little economic significance, because practically all the valuable resources would be placed under the exclusive control of individual coastal States. In refutation of this, the points were made that mineral resources of commercial value had been discovered on the deep ocean floor, and that sea-bed technology had developed to the extent of enabling their recovery. On the basis of such facts, it was argued that the establishment of an appropriate international machinery with comprehensive powers and functions was necessary, because its absence would bring about the situation in which only the technically advanced States would enjoy freedom to acquire them.

15. In conclusion, the points made were cogent, the debate was lively and forceful, and a high degree of expert knowledge and competence characterized the deliberations. The question of the law of the sea is expected to continue to be the priority item on the agenda of the fourteenth session of the Committee in 1973.

The law of international rivers

16. The subject "Law of international rivers" was referred to the Committee at its ninth session by the Governments of Iraq and Pakistan. Both Governments appeared to be primarily interested in the uses of waters of international rivers. At the eleventh session of the Committee, the delegates of Iraq and Pakistan submitted the joint draft articles which they wished the Committee to take up as the basis for discussion. The delegate of India also submitted a proposal that the Helsinki Rules adopted

by the International Law Association in 1966⁴ should be the basis of the Committee's study and that, to begin with, the first eight articles of the Helsinki Rules should be taken up. No progress could be made at the eleventh session on this subject as the discussions centred round procedural matters.

17. At the twelfth session, the Sub-Committee on the subject requested its Rapporteur to prepare a set of draft articles amalgamating as far as possible the proposals contained in the two drafts submitted at the eleventh session. The Rapporteur submitted his working paper containing ten draft proposals, which were accepted by the Sub-Committee as the basis of discussion. However, owing to lack of time, the Sub-Committee was able to consider only draft proposals I to V during the session, and the rest were considered at the inter-session meeting held at Colombo in September 1971.

18. At the thirteenth session, the Sub-Committee was reminded at the beginning of its work by one member that the draft proposals prepared by the Rapporteur at the twelfth session did not cover all aspects of the law of international rivers and that they were silent in particular on the rules relating to navigational uses of such rivers. The Sub-Committee accordingly agreed to take up other aspects of this subject including navigation, pollution, timber-floating etc., at future sessions. The Sub-Committee also agreed that the Committee should direct the secretariat to prepare a study on the subject of the right of access of land-locked countries to the sea through international rivers. It was further agreed that the new draft proposals, with appropriate commentaries on each proposal, should be prepared by the Rapporteur of the Sub-Committee and should be distributed through the secretariat to members of the Sub-Committee before the date of the fourteenth session.

International sale of goods

19. The Sub-Committee on the law relating to the international sale of goods took up for discussion only the draft standard form of contract for sale of consumer goods, prepared by the Joint Rapporteur of the Sub-Committee at the suggestion of the Secretary-General of the Committee, on 24 January 1972. The Assistant Secretary of UNCITRAL and the Secretary-General of UNIDROIT attended the meeting of the Sub-Committee. After some discussion, the Sub-Committee adopted the report recommending certain amendments to the draft standard form of contract. The draft standard form of contract and a copy of the report of the Sub-Committee are annexed to the present report.⁵

20. Earlier, at the plenary meeting, the Committee heard the statement made by the Assistant Secretary of UNCITRAL on the work of that Commission during 1971.

⁴ International Law Association, *Report of the Fifty-second Conference, held at Helsinki, 1966* (London, International Law Association, 1967), pp. 484-532.

⁵ See foot-note 1.

21. In conclusion, I should like to express my deep gratitude for the warm welcome accorded to me by the President of the Committee, Mr. T. O. Elias, Attorney-General of Nigeria, and for the cordial reception and kindness shown to me by the Secretary-General of the Committee and the officials of the Government of Nigeria.

ANNEX

Statement made by Mr. Senjin Tsuruoka, Chairman of the International Law Commission, at the thirteenth session of the Asian-African Legal Consultative Committee

1. It is a great honour and pleasure for me to attend the thirteenth session of the Asian-African Legal Consultative Committee on behalf of the International Law Commission. I am convinced that under the able leadership of the Chairman, the Committee will be able to carry out its work successfully. I should also like to ask the Chairman to convey to the Government of Nigeria my deep gratitude for the warm hospitality which it has given me.

Now, I would like to give the Committee a general idea of the work of the International Law Commission during its twenty-third session in 1971.

2. The main items on the agenda of the twenty-third session of the Commission were :

- Relations between States and international organizations;
- Succession of States;
- State responsibility;
- Most favoured-nation clause;

The question of treaties concluded between States and international organizations or between two or more international organizations.

I wish to deal in the first place with the topic of relations between States and international organizations.

Following the recommendation of the General Assembly in 1970,^a the International Law Commission at its twenty-third session completed the preparation of a draft entitled "Draft articles on the representation of States in their relations with international organizations". The draft articles, which represent the fourth achievement of the Commission in the field of diplomatic law, constitute both codification and progressive development of international law.

3. The final draft consists of 82 articles and is divided into four parts and an annex. Part I, entitled "Introduction", contains provisions applicable to the draft articles as a whole. Article 2 provides that the draft articles apply to the representation of States in their relations with international organizations of universal character, that is, intergovernmental organizations whose membership and responsibilities are on a world-wide scale. They are also applicable to the representation of States at conferences convened by or under the auspices of such organizations. The representation of entities other than States in their relations with international organizations is not within the scope of the draft articles.

The draft articles, while intended to provide a uniform régime, are without prejudice to different rules laid down in headquarters agreements or other conventions which are in force. Nor do they preclude the conclusion of future agreements which may contain provisions diverging in some respects from the rules laid down in the draft articles.

4. Part II contains provisions dealing, *inter alia*, with the establishment of permanent missions and permanent observer missions, their functions, appointment of their members, their size and composition, as well as privileges and immunities of missions and of their members.

5. Part III deals specifically with delegations to organs of international organizations of universal character and delegations to conferences convened by or under the auspices of such organizations. It contains, provisions on, among other questions, privileges and immunities as well as the sending, credentials, size and composition of delegations.

6. Part IV contains provisions which are generally applicable to missions to international organizations and delegations to organs and conferences, dealing with questions such as nationality of the members of missions and delegations, respect for the laws and regulations of the host State, the entry into and departure from the host State. Special attention must be given to articles 81 and 82. Article 81 provides for consultations between the sending State the host State and the organization aiming at the settlement of any dispute arising between them. Article 82 envisages the utilization of any settlement procedure which may be established in the organization and, in the absence of any such procedure, the reference of the dispute to conciliation.

7. Finally, the International Law Commission presented a set of provisions on observer delegations to organs and to conferences in the form of an annex.

8. The Commission recommended that the General Assembly of the United Nations should convene an international conference of plenipotentiaries to study the Commission's draft on this subject. The General Assembly, at its twenty-sixth session, which I attended as the representative of the International Law Commission, invited Member States and Switzerland to submit their written comments and observations on the draft articles and on the procedure to be adopted for the elaboration and conclusion of a convention on the subject.^b

9. As for the other topics currently under study, it was unfortunately not possible for the Commission to consider them owing to the fact that the Commission devoted its time almost entirely to the completion of the draft articles on the representation of States in their relations with international organizations.

10. Turning to other decisions and conclusions, the International Law Commission at its twenty-third session decided to include a question entitled "Non-navigational uses of international watercourses" in its general programme of work. The Commission, however, left to the Commission in its new composition the question of the priority to be given to that topic.

11. In connexion with the organization of work of the Commission at its twenty-fourth session (1972), the Commission requested indication from the General Assembly as to the priority to be given to the problem of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law. The General Assembly at its twenty-sixth session requested the Commission to study this subject as soon as possible with a view to preparing a set of draft articles for submission to the General Assembly at the earliest date which the Commission considered appropriate.^c

12. Before concluding my statement, I should like to inform the Committee that the International Law Commission was very pleased to have Mr. Fernando and Mr. Sen as observers at its twenty-third session. I should also like to inform the Committee that, in the course of the debate on the report of the International Law Commission in the Sixth Committee of the General Assembly, several representatives welcomed the continuing co-operation between this Committee and the International Law Commission. I hope that this close relationship between the Asian-African Legal Consultative Committee and the International Law Commission will be strengthened further in the future.

^a Resolution 2634 (XXV), para. 4 (a).

^b Resolution 2780 (XXVI), sect. II, para. 2.

^c *Ibid.*, sect. III, para. 2.

REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

DOCUMENT A/8710/REV.1

Report of the International Law Commission on the work of its twenty-fourth session,
2 May - 7 July 1972

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ANNEX*

Observations of Member States on the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, transmitted to the International Law Commission in accordance with section III of General Assembly resolution 2780 (XXVI)	329
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ABBREVIATIONS

Benelux	Customs and economic union between Belgium, Netherlands and Luxembourg
BIRPI	United International Bureaux for the Protection of Intellectual Property
CMEA	Council for Mutual Economic Assistance
EEC	European Economic Community
EFTA	European Free Trade Association
EURATOM	European Atomic Energy Community
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade (also the Contracting Parties and the secretariat)
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
I.C.J.	International Court of Justice
<i>I.C.J. Pleadings</i>	<i>I.C.J., Pleadings, Oral Arguments, Documents</i>

* The observations contained in this annex were originally distributed as documents A/8710/Add.1 and A/8710/Add.2.

<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
ILO	International Labour Organisation
IMCO	Inter-Governmental Maritime Consultative Organization
ITU	International Telecommunication Union
LAFTA	Latin American Free Trade Association
OAS	Organization of American States
OAU	Organization of African Unity
P.C.I.J.	Permanent Court of International Justice
P.C.I.J., Series A/B	P.C.I.J., <i>Judgments, Orders and Advisory Opinions</i>
P.C.I.J., Series C	P.C.I.J., <i>Pleadings, Oral Statements and Documents</i>
UAR	United Arab Republic
UNCITRAL	United Nations Commission on International Trade Law
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNITAR	United Nations Institute for Training and Research
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 did not appear in the original.

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-fourth session at the United Nations Office at Geneva from 2 May to 7 July 1972. The work of the Commission during this session is described in the present report. Chapter II of the report, on succession of States in respect of treaties, contains a description of the Commission's work on that topic, together with 31 draft articles and commentaries thereon, as provisionally adopted by the Commission. Chapter III, on the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, contains a description of the Commission's work on that topic, together with 12 draft articles and commentaries thereon, as approved by the Commission. Chapter IV contains a description of the Commission's progress of work on the following topics on its agenda: (1) succession of States in respect of matters other than treaties; (2) State responsibility; (3) the most-favoured-nation clause; (4) the question of treaties concluded between States and international organizations or between two or more international organizations. 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. Gonzalo ALCÍVAR (Ecuador);
 Mr. Milan BARTOS (Yugoslavia);
 Mr. Mohammed BEDJAOUI (Algeria);
 Mr. Suat BILGE (Turkey);
 Mr. Jorge CASTAÑEDA (Mexico);
 Mr. Abdullah EL-ERIAN (Egypt);
 Mr. Taslim O. ELIAS (Nigeria);
 Mr. Edvard HAMBRO (Norway);
 Mr. Richard D. KEARNEY (United States of America);
 Mr. NAGENDRA SINGH (India);
 Mr. Robert QUENTIN-BAXTER (New Zealand);
 Mr. Alfred RAMANGASOAVINA (Madagascar);
 Mr. Paul REUTER (France);
 Mr. Zenon ROSSIDES (Cyprus);
 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. All members attended meetings of the twenty-fourth session of the Commission.

B. Officers

4. At its 1149th meeting, held on 2 May 1972, the Commission elected the following officers:

Chairman: Mr. Richard D. Kearney;
First Vice-Chairman: Mr. Endre Ustor;
Second Vice-Chairman: Mr. Alfred Ramangasoavina;
Rapporteur: Mr. Gonzalo Alcívar.

C. Drafting Committee

5. At its 1158th meeting, held on 15 May 1972, the Commission appointed a Drafting Committee composed as follows:

Chairman: Mr. Endre Ustor;
Members: Mr. Roberto Ago, Mr. Jorge Castañeda, Mr. Taslim O. Elias, Mr. Nagendra Singh, Mr. Robert Quentin-Baxter, Mr. Paul Reuter, Mr. Arnold J. P. Tammes, Mr. Nikolai Ushakov, Sir Humphrey Waldock and Mr. Mustafa Kamil Yasseen.

Mr. Gonzalo Alcívar took part in the Committee's work in his capacity as Rapporteur of the Commission.

D. Working Group on the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law

6. At its 1150th meeting, held on 3 May 1972 the Commission set up a Working Group on the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, composed as follows:

Chairman: Mr. Senjin Tsuruoka;
Members: Mr. Roberto Ago, Mr. Edvard Hambro, Mr. José Sette Câmara, Mr. Doudou Thiam and Mr. Nikolai Ushakov.

It was also decided that the Chairman of the Commission Mr. Richard D. Kearney, would attend the meetings of the Working Group as required.

E. Secretariat

7. Mr. Constantin A. Stavropoulos, Legal Counsel, attended the 1177th to 1179th meetings, held from 12 to

14 June 1972, and represented the Secretary-General on those occasions. Mr. Yuri M. Rybakov, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General at the other meetings of the session, and acted as Secretary to the Commission. Mr. Nicolas Teslenko acted as Deputy Secretary to the Commission and Mr. Santiago Torres-Bernárdez as Senior Assistant Secretary. Miss Jacqueline Dauchy and Mr. Eduardo Valencia-Ospina served as assistant secretaries.

F. Agenda

8. The Commission adopted an agenda for the twenty-fourth session, consisting of the following items:

1. Succession of States:
 - (a) Succession in respect of treaties;
 - (b) Succession in respect of matters other than treaties.
2. State responsibility.
3. Most-favoured-nation clause.
4. Question of treaties concluded between States and international organizations between two or more international organizations.
5. Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law (para. 2 of section III of General Assembly resolution 2780 (XXVI).
6. (a) Review of the Commission's long-term programme of work: "Survey of International Law" prepared by the Secretary-General (A/CN.4/245);¹
 (b) Priority to be given to the topic of the law of the non-navigational uses of international watercourses (para. 5 of section 1 of General Assembly resolution 2780 (XXVI).
7. Organization of future work.
8. Co-operation with other bodies.
9. Date and place of the twenty-fifth session.
10. Other business.

9. In the course of the session, the Commission held 51 public meetings (1149th to 1199th meetings). In addition, the Drafting Committee held 10 meetings and the Working Group on the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law also held 10 meetings. The Commission concentrated on agenda items 1 (Succession of States: (a) succession in respect of treaties) and 5 (Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law); in connexion with each of these items, it adopted a complete set of draft articles. In view of the great difficulties of completing two sets of draft articles in the course of a ten-week session, the Commission did not consider the other topics on its agenda. However, taking into account the fact that at this session further reports were submitted by Special Rapporteurs on some of those topics, the Commission decided to include in chapter IV of the present

¹ *Yearbook of the International Law Commission, 1971, vol. II (Part Two), p. 1.*

report an account of the progress of work thereon resulting from the submission of those reports.

G. Address by the Secretary-General

10. The Secretary-General of the United Nations addressed the Commission at its 1194th meeting, held on 4 July 1972.

11. The Chairman of the Commission paid a tribute to the Secretary-General, who, since taking office, had actively striven to solve difficult problems by means based on respect for legal principles. The Secretary-General was not only a trained jurist, who, as Chairman of the Committee on the Peaceful Uses of Outer Space, had contributed to the development of outer space law, but also came from a country which had produced a number of eminent lawyers and was closely linked with the progress of international law, as shown by the very titles of several important codification conventions adopted under United Nations auspices.

12. The Secretary-General stressed the importance of international law and its role in modern life. He emphasized that, without strict respect for the rules of international law and the basic principles embodied in the United Nations Charter, it would be impossible to safeguard peace and promote the general welfare of nations. There was no long-term alternative to a policy of peaceful coexistence within the framework of international law, and differences in ideologies and social systems must not constitute obstacles to normal international relations based on principles such as those which had been solemnly proclaimed by the General Assembly

in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), annex). After stressing the importance and quality of the work done by the Commission, the Secretary-General observed that, as a result of developments in political, economic and social life and of the scientific and technological revolution, urgent demands were being made on all the means which man had devised to achieve and maintain international order and particularly on international law. In that connexion the Secretary-General expressed the hope that when the Commission reviewed its long-term programme of work, it would take the opportunity to enhance the role of international law in the United Nations system. It was important that the codification and progressive development of international law should be pursued even more energetically in the future than in the past. In conclusion, the Secretary-General stressed the practical and doctrinal importance of the topics discussed at the twenty-fourth session and said he was confident that, in its report to the General Assembly, the Commission would once gain fulfil the high expectations placed in its work.

13. The Chairman referred in turn to the need for the Commission to move forward more rapidly in its important task. He emphasized that the Commission had so many topics on its agenda which demanded priority attention that it was impossible for it to deal with them all with its present resources and by the methods currently employed. He therefore expressed the hope that if the Commission were to make proposals in that connexion, the Secretary-General would give them favourable consideration.

Chapter II

SUCCESSION OF STATES: SUCCESSION IN RESPECT OF TREATIES

A. Introduction

1. SUMMARY OF THE COMMISSION'S PROCEEDINGS

14. At its nineteenth session in 1967, the International Law Commission made new arrangements for dealing with the topic "Succession of States and Governments".² 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-Com-

mittee on Succession of States and Governments³ and agreed to by the Commission the same year, namely: (a) succession in respect of treaties, (b) succession in respect of matters other than treaties⁴ and (c) succession in respect of membership of international organizations.

15. In 1967, the Commission also 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,

² For a detailed account of the historical background of the topic as a whole, see *Yearbook of the International Law Commission, 1968*, vol. II, pp. 213 *et seq.*, document A/7209/Rev.1, paras. 29-42 and *ibid.*, 1969, vol. II, pp. 222 *et seq.*, document A/7610/Rev.1, paras. 30-34.

³ *Ibid.*, 1963, vol. II, p. 260, document A/5509, annex II.

⁴ Originally called "Succession in respect of rights and duties resulting from sources other than treaties". See *Yearbook of the International Law Commission, 1968*, vol. II, p. 216, document A/7209/Rev.1, para. 46.

namely succession in respect of membership of international organizations.⁵

16. 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 resolutions 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.

17. Sir Humphrey Waldock, the Special Rapporteur on succession in respect of treaties, submitted from 1968 to 1972 five reports on the topic. The first report,⁶ which was of a preliminary character, was considered by the Commission at its twentieth session in 1968. Following the discussion of the report, the Commission concluded that it was not called upon to take any formal decision.⁷ The Commission noted the Special Rapporteur's interpretation of his task as strictly limited to succession in respect of treaties, i.e. to the question how far treaties previously concluded and applicable with respect to a given territory might still be applicable after a change in the sovereignty over that territory; and his proposal to proceed on the basis that the present topic is essentially concerned only with the question of succession in respect of the treaty as such.⁸ A summary of the views expressed was included for information in the Commission's report on the session.⁹ It was also agreed that it would be for the Special Rapporteur to take account of the aspects of the general debate on succession in respect of matters other than treaties, held at the same session of the Commission,¹⁰ in so far as they might also have reference to succession in respect of treaties.

18. At its twenty-second session, the Commission considered together, in a preliminary manner, the draft articles in the second¹¹ and third¹² reports, submitted by the Special Rapporteur in 1969 and 1970. The four draft articles of the second report deal with the use of certain terms, the area of territory passing from one State to another (principle of "moving treaty frontiers"), devolution agreements, and unilateral declarations by successor States. The third report contains additional provisions on the use of terms, eight draft articles concerning treaties providing for the participation of "new States", the general rules governing the position of "new States" in regard to multilateral treaties and a note on the question of

placing a time-limit on the exercise of the right to notify succession.

19. Having regard to the nature of the discussion, the Commission confined itself to endorsing the Special Rapporteur's general approach to the topic and did not take any formal decision on the substance of the draft articles considered. The Commission did, however, include in its 1970 report to the General Assembly extensive summaries both of the Special Rapporteur's proposals and of the views expressed by members who took part in the discussion.¹³ By resolution 2634 (XXV), of 12 November 1970, the General Assembly recommended that the Commission should continue its work with a view to completing the first reading of draft articles on succession of States in respect of treaties.

20. At the Commission's twenty-third session, in 1971, the Special Rapporteur submitted his fourth report¹⁴ containing an additional provision on the use of terms and five more draft articles on the general rules governing the position of "new States" in regard to bilateral treaties. Occupied with the completion of its draft on the representation of States in their relations with international organizations, the Commission, owing to lack of time, did not consider the topic of the succession of States in respect of treaties. It decided, however, to include in chapter III of its report on the session a section, prepared by the Special Rapporteur, containing an account of the progress of work on the topic.¹⁵

21. At the present session, the Special Rapporteur submitted his fifth report (A/CN.4/256 and Add.1-4)¹⁶ designed to complete the series of draft articles in his second, third and fourth reports. The report is devoted to the rules applicable to particular categories of succession and to the "dispositive", "localized" or "territorial" treaties. It contains seven more draft articles. The part relating to particular categories of succession deals with protected States, mandates and trusteeships, colonies, and associated States, formation of non-federal and federal unions of States, dissolutions of a union of States and other dismemberments of a State into two or more States. It includes also a definition of "union of States" as well as an excursus on States, other than unions of States, which are formed from two or more territories.

22. The Commission considered the second, third, fourth and fifth reports submitted by the Special Rapporteur at its 1154th to 1181st, 1187th, 1190th and 1192nd to 1195th meetings and referred the draft articles contained therein to the Drafting Committee. At its 1176th, 1177th, 1181st, 1187th, 1196th and 1197th meetings, the Commission considered the reports of the Drafting Committee, which was also entrusted with the task of preparing the text of certain general provisions. At its 1197th meeting the Commission adopted a provisional draft on succession of States in respect of treaties as recommended by General Assembly resolution 2780 (XXVI) of 3 December

⁵ *Ibid.*, 1967, vol. II, p. 368, document A/6709/Rev.1, paras. 38-41.

⁶ *Ibid.*, 1968, vol. II, p. 87, document A/CN.4/202.

⁷ *Ibid.*, vol. II, p. 221, document A/7209/Rev.1, paras. 80-81.

⁸ *Ibid.*, para. 82.

⁹ *Ibid.*, pp. 221 *et seq.*, paras. 83-91.

¹⁰ *Ibid.*, pp. 216 *et seq.*, paras. 45-79.

¹¹ *Ibid.*, 1969, vol. II, p. 45, document A/CN.4/214 and Add.1-2.

¹² *Ibid.*, 1970, vol. II, p. 25, document A/CN.4/224 and Add.1.

¹³ *Ibid.*, pp. 301 *et seq.*, document A/8010/Rev.1, paras. 37-63.

¹⁴ *Ibid.*, 1971, vol. II (Part One), document A/CN.4/249.

¹⁵ *Ibid.*, p. 340, document A/8410/Rev.1, paras. 62-70.

¹⁶ See p. 1 above.

1971. The text of the draft articles and the commentaries thereto as adopted by the Commission are reproduced in section C below.

23. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit the provisional draft articles, through the Secretary-General, to Governments of Member States for their observations.

24. Since 1962, the Secretariat had 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";¹⁷ (b) a memorandum on "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depository";¹⁸ (c) a study entitled "Digest of the decisions of international tribunals relating to State succession"¹⁹ and a supplement thereto;²⁰ (d) a study entitled "Digest of decisions of national courts relating to succession of States and Governments";²¹ (e) seven 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: 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),²² "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),²³ and "International Telecommunication Union: 1932 Madrid and 1947 Atlantic City International Telecommunication Conventions and subsequent revised Conventions and Telegraph, Telephone, Radio and Additional Radio Regulations" (study VII);²⁴ (f) three studies in the series "Succession of States in respect of bilateral treaties", entitled respectively "Extradition treaties" (study I),²⁵ "Air transport agreements" (study II), and "Trade agreements" (study III);²⁶ (g) a volume of the United Nations Legislative Series entitled *Materials on succession of States*,²⁷ containing the information provided or indicated by Governments of Member States in

response to the Secretary-General's request. A supplement to the volume was circulated at the present session of the Commission as document A/CN.4/263.

2. STATE PRACTICE

25. The General Assembly in its resolutions 1765 (XVII), of 20 November 1962, and 1902 (XVIII), of 18 November 1963, recommended that the Commission should proceed with its work on succession of States "with appropriate reference to the views of States which have achieved independence since the Second World War". The case of those new States, most of which emerged from former dependent territories, is the commonest form in which the issue of succession has arisen during the past twenty-five years and the stress laid on it by the General Assembly's recommendations needs neither justification nor explanation at the present moment in history. The Commission has therefore given special attention throughout the study of the topic to the practice of the newly independent States referred to in the above-mentioned resolutions of the General Assembly without, however, neglecting the relevant practice of older States. On the emergence of a newly independent State, the problems of succession which arise in respect of *treaties* are inevitably problems which by their very nature involve consensual relations with other existing States and, in the case of some multilateral treaties, a very large number of other States. Today, moreover, on the emergence of a new State, the problems of succession will touch as many recently emerged new States as it will old States.

26. It is in the nature of things that more recent practice must be accorded a certain priority as evidence of the *opinio juris* of today, especially when, as in the case of succession of States in respect of treaties, the very frequency and extensiveness of the modern practice tends to submerge the earlier precedents. No purpose would, however, be served by distinguishing sharply between the value of earlier and later precedents, since the basic elements of the situations giving rise to the questions of succession in respect of treaties in the earlier precedents were much the same as in modern cases. Moreover, if recent practice is extremely rich in matters relating to new States emerging from a dependent territory, the same cannot be said for other cases, such as, for instance, secession, dismemberment of an existing State, the formation of unions of States and the dissolution of a union of States. Nor can the Commission fail to recognize that the era of decolonization is nearing its completion and that it is in connexion with these other cases that in future problems of succession are likely to arise. The Commission has therefore taken into account, as appropriate, earlier precedents that throw light on these cases. In considering the various precedents, the Commission has tried to discern with sufficient clearness how far the State practice was an expression simply of policy and how far and in what points an expression of legal rights or obligations.

27. In addition, the Commission has borne in mind that new factors have come into play that affect the context within which State practice in regard to succession takes place today. Particularly important is the much greater

¹⁷ *Yearbook of the International Law Commission, 1962*, vol. II, p. 101, document A/CN.4/149 and Add.1.

¹⁸ *Ibid.*, p. 106, document A/CN.4/150.

¹⁹ *Ibid.*, p. 131, document A/CN.4/151.

²⁰ *Ibid.*, 1970, vol. II, p. 170, document A/CN.4/232.

²¹ *Ibid.*, 1963, vol. II, p. 95, document A/CN.4/157.

²² *Ibid.*, 1968, vol. II, p. 1, document A/CN.4/200 and Add. 1-2.

²³ *Ibid.*, 1969, vol. II, p. 23, document A/CN.4/210.

²⁴ *Ibid.*, 1970, vol. II, p. 61, document A/CN.4/225.

²⁵ *Ibid.*, p. 102, document A/CN.4/229.

²⁶ *Ibid.*, 1971, vol. II (Part Two), p. 111, documents A/CN.4/243 and A/CN.4/243Add.1.

²⁷ United Nations publication, Sales No. E/F.68.V.5.

interdependence of States, which has affected the policy of successor States in some measure in regard to continuing the treaty relations of the territory to which they have succeeded, and the fact that the modern precedents reflect the practice of States conducting their relations under the régime of the principles of the Charter of the United Nations. Important also is the enormous growth of international organizations and the contribution which they have made to the development of depositary practice and the collection and dissemination of information regarding the treaty relationships of successor States.

3. THE CONCEPT OF "SUCCESSION OF STATES" WHICH EMERGED FROM THE STUDY OF THE TOPIC

28. Analogies drawn from municipal law concepts of succession are frequent in the writings of jurists and are sometimes also to be found in State practice. A natural enough tendency also manifests itself both among writers and in State practice to use the word "succession" as a convenient term to describe any assumption by a State of rights and obligations previously applicable with respect to territory which has passed under its sovereignty without any consideration of whether this is truly succession by operation of law or merely a voluntary arrangement of the States concerned. Municipal law analogies, however suggestive and valuable in some connexions, have to be viewed with caution in international law, for an assimilation of States to individuals as legal persons neglects fundamental differences and may lead to unjustifiable conclusions derived from municipal law.

29. The approach to succession adopted by the Commission after its study of the topic of succession in respect of *treaties* is based upon drawing a clear distinction between, on the one hand, the fact of the replacement of one State by another in the responsibility for the international relations of a territory and, on the other, the transmission of treaty rights and obligations from the predecessor to the successor State. A further element in the concept is that a consent to be bound given by the predecessor State in relation to a territory prior to the succession of States, establishes a legal nexus between the territory and the treaty and that to this nexus certain legal incidents attach.

30. In order to make clear the distinction between the fact of the replacement of one State by another and the transmission of rights and obligations, the Commission inserted in article 2 a provision defining the meaning of the expression "succession of States" for the purpose of the draft. Under this provision the expression "succession of States" is used throughout the articles to denote simply a change in the responsibility for the international relations of a territory, thus leaving aside from the definition all questions of the rights and obligations as a legal incident of that change. The rights and obligations in respect of treaties deriving from a "succession of States", as defined in the draft, are then to be ascertained from the specific provisions of the articles themselves.

4. RELATIONSHIP BETWEEN SUCCESSION IN RESPECT OF TREATIES AND THE GENERAL LAW OF TREATIES

31. A close examination of State practice afforded no convincing evidence of any general doctrine by reference to which the various problems of succession in respect of treaties could find their appropriate solution. The diversity in regard to the solutions adopted makes it difficult to explain this practice in terms of any fundamental principle of "succession" producing specific solutions to each situation. Nor is the matter made any easier by the fact that a number of different theories of succession are to be found in the writings of jurists. If any one specific theory were to be adopted, it would almost certainly be found that it would not be made to cover the actual practice of States, organizations and depositaries without distorting either the practice or the theory. If, however, the question of succession in respect of treaties is approached more from the point of view of the law of treaties some general rules are discernible in practice.

32. The task of codifying the law relating to succession of States in respect of treaties appears, in the light of State practice, to be rather one of determining within the law of treaties the impact of the occurrence of a "succession of States" than *vice versa*. It follows that, in approaching questions of succession of States in respect of treaties, the implications of the general law of treaties have constantly to be borne in mind. As today the most authoritative statement of the general law of treaties is that contained in the Vienna Convention on the Law of Treaties (1969),²⁸ the Commission felt bound to take the provisions of that Convention as an essential framework of the law relating to succession of States in respect of treaties.

33. Indeed, the question of the treatment to be accorded to succession of States arose during the codification of the law of treaties and the commentaries of the Commission to its draft articles on the law of treaties contained several references on the matter. It was for reasons of convenience, linked mainly to the need not to delay further the conclusion of the codification of the general law of treaties, that the Commission decided finally to insert in its draft a similar general reservation with regard to the problems arising from a succession of States to that which is embodied today in article 73 of the Vienna Convention with respect to the law of treaties generally.

34. Accordingly, the draft articles now submitted presuppose the existence of the provisions, wording and terminology of the Convention on the Law of Treaties. Several of the introductory provisions of the present draft—such as those concerning its scope, the use of terms, cases not within the scope of the draft, treaties constituting international organizations or adopted within them, and obligations imposed by international law independently of a treaty (articles 1-5)—follow closely the language of the corresponding provisions of

²⁸ For the text of the Convention, 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. 289.

the Vienna Convention. In one instance, article 15 (reservations), an express cross-reference is made to the relevant articles of the Vienna Convention; in other instances, as in article 17 (notification of succession), certain provisions of the Vienna Convention are reproduced with the adjustments necessary to fit them into the context of the present topic.

5. THE PRINCIPLE OF SELF-DETERMINATION AND THE LAW RELATING TO SUCCESSION IN RESPECT OF TREATIES

35. The Commission has taken account of the implications of the principles of the Charter of the United Nations, in particular self-determination, in the modern law concerning succession in respect of treaties. For this reason it has not felt able to endorse the thesis put forward by some jurists²⁹ that the modern law does, or ought to, make the presumption that a "newly independent State" consents to be bound by any treaties previously in force internationally with respect to its territory, unless within a reasonable time it declares a contrary intention. Those who advocate the making of that presumption are no doubt influenced by the ever-increasing interdependence of States, the consequential advantages of promoting the continuity of treaty relations in cases of succession and the considerable extent to which in the era of decolonization newly independent States have accepted the continuance of the treaties of the predecessor States. The presumption, however, touches a fundamental point of principle affecting the general approach to the formulation of the law relating to the succession of a newly independent State.

36. The Commission, after a study of State practice, concluded that it is one thing to admit on the plane of policy the general desirability of a certain continuity in treaty relations upon the occurrence of a succession and another thing to convert that policy into a legal presumption. The traditional principle that a new State begins its treaty relations with a clean slate, if properly understood and limited, was in the opinion of the Commission more consistent with the principle of self-determination. At the same time this principle was well-designed to meet the situation of newly independent States which emerge from former dependent territories. Consequently, the Commission was of the opinion that the main implication of the principle of self-determination in the law concerning succession in respect of treaties was precisely to confirm as the underlying norm for cases of newly independent States the traditional clean slate principle, which derived from the treaty practice relating to cases of secession.

37. The "clean slate" metaphor, the Commission wished to emphasize, is merely a convenient and succinct way of referring to the newly independent State's general freedom from obligation in respect of its predecessor's treaties. But that metaphor is misleading if account is not taken of other principles which effect the position of a

newly independent State in relation to its predecessor's treaties. In the first place, as the commentaries to articles 12 and 13 make clear, modern treaty practice recognizes that a newly independent State has the right under certain conditions to establish itself as a party to any multilateral treaty, except one of a restricted character, in regard to which its predecessor State was either a "party" or a "contracting State" at the date of independence. In other words, the fact that prior to independence the predecessor State had established its consent to be bound by a multilateral treaty and its act of consent related to the territory now under the sovereignty of the successor State creates a legal nexus between that territory and the treaty in virtue of which the successor State has the right, if it wishes, to participate in the treaty on its own behalf as a separate party or contracting State. In the case of multilateral treaties of a restricted character and bilateral treaties, the successor State may invoke a similar legal nexus between its territory and the treaty as a basis for achieving the continuance in force of the treaty with the consent of the other State or States concerned. Accordingly, the so-called clean slate principle, as it operates in the modern law of succession of States, is very far from normally bringing about a total rupture in the treaty relations of a territory which emerges as a newly independent State. The modern law, while leaving the newly independent State free under the clean slate principle to determine its own treaty relations, holds out to it the means of achieving the maximum continuity in those relations consistent with the interests of itself and of other States parties to its predecessor's treaties. In addition, the clean slate principle does not, in any event, relieve a newly independent State of the obligation to respect a boundary settlement and certain other situations of a territorial character established by treaty.

38. The principal new factor which has appeared in the practice regarding succession of States during the United Nations period has been the use of agreements, commonly referred to as "devolution" or "inheritance" agreements, which are concluded between a predecessor and successor State and provide for the continuity of treaty rights and obligations or, alternatively, "unilateral declarations" by a successor State designed to regulate its treaty position after the succession of States. As to devolution agreements, quite apart from any question that may arise concerning their legal validity under the general law of treaties, it is clear that a devolution agreement cannot by itself alter the position of a successor State vis-à-vis other States parties to the predecessor State's treaties. The same is true *a fortiori* of purely unilateral declarations. In short, however useful such instruments as devolution agreements and unilateral declarations may be in promoting continuity of treaty relations, they still leave the effects of a succession of States to be governed essentially by the general law concerning succession in respect of treaties.

6. GENERAL FEATURES OF THE DRAFT ARTICLES

(a) *Form of the draft*

39. The final form of the codification of the law relating to succession of States in respect of treaties and its precise relationship with the Vienna Convention on the

²⁹ See International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), pp.xiii-xv [Resolutions] and 596-632 [Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors].

Law of Treaties are clearly matters to be decided at a later stage, when the Commission has completed the second reading of the draft articles in the light of the comments and observations of Governments. At that time, in accordance with the provisions of its Statute, the Commission will make the recommendations on those matters which it considers appropriate.

40. Without prejudging those recommendations, the Commission has cast its study of the succession of States in respect of treaties in the form of a group of draft articles as recommended by the General Assembly. The draft articles have been prepared in a form to render them capable of serving as a basis for the conclusion of a convention should this be decided upon. The Commission was in any event of the view that the preparation of draft articles was the most appropriate and effective method of studying and identifying the rules of international law relating to succession of States in respect of treaties.

41. In this connexion, the Commission thought it desirable to comment briefly on the temporal element in any codification of the law of succession of States. Under the general law of treaties a convention is not binding upon a State unless and until it is a party to the convention. Moreover, under a general rule, now codified in article 28 of the Vienna Convention on the Law of Treaties, the provisions of a treaty, in the absence of a contrary intention "do not bind a party in relation to any act or fact which took place [. . .] before the date of the entry into force of the treaty with respect to that party". Since a succession of States in most cases brings into being a new State, a convention on the law of succession of States would *ex hypothesi* not be binding on the successor State unless and until it took steps to become a party to that convention; and even then the convention would not be binding upon it in respect of any act or fact which took place before the date on which it became a party. Nor would other States be bound by the convention in relation to the new States until the latter had become a party. Accordingly, the question may be raised as to the value of codifying the law of succession of States in the form of a convention. In the Commission's view, the consideration just mentioned does not really detract substantially from the value of a codifying convention as an instrument for consolidating legal opinion regarding the generally accepted rules of international law concerning succession of States. Such a convention has important effects in achieving general agreement as to the content of the law which it codifies and thereby establishing it as the accepted customary law on the matter. A new State, though not formally bound by the convention, would find in its provisions the norms by which to be guided in dealing with questions arising from the succession of States.

(b) *Scope of the draft*

42. The draft articles, as the title to the present chapter indicates, are limited to succession of States in respect of treaties. The topic of succession on the Commission's programme was entitled "Succession of States and Governments". But in 1963 the Commission decided that priority should be given to succession of States and that

succession of Governments should be studied "only to the extent necessary to supplement the study on State succession".³⁰ This decision having been endorsed by the General Assembly, the Commission has limited its draft on succession in respect of treaties to questions arising in connexion with the succession of States. It also follows that the draft does not deal with any questions concerning the succession of subjects of international law other than States, in particular international organizations.

43. The limitation of the draft articles to succession in respect of treaties is the consequence of the Commission's decision in 1967³¹ to study succession in respect of treaties as a distinct part of the topic of succession of States. The scope of the draft articles is also narrowed by the meaning given to the term "treaty" in article 2, subparagraph 1 (a), which confines the treaties covered by the draft to treaties "concluded between States" and "in written form". This provision excludes from the scope of the draft succession of States in respect of: (a) treaties concluded between States and other subjects of international law; (b) treaties concluded between such other subjects of international law; and (c) international agreements not in written form. The Commission decided to limit the scope of the draft in these respects for several reasons. First, the considerations which led the Commission and the United Nations Conference on the Law of Treaties to exclude these three categories of international agreements from the scope of the codification of the general law of treaties in the Vienna Convention appear to apply with equal force to the codification of the present topic. Secondly, since the present articles are designed to supplement the Vienna Convention by codifying the general law governing succession in respect of treaties, it seems desirable in the interests of uniformity in codification that they should cover the same range of treaties as that Convention. Thirdly, so far as concerns treaties to which subjects of international law other than States are parties, the Commission noted that its study of the question of treaties concluded between States and international organizations or between two or more international organizations is still in its early stages.³²

44. The Convention on the Law of Treaties, in article 73, excluded specifically from its purview "any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States."³³ Clearly, the exclusion of questions of succession of States is out of place in the present draft. But this is not so with the exclusion of questions concerning State responsibility

³⁰ *Yearbook of the International Law Commission, 1963, vol. II, p. 224, document A/5509, para. 57.*

³¹ See paras. 14-15 above.

³² This topic has been taken up by the Commission in accordance with the recommendation of the General Assembly in resolution 2501 (XXIV), of 12 November 1969, following upon the resolution adopted by the United Nations Conference on the Law of Treaties entitled "Resolution relating to article 1 of the Vienna Convention on the Law of Treaties" (*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. 285).

³³ *Ibid.*, p. 229.

and the outbreak of hostilities. The Commission therefore considered that, as in the case of the general law of treaties and for the same reasons,³⁴ a provision should be inserted in the draft articles including a general reservation in regard to these questions. In addition, the Commission considered that it should make a similar reservation excluding from the purview of the present draft any question that may arise in regard to a treaty from a *military occupation*. Although military occupation may not constitute a "succession of States" within the meaning given to that term in article 2 of the present draft, it may raise analogous problems.³⁵

(c) *Scheme of the draft*

45. The topic of succession of States in respect of treaties has traditionally been expounded in terms of the effect upon the predecessor State's treaties of various categories of events, notably: annexation of territory of the predecessor State by another State; voluntary cession of territory to another State; birth of a new State as a result of the separation of part of the territory of a State; formation of a union of States; dissolution of a union; entry into the protection of another State and termination of such protection; enlargement or loss of territory. In addition to studying the traditional categories of succession of States, the Commission took into account the treatment of dependent territories in the Charter of the United Nations. It concluded that for the purpose of codifying the modern law of succession of States in respect of treaties it would be sufficient to arrange the cases of succession of States under three broad categories: (a) transfers of territory; (b) newly independent States; (c) the uniting of States, the dissolution of a State and the separation of part of a State.

46. In dealing with the various cases of succession of States the Commission found it necessary in a number of instances to distinguish between three categories of treaties: (a) multilateral treaties in general; (b) multilateral treaties of a restricted character; and (c) bilateral treaties. The distinction between multilateral treaties in general and multilateral treaties of a restricted character was also made in article 20, paragraph 2, of the Vienna Convention on the Law of Treaties in connexion with the acceptance of reservations. In the present articles, the Commission found it necessary to include a separate provision for multilateral treaties of a restricted character in several places, and in doing so it used language modelled on that used in the above-mentioned provision of the Vienna Convention.

47. The Commission further found it necessary to distinguish a particular category of treaties by reference to the particular substance and effect of their provisions; or, more accurately, to distinguish the régimes established by such treaties as constituting particular cases for

purposes of the law of succession of States. These particular cases concern boundaries and régimes of a territorial character established by treaty and are covered in part V of the draft articles.

48. Part IV contains a "miscellaneous" article which makes a general reservation concerning any question that may arise in regard to a treaty from military occupation of territory, State responsibility or the outbreak of hostilities.

49. Taking into account the above points, the Commission has provisionally arranged the draft articles as follows:

Part I: General provisions (articles 1 to 9);

Part II: Transfer of territory (article 10);

Part III: Newly independent States (articles 11 to 25);

Part IV: Uniting, dissolution and separation of States (articles 26 to 28);

Part V: Boundary régimes or other territorial régimes established by a treaty (articles 29 and 30);

Part VI: Miscellaneous provisions (article 31).

50. Some members of the Commission stressed the importance of examining in due course the question of the possible need for provisions concerning the settlement of disputes arising out of the interpretation and application of the present draft articles. The Commission considered it premature to take up this question at the present session.

51. In the course of its study of the case of newly independent States the Commission considered the question whether any time-limit ought to be placed on the exercise of the option to notify succession to a multilateral treaty. It felt that there were considerations both against and in favour of such a time-limit, and that it would be in a better position to arrive at a decision on the point after receiving the comments of Governments on the draft articles. Accordingly, it did not include any provision on the point in the draft articles at the present stage of its work.

52. In conclusion, the Commission points out that the articles that it has formulated on succession of States in respect of treaties in the present report contain elements of progressive development as well as of codification of the law.

B. Resolution adopted by the Commission

53. The Commission at its 1199th meeting, on 7 July 1972, after adopting, on the basis of the proposals made by the Special Rapporteur, the text of the draft articles on succession of States in respect of treaties and the commentaries, adopted by acclamation the following resolution:

The International Law Commission,

Having adopted provisionally the draft articles on succession of States in respect of treaties,

Desires to express its deep appreciation and thanks to the Special Rapporteur, Sir Humphrey Waldock. The draft articles on that subject and the commentaries thereto illustrate the invaluable contribution of wisdom, learning and devoted effort that Sir Humphrey Waldock has made to the development of the law of treaties.

³⁴ See the introduction to the draft articles on the law of treaties adopted by the Commission: *Yearbook of the International Law Commission, 1966*, vol. II, pp. 176-177, document A/6309/Rev.1, part II, paras. 29-31.

³⁵ See below, article 31 (Cases of military occupation, State responsibility and outbreak of hostilities) and the commentary thereto.

C. Draft articles on succession of States in respect of treaties

PART I

GENERAL PROVISIONS

Article 1. Scope of the present articles

The present articles apply to the effects of succession of States in respect of treaties between States.

Commentary

(1) This article corresponds to article 1 of the Vienna Convention on the Law of Treaties³⁶ and its purpose is to limit the scope of the present articles in two important respects.

(2) First, it gives effect to the Commission's decision that the scope of the present articles, as of the Vienna Convention itself, should be restricted to matters concerning treaties concluded between States.³⁷ It therefore underlines that the provisions which follow are designed for application only to "the effects of succession of State in respect of treaties *between States*". This restriction also finds expression in article 2, sub-paragraph 1 (a), which gives to the term "treaty" the same meaning as in the Vienna Convention, a meaning which specifically limits the term to "an international agreement concluded between States".

(3) It follows that the present articles have not been drafted so as to apply to succession of States in respect of treaties to which other subjects of international law, and in particular international organizations, are parties. At the same time, the Commission recognized that the principles which they contain may in some measure also be applicable with reference to treaties to which other subjects of international law are parties. Accordingly, in article 3 it has made a general reservation on this point analogous to that in article 3 of the Vienna Convention.

(4) Secondly, article 1 gives effect to the Commission's decision that the present articles should be confined to succession of *States* in respect of treaties.³⁸ By using the words "the effects of succession of *States*", the article is designed to exclude both "succession of governments" and "succession of other subjects of international law", notably international organizations, from the scope of the present articles. This restriction of their scope finds further expression in article 2, sub-paragraph 1 (b), which provides that the term "succession of States" means for the purposes of the present draft "the replacement of one *State* by another in the responsibility for the international relations of territory".

³⁶ For all references to the Vienna Convention on the Law of Treaties, see *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. 289.

³⁷ See above, sect. A, para. 43.

³⁸ *Ibid.*, para 42.

Article 2. Use of terms

1. For the purposes of the present articles:

(a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(c) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(d) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(e) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

(f) "newly independent State" means a State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible;

(g) "notification of succession" means in relation to a multilateral treaty any notification, however phrased or named, made by a successor State to the parties or, as the case may be, contracting States or to the depositary expressing its consent to be considered as bound by the treaty;

(h) "full powers" means in relation to a notification of succession a document emanating from the competent authority of a State designating a person or persons to represent the State for making the notification;

(i) "ratification", "acceptance" and "approval" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(j) "reservation" means a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty or when making a notification of succession to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

(k) "contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(l) "party" means a State which has consented to be bound by the treaty and for which the treaty is in force;

(m) "other State party" means in relation to a successor State any party, other than the predecessor State, to a treaty in force at the date of a succession of States in respect of the territory to which that succession of States relates;

(n) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Commentary

(1) This article, as its title and the introductory words of paragraph 1 indicate, is intended only to state the meaning with which terms are used in the draft articles.

(2) *Sub-paragraph 1 (a)* reproduces the definition of the term "treaty" given in article 2, sub-paragraph 1 (a), of the Vienna Convention on the Law of Treaties. It results from the general conclusions reached by the Commission concerning the scope of the present draft articles and its relationship with the Vienna Convention.³⁹ Consequently, the term "treaty" is used throughout the present draft articles, as in the Vienna Convention, as a general term covering all forms of international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

(3) *Sub-paragraph 1 (b)* specifies the sense in which the term "succession of States" is used in the draft articles and is of cardinal importance for the whole structure of the draft. The definition corresponds to the concept of "succession of States" which emerged from the study of the topic by the Commission. Consequently, the term is used as referring exclusively to *the fact of the replacement* of one State by another in the responsibility for the international relations of territory, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event. The rights and obligations deriving from a "succession of States" are those specifically provided for in the present draft articles.⁴⁰

(4) The Commission considered that the expression "in the responsibility for the international relations of territory" is preferable to other expressions such as "in the sovereignty in respect of territory" or "in the treaty making competence in respect of territory", because it is a formula commonly used in State practice and more appropriate to cover in a neutral manner any specific case independently of the particular status of the territory in question (national territory, trusteeship, mandate, protectorate, dependent territory, etc.). The word "responsibility" should be read in conjunction with the words "for the international relations of territory" and does not intend to convey any notion of "State responsibility", a topic currently under study by the Commission and in respect of which a general reservation has been inserted in article 31 of the present draft.

(5) The meanings attributed in *sub-paragraph 1 (c)*, *1 (d)* and *1 (e)* to the terms "predecessor State", "successor State" and "date of the succession of States" are merely consequential upon the meaning given to "succession of States" in *sub-paragraph 1 (b)* and do not appear to require any comment.

(6) The expression "newly independent State", defined in *sub-paragraph 1 (f)*, signifies a State which has arisen from a succession of States in a territory which immediately before the date of the succession of States was

a dependent territory for the international relations of which the predecessor State was responsible. After studying the various historical types of dependent territories (colonies, trusteeships, mandates, protectorates, etc.), the Commission concluded that their characteristics do not today justify differences in treatment from the standpoint of the general rules governing succession of States in respect of treaties.⁴¹ Consequently, the definition includes any case of emergence to independence of a former dependent territory whatever its particular type may be. On the other hand, the definition excludes cases concerning the emergence of a new State as a result of a separation of part of an existing State, of a uniting of two or more existing States or of a dissolution of an existing State. It is to differentiate clearly these cases from the case of the emergence to independence of a former dependent territory that the expression "newly independent State" has been chosen instead of the shorter expression "new State".

(7) *Sub-paragraph 1 (g)* defines the term "notification of succession". This term connotes the act by which a successor State establishes on the international plane its consent to be bound by a multilateral on the basis of the legal nexus established before the date of the succession of States between the treaty and the territory to which the succession relates. The term "notification of succession" seems to be the most commonly used by States and depositaries for designating *any notification* of such a successor State's consent to be bound. It is for that reason that the Commission has retained that expression instead of others, such as notification or declaration of continuity, which can also be found in practice. To avoid any misunderstanding from the use of a particular term, the words "however phrased or named" have been inserted after the words "any notification". Unlike ratification, accession, acceptance or approval, notification of succession need not take the form of the deposit of a formal instrument. The procedure for notifying succession is further dealt with in article 17, but deposit of a formal instrument. The procedure for notifying succession is further dealt with in article 17, but in general any notification containing the requisite declaration of will of the successor State suffices. The successor State's notification of succession should be addressed to the parties or, as the case may be, contracting States or to the depositary.

(8) The definition of the term "full powers" in relation to a notification of succession (*sub-paragraph 1 (h)*) cor-

⁴¹ The Commission recognized that in the traditional law of succession of States, protected States have in some degree been distinguished from other dependencies of a State. Thus, treaties of the protected State concluded prior to its entry into protection have been considered as remaining in force; and treaties concluded by the protecting Power specifically in the name and on behalf of the protected State have been considered as remaining in force for the protected State after termination of the protectorate. But the Commission did not think that a codification of the law of succession of States today need or should provide for the case of "protected States". The Commission also discussed whether any special provision should be included in the draft in regard to possible cases in future of a succession of States relating to an "associated State". It felt, however, that the arrangements for such associations vary considerably and that the rule to be applied would depend on the particular circumstances of each association.

³⁹ *Ibid.*, para. 43.

⁴⁰ *Ibid.*, paras. 28-30.

responds with the phraseology used for the definition of that term in article 2, sub-paragraph 1 (c), of the Vienna Convention on the Law of Treaties. The terms and expressions "ratification", "acceptance" and "approval" (*sub-paragraph 1 (i)*), "reservation" (*sub-paragraph 1 (j)*), "contracting State" (*sub-paragraph 1 (k)*), "party" (*sub-paragraph 1 (l)*) and "international organization" (*sub-paragraph 1 (n)*) reproduce the wording of the corresponding terms and expressions of the Vienna Convention and are used with the sense given to them in that Convention.

(9) In drafting rules regarding succession in respect of treaties, particularly in respect of bilateral treaties, there is a need for a convenient expression to designate the other parties to treaties concluded by the predecessor State and in respect of which the problem of succession arises. The expression "third State" is not available since it has already been made a technical term in the Vienna Convention denoting "a State *not** a party to the treaty" (article 2, sub-paragraph 1 (*h*)). Simply to speak of "the other party to the treaty" does not seem entirely satisfactory because the question of succession concerns the *triangular* position of the predecessor State, the successor State and the other State which concluded the treaty with the predecessor State. Moreover, the expression "other party" has too often to be used—and is too often used in the Vienna Convention—in its ordinary general sense for its use as a term of art in the present articles with a special meaning to be acceptable. It therefore seems necessary to find another expression to use as a term of art denoting the other parties to a predecessor State's treaties. The Commission considered that the expression "other State party" was an appropriate one for this purpose and accordingly inserted it with the corresponding definition in article 2 as *sub-paragraph 1 (m)*.

(10) Lastly, *paragraph 2* corresponds to paragraph 2 of article 2 of the Vienna Convention on the Law of Treaties. The provision is designed to safeguard in matters of terminology the position of States in regard to their international law and usages.

Article 3. Cases not within the scope of the present articles

The fact that the present articles do not apply to the effects of succession of States in respect of international agreements concluded between States and other subjects of international law or in respect of international agreements not in written form shall not affect:

(a) The application to such cases of any of the rules set forth in the present articles to which they would be subject under international law independently of these articles;

(b) The application as between States of the present articles to the effects of succession of States in respect of international agreements to which other subjects of international law are also parties.

Commentary

(1) This article corresponds to article 3 of the Vienna Convention on the Law of Treaties. Its purpose is simply to prevent any misconception which might result from the express limitation of the scope of the draft articles to

succession of States in respect of treaties concluded between States and in written form.

(2) The reservation in *sub-paragraph (a)* recognizes that certain of the provisions of the draft may be of general application and relevant also in cases excluded from the scope of the present articles. It therefore preserves the possibility of the "application to such cases of any of the rules set forth in the present articles to which they would be subject under international law independently of these articles".

(3) The reservation in *sub-paragraph (b)*, is based on a provision added by the United Nations Conference on the Law of Treaties to the Commission's draft articles on the law of treaties. It safeguards the application of the rules set forth in the draft articles *to the relations between States* in cases of a succession of States in respect of an international agreement to which not only States but also other subjects of international law are likewise parties. The reservation underlines the general character of the codification of the law on State succession embodied in the present draft articles so far as the relations between States are concerned, notwithstanding the formal limitation of the scope of the draft articles to succession of States in respect of treaties between States.

(4) In addition, however, to the necessary drafting changes, this article differs from article 3 of the Vienna Convention on the Law of Treaties in some respects. First, the word "or between such other subjects of international law", in the introductory sentence have been omitted, since a case of succession between subjects of international law other than States is not a "succession of States". Secondly, the article contains no provision corresponding to *sub-paragraph (a)* of article 3 of the Vienna Convention because such a provision is relevant for the present draft articles. Lastly, the wording of *sub-paragraph (b)* of the present article, in particular the use of the words "as between States", is an adaptation of the wording of *sub-paragraph (c)* of article 3 of the Vienna Convention to the drafting needs of the present context.

Article 4. Treaties constituting international organizations and treaties adopted within an international organization

The present articles apply to the effects of succession of States in respect of:

(a) Any treaty which is the constituent instrument of an international organization without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization;

(b) Any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

Commentary

(1) This article parallels article 5 of the Vienna Convention on the Law of Treaties. As with the general law of treaties, it seems essential to make the application of the present articles to treaties which are constituent instruments of an international organization subject to any relevant rules of the organization. This is all the more

necessary in that succession in respect of constituent instruments necessarily encroaches upon the question of admission to membership which in many organizations is subject to particular conditions and therefore involves the law of international organizations. This was indeed one of the reasons why the Commission in 1967 decided to leave aside for the time being the subject of succession in respect of membership of international organizations.⁴²

(2) 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. 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.⁴³

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.⁴⁴

(3) The practice excluding succession is clearest in cases where membership of the organization is dependent 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 the 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.⁴⁵ 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 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.⁴⁶

In other words, membership of the organization being in issue, the new State cannot simply notify the depositary of its succession by a notification made, for instance, in accordance with article 17 of the present draft articles. It must proceed by the route prescribed for membership in the constituent treaty—i.e. deposit of an instrument of acceptance.⁴⁷

(4) On the other hand, when a multilateral treaty creates a weaker association of its parties, with 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. Thus the Swiss Government, as depositary, has accepted notifications of succession from new States in regard to the Berne Convention (1886) and subsequent Acts of revision which form the International Union for the Protection of Literary and Artistic Works;⁴⁸ and it has done the same in regard to the Paris Convention (1883) and subsequent Acts of revision and special agreements which form the International Union for the Protection of Industrial Property.⁴⁹ This practice appears to have met with the approval of the other parties to the instruments.

(5) Some constituent treaties provide expressly for 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 9 of the present draft articles 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.⁵⁰ The Hague Conventions of 1889 and 1907 for the Pacific Settlement of International Disputes provided that

⁴² *Yearbook of the International Law Commission*, 1967, vol. II, p. 368, document A/6709/Rev.1, para. 41.

⁴³ *Ibid.*, 1962, vol. II, p. 103, document A/CN.4/149 and Add.1, paras. 15-16.

⁴⁴ *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, 1965), chapter 12, for a general review of succession in respect of membership of international organizations; however, the classifications adopted in that chapter seem to be based on the hypothesis that "succession" is necessarily a process which takes place automatically.

⁴⁵ *Yearbook of the International Law Commission*, 1962, vol. II, p. 124, document A/CN.4/150, paras. 145.

⁴⁶ *Ibid.*, p. 118, para. 98; also *ibid.*, p. 124, paras. 145-146.

⁴⁷ ICAO and ITU are examples of other organizations in which the same principle is applied.

⁴⁸ *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.

⁴⁹ *Ibid.*, pp. 57-72, paras. 246-314.

⁵⁰ *Ibid.*, pp. 28-32, paras. 109-127.

(a) States represented at or invited to the Peace Conferences might either ratify or accede, and (b) accession by other States was to form the subject of a "subsequent agreement between the Contracting Powers".⁵¹ By decisions of 1955, 1957 and 1959, the Administrative Council of the Court 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 (4) of the present commentary, where the element of membership is not sufficiently significant to oust the general principles of succession of States in respect of multilateral treaties.

(6) 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 ITU, UNESCO, UPU and WHO. The practice in regard to such separate or associate membership has not been entirely uniform. The two "Unions" [ITU and UPU] seem, in general to have allowed a succession to membership in cases where the new State already had a separate identity during its existence as a dependent territory having the status of a 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 member.⁵² 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 recognizes any process of succession converting an associate into a full member on the attainment of independence.⁵³ 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.

(7) With regard to treaties adopted within an international organization membership may again be a factor to be taken into account in regard to a new State's participation in these treaties. This is necessarily so when participation in the treaty is indissolubly linked with membership of the organization. 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 (1944) is open for acceptance only by members of ICAO,⁵⁴ 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.⁵⁵ Similarly, although membership of UNESCO or of the United Nations is necessary for participation in the Agreement on the Importation of Educational, Scientific and Cultural Materials (1950)⁵⁶ this has not prevented a number of newly independent States, after acquiring membership from notifying their succession to this Agreement.⁵⁷ Again, some seventeen newly independent States have transmitted notifications of successions to the 1946 Convention on the Privileges and Immunities of the United Nations⁵⁸ which, under its Final Article (section 31), is open only to accession by Members of the Organization.

(8) 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. 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 ILO in its early stages, had one or two exceptions.⁵⁹ 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 recognizing itself to be bound by labour conventions applicable in respect of its territory on the date of its independence. Furthermore, although these declarations are made in connexion

⁵⁴ Article VI. See United Nations, *Treaty Series*, vol. 84, p. 396.

⁵⁵ Pakistan (1948), Ceylon (1957), Federation of Malaya (1959), Madagascar (1962) and Dahomey (1963) see United Nations, *Materials on Successions of States* (United Nations publication, Sales No. E/F.68.V.5), pp. 224-226.

⁵⁶ Article IX. See 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.

⁵⁷ Ghana (1958), Malaysia (1959), Nigeria (1961), Zaire (1962), Sierra Leone (1962), Cyprus (1963), Rwanda (1964), Trinidad and Tobago (1966), Malta (1968) and Mauritius (1969). See United Nations, *Multilateral treaties in respect of which the Secretary-General performs depositary functions: List of signatures, ratifications, accessions, etc., as at 31 December 1971* (United Nations publication, Sales No. E.72.V.7), pp. 318-319.

⁵⁸ United Nations, *Treaty Series*, vol. I, p. 15.

⁵⁹ Ceylon (1958), 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 it considered itself as continuing to be bound by its predecessor's ratifications.

⁵¹ *Ibid.*, p. 27, para. 104.

⁵² *Ibid.*, 1970, vol. II, p. 61, document A/CN.4/225.

⁵³ See International Law Association, *The Effect . . . (op. cit.)*, pp. 256-258, 327-330 and 334-339.

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.

(9) 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 Organizations 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".⁶⁰

(10) In the light of the foregoing, the question may even be asked whether the law of succession applies to constituent instruments of international organizations, at all. For example, the right of participation of a newly independent State in multilateral treaties in force by a notification of succession cannot formally extend to constituent instruments of an international organization because participation in those instruments is generally governed, as indicated in the preceding paragraphs, by the rules of the organization in question concerning the acquisition of membership. On the other hand, there are certain international organizations, such as some unions, which do not have, properly speaking, specific rules for acquisition of membership. In those organizations the law of succession in respect of treaties has at times been applied, and may be applied, to participation of a newly independent State in their respective constituent instruments. Furthermore, there have been cases in connexion with the dissolution of a union of States in which the question of the participation in the organization of the separated States has been approached from the standpoint of the law concerning succession in respect of treaties. In addition, succession in respect of a constituent instrument is not necessarily linked to matters relating to membership. For instance, the "moving treaty frontiers" rule applies in the case of treaties constituting an international organization. In short, while the rules of succession of States frequently do not apply in respect of a constituent instrument of an international organization, it would be incorrect to say that they do not apply at all to this category of treaties. In principle, the relevant rules of the organization are paramount, but they do not exclude altogether the application of the general rules of

succession of States in respect of treaties in cases where the treaty is a constituent instrument of an international organization.

(11) As to "treaties adopted within an international organization", the possibility clearly exists that organizations should develop their own rules for dealing with questions of succession. For example, as already mentioned, the ILO has developed a consistent practice regarding the assumption by "successor" members of the organization of the obligations of ILO conventions previously applicable within the territory concerned. Without taking any position as to whether this particular practice has the status of a custom or of an internal rule of that organization, the Commission considers that a general reservation of relevant rules of organizations is necessary to cover such practices with regard to treaties adopted within an international organization.

(12) The basic principle for both categories of treaties dealt with in the article is therefore the same, namely that the rules of succession of States in respect of treaties apply to them "without prejudice to" any relevant rules of the organization in question. Having regard, however, to the fundamental importance of the rules concerning the acquisition of membership in relation to succession of States in respect of constituent instruments, the Commission thought it advisable to make special mention of rules concerning acquisition of membership in cases involving constituent instruments. Accordingly, since this point arises only in connexion with constituent instruments the Commission has divided the article into two sub-paragraphs and in the first sub-paragraph has referred specifically to both "rules concerning acquisition of membership" and "any other relevant rules of the organization".

(13) As to the meaning of the term "rules" in article 4, it may be useful to recall the statement made by the Chairman of the Drafting Committee of the United Nations Conference on the Law of Treaties according to which the term "rules" in the parallel article of the Convention on the Law of Treaties applies both to written rules and to unwritten customary rules of the organization, but not to mere procedures which have not reached the stage of mandatory legal rules.⁶¹

(14) Having inserted in the present article these general provisions concerning the application of the rules embodied in the draft to constituent instruments of international organizations and to treaties adopted within international organizations, the Commission has not made specific reservations in this regard in later articles.

Article 5. Obligations imposed by international law independently of a treaty

The fact that a treaty is not in force in respect of a successor State as a result of the application of the present articles shall not in any way impair the duty of any State

⁶⁰ Five States have transmitted notifications of succession to the Secretary-General in respect of the Convention on the Political Rights of Women and seven States also in respect of the Convention on the Nationality of Married Women (see United Nations, *Multilateral Treaties . . . 1971 (op. cit.)*, pp. 329, 330 and 335).

⁶¹ *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. 147, 28th meeting of the Committee of the Whole, para. 15.

to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

Commentary

Article 5 is modelled on article 43 of the Vienna Convention on the Law of Treaties which reproduces almost verbatim article 40 of the Commission's draft article on the Law of Treaties, Article 43 is one of the general provisions of part V of the Vienna Convention, concerning invalidity, termination and suspension of the operation of treaties. The Commission's commentary on its draft article 40 explained its reason for including the article as follows:

... The Commission considered that although the point might be regarded as axiomatic, it was desirable to underline that the termination of a treaty would not release the parties from obligations embodied in the treaty to which they were also subject under any other rule of international law.⁶²

For the same reason, the Commission deemed it desirable to include a general provision in part I of the present draft making it clear that the non-continuance in force of a treaty upon a succession of States as a result of the application of the draft in no way relieved the successor State of obligations embodied in the treaty which were also obligations to which it would be subject under international law independently of the treaty.

Article 6. Cases of succession of States covered by the present articles

The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

Commentary

(1) The Commission in preparing draft articles for the codification of the rules of general international law normally assumes that these articles are to apply to facts occurring and situations established in conformity with international law. Accordingly it does not as a rule state that their application is so limited. Only when matters not in conformity with international law call for specific treatment or mention does it deal with facts or situations not in conformity with international law. Thus in its draft articles on the law of treaties the Commission included, among others, specific provisions on treaties procured by coercion and treaties which conflict with the norms of *jus cogens* as well as certain reservations in regard to the specific subjects of State responsibility, outbreak of hostilities and cases of aggression. But the Commission—and the Conference on the Law of Treaties—otherwise assumed that the provisions of the Convention on the Law of Treaties would apply to facts occurring and situations established in conformity with international law.

(2) Some members of the Commission considered that it would suffice to rely upon the same general presumption in drafting the present articles and that it was unnecessary to specify that the articles would apply only to the effects of a succession of States occurring in conformity with international law. Other members, however, were of the opinion that, in regard particularly to transfers of territory it was desirable to underline that only transfers occurring in conformity with international law should fall within the concept of "succession of States" for the purpose of the present articles. Since to specify the element of conformity with international law with reference to one category of succession of States might give rise to misunderstandings as to the position regarding that element in other categories of succession of States, the Commission decided to include amongst the general articles a provision safeguarding the question of the lawfulness of the succession of States dealt with in the present articles. Accordingly, article 6 provides that the present articles relate only to the effects of a succession of States occurring in conformity with international law.

Article 7. Agreements for the devolution of treaty obligations or rights from a predecessor to a successor State

1. A predecessor State's obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State towards other States parties to those treaties in consequence only of the fact that the predecessor and successor States have concluded an agreement providing that such obligations or rights shall devolve upon the successor State.

2. Notwithstanding the conclusion of such an agreement, the effects of a succession of States on treaties which, at the date of that succession of States, were in force in respect of the territory in question are governed by the present articles.

Commentary

(1) Article 7 deals with the legal effects of agreements by which upon a succession of States, the predecessor and successor States have sought to make provision for the devolution to the successor of the obligations and rights of the predecessor under treaties formerly applicable in respect of the territory concerned. Those agreements, commonly referred to as "devolution agreements", have been quite frequent particularly, although not exclusively, in cases of the emergence of a dependent territory into a sovereign State in the post-war process of decolonization.

(2) Some of the newly independent States which have not concluded devolution agreements have taken no formal step to indicate their general standpoint regarding succession in respect of treaties; such is the case, for example, with States which have emerged from former French African territories. Quite a number of newly independent States, however, have made unilateral declarations of a general character, in varying terms, by which they have taken a certain position—negative or otherwise—in regard to the devolution of treaties concluded by the predecessor State with reference to their territory. These declarations, although they have affinities

⁶² *Ibid.*, Documents of the Conference (United Nations publication, Sales No. E.70.V.5), p. 57.

with devolution agreements, are clearly distinct types of legal acts and are therefore considered separately in article 8 of the draft. The present article is concerned only with *agreements* between the predecessor and successor State purporting to provide for the devolution of treaties.

(3) The conclusion of "devolution agreements" seems to be due primarily to the fact that it was the established practice of the United Kingdom to propose a devolution agreement to its overseas territories on their emergence as independent States and to the fact that many of these territories entered into such an agreement. New Zealand also concluded a devolution agreement with Western Samoa⁶³ on the same model as that of the United Kingdom agreement with its overseas territories, as did also Malaysia with Singapore on the latter's separation from Malaysia.⁶⁴ Analogous agreements were concluded between Italy and Somalia⁶⁵ and between the Netherlands and Indonesia.⁶⁶ As to France, it concluded devolution agreements in a comprehensive form with, respectively, Laos and Viet-Nam⁶⁷ and an agreement in more particular terms with Morocco,⁶⁸ but devolution agreements do not seem to have been usual between France and her former African territories.⁶⁹ The terms of these agreements vary to some extent, more especially when the agreement deals with a particular situation, as in the case of the France-Morocco and Italy-Somalia Agreements. But, with the exception of the Indian Independence (International Arrangements) Order (1947)⁷⁰ providing for the special cases of India and Pakistan the agreements are in the form of treaties; and, with some exceptions, notably the French agreements, they have been registered as such with the Secretariat of the United Nations.

⁶³ Exchange of letters of 30 November 1962 (see United Nations, *Treaty Series*, vol. 476, pp. 4 and 6).

⁶⁴ Agreement between Malaysia and Singapore relating to the separation of Singapore from Malaysia as an independent and sovereign State, signed at Kuala Lumpur on 7 August 1965. See document A/CN.4/263 (supplement prepared by the Secretariat to *Materials on Succession of States* (*op. cit.*), Singapore, Treaties.

⁶⁵ Treaty of Friendship (with Exchange of Notes) concluded between Italy and Somalia, Mogadiscio, 1 July 1960. For the original Italian text see *Diritto Internazionale*, vol. XVI, 1962, pp. 440-442. English text provided by the United Kingdom Government appears in United Nations, *Materials on Succession of States* (*op. cit.*), pp. 169-170.

⁶⁶ Draft Agreement on Transitional Measures included in the Round-Table Conference Agreement between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia of 27 December 1949 (see United Nations, *Treaty Series*, vol. 69, p. 266).

⁶⁷ Traité d'amitié et d'association entre le Royaume du Laos et la République française (22 October 1953), article 1, in United Nations *Materials on Succession of States* (*op. cit.*), p. 72, and Treaty of Independence, signed 4 June 1954, between Viet-Nam and the French Republic, article 2 (*British and Foreign State Papers, 1954* (London, H.M. Stationery Office, 1963), vol. 161, p. 649).

⁶⁸ Convention diplomatique franco-marocaine (20 May 1956) (see *Annuaire français de droit international, 1956* (Paris, 1957), vol. II, p. 133).

⁶⁹ One such Agreement seems to have been made between France and the Ivory Coast.

⁷⁰ *British and Foreign State Papers, 1947* (London, H.M. Stationery Office, 1955), Part I, vol. 147, pp. 158-176.

(4) Devolution agreements are of interest from two separate aspects. The first is the extent to which, if any, they are effective in bringing about a succession to, or continuance of, the predecessor State's treaties; and the second is the evidence which they may contain of the views of States concerning the customary law governing succession of States in respect of treaties. The second aspect is considered in the commentary to article 11. The present article thus deals only with the legal effects of a devolution agreement as an instrument purporting to make provisions concerning the treaty obligations and rights of a newly independent State. The general feature of devolution agreements is that they provide for the transmission from the predecessor to the successor State of the obligations and rights of the predecessor State in respect of the territory under treaties concluded by the predecessor and applying to the territory. A typical example of a devolution agreement is, for instance, the agreement concluded in 1957 between the Federation of Malaya and the United Kingdom by an Exchange of Letters.⁷¹ The operative provisions, contained in the United Kingdom's letter, read as follows:

I have the honour to refer to the Federation of Malaya Independence Act, 1957, under which Malaya has assumed independent status within the British Commonwealth of Nations, and to state that it is the understanding of the Government of the United Kingdom that the Government of the Federation of Malaya agree to the following provisions:

(i) All obligations and responsibilities of the Government of the United Kingdom which arise from any valid international instrument are, from 31 August, 1957, assumed by the Government of the Federation of Malaya in so far as such instruments may be held to have application to or in respect of the Federation of Malaya.

(ii) The rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to or in respect of the Federation of Malaya are from 31 August, 1957 enjoyed by the Government of the Federation of Malaya.

I shall be grateful for your confirmation that the Government of the Federation of Malaya are in agreement with the provisions aforesaid and that this letter and your reply shall constitute an agreement between the two Governments.⁷²

(5) The question of the legal effects of such an agreement as between the parties to it, namely as between the former sovereign and the successor State, cannot be separated from that of its effects vis-à-vis third States, for third States have rights and obligations under the treaties with which a devolution agreement purports to deal. Accordingly, it seems important to consider how the general rules of international law concerning treaties and third States, that is articles 34 to 36 of the Vienna Convention on the Law of Treaties, apply to devolution agreements, and this involves determining the intention of parties to those agreements. A glance at a typical devolution agreement, like that reproduced in that preceding paragraph, suffices to show that the intention of the parties to these agreements is to make provision *as between themselves for their own obligations and rights*

⁷¹ United Nations, *Treaty Series*, vol. 279, p. 287.

⁷² *Ibid.*, p. 288.

under the treaties concerned and is not to make provision for obligations or rights of third States, within the meaning of articles 35 and 36 of the Vienna Convention. It may be that, in practice, the real usefulness of a devolution agreement is in facilitating the continuance of treaty links between a territory newly independent and other States. But the language of devolution agreements does not normally admit of their being interpreted as being intended to be the means of establishing obligations or rights for third States. According to their terms they deal simply with the transfer of the treaty obligations and rights of the predecessor to the successor State.

(6) A devolution agreement has then to be viewed, in conformity with the apparent intention of its parties, as a purported assignment by the predecessor to the successor State of the former's obligations and rights under treaties previously having application to the territory. It is, however, extremely doubtful whether such a purported assignment *by itself* changes the legal position of any of the interested States. The Vienna Convention on the Law of Treaties contains no provisions regarding the assignment either of treaty rights or of treaty obligations. The reason is that the institution of "assignment" found in some national system of law by which, under certain conditions, contract rights may be transferred without the consent of the other party to the contract does not appear to be an institution recognized in international law. In international law the rule seems clear that an agreement by a party to a treaty to assign either its obligations or its rights under the treaty cannot bind any other party to the treaty without the latter's consent. Accordingly, a devolution agreement is in principle ineffective by itself to pass either treaty obligations or treaty rights of the predecessor to the successor State. It is an instrument which, *as a treaty*, can be binding only as between the predecessor and successor States and the direct legal effects of which are necessarily confined to them.

(7) Turning now to the direct legal effects which devolution agreements may have as between the predecessor and the successor State, and taking the assignment of obligations first, it seems clear that, from the date of independence, the treaty obligations of the predecessor State cease automatically to be binding upon itself in respect of the territory now independent. This follows from the principle of moving treaty frontiers which is as much applicable to a predecessor State in the case of independence as in the case of the mere transfer of territory to another existing State dealt with in article 10, because the territory of the newly independent State has ceased to be part of the entire territory of the predecessor State. Conversely, on the date of succession, the territory passes into the treaty régime of the newly independent State; and, since the devolution agreement is incapable by itself of effecting an assignment of the predecessor's treaty obligations to the successor State without the assent of the other States parties, the agreement does not *of its own force* establish any treaty nexus between the successor State and other States parties to the treaties of the predecessor State.

(8) As to the assignment of rights, it is crystal clear that a devolution agreement cannot bind the other States parties to the predecessor's treaties (who are "third States" in relation to the devolution agreement) and

cannot, therefore, operate by itself to transfer to the successor State any rights vis-à-vis those other States parties. Consequently, however, wide may be the language of a devolution agreement and whatever may have been the intention of the predecessor and successor States, the devolution agreement cannot of its own force pass to the successor State any treaty rights of the predecessor State which would not in any event pass to it independently of that agreement.

(9) It is also evident that in the great majority of cases the treaties of the predecessor State will involve both obligations and rights in respect of the territory. In most cases, therefore, the passing of obligations and the passing of rights to the successor State under a treaty are questions which cannot be completely separated from each other.

(10) Consequently, it must be concluded that devolution agreements do not by themselves materially change for any of the interested States (successor State, predecessor State, other States parties) the position which they would otherwise have. The significance of such an agreement is primarily an indication of the intentions of the newly independent State in regard to the predecessor's treaties and a formal and public declaration of the transfer of responsibility for the treaty relations of the territory. This follows from the general principles of the law of treaties and appears to be confirmed by State practice. At the same time devolution agreements may play a role in promoting continuity of treaty relations upon independence.⁷⁸

(11) State practice seems to confirm that the primary value of devolution agreements is simply as an expression of the successor State's *willingness* to continue the treaties of its predecessor. That devolution agreements, if valid, do constitute at any rate a general expression of the successor State's willingness to continue the predecessor State's treaties applicable to the territory would seem to be clear. The critical question is whether a devolution agreement constitutes something more, namely an *offer* to continue the predecessor State's treaties which a third State, party to one of those treaties, may accept and by that acceptance alone bind the successor State to continue the treaties. In paragraph 5 of the present commentary it has been said that a devolution agreement cannot, according to its terms, be understood as an instrument intended to be the means of establishing rights for third States. Even so, is a devolution agreement to be considered as a declaration of consent by the successor State to the continuance of the treaties which a third State may by its mere assent, express or tacit, convert into an agreement to continue in force the treaties of the predecessor State? Or, in the case of multilateral treaties, does the conclusion and registration of a devolution agreement constitute a notification of succession so that the successor State is forthwith to be regarded by other States parties and the depositary as a party to the treaty?

⁷⁸ For an assessment of the value of devolution agreements, see International Law Association, *The Effect . . . (op. cit.)*, chapter 9.

(12) The Secretary-General's own practice as depositary of multilateral treaties seems to have begun by attributing largely automatic effects to devolution agreements⁷⁴ but to have evolved afterwards in the direction of regarding them rather as a general expression of intention. The present practice of the Secretary-General appears to be based on the view that, notwithstanding the conclusion of a devolution agreement, a newly independent State ought not to be included among the parties to a multilateral treaty without first obtaining confirmation that this is in accord with its intention. Thus the Secretariat memorandum on "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary", dated 1962, explains that, when a devolution agreement has been registered or has otherwise come to the knowledge of the Secretary-General, a letter is written to the new State which refers to the devolution agreement and continues on the following lines:

It is the understanding of the Secretary-General, based on the provisions of the aforementioned agreement, that your Government recognizes itself bound, as from [the date of independence], by all international instruments which had been made applicable to [the new State] by [its predecessor] and in respect of which the Secretary-General acts as depositary. The Secretary-General would appreciate it if you would confirm this understanding *so that in the exercise of his depositary functions he could notify all interested States accordingly.*⁷⁵

Again, when considering whether to regard a new State as a party for the purpose of counting the number of parties needed to bring a convention into force, it is the new State's specific notification of its will with regard to that convention, not its devolution agreement, which the Secretary-General has treated as relevant.

(13) The Secretary-General does not receive a devolution agreement in his capacity as a depositary of multilateral treaties but under Article 102 of the United Nations Charter in his capacity as registrar and publisher of treaties. The registration of a devolution agreement, even after publication in the United Nations *Treaty Series*, can therefore not be equated with a notification by the newly independent State to the Secretary-General, as depositary, of his intention to become a separate party to a specific multilateral treaty. Some further manifestation of will on the part of the newly independent State with reference to the particular treaty is needed to establish definitively the newly independent State's position as a party to the treaty in its own name.

(14) The practice of other depositaries of multilateral treaties equally does not seem to support the idea that a devolution agreement, as such, operates to effect or perfect a succession to a multilateral treaty without any notification of the State's will specifically with reference to the treaty in question. Occasionally, some reliance seems to have been placed on a devolution agreement as a factor in establishing a State's participation in a multi-

lateral treaty. Thus, at the instance of the Netherlands Government, the Swiss Government appears to have regarded the Netherlands-Indonesian devolution agreement as sufficient basis for considering Indonesia as a separate party to the Berne Convention for the Protection of Literary and Artistic Works.⁷⁶ But in its general practice as depositary of this and of other Conventions, including the Geneva humanitarian conventions, the Swiss Government does not seem to have treated a devolution agreement as a sufficient basis for considering a successor State as a party to the convention but has acted only upon a declaration or notification of the State in question.⁷⁷ Indonesia also has made it plain in another connexion that it does not interpret its devolution agreement as committing it in respect of individual treaties. Furthermore, it appears from the practice of the United States published in *Materials on Succession of States*⁷⁸ that the United States also acts only upon a declaration or notification of the successor State, not upon its conclusion of a devolution treaty, in determining whether that State should be considered a party to a multilateral treaty for which the United States is the depositary.

(15) The practice of individual States, whether "successor" States or interested "third" States, may be less clear cut but it also appears to confirm the limited significance of devolution agreements. The United Kingdom has sometimes appeared to take the view that a devolution agreement may suffice to constitute the successor State a party to United Kingdom treaties previously applied to the territory in question. Thus, in 1961, the United Kingdom appears to have advised the Federation of Nigeria that its devolution agreement would suffice to establish Nigeria as a separate party to the Warsaw Convention of 1929 and Nigeria appears on that occasion ultimately to have accepted that point of view.⁷⁹ On the other hand, Nigeria declined to treat her devolution agreement as committing her to assume the United Kingdom's obligations under certain extradition treaties.⁸⁰ In any event, the United Kingdom seems previously to have advised the Government of Burma rather differently in regard to that same Warsaw Convention.⁸¹ Moreover, when looking at the matter as a "third State", the United Kingdom has declined to attribute any automatic effects to a devolution agreement. Thus, when informed by Laos that it considered the Anglo-French Civil Procedure Convention of 1922 as continuing to apply between Laos and the United Kingdom in consequence of a devolution agreement, the United Kingdom expressed its *willingness* that this should be so but added that the United Kingdom

wished it to be understood that the Convention continued in force not by virtue of the 1953 Franco-Laotian Treaty of Friendship, but because Her Majesty's Government and the Government of Laos

⁷⁴ See "Summary of the practice of the Secretary-General as Depositary of multilateral treaties" (ST/LEG/7), paras. 108-134; and legal opinion given to the United Nations High Commissioner for Refugees in United Nations, *Juridical Yearbook, 1963* (United Nations publication, Sales No. 65.V.3), pp. 181-182.

⁷⁵ *Yearbook of the International Law Commission, 1962*, vol. II, p. 122, document A/CN.4/150, p. 122, para. 133.

⁷⁶ *Ibid.*, 1968, vol. II, pp. 13-14, document A/CN.4/200 and Add. 1-2, paras. 26-29.

⁷⁷ *Ibid.*, pp. 16 *et seq.*, paras. 35-85, and pp. 39 *et seq.*, paras. 158-224.

⁷⁸ *Op. cit.*, pp. 224-228.

⁷⁹ *Ibid.*, p. 181.

⁸⁰ *Ibid.*, pp. 193-194.

⁸¹ *Ibid.*, pp. 180-181.

were agreed that the 1922 Anglo-French Civil Procedure Convention should continue in force as between the United Kingdom and Laos.⁸³

The Laos Government, it seems, acquiesced in this view. Similarly, in the case concerning the Temple of Preah Vihear⁸³ Thailand in the proceedings on its preliminary objections formally took the position before the International Court of Justice that in regard to "third States" devolution agreements are *res inter alios acta* and in no way binding upon them.

(16) A devolution agreement is treated by the United States as an "acknowledgement in general terms of the continuance in force of agreements" justifying the making of appropriate entries in its *Treaties in Force* series.⁸⁴ But the United States does not seem to regard the devolution agreement as conclusive of the attitude of the newly independent State with respect to individual treaties; nor its own entry of an individual treaty against the name of the new State in the *Treaties in Force* series as doing more than record a presumption or probability as to the continuance in force of the treaty vis-à-vis that State. The practice of the United States seems rather to be to seek to clarify the newly independent State's intentions and to arrive at a common understanding with it in regard to the continuance in force of individual treaties.⁸⁵

(17) Many newly independent States which have entered into devolution agreements have recognized themselves as bound by some at least of the multilateral conventions of which the Secretary-General is depositary previously applied with respect to their territories. Some of these States, on the other hand, have not done so.⁸⁶ In the case of other general multilateral treaties the position seems to be broadly the same.⁸⁷ In the case of bilateral treaties, newly independent States appear not to regard a devolution agreement as committing them vis-à-vis third

States to recognize the continuance in force of each and every treaty but reserve the right to make known their intentions with respect to each particular treaty. The Government of Indonesia, for instance, took this position very clearly in a Note of 18 October 1963 to the Embassy of the Federal Republic of Germany.⁸⁸ Neither this Note nor a previous Note addressed by the Indonesian Government to the United Kingdom in similar terms in January 1961⁸⁹ appears to have met with any objection from the other State. While referring to its devolution agreement as evidence of its willingness to continue certain United Kingdom-United States treaties in force after independence, Ghana in its correspondence with the United States reserved a certain liberty to negotiate regarding the continuance of any particular clause or clauses of any existing treaties.⁹⁰ Equally, in correspondence with the United Kingdom concerning extradition treaties Nigeria seems to have considered herself as possessing a wide liberty of appreciation in regard to the continued application of this category of treaties,⁹¹ as also in correspondence with the United States.⁹² Even where the successor State is in general disposed in pursuance of its devolution agreement to recognize the continuity of its predecessor's treaties, it not infrequently finds it necessary or desirable to enter into an agreement with a third State providing specifically for the continuance of a particular treaty.⁹³

(18) The practice of States does not admit, therefore, the conclusion that a devolution agreement should be considered as by itself creating a legal nexus between the successor State and third States parties in relation to treaties applicable to the successor State's territory prior to its independence. Some successor States and some third States parties to one of those treaties have undoubtedly tended to regard a devolution agreement as creating a certain presumption of the continuance in force of certain types of treaties. But neither successor States nor third States nor depositaries have as a general rule attributed automatic effects to devolution agreements. Accordingly, State practice as well as the relevant principles of the law of treaties would seem to indicate that

⁸³ *Ibid.*, p. 188. Even more explicit is the United Kingdom's comment upon this episode (*ibid.*, pp. 188-189). See also the United Kingdom's advice to Pakistan that the Indian Independence (International Arrangements) Order, 1947, could have validity only between India and Pakistan and could not govern the position between Pakistan and Thailand [Siam] (*ibid.*, pp. 190-191).

⁸⁴ See *I.C.J. Pleadings, Temple of Preah Vihear*, vol. II, p. 33. The Court itself did not pronounce upon the question of succession, as it held its jurisdiction to entertain the case upon other grounds.

⁸⁵ United States, Department of State, *Treaties in Force—A List of Treaties and other International Agreements of the United States in Force* (Washington D.C., U.S. Government Printing Office). The United States practice has been described by an Assistant Legal Adviser to the State Department in a letter to the Editor-in-Chief of the *American Journal of International Law* (printed in International Law Association, *The Effect . . . (op. cit.)*, pp. 382-386).

⁸⁶ See United States Exchanges of Notes with Ghana, Trinidad and Tobago and Jamaica, in United Nations, *Materials on Succession of States (op. cit.)*, pp. 211-213 and 220-223.

⁸⁷ For example, Indonesia and Somalia (see *Yearbook of the International Law Commission, 1962*, vol. II, pp. 110 and 111, document A/CN.4/150, paras. 21 and 31-33, and *ibid.*, p. 119, para. 106).

⁸⁸ *Ibid.*, 1968, vol. II, p. 1, document A/CN.4/200 and Add.1-2. The case of international labour conventions is special owing to the practice of the ILO requiring new States to recognize the continuance of labour conventions on their admission to the organization.

⁸⁸ United Nations, *Materials on Succession of States (op. cit.)*, p. 37. In the Westerling case, Indonesia invoked the Anglo-Netherlands Extradition Treaty of 1898 and the United Kingdom Government informed the Court that it recognized Indonesia's succession to the rights and obligations of the Netherlands under the Treaty (*ibid.*, pp. 196-197).

⁸⁹ *Ibid.*, p. 186.

⁹⁰ *Ibid.*, pp. 211-213.

⁹¹ *Ibid.*, pp. 193-194.

⁹² See International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), p. 630 [Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors, annex E].

⁹³ For example, agreements between India and Belgium (see Belgium, *Moniteur belge* (Brussels), 26 February 1955, Year 1955, No. 57, p. 967); Pakistan and Belgium (United Nations, *Treaty Series*, vol. 133, pp. 200-202); Pakistan and Switzerland (Switzerland, *Recueil officiel des lois et ordonnances de la Confédération suisse* (Bern), 15 December 1955, Year 1955, No. 50, p. 1168); Pakistan and Argentina (United Nations, *Materials on Succession of States (op. cit.)*, pp. 6-7); United States and Trinidad and Tobago and United States and Jamaica (*ibid.*, pp. 220-224).

devolution agreements, however important as general manifestations of the attitude of successor States to the treaties of their predecessors, should be considered as *res inter alios acta* for the purposes of their relations with third States.⁹⁴

(19) In the light of the foregoing, *paragraph 1* of the present article declares that the obligations and rights of a predecessor State under treaties in force in respect of a territory at the date of a succession of States do not become the obligations and rights of the successor State towards other States parties in consequence *only* of the fact that the predecessor and successor States have concluded a devolution agreement. In order to remove any possible doubt on the point, it spells out the rule, which emerges both from general principles and State practice, that a devolution agreement does not of its own force create any legal nexus between the successor State and other States parties.

(20) *Paragraph 2* of the article then provides that, even if a devolution agreement has been concluded, "the effects of a succession of States" on treaties which at the date of a succession were in force in respect of the territory in question are governed by the present articles. This does not deny the relevance which a devolution agreement may have as a general expression of the Successor State's policy in regard to continuing its predecessor's treaties in force nor its significance in the process of bringing about the continuance in force of a treaty. What the paragraph says is that notwithstanding the conclusion of a devolution agreement the effects of a succession of States are governed by the rules of general international law on succession of States in respect of treaties codified in the present articles. It emphasizes that a devolution agreement cannot *of itself* pass to the successor State vis-à-vis other States parties any treaty obligations or rights which would not in any event pass to it under general international law.

(21) Lastly, on the question of the intrinsic validity as treaties of "devolution agreements", some members considered that this question should be approached from the point of view of "coercion", and in particular of political or economic coercion. They felt that devolution agreements may be the price paid to the former sovereign for freedom and that in such cases the validity of a devolution agreement could not be sustained. Other members observed that, although the earlier devolution agreements may in some degree have been regarded as part of the price of independence, later agreements seem rather to have been entered into for the purpose of obviating the risk of a total gap in the treaty relations of the newly independent State and at the same time recording the former sovereign's disclaimer of any future liability under its treaties in respect of the territory concerned. Having regard to the fact that the question of the validity of a devolution agreement is one which necessarily falls under the general law of treaties recently codified in the Vienna Convention on the Law of Treaties, the Commission

concluded that it was not necessary to include any special provision on the point in the present articles. The validity of a devolution agreement in any given case should, in its view, be left to be determined by the relevant rules of the general law of treaties as set out in the Vienna Convention, in particular in articles 42 to 43.

Article 8. Successor State's unilateral declaration regarding its predecessor State's treaties

1. A predecessor State's obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States parties to those treaties in consequence only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory.

2. In such a case the effects of the succession of States on treaties which at the date of that succession of States were in force in respect of the territory in question are governed by the present articles.

Commentary

(1) As indicated in paragraph (2) of the commentary to article 7, a number of the newly independent States have made unilateral declarations of a general character whereby they have stated a certain position in regard to treaties having application in respect of their respective territories prior to the date of the succession of States. The present article deals with the legal effect of these unilateral declarations in the relations between the declarant State and other States parties to the treaties in question.

(2) In March 1961 the United Kingdom Government suggested to the Government of Tanganyika that, on independence, it should enter into a devolution agreement by exchange of letters, as had been done by other British territories on their becoming independent States. Tanganyika replied that, according to the advice which it had received, the effect of such an agreement might be that it (a) would enable third States to call upon Tanganyika to perform treaty obligations from which it would otherwise have been released on its emergence into statehood; but (b) would not, by itself, suffice to entitle it to call upon third States to perform towards Tanganyika treaties which they had concluded with the United Kingdom. Accordingly, it did not enter into a devolution agreement, but wrote instead to the Secretary-General of the United Nations in December 1961 making the following declaration:

The Government of Tanganyika is mindful of the desirability of maintaining, to the fullest extent compatible with the emergence into full independence of the State of Tanganyika, legal continuity between Tanganyika and the several States with which, through the action of the United Kingdom, the territory of Tanganyika was prior to independence in treaty relations. Accordingly, the Government of Tanganyika takes the present opportunity of making the following declaration:

As regards bilateral treaties validly concluded by the United Kingdom on behalf of the territory of Tanganyika or validly applied or extended by the former to the territory of the latter, the Government of Tanganyika is willing to continue to apply within

⁹⁴ Another consideration to be taken into account is the difficulty in some cases of identifying the treaties covered by a devolution agreement.

its territory, on a basis of reciprocity, the terms of all such treaties for a period of two years from the date of independence (i.e., until 8 December 1963) unless abrogated or modified earlier by mutual consent. At the expiry of that period, the Government of Tanganyika will regard such of these treaties which could not by the application of the rules of customary international law be regarded as otherwise surviving, as having terminated.

It is the earnest hope of the Government of Tanganyika that during the aforementioned period of two years, the normal processes of diplomatic negotiations will enable it to reach satisfactory accord with the States concerned upon the possibility of the continuance or modification of such treaties.

The Government of Tanganyika is conscious that the above declaration applicable to bilateral treaties cannot with equal facility be applied to multilateral treaties. As regards these, therefore, the Government of Tanganyika proposes to review each of them individually and to indicate to the depositary in each case what steps it wishes to take in relation to each such instrument—whether by way of confirmation of termination, confirmation of succession or accession. During such interim period of review any party to a multilateral treaty which has prior to independence been applied or extended to Tanganyika may, on a basis of reciprocity, rely as against Tanganyika on the terms of such treaty.⁹⁵

At Tanganyika's express request, the Secretary-General circulated the text of its declaration to all Members of the United Nations.

The United Kingdom then in turn wrote to the Secretary-General requesting him to circulate to all Members of the United Nations a declaration couched in the following terms:

I have the honour [. . .] to refer to the Note dated 9 December 1961 addressed to your Excellency by the then Prime Minister of Tanganyika, setting out his Government's position in relation to international instruments concluded by the United Kingdom, whose provisions applied to Tanganyika prior to independence. Her Majesty's Government in the United Kingdom hereby declare that, upon Tanganyika becoming an independent Sovereign on 9th of December 1961, they ceased to have the obligations or rights, which they formerly had, as the authority responsible for the administration of Tanganyika, as a result of the application of such international instruments to Tanganyika.⁹⁶

In other words, the United Kingdom caused to be circulated to all Members of the United Nations a formal disclaimer, so far as concerned the territory of Tanganyika of any obligations or rights of the United Kingdom under treaties applied by it to that territory prior to independence.

(3) The precedent set by Tanganyika⁹⁷ has been followed by a number of other newly independent States whose unilateral declarations have, however, taken varying forms.⁹⁸

(4) Botswana in 1966 and Lesotho in 1967⁹⁹ made declarations in the same terms as Tanganyika. In 1969 Lesotho requested the Secretary-General to circulate to all Members of the United Nations another declaration extending the two-year period of review for bilateral treaties specified in its 1967 declaration for a further period of two years. At the same time, it pointed out that its review of its position under multilateral treaties was still in progress and that, under the terms of its previous declaration, no formal extension of the period was necessary. The new declaration concluded with the following *caveat*:

The Government of the Kingdom of Lesotho wishes it to be understood that this is merely a transitional arrangement. Under no circumstances should it be implied that by this Declaration Lesotho has either acceded to any particular treaty or indicated continuity of any particular treaty by way of succession.¹⁰⁰

(5) In 1968 Nauru also made a declaration which, with some minor differences of wording, follows the Tanganyika model closely. But the Nauru declaration does differ on one point of substance to which attention is drawn because of its possible interest in the general question of the existence of rules of customary law regarding succession in the matter of treaties with respect to bilateral treaties. The Tanganyika declaration provides that on the expiry of the provisional period of review Tanganyika will regard such of them as "*could not by the application of the rules of customary international law be regarded as otherwise surviving,* as having terminated*"¹⁰¹ The Nauru declaration, on the other hand, provides that Nauru will regard "each such treaty as having terminated *unless it has earlier agreed with the other contracting party to continue that treaty in existence*"¹⁰² without any reference to customary law. In addition, Nauru requested the circulation of its declaration to members of the specialized agencies as well as to States Members of the United Nations.¹⁰³

(6) Uganda, in a Note to the Secretary-General of 12 February 1963,¹⁰⁴ made a declaration applying a single procedure of provisional application to both bilateral and multilateral treaties. The declaration stated that in respect of all treaties validly concluded by the United Kingdom on behalf of the Uganda Protectorate or validly extended to it before 9 October 1962 (the date of independence) Uganda would continue to apply them, on the basis of reciprocity, until the end of 1963, unless they should be abrogated, or modified by agree-

⁹⁹ *Ibid.*, Treaties, Botswana and Lesotho.

¹⁰⁰ *Ibid.*, Treaties, Lesotho.

¹⁰¹ See para. 2 above.

¹⁰² United States of America, Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1972*, Dept. of State publication No. 8628 (Washington D.C., U.S. Government Printing Office), p. 169.

¹⁰³ Full text of the declaration in communication dated 28 May 1968 transmitted by the Secretary-General on 2 July 1968 (LE 222 NAURU).

¹⁰⁴ See United Nations, *Materials on Succession of States (op. cit.)*, pp. 179-180. See also the explanatory statement of the Government of Uganda in Sessional Paper No. 2 of 1963 in International Law Association, *The Effect . . . (op. cit.)*, p. 386.

⁹⁵ United Nations, *Materials on Succession of States (op. cit.)*, pp. 177-178.

⁹⁶ *Ibid.*, p. 178.

⁹⁷ For the subsequent declaration made by the United Republic of Tanzania on the Union of Tanganyika with Zanzibar, see paragraph 10 of the present commentary.

⁹⁸ For the declaration of Tonga, see document A/CN.4/263 (Supplement prepared by the Secretariat to *Materials on Succession of States (op. cit.)*), United Kingdom of Great Britain and Northern Ireland, Treaties, Tonga.

ment with the other parties concerned. The declaration added that at the end of that period, or of any subsequent extension of it notified in a similar manner, Uganda would regard the treaties as terminated except such as "must by the application of the rules of customary international law be regarded as otherwise surviving". The declaration also expressed Uganda's hope that before the end of the period prescribed the normal processes of diplomatic negotiations would have enabled it to reach satisfactory accords with the States concerned upon the possibility of the continuance or modification of the treaties; and, in the case of multilateral treaties, it expressed its intention within that same period to notify the depositary of the steps it wished to take in regard to each treaty. Like Tanganyika, Uganda expressly stated that, during the period of review, the other parties to the treaties might, on the basis of reciprocity, rely on their terms as against Uganda.¹⁰⁵

Kenya¹⁰⁶ and Malawi¹⁰⁷ subsequently requested the Secretary-General to notify Members of the United Nations of declarations made by them in the same form as Uganda. Kenya's declaration contained an additional paragraph which is of some interest in connexion with so-called dispositive treaties and which reads:

Nothing in this Declaration shall prejudice or be deemed to prejudice the existing territorial claims of the State of Kenya against third parties and the rights of dispositive character initially vested in the State of Kenya under certain international treaties or administrative arrangements constituting agreements.

(7) In September 1965, Zambia communicated to the Secretary-General a declaration framed on somewhat different lines:

I have the honour to inform you that the Government of Zambia, conscious of the desirability of maintaining existing legal relationships, and conscious of its obligations under international law to honour its treaty commitments, acknowledges that many treaty rights and obligations of the Government of the United Kingdom in respect of Northern Rhodesia were succeeded to by Zambia upon independence by virtue of customary international law.

Since, however, it is likely that in virtue of customary international law, certain treaties may have lapsed at the date of independence of Zambia, it seems essential that each treaty should be subjected to legal examination. It is proposed, after this examination has been completed, to indicate which if any, of the treaties which may have lapsed by customary international law the Government of Zambia wishes to treat as having lapsed.

The question of Zambia's succession to treaties is complicated by legal questions arising from the entrustment of external affairs powers to the former Federation of Rhodesia and Nyasaland. Until these questions have been resolved it will remain unclear to what extent Zambia remains affected by the treaties contracted by the former Federation.

¹⁰⁵ In Uganda's declaration the statement in terms refers only to multilateral treaties; but Uganda's intention seems clearly to be that parties to any of the treaties should be able, on the basis of reciprocity, to rely on their terms as against itself during the period of review.

¹⁰⁶ For the text of Kenya's declaration, see document A/CN.4/263 (Supplement prepared by the Secretariat to *Materials on Succession of States (op. cit.)*), United Kingdom of Great Britain and Northern Ireland, Treaties, Kenya.

¹⁰⁷ For the text of Malawi's declaration, *ibid.*, Malawi, Treaties.

It is desired that it be presumed that each treaty has been legally succeeded to by Zambia and that action be based on this presumption until a decision is reached that it should be regarded as having lapsed. Should the Government of Zambia be of the opinion that it has legally succeeded to a treaty and wishes to terminate the operation of the treaty, it will in due course give notice of termination in the terms thereof.

The Government of Zambia desires that this letter be circulated to all States members of the United Nations and the United Nations specialized agencies, so that they will be effected with notice of the Government's attitude.¹⁰⁸

Subsequently, declarations in the same form were made by Guyana, Barbados and Mauritius.¹⁰⁹ The declarations of Barbados and Mauritius did not contain anything equivalent to the third paragraph of the Zambia declaration. The Guyanese declaration, on the other hand, did contain a paragraph similar to that third paragraph, dealing with Guyana's special circumstances, and reading as follows:

Owing to the manner in which British Guiana was acquired by the British Crown, and owing to its history previous to that date, consideration will have to be given to the question which, if any, treaties contracted previous to 1804 remain in force by virtue of customary international law.

(8) In all the above instances, the United Kingdom requested the Secretary-General to circulate to States Members of the United Nations a formal disclaimer of any continuing obligations or rights of the United Kingdom¹¹⁰ in the same terms as in the case of Tanganyika.¹¹¹

(9) Swaziland, in 1968, framed its declaration in terms which are at once simple and comprehensive:

I have the honour [. . .] to declare on behalf of the Government of the Kingdom of Swaziland that for a period of two years with effect from 6 September 1968, the Government of the Kingdom of Swaziland accepts all treaty rights and obligations entered into prior to independence by the British Government on behalf of the Kingdom of Swaziland, during which period the treaties and international agreements in which such rights, and obligations are embodied will receive examination with a view to determining, at the expiration of that period of two years, which of those rights and obligations will be adopted, which will be terminated, and which of these will be adopted with reservations in respect of particular matters.¹¹²

The declaration was communicated to the Secretary-General with the request that it should be transmitted to all States Members of the United Nations and members of the specialized agencies.

¹⁰⁸ *Ibid.*, United Kingdom of Great Britain and Northern Ireland, Treaties, Zambia.

¹⁰⁹ *Ibid.*, Treaties, Guyana, Barbados and Mauritius.

¹¹⁰ See United Nations, *Materials on Succession of States (op. cit.)*, pp. 178 and 180, and document A/CN.4/263 (Supplement prepared by the Secretariat to *Materials on Succession of States*), United Kingdom of Great Britain and Northern Ireland, Treaties, Kenya, Malawi, Zambia, Guyana, Botswana, Lesotho, Barbados, Mauritius.

¹¹¹ See para. 2 above.

¹¹² See document A/CN.4/263 (Supplement prepared by the Secretariat to *Materials on Succession of States (op. cit.)*), United Kingdom of Great Britain and Northern Ireland, Treaties, Swaziland.

(10) In 1964 the Republic of Tanganyika and the People's Republic of Zanzibar were united into a single sovereign State which subsequently adopted the name of United Republic of Tanzania. Upon the occurrence of the union the United Republic addressed a Note to the Secretary-General informing him of the event and continuing:

The Secretary-General is asked to note that the United Republic of Tanganyika and Zanzibar declares that it is now a single Member of the United Nations bound by the provisions of the Charter, and that all international treaties and agreements in force between the Republic of Tanganyika or the People's Republic of Zanzibar and other States or international organizations will, to the extent that their implementation is consistent with the constitutional position established by the Articles of Union, remain in force within the regional limits prescribed on their conclusion and in accordance with the principles of international law.¹¹³

The Note concluded by requesting the Secretary-General to communicate its contents to all Member States of the United Nations, to all organs, principal and subsidiary of the United Nations, and to the specialized agencies. The Note did not in terms continue in force, or refer to in any way, the previous declaration made by Tanganyika in 1961.¹¹⁴ But equally it did not annul the previous declaration which seems to have been intended to continue to have effects according to its terms with regard to treaties formerly in force in respect of the territory of Tanganyika.

(11) Two States formerly dependent upon Belgium have also made declarations which have been circulated to States Members of the United Nations. Rwanda's declaration, made in July 1962, was in quite general terms:

The Rwandese Republic undertakes to comply with the international treaties and agreements, concluded by Belgium and applicable to Rwanda, which the Rwandese Republic does not denounce or which have not given rise to any comments on its part.

The Government of the Republic will decide which of these international treaties and agreements should in its opinion apply to independent Rwanda, and in so doing will base itself on international practice.

These treaties and agreements have been and will continue to be the subject of detailed and continuous investigations.¹¹⁵

(12) Burundi, on the other hand, in a Note of June 1964, framed a much more elaborate declaration which was cast somewhat on the lines of the Tanganyika declaration. It read:

The Ministry of Foreign Affairs and Foreign Trade of the Kingdom of Burundi presents its compliments to U Thant, Secretary-General of the United Nations, and has the honour to bring to his attention the following Declaration stating the position of the Government of Burundi with regard to international agreements entered into by Belgium and made applicable to the Kingdom of Burundi before it attained its independence.

¹¹³ See International Law Association, *The Effect . . . (op. cit.)*, pp. 381-382; and United States, Department of State, *Treaties in Force—A List of Treaties and other International Agreements of the United States in Force on January 1, 1968* (Washington D.C., U.S. Government Printing Office, 1968), p. 200.

¹¹⁴ See para. 2 above.

¹¹⁵ See United Nations, *Materials on Succession of States (op. cit.)*, p. 146. This declaration was transmitted to the Secretary-General by the Belgian Government in 1962.

I. The Government of the Kingdom of Burundi is prepared to succeed to *bilateral agreements* subject to the following reservations:

(1) The agreements in question must remain in force for a period of four years, from 1 July 1962 the date of independence of Burundi, that is to say until 1 July 1966;

(2) The agreements in question must be applied on a basis of reciprocity;

(3) The agreements in question must be renewable by agreement between the parties;

(4) The agreements in question must have been effectively applied;

(5) The agreements in question must be subject to the general conditions of the law of nations governing the modifications and termination of international instruments;

(6) The agreements in question must not be contrary to the letter or the spirit of the Constitution of the Kingdom of Burundi.

When this period has expired,* any agreement which has not been renewed by the parties or has terminated under the rules of customary international law will be regarded by the Government of Burundi as having lapsed.

Similarly, any agreement which does not comply with the reservations stated above will be regarded as null and void.

With regard to bilateral agreements concluded by independent Burundi the Government intends to submit such agreements to the Secretary-General for registration once internal constitutional procedures have been complied with.

II. The Government of Burundi is prepared to succeed to *multilateral agreements* subject to the following reservations:

(1) that the matters dealt with in these agreements are still of interests;

(2) that these agreements do not, under article 60 of the Constitution of the Kingdom of Burundi, involve the State in any expense or bind the Burundi individually. By the terms of the Constitution, such agreements cannot take effect unless they have been approved by Parliament.

In the case of multilateral agreements which do not meet the conditions stated above, the Government of Burundi proposes to make known its intention explicitly in each individual case. This also applies to the more recent agreements whose provisions are applied tacitly, as custom, by Burundi. The Government of Burundi may confirm their validity, or formulate reservations or denounce the agreements. In each case it will inform the depositary whether it intends to be bound in its own right by accession or through succession.

With regard to multilateral agreements open to signature, the Government will shortly appoint plenipotentiaries holding the necessary powers to execute formal acts of this kind.

III. In the intervening period, however, the Government will put into force the following *transitional provisions*:

(1) any party to a regional multilateral treaty or a multilateral treaty of universal character which has been effectively applied on a basis of reciprocity can continue to rely on that treaty as of right in relation to the Government of Burundi until further notice;

(2) the transitional period will terminate on 1 July 1966;

(3) no provision in this Declaration may be interpreted in such a way as to infringe the territorial integrity, independence or neutrality of the Kingdom of Burundi.

The Ministry requests the Secretary-General to be so good as to issue this Declaration as a United Nations document for circulation among Member States and takes this opportunity to renew

* Extended for a further period of two years by a Note of December 1966.

to the Secretary-General the assurances of its highest consideration.¹¹⁶

In this declaration, it will be noted, the express provision that during the period of review the other parties may continue to rely on the treaties as against Burundi appears to relate only to multilateral treaties.

(13) The declarations here in question do not fall neatly into any of the established treaty procedures. They are not sent to the Secretary-General in his capacity as registrar and publisher of treaties under Article 102 of the Charter. The communications under cover of which they have been sent to the Secretary-General have not asked for their registration or for their filing and recording under the relevant General Assembly resolutions. In consequence, the declarations have not been registered or filed and recorded; nor have they been published in any manner in the United Nations *Treaty Series*. Equally the declarations are not sent to the Secretary-General in his capacity as a depositary of multilateral treaties. A sizeable number of the multilateral treaties which these declarations cover may, no doubt, be treaties of which the Secretary-General is the depositary. But the declarations also cover numerous bilateral treaties for which there is no depositary, as well as multilateral treaties which have depositaries other than the Secretary-General. The declarations seem to be sent to the Secretary-General on a more general basis as the international organ specifically entrusted by the United Nations with functions concerning the publication of acts relating to treaties or even merely as the convenient diplomatic channel for circulating to all States Members of the United Nations and members of the specialized agencies notifications of such acts.

(14) Unlike devolution agreements, the declarations are addressed directly to the other interested States, that is, to the States parties to the treaties applied to the newly independent State's territory prior to its independence. They appear to contain, in one form or another, an engagement by the declarant State, on the basis of reciprocity, to continue the application of those treaties after independence provisionally, pending its determination of its position with respect to each individual treaty. Thus, the first purpose of the declaration would seem to be the creation, in a different context, of a treaty relation analogous to that which is the subject of article 25 of the Vienna Convention on the Law of Treaties concerning provisional application of a treaty pending its entry into force. The question of the definitive participation of the newly independent State in the treaties is left to be determined with respect to each individual treaty during a period of review, the situation being covered meanwhile by the application of the treaty provisionally on the basis of reciprocity.

(15) Notwithstanding certain variations of formulation, the terms of the Tanganyika, Uganda, and Swaziland type declarations confirm what is said in the previous

paragraph. Even the Zambia-type declarations, more affirmative in their attitude toward succession to the predecessor State's treaties, expressly recognize that in virtue of customary law certain treaties may have lapsed at the date of independence; they furnish no indications which might serve to identify either the treaties which are to be considered as succeeded to by the declarant State or those which are to be considered as likely to have lapsed by virtue of customary law; and they expressly state it to be essential that *each* treaty should be subject to legal examination with a view to determining whether or not it has lapsed.

(16) Although addressed to a large number of States among which are, for the most part, to be found other States parties to the treaties applied to the declarant State's territory prior to its independence, the declarations are *unilateral acts* the legal effects of which for the other parties to the treaties cannot depend on the will of the declarant State alone. This could be so only if a newly independent State might be considered as possessing under international law a right to the provisional application of the treaties of its predecessor for a certain period after independence. But such a right does not seem to have any basis in State practice; indeed, many of the declarations themselves clearly assume that the other parties to the treaties are free to accept or reject the declarant State's proposal to apply its predecessor's treaties provisionally. Equally, the treaties themselves do not normally contemplate the possibility either of "provisional parties" or of a "provisional application". Accordingly, the legal effect of the declarations seems to be that they furnish bases for a *collateral* agreement in simplified form between the newly independent State and the individual parties to its predecessor's treaties for the provisional application of the treaties after independence. The agreement may be express but may equally arise from the conduct of any individual State party to any treaty covered by the declaration, in particular from acts showing that it regards the treaty as still having application with respect to the territory.

(17) There is, of course, nothing to prevent a newly independent State from making a unilateral declaration in which it announces definitely that it considers itself, or desires to have itself considered, as a party to treaties, or certain treaties, of its predecessor applied to its territory prior to independence. Even then, since the declaration would not, as such, be binding on other States, its legal effect would be governed simply by the provisions of the present articles relating to notifying succession to multilateral treaties and the continuation in force of treaties by agreement. In other words, in relation to the third States parties to the predecessor State's treaties the legal effect of such a unilateral declaration would be analogous to that of a devolution agreement.

(18) In the modern practice described above the primary role of unilateral declarations by successor States has been to facilitate the provisional application of treaties previously applied to the territory in question; and these declarations have for the most part been made by newly independent States. Nevertheless unilateral declarations of this kind may be framed in general terms not limited to provisional application and they may be made by

¹¹⁶ See International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), pp. 617-619 [Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors, annex A, VI].

successor States other than newly independent States. Accordingly, the Commission decided to formulate in article 8 the rule concerning the legal effect of unilateral declarations as one of general scope and to include it among the general provisions of part I alongside the article dealing with devolution agreements (article 7).

(19) At the same time, since the principal importance of provisional application of treaties upon a succession of States seems in practice to be in cases of newly independent States, the Commission decided to deal with this subject separately, and to place provisions necessary for this purpose in a special section (section 4) in part III of the present draft articles.

(20) As to the present article, the Commission decided to formulate it along the lines of article 7 (devolution agreements), because the negative rule specifying the absence of any direct effects of a successor State's declaration upon the other States parties to the predecessor's treaties applies in both cases, even although the legal considerations on which the rule is based may not be precisely the same in the case of declarations as in the case of devolution agreements.

(21) Accordingly, *paragraph 1* of this article states that a predecessor State's obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States parties to those treaties in consequence *only* of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory. And *paragraph 2* provides that in such a case "the effects of the succession of States" on treaties which at the date of succession of States were in force in respect of the territory in question are governed by the present articles.

Article 9. Treaties providing for the participation of a successor State

1. When a treaty provides that, on the occurrence of a succession of States, a successor State shall have the option to consider itself a party thereto, it may notify its succession in respect of the treaty in conformity with the provisions of the treaty or, failing any such provisions, in conformity with the provisions of the present articles.

2. If a treaty provides that, on the occurrence of a succession of States, the successor State shall be considered as a party, such a provision takes effect only if the successor State expressly accepts in writing to be so considered.

3. In cases falling under paragraphs 1 or 2, a successor State which establishes its consent to be a party to the treaty is considered as a party from the date of the succession unless the treaty otherwise provides or it is otherwise agreed.

Commentary

(1) This article, as its title indicates, concerns the case of participation by a successor State in a treaty by virtue of a clause of the treaty itself, as distinct from the case where the right of participation arises from general law

of succession. Although clauses of that kind have not been numerous, there are treaties, mainly multilateral treaties, which contain provisions purporting to regulate *in advance* the application of the treaty on the occurrence of a succession of States. The clauses may refer to a certain category of States or to a particular State. Frequently, they have been included in treaties when the process of the emergence of one or more successor States was in an advanced stage at the time of the negotiations of the original treaty or of an amendment or revision of the treaty.

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

In 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.*¹¹⁷

This clause, which was included in the original text of the General Agreement,¹¹⁸ 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 independent States*.¹¹⁹ 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 by a series of recommendations have found it desirable to supplement that clause with a further procedure of "provisional application", called "*de facto* application".¹²⁰

(3) The net result has been that under paragraph 5c of article XXVI of GATT, 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 by 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.¹²¹ It may be added that States which become contracting parties to the General Agreement under Article XXVI, paragraph 5c,

¹¹⁷ United Nations, *Treaty Series*, vol. 278, p. 204.

¹¹⁸ Initially part of paragraph 4 of article XXVI of the General Agreement, it became paragraph 4c under the Amending Protocol of 13 August 1949 and then paragraph 5c 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).

¹¹⁹ Burma, Ceylon and Southern Rhodesia were the territories concerned (*ibid.*, foot-note 549).

¹²⁰ *Ibid.*, p. 74, paras. 321-325, for the details of these recommendations.

¹²¹ *Ibid.*, pp. 76 *et seq.*, paras. 332-350.

are considered as having by implication agreed to become parties to the subsidiary GATT multilateral treaties made applicable to their territories prior to independence.

(4) Other examples of treaties providing for the participation of a successor State can be found in various commodity agreements: the Second¹²² and Third¹²³ International Tin Agreements of 1960 and 1965; the 1962 International Coffee Agreement;¹²⁴ and the 1968 International Sugar Agreement.¹²⁵ Article XXII, paragraph 6, of the Second International Tin Agreement, 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.

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 that the newly independent States which have become parties to the Second Tin Agreement (1960)¹²⁶ have not done so under paragraph 6 of article XXII. Similarly, although the Third International Tin Agreement (1965) 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 newly independent State's having assumed the character of a party under the clause.

(5) Article XXI, paragraph 1, of the Second Tin Agreement (1960) 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", and among these were Zaire and Nigeria, both of whom became independent prior to the expiry 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 seemed 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 appear to have taken no action to establish their participation in the Agreement after independence.

(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.¹²⁷

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 Second Tin Agreement (1960), 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 and then ratifying¹²⁸ the Agreement.

(8) The only other multilateral treaty containing a similar clause appears to be yet another commodity agreement, the International Sugar Agreement (1968), article 66, paragraph 2, of which is couched in much the same terms¹²⁹ 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. The new Sugar Agreement is, however, too recent for the clause in paragraph 2 of article 66 to have been tested in practice.

(9) An example of a bilateral agreement containing a clause providing for the future participation of a territory after its independence is the Agreement to resolve the controversy over the frontier between Venezuela and

¹²² United Nations, *Treaty Series*, vol. 403, p. 3.

¹²³ *Ibid.*, vol. 616, p. 317.

¹²⁴ *Ibid.*, vol. 469, p. 169.

¹²⁵ *United Nations Sugar Conference, 1968: Summary of Proceedings* (United Nations publication, Sales No. E.69.II.D.6), p. 56, annex III.

¹²⁶ Zaire [Republic of Congo (Leopoldville)] and Nigeria (United Nations, *Treaty Series*, vol. 403, pp. 4, 115 and 116).

¹²⁷ United Nations, *Treaty Series*, vol. 469, p. 238. This paragraph is reproduced in the 1968 Coffee Agreement as Article 65, paragraph 4.

¹²⁸ United Nations, *Multilateral Treaties . . . 1971 (op. cit.)*, p. 357.

¹²⁹ See *United Nations Sugar Conference, 1968: Summary of Proceedings* (United Nations publication, Sales No.: E.69.II.D.6), Annex III, p. 73.

British Guiana (Geneva, 1966)¹³⁰ concluded between the United Kingdom and Venezuela shortly before British Guiana's independence. 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.

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 itself 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.

(10) In the light of the State practice referred to in the preceding paragraphs, the Commission considered it desirable to enunciate separately the two rules set forth in *paragraphs 1 and 2* of the present article. *Paragraph 1* deals with the more frequent case, namely, where the successor State has *an option* under the treaty to consider itself as a party thereto. These cases would seem to fall within the rule in article 36 (treaties providing for rights for third States) of the Vienna Convention on the Law of Treaties. 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 the provisions of the treaty as to the procedure, or failing any such provisions, to the general rules on succession of States in respect of treaties contained in the present draft articles; and this is so stated in *paragraph 1*.

(11) *Paragraph 2* concerns those cases where a treaty purports to lay down that, on a succession of States, the successor State *shall be considered as a party*. In those cases the treaty provisions not merely confer a right of option on the successor State to become a party but appear to be intended as the means of establishing automatically an obligation for the successor State to consider itself a party. In other words, these cases seem to fall within article 35 (treaties providing for obligations for third States) of the Vienna Convention on the Law of Treaties. 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 under the sovereignty of its predecessor. The Commission agreed that it should not. Otherwise, the original parties would be able to impose succession on the newly independent State, and to do this in conflict with the general rule governing succession in respect of treaties laid down for newly independent States set out in the present articles. Consequently, *paragraph 2* states that the treaty provision that the successor State shall be considered as a party "takes effect only if the successor State expressly accepts in writing to be so considered". Under the paragraph, therefore, the successor State would be considered as being under no obligation at all to become a party by virtue of the treaty clause alone. The treaty clause, whatever its wording, would be considered an option, not an obligation of the successor State to become a party to the treaty. The words "shall be considered as a party" are intended to cover all related expressions found in treaty language, such as "shall be a party" or "shall be deemed to be a party".

(12) The Commission thought it preferable to require some evidence of subsequent acceptance by the successor State in all cases, in spite of the fact that in some instances, particularly where the territory was already in an advanced state of self-government at the time of the conclusion of the treaty, representatives of the territory might have been consulted in regard to future participation in the treaty after independence.

(13) The question of the continuity of application of the treaty during the intervening period between the date of the succession of States and the time of the successor State's expression of consent having been raised by certain members, the Commission decided to add the provision contained in *paragraph 3*. *Paragraph 3*, therefore, intends to ensure continuity of application by providing that, as a general rule, the successor State, if it consents to be considered as a party, in cases falling under *paragraphs 1 or 2* of the article, will be so considered *as from the date of the succession of States*. This general rule is qualified by the concluding proviso "unless the treaty otherwise provides or it is otherwise agreed" which safeguards the provisions of the treaty itself and the freedom of the parties.

(14) Although the recent precedents recorded in this commentary relate to newly independent States, and mainly to multilateral treaties, the Commission considered it advisable, given the matters of principle involved, to formulate the provisions of article 9 in general terms, in order to make them applicable to all cases of succession of States and to all types of treaty. This being so, it included the article among the general provisions of the present draft.

¹³⁰ United Nations, *Treaty Series*, vol. 561, p. 321.

PART II

TRANSFER OF TERRITORY

Article 10. Transfer of territory

When territory under the sovereignty or administration of a State becomes part of another State:

(a) Treaties of the predecessor State cease to be in force in respect of that territory from the date of the succession; and

(b) Treaties of the successor State are in force in respect of that territory from the same date, unless it appears from the particular treaty or is otherwise established that the application of the treaty to that territory would be incompatible with its object and purpose.

Commentary

(1) This article concerns the application of a rule, which is often referred to by writers as the "moving treaty frontiers" rule, in cases where territory not itself a State undergoes a change of sovereignty and the successor State is an already existing State. The article thus concerns cases which do not involve a union of States or merger of one State in another, and equally to not involve the emergence of a newly independent State. The moving treaty frontiers principle also operates in varying degrees in certain other contexts. But in these other contexts it functions in conjunction with other rules, while in the cases covered by the present article—the mere addition of a piece of territory to an existing State by transfer—the moving treaty frontiers rule appears in pure form. Although in a sense the rule underlies much of the law regarding succession of States in respect of treaties, the present case constitutes a particular category of succession of States, which the Commission considered should be in a separate part. Having regard to its relevance in other contexts, the Commission decided to place it in part II of the draft, immediately after the general provisions in part I.

(2) Shortly stated, the moving treaty frontiers rule means that, on a territory's undergoing a change of sovereignty, it passes automatically out of the treaty régime of the predecessor sovereign into the treaty régime of the successor sovereign. It thus has two aspects, one positive and the other negative. The positive aspect is that the treaties of the successor State begin automatically to apply in respect of the territory as from the date of the succession. The negative aspect is that the treaties of the predecessor State, in turn, cease automatically to apply in respect of the territory as from that date.

(3) The rule, since it envisages a simple substitution of one treaty régime for another, may appear *prima facie* not to involve any succession of States in respect of treaties. Nevertheless the cases covered by the rule do involve a "succession of States" in the sense that this concept is used in the present draft articles, namely a replacement of one State by another in the responsibility for the international relations of territory. Moreover, the rule is well established in State practice and is commonly included by writers among the cases of succession of

States. As to the rationale of the rule, it is sufficient to refer to the principle embodied in article 29 of the Vienna Convention on the Law of Treaties under which, unless a different intention is established, a treaty is binding upon each party in respect of its entire territory. This means generally that at any given time a State is bound by a treaty in respect of any territory of which it is sovereign, but is equally not bound in respect of territory which it no longer holds.

(4) On the formation of Yugoslavia after the First World War, the former treaties of Serbia were regarded as having become applicable to the whole territory of Yugoslavia. If some have questioned whether it was correct to treat Yugoslavia as an enlarged Serbia rather than as a new State, in State practice the situation was treated as one where the treaties of Serbia should be regarded as applicable *ipso facto* in respect of the whole of Yugoslavia. This seems to have been the implication of article 12 of the Treaty of Saint-Germain-en-Laye so far as concerns all treaties concluded between Serbia and the several Principal Allied and Associated Powers.¹³¹ The United States of America afterwards took the position that Serbian treaties with the United States both continued to be applicable and extended to the whole of Yugoslavia,¹³² while a number of neutral Powers, including Denmark, the Netherlands, Spain, Sweden and Switzerland, also appeared to have recognized the continued application of Serbian treaties and their extension to Yugoslavia. The United States position was made particularly clear in a memorandum filed by the State Department as *amicus curiae* in the case of *Ivancevic v. Artukovic*.¹³³

(5) Among more recent examples of the application of this rule may be mentioned the extension of Canadian treaties to Newfoundland upon the latter's becoming part of Canada,¹³⁴ the extension of Ethiopian treaties to Eritrea in 1952, when Eritrea became an autonomous unit federated with Ethiopia,¹³⁵ the extension of Indian treaties to the former French¹³⁶ and Portuguese possessions on their absorption into India, and the extension of Indonesian treaties to West Irian after the transfer of that territory from the Netherlands to Indonesia.¹³⁷

¹³¹ United Kingdom, *Treaty Series* (1919), No. 17 [Cmd. 461] (London, H.M. Stationery Office, 1919), p. 94.

¹³² See G. H. Hackworth, *Digest of International Law* (Washington D.C., U.S. Government Printing Office, 1940-44), vol. V, pp. 374-375; *Foreign Relations of the United States (1927)* (Washington D.C., U.S. Government Printing Office, 1942), vol. III, pp. 842-843.

¹³³ See M. M. Whiteman, *Digest of International Law* (Washington D.C., U.S. Government Printing Office, 1963), vol. 2, pp. 940-945, and especially at pp. 944-945.

¹³⁴ See, for example, *Yearbook of the International Law Commission, 1971*, vol. II (Part Two), pp. 132-135 and 176, document A/CN.4/243, paras. 85-101, and document A/CN.4/243/Add.1, para. 137.

¹³⁵ See "Summary of the practice of the Secretary-General as depositary of multilateral agreements" (ST/LEG/7), p. 63; and *Yearbook of the International Law Commission, 1970*, vol. II, p. 87, document A/CN.4/225, paras. 102-103; and *Ibid.*, 1971, vol. II (Part Two), p. 175, document A/CN.4/243/Add.1, para. 128.

¹³⁶ See, for example, *Yearbook of the International Law Commission, 1970*, vol. II, p. 93, document A/CN.4/225, paras. 127-128.

¹³⁷ *Ibid.*, p. 94, paras. 132-133.

(6) Article 10 sets out the two aspects of the moving treaty frontiers rule mentioned above. This article, like the draft articles as a whole, has to be read in conjunction with article 6 which limits the present articles to lawful situations and with the saving clause of article 31 concerning cases of military occupation, etc. Article 10 is limited to normal changes in the sovereignty or administration of territory; and article 31 makes it plain that despite the use of the words "or administration" in the opening phrase, the article does not cover the case of a military occupant. The words "or administration" have been used in order to cover cases in which the territory transferred was not under the sovereignty of the predecessor State, but only under an administering Power responsible for its international relations. As to article 6, although the limitation to lawful situations applies throughout the draft articles, some members of the Commission considered it to be of particular importance in the present connexion.

(7) *Sub-paragraph (a)* of article 10 states the negative aspect, namely that the treaties of the predecessor State cease to be in force from the date of the succession of States in respect of territory which has become part of another State. From the standpoint of the law of treaties, this aspect of the rule can be explained by reference to certain principles, such as those governing the territorial scope of treaties, supervening impossibility of performance of fundamental change of circumstances (articles 29, 61 and 62 of the Vienna Convention on the Law of Treaties). Accordingly, the rights and obligations under a treaty cease in respect of territory which is no longer within the sovereignty or administration of the State party concerned.

(8) *Sub-paragraph (a)* does not, of course, touch the treaties of the predecessor State otherwise than in respect of their application to the territory which passes out of its sovereignty or administration. Apart from the contraction in their territorial scope, its treaties are not normally affected by the loss of the territory. Only if the piece of territory concerned had been the object, or very largely the object, of a particular treaty might the continuance of the treaty in respect of the predecessor's own remaining territory be brought into question on the ground of impossibility of performance or fundamental change of circumstances. In such cases, the question should be settled in accordance with the general rules of treaty law codified by the Vienna Convention on the Law of Treaties and did not seem to require any specific rule in the context of the present draft articles. In this connexion, however, certain members recalled that under *sub-paragraph (b)* of paragraph 2 of article 62 (fundamental change of circumstances) of the Vienna Convention, a fundamental change of circumstances might not be invoked as a ground for terminating or withdrawing from a treaty "if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty".

(9) In the case of some treaties, more especially general multilateral treaties, the treaty itself may still be applicable to the territory after the succession, for the simple reason that the successor State also is a party to the

treaty. In such a case there is not, of course, any succession to or continuance of the treaty rights or obligations of the predecessor State. On the contrary, even in these cases the treaty régime of the territory is changed and the territory becomes subject to the treaty exclusively in virtue of the successor State's independent participation in the treaty. For example, any reservation made to the treaty by the predecessor State would cease to be relevant while any reservation made by the successor State would become relevant in regard to the territory.

(10) *Sub-paragraph (b)* of article 10 provides for the positive aspect of the moving treaty frontiers rule in its application to cases where territory is added to an already existing State, by stating that treaties of the successor State *are in force in respect of* that territory from the date of succession of States. Under this *sub-paragraph* the treaties of the successor State are considered as applicable of their own force in respect of the newly acquired territory. Even if in some cases the application of the treaty régime of the successor State to the newly acquired territory may be said to result from an agreement, tacit or otherwise, between it and the other States parties to the treaties concerned, in most cases the moving of the treaty frontier is an automatic process. The change in the treaty régime applied to the territory is rather assumed to be the natural consequence of its passing under the sovereignty or administration of the State now responsible for its foreign relations.

(11) Exception should be made, however, of certain treaties, for example those having a restricted territorial scope which does not embrace the territory newly acquired by the successor State. This explains the addition to *sub-paragraph (b)* of the proviso "unless it appears from the particular treaty or is otherwise established that the application of the treaty to that territory would be incompatible with its object and purpose."

(12) Lastly, article 10 should be read in conjunction with the specific rules relating to boundary régimes or other territorial régimes established by a treaty set forth in articles 29 and 30 of part V of the present draft articles.

PART III

NEWLY INDEPENDENT STATES

SECTION I. GENERAL RULE

Article 11. Position in respect of the predecessor State's treaties

Subject to the provisions of the present articles, a newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that, at the date of the succession of States, the treaty was in force in respect of the territory to which the succession of States relates.

Commentary

(1) This article formulates the general rule concerning the position of a newly independent State in respect of treaties previously applied to its territory by the predecessor State.

(2) The question of a newly independent State's inheritance of the treaties of its predecessor has two aspects: (a) whether that State is under an *obligation* to continue to apply those treaties to its territory after the succession of State and (b) whether it is *entitled* to consider itself as a party to the treaties in its own name after the succession of States. These two aspects of succession in the matter of treaties cannot in the view of the Commission be treated as if they were the same problem. If a newly independent 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 newly independent 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 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 assume 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 to determine whether such a legal obligation does exist in general international law, and it is this point to which the present article is directed.

(3) The majority of writers take the view, supported by State practice, that a newly independent State begins its life with a clean slate, except in regard to "local" or "real" obligations. The clean slate is generally recognized to be the "traditional" view on the matter. It has been applied to earlier cases of newly independent States emerging either from former colonies (i.e. the United States of America; the Spanish American Republics) or from a process of secession or dismemberment (i.e. Belgium, Panama, Ireland, Poland, Czechoslovakia, Finland). Particularly clear on the point is a statement made by 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.¹³⁸

¹³⁸ A. D. McNair, *The Law of Treaties*, rev. ed. (Oxford, Clarendon Press, 1961), p. 605. See also *Yearbook of the International Law Commission, 1970*, vol. II, p. 122, document A/CN.4/229, para. 109.

(4) 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,¹³⁹ 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.¹⁴⁰

Today the practice of States and organizations concerning the participation of newly independent States in multilateral treaties, as it has developed, may call for some qualification of that statement and for a sharper distinction to be drawn between participation in multilateral treaties in general and participation in constituent instruments of international organizations. Even so, the Secretariat's opinion, given in 1947, that Pakistan as a new State, would not have *any* of the treaty rights of its predecessor was certainly inspired by the "clean slate" doctrine and confirms that this was the "traditional" and generally accepted view at that date.

(5) Examples of the "clean slate" doctrine in connexion with bilateral treaties are to be found in the Secretariat studies on "Succession of States in respect of bilateral treaties"¹⁴¹ and in the publication *Materials on Succession of States*.¹⁴² For instance, Afghanistan invoked the "clean slate" doctrine in connexion with her dispute with Pakistan regarding the frontier resulting from the Anglo-Afghan Treaty of 1921.¹⁴³ Similarly, Argentina seems to have started from the basis of the "clean slate" principle in appreciating Pakistan's position in relation to the Anglo-Argentine Extradition Treaty of 1889,¹⁴⁴ although she afterwards *agreed* to regard the Treaty as in force between herself and Pakistan. Another if special 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.¹⁴⁵

(6) The metaphor of the "clean slate" is a convenient way of expressing the basic concept that a new State begins its international life free 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 existing State practice to be at once, too broad and too categorical.¹⁴⁶ It is too broad in that it suggests that, so far as concerns the newly independent

¹³⁹ This assumption was disputed by Pakistan.

¹⁴⁰ See *Yearbook of the International Law Commission, 1962*, vol. II, p. 101, document A/CN.4/149 and Add.1, para. 3.

¹⁴¹ See above, sect. A, para. 24.

¹⁴² United Nations, *Materials on Succession of States (op. cit.)*.

¹⁴³ *Ibid.*, p. 2.

¹⁴⁴ *Ibid.*, pp. 6-7.

¹⁴⁵ *Ibid.*, pp. 41-42; see also *Yearbook of the International Law Commission, 1950*, vol. II, pp. 206-218, document A/CN.4/19.

¹⁴⁶ See above, sect. A, para. 37.

States, 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 categorical in that it does not make clear whether it means only that a newly independent 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 newly independent State is not *entitled* to claim any right to be or become a party to any of its predecessor's treaties. As already pointed out, a newly independent State may have a clean slate in regard to any *obligation* to continue to be bound by its predecessor's treaties without it necessarily following that the newly independent State is without any *right* to establish itself as a party to them.

(7) Writers, when they refer to the co-called principle of 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 evidence of State practice supports 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 respects of its territory. It appears to the Commission, despite some learned opinion to the contrary, that on this point no difference is to be found in the practice between bilateral and multilateral treaties, including multipartite instruments of a legislative character.

(8) The Commission, as stated in article 12 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 newly independent State's *right* to be a party to a treaty concluded by its predecessor. But it seems to it very difficult to sustain the proposition that a newly independent State is to be considered as automatically subject to the obligations of multilateral treaties of a law-making character concluded by its predecessor 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 newly independent 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 newly independent State must be considered as *contractually* bound by the *treaty as a treaty*. Why, the newly independent 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 newly independent State ask that question when the actual content of the treaty is of a law-creating rather than of a law-consolidating character.

(9) State and depositary practice confirms that the clean slate principle applies also to general multilateral treaties

and multilateral treaties of a law-making character. No distinction made today on this point—even when a newly independent State has entered into a "devolution agreement" or made a "unilateral declaration"—by the Secretary-General as depositary of several general multilateral treaties. The Secretary-General does not regard himself as able automatically to list the newly independent State among the parties to general multilateral treaties of which he is the depositary and which were applicable in respect to the newly independent State's territory prior to its independence. It is only when he receives some indication of the newly independent 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 newly independent State has not entered into a devolution agreement or made a unilateral declaration of a general character.¹⁴⁷

(10) The practice of other depositaries appears also to be based upon the hypothesis that a newly independent 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. Despite the humanitarian objects of the Geneva Red Cross Conventions and the character of the law which they contain as general international law, the Swiss Federal Council has not treated a newly independent State as automatically a party in virtue of its predecessor's ratification on 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.¹⁴⁸ 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. 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.¹⁴⁹ 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.

(11) The practice of the Swiss Federal Council in regard to the Berne Convention of 1886 for the Protection of Literary and Artistic Works and the subsequent Acts revising it is the same.¹⁵⁰ The Swiss Government, as depositary, has not treated a newly independent 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 newly independent State as bound by the Convention

¹⁴⁷ *Yearbook of the International Law Commission, 1962*, vol. II, p. 122, document A/CN.4/150, para. 134.

¹⁴⁸ *Ibid.*, 1968, vol. II, pp. 32 *et seq.*, document A/CN.4/200 and Add.1 and 2, paras. 128-232.

¹⁴⁹ *Ibid.*, pp. 38 *et seq.*, paras. 152-184.

¹⁵⁰ *Ibid.*, pp. 7 *et seq.*, paras. 4-98.

without some expression of its will to continue as, or to become, a party. In one case,¹⁵¹ the Swiss Government does seem to have treated the conclusion of a general devolution agreement as sufficient manifestation of a newly independent State's will. But that seems to be the only instance in which it has acted on the basis of a devolution alone and, in general, it seems to assume the need for some manifestations of the newly independent State's will specifically with reference to the Berne Conventions. This assumption also seems 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.¹⁵²

(12) 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.¹⁵³ 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 had expressed a desire to that effect.¹⁵⁴ In the event twelve new States have expressed the desire to be considered as a party in virtue of their predecessor's participation, while three have preferred to become parties by accession. One new State expressly declared that it did not consider itself bound by either the 1889 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.

(13) The practice of the United States of America 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.¹⁵⁵

(14) 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, therefore, 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?

(15) Considerable support can be found among writers and in State practice for the view that general international 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 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. Almost all the unilateral declarations made by new States which emerged from territories 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.

(16) 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" or as "dispositive", or "real", or "localized" treaties, or as treaties creating servitudes.

(17) This seems to be confirmed by statements of the United Kingdom, by reference to whose legal concepts the framers of the devolution agreements and unilateral declarations in many cases guided themselves. The "Note on the question of treaty succession on the attainment of

¹⁵¹ See above, commentary to article 7, para. 14.

¹⁵² *Yearbook of the International Law Commission, 1968*, vol. II, pp. 54 *et seq.*, document A/CN.4/200 and Add.1 and 2, paras. 233-314.

¹⁵³ *Ibid.*, pp. 26 *et seq.*, paras. 99-127.

¹⁵⁴ *Ibid.*, p. 29, para. 113.

¹⁵⁵ United Nations, *Materials on Succession of States (op. cit.)*, pp. 224-228.

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.¹⁵⁶

(18) 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 Commission, that a newly independent State is not, *ipso jure*, bound to inherit its predecessor's treaties, whatever may be the practical advantage of continuity in treaty relations. This is the rule provided for in the present article with regard to the newly independent State's position in respect of the treaties applied to its territory by the predecessor State prior to the date of the succession of States. The newly independent State "is not bound to maintain in force" those predecessor State's treaties nor "to become a party" thereto.

(19) That general rule is without prejudice to the rights and obligations of the States concerned as set forth in the present draft, as expressly indicated by the opening proviso "Subject to the provisions of the present articles". The purpose of this proviso is twofold. First, it sets out to safeguard the newly independent State's position with regard to its participation in multilateral treaties by a notification of succession and to obtaining the continuance in force of bilateral treaties by agreement. Secondly, the proviso preserves the position of any interested State with regard to the so-called "localized", "territorial", or "dispositive" treaties dealt with in articles 29 and 30 of the present draft.

(20) The general rule in article II, as indicated, concerns only the case of newly independent States and applies subject to the above-mentioned reservation to "any treaty". It covers, therefore, multilateral as well as bilateral treaties. With regard to multilateral instruments of a law-making character or general multilateral treaties embodying principles or customary rules of international law, the Commission recognizes the desirability of not giving the impression that a newly independent State's freedom from an obligation to assume its predecessor's treaties means that it has a clean slate also in respect of principles of general unilateral law embodied in those treaties. But it felt that this point would more appropriately be covered

by including in the draft a general provisions safeguarding the application to a successor State of rules of international law to which it would be subject independently of the treaties in question. Such a general provision is contained in article 5.

SECTION 2. MULTILATERAL TREATIES

Article 12. Participation in treaties in force

1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates.

2. Paragraph 1 does not apply if the object and purpose of the treaty are incompatible with the participation of the successor State in that treaty.

3. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties, the successor State may establish its status as a party to the treaty only with such consent.

Commentary

(1) This article and the other articles of this section deal with the participation of a newly independent State, by a notification of succession, in multilateral treaties which at the date of the succession of States were in force in respect of the territory which has become the newly independent State's territory. Section 3 deals with the position of a newly independent State in relation to its predecessor's bilateral treaties.

(2) The question whether a new State is entitled to consider itself a party to its predecessor's treaties, as already pointed out in the commentary to article 11, 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 support the conclusion that a new State has a general *right of option* to be a party to certain categories of multilateral treaties in virtue of its character as a successor State. A distinction must, however, be drawn in this connexion between multilateral treaties in general and multilateral treaties of a restricted character, for it is only in regard to the former that a newly independent State appears to have an actual right of option to establish itself as a party *independently of the consent of the other States parties and quite apart from the final clauses of the treaty*.¹⁵⁷

(3) In the case of multilateral treaties in general, the entitlement of a newly independent State to become a party in its own name seems well settled, and is indeed

¹⁵⁶ International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), p. 619 [Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors, annex B]. 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, *Materials on Succession of States* (*op. cit.*)), pp. 182-183.

¹⁵⁷ See also para. 12 below.

implicit in the practice already discussed in the commentaries to articles 7, 8 and 11 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, when it has made a unilateral declaration of provisional application, and when it has given no indication as to its attitude in regard to its predecessor's treaties.¹⁵⁸ The Secretary-General does not consult the other parties to the treaties before he writes to the newly independent 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 newly independent State. He appears, therefore, to act upon the assumption that a newly independent 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 newly independent States themselves have proceeded on the basis that they do indeed possess such a right of participation.

(4) The same appears, in general, to hold good for multilateral treaties which have depositaries other than the Secretary-General. Thus, the practice followed by the Swiss Government as depositary of the Convention for the Protection of Literary and Artistic Works and subsequent Acts of revision and by the States concerned seems clearly to acknowledge that successor States, newly independent, possess a right to consider themselves parties to these treaties in virtue of their predecessor's participation;¹⁵⁹ and this is true also of the Geneva Humanitarian Conventions in regard to which the Swiss Federal Council is the depositary.¹⁶⁰ The practice in regard to multilateral conventions of which the United States of America is depositary has equally been based on a recognition of the right of a newly independent State to declare itself a party to the conventions on its own behalf.¹⁶¹

(5) Current treaty practice in cases of succession therefore seems to provide ample justification for the Commission to formulate a rule recognizing that a newly independent State may establish itself as a separate party to a general multilateral treaty, by notifying its continuance of, or succession to, the treaty. With certain exceptions, writers, it is true, do not refer—or do not refer clearly—to a successor State's *right of option* to establish itself as a party to multilateral treaties applicable in respect of its territory prior to independence. 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 already mentioned resolution of its Buenos Aires Conference,¹⁶² 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 Commission to be more consonant both with modern practice and the general law of treaties.

(6) As for the basis of the right of option of the newly independent State, it was agreed in the Commission that the treaty should be one that was *internationally applicable*, at the date of the succession of States, in respect of the territory to which the succession relates. Consequently the criterion accepted by the Commission is *that by its acts, the predecessor State should have established a legal nexus 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. The present article concerns the case in which that legal nexus is complete, namely when the treaty is *in force* in respect of the territory at the date of the succession of States. Two other cases where the legal nexus between the treaty and the territory is less complete are examined in the commentaries to article 13 (participation in treaties not yet in force) and article 14 (ratification, acceptance or approval of a treaty signed by the predecessor State).

(7) In applying the criterion referred to above, 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.¹⁶³ 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 being expressed in article 29 of the Vienna Convention on the Law of Treaties. The operation of this principle is well explained by the summary of the Secretary-General's depositary practice 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 pro-

¹⁵⁸ *Yearbook of the International Law Commission, 1962*, vol. II, p. 122, document A/CN.4/150, paras. 133-134.

¹⁵⁹ *Ibid.*, 1968, vol. II, pp. 22 *et seq.*, document A/CN.4/200 and Add.1-2, paras. 71-98.

¹⁶⁰ *Ibid.*, pp. 38 *et seq.*, paras. 152-180.

¹⁶¹ United Nations, *Materials on Succession of States (op. cit.)*, pp. 224-228.

¹⁶² See foot-note 29 above.

¹⁶³ 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.

cedures 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.¹⁶⁴

When 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 on the Law of Treaties, the treaty was binding on the predecessor State in respect of its entire territory and, therefore, in respect of all its dependent territories.¹⁶⁵ 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 newly independent States which were their dependencies at 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*.¹⁶⁶ In other words, a newly independent 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 of 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.¹⁶⁷ 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 State.

(9) 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 Commission 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 by

the Commission from the modern practice are correct, what the principle confers upon a successor State is simply a *right of option* to establish itself as a separate party to the treaty in virtue of the legal nexus established by its predecessor between the territory to which the succession of States relates 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 considered as a separate party to the treaty*. In short, a newly independent State whose territory was subject to the régime of a multilateral treaty at the date of the State's succession is entitled, simply in virtue of that fact, to establish itself as a separate party to the treaty.

(10) This general principle is not without some qualifications as to its exercise. The first concerns the constituent instruments of international organizations and treaties adopted with an international organization. In such cases, the application of the general principle is subject to the "relevant rules" of the organization in question and, notably, in the case of constituent instruments to the rules concerning acquisition of membership. This point has been dealt with in the commentary to article 4 and needs no further elaboration here.

(11) Secondly, the successor State's participation in a multilateral treaty may be actually incompatible with the object and purpose of the treaty. This incompatibility may result from various factors or a combination of factors: when participation in the treaty is indissolubly linked with membership in an international organization of which the State is not a member; when the treaty is regional in scope; or when participation in a treaty is subject to other preconditions. 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 Convention, 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.¹⁶⁸ Clearly, in cases such as this the need for a party to be a member of an international organization 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 newly independent State concerned is, in the particular circumstances, really incompatible with the regional object and purpose of the treaty.

(12) Thirdly, as already indicated,¹⁶⁹ an important distinction—analogue to that made in article 20, para-

¹⁶⁴ *Yearbook of the International Law Commission, 1962, vol. II*, pp. 122-123, document A/CN.4/150, para. 137.

¹⁶⁵ *Ibid.*, p. 125, para. 138.

¹⁶⁶ *Ibid.*, para. 139.

¹⁶⁷ For some cases where a treaty does specifically make provision for the participation of successor States in the treaty, see the commentary to article 9.

¹⁶⁸ See M.-A. Eissen, *The British Year Book of International Law, 1968-1969* (London, Oxford University Press, 1970), vol. 43, pp. 190-192.

¹⁶⁹ See para. 2 above.

graph 2, of the Vienna Convention on the Law of Treaties—has to be made in the present context between treaties drawn up by a limited number of States and other multilateral treaties. In the context of the admissibility of reservations the Commission and the United Nations Conference on the Law of Treaties took the view that the limited number of the negotiating States may show 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 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 suffice to establish such an intention. The limited number of the negotiating States combined with the object and purpose of the treaty may similarly establish an intention to confine the circle of possible parties to the negotiating States. In this case it seems logical also to conclude that the participation of a *successor* State in the treaty should be subject to the concurrence of all the parties. Sometimes these treaties may be constituent instruments of limited international organization or treaties adopted within such an organization, in which case the matter will be covered by the general reservation in article 4. But there are other cases where these factors are not present and in these cases the Commission considered that an exception must be made to the successor State's option to consider itself a party to a multilateral treaty. The appropriate rule must then be that a successor State may consider itself a party to a restricted multilateral treaty of this type only with the consent of all the parties.

(13) Having regard to the various considerations set out in the preceding paragraphs, the present article lays down in *paragraph 1*, as the *general* rule for multilateral treaties, that a newly independent State is entitled to establish its status as a party, by a notification of succession, to any multilateral treaty which at the date of the succession was in force in respect of the territory to which the succession of States relates, subject to the exceptions provided for in paragraphs 2 and 3 of the article. *Paragraph 2* then excepts from the general rule cases where it would be incompatible with the object and purpose of the treaty to allow the newly independent State to become a party. *Paragraph 3* further excepts from the general rule any treaty which under its own terms or by reason of the limited number of the negotiating States and the object and purpose of the treaty must be considered as requiring the consent of all the parties for the participation of any additional State. In such cases, the paragraph provides that the consent of all the parties to the treaty is required.

(14) The application of the article to constituent instruments of international organizations and to treaties concluded within an international organization being subject to the general provision of article 4, it is unnecessary to cover the point again here.

Article 13. Participation in treaties not yet in force

1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession, establish its

status as a contracting State to a multilateral treaty, which at the date of the succession of States was not in force in respect of the territory to which that succession of States relates, if before that date the predecessor State had become a contracting State.

2. Paragraph 1 does not apply if the object and purpose of the treaty are incompatible with the participation of the successor State in that treaty.

3. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the contracting States, the successor State may establish its status as a contracting State to the treaty only with such consent.

4. When a treaty provides that a specified number of parties shall be necessary for its entry into force, a newly independent State which establishes its status as a contracting State to the treaty under paragraph 1 shall be reckoned as a party for the purpose of that provision.

Commentary

(1) The present article, which parallels article 12, deals with the participation of a newly independent State in a multilateral treaty not yet in force at the date of the succession of States, but in respect of which at that date the predecessor State had established its consent to be bound with reference to the territory in question. In other words, the article regulates the successor State's participation in a multilateral treaty in cases when, at the date of the succession, the predecessor State although not an actual "party" to the treaty was a "contracting State".¹⁷⁰

(2) A substantial interval of time not infrequently elapses between the expression by a State of its consent to be bound by a treaty and the entry into force of the treaty. This is almost inevitable 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. In such cases, at the date of a succession of States, a predecessor State may have expressed its consent to be bound, by an act of consent extending to the territory to which the succession relates, without the treaty's having yet come into force.

(3) As already indicated,¹⁷¹ the right of option of a newly independent State to participate on its own behalf as a separate party in a multilateral treaty, under the law of succession, is based in the legal nexus formerly established by the predecessor State between the treaty and the territory. The treaty must be *internationally applicable*, at the date of the succession of States, to the territory which afterwards becomes the territory of the successor State.

(4) Sometimes this criterion is expressed in terms that might appear to require the *actual* previous application of

¹⁷⁰ For the meaning in the present draft of the terms "contracting State" and "party", see article 2, sub-paragraphs 1(k) and 1(l), of these draft articles and article 2, sub-paragraphs 1(f) and 1(g), of the Vienna Convention on the Law of Treaties.

¹⁷¹ See above, commentary to article 12, para. 6.

the treaty in respect of the territory which becomes the successor State's territory. Indeed, the letter addressed by the Secretary-General to a newly independent State drawing its attention to the treaties of which he is the depositary used the expression "multilateral treaties *applied** in [the] territory".¹⁷² In a few cases, newly independent States have also replied 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.¹⁷³ 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.

(5) 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. Indeed, in the Secretariat memorandum "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary" the practice on the matter, as established by 1962, was summarized as follows:

The lists of treaties sent to new States 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.¹⁷⁴ 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 treaty¹⁷⁵ which was not yet in force.¹⁷⁶

So far as is known to the Commission, 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 con-

trary, as will appear in the following paragraph, the Commission is of the opinion that they must be considered to have accepted it.

(6) This conclusion raises a further related question. Should the newly independent State's notification of succession be counted for the purpose of aggregating the necessary number of parties to bring the convention into force when the final clauses of the convention make the entry into force dependent on a specified number of signatures, ratifications, etc.? The Secretariat memorandum of 1962 referring to the point said 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"¹⁷⁷ of Nigeria and Sierra Leone toward the number of twenty-two.¹⁷⁸ 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 notifications of succession 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 notifications of succession by three new States. The practice of the Secretary-General as depositary therefore seems settled in favour of treating the notifications of succession of newly independent 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.

(7) The final clauses here in question normally 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 newly independent 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 defi-

¹⁷² *Yearbook of the International Law Commission, 1962*, vol. II, p. 122, document A/CN.4/150, para. 134. The International Law Association, it may be added, formulated the criterion as follows: a treaty which was "internationally in force with respect to the entity or territory corresponding with it prior to independence. . ." (International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), p. 596 [Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors]).

¹⁷³ For example, Zaire (Congo (Léopoldville)) did not consider itself bound by the Convention on the Privileges and Immunities of the United Nations on this ground (*Yearbook of the International Law Commission, 1962*, vol. II, p. 115, document A/CN.4/150, para. 74); nor did the Ivory Coast with regard to the 1953 Convention on the Political Rights of Women (*ibid.*, p. 116, para. 83).

¹⁷⁴ These two States did so at dates before the Conventions in question had come into force.

¹⁷⁵ Protocol relating to a Certain Case of Statelessness (1930). See United Nations, *Multilateral Treaties . . . 1971* (*op. cit.*), p. 410.

¹⁷⁶ *Yearbook of the International Law Commission, 1962*, vol. II, pp. 123-124, document A/CN.4/150, para. 143.

¹⁷⁷ Notification of succession.

¹⁷⁸ See *Yearbook of the International Law Commission, 1962*, vol. II, p. 124, document A/CN.4/150, para. 143.

natively accepted the obligations of the treaty before they become binding on any one State.¹⁷⁹ To adopt the contrary position would almost mean 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. The Commission concluded, therefore, that the present article should state the law in terms which accord with these considerations and with the Secretary-General's depositary practice, as now firmly established.

(8) In the light of the foregoing, the Commission decided to model the provisions of *paragraphs 1, 2 and 3* of this article along the lines of the corresponding provisions of article 12 with the adjustments required by the present context. Consequently paragraphs 1, 2 and 3 of article 13 are identical to paragraphs 1, 2 and 3 of article 12, except that: (a) the words "its status as a party" are replaced in paragraphs 1 and 3 by the words "its status as a contracting State"; (b) the words "was in force" are replaced in paragraph 1 by the words "was not in force"; and (c) the words "if before that date the predecessor State had become a contracting State" are added at the end of paragraph 1.

(9) Lastly, *paragraph 4* makes a notification of succession by a newly independent State as equivalent to a definitive signature, ratification, etc., for the entry into force of the treaty, in accordance with the conclusion reached above.

Article 14. Ratification, acceptance or approval of a treaty signed by the predecessor State

1. If before the date of the succession of States, the predecessor State signed a multilateral treaty subject to ratification and by the signature intended that the treaty should extend to the territory to which the succession of States relates, the successor State may ratify the treaty and thereby establish its status:

(a) As a party, subject to the provisions of article 12, paragraphs 2 and 3;

(b) As a contracting State, subject to the provisions of article 13, paragraphs 2, 3 and 4.

2. A successor State may establish its status as a party or, as the case may be, contracting State to a multilateral treaty by acceptance or approval under conditions similar to those which apply to ratification.

Commentary

(1) The view has been expressed in the commentaries to articles 12 and 13 that a newly independent State inherits a

¹⁷⁹ The Committee on the Succession of New States of the International Law Association in an explanatory note accompanying the draft resolution submitted to the Buenos Aires Conference in 1968 took up a position which led it to a conclusion opposite to that proposed in the present article (International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), pp. 602-603 [Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors, Notes]).

right, if it wishes, to become a party or contracting State in its own name to a multilateral treaty in virtue of the legal nexus established between the territory and the treaty by *the acts* of the predecessor State. As indicated in those commentaries, a well established practice already exists which recognizes the option of the successor State to become a party or a contracting State on the basis of its predecessor's having established its *consent to be bound*, irrespective of whether the treaty was actually in force at the moment of the succession of States. The present article deals with the case of a predecessor State's signature which was still subject to ratification, acceptance or approval when the succession of States occurred.

(2) There is, of course, an important difference between the position of a State which has definitely committed itself to be bound by a treaty and one which has merely signed it subject to ratification, acceptance or approval. The question, therefore, arises whether a predecessor State's signature, still subject to ratification, acceptance or approval, creates a sufficient legal nexus between the treaty and the territory concerned on the basis of which a successor State may be entitled to participate in a multilateral treaty under the law of succession. The Secretariat memorandum "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary" of 1962 made the following comment on this point:

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 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.¹⁸⁰

(3) A possible point of view might be that in such a case the conditions do not exist for the transmission of any obligation or right from a predecessor to a successor State.¹⁸¹ The predecessor did not have any definitive obligations or rights under the treaty at the moment of the succession of States, nor were any such obligations or rights then applicable with respect to the successor State's territory. As the International Court of Justice has stated

¹⁸⁰ *Yearbook of the International Law Commission, 1962*, vol. II, p. 124, document A/CN.4/150, para. 151.

¹⁸¹ This seems to have been the view on the matter taken by the International Law Association's Committee on the Succession of New States. It should be recalled, however, that the Association took the position that a legal nexus existed between the treaty and the territory when the treaty was *in force* in respect of the territory at the date of succession of States (see foot-note 172 above). From this standpoint it was consistent for the Association to consider that a legal nexus did not exist on the basis of a bare predecessor State's signature subject to ratification, acceptance or approval.

on several occasions,¹⁸² a signature subject to ratification, acceptance or approval does not bind the State. This is also the law codified by article 14 of the Vienna Convention on the Law of Treaties.

(4) On the other hand, the opinion of the International Court of Justice both on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide¹⁸³ and article 18 of the Vienna Convention on the Law of Treaties do recognize that a signature subject to ratification creates for the signatory State certain limited obligations of good faith and a certain legal nexus in relation to the treaty. Thus, it seems possible to justify the recognition of the option of a newly independent 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.

(5) This solution, the most favourable both to successor States and to the effectiveness of multilateral treaties, is the one embodied in the present article, notwithstanding doubts expressed by some members of the Commission as to its justification. The article has been included in the draft to enable Governments to express their views on the matter so that the Commission may reach a clear conclusion on this point when it undertakes its revision of the present draft. If the opposite solution were adopted the practical difference would appear to be marginal, because occasions for the exercise of the right provided for in the article are likely to be rare. Moreover, not only is the number of possible cases likely to be small but in many cases the treaty will normally be open to accession by the newly independent State. The question had a special interest some years ago in relation to certain League of Nations treaties, but the participation of newly independent States in those treaties ceased to present any problem as a result of the adoption by the General Assembly of its resolution 1903 (XVIII) of 18 November 1963, following the study of the problem made by the International Law Commission in its 1963 report to the Assembly.¹⁸⁴

(6) The question, however, is a general one and some members of the Commission felt that the possibility of a successor State's liberty to ratify a treaty on the basis of its predecessor's signature assuming importance in future in connexion with multilateral treaties could not be altogether excluded. 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 cited from the Secretariat memorandum¹⁸⁵ seems to leave open the question whether a successor State is entitled to ratify such a treaty.

¹⁸² For example, in the North Sea Continental Shelf Cases (*I.C.J. Reports 1969*, p. 3).

¹⁸³ *I.C.J. Reports 1951*, p. 28.

¹⁸⁴ *Yearbook of the International Law Commission, 1963*, vol. II, pp. 217 *et seq.*, document A/5509, paras. 18-50.

¹⁸⁵ See para. 2 above.

(7) In the light of the above considerations, the present article provides that, if before the date of the succession of States, the predecessor State signed a multilateral treaty subject to ratification, acceptance or approval, and by the signature intended that the treaty should extend to the territory to which the succession of States relates, the newly independent State may ratify, accept or approve the treaty and thereby establish its status as a "party" if the treaty was in force, or as a "contracting State" if the treaty was not yet in force.

(8) Lastly, the Commission considered that even on the assumption of the adoption of this article, it would not be appropriate to regard the successor State as bound by the obligation of good faith contained in article 18 of the Vienna Convention until it had at least established its consent to be bound and become a contracting State. In other words, the recognition of a successor State's right to ratify, etc., a treaty on the basis of its predecessor's signature ought not to have the result of bringing the successor State within article 18, sub-paragraph (a), of the Vienna Convention.

Article 15. Reservations

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining any reservation which was applicable in respect of the territory in question at the date of the succession of States unless:

(a) In notifying its succession to the treaty, it expresses a contrary intention or formulates a new reservation which relates to the same subject matter and is incompatible with the said reservation; or

(b) The said reservation must be considered as applicable only in relation to the predecessor State.

2. When establishing its status as a party or a contracting State to a multilateral treaty under article 12 or 13, a newly independent State may formulate a new reservation unless:

(a) The reservation is prohibited by the treaty;

(b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

3. (a) When a newly independent State formulates a new reservation in conformity with the preceding paragraph the rules set out in articles 20, 21, 22 and article 23, paragraphs 1 and 4, of the Vienna Convention on the Law of Treaties apply.

(b) However, in the case of a treaty falling under the rules set out in paragraph 2 of article 20 of that Convention, no objection may be formulated by a newly independent 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 on the Law of Treaties. 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.

(2) Whenever a newly independent State is to be considered as a party to a multilateral treaty, under the law of succession, pure 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 the law of succession 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 of the treaty. 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.

(3) The Secretariat studies entitled "Succession of States to multilateral treaties"¹⁸⁶ contain some evidence of practice in regard to reservations. Some cases concern the Berne Convention for the Protection of Literary and Artistic Works. Thus, the United Kingdom made a reservation to the Berlin Act (1908) regarding retroactivity on behalf of itself and all its dependent territories with the exception of Canada; France, on behalf of itself and all its 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 at the date of 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.¹⁸⁷

Another case relates to the Geneva Humanitarian Conventions of which the Swiss Government is also the depositary. No mention is made of reservations in the final clauses of these Conventions, but reservations have been formulated by a considerable number of States.¹⁸⁸ 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).¹⁸⁹ 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.¹⁹⁰ The notifications of these States do not refer explicitly to the United Kingdom's reservation. The point of departure for all these States was however 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 for the Protection of Literary and Artistic Works and subsequent Acts of revision, seems to have assumed that reservations are inherited automatically in cases of succession in the absence of any evidence of their withdrawal.

(4) The practice of successor States in regard to treaties for which the Secretary-General is the depositary appears to have been fairly flexible.¹⁹¹ 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.¹⁹² In such a case the reservation is, of course, to be regarded as an entirely new reservation so far as concerns the

¹⁸⁶ *Ibid.*, p. 35, para. 138.

¹⁸⁹ United Nations, *Treaty Series*, vol. 75, p. 287.

¹⁹⁰ *Yearbook of the International Law Commission, 1968*, vol. II, pp. 41-42, document A/CN.4/200 and Add.1-2, paras. 170-174.

¹⁹¹ United Nations, *Multilateral treaties . . . 1971 (op. cit.)* and United Nations, *Multilateral treaties in respect of which the Secretary-General performs depositary functions, Annex: Final Clauses* (United Nations publication, Sales No. E.68.V.4).

¹⁹² 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 United Nations, *Multilateral treaties . . . 1971 (op. cit.)*, pp. 232-233.

¹⁸⁶ See above, sect. A, para. 24.

¹⁸⁷ *Yearbook of the International Law Commission, 1968*, vol. II, pp. 24-25, document A/CN.4/200 and Add.1-2, paras. 86-92.

newly independent 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 only in cases of notification of succession that problems arise.

(5) Equally, when transmitting a notification of succession newly independent States have not infrequently repeated or expressly maintained a reservation made by their predecessor; 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;¹⁹³ and Cyprus and Zambia expressly confirmed their maintenance of that same reservation which had likewise been made applicable to each of their territories.¹⁹⁴ Other examples are the repetition by Malta of a United Kingdom objection to a reservation to the 1961 Vienna Convention on Diplomatic Relations;¹⁹⁵ 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;¹⁹⁶ and by Cyprus, Jamaica and Sierra Leone of United Kingdom reservations made to the 1949 Convention on Road Traffic, with annexes.¹⁹⁷ In the last mentioned case, Cyprus and Jamaica omitted from the repeated reservation a territorial application clause irrelevant to their own circumstances.

(6) 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 Convention 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.¹⁹⁸ Malta, also after an interval of some weeks, similarly informed the Secretary-General.¹⁹⁹ Both these States acted in the same manner in regard to their predecessors' reservations to the Convention Concerning Customs Facilities for Touring (1954).²⁰⁰ 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 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).²⁰¹ The Swiss Government²⁰² also 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.

(7) 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-General²⁰³ 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), the application of which had been extended to her territory before independence without any reservation whatever. Malta's notification nevertheless contained a reservation on 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 14.²⁰⁴

(8) On 25 February 1969 Botswana notified the Secretary-General²⁰⁵ 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

¹⁹³ *Ibid.*, p. 93.

¹⁹⁴ *Ibid.*, pp. 91 and 92 respectively.

¹⁹⁵ *Ibid.*, p. 51.

¹⁹⁶ *Ibid.*, pp. 224 and 225.

¹⁹⁷ *Ibid.*, pp. 251, 252 and 253 respectively.

¹⁹⁸ *Ibid.*, p. 236, foot-note 9.

¹⁹⁹ *Ibid.*, p. 237, foot-note 10.

²⁰⁰ *Ibid.*, p. 229, foot-notes 11 and 12.

²⁰¹ See United Nations, *Juridical Yearbook, 1963* (United Nations publication, Sales No. 65.V.3), pp. 181-182.

²⁰² See para. 3 above.

²⁰³ Secretary-General's circular letter of 16 August 1968 (C.N. 123, 1968, Treaties-2).

²⁰⁴ Secretary-General's circular letter of 3 December 1968 (C.N. 182, 1968, Treaties-4).

²⁰⁵ Secretary-General's circular letter of 21 May 1969 (C.N.80, 1969, Treaties-1).

made by the United Kingdom which Botswana was maintaining.

(9) On 18 July 1969 Mauritius informed the Secretary-General²⁰⁶ 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' two reservations to the interested States.

(10) 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, 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.* Accordingly, 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.

(11) The practice examined in the preceding paragraphs 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.

(12) A newly independent 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. The formulation of new or revised reservations would appear, however, not very consistent with the notion of a "succession" to the predecessor State's rights and obligations with respect to the territory. But it does appear compatible with the idea that a successor State, by virtue simply of the previous application of the treaty to its territory, is entitled to or has a right to become a separate party in its own name. So far as is known, no objection has been made by any State to the practice in question or to the Secretary-General's treatment of it. 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 newly independent States in multilateral treaties, while seeking to protect the rights of other States under the general law of reservations.

(13) 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",²⁰⁷ 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*.²⁰⁸ Even the information published in *Multilateral treaties in respect of which the Secretary-General performs depositary functions*²⁰⁹ 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 Zaire, when it notified its succession to the 1948 Convention on the Prevention and Punishment of the Crime 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

²⁰⁷ *Yearbook of the International Law Commission, 1968*, vol. II, p. 1, document A/CN.4/200 and Add.1-2; *ibid.*, 1969, vol. II, p. 23, document A/CN.4/210; and *ibid.*, 1970, vol. II, p. 61, document A/CN.4/225.

²⁰⁸ United Nations, *Materials on Succession of States (op. cit.)*.

²⁰⁹ United Nations, *Multilateral treaties . . . 1971 (op. cit.)*.

²⁰⁶ Secretary-General's circular letter of 11 September 1969 (C.N. 168, 1969, Treaties-5).

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 obligations under this paragraph. Malta, an ex-United Kingdom dependency which became a party by succession, repeated the terms of this declaration in its notification of succession.²¹⁰

(14) According to the provisions of the Vienna Convention on the Law of Treaties concerning objections to reservations (article 20, paragraph 4 (b), in conjunction with article 21, paragraph 3),²¹¹ unless the objecting State has definitely indicated that by its objection it means to stop the entry into force of the treaty as between the two States, 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. But, if an objection has been accompanied by an indication that it is to preclude the entry into force of the treaty as between the objecting State and the reserving State, the treaty will not have been in force at all in respect of the successor State's territory at the date of the succession of States *in relation to the reserving State*. The evidence of practice, however, does not seem to indicate any great concern on the part of newly independent States with the objections of their predecessor to reservations formulated by other States. The simplest course might be to treat an objection 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.

(15) In the light of the considerations in the foregoing paragraphs and having regard to the nature of modern multilateral treaties and to the system of law governing reservations in articles 19 to 23 of the Vienna Convention on the Law of Treaties, the Commission decided to adopt a pragmatic and flexible approach to the treatment of reservations and objections thereto in the context of the present draft articles on succession of States in respect of treaties. When a newly independent State transmits a notification of succession, 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 at 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.

(16) 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 Commission concluded that for various reasons such a presumption should be made. First, the presumption of an intention to maintain the reservations was indicated by the very concept of succession to the predecessor's treaties. Secondly, a State is in general not to be understood as having undertaken more onerous obligations unless it has unmistakably indicated an intention to do so; and to treat a successor State, on the basis of its mere silence, as having dropped its predecessor's reservations would be to impose upon it a more onerous obligation. Thirdly, if 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) a contrary intention is expressed by the successor State (*sub-paragraph a*); (b) the successor State formulates a new reservation which relates to the same subject matter and is incompatible with the predecessor State's reservation (*sub-paragraph a*); (c) the predecessor State's reservation must be considered as applicable only in relation to itself (*sub-paragraph b*).²¹² In the case of these exceptions the presumption of an intention to maintain the predecessor State's reservation is thus negated.

(17) *Paragraph 2* of the article provides for the case where the successor State formulates new reservations of its own when establishing its status as a party or a contracting State to a multilateral treaty under articles 12 or 13 of the present draft articles. Logically, as already pointed out, there may be said to be some inconsistency in claiming to become a party or a contracting State in virtue of the predecessor's act and in the same breath 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 in law as 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

²¹⁰ *Ibid.*, p. 53.

²¹¹ 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.

²¹² Examples of reservations appropriate only in relation to the predecessor State are United Kingdom reservations regarding the extension of the treaty to dependent territories.

is the one embodied in paragraph 2 of this article. It corresponds to the practice of the Secretary-General as depositary, and it has the advantage of making the position of a newly independent 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 newly independent State in any case where the treaty is not, for technical reasons, open to its participation by any other procedure than succession. Of course, the possibility for a successor State to formulate new reservations in a notification of succession is subject to the limitations of the general law governing the formulation of reservations by any State, namely by article 19 of the Vienna Convention on the Law of Treaties whose sub-paragraphs (a), (b) and (c) are incorporated in paragraph 2 of the present article.

(18) *Sub-paragraph 3 (a)* of article 15 goes on to lay down that when a newly independent State formulates a new reservation in conformity with paragraph 2 of the article, the rules set out in articles 20, 21, 22 and 23, paragraphs 1 and 4,²¹³ of the Vienna Convention on the Law of Treaties apply. In other words, the general law of treaties concerning acceptance of and objections to reservations, legal effects of reservations and of objections to reservations, withdrawal of reservations and of objections to reservations, and relevant rules of the procedure regarding reservation will be applicable. Although some opposition was expressed to the method of drafting by reference, the Commission decided to follow that method because to reproduce in the paragraph all the provisions in question would have rendered article 15 very long and heavy. The Commission also took into account the fact that the present draft articles was intended to complement the articles on the general law of treaties contained in the Vienna Convention and to form part of a coherent codification of the whole law of treaties. At any rate, the references to the Vienna Convention in the present article will give an opportunity to Governments to express their views on the whole question of drafting by reference in the context of codification.

(19) Lastly, *sub-paragraph 3 (b)* deals with a specific case, namely when the predecessor State itself has "accepted" the reservation and all other State parties have done likewise, in the context of a multilateral treaty of the kind envisaged in article 20, paragraph 2, of the Vienna Convention on the Law of Treaties. In such a case, 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) provides that in cases falling under article 20, paragraph 2, of the Vienna Convention no objection may be formulated by a newly independent State to a reservation which has been accepted by all the parties to the treaty.

Article 16. Consent to be bound by part of a treaty and choice between differing provisions

1. Except as provided in paragraphs 2 and 3, when a newly independent State establishes its status as a party or contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining the predecessor State's:

(a) Consent, in conformity with the treaty, to be bound only by part of its provisions; or

(b) Choice, in conformity with the treaty, between differing provisions.

2. When so establishing its status as a party or contracting State, a newly independent State may, however, declare its own choice in respect of parts of the treaty or between differing provisions under the conditions laid down in the treaty for making any such choice.

3. A newly independent State may also exercise, under the same conditions as the other parties or contracting States, any right provided for in the treaty to withdraw or modify any such choice.

Commentary

(1) This article deals with questions analogous to those covered in article 15. It refers to cases where a treaty permits a State to express its consent to be bound only by part of a treaty or to make a choice between differing provisions, that is, to the situations envisaged in paragraphs 1 and 2, respectively, of article 17 of the Vienna Convention on the Law of Treaties. If its predecessor State has consented to be bound only by part of a treaty or, in consenting to be bound, has declared a choice between differing provisions, the question arises as to 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 to be bound only by part of a treaty is furnished by the 1949 Convention on Road Traffic, article 2, paragraph 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.²¹⁴ When extending the application of the Convention to Cyprus and Sierra Leone, the United Kingdom specifically made that extension subject to the same exclusions.²¹⁵ In the case of Malta, on the other hand, the declaration excluded only annex 1,²¹⁶ while in the case of Jamaica the declaration contained a reservation on a certain point but made no allusion to annexes 1 and 2.²¹⁷ On becoming independent, these four countries transmitted to the Secretary-General notifications of succession to the Convention. Three of them, Cyprus, Malta and Sierra Leone, accompanied their notifications with declarations reproducing the particular exclusions in force in respect of their territories

²¹³ Paragraphs 2 and 3 of article 23 of the Vienna Convention are irrelevant in the present context.

²¹⁴ See United Nations, *Multilateral treaties . . . 1971 (op. cit.)*, p. 253.

²¹⁵ *Ibid.*, pp. 255 and 257.

²¹⁶ *Ibid.*, p. 256.

²¹⁷ *Ibid.*

before independence.²¹⁸ Jamaica, on the other hand, to which the exclusions had not been applied before independence, did not content itself with simply reproducing the reservation made by the United Kingdom on its behalf; it added a declaration excluding annexes 1 and 2.²¹⁹

(3) The 1949 Convention on Road Traffic furnishes also an example of choice between 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.²²⁰ These declarations were reproduced by both countries in their notifications of succession.²²¹ Malta, in respect of which no such declaration had been made, said nothing on the matter in its notification. Jamaica, on the other hand, in respect of which also no such declaration had been made,²²² added to its notification a declaration in terms similar to those of Cyprus and Sierra Leone.²²³

(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.²²⁴ 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.²²⁵ 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.²²⁶ France, in contrast with the United Kingdom, specified the narrower form of obligation "in Europe"; and it was in the narrower form that it extended the Convention to all its dependent territories, twelve of which afterwards transmitted notifications of succession to the Secretary-General.²²⁷ 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 elsewhere".²²⁸ 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 Conven-

tion to their territory. For not long after notifying their succession to the Secretary-General, three²²⁹ of them informed him of the extension of their obligations under the Convention by the adoption of the wider formula; and four others²³⁰ did the same after intervals varying from eighteen months to nine years. The remaining one country²³¹ has not changed its notification and is 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 its dependent territories.²³² In 1960 Malaysia and in 1966 Malta notified the Secretary-General²³³ of their succession of 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,²³⁴ 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 has been extended to the territory by her predecessor.²³⁵

(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 article²³⁶ 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

²¹⁸ *Ibid.*, pp. 251, 252 and 253.

²¹⁹ *Ibid.*, p. 252.

²²⁰ *Ibid.*, pp. 255 and 257.

²²¹ *Ibid.*, pp. 251 and 253.

²²² *Ibid.*, p. 256.

²²³ *Ibid.*, p. 252.

²²⁴ *Ibid.*, p. 90.

²²⁵ *Ibid.*, p. 98.

²²⁶ *Ibid.*, pp. 91, 92 and 93.

²²⁷ *Ibid.*, p. 90 and foot-note 4.

²²⁸ Algeria, Guinea, Morocco and Tunisia (*ibid.*, p. 90, foot-note 3).

²²⁹ Cameroun, Central African Republic and Togo (*ibid.*, p. 90, foot-note 4).

²³⁰ Dahomey, Ivory Coast, Niger, Senegal (*ibid.*).

²³¹ Congo (*ibid.*, p. 90).

²³² *Ibid.*, pp. 427-428.

²³³ The functions of the depositary had been transferred to him on the dissolution of the League of Nations.

²³⁴ United Nations, *Multilateral treaties . . . 1971 (op. cit.)*, p. 438.

²³⁵ *Ibid.*, p. 439.

²³⁶ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 76, document A/CN.4/200 and Add.1-2, para. 330.

both the newly independent States.²³⁷ A somewhat different, but still analogous, form of election is offered to a party to GATT under Article XXXV, paragraph 1, which provides:

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 1965, Belgium, France and the United Kingdom all invoked this provision and thereby excluded the application of GATT in their relations with Japan.²³⁸ 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.²³⁹

(8) The Commission came to the conclusion that the same general considerations apply here as in the case of reservations. If, therefore, a newly independent State transmits a notification of succession without referring specifically to its predecessor's choice in respect of parts of the treaty or between differing provisions, and without declaring a 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 choice made by its predecessor. The Secretary-General normally seeks to obtain clarification of the newly independent 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 is both logical and necessary (otherwise, there might be no means of determining which version of the provisions was binding on the newly independent State) to consider the newly independent State as maintaining the choice of its predecessor. *Paragraph 1* of article 16 accordingly states the general rule in terms of a presumption in favour of the maintenance of the predecessor's choice.

(9) On the other hand, for reasons similar to those given in the case of reservations, the Commission was of the opinion that a State notifying its succession to a multilateral treaty should have the same rights of 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 not as an automatic replacement 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 can be no objection to allowing a successor State the same rights of choice as it

would have under the terms of the treaty if it were becoming a party by accession. *Paragraph 2* of article 16 accordingly permits a State, when notifying its succession, to exercise any right of choice provided for in the treaty under the same conditions as the other parties.

(10) Treaties which accord a right of choice in respect of parts of the treaty or between differing provisions not infrequently provide for a power afterwards to modify the choice.²⁴⁰ Indeed where the 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 a choice in force in respect of its territory; and *paragraph 3* of article 16 so provides.

Article 17. Notification of succession

1. A notification of succession in respect of a multilateral treaty under article 12 or 13 must be made in writing.

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 communicating it may be called upon to produce full powers.

3. Unless the treaty otherwise provides, the notification of succession shall:

(a) If there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;

(b) 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;

(c) If transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary.

Commentary

(1) Article 17 concerns the procedure through which a newly independent State may exercise its right under article 12 or 13 to establish its status as a party or contracting State to a multilateral treaty by way of succession.

(2) An indication of the practice of the Secretary-General in the matter may be found in the letter which he addresses to newly independent States inquiring as to their intentions concerning treaties of which he is the depositary. This letter contains the following passage:

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.*²⁴¹

²⁴⁰ 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).

²⁴¹ See *Yearbook of the International Law Commission, 1962*, vol. II, p. 122, document A/CN.4/150, para. 134.

²³⁷ *Ibid.*, p. 82, para. 362.

²³⁸ *Ibid.*, para. 359.

²³⁹ *Ibid.*, paras. 360-361.

However, although the notifications received by the Secretary-General have for the most part been signed by the Head of State or Government or by the Minister for Foreign Affairs, 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,²⁴² and these have been accepted as sufficient by the Secretary-General.

(3) 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.

(4) The depositary practice of the Swiss Government also appears to accept as adequate any communication which expresses authoritatively the will of a newly independent State to continue to be bound by the treaty. Thus, in the case of the Berne Convention for the Protection of Literary and Artistic Works and its subsequent Acts of revision, of which it is the depositary, the Swiss Government has accepted the communication of a "declaration of continuity" as the normal procedure for a newly independent State to adopt today in exercising its right to become a party by succession.²⁴³ 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 newly independent States have become parties by succession.²⁴⁴ 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 newly independent 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.

²⁴² *Ibid.*, p. 125, para. 162.

²⁴³ *Ibid.*, 1968, vol. II, p. 22, document A/CN.4/200 and Add.1-2, para. 72.

²⁴⁴ *Ibid.*, p. 50, para. 215. The Geneva Humanitarian Conventions, it should be pointed out, also allow simplified forms of "accession" (*ibid.*, para. 214).

(5) The practice of other depositaries is 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".²⁴⁵ 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 newly independent State's will to be considered as a party communicated by it in a diplomatic note or letter.²⁴⁶

(6) In some instances the Swiss Government has accepted a notification not from the newly independent State itself but from the predecessor 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,²⁴⁷ and in 1937 when the United Kingdom notified to it the participation of Burma in the Geneva Humanitarian Conventions of 1929.²⁴⁸ 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.

(7) But 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, no general conclusion should be drawn from these cases that the notification of a predecessor State is *as such* sufficient evidence of the newly independent State's will to be considered as continuing to be bound by a treaty. Clearly, a newly independent State in the early days of its independence may find it convenient to employ the diplomatic services of the predecessor State for the purpose of making a communication to a depositary.²⁴⁹ But every consideration of principle—and not least the principles of independence and self-determination—demands that the act expressing a newly independent State's will to be considered a party to a treaty in the capacity of a successor State should be its own and not that of the predecessor State. In other words, a notification of succession, in order to be effective, must either emanate directly from the competent authorities of the newly independent State or be accompanied by evidence that it is communicated to the depositary expressly by direction of those authorities. If the Swiss Government's

²⁴⁵ United Nations, *Materials on Succession of States (op. cit.)*, p. 224.

²⁴⁶ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 31, document A/CN.4/200 and Add.1-2, para. 124.

²⁴⁷ *Ibid.*, p. 12, paras. 22-23.

²⁴⁸ 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).

²⁴⁹ This was so in the case of the former British Dominions.

acceptance of the Netherlands Government's communication regarding Indonesia's succession to the Berne Convention, mentioned in the preceding paragraph, is to be understood as based upon a different view, it is not a precedent which could 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 newly independent State.²⁵⁰

(8) As was indicated above, a newly independent State may notify its succession in respect of a treaty not only under article 12, when its predecessor is a party to the treaty at the date of succession, but also under article 13, when its predecessor is a contracting State. For this reason a "notification of succession" is defined in article 2, subparagraph 1 (g), as meaning in relation to a multilateral treaty "any notification, however phrased or named, made by a successor State to the parties or, as the case may be, contracting States or to the depositary expressing its consent to be considered as 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? Although the two cases are not exactly parallel, the Commission considered that guidance may be found in article 67 of the Vienna Convention on the Law of Treaties, which contains provision 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).

(9) Accordingly, the phraseology of *paragraphs 1 and 2* of article 17 is inspired by that in article 67 of the Vienna Convention. They provide that a notification of succession under article 12 or 13 must be made in writing and that, if it is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers. *Paragraph 3*, which parallels article 78 of the Vienna Convention, adds that, if there is no depositary, the notification shall be transmitted direct to the States for which it is intended, or, if there is a depositary, to the latter. In each case, the paragraph specifies the moment at which the notification shall be considered as having been made.

Article 18. Effects of a notification of succession

1. Unless a treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession under article 12 or 13 shall be considered a party or, as the case may be, contracting State to the treaty:

(a) On its receipt by the depositary; or

(b) If there is no depositary, on its receipt by the parties or, as the case may be, contracting States.

2. When under paragraph 1 a newly independent State is considered a party to a treaty which was in force at the date of the succession of States, the treaty is considered as being in force in respect of that State from the date of the succession of States unless;

(a) The treaty otherwise provides;

(b) In the case of a treaty which falls under article 12, paragraph 3, a later date is agreed by all the parties;

(c) In the case of other treaties, the notification of succession specifies a later date.

3. When under paragraph 1 a newly independent State is considered a contracting State to a treaty which was not in force at the date of the succession of States, the treaty enters into force in respect of that State on the date provided by the treaty for its entry into force.

Commentary

(1) The present article deals with the legal effects of a notification of succession by a newly independent State, made under articles 12 or 13 of the present draft articles. Three articles of the Vienna Convention on the Law of Treaties have particularly to be borne in mind in regard to this matter: 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.

(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 17 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 sub-paragraphs, therefore, the legal nexus between the notifying State and any other State 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,

²⁵⁰ *Yearbook of the International Law Commission, 1968*, vol. II, pp. 13-14, document A/CN.4/200 and Add.1-2, paras. 26-31.

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 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, where the treaty provides for notification to the other contracting States, article 78 of the Vienna Convention 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 9 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, paragraph (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 newly independent State and any other interested State will not be established until the receipt of the notification by the latter.

(5) *Paragraph 1* of this article, therefore, states that "unless a treaty otherwise provides or it is otherwise agreed", when a newly independent State makes a notification of succession, under articles 12 or 13 of the present articles, it shall be considered a party or, as the case may be, a contracting State to the treaty upon the receipt of the notification by the depositary or, if there is no depositary, upon the receipt of the notification by the parties or the contracting States concerned.

(6) The moment of the establishment of the newly independent State's status as a "party" or a "contracting State" to a multilateral treaty is not necessarily the same as the moment of the entry into force of the treaty with respect to that State. 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 treaty practice appears rather to confirm that, on transmitting a notification of succession a newly independent State is to be considered as being a party to the treaty *from the date of independence*. The Secretariat memorandum "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary" comments on this point as follows:

In general, new States that have recognized that they continue to be bound by treaties have considered themselves bound from the time of their attainment of independence. With regard to international labour conventions, however, it is the custom for new States to consider themselves bound only as of the date on which they are admitted to the International Labour Organisation.²⁵¹

Furthermore, the letter sent by the Secretary-General to newly independent 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 . . .²⁵²

It follows that periods of delay are not treated as relevant to notifications of succession in the depositary practice of the Secretary-General. 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, the date of 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

²⁵¹ See *Yearbook of the International Law Commission, 1962*, vol. II, p. 126, document A/CN.4/150, para. 164.

²⁵² *Ibid.*, p. 122, para. 134.

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.

(8) The statement in the Secretariat memorandum quoted above regarding labour conventions needs a word of explanation. 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*.

(9) 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 Berne Convention for the Protection of Literary and Artistic Works and its subsequent Acts of revision a newly independent 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.²⁵³ 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*, it is regarded as a party only from the date on which the instrument of accession takes effect.²⁵⁴ In the case of the Geneva Humanitarian Conventions, the rule now followed by the Swiss Federal Council is that a newly independent State which transmits a notification of succession is to be considered as a party from the date on which it attained independence; and it now usually states this when registering the notification with the United Nations Secretariat.²⁵⁵

(10) 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 date of their own independence but from that of

their predecessor State's ratification or accession.²⁵⁶ The depositary practice of the United States of America is to recognize the right of new States "to declare themselves bound uninterruptedly by multilateral treaties of a non-organizational type concluded in their behalf by the parent State . . .".²⁵⁷ Giving examples of this practice, the United States mentions Ceylon and Malaya as cases where newly independent States have explicitly taken the position that they consider themselves as parties to the International Air Services Transit Agreement (1944) as from the date of its acceptance by their predecessor, the United Kingdom,²⁵⁸ and it lists Pakistan as a case where the newly independent State was considered to have become a party as from the date of independence—the date of its partition from India.²⁵⁹

(11) The practice is therefore consistent in applying the principle of continuity 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 newly independent State attains its statehood and acquires its international responsibility for the territory to which the succession relates. The concept of succession and continuity are fully satisfied if a newly independent State's notification of succession is held to relate back to the date of independence, for the result is that the newly independent 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 newly independent State responsible internationally for the *defaults* of its predecessor in the performance of the treaty prior to succession. This seems excessive, and it is difficult to believe the newly independent 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 newly independent States are, for the most part, State which had entered into a "devolution agreement" with their predecessor State.²⁶⁰ But it is equally difficult to believe that, by entering into a devolution agreement in however wide terms,²⁶¹ they intended to do

²⁵⁶ *Ibid.*, p. 31, para. 125.

²⁵⁷ United Nations, *Materials on Succession of States (op. cit.)*, p. 224.

²⁵⁸ *Ibid.*, p. 225.

²⁵⁹ *Ibid.*

²⁶⁰ For example, Ceylon and Cyprus.

²⁶¹ 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 [in the new State], be assumed by the Government of [the new State]."

²⁵³ *Ibid.*, 1968, vol. II, pp. 22-23, document A/CN.4/200 and Add.1-2, paras. 78-82.

²⁵⁴ One month after the deposit of the instrument (*ibid.*, p. 23, para. 81).

²⁵⁵ *Ibid.*, pp. 51-52, paras. 219-224. Only in one early case (Transjordan), has the Swiss Federal Council treated the date of notification as the date from which the provisions of the Convention bound the new State (*ibid.*, p. 52, para. 223).

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.

(12) In the light of these considerations *paragraph 2* of the present article lays down that when under *paragraph 1* of the article a newly independent State is considered a party to a multilateral treaty *in force* at the date of the succession of States, the treaty is considered as being in force in respect of that State *from the date of the succession of States*, except in cases falling under the provisions in sub-paragraphs (a), (b) and (c) of *paragraph 2*. This presumption, which implies a deviation from the general rule in *paragraph 3* of *article 24* of the Vienna Convention on the Law of Treaties, seems justified in the light of existing practice of the very purpose normally aimed at by a notification of succession. It is a presumption which may be negated by the provisions of the treaty itself (sub-paragraph (a)) or, in certain specified cases, by the agreement of the parties to the treaty (sub-paragraph (b)) or by the newly independent State's will (sub-paragraph (c)).

(13) The exception in *sub-paragraph 2* (a) is the same as in *paragraph 3* of *article 24* of the Vienna Convention. The provisions of the treaty in question prevail in the matter. For example, if in a case falling under *article 9* of the present articles the treaty should not only provide in advance for notifications of succession but also prescribe a period of delay before the entry into force of the treaty in respect of the notifying State, the treaty provisions would apply and the treaty will enter into force for that State after the expiry of the period of delay.

(14) *Sub-paragraph 2* (b) concerns the specific case of a multilateral treaty which under its own terms, or by reason of the limited number of the negotiating States and the object and purpose of the treaty, must be considered as requiring the consent of all the parties for the participation of any other State. *Sub-paragraph 2* (b) preserves the freedom of the parties to these treaties to agree upon a date later than the date of the succession of States. If they do so, the treaty is considered to be in force in respect of the notifying State at the later date agreed upon by the parties.

(15) *Sub-paragraph 2* (c) allows the notifying State the possibility of making its participation in the treaty effective from the date of its notification rather than of its independence. When the notification of succession relates to multilateral treaties other than those mentioned in the preceding paragraph, a newly independent State is entitled to specify in its notification a date later than the date of the succession of States and such later date will be then considered as the date from which the treaty is in force for that State.

(16) Lastly, *paragraph 3* of the article provides that when a newly independent State is considered a contracting State to a multilateral treaty which *was not in force* at the date of the succession of States, the treaty enters into force in respect of the newly independent State on the date provided by the treaty for its entry into force. This rule corresponds to that contained in *paragraph 1* of *article 24* of the Vienna Convention.

SECTION 3. BILATERAL TREATIES

Article 19. Conditions under which a treaty is considered as being in force

1. A bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as being in force between a newly independent State and the other State party in conformity with the provision of the treaty when:

(a) They expressly so agree; or

(b) By reason of their conduct they are to be considered as having so agreed.

2. A treaty considered as being in force under *paragraph 1* applies in the relations between the successor State and the other State party from the date of the succession of States, unless a different intention appears from their agreement or is otherwise established.

Commentary

(1) This article deals with the conditions under which a bilateral treaty which was in force between the predecessor State and another State at the date of the succession of States is considered as being in force between the newly independent State and the other State party. As already indicated,²⁶² the question whether a successor State may have a *right* to consider itself a party or a contracting State in its own name to treaties in force at the date of the succession of States is separate and different from the question whether it is under an *obligation* to do so. *Article 11* of the present draft lays down the general rule that a newly independent State is not *ipso jure* bound by its predecessor State's treaties nor under any obligation to take steps to become a party or a contracting State to them. This rule applies to bilateral and multilateral treaties alike; but it still leaves the question as to whether this means that the successor State is in the position of having a clean slate in regard to bilateral treaties.

(2) The "clean slate" metaphor, as already noted in the commentary to *article 11*, is admissible only in so far as it expresses the basic principle that a newly independent State begins its international life free of any general obligations to take over the treaties of its predecessor. The evidence is plain that a treaty in force with respect to a territory at the date of succession is frequently applied afterwards as between the successor State and the other party or parties to the treaty; and this indicates that the former legal nexus between the territory and the treaties of the predecessor State has at any rate some legal implications for the subsequent relations between the successor State and the other parties to the treaties. If in the case of many multilateral treaties that legal nexus appears to generate an actual right for the successor State to establish itself as a party or a contracting State, this does not appear to be so in the case of bilateral treaties.

(3) The reasons are twofold. First, the personal equation—the identity of the other contracting party—although an element also in multilateral treaties, necess-

²⁶² See above, commentary to *article 11*, para. 2.

arily plays a more dominant role in bilateral treaty relations; for the very object of most bilateral treaties is to regulate the mutual rights and obligations of the parties by reference essentially to their own particular relations and interests. In consequence, it is not possible automatically to infer from a State's previous acceptance of a bilateral treaty as applicable in respect of a territory its willingness to do so after a succession in relation to a wholly new sovereign of the territory. Secondly, in the case of a bilateral treaty there is no question of the treaty's being brought into force *between the successor State and its predecessor*, as happens in the case of a multilateral treaty. True, in respect of the predecessor State's remaining territory the treaty will continue on force bilaterally as between it and the other party to the treaty. But should the treaty become applicable as between that other party and the successor State, it will do so as a new and purely bilateral relation between them which is independent of the predecessor State. Nor will the treaty come into force at all as between the successor and predecessor States. No doubt, the successor and predecessor States may decide to regulate the matter in question, e.g. extradition or tariffs, on a similar basis. But if so, it will be through a new treaty which is exclusive to themselves and legally unrelated to any treaty in force prior to independence. In the case of bilateral treaties, therefore, the legal elements for consideration in appreciating the rights of a successor State differ in some essential respects from those in the case of multilateral treaties.

(4) From the considerable measure of continuity found in practice, a general presumption has sometimes been derived that bilateral treaties in force with respect to a territory and known to the successor State continue in force unless the contrary is declared within a reasonable time after the successor State's attainment of independence.²⁶³ Some writers even see in it a general principle of continuity implying legal rights and obligations with respect to the maintenance in force of a predecessor State's bilateral treaties. In some categories of treaties, it is true, continuity in one form or another occurs with impressive regularity. This is, for example, the case with the air transport agreements and trade agreements examined in the second²⁶⁴ and third²⁶⁵ Secretariat studies on "Succession in respect of bilateral treaties".

(5) The prime cause of the frequency with which some measure of continuity is given to such treaties as air transport and trade agreements in the event of a succession seems to be the practical advantage of continuity to the interested States in present conditions. Air transport is as normal a part of international communications today as railway and sea transport; and as a practical matter it is extremely likely that both the successor State and the other interested State will wish any existing air services to continue at least provisionally until new arrangements are

made.²⁶⁶ Again, international trade is an integral part of modern international relations; and practice shows that both the successor State and the other interested States find it convenient in many instances to allow existing trade arrangements to run on provisionally until new ones are negotiated.²⁶⁷

(6) Agreements for technical or economic assistance are another category of treaties where the practice shows a large measure of continuity.²⁶⁸ An example may be seen in an Exchange of Notes between the United States of America and Zaire in 1962 concerning the continuance in force of certain United States-Belgian treaties of economic co-operation with respect to the Congo, which is reproduced in *Materials on Succession of States*.²⁶⁹ In general, the view of the United States, the interested other party in the case of many such treaties, has been stated to be that an economic co-operation agreement "should be regarded as continuing in force with a newly independent State if that State continues to accept benefits under it".²⁷⁰

(7) A measure of "de facto continuity" has also been found in certain other categories of treaties such as those concerning abolition of visas, migration or powers of consuls and in tax agreements.²⁷¹ Continuity is also a feature of the practice in regard to bilateral treaties of a "territorial" or "localized" character. But these categories of treaties raise special issues and will be examined separately in the commentary to articles 29 and 30.

(8) The Commission is therefore aware that State practice shows a tendency towards continuity in the case of certain categories of treaties. It does not believe however that the practice justifies the conclusion that the continuity derives from a customary legal rule rather than the will of the States concerned (the successor State and the other party to its predecessor's treaty). At any rate, practice does not seem to support the existence of a unilateral right in a newly independent State to consider a bilateral treaty as continuing in force with respect to its territory after independence *regardless of the wishes of the other party to the*

²⁶⁶ The summary of the practice given in the Secretariat study of air transport agreements (*ibid.*, pp. 146 and 147, document A/CN.4/243, paras. 177 and 182) underlines the prevalence of continuity in the case of such agreements.

²⁶⁷ Here also, the summary of the practice given in the Secretariat study of trade agreements (*ibid.*, pp. 181 and 182, document A/CN.4/243/Add.1, paras. 169 and 172) is suggestive of a large measure of continuity.

²⁶⁸ See International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 567.

²⁶⁹ United Nations, *Materials on Succession of States (op. cit.)*, pp. 219-220. See also an Exchange of Notes between the United States of America and the Somali Republic in 1961 (*ibid.*, pp. 216 and 217).

²⁷⁰ See note by an Assistant Legal Adviser to the Department of State in *The American Journal of International Law* (Washington D.C.), vol. 59, No. 1 (January 1965), p. 96. Cf. the observation that "economic agreements are also not succeeded to automatically by new States. But this must not lead to unjust enrichment and to infringement of lawful interests and rights of other States" in International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 564.

²⁷¹ International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 577.

²⁶³ See International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. xiii and pp. 557-595, and *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), p. xiii and pp. 589-632.

²⁶⁴ *Yearbook of the International Law Commission, 1971*, vol. II (Part Two), p. 111, document A/CN.4/243.

²⁶⁵ *Ibid.*, p. 149, document A/CN.4/243/Add.1.

treaty. This is clear from some of the State practice already set out in commentaries to previous articles. Thus, the numerous unilateral declarations by newly independent States examined in the commentary to article 8 have unmistakably been based on the assumption that, as a general rule, the continuance in force of their predecessor's bilateral treaties is a matter on which it would be necessary to reach an accord with the other party to each treaty. The Commission is aware that those declarations envisage that some categories of treaties may continue in force automatically under customary law. But apart from these possible exceptions they clearly contemplate bilateral treaties as continuing in force only by mutual consent. Again, as pointed out in the commentary to article 7,²⁷² even when a predecessor State purports to transmit rights under its treaties to its successor State, the express or tacit concurrence of the other contracting party has still been regarded as necessary to make a bilateral treaty enforceable as between it and the successor State.

(9) Further State practice to the same effect is contained in *Materials on Succession of States*.²⁷³ Argentina, for example, which did not accept Pakistan's claim that the Argentine-United Kingdom Extradition Treaty (1889) should be considered as continuing in force automatically with respect to Pakistan, afterwards assented to the extension of that treaty to Pakistan "by virtue of a new agreement signed in 1953 and formalized by an exchange of notes".²⁷⁴ Similarly, correspondence between Ghana and the United States in 1957-1958 shows that the continuance of former United Kingdom treaties in respect of Ghana was regarded as a matter to be dealt with by the conclusion of an agreement.²⁷⁵ It is true that occasionally, as in the case of a United States *Aide-Mémoire* to the Federation of Malaya in 1958, language is used which might seem to imply that a new State was considered to have effected the continuance of a treaty by its unilateral act alone.²⁷⁶ But such language generally occurs in cases where the other party was evidently in agreement with the successor State as to the desirability of continuing the treaty in force, and does not seem to have been based on the recognition of an actual right in the successor State. Moreover, in the particular case mentioned the successor State, Malaya, seems in its reply to have viewed the question as one of concluding an agreement rather than of exercising a right: "Your *Aide-Mémoire* of 15 October 1958 and this Note are to be regarded as constituting the agreement in this matter".²⁷⁷ The technique of an exchange of notes or letters regarding the continuance of a bilateral treaty, accompanied by an express statement that it is to be regarded as constituting an agreement, has indeed become very common: a fact which in itself indicates that, in general, the continuance of bilateral treaties is a matter not of right but of agreement. Instances of the use of the technique in connexion with such categories of

bilateral treaties as air transport, technical co-operation and investment guarantee agreements, are to be found in documents supplied by the United States and published in *Materials on Succession of States*.²⁷⁸ Numerous examples can also be seen in the first of the Secretariat studies on "Succession in respect of bilateral treaties",²⁷⁹ which is devoted to extradition treaties.

(10) Continuity of bilateral treaties, as is emphasized in the Secretariat studies,²⁸⁰ has been recognized or achieved on the procedural level by several different devices; a fact which in itself suggests that continuity is a matter of the attitudes and intention of the interested States. True, in certain categories of treaties—e.g. air transport agreements—continuity has quite often simply occurred; and this might be interpreted as indicating recognition of a right or obligation to maintain them in force. But even in these cases the continuity seems in most instances to be rather a tacit manifestation of the will of the interested States.²⁸¹

(11) Individual instances of continuity have necessarily to be understood in the light of the general attitude of the States concerned in regard to succession in respect of bilateral treaties. Thus frequent reference is made by writers to the listing of treaties against the name of a successor State in the United States publication *Treaties in Force*, but this procedure has to be understood against the background of the United States' general practice which was authoritatively explained in 1965 as follows:

In practice the United States Government endeavours to negotiate new agreements, as appropriate, with a newly independent State as soon as possible. In the interim it tries, where feasible, to arrive at a mutual understanding with new State specifying which bilateral agreements between the United States and the former parent State shall be considered as continuing to apply. In most cases the new State is not prepared in the first years of its independence to undertake a commitment in such specific terms. To date the United States-Ghana exchange is the only all-inclusive formal understanding of this type arrived at, although notes have also been exchanged with Trinidad and Tobago and Jamaica regarding continued application of the 1946 Air Services Agreement. An exchange of notes with Congo (Brazzaville) on continuation of treaty obligations is couched only in general terms.²⁸²

²⁷⁸ *Ibid.*, pp. 211-224.

²⁷⁹ *Yearbook of the International Law Commission, 1970*, vol. II, pp. 109 *et seq.*, document A/CN.4/229, paras. 23, 31, 33, 62-66, 68, 69, 71, 72, 74 and 77-79. Agreements of this kind in the form of exchanges of notes are in many cases registered with the Secretariat under Article 102 of the Charter (*ibid.*, p. 128, para. 135).

²⁸⁰ *Ibid.*, pp. 127 and 128, paras. 134 and 135; and *ibid.*, 1971 vol. II (Part Two), pp. 146-147 and 181-183, document A/CN.4/243, paras. 177-187 and document A/CN.4/243/Add.1, paras. 169-177.

²⁸¹ Some instances can certainly be found where one or other interested State sought to place the continuity on the basis of a legal rule. An example is Japan's claim as of right to the continuance of its traffic rights into Singapore which had been granted to it in the United Kingdom-Japan Agreement for Air Services (1952). This claim was made first against Malaysia and then, after the separation of Singapore from Malaysia, against Singapore itself. But the successor State, first Malaysia and then Singapore, underlined in each case the "voluntary" character of their acceptance of the obligations of the United Kingdom under the 1952 Agreement (*ibid.*, pp. 137-138 and 140-141, document A/CN.4/243, paras. 122 and 123 and 138-143).

²⁸² International Law Association, *The Effect . . . (op. cit.)*, pp. 385 and 386. See also commentary to article 7, para. 16.

²⁷² See above, commentary to article 7, paras. 5 and 6.

²⁷³ United Nations, *Materials on Succession of States (op. cit.)*.

²⁷⁴ *Ibid.*, pp. 6 and 7.

²⁷⁵ *Ibid.*, pp. 211-213.

²⁷⁶ *Ibid.*, pp. 229 and 230.

²⁷⁷ *Ibid.*, p. 230.

That the United Kingdom regards the continuity of bilateral treaties as a matter of consent on both sides clearly appears from its reply to inquiry in 1963 from the Norwegian Government concerning the continuance in force of the Anglo-Norwegian Double Taxation Agreement (1951) with respect to certain newly independent States:

The Foreign Office replied to the effect that the Inheritance Agreements concluded between the United Kingdom and those countries now independent were thought to show that the Governments of those countries would accept the position that the rights and obligations under the Double Taxation Agreement should still apply to those countries *but that the question whether the Agreement was, in fact, still in force between those countries and Norway was a matter to be resolved by the Norwegian Government and the Governments of those countries.*²⁸³

A recent statement of Canadian practice²⁸⁴ indicates that it is similar to that of the United States:

... the Canadian approach has been along essentially empirical lines and has been a two-stage one. Where a newly independent State has announced that it intends to be bound by all or certain categories of treaties which in the past were extended to it by the metropolitan country concerned, Canada has, as a rule, tacitly accepted such a declaration and has regarded that country as being a party to the treaties concerned. However, where a State has not made any such declaration or its declaration has appeared to Canada to be ambiguous, then, as the need arose, we have normally sought information from the Government of that State as to whether it considered itself a party to the particular multilateral or bilateral treaty in connexion with which we require such information.

The writer then added the comment:

Recent practice supports the proposition that, *subject to the acquiescence of third States,** a former colony continues after independence to enjoy and be subject to rights and obligations under international instruments formerly applicable to it, unless considerations as to the manner in which the States came into being or as to the political nature of the subject matter render the treaty either impossible or invidious of performance by the new State.

Whether this practice should be regarded as a strict succession to a legal relationship, or as a novation may still be an open question.²⁸⁵

(12) From the evidence adduced in the preceding paragraphs, the Commission concludes that succession in respect of bilateral treaties has an essentially voluntary character: voluntary, that is, on the part not only of the successor State but also of the other interested State. On this basis the fundamental rule to be laid down for bilateral treaties appears to be that their continuance in force after independence is a matter of agreement, express or tacit, between the successor State and the other State party to the predecessor State's treaty.

(13) A further question the Commission had to examine was that of determining when and upon what basis (i.e. definitively or merely provisionally) a successor State and the other State party are to be considered as having agreed

to the continuance of a treaty which was in force in respect of the successor State's territory at the date of the succession. Where there is an express agreement, as in the Exchanges of Notes mentioned in paragraph (9) above, no problem arises. Whether the agreement is phrased as a confirmation that the treaty is considered as in force or as a consent to its being so considered, the agreement operates to continue the treaty in force and determines the position of the States concerned in relation to the treaty. There may be a point as to whether they intend the treaty to be in force definitively according to its terms (notably any provision regarding notice of termination) or merely provisionally, pending the conclusion of a fresh treaty. But that is a question of interpretation to be resolved in accordance with the ordinary rules for the interpretation of treaties.

(14) Difficulty may arise in the not infrequent case where there is no express agreement. Where the newly independent State and the other State party have applied the terms of the treaty *inter se*, the situation is simple, since the application of the treaty by both States necessarily implies an agreement to consider it as being in force. But less clear cases arise in practice: these include situations where one State may have evidenced in some manner an apparent intention to consider a treaty as continuing in force—e.g. by listing the treaty amongst its treaties in force—but the other State has done nothing in the matter; or where the newly independent State has evidenced a general intention in favour of the continuance of its predecessor's treaties but has not manifested any specific intention with reference to the particular treaty; or where neither State has given any clear indication of its intentions in regard to the continuance of bilateral treaties.

(15) As already indicated,²⁸⁶ a general presumption of continuity has sometimes been derived from the considerable measure of continuity found in modern practice and the ever-going interdependence of States. The Commission observes however that the question here in issue is the determination of the appropriate rule in a particular field of law—that of treaty relations where intention and consent play a major role. State practice, as shown in the preceding paragraphs, contains much evidence that the continuance in force of bilateral treaties, unlike multilateral treaties, is commonly regarded by both the newly independent State and the other State party as a matter of mutual agreement. Accordingly, no general rule or presumption that bilateral treaties continue in force unless a contrary intention is declared may be deduced, in the Commission's view, from the frequency with which continuity occurs. Moreover a solution based upon the principle not of "contracting out" of continuity but of "contracting in" by some more affirmative indication of the consent of the particular States concerned, is more in harmony with the principle of self-determination.

(16) Taking therefore into account both the frequency with which the question of continuity is dealt with in practice as a matter of mutual agreement and the prin-

²⁸³ United Nations, *Materials on Succession of States (op. cit.)*, p. 192.

²⁸⁴ See *The Canadian Yearbook of International Law*, vol. VII, 1969 (Vancouver, B.C.), pp. 329-331.

²⁸⁵ *Ibid.*, p. 331.

²⁸⁶ See para. 4 above.

principle of self-determination, the Commission concludes that the conduct of the particular States in relation to the particular treaty should be the basis of the general rule for bilateral treaties. The Commission is aware that a rule which hinges upon the establishment of mutual consent by inference from the conduct of the States concerned may also encounter difficulties in its application in some types of cases. But these difficulties arise from the great variety of ways in which a State may manifest its agreement to consider itself bound by a treaty, including tacit consent; and they are difficulties found in other parts of the law of treaties.²⁸⁷

(17) The Commission then had to consider the question whether the rule should seek to indicate particular acts or conduct which give rise to the inference that the State concerned has consented to the continuance of a bilateral treaty or whether it should merely be formulated in general terms. It examined whether any particular provisions should be inserted concerning the inferences to be drawn from a newly independent State's conclusion of a devolution agreement, from a unilateral declaration inviting continuance of treaties (provisionally or otherwise), from a unilateral listing of a predecessor State's treaty as in force in relation to a new State, from the continuance in force of a treaty in the internal law of a State, or from reliance on the provisions of the treaty by a newly independent State or by the other State party to it in their mutual relations. It came, however, to the conclusion that the insertion of any such provisions prescribing the inferences to be drawn from particular kinds of acts would not be justified. It noted in that respect that in the case of devolution agreements and unilateral declarations, much depends both on their particular terms and on the intentions of those who made them. As appears from the commentaries to articles 7 and 8, even where States may appear in such instruments to express a general intention to continue their predecessor's treaties, they frequently make the continuance of a particular treaty a matter of discussion and agreement with the other interested State. Moreover, in all cases it is not simply a question of the intention of one State but of both: of the inferences to be drawn from the act of one and the reaction—or absence of reaction—of the other. Inevitably the circumstances of any one case differ from those of another and it seems hardly possible to lay down detailed presumptions without taking the risk of defeating the real intentions of one or other State. Of course, one of the two States concerned may so act as to lead the other reasonably to suppose that it had agreed to the continuance in force of a particular treaty, in which event account has to be taken of the principle of good faith applied in article 45 of the Vienna Convention on the Law of Treaties (often referred to as *estoppel* or *préclusion*.) But subject to the application of that principle, the problem is always one of establishing the consent of each State to consider the treaty as in force in their mutual relations either by express evidence or by inference from the circumstances.

²⁸⁷ Cf., for example, the Vienna Convention on the Law of Treaties, articles 12-15 (consent to be bound), 20 (acceptance of and objection to reservations), and 45 (loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty).

(18) In general, although the context may be quite different, the questions which arise under the present article appear to have affinities with those which arise under article 45 of the Vienna Convention on the Law of Treaties. The Commission therefore felt that the language used to apply the principle of good faith (*estoppel*—*préclusion*) in that article would serve a similar purpose in the present context.

(19) Accordingly, *paragraph 1* of the present article provides that a bilateral treaty is considered as being in force between a successor State and the other State party to the treaty when (a) they expressly so agree or (b) when "by reason of their conduct they are to be considered as having so agreed".

(20) *Paragraph 2* deals with the question of the date on which a treaty is to be considered as becoming binding between a newly independent State and the other State party to it under the provisions of paragraph 1. The very notions of "succession" and "continuity" suggest that this date should, in principle, be the date of the newly independent State's "succession" to the territory. This is also suggested by terminology found in practice indicating that the States concerned agree to regard the predecessor's treaty as continuing in force in relation to the successor State. Accordingly the Commission considers that the primary rule concerning the date of entry into force must be the date of the succession. On the other hand, the continuance of the treaty in force in relation to the successor State being a matter of agreement, the Commission sees no reason why the two States should not fix another date if they so wish. Paragraph 2, therefore, admits the possibility of some other dates being agreed between the States concerned.

(21) Mention has already been made²⁸⁸ of the question whether the successor State and the other State party intend to continue the treaty in force definitively in conformity with its terms or only to apply it provisionally. Being essentially a question of intention it will depend on the evidence in each case, including the conduct of the parties. Where the intention is merely to continue the application of the treaty provisionally, the legal position differs in some respects from that in cases where the intention is to maintain the treaty itself in force. Since this is also true of the provisional application of multilateral treaties, the Commission decided to deal with the question of provisional application, both of bilateral and multilateral treaties, separately in part III, section 4, of the present draft.

Article 20. The position as between the predecessor and the successor State

A treaty which under article 19 is considered as being in force between a newly independent State and the other State party is not by reason only of the fact to be considered as in force also in the relations between the predecessor and the successor State.

²⁸⁸ See para. 13 above.

Commentary

(1) The rule formulated in this article may be thought to go without saying, since the predecessor State is not a party to the agreement between the newly independent State and the other State party which alone brings the treaty into force between the latter States. Nevertheless, the Commission thought it desirable to formulate the rule in an article if only to remove any possibility of misconception. It is true that the legal nexus which arises between, a treaty and a newly independent State's territory by reason of the fact that the treaty concluded by its predecessor was in force in respect of its territory at the date of the succession provides a basis for the subsequent application of the treaty in the bilateral relations between the new sovereign of the territory and the other State party—by agreement between them. But it does not invest the newly independent State with a right to become a party to the actual treaty between its predecessor and the other State party, so as to bring the treaty into force also between itself and its predecessor, as would happen in the case of a multilateral treaty.

(2) The position, as has been pointed out,²⁸⁹ is rather that the agreement between the newly independent State and the other State party gives rise to a collateral bilateral treaty, which exists *parallel* with the original treaty concluded between the predecessor State and the other State party. The collateral treaty, even though it may be in all respects the twin of the original treaty, operates between the successor State and the other State party as a purely bilateral relation between them which is independent of the predecessor State. Furthermore, should the successor and the predecessor State decide to regulate the same matter—e.g. extradition, tariffs, etc.—on a similar basis, it will be through a new treaty which is exclusive to themselves and legally unconnected with the treaty formerly concluded between the predecessor State and the other State party. Indeed, in many cases—e.g. air transport route agreements—the considerations motivating the provisions of the treaty between the predecessor State and the other State party may be quite different from those relevant in the bilateral relations between the predecessor State and the newly independent State.

(3) The rule is supported by practice inasmuch as neither successor nor predecessor States have ever claimed that in these cases the treaty is to be considered as in force between them as well as between the successor State and the other State party.

(4) Accordingly, the present article simply provides that a bilateral treaty, considered under article 19 as being in force for a newly independent State and the other State party, is not by reason only of that fact to be considered as in force also between the predecessor and the successor State.

Article 21. Termination, suspension of operation or amendment of the treaty as between the predecessor State and the other State party

1. When under article 19 a treaty is considered as being in force between a newly independent State and the other State party, the treaty:

(a) Does not cease to be in force in the relations between them by reason only of the fact that it has subsequently been terminated in the relations between the predecessor State and the other State party;

(b) Is not suspended in operation in the relations between them by reason only of the fact that it has subsequently been suspended in operation in the relations between the predecessor State and the other State party;

(c) Is not amended in the relations between them by reason only of the fact that it has subsequently been amended in the relations between the predecessor State and the other State party.

2. The fact that a treaty has been terminated or, as the case may be, suspended in operation in the relations between the predecessor State and the other State party after the date of the succession of States does not prevent the treaty from being considered as in force, or as the case may be, in operation between the successor State and the other State party if it is established in accordance with article 19 that they so agreed.

3. The fact that a treaty has been amended in the relations between the predecessor State and the other State party after the date of the succession of States does not prevent the unamended treaty from being considered as in force under article 19 in the relations between the successor State and the other State party, unless it is established that they intended the treaty as amended to apply between them.

Commentary

(1) This article deals with the case where, after a succession of States, a bilateral treaty is terminated, suspended in operation or amended as between the predecessor State and the other State party.

(2) Once it is recognized that, in general, succession in respect of bilateral treaties occurs through the express or tacit agreement of the newly independent State and the other State party, it follows that the treaty operates between these States independently of the predecessor State. The legal source of the obligations of the newly independent State and the other State party *inter se* is their own agreement to maintain the original treaty; and the agreement, as it were, cuts the umbilical cord between those obligations and the original treaty. Consequently, there is no legal reason why the termination of the original treaty, by agreement or otherwise, in the relations between the predecessor State and the other State party should at the same time involve the termination of the treaty in the relations between the newly independent State and the other State party. The termination of these treaty relations is a matter which, in principle, concerns the newly independent State and the other State party and them alone.

²⁸⁹ See above, commentary to article 19, para. 3.

(3) The expiry of the treaty simply by the force of its own terms may, of course, entail the simultaneous termination of the treaty relations (a) between the predecessor State and the other State party and (b) between the successor State and the other State party. Thus, if the treaty provides for its own termination on a specified date, it will cease to be in force on that date for the successor State and the other State party (unless they specially agree otherwise) because that provision of the treaty forms part of their own agreement. An instance of the expiry of the original treaty by the force of its own terms may be found in the Secretariat study of air transport agreements,²⁹⁰ which refers to the United States of America having reminded, first, Trinidad and Tobago and, secondly, Jamaica that an Exchange of Notes of 1961 between the United States and the United Kingdom was due to expire very soon. Another appears in the Secretariat study of trade agreements²⁹¹ where mention is made of the expiry of Franco-Italian and Franco-Greek trade agreements, which were applicable to Morocco and Tunis, some months after the attainment of independence by these countries.

(4) On the other hand, a termination of the treaty as between the predecessor State and the other State party resulting from the initiative of one of them (e.g. a notice of termination under the treaty as a response to a breach of the treaty), does not, *ipso jure*, affect the separate treaty or relations between the successor State and the other State party.²⁹² The Secretariat study on air transport agreements provides an example in the India-United States of America Agreement of 1946.²⁹³ After Pakistan's separation from India, it agreed with the United States in an Exchange of Notes that the 1946 Agreement should be considered as in force between Pakistan and the United States. In 1954, India gave notice of termination to the United States and in 1955 the 1946 Agreement ceased to be in force with respect to India itself. With respect to Pakistan, however, it continued in force.

(5) Similarly, the principle finds expression in cases where the other State party, desirous of terminating the treaty in respect of the successor as well as the predecessor State, has taken steps to communicate its notice of termination to the successor State as well as the predecessor. Thus, when Sweden decided in 1951 to terminate the Norway and Sweden-United Kingdom Extradition Treaty of 1873, she gave notice of termination separately to India,²⁹⁴ Pakistan,²⁹⁵ and Ceylon.²⁹⁶ Cor-

respondingly, the principle also finds expression in cases where the predecessor and successor States have each separately given notice of termination to the other State party. An example is a series of notices of termination given by Malaysia and by Singapore in May 1966 to put an end to air transport agreements concluded by Malaysia respectively with Denmark,²⁹⁷ Norway,²⁹⁸ France,²⁹⁹ the Netherlands³⁰⁰ and New Zealand.³⁰¹ Malaysia's termination of the 1946 United Kingdom-United States Air Transport Agreement does not appear to be any exception.³⁰² After Malaysia's attainment of independence this Agreement was considered by it and the United States as continuing in force between them. Then in 1965, some two months before Singapore's separation from Malaysia, Malaysia gave notice of termination to the United States and this was treated by the latter as terminating the agreement also for Singapore, although the twelve months period of notice presented in the treaty did not expire until after Singapore had become independent. In this case Malaysia was the State responsible for Singapore's external relations at the time when the notice of termination was given, and the United States presumably felt that fact to be decisive. Whether a notice of termination, which has not yet taken effect at the date of independence ought to be regarded as terminating the legal norms between the treaty and the new State's territory may raise a question. But it is a question which is not limited to bilateral treaties and does not affect the validity of the principle here in issue.

(6) At first sight, Canada might seem to have departed from the principle in correspondence with Ghana in 1960 concerning the United Kingdom-Ghana double taxation agreement which had been applied to the Gold Coast in 1957.³⁰³ Three years later Canada gave notice of termination to the United Kingdom but not to Ghana, which took the position that the agreement was still in force between itself and Canada. The latter is then reported as having objected that it had understood that the United Kingdom would communicate the notice of termination to any States interested by way of succession. If such was the case, Canada would not seem to have claimed that its termination of the original treaty *ipso jure* put an end also to the operation of the treaty as between itself and Ghana. It seems rather to have maintained that its notice of termination was intended to be communicated also to Ghana and was for that reason effective against the latter. Although Ghana did not pursue the matter, the Commission doubts whether, in the light of article 78 of the Vienna Convention on the Law of Treaties, a

²⁹⁰ *Yearbook of the International Law Commission, 1971*, vol. II (Part Two), p. 128, document A/CN.4/243, para. 54.

²⁹¹ *Ibid.*, p. 163, document A/CN.4/243/Add.1, para. 71.

²⁹² This point is made the subject of a specific rule by the International Law Association in its resolution No. 3 on succession in respect of treaties (see International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), p. xiv [Resolutions] and p. 601 [Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors, Note 3]).

²⁹³ *Yearbook of the International Law Commission 1971*, vol. II (Part Two), p. 122, document A/CN.4/243, paras. 17-19.

²⁹⁴ *Yearbook of the International Law Commission, 1970*, vol. II, p. 109, document A/CN.4/229, para. 25.

²⁹⁵ *Ibid.*, p. 110, para. 32.

²⁹⁶ *Ibid.*, p. 111, para. 38.

²⁹⁷ *Ibid.*, 1971, vol. II (Part Two), p. 139, document A/CN.4/243, para. 131.

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid.*, para. 135.

³⁰⁰ *Ibid.*, p. 141, document A/CN.4/243, para. 146.

³⁰¹ *Ibid.*, para. 147.

³⁰² *Ibid.*, p. 142, document A/CN.4/243, para. 151; also *ibid.*, p. 128, document A/CN.4/243, para. 125.

³⁰³ International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), p. 632 [Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors, annex E].

notice of termination can be effective against a successor State unless actually received by it. This is on the assumption that when the notice of termination was given by the predecessor State, the treaty was *already in force* between the new State and the other State party. A notice of termination given by the predecessor State or by the other State party *before any arrangement had been reached between the successor State and the other State party* would present a situation of a rather different kind.³⁰⁴

(7) *Paragraph 1 (a)* of the article accordingly provides that a treaty considered as being in force between a newly independent State and the other State party does not cease to be in force in the relations between them by reason only of the fact that it has subsequently been terminated in the relations between the predecessor State and the other State party. This, of course, leaves it open to the other State party to send a notice of termination under the treaty simultaneously to both the predecessor and successor States. But it establishes the principle of the separate and independent character of the treaty relations between the two pairs of States.

(8) For the sake of completeness, and taking account of the terminology of the Vienna Convention on the Law of Treaties, the Commission has also provided in this article for the case of *suspension* of operation of the treaty as between the predecessor State and the other State party. The case being similar to that of termination of the treaty, the relevant rules should obviously be the same. Hence the provision contained in *paragraph 1 (b)*.

(9) The same basic principle must logically govern the case of an amendment of a treaty which is considered as in force between a newly independent State and the other State party. An amendment agreed between the predecessor State and the other State party would be effective only between themselves and would be *res inter alios acta* for the newly independent State in its relations with the other State party. It does not, therefore, *ipso jure* effect a similar alteration in the terms of the treaty as applied in the relations between the newly independent State and the other State party. Any such alteration is a matter to be agreed between these two States, and it is hardly conceivable that the rule should be otherwise.

(10) In the case of air transport treaties, for example, it frequently happens that after the newly independent State and the other State party have agreed, expressly or tacitly, to consider the treaty as continuing in force, the original treaty is amended to take account of the new air route situation resulting from the emergence of the new State. Such an amendment obviously cannot be reproduced in the treaty as applied between the newly independent State and the other State party. Numerous instances of such amendments to the original treaty made for the purpose of changing route schedules may be seen in the Secretariat study on succession in respect of air transport agreements.³⁰⁵ In these cases, although the

original air transport agreement itself is considered by the new State and the other State party as in force also in the relations between them, the fact that there are really two separate and parallel treaties in force manifests itself in the different route schedules applied, on the one hand, between the original parties and, on the other, between the newly independent State and the other State party.

(11) The principle also manifests itself in cases which recognize the need for a newly independent State's participation in or consent to an amendment of the original treaty if the amendment is to operate equally in its relations with the other State party. There are several such cases to be found in the Secretariat study, of trade agreements in paragraphs giving an account of the amendment of certain French trade agreements applicable in respect of former French African territories at the date of their attainment of independence.³⁰⁶ When in 1961 certain Franco-Swedish trade agreements were amended and extended in duration, and again in subsequent years, six new States authorized France to represent them in the negotiations, while a further six newly independent States signed the amending instrument on their own behalf. In other cases of a similar kind³⁰⁷ sometimes France expressly acted on behalf of the French Community; more usually those of the new ex-French African States who desired to continue the application of the French trade agreements signed the amending instruments on their own behalf. The same Secretariat study also mentions a number of Netherlands trade agreements that provided for annual revising instruments in which Indonesia was to have the right to participate.³⁰⁸ But Indonesia not having exercised this right, its participation in the trade agreements in question ceased. Yet another illustration of the need for a new State's consent, if a revising instrument is to affect it, can be seen in the Secretariat study of extradition treaties,³⁰⁹ though this is perhaps more properly to be considered a case of termination through the conclusion of a new agreement. In 1931 the United Kingdom and United States of America concluded a new extradition treaty, which was expressed to supersede all their prior extradition treaties, save that in the case of each of the Dominions and India the prior treaties were to remain in force unless those States should accede to the 1931 Treaty or negotiate another treaty on their own.

(12) *Paragraph 1 (c)* of the present article, therefore, further provides that a bilateral treaty considered to be in force for a newly independent State and the other State party is not amended in the relations between them by reason only of the fact that it has been amended in the relations between the predecessor State and the other

³⁰⁴ See para. 13 below.

³⁰⁵ *Yearbook of the International Law Commission, 1971*, vol. II (Part Two), pp. 122, 123, 125, 126, 128 and 129, document A/CN.4/243, paras. 20, 26, 35, 40, 42, 58 and 66.

³⁰⁶ *Ibid.*, pp. 164-165, document A/CN.4/243/Add.1, paras. 73-80.

³⁰⁷ In many of these cases, the object of the amending instrument was essentially to prolong the existing trade agreement.

³⁰⁸ *Yearbook of the International Law Commission, 1971*, vol. II (Part Two), pp. 169-171, document A/CN.4/243/Add.1, paras. 95-104.

³⁰⁹ *Ibid.*, 1970, vol. II, pp. 107-108, document A/CN.4/229, para. 13.

State party. This again does not exclude the possibility of an amending agreement's having a parallel effect on the treaty relations between the successor State and the other State party if the interested State—in this case the newly independent State—so agrees.

(13) The point remains as to whether any special rule has to be stated for the case where the original treaty is terminated, suspended in operation or amended before the newly independent State and the other State party can be considered as having agreed upon its continuance. If the treaty has been effectively terminated before the date of the succession there is no problem—other than the effect of a notice of termination given before but expiring after the date of the succession. The treaty is not one which can be said to have been in force in respect of the newly independent State's territory at the date of the succession so that, if that State and the other State party should decide to apply the treaty in their mutual relations, it will be on the basis of an entirely new transaction between them. The problem concerns rather the possibility that the predecessor State or the other State party should terminate the treaty soon after the date of the succession and before the newly independent State and the other State party have taken any position regarding the continuance in force of the treaty in their mutual relations. The Commission is of the view that the necessary legal nexus is established for the purpose of the law of succession if the treaty is in force in respect of the newly independent State's territory at the date of succession. On this basis, there does not seem to be any logical reason why that legal nexus should be affected by any act of the predecessor State after that date.

(14) The Commission realizes that the point may not be of great importance since, as article 19 expressly recognizes, the bringing of the treaty into force in the relations between the newly independent State and the other State party is a matter for their mutual agreement. In consequence, it is open to them to disregard the termination, suspension of operation or amendment of the treaty between the original parties or to treat it as conclusive as between themselves according to their wishes. On the other hand, the point may have importance in determining the position in the case of an alleged agreement to continue the treaty in force to be implied simply from the conduct of the newly independent State and the other State party, e.g. from the continued application of the treaty. The Commission has therefore thought it better to deal with the matter in the article. *Paragraph 2* of the article in effect provides that the termination or suspension of operation of the treaty between the original parties after the date of the succession of States does not prevent the treaty from being considered as in force or, as the case may be, in operation between the successor State and the other State party if it is established in accordance with article 19 that they so agreed. *Paragraph 3* provides that the amendment of the treaty between the original parties after the date of the succession of States does not prevent the unamended treaty from being considered as in force under article 19 in the relations between the successor State and the other State party, unless it is established that they intended the treaty as amended to apply between them.

SECTION 4. PROVISIONAL APPLICATION

Article 22. Multilateral treaties

1. A multilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as applying provisionally between the successor State and another State party to the treaty if the successor State notifies the parties or the depositary of its wish that the treaty should be so applied and if the other State party expressly so agrees or by reason of its conduct is to be considered as having so agreed.

2. However, in the case of a treaty which falls under article 12, paragraph 3, the consent of all the parties to such provisional application is required.

Commentary

(1) The Commission, as mentioned already,³¹⁰ decided to deal with the provisional application of treaties on a succession of States separately from their continuance in force definitively. Moreover, since the principal importance of provisional application in the context of succession of States seems to be in the case of newly independent States, it also decided to assign this matter to the present section of part III. Section 4 is divided into three articles: the present article and article 23 cover respectively multilateral and bilateral treaties, and article 24 the termination of provisional application.

(2) The provisional application of a multilateral treaty as such hardly seems possible, except in the case of a "restricted" multilateral treaty and then only with the agreement of all the parties. The reason is that participation in a multilateral treaty is governed by its final clauses which do not, unless perhaps in rare cases, contemplate the possibility of participation on a provisional basis, i.e. on a basis different from that of the parties to the treaty *inter se*. Theoretically, it might be possible by a notification circulated to all the parties to obtain the consent of each one to such a provisional participation in the treaty by a newly independent State. But this would raise complex questions as to the effect of obligations of individual States. Moreover, this form of provisional application does not appear to occur in practice. The Commission did not, therefore, think that it would be appropriate to recognize it in the present draft.

(3) What does occur in practice, and is indeed specifically implied by some of the unilateral declarations mentioned in the commentary to article 8, is the provisional application of a multilateral treaty on a reciprocal basis between a newly independent State and individual States parties to the treaty. But in those cases what happens is that the multilateral treaty is by a collateral agreement applied provisionally between the newly independent State and a particular party to the treaty on a *bilateral* basis. The case is thus totally different from the definitive participation of a newly independent State in virtue of the option accorded to it in articles 12 and 13 to establish its status as a party or contracting State by its own acts alone.

³¹⁰ See above, commentary to article 8, para. 19.

(4) Where the multilateral treaty is one of a restricted character which falls under article 12, paragraph 3, the position is different. There is then no real obstacle to prevent the parties, limited in number as they are, from agreeing with the newly independent State to apply the treaty provisionally on whatever conditions they think fit. But in this case, having regard to the restricted character of the treaty, it seems necessary that the provisional application of the treaty should be agreed to by *all* the parties.

(5) Accordingly, *paragraph 1* of the present article states that a multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession relates is considered as applying provisionally *between the successor State and another State party* when the two following conditions are fulfilled: (a) the successor State notifies the parties or the depositary of its wish that the treaty should be applied provisionally; and (b) the other State party expressly so agrees or by reason of its conduct is to be considered as having so agreed. *Paragraph 2* specifies that in the case of a restricted multilateral treaty the consent of *all the parties* to such provisional application is required.

Article 23. Bilateral treaties

A bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as applying provisionally between the successor State and the other State and the other State party if:

(a) They expressly so agree; or

(b) By reason of their conduct they are to be considered as having agreed to continue to apply the treaty provisionally.

Commentary

(1) Under article 19 the continuance in force of a bilateral treaty as between a newly independent State and the other State party is always a question of agreement express or implied. The question being one of agreement, it is equally open to the States concerned to agree merely to continue to apply the treaty provisionally between them, rather than to continue it in force definitively in accordance with its terms. This is a procedure specifically invited by many of the unilateral declarations mentioned in the commentary to article 8. Those declarations fix a period during which the newly independent State offers to apply any bilateral treaty provisionally with a view to its replacement by a fresh treaty, or failing such replacement, its termination at the end of the period. In the case of declarations of this type, if the other State accepts either expressly or implies the offer of the newly independent State, it is necessarily an agreement for the *provisional application* of the treaty which arises.³¹¹

(2) The provisional application of bilateral treaties also arises quite frequently in practice from express agreement

to that effect between the newly independent State and the other State party. These express agreements are normally in the form of an exchange of notes and provide for the provisional application of the treaty pending the negotiation of a new treaty or for a specified period, etc. When there is such an express agreement, no difficulty arises because the intention of the States concerned to apply the treaty *provisionally* is clearly indicated in the agreement. The main problem is where there is no such express agreement and the intention to continue the application of the treaty provisionally rather than definitely has to be inferred from the circumstances of the case. Not infrequently one or other party may have given a specific indication of its intention to apply the treaty provisionally, as in the case of the unilateral declarations referred to above; and in that case the inference from the conduct of the parties in favour of provisional application will be strong. In the absence of any such specific indication of the attitude of one or other State, the situation may be more problematical; but as in other contexts in the law of treaties it can only be left to be determined by an appreciation of the circumstances of the particular case.

(3) Article 23 accordingly provides that a bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as applying provisionally between the successor State and the other State party if they *expressly* so agree or *by reason of their conduct* they are to be considered as having agreed to continue to apply the treaty provisionally.

Article 24. Termination of provisional application

1. The provisional application of a multilateral treaty under article 22 terminates if:

(a) The States provisionally applying the treaty so agree;

(b) Either the successor State or the other State party gives reasonable notice of such termination and the notice expires; or

(c) In the case of a treaty which falls under article 12, paragraph 3, either the successor State or the parties give reasonable notice of such termination and the notice expires.

2. The provisional application of a bilateral treaty under article 23 terminates if:

(a) The successor State and the other State party so agree; or

(b) Either the successor State or the other State party gives reasonable notice of such termination and the notice expires.

3. Reasonable notice of termination for the purpose of the present articles shall be:

(a) Such period as may be agreed between the States concerned; or

(b) In the absence of any agreement, twelve months' notice unless a shorter period is prescribed by the treaty for notice of its termination.

³¹¹ See, for example, the three Secretariat studies on succession in respect of bilateral treaties: *Yearbook of the International Law Commission, 1970*, p. 102, document A/CN.4/229; and *ibid.*, 1971, vol. II (Part Two), pp. 111 and 149, document A/CN.4/243 and A/CN.4/243/Add.1.

Commentary

(1) This article sets out the general rules for the termination of a treaty which is being applied provisionally between a successor State and another State party to the treaty. *Paragraph 1* deals with termination in cases of provisional application of a multilateral treaty under article 22 and *paragraph 2* with termination in cases of provisional application of a bilateral treaty under article 23. Both paragraphs envisage termination coming about either by mutual agreement or by the giving of reasonable notice of termination. No doubt, provisional application may be terminated in other ways under the general law of treaties, e.g. if the States concerned conclude a new treaty relating to the same subject matter and incompatible with the application of the earlier treaty. But the Commission considered that the present article should be confined to the rules which specifically concern the termination of the provisional application of a predecessor States' treaty between the successor State and another State party.

(2) When it is a question of termination by agreement, the main point is to identify the State or States the agreement of which is necessary. In the case of bilateral treaties there is no problem; and the same is true of a multilateral treaty provisionally applied between the successor State and individual parties under article 22. The consent of both States applying the treaty provisionally is *ex hypothesi* necessary. In the case of a multilateral treaty of a restricted character, just as the consent of all the parties and the successor State was necessary for the provisional application of the treaty, so it must be also for the termination of such provisional application.

(3) When it is a question of termination by the giving of reasonable notice, the main points are to identify the State or States which may give such notice and to determine what constitutes reasonable notice. As to the State or States which may give notice, there is again no problem in the case of a bilateral treaty and of a multilateral treaty: either the successor State or the other State party applying the treaty provisionally may give reasonable notice of termination. In the case of a multilateral treaty of a restricted character either the successor State or the parties may give notice; and then it may be a question whether the notice must be given by *all* the parties. The Commission considered that in principle the termination of provisional application of a treaty vis-à-vis a successor State was a matter that concerned all the parties, but thought it was not necessary to specify that the notice should be given by all the parties.

(4) The requirement of reasonable notice is for the protection of both the successor State and other States parties, since the abrupt termination of provisional application might create administrative and other difficulties for the other State. The Commission noted that article 56 of the Vienna Convention on the Law of Treaties, which concerns denunciation or withdrawal from a treaty, in dealing with a problem having similar aspects, prescribed a twelve months' period of notice. Having regard to the kind of treaties normally involved—e.g. trade, air transport, tax and extradition treaties—the Commission considered that a similar period of notice would be appropriate in the present context. On the other hand, if the treaty

should provide for a shorter period of notice for its termination, it would be logical that this shorter period should apply also to the termination of the provisional application of the treaty under the present article.

(5) Accordingly, *paragraph 1* of the article states that the provisional application of a *multilateral treaty* under article 22 terminates if (a) the States provisionally applying the treaty so agree; (b) either the successor State or the other State party gives reasonable notice of such termination and the notice expires; or (c) in the case of a restricted multilateral treaty either the successor State or the parties give reasonable notice of such termination and the notice expires. *Paragraph 2* then provides that the provisional application of a *bilateral treaty* under article 23 terminates if (a) the successor State and the other State party so agree; or (b) either the successor State or the other State party gives reasonable notice of such termination and the notice expires.

(6) Lastly, *paragraph 3* specifies that a *reasonable notice of termination* for the purpose of the present articles shall be: (a) such period as may be agreed between the States concerned; or (b) in the absence of any agreement, twelve months' notice unless a shorter period is prescribed by the treaty for notice of its termination.

SECTION 5. STATES FORMED FROM TWO OR MORE TERRITORIES

Article 25. Newly independent States formed from two or more territories

When the newly independent State has been formed from two or more territories in respect of which the treaties in force at the date of the succession of States were not identical, any treaty which is continued in force under articles 12 to 21 is considered as applying in respect of the entire territory of that State unless:

(a) It appears from the treaty or is otherwise established that the application of the treaty to the entire territory would be incompatible with its object and purpose or the effect of the combining of the territories is radically to change the conditions for the operation of the treaty;

(b) In the case of a multilateral treaty other than one referred to in article 12, paragraph 3, the notification of succession is restricted to the territory in respect of which the treaty was in force prior to the succession;

(c) In the case of a multilateral treaty of the kind referred to in article 12, paragraph 3, the successor State and the other States parties otherwise agree;

(d) In the case of a bilateral treaty, the successor State and the other State party otherwise agree.

Commentary

(1) Article 25 concerns the special case of the emergence of a newly independent State formed from two or more territories, *not already States when the succession occurred*, and in respect of which the treaties in force at the date of the succession of States were not identical. This case is to be differentiated from the uniting of two or more States in one State dealt with in article 26 of the present articles.

(2) The underlying legal situations at the moment of the succession are not the same in the uniting of two or more States as in the creation of a State formed from two or more mere territories.³¹² The States which unite in one State have prior treaty régimes of their own—an existing complex of treaties to which each of them is a party in its own name. A mere territory may have an existing complex of treaties formerly made applicable to it by its administering Power; but these treaties are not treaties to which it is itself a party at the moment when it joins other territory or territories to compose a State. On the contrary, they are treaties to which a successor State would be considered a party only after notification of succession in the case of a multilateral treaty or by agreement in the case of a bilateral treaty.

(3) One example of such a plural-territory State, of a federal type, is Nigeria, which was created out of four former territories, namely, the colony of Lagos, the two protectorates of Northern and Southern Nigeria and the northern region of the British Trust Territory of the Cameroons.³¹³ The treaty situation on the eve of independence has been broadly estimated as follows: ³¹⁴ of the 78 multilateral treaties affecting parts of Nigeria before independence 37 applied to all territories, 31 to Lagos only, 3 to the two Protectorates only, 6 to both Lagos and the two Protectorates and 1 to the Trust Territory only. Of the 222 bilateral treaties, 151 applied equally to all four parts, 53 to Lagos only, 1 to the two Protectorates only, 13 to both Lagos and the two Protectorates, and 2 to the Trust Territory only. Nigeria is a State which entered into a devolution agreement with the United Kingdom prior to independence and has since notified or acknowledged its succession to a certain number of the above mentioned multilateral and bilateral treaties. Neither in its devolution agreement ³¹⁵ nor in its notifications or acknowledgements does Nigeria seem to have distinguished between treaties previously applicable in respect of all four territories or only of some of them. Moreover, in notifying or acknowledging the continuance in force of any treaties for Nigeria, it seems to have assumed that they would apply

³¹² The International Law Association referred to a composite State as a State “formed out of several previously separate States or territories”, grouping together therefore all unions or federations whether formed from a union of States or merely from two or more territories (see the International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), p. 600 [Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors, note 2]).

³¹³ Although there was a consolidation of some of those territories since 1914, when Northern and Southern Nigeria were amalgamated, the whole territory being known thereafter as the Colony and Protectorate of Nigeria. The territory as a whole was then divided into three areas: the Colony of Nigeria and two groups of provinces and protectorates—Northern and Southern. The Southern was later divided into Eastern and Western. In 1951, the Northern, Eastern and Western were renamed regions. At the date of independence there were British treaties applicable in respect of different parts of Nigeria, notwithstanding such a consolidation.

³¹⁴ The figures for multilateral and bilateral treaties add up to about 300 treaties in force in respect of one or other part of Nigeria at the date of independence.

³¹⁵ For the text, see *Yearbook of the International Law Commission, 1962*, vol. II, p. 127, document A/CN.4/150, annex, No. 10.

to Nigeria as a whole and not merely within the respective regions in regard to which they had been applicable before independence. As both depositaries ³¹⁶ and other contracting parties appear to have acquiesced in this point of view, for they also refer simply to Nigeria.³¹⁷

(4) The Federation of Malaysia is a more complex case, involving two stages. The first was the formation of the Federation of Malaya as an independent State in 1957 out of two colonies, Malacca and Penang, and nine Protectorates. The bringing together of these territories into a federal association had begun in 1948 so that post-1948 British treaties were applicable in respect of the whole federation at the moment of independence; but the pre-1948 British treaties were applicable in respect only of the particular territories in regard to which they had been concluded. The devolution agreement entered into by Malaya ³¹⁸ referred simply to instruments which might be held to “have application to or in respect of the Federation of Malaya”. On the other hand, Article 169 of the Constitution,³¹⁹ which related to the Federal Government’s power to legislate for the implementation of treaties, did provide that any treaty entered into by the United Kingdom “on behalf of the Federation or any part thereof” should be deemed to be a treaty between the Federation and the other country concerned. Exactly what was intended by this provision is not clear. But in practice neither the Federation nor depositaries appear in the case of multilateral treaties to have related Malaya’s participation to the particular regions of Malaya in regard to which the treaty was previously applicable.³²⁰ In the case of bilateral treaties the practice available to the Commission does not indicate clearly how far continuance in force of pre-independence treaties was related to the particular regions in regard to which they were applicable.

(5) The second stage of the Federation occurred in 1963 when, by a new agreement, Singapore, Sabah and Sarawak joined the Federation, the necessary amendments being made to the Constitution for this purpose. Article 169 continued as part of the amended Constitution and was therefore in principle applicable in internal law with respect to the new territories; but no devolution agreement was entered into between the United Kingdom and the Federation in relation to these territories. In two opinions given in 1963 the United Nations Office of Legal Affairs regarded the entry of the three territories into the Federation as an enlargement of the Federation. The first con-

³¹⁶ e.g. the Secretary-General’s letter of enquiry of 28 February 1961 (*ibid.*, p. 117, para. 96).

³¹⁷ See, for example, United States, Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1972* (Washington D.C., U.S. Government Printing Office, 1972), pp. 179-180.

³¹⁸ See United Nations, *Materials on Succession of States* (*op. cit.*), p. 76.

³¹⁹ *Ibid.*, pp. 87-88.

³²⁰ See the Secretary-General’s letter of enquiry of 8 December 1957 in *Yearbook of the International Law Commission, 1962*, vol. II, p. 112, document A/CN.4/150, para. 44; and United Nations, *Multilateral Treaties . . . 1971* (*op. cit.*), where reference is made simply to Malaya as a party to certain of the treaties listed in the Secretary-General’s letter of enquiry.

cerned Malaysia's membership of the United Nations and, after reciting the basic facts and certain precedents, the Office of Legal Affairs stated:

An examination of the Agreement relating to Malaysia of 9 July 1963 and of the constitutional amendments, therefore, confirms the conclusion that the international personality and identity of the Federation of Malaya was not affected by the changes which have taken place. Consequently, Malaysia continues the membership of the Federation of Malaya in the United Nations.

Even if an examination of the constitutional changes had led to an opposite conclusion that what has taken place was not an enlargement of the existing Federation but a merger in a union or a new federation, the result would not necessarily be different as illustrated by the cases of the United Arab Republic and the Federal Republic of Cameroon.³²¹

If that opinion concerned succession in relation to membership, the second concerned succession in relation to a treaty—a Special Fund Agreement. The substance of the advice given by the United Nations Office of Legal Affairs is as follows:

As you know, the Agreement between the United Kingdom and the Special Fund was intended to apply to Special Fund projects in territories for the international relations of which the United Kingdom is responsible (see, e.g., the first paragraph of the preamble to the Agreement). In view of the recent changes in the international representation of Sabah (North Borneo) and Singapore, the *United Kingdom Agreement may be deemed to have ceased to apply with respect to those territories in accordance with general principles of international law,** and this would be true notwithstanding that the Plans of Operation for the projects technically constitute part of the Agreement with the United Kingdom under article I, paragraph 2, of that Agreement. Although the Special Fund could take the position that the United Kingdom Agreement has devolved upon Malaysia and that it continues to apply to Singapore and Sabah (North Borneo), this could well result in two separate agreements becoming applicable within those territories (i.e., the United Kingdom Agreement for projects already in existence and, as explained below, the Agreement with Malaya with respect to future projects), a situation which could give rise to confusion and should be avoided if possible.

As regards the Agreement between the Special Fund and Malaya, it continues in force with respect to the State now known as Malaysia since the previous international personality of the Federation of Malaya continues and has no effect on its membership in the United Nations. Similarly, the Agreement between the Special Fund and the Federation of Malaya should be deemed unaffected by the change in the name of the State in question. *Moreover, we are of the opinion that the Malayan Agreement applies of its own force and without need for any exchange of letters to the territory newly acquired by that State,** and to Plans of Operation for future projects therein, in the absence of any indication to the contrary from Malaysia.³²²

The Office of Legal Affairs advised that "Malaysia" constituted an enlarged "Malaya" and that "Malaya's" Special Fund Agreement, by operation of the moving treaty frontier principle, had become applicable in respect of Singapore and Sabah. This advice was certainly in accordance with the principle generally applied in cases of enlargement of territory, as is illustrated by the cases of the accession of Newfoundland to the Canadian Federation,

and the "federation" of Eritrea with Ethiopia.³²³ Moreover, the same principle, that Malaya's treaties would apply automatically to the additional territories of Singapore, Sabah and Sarawak, appears to have been acted on by the Secretary-General in his capacity as depositary of multilateral treaties. Thus, in none of the many entries for "Malaysia" in *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions*³²⁴ is there any indication that any of the treaties apply only in certain regions of Malaysia.

(6) Similarly, in the case of other multilateral treaties Malaysia appears to have been treated simply as an enlargement of Malaya and the treaties as automatically applicable in respect of Malaysia as a whole.³²⁵ An exception is the case of GATT where Malaysia notified the Director-General that certain pre-federation agreements of Singapore, Sarawak and Sabah would continue to be considered as binding in respect of those States, but would not be extended to the States of the former Federation of Malaya; and that certain other agreements in respect of the latter States would for the time being not be extended to the three new States.³²⁶

(7) The circumstances of the federation of Rhodesia and Nyasaland in 1963, which was formed from the colony of Southern Rhodesia and the protectorates of Northern Rhodesia and Nyasaland, were somewhat special so that it is not thought to be a useful precedent from which to draw any general conclusions in regard to the formation of plural-territory States. The reason is that the British Crown retained certain vestigial powers with respect to the external relations of the Federation and this prevents the case from being considered as a "succession" in the normal sense.

(8) States formed from two or more territories may equally be created in the form of unitary States, modern instances of which are Ghana and the Republic of Somalia. Ghana consists of the former colony of the Gold Coast, Ashanti, the Northern Territories Protectorate and the Trusteeship Territory of Togoland. It appears there were no treaties, multilateral or bilateral, which were applied before independence to Ashanti, the Northern Territories or Togoland which were not also applied to the Gold Coast; on the other hand, there were some treaties which applied to the Gold Coast but not to the other parts of what is now Ghana. The latter point is confirmed by the evidence in *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions*.³²⁷ In regard to bilateral treaties it seems that of the nine United Kingdom treaties listed under Ghana in the United States publication *Treaties in Force*, three had previously applied to the Gold Coast alone, one to the

³²¹ United Nations, *Juridical Yearbook, 1963* (United Nations publication, Sales No. 65.V.3), p. 163.

³²² *Ibid.*, p. 178.

³²³ See above, commentary to article 10, para. 5.

³²⁴ United Nations, *Multilateral Treaties . . . 1971* (*op. cit.*).

³²⁵ See *Yearbook of the International Law Commission, 1969*, vol. II, pp. 38 and 41, document A/CN.4/210, paras. 53 and 63, and *ibid.*, 1970, vol. II, pp. 90-91, document A/CN.4/225, paras. 114-115.

³²⁶ *Ibid.*, 1968, vol. II, p. 84, document A/CN.4/200 and Add.1-2, para. 371.

³²⁷ United Nations, *Multilateral Treaties . . . 1971* (*op. cit.*).

Gold Coast and Ashanti alone and only five to all four parts of Ghana.

(9) After independence Ghana notified her succession in respect of a number of multilateral treaties of which the Secretary-General is the depositary, some being treaties previously applicable only in respect of parts of what is now her territory. There is no indication in the Secretary-General's practice that Ghana's notifications of succession are limited to particular regions of the State; and, similarly, there is no indication in the United States *Treaties in Force* that any of the nine United Kingdom bilateral treaties specified as in force *vis-à-vis* Ghana are limited in their application to the particular regions in respect of which they were in force prior to independence. Nor has the Commission found any practice to the contrary in the Secretariat studies of succession in respect of multilateral or of bilateral treaties or in *Materials on Succession of States*.³²⁸ In other words, the presumption seems to have been made that Ghana's acceptance of succession was intended to apply to the whole of her territory, even although the treaty might previously have been applicable only in respect of some part of the new composite State.

(10) The Republic of Somalia is a unitary State composed of Somalia and Somaliland. Both these territories had become independent States before their uniting as the Republic of Somalia so that, technically, the case may be said to be one of a uniting of States. But their separate existences as independent States were very short-lived and designed merely as steps towards the creation of a unitary Republic. In consequence, from the point of view of succession in respect of treaties the case has some similarities with that of Ghana, provided that allowance is made for the double succession which the creation of the Republic of Somalia involved. The general attitude of the Somalia Government seems to have been that treaties, when continued at all, apply only to the areas to which they territorially applied before independence. This is certainly borne out by the position taken by Somalia in regard to ILO conventions previously applicable to either or both of the territories of which it was composed.³²⁹ There were two such conventions previously applicable both to the Trust Territory and to British Somaliland and these Somalia recognized as continuing in force in respect of the whole Republic. Seven more conventions had previously been applicable to the Trust Territory but not to British Somaliland and a further six applicable to British Somaliland but not to the Trust Territory. These conventions also she recognized as continuing in force but only in respect of the part of her territory to which they had been applicable. It appears that Somalia adopts the same attitude in regard to extradition treaties; and that she accordingly would refuse extradition of a person in the Trust Territory if extradition were sought under a former British extradition treaty applicable in respect of British Somaliland.

(11) In general, Somalia has been very sparing in her recognition of succession in respect of treaties, as may be

seen from the extreme paucity of references to Somalia in the Secretariat studies. It is also reflected in the fact that she has not recognized her succession to any of the multilateral treaties of which the Secretary-General is the depositary.³³⁰ As to those treaties, the position taken by the Secretary-General in 1961 in his letter of enquiry to Somalia is of interest. He listed nine multilateral treaties previously applicable in respect of both the Trust Territory and British Somaliland and said that, upon being notified that Somalia recognized herself as bound by them, she would be considered as having become a party to them in her own name as from the date of independence. He then added:

The same procedure could be applied in respect of those instruments which either were made applicable only to the former Trust Territory of Somaliland by the Government of Italy or only to the former British Somaliland by the Government of the United Kingdom, provided that your Government would recognize that their application now extends to the entire territory of the Republic of Somalia.*³³¹

This passage seems to deny to Somalia the possibility of notifying her succession to the treaties in question only in respect of the territory to which they were previously applicable. If so, it may be doubted whether in the light of later practice it any longer expresses the position of the Secretary-General in regard to the possibility of a succession restricted to the particular territory to which the treaty was previously applicable.

(12) The practice summarized in the preceding paragraphs indicates that cases of the formation of a State from two or more territories fall within the rules of part III (Newly independent States) of the present draft articles and that the only particular question which they raise is the territorial scope to be attributed to a treaty which at the date of the succession was not in force in all the territories which formed the newly independent State when such treaty is recognized by the latter as remaining in force.

(13) As is apparent from the recorded practice, the question of territorial scope has been dealt with in one way in some cases and in a different way in others. However, once it is accepted that in a newly independent State it is a matter of consent, the differences in the practice are reconcilable on the basis that they merely reflect differences in the intentions—in the consents—of the States concerned. The question then is whether a treaty should be presumed to apply to the entire territory of the newly independent State formed from two or more territories unless a contrary intention appears, or whether a treaty should be presumed to apply only in respect of the constituent territory or territories in which it was previously in force unless an intention to apply it to the entire territory of the newly independent State appears.

(14) The Commission considered the former of these two possibilities to be the more appropriate rule. Consequently, the introductory sentence of article 25 provides that when a newly independent State has been formed from two or more territories in respect of which the

³²⁸ United Nations, *Materials on Succession of States* (op. cit.).

³²⁹ See *Yearbook of the International Law Commission, 1962*, vol. II, p. 119, document A/CN.4/150, para. 103.

³³⁰ *Ibid.*

³³¹ *Ibid.*, p. 118, para. 104.

treaties in force at the date of the succession of States were not identical, any treaty which is continued in force under articles 12 to 21 of the present draft articles is considered as applying in respect of the entire territory of that State.

(15) At the same time, the Commission felt it necessary to except from the "entire territory" presumption, the cases mentioned in sub-paragraphs (a) to (d) of the article. The first exception relates to a case in which it appears from the treaty or is otherwise established that the application of the treaty to the entire territory would be incompatible with its object and purpose or the effect of the combining of the territories is radically to change the conditions for the operation of the treaty (*sub-paragraph* (a)). The second exception concerns multilateral treaties other than restricted ones. In such a case, the newly independent State may indicate in its notification of succession that the application of the treaty is restricted to the territory in respect of which the treaty was in force prior to the succession (*sub-paragraph* (b)). Finally, for restricted multilateral treaties and bilateral treaties the "entire territory" presumption may be negated by agreement the successor State and the other States parties (*sub-paragraphs* (c) and (d)).

PART IV. UNITING, DISSOLUTION AND SEPARATION OF STATES

Article 26. Uniting of States

1. On the uniting of two or more States in one State, any treaty in force at that date between any of those States and other States parties to the treaty continues in force between the successor State and such other States parties unless:

(a) The successor State and the other States parties otherwise agree; or

(b) The application of the particular treaty after the uniting of the States would be incompatible with its object and purpose or the effect of the uniting of the States is radically to change the conditions for the operation of the treaty.

2. Any treaty continuing in force in conformity with paragraph 1 is binding only in relation to the area of the territory of the successor State in respect of which the treaty was in force at the date of the uniting of the States unless:

(a) The successor State notifies the parties or the depositary of a multilateral treaty that the treaty is to be considered as binding in relation to its entire territory;

(b) In the case of a multilateral treaty falling under article 12, paragraph 3, the successor State and all the parties otherwise agree; or

(c) In the case of a bilateral treaty, the successor State and the other State party otherwise agree.

3. Paragraphs 1 and 2 apply also when a successor State itself unites with another State.

Commentary

(1) This articles deals with a succession of States arising from the uniting in one State of two or more States, which had separate international personalities at the date of the succession. The case of the emergence of a State from the combining of two or more territories, not already States at the date of the succession, falls within the rules which govern newly independent States and, accordingly, has been dealt with separately in part III, article 25. The transfer of a mere *territory* to an existing State also falls under an earlier provision of the draft articles, namely the moving treaty frontier rule set out in article 10.

(2) The succession of States envisaged in the present article involves therefore the disappearance of two or more sovereign States and, through their uniting, the creation of a new State. Nor does it matter what may be the particular form of the internal constitutional organization adopted by the successor State. The uniting may lead to a wholly unitary State, to a federation or to any other form of constitutional arrangement. In other words, the degree of separate identity retained by the original States after their uniting, within the constitution of the successor State, is irrelevant for the operation of the provisions set forth in the article.

(3) Being concerned only with the uniting of two or more States in one State, associations of States having the character of intergovernmental organizations such as, for example, the United Nations, the specialized agencies, OAS, the Council of Europe, CMEA, etc., fall completely outside the scope of the article; as do some hybrid unions which may appear to have some analogy with a uniting of States but which do not result in a new State and do not therefore constitute a succession of States.

(4) One example of such a hybrid is EEC, as to the precise legal character of which opinions differ. For the present purpose, it suffices to say that, from the point of view of succession in respect of treaties, EEC appears to keep on the plane of intergovernmental organizations. Thus, article 234 of the Treaty of Rome³³² unmistakably approaches the question of the pre-Community treaties of member States with third countries from the angle of the rules governing the application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention on the Law of Treaties). In other words, pre-Community treaties are dealt with in the Rome Treaty in the context of compatibility of treaty obligations and not of succession or moving treaty frontiers. The same is true of the instruments which established the other two European Communities.³³³ Furthermore, the Treaty of

³³² Treaty instituting the European Economic Community. See United Nations, *Treaty Series*, vol. 294, p. 17 (text in French).

³³³ Treaty instituting the European Coal and Steel Community, section 17 of the Convention on Transitional Provisions (United Nations, *Treaty Series*, vol. 261, pp. 297 and 299); and Treaty establishing the European Atomic Energy Community, articles 105 and 106 (*ibid.*, vol. 298, p. 205).

Accession of 22 January 1972,³³⁴ which sets out the conditions under which four additional States may join EEC and Euratom, deals with the pre-accession treaties of the candidate States on the basis of compatibility of treaty obligations—of requiring them to bring their existing treaty obligations into line with the obligations arising from their accession to the Communities. Similarly, the Treaty of Accession expressly provides for the new member States to become bound by various categories of pre-accession treaties concluded by the Communities or by their original members and does not rely on the operation of any principle of succession or of moving treaty frontiers.

(5) Numerous other economic unions have been created in various forms and with varying degrees of “community” machinery; e.g. EFTA, LAFTA and other free-trade areas and the Benclux. In general, the constitutions of these economic unions leave in no doubt their essential character as inter-governmental organizations. In the case of the Belgium-Luxemburg Economic Union, if Belgium may be expressly empowered to conclude treaties on behalf of the Union, the relationship between the two countries within the Union appears to remain definitively on the international plane. In practice all these economic unions, including the closely integrated Liechtenstein-Swiss Customs Union, have been treated as international unions and not as involving the creation of a new State.

(6) In analysing the effect on treaties of a uniting of States, writers tend to make a distinction between cases in which the successor State is organized in a federal form and cases in which the successor State adopts another constitutional form of government, but they tend also to conclude that the distinction has no great significance. Among the historical examples more commonly mentioned are the formation of the United States of America, Switzerland, the German Federation of 1871, the foundation of the Greater Republic of Central America in 1895 and the former unions of Norway and Sweden and of Denmark and Iceland. The chief modern precedents are the uniting of Egypt and Syria in 1958 and of Tanganyika and Zanzibar in 1964.

(7) Various interpretations of the effect of the formation of the German Federation of 1871 upon pre-existing treaties have been advanced but the prevailing view seems to be that the treaties of the individual German States continued either to bind the federal State, as a successor to the constituent State concerned, within their respective regional limits or to bind the individual States through the federal State until terminated by an inconsistent exercise of federal legislative power. It is true that certain treaties of individual States were regarded as applicable in respect of the federation as a whole. But these cases appear to have concerned only particular categories of treaties and

in general any continuity of the treaties of the States was confined to their respective regional limits. Under the federal constitution the individual States retained both their legislative and their treaty-making competence except in so far as the federal Government might exercise its over-riding powers in the same field.

(8) The Swiss Federal Constitution of 1848 vested the treaty-making and treaty-implementing powers in the federal Government. At the same time, it left in the hands of the Cantons a concurrent, if subordinate, power to make treaties with foreign States concerning “l'économie publique, les rapports de voisinage et de police”.³³⁵ The pre-federation treaties of individual Cantons, it seems clear, were considered as continuing in force within their respective regional limits after the formation of the federation. At the same time, the principle of continuity does not appear to have been limited to treaties falling within the treaty-making competence still possessed by the Cantons after the federation. It further appears that treaties formerly concluded by the Cantons are not considered under Swiss law as abrogated by reason only of incompatibility with a subsequent federal law but are terminated only through a subsequent exercise of the federal treaty-making power.

(9) Another precedent, though the federation was very short-lived, is the foundation of the Greater Republic of Central America in 1895. In that instance El Salvador, Nicaragua and Honduras signed a Treaty of Federation constituting the Greater Republic; and in 1897 the Greater Republic itself concluded a further treaty of federation with Costa Rica and Guatemala, extending the federation to these two Republics. The second treaty, like the first, invested the Federation with the treaty-making power, but it also expressly provided “former treaties entered into by the States shall still remain in force in so far as they are not opposed to the present treaty”.³³⁶

(10) The notification made by the Soviet Union on 23 July 1923 concerning the existing treaties of the Russian, White Russian, Ukrainian and Transcaucasian Republics may perhaps be regarded as a precedent of a similar kind. The notification stated that

the People's Commissariat for Foreign Affairs of the USSR is charged with the execution in the name of the Union of all its international relations, including the execution of all treaties and conventions entered into by the above-mentioned Republics with foreign States which shall remain in force in the territories of the respective Republics.

(11) The admission of Texas, then an independent State, into the United States of America in 1845 also calls for consideration in the present context. Under the United States constitution the whole treaty-making power is vested in the federal Government, and it is expressly forbidden to the individual States to conclude treaties. They may enter into agreements with foreign Power only with

³³⁴ Treaty concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community: Act concerning the conditions of accession and the adjustments to the treaties, article 4. See *Official Journal of the European Communities—Legislation*, Special Edition, Luxembourg, 27 March 1972, No. L 73, pp. 14-15.

³³⁵ C. Hilty, *Les conditions fédérales de la Confédération suisse* (Neuchâtel, Attinger, 1891), p. 439.

³³⁶ “Los tratados anteriores, celebrados entre los Estados quedarán vigentes en lo que no se opongan al presente Pacto”. See J. M. Bonilla, ed., *Derecho de Gentes Positivo Nicaragüense*, t. II, *Pactos internacionales panamericanos* (Managua, Tipografía y Encuadernación Nacional, 1922), pp. 212-213.

the consent of Congress which has always been taken to mean that they may not make treaties on their own behalf. The United States took the position that Texas's pre-federation treaties lapsed and that Texas fell within the treaty-régime of the United States; in other words, that it was a case for the application of the moving treaty frontier principle. At first, both France and Great Britain objected, the latter arguing that Texas could not, by voluntarily joining the United States federation, exonerate herself from her own existing treaties. Later, in 1857, Great Britain came round to the United States view that Texas's pre-federation treaties had lapsed. The reasoning of the British Law Officers seems, however, to have differed slightly from that of the United States Government.

(12) As to non-federal successor States, the "*personal unions*" may be left out of account, because they do not raise any question of succession. They entail no more than the possession, sometimes almost accidental, by two States of the same person as Head of State (e.g. Great Britain and Hanover between 1714 and 1837), and they in no way affect the treaty relations of the States concerned with other States. In any event, they appear to be obsolete. So-called "*real unions*", on the other hand, entail the creation of a composite successor State. Such a State exists when two or more States, each having a separate international personality, are united under a common constitution with a common Head of State and a common organ competent to represent them in their relations with other States. A union may have some other common organs without losing its character as a "real" rather than federal union; but the essence of the matter for present purposes is the separate identities of the individual States and the common organs competent to represent them internationally in at least some fields of activity. Amongst the older cases of real unions that are usually mentioned are the Norwegian-Swedish union under the Swedish Crown from 1814 to 1905 and the Danish-Icelandic union under the Danish Crown from 1918 to 1944. In each of these cases, however, one of the two union States (Norway and Iceland respectively) had not been independent States prior to the union, and it is only in connexion with the *dissolution* of unions that these precedents are cited.³³⁷ More to the point are the modern precedents of the uniting of Egypt and Syria in 1958 and of Tanganyika and Zanzibar in 1964.

(13) Egypt and Syria, each an independent State and Member of the United Nations, proclaimed themselves in 1958 one State to be named the "United Arab Republic" the executive authority being vested in a Head of State and the legislative authority in one legislative house. Article 58 of the Provisional Constitution³³⁸ also provided that the Republic should consist of two regions, Egypt and Syria, in each of which there should be an executive

council competent to examine and study matters pertaining to the execution of the general policy of the region. But under the Constitution of the Republic the legislative power and the treaty-making power (article 56) were both entrusted to the central organs of the united State, without any mention of the region's retaining any separate legislative or treaty-making powers of their own. *Prima facie*, therefore, the Proclamation and Provisional Constitution designed the UAR to be a new unitary State rather than a "union", either real or federal. In practice, however, Egypt and Syria were generally recognized as in some measure retaining their separate identity as distinct units of the UAR.

(14) This view of the matter was, no doubt, encouraged by the terms of article 69 of the Provisional Constitution, which provided for the continuance in force of all the pre-union treaties of both Egypt and Syria within the limits of the particular region in regard to which each treaty had been concluded. *Vis-à-vis* third States, however, that provision had the character of a unilateral declaration which was not, as such, binding upon them.

(15) In regard to multilateral treaties, the Foreign Minister of the UAR made a communication to the Secretary-General of the United Nations in the following terms:

It is to be noted that the Government of the United Arab Republic declares that the Union is a single Member of the United Nations, bound by the provisions of the Charter, and that all international treaties and agreements concluded by Egypt or Syria with other countries will remain valid within the regional limits prescribed on their conclusion and in accordance with the principles of international law.³³⁹

The response of the Secretary-General to this communication was, during the existence of the Union, to list the UAR as a party to all the treaties to which Egypt or Syria had been parties before the Union was formed; and under the name of the UAR he indicated whether Egypt or Syria or both had taken action in respect of the treaty in question.³⁴⁰ As to treatment accorded to the UAR in regard to membership of the United Nations,³⁴¹ the notification addressed by the UAR to the Secretary-General had requested him to communicate the information concerning the formation of the United Republic to all Member States and principal organs of the United Nations and to all subsidiary organs, particularly those on which Egypt or Syria, or both, had been represented. The Secretary-General, in his capacity as such, accepted credentials issued by the Foreign Minister of the UAR for its Permanent Representative, informing Member States and all principal and subsidiary organs of his action in the following terms:

In accepting this letter of credentials the Secretary-General has noted that this is an action within the limits of his authority, undertaken without prejudice to and pending such action as other organs of the United Nations may take on the basis of notification of the constitution of the United Arab Republic and the Note of 1 March 1958.³⁴² [The Foreign Minister's Note informing the Secretary-General of the formation of the United Republic.]

³³⁷ The union of Austria and Hungary in the Dual Monarchy is another case sometimes cited, but only in regard to the effect of a dissolution of a union on treaties.

³³⁸ For the text of the Provisional Constitution of the United Arab Republic, see *The International and Comparative Law Quarterly* (London), vol. 8, pp. 374-380.

³³⁹ *Yearbook of the International Law Commission, 1962*, vol. II, p. 113, document A/CN.4/150, para. 48.

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.*, p. 104, document A/CN.4/149 and Add.1, paras. 17-21.

³⁴² *Ibid.*, para. 19.

The upshot was that the “representatives of the Republic without objection took their seats in all the organs of the United Nations of which Egypt or Syria, or both, had been members”; and this occurred without the UAR’s undergoing “admission” as a Member State.³⁴³ It seems therefore that the Secretary-General and the other organs of the United Nations, acted on the basis that the UAR united and continued in itself the international personalities of Egypt and Syria. The Specialized Agencies, *mutatis mutandis*, dealt with the case of the UAR in a similar way. In the case of ITU it seems that the UAR was considered as a party to the constituent treaty, subject to different reservations in respect of Egypt and Syria which corresponded to those previously contained in the ratifications of those two States.³⁴⁴

(16) The practice regarding bilateral treaties proceeded on similar lines, in accord with the principles stated in article 69 of the Provisional Constitution; i.e. the pre-union bilateral treaties of Egypt and Syria were considered as continuing in force within the regional limits in respect of which they had originally been concluded. The practice examined shows that it was the case with regard to extradition treaties, commercial treaties and air transport agreements of Egypt and Syria.³⁴⁵ The same view in regard to the pre-union treaties of Egypt and Syria was reflected in the lists of treaties in force published by other States. The United States, for example, listed against the United Arab Republic twenty-one pre-union bilateral treaties with Egypt and six with Syria.

(17) The uniting of Tanganyika and Zanzibar in the United Republic of Tanzania in 1964 was also a union of independent States under constituent instruments which provided for a common Head of State and a common organ responsible for the external, and therefore treaty, relations of the United Republic.³⁴⁶ The constituent instruments indeed provided for a Union Parliament and Executive to which various major matters were reserved. Unlike the Provisional Constitution of the UAR, they also provided for a separate Zanzibar legislature and executive having competence in all internal matters not reserved to the central organs of the United Republic. The particular circumstances in which the United Republic was created, however, complicated this case as a precedent from which to deduce principles governing the effect of the uniting of two or more States in one State upon treaties.

(18) If both Tanganyika and Zanzibar were independent States in 1964 when they united in the Republic of Tanzania, their independence was of very recent date. Tanganyika, previously a Trusteeship territory, had become independent in 1961; Zanzibar, previously a colonial protectorate, had attained independence and become a

Member of the United Nations only towards the end of 1963. In consequence the formation of Tanzania occurred in two stages, the second of which followed very rapidly after the first: (a) the emergence of each of the two individual territories to independence, and (b) the uniting of the two, now independent, States in the Republic of Tanzania. Tanganyika, on beginning life as a new State, had made the Nyerere declaration by which, in effect, she gave notice that pre-independence treaties would be considered by her as continuing in force only a provisional basis during an interim period, pending a decision as to their continuance, termination or renegotiation.³⁴⁷ She recognized the possibility that some treaties might survive “by the application of rules of customary law”, apparently meaning thereby boundary and other localized treaties. Otherwise, she clearly considered herself free to accept or reject pre-independence treaties. The consequence was that, when not long afterwards Tanganyika united with Zanzibar, many pre-union treaties applicable in respect of her territory had terminated or were in force only provisionally. Except for possible “localized treaties”, she was bound only by such treaties as she had taken steps to continue in force. As to Zanzibar, there seems to be little doubt that, leaving aside the question of localized treaties, she was not bound to consider any pre-independence treaties as in force at the moment when she joined with Tanganyika in forming the Republic of Tanzania.

(19) In a Note of 6 May 1964, addressed to the Secretary-General, the new United Republic informed him of the uniting of the two countries as one sovereign State under the name of the United Republic of Tanganyika and Zanzibar (the subsequent change of name to Tanzania was notified on 2 November 1964).³⁴⁸ It further asked the Secretary-General:

to note that the United Republic of Tanganyika and Zanzibar declares that it is now a single member of the United Nations bound by the provisions of the Charter, and that all international treaties and agreements in force between the Republic of Tanganyika or the People’s Republic of Zanzibar and other States or international organizations will, to the extent that their implementation is consistent with the constitutional position established by the Articles of the Union, remain in force within the regional limits prescribed on their conclusion and in accordance with the principles of international law.³⁴⁹

This declaration, except for the proviso “to the extent that their implementation is consistent with the constitutional position established by the Articles of the Union”, follows the same lines as that of the United Arab Republic. Furthermore, the position taken by the Secretary-General in communicating the declaration to other United Nations organs and to the specialized agencies was almost identical with that adopted by him in the case of the UAR, and the specialized agencies seem to have followed the precedent of the UAR in dealing with the merger of Tanganyika and Zanzibar in the United Republic of Tanzania. At any rate, the resulting united State was treated as simply continuing the membership of Tanganyika (and also of Zan-

³⁴³ *Ibid.*, para. 20.

³⁴⁴ *Ibid.*, 1970, vol. II, p. 89, document A/CN.4/225, para. 108.

³⁴⁵ *Ibid.*, pp. 129-130 and 127, document A/CN.4/229, paras. 147 and 130-131; and *ibid.*, 1971, vol. II (Part Two), pp. 142-146, 148, 179-181 and 183, documents A/CN.4/243, paras. 152-175 and 190, and A/CN.4/243/Add.1, paras. 149-166 and 181.

³⁴⁶ See “Treaties and succession of States and governments in Tanzania”, in Nigerian Institute for International Affairs, *African Conference on International Law and African Problems: Proceedings* (Carnegie Endowment for International Peace, 1967), paras. 26-28.

³⁴⁷ See above, commentary to article 8, para. 2.

³⁴⁸ United Nations, *Multilateral Treaties . . . 1971 (op. cit.)*, p. 7, foot-note 8.

³⁴⁹ *Ibid.*

zibar in those cases where the latter had become a Member prior to the union) without any need to undergo the relevant admission procedure.

(20) As to multilateral treaties, Tanzania confirmed to the Secretary-General that the United Republic would continue to be bound by those in respect of which the Secretary-General acts as depositary and which had been signed, ratified or acceded to *on behalf of Tanganyika*. No doubt, the United Republic's communication was expressed in those terms for the simple reason that there were no such treaties which had been signed, ratified or acceded to *on behalf of Zanzibar* during the latter's very brief period of existence as a separate independent State prior to the union. In the light of that communication, the Secretary-General listed the United Republic as a party to a number of multilateral treaties on the basis of an act of acceptance, ratification or accession by Tanganyika prior to the union. Moreover, he listed the date of *Tanganyika's* act of acceptance, ratification or accession as the commencing date of the United Republic's participation in the treaties in question.³⁵⁰ Only in the cases of the Charter of the United Nations and the Constitution of WHO, to which Zanzibar had become a party by admission prior to the union, was any mention made of Zanzibar; and in these cases under the entry for Tanzania he also gave the names of Tanganyika and Zanzibar together with the separate dates of their respective admission to the United Nations.³⁵¹ In the other cases, the entry for Tanzania did not contain any indication that Tanzania's participation in the treaty was to be considered as restricted to the regional limits of Tanganyika.

(21) Tanganyika, after attaining independence, notified her succession to the four Geneva Humanitarian Conventions of 1949 and was therefore a party to them at the time of the formation of the United Republic of Tanzania.³⁵² Zanzibar, on the other hand, had taken no action with respect to these treaties prior to the union. Tanzania is now listed as a party, but it seems that the question whether Tanzania's participation embraces Zanzibar as well as Tanganyika is regarded as still undetermined.³⁵³ Similarly, the Republic of Tanganyika but not Zanzibar had become a party to the Paris Convention for the Protection of Industrial Property (Lisbon text) prior to the formation of the United Republic. After the formation of the Union, BIRPI listed Tanzania as having acceded to the Paris Convention on the basis of the Lisbon

text; but in this case also it was stated that the question of the application of the Convention to Zanzibar was still undetermined.³⁵⁴ The situation at the moment of union differed in the case of GATT, in that Zanzibar, although she had not taken steps to become a party prior to the formation of the united State, had been an associate member of GATT before attaining independence. Otherwise, it was similar, as Tanganyika had notified the Secretary-General of her succession not only to GATT but to forty-two international instruments relating to GATT. After the uniting the United Republic of Tanzania informed GATT of its assumption of responsibility for the external trade relations of both Tanganyika and Zanzibar, and the United Republic was then regarded as a single contracting party to GATT.³⁵⁵ In the case of FAO also Tanganyika, before the Union, had taken steps to become a member while Zanzibar, a former associate member had not. On being notified of the uniting of the two countries in a single State, the FAO Conference formally recognized that the United Republic of Tanzania "replaced the former member Nation, Tanganyika, and the former associate member, Zanzibar". At the same time, the membership of the United Republic is treated by FAO as dating from the commencement of *Tanganyika's* membership; and it appears that Zanzibar is considered to have had the status of a non-member State during the brief interval between its attainment of independence and the formation of the United Republic of Tanzania.³⁵⁶ In ITU, the effect of the creation of the united State seems to have been determined on similar lines.³⁵⁷

(22) Bilateral treaties—leaving aside the question of localized treaties—in the case of Tanganyika were due under the terms of the Nyerere declaration to terminate two years after independence, that is on 8 December 1963 and some months before the formation of Tanzania. The position at the date of the uniting therefore was that the great majority of the bilateral treaties applicable to Tanganyika prior to its independence had terminated. In some instances, however, a pre-independence treaty had been continued in force by mutual agreement before the uniting took place. This was so, for example, in the case of a number of commercial treaties, legal procedure agreements and consular treaties, the maintenance in force of which had been agreed in exchanges of notes with the interested States. In other instances, negotiations for the maintenance in force of a pre-independence treaty which had been begun by Tanganyika prior to the date of the uniting were completed by Tanzania after that date. In addition, a certain number of new treaties had been concluded by Tanganyika between the date of its independence and that of the formation of the United Republic. In the case of visa abolition agreements, commercial treaties, extradition and legal procedure agreements, it seems that prior

³⁵⁰ e.g. the Convention of 1946 on the Privileges and Immunities of the United Nations; the Convention of 1947 on the Privileges and Immunities of the Specialized Agencies; the Vienna Convention on Diplomatic Relations and its Optional Protocols; the Paris Agreements of 1904 and 1910 for the Suppression of White Slave Traffic as amended by Protocols signed at New York in 1949; the Conventions for the Suppression of the Circulation of Obscene Publications; the Agreement of 1963 Establishing the African Development Bank, etc. (See United Nations, *Multilateral Treaties . . . 1971* (*op. cit.*), pp. 34, 43, 49, 54, 56, 164, 167, 175, 180, 205.)

³⁵¹ *Ibid.*, pp. 7 and 185.

³⁵² *Yearbook of the International Law Commission, 1968*, vol. II, p. 41, document A/CN.4/200 and Add.1 and 2, para. 171.

³⁵³ See United States, Department of State, *Treaties in Force . . . 1972* (*op. cit.*), p. 364, foot-note 3.

³⁵⁴ *Yearbook of the International Law Commission, 1968*, vol. II, p. 59, document A/CN.4/200 and Add.1 and 2, para. 258 and foot-note 466.

³⁵⁵ *Ibid.*, pp. 84 and 86, paras. 373 and 382.

³⁵⁶ *Ibid.*, 1969, vol. II, pp. 38 and 42, document A/CN.4/210, paras. 52 and 70.

³⁵⁷ *Ibid.*, 1970, vol. II, p. 90, document A/CN.4/225, paras. 111-112.

to the uniting Zanzibar had either indicated a wish to terminate the pre-independence treaties or given no indication of a wish to maintain any of them in force. In the case of consular treaties, seven of which treaties had been applicable in respect of Zanzibar prior to its independence, it seems that the consuls continued at their posts up to the date of the uniting, so that the treaties appear to that extent to have remained in force, at any rate provisionally.

(23) After the formation of the United Republic Tanganyika's new Visa Abolition Agreements with Israel and the Federal Republic of Germany were, it appears, accepted as *ipso jure* continuing in force. In addition agreements concluded by Tanganyika for continuing in force pre-independence agreements with five countries were regarded as still in force after the uniting. In all those cases the treaties, having been concluded only in respect of Tanganyika were accepted as continuing to apply only in respect of the region of Tanganyika and as not extending to Zanzibar. As to commercial treaties, the only ones in force on the eve of the uniting were the three new treaties concluded by Tanganyika after its independence with Czechoslovakia, the Soviet Union and Yugoslavia. These treaties again appear to have been regarded as *ipso jure* remaining in force after the formation of the United Republic, but in respect only of the region of Tanganyika. In the case of extradition agreements understandings were reached between Tanganyika and some countries for the maintenance in force provisionally of these agreements. It seems that after the uniting these understandings were continued in force and, in some cases, made the subject of express agreements by exchanges of notes. It further seems that it was accepted that, where the treaty had been applicable in respect of Zanzibar prior to its independence, the agreement for its continuance in force should be considered as relating to Zanzibar as well as Tanganyika. And since these were cases of mutual agreement, it was clearly open to the States in question so to agree. It may be added that after the uniting consular treaties applicable previously in relation to Tanganyika or to Zanzibar also appear to have continued in force as between the United Republic and the other States parties in relation to the region to which they had applied prior to the creation of the united State.

(24) The distinguishing elements of the uniting of Egypt and Syria and of Tanganyika and Zanzibar appear to be: (a) the fact that prior to each uniting both component regions were internationally recognized as fully independent sovereign States; (b) the fact that in each case the process of uniting was regarded not as the creation of a wholly new sovereign State or as the incorporation of one State into the other but as the uniting of two existing sovereign States into one; and (c) the explicit recognition in each case of the continuance in force of the pre-union treaties of both component States in relation to, and in relation *only* to, their respective regions, unless otherwise agreed.

(25) Attention is drawn to two further points. The first is that in neither of the two cases did the constitutional arrangements leave any treaty-making power in the

component States after the formation of the united State. It follows that the continuance of the pre-union treaties within the respective regions was wholly unrelated to the possession of treaty-making powers by the individual regions after the formation of the Union. The second is that in her declaration of 6 May 1964 Tanzania qualified her statement of the continuance of the pre-existing treaties of Tanganyika and Zanzibar by the proviso "to the extent that their implementation is consistent with the constitutional position established by the Articles of the Union". Such a proviso, however, is consistent with a rule of continuity of pre-existing treaties *ipso jure* only if it does no more than express a limitation on continuity arising from the objective incompatibility of the treaty with the uniting of the two States in one State; and this appears to be the sense in which the proviso was intended in Tanzania's declaration.

(26) The precedents concerning the unifying of Egypt and Syria and of Tanganyika and Zanzibar appear therefore to indicate a rule prescribing the continuance in force *ipso jure* of the treaties of the individual constituent States, within their respective regional limits and subject to their compatibility with the situation resulting from the creation of the unified State. In the case of these precedents the continuity of the treaties was recognized although the constitution of the united State did not envisage the possession of any treaty-making powers by the individual constituent States. In other words, the continuance in force of the treaties was not regarded as incompatible with the united State merely by reason of the non-possession by the constituent States, after the date of the succession, of any treaty-making power under the constitution. The precedents concerning federal States are older and less uniform. Taken as a whole, however, and disregarding minor discrepancies, they also appear to indicate a rule prescribing the continuance in force *ipso jure* of the pre-federation treaties of the individual States within their respective regional limits. Precisely how far in those cases the principle of continuity was linked to the continued possession by the individual States of some measure of treaty-making power or international personality is not clear. That element was present in the cases of the German and Swiss federations and its absence in the case of the United States of America seems to have been at any rate one ground on which continuity was denied. Even in those cases, however, to the extent that they considered the principle of continuity to apply, writers seem to have regarded the treaties as remaining in force *ipso jure* rather than through any process of agreement.

(27) In the light of the above practice and the opinion of the majority of writers, the Commission concluded that a uniting of States should be regarded as in principle involving the continuance in force of the treaties of the States in question *ipso jure*. This solution is also indicated by the need of preserving the stability of treaty relations. As sovereign States, the predecessor States had a complex of treaty relations with other States and ought not to be able at will to terminate those treaties by uniting in a single State. The point has particular weight today in view of the tendency of States to group themselves in new forms of association.

(28) Consequently, the Commission formulated the rule embodied in article 26 on the basis of the *ipso jure* continuity principle duly qualified by other elements which need also to be taken into account: i.e. the compatibility of the treaties in force prior to the uniting of the States with the situation resulting from it and the territorial scope which those treaties had under their provisions. *Paragraph 1* of the article states, therefore, that on the uniting of two or more States in one State, any treaty in force at that date between any of those States and other States parties to the treaty continues in force between the successor State and such other States parties except as provided for in sub-paragraphs (a) and (b).

(29) *Sub-paragraph 1* (a) merely sets aside the *ipso jure* continuity rule when the successor State and the other State parties so agree. *Sub-paragraph 1* (b) then, excepts from the *ipso jure* continuity rule cases where the application of the particular treaty after the uniting of the States would be incompatible with its objects and purpose or the effect of the uniting of the States is radically to change the conditions for the operation of the treaty. By such a formula, the Commission intends to lay down an *international objective legal test of compatibility* which, if applied in good faith, should provide a reasonable, flexible and practical rule. The "incompatibility with the object and purpose of the treaty" and the "radical change in the conditions for the operation of the treaty", used in other contexts by the Vienna Convention on the Law of Treaties, in the Commission's view, are the appropriate criteria in the present case to take account of the interests of all the States concerned and to cover all possible situations and all kinds of treaties.

(30) *Paragraph 2* of the article takes care of the territorial scope element by providing that any treaty continuing in force in conformity with paragraph 1 *is binding only in relation to the area of territory of the successor State in respect of which the treaty was in force at the date of the uniting of the States*. This general rule limiting the territorial scope of the treaties to the areas in respect of which they were applicable at the date of the succession of States admits, however, the three exceptions enumerated in sub-paragraphs 2 (a), (b) and (c). The exception in *sub-paragraph 2* (a) entitles the successor State unilaterally to notify the parties or the depositary of a multilateral treaty that the treaty is to be considered as binding in relation to its entire territory. This appeared to the Commission to be justifiable on the basis of the actual practice and as favouring the effectiveness of multilateral treaties. *Sub-paragraphs 2* (b) and (c) relating to restricted multilateral treaties and bilateral treaties provided that such treaties may also be extended to the entire territory of the successor State when this State and the other State parties so agree.

(31) *Paragraph 3* simply provides that the rules set forth in paragraphs 1 and 2 of the article apply also to the case of a uniting of the successor State with another State, in other words, when a further State unites with the States already united as one State.

(32) Lastly, the Commission considered that the rules governing a uniting of States should be the same whether the uniting is established by treaty or by other instru-

ments. To make such a formal distinction the basis for applying different rules of succession in respect of treaties could hardly be justified. A constituent instrument not in treaty form may often embody agreements negotiated between the States concerned. The uniform rules provided for in the present article are intended therefore to apply equally to cases of a uniting of States established by treaty. To that extent, they take precedence over the rules of the general law of treaties embodied in article 30 of the Vienna Convention on the Law of Treaties (application of successive treaties relating to the same subject-matter) to the extent that those rules might otherwise be applicable.

Article 27. Dissolution of a State

1. When a State is dissolved and parts of its territory become individual States:

(a) Any treaty concluded by the predecessor State in respect of its entire territory continues in force in respect of each State emerging from the dissolution;

(b) Any treaty concluded by the predecessor State in respect only of a particular part of its territory which has become an individual State continues in force in respect of this State alone;

(c) Any treaty binding upon the predecessor State under article 26 in relation to a particular part of the territory of the predecessor State which has become an individual State continues in force in respect of this State.

2. Paragraph 1 does not apply if:

(a) The States concerned otherwise agree; or

(b) The application of the treaty in question after the dissolution of the predecessor State would be incompatible with the object and purpose of the treaty or the effect of the dissolution is radically to change the conditions for the operation of the treaty.

Commentary

(1) This article deals with questions of succession in respect of treaties arising from a dissolution of a State where parts of its territory become separate independent States and the original State ceases to exist. The situation covered by the article presupposes a predecessor State, namely the dissolved State, and two or more successor States, namely the new States established in parts of the former territory of the predecessor State. The article regulates the effect of such a succession of States on treaties in force at the date of the dissolution in respect of the territory of the dissolved State.

(2) One of the older precedents usually referred to in this connexion is the dissolution of Great Colombia in 1829-1831, after being formed some ten years earlier by New Granada, Venezuela and Quito (Ecuador). During its existence Great Colombia had concluded certain treaties with foreign powers. Among these were treaties of amity, navigation and commerce concluded with the United States of America in 1824 and with Great Britain in 1825. After the dissolution, it appears that the United States of America and New Granada considered the treaty of 1824 to continue in force as between those two

countries. It further appears that Great Britain and Venezuela and Great Britain and Ecuador, if with some hesitation on the part of Great Britain, acted on the basis that the treaty of 1825 continued in force in their mutual relations. In advising on the position in regard to Venezuela the British Law Officers, it is true, seem at one moment to have thought the continuance of the treaty required the confirmation of both Great Britain and Venezuela; but they also seem to have felt that Venezuela was entitled to claim the continuance of the rights under the treaty.

(3) Another of the older precedents usually referred to is the dissolution of the union of Norway and Sweden in 1905. During the union these States had been recognized as having separate international personalities, as is illustrated by the fact that the United States had concluded separate extradition treaties with the Governments of Norway and Sweden. The King of Norway and Sweden had, moreover concluded some treaties on behalf of the union as a whole and others specifically on behalf of only one of its constituents. On the dissolution of the union each State addressed identical notifications to foreign Powers in which they stated their view of the effect of the dissolution. These notifications, analogous to some more recent notifications informed other Powers of the position which the two States took in regard to the continuance of the union's treaties: those made specifically with reference to one State would continue in force only as between that State and the other States parties; those made for the union as a whole would continue in force for each State but only relating to itself.

(4) Great Britain accepted the continuance in force of the union treaties vis-à-vis Sweden only pending a further study of the subject, declaring that the dissolution of the union undoubtedly afforded His Majesty's Government the right to examine, *de novo*, the treaty engagements by which Great Britain was bound to the union. Both France and the United States of America, on the other hand, appear to have shared the view taken by Norway and Sweden that the treaties of the former union continued in force on the basis set out in their notifications.

(5) The termination of the Austro-Hungarian Empire in 1919 appears to have been a case of dissolution of a union in so far as it concerns Austria and Hungary and a separation in so far as it concerns the other territories of the Empire. The dissolution of the Dual Monarchy is complicated as a precedent by the fact that it took place after the 1914-1918 war and that the question of the fate of the Dual Monarchy's treaties was regulated by the peace treaties. Austria in her relations with States outside the peace treaties appears to have adopted a more reserved attitude towards the question of her obligation to accept the continuance in force of Dual Monarchy treaties. Although in practice agreeing to the continuance of Dual Monarchy treaties in her relations with certain countries, Austria persisted in the view that she was a new State not *ipso jure* bound by those treaties. Hungary, on the other hand, appears generally to have accepted that she should be considered as remaining bound by the Dual Monarchy treaties *ipso jure*.

(6) The same difference in the attitudes of Austria and Hungary is reflected in the Secretariat's studies of suc-

cession in respect of bilateral treaties. Thus, in the case of an extradition treaty, Hungary informed the Swedish Government in 1922 as follows:

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.**³⁵⁸

Austria, on the other hand, appears to have regarded the continuity of a Dual Monarchy extradition treaty with Switzerland as dependent on the conclusion of an agreement with that country.³⁵⁹ Similarly, in the case of trade agreements the Secretariat study observes: "In so far as the question was not regulated by specific provisions in the Peace Settlement, Austria took a generally negative view of treaty continuity, and Hungary a positive one".³⁶⁰ And this observation is supported by references to the practice of the two countries in relation to the Scandinavian States, the Netherlands and Switzerland, which were not parties to the Peace Settlement. Furthermore, those differing attitudes of the two countries appear also in their practice in regard to multilateral treaties, as is shown by the Secretariat study of succession in respect of the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes.³⁶¹

(7) Between 1918 and 1944 Iceland was associated with Denmark in a union of States under which treaties made by Denmark for the union were not to be binding upon Iceland without the latter's consent. During the union Iceland's separate identity was recognized internationally; indeed, in some cases treaties were made separately with both Denmark and Iceland. At the date of dissolution there existed some pre-union treaties which had continued in force for the union with respect to Iceland as well as further treaties concluded during the union and in force with respect to Iceland. Subsequently, as a separate independent State, Iceland, considered both categories of union treaties as continuing in force with respect to itself and the same view of its case appears to have been taken by the other States parties to those treaties. Thus, according to the Secretariat study of the extradition treaties:

... a list published by the Icelandic Foreign Ministry of its treaties in force as of 31 December 1964 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) and the United States of America. In each case it is also indicated that the other listed countries consider that the treaty is in force.³⁶²

³⁵⁸ *Ibid.*, p. 123, document A/CN.4/229, para. 115.

³⁵⁹ *Ibid.*, para. 116.

³⁶⁰ *Ibid.*, 1971, vol. II (Part Two), p. 172, document A/CN.4/243/Add.1, para. 110.

³⁶¹ *Yearbook of the International Law Commission, 1968*, vol. II, pp. 28 and 29, document A/CN.4/200 and Add.1-2, paras. 110-112.

³⁶² *Ibid.*, 1970, vol. II, p. 122, document A/CN.4/229, para. 111.

Again, according to the Secretariat study of trade agreements, the same Icelandic list:

. . . includes treaties and agreements concerning trade concluded before 1914 by Denmark with Belgium, Chile, France, Hungary, Italy, Liberia, Netherlands, Norway, Sweden, Switzerland and the United Kingdom (also listed under Canada, Ceylon, India and South Africa), and trade treaties and agreements concluded between 1918 and 1944 with Austria, Bolivia, Brazil, Czechoslovakia, Finland, Greece, Haiti, Poland, Romania, Spain, the USSR and the United States of America. Seventeen of the twenty-seven listed States have also confirmed that the treaties in question remain in effect. The remainder appear to have taken no position.³⁶³

As to multilateral treaties, it is understood that, after the dissolution, Iceland considered itself a party to any multilateral treaty which had been applicable to it during the union. But the provision in the constitution of the union that treaties made for the union were not to be binding upon Iceland without its consent was strictly applied; and a good many multilateral treaties made by Denmark during the union, including treaties concluded under the auspices of the League of Nations, were not in fact subscribed to by Iceland. This seems to be the explanation of why in *Multilateral Treaties in respect of which the Secretary-General performs depositary functions* Denmark is in a number of cases listed today as a party to a League of Nations treaty, but not Iceland.³⁶⁴ In some cases, moreover, Denmark and Iceland are given separate entries indicating either that Denmark and Iceland are both bound by the treaty or that Denmark is bound and the treaty is open to accession by Iceland.³⁶⁵ The practice in regard to multilateral treaties thus only serves to confirm the separate international personality of Iceland during the union.

(8) The effect of the formation of the United Arab Republic on the pre-union treaties of Syria and Egypt has been considered in the commentary to article 26. Some two and a half years after its formation the union was dissolved through the withdrawal of Syria. The Syrian Government then passed a decree providing that, in regard to both bilateral and multilateral treaties, any treaty concluded during the period of union with Egypt was to be considered in force with respect to the Syrian Arab Republic. It communicated the text of this decree to the Secretary-General, stating that in consequence "obligations contracted by the Syrian Arab Republic under multilateral agreements and conventions during the period of the Union with Egypt remain in force in Syria".³⁶⁶ In face of this notification the Secretary-General adopted the following practice:

³⁶³ *Ibid.*, 1971, vol. II (Part Two), pp. 171-172, document A/CN.4/243/Add.1, para. 109.

³⁶⁴ e.g. Protocol on Arbitration Clauses (1923), Convention for the Execution of Foreign Arbitral Awards (1927), etc. See United Nations, *Multilateral Treaties . . . 1971* (*op. cit.*), pp. 414 *et seq.*

³⁶⁵ Signatures, ratifications and accessions in respects of agreements and conventions concluded under the auspices of the League of Nations. See League of Nations, *Official Journal, Special Supplement No. 193* (1944).

³⁶⁶ United Nations, *Multilateral Treaties . . . 1971* (*op. cit.*), p. 3, foot-note 3.

Accordingly, in so far as concerns any action taken by Egypt or subsequently by the United Arab Republic in respect of any instrument concluded under the auspices of the United Nations, the date of such action is shown in the list of States opposite the name of Egypt. The dates of actions taken by Syria, prior to the formation of the United Arab Republic are shown opposite the name of the Syrian Arab Republic, as also are the dates of receipt of instruments of accession or notification of application to the Syrian Province deposited on behalf of the United Arab Republic during the time when Syria formed part of the United Arab Republic.³⁶⁷

In other words, each State was recorded as remaining bound in relation to its own territory by treaties of the United Arab Republic concluded during the period of the union as well as by treaties to which it had itself become a party prior to the union and which had continued in force in relation to its own territory during the union.

(9) Syria made a unilateral declaration as to the effect to the dissolution on treaties concluded by the union during its existence. At the same time, Syria clearly assumed that the pre-union treaties to which the former State of Syria had been a party would automatically be binding upon it and this seems also to have been the understanding of the Secretary-General. Egypt, the other half of the union, made no declaration. Retaining the name of the United Arab Republic (the subsequent change of name to Arab Republic of Egypt (Egypt) was notified to the Secretary-General on 2 September 1971), it apparently regarded Syria as having in effect seceded, and the continuation of its own status as a party to multilateral treaties concluded by the union as being self-evident. Egypt also clearly assumed that the pre-union treaties to which it had been a party would automatically continue to be binding upon the UAR. This treaty practice in regard to Syria and the United Arab Republic has to be appreciated against the background of the treatment of their membership of international organizations.³⁶⁸ Syria, in a telegram to the President of the General Assembly, simply requested the United Nations to "take note of the resumed membership in the United Nations of the Syrian Arab Republic."³⁶⁹ The President after consulting many delegations and after ascertaining that no objection had been made, authorized Syria to take its seat again in the Assembly. Syria, perhaps because of its earlier existence as a separate Member state, was therefore accorded different treatment from Pakistan in 1947 which was required to undergo admission as a new State. No question was ever raised as to the United Arab Republic's right to continue its membership after the dissolution of the union. Broadly speaking the same solution was adopted in other international organizations.

(10) Other practice in regard to multilateral treaties is in line with that followed by the Secretary-General, as can be seen from the Secretariat studies of the Berne Convention for the Protection of Literary and Artistic Works,³⁷⁰

³⁶⁷ *Ibid.*

³⁶⁸ See above, commentary to article 26.

³⁶⁹ *Official Records of the Security Council, Sixteenth Year, Supplement for October, November and December 1961*, document S/4958.

³⁷⁰ *Yearbook of the International Law Commission, 1968*, vol. II, p. 18, document A/CN.4/200 and Add.1-2, paras. 50 and 51.

the Convention for the Protection of Industrial Property³⁷¹ and the Geneva Humanitarian Conventions.³⁷² This is true also of the position taken by the United States of America, as depositary of the Statute of IAEA, in correspondence with Syria concerning the latter's status as a member of that Agency. As to bilateral treaties, the Secretariat studies of air transport³⁷³ and trade³⁷⁴ agreements confirm that the practice was similar.

(11) The dissolution of the Mali Federation in 1960 is sometimes cited in the present connexion. But the facts concerning the dissolution of that extremely ephemeral federation are thought to be too special for it to constitute a precedent from which to derive any general rule. In 1959 representation of four autonomous territories of the French Community adopted the text of a constitution for the "Federation of Mali", but only two of them—Sudan and Senegal—ratified the constitution. In June 1960 France, Sudan and Senegal reached agreement on the conditions of the transfer of competence from the Community to the Federation and the attainment of independence. Subsequently seven agreements of co-operation with France were concluded in the name of the Federation of Mali. But in August Senegal annulled her ratification of the constitution and was afterwards recognized as an independent State by France; and in consequence the newborn Federation was, almost with its first breath, reduced to Sudan alone. Senegal, the State which had in effect dissolved or seceded from the Federation, entered into an exchange of notes with France in which it stated its view that:

... by virtue of the principles of international law relating to the succession of States, the Republic of Senegal is subrogated, in so far as it is concerned, to the rights and obligations deriving from the co-operation agreements of 22 June 1960 between the French Republic and the Federation of Mali, without prejudice to any adjustments that may be deemed necessary by mutual agreement.³⁷⁵

The French Government replied that it shared this view. Mali, on the other hand, which had contested the legality of the dissolution of the Federation by Senegal and retained the name of Mali, declined to accept any succession to obligations under the co-operation agreements. Thus, succession was accepted by the State which might have been expected to deny it and denied by the State which might have been expected to assume it. But in all the circumstances, as already observed, it does not seem that any useful conclusions can be drawn from the practice in regard to the dissolution of this Federation.

(12) The Commission recognized that almost all the precedents of a disintegration of a State resulting in its extinction have concerned the dissolution of a so-called union of States. The Commission also recognized that traditionally jurists have tended to emphasize the possession of a certain degree of separate international personality by constituent territories of the State during the union

as an element for determining whether treaties of a dissolved State continue to be binding on the States emerging from the dissolution. After studying the modern practice, however, the Commission concluded that the almost infinite variety of constituted relationships and of kinds of "union" render it inappropriate to make this element the basic test for determining whether treaties continue in force upon a dissolution of a State. It considered that today every dissolution of a State which results in the emergence of new individual States should be treated on the same basis for the purpose of the continuance in force of treaties.

(13) Taking account of discrepancies in the practice set out above some members of the Commission were inclined to favour a rule according to which participation of the States which emerged from the dissolution of a State of treaties of the predecessor State in force at the date of the dissolution would be a matter of consent. The Commission, however, concluded that the practice was sufficiently consistent to support the formulation of a rule which, with the necessary qualifications, would provide that treaties in force at the date of the dissolution should remain in force *ipso jure* with respect to each State emerging from the dissolution. This is the rule proposed in *paragraph 1* of the present article which at the times relates its operation to the territorial scope of the treaties in question prior to the dissolution.

(14) Thus, *sub-paragraph 1 (a)* states that any treaty concluded by the predecessor State *in respect of its entire territory* continues in force in respect of each State emerging from the dissolution. Then, *sub-paragraph 1 (b)*, provides that any treaty concluded by the predecessor State *in respect only of a particular part of its territory which has become an individual State* continues in force in respect of this State alone. Finally, *sub-paragraph 1 (c)* which contemplates the case of the dissolution of a State previously constituted by the uniting of two or more States, specifies that any treaty binding upon the predecessor State under article 26 in relation to a particular part of its territory which has become an individual State continues in force in respect of this State.

(15) *Paragraph 2* of the article qualified the application of the provision in *paragraph 1* by excepting a treaty from the rule of *ipso jure* continuity if the States concerned otherwise agree or if the application of the treaty after the dissolution of the predecessor State would be incompatible with its object and purpose or if the effect of the dissolution is radically to change the conditions for its operation.

Article 28. Separation of part of a State

1. If part of the territory of a State separates from it and becomes an individual State, any treaty which at the date of the separation was in force in respect of that State continues to bind it in relation to its remaining territory, unless:

(a) It is otherwise agreed; or

(b) It appears from the treaty or from its object and purpose that the treaty was intended to relate only to the territory which has separated from that State or the effect of the separation is radically to transform the obligations and rights provided for in the treaty.

³⁷¹ *Ibid.*, pp. 67 and 68, paras. 296 and 297.

³⁷² *Ibid.*, pp. 49 and 50, para. 211.

³⁷³ *Ibid.*, 1971, vol. II (Part Two), pp. 142-146, document A/CN.4/243, paras. 152-175.

³⁷⁴ *Ibid.*, p. 144, document A/CN.4/243, paras. 161-166.

³⁷⁵ *Ibid.*, p. 146, document A/CN.4/243, para. 176.

2. In such a case, the individual State emerging from the separation is to be considered as being in the same position as a newly independent State in relation to any treaty which at the date of separation was in force in respect of the territory now under its sovereignty.

Commentary

(1) Article 10 of the present draft articles covers the case of the separation from a State of a part of its territory which joins with another State (the moving treaty frontier rule), and article 27 deals with the complete dissolution of a State the separate parts of which become independent and sovereign States. Article 28 is concerned with another situation, namely with the case where a part of the territory of a State separates from it and becomes itself an independent State, but the State from which it has sprung, the predecessor State, continues its existence unchanged except for its diminished territory. In this type of case the effect of the separation is the emergence of a new State by secession. The present article regulates the treaty position both of the original State and of the new State arising from the separation.

(2) Before the era of the United Nations, colonies were considered as being in the fullest sense territories of the colonial power. Consequently some of the earlier precedents usually cited for the application of the "clean slate" rule in cases of secession concerned the secession of colonies; e.g. the secessions from Great Britain and Spain of their American colonies. In these cases the new States are commonly regarded as having started their existence freed from any obligations in respect of the treaties of their parent State. Another early precedent is the secession of Belgium from the Netherlands in 1830. It is believed to be the accepted opinion that in the matter of treaties Belgium was regarded as starting with a clean slate, except for treaties of a local or dispositive character. Thus, in general the pre-1830 treaties continued in force for the Netherlands, while Belgium concluded new ones or formalized the continuance of the old ones with a number of States.

(3) When Cuba seceded from Spain in 1898, Spanish treaties were not considered as binding upon it after independence. Similarly, when Panama seceded from Colombia in 1903, both Great Britain and the United States regarded Panama as having a clean slate with respect to Colombia's treaties. Panama itself took the same stand, though it was not apparently able to convince France that it was not bound by Franco-Colombian treaties. Colombia, for its part, continued its existence as a State after the separation of Panama, and that it remained bound by treaties concluded before the separation was never questioned. Again, when Finland seceded from Russia after the first world war, both Great Britain and the United States of America concluded that Russian treaties previously in force with respect to Finland would not be binding on the latter after independence. In this connexion reference may be made to a statement by the United Kingdom in which the position was firmly taken by that State that the clean slate principle applied to Finland except with respect to treaty obligations which were "in the nature of servitudes".³⁷⁶

³⁷⁶ See above, commentary to article 11, para. 3.

(4) The termination of the Austro-Hungarian Empire has already been discussed³⁷⁷ in the context of the dissolution of a State. The opinion was there expressed that it seemed to be a dissolution of a union in so far as it concerned the Dual Monarchy itself and a separation in so far as it concerned other territories of the Empire. These other territories, which seem to fall into the category of separation, were Czechoslovakia and Poland.³⁷⁸ Both these States were required in the Peace Settlements to undertake to adhere to certain multilateral treaties as a condition of their recognition. But outside these special undertakings they were both considered as newly independent States which started with a clean slate in respect of the treaties of the former Austro-Hungarian Empire.

(5) Another precedent from the pre-United Nations era is the secession of the Irish Free State from the United Kingdom in 1922. Interpretation of the practice in this case is slightly obscured by the fact that for a period after its secession from the United Kingdom the Irish Free State remained within the British Commonwealth as a "Dominion". This being so, the United Kingdom Government took the position that the Irish Free State had not seceded and that, as in the case of Australia, New Zealand and Canada, British treaties previously applicable in respect of the Irish Free State remained binding upon the new Dominion. The Irish Free State, on the other hand, considered itself to have seceded from the United Kingdom and to be a newly independent State for the purposes of succession in respect of treaties. In 1933 the Prime Minister (Mr. De Valera) made the following statement in the Irish Parliament on the Irish Free State's attitude towards United Kingdom treaties:

... 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 or conventions themselves are terminated or amended. Occasion has then been taken, where desirable, to conclude separate engagements with the States concerned.³⁷⁹

The Irish Government, as its practice shows, did not claim that a new State had a right *unilaterally* to determine its acceptance or otherwise of its predecessor's treaties. This being so, the Irish Prime Minister in 1933 was attributing to a seceded State a position not very unlike that found in the practice of the post-war period concerning newly independent States.

(6) In the case of multilateral treaties, the Irish Free State seems in general to have established itself as a party by means of accession, not succession, although it is true that the Irish Free State appears to have acknowledged its status as a party to the 1906 Red Cross Convention on the basis of the United Kingdom's ratification of the

³⁷⁷ See above, commentary to article 27, paras. 5 and 6.

³⁷⁸ Poland was formed out of territories previously under the sovereignty of three different States: Austro-Hungarian Empire, Russia and Germany.

³⁷⁹ *Yearbook of the International Law Commission, 1970, vol. II, p. 108, document A/CN.4/229, para. 15.*

Convention on 16 April 1907.³⁸⁰ In the case of the Berne Union for the Protection of Literary and Artistic Works, however, it *acceded* to the Convention, although using the United Kingdom's diplomatic services to make the notification.³⁸¹ The Swiss Government, as depositary, then informed the parties to the Union of this accession and, in doing so, added the observation that the Union's International Office considered the Irish Free State's accession to the Convention as "proof that, on becoming an independent territory, it had left the Union". In other words, the Office recognized that the Free State had acted on the basis of the "clean slate" principle and had not "succeeded" to the Berne Convention. Moreover, in *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions* the Republic of Ireland is listed as a party to two conventions ratified by Great Britain before the former's independence and in both these cases the Republic became a party by accession.³⁸²

(7) Thus in cases of separation the practice prior to the United Nations era, if there may be one or two inconsistencies, provides strong support for the "clean slate" rule in the form in which it is expressed in article 11 of the present draft: i.e. that a seceding State, as a newly independent State, is not bound to maintain in force, or to become a party to, its predecessor's treaties. Prior to the United Nations era depositary practice in regard to cases of succession of States was much less developed than it has become in the past twenty-five years owing to the very large number of cases of succession of States with which depositaries have been confronted. Consequently, it is not surprising that the earlier practice in regard to seceding States does not show any clear concept of notifying succession to multilateral treaties, such as is now familiar. With this exception, however, the position of a seceding State with respect to its predecessor's treaties seems in the League of Nations era to have been much the same as that in modern practice of a State which has emerged to independence from a previous colonial trusteeship or protected status.

(8) During the United Nations period cases of separation resulting in the creation of a newly independent State, as distinct from a dependent territory emerging as a sovereign State, have been comparatively few. The first such case was the somewhat special one of Pakistan which, for purposes of membership of international organizations and participation in multilateral treaties, was in general treated as having seceded from India and, therefore, neither bound nor entitled *ipso jure* to the continuance of pre-independence treaties.³⁸³ This is also to a large extent

³⁸⁰ *Ibid.*, 1968, vol. II, pp. 38 and 39, document A/CN.4/200 and Add.1-2, paras. 154-158.

³⁸¹ *Ibid.*, p. 13, para. 25.

³⁸² The International Convention for the Suppression of the White Slave Traffic (1910) and the Agreement for the Suppression of the Circulation of Obscene Publications (1910) (United Nations, *Multilateral Treaties . . . 1971 (op. cit.)*, pp. 168 and 181).

³⁸³ See above, commentary to article 11, paras. 4 and 5. See also *Yearbook of the International Law Commission, 1968*, vol. II, pp. 16, 29, 40, document A/CN.4/200 and Add.1-2, paras. 38, 115-117, and 166-167; *ibid.*, 1969, vol. II, p. 37, document A/CN.4/210, para. 49; and *ibid.*, 1970, vol. II, pp. 71 *et seq.*, document A/CN.4/225, paras. 24-33.

true in regard to bilateral treaties,³⁸⁴ though in some instances it seems, on the basis of the devolution arrangements embodied in the Indian Independence (International Arrangements) Order 1947, to have been assumed that Pakistan was to be considered as a party to the treaty in question. Thus, the case of Pakistan has analogies with that of the Irish Free State and, as already indicated in the commentary to article 11, appears to be an application of the principle that a seceded State has a clean slate in the sense that it is not under any *obligation* to accept the continuance in force of its predecessor's treaties.

(9) The adherence of Singapore to the Federation of Malaysia in 1963 has already been referred to.³⁸⁵ In 1965, by agreement, Singapore separated from Malaysia, becoming an independent State. The Agreement between Malaysia and Singapore, in effect, provided that any treaties in force between Malaysia and other States at the date of Singapore's independence should, in so far as they had application to Singapore, be deemed to be a treaty between the latter and the other State or States concerned. Despite this "devolution agreement" Singapore subsequently adopted a posture similar to that of other newly independent States. While ready to continue Federation treaties in force, Singapore regarded that continuance as a matter of mutual consent. Even if in one or two instances other States contended that it was under an obligation to accept the continuance of a treaty, this contention was rejected by Singapore.³⁸⁶ Similarly, as the entries in *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions*³⁸⁷ show, Singapore has notified or not notified its succession to multilateral treaties, as it has thought fit, in the same way as other newly independent States.

(10) The available evidence of practice does not therefore support the thesis that in the case of a separation of part of a State, as distinct from the dissolution of a State, treaties continue in force *ipso jure* in respect of the territory of the separated State. On the contrary, evidence strongly indicates that the separated territory which becomes a sovereign State is to be regarded as a newly independent State to which in principle the rules of the present draft articles concerning newly independent States should apply. This is the practice independently of the magnitude of the separation. Thus, the separation of East and West Pakistan from India was regarded as analogous to a secession resulting in the emergence of Pakistan. Similarly, if the recent election of WHO to admit Bangladesh as a new member together with its acceptance of West Pakistan as continuing the personality and membership of Pakistan are any guide, the virtual splitting of a State in two does not suffice to constitute the disappearance of the original State.

³⁸⁴ *Ibid.*, pp. 109 *et seq.*, document A/CN.4/229, paras. 28-34; and *ibid.*, 1971, vol. II (Part Two), pp. 121-122, and 155-156, documents A/CN.4/243, paras. 11-19 and A/CN.4/243/Add.1, paras. 30-36; and United Nations, *Materials on Succession of States (op. cit.)*, pp. 1-8, 137 and 138, 190 and 191, 225.

³⁸⁵ See above, commentary to article 25, paras. 5 and 6.

³⁸⁶ See foot-note 281 above. See also *Yearbook of the International Law Commission, 1970*, vol. II, p. 118, document A/CN.4/229, para. 89.

³⁸⁷ United Nations, *Multilateral Treaties . . . 1971 (op. cit.)*.

(11) The basic position of the State which continues in existence is clear enough since it necessarily remains in principle a party to the treaties which it has concluded. The main problem therefore is to formulate the criteria by which to determine the effect upon its participation in these treaties of the separation of part of its territory. The territorial scope of a particular treaty, its object and purpose and the change in the situation resulting from the separation are elements which have to be taken into account. Accordingly *paragraph 1* lays down that the predecessor State remains bound in relation to its remaining territory by the treaties binding upon that State at the date of the separation. The necessary safeguarding provisions to take account of the elements just mentioned are then formulated in sub-paragraphs *1 (a)* and *(b)* as exceptions to the general rule. Under these exceptions the predecessor State will not continue to be bound if: *(a)* it is otherwise agreed (*sub-paragraph (a)*); *(b)* the treaty was intended to relate only to the territory which has separated or the effect of the separation is radically to transform the obligations and rights provided for in the treaty (*sub-paragraph (b)*). The position of the predecessor State in respect of pre-separation treaties remains as before the separation, subject only to these exceptions.

(12) In the light of the recorded practice, *paragraph 2* of article 28 states that the new State emerging from the separation is to be considered as being in the same position as a newly independent State in relation to any treaty which at the date of separation was in force in respect of the territory now under its sovereignty. In other words, the basic rule governing the position of the separated State will be the so-called clean slate rule formulated in article 11 and its participation in treaties of the original State at the date of the separation will be regulated by articles 12 to 21 of the present draft articles. Some members of the Commission were inclined to question whether *paragraph 2* should apply automatically and in all cases to the separated State and reserved their position on this point until after the Commission would receive the comments of Governments.

PART V

BOUNDARY REGIMES OR OTHER TERRITORIAL REGIMES ESTABLISHED BY A TREATY

Article 29. Boundary régimes

A succession of States shall not as such affect:

- (a)* A boundary established by a treaty; or
- (b)* Obligations and rights established by a treaty and relating to the régime of a boundary.

Article 30. Other territorial régimes

1. A succession of States shall not as such affect:

- (a)* Obligations relating to the use of a particular territory, or to restrictions upon its use, established by a

treaty specifically for the benefit of a particular territory of a foreign State and considered as attaching to the territories in question;

- (b)* Rights established by a treaty specifically for the benefit of a particular territory and relating to the use, or to restrictions upon the use of a particular territory of a foreign State and considered as attaching to the territories in question.

2. A succession of States shall not as such affect:

- (a)* Obligations relating to the use of a particular territory, or to restrictions upon its use, established by a treaty specifically for the benefit of a group of States or of all States and considered as attaching to that territory;

- (b)* Rights established by a treaty specifically for the benefit of a group of States or of all States and relating to the use of a particular territory, or to restrictions upon its use, and considered as attaching to that territory.

Commentary

(1) Both in the writings of jurists and in State practice frequent reference is made to certain categories of treaties, variously described as of a "territorial" "dispositive", "real" or "localized" character, as binding upon the territory affected notwithstanding any succession of States. The question of what will for convenience be called in this commentary territorial treaties is at once important, complex and controversial. In order to underline its importance the Commission need only mention that it touches such major matters as international boundaries, rights of transit on international waterways or over another State, the use of international rivers, demilitarization or neutralization of particular localities, etc.

(2) The weight of opinion amongst modern writers supports the traditional doctrine that treaties of a territorial character constitute a special category and are not affected by a succession of States. At the same time, some jurists tend to take the position, especially in regard to boundaries, that it is not the treaties themselves which constitute the special category so much as the situations resulting from their implementation. In other words, they hold that in the present context it is not so much a question of succession in respect of the treaty itself as of the boundary or other territorial régime established by the treaty. In general, however, the diversity of the opinions of writers makes it difficult to find in them clear guidance as to what extent and upon what precise basis international law recognizes that treaties of a territorial character constitute a special category for the purposes of the law applicable to succession of States.

(3) The proceedings of international tribunals throw some light on the question of territorial treaties. In its second Order in the case concerning the Free Zones of Upper Savoy and the District of Gex the Permanent Court of International Justice made a pronouncement which is perhaps the most weighty endorsement of the existence of a rule requiring a successor State to respect a territorial treaty affecting the territory to which a succession of States relates. The Treaty of Turin of 1816, in fixing the frontier between Switzerland and Sardinia, imposed restrictions on the levying of customs duties in

the Zone of St. Gingolph. Switzerland claimed that under the treaty the customs line should be withdrawn from St. Gingolph. Sardinia, although at first contesting this view of the Treaty, eventually agreed and gave effect to its agreement by a "Manifesto" withdrawing the customs line. In this context, the Court said:

... as this assent given by His Majesty the King of Sardinia, without any reservation, terminated an international dispute relating to the interpretation of the Treaty of Turin; as, accordingly, the effect of the Manifesto of the Royal Sardinian Court of Accounts, published in execution of the Sovereign's orders, laid down, in a manner binding upon the Kingdom of Sardinia, what the law was to be between the Parties; as the agreement thus interpreted by the Manifesto confers on the creation of the zone of Saint-Gingolph the character of a treaty stipulation which France is bound to respect, as she succeeded Sardinia in the sovereignty over that territory.*³⁸⁸

This pronouncement was reflected in much the same terms in the Court's final judgment in the second stage of the case.³⁸⁹ Although the territorial character of the Treaty is not particularly emphasized in the passage cited above, it is clear from other passages that the Court recognized that it was here dealing with an arrangement of a territorial character. Indeed, the Swiss Government in its pleadings had strongly emphasized the "real" character of the agreement,³⁹⁰ speaking of the concept of servitudes in connexion with the Free Zones.³⁹¹ The case is, therefore, generally accepted as a precedent in favour of the principle that certain treaties of a territorial character are binding *ipso jure* upon a successor State.

(4) What is not, perhaps, clear is the precise nature of the principle applied by the Court. The Free Zones, including the Sardinian Zone, were created as part of the international arrangements made at the conclusion of the Napoleonic Wars; and elsewhere in its judgments³⁹² the Court emphasized this aspect of the agreements concerning the Free Zones. The question, therefore, is whether the Court's pronouncement applies generally to treaties having such a territorial character or whether it is limited to treaties forming part of a territorial settlement and establishing an objective treaty régime. On this question it can only be said that the actual terms of that pronouncement were quite general. The Court does not seem to have addressed itself specifically to the point whether in such a case the succession is in respect of the treaty or in respect of the situation resulting from the execution of the treaty. Its language in the passage from its Order cited above and in the similar passage in its final judgment, whether or not intentionally, refers to "*a treaty stipulation*" which France is bound to respect, as she succeeded Sardinia in the sovereignty over that territory".

(5) Before the Permanent Court had been established, the question of succession in respect of a territorial treaty came before the Council of the League of Nations with reference to Finland's obligations to maintain the demili-

tarization of the Åland Islands. The point arose in connexion with a dispute between Sweden and Finland concerning the allocation of the Islands after Finland's detachment from Russia at the end of the First World War. The Council referred the legal aspects of the dispute to a committee of three jurists, one of whom was Max Huber, later to be Judge and President of the Permanent Court. The treaty in question was the Åland Islands Convention, concluded between France, Great Britain and Russia as part of the Peace Settlement of 1856, under which the three Powers declared that "the Åland Islands shall not be fortified, and that no military or naval base shall be maintained or created there."³⁹³ Two major points of treaty law were involved. The first, Sweden's right to invoke the Convention although not a party to it, was discussed by the Special Rapporteur for the law of treaties in his third report on the topic in connexion with the effect of treaties on third States and objective régimes.³⁹⁴ The second was the question of Finland's obligation to maintain the demilitarization of the islands. In its opinion the Committee of Jurists, having observed that "the existence of international servitudes, in the true technical sense of the term, is not generally admitted",³⁹⁵ nevertheless found reasons for attributing special effects to the demilitarization Convention of 1856:

As concerns the position of the State having sovereign rights over the territory of the Åland Islands, if it were admitted that the case is one of "real servitude", it would be legally incumbent upon this State to recognize the provisions of 1856 and to conform to them. A similar conclusion would also be reached if the point of view enunciated above were adopted, according to which the question is one of a definite settlement of European interests and not a question of mere individual and subjective political obligations. Finland, by declaring itself independent and claiming on this ground recognition as a legal person in international law, cannot escape from the obligations imposed upon it by such a settlement of European interests.

The recognition of any State must always be subject to the reservation that the State recognized will respect the obligations imposed upon it either by general international law or by definite international settlements relating to its territory.*³⁹⁶

Clearly, in that opinion the Committee of Jurists did not rest the successor State's obligation to maintain the demilitarization régime simply on the territorial character of the treaty. It seems rather to have based itself on the theory of the dispositive effect of an international settlement established in the general interest of the international community (or at least of a region). Thus it seems to have viewed Finland as succeeding to an established régime or situation constituted by the treaty rather than to the contractual obligations of the treaty as such.

(6) The case concerning the Temple of Preah Vihear,³⁹⁷ cited by some writers in this connexion, is of a certain

³⁸⁸ *British and Foreign State Papers, 1855-1856* (London, Foreign Office, 1865), p. 24.

³⁸⁹ *Yearbook of the International Law Commission, 1964*, vol. II, pp. 22-23 and 30, document A/CN.4/167 and Add.1-3, commentary to article 62, para. 12 and commentary to article 63, para. 11.

³⁹⁰ League of Nations, *Official Journal, Special Supplement No. 3* (October 1920), p. 16.

³⁹¹ *Ibid.*, p. 18.

³⁹² *I.C.J. Reports 1962*, pp. 6-146.

³⁸⁸ Order of 6 December 1930 (*P.C.I.J.*, series A, No. 24, p. 17).

³⁸⁹ *P.C.I.J.*, series A/B, No. 46, p. 145.

³⁹⁰ *P.C.I.J.*, series C, No. 17-I, Case of the Free Zones of Upper Savoy and the District of Gex, vol. III, p. 1654.

³⁹¹ *Ibid.*, vol. I, p. 415.

³⁹² e.g. *P.C.I.J.*, series A/B, No. 46 at p. 148.

interest in regard to boundary treaties, although the question of succession was not dealt with by the International Court of Justice in its judgment. The boundary between Thailand and Cambodia had been fixed in 1904 by a Treaty concluded between Thailand (Siam) and France as the then protecting Power of Cambodia. The case concerned the effects of an alleged error in the application of the Treaty by the Mixed Franco-Siamese Commission which demarcated the boundary. Cambodia had in the meanwhile become independent and was therefore in the position of a newly independent State in relation to the boundary Treaty. Neither Thailand nor Cambodia disputed the continuance in force of the 1904 Treaty after Cambodia's attainment of independence, and the Court decided the case on the basis of a map resulting from the demarcation and of Thailand's acquiescence in the boundary depicted on that map. The Court was not therefore called upon to address itself to the question of Cambodia's succession to the boundary Treaty. On the other hand, it is to be observed that the Court never seems to have doubted that the boundary settlement established by the 1904 Treaty and the demarcation, if not vitiated by error, would be binding as between Thailand and Cambodia.

(7) More directly to the purpose is the position taken by the parties on the question of succession in their pleadings on the preliminary objections filed by Thailand. Concerned to deny Cambodia's succession to the rights of France under the pacific settlement provisions of a Franco-Siamese Treaty of 1937, Thailand argued as follows:

Under the customary international law of state succession, if Cambodia is successor to France in regard to the tracing of frontiers, she is equally bound by treaties of a local nature which determine the methods of marking these frontiers on the spot. However, the general rules of customary international law regarding state succession do not provide that, in case of succession by separation of a part of a State's territory, as in the case of Cambodia's separation from France, the new State succeeds to political provisions in treaties of the former State. [...] The question whether Thailand is bound to Cambodia by peaceful settlement provisions in a treaty which Thailand concluded with France is very different from such problems as those of the obligations of a successor State to assume certain burdens which can be identified as connected with the territory which the successor acquires after attaining its independence. *It is equally different from the question of the applicability of the provisions of the treaty of 1904 for the identification and demarcation on the spot of the boundary which was fixed along the watershed.** ³⁹⁸

Cambodia, although it primarily relied on the thesis of France's "representation" of Cambodia during the period of protection, did not dissent from Thailand's propositions regarding the succession of a new State in respect of territorial treaties. On the contrary, she argued that the peaceful settlement provisions of the 1937 Treaty were directly linked to the boundary settlement and continued:

Thailand recognizes that Cambodia is the successor to France in respect of treaties for the definition and delimitation of frontiers. It cannot arbitrarily exclude from the operation of such treaties any provisions which they contain relating to the compulsory jurisdiction rule *in so far as this rule is ancillary to the definition and delimitation of frontiers.** ³⁹⁹

Thus both parties seem to have assumed that, in the case of a newly independent State, there would be a succession not only in respect of a boundary settlement but also of treaty provisions ancillary to such settlement. Thailand considered that succession would be limited to provisions forming part of the boundary settlement itself, and Cambodia that it would extend to provisions in a subsequent treaty directly linked to it.

(8) The case concerning right of passage over Indian Territory ⁴⁰⁰ is also of a certain interest, though it did not involve any pronouncement by the Court on succession in respect of treaty obligations. True, it was under a Treaty of 1779 concluded with the Marathas that Portugal first obtained a foothold in the two enclaves which gave rise to the question of a right of passage in that case. But the majority of the Court specifically held that it was not in virtue of this Treaty that Portugal was enjoying certain rights of passage for civilian personnel on the eve of India's attainment of independence; it was in virtue rather of a local custom that had afterwards become established as between Great Britain and Portugal. The right of passage derived from the consent of each State, but it was a customary right, not a treaty right, with which the Court considered itself to be confronted. The Court found that India had succeeded to the legal situation created by that bilateral custom "unaffected by the change of régime in respect of the intervening territory which occurred when India became independent". ⁴⁰¹

(9) State practice, and more especially modern State practice, has now to be examined; and it is proposed to deal with it first in connexion with boundary treaties and then in connexion with other forms of territorial treaties.

(10) *Boundary treaties.* Mention must first be made of article 62, paragraph 2 *a*, of the Vienna Convention on the Law of Treaties which provides that a fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty "if the treaty establishes a boundary". This provision was proposed by the Commission as a result of its study of the general law of treaties. After pointing out that this exception to the fundamental change of circumstances rule appeared to be recognized by most jurists, the Commission commented:

Paragraph 2 excepts from the operation of the article two cases. The first concerns treaties establishing a boundary, a case which both States concerned in the *Free Zones* case appear to have recognized as being outside the rule, as do most jurists. Some members of the Commission suggested that the total exclusion of these treaties from the rule might go too far, and might be inconsistent with the principle of self-determination recognized in the Charter. The Commission, however, concluded that treaties establishing a boundary should be recognized to be an exception to the rule, because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions. It also took the view that "self-determination", as envisaged in the Charter was an independent principle and that it might lead to confusion if, in the context of the law of treaties, it were presented as an application of the rule contained in the present article. By excepting treaties establishing a boundary from its scope the

³⁹⁸ *I.C. Pleadings, Temple of Preah Vihear*, vol. I, pp. 145-146.

³⁹⁹ *Ibid.*, p. 165 [translation by the Secretariat].

⁴⁰⁰ *I.C.J. Reports 1960*, p. 6.

⁴⁰¹ *Ibid.*, p. 40.

present article would not exclude the operation of the principle of self-determination in any case where the conditions for its legitimate operation existed. The expression "treaty establishing a boundary" was substituted for "treaty fixing a boundary" by the Commission, in response to comments of Governments, as being a broader expression which would embrace treaties of cession as well as delimitation treaties.⁴⁰²

The exception of treaties establishing a boundary from the "fundamental change of circumstances rule", though opposed by a few States, was endorsed by a very large majority of the States at the United Nations Conference on the Law of Treaties. The considerations which led the Commission and the Conference to make this exception to the fundamental change of circumstances rule appear to apply with the same force to a succession of States, even though the question may have presented itself in a different context. Accordingly, the Commission considers that the attitude of States towards boundary treaties at the United Nations Conference on the Law of Treaties is extremely pertinent also in the present connexion.

(11) Attention has already been drawn to the assumption apparently made by both Thailand and Cambodia in the Temple of Preah Vihear Case of the latter country's succession to the boundary established by the Franco-Siamese Treaty of 1904.⁴⁰³ That this assumption reflects the general understanding concerning the position of a successor State in regard to an established boundary settlement seems clear. Tanzania, although in its unilateral declaration it strongly insisted on its freedom to maintain or terminate its predecessor's treaties, has been no less insistent that boundaries previously established by treaty remain in force.⁴⁰⁴ Furthermore, despite their initial feelings of reaction against the maintenance of "colonial" frontiers, the newly independent States of Africa have come to endorse the principle of respect for established boundaries. Article III, paragraph 3, of the OAU Charter, it is true, merely proclaimed the principle of "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence".⁴⁰⁵ But in 1964, with reservations only from Somalia and Morocco, the Conference of Heads of State and Government held in Cairo adopted a resolution which, after reaffirming the principle in Article III, paragraph 3, solemnly declared that "all Member States pledge themselves to respect the borders existing on their achievement of national independence".⁴⁰⁶ A similar resolution was adopted by the Conference of Heads of State or Government of Non-Aligned Countries also held in Cairo later in the same year. This does not, of course, mean that boundary disputes have not arisen or may not arise between African States. But the legal grounds invoked must

be other than the mere effect of the occurrence of a succession of States on a boundary treaty.

(12) Somalia has two boundary disputes with Ethiopia, one in respect of the former British Somaliland boundary and the other in respect of the former Italian Somaliland boundary; and a third dispute with Kenya in respect of its boundary with Kenya's North Eastern Province. Somalia's claims in these disputes are based essentially on ethnic and self-determination considerations and on alleged grounds for impeaching the validity of certain of the relevant treaties. Somalia does not seem to have claimed that, as a successor State, it was *ipso jure* freed from any obligation to respect the boundaries established by treaties concluded by its predecessor State though it did denounce the 1897 Anglo-Ethiopian Treaty in response to Ethiopia's unilateral withdrawal of the grazing rights mentioned below. Ethiopia and Kenya, which is itself also a successor State, take the position that the treaties in question are valid and that, being boundary settlements, they must be respected by a successor State. As to the Somali-Ethiopian dispute regarding the 1897 Treaty, the boundary agreed between Ethiopia and Great Britain in 1897 separated some Somali tribes from their traditional grazing grounds; and an exchange of letters annexed to the Treaty provided that these tribes, from either side of the boundary, would be free to cross it to their grazing grounds. The 1897 Treaty was reaffirmed in an agreement concluded between the United Kingdom and Ethiopia in 1954, article I of this agreement reaffirming the boundary and article II the grazing rights. Article III then created a "special arrangement" for administering the use of the grazing rights by the Somali tribes. In 1960, shortly before independence, a question had been put to the British Prime Minister in Parliament concerning the continuance of the Somali grazing rights along the Ethiopian frontier to which he replied:

Following the termination of the responsibilities of H.M. Government for the Government of the Protectorate, and in the absence of any fresh instruments, the provisions of the 1897 Anglo-Ethiopian Treaty should, in our view, be regarded as remaining in force as between Ethiopia and the successor State. On the other hand, Article III of the 1954 Agreement, which comprises most of what was additional to the 1897 Treaty, would, in our opinion, lapse.⁴⁰⁷

The United Kingdom thus was of the view that the provisions concerning both the boundary and the Somali grazing rights would remain in force and that only the "special arrangement", which pre-supposed British administration of the adjoining Somali territory, would cease. In this instance, it will be observed, the United Kingdom took the position that ancillary provisions which constituted an integral element in a boundary settlement would continue in force upon a succession of States, while accepting that particular arrangements made by the predecessor State for the carrying out of those provisions would not survive the succession of States. Ethiopia, on the other hand, while upholding the boundary settlement, declined to recognize that the ancillary

⁴⁰² Paragraph 11 of the Commission's commentary to draft article 59 [now article 62 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. 79).

⁴⁰³ See para. 6 above.

⁴⁰⁴ OAU document A.H.G./Res.16(1); see also S. Touval, "Africa's frontiers—Reactions to a colonial legacy", *International Affairs* (London), No. 4, October 1966, pp. 641-654.

⁴⁰⁵ United Nations, *Treaty Series*, vol. 479, p. 74.

⁴⁰⁶ OAU document A.H.G./Res.16(1).

⁴⁰⁷ United Nations, *Materials on Succession of States* (*op. cit.*), p. 185.

provisions, which constituted one of the conditions of that settlement, would remain binding upon it.

(13) In a number of other instances the United Kingdom recognized that rights and obligations under a boundary treaty would remain in force after a succession of States. One is the Convention of 1930 concluded between the United States of America and the United Kingdom for the delimitation of the boundary between the Philippine Archipelago and North Borneo. Upon the Philippines becoming independent in 1946, the British Government in a diplomatic Note acknowledged that as a result "the Government of the Republic of the Philippines has succeeded to the rights and obligations of the United States under the Notes of 1930".⁴⁰⁸

(14) Another instance is the Treaty of Kabul concluded between the United Kingdom and Afghanistan in 1921 which, *inter alia*, defined the boundary between the then British Dominion of India and Afghanistan along the so-called Durand line. On the division of the Dominion into the two States of India and Pakistan and their attainment of independence, Afghanistan questioned the boundary settlement on the basis of the doctrine of fundamental change of circumstances. The United Kingdom's attitude in response to this possibility, as summarized by it in *Materials on Succession of States*, was as follows:

The Foreign Office were advised that the splitting of the former India into two States—India and Pakistan—and the withdrawal of British rule from India had not caused the Afghan Treaty to lapse and it was hence still in force. It was nevertheless suggested that an examination of the Treaty might show that some of its provisions being political in nature or relating to continuous exchange of diplomatic missions were in the category of those which did not devolve where a State succession took place. *However, any executed clauses such as those providing for the establishment of an international boundary or, rather, what had been done already under executed clauses of the Treaty, could not be affected, whatever the position about the Treaty itself might be.*⁴⁰⁹

Here therefore the United Kingdom again distinguishes between provisions establishing a boundary and ancillary provisions of a political character. But it also appears here to have distinguished between the treaty provisions *as such* and the boundary resulting from their execution—a distinction made by a number of jurists. Afghanistan, on the other hand, contested Pakistan's right in the circumstances of the case to invoke the boundary provisions of the 1921 Treaty.⁴¹⁰ It did so on various grounds, such as the alleged "unequal" character of the Treaty itself. But it also maintained that Pakistan, as a newly independent State, had a "clean slate" in 1947 and could not claim automatically to be a successor to British rights under the 1921 Treaty.

(15) There are a number of other modern instances in which a successor State has become involved in a boundary dispute. But these appear mostly to be instances where either the boundary treaty in question left the course of the boundary in doubt or its validity was challenged on one ground or another; and in those in-

stances the succession of States merely provided the opportunity for reopening or raising grounds for revising the boundary which are independent of the law of succession. Such appears to have been the case, for example, with the Morocco-Algeria, Surinam-Guyana, and Venezuela-Guyana⁴¹¹ boundary disputes and, it is thought, also with the various Chinese claims in respect of Burma, India and Pakistan. True, China may have shown a disposition to reject the former "British" treaties as such; but she seems rather to challenge the treaties themselves than to invoke any general concept of a newly independent State's clean slate with respect to the treaties, including boundary treaties.

(16) The weight of the evidence of State practice and of legal opinion in favour of the view that in principle a boundary settlement is unaffected by the occurrence of a succession of States is strong and powerfully reinforced by the decision of the United Nations Conference on the Law of Treaties to except from the fundamental change of circumstances rule a treaty which establishes a boundary. Consequently, the Commission considered that the present draft must state that boundary settlements are not affected by the occurrence of a succession of States as such. Such a provision would relate exclusively to the effect of the succession of States on the boundary settlement. It would leave untouched any other ground of claiming the revision or setting aside of the boundary settlement, whether self-determination or the invalidity or termination of the treaty. Equally, of course, it would leave untouched any legal ground of defence to such a claim that may exist. In short, the mere occurrence of a succession of States would neither consecrate the existing boundary if it was open to challenge nor deprive it of its character as a legally established boundary, if such it was at the date of the succession of States.

(17) The Commission then examined how such a provision should be formulated. The analogous provision in the Vienna Convention appears in article 62, subparagraph 2 *a*, as an exception to the fundamental change of circumstances rule, and it is so framed as to relate to the treaty rather than to the boundary resulting from the treaty. For the provision reads: "A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a *treaty*:"* (a) if the *treaty** establishes a boundary". However, in the present draft the question is not the continuance in force or otherwise of a treaty between the parties; it is the obligations and rights which devolve upon a successor State. Accordingly, it does not necessarily follow that here also the rule should be framed in terms relating to the boundary treaty rather than to the legal situation established by the treaty; and the opinion of jurists today tends to favour the latter formulation of the rule. If the rule is regarded as relating to the situation resulting from the dispositive effect of a boundary treaty, then it would not seem properly to be an exception to article 11 of the present draft. It would seem rather to be a general rule

⁴⁰⁸ *Ibid.*, p. 190.

⁴⁰⁹ *Ibid.*, p. 187.

⁴¹⁰ *Ibid.*, pp. 1-5.

⁴¹¹ See above, commentary to article 9, para. 9.

that a succession of States is not as such to be considered as affecting a boundary or a boundary régime established by treaty prior to that succession of States.

(18) Some members of the Commission considered that to detach succession in respect of the boundary from succession in respect of the boundary treaty might be somewhat artificial. A boundary may not have been fully demarcated so that its precise course in a particular area may be brought into question. In that event recourse must be had to the interpretation of the treaty as the basic criterion for ascertaining the boundary, even if other elements, such as occupation and recognition, may also come into play. Moreover, a boundary treaty may contain ancillary provisions which were intended to form a continuing part of the boundary régime created by the treaty and the termination of which on a succession of States would materially change the boundary settlement established by the treaty. Again, when the validity of the treaty or of a demarcation under the treaty was in dispute prior to the succession of States, it might seem artificial to separate succession in respect of the boundary from succession in respect of the treaty. Other members, however, felt that a boundary treaty has constitutive effects and establishes a legal and factual situation which thereafter has its own separate existence; and that it is this situation, rather than the treaty, which passes to a successor State. Moreover, not infrequently a boundary treaty contains provisions unconnected with the boundary settlement itself, and yet it is only this settlement which called for special treatment in case of a succession of States. At the same time the objections raised to this approach to the matter would lose much of their force if it were recognized that the legal situation constituted by the treaty comprises not only the boundary itself but also any boundary régime intended to accompany it and that the treaty provisions combined to constitute the title deeds of the boundary.

(19) There was general agreement in the Commission upon the basic principle that a succession of States does not, as such, affect a boundary or a boundary régime established by treaty. Having regard to the various considerations mentioned in the previous paragraphs and to the trend of modern opinion on the matter, the Commission concluded that it should formulate the rule not in terms of the treaty itself but of a boundary established by a treaty and of a boundary régime so established. Accordingly, article 29 provides that a succession of States shall not as such affect: (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the régime of a boundary. In accepting this formulation the Commission underlined the purely negative character of the rule, which goes no further than to deny that any succession of States simply by reason of its occurrence affects a boundary established by a treaty or a boundary régime so established. As already pointed out,⁴¹² it leaves untouched any legal ground that may exist for challenging the boundary, such as self-determination or the invalidity of the treaty, just as it also leaves untouched any legal ground of defence

to such a challenge. The Commission was also agreed that this negative rule must apply equally to any boundary régime established by a treaty, whether the same treaty as established the boundary or a separate treaty.

(20) *Other territorial treaties.* The Commission has drawn attention⁴¹³ to the assumption which appears to be made by many States, including newly independent States, that certain treaties of a territorial character constitute a special category for purposes of succession of States. In British practice there are numerous statements evidencing the United Kingdom's belief that customary law recognizes the existence of such an exception to the clean slate principle and also to the moving treaty frontier rule. One such is a statement with reference to Finland.⁴¹⁴ Another is the reply of the Commonwealth Office to the International Law Association.⁴¹⁵ A further statement of a similar kind may be found in *Materials on Succession of States*⁴¹⁶ the occasion being discussions with the Cyprus Government regarding article 8 of the Treaty concerning the Establishment of the Republic of Cyprus.

(21) The French Government appears to take a similar view. Thus, in a note addressed to the German Government in 1935, after speaking of what was, in effect, the moving treaty frontier principle, the French Government continued:

This rule is subject to an important exception in the case of conventions which are not of a political character, that is to say, which were not concluded in relation to the actual personality of the State, but are of territorial and local application and are based on a geographical situation; the successor State, irrespective of the reason for which it succeeds, is bound to assume the burdens arising from treaties of this kind just as it enjoys the advantages specified in them.

Canada, again in the context of the moving treaty-frontier rule, has also shown that it shares the view that territorial treaties constitute an exception to it. After Newfoundland had become a new province of Canada, the Legal Division of the Department of External Affairs explained the attitude of Canada as follows:

... Newfoundland became part of Canada by a form of cession and that consequently, in accordance with the appropriate rules of international law, agreements binding upon Newfoundland prior to union lapsed, *except for those obligations arising from agreements locally connected which had established proprietary or quasi-proprietary rights,** [. . .]⁴¹⁷

Some further light is thrown on the position taken by Canada on this question by the fact that Canada did not recognize air transit rights through Gander airport in Newfoundland granted in pre-union agreements as binding after Newfoundland became part of Canada.⁴¹⁸ On the other hand, Canada did recognize as binding upon her a condition precluding the operation of commercial

⁴¹² See para. 16 above.

⁴¹³ See above, commentary to article 11, para. 15.

⁴¹⁴ *Ibid.*, para. 3.

⁴¹⁵ *Ibid.*, para. 17.

⁴¹⁶ United Nations, *Materials on Succession of States (op. cit.)*, p. 183.

⁴¹⁷ *Yearbook of the International Law Commission, 1971*, vol. II (Part Two), pp. 132-133, document A/CN.4/243, para. 85.

⁴¹⁸ *Ibid.*, pp. 133-135, document A/CN.4/243, paras. 86-100.

aircraft from certain bases in Newfoundland leased to the United States of America before the former became a part of Canada. Furthermore, she does not seem to have questioned the continuance in force of the fishery rights in Newfoundland waters which were accorded by Great Britain to the United States in the Treaty of Ghent in 1818 and were the subject of the North Atlantic Fisheries Arbitration in 1910, or of the fishery rights first accorded to France in the Treaty of Utrecht (1713) and dealt with in a number of further treaties.

(22) An instructive precedent involving the succession of newly independent States is the so-called Belbases Agreements of 1921 and 1951, which concern Tanzania, on the one hand, and Zaire, Rwanda and Burundi, on the other. After the First World War the mandates entrusted to Great Britain and Belgium respectively had the effect of cutting off the central African territories administered by Belgium from their natural sea-port, Dar-es-Salaam. Great Britain accordingly entered into an Agreement with Belgium in 1921, under which Belgium, at a nominal rent of one franc per annum, was granted a lease in perpetuity of port sites at Dar-es-Salaam and Kigoma in Tanganyika. This Agreement also provided for certain customs exemptions at the leased sites and for transit facilities for the territories under Belgian mandate to those sites. In 1951, by which date the mandates had been converted into trusteeships, a further Agreement between the two administering Powers provided for a change in the site at Dar-es-Salaam but otherwise left the 1921 arrangements in force. The Belgian Government, it should be added, expended considerable sums in developing the port facilities at the leased sites. On the eve of independence, the Tanganyika Government informed the United Kingdom that it intended to treat both Agreements as void and to resume possession of the sites. The British Government replied that it did not subscribe to the view that the Agreements were void but that, after independence, the international consequences of Tanganyika's views would not be its concern. It further informed Belgium and the Government of Zaire, Rwanda and Burundi both of Tanganyika's statement and of its own reply.⁴¹⁹ In the National Assembly Prime Minister Nyerere explained⁴²⁰ that in Tanganyika's view: "A lease in perpetuity of land in the territory of Tanganyika is not something which is compatible with the sovereignty of Tanganyika *when made by an authority whose own rights in Tanganyika were for a limited duration.*" After underlining the limited character of a mandate or trusteeship, he added: "It is clear, therefore, that in appearing to bind the territory of Tanganyika for all time, the United Kingdom was trying to do something which it did not have the power to do." When in 1962 Tanganyika gave notice of her request for the evacuation of the sites, Zaire, Rwanda and Burundi, which had all now attained independence, countered by claiming to have succeeded to

Belgium's rights under the Agreements. Tanganyika then proposed that new arrangements should be negotiated for the use of the port facilities, to which the other three successor States assented; but it seems that no new arrangement has yet been concluded and that *de facto* the port facilities are being operated as before.

(23) The point made by Tanganyika as to the limited character of the competence of an administering power is clearly not one to be lightly dismissed. Without, however, expressing any opinion on the correctness or otherwise of the positions taken by the various interested States in this case, it is sufficient here to stress that Tanganyika itself did not rest its claim to be released from the Belbases Agreements on the clean slate principle. On the contrary, by resting its claim specifically on the limited character of an administering Power's competence to bind a mandated or trusteeship territory, it seems by implication to have recognized that the free port base and transit provisions of the agreements were such as would otherwise have been binding upon a successor State.

(24) In the context, at any rate, of military bases, the relevance of the limited character of an administering Power's competence seems to have been conceded by the United States of America in connexion with the bases in the West Indies granted to it by the United Kingdom in 1941; and this in relation to the limited competence of a colonial administering power. In the Agreement the bases were expressed to be leased to the United States for 99 years. But on the approach of the West Indies territories to independence the United States took the view that it could not, without exposing itself to criticism, insist that restrictions imposed upon the territory of the West Indies while it was in a colonial status would continue to bind it after independence.⁴²¹ The West Indies Federation for its part maintained that "on its independence it should have the right to form its own alliances generally and to determine for itself what military bases should be allowed on its soil and under whose control such bases should come."⁴²² In short, it was accepted on both sides that the future of the bases must be a matter of agreement between the United States and the newly independent West Indies. In the instant case it will be observed that there were two elements: (a) the grant while in a colonial status and (b) the personal and political character of military agreements. An analogous case is the Franco-American Treaty of 1950 granting a military base to the United States of America in Morocco before the termination of the protectorate. In that case, quite apart from the military character of the agreement, Morocco objected that the agreement had been concluded by the protecting Power without any consultation with the protected State and could not be binding on the latter on its resumption of independence.⁴²³

⁴¹⁹ United Nations, *Materials on Succession of States (op. cit.)*, pp. 187-188.

⁴²⁰ See "Treaties and succession of States and governments in Tanzania", in Nigerian Institute for International Affairs, *African Conference on International Law and African Problems: Proceedings* (Carnegie Endowment for International Peace, 1967), para. 119.

⁴²¹ See A. J. Esgain, "Military servitudes and the new nations", in W. V. O'Brien, ed., *The New Nations in International Law and Diplomacy (The Yearbook of World Polity, vol. III)* (New York, Praeger, 1965), p. 78.

⁴²² *Ibid.*, p. 79.

⁴²³ *Ibid.*, pp. 72-76.

(25) Treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties. Among early precedents cited is the right of navigation on the Mississippi granted to Great Britain by France in the Treaty of Paris 1863 which, on the transfer of Louisiana to Spain, the latter acknowledged to remain in force.⁴²⁴ The provisions concerning the Shatt-el-Arab in the Treaty of Erzerum, concluded in 1847 between Turkey and Persia, are also cited. Persia, it is true, disputed the validity of the Treaty. But on the point of Iraq's succession to Turkey's right under the Treaty no question seems to have been raised. A modern precedent is Thailand's rights of navigation on the River Mekong, granted by earlier treaties and confirmed on a Franco-Siamese Treaty of 1926. In connexion with the arrangements for the independence of Cambodia, Laos and Viet-Nam, it was recognized by these countries and by France that Thailand's navigational rights would remain in force.

(26) As to water rights, a major modern precedent is the Nile Waters Agreement of 1929 concluded between the United Kingdom and Egypt which *inter alia* provided:

Save with the previous agreement of the Egyptian Government, no irrigation or power works or measures are to be constructed or taken on the River Nile or its branches, or on the lakes from which it flows, *so far as all these are in the Sudan or in countries under British administration*,* which would, in such manner as to entail any prejudice to the interests of Egypt, either reduce the quantity of water arriving in Egypt, or modify the date of its arrival, or lower its level.*⁴²⁵

The effect of this provision was to accord priority to Egypt's uses of the Nile waters in the measure that they already existed at the date of the Agreement. Moreover, at that date not only the Sudan but Tanganyika, Kenya and Uganda, all riparian territories in respect of the Nile river basin, were under British administration. On attaining independence the Sudan, while not challenging Egypt's established rights of user, declined to be bound by the 1929 Agreement in regard to future developments in the use of Nile waters. Tanganyika, on becoming independent, declined to consider itself as in any way bound by the Nile Waters Agreement. It took the view that an agreement that purported to bind Tanganyika for all time to secure the prior consent of the Egyptian Government before it undertook irrigation or power works or other similar measures on Lake Victoria or in its catchment area was incompatible with her status as an independent sovereign State. At the same time, Tanganyika indicated its willingness to enter into discussions with the other interested Governments for equitable regulation and division of the use of the Nile waters. In reply to Tanganyika the UAR, for its part, maintained that pending further agreement, the 1929 Nile Waters Agreement, which has so far regulated the

use of the Nile waters, remains valid and applicable. In this instance, again, there is the complication of the treaty's having been concluded by an administering Power, whose competence to bind a dependent territory in respect of territorial obligations is afterwards disputed on the territory's becoming independent.

(27) Analogous complications obscure another modern precedent, Syria's water rights with regard to the River Jordan. On the establishment of the mandates for Palestine and Syria after the First World War, Great Britain and France entered into a series of agreements dealing with the boundary régime between the mandated territories, including the use of the waters of the River Jordan. An Agreement of 1923 provided for equal rights of navigation and fishing,⁴²⁶ while a further Agreement of 1926 stated that "all rights derived from local laws or customs concerning the use of the waters, streams, canals and lakes for the purposes of irrigation or supply of water to the inhabitants shall remain as at present".⁴²⁷ These arrangements were confirmed in a subsequent Agreement. After independence, Israel embarked on a hydroelectric project which Syria considered incompatible with the régime established by the above-mentioned treaties. In debates in the Security Council Syria claimed that it had established rights to waters of the Jordan in virtue of the Franco-British treaties, while Israel denied that it was in any way affected by treaties concluded by the United Kingdom. Israel, indeed, denies that it is either in fact or in law a successor State at all.

(28) Some other examples of bilateral treaties of a territorial character are cited in the writings of jurists, but they do not seem to throw much clearer light on the law governing succession in respect of such treaties.⁴²⁸ Mention has, however, to be made of another category of bilateral treaties which are sometimes classified as "dispositive" or "real" treaties: namely, treaties which confer specific rights of a private law character on nationals of a particular foreign State; e.g. rights to hold land. These treaties have sometimes in the past been regarded as dispositive in character for the purposes of the rules governing the effect of war on treaties.⁴²⁹ Without entering into the question whether such a categorization of these treaties is valid in that context, there does not seem to be sufficient evidence that they are to be regarded as treaties of a dispositive or territorial character under the law governing succession of States in respect of treaties.

(29) There remain, however, those treaties of a territorial character which were discussed by the Commission in 1964 at its sixteenth session under the broad designation of "treaties providing for objective régimes" in the course of its work on the general law of treaties. The

⁴²⁴ Another early precedent cited is the grant of navigation rights to Great Britain by Russia in the Treaty of 1825 relating to the Canadian-Alaska boundary, but it is hardly a very clear precedent.

⁴²⁵ See United Nations, *Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for other Purposes than Navigation* (United Nations publication, Sales No. 63.V.4), p. 101; see also document A/5409, paras. 100-107.

⁴²⁶ See United Nations, *Legislative Texts and Treaty Provisions...* (*op. cit.*), pp. 287-288.

⁴²⁷ *Ibid.*, p. 288.

⁴²⁸ e.g. certain Finnish frontier arrangements, the demilitarization of Hünigen, the Congo leases, etc.

⁴²⁹ e.g. the draft convention on the law of treaties prepared by the Research in International Law of the Harvard Law School (*American Journal of International Law* (October, 1935), vol. 29, Supplement No. 4, part III).

examination of those treaties by the Commission and by its Special Rapporteur from the point of view of their effects upon third States may be found in the proceedings of the Commission at its sixteenth session.⁴³⁰ The characteristic of the treaties in question is that they attach obligations to a particular territory, river, canal etc., for the benefit either of a group of States (e.g. riparian States of a particular river) or of all States generally. They include treaties for the neutralization or demilitarization of a particular territory, treaties according freedom of navigation in international waterways or rivers, treaties for the equitable use of the water resources of an international river basin and the like. The Commission in its work on the law of treaties did not consider that a treaty of this character has the effect of establishing, by its own force alone, an objective régime binding upon the territorial sovereignty and conferring contractual rights on States not parties to it. While recognizing that an objective régime may arise from such a treaty, it took the view that the objective régime results rather from the execution of the treaty and the grafting upon the treaty of an international custom. The same view of the matter was taken by the United Nations Conference on the Law of Treaties and the Vienna Convention does not except treaties intended to create objective régimes from the general rules which it lays down concerning the effects of treaties on third States. In the present context, if a succession of States occurs in respect of the territory affected by the treaty intended to create an objective régime, the successor State is not properly speaking a "third State" in relation to the treaty. Owing to the legal nexus which existed between the treaty and the territory prior to the date of the succession of States, it is not open to the successor State simply to invoke article 35 of the Vienna Convention under which a treaty cannot impose obligations upon a third State without its consent. The rules concerning succession in respect of treaties also come into play. But under these rules there are cases where the treaty intended to establish an objective régime would not be binding on a successor State, unless such a treaty were considered to fall under a special rule to that effect. Equally, if the succession of States occurs in relation to a State which is the beneficiary of a treaty establishing objective régime, under the general law of treaties and the law of succession the successor State would not necessarily be entitled to claim the rights enjoyed by its predecessor State, unless the treaty were considered to fall under such a special rule. That such a special rule exists is, in the opinion of the Commission, established by a number of convincing precedents.

(30) Reference has already been made to two of the principal precedents⁴³¹ in discussing the evidence on treaties of a territorial character to be found in the proceedings of international tribunals. These are the *Free Zones* case and the *Aland Islands* question, in both

of which the tribunal considered the successor State to be bound by a treaty régime of a territorial character established as part of a "European settlement". An earlier case involving the same element of a treaty made in the general interest concerned Belgium's position, after its separation from the Netherlands, in regard to the obligations of the latter provided for by the Peace Settlements concluded at the Congress of Vienna with respect to fortresses on the Franco-Netherlands boundary. The four Powers (Great Britain, Austria, Prussia and Russia) apparently took the position that they could not admit that any change with respect to the interests by which these arrangements were regulated had resulted from the separation of Belgium and Holland; and the King of the Belgians was considered by them as standing with respect to these fortresses and in relation to the four Powers, in the same situation, and bound by the same obligations, as the King of the Netherlands previous to the Revolution. Although Belgium questioned whether it could be considered bound by a treaty to which it was a stranger, it seems in a later treaty to have acknowledged that it was in the same position as the Netherlands with respect to certain of the frontier fortresses. Another such case is article XCII of the Act of the Congress of Vienna,⁴³² which provided for the neutralization of Chablais and Faucigny, then under the sovereignty of Sardinia. These provisions were connected with the neutralization of Switzerland effected by the Congress and Switzerland had accepted them by a Declaration made in 1815. In 1860, when Sardinia ceded Nice and Savoy to France, both France and Sardinia recognized that the latter could only transfer to France what it itself possessed and that France would take the territory subject to the obligation to respect the neutralization provisions. France, on its side, emphasized that these provisions had formed part of a settlement made in the general interests of Europe. The provisions were maintained in force until abrogated by agreement between Switzerland and France after the First World War with the concurrence of the Allied and Associated Powers recorded in article 435 of the Treaty of Versailles.⁴³³ France, it should be mentioned, had itself been a party to the settlements concluded at the Congress of Vienna, so that it could be argued that it was not in a position of a purely successor State. Even so, its obligation to respect the neutralization provisions seems to have been discussed simply on the basis that, as a successor to Sardinia, it could only receive the territory burdened with those provisions.

(31) The concept of international settlements is also invoked in connexion with the régimes of international rivers and canals. Thus, the Berlin Act of 1885 established régimes of free navigation on both the Rivers Congo and Niger; and in the former case the régime was regarded as binding upon Belgium after the Congo had passed to it by cession. In the Treaty of Saint-Germain-en-Laye (1919) some only of the signatories of the 1885 Act abrogated it as between themselves, substituting for it a

⁴³⁰ See *Yearbook of the International Law Commission, 1964*, vol. I, pp. 96 *et seq.*, 738th-740th meetings; and *ibid.*, vol. II, pp. 27-34, document A/CN.4/167 and Add.1-3, commentary to article 63, and pp. 184-185, document A/5809, chap. II, sect. B, commentary to article 62.

⁴³¹ See paras. 3-5 above.

⁴³² *British and Foreign State Papers, 1814-1815* (London, Foreign Office, 1839), pp. 45-46.

⁴³³ *Ibid.*, 1919 (London, H.M. Stationery Office, 1922), vol. CXII, p. 206.

preferential régime; and this came into question before the Permanent Court of International Justice in the *Oscar Chinn* case. Belgium's succession to the obligations of the 1885 Act appears to have been taken for granted by the Court in that case. The various riparian territories of the two rivers had meanwhile become independent States, giving rise to the problem of their position in relation to the Berlin Act and the Treaty of Saint-Germain. In regard to the Congo the problem has manifested itself in GATT and also in connexion with association agreements with EEC. Although the States concerned may have varied in the policies which they have adopted concerning the continuance of the previous régime, they seem to have taken the general position that their emergence to independence has caused the Treaty of Saint-Germain and the Berlin Act to lapse. In regard to the Niger, the newly independent riparian States in 1963 replaced the Berlin Act and the Treaty of Saint-Germain with a new Convention. The parties to this Convention "abrogated" the previous instruments, as between themselves and in the negotiations preceding its conclusion there seems to have been some difference of opinion as to whether abrogation was necessary. But it was on the basis of a fundamental change of circumstances rather than of non-succession that these doubts were expressed.⁴³⁴

(32) The Final Act of the Congress of Vienna set up a Commission for the Rhine, the régime of which was further developed in 1868 by the Convention of Mannheim; and although after the First World War the Treaty of Versailles reorganized the Commission, it maintained the régime of the Convention of Mannheim in force. As to cases of succession, it appears that in connexion with membership of the Commission, when changes of sovereignty occurred, the rules of succession were applied, though not perhaps on any specific theory of succession to international régimes or to territorial treaties.

(33) The question of succession of States has also been raised in connexion with the Suez Canal Convention of 1888. The Convention created a right of free passage through the Canal and, whether by virtue of the treaty or of the customary régime which developed from it, this right was recognized as attaching to non-signatories as well as signatories. Accordingly, although many new States have hived off from the parties to the Convention, their right to be considered successor States was not of importance in regard to the use of the Canal. In 1956, however, it did come briefly into prominence in connexion with the Second Conference on the Suez Canal convened in London. Complaint was there made that a number of States, who were not present, ought to have been invited to the Conference; and, *inter alia*, it was said that some of those States had the right to be present in the capacity of successor States of one or other party to the Convention.⁴³⁵ The matter was not pushed to any conclusion, and the incident can at most be said to provide an indication in favour of succession in the case of an international settlement of this kind.

⁴³⁴ See *American Journal of International Law* (Washington), vol. 57, No. 4 (October 1963), pp. 879-880.

⁴³⁵ United Nations, *Materials on Succession of States* (*op. cit.*), pp. 157-158.

(34) Some further precedents of one kind or another might be examined, but it is doubtful whether they would throw any clearer light on the difficult question of territorial treaties. Running through the precedents and the opinions of writers are strong indications of a belief that certain treaties attach a régime to territory which continues to bind it in the hands of any successor State. Not infrequently other elements enter into the picture, such as an allegation of fundamental change of circumstances or the allegedly limited competence of the predecessor State, and the successor State in fact claims to be free of the obligation to respect the régime. Nevertheless, the indications of the general acceptance of such a principle remain. At the same time, neither the precedents nor the opinions of writers give clear guidance as to the criteria for determining when this principle operates. The evidence does not, however, suggest that this category of treaties should embrace a very wide range of so-called territorial treaties. On the contrary, this category seems to be limited to cases where a State by a treaty grants a right to use territory, or to restrict its own use of territory, which is intended to attach to territory of a foreign State or, alternatively, to be for the benefit of a group of States or of all States generally. There must in short be something in the nature of a territorial régime.

(35) In any event, the question arises here, as in the case of boundaries and boundary régimes, whether in these cases there is succession in respect of the treaty as such or rather whether the régime established by the dispositive effects of the treaty is affected by the occurrence of a succession of States. The evidence might perhaps suggest either approach. But the Commission considered that in formulating the rule for the effect of a succession of States upon objective régimes established by treaty, it ought to adopt the same standpoint as in the case of boundary régimes and other régimes of a territorial character established by a treaty. In other words, the rule should relate to the legal situation—the régime—resulting from the dispositive effects of the treaty rather than to succession in respect of the treaty. Moreover, in the case of objective régimes it considered that this course was also strongly indicated by the decisions of the Commission and of the United Nations Conference on the Law of Treaties with regard to treaties providing for such régimes in codifying the general law of treaties.

(36) Accordingly, article 30, like article 29, states the law regarding other forms of territorial régimes simply in terms of the way in which a succession of States affects—or rather does not affect—the régime in question. The difficulty is to find language which adequately defines and limits the conditions under which the article applies. The article is divided into two paragraphs dealing respectively with territorial régimes established for the benefit of particular territory of another State (paragraph 1) and territorial régimes established for the benefit of a group of States or all States (paragraph 2).

(37) *Paragraph 1* (a) of article 30 provides that a succession of States shall not affect obligations relating to the use of a *particular territory*, or to restrictions upon its use, established by a treaty *specifically* for the benefit of a *particular territory* of a foreign State and considered as *attaching to the territories in question*. Correspondingly,

paragraph 1 (b) provides that a succession of States shall not affect rights established by a treaty *specifically* for the benefit of a *particular territory* and relating to the use, or to restrictions upon the use of a *particular territory* of a foreign State and *considered as attaching to the territories in question*. The Commission considered that in the case of these territorial régimes there must be attachment both of the obligation and the right to a particular territory rather than to the burdened State as such or to the beneficiary State as such. In adding the words “and considered as attaching to the territories in question”, the Commission intended not only to underline this point but also to indicate the relevance of the dispositive element, the establishment of the régime through the execution of the treaty.

(38) *Paragraph 2* contains similar provisions for objective régimes, with the exception that here the requirement of attachment to *particular territory* applies only to the territory in respect of which the *obligation* is established; there is no requirement of attachment of rights established by the treaty to any particular territory or territories because the special character of the régime with respect to the *right* established by the treaty lies in its creation in the interest of a *group* of States or of *all* States and not with regard to a particular territory or territories.

(39) “Territory” for the purposes of the present article is intended to denote any part of the land, water or air space of a State. But the Commission considered this to be the natural meaning of the word in a context like the present one and that it was unnecessary to specify it in the article.

PART VI

MISCELLANEOUS PROVISIONS

Article 31. Cases of military occupation, State responsibility and outbreak of hostilities

The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty from the military occupation of a territory or from the international responsibility of a State or from the outbreak of hostilities between States.

Commentary

(1) Mention has already been made⁴³⁶ of the reasons for inserting the present article in the draft. The article excludes three specific matters from the scope of the draft articles. As to the first—questions arising in regard to a treaty from the military occupation of territory—the Commission considered that although military occupation may not constitute a succession of States within the meaning given to that term in article 2 of the present draft, it may raise analogous problems. Accordingly, if only to avoid misunderstanding, it seems desirable specifically to provide that nothing in the present articles is to pre-

judge any question that may arise in the case of military occupation. No doubt some cases of military occupation would in any event be excluded by the general provision in article 6 limiting the draft articles to succession of States occurring in conformity with international law; but it seems doubtful whether that provision would necessarily suffice to cover every case.

(2) The second matter excluded—questions arising in regard to a treaty from the international responsibility of a State—was excluded also from the Vienna Convention on the Law of Treaties by article 73. The Commission, when proposing this exclusion in its final report on the law of treaties, explained in its commentary to the relevant article⁴³⁷ its reason for doing so. It considered that an express reservation in regard to the possible impact of the international responsibility of a State on the application of its draft articles was desirable in order to prevent any misconceptions as to the interrelation between the rules governing that matter and the law of treaties. Principles of State responsibility might have an impact on the operation of certain parts of the law of treaties in conditions of entirely normal international relations. The Commission, therefore, decided that considerations of logic and of the completeness of the draft articles indicated the desirability of inserting a general reservation covering cases of State responsibility. The Commission further underlined the need to formulate the reservation in entirely general terms in order that it should not appear to prejudice any of the questions of principle arising in connexion with this topic of State responsibility, the codification of which the Commission already had in hand. The same considerations, in the Commission's view, make it desirable to insert in the present article a general reservation covering cases of State responsibility.

(3) The third matter excluded—questions arising in regard to a treaty from the outbreak of hostilities—was likewise excluded from the Vienna Convention on the Law of Treaties by article 73. This exclusion was inserted in article 73 not by the International Law Commission but by the Vienna Conference itself. The Commission had taken the view that the outbreak of hostilities should be considered as an entirely abnormal condition and that the rules governing its legal consequences should not be regarded as forming part of the general rules of international law applicable in the normal relations between States. Without dissenting from that general point of view, the Conference decided that a general reservation concerning the outbreak of hostilities was nevertheless desirable. True, there was a special reason for inserting that reservation in the Vienna Convention; for article 42, paragraph 2, of the Convention expressly provides that the termination or the suspension of its operation “may take place only as a result of the application of the provisions of the treaty or of the present Convention”. Even so, the Commission considered that in the interests of uniformity as well as because of the possible impact of the outbreak of hostilities in cases of succession it was desirable to reproduce the reservation in the present articles.

⁴³⁶ See above, sect. A, para. 44.

⁴³⁷ Article 69. 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. 87.

Chapter III

QUESTION OF THE PROTECTION AND INVIOABILITY OF DIPLOMATIC AGENTS AND OTHER PERSONS ENTITLED TO SPECIAL PROTECTION UNDER INTERNATIONAL LAW

A. Introduction

I. SUMMARY OF THE COMMISSION'S PROCEEDINGS

54. At its twenty-second session, in 1970, the Commission received from the President of the Security Council a letter dated 14 May 1970 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 need for action to ensure the protection and inviolability of diplomatic agents in view of the increasing number of attacks on them. The Chairman of the Commission replied to the foregoing communication by a letter dated 12 June 1970 which referred to the Commission's past work in this area and stated the Commission would continue to be concerned with the matter.⁴³⁸

55. At the twenty-third session of the Commission, in 1971, in connexion with the adoption of the Commission's agenda, the suggestion was made by Mr. Kearney that the Commission should consider whether it would be possible to produce draft articles regarding such crimes as the murder, kidnapping and assaults upon diplomats and other persons entitled to special protection under international law.⁴³⁹ The Commission recognized both the importance and the urgency of the matter, but deferred its decision in view of the priority that had to be given to the completion of the draft articles on the representation of States in their relations with international organizations. In the course of the session it became apparent that there would not be sufficient time to deal with any additional subject. In considering its programme of work for 1972, however, the Commission reached the decision that, if the General Assembly requested it to do so, it would prepare at its 1972 session a set of draft articles on this important subject with the view to submitting such articles to the twenty-seventh session of the General Assembly.⁴⁴⁰

56. By resolution 2780 (XXVI), of 3 December 1971, the General Assembly, *inter alia*, recognizing the views expressed by the Commission in paragraphs 133 and 134 of its report, in particular those on the importance and urgency of dealing with the problem of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, requested: (a) the Secretary-General to invite comments

from Member States before 1 April 1972 on the question of the protection of diplomats and to transmit them to the International Law Commission at its twenty-fourth session; and (b) the Commission to study as soon as possible, in the light of the comments of Member States, the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, with a view to preparing a set of draft articles dealing with offences committed against diplomats and other persons entitled to special protection under international law for submission to the General Assembly at the earliest date which the Commission would consider appropriate.

57. In pursuance of the foregoing decision the Secretary-General, in a circular letter dated 11 January 1972, invited Member States to communicate to him, before 1 April 1972, their comments on the question of the protection of diplomats with a view to transmitting them to the International Law Commission at its twenty-fourth session.

58. At its present session, the Commission had before it the written observations received from twenty-six Member States which are reproduced in an annex to the present report. Attached to its written observations, Denmark submitted the text of a draft convention on the question, referred to as "the Rome draft".⁴⁴¹ In addition, the Commission had before it a working paper containing the text of a draft convention on the question, submitted to the twenty-sixth session of the General Assembly by the delegation of Uruguay (hereinafter referred to as the "Uruguay working paper") and prepared for transmission to the Commission,⁴⁴² and a working paper prepared by Mr. Kearney, Chairman of the Commission, containing draft articles concerning crimes against persons entitled to special protection under international law (A/CN.4/L.182).⁴⁴³ The Commission had also at its disposal an extensive documentation relevant to the question, made available by the Secretariat, which included in particular the Convention to Prevent and Punish the Acts of Terrorism taking the Form of Crimes against Persons and related Extortion that are of International Significance, signed at Washington at the third Special Session of the General Assembly of the Organization of American States of 2 February 1971, hereinafter referred to as "the OAS Convention",⁴⁴⁴ the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed

⁴³⁸ See *Yearbook of the International Law Commission, 1970*, vol. II, pp. 273-274, document A/8010/Rev.1, para. 11.

⁴³⁹ *Ibid.*, 1971, vol. I, p. 3, 1087th meeting, para. 38.

⁴⁴⁰ *Ibid.*, 1971, vol. II (Part One), p. 352, document A/8410/Rev.1, paras. 133-134.

⁴⁴¹ See below, p. 114.

⁴⁴² A/C.6/L.822.

⁴⁴³ To be printed in *Yearbook of the International Law Commission, 1972*, vol. II.

⁴⁴⁴ For the text of the OAS Convention, see *Official Documents of the Organization of American States*, OEA/Ser.A/17 (Washington D.C., OAS General-Secretariat, 1971), p. 6.

at Montreal on 23 September 1971⁴⁴⁵ and the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970,⁴⁴⁶ hereinafter referred to, respectively, as "the Montreal" and "The Hague" Conventions, the latter two instruments concluded under the auspices of ICAO.

59. The Commission began its work at the present session by taking up the question, which was considered at the 1150th to 1153rd, 1182nd to 1186th, 1188th, 1189th and 1191st to 1193rd meetings. An initial general discussion was held at the 1150th to 1153rd meetings. At its 1150th meeting, the Commission set up a Working Group⁴⁴⁷ to review the problem involved and prepare a set of draft articles for submission to the Commission.

60. In the course of the general discussion the question was raised whether the Commission should limit itself to draft articles covering persons entitled to special protection under international law. Terrorism had become widespread and many innocent people had suffered thereby. It might be better to follow the examples of the Hague and Montreal Conventions and seek to provide some means of protection against terrorist acts generally. Other members queried whether a convention of the nature envisaged would be really useful in providing protection. In this connexion, reference was made to the fact that the League of Nations Convention for the Prevention and Punishment of Terrorism of 16 November 1937 had not been ratified by any States.⁴⁴⁸ The majority of speakers expressed the view, however, that the question of the utility as well as the scope of draft articles on the subject, had been determined by resolution 2780 (XXVI) of the General Assembly.

61. Other members expressed doubts as to the possibility of completing a set of draft articles during the twenty-fourth session of the Commission in view of the difficult questions involved and, in particular, the question how "political offences" should be treated and the necessity of upholding the principle of asylum. It was pointed out that in the OAS Convention, article 6 specifically provided that "None of the provisions of this Convention shall be interpreted so as to impair the right of asylum". It was also pointed out that the right of territorial asylum was traditional in Latin America. In the light of these difficulties and the fact that the General Assembly in resolution 2780 (XXVI) had merely referred to submitting a draft set of articles "to the General Assembly at the earliest date which the Commission considers appropriate", it was urged that the Commission follow its traditional procedure of appointing a Special Rapporteur to make a study of the subject, and then prepare draft articles for consideration by the Commission.

62. Most of the members who participated in the discussion, however, took the view that the subject was one

of sufficient urgency and importance to justify the Commission adopting a more expeditious method of producing a set of draft articles than the appointment of a Special Rapporteur and that the establishment of a special working group, which would base its work upon the existing texts dealing with the protection of diplomatic agents and other officials engaged in international activities as well as those treaties concerned with specific types of terrorism, such as the hijacking of aeroplanes, was the most efficient means of enabling the Commission to produce a set of draft articles for submission to the General Assembly at its twenty-seventh session.

63. In the initial stage of its work the Working Group held seven meetings from 24 May to 16 June 1972, at the conclusion of which it submitted for the consideration of the Commission a first report containing a set of 12 draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons (A/CN.4/L.186).⁴⁴⁹ In introducing the Working Group's report at the 1182nd meeting, its Chairman, Mr. Tsuruoka, pointed out that the Working Group in order to facilitate discussion in the Commission and subsequent comments of Governments, was submitting a text that aimed at ensuring the utmost protection for the persons concerned. The Commission considered the Working Group's report at its 1182nd to 1186th and 1188th and 1189th meetings and referred the set of draft articles back to the Working Group for revision in the light of the discussion. In the course of these discussions most of the members of the Commission indicated support for the general approach that had been taken in the articles. Some members of the Commission again raised the question whether the principle of territorial asylum should be specifically preserved in the context of political crimes. The general view of the Commission, however, was that crimes of the nature described in the draft articles were not political crimes. The question whether the attacker should know that the individual attacked was a specially protected person was discussed by several members in connexion with the use of the phrase "regardless of motive" in draft article 2. The consensus was that some formula should be adopted to establish a requirement for such knowledge. Among other aspects of the draft articles discussed, the Commission in general supported the conclusion that a clause eliminating the application of all periods of limitation for prosecution of the specified offences was too severe. One member considered the draft articles deficient in that they did not provide alternative provisions so that States could indicate preferred courses of action in their comments.

64. The Working Group held three additional meetings on 26, 28 and 30 June 1972 and submitted to the Commission two further reports containing a revised set of 12 draft articles (A/CN.4/L.188 and Add.1;⁴⁵⁰ A/CN.4/

⁴⁴⁵ For the text of the Montreal Convention, see ICAO, document 8966, p. 1.

⁴⁴⁶ For the text of the Hague Convention, see ICAO, document 8920, p. 1.

⁴⁴⁷ See above, chap. I, para. 6.

⁴⁴⁸ League of Nations, *Official Journal, Special Supplement No. 193* (1944), p. 54.

⁴⁴⁹ The text of the draft articles is reproduced in *Yearbook of the International Law Commission, 1972*, vol. I, 1182nd, 1185th, 1186th, 1188th and 1189th meetings.

⁴⁵⁰ *Idem*, 1191st and 1192nd meetings.

L.189⁴⁵¹). The Commission considered the Working Group's second and third reports at its 1191st, 1192nd and 1193rd meetings, and provisionally adopted a draft of 12 articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons.⁴⁵² In accordance with articles 16 and 21 of its Statute, the Commission decided to submit the present provisional set of draft articles to the General Assembly, and to submit them to Governments for comments.

2. SCOPE, PURPOSE AND STRUCTURE OF THE DRAFT ARTICLES

65. In accordance with the mandate contained in paragraph 2 of section III of General Assembly resolution 2780 (XXVI),⁴⁵³ the scope of the present draft is restricted to crimes committed against diplomatic agents and other persons entitled to special protection under international law. The Commission, however, recognizes that the question of crimes committed against such persons is but one of the aspects of a wider question, the commission of acts of terrorism. The elaboration of a legal instrument with the limited coverage of the present draft is an essential step in the process of formulation of legal rules to effectuate international co-operation in the prevention, suppression and punishment of terrorism. The over-all problem of terrorism throughout the world is one of great complexity but there can be no question as to the need to reduce the commission of terrorist acts even if they can never be completely eliminated. The General Assembly may consider it important to give consideration to this general problem.

66. The scope of the draft extends, *ratione personae*, to diplomatic agents and other persons entitled to special protection under international law. By making the person of diplomatic agents inviolable, international law has long since acknowledged the fact that certain immunities and privileges for such agents are essential to the conduct of relations among sovereign and independent States.⁴⁵⁴ Inviolability includes imposing on the States to which diplomatic agents are accredited a duty of special protection, that is, a protection higher than that which they are obliged to accord to a private person. Under international law, inviolability is attached also to the premises of the diplomatic mission. These principles have been codified in articles 29 and 22 of the Vienna Convention on Diplomatic Relations (1961)⁴⁵⁵ adopted on the basis

of the draft articles on diplomatic intercourse and immunities prepared by the Commission. Those articles read as follows:

Article 29

The person of a diplomatic agent shall be inviolable. [. . .] The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Article 22

1. The premises of the mission shall be inviolable. [. . .]
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

In the commentary to article 27 of its final draft on diplomatic intercourse and immunities, which formed the basis for article 29 of the Vienna Convention, the Commission stated:

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 exempt 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.⁴⁵⁶

Provisions concerning the protection of consular officers and consular premises are contained in the Vienna Convention on Consular Relations (1963).⁴⁵⁷ Article 40 (protection of consular officers) provides:

The receiving State shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity.

Paragraph 3 of article 31 (inviolability of the consular premises) of the same Convention provides:

Subject to the provisions of paragraph 2 of this article, the receiving State is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.

Inviolability of the representatives of the sending State and of the members of the diplomatic staff in a special mission and of the premises of that mission are found in the 1969 Convention on Special Missions.⁴⁵⁸ In 1971 the Commission included in its draft articles on the representation of States in their relations with international organizations a series of provisions regarding the inviolability of members of missions and delegations concerned in the operations of international organizations as well as their

⁴⁵¹ *Idem*, 1193rd meeting.

⁴⁵² For the text of the articles, with commentaries, see section B below.

⁴⁵³ See para. 56 above.

⁴⁵⁴ See E. M. Satow, *A Guide to Diplomatic Practice*, 4th ed. (London, Longmans, Green, 1957), pp. 176 *et seq.*; B. Sen, *A Diplomat's Handbook of International Law and Practice* (The Hague, Nijhoff, 1965), pp. 80 *et seq.*; E. de Vattel, *Le droit des gens ou Principes de la loi naturelle*, book IV, chap. VII, reproduced in *The Classics of International Law*, ed. by J. B. Scott (Washington D.C., Carnegie Institution, 1916), vol. II, pp. 314 *et seq.*

⁴⁵⁵ For the text of the Vienna Convention in Diplomatic Relations, see United Nations, *Treaty Series*, vol. 500, p. 95.

⁴⁵⁶ *Yearbook of the International Law Commission, 1958*, vol. II, p. 97, document A/3859, chap. III, sect. II.

⁴⁵⁷ For the text of the Vienna Convention on Consular Relations, see United Nations, *Treaty Series*, vol. 596, p. 261.

⁴⁵⁸ Articles 29 and 25 of the Convention. For the text of the Convention on Special Missions, see General Assembly resolution 2530 (XXIV), annex.

premises and accommodations.⁴⁵⁹ A variety of other categories of persons who as officials of a State or an international organization are engaged in carrying on international relations are similarly accorded special protection under general international law or international agreements.⁴⁶⁰

67. Violent attacks against diplomatic agents and other persons entitled to special protection under international law not only gravely disrupt the very mechanism designed to effectuate international co-operation for the safeguarding of peace, the strengthening of international security and the promotion of the general welfare of nations but also prevent the carrying out and fulfilment of the purposes and principles of the Charter of the United Nations. The increasing frequency with which those crimes are being committed makes particularly urgent the task of formulating legal rules aimed at reinforcing the atmosphere of personal security and absence of coercion within which persons selected by States or international organizations to represent them in their relations with other States or organizations should carry out their responsibilities. This is the purpose of the present draft. Basing itself on the existing legal obligations that are intended to contribute effectively to the inviolability and protection of the persons in question, these draft articles seek to achieve this purpose through the promotion of international co-operation for the prevention and punishment of crimes committed against those persons.

68. Specifically, the draft seeks to ensure that safe-havens will no longer be available to a person as to whom there are grounds to believe that he has committed serious offences against internationally protected persons. To achieve this end, the draft centres on two main points: it provides the basis for the assertion of jurisdiction over such crimes by all States party and it gives to States where the alleged offender may be found the option to extradite him or to submit the case to its competent authorities for the purpose of prosecution. Provisions to this effect are found in articles 2 and 6 of the draft.

69. Further, the draft envisages international co-operation at both the levels of prevention and suppression of crimes and is structured along a logical sequence of stages between those two levels. Thus, following the determination of the scope of the draft, *ratione personae* in article 1 and *ratione materiae* in article 2, article 3 takes up the situation when commission of the crime is in the preparatory stage and provides for international collaboration in its prevention. Article 4 refers to the case where the crime has been committed and the alleged offender is presumed to have fled abroad. Article 5 relates to the action to be taken when the alleged offender is found. Article 6 establishes the option given to the State in whose territory the alleged offender is present to extradite or

submit the case for prosecution; and article 7 seeks to make that option a real one as regards extradition. Articles 8 to 11 concern various aspects of the proceedings to be instituted against the alleged offender and article 12 provides for the settlement of the disputes that may arise between States party.

B. Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons

Article 1

For the purposes of the present articles:

1. "Internationally protected person" means:

(a) A Head of State or a Head of Government, whenever he is in a foreign State, as well as members of his family who accompany him;

(b) Any official of either a State or an international organization who is entitled, pursuant to general international law or an international agreement, to special protection for or because of the performance of functions on behalf of his State or international organization, as well as members of his family who are likewise entitled to special protection.

2. "Alleged offender" means a person as to whom there are grounds to believe that he has committed one or more of the crimes set forth in article 2.

3. "International organization" means an intergovernmental organization.

Commentary

(1) In accordance with the practice followed in many of the conventions adopted under the auspices of the United Nations, this article deals with those expressions to which a specific meaning is attributed for the purposes of the present draft.

(2) Paragraph 1 sets forth the meaning of the expression "internationally protected person", thus determining, *ratione personae*, the scope of the draft. For selecting that particular expression and determining its exact coverage, the Commission found guidance in the terms of its mandate as contained in paragraph 2 of section III of General Assembly resolution 2780 (XXVI).⁴⁶¹ Paragraph 1 of the present article describes in two separate sub-paragraphs the categories of persons to whom the expression is made applicable. In sub-paragraph (a) specific mention is made of a Head of State or a Head of Government. This is done on account of the exceptional protection which, under international law, attaches to such a status. The sub-paragraph emphasizes the special status of a Head of State or Head of Government when he travels abroad and which extends to members of his family who accompany him. A Head of State or Head of Government is entitled to special protection whenever he is in a foreign State and whatever may be the nature of his visit—official, unofficial

⁴⁵⁹ Part II (missions to international organizations), articles 23 and 28; part III (delegations to organs and to conferences), articles 54 and 59; and annex to the draft (observer delegations to organs and to conferences), articles M and N. See *Yearbook of the International Law Commission, 1971, vol. II (Part One)*, pp. 284 *et seq.*, document A/8410/Rev.1, chap. II, sect. D.

⁴⁶⁰ In general, see C. W. Jenks, *International Immunities* (London, Stevens, 1961).

⁴⁶¹ See para. 56 above.

or private.⁴⁶² Some members of the Commission considered that the term "Head of State or Head of Government" included members of an organ which functioned in that capacity in a collegial fashion. Other members, however, were of the opinion that, given the criminal law character of the present draft, the categories of persons to whom the draft applied could not be extended by analogy. The Commission agreed that in enacting legislation to implement the articles, States should bear in mind the desirability of ensuring the fullest protection to all persons who have the quality of Head of State or Government.

(3) The Commission also considered whether persons of cabinet rank or holding equivalent status should also be included with the Head of State and the Head of Government as entitled to special protection at all times and in all circumstances when in a foreign State. The Commission decided that, while there was some support for extension of the principle to cabinet officers, it could not be based upon any broadly accepted rule of international law and consequently should not be proposed.⁴⁶³ A cabinet officer would, of course, be entitled to special protection whenever he was in a foreign State in connexion with some official function.

(4) The other persons who under the article are to be regarded as "internationally protected persons" are defined by a series of requirements in *sub-paragraph (b)*. This sub-paragraph requires that these persons be officials of either a State or an international organization and that they be, under general international law or an international agreement, entitled to special protection for or because of the performance of functions on behalf of their State or international organization. The sub-paragraph also extends to members of the family of such officials who are likewise entitled to special protection.

(5) The Commission decided in favour of the general formulation over an enumeration of the classes specified in particular conventions as being the best means of effectuating the stated desire of the General Assembly for the broadest possible coverage. In formulating sub-paragraph (b) the Commission found inspiration both in article 2 of the OAS Convention which refers to "those persons to whom the State has the duty to give special

protection according to international law" and in article 1 of the Rome draft which refers to:

(a) members of permanent or special diplomatic missions and members of consular posts;

(b) civil agents of States on official mission;

(c) staff members of international organizations in their official functions;

(d) persons whose presence and activity abroad is justified by the accomplishment of a civil task defined by an international agreement for technical co-operation or assistance;

(e) members of the families of the above-mentioned persons.

(6) Under sub-paragraph (b), whether or not an official of either a State or an international organization is to be regarded as an "internationally protected person" depends on his being entitled, pursuant to general international law or an international agreement, at the time when and in the place where a crime against him or his premises is committed, to special protection for or because of the performance of official functions. Thus, a diplomatic agent on vacation in a State other than a host or receiving State would not normally be entitled to special protection. Some members suggested that if the purpose of the convention was to reduce the incidence of attacks upon internationally protected persons as such the convention should apply whether they were in a foreign country on official business or in a foreign country on holiday. A kidnapping could as well be committed in the one place as the other for the purpose of bringing pressure on a host government of the sending State. The Commission in general considered that this extension of the existing rules regarding the requirements for inviolability and special protection would not be warranted. The basic purpose of the draft articles was to protect the system of communications among States and extension of special protection to, for example, diplomatic agents on leave in a third State, that might well be unaware of their presence, could not be justified under the international conventions currently in force or the applicable rules of international law.⁴⁶⁴

(7) As used in sub-paragraph (b), the expression "special protection" applies to all officials who are entitled to inviolability, as well as all others who are entitled to the somewhat more limited concept of protection. Also the use of the expression "general international law or an international agreement" makes it clear that as regards officials of States the internationally protected person will be the one who is in the service of a State other than the one which has the duty to afford special protection. One member drew attention to the obligation incumbent upon all persons entitled to special protection not to interfere in the internal affairs of the host or receiving State and, in particular not to interfere directly or indirectly in insur-

⁴⁶² See in general P. Cahier, *Le droit diplomatique contemporain* (Geneva, Droz, 1962), Publications de l'Institut universitaire de hautes études internationales, No. 40, pp. 336-346.

⁴⁶³ For the status of Heads of State, Heads of Government, Ministers for Foreign Affairs and Cabinet Ministers, see the Commission's consideration of the matter in connexion with the question of high-level special missions: *Yearbook of the International Law Commission, 1965*, vol. II, p. 192, document A/6009, chap. III, annex; *Yearbook of the International Law Commission, 1967*, vol. I, pp. 157-168 and 235, 923rd-925th meetings and 937th meeting, paras. 68-75; *ibid.*, vol. II, pp. 36, 77 and 347, document A/CN.4/194 and Add.1-5, paras. 272-276, chap. III, article 17 *quarter* (new), and document A/6709/Rev.1, chap. II, sect. D, article 21.

Article 21 of the Convention on Special Missions and article 50 of the Commission's draft articles on the representation of States in their relations with international organizations (*Yearbook of the International Law Commission, 1971*, vol. II (Part One), pp. 284 *et seq.*, document A/8410/Rev.1, chap. II, sect. D) refer to the facilities, privileges and immunities "accorded by international law" to Heads of State, Heads of Government, Ministers for Foreign Affairs and other persons of high rank.

⁴⁶⁴ Article 40 of the Vienna Convention on Diplomatic Relations, article 54 of the Vienna Convention on Consular Relations, article 42 of the Convention on Special Missions and article 78 of the Commission's draft articles on the representation of States in their relations with international organizations—all concerning transit through the territory of a third State—provide that the third State shall accord to the person concerned inviolability and such other immunities as may be required to ensure the transit through its territory while proceeding to take up or return to his post or functions in the receiving or host State or when returning to the sending State.

reactionist movements. The consensus in the Commission was that this duty was already adequately set forth in such provisions as article 41 of the Vienna Convention on Diplomatic Relations.⁴⁶⁵

(8) The expression "general international law" is used to supplement the reference to "an international agreement". In the absence of the first expression, for example, diplomatic agents stationed in a State not party to the Vienna Convention on Diplomatic Relations or a similar treaty would be excluded from the coverage of sub-paragraph (b). Further, the expression is designed to take into account developments in international law such as the need for protection of representatives of the sending State in a special mission and members of the diplomatic staff of the special mission within the meaning of the Convention on Special Missions; heads of mission, members of the diplomatic staff and members of the administrative and technical staff of the mission within the meaning of the draft articles on the representation of States in their relations with international organizations adopted by the Commission in 1971 as well as heads of delegations, other delegates, members of the diplomatic staff and members of the administrative and technical staff of the delegation within the meaning of the same draft articles. One member of the Commission suggested that reference should also be made to protection provided for foreign officials under the internal law of the host or receiving State as this law might encompass some categories of persons in addition to those comprehended under general international law or an international agreement as entitled to special protection. The addition was, however, considered unnecessary.

(9) Among the officials who, in the circumstances provided for in sub-paragraph (b), could be regarded as "internationally protected persons" by virtue of their entitlement to special protection under international agreements the following may likewise be mentioned by way of example: diplomatic agents and members of the administrative and technical staff of the mission within the meaning of the Vienna Convention on Diplomatic Relations; consular officers within the meaning of the Vienna Convention on Consular Relations; officials of the United Nations within the meaning of articles V and VII of the Convention on the Privileges and Immunities of the United Nations;⁴⁶⁶ experts on mission for the United Nations within the meaning of article VI of the Convention on the Privileges and Immunities of the United Nations and officials of the Specialized Agencies within the meaning of articles VI and VIII of the Convention on the Privileges and Immunities of the Specialized Agencies.⁴⁶⁷ In enacting legislation to put the draft articles into effect, it would be appropriate for States, in determining the

extent of coverage *ratione personae* to take account of the need to afford a wide range of foreign officials protection against terroristic activities.

(10) The entitlement to special protection referred to in sub-paragraph (b) must be for or because of the performance of official functions. The preposition "for" relates specifically to the special protection to be afforded by a receiving or host State; the preposition "because of" refers to the special protection to be afforded by a State of transit as required for example under article 40 of the Vienna Convention on Diplomatic Relations.

(11) As regards the members of the family envisaged also in sub-paragraph (b) the word "likewise" has been used to emphasize that their entitlement to special protection does not arise from the present draft but, as in the case of officials, must exist pursuant to general international law or an international agreement and, again, be applicable where and when the offence is committed. Thus, the wife of a diplomatic agent would be entitled to special protection under, and subject to the conditions of, article 37 of the Vienna Convention on Diplomatic Relations if her husband was assigned to a State party to that Convention.

(12) *Paragraph 2* concerns the meaning of the expression "alleged offender". The Commission considered it useful to employ this expression to make clear that in order to set in motion the machinery envisaged in the articles against an individual there must be grounds to believe that he has committed one of the crimes to which the draft articles apply.

(13) *Paragraph 3* reproduces the meaning of the expression "international organization", as found in article 2, paragraph 1 (i), of the Vienna Convention on the Law of Treaties⁴⁶⁸ and article 1, paragraph 1 (1), of the draft articles on the representation of States in their relations with international organizations. The Commission considered whether the protection to be afforded the officials of international organizations should be limited to those of a universal character. It reached the conclusion that the special considerations that led to limiting the scope of the draft articles on the representation of States in their relations with international organizations did not apply in the case of protection. The essential and important work done by a great variety and number of such organizations led the Commission to extend the coverage of sub-paragraph (b) of paragraph 1 of the article to officials not only of international organizations of universal character but also of the regional and other intergovernmental organizations.

(14) The suggestion was made that, in view of their special character, major humanitarian organizations such as the International Committee of the Red Cross should likewise be included. The Commission concluded that it would not be desirable to propose extending the concept of special protection to officials of other than intergovernmental organizations.

⁴⁶⁵ And article 55 of the Convention on Consular Relations, article 47 of the Convention on Special Missions and article 75 of the Commission's draft articles on the representation of States in their relations with international organizations.

⁴⁶⁶ For the text of the Convention on the Privileges and Immunities of the United Nations, see United Nations, *Treaty Series*, vol. 1, p. 15.

⁴⁶⁷ For the text of the Convention on the Privileges and Immunities of the Specialized Agencies, see *ibid.*, vol. 33, p. 261.

⁴⁶⁸ For the text of the Convention on the Law of Treaties, 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. 289.

Article 2

1. The intentional commission, regardless of motive, of:

(a) A violent attack upon the person or liberty of an internationally protected person;

(b) A violent attack upon the official premises or the private accommodation of an internationally protected person likely to endanger his person or liberty;

(c) A threat to commit any such attack;

(d) An attempt to commit any such attack; and

(e) Participation as an accomplice in any such attack, shall be made by each State Party a crime under its internal law, whether the commission of the crime occurs within or outside of its territory.

2. Each State Party shall make these crimes punishable by severe penalties which take into account the aggravated nature of the offence.

3. Each State Party shall take such measures as may be necessary to establish its jurisdiction over these crimes.

Commentary

(1) The provisions of article 2 deal with two distinct though related matters: (a) the determination, *ratione materiae*, of the scope of the draft by setting forth the crimes to which it will apply, and (b) the determination of the competence of States party to prosecute and punish those crimes.

(2) The first of those aspects is dealt with in *paragraph 1*, which describes the crimes encompassed as first a violent attack either upon the person or liberty of an internationally protected person or upon the official premises or the private accommodation of such a person likely to endanger his person or liberty (sub-paragraphs (a) and (b)). This is followed by a series of ancillary offences: a threat or an attempt to commit any such attack or participation as an accomplice therein (sub-paragraphs (c), (d) and (e)).

(3) Articles 1 of the Montreal and The Hague Conventions, the Uruguay working paper and the Rome draft and article 2 of the OAS Convention also contain provisions describing the offences covered in those instruments. In the two latter texts specific reference is made to such individual crimes as "kidnapping, murder, and other assaults against the life or personal [physical] integrity, of those persons to whom the State has the duty to give special protection".⁴⁶⁹ Some members of the Commission preferred this method of listing the individual crimes to be covered by the draft articles. The principal basis for supporting this approach was that articles dealing with criminal matters should be as specific as possible because interpretation of the defined crimes would be on a restrictive basis.

⁴⁶⁹ For instance, article 2 of the OAS Convention reads as follows:

"For the purposes of this Convention, kidnapping, murder, and other assaults against the life or personal integrity of those persons to whom the State has the duty to give special protection according to international law, as well as extortion in connexion with those crimes, shall be considered common crimes of international significance, regardless of motive."

(4) The Commission considered, however, that it would be preferable to use the general expression "violent attack", in order both to provide substantial coverage of serious offences and at the same time to avoid the difficulties which arise in connexion with a listing of specific crimes in a convention intended for adoption by a great many States. In view of the difference in definitions of murder, kidnapping or serious bodily assault that might be found in a hundred or more varying criminal systems if the method of listing individual crimes were to be used, it would seem necessary to adopt the difficult approach of including for re-incorporation into internal law a precise definition of such crimes. It appeared to the Commission that agreement upon such specific definitions might not be possible. Consequently it was decided to leave open to each individual State party the ability to utilize the various definitions which exist in its internal law for the specific crimes which are comprised within the concept of violent attack upon the person or liberty and upon official premises or accommodation, or to amend its internal law if necessary in order to implement the articles.

(5) As previously indicated, sub-paragraph 1 (a) of article 2 refers to a violent attack upon the person or liberty of an internationally protected person and examples of such kind of crimes are the murder, wounding or kidnapping of such a person. Sub-paragraph 1 (b) refers to a violent attack upon the official premises or the private accommodation of an internationally protected person, likely to endanger his person or liberty. It incorporates a principle not found in the OAS Convention, the Uruguay working paper or the Rome draft. Such violent attacks, which have taken the form of bombing an embassy, forcible entry into the premises of a diplomatic mission or discharging firearms at the residence of an ambassador, have occurred with such frequency in recent times that it was essential to include them in the present draft. Again, the general term "violent attack" permits States to define the crimes covered by the term in accordance with internal practice. It should be noted, however, that sub-paragraph (b) is not intended to cover minor intrusions into the protected premises. Further, the Commission did not deem it necessary to include in article 1 on the use of terms provisions regarding the expressions "official premises" and "private accommodation" as it considered that they have a precise and generally recognized meaning.

(6) Sub-paragraphs 1 (c) and (d) refer respectively to a threat and an attempt to commit any of the violent attacks referred to in sub-paragraphs (a) and (b). Sub-paragraph (e) refers to participation as an accomplice in any such attacks. The concept of threat appears in article 1 of The Hague Convention. Attempt and participation are likewise included in The Hague and the Montreal Conventions and in the Uruguay working paper. Threat, attempt and participation as an accomplice are well defined concepts under most systems of criminal law and do not require, therefore, any detailed explanation in the context of the present draft. It should be noted, however, that some concern was expressed regarding both the scope of the provision on threat and the need for inclusion of this type of offence.

(7) Unlike the Uruguay working paper, paragraph 1 does not include conspiracy to commit any of the violent attacks referred to in sub-paragraphs (a) and (b) because of the great differences in its definition under the various systems of criminal law. Some systems do not even recognize it as a separate crime.

(8) As it is indicated by the first sentence of paragraph 1, the acts listed in sub-paragraphs (a) to (e) are crimes when committed intentionally, regardless of motive. The word "intentional", which is similar to the requirement found in article 1 of the Montreal Convention, has been used both to make clear that the offender must be aware of the status as an internationally protected person enjoyed by the victim as well as to eliminate any doubt regarding exclusion from the application of the article of certain criminal acts which might otherwise be asserted to fall within the scope of sub-paragraphs (a) or (b), such as the serious injury of an internationally protected person in an automobile accident as a consequence of the negligence of the other party.

(9) While criminal intent is regarded as an essential element of the crimes covered by article 2, the expression "regardless of motive" restates the universally accepted legal principle that it is intent to commit the act and not the reasons that led to its commission that is the governing factor. Such an expression is found in article 2 of the OAS Convention and article 1 of the Uruguay draft. As a consequence the requirements of the Convention must be applied by a State party even though, for example, the kidnapper of an ambassador may have been inspired by what appeared to him or is considered by the State party to be the worthiest of motives.

(10) The second important aspect of article 2 is that paragraph 1 incorporates the principle of universality as the basis for the assertion of jurisdiction in respect of the crimes set forth therein. In determining a jurisdictional basis that is comparable to that over piracy, the provision of paragraph 1 places the present draft, for the purposes of jurisdiction, in the same category as those conventions which provide for co-operation in the prevention and suppression of offences which are of concern to the international community as a whole, such as the slave trade and traffic in narcotics.⁴⁷⁰ Each State party is, therefore, required to make the prescribed acts crimes under its internal law regardless where the acts may be committed. It should be noted that, unlike The Hague and the Montreal Conventions and the Rome draft which use the word "offence", the present article employs the term

"crime". In the context of The Hague and the Montreal Conventions the use of the word "offence" was justified by the novel character of the criminal acts to which it was intended to apply. The acts covered in the present draft have normally been regarded as crimes in domestic legislation, which is why they are so labelled in article 2.

(11) The provisions of paragraph 1 are intended to provide for the exercise of jurisdiction in a broad sense, that is as regards both substantive and procedural criminal law. In order to eliminate any possible doubts on the point, the Commission decided to include in *paragraph 3* a specific requirement, such as is found in The Hague and the Montreal Conventions and in the Rome draft, concerning the establishment of jurisdiction.

(12) *Paragraph 2* of article 2 provides that the crimes set forth in paragraph 1 be made "crimes punishable by severe penalties which take into account the aggravated nature of the offence". Some members of the Commission suggested that the reference to aggravated nature of the offence should be eliminated as unwarranted and unnecessary. In their view the nature of the crime was the essential determinant of the penalty to be imposed; to require that the same act be punished by a more severe penalty if an internationally protected person rather than an ordinary citizen were the victim would be an invidious distinction. Most members of the Commission considered that the reference to the aggravated nature of the offence was warranted. It was pointed out that the official capacity of the victim was readily recognized as affecting the gravity of the offence. The murder of a policeman in the performance of his duties was cited as a common example. Furthermore, severe penalties are likewise required in article 2 of The Hague Convention and article 3 of the Montreal Convention for the offences covered by those two instruments. The last phrase of paragraph 2 of the present article has been included to stress the idea that violent attacks directed against those persons who constitute the means for carrying on the work of the world community constitute a grave threat to the channels of communication upon which States depend for the maintenance of international peace and order. Consequently such attacks should be deterred by the imposition of penalties which take into account the importance of the world interests that are impaired by those attacks.

Article 3

States Party shall co-operate in the prevention of the crimes set forth in article 2 by:

(b) Taking measures to prevent the preparation in their respective territories for the commission of those crimes either in their own or in other territories;

(b) Exchanging information and co-ordinating the taking of administrative measures to prevent the commission of those crimes.

Commentary

(1) The provisions of article 3 are intended to result in more effective measures for the prevention of the crim

⁴⁷⁰ For instance, article 36, paragraph 1, of the 1961 Single Convention on Narcotic Drugs provides that:

"Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty." (United Nations, *Treaty Series*, vol. 520, p. 252.)

set forth in article 2, in particular through international co-operation. This is to be achieved by establishing for States party the double obligation to take measures to suppress the preparation in their territories of those crimes, irrespective of where they are to be committed, and to exchange information and co-ordinate the taking of those administrative measures which could lead to preventing such crimes from being carried out.

(2) Article 3 substantially reproduces the provisions of article 8, sub-paragraphs (a) and (b), of the OAS Convention and article 9, sub-paragraphs (a) and (b), of the Uruguay working paper. Sub-paragraph (a) of the present article embodies the well established principle of international law that every State must ensure that its territory is not used for the preparation of crimes to be committed in other States.⁴⁷¹ In addition, it expressly refers to the obligation of every State party to take preventive measures when the crimes in preparation are intended to be committed in its own territory, which constitutes compliance both with the principles of international law and the more special requirements to ensure inviolability and protection as set forth, for example, in the Vienna Conventions on diplomatic relations and on consular relations.

(3) As in other provisions of the present draft, the article limits itself to stating the general principle and does not go into the manner of implementation of the obligations imposed. Both the nature and the extent of the measures provided for in sub-paragraph (a), as well as of the information and administrative measures provided for in sub-paragraph (b), should be determined by States on the basis of their particular experience and requirements. They would, of course, include both police and judicial action as the varying circumstances might demand. In this connexion the Commission discussed the duty of host and receiving States to ensure that adequate steps were taken to guard internationally protected persons and premises. What constituted adequate steps obviously varied considerably from place to place. The type of protection required in a city with a high rate of violent crimes or with existing terrorist groups would be much more extensive than that in a city where these elements were absent. In the former case the host or receiving State might have to devote considerable resources to preventive measures but it is its clear duty to take all necessary protective measures.

Article 4

The State Party in which one or more of the crimes set forth in article 2 have been committed shall, if it has reason to believe an alleged offender has fled from its territory, communicate to all other States Party all the pertinent facts regarding the crime committed and all available information regarding the identity of the alleged offender.

⁴⁷¹ "The law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof" (United States v. Arjona, in United States of America, Supreme Court, *United States Reports*, vol. 120, October term, 1886 (New York, The Banks Law Publishing Co., 1911), p. 484).

Commentary

(1) The present article is the first of a series of provisions setting up the system of notifications provided for in the draft as the necessary means for effectively implementing the obligations established therein. There is no parallel obligation in The Hague, the Montreal or the OAS Conventions. The Commission considered that, in the circumstances envisaged in the article, the State party in whose territory the crime has been committed should have the obligation to communicate to all other States party all pertinent facts regarding the crime and all available information regarding the identity of the alleged offender. Full latitude is left to that State as to the manner in which the communication should be made since the appropriate means may vary from case to case.

(2) The article does not provide for any specific action to be taken by the "other States Party" upon receipt of the information. It is assumed that standard procedures with respect to wanted criminals will be put into effect. As these would vary not only from State to State but also in light of the circumstances of the individual case, a general rule regarding any specific obligations to act upon receipt of the information appeared undesirable.

Article 5

1. The State Party in whose territory the alleged offender is present shall take the appropriate measures under its internal law so as to ensure his presence for prosecution or extradition. Such measures shall be immediately notified to the State where the crime was committed, the State or States of which the alleged offender is a national, the State or States of which the internationally protected person concerned is a national and all interested States.

2. Any person regarding whom the measures referred to in paragraph 1 of this article are being taken shall be entitled to communicate immediately with the nearest appropriate representative of the State of which he is a national and to be visited by a representative of that State.

Commentary

(1) The provisions of article 5 concern the immediate action to be taken when the alleged offender is discovered on the territory of a State party following the commission of any of the crimes set forth in article 2. They must be considered in the light of the requirement stated in article 1, paragraph 2, that there be grounds to believe that the alleged offender has committed one or more of the crimes set forth in article 2. The article, while safeguarding the rights of the alleged offender, places on the State party in whose territory he is found the obligation to take the appropriate measures to prevent his escape pending that State's decision on whether he should be extradited or the case be submitted to its competent authorities for the purpose of prosecution as provided for in article 6.

(2) Article 5 substantially reproduces the provisions of article 6 of The Hague and the Montreal Conventions. As in the latter articles, the second sentence of *paragraph 1*

of article 5 specifically refers to those States which are particularly concerned, whether or not they may be parties to the instrument, to ensure that they shall be immediately notified of the measures taken. The purpose of the requirement is twofold. In the first place, it is desirable to notify States that are carrying on a search for the alleged offender that he has been found. In the second place it will permit any State with a special interest in the particular crime committed to determine if it wishes to request extradition and to commence the preparation of necessary documents and the collection of the required evidence.

(3) *Paragraph 2* of the article is designed to safeguard the rights of the alleged offender, thereby strengthening in this specific instance the general obligation established under article 8. The provision is similar to those found in many consular agreements.⁴⁷²

Article 6

The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.

Commentary

(1) Article 6 embodies the principle *aut dedere aut judicare*, which is basic to the whole draft. The same principle serves as the basis of article 5 of the OAS Convention, article 7 of The Hague and the Montreal Conventions, article 4 of the Rome draft and article 5 of the Uruguay working paper. The article gives to the State party in the territory of which the alleged offender is present the option either to extradite him or to submit the case to its competent authorities for the purpose of prosecution. In other words, the State party in whose territory the alleged offender is present is required to carry out one of the two alternatives specified in the article, it being left to that State to decide which that alternative will be. It is, of course, possible that no request for extradition will be received, in which case the State where the alleged offender is found would be effectively deprived of one of its options and have no recourse save to submit the case to its authorities for prosecution. On the other hand, even though it has been requested to extradite, it may submit the case to its competent authorities for the purpose of prosecution, for whatever reasons it may see fit to act upon. Some members of the Commission had been concerned to ensure that there is no impairment of the principle of *non-refoulement*. The article as drafted makes this point clear. Thus, if the State where the alleged offender is found considers that he would not receive a fair trial or would be subjected to any type of abusive treatment in a State which has requested extra-

dition, that request for extradition could, and should, be rejected.

(2) The obligation of the State party in whose territory the alleged offender is present, if it does not extradite him, is to submit the case to its competent authorities for the purpose of prosecution. Some members of the Commission considered that it should be made clear that the article is not a strait jacket for the authorities responsible for making decisions regarding prosecutions in criminal cases. As the article is drafted, it is clear that no obligation is created thereunder to punish or to conduct a trial. The obligation of the State where the alleged offender is present will have been fulfilled once it has submitted the case to its competent authorities, which will, in most States, be judicial in character, for the purpose of prosecution. It will be up to those authorities to decide whether to prosecute or not, subject to the normal requirement of treaty law that the decision be taken in good faith in the light of all the circumstances involved. The obligation of the State party in such case will be fulfilled under the article even if the decision which those authorities may take is not to commence criminal trial proceedings. To further emphasize the exact nature of the obligations created by this article, the Commission deemed it appropriate to add at the end the phrase "through proceedings in accordance with the laws of that State".

(3) Article 6 substantially reproduces the identical text of articles 7 of The Hague and the Montreal Conventions and article 4 of the Rome draft. The text of article 6 does not retain the phrase "whether or not the offence was committed in its territory", which would appear superfluous in view of the provision for extra-territorial jurisdiction contained in article 2, paragraph 1, of the present draft. On the other hand, the phrase "without undue delay" has been added in order that the actual implementation of the obligation may not be frustrated by unjustifiably allowing the passing of time; at the same time that phrase seeks to ensure that the alleged offender will not be kept in preventive custody beyond what is reasonable and fair, thus strengthening in that specific instance the general obligation laid down in article 8.

(4) The article does not include the second sentence found in the corresponding texts of the Montreal and The Hague Conventions and the Rome draft which reads as follows: "Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State". In the discussion of this article it was suggested that this second sentence should be maintained in its entirety. The point was made that the States present at The Hague and the Montreal conferences had, after substantial study, adopted this sentence in order to provide a necessary degree of tolerance to the officials charged with making the decision to prosecute or not to prosecute. Failure to include the sentence could make the draft article unacceptable to States that had sought this formula at The Hague and the Montreal conferences. As the obligation imposed on a State party is that of submitting the case to its competent authorities for the purpose of prosecution, the Commission considered it beyond the scope of the present draft to provide specific requirements as to the

⁴⁷² So far as consular law is concerned, the general rules on the communication and contact of consular officers with nationals of the sending State have been codified in article 36 of the Vienna Convention on Consular Relations.

manner in which those authorities should exercise their functions under internal law. Furthermore, any such provision would appear redundant in view of the provisions of article 2 of the present draft, in particular paragraph 2 thereof. Finally, in so far as the above-mentioned sentence might be interpreted as aiming at guaranteeing the rights of the alleged offender, it would appear unnecessary in view of the provisions of article 8. The Commission considered, in general, that all desirable effect of that sentence in the Montreal and The Hague Conventions and in the Rome draft could be more appropriately achieved by adding the phrase "through proceedings in accordance with the laws of that State" at the end of the present draft article.

Article 7

1. To the extent that the crimes set forth in article 2 are not listed as extraditable offences in any extradition treaty existing between States Party they shall be deemed to have been included as such therein. States Party undertake to include those crimes as extraditable offences in every future extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may, if it decides to extradite, consider the present articles as the legal basis for extradition in respect of the crimes. Extradition shall be subject to the procedural provisions of the law of the requested State.

3. States Party which do not make extradition conditional on the existence of a treaty shall recognize the crimes as extraditable offences between themselves subject to the procedural provisions of the law of the requested State.

4. An extradition request from the State in which the crimes were committed shall have priority over other such requests if received by the State Party in whose territory the alleged offender has been found within six months after the communication required under paragraph 1 of article 5 has been made.

Commentary

(1) The provisions of article 7 are a corollary to those of article 6. In the discussion of the relationship of this article to article 6 concern was expressed that no doubt be allowed that the provisions of article 7 are intended to assist in implementing the option provided in article 6 and not to make the alternative of extradition controlling. The Commission considers that any such doubt has been eliminated in articles 6 and 7 as formulated.

(2) If the option recognized in article 6 is to be effective, either alternative envisaged therein should be capable of implementation when an alleged offender is found in the territory of a State party. It is desirable, therefore, to provide in the present draft the legal basis for extradition of alleged offenders in a variety of situations so that the State in which the alleged offender is present will be afforded a real rather than an illusory choice. This, article 7 seeks to do in detail. *Paragraph 1* will apply when the States concerned have an extradition treaty in

effect between them which does not include the offence for which extradition is sought. *Paragraph 2* covers the situation of States party which make extradition conditional on the existence of an extradition treaty and no such treaty exists at the time when extradition is to be requested. *Paragraph 3* covers the situation between those States which do not make extradition conditional on the existence of a treaty. Similarly detailed provisions regarding the legal basis for extradition are to be found in the OAS, The Hague and the Montreal Conventions, in the Rome draft and in the Uruguay working paper.

(3) Article 7 substantially reproduces the text of articles 8 of The Hague and the Montreal Conventions and 5 of the Rome draft. The first sentence of article 8, paragraph 1, of the Montreal Convention reads as follows: "The offences shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States". The first sentence of paragraph 1 of this article is worded differently in order to emphasize the distinction between the present draft and The Hague and the Montreal Conventions. In those two Conventions the wording of article 8 was required as they deal with novel offences not found in most extradition treaties. However, the crimes described in article 2 of the present draft are for the most part serious common crimes under the internal law of practically all States and as such would normally be listed in existing extradition treaties under such categories as murder, kidnapping, bombing, breaking and entering and the like. Also, in the first sentence of paragraph 1 the word "listed" has been substituted for "included" in order to emphasize that the reference being made is to those specific provisions of an extradition treaty which describe the "extraditable offences". Those provisions may take the form of an actual list of the offences which are extraditable or may be couched in the form of a penalty test, that is, the offences for which extradition is envisaged are described by reference to the seriousness of the penalties prescribed.⁴⁷³ Although the provisions of paragraph 2 of article 2 would seem in themselves sufficient to achieve, as regards extradition treaties which use the penalty test, the purposes of paragraph 1 of article 7, the Commission, in order to leave no doubt on the point, deemed it necessary to stress that the paragraph is intended to cover all extradition treaties, irrespective of the manner in which the extraditable offences may be described therein.

⁴⁷³ Typical offences listed in extradition treaties include murder, murderous assault, mutilation, piracy, arson, rape, robberies, larcenies, forgeries, counterfeiting, embezzlement and kidnapping (see, for example, article III of the Treaty between the United States of America and the Republic of Mexico for the Extradition of Criminals of 11 December 1861, in G. P. Sanger, ed., *The Statutes at Large, Treaties and Proclamations, of the United States of America*, vol. XII (Boston, Little, Brown, 1865), pp. 1200-1201). For an example of a treaty provision describing offences by reference to the seriousness of the penalties prescribed, see article 1 b of the Convention on Extradition adopted by the Seventh International Conference of American States signed at Montevideo on 26 December 1933 (League of Nations, *Treaty Series*, vol. CLXV, p. 45). See also article 2 of the draft convention on extradition prepared by the Research in International Law of the Harvard Law School (*Supplement to the American Journal of International Law*, Washington D.C. (January and April 1935), vol. 29, Nos. 1 and 2, p. 21).

(4) In the first sentence of paragraph 2 the phrase "if it decides to extradite" has been included in substitution of the phrase "at its option", found in the Montreal and The Hague Conventions and the Rome draft, in order to further clarify the relationship between the provisions of article 7 and those of article 6. The use of the latter phrase might create a false impression as to the priority of the alternatives open to the requested State. Under article 6 that State may, at its option, decide to extradite or to submit the case to its competent authorities for the purpose of prosecution. If it chooses to do the first, it is authorized, in the circumstances envisaged in paragraph 2 of article 7, to consider the present draft as the legal basis for the implementation of its choice in the particular case.

(5) Both in paragraphs 2 and 3 of article 7 the phrase "procedural provisions" has been substituted for the phrase in the Montreal and The Hague Conventions and the Rome draft—"other conditions provided"—in order to make clear that what is concerned is the effective implementation of the decision to extradite made by the requested State.

(6) *Paragraph 4* of article 7 is a new provision included to cover the case of conflicting requests for extradition. Among such requests as may be received by the State party in whose territory the alleged offender is present, priority is to be given to the request from the State in which the crimes were committed. In so providing, paragraph 4 is simply reaffirming the generally acknowledged primacy of the principle of territoriality in matters of jurisdiction. The system of priority thus established operates only within a six-month period following the making of the communication required under paragraph 1 of article 5. That period of time was deemed sufficient not only as a means of inducing the territorial State to submit promptly its request for extradition but also to allow for the procedural requirements connected with such a request to be fulfilled in the normal manner. In this respect the Commission deems it necessary to stress that the time limit thus fixed in no way prejudices the freedom of choice recognized for States party under article 6. If in the exercise of the option granted by that article a State party has within the six-month period already submitted the case to its competent authorities for the purpose of prosecution, the fact of its being seized with a request for extradition from the State where the crime was committed before the expiry of such period does not affect the course of the proceedings thus instituted. There would, however, be no obstacle to complying with this or any other request for extradition while terminating its own action in so far as the draft articles are concerned.

(7) Article 7 does not include a provision similar to that of paragraph 4 of the corresponding articles in The Hague and the Montreal Conventions and the Rome draft, in view of the provisions of article 2 concerning extra-territorial jurisdiction.

Article 8

Any person regarding whom proceedings are being carried out in connexion with any of the crimes set forth in article 2 shall be guaranteed fair treatment at all stages of the proceedings.

Commentary

Article 8, which finds inspiration in articles 4 and 8 (c) of the OAS Convention and 4 and 9 (c) of the Uruguay working paper, is intended to safeguard the rights of the alleged offender from the moment he is found and measures are taken to ensure his presence until a final decision is taken on the case. The expression "fair treatment" was preferred, because of its generality, to more usual expressions such as "due process", "fair hearing" or "fair trial" which might be interpreted in a narrow technical sense. The expression "fair treatment" is intended to incorporate all the guarantees generally recognized to a detained or accused person. An example of such guarantees is found in article 14 of the International Covenant on Civil and Political Rights.⁴⁷⁴ As has been noted in the commentaries on certain other articles, specific protections for the alleged offender have been provided for when such action appeared desirable.

Article 9

The statutory limitation as to the time within which prosecution may be instituted for the crimes set forth in article 2 shall be, in each State Party, that fixed for the most serious crimes under its internal law.

Commentary

(1) This article was the subject of considerable discussion in the Commission. Some members considered that, in view of the effect of the crimes concerned upon the maintenance of international relations and the conspiratorial content of many of such crimes, the draft articles should provide that there be no limitation upon the time within which prosecution could be brought for these offences. Other members opposed any reference to the problem in the draft articles. In their view the basic purposes of prescriptive periods with respect to crimes apply with respect to the crimes dealt with in the draft articles. These purposes include the protection of innocent persons against the filing of charges after passage of so much time that evidence cannot be obtained to present a defence. Article 9 as adopted by the Commission represents a compromise between these points of view. A number of members, however, expressed doubts as to the desirability of the compromise.

(2) The provisions of the article are intended to prevent the frustration of the objectives of the draft by the operation of the statutes of limitation regarding the categories of crimes specified in article 2, in particular

⁴⁷⁴ For the text of the Covenant, see General Assembly resolution 2200 A (XXI), annex. Article 14 of the Covenant states, *inter alia*, in its paragraph 1, that

"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

Paragraphs 2 to 7 of that article set forth in detail a certain number of minimum guarantees, particularly in connexion with the determination of a criminal charge.

where the time-limits for prescription are relatively short. This explains the description in the article of the applicable statutory limitations by reference to the seriousness of the crimes. Under internal law the seriousness of a crime, which can be measured in terms of the gravity of the penalty ascribed to it, is normally in direct relationship to the length of the time-limit fixed for prescription. The provisions of article 9 are, therefore, consequential upon those of article 2, paragraph 2, of this draft.

(3) Article 9 deals only with the statutory limitation as to the time within which prosecution may be instituted. It does not refer to prescription as regards punishment. This distinction is a reflection of the nature of one of the two alternatives open to States party under article 6, which is not to punish but rather to submit the case to their competent authorities for the purpose of prosecution. Also, the provisions of this article are, obviously, not intended to apply to those States party whose systems of criminal law do not contain rules on prescription.

Article 10

1. States Party shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of the crimes set forth in article 2, including the supply of all evidence at their disposal necessary for the proceedings.

2. The provisions of paragraph 1 of this article shall not affect obligations concerning mutual judicial assistance embodied in any other treaty.

Commentary

(1) Article 10 envisages co-operation between States party in connexion with criminal proceedings brought in respect of the crimes set forth in article 2 by providing for an obligation to afford one another the greatest measure of judicial assistance. Mutual assistance in judicial matters has been a question of constant concern to States and is the subject of numerous bilateral and multilateral treaties. The obligations arising out of any such treaties existing between States party to the present draft are fully preserved under this article.

(2) Article 10 substantially reproduces the provisions of article 10 of The Hague Convention, article 11 of the Montreal Convention and article 6 of the Rome draft. Provisions concerning mutual judicial assistance are also found in article 9, sub-paragraph *e*, of the Uruguay working paper. In *paragraph 1* of the present article the phrase "including the supply of all evidence at their disposal necessary for the proceedings" has been added in order to ensure that the article is not given a limited construction on the basis of the narrow technical meaning sometimes attributed to the expression "mutual judicial assistance". Clearly if the alleged offender is to be tried in a State other than that in which the crime was committed it will be necessary to make testimony available to the court hearing the case and in such form as the law of that State requires. In addition, part of the required evidence may be located in third States. Consequently the obligation is imposed upon all States party. Finally, the

expression "assistance in criminal matters" as used in the analogous conventions has been replaced by "judicial assistance" in *paragraph 2* to eliminate any possible ambiguity.

Article 11

The final outcome of the legal proceedings regarding the alleged offender shall be communicated by the State Party where the proceedings are conducted to the Secretary-General of the United Nations, who shall transmit the information to the other States Party.

Commentary

This article completes the system of notifications established in the draft. It relates to the final outcome of the legal proceedings regarding the alleged offender. The notification of such outcome to the other States party is an effective means of assuring the protection of the interests of both those States and the individuals concerned. Provisions similar to those of article 11 are found in article 11 of The Hague Convention and article 13 of the Montreal Convention. Under the latter two articles, the Council of ICAO is made the final recipient of the notification in question. The present article 11, however, makes States party the final recipients, through the intermediary of the Secretary-General of the United Nations.

Article 12

ALTERNATIVE A

1. Any dispute between the Parties arising out of the application or interpretation of the present articles that is not settled through negotiation may be brought by any State party to the dispute before a conciliation Commission to be constituted in accordance with the provisions of this article by the giving of written notice to the other State or States party to the dispute and to the Secretary-General of the United Nations.

2. A conciliation commission will be composed of three members. One member shall be appointed by each party to the dispute. If there is more than one party on either side of the dispute they shall jointly appoint a member of the conciliation Commission. These two appointments shall be made within two months of the written notice referred to in paragraph 1. The third member, the Chairman, shall be chosen by the other two members.

3. If either side has failed to appoint its member within the time-limit referred to in paragraph 2, the Secretary-General shall appoint such member within a further period of two months. If no agreement is reached on the choice of the Chairman within five months of the written notice referred to in paragraph 1, the Secretary-General shall within the further period of one month appoint as the Chairman a qualified jurist who is not a national of any State party to the dispute.

4. Any vacancy shall be filled in the same manner as the original appointment was made.

5. The commission shall establish its own rules of procedure and shall reach its decisions and recommendations by a majority vote. It shall be competent to ask any organ that is authorized by or in accordance with the Charter of the United Nations to request an advisory opinion from the International Court of Justice to make such a request regarding the interpretation or application of the present articles.

6. If the commission is unable to obtain an agreement among the parties on a settlement of the dispute within six months of its initial meeting, it shall prepare as soon as possible a report of its proceedings and transmit it to the parties and to the depositary. The report shall include the commission's conclusions upon the facts and questions of law and the recommendations it has submitted to the parties in order to facilitate a settlement of the dispute. The six months time-limit may be extended by decision of the commission.

7. This article is without prejudice to provisions concerning the settlement of disputes contained in international agreements in force between States.

ALTERNATIVE B

1. Any dispute between two or more Parties concerning the interpretation or application of the present articles which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each Party may at the time of signature or ratification of these articles or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other Parties shall not be bound by the preceding paragraph with respect to any Parties having made such a reservation.

3. Any Party having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the depositary governments.

Commentary

(1) Article 12 contains provisions regarding the settlement of disputes arising out of the application or interpretation of the articles. The article is presented in alternative formulations which provide, respectively, for the reference of the dispute to conciliation (*Alternative A*) or to an optional form of arbitration (*Alternative B*). Some members of the Commission expressed doubts as to the necessity for including provisions on disputes settlement in the draft articles as such disputes were unlikely to arise. When they did arise, their nature would be such as to make them unamenable to the application of settlement procedures. In general, however, the Commission considered that a variety of disputes could arise out of the draft articles and that it would be appropriate to suggest methods of settling them. In submitting alternative formulations, the Commission is seeking an expression of

views from Governments regarding the actual means of settlement to be eventually embodied in that instrument. The Commission limited itself to suggesting a conciliation or an optional arbitration procedure since it concluded that they represent the largest measure of common ground that would appear to exist at present among governments on the question of dispute settlement. The members of the Commission favouring the method of conciliation viewed it as the settlement procedure that would obtain the widest measure of acceptance under present conditions. The view was expressed that the optional arbitration proposal was merely a variant on the optional protocol method adopted in connexion with other conventions without great acceptance. Those members favouring the optional arbitration alternative considered conciliation inappropriate for the type of dispute that might arise. They also held the view that it was desirable to have procedures, even if optional, that provided finality.

(2) The Commission deemed it sufficient to reproduce in each alternative, with the necessary formal adaptations, texts which, although established within contexts different from that of the present draft, reflect the current approach to each of the means of settlement envisaged.

(3) *Alternative A* reproduces, with the requisite adaptations, article 82 of the draft articles on the representation of States in their relations with international organizations adopted by the Commission at its twenty-third session in 1971.⁴⁷⁵ The settlement procedure laid down in that article took into account evidence of recent State practice including article 66 of the Vienna Convention on the Law of Treaties and the Annex thereto and the Claims Commission provided for in the Convention on International Liability for Damage Caused by Space Objects.⁴⁷⁶ The observations set forth in paragraphs 8 to 11 and 13 of the commentary to article 82 of the Commission's 1971 draft apply, in general, to the provisions of *Alternative A*. As an example of the kind of textual adjustment that it might be found necessary to make if *Alternative A* were to be finally adopted, it was suggested that, since officials of the United Nations are included among the internationally protected persons envisaged in article 1, the President of the International Court of Justice should be given subsidiary or exclusive competence to appoint a member of the conciliation commission in the circumstances provided for in *paragraph 3*, which presently attribute such competence to the Secretary-General of the United Nations.

(4) *Alternative B* reproduces the text of article 14 of the Montreal Convention. It limits itself to providing for recourse to compulsory arbitration but allowing to each Party the possibility to enter a reservation to that particular provision. The Commission believes that this text could give rise to certain difficulties. Among other problems, the phrase "organization of the arbitration" in *paragraph 1* raises the question whether "organization" includes the appointment of members or only agreement on how members are to be appointed. In its Advisory

⁴⁷⁵ *Yearbook of the International Law Commission, 1971*, vol. II (Part One), pp. 284 *et seq.*, document A/8410/Rev.1, chap. II, sect. D.

⁴⁷⁶ General Assembly resolution 2777 (XXVI), annex.

Opinion of 18 July 1950 on the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania ⁴⁷⁷ the

⁴⁷⁷ *I.C.J. Reports 1950*, pp. 221 *et seq.*

International Court of Justice adopted the principle that the Court does not consider itself competent to supply a basic deficiency regarding the appointment of arbitrators contained in the agreement providing for arbitration.

Chapter IV

PROGRESS OF WORK ON OTHER TOPICS

70. As already indicated,⁴⁷⁸ the Commission was unable, owing to the lack of time, to discuss several topics on the agenda of the present session. However, the Special Rapporteurs on four of those topics made further progress in their work which is reflected in the reports they submitted to the Commission. These are briefly reviewed below.

A. Succession of States: succession in respect of matters other than treaties

71. A fifth report (A/CN.4/259)⁴⁷⁹ on succession of States in respect of matters other than treaties was submitted at the present session by the Special Rapporteur, Mr. Mohammed Bedjaoui. It reviewed and completed Mr. Bedjaoui's third⁴⁸⁰ and fourth⁴⁸¹ reports, submitted respectively at the Commission's twenty-second and twenty-third sessions. The fourth report, it will be recalled, contained a set of fifteen draft articles on succession to public property. The fifth report proposed revised versions of three of those articles, namely article 1 (irregular acquisition of territory), article 5 (definition and determination of public property), and article 6 (property appertaining to sovereignty). It suggested that a provision should be included in the draft to deal with the dual problem of, on the one hand, transferability to State property and, on the other, the amenability of jurisdiction of other public property in relation to the juridical order of the successor State. It also completed the review of State practice contained in the commentary appearing in the third report on the provision relating to archives and public libraries (article 7, renumbered 14 in the fourth report).

B. State responsibility

72. Mr. Roberto Ago, the Special Rapporteur, submitted at this session a fourth report, (A/CN.4/264),⁴⁸²

⁴⁷⁸ See para. 9 above.

⁴⁷⁹ See p. 61 above.

⁴⁸⁰ *Ibid.*, 1970, vol. II, p. 131, document A/CN.4/226.

⁴⁸¹ *Ibid.*, 1971, vol. II (Part One), p. 157, document A/CN.4/247 and Add.1.

⁴⁸² See p. 71 above.

designed to continue and complete the consideration of that part of the topic which relates to the conditions for attribution to the State of an act that many constitute a source of an international responsibility. The report dealt first with the particularly complex problem of attribution to the State of acts or omissions on the part of organs acting *ultra vires* or contrary to the provisions of municipal law applicable to them. It then took up the question whether acts or omissions on the part of individuals acting as such could be attributed to the State as a subject of international law; and, more generally, whether and in what sense the existence of an internationally wrongful act might be envisaged in the event of certain conduct on the part of individuals. Lastly, the report considered whether acts or omissions on the part of persons acting on the territory of a State on behalf of another subject of international law could be attributed to that State or whether the conduct of such persons should be ascribed only to the other subject in question. Also in this connexion, the report examined whether and in what sense the existence of an internationally wrongful act of the State might be envisaged in the event of certain conduct on the part of organs of another subject of international law.

73. At its twenty-fifth session, at which it proposes to begin a detailed study of the topic of international responsibility, the Commission will thus have before it two extensive reports covering a substantial part of the topic.

C. The most-favoured-nation clause

74. A third report on the most-favoured-nation clause (A/CN.4/257 and Add. 1)⁴⁸³ was submitted at the present session by the Special Rapporteur, Mr. Endre Ustor. The report contained a set of draft articles on the topic with commentaries. The articles defined the terms used in the draft, in particular the terms "most-favoured-nation clause" and "most-favoured-nation treatment". The commentary pointed out that the undertaking to accord most-favoured-nation treatment was a constitutive element of any most-favoured-nation clause. The report recalled the rule that most-favoured-nation treatment can be claimed solely on the basis of a treaty provision. It pointed out that the right of the beneficiary State to claim the advantages accorded by the granting State to a third

⁴⁸³ See p. 161 above.

State arise from a most-favoured-nation clause. In other words, the legal bond between the granting State and the beneficiary State originates in the treaty containing such a clause and not in the collateral treaty concluded between the granting State and the third State.

75. At the suggestion of the Special Rapporteur, the Commission requested the Secretariat to prepare a study on the most-favoured-nation clauses included in the treaties published in the United Nations *Treaty Series*. The study should survey the fields of application of the clauses in question, examine their relation to national treatment clauses, the exceptions provided for in treaties, and the practice concerning succession of States in respect of most-favoured-nation clauses.

D. The question of treaties concluded between States and international organizations or between two or more international organizations

76. In pursuance of the decision set out in sub-paragraph 118 (b) of the Commission's report on the work of its twenty-third session,⁴⁸⁴ Mr. Paul Reuter, Special Rapporteur on the topic, addressed through the Secretary-

⁴⁸⁴ *Yearbook of the International Law Commission, 1971, vol. II (Part One)*, document A/8410/Rev.1, chap. IV.

General a questionnaire to the principal international organizations in order to elicit information on their practice in the matter. At the present session he submitted to the Commission a first report (A/CN.4/258)⁴⁸⁵ which was also communicated to these organizations. The report contained a historical survey of the discussion of the topic in the Commission during its consideration of the law of treaties from 1950 to 1966 and in the United Nations Conference on the Law of Treaties which met in Vienna in 1968 and 1969. In the light of that survey the report made a preliminary examination of several essential problems such as the form in which international organizations express their consent to be bound by a treaty, their capacity to conclude treaties, the question of representation, the effect of treaties concluded by international organizations and the meaning of the reservation concerning the "rules of the organization" set out in article 5 of the Vienna Convention on the Law of Treaties. As soon as he receives the replies of the organizations concerned to the questionnaire addressed to them, the Special Rapporteur intends to prepare a further report which will enable the Commission to hold a preliminary discussion on the topic in order to give him guidance for his future work.

⁴⁸⁵ To be printed in *Yearbook of the International Law Commission, 1972, vol. II*.

Chapter V

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. The law of the non-navigational uses of international watercourses

77. In paragraph 5, section I, of resolution 2780 (XXVI), the General Assembly recommended that "the International Law Commission, in the light of its scheduled programme of work, decide upon the priority to be given to the topic of the law of the non-navigational uses of international watercourses". The Commission intends to take up the recommendation in general when it discusses its long-term programme of work. At the present session, the Commission reached the conclusion that the problem of pollution of international waterways was of both substantial urgency and complexity. Accordingly it requested the Secretariat to continue compiling the material relating to the topic with specific reference to the problems of the pollution of international watercourses.

B. Organization of future work

78. As already stated,⁴⁸⁶ the Commission decided to transmit through the Secretary-General to Governments

⁴⁸⁶ See para. 23 above.

of Member States for their observations the provisional draft articles on succession of States in respect of treaties adopted at the present session. In view of the time which will be required for the preparation of the observations of Governments and for their study by the Special Rapporteur, the Commission will be unable to consider at its twenty-fifth session the topic of succession of States in respect of treaties. The provisional agenda of that session will therefore include the remaining items on the Commission's current programme of work. These are: State responsibility; succession of States in respect of matters other than treaties; the most-favoured-nation clause; the question of treaties concluded between States and international organizations or between two or more international organizations; the review of the Commission's long-term programme of work, including the question of the priority to be given to the topic of the law of the non-navigational uses of international watercourses.

79. The Commission intends to consider at its twenty-fifth session, as matters of priority, the topics of State responsibility and of succession of States in respect of matters other than treaties. It also proposes to hold a brief discussion on the question of treaties concluded between States and international organizations or between

two or more international organizations, hopes to review its long-term programme of work, on the basis of the "Survey of international law" prepared by the Secretary-General,⁴⁸⁷ and to devote some time to the study of the most-favoured-nation clause.

C. Co-operation with other bodies

1. ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

80. Mr. Senjin Tsuruoka submitted a report (A/CN.4/262)⁴⁸⁸ on the thirteenth session of the Asian-African Legal Consultative Committee held at Lagos from 19 to 25 January 1972, which he had attended as an observer for the Commission.

81. The Asian-African Legal Consultative Committee was represented by its Secretary-General Mr. Sen, who addressed the Commission at its 1194th meeting.

82. Mr. Sen began by saying that the States of Asia and Africa which had emerged as independent nations in recent years owed a particular debt of gratitude to the Commission for having adequately reflected their views in its work on the codification and progressive development of international law. The member countries of the Committee therefore attached the highest importance to maintaining close relations with the Commission and it was to be hoped that the fruitful co-operation which already existed between the two bodies would continue for the benefit not only of the African and Asian States but of the world community as a whole.

83. Mr. Sen then stressed that the Committee, whose membership had grown in the past few years from seven to twenty-two, had been glad to welcome at its last session observers not only from fifteen States of the region not members of the Committee but also from twelve other States including Australia, the United States of America, the USSR, the United Kingdom and a number of Latin American States.

84. The Committee, whose secretariat had provided member countries with compilations on such topics as the law of treaties and the law of the sea, had also extended its activities in the field of international trade law and close co-operation was being maintained with UNCITRAL. In furtherance of the United Nations programme for technical assistance in the wider dissemination of international law, it had introduced a training scheme for young officers from the foreign offices of Asian and African countries.

85. Turning to the topics on the Commission's agenda which were of particular interest to the Committee, Mr. Sen stated that he had recently received communications from African countries that were not yet members of the Committee requesting that the principles concerning rights and obligations of States arising out of State succession should be settled urgently. Since the Inter-

national Law Commission had been considering the subject of State succession for a considerable time already, it had been felt that the Committee's work on the subject should only take a secondary place and that the best manner in which it could give its assistance was by preparing suggestions and comments on the basis of the Commission's drafts. The Committee was therefore greatly looking forward to studying the work of the Commission in the matter.

86. In connexion with the topic of State responsibility, the Committee had postponed consideration of State responsibility until the Commission has submitted its final recommendations on the subject.

87. Finally the Committee had been asked by two member Governments to study the questions of non-navigational uses of international watercourses and to make recommendations thereon taking into account the agricultural uses of waters and the peculiar problems of the region. Proposals by the Governments of Iraq and Pakistan were at present under consideration by a standing sub-committee as a preparatory step before consideration by the Committee itself. In that connexion, Mr. Sen expressed the hope that the Commission would be able to take up the subject soon and added that the Committee could in his view be of some assistance on a topic of such vital interest to Asia and Africa.

88. The Commission was informed that the fourteenth session of the Committee, to which it had a standing invitation to send an observer, would be held at a time and place to be notified later. The Commission requested its Chairman, Mr. Richard D. Kearney, to attend the session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

2. EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

89. 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 its 1186th meeting.

90. He mentioned first, among the recent achievements of the Council of Europe in the legal field, the signature of the European Convention on State Immunity (May 1972). That convention was supplemented by a protocol setting up a regional system for the juridical settlement of disputes under which private individuals would have access to a European court to be composed of the judges of the European Court of Human Rights.

91. With respect to the protection of fresh water against pollution, Mr. Golsong indicated that the work undertaken would lead to the adoption of a model convention containing provisions on the quality of the water in international watercourses which would impose on the contracting parties an obligation to observe a minimum purity standard and encourage them to adopt still stricter standards under individual agreements with each other. It had first been envisaged to introduce in the convention express provisions on inter-State liability for acts of pollution but the idea had been abandoned since such provisions might be superfluous in view of the general principles of international law on State responsibility.

⁴⁸⁷ *Yearbook of the International Law Commission, 1971, vol. II (Part Two)*, p. 1, document A/CN.4/245.

⁴⁸⁸ See p. 215 above.

Measures had been taken with a view to harmonizing national laws, both in the field of civil liability for damage resulting from the pollution of fresh water and in the field of criminal law. Another development to be noted in the matter of pollution was a proposal from the Netherlands Government that provisions be drawn up on civil liability for damage due to pollution by hydrocarbons from petroleum prospecting and extraction installations on the sea-bed.

92. Turning to international criminal law, Mr. Golsong drew attention to the signature of the European Convention on the Transfer of Proceedings in Criminal Matters (May 1972) which completed the system for penal co-operation set up under the Council of Europe.

93. In the field of human rights, Mr. Golsong referred to the first implementation by the European Court of Human Rights of article 50 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁴⁸⁹ Under that provision the European Court had power to afford just satisfaction to the injured party in case the violation of the Convention could not be remedied completely within the scope of the domestic law of the State concerned.

94. With respect to the question of relations between States and international organizations, he recalled that certain States members of the Council had expressed reservations on the provisional draft prepared by the International Law Commission, which in their view extended privileges and immunities to an excessive degree and did not pay enough attention to the functional criterion. Meanwhile the Commission had added in its final draft two articles, one providing for consultations between the sending State, the host State and the organization and the other for conciliation machinery. He thought that the insertion of these two provisions might favourably influence the final attitude of the member States of the Council of Europe towards the draft articles. Mr. Golsong also noted that specialized ministerial conferences, which would become more and more frequent, were not covered either by the draft articles on the representation of States in their relations with international organizations or by the Convention on Special Missions.

95. Turning to the question of the protection of diplomats against acts of violence, Mr. Golsong stated that the subject was of particular concern to the States members of the Council of Europe. He added that some of them had at the outset questioned the desirability of drawing up a convention on the matter and had felt that it was essential to have the support of the main body of the international community. With regard to technical assistance to promote the teaching, study, dissemination and wider appreciation of international law—General Assembly resolution 2099 (XX)—Mr. Golsong indicated that the Council of Europe had undertaken to put the texts of the conventions drawn up within the Council on computer tape so as to provide a more rapid synchroniz-

ation of legal positions and factual data. Pursuant to the same resolution a Nigerian lawyer had been invited to visit Strasbourg and valuable exchanges of views had taken place during his stay there. Lastly, Mr. Golsong drew attention to the publication of a collection containing the texts of conventions and agreements concluded under the auspices of the Council of Europe and of all statements and reservations relating thereto.

96. In conclusion, he stressed that the work of the European Committee was not duplicating that of the Commission. It was only where a universal codification of international law proved impossible that the Committee set out to draw up provisions applicable at the regional level to States which had established ties of international co-operation with each other.

97. The Commission was informed that the seventeenth session of the Committee, to which it had a standing invitation to send an observer, would be held at Strasbourg, France, in November 1972. The Commission requested its Chairman, Mr. Richard D. Kearney, 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

98. Mr. José Sette Câmara attended the last session of the Inter-American Juridical Committee held at Rio de Janeiro, Brazil, in January/February 1972 as an observer for the Commission; he made a statement before the Committee.

99. The Inter-American Juridical Committee was represented by Mr. Molina-Orantes who addressed the Commission at its 1175th meeting.

100. He stated that in the course of the two regular sessions which it had held during the past year, the Committee had, at the request of OAS, analysed and evaluated a number of multilateral treaties which were in force between member States. With respect to various agreements referred to in General Assembly resolution 2021 (XX), the Committee had expressed its opinion as to the approach which should be taken to each of them by the American States. With regard to a number of inter-American treaties primarily of juridical interest or concerning educational, scientific and cultural affairs, the Committee had, after evaluation, come to the conclusion that while a number of them should be more widely acceded to, some were not accepted by OAS countries, others had been superseded by subsequent treaties of world-wide scope—a case in point being the Convention on Treaties (Havana, 1928)⁴⁹⁰—and still others should be brought up to date.

101. The Committee has also studied the topic of conflicts of treaties, particularly with reference to the constituent instruments of international organizations both regional and sub-regional. It had concluded that the provisions on conflicts of treaties contained in the Vienna

⁴⁸⁹ United Nations, *Yearbook of Human Rights for 1950* (United Nations publication, Sales No. 1952.XIV.1), pp. 424-425.

⁴⁹⁰ J. B. Scott, ed., *The International Conferences of American States, 1889-1928* (New York, Oxford University Press, 1931), p. 416.

Convention on the Law of Treaties were not only adequate and correct but also applicable in cases where the constituent instruments of regional organizations were amended, unless they presented problems of a political nature in which case OAS should lay down the relevant rules for their amendment.

102. Another topic which the Committee had examined was the question of legal means for the protection and preservation of the historic and artistic heritage of the American countries. The Committee had reached the conclusion that it was necessary to bring up to date the inter-American conventions dealing with the protection of that heritage, particularly in order to establish an effective system of international co-operation which might help to prevent the growing illicit traffic in archeological, historical and artistic objects.

103. The Committee had also, at the request of the General Assembly of OAS, studied those treaties and conventions which constituted the inter-American system of peace and security with a view to strengthening the system. Mr. Molina-Orantes recalled in that respect that in 1948, the various pacific procedures for solving disputes—investigation, conciliation, good offices and mediation, and progressive arbitration—which had been heretofore regulated in separate conventions had been combined in a single document, the American Treaty on Pacific Settlement,⁴⁹¹ generally known as the Pact of Bogotá. In addition to those methods of settlement, the States signatories had accepted the obligation to resort to the International Court of Justice for the solution of disputes of a legal character and in certain cases to arbitration. The Committee had reached the conclusion that the Pact of Bogotá was a suitable juridical document for the purpose of consolidating and perfecting the inter-American system of peace and security and that it was more practical to recommend its ratification by States which had not yet done so than to embark on the long road leading to the conclusion of a new treaty. Mr. Molina-Orantes added that some members had expressed reservations with regard to article 20 of the Charter of OAS,⁴⁹² which had been signed at the same time as the Pact of Bogotá; in their opinion that article might be interpreted as restricting the right of an American State to resort directly to the organs of the United Nations for the solution of disputes, without first applying to the organs of the regional system.

104. Turning to another topic, Mr. Molina-Orantes indicated that the Committee had examined the question of the law of the sea with a view to combining in one document the common principles upheld by the majority of American States with regard to the most important aspects of international maritime law and thus contributing to the work of codification of that topic which was being prepared on a world-wide scale by the United Nations. An analysis of the legislation of the American States, as well as of various regional declarations and agreements, had revealed new trends in the law of the sea, especially with regard to the delimitation of zones of exclusive jurisdiction. The claim for exclusive jurisdiction was

based mainly on the need to exploit the natural resources of the adjacent waters, which were considered of vital importance for the coastal population. Regional principles of that kind had found their expression in the Declarations of Montevideo⁴⁹³ and Lima⁴⁹⁴ of 1970, which had proclaimed the right of coastal States to establish zones in which they would exercise their sovereignty or maritime jurisdiction without affecting the freedom of international communications.

105. Lastly the Committee had approved a draft convention on the Latin American traveller's cheque. It had also made a study of the juridical status of so-called "foreign guerrillas" in the territory of States and had started a discussion on the topic of the treatment of foreign investments.

106. The Commission was informed that the next session of the Committee, to which it had standing invitation to send an observer, would be held at Rio de Janeiro (Brazil) from 17 July to 26 August 1972. The Commission requested its Chairman, Mr. Richard D. Kearney, to attend the session or, if he was unable to do so, to appoint another member of the Commission for this purpose.

D. Date and place of the twenty-fifth session

107. The Commission decided to hold its next session at the United Nations office at Geneva from 7 May to 13 July 1973.

E. Representation at the twenty-seventh session of the General Assembly

108. The Commission decided that it would be represented at the twenty-seventh session of the General Assembly by its Chairman, Mr. Richard D. Kearney.

F. Gilberto Amado Memorial Lecture

109. In accordance with the decision taken by the Commission at its twenty-third session,⁴⁹⁵ and thanks, to a generous grant by the Brazilian Government, the first Gilberto Amado Memorial Lecture was given in the Council Chamber of the Palais des Nations on 15 June 1972. The lecture was delivered by Judge Eduardo Jiménez de Aréchaga, who spoke on "The amendments to the rules of the International Court of Justice", and was attended by members of the Commission and its secretariat, participants in the eighth session of the International Law Seminar and distinguished jurists. Judge Manfred Lachs was also present. The lecture was followed by a dinner.

110. At a meeting held on 28 June 1972, the Gilberto Amado Memorial Lecture Advisory Committee, under the chairmanship of Mr. T. O. Elias, expressed the opinion

⁴⁹¹ United Nations, *Treaty Series*, vol. 30, p. 55.

⁴⁹² *Ibid.*, vol. 119, p. 58.

⁴⁹³ Document A/AC.138/34.

⁴⁹⁴ Document A/AC.138/28.

⁴⁹⁵ See *Yearbook of the International Law Commission, 1971*, vol. II (Part One), pp. 354-355, document A/8410/Rev.1, paras. 164-169.

that it was desirable to print the above-mentioned lecture, at least in English and in French, with a view to bringing it to the attention of the largest possible number of specialists in the field of international law. However, the number of copies to be made available would have to be determined later after taking into consideration the cost of preparing the document in both languages and the financial position of the Memorial Lecture Fund.

111. The Advisory Committee expressed its gratitude to the Brazilian Government for its gesture, which had made the Gilberto Amado Memorial Lecture possible, and hoped that the Government would find it possible to renew its financial assistance in order to keep alive the memory of this illustrious Brazilian jurist who for so many years was a member of the International Law Commission. The Commission endorsed the opinion of the Advisory Committee and asked Mr. Sette Câmara to convey its views to the Brazilian Government.

G. International Law Seminar

112. Pursuant to General Assembly resolution 2780 (XXVI) of 3 December 1971, the United Nations office at Geneva organized during the Commission's twenty-fourth session an eighth session of the International Law Seminar intended for advanced students of that discipline and young officials of government departments, mainly Ministries of Foreign Affairs, whose functions habitually include consideration of questions of international law.

113. Between 5 and 23 June 1972 the Seminar held 12 meetings devoted to lectures followed by discussion or practical work; the last meeting was set aside for the evaluation of the Seminar session by the participants.

114. Twenty-three students from 22 different countries participated in the Seminar; they also attended meetings of the Commission during that period, had access to the facilities of the Palais des Nations Library, and had the opportunity to attend two film shows held by the United Nations Information Service.

115. A judge of the International Court of Justice (Mr. Lachs) and seven members of the Commission (Mr. Baroš, Mr. El-Erian, Mr. Reuter, Mr. Ruda, Mr. Ustor,

Sir Humphrey Waldock and Mr. Yasseen) generously gave their services as lecturers. The lectures dealt with various subjects connected with the past and present work of the International Law Commission, namely special missions, the representation of States in their relations with international organizations, agreements concluded by international organizations, the outer limit of the continental shelf, the succession of States in respect of treaties and the most-favoured-nation clause. In addition two lectures were held on the International Court of Justice, one dealing with the functioning of the Court in general and the other with the review of the Court's role by the General Assembly. The participants in the Seminar also attended the Gilberto Amado Memorial Lecture given by Judge Jiménez de Aréchaga. In addition Mr. Valencia-Ospina, a member of the Secretariat, conducted a meeting devoted to practical work on the draft articles on the representation of States in their relations with international organizations; Mr. Raton, the Director of the Seminar, gave an introductory talk on the International Law Commission and conducted a meeting devoted to practical work on the subject of the Commission's programme of future work.

116. The Seminar was held without cost to the United Nations, which did not contribute to the travel or living expenses of the participants. As at previous sessions, the Governments of Denmark, the Federal Republic of Germany, Finland, Israel, the Netherlands, Norway, Sweden and Switzerland made scholarships available to participants from developing countries. Thirteen candidates were chosen to receive such scholarships, and two holders of UNITAR scholarships were also admitted to the Seminar. The grant of scholarships is making it possible to achieve a much better geographical distribution of participants and to bring from distant countries deserving candidates who would otherwise be prevented from attending the session solely by lack of funds. It is therefore to be hoped that the above-mentioned Governments will continue to be generous and even that, if possible, one or two additional scholarships will be granted, since the changes made in the parities of certain currencies in 1971 have reduced the real value of the scholarships. It should be noted that the names of those chosen to receive scholarships are made known to the donor Governments and that the recipients are informed of the source of their scholarships.

ANNEX

Observations of Member States on the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, transmitted to the International Law Commission in accordance with section III of General Assembly resolution 2788 (XXVI) *

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NOTE

For the text of the conventions referred to in the present observations, see the following sources:

<p>Convention on Consular Relations (Vienna, 24 April 1963)</p>	<p>United Nations, <i>Treaty Series</i>, vol. 596, p. 261.</p>
<p>Convention on Diplomatic Relations (Vienna, 18 April 1961)</p>	<p><i>Ibid.</i>, vol. 500, p. 95.</p>
<p>Convention to Prevent and Punish the Acts of Terrorism taking the Form of Crimes against Persons and Related Extortion that are of International Significance (Washington, 2 February 1971)</p>	<p><i>OAS Official Records</i>, OEA/Ser.A/17 (Washington D.C., OAS General Secretariat, 1971), p. 6.</p>
<p>Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947)</p>	<p>United Nations, <i>Treaty Series</i>, vol. 33, p. 261.</p>
<p>Convention on the Privileges and Immunities of the United Nations (New York, 13 February 1946)</p>	<p><i>Ibid.</i>, vol. 1, p. 15.</p>
<p>Convention on Special Missions (New York 8 December 1969)</p>	<p>United Nations General Assembly resolution 2530 (XXIV), annex.</p>
<p>Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971)</p>	<p>ICAO, document 8966, p. 1.</p>
<p>Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970)</p>	<p>ICAO, document 8920, p. 1.</p>
<p>Single Convention on Narcotic Drugs (New York, 30 March 1961)</p>	<p>United Nations, <i>Treaty Series</i>, vol. 520, p. 204.</p>

* The observations contained in this annex were originally distributed as documents A/8710/Add.1 and A/8710/Add.2.

Argentina

[Original text: Spanish]
[29 June 1972]

1. It is a principle of conventional and customary international law that States are obliged to take effective steps to ensure the personal inviolability of diplomatic agents and other official foreign representatives. This obligation to treat them with due respect and to take all appropriate steps to prevent any attack on their persons, freedom or dignity has been expressly provided for in article 29 of the Convention on Diplomatic Relations, article 40 of the Convention on Consular Relations and article 29 of the Convention on Special Missions.

2. With regard to national legislation, it seems appropriate to refer to the relevant part of the following articles of the Argentinian Constitution:

"Article 100. The Supreme Court and lower courts of the nation shall exercise jurisdiction and pronounce judgement in all cases involving matters governed by the Constitution and laws of the nation, except for the reservation made in article 67, paragraph 11 . . . ; in cases concerning ambassadors, Ministers, and foreign consuls. . .

"Article 101. In these cases the Supreme Court shall exercise appellate jurisdiction according to the rules and exceptions prescribed by the Congress; but in all matters concerning ambassadors, Ministers and foreign consuls and those in which any province is a party, the Court shall exercise original and exclusive jurisdiction."

The above constitutional provisions are quoted as proof of the guarantees accorded by the State of Argentina to foreign diplomats in matters to which they are "party" and without prejudice to the following.

3. It should be added that article 221 of the Penal Code, as amended by Act No. 17567, provides as follows:

"A sentence of six months' to three years' rigorous imprisonment shall be imposed on:

"(1) Any person who violates the immunities of the Head of a State or the representative of a foreign Power.

"(2) Any person who offends the dignity or self-respect of any of the said persons while they are in Argentine territory."

Finally, it should be stated that, when the victim of a crime is a diplomatic or consular agent, the Supreme Court shall have original and exclusive jurisdiction to deal with such cases.^a

^a *Fallos de la Corte suprema*, vol. 272*, p. 87; *ibid.*, vol. 277, p. 69; recently [19 July 1971], *ibid.*, vol. 280, p. 164.

Australia

[Original text: English]
[25 April 1972]

Existing conventions already require a large number of the nations of the world to afford protection to diplomats. It is questionable whether yet another set of draft articles would prove more acceptable to nations outside this group than existing conventions. By these are meant the Vienna Conventions on Diplomatic and Consular Relations which require States Party thereto to treat a diplomatic agent or consul "with due respect" and take "all appropriate steps to prevent any attack on his person, freedom or dignity".

By "other persons entitled to special protection under international law" presumably is meant persons associated with inter-

national organizations e.g. representatives attending meetings, officials etc. The draft articles on the representation of States in their relations with international organizations^a deal with representatives attending meetings of international organizations in similar terms to diplomats. It would seem that in respect of protection this reflects such instruments as the United Nations and the Specialized Agencies Conventions on Privileges and Immunities. On the other hand we know of no instrument applicable to an international organization which requires States parties thereto to provide protection to officials. The reverse is usually the situation in that officials are protected from the activities of the State itself e.g. immunity from arrest.

In this situation there may not be much value in the International Law Commission's preparing yet another set of draft articles dealing with offences against diplomats, consuls, representatives attending meetings etc. What could be of value would be for the Commission to investigate and provide a guide as to how States might implement the requirements of the Conventions. The Commission could examine the various ways in which States have implemented these requirements and produce a code of desirable practice. There would seem to be nothing in this proposal contrary to the Commission's function of encouraging "the progressive development of international law and its codification".

As to protection of "other persons entitled to special protection under international law" not covered by existing or proposed conventions already drafted, the extent of the problem—if any—is not clear. Perhaps this is something further that the United Nations itself could investigate. It would seem that in the normal situation such people would not be the focus of political activists as are the representatives of States. In the abnormal situation the effectiveness of a convention is debatable in any case. This could of course change if the power and influence of international organizations continue to grow.

^a See *Yearbook of the International Law Commission, 1971*, vol. II (Part One), pp. 284 *et seq.*, document A/8410/Rev.1, chap. II, D.

Belgium

[Original text: French]
[2 June 1972]

The observations made below are of a preliminary nature and relate mainly to public and private international law. Belgium intends to make more extensive comments at a later stage of the preparation of the draft convention, particularly with reference to international penal law.

I. GENERAL OBSERVATIONS

A. Significance of the convention

1. The convention should be drawn up in such a way as to secure the widest possible agreement.
2. The aim is to ensure the safety of persons who are threatened with, or are victims of, kidnapping. Its deterrent effect should be of capital importance.

B. Responsibility of the receiving State

3. The point of departure should be the obligation of the receiving State to ensure appropriate protection for diplomats accredited to it. It would then be possible to take the position that the receiving State would be presumed to be in fault whenever it failed to meet a request by a diplomat for reasonable protection. The protective

measures incumbent upon the receiving State should therefore be specified in the convention.

4. The basis of protection resides in the special legal status of diplomats and, secondarily, of the members of their families, as laid down in the Vienna Convention on Diplomatic Relations in 1961.

C. Judicial measures

5. Effective judicial co-operation must be established between States as soon as an attempt has been made against a diplomat. It should, in particular, include the duty of the Government of the receiving State to provide the Government of the sending State with all the information available to it.

6. One of the purposes of the draft convention should be to qualify certain offences affecting international relations as international crimes, so that the perpetrators can be tried by the competent authorities of any State on whose territory they are found, unless extradition proceedings have been started against them.

D. Reparation for damages

7. Reparation for offences which engage the responsibility of receiving States with respect to the resultant damages would appear to be of particular importance, since this responsibility is not at present reflected in any legal obligation.

It would be desirable to require the Government of the State in whose territory the crime was committed to pay compensation to the victim or the victim's family.

II. SPECIFIC OBSERVATIONS

The draft articles submitted by the United States of America (A/CN.4/L.182)^a call for the following observations:

Article 1, paragraph 2

Subparagraph (a) would have the effect of creating a lacuna;

Subparagraph (b) is concerned with rather unlikely cases.

The two subparagraphs remove the obligations of third States, which would no longer be bound to extradite the presumed perpetrators of the offence, although they are likely to seek refuge in the territory of such States.

Article 3, paragraphs 2 and 4

The drafting of paragraph 2 and of paragraph 4 might create certain difficulties. A State cannot be bound by a convention which it has not signed.

The drafting of subparagraphs (a), (b) and (c) should be amended and based on the wording of subparagraph (g). Paragraph 4 could thus be deleted.

Articles 4, 5, 6 and 7

Logically, article 7 should be the third paragraph of article 4, which should become article 6.

Instead of referring to "severe penalties" (article 7), minimum penalties should be fixed.

Article 6 should be article 4.

Article 9, paragraph 2

Care should be taken not to give the perpetrators of the crimes in question special privileges by comparison with the normal system of remand in custody.

Brazil

[Original text: English]
[15 March 1972]

The issue of offences or crimes committed against persons with the right to special protection, such as diplomatic or consular representatives, is only one aspect of a wider question, i.e., international treatment of all offences or crimes committed by terrorists. With reference to the adoption of an adequate judicial remedy to be applied in the struggle against terrorism, the Brazilian Government has stressed the need for multilateral co-operation in the prevention, sanction and repression of acts of terrorism, since it is an undercover activity, organized on a world-wide basis, in order to undermine the structure of States, violating the most legitimate rights of man. In the forum of OAS Brazil defended the point of view that terrorist acts, kidnappings and corresponding demands for ransom should be categorized as grave common crimes against humanity and accordingly stressed the need for international regulations defining such crimes, especially for purposes of extradition. The perpetrators of acts of terrorism should be denied the right of asylum, which, however, must be maintained intact as far as its basic principles are concerned, particularly as to the faculty of the authority offering asylum to define the nature of the crime which gave rise to the request for asylum. This position is intended solely to prevent the institution of asylum from being distorted in order to serve in erroneous application as protection for common criminals.

During the third extraordinary session of the General Assembly of OAS (January 1971), Brazil favoured a broad draft convention covering the prevention of terrorism as a whole, since the approval of a limited convention, i.e., one dealing only with cases involving the kidnapping of diplomats, consuls and other persons with the right to special protection, would be of little use in achieving the purposes it is intended to serve. The persons whom such a restricted convention would cover already enjoy sufficient international protection in the field of law.

Canada

[Original text: French]
[25 April 1972]

Security and the absence of coercion are the two essential elements in inter-State and international relations. It is for this reason that one of the oldest institutions of international law is the inviolability of ambassadors and their staff, an inviolability which imposes on the receiving State the obligation to protect them from any attack against their person, freedom or dignity. This rule of inviolability is still as essential today as ever for the proper conduct of international relations. The attacks of a new kind against diplomatic and consular inviolability which we have been witnessing in recent years must be countered in an appropriate way. It is the Canadian Government's opinion that an international convention to ensure the inviolability traditionally accorded by international law to those professionally engaged in international relations is highly desirable.

The Vienna Conventions on Diplomatic Relations (1961) and on Consular Relations (1963) have already affirmed and codified the principle of inviolability. The convention now under consideration should contain measures for prevention and punishment calculated to deter from their purpose any person or group of persons who may be tempted to use representatives or agents of foreign States or international organizations as instruments for political pressure against a government or for publicity on the international scene. If its work is to be useful, the International Law Commission should embody in its draft convention, above all, the

^a See p. 201 above.

elements most likely to have a deterrent effect with regard to crimes against foreign representatives. In the opinion of the Canadian Government, this deterrent effect is the most important feature of any convention intended to ensure the security of international relations through better protection of diplomats, consuls and other agents concerned with international relations.

The Canadian Government also hopes that the convention to be drafted will be relatively simple and limited in scope, for the following reason: such a convention will necessarily touch on certain areas of international law which are still ill-defined and which the International Law Commission will eventually have to study, such as political asylum, State responsibility and non-territorial criminal jurisdiction. Any incursion going too far into these areas might give rise to controversies which would make the convention unacceptable to some countries. For the purpose of deterrence mentioned above, it may be preferable to aim at a convention of limited legal scope, but acceptable to a majority of States. The Canadian Government's main suggestion is, therefore, that a restrictive approach should be adopted to the classes of person covered and the crimes to which the convention will apply.

The Canadian Government has examined with great interest the Convention to Prevent and Punish the Acts of Terrorism, adopted by OAS (1971), and the draft conventions on the protection of diplomats and other persons submitted by Uruguay^a and the United States of America (A/CN.4/L.182)^b as well as the Rome draft.^c The International Law Commission will certainly find constructive elements in them which it can combine in a universal instrument. The Canadian Government, for its part, has drawn on the above-mentioned work to define its present position on the constituent elements of the future convention, as presented below.

The persons to be protected

The above-mentioned texts use the expression "persons entitled to special protection under international law" or some similar wording. The Rome draft lists a number of examples; the United States draft establishes a limitative list by reference to other international instruments. This procedure introduces a doubtful element into the convention. Since the meaning of the expression "persons entitled to special protection" is ill-defined in international law, contracting States would be undertaking to fulfil an obligation whose precise scope remains unknown. Even taken in its narrowest sense, the expression may cover a multitude of persons, and this considerably increases the burden of the obligation placed on contracting States, the scope of which is unduly extended. Experience in recent years shows that those chosen as instruments for political pressure are mainly persons having an obvious representative function and an important post. The essential purpose of the convention would be to provide protection against crimes committed because of the victims' official status; and if the convention is to be made applicable without too many abuses it must, as far as possible, avoid sanctioning crimes in which the special status of the victim did not enter into consideration. If the convention covers a large number of foreign nationals, its effect will be to sanction mainly crimes which are of no international significance except for the status of the victim, which is merely incidental. This result could be avoided by restricting the application of the convention to cases in which the presumed offender was aware of the victim's special status; but such a condition would make the convention harder to enforce by providing the criminal with an easy pretext for evading its application. The persons who should be protected are foreign dignitaries (Heads of State, Heads of Government and ministers or persons of ministerial rank);

^a Document A/C.6/L.822.

^b See p. 201 above.

^c See p. 335 below.

diplomats and consular officials and persons entitled to the same inviolability as diplomats or consular officials under the Vienna Conventions on Diplomatic Relations and on Consular Relations; high officials of important international organizations and representatives of States to those organizations. The persons covered by the Convention on Special Missions should not enjoy the protection of the future convention: owing to the frequency of their movements and the absence of publicity regarding them, they are far less exposed to dangers of the kind that threaten permanent missions. Moreover, the lack of enthusiasm with which this convention has been received so far testifies to the danger of a convention extending the frontiers of international law too quickly.

In most cases persons other than dignitaries and the representatives or agents of foreign States or international organizations will be sufficiently protected by virtue of the general responsibility of States for the protection of foreign nationals resident on their territory.

Crimes

Only crimes constituting a serious infringement of the inviolability of the persons protected by the proposed convention should be taken into consideration, such as murder, kidnapping, illegal restraint and serious assault. It would be preferable not to create crimes that are new to the domestic law of contracting States. The Canadian Government would, however, be in favour of a provision imposing heavier penalties for crimes committed against persons protected by the convention. It also suggests that, in view of the special circumstances and the international repercussions of these crimes, the contracting States should recognize that they cannot be classed as political crimes; they should consequently be regarded as common crimes which leave the way open for extradition. Nor should the perpetrators of these crimes enjoy political asylum. Without these restrictions the deterrent effect of the convention would be seriously impaired. The Canadian Government hopes that States which are attached to the institution of political asylum will accept this restriction in regard to crimes of violence that are universally censured. Crimes committed against foreign representatives should be distinguished from crimes committed directly against the security or the government of a State by one of its own nationals. Unless some reasonable limit is set to the institution of political asylum, foreign representatives will continue to be the innocent victims of internal political strife in receiving States for a long time to come. Unless it sets such a limit, the proposed convention will have little justification. Some States will perhaps maintain that no limit should be set to the concessions which the receiving State may agree to in negotiations in such circumstances, and will accept the principle that it should be given full latitude. But it is not necessary for the extraordinary measures which a State may be led to adopt in special circumstances to be expressly provided for in a convention. International law can tolerate some breaches of treaty obligations when the higher interests of national defence and security of the State are involved.

Extradition

If the future convention recognizes that crimes against diplomats are not to be regarded as political offences, the extradition of those responsible for them will become possible in several cases under already existing treaties. In order to increase the convention's deterrent effect, however, it is none the less necessary to include at least some provisions stressing the need for extradition in accordance with the national laws and treaties governing it. It should be considered whether it would be advisable to follow the provisions of The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, which imposes on States the obligation to include the crimes mentioned in that Convention in their existing or future extradition treaties, or to adopt the less rigorous terms of the Single Convention on Narcotic Drugs, which states that it is

desirable that the offences referred to be included as extradition crimes in any extradition treaty which has been or may hereafter be concluded between any of the parties.

The choice of terms imposing heavier or lighter obligations on the parties to the future convention depends on a balance to be established between two equally desirable objects: that of an effective convention and that of a convention acceptable to a large majority of States. Lastly, criminal prosecution in a State other than that in which the crime was committed should be provided for as an exception and only in cases in which there is no possibility of extradition, either because there is no applicable law or treaty or because the presumed criminal is a national of the State from which extradition is requested.

As to the reservation covering extradition for political crimes, it should be remembered that several extradition treaties already contain a clause on outrages which provides for extradition for certain particularly serious political crimes.

Responsibility of the receiving State

The Vienna Conventions on Diplomatic Relations and on Consular Relations are silent on the method of determining the receiving State's responsibility for infringements of the inviolability of foreign representatives. Thus, the receiving State does not have to show that it has taken "appropriate steps" to protect foreign representatives; the nature and extent of the receiving State's obligations remain ill-defined; there is no provision for compensation for damages suffered. These are gaps which should be filled in order to avoid disputes liable to disturb harmonious relations between States or between States and international organizations.

Where a representative or agent of a foreign State or an international official has been the victim of a crime, the receiving State has a duty to restore the lost inviolability as soon as possible and to prosecute the guilty persons. The receiving State may then find itself in a dilemma: for instance, in a case of kidnapping, the most direct and surest means of restoring the victim's inviolability may be to yield to his kidnappers' demands, regardless of the consequences for the maintenance of order, the security of the State and other domestic interests. On the other hand, to refuse the demands may endanger the victim's physical integrity and even his life. International law does not impose any rule of conduct on the receiving State in such cases, and it is better not to do so. In such a situation the receiving State should remain free to act according to the circumstances and the conflicting interests at stake. It cannot be accepted that because of its duty to provide special protection a government must give way to every demand made by the kidnappers of a foreign representative. No social system could tolerate an obligation carried to that length.

It is, however, important, in the interests of international relations, to guarantee fair reparation in every case. The difficulties involved in determining responsibility are practically insuperable. It might therefore be advisable to consider a system of reparation based not on responsibility, but on the principles of hospitality and courtesy. Rather than engage in an awkward discussion or make an embarrassing admission of responsibility, the receiving State would undertake in all cases to compensate the sending State for any damage to property or injury to persons, in accordance with scales to be established. This obligation to make reparation would also have the advantage of inducing the receiving State to pay more attention to preventive measures. In this sphere of preventive measures and diligence in protecting foreign representatives, the receiving State must be allowed to exercise its discretion freely. Certainly the receiving State must exercise the necessary vigilance and take any special measures required to provide foreign representatives with adequate protection; but it should not be thought that in order to honour this obligation it must accede to requests for protection which it considers unfounded or spend sums on protection which place an undue burden on the national budget. Conversely, protective measures should not be imposed on foreign

representatives against their wishes or unduly restrict their freedom of action.

Canadian law

There are at present no special provisions in Canadian criminal law concerning crimes against foreign representatives. Those responsible for kidnapping the United Kingdom Trade Commissioner at Montreal in 1970 were not prosecuted on criminal charges, because they obtained a safe conduct to go abroad when the Commissioner was released. It is still possible that they may be tried on charges of criminal abduction and illegal restraint if they fall into the hands of Canadian justice.

As regards extradition, a treaty recently concluded between Canada and the United States of America contains a provision (article 4) under which the State to which application is made can refuse extradition if the offence in question is of a political nature; it is, however, also expressly provided that this clause shall not apply to serious crimes against a person enjoying special protection under international law.⁴ Such a provision has the advantage of allowing the States concerned to grant political asylum, while at the same time excluding from the class of political offences proper those indirect and specially grave political offences whose victims are innocent foreigners, and whose effects go far beyond the framework of domestic politics and threaten international relations as a whole.

Conclusion

The Canadian Government is in favour of an international convention designed to increase the stability of international relations by protecting the inviolability of foreign representatives. It wishes to assure the International Law Commission of its willingness to collaborate in this project. It suggests that in order to achieve the proposed purpose effectively, a convention of this sort should be limited in scope and contain mainly deterrent elements, such as severity of punishment and refusal of political asylum; it should contain as few innovations and obligations as possible, so that a large majority of States may quickly accede to it.

⁴ Articles 3 and 4 of the treaty and list of offences reproduced in *International Legal Materials*, Washington (D.C.), vol. XI, No. 1 (January 1972), pp. 22 *et seq.*

Colombia

[Original text: Spanish]
[7 February 1972]

Colombia has not yet adhered to the Vienna Convention on Diplomatic Relations of 18 April 1961, or the Conventions on the privileges and immunities of the United Nations and the specialized agencies, adopted respectively by the General Assembly of the United Nations on 13 February 1946 and 21 November 1947, and, in their absence, Decree No. 3135 of 1956 has been applied.^a

Article 10^b of this Decree specifies the essential prerogatives,

^a Colombia, *Diario Oficial* (Bogotá), 5 February 1957, XCIIIrd Year, No. 29275, p. 281.

^b In addition to article 10 Legislative Decree 3135 contains the following articles which the Secretariat feels may be of relevance:

Article 2. The granting of prerogatives and exemptions of a diplomatic nature shall always be understood to be subject to the observance of a system of the strictest international reciprocity.

Article 3. If the reciprocity that is invoked in order to obtain

(Continued on next page.)

which, according to practice and custom, have been granted to diplomatic personnel, namely:

1. Inviolability of the person;
2. Inviolability of the home and of correspondence;
3. Immunity from criminal jurisdiction; and
4. Immunity from civil jurisdiction with the following exceptions:

- (a) Whenever the diplomatic official renounces his immunity, as plaintiff;
- (b) In the case of actions *in rem*, including actions *in personam* relating to an item of real or personal property located within the national territory; and
- (c) In case of acts relating to a professional activity extraneous to the functions of the diplomatic official.

There are no established legal opinions or judicial precedents on the subject.

(Foot-note ^b continued)

any privilege not covered in this decree is not based on a convention, the Government may or may not grant it, according to whether it coincides with its interests. Legislative rather than *de facto* reciprocity may be required.

Article 4. The application of the system of international reciprocity pertains solely to the Ministry of Foreign Affairs which, through its Protocol Division, may broaden or restrict specific prerogatives, in those cases when the Government deems it necessary, and settle any question which may arise over the interpretation of provisions contained herein.

Article 5. Commitments entered into by the Republic under agreements on points identical or similar to those covered in this decree shall not be affected by the provisions contained herein, and, shall therefore continue in force for the term specified in each agreement. When an extension is under discussion or a new agreement is to be concluded, the provisions governing the matter must be applied.

Article 6. No official of the Colombian Foreign Service may demand in the country in which he resides greater privileges or immunities than those granted to diplomatic or consular agents accredited in Colombia.

Article 7. The granting of any kind of prerogatives, exemptions or immunities requires that the recipient shall meet the following conditions:

- (a) He is a duly accredited official;
- (b) He is a national of the State that appoints him and is paid by its Government;
- (c) He does not engage in activities other than his official functions, for which he has not been accredited.

Article 8. The following classification is established for persons who under the preceding article may enjoy prerogatives, privileges and immunities:

(a) *Accredited diplomatic personnel*, including: Nuncio and Ambassador Extraordinary and Plenipotentiary; Internuncio, Envoy Extraordinary and Minister Plenipotentiary, Chargé d'Affaires by appointment, Chargé d'Affaires *ad interim*, Minister-Counsellor, Legal Adviser, Counsellor, First Secretary, Second Secretary, Third Secretary, Military, Naval, Air, Civil and Specialized Attachés.

(b) *Unaccredited diplomatic personnel*, including any of the above-mentioned officials in transit through the national territory or on a temporary visit to the Republic, without being accredited in Colombia.

(c) *Consular personnel*, including any of the following officials; Consuls General, Consuls of first and second class, Vice-Consuls and Consular Agents.

(d) *International technical personnel*, including non-Colombian officials belonging to international or technical assistance organizations assigned to Colombia or contracted by the National Government. For the granting of prerogatives the chief of a technical office or representative of an international organization shall have the same rank as the personnel enumerated in (a) above, and the others, that of (e) below.

(e) *Official personnel*, consisting of non-Colombian office employees in the official service of a diplomatic or consular

Cuba *

[Original text: Spanish]
[22 August 1972]

1. Far from considering this a question of urgency and importance, the Revolutionary Government of Cuba considers it unnecessary, self-defeating and impractical, for the following reasons:

(a) It would be superfluous to undertake the study of a new convention on diplomatic inviolability, since this question is amply covered by other international conventions, under which it is the host Government that is responsible for the proper protection of diplomats accredited to the country.

(b) A convention containing nothing more than repressive measures could not deal with or remove the economic, social and political causes which give rise to the type of violence that it is intended to eliminate.

(c) Taking the question from another angle, any convention that might be adopted would have the opposite effect to what is intended and would be quite useless. It would have the opposite effect because its repressive tenor would stimulate violence instead of repressing it; and it would be useless because few States would be in a position to ratify it, some because they do not wish to prejudice the institution of asylum, which they consider just and suitable, and others because they do not wish to diminish the internal jurisdiction of the State, since it is the State which is responsible for upholding the rule of law.

2. Furthermore, it is obvious that, once established authority begins to crack under the irresistible onslaught of a revolutionary violence, a new convention will be quite useless; it will be simply a deplorable attempt to gain the sanction of international law for policies of terror unleashed against the national liberation movements by tyrannical régimes that are alien to the people and are the lackeys of imperialism.

3. For the reasons set out above, we categorically deny the importance and urgency of this question, and we shall oppose the adoption of any kind of repressive convention that may be submitted to the General Assembly.

* These comments were received after the closure of the Commission's twenty-fourth session.

Czechoslovakia

[Original text: English]
[25 April 1972]

Having in mind the ever more frequent criminal acts committed against persons entitled to special protection under international law and infringing thus in a flagrant manner upon the inviolability

(Foot-note ^b concluded)

mission paid by the State to which the mission belongs and engaged exclusively in its service.

(f) *Service personnel*, consisting of non-Colombian employees in the domestic service of any of the members of a diplomatic mission.

Article 9. Privileges and immunities are in general extended to the family of the holder, defined as the wife, unmarried daughters and sons under 21 years of age who reside with the official and who do not engage in private activities for profit.

Article 18. For reasons of courtesy to the occupants, and at the request of the chief of mission, a free police guard service may be assigned to the headquarters of each foreign diplomatic mission.

of such persons, taking into consideration that such criminal acts prevent persons against which they are committed from discharging their functions and affect normal relations among States, having in mind the progressive development of international law and its codification in accordance with the Charter of the United Nations, the Czechoslovak Socialist Republic considers it appropriate that the International Law Commission should deal with the question of protection and inviolability of diplomatic agents and other persons entitled to special protection under international law as specified in section III, paragraph 2 of resolution 2780 (XXVI) adopted by the United Nations General Assembly on 3 December 1971.

At the same time, it considers it appropriate that the International Law Commission itself should decide when it includes, within the possibilities, this complex of problems in its programme of work.

Denmark

[Original text: English]
[18 April 1972]

1. It is the opinion of the Danish Government that the obligations of States as to the protection of diplomats and others are adequately established in international law as codified in existing conventions, such as the 1961 and 1963 Conventions on Diplomatic and on Consular Relations.

2. For this reason, the present need seems to be not so much for further emphasis on this obligation as for covering the situation where the author of such crimes is apprehended in a third country. In the Danish view there is a similarity of purpose in this respect with the purposes of the Conventions concluded in The Hague in 1970 and in Montreal in 1971 on seizure of aircraft and on unlawful acts against the safety of civil aviation, respectively.

3. Firstly, it would seem that there is the same "international element" in both types of cases. In the aviation conventions, the object of protection is the unimpaired communication between countries and peoples. In the present convention, the object is the communications and relations between governments.

4. Secondly, there seems to be the same need for the major elements contained in the aviation conventions, namely:

(a) The establishment of a system of international co-operation with a view to preventing or counteracting such crimes or to safeguarding the victims;

(b) The establishment of a set of legal rules which will ensure the punishment of the authors of the crime, either by way of extradition or through criminal proceedings in the State in which they are apprehended. In other words, rules which widen the possibility of effecting extradition and oblige a State to adopt rules for international jurisdiction in such matters;

(c) The establishment of a basis for international condemnation of such crimes and the creation of legal platform for moral (or political) pressure on other States or organizations which might be condoning the crimes.

5. In the light of the above considerations, representatives of a group of States (including Denmark) meeting in Rome in February 1971, elaborated a draft convention, generally referred to as "the Rome draft", of which the English text is enclosed.^a In the view of the Danish Government this draft, which closely follows the Hague and Montreal Conventions, will constitute a suitable basis for elaboration of a final draft convention, especially because the provisions therein regarding extradition, punishment and jurisdiction must be considered the maximum results obtainable by consensus among a majority of States. The following examples would serve to illustrate this:

(a) During the Hague Conference it was amply demonstrated that for various reasons a majority of States would not be able to accept provisions for mandatory extradition. The balanced system of extradition or punishment adopted by the Hague Conference and likewise accepted in Montreal should be considered as the optimum of what can be accomplished at an international conference.

(b) The question whether the political motive behind the crime should be disregarded and the act considered as a "common crime" was a most controversial one in The Hague. A solution was found by the words "without exception whatsoever" in article 7 of that Convention (and of the Montreal Convention).

(c) A provision that a State which makes extradition conditional on the existence of a treaty shall consider the convention as sufficient legal basis could not find acceptance. The actual wording (in article 8, paragraph 2) reads: "may at its option . . .".

6. The Hague Convention was adopted by 74 votes, with none against, and 2 abstentions. On the last day of the Conference it was signed by 50 States and has since been widely adhered to. In consequence hereof and of considerations such as those mentioned above, the Montreal Conference generally agreed to adopt without further discussion the rules on extradition, punishment and jurisdiction set out in the Hague Convention. It would seem, therefore, that if the Hagues rules were to be disregarded in the preparation of a new convention, this would tend to create unnecessary difficulties on issues to which a widely acceptable solution has already been found.

7. It has been said that the Hague Convention differs from a convention on the protection of diplomats in that in the case of hijacking it is inherent in the crime that the author moves out of the country where the crime is committed or initiated to some other country, whereas it is typical of crimes against diplomats that the authors stay within the territory. In the Danish opinion this is not a pertinent distinction, because the Hague Convention also covers the case of an author being apprehended later in a third country, i.e. a State which has had no formal connexion with the actual crime. Further, it should be borne in mind that the Montreal Convention typically covers exactly the situation where the authors will stay behind (but may at a later stage seek refuge in a third country).

8. Some States have particularly stressed that a convention should be formulated in a manner that would not impede a State in attempts at obtaining the release of the victim through negotiations with kidnappers or otherwise rather than securing the arrest of the kidnappers. It is the Danish opinion than, irrespective of the wording of a convention, a State would by virtue of the law of necessity be free to take such action. If, however, it were possible to include in the formulation of the convention text a satisfactory provision to that effect, the Danish Government would be ready to support it.

9. While, as stated above, the Danish Government finds the Rome draft a suitable basis for the drafting of a convention, some doubt is felt about the advisability of allowing for the coverage of persons under protection to be so wide as attempted in the draft.

WORKING PAPER

The States Parties to this Convention ("Rome draft")

Considering that acts of assault against persons of a certain status seriously jeopardize the safety of these persons and may disturb peaceful relations between States,

Considering that the occurrence of such acts is a matter of grave concern,

Mindful of their obligations according to international law to protect by all appropriate means foreign persons of a certain status present in their territories,

^a See "Working paper" below.

Considering the urgent need for co-operation among States to prevent such acts of assault and to punish the offenders wherever they may be present,

Have agreed as follows:

Article 1

This Convention applies, in the case of offences directed against persons who are nationals of a Contracting State or offences which have taken place in the territory of a Contracting State, to kidnapping, murder and other assaults against the life or physical integrity of those persons to whom the State has the duty, according to international law, to give special protection and in particular:

- (a) Members of permanent or special diplomatic missions and members of consular posts;
- (b) Civil agents of States on official mission;
- (c) Staff members of international organizations in their official functions;
- (d) Persons whose presence and activity abroad is justified by the accomplishment of a civil task defined by an international agreement for technical co-operation or assistance;
- (e) Members of the families of the above-mentioned persons.

Article 2

Each Contracting State shall take all appropriate measures in order to prevent and punish the offences described in article 1.

Article 3

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offences described in article 1 not only when they are committed in its territory, but also when they are directed against a person who is a national of that Contracting State, irrespective of where the offences are committed.

2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences in the case where the alleged offender is present in its territory and it does not extradite him pursuant to article 5 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 4

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offences were committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

Article 5

1. The offences described in article 1 shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States. Contracting States undertake to include the offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. The offences shall be treated, for the purpose of extradition between Contracting States, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with paragraph 1 of article 3.

Article 6

1. Contracting States shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of the offences described in article 1. The law of the State requested shall apply in all cases.

2. The provisions of paragraph 1 of this article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.

... (final clauses).

Ecuador

[Original text: Spanish]
[5 May 1972]

The Government of Ecuador, aware of the United Nations' interest in devising appropriate measures to prevent the kidnapping of diplomatic agents and to ensure adequate punishment of the guilty when such offences occur, considers that there is a need for an international convention on the subject as a first step towards the development of an international penal code which will one day have to be prepared in the permanent interests of universal justice.

France

[Original text: French]
[2 May 1972]

1. The French Government considers that it should first recall its reservations on the actual principle of the possible preparation of a new convention on the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law.

As the French delegation to the twenty-sixth session of the General Assembly pointed out during the debate in the Sixth Committee devoted to consideration of the report of the International Law Commission on the work of its twenty-third session, the protection of diplomatic missions and consular posts and members of their staff seems to be properly provided for in international law.^a Such protection is primarily the responsibility of the receiving State or State of residence. Thus article 29 of the Convention on Diplomatic Relations provides that the person of a diplomatic agent is inviolable and that the receiving State "shall take all appropriate steps to prevent any attack on his person, freedom or dignity". Similar provisions concerning consular officers are contained in article 40 of the Convention on Consular Relations and it goes without saying that in this matter the Vienna Conventions are merely the expression of general international law, so that the obligations and responsibility of States are no different in the absence of binding treaty provisions.

^a See *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee*, 1258th meeting.

Thus the legal obligations of States are well established, and the problem is that of their effective application. It seems advisable not to weaken the effect of existing rules by attempting to formulate new ones.

2. The French Government has noted that the drafts submitted so far for consideration by the International Law Commission (working paper prepared by Mr. Richard D. Kearney (A/CN.4/L.182);^b working paper submitted by the delegation of Uruguay to the Sixth Committee^c) relate more to international judicial co-operation than to diplomatic law.

In this connexion too, the French Government has serious doubts about the necessity and the advisability of a convention of this kind. For the problem is very different from that with which States are confronted in cases of hijacking of aircraft. For these cases it was necessary to define a new offence since the hijacking of aircraft was not covered by the law of most States. However, there can be no doubt that kidnapping and illegal restraint are severely punished everywhere, whoever the victims may be. Moreover, the activities of aircraft hijackers are, in nearly all cases, international, since they move from country to country, which justifies the existence of special rules on jurisdiction and necessitates strengthened and specific international judicial co-operation. The case of kidnappers of diplomats is quite different, since these criminals do not usually take asylum in another State except as the outcome of negotiations to free their victims.

3. If it were nevertheless considered that there is a need—which the French Government does not at present perceive—to prepare a convention on the kidnapping of diplomats, in order to be effective, the new instrument should be acceptable to a large majority of States. It would therefore be essential, first, that the scope of the proposed convention should be well defined, secondly, that the solutions adopted should not be in conflict with the law of the States invited to become parties to it, and lastly, that the solutions should take account of the fact that the object in view is primarily to ensure the safety of persons who are threatened with kidnapping or have been kidnapped and that, consequently, the freedom of action of States to protect such persons should not be hampered by carrying legal logic too far.

4. As regards the first of the above-mentioned points, the International Law Commission should first try to define the categories of persons who would be entitled to special protection for the purposes of the proposed convention. In the opinion of the French Government, since such a text will have implications for criminal law, this definition should be extremely precise. There can be no question here of referring, without further particulars, to international law or to the duty of States to give special protection to important persons who are not expressly mentioned. Nor can States be required to apply the convention to persons protected by treaties to which those States are not parties. Finally, even in the case of persons who have a special status under a convention to which the State concerned is a party, it is not certain that that status gives them an inviolability similar to that to which diplomats are entitled and therefore justifies the adoption of similar rules where they are concerned.

In addition, the Commission should take particular care in defining the acts to which the convention would apply. In the opinion of the French Government, no attempt should be made to define a new offence. Kidnapping, murder and illegal restraint are, as has already been pointed out, perfectly well known to national law, and States might be reluctant to accept a text which created special categories for such crimes according to the status of the victim. Hence no reference should be made to the concept of an "international crime", which is, moreover, difficult to pin-

point and to apply. In other words, the purpose of the definition should be only to specify the offences for which the mutual judicial assistance it is intended to establish would come into play. Its effect must not be to make the penalties for these offences different from those imposed when the victim has no special status. Moreover, if the Commission decides to study texts submitted, it will probably consider it advisable to verify that all the acts mentioned as requiring the application of the convention are in fact treated as criminal acts by the law of all States Members of the United Nations. It will also, no doubt, consider that it is unnecessary to bring international machinery of any kind into play for trifling infringements of diplomatic inviolability.

5. With regard to the actual substance of the proposed convention, the French Government wishes to make the following remarks:

(a) Since, as has already been stated, the offence is not in itself of an international nature and since persons committing it are only exceptionally found on the territory of a foreign State, usually after the commission of the act, there are far fewer reasons than in the case of aircraft hijacking to make exceptions to the basic principle of the territoriality of criminal law. In addition, account must be taken of the fact that the courts of a State other than that in which the crime was committed will have less information and evidence at their disposal in the case of a crime against a diplomat than in the case of unlawful seizure of an aircraft. If it were intended to request States to establish their jurisdiction over such acts—a point on which the French Government makes every reservation—it would obviously not be possible to create as many cases subject to jurisdiction as are provided for in the Hague Convention.

(b) The French Government could not accept a text which did not reserve the principle of the expediency of prosecution. The only obligation which could possibly be considered is that of referring the case to the authorities competent to institute criminal proceedings.

(c) The convention should also, in the provisions relating to extradition, respect the principle that the political or non-political nature of the offence may be taken into account for extradition purposes. Any convention which precluded the possibility of refusing extradition for a political crime would be contrary to the basic principles of the law of many States and, for that reason, would not secure a significant number of ratifications.

(d) It is quite clear that if States which do not make extradition conditional on the existence of a treaty had to extradite for the acts referred to in the proposed convention (subject to the reservations indicated in the preceding paragraph), the convention would have to serve as an extradition treaty for States which make extradition conditional on the existence of such a treaty.

(e) The French Government considers that if there are to be provisions relating to mutual assistance in the sphere in question, they can relate, as in all conventions on international judicial co-operation, only to punishment and not to prevention.

6. Finally, the French Government believes the Commission will be aware of the fact that this is a very delicate matter which sometimes calls for the adoption of solutions that emerge only at the time of the event. It should therefore be careful not to cast its draft in inflexible terms which might tend to defeat the object in view.

Iran

[Original text: French]
[15 March 1972]

^a See p. 201 above.

^c Document A/C.6/L.322.

1. Consideration of the question of the protection of diplomats by the International Law Commission and the Sixth Committee of the General Assembly has made it possible to reaffirm the importance of the basic rule of diplomatic law, namely that con-

cerning the inviolability of diplomatic premises and the respect due to the person of the diplomat.

2. Demonstrations of violence against diplomats might paralyse the smooth operation of inter-State relations. In order to perform his functions, the diplomat must be protected from any hostile act by any person whatsoever.

3. The Imperial Government of Iran endorses the idea that the International Law Commission should prepare a draft international convention designed to strengthen the means of protection provided for under international instruments now in force.

4. It seems advisable to leave it to the International Law Commission to reconcile the need to complete the study of the questions to which it has already accorded priority and, given the importance of preparing a draft convention on the protection of diplomats, the need to submit such a draft to the General Assembly at the earliest possible date.

Israel

[Original text: English]
[29 March 1972]

In its broader context, the protection of missions—whether permanent or temporary—to international organizations cannot be separated from the problem of the protection of diplomatic missions in general. Although details may vary in accordance with the particular stipulations of “headquarters agreements” and analogous instruments, the basic elements of the law are common for all the representatives of a foreign State—diplomatic or consular—on the territory of the host State with its knowledge and consent. The Government of Israel is constrained to emphasize this at the outset, since several of its missions abroad have been the objects of deliberate and politically motivated attacks, and likewise several members of its foreign service or their spouses have been killed or injured as the result of those attacks. Others have been the victims of criminal attacks which were probably on the whole devoid of particular political motivation.

In this connexion the Government of Israel has noted that the International Law Commission in 1971, after a series of fatal attacks on diplomats had taken place in different parts of the world, has reaffirmed in strong terms the obligation of the host State to respect and to ensure respect for the person of individuals concerned and to take all necessary measures to that end, including “the provision of a special guard if circumstances so require” (draft articles on the representation of States in their relations with international organizations, article 28, commentary, para. 3^a). It is necessary to recall from time to time in unambiguous terms the fundamental character of this rule, which is and must be the dominant principle. The possible weakening of it, implicit in the doctrine advanced in section 5, chapter VI, of the working paper prepared by the Secretary-General entitled *Survey of International Law*^b seems to go too far in its search after “even-handedness”. Some of its propositions must, therefore, be subject to very close scrutiny before they can be accepted as positive international law.

In its appreciation of the position in law, the Government of Israel proceeds from the view that it is an uncontroversial rule of public international law that States have a primary and fundamental obligation to secure the safety of all alien persons or property within their territory, and to do so both by preventive and repressive action, and that this rule applies with even greater cogency to foreign diplomatic personnel, considering that it is

mainly through the medium of diplomatic contacts that a peaceful coexistence of nations is possible.

The first obligation of the receiving State obviously relates to the taking of preventive measures, and its responsibility is engaged whenever it has neglected to take all reasonable measures for the prevention of offences and damaging action. Such preventive action presupposes appropriate bilateral contacts and a sympathetic consideration of complaints, particularly those that are made after warnings or threatening communications are received, or prior attacks on nationals of the sending State, its institutions or any object symbolic of its international presence (exhibitions, ships, emblems, etc.) have taken place. The authorities of the receiving State will have to inform foreign representations of any advance knowledge they may have in this respect. In a number of countries the shortage of police and security personnel and the risks which this entails are frequently to a large extent overcome through modern technical means of crime prevention and of security for persons and premises. Although it would seem obvious, it appears that it would be timely to recall to host Governments that they are under a general obligation to facilitate the installations of technical devices of this kind should a diplomatic mission consider this necessary for its own security. This is not a matter which can be left to the exclusive initiative of the authorities of the host State.

As matters depend on local conditions, it is difficult to generalize as to the nature of the preventive measures to be taken; they may range from police screening of the surroundings of diplomatic offices and living quarters, protection of diplomats and members of their families therein and when moving about the receiving State, to the control of mail deliveries to their address, up to permitting diplomatic personnel to carry arms for their personal defence or allowing their protection by armed guards on their premises. Attention is drawn to certain local provisions for the establishment of security zones around foreign diplomatic or consular offices. The instances set out in this paragraph are, of course, illustrative only.

Obviously, police measures of protection must not interfere with bona fide visitors approaching and entering diplomatic premises.

No less important are deterrent measures, including the maintenance of a system of law adequate to deter acts of violence, and of police and other forces adequate for the protection required. Failure to exercise due diligence to afford protection, is wrongful. Part of deterrent action is penal retribution for criminal interference with diplomatic or consular activities, either on permanent or on special mission, including verbal or gestured insult. An appropriate punishment based on general guidelines and without giving consideration to the plea in attenuation that the act was a political crime, is part of doing justice in these matters, the object being not only to inflict on the accused a punishment commensurate with the fate of the individual victim of his crime but also to ensure the security of the service. Here too justice must be done, and, moreover, it must be patent to the public that justice is being done. It is an obligation of the public prosecutor—whatever otherwise the procedure in penal matters—to watch from the beginning and until the exhaustion of means of appeal, that the perpetrators of crimes against foreign States, the diplomatic and consular representations thereof, and the staff attached thereto, be prosecuted without delay, and any sentence duly imposed and carried out.

In case the perpetrator of a crime of this kind is not a national of the receiving State, a case for extradition may arise, and the insertion of an appropriate regulation in terms of international obligation is urgently called for. It might be useful if the International Law Commission were to draw up minimum standards of penal retribution to indicate in this way too the standards of responsibility of the receiving State and its providing for diplomatic security.

^a *Yearbook of the International Law Commission, 1971*, vol. II (Part One), pp. 284 *et seq.*, document A/8410/Rev.1, chap. II, D).

^b *Yearbook of the International Law Commission, 1971*, vol. II (Part two), p. 1, document A/CN.4/245.

This Government has noted that the International Law Commission proposes taking up the subject of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law at its twenty-fourth session (1972). It is looking forward with interest to the progress which the Commission will report.

Jamaica

[Original text: English]
[23 March 1972]

It is an established principle of international law that the person on a diplomatic agent is inviolable. This principle was codified by the Vienna Convention on Diplomatic Relations, article 29 of which provides as follows:

“The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.”

In recent years the conscience of the world has been indignantly aroused by the frequent violations of this principle within the particular context of the kidnapping, violent assault, murder, and other outrages directed at the person of diplomatic agents or other representatives within the international community having special protection under international law. So far, the means by which the principles codified by article 29 of the Vienna Convention are translated into practical effect, have been left entirely to the host State within which a diplomatic representative may for the time being be present. Events have proved that there exists a very serious hiatus in the protective arrangements affecting diplomatic representatives, so far as these arrangements derive from existing international instruments and are translated into national legislation. It is well known that, so far as violations have in the past been directed against diplomatic agents, the offenders have, in the majority of cases, escaped with impunity by the simple device of getting away from the jurisdiction within which the acts took place.

It is the view of the Government of Jamaica that any study which the International Law Commission may give to the matter, with a view to affording wider protection to diplomatic agents, etc., must include the possibility or feasibility of concluding an international instrument which should have the widest possible application among the nations of the world; which instrument would have, *inter alia*, the following basic features:

1. Declaring as an offence under international law the kidnapping, murder, violent assault or other serious acts directed against the person of a diplomatic agent;
2. Making it an obligation for contracting parties to the instrument to extradite an offender to the jurisdiction where the offence was committed; failing extradition, for the contracting party concerned, to have the offender appropriately tried and punished in accordance with its own laws; and
3. It should be possible for all States to become parties to the instrument.

Japan

[Original text: English]
[25 April 1972]

The Government of Japan shares the concern expressed by many States in various forums of international organizations over recent incidents involving offences against the person of diplomatic agents and other persons entitled to special protection under international law and international conventions. Such offences

will seriously affect not only the friendly relations among States concerned but also the interests of the international community as a whole. The Government of Japan believes that some effective international measures should be taken to prevent the recurrence of such acts. It welcomes the action taken by the General Assembly of the United Nations. A thorough study of the question by the International Law Commission could be very useful, and it supports in principle that the Commission prepare a set of draft articles dealing with offences committed against diplomats and other persons entitled to special protection under international law. The Government of Japan is prepared to give its full cooperation to the work of the Commission.

The Government of Japan transmits herewith some of its preliminary comments on the question which the Commission is invited to take into account in considering a future draft convention.

1. Persons to be protected

In studying the contents of an international instrument on the subject, careful consideration should be given to the definition of persons for special protection under a future international instrument. It must be decided whether the persons who would be given special protection should include persons other than diplomats and consular agents and, if so, what other persons should be included.

The Government of Japan is of the view that the list of persons for special protection should be restrictive. The list should be decided in the light of recent trends which show that the offences against diplomatic and consular agents have been, in the main, politically inspired or for extortion purposes. A future convention should therefore deal only with those persons who are to be considered especially valuable for political extortion and for publicity purposes, namely, Heads of State or Government, members of imperial or royal families, members of Cabinet, and other high ranking government officials of ministerial rank, diplomats and consular agents.

2. Offence

(a) Acts, such as murder or kidnapping of diplomatic agents and other persons entitled to special protection under international law, if committed with the intention of extorting anything of value, of releasing offenders or alleged offenders, or changing important governmental actions or policies, should be made offences and punishable.

(b) Attempt to commit above-mentioned acts and participation as an accomplice should also be made punishable.

(c) It is considered to be necessary that a contracting State shall make the offence punishable if the offence is committed within its territory, or when its national committed the offence. Serious study should also be made of the necessity of making an offence punishable of which its national is victim.

(d) It is believed to be necessary that a provision be included in the draft to the effect that the offence should be made severely punishable.

(e) Careful study should be made whether it is advisable to qualify the offence as an “international crime”, or a “crime against the law of nations” in view of the various concepts attached to the terms.

3. Jurisdiction

A contracting State should be obliged to take such measures as may be necessary to establish its jurisdiction over the offence when: (a) the offence is committed in its territory, (b) its national has committed the offence and, subject to the comment in paragraph 2 (c) above, its national is the object of the offence. It should also be permitted to establish its jurisdiction when the alleged offender is in its territory and it does not extradite him to

any State exercising its jurisdiction under (a), (b) and (c) of the present paragraph.

4. Political offence

The Government of Japan does not believe it necessary to include in the draft articles a provision to the effect that the offence shall not be considered as a political offence.

On the other hand, it is considered essential that a future convention on the subject should include a provision requiring a contracting State in whose territory an alleged offender is found to extradite him, or, if it does not extradite him and *if it has established its jurisdiction*, to submit the case to its competent authorities for the purpose of prosecution.

Kuwait

[Original text: English]
[5 April 1972]

Diplomats enjoy the special status of being representatives of foreign sovereign Governments in the receiving State, and this special status has been granted to them by custom and by international law. The receiving State, by accepting the appointment of the diplomat in its territory, is under a duty at the same time to provide him with the necessary protection in order that he may exercise his functions as a representative of a sovereign State.

The duty to protect accredited diplomats has been implemented in the Vienna Convention on Diplomatic Relations, and article 22, paragraph 2, of the said Convention imposes upon the receiving States the special duty to take all appropriate steps to protect the premises of the mission, etc., while article 29 of the same Convention provides that the receiving State shall take all appropriate steps to prevent any attack on the freedom or dignity of the diplomatic agent.

Although these articles may seem comprehensive in providing the necessary protection for the premises of the mission and the person of the diplomatic agent, they nevertheless contain ambiguous terms which are open for different interpretations. The major ambiguity lies here in the term "appropriate steps". What is meant by "appropriate steps"? Who decides what is "appropriate", the receiving State or the sending State? A protection may seem appropriate in the opinion of the receiving State. On the other hand, it may seem inappropriate in the opinion of the sending State. Is the receiving State bound to conform with what the sending State may regard as an appropriate step for the protection of its mission or its diplomatic agent in the receiving State?

Owing to the recent escalation of unjustified acts of violence committed by political groups in various capitals against certain identified diplomatic missions and the kidnapping of their personnel for the purpose of holding them as hostages in furtherance of political demands (which has often resulted in their humiliation if not their murder), the International Law Commission should give this matter its urgent consideration in order that a first phase solution could be achieved through the Commission while the second phase could be achieved with the willingness and co-operation of the Member States of the United Nations.

The Government of the State of Kuwait is of the view that the International Law Commission should endeavour to provide a clear interpretation to the above-mentioned articles, namely, article 22, paragraph 2, and article 29 of the Convention on Diplomatic Relations so that adequate protection will be constantly ensured by the receiving State.

Furthermore, the International Law Commission will be well advised to request or invite Member States of the United Nations to provide adequate legislation in their internal laws for a more severe punishment of offenders who are guilty of committing any

acts of violence or humiliation against diplomatic personnel or interference with or destruction of diplomatic premises. In addition, rewards should be offered to any person giving any information leading to the arrest and conviction of the offenders. Such rewards will encourage citizens of the receiving State to co-operate with the authorities in the apprehension of such offenders.

In conclusion, the Government of the State of Kuwait would like at this stage to pledge the continuance of its maximum ability of protection of diplomatic premises and personnel on its territory whenever human and economic resources are available, on the condition that Kuwait missions and diplomats in foreign States enjoy the same standard of protection on a reciprocal basis. Furthermore, the State of Kuwait is pleased to note that during its 10 years of independence, not a single incident has ever occurred in Kuwait against any diplomatic mission or personnel accredited to it. The sense of security enjoyed by diplomats in Kuwait stems from our belief that diplomats should not be denied the right of self-security which they are entitled to, nor the necessary freedom to exercise their duties in order that peace and security shall prevail in international diplomatic relations.

Madagascar

[Original text: French]
[2 May 1972]

1. The Vienna Conventions on Diplomatic Relations and Consular Relations—to which Madagascar has acceded—require the receiving State to take all "reasonable" or "appropriate" steps to prevent any attack on the person, freedom or dignity of a diplomat or on his private residence, property or correspondence.

In the matter of offences against diplomats, with which we are concerned, Malagasy criminal law contains two kinds of provisions:

(a) The special provisions of article 38 of Law No. 52-29, of 27 February 1959, as amended, make offences committed in public against an ambassador, minister plenipotentiary, envoy, chargé d'affaires or other accredited diplomatic agent liable to the same penalties as offences against, or insults to, the President of the Republic or the Government. Diplomatic agents thus enjoy special protection.

(b) The general provisions of the Penal Code and the special criminal laws punish all such offences committed on Malagasy territory, though the fact that the victim has the status of a diplomatic agent does not constitute an aggravating circumstance.

The application of these rules, which are adequate in internal law, has not given rise to any difficulty so far.

2. A new form of criminality has recently made its appearance in some States: the taking of diplomats as hostages for the payment of a ransom, the release of political prisoners or the execution of an order given to the Government of the receiving State.

The Governments thus attacked have found themselves in a most embarrassing position. They have been faced with the choice of yielding to blackmail and so violating their own laws and the constitutional principle of the separation of powers, or refusing to make any concession and coming into conflict with the sending State of the diplomat concerned, especially where the threat has been carried out.

The decisions taken have differed from State to State, but are based either on considerations of pure expediency, or on a position of principle in which domestic policy takes precedence over foreign policy or vice versa.

The problem is obviously of a political nature and any solution must depend on a number of factors (the constitutional system, the strength or weakness of the receiving Government, the inten-

sity of the economic and political pressures on it, etc.); it seems open to question whether an international convention on the subject would have any practical value.

3. States have two possibilities open to them:

(a) To provide that in all circumstances the protection accorded to diplomats is absolute and must take precedence over all other considerations. This thesis is untenable, for its application would lead to a recurrence of attacks on diplomats, their purpose being assured of success.

(b) Conversely, to declare that no Government will yield to blackmail. This would certainly provide a deterrent calculated to discourage the perpetrators of attacks and, indirectly, to promote the protection of diplomatic agents. In the present state of international society, however, it must be expected that many States will prefer to uphold the principle of freedom of action, if only in order to have more influence on the action of their neighbours.

4. What, then, would be the content of the new international convention?

It could, of course, recommend that measures be taken for the preventive protection of diplomatic agents. That is a matter for the authorities responsible for security and the administrative police.

It could also establish, on the lines of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, an international jurisdiction, each State undertaking to punish serious offences against diplomatic agents wherever committed, subject to extradition where appropriate.

Lastly, it could define the category of persons for whose benefit exceptional measures would be taken.

These are relatively minor points compared with those set out in paragraphs 2 and 3 above.

They might usefully be submitted to the International Law Commission for consideration, however, since in its work on State responsibility it will in any case have to state an opinion on the question of the international responsibility of States which give their constitutional and legislative rules precedence over the principle of absolute protection of diplomatic agents. This seems, in fact, to be the real heart of the matter.

Netherlands

[Original text: English]
[20 April 1972]

1. The Netherlands Government has carefully considered the problems involved in the preparation of a draft convention on the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law. It may be recalled that, in a letter to the President of the Security Council of 5 May 1970,^a the Netherlands Government expressed its concern at the increasing number of attacks on diplomats, stating as its view that attacks involving the person, freedom or dignity of diplomats could lead to situations which might give rise to disputes which in turn might even constitute threats to international peace and security. On that occasion the Netherlands Government observed that from ancient times peoples of all nations have recognized the status of diplomatic agents, whose immunity and inviolability have clearly been established by time-honoured rules of international law.

2. The latter point is one of major importance. During the discussions on the subject in the Sixth Committee of the General

Assembly at its twenty-sixth session,^b many delegations drew attention to the existing codification of the host State's duty to protect the inviolability of foreign diplomats who are on official missions in its territory (see article 29 of the Convention on Diplomatic Relations, article 40 of the Convention on Consular Relations, article 29 of the Convention on Special Missions; see also articles 28, 59 and M of the International Law Commission's draft articles on relations between States and international organizations^c). The very fact of its codification underscores the existence of the obligation of host States under international law to take "all appropriate steps" to protect foreign diplomats on official missions in their territories against attacks involving their person, freedom or dignity. This obligation entails the responsibility for host States to take all reasonable measures to prevent and punish such acts.

3. It may be wondered whether it is necessary, or indeed feasible to lay down any further rules and to draft a special convention under which States (not only the host States of threatened diplomats) agree either to *prosecute* or to *extradite* persons in their territory who have committed such acts of violence against foreign diplomats. The Netherlands Government has carefully considered the matter. There are two sides to the medal: the question is not only how to *prevent* threats to the freedom and security of diplomats, but also how to bring a diplomat to a place of safety with the least delay once an *actual* attack involving his freedom and security has occurred. In this respect two conflicting responsibilities rest upon the host State of a "kidnapped" diplomat which is a party to a new convention establishing the obligation in principle either to prosecute or to extradite a diplomat's captors. Its obligation under the new convention envisaged may come into conflict with its *primary* obligation as a host State under general international law to take "all appropriate steps" to protect the diplomats on official missions in its territory. It may be opportune for the State to negotiate with the captors and agree to their conditions (e.g. payment of ransoms, free conduct out of the territory) to secure the diplomat's release. This should be left to the discretion of the State, and to the Netherlands Government it seems essential that any new convention of the kind envisaged clearly leave to the State parties the option to negotiate with and agree to the demands of the captors if they deem such a course advisable. In this respect the following text of article 7 of the draft convention submitted by Uruguay

"The course to be followed in dealing with acts of extortion in connexion with the kidnapping or detention of one of the persons referred to in article 1 of this Convention shall be left to the discretion of the State concerned and shall in no case give rise to international responsibility."^d

would seem misleading: the responsibilities of host States under existing general international law should on no account be lessened, so any new convention should offer certain possibilities of "escape" in respect of the obligation "to prosecute or to extradite".

4. If a convention were to be drawn up under which States were obliged in principle either to prosecute or to extradite persons in their territory who have committed offences against foreign diplomats, the Netherlands Government holds the view that it should satisfy the following conditions:

^b See *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee*, 1256th-1264th meetings.

^c Articles 28 and 58 of the draft articles on the representation of States in their relations with international organizations: *Yearbook of the International Law Commission, 1971*, vol. II, (Part One), pp. 284 *et seq.*, document A/8410/Rev.1, chap. II, D; article M of the draft articles on observer delegations to organs and to conferences: *ibid.*, p. 61 (*ibid.*, document A/8410/Rev.1, chap. II, annex).

^d Document A/C.6/L.822.

^a See *Yearbook of the International Law Commission, 1970*, vol. II, p. 273, document A/8010/Rev.1, chap. I, sect. F.

(a) The convention should be of a world-wide nature and should be open to all States to ensure the widest possible participation.

(b) The subject matter of the convention should not include all possible acts of "terrorism", but should be restricted to acts of violence (e.g. kidnapping, murder, assault resulting in serious bodily injury) against persons protected under international law. The group of persons protected (foreign diplomats, their families and staff), as well as the basis of the jurisdiction of the State parties in respect of the offenders, should be clearly defined.

(c) As stated above, a convention of this kind should in no way weaken the existing obligation of host States under international law to protect the foreign diplomats on official missions in their territories. Contracting States should retain the option to negotiate with kidnapers of a diplomat and to agree to their demands to ensure the diplomat's safety and obtain his release.

(d) The rules effectuating the "either prosecute or extradite" system in the convention envisaged should not differ to any great extent from those laid down in two recently established conventions in this field, i.e. the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 1970 and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971, which after long deliberation have proved acceptable to a large number of States. Under these Conventions the "offence" is considered as an "ordinary offence of a serious nature" for purposes of *prosecution* (article 7), but for purposes of *extradition* the conditions in extradition treaties and in the national laws of the contracting States prevail (article 8). Consequently, a State like the Netherlands, whose Extradition Act does not allow extradition in cases of "serious misgivings whether the government requesting the extradition would not prosecute the accused for reasons of his race, religion, nationality or political conviction"^e would retain the option not to extradite the offender in such an event, and the Netherlands Government deems this an essential condition in any convention of this kind.

(e) A clause should be added under which the States parties agree to submit any dispute arising from the interpretation and application of the convention to arbitration or to the International Court of Justice.

5. To summarize, the Netherlands Government believes that the convention envisaged should perforce offer certain possibilities of "escape". Though this may cause one to wonder whether such a convention would constitute a really effective remedy against attacks on diplomats, the Netherlands Government would not in principle oppose the drafting of a convention, provided that the conditions put forward in the foregoing are fulfilled.

^e Netherlands, *Staatsblad van het Koninkrijk der Nederlanden* (The Hague), 1967, No. 139.

Niger

[Original text: French]
[22 February 1972]

The Government of the Niger has noted with deep concern the events which in recent years have endangered the lives of diplomats and consuls of several countries, and which have in some cases had tragic consequences. It totally condemns such acts, which violate a tradition that is universally respected, even in time of war. Accordingly, it approves any initiative which may be taken by the international community to ensure the safety of diplomats on assignments and affirms its readiness to sign any convention prepared for this purpose. However, it has no specific suggestions or proposals to make in this regard to the International Law Commission.

Norway

[Original text: English]
[14 April 1972]

The Norwegian Government has viewed with grave concern the deteriorating situation during the past few years with regard to such crimes as assaults upon and kidnapping of diplomats and consular officials in certain countries. These crimes against persons entitled to special protection under international law—which on several occasions resulted in a tragic loss of life—constitute a serious threat to normal diplomatic activities and a considerable curtailment of the freedom of movement of these persons.

The Norwegian Government has therefore noted with satisfaction that the United Nations General Assembly, in its resolution 2780 (XXVI) of 3 December 1971, has requested the International Law Commission to study this important problem and submit proposals for an international convention regarding crimes against diplomats and consular officials.

However, since it is of the opinion that these crimes are in most cases closely connected with the internal political, economic and social conditions prevailing in the countries concerned, the Norwegian Government is somewhat doubtful as to whether such criminal activities can be effectively counteracted by means of a new international instrument. It should be recalled in this connexion that international rules aiming at the protection of diplomats and consular officials already exist. Among the most important of these rules are article 29 of the Convention on Diplomatic Relations and article 40 of the Convention on Consular Relations. Moreover, such crimes against persons entitled to special protection under international law are in most countries considered serious breaches of the law. It seems that much could be achieved through a more vigorous and strict law enforcement in each country when such crimes occur.

Should the International Law Commission, after further study of this question, reach the conclusion that a new convention is called for, the Norwegian Government would suggest that this convention be formulated in such a way that it will ensure the largest possible international support and approval. For this purpose, the convention should not include rules which are too comprehensive and detailed as regards the obligations incumbent upon receiving countries as well as third countries which might conceivably become involved. Each individual country should to the largest extent possible be free to solve the problem in its own way and be given the opportunity to complete the often delicate negotiations and manœuvres which such crimes necessitate.

On the other hand, the categories of persons entitled to protection should not be too restrictive. The development of international co-operation since the Second World War—especially in the technical and economic fields—makes this necessary. A wide definition of the categories of persons entitled to protection would also help ensure a larger measure of international support for the convention.

Furthermore, the Norwegian Government considers that serious attacks on diplomats should probably not be viewed as a political crime, for this could entail certain consequences as far as the question of political asylum and extradition is concerned.

Rwanda

[Original text: French]
[4 May 1972]

Under the Vienna Convention on Diplomatic Relations, particularly articles 29 to 40, the receiving State must take appropriate steps to ensure the protection of diplomats so that they may dis-

charge their functions efficiently. Actually, it would be difficult for a diplomatic agent to exercise his functions if he were subjected at any moment to measures incompatible with the diplomatic privileges and immunities that he should enjoy in the territory of the State in which he resides.

In this connexion, the Government of Rwanda wishes to draw the attention of the States Members of the United Nations to the distressing subject of the abduction of diplomats. This highly regrettable situation, which is prevalent in certain countries, may well spread throughout most of the world unless the States parties to the Convention on Diplomatic Relations which experience cases of abduction mete out exemplary punishment to the offenders.

In addition to the abduction of diplomats and other acts incompatible with diplomatic privileges and immunities, the Government of Rwanda wishes to draw attention here to another important question that may arise in the event of the severance of diplomatic relations. The Governments of receiving States should bear in mind that, where relations between States are severed, the principles of respect for the human person and the right to life continue to apply none the less to diplomatic agents. They should therefore ensure the protection of the persons concerned as far as the point of departure from the State of residence to the sending State. Appropriate steps should also be taken to protect the premises of the former mission. Furthermore, the ransacking of such premises which, in certain countries, follows the decision to sever diplomatic relations is a matter of great concern to sending States, because, in the final analysis, there can be no justification for such acts.

In conclusion, the Government of the Rwandese Republic considers that respect for, and the application of, the principles set forth in the Convention on Diplomatic Relations would solve the problem of the protection of diplomats, since that Convention sets forth both the obligations and the rights of diplomatic agents, the sending State and the receiving State.

Sweden

[Original text: English]
[10 April 1972]

The Swedish Government, which is concerned about the increasing rate of acts of violence directed against diplomats and other official representatives, recognizes the importance of examining ways and means to prevent such acts. It welcomes therefore the initiative taken within the United Nations to study this matter. It is generally recognized that States, according to international law, are obliged to afford special protection to diplomats and certain other official representatives. This principle of general international law is reflected, for instance, in article 29 of the Vienna Convention on Diplomatic Relations which imposes upon States the duty to take all appropriate steps to prevent any attack on a diplomat's person, freedom or dignity. If this obligation is not fulfilled, the State may be held responsible under international law. The obligation to protect is thus clearly laid down in article 29 of the Vienna Convention. The problem is that, particularly during the last few years, the protective measures taken have not always been sufficient to prevent tragic acts of violence against diplomats, the root cause of which is often to be found in the political, economic and social situation in the countries concerned.

It was under the impact of such events that the General Assembly adopted resolution 2328 (XXII) on 18 December 1967, in which the Assembly recalled, *inter alia*, that the unimpeded functioning of the diplomatic channels for communication and consultation between Governments is vital to avoid dangerous misunderstanding and friction. By the same resolution, States were urged to take every measure necessary to secure the implementation of the rules of international law governing diplomatic relations and, in

particular, to protect diplomatic missions and to enable diplomatic agents to fulfil their tasks in conformity with international law.

In view of the continued violence of this kind, it is natural to look for further ways and means. One way might be to deal with the matter in a binding international instrument. Without expressing at this stage an opinion as to whether a new convention is likely to contribute to improving the protection in this field, the Swedish Government is gratified that the matter has been taken up in the United Nations and will be considered, in the first place, by the International Law Commission. The Swedish Government is confident that the International Law Commission in its work will take into consideration also drafts and studies on this subject which have already been elaborated within other international organizations and by individual States.

As to the contents of a possible convention the Swedish Government feels that it would be premature to make any detailed proposals. It wishes, however, to present the following preliminary suggestions of a general character.

The categories to be covered by the convention should not be too limited. They should include all persons who already enjoy special protection under international law. Experience shows, however, that other categories might also be in need of special protection against kidnapping and other acts of violence and the possibility of including such categories in the convention ought to be further examined.

An important question is whether the convention should contain provisions regarding the extradition of offenders. On this point, the Swedish Government wishes to observe that in any case extradition should not be made compulsory. A State should be free to choose between prosecuting an offender or extraditing him to the country where the offence was committed. In this connexion the question of asylum has also to be considered carefully.

The Swedish Government considers it important that a convention of this kind should not unduly restrict the freedom of action which any Government should enjoy when dealing with individual cases of kidnapping or other acts of violence. Moreover, it is essential that the convention should be so drafted that it can be expected to obtain universal acceptance which would considerably strengthen its deterrent effect.

Ukrainian Soviet Socialist Republic

[Original text: Russian]
[21 April 1972]

The question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, which, in its resolution 2780 (XXVI), the General Assembly has requested the International Law Commission to study, is a pressing matter of great importance.

Criminal acts against diplomats, which have become increasingly frequent of late, are incompatible with the basic principles of international law, create difficulties in relations between States and increase international tension. In the interests of co-operation and the development of friendly relations, States should use every means of preventing attempts on the life, health and dignity of diplomats.

At the same time, the Ukrainian SSR deems it necessary to emphasize that in preparing draft articles on the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, the International Law Commission should take account of the relevant generally accepted rules of international law in force, which have been confirmed, in particular, by articles 29 and 37 of the Vienna Convention on Diplomatic Relations, and whose importance the Commission

should be careful not to impair. Moreover, in its work on these draft articles, the Commission should bear in mind its programme of work and the order of priorities laid down therein.

If the draft articles referred to are to serve as a constructive basis for an appropriate instrument of international law, they should spell out the obligations of States to ensure, under domestic law, the effective prosecution of persons who have committed criminal acts against diplomats.

Such acts should be regarded as international crimes interfering with peaceful and friendly relations between States.

For the prevention and suppression of such crimes, co-operation between States should play an important part in securing the extradition and punishment of the perpetrators pursuant to international agreements on extradition or in accordance with domestic law. In order to develop such co-operation, States should provide legal assistance and keep each other informed for the purpose of preventing and suppressing such crimes or of punishing those who have committed them.

Union of Soviet Socialist Republics

[*Original text: Russian*]
[18 April 1972]

The question of the protection and inviolability of diplomats and other persons entitled to special protection under international law is an urgent one of great importance. In this regard the General Assembly's proposal that the International Law Commission should study this question with a view to preparing a set of draft articles dealing with offences against diplomats and other persons entitled to special protection under international law deserves serious attention.

It should be borne in mind, however, that the preparation of special draft articles on the protection of diplomats and persons entitled to special protection under international law must not in any way detract from the existing international legal norms in this matter, more particularly articles 29 and 37 of the Vienna Convention on Diplomatic Relations, under which the receiving State is obliged to treat diplomatic agents and their families with due respect and to take all appropriate steps to prevent any attack on their person, freedom or dignity. At the same time, work on special draft articles should not be detrimental to the International Law Commission's work on other important international legal questions in its programme.

As regards the possible content of the draft articles, the following points should be incorporated:

1. Recognition of offences against the life, health and dignity of persons entitled to special protection under international law as being serious international crimes detrimental to relations between States.

2. The obligation of States to co-operate in preventing and suppressing such offences.

3. The obligation of States, for the above purposes and in accordance with their law, to prosecute as criminals persons who have planned, attempted to commit or committed such offences, and also their accomplices.

4. The obligation of States, in cases where the offender is found to be in the territory of a third State, to hand the offender over, in accordance with extradition treaties or domestic law, to the State in whose territory the offence was committed. In the case of failure of a State to hand over one of its own nationals, or in the absence of obligations in respect of extradition, States must prosecute the offender under domestic law, irrespective of the place where the offence was committed.

5. The obligation of States to afford legal assistance in the investigation of offences and other necessary legal aid for the purpose of exposing the offender and elucidating other attendant circumstances.

6. The obligation of States to provide reciprocal information on matters relating to the prevention and suppression of such offences and to the prosecution of the offenders.

United Kingdom of Great Britain and Northern Ireland

[*Original text: English*]
[30 March 1972]

1. International law has for many centuries regarded the persons of ambassadors as inviolable and has imposed on States to which they are accredited a special duty of protection. Thus article 29 of the Vienna Convention on Diplomatic Relations provides that the receiving State shall treat a diplomatic agent with due respect and shall take all appropriate steps to prevent any attack on his person, freedom and dignity.

2. The kidnapping of diplomats and other serious offences against them have become in recent years a grave problem. The Government of the United Kingdom fully support appropriate measures which would be likely to reduce this danger.

3. The Government of the United Kingdom have therefore followed closely the course of international discussion of this question. OAS has prepared the Convention to Prevent and Punish the Acts of Terrorism (Washington, February 1971) and the United Nations General Assembly, in section III of its resolution 2780 (XXVI), has requested the International Law Commission to study this matter. Further drafts for a convention on the subject have now been submitted to the International Law Commission by the delegation of Uruguay at the twenty-sixth session of the General Assembly^a and in a working paper prepared by Mr. Richard D. Kearney (A/CN.4/L.182).^b These are all important events.

4. At present the United Kingdom Government have not formed a definitive view on the question whether the adoption of a convention would in fact and in practice be likely to deter those who commit such crimes. This is a matter on which they will take a position in the course of further consideration of this question and in the light of the views of other Governments.

5. However, there are a number of important factors which arise in connexion with any such draft convention; and the attitude of the Government of the United Kingdom to such a convention will be influenced by the extent to which due account is taken of these factors.

6. First, the convention should respect the principle of independence of the competent authorities in connexion with powers of arrest, and the independence of prosecuting authorities in deciding whether an accused person should be brought before the courts. These very points were discussed at great length and satisfactory wording for giving effect to these principles is to be found in articles 6 and 7 of the Convention for the Suppression of the Unlawful Seizure of Aircraft (The Hague, 1970), and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 1971). On these points those Conventions represent satisfactory precedents and it is recommended that any future convention on the present subject should

^a Document A/C.6/L.822.

^b See p. 201 above.

follow closely the wording then adopted, with a view to assisting prompt and wide acceptance.

7. Secondly, experience has shown that it is very desirable that, in consultation together, the Governments concerned should be able to exercise a reasonable freedom of action in handling specific cases and the convention should be drawn up in terms sufficiently flexible to make this possible.

8. Thirdly, the generally accepted principles concerning extradition and, in particular, the treatment of political offences in connexion with extradition should be recognized and applied. Extradition must take place in accordance with the requirements of the requesting State and subject to any limitations customary in extradition treaties. The United Kingdom would see no objection to a provision providing an option whereby States whose extradition arrangements normally depend on extradition treaties could elect to treat the future convention as a basis for extradition to contracting States with which they have no extradition treaty. Such a provision is included in the Hague Convention (1970). The Government of the United Kingdom, however, reserve the position fully as to what action would be taken in relation to such an option.

9. Fourthly, the offences covered and the persons protected by the convention should be sufficiently and satisfactorily defined. The offences should be of a sufficient gravity to merit such exceptional treatment as would be involved in the convention and thus should include not only murder and kidnapping, but also assaults occasioning grievous bodily harm. Furthermore, it seems reasonable that the convention should apply when these offences are committed against the protected person with knowledge that he falls within the class protected. The justification for the convention lies in the internationally recognized status of diplomats and other protected persons, and it might be open to criticism if it applied to offences which had no connexion with that status.

10. The class of persons to be protected by the convention should also be satisfactorily and sufficiently defined. Obviously, it should extend beyond the field of diplomats in the traditional sense of the word. But, in preparing a definition, it should be borne in mind that States would have difficulty in according the protection of the convention to persons whose international status arises in connexion with organizations of which those States are not members or conventions to which they are not parties. If these problems cannot be satisfactorily resolved during the drafting of the convention, this might significantly reduce the number of States which were able to become parties and thus its effectiveness as an international instrument.

11. Accordingly, a central element of a convention, if there is general international support for one, would consist of a provision requiring that a State in which a person reasonably suspected of an offence within the convention is found, should either permit his extradition to the country where the offence occurred, or else should submit the case to its prosecution authorities with a view to his prosecution.

12. In addition, the convention could usefully provide for appropriate consultation among the countries concerned in order to deal with questions arising out of the convention.

13. The Government of the United Kingdom welcome this opportunity of indicating in outline their views on certain important aspects of the question. It is also hoped that the International Law Commission will so arrange its handling of this question that a further opportunity is given to Governments to comment on its proposals before the Commission comes to give final consideration to them.

United States of America

[Original text: English]
[17 April 1972]

The Government of the United States of America fully supports the request of the General Assembly (resolution 2780 (XXVI),

sect. III) that the International Law Commission study as soon as possible the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law. The United States Government trusts that the International Law Commission will find itself able to prepare a set of draft articles dealing with offences committed against such persons during the course of its twenty-fourth session in 1972 in view of the urgent need to take all available steps to deter the commission of such offences.

With respect to the substance of such a set of draft articles the United States Government considers that the articles should provide a basis for the detention and prosecution of those accused of committing serious offences against diplomats and other persons entitled to special protection under international law wherever those accused persons may be found throughout the world. Consequently, it would be appropriate to include in any such set of articles provision to the effect that all States parties to any eventual convention shall have jurisdiction to try individuals accused of serious crimes against persons entitled to special protection under international law.

A major purpose of such a convention should be to eliminate to the greatest extent possible "safe havens" for persons who commit crimes of this nature. It would be desirable therefore that the draft articles impose an obligation upon a State where any person accused of such offence may be found, either to take steps to bring him before its own courts or to extradite him pursuant to the request of an interested State which proposes to prosecute him. It is the view of the United States that there are certain advantages to permitting the State where the accused may be found to decide whether it prefers to initiate legal action itself or to extradite the accused to another State. This freedom of choice would tend to reduce or eliminate the difficulties which could arise in certain circumstances such as when the accused individual is a national of the State in which he is found and the offence has been committed elsewhere.

There are a number of difficult problems to be faced in formulating a set of draft articles that will make a substantial contribution to the reduction of serious crimes against persons who are entitled to special protection under international law.

The United States trusts that in dealing with problems of this nature the Commission will bear in mind the essential importance of the maintenance of international channels of communication. International co-operation for peace, for economic development, for the improvement of living conditions, indeed for achievement of all the purposes and principles of the Charter of the United Nations, demand that persons specially selected by their States or by international organizations to promote such objectives be able to carry out their responsibilities without being subjected to the threat of murder, kidnapping or similar serious crimes.

The world has witnessed in the past several years a mounting tide of offences committed against diplomats and other officials engaged in carrying on international activities solely because of their diplomatic or official character. Such offences constitute serious common crimes which should be prosecuted as such; in addition they strike at the heart of international activity. In selecting the measures necessary to reduce such dangers, care must be taken to ensure that the perpetrators are not able to escape just punishment on the basis that they committed the offences for political ends. It is the view of the United States that the selection of diplomats and others entitled to special protection of international law as the objects of serious crimes for the purpose of obtaining political ends is so disruptive of the international order that the individuals who commit such offences should be prosecuted without reference to the validity or merit of the political ends concerned.

Yugoslavia

[Original text: English]
[5 May 1972]

The Government of the Socialist Federal Republic of Yugoslavia attaches great importance to the question of the protection of staff members of diplomatic missions which, as of late, is becoming more urgent. The number of crimes committed against diplomatic representatives and persons entitled to special protection under international law has increased in many States. Yugoslavia, in this respect, has undergone a particularly trying experience. The Yugoslav representatives in some countries have been subjected to attacks and acts of terrorism committed by individuals or groups, the evidence of which is the brutal murder of an Ambassador of the Socialist Federal Republic of Yugoslavia in 1971. Having in mind the need to prevent such crimes and acts of violence and to ensure normal discharging of duties by diplomatic representatives and other persons engaged in activities of international interest, the Yugoslav Government considers that it is essential to immediately prepare a set of draft articles relating to the question of the protection and inviolability of persons entitled to special protection under international law.

In this respect, the Government of the Socialist Federal Republic of Yugoslavia is of the opinion that the rules relating to protection and inviolability of persons entitled to special protection under international law should include, in particular, the following:

1. An obligation of host States to undertake preventive measures with a view to deterring the preparations of attacks, attempts at committing or participation in committing crimes against persons entitled to special protection under international law, including members of their families.

2. Grave offences and serious crimes should not be treated as political criminal acts even in those cases where motivations for committing such acts are of a political nature.

3. Sanctions should be undertaken against all perpetrators of such criminal acts, irrespective of whether or not they enjoy the same citizenship as their victim.

4. States are obliged in cases of attacks upon diplomatic representatives to take urgent measures against the perpetrators of such acts and to render more severe the existing punishments to this end.

5. A request for extradition may be refused, provided that the State in whose territory the crime was committed and the culprit was found institutes without delay legal proceedings against the said person.

6. When several States at the same time claim the right to extradition, the extradition should be granted to the State to which the victim of the crime belongs (especially in case of death).

7. States are obliged to mutually co-operate with a view to preventing and combating such crimes, especially with respect to undertaking preventive measures.

8. If the perpetrators of criminal acts belong to an organization which instigates, organizes, assists or participates in the execution of these criminal acts, each State is obliged, in addition to punishing the culprits, to undertake effective measures and to dissolve such an organization.

9. The rules under consideration would not apply to criminal acts committed in the territory of a State if both the culprit and the victim were the citizens of the said State.

The Government of the Socialist Federal Republic of Yugoslavia is of the opinion that the question of the protection of diplomats and other persons discharging duties of international interest, as well as of diplomatic missions, merits the full attention of the international community and hopes that the International Law Commission will give priority to the consideration of this question in conformity with General Assembly resolution 2780 (XXVI).

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/AC.138/28	Letter dated 14 August 1970 from the Chairman of the Delegation of Peru addressed to the Chairman of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction	Mimeographed.
A/AC.138/34	Texts of the Montevideo Declaration (8 May 1970), of the relevant portion of the Lusaka Declaration and of the report of the Sub-Committee on the Law of the Sea to the twelfth session of the Asian-African Legal Consultative Committee	Mimeographed.
A/C.6/L.822	Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law: Uruguay—working paper	Mimeographed.
A/CN.4/23	Report on the law of treaties, by J. L. Brierly, Special Rapporteur	<i>Yearbook of the International Law Commission 1950</i> , vol. II, p. 222.
A/CN.4/43	Second report on the law of treaties, by J. L. Brierly, Special Rapporteur	<i>Ibid.</i> , 1951, vol. II, p. 70.
A/CN.4/L.55	Law of treaties: working paper prepared by the Secretariat	Mimeographed.
A/CN.4/63	Report on the law of treaties, by H. Lauterpacht, Special Rapporteur	<i>Yearbook of the International Law Commission, 1953</i> , vol. II, p. 90.
A/CN.4/87	Second report on the law of treaties, by H. Lauterpacht, Special Rapporteur	<i>Ibid.</i> , 1954, vol. II, p. 123.
A/CN.4/263	Supplement, prepared by the Secretariat, to <i>Materials on Succession of States</i> (United Nations publication, Sales No. E/F.68.V.5)	Mimeographed.
A/CN.4/L.161 and Add. 1 and 2	Question of treaties concluded between States and international organizations or between two or more international organizations: Working paper submitted by the Secretary-General, containing a short bibliography, a historical survey of the question and a preliminary list of the relevant treaties published in the United Nations <i>Treaty Series</i>	<i>Idem.</i>
A/CONF.39/5, vols. I and II	Analytical compilation of comments and observations made in 1966 and 1967 with respect to the final draft articles on the law of treaties; working paper prepared by the Secretariat—vols. I and II	<i>Idem.</i>
A/CONF.39/6 and Add. 1 and 2	Comments and amendments to the final draft articles on the law of treaties submitted in 1968 in advance of the [United Nations] Conference [on the Law of Treaties] in accordance with General Assembly resolution 2287 (XXII)	<i>Idem.</i>
A/CONF.39/7 and Add. 1 and Add.1/Corr.1 and Add.2	Written statements submitted by specialized agencies and intergovernmental bodies invited to send observers to the [United Nations] Conference [on the Law of Treaties]	<i>Idem.</i>

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
ST/LEG/7	Summary of the practice of the Secretary-General as depositary of multi-lateral treaties	Mimeographed
ST/SG/14	<i>Agreements between the United Nations and the Specialized, Agencies and the International Atomic Energy Agency</i>	United Nations publication, Sales No. E/F. 61.X.1.

**CHECK LIST OF DOCUMENTS OF THE TWENTY-FOURTH SESSION
NOT REPRODUCED IN VOLUME II**

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/252	Provisional agenda	Mimeographed. For the agenda as adopted, see p. 222 above, (A/8710/Rev.1, para. 8).
A/CN.4/253 and Add.1-5	Observations of Member States on the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law	Reproduced in A/8710/Rev.1, annex, (p. 329 above).
A/CN.4/255	Letter dated 18 February 1972 from Mr. Mohamed Bedjaoui to the Chairman of the International Law Commission	<i>Mimeographed.</i>
A/CN.4/260	Letter dated 30 March 1972 from Mr. Abdullah El-Erian to the Chairman of the International Law Commission	<i>Idem.</i>
A/CN.4/261 and Corr.1	Letter dated 31 March 1972 from Mr. Mustafa K. Yasseen to the Chairman of the International Law Commission	<i>Idem.</i>
A/CN.4/263	Supplement, prepared by the Secretariat, to <i>Materials on succession of States</i> (United Nations publication, Sales No. E/F.68.V.5)	<i>Idem.</i>
A/CN.4/L.183	Draft articles on succession in respect of treaties adopted by the Drafting Committee on first reading: texts of articles 0, 1 (<i>bis</i>), 1 (<i>ter</i>), 1 (<i>quater</i>), 2 and 3	Text of articles reproduced in the summary records of the 1176th and 1177th meetings (vol. I)
A/CN.4/L.183/Add.1	<i>Idem.</i> —articles 4 to 6	<i>Idem.</i> 1181st meeting (vol. I)
A/CN.4/L.183/Add.2	<i>Idem.</i> —articles 7 and 8	<i>Idem.</i>
A/CN.4/L.183/Add.3	<i>Idem.</i> —articles 1 (<i>quinquies</i>), 8 (<i>bis</i>) and 9 to 11	<i>Idem.</i> , 1187th meeting (vol. I)
A/CN.4/L.183/Add.4	<i>Idem.</i> —articles X, 12, 13, 15, 17, 17 (<i>bis</i>), 17 (<i>ter</i>) and 17 (<i>quater</i>)	<i>Idem.</i> , 1196th meeting (vol. I)
A/CN.4/L.183/Add.5	<i>Idem.</i> —articles 1, 17 (<i>quinquies</i>) and 19 to 21	<i>Idem.</i>
A/CN.4/L.183/Add.6	<i>Idem.</i> —articles 22 and 22 (<i>bis</i>)	<i>Idem.</i> , 1197th meeting (vol. I)
A/CN.4/L.185	<i>Idem.</i> —Text of article 2 adopted by the Drafting Committee on second reading	<i>Idem.</i> , 1181st meeting (vol. I)
A/CN.4/L.186	Report of the Working Group on the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law: draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons	<i>Idem.</i> , 1182nd, 1185th, 1186th, 1188th and 1189th meetings (vol. I)
A/CN.4/L.187 and Add.1-20	Draft report of the International Law Commission on the work of its twenty-fourth session (chap. II)	Mimeographed. For the final text, see document A/8710/Rev.1 (p. 219 above).
A/CN.4/L.188 and Add.1	Second report of the Working Group on the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law: revised draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons	Text of the articles reproduced in the summary records of the 1191st and 1192nd meetings (vol. I).
A/CN.4/L.189	Third report of the Working Group: revised article 2	<i>Idem.</i> , 1193rd meeting (vol. I).

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.190 and Add.1 A/CN.4/L.191 A/CN.4/L.192	Draft report of the Commission on the work of its twenty-fourth session (chap. I and III-V)	Mimeographed. See above, observation concerning A/CN.4/L.187 and Add.1-20.
A/CN.4/Sr.1149- 1199	Provisional summary records of the 1149th to the 1199th meetings of the International Law Commission	Mimeographed. For the final text, see vol. I.

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