

YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
1974

*Volume II*  
*Part One*

*Documents of the twenty-sixth session:  
Reports of Special Rapporteurs, other documents  
submitted by members of the Commission and report  
of the Commission to the General Assembly*

---

UNITED NATIONS





YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
1974

*Volume II*  
*Part One*

*Documents of the twenty-sixth session:  
Reports of Special Rapporteurs, other documents  
submitted by members of the Commission and report  
of the Commission to the General Assembly*

---

UNITED NATIONS  
New York, 1975



## NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The word *Yearbook* followed by suspension points and the year (e.g. *Yearbook . . . 1970*) indicates a reference to the *Yearbook of the International Law Commission*.

A/CN.4/SER.A/1974/Add.1 (Part 1)

UNITED NATIONS PUBLICATION

*Sales No. E.75.V.7 (Part I)*

Price: \$U.S. 14.00  
(or equivalent in other currencies)

## CONTENTS

	<i>Page</i>
<b>Prefatory note</b> . . . . .	iv
<b>Succession of States in respect of treaties (agenda item 4)</b>	
<i>Document A/CN.4/278 and Add.1-6</i> : First report on succession of States in respect of treaties, by Sir Francis Vallat, Special Rapporteur . . . . .	1
<i>Document A/CN.4/L.206</i> : Article for insertion in Part I of the draft articles on succession of States in respect of treaties, proposed by Mr. Ushakov . . . . .	89
<b>Succession of States in respect of matters other than treaties (agenda item 5).</b>	
<i>Document A/CN.4/282</i> : Seventh report on succession of States in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur—draft articles on succession to public property, with commentaries . . . . .	91
<b>Most-favoured-nation clause (agenda item 6)</b>	
<i>Document A/CN.4/280</i> : Fifth report on the most-favoured-nation clause, by Mr. Endre Ustor, Special Rapporteur—draft articles with commentaries ( <i>continued</i> ) . . . . .	117
<b>Question of treaties concluded between States and international organizations or between two or more international organizations (agenda item 7)</b>	
<i>Document A/CN.4/279</i> : Third 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—draft articles with commentaries . . . . .	135
<b>Co-operation with other bodies (agenda item 10)</b>	
<i>Document A/CN.4/L.214</i> : Report on the twenty-first session of the European Committee on Legal Co-operation, by Mr. A. H. Tabibi, observer for the Commission . . . . .	153
<b>Report of the Commission to the General Assembly</b>	
<i>Document A/9610/Rev.1</i> : Report of the International Law Commission on the work of its twenty-sixth session, 6 May-26 July 1974 . . . . .	157
<b>Check list of documents referred to in this volume</b> . . . . .	332
<b>Check list of documents of the twenty-sixth session not reproduced in volume II</b> . . . . .	333

## PREFATORY NOTE

Volume II of the 1974 *Yearbook* consists of two separately published parts containing the following documents:

### PART ONE (*present volume*)

- A/9610/Rev.1 Report of the International Law Commission on the work of its twenty-sixth session (6 May-26 July 1974)
- A/CN.4/278 and Add.1-6 First report on succession of States in respect of treaties, by Sir Francis Vallat, Special Rapporteur
- A/CN.4/279 Third 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—draft articles with commentaries
- A/CN.4/280 Fifth report on the most-favoured-nation clause, by Mr. Endre Ustor, Special Rapporteur—draft articles with commentaries (*continued*)
- A/CN.4/282 Seventh report on succession of States in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur—draft articles on succession to public property, with commentaries
- A/CN.4/L.206 Article for insertion in Part I of the draft articles on succession of States in respect of treaties, proposed by Mr. Ushakov
- A/CN.4/L.214 Report on the twenty-first session of the European Committee on Legal Co-operation, by Mr. A. H. Tabibi, observer for the Commission

### PART TWO (*United Nations publications, Sales No. E.75.V.7 (Part II)*)

- A/5409 Legal problems relating to the utilization and use of international rivers: report of the Secretary-General
- A/CN.4/274 Legal problems relating to the non-navigational uses of international watercourses: supplementary report submitted by the Secretary-General
- A/CN.4/276 Filling of casual vacancies: note by the Secretariat
- A/CN.4/277 Selected bibliography on the question of treaties concluded between States and international organizations or between two or more international organizations: document prepared by the Secretariat
- A/CN.4/281 Possibilities of participation by the United Nations in international agreements on behalf of a territory: study prepared by the Secretariat

# SUCCESSION OF STATES IN RESPECT OF TREATIES

(Agenda item 4)

DOCUMENT A/CN.4/278 AND ADD.1-6\*

First report on succession of States in respect of treaties, by Sir Francis Vallat,  
Special Rapporteur

[Original: English]  
[19 and 22 April, 8, 24 and 31 May  
and 10 and 21 June 1974]

## CONTENTS

	Paragraphs	Page
I. INTRODUCTION . . . . .	1-9	3
A. Basis of the present report . . . . .	1-7	3
B. Arrangement of the present report . . . . .	8-9	4
II. OBSERVATIONS ON THE DRAFT ARTICLES AS A WHOLE . . . . .	10-92	4
A. Importance of and need for the codification of the topic . . . . .	11-15	4
B. Sources of the draft articles . . . . .	16-18	6
C. The concept of "succession of States" . . . . .	19-20	6
D. Relationship between succession in respect of treaties and the general law of treaties . . . . .	21-23	6
E. The principle of self-determination and the law relating to succession in respect of treaties . . . . .	24-30	7
F. Form of the draft . . . . .	31-41	10
G. Scope of the draft . . . . .	42-48	11
H. Scheme of the draft . . . . .	49-65	13
1. Categories of succession of States . . . . .	50-57	14
2. Categories of treaties . . . . .	58-61	16
3. Arrangement of the draft articles . . . . .	62-65	17
I. Recognition and succession of States . . . . .	66-80	17
J. Interrelation between the present draft articles and the draft articles on succession of States in respect of matters other than treaties . . . . .	81-87	20
K. General approval or disapproval . . . . .	88-92	22
III. OBSERVATIONS ON THE SPECIFIC PROVISIONS OF THE DRAFT ARTICLES . . . . .	93-471	23
Preliminary observations of the Special Rapporteur . . . . .	93-94	23
Part I. General provisions . . . . .	95-196	23
Article 1. Scope of the present articles . . . . .	95-98	23
Article 2. Use of terms . . . . .	99-135	24
Paragraph 1 (a) . . . . .	99-158	24
Paragraph 1 (b) . . . . .	102-119	24
Paragraph 1 (c) . . . . .	120	28
Paragraph 1 (d) . . . . .	121-123	28
Paragraph 1 (e) . . . . .	124-135	28
Paragraph 1 (f) . . . . .	136-143	30
Paragraph 1 (g) . . . . .	144-146	31
Paragraph 1 (h) . . . . .	147	32
Paragraph 1 (i) . . . . .	148-150	32
Paragraph 1 (j) . . . . .	151	32
Paragraph 1 (k) . . . . .	152	32
Paragraph 1 (l) . . . . .	153	32

\* Incorporating A/CN.4/278/Add.5/Corr.1.

	<i>Paragraphs</i>	<i>Page</i>
Paragraph 1 ( <i>m</i> ) . . . . .	154	32
Paragraph 1 ( <i>n</i> ) . . . . .	155-157	32
Paragraph 2 . . . . .	158	32
Article 3. Cases not within the scope of the present articles . . . . .	159-162	32
Article 4. Treaties constituting international organizations and treaties adopted within an international organization . . . . .	163-165	33
Article 5. Obligations imposed by international law independently of a treaty . . . . .	166-169	33
Article 6. Cases of succession of States covered by the present articles . . . . .	170-179	33
Article 7. Agreements for the devolution of treaty obligations or rights from a predecessor to a successor State . . . . .	180-186	35
Article 8. Successor State's unilateral declaration regarding its predecessor State's treaties . . . . .	187-190	36
Article 9. Treaties providing for the participation of a successor State . . . . .	191-196	36
<b>Part II. Transfer of territory . . . . .</b>	<b>197-213</b>	<b>37</b>
Article 10. Transfer of territory . . . . .	197-213	37
<b>Part III. Newly independent States . . . . .</b>	<b>214-363</b>	<b>39</b>
Section 1. General rule . . . . .	214-319	39
Article 11. Position in respect of the predecessor State's treaties . . . . .	214-217	39
Section 2. Multilateral treaties . . . . .	218-256	40
Article 12. Participation in treaties in force . . . . .	218-256	40
Article 13. Participation in treaties not yet in force . . . . .	257-263	48
Article 14. Ratification, acceptance, or approval of a treaty signed by the predecessor State . . . . .	264-274	49
Article 15. Reservations . . . . .	275-298	50
Article 16. Consent to be bound by part of a treaty and choice between differing provisions . . . . .	299-306	55
Article 17. Notification of succession . . . . .	307-308	56
Article 18. Effects of a notification of succession . . . . .	309-319	56
Section 3. Bilateral treaties . . . . .	320-333	58
Article 19. Conditions under which a treaty is considered as being in force . . . . .	320-326	58
Article 20. The position as between the predecessor and the successor State . . . . .	327-328	59
Article 21. Termination, suspension of operation or amendment of the treaty as between the predecessor State and the other State party . . . . .	329-333	59
Section 4. Provisional application . . . . .	334-352	59
Article 22. Multilateral treaties . . . . .	334-342	59
Article 23. Bilateral treaties . . . . .	343-346	61
Article 24. Termination of provisional application . . . . .	347-352	61
Section 5. States formed from two or more territories . . . . .	353-363	62
Article 25. Newly independent States formed from two or more territories . . . . .	353-363	62
<b>Part IV. Uniting, dissolution and separation of States . . . . .</b>	<b>364-416</b>	<b>64</b>
Article 26. Uniting of States . . . . .	364-389	64
Article 27. Dissolution of a State . . . . .	390-405	68
Article 28. Separation of part of a State . . . . .	406-416	71
<b>Part V. Boundary régimes or other territorial régimes established by a treaty . . . . .</b>	<b>417-462</b>	<b>73</b>
Article 29. Boundary régimes and . . . . .		
Article 30. Other territorial régimes . . . . .	417-462	73
<b>Part VI. Miscellaneous provisions . . . . .</b>	<b>463-471</b>	<b>87</b>
Article 31. Cases of military occupation, State responsibility and outbreak of hostilities . . . . .	463-471	87

## I. Introduction

### A. BASIS OF THE PRESENT REPORT

1. By resolution 3071 (XXVIII) adopted on 30 November 1973, the General Assembly welcomed the decision of the International Law Commission to give priority at its twenty-sixth session to succession of States with respect to treaties and to State responsibility. The same resolution recommended that the International Law Commission should complete at its twenty-sixth session, in the light of comments received from Member States, the second reading of the draft articles on succession of States in respect of treaties adopted at its twenty-fourth session.<sup>1</sup> Accordingly, the basis of the present report will be the draft articles as set out in that report of the International Law Commission. As recommended by the resolution, the draft articles will be re-examined in the light of comments received from Member States whether in writing or through the debates in the Sixth Committee and in the General Assembly itself. Though all due weight will be given to those comments, account will also be taken of any other considerations that appear to be relevant including, as appropriate, the views of any non-member State.

2. In general, the purpose of the Special Rapporteur will be to help the Commission towards the fulfilment of its task on the basis of the draft articles. It would not be compatible with the task in hand to introduce extensive innovations or new departures of doctrine. Such a course would impede the progress of the Commission and might even prevent it from completing the draft articles at its twenty-sixth session. Moreover, it is clear that the draft articles have, broadly speaking, been received with approval in the General Assembly and that any radical departure from their general tenor would be likely to create serious obstacles to their ultimate acceptance by the international community as a whole.

3. Nevertheless, due account will be taken of all the comments made by or on behalf of Governments even though it may not be feasible to mention specifically each comment that has been made. On the other hand, it will not be possible to accede to every suggestion or bend to every criticism. Due account will have to be taken of considerations of law and practice and compatibility with the nature and characteristics of the draft as a whole, and of views previously expressed in the Commission itself.

4. Much help and guidance has been derived from the reports of Sir Humphrey Waldock, as Special Rapporteur on both succession of States in respect of treaties and the law of treaties, especially his fourth report on the law of treaties.<sup>2</sup> The form and method of presentation used by him will be followed as far as possible.

5. It is unnecessary to summarize the history of the draft articles prior to the report of the Commission on its twenty-fourth session.<sup>3</sup> It is sufficient to refer to the summary of the Commission's proceedings and the documentation mentioned in paragraphs 14 to 24 of that report. Chapter II of the report, which contains, *inter alia*, the draft articles and the Commission's commentaries on them, was discussed during the debate in the Sixth Committee on the report of the International Law Commission at the twenty-seventh session of the General Assembly in 1972 (agenda item 85). The Sixth Committee considered this item at its 1316th to 1329th and 1336th to 1339th meetings, held from 28 September to 11 October and from 18 to 20 October 1972. The summary records of those meetings contain the greater part of the comments made by delegations on the draft articles. The comments are summarized in the report of the Sixth Committee.<sup>4</sup> That report was considered at the 2091st plenary meeting of the General Assembly which, upon the recommendation of the Sixth Committee, adopted resolution 2926 (XXVII) of 28 November 1972 on the report of the International Law Commission. By the resolution, the General Assembly welcomed the draft articles prepared by the International Law Commission on succession of States in respect of treaties and recommended that the Commission should proceed with further consideration of that topic in the light of comments received from Member States on the present draft. It should be noted that relevant comments were made, by way of explanation of vote on the resolution, by the delegations of Somalia, Ethiopia and Kenya.

6. At its twenty-fifth session in 1973, the Commission did not consider the draft articles on succession of States in respect of treaties, but, in its report on the work of that session, the Commission expressed the intention to complete at the next session the second reading of the whole of the draft articles on this topic.<sup>5</sup> The report of the Commission (agenda item 89) was considered by the Sixth Committee at its 1396th to 1407th and 1414th to 1416th meetings, held from 25 September to 4 October and from 11 to 16 October 1973. Although the draft articles as such were not before the Committee, a number of comments were made by delegations. These are summarized in the report of the Sixth Committee.<sup>6</sup> That report was presented to the General Assembly at its 2186th plenary meeting on 30 November 1973 and the Assembly thereupon adopted resolution 3071 (XXVIII) to which reference has already been made.<sup>7</sup>

7. By 1 March 1974 written comments had been received from the Governments of the following 10 Member States: Austria, Czechoslovakia, Denmark, German Democratic Republic, Poland, Somalia, Sweden, Syrian Arab Republic, United Kingdom of Great Britain and

<sup>1</sup> For all references to the draft articles and commentaries, see *Yearbook . . . 1972*, vol. II, pp. 230 *et seq.*, document A/8710/Rev.1, chap. II, C.

<sup>2</sup> *Yearbook . . . 1965*, vol. II, p. 3, document A/CN.4/177 and Add.1 and 2.

<sup>3</sup> *Yearbook . . . 1972*, vol. II, p. 219, document A/8710/Rev.1.

<sup>4</sup> *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, sect. III, B.

<sup>5</sup> *Yearbook . . . 1973*, vol. II, p. 231, document A/9010/Rev.1, para. 178.

<sup>6</sup> *Official Records of the General Assembly, Twenty-eighth Session, Annexes*, agenda item 89, document A/9334, sect. III, G, 1.

<sup>7</sup> See para. 1 above.

Northern Ireland, United States of America.<sup>8</sup> Comments had also been received in a letter dated 30 April 1973 addressed to the Secretary-General of the United Nations by the Prime Minister and Minister of Foreign Affairs of Tonga, at that time a non-member State. At the request of the Chairman of the Commission, the letter was circulated to members of the Commission during its twenty-fifth session.<sup>9</sup>

#### B. ARRANGEMENT OF THE PRESENT REPORT

8. Following the introduction contained in section I, the remainder of the present report consists of:

Section II: Observations on the draft articles as a whole;

Section III: Observations on the specific provisions of the draft articles;

Section IV: The problem of procedures for the settlement of disputes concerning interpretation and application of a convention based on the draft articles.<sup>10</sup>

To ensure continuity and ease of reference, the sub-headings in section II are based on those used for the corresponding passages in the 1972 report of the Sixth Committee.<sup>11</sup>

9. In section II, maximum use is made of the summaries in that report and in the 1973 report of the Sixth Committee<sup>12</sup> of the comments made by delegations at the twenty-seventh and twenty-eighth sessions of the General Assembly. The written comments submitted by each Government will be recorded individually. In section III so far as feasible, comments will be attributed specifically to the States on whose behalf they were made whether orally or in writing. In some instances, however, it may be difficult to reflect accurately the views expressed by delegations because of the natural consequences of oral expression and the condensation of speeches in summary records. The Special Rapporteur has done his best to extract the views of delegations from the summary records of the Sixth Committee, but wishes to apologize in advance for any errors or omissions that he may have made in that regard.

#### II. Observations on the draft articles as a whole

10. From the statements made at the twenty-seventh and twenty-eighth sessions of the General Assembly, it is plain that the provisional draft articles contained in the report of the International Law Commission on the work of its twenty-fourth session are regarded as a

<sup>8</sup> For the text of the written comments received from Governments of Member States, see below, pp. 313-330, document A/9610/Rev.1, annex I.

<sup>9</sup> Document ILC (XXV)/Misc.2.

<sup>10</sup> The Special Rapporteur did not find it feasible or expedient to complete this section of the report, but, if required, will submit a separate report on the settlement of disputes in connexion with the proposed convention.

<sup>11</sup> See *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, sect. III, B, 1.

<sup>12</sup> See foot-note 6 above,

sound basis for the further work of the Commission and the production of a set of draft articles which are likely to prove generally acceptable. There has been much praise for the high quality of the work already done and for the excellence of the commentaries. But, in the opinion of the Special Rapporteur, this does not mean that there is no room for improvement in the light of the comments made by delegations and by Governments. Bearing in mind the general approbation of the provisional draft articles, it is now the function of the Special Rapporteur to set out those comments systematically and to submit his own observations and proposals.

#### A. IMPORTANCE OF AND NEED FOR THE CODIFICATION OF THE TOPIC

##### *Comments of Governments*

##### *Oral comments*

11. According to the 1972 report of the Sixth Committee,<sup>13</sup> several delegations to the twenty-seventh session of the General Assembly stated that the greatest merit of the provisional draft articles was that they took account of the principles of international law enshrined in the Charter, particularly of the principle of self-determination and the principle of the sovereign equality of States, as well as of the realities of contemporary international life. It was said that the draft was the more remarkable because the task of codification was particularly difficult in the field where there was no general doctrine, and State practice and custom had not yet produced well established and consistent precedents. Gaps and conflicting views had obliged the Commission to make certain innovations and to creative work with a view to finding appropriate and balanced solutions to the problems involved. The draft articles prepared by the Commission, which contained elements of codification as well as of progressive development, were intended "to lay down practicable and detailed provisions which would introduce uniformity and clearness in the sparse present rules, develop them and fill the existing lacunae, taking into consideration the interests of the States as well as those of the international Community".<sup>14</sup> This generally favourable approach did not, however, mean that the draft articles were free from criticism.

Some delegations considered that the codification of the topic of succession in respect of treaties was an urgent task, because certain additions were still needed to the codification of the law of treaties embodied in the 1969 Vienna Convention on the Law of Treaties<sup>15</sup> and mentioned that the draft articles constituted a link between the law of treaties and the law of the succession of States. Several representatives underlined the special

<sup>13</sup> See *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, paras. 24-33.

<sup>14</sup> *Ibid.*, para. 26.

<sup>15</sup> For all references to the Vienna Convention on the Law of Treaties (referred to hereafter as "the Vienna 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.

importance of the draft articles for the newly independent States. They considered that the Commission had rightly concentrated on the newly independent States and proceeded with appropriate reference to the views of States which had achieved independence since the Second World War. They recalled that the process of decolonization was far from complete. But they acknowledged that the draft articles also contained important provisions concerning the uniting, dissolution and separation of States. Other delegations considered that the draft articles paid too much attention to the problem of newly independent States, at a time when the era of decolonization was drawing to a close, at the expense of succession problems of the future. In their view, the provisions of the draft relating to the uniting, dissolution and separation of States should be developed in the light of the practical needs of the future and due consideration given to new forms of association of States such as economic integration units or fiscal unions. Some delegations said that, as only few dependent territories remained, the topic had to a great extent lost its practical importance.

#### *Written comments*

12. *Austria.* As divergent views on the present topic have in the past been expounded by eminent scholars of international law, the Government of Austria considers that it is an important task to arrive at a solution of the problems arising in connexion with the succession of States in respect of treaties which will gain as widespread an acceptance as possible by the international community.

*German Democratic Republic.* The Government of the German Democratic Republic considers with regard to State succession in general that it is a matter important for the development of international relations, both as a result of national liberation and social revolution and of the uniting, separation or dissolution of States. Future rules on succession of States should facilitate the entry into international relations of the successor State and should therefore be such as to enable the latter to enjoy its rights as a sovereign, equal State without hindrance or delay. At the same time it is in the interest of all States that cases of States succession should not disturb international treaty and other relations which were established in accordance with the principles of international law in force and that the previous state of such relations should be maintained.

*Sweden.* The Swedish Government regarded the draft articles and the commentaries pertaining thereto as a most valuable contribution to the study of a difficult and vital problem in international law and organization. The Swedish Government noted that the Commission had given special attention to the practice of the newly independent States but had observed that, as the era of decolonization was nearing its completion, it was in connexion with other cases that in future problems of succession were likely to arise. In view of that forecast, which was shared by the Swedish Government, it seemed somewhat impractical to let rules related to a temporary and perhaps exceptional situation dominate a draft of articles intended for future application over a long period of time.

The Swedish Government added,

Moreover, the draft articles on newly independent States hardly solve the problem to what extent treaties concluded by predecessor States are still valid for States which have achieved independence since the Second World War. They rather tend to confirm the prevailing uncertainty in that respect. The General Assembly's wishes might better be met by seeking a separate solution to treaty problems related to succession connected with decolonization, *i.e.*, by an *ad hoc* settlement of an *ad hoc* situation.

#### *Observations and proposals of the Special Rapporteur*

13. In the opinion of the Special Rapporteur, there is no doubt about the importance of and need for codification (including progressive development) of the topic of succession of States in respect of treaties. This is so both from the juridical and the practical point of view. The topic involves a significant aspect of the law of treaties whose codification is needed as an important step towards completion of the codification in the Vienna Convention. From the practical point of view, the facts that there are comparatively few dependent territories remaining and that the period of decolonization is drawing to a close in no way diminishes the importance of clarifying the legal position, at least for those territories which have not yet attained independence. For so many States that have acquired independence since the Second World War the whole question of succession in respect of treaties has been beset by doubt and complexity. The fact that comparatively few territories have not yet attained independence does not diminish the importance of making the way as clear and simple as possible for them. The fact that the era of decolonization is drawing to a close only underlines the urgency of the task of codification so far as dependent territories are concerned.

14. On the other hand, many of the comments have brought out the point that in a codification, which must look to the future, all aspects of the topic should be considered with equal care and thoroughness. Every effort should be made to ensure that the articles concerning cases other than that of newly independent States are as satisfactory in substance and as well drafted as the articles concerning those States. It is also necessary, in the opinion of the Special Rapporteur, to ensure that all relevant cases are covered without, however, including cases that do not properly fall within the concept of "succession of States". In this connexion, certain comments have mentioned cases of social revolution and new forms of association of States such as economic integration units or fiscal units. While such cases will, of course, have to be considered seriously, it will be more convenient to examine them subsequently in the present report, particularly in connexion with the scheme of the draft.<sup>18</sup>

15. The Swedish Government, in its written comments, has suggested that the General Assembly might seek a separate solution to treaty problems related to succession connected with decolonization "by an *ad hoc* settlement of an *ad hoc* situation". The Special Rapporteur believes that such an approach would have to face great political obstacles and would run counter to the wishes of the large majority of Member States. The Special Rapporteur

<sup>18</sup> See below paras. 42-48 and 50-57.

does not advise the adoption of any such approach. On the contrary, he proposes that the articles on newly independent States should remain as part of the draft and that, in accordance with the wish of the General Assembly expressed in resolution 3071 (XXVIII), the International Law Commission should complete at its twenty-sixth session the second reading of "the draft articles on succession of States in respect of treaties adopted at its twenty-fourth session".

## B. SOURCES OF THE DRAFT ARTICLES

### *Comments of Governments*

#### *Oral comments*

16. Little need be said under this heading. There was a large measure of approval among delegations at the twenty-seventh session of the General Assembly for the sources on which the Commission had drawn. However, a few of the comments made at that session are worth mentioning. Certain representatives stressed that a sharp distinction between the value of the earlier and later precedents should be avoided. The view was also expressed that the practice of depositaries was purely administrative in character and could not be regarded as being binding on States parties or giving rise to a customary rule. Finally, some doubts were expressed whether full justice was done to the many occasions when, without controversy, the States concerned had continued to apply treaties, particularly in the bilateral field.<sup>17</sup>

#### *Written comments*

17. Remarks about sources were made in some of the written comments of Governments, such as those of the German Democratic Republic, Sweden and the United Kingdom, but it is more convenient to record them in relation to the context in which they were made. This will be done.

### *Observations and proposals of the Special Rapporteur*

18. While the comments made on sources should and will be borne in mind, it is not considered that they require any observations or proposals by the Special Rapporteur.

## C. THE CONCEPT OF "SUCCESSION OF STATES"

### *Comments of Governments*

19. According to the 1972 report of the Sixth Committee

All representatives who referred to the matter, shared the Commission's view that analogies drawn from municipal law concepts of succession should be avoided. They agreed with the use, for the purpose of the draft articles, of the expression "succession of States" to denote simply the fact of the replacement of one State by another, thus excluding all questions of rights and obligations as a legal incident of that change.<sup>18</sup>

<sup>17</sup> *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, para. 34.

<sup>18</sup> *Ibid.*, para. 35.

### *Observations and proposals of the Special Rapporteur*

20. Apart from stressing the importance of these comments as confirming the approach adopted by the Commission, the Special Rapporteur has no observations or proposals to make in this connexion.

## D. RELATIONSHIP BETWEEN SUCCESSION IN RESPECT OF TREATIES AND THE GENERAL LAW OF TREATIES

### *Comments of Governments*

#### *Oral comments*

21. A number of delegations agreed that State practice afforded no convincing evidence of any general doctrine by reference to which the various problems of succession in respect of treaties would find their appropriate solution and that the task of codification appeared to be rather one of determining within the law of treaties the impact of the occurrence of a "succession of States" than *vice versa*. They endorsed the Commission's approach that the provisions of the Vienna Convention should be taken as an essential framework of the law relating to succession of States in respect of treaties. However, one delegation expressed the view that the analogy with the Vienna Convention was carried too far and that the statement (which is reflected in the two preceding sentences) contained in paragraph 32 of the Commission's report was not acceptable.<sup>19</sup>

#### *Written comments*

22. *Denmark*. In the context of general approval of the draft articles, the Danish Government mentioned that they underscored the relationship with the Vienna Convention.

*Poland*. The Government of the Polish People's Republic deemed that the question of succession of States in respect of treaties should be considered with due regard to the provisions of the Vienna Convention.

*United Kingdom*. The United Kingdom Government supported the decision of the Commission to take the provisions of the Vienna Convention as an essential framework of the law relating to succession of States in respect of treaties.

*United States of America*. The Government of the United States stated that the decision of the Commission to maintain, particularly in part I (General Provisions) a substantial parallelism with the Vienna Convention was a sensible one. The United States Government also stated that "the unification of international law is promoted by the adoption of substantially identical texts to the greatest extent that varying subject-matters permit".

### *Observations and proposals of the Special Rapporteur*

23. Although the proposition has been stated in different ways, there has been general approval for the approach of the Commission in taking the Vienna Convention as an essential framework of the law relating to succession

<sup>19</sup> *Ibid.*, para. 36.

of States in respect of treaties. The Special Rapporteur shares the view that the task of codification in this field is one of determining within the law of treaties the impact of the occurrence of a "succession of States" rather than *vice versa*. Nevertheless, in his opinion, heed should be taken of the warning not to carry too far the analogy with the Vienna Convention. In other words, the Commission should be prepared to depart from the exact wording or form of the Vienna Convention if this should be necessary having regard to the particular requirements of the subject-matter of the draft articles now under consideration.

#### E. THE PRINCIPLE OF SELF-DETERMINATION AND THE LAW RELATING TO SUCCESSION IN RESPECT OF TREATIES

##### *Comments of Governments*

###### *Oral comments*

24. The comments of delegations on the implications of the principle of self-determination made at the twenty-seventh session of the General Assembly are extensively summarized in the report of the Sixth Committee,<sup>20</sup> to which members of the Commission are respectfully referred. The main implication of the principle of self-determination has been the clean slate principle chosen by the Commission as the basic principle for the provisions of the draft articles relating to newly independent States. The clean slate principle did not involve rejection of the continuity of treaties, but did imply that the newly independent State was entitled to choose which treaties concluded by its predecessor would be regarded as continuing and which would be considered as terminated. Although some delegations took the view that the "clean slate" principle might better be based on State sovereignty, and views varied as to the extent to which the application of the clean slate principle should be limited in the draft articles, most delegations accepted the principle as understood by the Commission and reflected in the draft articles. The clean slate principle was also supported by some delegations at the twenty-eighth session of the General Assembly.<sup>21</sup>

25. At the twenty-seventh session of the General Assembly a few delegations expressed reservations about the application given to the clean slate principle by the Commission, especially in part V of the draft which excluded "dispositive", "localized" or "real" treaties from the scope of the clean slate principle.<sup>22</sup> On the other hand, certain representatives considered that the "clean slate" principle had also a natural application in cases concerning a change of régime in a State as a result of a social revolution which might cause such a State to modify radically its position with regard to its international relations. They could therefore not accept

the restrictive application of that principle in the draft articles to newly independent States only.<sup>23</sup>

26. Opposition to reliance on the clean slate doctrine was expressed by the Swedish delegation of 26 September 1973 in the Sixth Committee at the twenty-eighth session of the General Assembly. Since the views of the Swedish Government have been restated in its written comments, the summary of the comments made by the Swedish delegation will be brief. The representative of Sweden in the Sixth Committee said that his Government was not convinced that State practice was consistent enough to form the basis of "firm and clear" customary law in that matter, and that the Commission itself had stated that conflicting views had been expressed and followed in practice. In his Government's view, with respect to multilateral treaties and certain types of bilateral treaties there were factors that pointed in the direction of a need for continuity in treaty relations rather than for a clean slate. He questioned the application given to the principle of self-determination in the case of newly independent States. For the reasons he had given, his Government considered that it might be worth while attempting to create a system or model based not on the clean slate doctrine but on the opposite principle that a new State continued to be bound by treaties concluded by the predecessor State, coupled with an extensive right of the new State to denounce undesirable treaties. He said that the question of the legal consequences of succession of States was, as a whole, one of the most controversial fields of international law and that State practice was inconsistent and obscure and doctrine was confusing owing to an abundance of conflicting views. He regarded codification in this field as mainly a legislative task where abstract principles and juridical logic were less important than common sense and a will to conciliate conflicting interests and to maintain friendly and orderly relations within the international community.<sup>24</sup>

###### *Written comments*

27. *Czechoslovakia.* The Government of the Czechoslovak Socialist Republic, in giving consideration to the draft articles, took a favourable view, in particular, of the clean slate principle on which the substance of the draft was based, under which a newly independent State is not committed to the treaties concluded by former metropolitan powers. In this context, the Czechoslovak authorities also drew attention to "States which came into being as a result of a social revolution".

*Denmark.* The Danish Government when expressing the general acceptability of the draft articles stated,

Particularly the implications of the "clean slate" principle in relation to bilateral treaties should today—in the light of the practice of States and the basic principle of equal rights and self-determination of peoples—be considered accepted customary rules of international law. This view is also in keeping with the practice observed so far in Denmark when dealing with specific cases of treaty succession.

<sup>20</sup> *Ibid.*, paras. 37-49.

<sup>21</sup> See *Official Records of the General Assembly, Twenty-eighth Session, Sixth Committee*, 1401st meeting, para. 13 (Kenya), and *ibid.*, 1406th meeting, para. 25 (Zambia) and para. 36 (Indonesia).

<sup>22</sup> *Ibid.*, *Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, paras. 43-44.

<sup>23</sup> *Ibid.*, para. 38.

<sup>24</sup> *Ibid.*, *Twenty-eighth Session, Sixth Committee*, 1398th meeting, paras. 12-18. See also the report of the Sixth Committee (*ibid.*, *Annexes*, agenda item 89, document A/9334, para. 119).

*German Democratic Republic.* In the view of the Government of the German Democratic Republic, the clean slate principle in cases of succession resulting from decolonization is a basically correct point of departure in this context.

*Poland.* In the opinion of the Government of the Polish People's Republic, the Commission rightly applied the clean slate principle in the case of the newly independent States—as required by the principle of self-determination of nations and sovereignty of States.

*Somalia.* The comments of the Government of the Somali Democratic Republic, though they are in fact related to the application of the clean slate principle, are concerned with part V of the draft articles dealing with boundary régimes and other territorial régimes established by treaty. Accordingly, they will be considered in the context of part V.

*Sweden.* The Swedish Government commented that more than half of the draft articles concerned State succession in the case of newly independent States. The Government recalled that the Commission had given special attention to the practice of the newly independent States referred to in General Assembly resolutions 1765 (XVII) of 20 November 1962 and 1902 (XVIII) of 18 November 1963. On the other hand, the Commission had observed that the era of decolonization was nearing its completion and that it was in connexion with other cases—such as succession, dismemberment of an existing State, the formation of unions of States and the dissolution of a union of States—that in the future problems of succession were likely to arise. The Swedish Government shared this forecast, and commented that it seemed somewhat impractical to let rules related to a temporary and perhaps exceptional situation dominate a draft of articles intended for future application over a long period of time. Moreover, the draft articles tended to confirm the prevailing uncertainty and hardly solved the problem of succession in respect to treaties for newly independent States. The Swedish Government suggested that the General Assembly's wishes might better be met by seeking a separate solution to treaty problems related to succession connected with decolonization, i.e., by an *ad hoc* settlement of an *ad hoc* situation.

The Swedish Government observed that the relevant draft articles were based on a so-called clean slate doctrine and that article 11 and the other articles provided for newly independent States a combination of non-obligation and the right to establish status as a party (in some cases without, in others with, the consent of other parties) which might prolong the uncertainty regarding the new State's treaty relations instead of offering workable solutions.

According to the Swedish Government, for the Commission the clean slate doctrine is a codification of existing international law and the Commission considers that the doctrine derives from State practice and is confirmed by the principle of self-determination. In the view of the Swedish Government, however, the description of practice given in the Commission's commentaries rather shows that conflicting views have been expressed

and followed in practice, and that consequently practice is far from being consistent.

The Swedish Government criticized the extent to which the Commission relied on the practice of the Secretary-General and other depositaries, which could not in itself bind the parties. Silence by a party to a treaty when notified that a new State did not consider itself obligated by the treaty did not necessarily imply that the party agreed or conceded that the new State was not bound. In other words, it was doubtful whether an adequate *opinio juris* could be deduced from the practice of depositaries and parties in this matter. With respect to multilateral treaties, such as the Red Cross Conventions, the practice of newly independent States did not seem to be wholly consistent. Similarly, the Swedish Government commented, the Commission stated that there was a "considerable measure of continuity found in practice" in regard to certain categories of bilateral treaties. In these circumstances, it was difficult to see how a clean slate principle could be derived from current State practice with respect to bilateral treaties.

Nor did it seem possible to base the clean slate doctrine on the principle of self-determination, an admittedly vague principle the substance of which is that nations of peoples have a right to political independence. It was not apparent why the principle of self-determination should require clean slate for newly independent States and for States emerging by separation (article 28) but not for States created by uniting of States or dissolution of a State (articles 26 and 27).

If, as seemed to be the case, practice and principles such as self-determination of peoples did not give sure guidance, the task to be accomplished seemed to be not so much codification of customary law as progressive development. Accordingly, practical considerations could and should be allowed to influence the preparation of the written rules.

The Swedish Government maintained that, from the practical point of view, the application of the clean slate doctrine was likely to cause serious inconvenience. There would be uncertainty for the new State and it was arguable that the doctrine would not be in conformity with the general interest of States.

The Swedish Government suggested that, in view of these considerations, it might be worth while attempting to create a system or model based on the principle that the new State continues to be bound by the treaties concluded by the predecessor State. The application of that principle would seem to maintain stability and clarity in treaty relations. It might then be possible to incorporate an extensive right to denounce undesirable treaties and to provide that certain categories of treaties, such as treaties of alliance and military treaties, would not be binding on the successor State. There were obviously many other features and details of such a system which would have to be studied and worked out.

In the view of the Swedish Government, the establishment of an alternative model on these lines would be a great help to Governments in deciding what attitude to take with respect to the very difficult problems related to State succession in respect of treaties. Without express-

ing a definitive opinion on the 'clean slate' model or on an opposite system, the Swedish Government would welcome an alternative draft of articles based on the opposite assumption that the new State inherits the treaties of the predecessor (possibly with the exception of certain categories) but has the right in a manner to be regulated in the draft to denounce such treaties (with the exception of "territorial" treaties). Such an alternative would simplify the drafting of rules for the future. Many of the provisions contained in the part dealing with "newly independent States" (such as, e.g., those on "provisional application") would be unnecessary, and this part and the part dealing with "separation of part of a State" could be combined, which would eliminate a distinction which seems rather artificial or in any case difficult to define.

*United Kingdom.* The United Kingdom Government, referring to the introduction to the draft articles,<sup>25</sup> noted that the principles of the United Nations Charter, and in particular that of self-determination, were considered by the Commission to have "implications" in the modern law concerning succession in respect of treaties, the main implication in its opinion being "to confirm" the clean slate principle. The United Kingdom Government continued to have doubts as to whether full weight had been given to the many instances in which, without controversy, States concerned had continued to apply treaties after a succession of States. Where there had been controversies, these had usually been satisfactorily resolved without too much difficulty. The United Kingdom Government commented that, whilst a succession of States marked a time of change, it was usually in the interests of all States concerned to maintain as much of the essential fabric of international society (in which treaties played an important part) as was consistent with the change. This was especially the case with multilateral treaties of a law-abiding character or which established international standards.

*United States of America.* The Government of the United States considered that the draft articles constituted a sound basis for consideration of this difficult topic and supported the general approach taken in part III of the draft articles, regarding newly independent States.

#### *Observations and proposals of the Special Rapporteur*

28. In the context of the clean slate principle, certain delegations commented that it had a natural application in cases concerning a change of régime in a State as a result of a social revolution.<sup>26</sup> Written comments in a similar sense were made by Czechoslovakia and the German Democratic Republic. As indicated above,<sup>27</sup> these comments will be considered later.<sup>28</sup>

29. The reasoned arguments presented in the oral and written comments of the Swedish Government, as well as

the doubts expressed by the United Kingdom Government are, in principle, worthy of most careful consideration.<sup>29</sup> Indeed, in the opinion of the Special Rapporteur it cannot be said with confidence that there is an established and generally accepted rule of customary international law that a newly independent State is in general free from obligation in respect of its predecessor's treaties. Nevertheless, the tendency of modern practice and doctrine has been in that direction, and the clean slate metaphor as understood and applied by the Commission is more in accordance with than contrary to that practice and doctrine. Moreover, overwhelming support for the clean slate doctrine has been expressed by Member States. On the other hand, the Swedish Government does not definitively reject the clean slate model, nor does the United Kingdom Government go beyond the expression of doubts whether the principles of the Charter of the United Nations, in particular that of self-determination, and practice concerning the continuity of treaties have confirmed the clean slate principle. Thus, the weight of opinion is clearly in favour of the clean slate principle rather than that of the continuity of treaty rights and obligations in the case of newly independent States.

30. Nevertheless, this approach seems to be dictated as much by practical considerations as by requirements of law. Therefore, there is room for consideration of the suggestion made by the Swedish Government that it might be worth while attempting to create a system or model based on the principle that the new State continues to be bound by the treaties concluded by the predecessor State. However, the Special Rapporteur does not think that it would be appropriate for him to prepare an alternative set of draft articles on the lines contemplated by the Swedish Government without a decision of the Commission to that effect. He will, of course, be willing to do his best to prepare such a set of draft articles if that should prove to be the wish of the Commission. But having regard to the comments of Governments, that is not a course that he could recommend. Moreover, it would not be consistent with the decision of the Commission, endorsed by the General Assembly, to complete the second reading of the draft articles at its twenty-sixth session. The alternative would involve a major departure of principle and detail from the Commission's draft articles and the preparation of the alternative set of draft articles would take so much of the Commission's time that it would imperil the completion of the draft. Accordingly, the Special Rapporteur proposes that the Commission should not accede to the suggestion of the Swedish Government but should proceed with the detailed examination of the articles already drafted on the basis of the clean slate principle.

<sup>25</sup> *Yearbook . . . 1972*, vol. II, p. 227, document A/8710/Rev.1, paras. 35-36.

<sup>26</sup> See above para. 25.

<sup>27</sup> See para. 14.

<sup>28</sup> See paras. 50-57 below.

<sup>29</sup> In its letter dated 30 April 1973 (see above, para. 7 and footnote 9), the Government of Tonga also criticizes the extent to which the International Law Commission has relied on the clean slate doctrine with special reference to draft article 11. Although account has been taken of the observations made by the Government of Tonga, it is more convenient to consider them in detail elsewhere, e.g., in relation to article 11 (see paras. 215-217 below).

## F. FORM OF THE DRAFT

*Comments of Governments**Oral comments*

31. According to the 1972 report of the Sixth Committee, most of the delegations who referred to this question considered that to cast the results of the study in the form of a group of draft articles which could eventually serve as a basis for the conclusion of a convention was the most appropriate way of codifying the rules of international law relating to succession of States in respect of treaties. Some delegations, however, underlined the anomaly of giving a conventional form to the codification of the topic, since a succession of States in most cases brings into being a new State which under the clean slate principle could not be bound by the convention until it became a party thereto in its own behalf. This apparent anomaly was explained by other delegations by reference to the interpenetration between customary and conventional international law and the working of the codification process. Moreover, prior knowledge derived from a convention would be helpful to the authorities of a new State and, since the proposed convention was designed to leave all options open to newly independent States, it was unlikely that they would be reluctant to participate in it.<sup>30</sup>

*Written comments*

32. *Denmark.* The Danish Government commented that the draft articles might be used in the preparation either of a convention or of a code which is not legally binding, but considered that it seemed preferable to aim at the adoption of a legally binding convention. The fact that a convention, as a result of the general rule on non-retroactivity of treaties, would normally not be binding upon a successor State in respect of its own terms of succession was hardly a sufficient argument against using the convention as an instrument, as pointed out by the International Law Commission itself in the report on the work of its twenty-fourth session.<sup>31</sup> In the opinion of the Danish Government, a convention rather than a non-binding code might serve more adequately to determine what would be considered generally accepted international law regarding succession in respect of treaties and consequently be a guide to all States. A convention would, moreover, in any event be binding in the relationships which with respect to State succession would emerge between a predecessor State and third States when those States had become parties to the convention. Finally, the Danish Government suggested that consideration might be given to the insertion in a prospective convention of an optional clause on retroactivity relative to new States.

*German Democratic Republic.* The Government of the German Democratic Republic stressed the close interrelation between succession in respect of treaties and succes-

sion in respect of matters other than treaties and expressed itself in favour of a single convention comprising both aspects of State succession; and considered that, if there were separate texts, at least uniform principles should be established in both of them.

*Poland.* The Government of the Polish People's Republic supported the codification of norms regulating succession of States in respect of treaties in the form of a convention, as the provisions of the codification being drafted should enjoy a legal standing equal to the Vienna Convention.

*United Kingdom.* The United Kingdom Government favoured the drawing up by the Commission of a final set of draft articles for a convention. Whilst noting the temporal element in any codification and development of the law of succession of States, they considered a convention to be the best type of instrument in the present state of international society. In this connexion it was noted that the International Court of Justice in some of its recent judgements had cited the Vienna Convention even though it was not in force and when in force would not be retrospective.

*Observations and proposals of the Special Rapporteur*

33. The main question that has been raised in connexion with the form of the codification of the law relating to succession of States in respect of treaties is whether it should be effected in the form of a convention. It will be appropriate for the Commission to make its recommendations on this question, as indicated in its report,<sup>32</sup> when it has completed the second reading of the draft articles. As the second reading should be completed at the forthcoming twenty-sixth session, it will be appropriate for the Commission to make its recommendations on this matter before the end of that session.

34. The principle objection to embodying the draft articles in a convention, recognized in the Commission's report, and in a number of comments by Governments, is a theoretical one. The objection, as expressed by the Commission itself, is,

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 State until the latter had become a party.<sup>33</sup>

35. There can be no doubt that from a theoretical point of view this objection is a cogent one in the sense that a convention on succession in respect of treaties would, by reason of the intrinsic nature of the situation, not have the direct binding effect that would normally flow from a convention. Nevertheless, even from this point of view, a convention would have the merit that it would regulate and, if well drafted, clarify the relevant treaty relations between the predecessor State and other States parties to the treaties in question on the assumption that they were

<sup>30</sup> *Official Records of the General Assembly, Twenty-seventh Session, Annexes, agenda item 85, document A/8892, paras. 50-51.*

<sup>31</sup> *Yearbook . . . 1972, vol. II, p. 228, document A/8710/Rev.1, para. 41.*

<sup>32</sup> *Ibid.*, pp. 227-228, document A/8710/Rev.1, para. 39.

<sup>33</sup> *Ibid.*, p. 228, document A/8710/Rev.1, para. 41.

all parties to the convention. Thus, to this limited extent, a convention would have direct legal value for the parties to it.

36. On the other hand, it should be noted that most of the Governments which have commented on the draft articles have favoured the form of a convention. There are basically three reasons for this attitude. First, the articles in the form of a convention would provide guidance to new States in dealing with questions arising from the succession of States. This reason is given, *inter alia*, in the Commission's report.<sup>34</sup> In itself, this reason does not seem to be very cogent, because much the same might be said of a declaratory code or a model. However, experience has shown that a convention is likely to be regarded as more authoritative in character and, accordingly, to be more effective as a guide.

37. Secondly, the articles, if adopted in the form of a convention, might contribute to the establishment of generally accepted rules of international law. The extent to which this might in fact prove to be the case would depend on the intrinsic merit of the draft articles, as reflecting customary international law or as providing sensible and acceptable solutions in areas of doubt, and on the support consequently given by States to the convention. If the majority of States became parties to the convention within a reasonable period of time, the establishment of a convention would have proved worthwhile. This, if the convention form is to be recommended, is an added incentive to try to produce a set of draft articles which over all is likely to appeal to Governments. On the assumption that a convention on succession of States in respect of treaties would receive wide support, the possible contribution to the development of customary international law does appear to be a good reason for adopting this form.

38. Thirdly, there has been general support for the view that the draft articles on succession of States in respect of treaties should be drafted on the basis of or in parallel with the provisions of the Vienna Convention. If so, it may be right to regard the articles on succession of States in respect of treaties as supplementary to the provisions of the Vienna Convention. In that case, it would be appropriate to give these articles the same status as the Vienna Convention, i.e., to establish them in the form of a convention.

39. While recognizing the unavoidable shortcomings in the legal effects of a convention on succession of States in respect of treaties, having regard to the reasons mentioned above, the Special Rapporteur is of the opinion that it would be useful for the draft articles on this topic to be incorporated in a convention in the hope that it will receive a wide measure of support from States. Accordingly, he proposes that the Commission should continue with the preparation of the draft articles in a form suitable for incorporation in a convention and that in due course the Commission should recommend the draft to Members with a view to the conclusion of a convention.

40. It remains to consider the suggestion, made in the written comments of the Danish Government,<sup>35</sup> that an

optional clause on retroactivity relative to new States might be inserted in a prospective convention. It is not clear to the Special Rapporteur exactly what would be the nature and content of such a clause, or whether there is any need for an *optional* clause of a *general* character. The draft articles on succession of States in respect of treaties, while they contain articles 3 and 4 corresponding respectively to articles 3 and 5 of the Vienna Convention, do not contain a general clause on non-retroactivity corresponding to article 4 of that Convention. It appears that the technique adopted in the draft articles on succession of States in respect of treaties is to provide for retroactive effect in each of the articles as and when required. For example, paragraph 3 of draft article 9 provides that, in cases falling under paragraph 1 or 2 of the article, "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". The point is stressed in paragraph 13 of the commentary on draft article 9 which says,

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 paragraph 1 or 2 of the article, will be so considered *as from the date of the succession of States*.

The provision would apply to the successor State even if (which is quite likely to be the case) it became a party to the convention on succession of States in respect of treaties at a date later than the date of the succession of States. If the successor State exercised one of the options provided by paragraph 1 or 2 of the article with respect to a particular treaty the effect would be retroactive to the date of the succession of States. This, in the view of the Special Rapporteur, is implicit in the provisions of paragraph 3 of draft article 9, and, in relation to cases falling within that article, it would be unnecessary and confusing to include in the convention an article giving a successor State a general right to opt for retroactivity.

41. Nevertheless, in the light of the Danish Government's comments, it will be necessary to consider whether each specific article in the draft contains the element of retroactivity required to ensure the proper continuity of treaty relations for the successor State. Consideration should also be given to the question whether the draft articles should themselves contain an option of the kind contemplated in paragraph 1 of draft article 9, i.e., for a successor State to consider itself a party to the convention if the predecessor State was already a party, and for that option, when exercised, to have effect so that the successor State is considered as a party to the convention from the date of the succession.

## G. SCOPE OF THE DRAFT

### *Comments of Governments*

#### *Oral comments*

42. According to the Sixth Committee's 1972 report,<sup>36</sup> the scope of the draft articles, as described in the Com-

<sup>34</sup> *Ibid.*

<sup>35</sup> See para. 32 above.

<sup>36</sup> *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, para. 52.

mission's report,<sup>37</sup> was generally endorsed at the twenty-seventh session of the General Assembly. One delegation, however, criticized the scope of the draft for having excluded treaties concluded by international organizations. In the Sixth Committee's report, the views of that delegation<sup>38</sup> are summarized in the following sense. The exclusion of treaties concluded by international organizations would leave outside the scope of the draft certain cases of succession resulting from the participation of States in certain hybrid unions, like customs unions and common markets. Such unions might obtain an exclusive right to enter into trade agreements, as in the case of EEC under the Treaty of Rome. Trade agreement partners of the individual States forming the union, prior to its establishment, might not be sufficiently helped by providing that they would always have a right to claim damages from the States entering into the union. They might have a real interest in obtaining some legal relationship with the successor organization. In such a context, a sharp distinction between treaties made by States and treaties made by international organizations would seem objectionable.

#### *Written comments*

43. No written comments were received.

#### *Observations and proposals of the Special Rapporteur*

44. It may be noted that, although the suggestion for the extension of the scope of the draft articles was made by the Netherlands delegation early in the debate in the Sixth Committee at the twenty-seventh session of the General Assembly, it was not supported by any other delegation either at that session or at the twenty-eighth session of the General Assembly or in the written comments of Governments.<sup>39</sup> Nevertheless, as in the case of other comments, it should be considered on its merits, bearing in mind of course the views of other Governments and of the General Assembly as a whole.

45. In this perspective, however, there are strong reasons for not pursuing the suggestion of the Netherlands delegation. As stated in the Commission's report, its decision in 1963 to limit its study to succession of States, as distinct from succession of Governments, was endorsed by the General Assembly and it followed that the draft did not deal with any questions concerning the succession of subjects of international law other than States, in particular international organizations. Thus,

<sup>37</sup> *Yearbook . . . 1972*, vol. II, p. 228, document A/8710/Rev.1, paras. 42-43.

<sup>38</sup> See *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, para. 53. For a fuller summary of the statement made the delegation in question (the Netherlands delegation), see the summary record of the relevant meeting of the Sixth Committee (*ibid.*, *Sixth Committee*, 1317th meeting, paras. 15-20).

<sup>39</sup> At the twenty-seventh session of the Assembly, however, the delegation of Uruguay wondered what the situation would be if a State renounced part of its obligations under bilateral treaties at the time when it joined an international organization and what would happen to bilateral economic treaties when a State decided to join a multinational economic organization (*ibid.*, 1318th meeting, para. 10).

the point was expressly called to the attention of the General Assembly, which, nevertheless, by resolution 3071 (XXVIII)<sup>40</sup> recommended that the Commission should complete "the second reading of the draft articles on succession of States in respect of treaties adopted at its twenty-fourth session". On a point so fundamental to the scope of the draft articles, no doubt the General Assembly would have indicated its intention if it had wished the articles to be extended to questions of succession relating to international organizations.

46. Moreover, the oral and written comments of Governments have shown general approval for the approach of the Commission taking the Vienna Convention as an essential framework of the law relating to succession of States in respect of treaties. The Vienna Convention is limited to treaties between States and does not extend to treaties concluded between States and international organizations or between international organizations. Accordingly, it would not be consistent with reliance on the Vienna Convention "as an essential framework" to extend the draft articles so as to comprise cases of "succession of international organizations in respect of treaties". Such an extension would be especially undesirable when the Commission itself has under study, as pointed out in its report, the question of treaties concluded between States and international organizations or between two or more international organizations which was then and still is in its early stages.

47. Finally, there are difficulties of principle in the way of the suggestion of the Netherlands delegation. The kind of "succession" contemplated would be different in character from the kind of "succession" contemplated in the draft articles. As at present drafted, according to article 2, paragraph 1 (b) "succession of States" means "the replacement of one State by another in the responsibility for the international relations of territory". "Replacement" seems to contemplate *complete* replacement and not *partial* transfer or conferment of powers to conclude treaties. The fact of succession by replacement is one thing: the conferment of exclusive powers in a limited field is something quite different. The legal consequences of giving an international organization exclusive powers to negotiate and conclude treaties either on its own behalf or on behalf of its members are likely to be regulated by the international instrument by which they are given. These consequences may vary from case to case. The mere fact that exclusive powers in a certain field are conferred on an international organization will not necessarily mean that the existing treaty obligations of the member States will be immediately and automatically terminated, or indeed that they will necessarily be terminated otherwise than through negotiation. This will depend on the terms of the treaty establishing the organization or conferring the relevant powers on it.<sup>41</sup> In principle, it is in that context that the States concerned should safeguard the legal position with respect to the other parties to any treaty that may be affected.

<sup>40</sup> See para. 1 above.

<sup>41</sup> The provisions touching this matter contained in the Treaty establishing EEC (done at Rome on 25 March 1957) are complex. The following are among the relevant articles:

48. For all these reasons, the Special Rapporteur considers that it would not be appropriate to accede to the suggestion made by the Netherlands delegation,

#### Article 2

It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.

#### Article 3

For the purposes set out in the preceding Article, the activities of the Community shall include, under the conditions and with the timing provided for in this Treaty:

...

(b) the establishment of a common customs tariff and a common commercial policy towards third countries;

...

(k) the association of overseas countries and territories with the Community with a view to increasing trade and to pursuing jointly their effort towards economic and social development.

...

#### Article 111

In the course of the transitional period and without prejudice to Articles 115 and 116, the following provisions shall apply:

1. Member States shall co-ordinate their commercial relations with third countries in such a way as to bring about, not later than at the expiry of the transitional period, the conditions necessary to the implementation of a common policy in the matter of external trade.

The Commission shall submit to the Council proposals regarding the procedure to be applied, in the course of the transitional period, for the establishment of common action and regarding the achievement of a uniform commercial policy.

2. The Commission shall submit to the Council recommendations with a view to tariff negotiations with third countries concerning the common customs tariff.

The Council shall authorise the Commission to open such negotiations.

The Commission shall conduct these negotiations in consultation with a special Committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it.

3. The Council shall, when exercising the powers conferred upon it under this Article, act during the first two stages by means of a unanimous vote and subsequently by means of a qualified majority vote.

4. Member States shall, in consultation with the Commission, take all necessary measures with the object, in particular, of adjusting their tariff agreements in force with third countries in order that the entry into force of the common customs tariff may not be delayed.

5. Member States shall aim at securing uniformity between themselves at as high a level as possible of their lists of liberalisation in regard to third countries or groups of third countries. For this purpose the Commission shall make any appropriate recommendations to Member States.

If Member States abolish or reduce quantitative restrictions in regard to third countries, they shall inform the Commission beforehand and shall accord identical treatment to the other Member States.

#### Article 112

1. Without prejudice to obligations undertaken by Member States within the framework of other international organisations, their measures to aid exports to third countries shall be progressively harmonised before the end of the transitional period to the extent necessary to ensure that competition between enterprises within the Community shall not be distorted.

On a proposal of the Commission, the Council, acting until the end of the second stage by means of a unanimous vote and sub-

and proposes that the Commission should adhere to the scope of the draft articles indicated in its report and for which provision is made in the draft articles.

#### H. SCHEME OF THE DRAFT

49. The 1972 report of the Sixth Committee deals with a number of points under the heading "Scheme of the

sequently by means of a qualified majority vote, shall issue the directives necessary for this purpose.

2. The preceding provisions shall not apply to such drawbacks on customs duties or charges with equivalent effect nor to such refunds of indirect charges including turnover taxes, excise duties and other indirect taxes as are accorded in connection with exports of goods from a Member State to a third country, to the extent that such drawbacks or refunds do not exceed the charges which have been imposed, directly or indirectly, on the products exported.

#### Article 113

1. After the expiry of the transitional period, the common commercial policy shall be based on uniform principles, particularly in regard to tariff amendments, the conclusion of tariff or trade agreements, the alignment of measures of liberalisation, export policy and protective commercial measures including measures to be taken in cases of dumping or subsidies.

2. The Commission shall submit proposals to the Council for the putting into effect of this common commercial policy.

3. Where agreements with third countries require to be negotiated, the Commission shall make recommendations to the Council, which will authorise the Commission to open the necessary negotiations.

The Commission shall conduct these negotiations in consultation with a special Committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it.

4. The Council shall, when exercising the powers conferred upon it by this Article, act by means of a qualified majority vote.

#### Article 114

The agreements referred to in Article 111, paragraph 2, and in Article 113 shall be concluded on behalf of the Community by the Council acting during the first two stages by means of a unanimous vote and subsequently by means of a qualified majority vote.

...

#### Article 228

1. Where this Treaty provides for the conclusion of agreements between the Community and one or more States or an international organisation, such agreements shall be negotiated by the Commission. Subject to the powers conferred upon the Commission in this field, such agreements shall be concluded by the Council after the Assembly has been consulted in the cases provided for by this Treaty.

The Council, the Commission or a Member State may, as a preliminary, obtain the opinion of the Court of Justice as to the compatibility of the contemplated agreements with the provisions of this Treaty. An agreement which is the subject of a negative opinion of the Court of Justice may only enter into force under the conditions laid down, according to the case concerned, in Article 236.

2. Agreements concluded under the conditions laid down above shall be binding on the institutions of the Community and on Member States.

...

#### Article 234

The rights and obligations resulting from conventions concluded prior to the entry into force of this Treaty between one or more Member States, on the one hand, and one or more third countries, on the other hand, shall not be affected by the provisions of this Treaty.

In so far as such conventions are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate any incompatibility found to exist. Member

(Continued on next page.)

draft".<sup>42</sup> Several of these points relate to particular draft articles and are more conveniently considered in connexion with the draft articles to which they relate. It is also intended to deal with the question of the settlement of disputes, mentioned in the Sixth Committee's report,<sup>43</sup> at the end of the present report. At this stage, consideration will be given to "categories of succession of States", "categories of treaties" and "arrangement of the draft articles" corresponding to the relevant paragraphs of the Commission's report.<sup>44</sup>

## 1. CATEGORIES OF SUCCESSION OF STATES

### *Comments of Governments*

#### *Oral comments*

50. According to the Sixth Committee's report some delegations supported the conclusion of the Commission that, for the purpose of codifying the law of succession of States in respect of treaties, it would be sufficient to arrange cases of succession of States under three broad headings: (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. Other representatives stated that such an arrangement implied serious omissions, because it did not take into account the very important case of a change of régime in a State as a result of a social revolution.

(Foot-note 41 continued)

States shall, if necessary, assist each other in order to achieve this purpose and shall, where appropriate, adopt a common attitude.

Member States shall, in the application of the conventions referred to in the first paragraph, take due account of the fact that the advantages granted under this Treaty by each Member State form an integral part of the establishment of the Community and are therefore inseparably linked with the creation of common institutions, the conferring of competences upon such institutions and the granting of the same advantages by all other Member States.

...

#### *Article 237*

Any European may apply to become a member of the Community. It shall address its application to the Council which, after obtaining the opinion of the Commission, shall act by means of a unanimous vote.

The conditions of admission and the amendments to this Treaty necessitated thereby shall be the subject of an agreement between the Member States and the applicant State. Such agreement shall be submitted to all the contracting States for ratification in accordance with their respective constitutional rules.

#### *Article 238*

The Community may conclude with a third country, a union of States or an international organisation agreements creating an association embodying reciprocal rights and obligations, joint actions and special procedures.

Such agreements shall be concluded by the Council acting by means of a unanimous vote and after consulting the Assembly.

Where such agreements involve amendments to this Treaty, such amendments shall be subject to prior adoption in accordance with the procedure laid down in Article 236.

[For the full text of the Treaty of Rome, see United Nations, *Treaty Series*, vol. 298, pp. 3 *et seq.*]

<sup>42</sup> See *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, paras. 54-63.

<sup>43</sup> *Ibid.*, para. 62.

<sup>44</sup> *Yearbook . . . 1972*, vol. II, p. 229, document A/8710/Rev.1, paras. 45, 46 and 49.

51. The last-mentioned point was raised by the delegation of the Union of Soviet Socialist Republics on 6 October 1972 in the Sixth Committee and was subsequently mentioned in the Sixth Committee at the twenty-seventh session of the General Assembly by the delegations of Mongolia, Hungary, the Byelorussian Soviet Socialist Republic and Bulgaria. It was also mentioned by the delegation of the German Democratic Republic in the Sixth Committee at the twenty-eighth session of the General Assembly. The following were, according to the summary records of the debates in the Sixth Committee, the comments made by those delegations concerning this point:

*Union of Soviet Socialist Republics.* There were, however, some serious omissions in the draft articles. As stated in paragraph 45 of the report, the Commission had confined itself to arranging the cases of succession of States under three categories, comprising respectively, transfers of territory, newly independent States, and cases of the uniting of States and the dissolution of a State; however, it did not take into account the very important case of a change of régime in a State as a result of a social revolution, which might cause such a State to modify radically its position with regard to its international relations. The Soviet Union, for example, after the October revolution, had denounced all treaties concluded by the previous régime which were not in keeping with the people's sense of justice; the new socialist States of Eastern Europe and China and Cuba had proceeded in the same manner. The clean slate principle had a natural application in such cases—the French bourgeois revolution had had recourse to it in 1792—and his delegation could therefore not accept the restrictive application of that principle in the draft articles only to States which had liberated themselves from colonial rule.<sup>45</sup>

*Mongolia.* Special mention should be made of the problem of succession in respect of treaties in the event of social revolution. That important subject had, unfortunately, been neglected in the draft articles. The practice of States showed that, in cases of social revolution, the successor State had the right to terminate unacceptable treaties, while continuing in force those treaties which were in accordance with the generally accepted principles of international law. The silence of the draft articles concerning the problem of succession in respect of treaties in the event of social revolution represented a serious omission which, it was to be hoped, would be corrected by the Commission in its further discussion of the draft articles.<sup>46</sup>

*Hungary.* His delegation regarded Part III of the draft as the most important. However, it regretted to note a number of gaps in the draft articles, which failed to cover certain special cases of succession. The practice concerning other new States was more difficult to codify than in the case of newly independent States and work

<sup>45</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1324th meeting, para. 34.

<sup>46</sup> *Ibid.*, 1325th meeting, para. 48.

in that area was more in the nature of progressive development.<sup>47</sup>

*Byelorussian Soviet Socialist Republic.* With reference to the deficiencies, it was unfortunate that the Commission had classified cases of succession into only three broad categories, passing over in silence such important cases of succession as that occurring as a result of social revolution. He mentioned the treaty of military and economic union concluded in January 1921 between the Government of the Russian Federative Socialist Republic and the Government of the Byelorussian Soviet Socialist Republic confirming the two parties' independence and sovereignty; article 2 of that treaty stated that the Byelorussian SSR was not under any obligation to any party whatsoever by virtue of its having previously belonged to the Russian Empire . . . It was unfortunate that in its commentaries the Commission had not given a single example of succession practice concerning other socialist States in which the "clean slate" principle had been specifically applied, and that it had devoted its commentary primarily to the policy of "decolonization" pursued by the former metropolitan countries".<sup>48</sup>

*Bulgaria.* The provisions of article 1 and of article 2, paragraph 1 (b) and 1 (f), appeared to indicate that the scope of the draft articles was a rather limited one. It was true that the Commission had emphasized that article 2 excluded both succession of Governments and succession of other subjects of international law; however, it should at least have mentioned that the succession of States in the event of social revolution was also excluded.<sup>49</sup>

*German Democratic Republic.* As a legal successor to the former German Reich, the German Democratic Republic took an interest in the codification of rules on State succession. State succession, both as a result of national liberation movements and as a result of revolution, as well as in cases of unification, separation or dissolution of States, was an important matter for the development of international relations.<sup>50</sup>

#### *Written comments*

52. *Czechoslovakia.* In connexion with the expression of its favourable view of the clean slate principle for "newly independent States", the Czechoslovak Government wished to point to the fact that new States come into existence not only in the process of decolonization, but also in other ways. In that context, the Czechoslovak Government wished to draw attention to the States which came into being as a result of a social revolution and asked that article 2, paragraph 1, of the draft should be appropriately amended in that sense.

*German Democratic Republic.* The Government of the German Democratic Republic considered with regard

<sup>47</sup> *Ibid.*, para. 52.

<sup>48</sup> *Ibid.*, 1326th meeting, para. 41.

<sup>49</sup> *Ibid.*, para. 45.

<sup>50</sup> *Ibid.*, Twenty-eighth Session, Sixth Committee, 1399th meeting, para. 25.

to State succession in general that "it is a matter important for the development of international relations, both as a result of national liberation and social revolution and of the uniting, separation or dissolution of States." The Government observed that the draft articles on succession of States in respect of treaties proceeded from the clean slate principle in cases of succession resulting from decolonization and expressed the view that this was a basically correct point of departure in that context. In its hard core the draft covered decolonization comprehensively, but it did not sufficiently take account of the fact that the process of decolonization had come to its end, save for a few exceptions. Therefore, according to the Government of the German Democratic Republic, it appeared appropriate to call attention to the fact that new States might also emerge by way of social revolution and that the same principles should be applicable to them as were applied to States emerging by way of decolonization. Bearing this in mind, it was obvious that the term "newly independent State" in article 2, paragraph 1 (f), was inadequate in those respects. The Government of the German Democratic Republic held the view that the term in question should be replaced with a notion of successor State which would cover all successor States in so far as they were new States. That meant that those successor States which had emerged from social revolution should also be covered, along with those which had emerged from the uniting of States, the dissolution of States and the separation of States.

#### *Observations and proposals of the Special Rapporteur*

53. It is not possible from the 1972 report of the Sixth Committee or from the comments of Governments to form a clear view as to the opinions of Governments on the inclusion of any form of revolution among the circumstances giving rise to a succession of States for the purposes of the articles on succession of States in respect of treaties. On the one hand, there are comments by a comparatively small number of delegations in the Sixth Committee and the written comments of two Governments, while on the other there is a large measure of approval for the draft articles as a whole without mention of the problem arising from a social or any other kind of revolution. In these circumstances, it seems to the Special Rapporteur that it is a fair inference that there has not been a wide measure of support for the inclusion of cases of revolution and that the large majority of Governments of Member States are satisfied with the scheme of the draft articles adopted by the Commission under the three broad headings: (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.<sup>51</sup> One point that does seem to be clear is that a change of internal régime brought about by revolution is not within the framework of that scheme.

54. The problem raised by the oral and written comments of Governments quoted above was apparently not discussed by the Commission during consideration of the

<sup>51</sup> See para. 50 above. See also foot-note 44.

draft articles at its twenty-fourth session. However, when replying to the debate in the Sixth Committee at the twenty-seventh session of the General Assembly, the Chairman of the International Law Commission said,

The Commission had been criticized for neglecting the situation where the political or social structure of a State was overturned. That was however a question which went beyond the realm of succession and related to the very conception of what a State was. That very complex matter came within the sphere of political philosophy and the Commission had not attempted to deal with it.<sup>55</sup>

55. The question of the effect of a revolution may raise interesting legal questions in the field of the law of treaties. Nevertheless, it seems to the Special Rapporteur that this problem raises issues, not only with respect to the scheme of the draft articles but also with respect to their scope. The Commission in the commentary to draft article 1,<sup>55</sup> stressed that the article gave effect to its decision that the draft articles should be confined to succession of States in respect of treaties and that, by using the words "the effects of succession of States", the article was designed to exclude "succession of governments" from the scope of the draft articles. The commentary then pointed out that this restriction of the "scope" of the draft articles found further expression in article 2, paragraph 1 (b), which provided that the term "succession of States" meant for the purposes of the draft articles "the replacement of one State by another . . .". In the view of the Special Rapporteur, at least in the large majority of cases, a revolution or *coup d'état* of whatever kind brings about a change of government while the identity of the State remains the same. In other words, the problem of the effect of a revolution as regards the question of succession in respect of treaties, if it were to be considered, would fall within the scope of "succession of governments" rather than within that of "succession of States". To embark on such a major change of approach at this stage of the work of the Commission would not, in the light of the comments of Governments as a whole, appear to be the right course.

56. It might be argued that distinctions should be drawn between different kinds of revolution; but such a course would involve very difficult questions of definition which would not be solved simply by describing a particular kind of change of régime as a "social revolution". Moreover, such questions would inevitably be charged with overtones of a political and philosophical character which it would probably be beyond the capacity of the International Law Commission to answer satisfactorily within the space of a single session. Furthermore, even if the questions of classification and definition could be answered there would still be formidable obstacles in the form of questions as to the consequences of a change of régime as a result of a revolution.

57. Analysis of the comments of Governments would disclose differences of approach and of details, but it is not considered that, having regard to the foregoing considerations, such an analysis would be fruitful. In

<sup>55</sup> Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1328th meeting, para. 8.

<sup>56</sup> Para. 4 of the commentary.

this highly controversial context, the Special Rapporteur hesitates to make a firm proposal. He suggests, however, that the Commission might take the lead from the comments of the Bulgarian delegation<sup>54</sup> and point out in the commentary to article 1 that it had also excluded from the scope of the draft articles problems of succession arising as a result of changes of régime brought about by social or other forms of revolution.

## 2. CATEGORIES OF TREATIES

### *Comments of Governments*

#### *Oral comments*

58. The 1972 report of the Sixth Committee<sup>55</sup> records that certain delegations stressed that the Commission should give more detailed consideration to the different categories of treaties which should be distinguished in the draft. Recalling the question of law-making treaties,<sup>56</sup> it was suggested that it might be appropriate, and would help in some contexts, to make a tripartite distinction in respect of multilateral treaties (general multilateral treaties; normal multilateral treaties; multilateral treaties of limited participation) instead of the distinction between multilateral treaties and multilateral treaties of limited participation. It was said that under the category of "general multilateral treaties" would fall, to use the wording of the Declaration on Universal Participation in the Vienna Convention on the Law of Treaties,<sup>57</sup> multilateral treaties which dealt with the codification and progressive development of international law or the object and purpose of which were of interest to the international community as a whole.

#### *Written comments*

59. No written comments have been received suggesting the addition of "general multilateral treaties" as a third category of multilateral treaties.

#### *Observations and proposals of the Special Rapporteur*

60. After considerable discussion at the United Nations Conference on The Law of Treaties in 1968 and 1969, it was decided not to add "general multilateral treaties" as a separate category of multilateral treaties. The resulting classification in the Vienna Convention, based on participation, is for most purposes between bilateral and multilateral treaties. For the purposes of article 20 of the Convention, account is taken of "the limited number of the negotiating States" in connexion with the requirements of acceptance of a reservation by all the parties. However, the Convention does not establish a separate category of "restrictive multilateral treaties" or "multilateral treaties of limited participation". Accord-

<sup>54</sup> See para. 51 above.

<sup>55</sup> Official Records of the General Assembly, Twenty-seventh Session, Annexes, agenda item 85, document A/8892, para. 57.

<sup>56</sup> *Ibid.*, paras. 46-49.

<sup>57</sup> Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (*op. cit.*) p. 285.

ingly, to establish three categories of multilateral treaties on the lines indicated in the oral comments mentioned above would be a clear departure from the framework of the Vienna Convention.

61. Furthermore, it is not clear that any useful purpose would be served in the field of succession of States in respect of treaties by a general distinction based on the breadth of *participation* in a particular treaty. There may be value in drawing a distinction on some other ground, such as the law-making character of the treaty. This, however, is a question that calls for consideration in relation to the individual draft articles. Meanwhile, the Special Rapporteur does not propose the addition for the purpose of the draft articles of a separate category of multilateral treaties called "general multilateral treaties".

### 3. ARRANGEMENT OF THE DRAFT ARTICLES

#### *Comments of Governments*

##### *Oral comments*

62. According to the 1972 report of the Sixth Committee the point was made that the distinction between "newly independent States" and States resulting from the separation of part of an existing State, the uniting of two or more States or the dissolution of a State was artificial. One category, it was said, would have sufficed, that of "new State", which would have made it possible to simplify the draft. The view was also expressed that the Commission should have avoided the use of extra-judicial concepts or terms. For instance, it was difficult to see what compelling technical reasons had led the Commission to distinguish between what it termed "newly independent States" and States "emerging from the separation of a State", particularly in view of the fact that it had finally adopted identical solutions for both cases.<sup>58</sup>

##### *Written comments*

63. *Austria.* The Austrian Government agreed with the general outline as well as the basic content of the draft articles.

*Denmark.* The Danish Government expressed the opinion that the attempt at codification of the topic on State succession in respect of treaties was generally acceptable with respect not only to the structuring and delimitation of the draft but also to the individual articles.

*Poland.* In the opinion of the Government of the Polish People's Republic, the draft articles correctly take into account the specific characteristics of the various types of succession of States.

##### *Observations and proposals of the Special Rapporteur*

64. The comments mentioned in the two preceding paragraphs of the present report are by no means exhaustive and overlap with comments made on the draft as a whole and on the scheme of the draft articles. In fact, there has been a large measure of approval of the draft

articles and, either expressly or by implication, of the scheme adopted by the Commission. Apart from the implicit criticism of the arrangement of the draft articles, the oral comments mentioned above raise two specific points—one of terminology and one of substance. The point of terminology, relating in particular to the expression "newly independent State", criticizes the Commission for using "extra-judicial" concepts or terms. While observing that in treaty-drafting it is sometimes necessary to find new terms to meet new situations, the Special Rapporteur considers that the question of terminology is one to be kept under review throughout the process of drafting and, at the present stage, he has no proposal for a substitute for the expression "newly independent State".

65. The point of substance relates to what is said to be the identity of solution as between "newly independent States" (Part III of the draft) and "separation of part of a State" (article 28). As the Special Rapporteur reads the draft articles, however, there are certain relevant distinctions. Paragraph 1 of article 28 clarifies the position of the State itself where part of its territory becomes a State by separation. Also the cases themselves are different because in essence Part III of the draft articles is concerned with new States that were formerly *dependent* territories, whereas article 28 is concerned with new States which were formerly an *integral part* of the territory of a State. Therefore, during the process of drafting, it seems to be advisable to deal with the two cases separately even if in the end it is found that the relevant solutions are identical in both cases and that the provisions can be united. Accordingly, the Special Rapporteur proposes that this point also should be borne in mind and given consideration at a later stage in the Commission's deliberations at its twenty-sixth session.

### I. RECOGNITION AND SUCCESSION OF STATES

#### *Comments of Governments*

##### *Oral comments*

66. No oral comments were made.

##### *Written comments*

67. *Czechoslovakia.* The Government of the Czechoslovak Socialist Republic noted that the draft articles did not touch upon the question of the relation between recognition and succession of States. The Government commented, however, that, inasmuch as a refusal of recognition may be used for the purpose of preventing the successor State from making use of the rights ensuing in respect of that State from succession, it would be useful to specify in the draft that succession in respect of multilateral international treaties under conditions contained in the draft articles exists irrespective of whether the new State is or is not recognized by all other States parties to the treaty in question.

*German Democratic Republic.* The Government of the German Democratic Republic also noted that the draft articles did not refer to the relationship between recognition and State succession. Its position was that the absence

<sup>58</sup> *Official Records of the General Assembly, Twenty-seventh Session, Annexes, agenda item 85, document A/8892, para. 55.*

of recognition of a successor State must not result in that State being prevented from or hindered in exercising the rights and obligations ensuing from succession. Apart from succession in respect of bilateral treaties, which can hardly be realized without mutual recognition, the Government of the German Democratic Republic deemed it necessary to include in the draft articles a provision making it clear that succession in respect of multilateral treaties occurs independently of the recognition of a State. This would also take account of the generally recognized principle of international law that the international personality of a State exists independently of its recognition. In the opinion of the Government of the German Democratic Republic, a formula patterned on article 74 of the Vienna Convention could be adequate for this purpose.

*Observations and proposals of the Special Rapporteur*

68. As indicated above, the Special Rapporteur has found no comments made by delegations in the Sixth Committee at the twenty-seventh or twenty-eighth sessions of the General Assembly on the question of the relation between recognition and succession of States in respect of treaties. The written comments of the Governments of Czechoslovakia and the German Democratic Republic are the only comments of Governments that raise this question. Such limited interest in the question, however, would not in itself be sufficient reason to justify the Commission in declining to include provisions on recognition in the draft articles. On the other hand, the history of the topic of recognition of States and Governments indicates that the Commission would be unwise to embark on a discussion of the question at the present stage of its work on the draft articles on succession in respect of treaties.

69. It is indeed true that the draft articles do not deal with the question of recognition; but neither did the draft articles on the law of treaties prepared by the Commission at its eighteenth session<sup>59</sup> nor did the Vienna Convention. The silence of the Vienna Convention on the question of recognition again would not in itself be conclusive, but it is a reason for proceeding with great caution. There would be serious risks involved in broaching such a delicate and complex question in the general context of international law relating to treaties when previously it has been considered wiser not to do so.

70. The delicate and complex character of the question is confirmed by the history of the topic in the Commission itself. This is summarized in the "Survey of international law".<sup>60</sup> Having recalled "the widely held view that questions of recognition pertain to the province of politics rather than the law", the "Survey" said that, in 1949, the Commission had placed the item "Recognition of States and Governments" on the list of subjects for study and, although reference was made to the political aspects of the question, the general opinion was that, in view of its undoubted importance, an attempt should be made to

codify it. Since 1949, the Commission has referred to the subject of the recognition of States and Governments in several of its drafts, but has not entered into an extensive examination of the question. It is worth examining the paragraph of the observations concerning the draft Declaration on Rights and Duties of States adopted by the Commission at its first session in 1949 which is quoted in the "Survey". According to the passage quoted there, in connexion with a proposed article (which was not adopted by the Commission) some members took the view that, even before its recognition by other States, a State has certain rights in international law; on the other hand, a majority of the members of the Commission thought that the proposed article would go beyond generally accepted international law in so far as it applied to new-born States.<sup>61</sup>

The Commission concluded that the whole matter of recognition was too delicate and too fraught with political implications to be dealt with in a brief paragraph in this draft Declaration and it noted that the topic was one of the fourteen topics the codification of which has been deemed by the Commission to be necessary or desirable.<sup>62</sup>

71. The "Survey" then refers to a paragraph of the commentary to article 60 (Severance of diplomatic relations) of the final draft articles on the law of treaties adopted by the Commission in 1966. The paragraph stated:

... any problems that may arise in the sphere of treaties from the absence of recognition of a Government do not appear to be such as should be covered in a statement of the general law of treaties. It is thought more appropriate to deal with them in the context of other topics with which they are closely related, either succession of States and Governments... or recognition of States and Governments...<sup>63</sup>

It should be noted here that this statement spoke of recognition of a Government and not recognition of a State. The latter was not in fact treated as falling within the scope of article 60 or any other article of the draft on the law of treaties.

72. Paragraph 2 of article 7 of the draft articles on special missions adopted by the Commission in 1967, which stated: "A State may send a special mission to a State, or receive one from a State which it does not recognize",<sup>64</sup> was deleted by the Sixth Committee, and the Convention on Special Missions adopted by the General Assembly on 8 December 1969 does not refer to the existence or absence of recognition on the part of the States concerned.<sup>65</sup> In 1969, the Commission, in connexion with the topic "Relations between States and international organizations" decided to postpone for consideration at a future session the possible effects of various exceptional situations, such as absence of recognition, on the representation of States in international organizations because

<sup>61</sup> The proposed article would have read "Each State has the right to have its existence recognized by other States".

<sup>62</sup> *Yearbook*... 1949, p. 289, document A/925, para. 50.

<sup>63</sup> *Yearbook*... 1966, vol. II, p. 260, document A/6309/Rev.1, part II, chap. II, para. 1 of the commentary to article 60.

<sup>64</sup> *Yearbook*... 1967, vol. II, p. 350, document A/6709/Rev.1, chap. II, D.

<sup>65</sup> General Assembly resolution 2530 (XXIV), annex.

<sup>59</sup> *Yearbook*... 1966, vol. II, p. 177, document A/6309/Rev.1, part II, chap. II, C.

<sup>60</sup> Working paper prepared in 1971 by the Secretary-General. For the summary, see *Yearbook*... 1971, vol. II (Part Two), pp. 16-18, document A/CN.4/245, paras. 55-66.

of "the delicate and complex nature of the questions concerned".<sup>66</sup>

73. The two concluding paragraphs of the relevant section of the "Survey" contain a general summary of the position and merit special consideration. They are too long to be quoted in full in the present report, but it may be convenient to quote some of the more important sentences. In the first it is stated:

Although steps have been taken (for example, the inclusion of the topic on the Commission's long-term programme in 1949) towards codifying the topic so as to make its legal parameters more distinct, there has been a persistent current of opinion which has considered that since what was involved was a matter of discretion, lying in the hands of individual governments, there was, in effect, nothing to codify except this basic freedom of choice. . . . An effort to codify the topic would thus have, at the outset, to consider the major issue of whether or not the exercise of recognition is to remain essentially a matter lying wholly or largely in the hands of individual States and governments.<sup>67</sup>

74. In the following paragraph of the Survey, it is stated:

When aspects of the question of the effects of non-recognition have arisen in connexion with the Commission's work in various spheres (for example, with respect to the preparation of the draft articles on the law of treaties and in connexion with the topic of "Relations between States and international organizations"), the Commission has had difficulty in dealing with the question in isolation and has tended to set it aside until such time as it might decide to study the topic on a wider basis. It is possible, therefore, that by distinguishing the role of recognition in terms of the political relations between States on the one hand, and its legal requirements and consequences in various spheres on the other, consideration might be given to examining aspects listed above, not just in a single context, but more widely, with a view to its possible codification as a distinct legal institution or procedure, albeit one which is part of a larger whole.<sup>68</sup>

75. Enthusiasm for codification of the topic of recognition of States and Governments does not seem to be increasing. In the report of the Commission on the work of its twenty-fifth session, it was included among "other topics on which one or more members thought that the Commission might envisage undertaking work" and not among the topics "repeatedly mentioned" by members.<sup>69</sup> According to the 1973 report of the Sixth Committee, this topic was not among those mentioned by delegations for inclusion in the Commission's programme of work.<sup>70</sup>

76. In view of this history of reluctance to embark on the question of recognition of States, especially in a piecemeal manner, and of the delicacy and complexity of the topic, the Special Rapporteur would be reluctant to propose that the Commission should introduce any elements of the topic of recognition into the draft articles on succession of States in respect of treaties. Any reference to the effects of recognition or non-recognition of States would inevitably raise controversial issues about the character and

effects of recognition in international law in general and with respect to the law of treaties in particular. Even a purely negative formula of the kind suggested by the Government of Czechoslovakia,<sup>71</sup> by stating that succession in respect of multilateral treaties exists "irrespective of whether the new State is or is not recognized by all other States parties to the treaty in question", would itself raise the question of the effect of recognition or non-recognition of a State on its participation in multilateral treaties. While such questions are, of course, relevant, it was considered wiser not to deal with them in the context of the draft articles on the law of treaties, and, in the view of the Special Rapporteur, it would be wiser not to try to deal with them in the context of succession of States in respect of treaties.

77. The basic difficulty of the subject is underlined by the assumption in the written comments of the Government of the German Democratic Republic<sup>72</sup> that there is a "generally recognized principle of international law that the international personality of a State exists independently of its recognition". It is well known that there are differences of doctrine on the need for and possible obligation to recognize a new State. Moreover, even if the "principle of international law" were generally accepted in the form stated it would not in itself automatically lead to the right of participation by the new State in a multilateral treaty irrespective of recognition by the States parties to the treaty. For the reasons already indicated in the foregoing paragraphs, it is not considered advisable for the Commission to become involved in such delicate and complex questions at this stage of its work. Therefore, the Special Rapporteur has refrained from troubling the Commission with any attempt at an exposition of the various doctrinal views.

78. It remains to consider the specific suggestion made by the Government of the German Democratic Republic that a formula patterned on article 74 of the Vienna Convention could be adequate for the purpose of making it clear that succession in respect of multilateral treaties occurs independently of the recognition of a State. Apart from the general objection that such a proposition would involve consideration of the effects of recognition and non-recognition, with all its incidental problems, it is not a first sight obvious how article 74 could be adapted to the purpose intended.

79. Article 74 of the Vienna Convention reads:

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

The second sentence of the article does not appear to have any relevance to the intentions of the Government of the German Democratic Republic. It appropriate substitutions were made in the first sentence it would read:

The presence or absence of recognition between two or more States does not prevent a succession of States in respect of treaties between those States.

<sup>66</sup> *Yearbook . . . 1971*, vol. II (Part Two), p. 17, document A/CN.4/245, para. 63.

<sup>67</sup> *Ibid.*, pp. 17-18, document A/CN.4/245, para. 65

<sup>68</sup> *Ibid.*, p. 18, document A/CN.4/245, para. 66.

<sup>69</sup> *Yearbook . . . 1973*, vol. II, p. 230, document A/9010/Rev.1, para. 173.

<sup>70</sup> *Official Records of the General Assembly, Twenty-eighth Session, Annexes*, agenda item 89, document A/9334, para. 109.

<sup>71</sup> See para. 67 above.

<sup>72</sup> *Ibid.*

No doubt a more elegant formula could be devised, but the transposition does bring out the point that the cases of diplomatic and consular relations on the one hand and of recognition on the other are of a different character and that a formula applicable in the former is not necessarily applicable in the latter. This seems to the Special Rapporteur to be so as regards article 74 of the Vienna Convention. Further adaptation of the formula would, of course, be possible but it would tend to approximate to the suggestion of the Government of Czechoslovakia, with the attendant objections already mentioned.

80. Accordingly, having regard to the above general considerations and the difficulties involved in the specific suggestions made by the two Governments which have submitted written comments, the Special Rapporteur proposes that the Commission should decline to embark on particular aspects of the question of recognition of States in the context of the present draft articles, but should state in its report that, for reasons such as those mentioned in the foregoing paragraphs, it was decided to leave them for future consideration in a broader context. In any event, since the draft articles are only intended to apply to the effects of a succession of States occurring in conformity with international law, it is anticipated that cases involving non-recognition and falling within the draft articles are likely to be comparatively rare.

#### J. INTERRELATION BETWEEN THE PRESENT DRAFT ARTICLES AND THE DRAFT ARTICLES ON SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

##### *Comments of Governments*

##### *Oral comments*

81. No comments on the interrelation between the two sets of draft articles on succession of States appear to have been made at the twenty-seventh session of the General Assembly. The point was, however, mentioned by a number of delegations in the Sixth Committee at the twenty-eighth session. The relevant comments, as they appear in the summary records, are set out below in chronological order.

82. *United States of America.* The United States delegation welcomed the decision of the Commission, in dealing with the topic of succession of States in respect of matters other than treaties, to adopt as a working method a substantial degree of parallelism with the general principles incorporated in the draft articles on succession of States in respect of treaties. Although it might be necessary, as work on that topic developed, to depart from that working method, there was a sufficient relationship between the two subjects to permit the use of certain common definitions and general principles.<sup>73</sup>

*Finland.* The Finnish delegation noted that several provisions in the draft articles on succession of States in respect of matters other than treaties, adopted provi-

sionally by the Commission in 1973, were based on the corresponding articles on succession of States in respect of treaties adopted by the Commission on first reading in 1972. The delegation mentioned in particular articles 2 and 3 of the former.<sup>74</sup>

*Kenya.* The delegation of Kenya said that when the Commission had completed its work on all the draft articles on succession of States in respect of matters other than treaties, it might seriously consider amalgamating the drafts on that topic, on succession of States in respect of treaties and succession of States in respect of membership of international organizations, in order to avoid the inevitable duplication which would occur if the three subjects were dealt with separately. It would then, the delegation said, be necessary only to supplement article 3, "Use of terms" accordingly.<sup>75</sup>

*Brazil.* The Brazilian delegation, noting considerable progress by the Commission on succession of States in respect of matters other than treaties, said that the Commission had decided to align the subject, as far as possible, with the work already accomplished on succession of States in respect of treaties. In the two sets of draft articles there were provisions that corresponded with one another. Indeed, the two subjects had common roots in a situation arising out of the replacement of one State by another in the exercise of responsibility for the international relations of the territory. Articles 1 and 2 of the draft articles on succession of States in respect of matters other than treaties thus paralleled articles 1 and 6 respectively of the draft on succession in respect of treaties.<sup>76</sup>

*Israel.* The delegation of Israel observed that many of the articles on the law of treaties, including succession of States in respect of treaties, were properly couched as residual rules, thus giving effect to the leading principle of the autonomy of the will of the parties as one of the corner-stones of the law of treaties, especially in its procedural aspect. However, with regard to the substantive law of succession in respect of matters other than treaties, and bearing in mind the temporal element, the question had to be considered whether a series of draft articles of a pronounced residual character would constitute an appropriate exposition of the law, whether proposed as codification or as progressive development.<sup>77</sup>

*Bulgaria.* The Bulgarian delegation commented, with reference to the succession of States in respect of matters other than treaties, that the Commission had prepared an introduction consisting of three articles which contained the provisions applying to the draft as a whole and it had wisely related the draft to succession of States in respect of treaties.<sup>78</sup>

*United Republic of Tanzania.* The delegation of the United Republic of Tanzania said that the question of succession of States in respect of matters other than

<sup>74</sup> *Ibid.*, 1399th meeting, para. 36.

<sup>75</sup> *Ibid.*, 1401st meeting, para. 12.

<sup>76</sup> *Ibid.*, paras. 53 and 56.

<sup>77</sup> *Ibid.*, 1404th meeting, para. 12.

<sup>78</sup> *Ibid.*, 1405th meeting, para. 27.

<sup>73</sup> *Official Records of the General Assembly, Twenty-eighth Session, Sixth Committee*, 1398th meeting, para. 5.

treaties was very closely related to that of succession of States in respect of treaties. In both cases, it was a matter of determining the rights and duties of newly independent States.<sup>79</sup>

*Turkey.* The Turkish delegation agreed with the Commission that the criterion for delimitation between the topic of succession of States in respect of matters other than treaties and the topic of succession in respect of treaties should be "the subject-matter of succession", i.e., the content of the succession and not its form.<sup>80</sup>

#### *Written comments*

83. *Czechoslovakia.* The Government of the Czechoslovak Socialist Republic wished to note that, quite naturally, there was a close connexion between the problems involved in the succession of States in respect of treaties and the other questions of succession of States, and that, therefore, in elaborating on individual problems of the succession of States, it was necessary to proceed consistently from the same principles and to respect the necessity for a balanced relationship between individual cases of succession.

*German Democratic Republic.* The Government of the German Democratic Republic deemed it necessary to underline the close interrelation which no doubt existed between succession in respect of treaties and succession in respect of matters other than treaties. Proceeding from the fact that succession of States is a homogeneous institution of international law, the Government of the German Democratic Republic expressed itself in favour of a single convention comprising both aspects of State succession; but in case separate regulations were to be adopted, at least uniform principles should be established in their texts.

#### *Observations and proposals of the Special Rapporteur*

84. Only the oral comments of Kenya and the written comments of the German Democratic Republic have suggested that the draft articles on succession of States in respect of treaties and the draft articles on succession of States in respect of matters other than treaties should be combined in a single convention. Their reasons are somewhat different. The purpose of the former is "to avoid . . . inevitable duplication", while the latter relies on "the fact that succession of States is a homogeneous institution of international law". Both, however, would involve at least a partial reversal of the decision to treat the two aspects of the topic of succession of States separately and to give priority to the completion of the draft articles on succession of States in respect of treaties. Of course, it is desirable to avoid duplication where possible, but repetition in the interests of uniformity and consistency may be desirable. This was the view taken by the Commission in the draft articles on succession of States in respect of matters other than treaties prepared at its twenty-fifth session.<sup>81</sup> That view appears

to have been shared by most Governments so far as their views can be gleaned from the comments that have been made. However, the fact that there may be repetition in the interests of uniformity and consistency does not in itself lead to the conclusion that all the articles should be combined in a single convention.

85. On the other hand, if it were true that "succession of States is a homogeneous institution of international law", this would be a strong argument in favour of the abandonment of the plan to draft separate sets of draft articles for different aspects of the topic and of the completion of a single set to be embodied in a single convention. As the work of the Commission has developed, however, it has become clear that, while there are certain elements in common between the various aspects, there are material differences that justify different treatment. For example, the view that

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*,<sup>82</sup>

does not apply to other aspects such as succession of States in respect of State property. For the purposes of codification of the law relating to those aspects the provisions of the Vienna Convention could not be taken "as an essential framework".<sup>83</sup> The rules to be codified are likely to be different from, rather than homogeneous with, those to be codified in relation to succession of States in respect of treaties. Though there are undoubtedly common elements in the various aspects of the law relating to succession of States, there are such divergencies that the Commission could not safely proceed on the basis of the theory that "succession of States is a homogeneous institution of international law".

86. From the practical point of view also, it would be unwise at the present stage to aim at a single convention or even the ultimate unification of the sets of draft articles. The present task of the Commission is to complete the second reading of the draft articles on succession of States in respect of treaties adopted at its twenty-fourth session. Work on other aspects is not sufficiently advanced to enable any but the most limited account to be taken of the rules that will eventually be codified with respect to them, and attempts at speculation in the interests of ultimate unification would be likely to cause undue delay in the current work of the Commission.

87. On the other hand, it should be noted that most of the comments approved expressly or by implication some degree of parallelism between the two sets of draft articles and, in particular, so far as possible the use of common definitions and common basic principles. In the view of the Special Rapporteur, the Commission should constantly bear this objective in mind in completing the draft articles on succession of States in respect of treaties, so far as it can do so without distorting or unnecessarily hindering its work. Nevertheless, at the present stage,

<sup>79</sup> *Ibid.*, para. 31.

<sup>80</sup> *Ibid.*, 1406th meeting, para. 4.

<sup>81</sup> *Yearbook . . . 1973*, vol. II, p. 202, document A/9010/Rev.1, chap. III, sect. B.

<sup>82</sup> *Yearbook . . . 1972*, vol. II, p. 226, document A/8710/Rev.1, para. 32. See also paras. 21-23 above.

<sup>83</sup> *Ibid.*

the governing consideration in adopting any particular form of words should be what is best in the context of the law relating to succession in respect of treaties.

#### K. GENERAL APPROVAL OR DISAPPROVAL

##### *Comments of Governments*

##### *Oral comments*

88. In the Sixth Committee at the twenty-seventh session of the General Assembly, many delegations commended the members of the Commission, and in particular the Special Rapporteur, Sir Humphrey Waldock, for their contribution to the preparation of a draft which was referred to as an impressive piece of scholarly study, masterly work and legal expertise. The excellence of the comprehensive commentaries analysing the reasons and legal principles underlying each article was also stressed. Several representatives stated that the draft articles were a good and solid basis for continued work on the topic of succession of States in respect of treaties and seemed likely to prove acceptable to the entire international community. The draft was the more remarkable because the task of codification was particularly difficult in a field where there was no general doctrine and State practice and custom had not yet produced well established and consistent precedents. The draft articles marked the meeting-point of certain diverse legal opinions and tendencies. That fact had naturally determined the codification working methods followed by the Commission and the draft, which contained elements of codification as well as of progressive development, intended to lay down practicable and detailed provisions which would introduce uniformity and clearness in the sparse present rules, develop them and fill the existing lacunae, taking into consideration the interests of the States as well as those of the international community.<sup>84</sup>

89. Notwithstanding this generally favourable reaction, some representatives criticized certain aspects of the conclusions reached by the Commission in connexion with matters related mainly to the clean slate principle as a basic general rule for newly independent States, to the recognized exceptions to that principle, and to the scope and scheme of the draft. Other representatives singled out a certain number of questions for further study with a view to improving the draft.<sup>85</sup>

##### *Written comments*

90. *Austria.* The Austrian Federal Government stated that the provisional draft articles adopted by the Commission represented basically a system which had, *inter alia*, already been propounded by Austrian jurists. Austria therefore entirely agreed with the general outline as well as the basic content of those draft articles.

*Czechoslovakia.* The Government of the Czechoslovak Socialist Republic stated that the submitted draft of the

articles on succession of States in respect of treaties, prepared by the Commission, reflected current international practice, proceeded from the requirements of newly established States and was in harmony with the fundamental principles of current international law, particularly with the principles of sovereign equality of States and self-determination of nations. Therefore, the draft could, in substance, be regarded as a good foundation for a future codification of the questions involved.

*Denmark.* The Danish Government was of the opinion that the present attempt at codification of the topic of State succession in respect of treaties was generally acceptable with respect not only to the structuring and delimitation of the draft, but also to the individual articles.

*German Democratic Republic.* The Government of the German Democratic Republic welcomed the provisional draft articles on succession of States in respect of treaties presented by the Commission and, in general, considered them to be a suitable basis for a future codification of the questions of succession of States.

*Poland.* The Government of the Polish People's Republic welcomed with great satisfaction the text of the draft articles on succession of States in respect of treaties produced by the Commission. The Government was of the opinion that the draft articles correctly took into account the specific characteristics of the various types of succession of States.

*Sweden.* The Swedish Government commented that the draft articles on succession of States in respect of treaties and the commentaries pertaining thereto constituted a most valuable contribution to the study of a difficult and vital problem in international law and organization.

*Syrian Arab Republic.* The Government of the Syrian Arab Republic stated that it was in general agreement with the provisional draft articles on succession of States in respect of treaties.

*United Kingdom.* The United Kingdom Government stated that the provisional draft articles on succession of States in respect of treaties, adopted by the Commission in 1972, were a useful basis for further work on this topic.

*United States of America.* The Government of the United States considered that the provisional draft articles on succession of States in respect of treaties constituted a sound basis for consideration of this difficult topic. The Government commented that the difficulties inherent in preserving a proper balance between the objectives of preserving continuity in international relationships on the one hand while on the other taking account of the necessities of an emergent State, had, to a large extent, been met in the draft articles.

91. Apart from the above comments by Governments, there were also written comments from the Governments of the Somali Democratic Republic and of Tonga.<sup>86</sup> However, the comments of each of these two Governments were directed to particular aspects of the topic of special interest to that Government, and they did not

<sup>84</sup> *Official Records of the General Assembly, Twenty-seventh Session, Annexes, agenda item 85, document A/8892, paras. 24-26.*

<sup>85</sup> *Ibid.*, para. 27. With reference to the clean slate principle, the scope and the scheme of the draft, see respectively paras. 24-30, 42-48 and 49-65 above.

<sup>86</sup> See foot-note 9.

include any general expression of approval or disapproval of the provisional draft articles.

*Observations and proposals of the Special Rapporteur*

92. At the risk of some overlapping with other parts of the present report, the general views of Governments on the draft articles as a whole have been set out at some length because they demonstrate a remarkable degree of unanimity in their broad approval of the draft. This in no way diminishes the significance of the criticisms or the depth of penetration of some of them. On the contrary, only the Government of the Syrian Arab Republic has contented itself with an expression of general agreement. In most cases, general approval has been accompanied by criticisms and suggestions—some of a far-reaching character. Nevertheless, the favourable attitude of most Governments that have commented provides the Special Rapporteur with a guiding principle in approaching the task of considering the individual articles of the draft. The guiding principle is that he should adhere to the basic scope and main substance of the draft articles and seek to improve the draft rather than to introduce radical alterations. The Special Rapporteur would also propose that the Commission should be guided by the same principle in its second reading of the draft articles.

### III. Observations on the specific provisions of the draft articles

#### PRELIMINARY OBSERVATIONS OF THE SPECIAL RAPporteur

93. Several of the comments already covered in section II of the present report, while related to the draft articles as a whole, also relate to one or more specific articles. In general, such comments are not repeated in section III, but reference is made to them with respect to each article. Otherwise, the pattern of stating the oral comments of delegations to the General Assembly and the written comments of Governments has been followed, but the comments of delegations are given individually on the basis of the records of the Sixth Committee and the General Assembly in the order in which the statements were made.

94. The observations that follow are based on two assumptions. The first is that, in accordance with the normal practice of the Commission, the final draft of the definitions will be settled after the revision of the other draft articles has been completed. In this sense, the observations and proposals of the Special Rapporteur on the definitions should be regarded as provisional. The second is that the arrangement of the draft articles will be re-examined after the revision of all the draft articles, and that any consequential amendments that may be required will be made at that stage. On this understanding, the present order and numbering of the draft articles will be used in this section of the present report, which is based on the text of the draft articles and commentaries in the report of the International Law Commission to the General Assembly on the work of its twenty-fourth session.<sup>87</sup>

<sup>87</sup> See above, foot-note 1.

## PART I

### GENERAL PROVISIONS

#### Article 1. Scope of the present articles

##### Comments of Governments

##### Oral comments

95. *Pakistan.* The Pakistan delegation, as an example or minor failings in the language of the draft articles, pointed out that article 1 referred to "treaties" without qualifying the expression, although it had later been defined in article 2, paragraph 1 (a), with two limiting qualifications. The delegation therefore suggested that the insertion of the word "certain" before the word "treaties" might be appropriate.<sup>88</sup>

##### Observations and proposals of the Special Rapporteur

96. The Pakistan comment is the only one to make any suggestion about the wording of article 1. The comment relates to the expression "treaties between States" and the definition of the term "treaty" which are taken verbatim from article 1 and article 2, paragraph 1 (a) of the Vienna Convention. The insertion of the word "certain" in article 1 would be a departure from the wording used in the Vienna Convention. In the absence of any substantive reason for such a departure, the Special Rapporteur proposes that the present text of article 1 be retained.

97. Reference should be made here to the suggestion that the scope of the draft articles should be extended to include cases of succession resulting from the participation of States in certain hybrid unions, like customs unions and common markets.<sup>89</sup> If, contrary to the view of the Special Rapporteur, the Commission should decide that it would be appropriate to accede to that suggestion, it would be necessary to amend article 1 so as to extend its scope to such unions and common markets. On the other hand, if the Commission accepts the view of the Special Rapporteur, the point would appear to be adequately covered by the commentary to article 1 which says

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.<sup>90</sup>

98. The Commission might, however, consider inserting at this point in the commentary a sentence, based on the suggestion of the Bulgarian delegation, to the effect that the Commission had also excluded from the scope of the draft articles problems of succession arising as a result of changes of régime brought about by social or other forms of revolution.<sup>91</sup>

<sup>88</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1325th meeting, para. 20.*

<sup>89</sup> See paras. 42-48 above.

<sup>90</sup> Para. 4 of the commentary.

<sup>91</sup> See paras. 50-57 above.

## Article 2. Use of terms

### PARAGRAPH 1 (a)

#### Comments of Governments

##### Oral comments

99. *Cuba*. The Cuban delegation said that it should be made explicit in the definition of the term "treaty" that it meant a validly concluded international agreement.<sup>92</sup>

*Ukrainian SSR*. The Ukrainian delegation said that the provisions defining the scope of the draft articles were on the whole correctly formulated and that they ensured regulation of succession in respect of treaties concluded in accordance with the principles of international law.<sup>93</sup>

*Pakistan*. The Pakistan delegation said that the scope of the draft articles was limited with regard to both the categories of treaties and the parties to them, and that the limitations were brought out in the definition of the word "treaty". Nevertheless, said the delegation, that limitation had not reduced their value but had enabled the Commission to be thorough and far-sighted within the limit set. No effort had been spared to make the articles consistent with the Vienna Convention.<sup>94</sup>

##### Written comments

100. There were no written comments.

#### Observations and proposals of the Special Rapporteur

101. In effect, the comments of the delegations of Pakistan and the Ukrainian SSR uphold the text of the definition of the term "treaty" as it is in the draft article. The Cuban delegation, however, suggested that the definition should provide explicitly that the term meant "a validly concluded international agreement". Such an amendment would be a departure from the definition of the term "treaty" in article 2, paragraph 1 (a), of the Vienna Convention, with which the definition in the draft article is at present identical. In the view of the Special Rapporteur, such a departure from the corresponding text in the Vienna Convention is unnecessary and undesirable. Accordingly, it is proposed that the text be retained as drafted.

### PARAGRAPH 1 (b)

#### Comments of Governments

##### Oral comments

*Poland*. The Polish delegation said that the starting-point of the draft articles was very clear, namely, the definition of the expression "succession of States", which denoted simply the replacement of one State by another

in the responsibility for the international relations of a territory, thus excluding all questions of rights and obligations as a legal incident of that substitution.<sup>95</sup>

*Spain*. The Spanish delegation approved in principle the fundamental options which had been adopted including the one by which the concept "succession of States" meant the replacement of one State by another in the responsibility for the international relations of a territory.<sup>96</sup>

*Cuba*. The Cuban delegation did not feel that the words "in the responsibility for the international relations of territory" in the definition of the term "succession of States" were a particularly felicitous choice. The word "responsibility" had a very specific meaning in the law of contracts and obligations and it was not a question of international relations of territory but of international relations of sovereignty in respect of a particular territory; moreover, there was a transfer not only of responsibilities but also of rights and obligations. The delegation also thought that account should be taken of the fact that every territory had a population, whose prerogative it was to exercise its inalienable right to self-determination and to decide whether or not it was prepared to assume the responsibility deriving from earlier treaty relations.<sup>97</sup>

*El Salvador*. The delegation of El Salvador said that succession of States in respect of treaties involved both the replacement of one State by another as regards responsibility for the international relations of a particular territory and the transmission of the treaty rights and obligations.<sup>98</sup>

*Ukrainian SSR*. The Ukrainian delegation said that the Commission had been successful in defining the term "succession of States" in such a way that it could be applied not only to succession of States in respect of treaties but to succession in general.<sup>99</sup>

*Union of Soviet Socialist Republics*. The delegation of the USSR commented that the draft articles used a good deal of the terminology already contained in the Vienna Convention and that, of the new terms employed, "succession of States" was interesting in that it applied to succession of States generally and not just to succession in respect of treaties.<sup>100</sup>

*Turkey*. The Turkish delegation observed that the word "*responsabilité*" had a more precise meaning in French legal language than the word "responsibility" in English usage, and added that, although paragraph 4 of the commentary explained that it was not intended to convey any notion of "State responsibility", it would have been wiser to avoid the use of the term, particularly as the Commission was preparing draft articles on State responsibility.<sup>101</sup>

<sup>95</sup> *Ibid.*, 1320th meeting, para. 16.

<sup>96</sup> *Ibid.*, para. 23.

<sup>97</sup> *Ibid.*, 1322nd meeting, para. 6.

<sup>98</sup> *Ibid.*, 1323rd meeting, para. 10.

<sup>99</sup> *Ibid.*, para. 49.

<sup>100</sup> *Ibid.*, 1324th meeting, para. 33.

<sup>101</sup> *Ibid.*, 1325th meeting, para. 3.

<sup>92</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1322nd meeting, para. 5.*

<sup>93</sup> *Ibid.*, 1323rd meeting, para. 49.

<sup>94</sup> *Ibid.*, 1325th meeting, para. 19.

*Pakistan.* The Pakistan delegation said that the words "one State by another" created the impression that one whole State was to be replaced by another and suggested the inclusion of "whole or part" of a territory was likely to be conducive to greater accuracy.<sup>102</sup>

*Brazil.* The Brazilian delegation said that the draft articles on succession of States in respect of matters other than treaties contained provisions which corresponded to the provisions contained in the draft articles on succession in respect of treaties. Indeed, the two subjects had common roots in a situation arising out of the replacement of one State by another in the exercise of responsibility for the international relations of the territory.<sup>103</sup>

#### *Written comments*

103. *Sweden.* The Swedish Government commented that "responsibility" in the context of the definition of "succession of States" obviously meant something else than "State responsibility" in the technical sense, and that it was not evident what it did mean. In any case, the term was not clear enough to form part of a definition. Equally vague and obscure was the expression "international relations of territory". Did it imply that "territory" already was a subject of international law having relations to States governed by that law, such as treaty relations? If so, what became of the clean slate theory? If not what kind of international relations was meant. It seemed preferable to return to the expression earlier used by the (former) Special Rapporteur, namely "the replacement of one State by another in the sovereignty of territory". If that expression was considered too limited, because of the word "sovereignty", the term "administration" might be added, so that paragraph 1 (b) might read:

"Succession of States" means that the sovereignty over or administration of a territory passes from one State to another.

*United Kingdom.* The United Kingdom Government commented as follows. Whilst the phrase "in the responsibility for the international relations of territory" had been used in State practice, the draft definition was not altogether satisfactory. Quite apart from the possibility of confusion with the notion of "State responsibility", the meaning of the phrase was not entirely free from doubt in all cases and it could give rise to difficulties, e.g., as regards protected States. A possible improvement to get over the latter difficulty would be to add the words "previously forming the territory or part of the territory of the first State". However, the first alternative in the commentary ("in the sovereignty in respect of territory")<sup>104</sup> might be preferable. A consequential amendment would then be necessary to article 2, paragraph 1 (e).

*Tonga.* The Government of Tonga failed to find anything in the draft articles relating to the case of Protected States and therefore wished to recall that it was a Protected State from 1900, when the Treaty of

Friendship with Great Britain was entered into, until 1970 when it was abrogated by mutual consent. According to the comments of the Government of Tonga, the effect of the Treaty of Friendship was that Great Britain acted in "a representational capacity on behalf of the Kingdom of Tonga in the making of treaties". For this reason, the treaties which the Kingdom of Tonga had entered into before 1900 remained in force; and the treaties which Great Britain made on its own behalf were also made on behalf of the Kingdom of Tonga, which was consulted with respect to them. Upon the abrogation of the Treaty of Friendship, the Kingdom of Tonga terminated the grant of representational capacity in treaty making which it had made to Great Britain, and by re-entering the community of nations resumed the power to enter into treaties directly. The consequence of this was that all treaties which Great Britain had made validly on behalf of the Kingdom of Tonga now became the responsibility of the Government of Tonga, and the United Kingdom ceased to have such responsibility under these treaties except in its own territories. Should Great Britain have acted *ultra vires* in entering into treaties these would have been void, and this would not be a question for the law of State succession. After discussing the implications of the clean slate doctrine in the context of draft article 11, the Government of Tonga added the comment that other parties to Tonga's treaties have accepted that relationships have been unaffected by the abrogation of the Treaty of Friendship, and it believed that its own experience was a better guide to the contemporary legal position than the old cases of the independence of Belgium or Panama which were cited by the Commission.<sup>105</sup>

#### *Observations and proposals of the Special Rapporteur*

104. The definition of the term "succession of States" is not only the basis of the definitions that follow but is also the key to the draft articles as a whole. Therefore, it is particularly important that the definition should be as clear and precise as possible. It is apparent that, during its twenty-fourth session, the Commission devoted much care and skill to the drafting of the definition. At the twenty-seventh session of the General Assembly, the definition was expressly approved by the delegations of Poland, Spain and El Salvador and, at least implicitly by the delegations of Iraq, the Soviet Union and the Ukrainian SSR. At the twenty-eighth session of the General Assembly, the definition was also cited with approval by the Brazilian delegation. On the basis of this evidence, it cannot, however, safely be said that the draft definition has the support of a substantial majority of Members of the United Nations. Moreover, the wording of the definition has been criticized by the delegations of Cuba, Turkey and Pakistan and in the written comments of two Member States, Sweden and the United Kingdom. Criticism of the definition may also be implicit in the comments of the Government of the Kingdom of Tonga, whose views should be considered on their merits, even though Tonga is not a Member of the United Nations. The comments of Tonga, however,

<sup>102</sup> *Ibid.*, para. 21.

<sup>103</sup> *Ibid.*, *Twenty-eighth Session, Sixth Committee*, 1401st meeting, para. 56.

<sup>104</sup> Para. 4 of the commentary.

<sup>105</sup> ILC (XXV)/Misc.2, paras. 3, 5, 7 and 15.

raise a point of substance rather than of drafting, and will be considered below after the text of the definition has been re-examined in the light of the other comments.

105. In effect, there are three criticisms of the draft definition of "succession of States". First, Cuba, Turkey, Sweden and the United Kingdom criticize the use of the word "responsibility". Secondly, Cuba, Sweden and the United Kingdom would prefer the use of the concept of "sovereignty" instead of "international relations" for the purposes of the definition. Thirdly, the Pakistan delegation suggested the inclusion of "whole or part" of a territory to avoid the impression that one whole State was to be replaced by another. In the light of its criticisms, the Swedish Government suggested that paragraph 1 (b) might read:

"Succession of States" means that the sovereignty over or administration of a territory passes from one State to another.

106. Before considering the three criticisms, it should be noted that the definition suggested by the Swedish Government goes further in its alteration of the draft than is required by the Government's specific comments. It changes the form of the definition and departs from the idea of the fact of replacement which is an essential characteristic of the Commission's text. In the view of the Special Rapporteur, this change alone would make the suggested definition unsatisfactory. This does not, however, in itself answer the criticisms that have been made.

107. As regards the first two criticisms mentioned above, it is useful to recall the history of the matter in the Commission. In his first report on succession of States and Governments, Sir Humphrey Waldock, the Special Rapporteur, proposed the following definition for the purposes of the draft articles:

"Succession" means the replacement of one State by another or, as the case may be, of one Government by another, in the possession of the competence to conclude treaties with respect to a given territory.<sup>106</sup>

During the consideration of that report at the twentieth session of the Commission, some members gave support to the use of the idea of change in the possession of "competence" to conclude treaties with respect to a given territory. Certain members thought that the use of the term "competence" instead of "sovereignty" would have the advantage that the definition would cover a greater number of international situations such as international mandates, territories under trusteeship and protectorates. Other members preferred the term "sovereignty" as it would exclude certain situations; for instance, those arising from a military occupation. The Commission, however, decided that, for the time being, there was no need to attempt to draw up a general definition of State succession.<sup>107</sup>

108. In his second report on succession in respect of treaties, Sir Humphrey Waldock proposed that "succession" should mean "the replacement of one State by another in the sovereignty of territory or in the competence

to conclude treaties with respect to territory". Sir Humphrey Waldock preferred the wider coverage of the phrase "competence to conclude treaties", but to meet the wishes of those members who preferred a formulation in terms of "sovereignty", he suggested that reference might be made to both cases, change of sovereignty and change of treaty competence.<sup>108</sup> When the draft of article 1 was under consideration at the twenty-fourth session of the Commission, he pointed out that he had retained the idea of replacement of one State by another in the competence to conclude treaties with respect to territory because there existed cases where such a replacement might take place regardless of any change of sovereignty.<sup>109</sup> During the discussion that followed there was criticism of the use of the term "sovereignty" partly on the ground that, in the view of certain members, it did not cover colonial territories. It was also said that the words "replacement . . . in the competence to conclude treaties with respect to territory" were not sufficiently explicit, and that they could not be included in a definition applicable to the draft articles on succession of States in respect of matters other than treaties.<sup>110</sup> On the other hand, there was also support by certain members for the retention of the "sovereignty" formula and even of both formulae.<sup>111</sup> In spite of these differences of view, there was general agreement that a formula on the lines of that which had been put forward in the second report should be retained for the time being for working purposes.<sup>112</sup> Article 1 (use of terms) was referred to the Drafting Committee by the Commission at its 1158th meeting.

109. Later, at its 1173rd meeting, the Commission began the consideration of a draft article 18 (Former protected States, trusteeships and other dependencies) which Sir Humphrey Waldock had tentatively suggested so that problems involved might be examined by the Commission. In the discussion of the proposed article 18, it became clear that members of the Commission were aware of the relevance of the definitions to special cases such as those of mandates, trusteeships, protectorates and protected States. It may be presumed that this awareness, which emerged in the discussion of the proposed article 18, was carried into the Drafting Committee when it considered the draft definitions including the definition of the term "succession of States". At the 1176th meeting of the Commission, draft article 18 submitted by Sir Humphrey Waldock was referred to the Drafting Committee, where it disappeared without trace.

110. At its 1196th meeting, the Commission, considered a number of draft articles proposed by the Drafting Committee including the draft of article 1 (use of terms).

<sup>106</sup> *Yearbook . . . 1969*, vol. II, pp. 50 and 51, document A/CN.4/214 and Add.1 and 2, chap. II, article 1, para. 1 (a) and para. 4 of the commentary.

<sup>109</sup> *Yearbook . . . 1972*, vol. I, p. 31, 1155th meeting, para. 53.

<sup>110</sup> See, for example, the statement by Mr. Ushakov (*ibid.*, p. 33, 1156th meeting, paras. 14-16.)

<sup>111</sup> See, for example, statement by Mr. Ago (*ibid.*, pp. 36-37, 1156th meeting, paras. 63 and 64).

<sup>112</sup> Statement of Sir Humphrey Waldock summing up the discussion (*ibid.*, p. 42, 1158th meeting, para. 4).

<sup>106</sup> *Yearbook . . . 1968*, vol. II, p. 90, document A/CN.4/202, article 1, para. 2 (a).

<sup>107</sup> *Ibid.*, p. 217, document A/7209/Rev.1, paras. 47 and 50.

This contained the present text of the definition of "succession of States". The references to "sovereignty" and "competence to conclude treaties" had been replaced by "responsibility for the international relations of territory". The only explanation of the new draft offered by the Chairman of the Drafting Committee was that the Committee had been in some doubt as to whether the word "responsibility" should be retained, but had decided that further explanations could be given in the commentary in order to avoid any misunderstanding.<sup>113</sup> The Chairman, speaking as a member of the Commission, asked how the proposed definition related to such cases as Liechtenstein, San Marino and Andorra, where the responsibility for international relations was divided.<sup>114</sup> After a brief discussion, Sir Humphrey Waldock said that a distinction had to be made between the conduct of international relations and responsibility for international relations. He also said that the latter was the best short definition possible.<sup>115</sup> There was no criticism or dissent expressed by any member of the Commission. The clear inference is that the expression "responsibility for the international relations of" met the wishes of those who objected to the use of the term "sovereignty" and was sufficiently wide and flexible to satisfy those who thought that the expression "capacity to conclude treaties" was inadequate.

111. In the opinion of the Special Rapporteur, the expression "responsibility for the international relations" should be considered as a whole. It is the expression as a whole that has been widely used in State practice. Accordingly, the Commission should be very careful before accepting any substitution for the terms "responsibility" or "international relations". It is in the context of the expression as a whole that the word "responsibility" bears its proper meaning in English and in that context it cannot be confused with responsibility in the sense of contractual or tortious liability or with the somewhat special and technical meaning that the word has acquired in the expression "State responsibility". Of course, the use of the same word in different senses should be avoided if possible, but a search has revealed no alternative word that would be satisfactory in the context of the expression "responsibility for the international relations". Words such as "trust", "charge", "command", "commission", "assignment" or "mandate" which linguistically are among the possible alternatives clearly would not do. The conclusion of the Special Rapporteur is that "responsibility" is the best English word in the context, although it would be more satisfactory if a word other than "*responsabilité*" could be found for the French text.

112. The Special Rapporteur favours the retention of the expression as a whole because it covers all aspects of international relations, including the conclusion of treaties and their performance, and, without using the controversial term "sovereignty", covers the content of that term most relevant to the aspects of international law under consideration. Although the use of the term "sovereignty" might have the advantage of meeting the

case of protected States, it is not thought that this in itself is sufficient reason for reintroducing the word with the consequent effect of narrowing the scope of the definition of "succession of States". The alternative suggestion of the United Kingdom Government, namely, to add the words "previously forming the territory or part of the territory of the first State" would also be open to the objection that it would narrow the scope of the draft.

113. As regards the third criticism, there seems to be some misunderstanding. The definition is speaking of the replacement of one (whole) State by another (whole) State. The omission of the definite or indefinite article ("the" or "a") before the word "territory" meets the problem of covering cases involving a whole territory as well as those where only part of a territory is involved. Accordingly, in this respect, in the opinion of the Special Rapporteur the text is correct as drafted.

114. While, for the reasons indicated, the Special Rapporteur does not advise the Commission to accept as valid the criticism of the expression "the responsibility for the international relations", he notes that the Cuban and Swedish comments have called attention to the implication of the expression "of territory" that "territory" itself has "international relations". To avoid this impression, the Special Rapporteur suggests that the Commission might consider the use of some expression such as "with respect to". The drafting may be open to further improvement, but paragraph 1(b) might be amended to read:

"Succession of States" means the replacement of one State by another in the responsibility for international relations with respect to territory;

115. The main purpose of the comments of the Government of Tonga may be to make its own treaty position clear, but they amount to a complaint that there is nothing in the draft articles relating to the case of protected States. It is true that there is no special provision dealing with protected States (or other special cases such as mandates, trusteeships and protectorates). However, that is not the result of oversight on the part of the Commission nor does it necessarily mean that such special cases are excluded from the scope of the draft articles.

116. A substantial part of Sir Humphrey Waldock's fifth report on succession of States in respect of treaties was devoted to a proposed draft article 18 which provided expressly for "protected States", trusteeships and other dependent territories.<sup>116</sup> The draft article was supported by a rich commentary which discussed the problem of "protected States" in detail, dealing in particular with the case of Tonga.<sup>117</sup> There was a long quotation from the "general declaration of succession" made by the Government of Tonga in its letter of 18 June 1970 to the Secretary-General of the United Nations.<sup>118</sup> The proposed draft article 18 was discussed at the 1173rd to 1176th

<sup>113</sup> *Ibid.*, p. 270, 1196th meeting, para. 29.

<sup>114</sup> *Ibid.*, p. 271, 1196th meeting, para. 32.

<sup>115</sup> *Ibid.*, p. 271, 1196th meeting, para. 33.

<sup>116</sup> See *Yearbook . . . 1972*, vol. II, p. 3, document A/CN.4/256 and Add.1-4.

<sup>117</sup> *Ibid.*, pp. 4-10, paras. 4-23 of the commentary to article 18.

<sup>118</sup> *Ibid.*, p. 8, para. 18 of the commentary to article 18.

meetings of the Commission (during its twenty-fourth session) and was subjected to considerable criticism by several members of the Commission. The view was expressed that the preceding articles were sufficient to deal with the cases covered by article 18. It was against this background that the article was referred to the Drafting Committee at the Commission's 1176th meeting, and it was not surprising that (as mentioned above <sup>119</sup>) the article never emerged from the Drafting Committee. It may be inferred that the special cases (including that of "protected States") were left to be covered, if at all, by the preceding articles.

117. In this connexion, one of the key provisions is the definition of "succession of States". A question may well arise whether, for the purposes of the draft articles, there is a "succession of States" within the meaning of the definition in the case of a "protected State", should any such case ever arise in the future. This would be a good test of the soundness of the definition. The answer in a particular case would, in the view of the Special Rapporteur, depend on whether or not there was in fact a replacement in the responsibility for the international relations of the "protected State". If the "protecting State" had been responsible for the international relations of the "protected State", and had not been acting merely in a representative capacity in the conclusion of treaties on behalf of the "protected State" there would be a "succession of States". If, on the other hand, the identity of the "protected State" as a State continued during the period of "protection" and the "protecting State" acted only in a representative capacity on behalf of the "protected State", on the termination of "protection" there would be no case of "succession of States". The treaties validly concluded on behalf of the "protected State" would in principle continue in force.

118. This hypothetical case comes very close to the position of Tonga as outlined in its comments which are mentioned above. There is no need to investigate the question whether the estimate of its position by the Government of Tonga was in fact correct, but it seems to the Special Rapporteur that an examination of the hypothetical case shows that the definition in sub-paragraph (b) is basically sound. Cases of representation in international relations should be distinguished from cases of responsibility for international relations and the former should be left outside the scope of "succession of States". Accordingly, the Special Rapporteur proposes that the Commission should make no change in the definition of "succession of States" on this account.

119. Reference should also be made here to the section of the present report, where the question of the extension of the draft articles to cover social or other forms of revolution is discussed.<sup>120</sup> If, contrary to the suggestion of the Special Rapporteur, the Commission were to decide to make such an extension, it might be necessary to find another definition for "succession of States" or to amend the present one. The drafting of paragraph 1, sub-paragraphs (d) and (f) would also require reconsideration.

<sup>119</sup> See para. 109 above.

<sup>120</sup> See paras. 50-57 above.

#### PARAGRAPH 1 (c)

##### *Observations and proposals of the Special Rapporteur*

120. No oral or written comments on paragraph 1 (c) have been found and, even if the Commission should adopt minor drafting changes in paragraph 1 (b), this would probably not entail any amendment to paragraph 1 (c).

#### PARAGRAPH 1 (d)

##### *Comments of Governments*

##### *Written comments*

121. *Czechoslovakia*. Mention is made in the present report of the suggestion in the written comments of the Czechoslovak Government that article 2, paragraph 1, should be amended so as to extend the clean slate principle to the "States which came into being as a result of a social revolution".<sup>121</sup> The Czechoslovak Government noted that the definition of "newly independent State" contained in article 2, paragraph 1 (f), did not cover all the possibilities and held that the formulation in question should be supplemented in the above sense or possibly, after appropriate modification of paragraph 1 (d) of the same article, dealing with the term "successor State", be deleted from the draft.

##### *Observations and proposals of the Special Rapporteur*

122. Once more the Special Rapporteur would refer members of the Commission to the relevant passage of the present report<sup>122</sup> and pending a decision by the Commission on the point of principle deems it expedient not to attempt either the suggested redrafting of paragraph 1 (f) or the suggested redrafting of paragraph 1 (d) coupled with the possible deletion of paragraph 1 (f).

123. Otherwise, the observations made on paragraph 1(c) apply equally to paragraph 1 (d).

#### PARAGRAPH 1 (e)

##### *Comments of Governments*

##### *Oral comments*

124. *Pakistan*. The delegation of Pakistan said that, in paragraph 1 (e), the words "date" and "replaced" deserved to be particularly noted. Only one date of replacement of the predecessor State by the successor State, in respect of responsibility for international relations, was to be ascertained. That could be done more conveniently if the concept of replacement was defined. The delegation of Pakistan suggested that such replacement could be said to have two component parts. One was demonstrable capacity of the successor State to hold and administer the territory inherited by it and the other was the existence of sufficient international stability to be able to discharge the responsibility for

<sup>121</sup> See para. 52 above.

<sup>122</sup> See above, foot-note 120.

international relations. The delegation also remarked, in the context of comments on the clean slate principle that inherent in the concept of replacement was that of the continuity of the same territory.<sup>123</sup>

#### *Written comments*

125. *Czechoslovakia.* In the opinion of the Czechoslovak Government, it would be appropriate in connexion with the clarification in paragraph 1 (e) of the time when a succession of States occurs, to take into consideration the fact that a succession of States is part of a process which the successor State undergoes and to give thought to a formulation that would allow an indisputable determination of the moment when succession starts.

*German Democratic Republic.* The Government of the German Democratic Republic said that the draft left open the question at which date the succession of States occurred and who determined such date. Since, in international practice, succession normally took place as a process, it would be advisable to avoid any legal uncertainty, to include in the draft a formula which would stipulate unambiguously that the successor State, exercising the right of self-determination of its people, determined the date of succession and notified that date to other States.

*United Kingdom.* As recorded in the written comments in paragraph 1 (b), the United Kingdom Government pointed out that, if the expression "in the sovereignty in respect of territory" were used for the purposes of the definition of "succession of States", a consequential amendment to paragraph 1 (e) would be necessary.<sup>124</sup>

#### *Observations and proposals of the Special Rapporteur*

126. The comments of delegations raise an important point as to the date at which a succession of States occurs. It is most desirable that there should be clarity in this respect. As the Chairman of the Commission said at the end of the debate in the Sixth Committee at the twenty-seventh session of the General Assembly, a pertinent question had been raised about the point in time when the replacement of States that produced a succession occurred. As he also said, the specific time might indeed be very hard to determine, as for example in the case of national liberation movements, and the problem clearly required further study.<sup>125</sup>

127. The problem may be a difficult one, but it is necessary to be clear as to the nature of the problem. There are two distinct questions. One is whether the test of date of replacement is itself satisfactory and definitive. The other is how, if the text itself is satisfactory, the date is to be determined in any particular case. As to the test itself, there seems to have been general agreement that the *fact of replacement* of one State by another is sound. In the view of the Special Rapporteur, this is

right and the Commission should proceed on the basis of this test, whether the replacement be in the responsibility for international relations with respect to territory or in the sovereignty over territory. If so the problem is how the date of occurrence of the *fact of replacement* is to be determined in any particular case.

128. In this connexion, it may be said that while the process of replacement may be prolonged the completion of that process must take place at a given point in time. The difficulty is not a theoretical one, but the practical one of ascertaining when the process has been completed. Objectively, this is a matter to be determined on the basis of the factual evidence and it may be observed that, in practice, it is likely to be easier to ascertain the time at which replacement is completed in the specific matter of responsibility for international relations, than in the less specific matter of sovereignty.

129. In either case, the Special Rapporteur suggests that the succession of States should be regarded as taking place at the time of *completion* of the process of replacement. Indeed, in the absence of any indication to the contrary, this would appear to be the natural and ordinary meaning of the word "replaced" in the context in which it appears in paragraph 1 (e).

130. In most cases of lawful "succession" there will be no difficulty in the determination of the date of replacement. However, in some cases there may be difficulty and it is necessary to consider what (if any) provision should be made to meet such cases. Broadly speaking, there seem to be four conceivable solutions (a) determination by the predecessor State, (b) determination by the successor State, (c) determination by agreement between the predecessor and the successor State and (d) on the basis of the facts in each particular case. Each of these solutions is open to some possible objection.

131. Although in many cases the date of replacement might be determined by the predecessor State, this would not be possible or proper in all cases. For example, if one State were voluntarily to become an integral part of another State, but before the union with the successor State failed to make the necessary determination, there would thereafter be no machinery for making it. Again, if a dependent territory declared and established its independence against the will of the predecessor State, there might be a difference between them as to the date of replacement which, in the circumstances, ought not to be determined by the predecessor State.

132. It might, therefore, be tempting to adopt the second solution, which corresponds to the suggestion of the German Democratic Republic, and provide for determination by the successor State. Unfortunately, such a provision would beg the very question it was intended to answer because it would have to be established that a succession of States had taken place before the "successor" would be in a position to exercise its right of determination. Moreover, such a solution would inevitably involve problems of recognition which, in the view of the Special Rapporteur, the Commission should as far as possible leave on one side in drafting the articles on succession of States in respect of treaties.

<sup>123</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1325th meeting, paras. 21 and 22.*

<sup>124</sup> See para. 103 above.

<sup>125</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1328th meeting, para. 9.*

133. The third solution, namely determination by agreement between the predecessor State and the successor State, would be the most satisfactory in many cases, but would not always be possible and therefore could not be adopted as the sole solution. A combination of the first three solutions might be considered, but on reflection it will be realized that this would involve establishing priorities and would lead to further complexities.

134. Accordingly, the Special Rapporteur, with hesitation and reluctance, has come to the tentative conclusion that it would not be satisfactory to provide in the draft articles for determination of the date of replacement by the predecessor State or by the successor State or by agreement between them. The implication of this conclusion is that the definitions of "succession of States" and "date of the succession of States" should be left substantially as they are in paragraph 1, sub-paragraphs (b) and (e) and that the determination should be made on the basis of the facts in each particular case. In most instances, there is not likely to be any doubt about the relevant date. If any further clarification can be made, this should, of course, be done, but it should be recognized that the problem here is not so much one of lack of clarity in the text as possible difficulty in application due to factual doubts in particular cases. This is a phenomenon which is not uncommon in codifying conventions. Indeed, examples can readily be found in the Vienna Convention. In such circumstances, the prudent course may be to make some satisfactory and acceptable provision for the settlement of disputes arising out of the interpretation and application of the draft articles.

135. On the text of paragraph 1 (e), the Special Rapporteur has no concrete proposal, but the Commission might consider some explanation in the commentary which would make it clear that the date of replacement means the date on which the process of replacement either takes place or is completed. It is also for consideration whether a definition to that effect should be added, but, in the view of the Special Rapporteur, this is not necessary.

#### PARAGRAPH 1 (f)

##### *Comments of Governments*

##### *Oral comments*

136. *Cuba.* The Cuban delegation said that the term "newly independent State" should cover all the various historical categories of dependent territories, including those resulting from new forms of colonialism, namely, those characterized by the presence of tyrannical and servile régimes, which, although theoretically independent, were unconditionally subject to the wishes of big imperialist Powers which exercised absolute control. The delegation continued by saying that liberation from the constraint of neo-colonialism and the establishment of a new régime that was fully independent politically and economically — also involved, therefore, a succession of States.<sup>126</sup>

<sup>126</sup> *Ibid.*, 1322nd meeting, para. 7.

*Union of Soviet Socialist Republics.* The delegation of the USSR commented that the term "newly independent State" rightly included all categories of formerly dependent territories.<sup>127</sup>

*Byelorussian Soviet Socialist Republic.* The delegation of the Byelorussian SSR said that the definition of newly independent States which appeared in paragraph 1 (f), although it did not apply to all cases of newly-formed States, had been selected so that it could be applied to all cases of States freed from colonialism.<sup>128</sup>

##### *Written comments*

137. *Czechoslovakia.* (See the comments in connexion with the draft articles as a whole and under paragraph 1 (d).)<sup>129</sup>

*German Democratic Republic.* (See the comments in connexion with the draft articles as a whole.)<sup>130</sup>

*Sweden.* The Swedish Government commented that the definition of "newly independent State" was not complete. The crucial term used was "dependent territory" and that term was not defined. It was obvious that in the view of the Commission "dependent territory" was something different from "part of a State" (used in the title of article 28) but the difference was not clarified by definitions, as would be desirable.

*United Kingdom.* The United Kingdom Government, in the light of article 28 and their comment thereon,<sup>131</sup> suggested the following:

"newly independent State" means a *successor State* the territory of which immediately before the date of the succession of States was *part of the territory of the predecessor State*. (Additions in italics.)

The Government said that the insertion of the word "successor" would emphasize the fact that a newly independent State is a category of successor State. They also said that the scope and meaning in particular cases of the term "dependent territory for the international relations of which the predecessor State was responsible" was not completely clear.

##### *Observations and proposals of the Special Rapporteur*

138. The comments of the United Kingdom Government raise a point of some substance relating to draft article 28. It amounts to a suggestion that, for the purposes of the draft articles, a part of a State that separates and becomes a State should be regarded as a "newly independent State". There is some logic in this suggestion but it would in fact give to the concept of "newly independent State" a different sense from the one intended

<sup>127</sup> *Ibid.*, 1324th meeting, para. 33.

<sup>128</sup> *Ibid.*, 1326th meeting, para. 40.

<sup>129</sup> See paras. 52 and 121 above.

<sup>130</sup> See para. 52 above.

<sup>131</sup> The United Kingdom Government's comment on article 28 is as follows:

"It is considered that paragraph 1 of this article should be included in part III which could be broadened to cover successor States which are not newly independent. As regards paragraph 2, this would become unnecessary were the definition proposed in these Observations for the term 'newly independent State' (Article 2, para. 1(f)) to be adopted."

by the Commission. It would involve the deletion of the words "dependent territory for the international relations of which the predecessor State was responsible" as well as the addition of the words "part of the territory of the predecessor State". In the view of the Special Rapporteur, this suggestion is a typical example of a case in which it would be advisable to deal first with the point of substance and afterwards to consider whether any alteration in the definition is necessary. Accordingly, the Special Rapporteur proposes that the Commission should postpone a decision on this aspect of the United Kingdom comments until it has dealt with article 28. On the other hand, the Special Rapporteur thinks that the insertion of "successor" before "State" would clarify and improve the draft and proposes that the Commission should adopt this suggestion.

139. So far as the comments of Governments raise the question of social or other forms of revolution with respect to paragraph 1 (*f*), the Special Rapporteur would again refer the Commission to the relevant passage in the present report.<sup>132</sup>

140. The comments of the Cuban delegation, however, raise a different point. In the absence of specific examples, it is difficult to visualize the case or cases that the Cuban delegation had in mind, but generally speaking the point seems to involve factual and political questions that cannot be answered satisfactorily by further refinement of the definition. In the opinion of the Special Rapporteur, the Commission would be wise not to devote its time and energies to such questions.

141. What does call for consideration is whether the expression "a dependent territory for the international relations of which the predecessor State was responsible" is sufficiently clear and precise. This expression has been criticized by the Governments of Sweden and the United Kingdom, but the term "newly independent State" was freely used by delegations during the debates in the Sixth Committee without criticism and with apparent understanding of what it was intended to mean. If any clarification were required, this is provided by the commentary in the report of the Commission.<sup>133</sup> With reference to the comments of the Government of Tonga mentioned in connexion with paragraph 1 (*b*),<sup>134</sup> attention may be called to a foot-note to the commentary to article 2 in the Commission's report which explains the position of "protected States" and "associated States" with respect to the meaning of "dependent territory" in sub-paragraph (*f*).<sup>135</sup> Having regard to the misunderstanding that has arisen about "protected States" it might be advisable to incorporate the substance of the foot-note into the text of the commentary.

142. If one analyses the text, the word "territory" is qualified in two ways, i.e. by the adjective "dependent" and by the expression "for the international relations of which the predecessor State was responsible". The use of that expression is consequential on the use of the

corresponding expression in paragraph 1 (*b*). In this respect, the drafting of paragraph 1 (*f*) will depend on the decision of the Commission on sub-paragraph (*b*). It is the word "dependent" that gives the term "newly independent State" its special meaning, and the essential question here is whether the word "dependent" requires definition. In the view of the Special Rapporteur, although the meaning is clarified by the commentary, that meaning is not self-evident from the word itself as used in the context of paragraph 1 (*f*). Therefore, in principle, the term (if retained) ought to be defined; but the problem is to find a definition that will clarify the meaning without raising further questions of interpretation.

143. On the provisional assumption that article 28 is retained, the main purpose of the word "dependent" is to distinguish the case of a "newly independent State" from that of a new State created by separation of part of a State. It is intended to cover all "the various historical types of dependent territories".<sup>136</sup> Within this purpose, the meaning of "dependent territory" should be as wide as possible, leaving the limitation of the term to the condition for the occurrence of a succession of States, namely, that the predecessor State was responsible for the international relations of the territory. On this basis, if a definition is thought to be necessary, the Commission might consider the insertion between sub-paragraphs (*e*) and (*f*) of the following definition:

"dependent territory" means any territory which immediately before the date of the succession of States was not part of the territory of the predecessor State.

It might be suggested that the last expression should read "the metropolitan territory of the predecessor State". In the view of the Special Rapporteur, however, the insertion of the word "metropolitan" would not in itself clarify the meaning and it might be said that that word also requires definition. Therefore, if a definition of "dependent territory" were considered necessary, the Special Rapporteur would propose the above definition.

#### PARAGRAPH 1 (*g*)

##### *Comments of Governments*

##### *Written comments*

144. *Sweden.* The Swedish Government commented that "notification of succession" as defined in paragraph 1 (*g*) did not mean notification of a "succession of States" as defined in paragraph 1 (*b*), but notification of the consent of a successor State to be bound by a multilateral treaty, i.e., succession to a treaty. The use of the same term "succession" for these two different events was hardly consistent with the statement in the commentaries that the Commission's approach

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.<sup>137</sup>

<sup>132</sup> See paras. 50-57 above.

<sup>133</sup> Para. 6 of the commentary.

<sup>134</sup> See para. 103 above.

<sup>135</sup> See para. 6 of the commentary and foot-note 41.

<sup>136</sup> Para. 6 of the commentary.

<sup>137</sup> *Yearbook . . . 1972*, vol. II, p. 226, document A/8710/Rev.1, para. 29.

*United Kingdom.* The United Kingdom Government suggested that the words "considered as" might usefully be omitted here and elsewhere in the draft.

*Observations and proposals of the Special Rapporteur*

145. The words "considered as" are not used in the commentary. The Special Rapporteur thinks that they are superfluous and should be deleted.

146. From the point of view of purity of drafting, the criticism of the Swedish Government may be well-founded. The difficulty is to find a suitable alternative to the expression "notification of succession". Moreover, the word used is "succession" not "succession of States", so that the expression is not strictly speaking inconsistent with the commentary in the way suggested by the Swedish Government. On balance, the Special Rapporteur recommends retention of the expression "notification of succession".

PARAGRAPH 1 (h)

147. There were no comments or observations.

PARAGRAPH 1 (i)

*Comments of Governments*

*Oral comments*

148. *Venezuela.* The Venezuelan delegation said that paragraph 1 (i) was a departure from the text of article 11 of the Vienna Convention in that it excluded accession. The delegation remarked that the Commission had probably not considered such a concept viable in the relationship between a predecessor State and its successor. It appeared, however, that the draft articles did not entirely exclude the possibility that a successor State might accede to a treaty signed but not ratified by its predecessor, in a situation where it could become party to the treaty only by means of an arrangement embodied in its text. Further light was shed on such a situation in the text of article 14 and the commentary on it.<sup>138</sup>

*Written comments*

149. *United Kingdom.* The United Kingdom Government commented that a reference to accession could be added, in line with paragraph 1 (j) of the article.

*Observations and proposals of the Special Rapporteur*

150. While the terms "ratification", "acceptance" and "approval" are used in draft article 14, the term "accession" appears nowhere in the draft articles. It is true that the word "acceding" is used in paragraph 1 (j), but this is a definition of the term "reservation" derived from article 2, paragraph 1 (d), of the Vienna Convention. It seems to the Special Rapporteur that it would be superfluous to provide a definition of "accession" by insertion of the word in paragraph 1 (i) unless the term were used in one of the substantive provisions of the draft articles.

<sup>138</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1327th meeting, para. 19.*

PARAGRAPH 1 (j)

151. There were no comments or observations.

PARAGRAPH 1 (k)

152. There were no comments or observations.

PARAGRAPH 1 (l)

153. There were no comments or observations.

PARAGRAPH 1 (m)

154. There were no comments or observations.

PARAGRAPH 1 (n)

*Comments of Governments*

*Oral comments*

155. *Australia.* The Australian delegation suggested that paragraph 1 (n) should be amended to read: "international organization" means an international inter-governmental organization", and said that delegations from States which had a federal structure would appreciate the significance of that suggestion.<sup>139</sup>

*Nigeria.* The Nigerian delegation said that it would perhaps be advisable to add the word "international" before the words "intergovernmental organization", in order to remove any doubts which might arise when the expression was used in the context of States with a federal structure.<sup>140</sup>

*Canada.* The Canadian delegation agreed with the Australian proposal.<sup>141</sup>

*Observations and proposals of the Special Rapporteur*

156. The Special Rapporteur has no strong views on the suggestion made by the Australian delegation, but doubts whether the insertion of the word "international" before "intergovernmental organization" would achieve the result intended.

157. As pointed out in the commentary,<sup>142</sup> the wording of the definition corresponds to that used in the Vienna Convention. Therefore, in the interests of uniformity, on balance the Special Rapporteur favours the retention of paragraph 1 (n) as drafted.

PARAGRAPH 2

158. There were no comments or observations.

*Article 3. Cases not within the scope of the present articles*

*Comments of Governments*

*Written comments*

159. *Sweden.* The Swedish Government said that the principles contained in this article were not controversial,

<sup>139</sup> *Ibid.*, 1319th meeting, para. 2.

<sup>140</sup> *Ibid.*, 1324th meeting, para. 2.

<sup>141</sup> *Ibid.*, para. 14.

<sup>142</sup> Para. 8.

and it might be sufficient to refer to them in the commentary. If the article was maintained, its title should perhaps be changed. After all, the article was dealing with cases in which the provisions of the draft *were* applicable, under sub-paragraph (a) in substance and under sub-paragraph (b) also formally.

*Observations and proposals of the Special Rapporteur*

160. The fact that the article is non-controversial is not in itself a good reason for its omission. On the other hand, it does correspond to article 3 of the Vienna Convention, and is also useful in avoiding any misconception that might result from the limitations on the scope of the draft articles. Accordingly, the Special Rapporteur proposes that the article should be retained.

161. If the article is retained, the Swedish Government's comments on the title of the article will fall to be considered. In the opinion of the Special Rapporteur, the title is governed by the cases mentioned in the first part of the draft article and not by the "saving clauses" in sub-paragraphs (a) and (b). On this view, the title is correct. In any event, as regards sub-paragraph (a) the Special Rapporteur does not share the view of the Swedish Government. That sub-paragraph deals, not with the provisions of the draft articles as such, but with the rules of international law which exist independently of the articles. On the other hand, as regards sub-paragraph (b) the point is well taken and, if this sub-paragraph stood alone the title of the article should be altered. However, for the purpose of drafting the title, the article should be considered as a whole, and the consideration in the preceding paragraph seems to be overriding.

162. For the above reasons, the Special Rapporteur proposes the retention of the draft article and its title.

**Article 4. Treaties constituting international organizations and treaties adopted within an international organization**

*Comments of Governments*

*Oral comments*

163. According to the 1972 report of the Sixth Committee debates, reference was made with approval to the fact that the draft articles took into account the special aspects of succession in respect of treaties constituting international organizations and treaties adopted within an international organization and safeguarded the rules on membership and other relevant rules of the organization concerned. The opinion was expressed that treaties involving membership of international organizations should not be hastily succeeded to because membership might involve obligations such as budgetary commitments.<sup>143</sup>

*Observations and proposals of the Special Rapporteur*

164. It seemed convenient and expedient in this case to rely on the report of the Sixth Committee rather than to try to cite individual delegations.

165. The comments tend in the direction of approval of the draft article, and in the absence of any adverse comment from Governments, the Special Rapporteur proposes that the article be approved as drafted.

**Article 5. Obligations imposed by international law independently of a treaty**

*Comments of Governments*

*Written comments*

166. *Sweden.* The Swedish Government suggested that, as in the case of article 3, the content of this article might be transferred to the commentary.

*Observations and proposals of the Special Rapporteur*

167. The comment of the Swedish Government is the only one that has suggested any change with respect to this article.

168. It would be difficult to frame a suitable commentary without having the article as a basis for it and it would then be necessary to explain why no article corresponding to article 43 of the Vienna Convention had been included in the draft articles.

169. Although the article may not be necessary, the Special Rapporteur, for the above reasons, favours its retention.

**Article 6. Cases of succession of States covered by the present articles**

*Comments of Governments*

*Oral comments*

170. *Nigeria.* The Nigerian delegation said that the provisions of articles 3 to 9 appeared to be based on well-established principles of international law. In addition, the Commission had been wise to formulate article 6 in such a way as to safeguard the lawfulness of the succession of States covered by the draft articles. The delegation added that one could also endorse without difficulty the moving treaty frontiers principle embodied in article 10, since its application would necessarily depend upon strict invocation of article 6.<sup>144</sup>

*Kenya.* The delegation of Kenya could not see the utility of article 6, particularly as the Commission had included in article 31 rules concerning cases of military occupation and outbreak of hostilities.<sup>145</sup>

*Union of Soviet Socialist Republics.* The delegation of the USSR said that it should be noted that the draft articles applied only to cases of succession occurring in conformity with international law, as stated in article 6.<sup>146</sup>

*Pakistan.* The delegation of Pakistan pointed out that article 6 disregarded those types of succession which

<sup>144</sup> *Ibid.*, Sixth Committee, 1324th meeting, para. 2.

<sup>145</sup> *Ibid.*, para. 6.

<sup>146</sup> *Ibid.*, para. 35.

<sup>143</sup> *Official Records of the General Assembly, Twenty-seventh Session, Annexes, agenda item 85, document A/8892, para. 72.*

might not occur in conformity with the principles of international law embodied in the Charter of the United Nations. The inclusion of such a provision, supporting the peaceful settlement of disputes, was of paramount value.<sup>147</sup>

#### *Written comments*

171. *Poland.* The Polish Government considered that the provisions of the draft articles could be applied solely to such cases of State succession as arose while the principles of international law, and in particular the principles enshrined in the Charter of the United Nations, were being respected. The provisions of articles 6 and 31, expressing this proposition, dispelled any doubts concerning both the scope of the term "succession of States" and the scope of certain other provisions of the draft. It was useful, therefore, to retain these provisions in their present form.

*United Kingdom.* The United Kingdom Government considered that article 6 was superfluous for the reason given in paragraph 1 of the commentary, and that, if included, the article might be open to different interpretations in particular cases.

*United States of America.* The Government of the United States, having expressed support for articles 1 through 5, said that the purpose of article 6, to make clear that succession with regard to territory which did not take place in accordance with the requirements of international law should not be considered as the type of succession that was envisaged in the draft articles, was laudable. There was a question, however, whether the formulation of the article achieved the end sought. To the extent that the articles imposed obligations upon successor States that were designed to promote the principles of the Charter of the United Nations there was no reason for excluding the imposition of such obligations upon any State that claimed to be a successor State in respect of territory. Thus, the provision in article 29, that a succession of States should not as such affect a boundary established by a treaty, should apply in the case of any territorial change. Its applicability, in fact, might be more necessary in the case of a territorial change having elements of illegitimacy than in cases where there was no question as to the legality of the succession.

The Government of the United States commented that it would be desirable to clarify article 6 to make it clear that the obligations in the draft articles applied in all cases. The article could be recast so as to provide that the rights conferred upon successor States in the articles might be exercised only by States whose succession had taken place in conformity with international law.

The Government of the United States also commented that it seemed advisable to revise the commentary. The position that the Commission drafted on the assumption that the rules it laid down would normally apply to facts occurring and situations established in conformity with international law appeared too broad. The entire subject of State responsibility, for example, was concerned with

rules applying to situations where there had been a breach of international law. In preparing the Vienna Convention on Diplomatic Relations<sup>148</sup> the Commission had been concerned with formulating the normal rules for diplomatic intercourse among States. But in preparing the draft on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons,<sup>149</sup> the Commission was dealing with conduct in violation of the Vienna Diplomatic Conventions and other treaties and of basic principles of international law.

#### *Observations and proposals of the Special Rapporteur*

172. At the twenty-seventh session of the General Assembly, at the conclusion of the debate in the Sixth Committee, the Chairman of the Commission remarked that some delegations considered article 6 essential whereas others had found it superfluous, and added that, on that point, the Commission would rely on whatever comments States wished to transmit to it.<sup>150</sup>

173. Unfortunately, the written comments have not provided a clear-cut answer to the question whether article 6 should be retained. One Government has supported its retention. One has suggested its deletion as superfluous. The third has suggested its amendment and modification of the commentary.

174. In the view of the Special Rapporteur, article 6 has to be considered in the context of the draft articles as a whole, and particularly article 2, paragraph 1 (b) and articles 10 and 31. The commentary to article 2, paragraph 1 (b), stresses that the definition of "succession of States" refers exclusively to "the fact of the replacement of one State by another".<sup>151</sup> There is no indication whether this fact occurs lawfully or unlawfully. For the purposes of the draft articles, if the definition of "succession of States" is kept in its present form, the definition, and consequently the draft articles, would appear to apply whether the fact occurred lawfully or unlawfully. The draft articles contemplate a "succession of States" occurring in various circumstances which might in fact be brought about unlawfully, e.g. in the case of a transfer of territory to which article 10 relates. Theoretically, it would be possible to clarify the intention of the draft articles by an amendment to article 2. For example, the definition of "succession of States" could be amended to refer to "the lawful replacement . . .". Such an amendment, however, would dilute the intention to refer exclusively to the fact of replacement and might lead to difficulties in the interpretation and application of the definition.

175. Although the intention that the articles should apply only "to facts occurring and situations established in conformity with international law" might be inferred

<sup>148</sup> United Nations, *Treaty Series*, vol. 500, p. 95.

<sup>149</sup> *Yearbook . . . 1972*, vol. II, p. 312, document A/8710/Rev.1, chap. III, sect. B.

<sup>150</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1328th meeting, para. 12.

<sup>151</sup> Para. 3 of the commentary.

<sup>147</sup> *Ibid.*, 1325th meeting, para. 19.

from the normal practice of the Commission, it would be unsafe to rely on that possibility. Therefore, it would be advisable to keep an express provision on the lines of article 6.<sup>152</sup>

176. If article 6 is to be kept, the question arises whether it is properly drafted. Should it exclude the application of the articles *in toto* in the cases to which it relates, or should it merely exclude the enjoyment of the benefits of the draft articles in those cases, as suggested in the comments of the United States? There is certainly some attraction in that suggestion, but there are considerations in favour of keeping the article in its present form. From the negative point of view, the exclusion of the application of the articles in "unlawful" cases would merely mean that the articles as such would not apply. So far as the rules of customary international law were reflected in the articles, those rules would still be applicable independently of the articles. Perhaps this point should be made in the commentary. There are, on the other hand, reasons of a more positive kind for excluding "unlawful" cases from the draft articles. It might be unwise for the Commission to attempt to regulate such cases partially, without considering all their legal implications—and that would be the effect of applying some of the provisions of the draft articles but not others. Also, a number of the draft articles do not distinguish clearly between the creation of rights and the imposition of obligations. They are concerned with the legal situation with respect to treaties resulting from a "succession of States"—the question whether treaties do or do not remain in force. One may refer for example to articles 10, 19 and 20. Articles 29 and 30 are not themselves cast in language which expressly creates rights and obligations. They are framed as exclusions or saving clauses. Accordingly, in the cases to which articles 29 and 30 relate, exclusion from the application of the draft articles as a whole would not seem to make any material difference.

177. In the light of these considerations, the view of the Special Rapporteur is that it would be preferable to cast article 6 in its present form. If, however, the Commission should decide to adopt the United States suggestion the article might be drafted on the following lines:

The rights conferred by the present articles may only be exercised by a successor State if the succession of States has occurred in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

178. If article 6 is redrafted on the lines indicated in the preceding paragraph, the title will require alteration. It might be amended to read, "Limitation on the exercise of rights conferred by the present articles."

<sup>152</sup> Reference should be made in this context to the passage in the 1973 report of the Sixth Committee (*Official Records of the General Assembly, Twenty-eighth Session Annexes*, agenda item 89, document A/9334, para. 68), which relates to article 2 of the draft articles on succession of States in respect of matters other than treaties prepared by the International Law Commission at its twenty-fifth session. (*Yearbook . . . 1973*, vol. II, p. 203, document A/9010/Rev.1.) It was there recorded that several representatives stressed the importance of article 2 (corresponding to article 6 of the 1972 draft articles on succession of States in respect of treaties) and that it was pointed out that if the provision was included in one set of draft articles it also be included in the other.

179. Whether article 6 is redrafted or not, the Special Rapporteur agrees with the comments of the Government of the United States on the need to clarify paragraph 1 of the commentary, and proposes that the commentary should be clarified accordingly.

**Article 7. Agreements for the devolution of treaty obligations or rights from a predecessor to a successor State**

*Comments of Governments*

*Oral comments*

180. *Kenya.* The Kenyan delegation, commenting on article 7, agreed with the Commission that a devolution agreement concluded between the predecessor State and the successor State could not form the basis for a transmission of treaty rights and obligations to the successor State. The delegation said that upon acceding to independence a number of States—including Kenya—had rightly rejected agreements of that kind which had been concluded for the exclusive benefit of the colonial Power. The unilateral declarations of intent made by those countries were more in keeping with their new status as independent nations, since a new State succeeded not to treaties but to the competence to conduct its international relations and, consequently, to enter into treaty relations with other countries.<sup>153</sup>

*Zambia.* The Zambian delegation said that articles 7 and 8 were worded in such a way as to give equal significance to devolution agreements and unilateral declarations. While not contesting the Commission's view that, in the case of a State party to a treaty concluded by the predecessor State, the legal effect of a unilateral declaration would be analogous to that of a devolution agreement, the Zambian delegation felt that, if possible, the difference between the two forms of legal act should be reflected. A unilateral declaration was made voluntarily after careful consideration, whereas a devolution agreement might not always have been concluded quite freely. Furthermore, the delegation said, if treaty relations with the other State party were to continue in force, the latter must accept, tacitly at least, the provisional application of the treaty. A unilateral declaration and the acceptance, express or tacit, by the other State party had been used by the Zambian Government as a provisional method for maintaining most of its treaty relationships. It had preferred that procedure to negotiating the express revival of a lapsed treaty or a new treaty to replace it.<sup>154</sup>

*Written comments*

181. *United States of America.* The Government of the United States said that articles 7 and 8 might be clarified in each case by combining paragraphs 1 and 2 into a single paragraph which would say, in effect, that notwithstanding the conclusion of a devolution agreement, or a unilateral declaration by the successor State regarding the continuance in force treaties, the present articles

<sup>153</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1324th meeting, para. 7.

<sup>154</sup> *Ibid.*, 1326th meeting, para. 7.

governed the effects of the succession with respect to treaties in force in the territory on the date of succession. As drafted, article 7 left some doubt as to its relationship to articles 35, 36 and 37 of the Vienna Convention and article 8 raised some questions as to the law of unilateral acts. Examination of the commentaries to these articles, such as the commentary to article 7<sup>155</sup> and the commentary to article 8,<sup>156</sup> established the desirability of eliminating doubt on these points.

*Observations and proposals of the Special Rapporteur*

182. The comments by the delegations of Kenya and Zambia do not call for any change in article 7 except perhaps so far as they suggest that there might be some difference of tone or emphasis between article 7 and article 8 to reflect a difference of political attitude towards devolution agreements and unilateral declarations. Such a distinction, if it is to be made, is more suitable for the commentary than for the text of the draft article itself. With respect to article 7, the point seems to be adequately covered by the commentary.<sup>157</sup> As regards article 8, the point will be mentioned below in connexion with that article.

183. The comments of the United States Government affect the drafting of both articles, as well as the commentaries. It is convenient, however, to consider each article separately, especially because each article is concerned with a different kind of instrument.

184. If effect were given to the United States suggestion for the redrafting of article 7, it would read somewhat as follows:

**Notwithstanding the conclusion of an agreement between a predecessor and a successor State providing that the obligations or rights under treaties in force in respect of a territory at the date of the succession of States shall devolve upon the successor State, the effects of the succession of States on those treaties shall be governed by the present articles.**

185. No doubt the drafting is still open to improvement, but, in the view of the Special Rapporteur, this redraft has the advantages of simplifying and clarifying article 7 without any material loss. Accordingly, he proposes that the Commission should adopt a text for article 7 on the lines of the redraft in the preceding paragraph.

186. This change in the text, however, would not entirely dispose of the United States comments on this article. It would, of course, mean that if there were any difference between the provisions of the draft articles and those on treaties and third States of the Vienna Convention, the provisions of the draft articles dealing with the special case of succession of States would take effect. Having regard to the provisions of article 73 of the Vienna Convention, there could be no objection of principle to that result. Nevertheless, even if article 7 is amended in the way proposed, it might be advisable to clarify in the commentary the position vis-à-vis the provisions on treaties and third States of the Vienna Convention, especially articles 35, 36 and 37 as suggested

in the comments of the United States Government. This is particularly desirable since paragraph 21 of the commentary refers expressly to articles 42 to 53 of the Vienna Convention. Any such addition to the commentary might follow paragraph 18, and paragraphs 19 and 20 might be combined into a single paragraph corresponding to the single paragraph of article 7.

**Article 8. Successor State's unilateral declaration regarding its predecessor State's treaties**

*Comments of Governments*

187. See the comments under article 7.<sup>158</sup>

*Observations and proposals of the Special Rapporteur*

188. If effect were given to the United States suggestion for the redrafting of article 8, it would read somewhat as follows:

**Notwithstanding the fact that a successor State has made a unilateral declaration purporting to continue in force in respect of its territory treaties to which the predecessor State was a party in respect of that territory at the date of the succession of States, the effects of the succession of States on those treaties shall be governed by the present articles.**

189. For reasons similar to those given in the case of article 7, the Special Rapporteur proposes that the Commission should adopt a text for article 8 on the lines of the above redraft.

190. As regards the comments of the delegations of Kenya and Zambia, the Special Rapporteur thinks that the differences between devolution agreements and unilateral declarations and the circumstances in which they are made are sufficiently clear from the commentaries as they stand. If desired, however, it would be possible to add a sentence at the end of paragraph 20 of the commentary to article 8, referring to paragraph 21 of the commentary to article 7. It might say that different considerations would apply to a declaration as a unilateral act and that, in practice, it is less likely to be made as a result of "coercion" than a devolution agreement. The Special Rapporteur would not favour such an addition because he is not convinced that devolution agreements have been procured by "coercion".

**Article 9. Treaties providing for the participation of a successor State**

*Comments of Governments*

*Oral comments*

191. *Venezuela.* The Venezuelan delegation said that the Commission's approach to the matter dealt with in article 9 had been balanced. The precedents cited included, in paragraph 9 of the commentary to that article, the agreement between the United Kingdom and Venezuela regarding the Guyana [formerly British

<sup>155</sup> Paras. 15-17 of the commentary.

<sup>156</sup> Paras. 16 and 17 of the commentary.

<sup>157</sup> Para. 21 of the commentary.

<sup>158</sup> See paras. 180-181 above.

Guiana] Venezuela frontier and in paragraph 12 of the commentary the Commission had referred to the need "to require some evidence of subsequent acceptance by the successor State in all cases . . .". The delegation commented, however, that in at least one significant precedent practice indicated that such consent could be given in the act of signature itself, which would be binding upon the future successor State and make it a party to the instrument or, possibly, by the execution by the successor State of acts which clearly showed its intention of continuing to be bound by the treaty.<sup>159</sup>

#### *Written comments*

192. *United Kingdom.* The United Kingdom Government said that the Commission's proposal in article 9, paragraph 2, that express acceptance in writing was required appeared to be unduly restrictive. In the sort of situation under consideration tacit consent should be permitted.

#### *Observations and proposals of the Special Rapporteur*

193. The comments of the Venezuelan delegation and the United Kingdom Government both raise the same point with respect to paragraph 2 of article 9. They do not question the principle of the paragraph, namely, that where a treaty purports to lay down that, on a succession of States, the successor State shall be considered as a party, the provision cannot automatically bind the successor State; nor do they question the view of the Commission that it would be preferable to require some evidence of acceptance by the successor State in all cases (as stated in the commentary).<sup>160</sup> The point is whether it is necessary to require express acceptance in writing for the successor State to be considered a party to the treaty.

194. As indicated in the commentary,<sup>161</sup> the provisions of paragraph 2 may apply to a variety of cases of succession of States. In the future, cases of "newly independent States" are likely to be increasingly rare. In some cases, even of "newly independent States", continuity may be desirable in the interests of the successor State, but the requirement of express acceptance in writing might create constitutional or other difficulties. What really matters is that the successor State shall be free to make its own decision whether or not to be considered as a party to the treaty. If the intention to be a party is freely formed, the method of giving expression to that intention is of subsidiary importance. Indeed, it might be said that once a new State has control of its own destiny it should not be fettered as to the manner in which it may express its will or its intentions.

195. On the other hand, the analogy between the position of a successor State and that of a "third State" within the meaning of the Vienna Convention is not entirely sound. If the successor State were always to be regarded as a "third State", there would be no need for a set of rules dealing separately with "succession of States in respect of treaties".

196. For the above reasons, the Commission may like to reconsider its decision to require acceptance in writing for the purposes of paragraph 2. That requirement was based on the analogy of article 35 of the Vienna Convention. In this connexion, the Special Rapporteur does not make any proposal, but the Commission may like to consider the possibility of adapting the terms of article 37, paragraph 1, of the Vienna Convention for the purpose of introducing a greater measure of flexibility into paragraph 2 of draft article 9. If that course were adopted, the last clause of paragraph 2 might read: "only if it is established that it was the intention of the successor State to be so considered". There are, of course, various other ways of introducing a measure of flexibility into paragraph 2, but the draft now suggested would leave it in the hands of the successor State to choose its own method of establishing its intention to be considered as a party to the treaty.

## PART II

### TRANSFER OF TERRITORY

#### *Article 10. Transfer of territory*

##### *Comments of Governments*

#### *Oral comments*

197. *Spain.* The Spanish delegation said that the Commission might examine the possibility of extending to article 10 the exception to the continuity of a treaty in cases where a succession radically changed the conditions for the operation of the treaty, provided for in article 25 and other articles.<sup>162</sup>

*Nigeria.* The Nigerian delegation said that one could endorse without difficulty the "moving treaty frontiers" principle embodied in article 10, since its application would necessarily depend upon strict invocation of article 6.<sup>163</sup>

#### *Written comments*

198. *United Kingdom.* The United Kingdom Government said that reference to "administration" went too far and might lead to uncertainty. The point in the commentary<sup>164</sup> should be included in the draft article, e.g. by beginning "subject to the provisions of the present articles", as in draft article 11. The Government also said that, in the final phrase of sub-paragraph (b), the compatibility test, which existed in relation to reservations, was proposed: this required careful study. It would be preferable to make a more direct reference to the example of a treaty intended or expressed to have a restricted territorial scope which was given in the commentary.<sup>165</sup>

<sup>159</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1327th meeting, para. 20.*

<sup>160</sup> Para. 12.

<sup>161</sup> Paras. 12 and 14.

<sup>162</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1320th meeting, para. 26.*

<sup>163</sup> *Ibid.*, 1324th meeting, para. 20.

<sup>164</sup> Para. 12 of the commentary.

<sup>165</sup> Para. 11 of the commentary.

Finally the questions of impossibility of performance and fundamental change of circumstances also needed to be considered in this connexion.

*United States of America.* The Government of the United States considered that for the purposes both of clarity and of consistency it would be desirable to replace the phrase "under the sovereignty or administration of a State" with a phrase based on article 2, paragraph 1 (b), such as "when territory as to which one State has responsibility for international relations . . .".

*Observations and proposals of the Special Rapporteur*

199. These comments raise points on three parts of the draft article. Each of these will be considered in sequence as it affects the text.

200. First, it seems to the Special Rapporteur that the United Kingdom Government's comment that the point in the commentary should be included in the article is sound. The present contrast between articles 10 and 11 might be read as implying that a transfer of territory could have the effect of altering the boundary régime of the country with respect to other States party to the relevant treaty, whereas the transfer as such can only affect the territorial régime as between the predecessor and successor States. For these reasons, the Special Rapporteur proposes the insertion of the words "Subject to the provisions of the present articles" at the beginning of article 10.

201. Secondly, the United Kingdom and United States Governments have suggested changes in the introductory words. Although from different points of view, both have criticized the expression "under the sovereignty or administration", and the effect of both comments would be to bring article 10 into line with their view of what should be said in the definition of "succession of States" in article 2, paragraph 1 (b).

202. There is, however, an important difference of substance. The United Kingdom suggestion would limit the application of article 10 to territories under the "sovereignty" of a State. This would be more restricted than was the intention of the Commission as expressed in the commentary,<sup>166</sup> which was to cover not only territory under the sovereignty of the predecessor State but also territory under an administering Power responsible for its international relations. If the United Kingdom comments on article 2, paragraph 1 (b), were accepted, the change suggested for article 10 would be a natural corollary.<sup>167</sup>

203. The United States suggestion, on the other hand, would accord with the intention of the Commission expressed in the commentary and with the definition of "succession of States" in its present form.

204. In the view of the Special Rapporteur the scope of article 10 should correspond to the scope of the draft articles which results from the definition of "succession of

States". Moreover, as a principle of drafting, if a term has been defined, that term should be used if possible because the use of new terms is likely to lead to doubt and confusion.

205. Accordingly, the Special Rapporteur proposes the following introductory words for article 10:

Subject to the provisions of the present articles, when a succession of States occurs by a transfer of territory from the predecessor State to the successor State.

206. Thirdly, there are the comments of Spain and the United Kingdom that affect the limitation on the application of sub-paragraph (b) expressed in the clause "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".

207. The suggestion of the Spanish delegation is comparatively simple and effect could be given to it by adding at the end of sub-paragraph (b) words taken from article 25, e.g., "or would radically change the conditions for the operation of the treaty". The comments of the United Kingdom Government go further. In effect, they suggest that the "compatibility test" should be replaced by limitations based on (a) the restricted territorial scope of the treaty, (b) impossibility of performance and (c) fundamental change of circumstances.

208. It may be observed in passing that the "compatibility test" is likely to prove difficult to apply in particular cases and that its presence makes the addition of satisfactory procedures for the settlement of disputes desirable, if not essential. However, the same remark may be made, though perhaps with less force, about the other tests suggested. In the view of the Special Rapporteur difficulties of application should not be regarded at this stage as an overriding consideration. What is important is to ensure that the substance of the provision is right in the sense that it will cover the kinds of cases which should be excepted from the operation of sub-paragraph (b). Another consideration is that there should be a reasonable degree of consistency between the provisions of the draft articles.

209. For these reasons, the Special Rapporteur would be inclined to agree with the Spanish suggestion and bring the text of article 10 into line with that of article 25 (on the provisional assumption, of course, that the text of article 25 remains as drafted).

210. On the other hand, while the United Kingdom suggestion to use the example in paragraph 11 of the commentary in place of the "compatibility test" would have the advantage of certainty, it does not seem to the Special Rapporteur that it would cover all cases that might arise. For example, there might be treaty provisions relating to residents of the successor State which clearly should not be applicable to residents of the transferred territory, yet the provisions of the treaty might not have a "restricted territorial scope" except so far perhaps as this might be implied from the test of residence. But, depending on the nature of the obligations contained in the treaties, one treaty might properly be applicable to residents in the transferred territory while

<sup>166</sup> Para. 6 of the commentary.

<sup>167</sup> See the United Kingdom Government's written comments under article 2, para. 1 (b) and the Special Rapporteur's observations (paras 103, 111 and 112 above).

another might not. Accordingly, the Special Rapporteur, while regarding the "restricted territorial scope" as a good example, does not regard it as providing a satisfactory criterion.

211. The questions of impossibility of performance and fundamental change of circumstances raise different considerations. Here we have rules of international law which, broadly speaking, are embodied in articles 61 and 62 of the Vienna Convention. These are general rules applicable to all treaties whether those treaties have been the object of a "succession of States" or not. The Special Rapporteur has serious doubts whether, in relation to particular cases of succession, it would be wise to make special provision for the application of such rules. Subject to the special provisions of the draft articles, a succession of States cannot affect the application of the rules of law applicable to all treaties. Surely the continuance in force of treaties by virtue of the draft articles cannot change the nature of the treaties or, in general, the rules of international law applicable to them. If there is any doubt on this point, the Special Rapporteur would suggest that the Commission should consider a suitable draft article for inclusion in the general provisions, making the position clear: such a draft article might be inserted as article 4 *bis* or article 5 *bis*. He would not advocate trying to write into the present draft articles all the relevant rules contained in the Vienna Convention.

212. While recognizing that the compatibility test is not in itself entirely satisfactory, on balance the Special Rapporteur favours its retention with the addition at the end of sub-paragraph (b) of the words: "or would radically change the conditions for the operation of the treaty".

213. For the reasons indicated above, the Special Rapporteur proposes the following amended text:

*Article 10. Transfer of territory*

Subject to the provisions of the present articles, when a succession of States occurs by a transfer of territory from the predecessor State to the successor State.\*

(a) Treaties of the predecessor State cease to be in force in respect of that territory from the date of the succession;

(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 or would radically change the conditions for the operation of the treaty.\*

PART III

NEWLY INDEPENDENT STATES

SECTION 1. GENERAL RULE

*Article 11. Position in respect of the predecessor State's treaties*

*Comments of Governments*

214. To avoid unnecessary repetition reference is here made to the comments of Governments as given earlier in

\* Words in bold type are replacements for or additions to the original draft.

the present report under the heading "The principle of self-determination and the law relating to succession in respect of treaties".<sup>168</sup> However, the views of the Government of Tonga touching the principle of article 11 were not given in that Section and they are summarized here.

215. *Tonga.* The Government of Tonga complained that the Commission had not taken adequate account of the general declaration of succession made by Tonga on 18 June 1970 and addressed to the Secretary-General of the United Nations. It maintained that the theoretical basis of article 11 was not supported by the modern practice of newly-independent States which had made general declarations of succession to treaties, with the intention of keeping rights gained by them from treaties, except where the treaties were inapplicable in the new circumstances or "involved fundamental and not merely incidental restraints upon sovereignty".<sup>169</sup> The Commission had put too much stress on the burdens as distinct from the benefits of treaties and had erred in only providing for the inheritance of the "real" treaties, thereby preserving an obsolete distinction between "real" and "personal" treaties. While respecting the intention behind the provision for newly independent States to opt into "multilateral treaties" by a declaration of succession, the Government of Tonga asserted that this contradicted the principle of mutuality which was of the essence of treaty law. The intention of the Government of Tonga when it issued its general declaration was not to claim freedom to pick and choose but freedom to examine its treaties by reference to objective legal criteria to ascertain if they were in force. The Government of Tonga interpreted other general declarations of succession as embodying a like intention.

The Government of Tonga then called attention to the difficulties flowing from the right of option.

Pending a notification of succession everybody concerned, in the depositaries and in foreign Governments, would have to act on the assumption that any particular treaty was not in force for the newly independent State. This would be most inconvenient in relation to activities such as those of the High Commissioner for Refugees or the International Committee of the Red Cross. The need to examine a list, possibly, of several hundred would inevitably involve delay and would leave a time gap that would not in all cases be effectively filled by the retrospective effect of a notification of succession. What, for example, would be the position under the Warsaw Convention on International Carriage by Air if an aircraft crashed between the day of independence and the notification of succession? The Government of Tonga believed that the draft articles should aim to hold the treaty position of the newly independent State stable long enough "to enable the matter to be sorted out."<sup>170</sup> Finally the Government of Tonga believed that its own experience of the continuance of treaty relationships provided a better guide to the contemporary legal position

<sup>168</sup> See paras. 24-30 above.

<sup>169</sup> ILC(XXV)/Misc.2, para. 7.

<sup>170</sup> *Ibid.*, para. 12.

than the old cases of the independence of Belgium or Panama cited by the Commission.

*Observations and proposals of the Special Rapporteur*

216. It is hoped that the above summary does justice to the arguments of the Government of Tonga, which were circulated to members of the Commission in June 1973. Those arguments touch not only article 11 and the principle stated in it but also a number of other articles including articles 8, 12, 18 and 22. So far as article 11 is concerned, the Special Rapporteur could not advise the Commission to act on the view of the Government of Tonga in preference to the overwhelming body of opinion expressed on behalf of Governments of States Members of the United Nations. Moreover, the attitude of the Government of Tonga seems to be coloured by its own assessment of its position as a former "protected State", which is not typical of the position of most formerly dependent territories. In this connexion, the Special Rapporteur refers to his observations in the section of the present report dealing with the principle of self-determination and the law relating to succession in respect of treaties<sup>171</sup> and under article 2, paragraph 1(b).<sup>172</sup>

217. While not proposing any change in article 11, the Special Rapporteur recognizes that in some cases the strict application of the "clean slate" principle could operate unsatisfactorily, even from the point of view of the newly independent State. Accordingly, care should be taken to ameliorate such consequences so far as possible in the subsequent articles in connexion with which the arguments of the Government of Tonga, as well as the general comments of the Government of Sweden and other Governments of Member States will be borne in mind.

## SECTION 2. MULTILATERAL TREATIES

### *Article 12. Participation in treaties in force*

#### *Comments of Governments*

##### *Oral comments*

218. *Netherlands.* The Netherlands delegation wondered whether an exception should not be made to the clean slate principle in the case of the law-making treaties concluded by or under the auspices of the United Nations. Treaties such as the Vienna Conventions on Diplomatic Relations and on the Law of Treaties had not been made by a foreign Power in possible disregard of any right of self-determination. They were law-making acts of the world community intended to regulate international relations in general. To consider newly independent States automatically bound by such Conventions seemed equally as acceptable as considering them automatically bound by customary international law and by general principles of international law. There were at least two reasons for attributing a special status to such Con-

ventions. First, some rules of law of world-wide application were essential in human society and, whenever the United Nations succeeded in making world-wide legal rules, everything possible should be done to strengthen them. Secondly, the draft articles should bind new legal entities which might be formed under international law. How, asked the delegation, could the rights and obligations of such entities be regulated if it were stated at the outset that the rules being made would not be binding upon them? In this connexion the division of multilateral conventions into those of a restrictive and those of a more general character required further study.<sup>173</sup>

*France.* The French delegation said that some of the provisions in the draft were rather imprecise, such as those providing for exceptions to the proposed rules in cases where the new situation resulted in a radical transformation of the obligations and rights provided for in a treaty.<sup>174</sup>

*United States.* The United States delegation said that the restrictions provided for in article 12, paragraph 3, on succession to treaties of limited participation seemed judicious. The delegation also supported the clean slate principle in the way in which it had been applied in articles 11 to 25.<sup>175</sup>

*Australia.* The Australian delegation said that in article 12 it was recognized that for a new State to participate in certain multilateral treaties the consent of all existing parties might be required. It did not, however, deal with a situation where some parties might object to the notification of succession and others might not. In such a case, apart from the situation dealt with in paragraph 3, it was the delegation's view that the treaty would be in force between the new State and some of the States parties but not others. The delegation called attention to the results of the Advisory Opinion of the International Court of Justice concerning reservations to the Convention on Genocide<sup>176</sup> and the rule adopted in article 20 of the Vienna Convention.<sup>177</sup>

*Greece.* The delegation said that in the solutions proposed by the Commission, the clean slate principle was taken as being equally valid with regard to multilateral treaties, as was indicated in article 12. In that respect, the delegation wondered whether, in regard to multilateral treaties of a law-making character concluded under the auspices of the United Nations, an exception to the clean slate principle might not be in the interest both of the new State and of the international community as a whole. Most of such treaties had been drafted in harmony with the principles of the Charter of the United Nations and might be regarded to a large extent as codifications of customary law. Furthermore, said the delegation, it was most important for the maintenance of international peace and security and for the strengthening of the rule of law to recognize the applicability

<sup>171</sup> See paras. 28-30 above.

<sup>172</sup> See paras. 104-119 above.

<sup>173</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1317th meeting, paras. 18, 19 and 20.*

<sup>174</sup> *Ibid.*, 1318th meeting, para. 15.

<sup>175</sup> *Ibid.*, para. 18.

<sup>176</sup> *I.C.J. Reports 1951, p. 15.*

<sup>177</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1319th meeting, para. 3.*

of law-making conventions, especially those containing provisions of a *ius cogens* character.<sup>178</sup>

*Spain.* The Spanish delegation said that the Commission should give more detailed consideration to the different categories of multilateral treaties in the context of the succession of States. Article 12, paragraph 3, and article 13, paragraph 3, recognized the existence of a few multilateral treaties of limited participation without designating them by that name which led to the somewhat involved wording of article 14, paragraph 1 (a) and (b) and other provisions. It would be appropriate, as the Netherlands delegation had suggested, to specify a category of "general" multilateral treaties which, in the view of the Spanish delegation, were those "which deal with the codification and progressive development of international law, or object and purpose of which are of interest to the international community as a whole."<sup>179</sup> The delegation added that account should also be taken of the problem raised by the Australian delegation with regard to article 12 which made no provision for the case where some parties to a multilateral treaty approved a notification of succession while others were opposed to it. This problem might be solved by affirming the existence of three categories of multilateral treaties: those of limited participation, the normal and the general. The Spanish delegation also suggested the addition, in article 12, paragraph 2, of the exception to the continuity of a treaty in cases where a succession radically changed the conditions for the operation of the treaty provided for in article 25, sub-paragraph (a), etc.<sup>180</sup>

*Cuba.* The Cuban delegation observed that the clean slate situation of a newly independent State in respect of both bilateral and general multilateral treaties did not mean that the State in question could not be a party to them. Under article 12, a newly independent State might be a party to any multilateral treaty in respect to the territory to which the succession related although it could not be regarded as automatically bound by that treaty.<sup>181</sup>

*Ghana.* On the question of succession in respect of multilateral treaties, the delegation of Ghana said that the determining criterion could be more simply explained as dependent on the legal nexus established by the predecessor State between the territory concerned and the terms of the multilateral treaty. Moreover, new States should take time to reflect before accepting succession to treaties involving membership in international organizations in view of the various obligations that were involved.<sup>182</sup>

*Nigeria.* The Nigerian delegation expressed the view that articles 11 to 25 achieved a necessary balance between the need to allow newly independent States freely to determine the nature and the content of their treaty

relations and the interest of the international community in ensuring the stability of those relations. An exception to the clean slate principle should be made in the case of law-making treaties concluded under the auspices of the United Nations, since they had not been made by foreign Powers but were acts of the world community intended to regulate international relations. The Nigerian delegation, however, did not agree that newly independent States should be considered automatically bound by such treaties: they should be able to decide whether to accede to the treaties, in exercise of their right to self-determination.<sup>183</sup>

*Kenya.* The delegation of Kenya said that the exception to the clean slate principle mentioned by other delegations, including that of the Netherlands, concerning law-making treaties concluded under the auspices of the United Nations had been rejected by the Commission and was considered unacceptable by the newly independent countries. Those countries were most anxious to participate in the formulation of the norms of international law and could not accept that a group of States, often sharing common ideologies and social and economic interests, should legislate for the whole international community. They wanted unfettered discretion to determine what multilateral treaties of a general nature they should accede to; that did not mean that they were not bound by customary international law or by general principles of international law.<sup>184</sup>

*Canada.* The Canadian delegation said that article 12 reflected the consensual element, which was the essence of treaty relationships, in providing that a newly independent State could not establish its status as a party to a multilateral treaty without the consent of the other parties when it was clear from the nature of the treaty that such consent was necessary. There seemed to be some merit in the suggestion that newly independent States should be bound by treaties of a general law-making character concluded under the auspices of the United Nations, but the Canadian Government would like to give further thought to the suggestion particularly in the light of the comments made by various newly independent States.<sup>185</sup>

*Belgium.* The Belgian delegation said that, in article 12, paragraph 2, the Commission seemed to have confused the notion of the object and purpose of a treaty with the conditions which might govern the admission of a new party. The delegation said that the present provision could be retained with the addition of the phrase "or if the successor State is not able to satisfy the condition or conditions of participation". With regard to paragraph 3, perhaps the possibility should not be ruled out that a special multilateral treaty could enter into force as between the new State and only some of the States already parties to it.<sup>186</sup>

*Netherlands.* In reply to certain remarks of the representative of Kenya, the Netherlands delegation said that it had merely wished to stress that universal law-

<sup>178</sup> *Ibid.*, 1320th meeting, para. 9.

<sup>179</sup> *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (op. cit.)*, p. 285, document A/CONF.39/26, annex.

<sup>180</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1320th meeting, paras. 25 and 26.

<sup>181</sup> *Ibid.*, 1322nd meeting, para. 3.

<sup>182</sup> *Ibid.*, para. 35.

<sup>183</sup> *Ibid.*, 1324th meeting, para. 3.

<sup>184</sup> *Ibid.*, para. 8.

<sup>185</sup> *Ibid.*, para. 14.

<sup>186</sup> *Ibid.*, para. 24.

making conventions were of general benefit to the international community and the Sixth Committee and the Commission might develop criteria for defining such conventions. They might, for example, include conventions adopted by an overwhelming majority of the members of the international community or concluded under the auspices of the United Nations and dealing with questions of general and permanent interest.<sup>187</sup>

*Zambia.* The Zambian delegation, while supporting the clean slate principle, expressed in article 11, attached due significance to the provision in article 12 whereby newly independent States might participate in multilateral treaties by a notification of succession.<sup>188</sup>

*Morocco.* Although the draft articles were on the whole satisfactory, the delegation of Morocco regretted that they did not provide for an exception to the clean slate principle so that newly independent States would automatically be parties to multilateral law-making treaties, such as the Vienna Convention or the proposed convention on succession of States in respect of treaties. That was a serious omission.<sup>189</sup>

#### *Written comments*

219. *German Democratic Republic.* The Government of the German Democratic Republic said that a clearer wording would seem to be necessary for article 12, paragraph 2, and article 13, paragraph 2, according to which a successor State could not notify its participation in a multilateral treaty in force or not yet in force, if the object and purpose of the treaty were incompatible with the participation of the successor State in that treaty. The Government did not hold the present version adequate to exclude arbitrary hindrance of successor States from becoming parties to treaties.

*Poland.* The Government of the Polish People's Republic said that it was highly desirable to establish a time-limit, be it even seven or ten years, during which a newly independent State could use its right to notify its succession in respect of a multilateral treaty. Then it would be clear, at least from a certain point in time, what was the legal position—e.g., other States parties would know the date from which they should take into account the possibility of the retroactive application of a treaty in relation to newly independent States. On the other hand, in the event of expiry of the term, a newly independent State would always have the right to accede to the treaty. The Government also commented that there were no provisions in the draft seeking to regulate the legal status of other States parties to the multilateral treaty vis-à-vis newly independent States during the period between a succession of States and notification of succession in respect of the treaty (*inter alia*, in the light of the fact that notification of succession has retroactive effects). This question raised some doubts, e.g., whether the fact that the legal nexus existing between the other States parties and territory which became the territory of a newly independent State had been broken

on the day of assumption of independence by that State, resulted in the termination of all treaty obligations of other States parties in respect of this territory, or whether they had at least the obligation to restrain themselves from acts tending to obstruct the resumption of the operation of the treaty.

It was also unclear whether because of retroactive effects of the notification of succession, other States parties could be held responsible for acts inconsistent with the treaty and committed after the assumption of independence by a newly independent State and before the date of succession of such State in respect of the treaty. The Polish Government, as well as certain other parties to various multilateral treaties, was interested in the proper regulation of these questions.

Finally, the Polish Government added that, in the occasionally very long lapse between the date of a State's succession and notification of succession, a different situation might occur—e.g., termination or suspension of the treaty in relation to the predecessor State, complete termination of the treaty or its amendment either in relation to all parties or to some of them only (including, for instance, the predecessor State). The draft, in article 21, paragraphs 2 and 3, covered similar problems in respect of bilateral treaties. Explicit regulation of these problems also in relation to multilateral treaties would seem desirable.

*Sweden.* The Swedish Government commented that, as the option to notify continued adherence to a general multilateral treaty was apt to cause uncertainty as to the validity of those treaties for new States, it seemed to be a minimum requirement that a time-limit should be set for the exercise of the option. For similar reasons, it might be desirable to provide a time-limit also for agreements by which restricted multilateral treaties under article 12, paragraph 3, and bilateral treaties, under article 19, were continued.

*United Kingdom.* The United Kingdom Government said that, although the rule proposed in paragraph 1 was subject to the exceptions in paragraphs 2 and 3, they considered that insufficient weight was given to the intention of the parties to a particular treaty. As regards paragraph 2, whilst not opposing the proposal that a notification of succession might be made even though the accession provisions of a particular treaty did not cover a certain newly independent State,<sup>190</sup> the intention of the parties could appear from the wording of the treaty as well as from its object and purpose.

*United States of America.* The Government of the United States supported the general approach taken in part III of the draft articles but a number of improvements could be made. Article 12 permitted any newly independent State to become party to a multilateral treaty that applied to its territory prior to independence subject, *inter alia*, to the requirement that the participation of the State was not incompatible with the object and purpose of the treaty. A requirement of that type was reasonable but the question arose whether the test to be applied could be made more precise. A further question

<sup>187</sup> *Ibid.*, para. 40.

<sup>188</sup> *Ibid.*, 1326th meeting, para. 6.

<sup>189</sup> *Ibid.*, para. 18.

<sup>190</sup> Para. 8 of the commentary.

was how a determination was to be made whether succession to the treaty was or was not consistent with its object and purpose. Regarding the first issue, the Government said that it would appear that whenever a successor State could accede to a treaty there should not be any reasonable doubt as to its right to succeed to the treaty. While this would appear to be a reasonably obvious conclusion, it might be included in the article. Where the question of compatibility was unclear, however, and the treaty concerned had no provision for dealing with the situation, a number of difficult questions arose. If a party to the treaty were to object on the ground of incompatibility, would this be sufficient to prevent succession? If not, did the objection result in barring treaty relationships between that party and the successor State? Questions of the same character arose also with respect to a number of other articles in which the requirement of compatibility with object and purpose was laid down—article 13, paragraph 2; article 14, paragraph 1; and article 15, paragraph 2 (c). The United States Government considered that the Commission should attempt to reduce this area of uncertainty to the extent possible although it recognized that a number of questions regarding interpretation and application of the articles must be left to solution on a case by case basis. The United States Government also commented that various problems were complicated by the factor that, in authorizing the new State to make a declaration of succession, article 12 did not contain any limitation as to time. A State could make such a notification five, ten, or twenty-five years after becoming independent and the declaration would have retroactive effect for the entire period. The possible effects upon long-settled legal relationships were sufficiently extreme to require some protective measures. It would be desirable to provide a time-limit within which the right to notify succession must be expressed. The period should be long enough so that the new State had time enough to conduct a review of possibly applicable multilateral treaties while not being so long that private rights or the rights of other States party to the treaty would be seriously impaired by the retroactive effect of notification. A period of three years would seem to be sufficient for the new State to reach a determination while not being so long that private litigants or a court, for example, could not postpone a judgement pending clarification of the applicability of a treaty. In this connexion, an additional protective step would be to provide that periods of prescription or limitation would not run with respect to claims involving the applicability of a treaty during the three-year period.

*Observations and proposals of the Special Rapporteur*

220. The extensive comments of delegations and Governments have been set out at length because of the importance of both the article and the comments. The points that arise for consideration may be grouped under six headings:

- (a) Law-making treaties;
- (b) Time-limits;
- (c) The interim régime;

- (d) Grounds for excluding the application of paragraph 1 of article 12;
- (e) Objections to a notification of succession;
- (f) Termination, suspension or amendment of the treaty before notification of succession (*cf.* article 21, paragraphs 2 and 3).

(a) *Law-making treaties*

221. Before offering his own observations, the Special Rapporteur wishes to recall the statement made by the Chairman of the Commission at the conclusion of the debate in the Sixth Committee at the twenty-seventh session of the General Assembly. He said that, with regard to article 12, many delegations had posed the question whether the principle of continuance should be applied in the case of general law-making treaties. The Commission itself had devoted considerable time to the question and had come to the conclusion that it was not the practice for the principle of continuance to be applied, but that posed the question of whether existing practice should be considered correct. The Commission had felt that since other States were not bound to become parties to general law-making treaties it would not be fair or equitable to impose such an obligation on newly independent States. That conclusion, he added, seemed reasonable: for example, it seemed quite understandable that a new State might consider that it had enough problems to cope with without being bound by a treaty on the utilization of outer space.<sup>191</sup>

222. In the commentary to article 11,<sup>192</sup> the Commission examined the question whether 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. The conclusion reached was that the evidence of State practice appeared 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".<sup>193</sup> This conclusion, however, is to a considerable extent based on the practice of depositaries. Without minimizing the importance of their practice, it must be said that depositaries exercise an administrative function, and it is not part of their functions to decide difficult or disputed questions of law. As paragraph 2 of article 77 of the Vienna Convention makes plain, any difference between a State and the depositary as to the performance of the latter's functions should be brought to the attention of the signatory and the contracting States or, where appropriate, of the competent organ of the international organization concerned. State practice with respect to the Geneva Red Cross Conventions is conflicting. As stated in the commentary, quite a number of States have notified their acceptance of the Geneva Conventions in terms of a declaration of continuity, and some have used language indicating re-

<sup>191</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1328th meeting, para. 13.*

<sup>192</sup> Paras. 8-14.

<sup>193</sup> Para. 14 of the commentary to article 11.

cognition 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.<sup>194</sup>

223. In the light of examples such as this, it cannot properly be said that State practice is all one way. Nevertheless, it may be accepted that the weight of depositary and State practice is "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". This proposition, however, is concerned with the existence of an "obligation" on the newly independent State to consider itself bound. It does not necessarily close the door on further consideration of the nature of the option to be exercisable by a newly independent State to continue or not to continue participation in particular kinds of multilateral treaties. In theory, the option could take the form either of an option to accept status as a party to a treaty by a notification of succession or of an option to discontinue that status by notification of discontinuance on the assumption in the latter case that, after the date of the succession of States, the newly independent State was regarded as a party to the treaty.

224. The draft articles provide for the former kind of option—a right to opt in. In the light of the comments set out above, the Commission may wish to consider whether, on balance, it would be more satisfactory to provide for an option of the latter kind—a right to opt out.

225. Attention has been called to the difficult legal situation that might result from a delay in notification (especially a long one) in the case of certain kinds of multilateral treaties, and the doubts and confusion that might result from the retrospective effect of a notification of a succession of States. It may be asked whether the creation of such a dubious legal situation is in the interests of the newly independent State or of the international community—especially in the case of law-making treaties such as the Vienna Conventions on Diplomatic Relations, on Consular Relations and on the Law of Treaties, not to mention treaties such as those designed to ameliorate the conditions of humanity in time of war, to restrict the development of weapons of mass destruction or facilitate the rescue and return of astronauts, etc. On the other hand, it is difficult to see what unacceptable burdens would be cast on a newly independent State by participation in such treaties. The attention of the Government of the newly independent State would soon be called to any treaty which caused it real inconvenience and it would then be free to terminate its participation if it wished to do so. If the burdens were in fact too onerous the newly independent State would doubtless be quick to exercise its option not to continue as a party to the treaty. Moreover, the administrative task of examining multilateral treaties to which the newly independent State

might be a party would be no more onerous in the case of a right to opt out than in the case of a right to opt in. On the other hand, the general advantage of a right to opt out would be to provide a factor that might militate in favour of continuity and stability in treaty relations in an area where this is most desirable in the interests of international co-operation and peace and security.

226. There would, however, be certain objections to casting the right of the newly independent State in the form of an option to discontinue participation in a certain class of multilateral treaties. One possible objection is that an option in that form would involve treaty obligations for the newly independent State before it had had an opportunity to examine their implications. This might tend to put pressure on the State to review its position at an early stage in a hurry before it had had time properly to organize its administrative services. On the other hand, it might be said that it is desirable that the treaty position of the newly independent State should be clarified as promptly as possible and that an option such as that provided in article 12 (read with article 18) would tend to encourage delay.

227. Another possible objection is the difficulty of identifying and defining "law-making" multilateral treaties. What are "law-making" treaties? One answer, in effect suggested by the Spanish delegation, is treaties which deal with the codification and progressive development of international law or of which the object and purpose are of interest to the international community as a whole. Whether the class of treaties is called "general" or "law-making" multilateral treaties, in the view of the Special Rapporteur, although the intention is fairly clear, such a broad definition would be too vague for inclusion in a convention. Indeed, the concept "law-making" treaties is itself misleading and scientifically inexact. Treaties may codify existing customary international law, in which case they are not "making" law; or treaties may create "new law" in which case they are binding on the parties and do not as such create new customary international law. What is usually meant by "law-making" treaties is, of course, treaties of a hybrid character containing elements of both codification and progressive development. But as pointed out in the commentary<sup>195</sup> such treaties may contain "purely contractual" provisions, such as, for example, a provision for the compulsory adjudication of disputes.

228. In the light of considerations such as those mentioned above, the Special Rapporteur has come to the conclusion that it would not be possible to provide a satisfactory and workable definition of "general" or "law-making" treaties except by the simple device of making the provision applicable to all multilateral treaties not falling within paragraph 3 of article 12. The only other practicable alternative would seem to be to provide some test or machinery for identifying "law-making" treaties. For example, the provision might be made applicable to all multilateral treaties having more than a certain number of parties (signatories), or to all multilateral treaties adopted within or under the auspices

<sup>194</sup> Para. 10 of the commentary to article 11.

<sup>195</sup> Para. 8 of the commentary to article 11.

of the United Nations. Again a list might be established by the Secretary-General, by a committee established by the General Assembly or by the General Assembly itself. There is a great variety of choice, but the Special Rapporteur does not consider that it would be fruitful to examine them further at this stage.

229. Although there is considerable attraction in the doctrine of continuity in the case of "law-making" multilateral treaties, the Special Rapporteur does not think that the balance of considerations in favour of that doctrine is sufficiently strong to justify a recommendation that the Commission should alter the principle expressed in draft article 12. The Special Rapporteur does suggest, however, that the matter should be dealt with in the commentary to article 12 in the light of the above comments and observations and the deliberations of the Commission.

(b) *Time-limits*

230. In their written comments, the Governments of Poland, Sweden and the United States have said that there should be some limit on the time within which a notification of succession may be made.<sup>196</sup> The Swedish comments also point out that this question arises in article 12, paragraph 3, and article 19.

231. The consequence of suspension of treaty rights and obligations for newly independent States pending notification of succession coupled with the retroactive effect of the notification is bound to create a period of legal doubt and uncertainty. This consequence might be made more tolerable for the States concerned if a definite limit were placed on the length of the period of uncertainty. As the Polish Government said, if there were a time-limit within which a newly independent State could exercise its right to notify its succession in respect of a multilateral treaty, it would at least be clear from a certain point in time what was the legal position—e.g., other States would know the date from which they should take into account the possibility of the retroactive application of a treaty in relation to newly independent States. The reasoning in the comments of the Swedish and United States Governments is similar and seems to the Special Rapporteur to be sound.

232. Although time-limits on the actions of sovereign States are often viewed with disfavour, they are by no means uncommon where an option is exercisable or a notice is to be given. An example is to be found in paragraph 5 of article 20 of the Vienna Convention which provides that a reservation may be considered as accepted if no objection is raised within a period of twelve months.

233. For the purposes of a notification of succession under article 12, the Polish Government contemplates a period as long as seven or ten years, while the United States Government has suggested a period of three years. Whatever period is selected the criterion suggested by the United States Government seems to be right, namely—

The period should be long enough so that the new State has time enough to conduct a review of possibly applicable multilateral treaties while not being so long that private rights or the rights of

other States party to the treaty would be seriously impaired by the retroactive effect of notification.

Whether on the basis of these considerations three years is a long enough period is a matter of judgement on which the Special Rapporteur would prefer not to express a definitive view, but that period may provide a convenient starting point for the deliberations of the Commission.

234. If the Commission decides not to adopt an "opting-out" formula for paragraph 1 or make some such provision for multilateral treaties of a "law making" character, a time-limit can be provided by a simple amendment. For the above reasons, on this provisional basis, the Special Rapporteur proposes the following amended text for article 12, paragraph 1:

1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession made within a period of [3] years from the date of the succession of States,\* establish its status as a party to any multilateral treaty which at that date \* was in force in respect of the territory to which the succession of States relates.

Of course, if the Commission should take a different decision, more radical amendments will be necessary.

235. In connexion with the matter of time-limits, the United States Government has also said that an additional protective step would be to provide that periods of prescription or limitation would not run with respect to claims involving the applicability of a treaty during the three-year period. Although at first sight this suggestion seems eminently fair and reasonable, it does raise difficult and complex problems which, in the context of the present draft articles, might involve a series of provisions out of proportion to the magnitude of the hardship or injustice that might occur.

236. Presumably the intention would be to protect the private claimant against periods of prescription or limitation under the internal law of a State, and not to try to deal with the problem on the international level where fixed periods of prescription or limitation do not normally exist. However, there are, of course, cases in which multilateral treaties themselves lay down fixed periods within which action has to be taken and the question may arise whether such periods should run while the particular treaty is in suspense between the newly independent State and another State party to the treaty pending the notification of succession. A situation could arise in which the period had expired before the date of the notification of succession and yet the expiration of the period would operate against the other State party by virtue of the retroactive effect of the notification. Such cases may be rare and the actual consequences for the States concerned would depend on the provisions of the particular treaty. Although it is possible to foresee cases of potential hardship, the Special Rapporteur does not think that it would be practicable to provide a blanket provision to cover all multilateral treaties.

237. Somewhat similar considerations apply to periods of prescription or limitation under the internal law of a State. There is, however, the additional factor that a

<sup>196</sup> See para. 219 above.

\* Words in bold type are replacements for or additions to the original draft.

suspension of the running of such periods would require legislation. The Special Rapporteur doubts whether it would be feasible to require newly independent States to enact such legislation, although in theory enactment of the necessary legislation could be made a condition precedent to the exercise of the right to make a notification of succession.

238. In the view of the Special Rapporteur, although he does not see the possibility of making provision to meet the point raised by the United States Government, it is a fairly strong argument in favour of as short a period as possible for the making of a notification of succession.

(c) *The interim régime*

239. Between the date of the succession of States and that of the notification of succession there will be an interim period under the provisions of articles 12 and 18 as at present drafted. In the case of a particular multilateral treaty, there may be a legal vacuum as between the newly independent State and any other State party to the treaty. At best, as the Polish Government has pointed out, the position is unclear. What, if any, obligation will there be on another State party to observe the provisions of the treaty with respect to the newly independent State pending the notification of succession? May it then be exposed to accusations of breach of the treaty by virtue of conduct occurring during the interim period when there were no obligations incumbent on the newly independent State and the other State did not know whether or not a notification of succession would be made? This is a dilemma created for the other State party and not for the newly independent State, because the latter would be able to avoid embarrassing consequences for itself by using paragraph 2 (c) of article 18. It could avoid retroactive effect, and the consequences of its own conduct occurring before the date of the notification of succession, by specifying a date later than the date of the succession of States as the date from which the treaty should be considered as being in force.

240. Unless there is some flaw in the above analysis, the provisions of paragraph 1 of article 12, read with those of article 18 would result not only in an interim régime of doubt pending the notification of succession but also in legal inequality between the newly independent State and the other State party to the multilateral treaty. These consequences might be avoided by the adoption of an "opting-out" instead of an "opting-in" provision for paragraph 1 of article 12. But the Commission may prefer to maintain the principle of paragraph 1 and to seek some other solution to the problems raised by the Polish Government, or to accept the apparent inequality as an unavoidable consequence of the special position of the newly independent State.

241. In the context of article 12, no alternative solution springs to mind, although a provision on the lines of article 18 of the Vienna Convention—i.e. some form of good faith obligation incumbent on the newly independent State and the parties to the treaty pending the notification of succession—might help. Such a provision would be made easier to operate in practice if there was a reasonable time-limit for the making of the notification.

242. A better balance might also be secured by some modification of the retroactive effect of a notification of succession, but this point will be examined in the context of article 18 where the provision is made. The Special Rapporteur has no concrete proposals to make at this stage except that the Commission should give careful consideration to the above-mentioned problems, with a view to finding solutions that not only accord with past practice, but also ensure fair and workable provisions for the future.

(d) *Grounds for excluding the application of paragraph 1 of article 12*

243. As appears from the commentary to article 12<sup>197</sup> the Commission has contemplated three qualifications on the exercise of the right for which paragraph 1 of article 12 provides. These are covered by article 4 and by paragraphs 2 and 3 of article 12. There is no call here for further observations on article 4 or paragraph 3, but a number of comments touch on paragraph 2. They are those of the Spanish, Belgian and (possibly) French delegations and those of the Governments of the German Democratic Republic, the United Kingdom and the United States. Without making any concrete suggestions, the French and German Democratic Republic comments have criticized the drafting as unclear or imprecise. The Spanish delegation suggested the addition to the exception of cases where a succession radically changed the conditions for the operation of the treaty (the language actually criticized by the French delegation). The Belgian delegation suggested the addition of "or if the successor State is not able to satisfy the condition or conditions of participation". The United Kingdom Government considered that insufficient weight was given to the intention of the parties and as concerned paragraph 2 the intention of the parties could appear from the wording of the treaty as well as from its object and purpose. The United States Government suggested that it might be made clear in the text that, whenever a successor State had the right to accede, it had the right to succeed.

244. In the light of the above comments, it appears that the compatibility test is acceptable and is to be retained. If there is to be any attempt at clarification, it should be by addition to, rather than alteration of, the well-known formula. That there may be difficulties in the application of the formula is obvious, but once more this points to the need for satisfactory means for the settlement of disputes.

245. The Special Rapporteur has given careful consideration to the four specific suggestions for amendment to paragraph 2 and will try to indicate his conclusions briefly. The Belgian suggestion touches the very point dealt with in the commentary<sup>198</sup> and, having regard to the commentary, is adequately covered by the text as drafted. The Special Rapporteur has been unable to imagine a case in which it could be maintained that succession by a newly independent State having a right to accede to a treaty was incompatible with the object and purpose of that treaty. He would, therefore, be

<sup>197</sup> Paras. 10, 11 and 12.

<sup>198</sup> Para. 11.

reluctant to burden the text with an amendment to meet the suggestion of the United States Government. As regards the Spanish suggestion, the case dealt with in article 12 is different from that dealt with in article 25 (newly independent States formed from two or more territories) or in article 10 (transfer of territory) and the Special Rapporteur is not convinced that in article 12 there is a case for the suggested addition. If the Commission were to take a different view, the point could be met by the addition to paragraph 2 of the words "or the effect of that participation would be radically to change the conditions for the operation of the treaty."

246. The United Kingdom Government's suggestion is less clear-cut than those mentioned in the preceding paragraph. The desire to give effect to the intention of the parties is understandable, but the nature of the intention for which the United Kingdom Government would provide is not clear. Does their suggestion mean that a newly independent State should not be entitled to make a notification of succession to a multilateral treaty if it appears from the wording of the treaty that the intention of the parties is to exclude its succession? If so, the case would be covered by the words "under the terms of the treaty" in paragraph 3 and no further provision would appear to be necessary. Perhaps discussion will throw further light on this suggestion, but at present the Special Rapporteur does not consider it necessary to make any proposal to give effect to it.

(e) *Objections to a notification of succession*

247. The question of the effect of an objection to a notification of succession was raised by the delegations of Australia and Spain and the Government of the United States with reference to paragraph 2, and by the Belgian delegation with reference to paragraph 3. It is convenient to consider the comments of the last-named delegation first.

248. With regard to paragraph 3, the Belgian delegation said that perhaps the possibility should not be ruled out that a special multilateral treaty could enter into force as between the new State and only some of the States already parties to it. It seems to the Special Rapporteur, however, that that possibility would run counter to the purpose of paragraph 3, the effect of which should be maintained as it now stands.

249. The first question mentioned above is more complicated. In effect, the Australian and Spanish delegations suggested that where, on grounds of incompatibility falling within paragraph 2, some parties objected to a notification of succession while others did not, the treaty should be regarded as being in force between the newly independent State and the latter, but not between that State and the former. In this connexion, reference was made to article 20 of the Vienna Convention which provides a precedent for some such differentiation.

250. The United States Government raised the question in a somewhat different form. It asked how a determination was to be made whether succession to the treaty was or was not consistent with its object and purpose.

Assuming for the moment that there is no satisfactory procedure for making this determination, what would be the effect of an objection on grounds of incompatibility? Would the objection prevent succession or, if not, would the objection bar treaty relationships between the objecting State party and the newly independent State? The United States Government also pointed out that similar questions arose with respect to article 13, paragraph 2; article 14, paragraph 1; and article 15, paragraph 2 (c), which applied the compatibility test. As regards article 15, paragraph 2 (c), the questions would already appear to be answered in the sense of article 20 of the Vienna Convention by virtue of the provisions of paragraph 3 of draft article 15. Article 14, paragraph 1 itself depends on articles 12 and 13. Hence the questions really arise for consideration with respect to those two articles, and only indirectly with respect to article 14.

251. At present, there is no provision for a system of "objections" for the purposes of article 12, 13 or 14. Equally, there is no provision for the settlement of any differences that may arise in the application of those articles. The Special Rapporteur does not find very attractive the idea of introducing a system of objections which would enable another State party to a multilateral treaty to prevent the participation of a newly independent State in cases in which participation is not limited by reason of the nature of the treaty (i.e. under paragraph 3 of article 12 or of article 13). To give another State party the right to prevent the treaty from entering into force between itself and the newly independent State by making an objection would, in theory at least, deprive the newly independent State of the freedom of choice which the draft articles are designed to confer on it. Any other State party would, in relation to itself, be free to frustrate the decision of the newly independent State to bring the treaty into force between itself and that State.

252. The position under paragraph 2 of article 12 or 13 is not quite the same as in the case of reservations, because in the former the question is whether participation is itself compatible with the object and purpose of the treaty while in the latter the question is whether a reservation is compatible. If a State chooses to make a reservation to a treaty, it runs the risk that other States will find the reservation unacceptable. It does not follow that individual States should be given the right to decide that the participation of a newly independent State in a treaty is unacceptable. Such a result would be contrary to the general intent of the articles in part III of the draft.

253. For these reasons, the advice of the Special Rapporteur is that the Commission should decline to introduce a system of objections for the purposes of article 12, paragraph 2 or 3, or of article 13, paragraph 2 or 3. Unfortunately, if that advice is accepted, it will not solve the fundamental problem of any differences that may arise in the application of any of those paragraphs. In these circumstances, in the view of the Special Rapporteur, the sensible course would be to seek suitable means for settling any differences which may arise in the application of article 12 or 13 (or 14).

(f) *Termination, suspension or amendment of the treaty before notification of succession (cf. article 21, paragraphs 2 and 3)*

254. In its written comments, the Polish Government suggested that in the case of multilateral treaties there should be explicit regulation of problems arising from "termination or suspension of the treaty in relation to the predecessor State, complete termination of the treaty or its amendment either in relation to all parties or to some of them only (including for instance the predecessor State)." The Government pointed out that article 21, paragraphs 2 and 3, covered similar problems in respect of bilateral treaties.

255. The Commission recognized in respect of bilateral treaties that the point might not be of great importance.<sup>199</sup> It seems to the Special Rapporteur to be of no greater importance with respect to multilateral treaties. As the draft is already heavy with detail, additions to meet points of this kind should not be made unless they are necessary. It is most doubtful whether they are necessary in the case of multilateral treaties having regard to the provisions of the articles as drafted. The right of the successor State to make a notification of succession in respect of a multilateral treaty depends on whether it was in force in respect of the territory to which the succession of States relates at the date of the succession of States. So far as concerns the right to make a notification of succession what happens subsequently is irrelevant. Once a notification has been made, the treaty will be regarded as in force for the successor State as from a certain date. In the case of a multilateral treaty, this must mean the treaty and its provisions in whatever condition they stand at that date. The effect of regarding the treaty as in force from a certain date will also have the consequence that after that date the treaty will have the same effect for the successor State as for any other State party to it. If this is right, any withdrawal, termination, suspension of operation or amendment would have the same effect—no more and no less—for the successor State as for any other State party to the treaty. This seems to be the clear intention of articles 12 and 13 read with article 18

256. For these reasons, the Special Rapporteur makes no proposals for amendments to meet the suggestion of the Polish Government, but the Commission may wish to add some explanation on the point in the commentary, perhaps to article 18 rather than to article 12.

**Article 13. Participation in treaties not yet in force**

*Comments of Governments*

*Oral comments*

257. *Finland.* Articles 13 and 14, which give the successor State the right to participate in certain multilateral treaties not yet in force or to ratify, accept or approve a multilateral treaty signed by the predecessor State were innovations which, according to the Finnish delegation, seemed at a first reading to be acceptable.<sup>200</sup>

<sup>199</sup> Para. 14 of the commentary to article 21.

<sup>200</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1320th meeting, para. 3.*

*Spain.* The Spanish delegation made certain comments about article 12, paragraph 3, and article 13, paragraph 3, which are recorded above.<sup>201</sup>

The Spanish delegation also suggested the addition in article 13, paragraph 2 of the exception to the continuity of a treaty in cases where a succession radically changed the conditions for the operation of the treaty, provided for in article 25, sub-paragraph (a), etc.<sup>202</sup>

*Written comments*

258. *German Democratic Republic.* (See the comments under article 12 above.)<sup>203</sup>

*Sweden.* The Swedish Government said that the intended sense of the phrase "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 . . ." was better expressed in the commentary by the wording "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 . . .". The text of the article would accordingly be improved by replacing the first-mentioned phrase by the latter one.

*United Kingdom.* (See the comments under article 12 above.)<sup>204</sup>

*United States of America.* (See the comments under article 12 above.)<sup>205</sup>

*Observations and proposals of the Special Rapporteur*

259. With the exception of the general comment of the Finnish delegation and the drafting amendment to paragraph 1 of article 13, the comments made on article 12 also apply to article 13. Accordingly, it has not been thought necessary to repeat or to refer expressly to those comments except where the delegation or Government has itself mentioned article 13.

260. It follows that the observations of the Special Rapporteur on article 12 also apply to article 13 and, broadly speaking, any decisions taken by the Commission on article 12 will likewise govern its decisions on article 13. If, however, contrary to the expectations of the Special Rapporteur, the Commission should decide to cast article 12 in the form of an "opting out" (rather than an "opting in") clause, that decision would not automatically apply to article 13. On the contrary, since article 13 is concerned with the case where a treaty is not in force in respect of the territory at the date of the succession of States, it seems clear that it must be cast in the form of an "opting in" provision, as it is in the draft.

261. For the reasons already indicated,<sup>206</sup> it is desirable to make provision for some time-limit (say, three years)

<sup>201</sup> See para. 218 under article 12 above.

<sup>202</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1320th meeting, para. 26.*

<sup>203</sup> See para. 219 above.

<sup>204</sup> *Ibid.*

<sup>205</sup> *Ibid.*

<sup>206</sup> See paras. 230-234 under article 12 above.

within which a notification of succession may be made under article 13. To meet the point, paragraph 1 of article 13 might be amended using a formula similar to that proposed for paragraph 1 of article 12.

262. It remains to consider the drafting amendment to paragraph 1 suggested by the Swedish Government. This suggestion is eminently one for consideration by the Drafting Committee, but it may be helpful to add two observations here. First, the Swedish comment does call attention to the desirability of making it clear that the consent to be bound given by the predecessor State referred to the territory in question. The last clause of paragraph 1 as drafted does not make that point clear. Secondly, as a matter of drafting it is convenient to use the expression "contracting State" which is defined in paragraph 1 (*k*) of article 2 as meaning "a State which has consented to be bound by the treaty, whether or not the treaty has entered into force". Therefore, it would seem better to retain the words "had become a contracting State" rather than to substitute for it the words "had established its consent to be bound . . .". Drafting in this way has the additional advantage of consistency in using the expression "a contracting State" which appears earlier in paragraph 1.

263. In the light of the above considerations (on a provisional basis, as in the case of article 12), the Special Rapporteur proposes the following amended text for article 13, paragraph 1:

"1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession made within a period of [3] years from the date of the succession of States,\* establish its status as a contracting State to a multilateral treaty, which at that date\* was not in force in respect of the territory to which that succession of States relates, if at\* that date the predecessor State was\* a contracting State in respect of that territory.\*"

*Article 14. Ratification, acceptance,  
or approval of a treaty signed by the predecessor State*

*Comments of Governments*

*Oral comments*

264. *Finland.* (See the comments under article 13 above.)<sup>207</sup>

*Spain.* (See the comments under article 12 above.)<sup>208</sup>

*Belgium.* The Belgian delegation said that article 14 dealt with a situation which was quite hypothetical and it could well be deleted.<sup>209</sup>

*Zambia.* The Zambian delegation was in some doubt as to the necessity of article 14 because it did not consider that the signature of a treaty subject to ratification or approval justified the transfer to the successor of the obligations which the predecessor State had accepted. It suggested therefore that the article should be deleted.<sup>210</sup>

\* Words in bold type are replacements for or additions to the original draft.

<sup>207</sup> See para. 257 above.

<sup>208</sup> See para. 218 above.

<sup>209</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1324th meeting, para. 24.

<sup>210</sup> *Ibid.*, 1326th meeting, para. 8.

*Written comments*

265. *Sweden.* The Swedish Government commented that the Commission had included this article in order to enable Governments to express their views on it and thereby assist the Commission in reaching a clear conclusion as to whether it should be maintained in the draft. The article seemed to be in line with the clean slate doctrine and at the same time it demonstrated its tendency to lead to inequality between States. The Government pointed out that it was stated in the commentary 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".<sup>211</sup> The successor State would in other words be able to take advantage of a right established by the predecessor's signature of a treaty without assuming the obligation of good faith pertaining to that right. In these circumstances, the inclusion of the article could hardly be recommended.

*United Kingdom.* The United Kingdom favoured the effectiveness of multilateral treaties. However, the proposal in this article was not free from difficulty. The practice of the United Kingdom was to consult the Government of each British dependent territory about its attitude to a particular treaty after signature and before ratification. Moreover, it had not been the practice of the United Kingdom Government to include treaties signed but not ratified in the list of treaties compiled for each dependent territory before its independence. On balance, it was considered by the Government that the need for the proposed new rule was not great enough to outweigh its difficulties.

*United States of America.* (See the comments under article 12 above.)<sup>212</sup>

*Observations and proposals of the Special Rapporteur*

266. As explained in the commentary,<sup>213</sup> article 14 was included in the draft to enable Governments to express their views so that the Commission might reach a clear decision on the point which it raises when undertaking the revision of the draft articles. The essential question is whether the article should be retained. Unfortunately, the comments made by delegations and Governments do not provide a clear answer to that question. Some of the comments implicitly assume that the article will be retained. The Finnish delegation considered that, at first reading, the article seemed to be acceptable. The Belgian delegation, on the other hand, thought that the article dealt with a situation which was quite hypothetical and could well be deleted. The Zambian delegation also suggested the deletion of the article. The Swedish and United Kingdom Governments, though for different reasons, favoured the deletion of the article. In these circumstances, it becomes necessary to consider whether the reasons for retention of the article are sufficiently strong.

<sup>211</sup> Para. 8 of the commentary to article 14.

<sup>212</sup> See para. 219 above.

<sup>213</sup> Para. 5.

267. In support of the retention of the article, it may be said that signature of a treaty does create a legal nexus between the signatory State and the treaty, at least in the sense that the State, by virtue of its signature, acquires the right to ratify, accept or approve the treaty in accordance with the provisions of the treaty. That right may apply to territory which becomes the territory of the newly independent State. Therefore, it may be asked why should not the newly independent State have the benefit of that right to the extent of being entitled, as a successor State, to ratify, accept or approve the treaty on its own behalf? If this view is accepted, there is sufficient theoretical justification for the retention of the article on the basis of the principle that underlies articles 12 and 13.

268. On the other hand, there is no body of practice by States or depositaries in support of article 14 such as exists in the case of articles 12 and 13. Moreover, as pointed out in the commentary, although the question had a special interest some years ago in relation to certain League of Nations treaties,<sup>214</sup> there is no immediate pressing need for a provision such as that contained in article 14. The possibility of it proving necessary in the future cannot be very great or be likely to arise in many cases.

269. The article, as drafted, itself raises some problems. There is the problem of inequality to which the Government of Sweden has called attention. Surely the "good faith obligation" of the predecessor State as a signatory could not be imposed on the successor State. What then would be the position as between the successor State and other signatory or contracting States? It would appear that they would be bound by the "good faith obligation" but the successor State would not.

270. A second problem arises out of the words "and by the signature intended that the treaty should extend to the territory to which the succession of States relates". How is such intention to be established? In some cases, the intention of the signatory State may be declared at the time of signature or may be otherwise made clear. In others, the intention may be unknown. As the United Kingdom Government has said, an intention one way or the other may not be formed until after signature of the treaty. Even if, at the time of signature, the predecessor State had the intention that "the treaty should extend to the territory . . .", that intention might be abandoned after consultation with the local authorities or Government.

271. A third problem relates to the question of time-limits. Consideration of the question of time-limits underlines the difference between the cases intended to be covered by article 14 and those covered by articles 12 and 13. In the latter, the right of notification of succession is one that exists apart from the provisions of the treaty concerning ratification or accession. In the former, the right to ratify would appear to be one that should be exercised in accordance with and subject to the procedures and conditions provided by the treaty. On this reasoning, there would be no need for a time-limit on the exercise of the right to ratify, because ratification by the successor

State could take place whenever ratification could be effected by any signatory State, but only within any time-limit provided by the treaty for ratification by the signatories. However, if article 14 is to be retained, perhaps there should be some provision as to the conditions governing ratification, acceptance or approval by the successor State, making it clear that, in this respect, the relevant provisions of the treaty would apply. But such an amendment would not remove the necessity for sub-paragraphs (a) and (b) of paragraph 1, which themselves import into article 14 the difficulties of application involved in the provisions of the paragraphs of articles 12 and 13 to which they refer.

272. A fourth problem—or perhaps a series of problems—appears from an examination of article 14 in the light of articles 10 to 18 of the Vienna Convention. Article 14 of the draft reflects article 14 of the Vienna Convention, but cases other than those of signature followed by ratification, acceptance or approval might arise. For example, the treaty might be initialled rather than signed and consent to be bound might be expressed by subsequent signature: or the treaty might be signed *ad referendum* by a representative and subsequently confirmed by his State thereby expressing its consent to be bound by the treaty. These examples are suggested by articles 10 and 12 of the Vienna Convention. Article 11 of the Convention also raises the question whether provision should be made in article 14 (if retained) for cases where consent to be bound by a treaty is to be expressed after authentication of the text by some agreed means other than ratification, acceptance or approval. Indeed, articles 10 and 11 of the Vienna Convention raise the question whether article 14 (if retained) should cover all cases where authentication of the text is a separate preliminary step prior to the expression of a State's consent to be bound by a treaty. Having regard to problems such as these, the Special Rapporteur doubts whether it would be satisfactory to retain article 14 in its present form.

273. Finally, there has been some criticism of the draft articles on the ground that they are already too complicated, and article 14 could be omitted without breach of principle or running counter to established practice.

274. For all these reasons, the Special Rapporteur proposes that article 14 be deleted.

### *Article 15. Reservations*

#### *Comments of Governments*

##### *Oral comments*

275. *Netherlands.* The Netherlands delegation said that, in article 15, it might be advisable to strengthen the law-making conventions by not automatically maintaining reservations to them.<sup>215</sup>

*Australia.* The Australian delegation said that article 15, as provisionally adopted by the Commission, provided in effect that the new State should step exactly

<sup>214</sup> *Ibid.*

<sup>215</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1317th meeting, para. 19.*

into the shoes of its predecessor. The delegation said that that conclusion was not dictated by pure logic. The adoption of the clean slate principle led logically to precisely the opposite conclusion. It would be preferable for the new State to be obliged to renew a reservation made by its predecessor if it felt that that was desirable. Such a procedure would strengthen the multilateral treaty and would also be in accordance with article 15, paragraph 2, which allowed a new State to make a new reservation to suit its own particular position at the time when it made its notification of succession.<sup>216</sup>

*Canada.* The Canadian delegation said that, as the Australian delegation had pointed out, it would be logical for the clean slate principle also to apply to article 15 and for the new State to be required to renew reservations of the predecessor State if it so wished: that would enable it to exercise the same options it was allowed in other circumstances and would also have the advantage of weighing the balance in favour of a less restrictive application of treaty relationships.<sup>217</sup>

*Belgium.* The Belgian delegation said that article 15 should, like the preceding articles, have been based on the clean slate principle and should have provided that the new State would have to renew the reservation made by the predecessor State if it intended to maintain it with respect to itself.<sup>218</sup>

*Zambia.* The Zambian delegation said that article 15 was a pragmatic and flexible approach to the question of reservations. In view of the reference to Zambia's notification of its succession to the Convention relating to the Status of Refugees, cited in the commentary on the article,<sup>219</sup> the Zambian delegation wished to re-state the position which it had adopted at the previous session of the General Assembly. This was that, when a new State gave notice to the depositary of its succession to a treaty and at the same time notified him of reservations of its own without alluding to those formulated by its predecessor, the new State was a party to the treaty in question by succession, although the terms of its participation had been modified by the formulation of new reservations which implicitly abandoned the predecessor State's reservations. To some extent, such a situation seemed analogous to the application of successive treaties relating to the same subject-matter where the provisions of the earlier treaty applied only to the extent that they were compatible with those of the later treaty. In any case, the Zambian delegation could not accept the Netherlands' proposal that reservations in respect of multilateral law-making conventions should not be automatically maintained.<sup>220</sup>

*Venezuela.* The delegation of Venezuela said that article 15, paragraph 3 (a), had been drafted by reference to the rules contained in the various articles of the Vienna Convention. Some members of the Commission

had expressed doubts as to the advisability of that method and had thought that the rules in question should be reproduced. Venezuela had used the same method on numerous occasions in connexion with agreements and conventions of various kinds; it had achieved the purposes sought more surely and accurately. An agreement concluded between Venezuela and UNESCO in early 1972, for example, provided that, with regard to privileges and immunities, the relevant provisions of the Convention on the Privileges and Immunities of the Specialized Agencies should be followed—although Venezuela was still not a party to that Convention.<sup>221</sup>

#### *Written comments*

276. *Austria.* The Austrian Government commented, on paragraph 2 of article 15, that the idea embodied in the provision seemed to arise from a misunderstanding of the concept of succession. The Government said that a new State inherited conventions in precisely the same state in which they applied to its territorial predecessor and therefore inherited the latter's reservations. It might waive these reservations because that was also the right of its predecessor but it might not make new ones since its predecessor could not do so. If a newly independent State wished to make reservations it ought, in the view of the Austrian Government, to use the process of ratification or accession to become a party to the multilateral treaty.

*Poland.* The Government of the Polish People's Republic commented as follows:

As far as the question of reservations and objections in the context of succession of the newly independent States is concerned, the Government of the Polish People's Republic feels that the clean slate principle should be applicable also to the succession in respect of reservations of the predecessor States. Since the act of succession in respect of a treaty itself is of a constitutive—and not declaratory—nature, it seems logical that it should be so treated in every respect—also in respect of the scope of the treaty covered by that act. Besides, in the case of the newly independent States formed of two or more territories (article 25), the present presumption in favour of automatic inheritance of the reservations could cause some difficulties; for instance, if the reservations applied to the different territories are not mutually reconcilable. Therefore, the presumption formulated in article 15, paragraph 1 of the draft should be reversed.

The question of inheritance of objections has been completely omitted in the draft. In practice, however, a newly independent State on three occasions took clear positions with regard to objections of the predecessor States. Thus Barbados added a declaration to its notification of succession in respect of the 1949 Geneva Conventions on the Protection of War Victims, in which it submitted objections identical to those previously formulated by the United Kingdom.<sup>222</sup> Two other cases concern the Geneva Conventions on the Law of the Sea of 1958. Fiji and Tonga, while withdrawing an objection of the United Kingdom in respect of reservations of Indonesia, declared that they maintained all other objections.<sup>223</sup> Taking into account the acts presented above, it seems necessary to include in article 15 a provision providing that

<sup>216</sup> *Ibid.*, 1319th meeting, para. 4.

<sup>217</sup> *Ibid.*, 1324th meeting, para. 14.

<sup>218</sup> *Ibid.*, para. 24.

<sup>219</sup> Para. 10 of the commentary.

<sup>220</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1326th meeting, para. 9.*

<sup>221</sup> *Ibid.*, 1327th meeting, para. 24.

<sup>222</sup> United Nations, *Treaty Series*, vol. 653, p. 454; and *ibid.*, vol. 278, pp. 266-268.

<sup>223</sup> See *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions: List of Signatures, Ratifications, Accessions, etc., as at 31 December 1972* (United Nations publication, Sales No. E.73.V.7), pp. 398, 399, 404-406 and 412.

predecessor States' objections do not devolve upon the newly independent States unless expressly maintained in the notification of succession. In the opinion of the Government of the Polish People's Republic, supported by the practice quoted above, this is a correct presumption. The International Law Commission in its commentary<sup>224</sup> rightly points to a universal lack of interest on the part of the newly independent States in the maintaining of objections made by metropolitan States. The practice shows that metropolitan States made their objections, primarily, in pursuit of their own interests. It seems desirable to regulate the question of reservations and objections in two separate articles. One of them could deal with the predecessor States' reservations and objections and the other with new reservations and objections.

*Sweden.* The Swedish Government said that, in support of the provision in paragraph 2, the Commission stated that

the Secretary-General is now treating a newly independent State as entitled to become a part 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.<sup>225</sup>

The Swedish Government commented that it hardly needed to be pointed out that it was not within the authority of a depositary to agree to reservations and that consequently the Secretary-General's practice could not be the basis of a rule of customary international law. Nor did the fact that parties to a treaty in individual cases had not protested against new reservations submitted by newly independent States necessarily mean that those parties recognized that there was a general right in favour of those new States to formulate their own reservations. Paragraph 2 must therefore be considered as a proposal *de lege ferenda*. As such it was not appropriate, because in general reservations were not desirable and practical reasons why additional ones should be allowed in this case were not apparent.

The Government continued by saying that article 15 included by reference the content of a number of articles, dealing with reservations, of the Vienna Convention. The Commission stated in the commentary that thereby Governments would be given an opportunity "to express their views on the whole question of drafting by reference in the context of codification".<sup>226</sup> As far as the present article was concerned, the reference method seemed justified as otherwise the article would have been very long and heavy and as the draft had a close connexion with the Vienna Convention. Regarding the general question of drafting by reference, it was not possible to give a positive or negative answer valid for all occasions. Reasons for and against varied both in kind and weight with circumstances and the decisions would have to be based on the situation in the particular case.

*United Kingdom.* The United Kingdom Government said, as regards paragraph 1 (a), that the test of compatibility between two reservations might be difficult to apply in practice. Formulation of a new reservation on the same subject as an existing one should imply an intention to replace the latter by the former. Thus the

words "and is incompatible with the said reservation" might be omitted with advantage.

As regards paragraph 1 (b), a reservation which "must be considered as applicable only in relation to the predecessor State" could hardly be "applicable in respect of the territory in question at the date of the succession of States". Accordingly, paragraph 1 (b) was unnecessary.

In paragraph 2, a cross-reference might usefully be made to "the rules set out in article 19 of the Vienna Convention on the Law of Treaties" instead of repeating them *in extenso*.

*United States of America.* The United States Government commented as follows:

An even more complicated timing problem arises in connexion with articles 15 and 16. Article 15 permits a new State at the time it notifies succession to withdraw reservations previously applicable to the territory concerned or, subject to certain limitations, to make new reservations. Any old reservation inconsistent with a new reservation is replaced by the new reservation. It is not clear whether the retroactive effect of article 18 applies to the varying situations dealt with in article 16. Certainly it would seem reasonable to consider that a reservation maintained in effect under the notification of succession should be considered as having remained in effect during the period between independence and notification if the treaty is considered in effect for that period. But to give a new reservation such retroactive effect would be quite another matter since it could lead to arbitrary and inequitable consequences that the other parties would be totally unable to guard against. Paragraph 3 of article 15 provides some protection in that the reference to article 20 of the Vienna Convention would presumably permit other States party to object to the reservation within 12 months from the date of notification. However, it is possible that the third State might have no objection to the reservation as such but would have objection to its being retroactive. Similar problems arise when the new reservation is inconsistent with an old reservation. The Commission should eliminate these complications by making it clear that new reservations take effect when made, that is, at the date of notification of succession.

The right of the new State under paragraph 2 of article 16 to change the predecessor State's choice in respect of parts of the treaty or between differing provisions raises the same problems of uncertainty and possible prejudice, if the choice is given retroactive effect, as are raised by new reservations. Accordingly, such choice should have effect only from the notification of succession.

The difficulties encountered with regard to articles 15 and 16 emphasize the need for establishing a time-limit within which the new State should notify succession.

#### *Observations and proposals of the Special Rapporteur*

277. At first sight the comments on article 15 seem to be long and complicated, but, when they are related to the paragraphs of the article which they affect, they fall naturally into place. Accordingly, the comments will be considered under the heading of the paragraphs affected.

#### *Paragraph 1*

278. The Australian, Belgian, Canadian and Polish comments advocate the reversal of the presumption in paragraph 1 so that the successor State, if it wishes to maintain any reservations made by the predecessor State, shall be required to state its intention to that effect at the time of the notification of succession. The Netherlands delegation, in effect, made the same suggestion but

<sup>224</sup> See para. 14 of the commentary to article 15.

<sup>225</sup> Para. 11 of the commentary to article 15.

<sup>226</sup> Para. 18 of the commentary to article 15.

limited it to multilateral treaties of a "law-making" character.

279. So far as the suggestion of the Netherlands delegation is concerned, the decision of the Commission would largely depend on whether it decided to establish a separate category of "law-making" treaties for the purposes of article 12. In that connexion, reference may be made to the considerations stated above.<sup>227</sup> If the Commission decided not to establish a separate category of "law-making" treaties for the purposes of article 12, to do so for the purposes of article 15, paragraph 1, would introduce complications and additions to the draft that would be difficult to justify. In these circumstances, while appreciating the intrinsic merits of the suggestion made by the Netherlands delegation, the Special Rapporteur will leave it on one side for the time being.

280. The arguments in support of the reversal of the presumption in paragraph 1 of article 15 may be summarized as follows. First and foremost, the requirement that a reservation, if it is to be maintained, must be renewed by the successor State would be (so it is said) more consistent with the clean slate principle. Secondly, (according to the Polish Government) since the act of succession in respect of a treaty is of a constitutive—and not a declaratory—nature, it would be logical to treat it as such with respect to reservations as well as with respect to the treaty itself. Thirdly, reversal of the presumption in paragraph 1 would be more consistent with paragraph 2 of article 15 which would allow a newly independent State to make new reservations at the time of making its notification of succession to a treaty. Fourthly, the requirement of renewal would strengthen multilateral treaties by compelling newly independent States to make a positive decision if they wish to maintain any reservations made by a predecessor State.

281. The first and second of these arguments may be taken together. They are both based on the nature of the option given to newly independent States on the basis of what has more accurately been called the clean slate metaphor. It is convenient to speak of the clean slate principle but this expression should be understood not so much as an absolute principle in itself as shorthand for the principle stated in article 11 of the draft read with articles 12 and 13. As is clear both from the text of those articles and from the commentaries, they are concerned with the question of the inheritance by a newly independent State of the treaties of its predecessor State and this refers to the rights and obligations of the predecessor State under such treaties as they applied to the territory of the newly independent State at the date of the succession of States. The choice of the newly independent State is either to succeed or not to succeed to such treaties. As stated in the commentary to article 15,

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 exactly as they stood at the date of succession.<sup>228</sup>

Logically, this seems to be the right answer to the arguments based on a "logical" extension of the clean slate principle to reservations.

282. This conclusion also seems to be in accord with the effect of a reservation established with regard to another party in accordance with articles 19, 20 and 23 of the Vienna Convention, which, by virtue of the provisions of article 21 of the Convention, modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation. If there is succession in respect of a treaty to which there is a reservation, it is logical that it should be succession to the treaty as modified by the reservation in accordance with article 21 of the Vienna Convention. The newly independent State would, of course, be left free to withdraw the reservation if it wished to do so, but the right of withdrawal would exist for that State as an incident of the general law relating to treaties and not as an incident of the succession.

283. So far as the third argument is concerned, it is difficult to see why the grant of an additional right to make new reservations should imply an obligation to give notice of the maintenance of existing reservations. There does not appear to be any inconsistency in saying to a newly independent State, "You will have the benefit of any existing reservations, unless you wish to withdraw them, and you may also add new reservations if you wish to do so." Nor does there appear to be any greater consistency in saying, to the newly independent State, "You will only have the benefit of existing reservations if you express an intention to maintain them when you make your notification of succession, but you may make new reservations if you wish to do so." The argument of consistency between the provisions of paragraphs 1 and 2 does not have much force one way or the other.

284. Finally, there is the argument that the requirement of renewal would strengthen multilateral treaties by compelling newly independent States to make a positive decision if they wish to maintain existing reservations. Again, this argument does not seem to have much force one way or the other. So far as the requirement might encourage the implicit withdrawal of reservations it would perhaps tend to "strengthen multilateral treaties", but so far as it might discourage newly independent States from making a notification of succession it would have the opposite effect. It is impossible to forecast which tendency would be likely to prevail in particular cases.

285. From the point of view of the newly independent State, the present presumption in favour of the maintenance of reservations is probably less onerous than the reverse presumption would be.

286. In the light of the foregoing considerations and of the reasons given in the commentary, the Special Rapporteur has come to the conclusion that the pre-

<sup>227</sup> See paras. 221-229 above, under article 12.

<sup>228</sup> Para. 2 of the commentary.

sumption in paragraph 1 should be maintained and not be reversed.

287. Apart from the major change in paragraph 1 discussed in the above paragraphs, two minor changes to paragraph 1 have been suggested. The first, made by Zambia and the United Kingdom, is to the effect that formulation of new reservations to a multilateral treaty by a newly independent State when making its notification of succession should be regarded as implying withdrawal of any existing reservation which relates to the same subject matter. Perhaps Zambia would frame the proposition more broadly in the sense that the formulation of any new reservations to a treaty should be regarded as implicit withdrawal of all the old reservations. In that form, the proposition would be too broad and would be difficult to justify logically. In its narrower form as stated above, the proposition seems to be fair and reasonable and would make the application of paragraph 1 (a) more certain by avoiding the necessity of a judgment as to the compatibility between the old and the new reservation. The change could be effected by deleting from paragraph 1 (a) the words "and is incompatible with the said reservation". It would, of course, be open to the newly independent State when formulating its new reservation to incorporate the old one. This procedure would also have the advantage of helping towards clarity and certainty. For these reasons, the Special Rapporteur supports this suggestion.

288. The second minor change is one suggested by the United Kingdom Government. It is the deletion of paragraph 1 (b). Since paragraph 1 only applies to a reservation "which was applicable in respect of the territory in question at the date of the succession of States", it is unnecessary and confusing to provide expressly in sub-paragraph (b) for the exclusion of a category of reservations which by hypothesis would not be applicable in respect of that territory. Accordingly, the Special Rapporteur also supports this suggestion.

289. Finally, the Polish Government has made a suggestion concerning objections to reservations which is related to paragraph 1 of article 15. It is that there should be a presumption that the predecessor State's objections do not devolve upon the newly independent State unless expressly maintained in the notification of succession. Although linked to the suggestion that the presumption in favour of the maintenance of reservations should be reversed, the suggestion that there should be a presumption against the maintenance of objections is not necessarily dependent on the former suggestion. Nevertheless, on the whole, the reasoning which supports the retention of the presumption in favour of the maintenance of reservations also supports the presumption in favour of the maintenance of objections which is inherent in the present draft. If an objection has been made by a predecessor State so as to prevent the entry into force of the treaty between that State and the reserving State, as a matter of succession that is the legal position that will be inherited by the successor State. On the other hand, it will as a matter of customary international law or under article 22, paragraph 2, of the Vienna Convention, always be open to the successor State to withdraw the

objection if it wishes to do so. In these circumstances, there seems to be no need to complicate the draft by making express provisions with respect to objections.

290. Having regard to the foregoing considerations and certain minor points of drafting, the Special Rapporteur proposes that paragraph 1 of article 15 be re-drafted as follows:

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 to that treaty** \* which was applicable in respect of the territory in question at the date of the succession of States unless, **when making the notification of succession,** \* it expresses a contrary intention or formulates a new reservation which relates to the same subject matter **as that reservation.** \*

#### *Paragraph 2*

291. The Austrian and Swedish Governments have commented to the effect that the grant of a right to make new reservations when notifying succession to a treaty is not consistent with the nature of succession, is not adequately supported by practice and is not justified by practical reasons.

292. As a matter of principle, the comments of these Governments are well-founded. Indeed, one may add that paragraph 2 goes beyond the provisions of article 19 of the Vienna Convention, which only permits reservations to be formulated by a State "when signing, ratifying, accepting, approving or acceding to a treaty". Obviously, these occasions do not include "making a notification of succession to a treaty".

293. The real issue here is whether there are sufficient practical reasons for granting the right to make new reservations to a newly independent State. This is perhaps a question to be answered by Governments when casting the draft articles in the form of a convention. Meanwhile, it may be observed that paragraph 2 has not attracted widespread opposition from delegations or Governments. On the contrary, it has by implication received considerable support. In this connexion, one may refer, for example, to the comments of the Australian delegation and those of the United Kingdom and United States Governments. In support of paragraph 2, it may also be said that none of the occasions mentioned in article 19 of the Vienna Convention is available to a newly independent State which for any reason wishes to establish its status as a party or a contracting State to a multilateral treaty by way of succession. The notification of succession is, for a newly independent State, the only occasion which approximates to the occasions mentioned in article 19 of the Vienna Convention and which may provide an opportunity for it to make reservations which seem to be necessary or desirable in its new condition of independence.

294. Having regard to the points made in the commentary to article 15 <sup>229</sup> and the above considerations, it seems to the Special Rapporteur that there are sufficient practical reasons for maintaining paragraph 2 in the draft.

\* Words in bold type replacements for or additions to the original draft.

<sup>229</sup> Para. 17.

295. The United Kingdom Government, however, has suggested that paragraph 2 might be drafted by reference to the Vienna Convention like paragraph 3 without restating the provisions contained in article 19 of the Convention. On the assumption that drafting by reference to the Convention is acceptable for the purposes of paragraph 3 (which it appears to be) it seems to be sensible to use the same method for the purposes of paragraph 2.

296. Having regard to the above considerations, the Special Rapporteur proposes the following redraft of paragraph 2:

2. When making a notification of succession\* establishing its status as a party or as a contracting State to a multilateral treaty under article 12 or 13, a newly independent State may formulate a new reservation unless the reservation is one the formulation of which would be excluded by the provisions of sub-paragraph (a), (b) or (c) of article 19 of the Vienna Convention on the Law of Treaties.\*

#### *Paragraphs 2 and 3]*

297. The United States Government has suggested that it should be made clear in article 15 that a new reservation made on notification of succession should not operate retroactively. This suggestion is related to the possibility of delay in the making of a notification, but, even if a time-limit of say three years is imposed for the purposes of a notification of succession under article 12 or 13, there is no apparent reason why a new reservation should be made retroactive. The present draft of articles 15 and 18 may be sufficient as they stand because there is nothing in either article to suggest that a new reservation would have retroactive effect. Nevertheless, if a suitable form of words can be found it may be wise to cover the point expressly. This might be done by the addition of a fourth paragraph to article 15.

298. To assist the Commission in the consideration of this point, the Special Rapporteur proposes the following additional paragraph:

4. A new reservation established under paragraphs 2 and 3 shall not have any effect before the date of the making of the notification of succession.

#### *Article 16. Consent to be bound by part of a treaty and choice between differing provisions*

##### *Comments of Governments*

##### *Oral comments*

299. *Australia.* The Australian delegation took a position with respect to article 16 similar to that taken on article 15.<sup>230</sup>

##### *Written comments*

300. *Sweden.* The Swedish Government said that, as with the right to form new reservations, it seemed

\* Words in bold type are replacements for or additions to the original draft.

<sup>230</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1319th meeting, para. 4. See also para. 275 above, under article 15.*

exaggerated to accord to a newly independent State the right to declare its own choice in respect of parts of a treaty or between alternative provisions.

*United Kingdom.* The United Kingdom Government said, with regard to paragraph 3, that once a newly independent State had established its status as a party it had all the rights and obligations of a party. Thus the need for this paragraph was doubtful.

*United States of America.* (See the comments under article 15 above.)<sup>231</sup>

##### *Observations and proposals of the Special Rapporteur*

301. Again it is convenient to deal with the comments under the paragraphs to which they relate.

##### *Paragraph 1*

302. As in the case of paragraph 1 of article 15, the Australian delegation has suggested the reversal of the presumption in paragraph 1 of article 16. Here, however, there would be even less justification for the reversal and, in the view of the Special Rapporteur, the paragraph should be maintained as it stands. This is clearly in accordance with the principle that the newly independent State, which makes a notification of succession, inherits a treaty as it stands at the date of the succession of States subject to such additional choice as may be conferred on it.

##### *Paragraph 2*

303. The Swedish Government considers that it is exaggerated to accord to a newly independent State the right to declare its own choice in respect of parts of a treaty or between alternative provisions. As in the case of paragraph 2 of article 15, the decision whether to retain paragraph 2 of article 16 turns on practical considerations rather than on points of principle. To the Special Rapporteur it does not seem unreasonable to allow a newly independent State to exercise its own choice having regard to the circumstances in which it finds itself after independence. Accordingly, he proposes that paragraph 2 be retained.

304. If the paragraph is retained, the question arises whether, as suggested by the United States Government, it should be made clear that any choice declared under the paragraph does not operate retroactively. It might be wise to clarify the point. This could be done by redrafting paragraph 2 as follows:

2. When so establishing its status as a party or as a contracting State, a newly independent State may, with effect from the date of the making of the notification of succession,\* 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.

##### *Paragraph 3*

305. The United Kingdom Government doubts the need for paragraph 3. However, it may be advisable to

<sup>231</sup> See para. 276 above.

\* Words in bold type are replacements for or additions to the original draft.

retain the paragraph to avoid any implication from paragraph 1 that a newly independent State would be deprived of the right to withdraw or modify a choice made with respect to its territory. If so, as a matter of drafting, it would seem that the phrase "any such choice" at the end of the paragraph should be amended to read "any such *consent or choice*".

306. As regards the comments of the United States Government, there does not seem to be any need to provide against the retroactive effect of a withdrawal or modification under paragraph 3 because it would clearly be in exercise of a "right provided for in the treaty". This surely could not attract the retroactive effect for which article 18 provides.

### *Article 17. Notification of succession*

#### *Comments of Governments*

307. No comments were made by delegations or Governments.

#### *Observations and proposals of the Special Rapporteur*

308. Subject to a few minor points of drafting which it would be inappropriate to raise in the present report, the Special Rapporteur has no observations to make on article 17.

### *Article 18. Effects of a notification of succession*

#### *Comments of Governments*

##### *Oral comments*

309. *Israel*. The delegation of Israel said that it was essential for the Commission to give further consideration to the implication of the time factor for the topic as a whole and the proper formulation of all the draft articles and their commentaries to encompass that factor. In paragraph 41 of the report on its twenty-fourth session . . . there was a reference that seemed to be to the "temporal element" as an outward-looking factor in relation to the date on which the codification of the topic should be completed. However, the delegation said there was an inward-looking aspect of the time factor, namely the temporal conflict element in a rule such as those found in articles 18 or 19. In that text, time was a substantive matter of major importance. The so-called "intertemporal law" was an elusive topic; it had caused the Commission difficulties in the past and the Commission might look more deeply into the question.<sup>232</sup>

##### *Written comments*

310. *Sweden*. The Swedish Government said that a provision that a newly independent State in its notification of succession might specify a date for its adherence later than the date of the succession of States hardly seemed

justified, as it would introduce another element of uncertainty in treaty relations.

*United Kingdom*. The United Kingdom said that where a newly independent State made a notification of succession some considerable time after independence, other States might, in good faith, have acted in the meantime on the assumption that the treaty was not applicable between them and the newly independent State. Should the newly independent State insist upon the date of independence as the effective date, the other States would presumably not be open to allegations of breach for having failed to apply the treaty in the meantime. This aspect of the question was not dealt with in the Commission's proposals. As regards paragraph 2 (b), the Government said that it should be possible for all the parties to agree on a later date in all cases and not merely in those falling under article 12, paragraph 3.

*United States of America*. The United States Government commented as follows:

Article 18 provides that a newly independent State which submits a notification of succession is considered as a party to the treaty as of the date of receipt thereof, but that the treaty is considered as being in force between the parties from the date of succession. The commentary states that this application of the principle of continuity is supported by practice although States have deviated from the rule in relation to certain successions and treaties. The United States accepts the principle as a logical corollary to the theory of succession but considers that it may raise some difficult problems in application. For example, a new State is established. A dispute between private individuals develops which includes as a major issue whether a multilateral agreement applicable to the territory prior to independence remains in force within the new State. No notification of succession having been given by the new State, the court decides the case on the basis that the treaty is inapplicable. Thereafter, the new State deposits a notice of succession to the treaty. What effect, if any, does bringing the treaty into effect retroactively have upon the judgement? Is the judgement open to collateral attack? Is the situation affected by whether the time for appeal has expired and no appeal has been taken; by whether an appeal is pending? Is it equitable to make provision in the articles for reopening a final decision in such a case? If so, what of settlements agreed between the parties, whether or not approved by a court, based on the assumption that the treaty was inapplicable?

This set of problems is further complicated by the factor that in authorizing the new State to make a declaration of succession, article 12 does not contain any limitation as to time.

#### *Observations and proposals of the Special Rapporteur*

311. All the comments relate to the time element involved in paragraph 2 of article 18. This involves difficult questions that merit further consideration on the part of the Commission. The hypothesis of continuity based on the concept of succession when a newly independent State establishes its status as a party or contracting State to a multilateral treaty under article 12 or 13 is not challenged in any of the comments. The main problem is the hardship for other States parties to a multilateral treaty that may arise as a result of the uncertainty whether in a particular case the treaty is to be regarded by them as in force in respect of the newly independent State between the date of the succession of States and the date of the making of the notification of succession (if any).

<sup>232</sup> *Official Records of the General Assembly, Twenty-eighth Session, Sixth Committee, 1404th meeting, para. 11.*

312. It should be noted, however, that both the United Kingdom and United States comments, which give examples, are based on the view that between the succession of States and the notification another State party is entitled to act on the assumption that the treaty is not in force between itself and the newly independent State. That may be the effect of the present draft articles. The point is not covered expressly but it appears to be the right interpretation having regard to the requirement of the agreement of the other State party to provisional application of a multilateral treaty under article 22.

313. On the other hand, it would be possible, at least in theory, to provide that the other State party should continue to be bound by the treaty in respect of the newly independent State until the latter made a notification of succession or declared its intention not to do so. Such a solution would, of course, be inequitable in the sense that during the intervening period the other State party would be bound in any event, but the newly independent State would not be bound unless it made a notification of succession. While it would remove an element of uncertainty, it would not otherwise alleviate the hardship of other States. It would also be inconsistent with the provisions of article 22 as at present drafted.

314. Again it would in theory be possible to provide that another State party should not be regarded as bound by a treaty in its relations with a newly independent State pending a notification (unless there is agreement for provisional application under article 22). Such a provision, however, would either be inconsistent with the retroactive effect of a notification of succession, or, if the retroactive effect of a notification were retained, it would be a delusion that would not in fact improve the lot of the other State party. Much the same remarks may be made about the idea that another State party should not be held responsible for a breach of the treaty vis-à-vis the newly independent State committed during the period between the succession of States and the making of the notification of succession. Accordingly, the Special Rapporteur does not feel able to advise the Commission to adopt a solution on these lines.

315. Problems of the kind mentioned in the comments on article 18 were considered in some detail by the Commission on 30 and 31 May 1972 in connexion with what was then draft article 12.<sup>233</sup> It was pointed out that what is now paragraph 2 of article 18 reflected the practice of the United Nations Secretariat and that the recognition of the retroactive effect of a notification of succession did not appear in fact to have given rise to cases of serious hardship for other States parties to a multilateral treaty. Nevertheless, the possibility of hardship was considered and taken into account. It was also recognized that the apparent inequality between the newly independent State and another State party might be ameliorated by the imposition of a time-limit on the period allowed for making a notification of succession. When draft article 12 was referred to the Drafting Committee, the question of fixing a time-limit

was left in abeyance, but when the draft article was submitted to the Commission by the Chairman of the Drafting Committee there was no further discussion of the question.<sup>234</sup>

316. Provision for a time-limit might be made by amending articles 12 and 13 as indicated above,<sup>235</sup> or perhaps by amending article 18. However, pending a clarification of views in the Commission, it would be fruitless to suggest further alternative amendments. Nevertheless, it is apparent that the incorporation of a time-limit for the making of a notification of succession would make the position much more manageable for the other State party. In the absence of any other satisfactory solution which may be regarded as consistent with practice and the concept of succession underlying the draft, the Special Rapporteur suggests that the Commission should give careful consideration to the idea of making provision for such a time-limit in the draft articles.

317. It remains to consider the specific suggestions made by the Swedish and United Kingdom Governments. In effect, the Swedish Government has suggested the deletion of sub-paragraph (c) of paragraph 2 which gives the newly independent State the right to choose a date later than the succession of States for the entry into force of the treaty. The reason given is that this provision "would introduce another element of uncertainty in treaty relations". At first sight it may appear that this criticism is justified, but on reflection this does not seem to be so. The provision in fact would not introduce a new element into the liberty already exercised by newly independent States, nor is it intrinsically unreasonable that, if the newly independent State may require retroactive effect for its notification of succession back to the date of the succession of States, it may choose to do so for some shorter period. Accordingly, the Special Rapporteur does not propose adoption of the Swedish Government's suggestion.

318. The United Kingdom Government has suggested, as regards paragraph 2 (b), that it should be possible for all the parties to agree on a later date in all cases and not merely in those falling under article 12, paragraph 3. It seems to the Special Rapporteur, however, that this suggestion is based on some misunderstanding of the purpose of paragraph 2 (b) and the effect of paragraph 2 as a whole. Paragraph 2 (b) has the effect of excluding, in cases falling under article 12, paragraph 3, the option of the newly independent State to specify a later date which it would otherwise have under paragraph 2 (c). This is necessary because of the provisions of article 12, paragraph 3, with respect to "restricted" multilateral treaties. In the view of the Special Rapporteur the same necessity does not arise in the case of multilateral treaties which are not "restricted".

319. In the light of the above considerations, the Special Rapporteur proposes that the Commission should approve draft article 18 with the possible addition of a time-limit on the period within which a notification of succession may be made. If such addition is to be made, he would

<sup>233</sup> For the Commission's discussion of the draft article, See *Yearbook . . . 1972*, vol. I, pp. 103 *et seq.*, 1168th meeting, paras. 58-93 and 1169th meeting.

<sup>234</sup> *Ibid.*, p. 267, 1196th meeting, paras. 3-6.

<sup>235</sup> See paras. 230-238 above.

propose that it be done by amendment to articles 12 and 13 in the way already suggested.<sup>236</sup>

### SECTION 3. BILATERAL TREATIES

#### *Article 19. Conditions under which a treaty is considered as being in force*

##### *Comments of Governments*

##### *Oral comments*

320. *United States of America.* As an illustration of a rule which made a highly favourable first impression, said the United States delegation, was article 19, under which the consent of both States was required for a bilateral treaty to be considered as being in force. That article articulated a rule which the United States Government had followed since the Second World War in its role as a depositary.<sup>237</sup>

*Australia.* Citing the general rule with respect to bilateral treaties expressed in article 19, the Australian delegation pointed out that it reflected the existing rule of international customary law, namely that a State could be bound by a treaty only if it consented thereto.<sup>238</sup>

*Finland.* The Finnish delegation said that the rules set forth in article 19 were pertinent and accorded with State practice, but it would be desirable to specify, in paragraph 2, the exact date on which succession took effect.<sup>239</sup>

*Canada.* The Canadian delegation said that the draft articles on bilateral treaties—articles 19, 20 and 21—were in accord with the Canadian position on the question as indicated in the passage quoted in the commentary<sup>240</sup> to article 19.<sup>241</sup>

*Zambia.* The delegation of Zambia attached due significance to the provision whereby newly independent States might obtain the continuance in force of bilateral treaties by express or tacit agreement.<sup>242</sup>

*Byelorussian SSR.* The Byelorussian delegation said that article 19, paragraph 1 (b) might well give rise to conflicts which would be difficult to settle, where a successor State deemed that it had expressed its agreement by its conduct while the other party did not consider that its behaviour was a proof that succession had occurred. It would be preferable to envisage an obligation of notification for the successor State.<sup>243</sup>

##### *Written comments*

321. *Sweden.* The Swedish Government referred to its comments under article 12 regarding a time-limit.<sup>244</sup>

<sup>236</sup> See paras. 234 and 263 above.

<sup>237</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1318th meeting, para. 18.*

<sup>238</sup> *Ibid.*, 1319th meeting, para. 5.

<sup>239</sup> *Ibid.*, 1320th meeting, para. 3.

<sup>240</sup> Para. 11 of the commentary.

<sup>241</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1324th meeting, para. 15.*

<sup>242</sup> *Ibid.*, 1326th meeting, para. 6.

<sup>243</sup> *Ibid.*, para. 41.

<sup>244</sup> See para. 219 above.

*United Kingdom.* The United Kingdom Government said that too much had been read into the italicized words in the quotation made in the commentary<sup>245</sup> with reference to United Kingdom practice. The qualification of the United Kingdom reply had been dictated by the need not to interfere in the external affairs of newly independent countries. The purpose of the words "in conformity with the provisions of the treaty" in paragraph 1 was not clear. Paragraph 1 (b) appeared to be concerned with tacit agreement by conduct.

##### *Observations and proposals of the Special Rapporteur*

322. This article appears to be generally acceptable.

323. The Swedish Government, however, has raised the question whether a time-limit should be provided for article 19 for the reasons adduced with respect to article 12. The legal position is, however, different in the case of the two articles. Article 12 gives a unilateral right of notification of succession which, if made, will affect the rights and obligations of other States. Article 19, on the other hand, leaves the treaty relationship to be determined by express or tacit agreement. In these circumstances, there does not seem to be any need for a time-limit.

324. The Byelorussian delegation has suggested that it would be better to provide for a notification of succession by the successor State rather than to provide for tacit agreement to continue bilateral agreements. This suggestion would involve deletion of paragraph 1 (b) and the amendment of the main provision of paragraph 1 by the substitution of a provision for notification of succession by the successor State for the continuation of bilateral agreements by agreement between the newly independent State and the other State party. The reason given in support of this change is the difficulty of determining when there is a tacit agreement for the purposes of paragraph 1. While recognizing the risk of difficulty in making this determination in particular cases, it does not seem that the risk is sufficiently great to justify changing the principle of the paragraphs which is based on consent. On the other hand, practice and convenience are in favour of the continuation of bilateral treaties by agreement made either expressly or by conduct. Accordingly, the Special Rapporteur proposes that paragraph 1 should be retained including both sub-paragraphs.

325. Having regard to the provision for continuation by tacit agreement made in sub-paragraph (b), the United Kingdom Government have questioned the inclusion of the words "in conformity with the provisions of the treaty" in the first part of paragraph 1. This is, of course, a question of drafting, but it is not clear whether the words are referring to the substantive provisions or to the formal clauses in the treaty. In either case, they seem to be unnecessary and might be deleted.

326. The Finnish delegation suggested that paragraph 2 should specify the exact date on which succession took effect. While certainty is desirable, if continuation of a bilateral treaty is to be by agreement as provided in paragraph 1, it follows naturally that the date from which

<sup>245</sup> Para. 11.

the treaty is to be considered as in force should also be determined by agreement. This is, in effect, what paragraph 2 provides, although, as under paragraph 1, the agreement may be express or implied. Accordingly, the Special Rapporteur proposes that paragraph 2 should be retained substantially as it is in the draft articles.

**Article 20. The position as between the predecessor and the successor State**

*Comments of Governments*

*Oral comments*

327. *Australia.* The Australian delegation said that articles 20 and 21, like article 19, also gave effect to the basic principle of international customary law that a State could be bound by a treaty only if it consented thereto.<sup>246</sup>

*Finland.* By contrast with article 19, the Finnish delegation said that the *raison d'être* of articles 20 and 21, which dealt with the position as between the predecessor and the successor State and the effects of an act of the predecessor State performed after the date of succession on the treaty relations of the successor State was questionable, because those articles were merely statements of fact.<sup>247</sup>

*Canada.*<sup>248</sup>

*Observations and proposals of the Special Rapporteur*

328. The comments on article 20 are sparse and contradictory. The Finnish delegation questioned the need for the article because it was no more than a statement of fact. On the other hand, the Australian and Canadian delegations supported the article on the ground that it was in accord with current law and practice. In the view of the Special Rapporteur, although the rule formulated in the article may be self-evident, it is a useful clarification which points out the distinction between multilateral and bilateral treaties. In the case of a multilateral treaty to which the predecessor State remains a party, treaty relations will be established between that State and the newly independent State when the latter makes a notification of succession. In the case of a bilateral treaty, this will not be so. The result of continuation under article 19 will not be the creation of a tripartite treaty but, in effect, two bilateral treaties—one between the predecessor State and the other State party (which normally will continue notwithstanding the succession of States) and another between the successor State and the other State party. The succession of States will not result in the creation of relations with respect to the bilateral treaty between the successor and predecessor States. This proposition, which is embodied in the article, accords with practice. For these reasons, in the view of the Special Rapporteur, article 20 should be retained.

<sup>246</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1319th meeting, para. 5.

<sup>247</sup> *Ibid.*, 1320th meeting, para. 3.

<sup>248</sup> See para. 320 above, under article 19.

**Article 21. Termination, suspension of operation or amendment of the treaty as between the predecessor State and the other State party**

*Comments of Governments*

*Oral comments*

329. *Australia.*<sup>249</sup>

*Finland.*<sup>250</sup>

*Canada.*<sup>251</sup>

*Written comments*

330. *Poland.*<sup>252</sup>

*United Kingdom.* The United Kingdom Government said that paragraphs 2 and 3 of the article appeared to re-state the rules in paragraph 1 and that the drafting of the article could probably be much simplified.

*Observations and proposals of the Special Rapporteur*

331. The comments on article 21 are also sparse and contradictory. The same delegations have expressed the same attitudes as in the case of article 20, but the Polish Government, by suggesting parallel provisions in the cases of multilateral treaties, has by implication given its support to article 21.

332. It seems to the Special Rapporteur that article 21 deals with points on which clarification and certainty are desirable. Accordingly, he proposes that it should be retained.

333. On the other hand, the article is long and repetitive and, as the United Kingdom Government have suggested, it should, if possible, be shortened and simplified. It may be noted, however, that paragraphs 2 and 3 do not deal with exactly the same situations as paragraph 1, and simplification may prove more difficult than might be imagined at first sight. But the United Kingdom Government's comments raise only questions of drafting and do not call for any substantive decision by the Commission.

SECTION 4. PROVISIONAL APPLICATION

**Article 22. Multilateral treaties**

*Comments of Governments*

*Oral comments*

334. *Spain.* The Spanish delegation commented on the involved wording of paragraph 2 of article 22.<sup>253</sup>

*Sweden.* The Swedish delegation said that the Commission itself seemed to be aware of the unsettled situation which would be created by applying the clean slate

<sup>249</sup> See para. 327 above, under article 20.

<sup>250</sup> *Ibid.*

<sup>251</sup> See para. 320 above, under article 19.

<sup>252</sup> See para. 219 above, under article 12.

<sup>253</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1320th meeting, para. 25.

doctrine inasmuch as it suggested in draft articles 22 to 24 supplementary rules for the provisional application of treaties of the predecessor State.<sup>254</sup>

*Written comments*

335. *Sweden.* The Swedish Government, commenting on articles 22 to 24, said that the provisions regarding "provisional application" seemed to be needed to correct practical inconveniences of the clean slate doctrine. As formulated, they led to additional inequality between the States concerned. A newly independent State would be committed to provisional application of a multilateral treaty only after it had made a formal notification to that effect. While a State party to the treaty would be so committed also "by reason of its conduct". The justification of that difference was not apparent.

The Government added that the interpretation of the phrase "by reason of its conduct" in particular cases in regard to both multilateral and bilateral treaties was apt to cause difficulties and disputes.

The Government again pointed out that the complications of provisional application would be avoided in the alternative model referred to earlier in its comments.<sup>255</sup>

*United Kingdom.* The United Kingdom Government said that the term "successor State" appeared in article 22 (and articles 23 and 24) although the articles were in part III on "newly independent States". Reference should be made to the "predecessor State" as well as to "another State party"; in contrast to the position under article 19, a multilateral treaty could of course be applied provisionally between the successor State and the predecessor State. More generally, said the Government, the proposals, as drafted, appeared to permit a newly independent State to pick and choose between the existing parties to a treaty. The desirability of such discrimination was open to question, especially when it was not permitted under the general law on multilateral treaties. It could lead to different "schools" of States within a single treaty system. The commentary indicated that a right of choice was not intended. The notifications referred to had been made, in the case of declarations, to the United Nations Secretary-General rather than to individual States parties to or depositaries of particular treaties.<sup>256</sup>

*Observations and proposals of the Special Rapporteur*

336. The only general comments on provisional application are those of the Swedish delegation and the Swedish Government. In reality, these comments are criticisms of the clean slate doctrine on the grounds that, if the opposite approach were adopted, the articles on provisional application would be unnecessary, and that the articles themselves introduce an additional element of inequality. In connexion with the first of these two grounds, reference should be made to an

earlier passage in the present report where the Swedish Government's criticisms of the clean slate principle are set out and it is proposed by the Special Rapporteur that the Commission should not attempt the preparation of an alternative set of draft articles at its twenty-sixth session.<sup>257</sup> On the assumption that the views of the Commission will accord with that proposal, the point requires no further examination here. Nevertheless, it may be noted that provisional application could do much to avoid inconvenience or hardship that might result from the application of the clean slate principle. Having regard to the practical value of articles 22 to 24 on provisional application, it is not surprising that there has not been any opposition to their inclusion in the draft. The Swedish Government's complaint of "inequality" is directed to the formulation of these draft articles and is more conveniently considered, together with the other comments, under the headings of the relevant paragraphs of the draft articles.

*Paragraph 1*

337. The Swedish Government has criticized the words "by reason of its conduct" on the ground that they introduce inequality into the draft because the newly independent State will only be committed to provisional application by formal notification while the other State party may be committed by its conduct. There does not, however, seem to be any real inequality here. It is more a matter of providing the most satisfactory procedure and it is difficult to imagine a multilateral treaty being accepted as applicable simply by the conduct of the newly independent State and another State party to the treaty. A minimum in the interests of certainty seems to be a requirement of express notification by the newly independent State. However, once notification has been made, the basis for provisional application is clearly laid, and conduct on the part of the other State party may well be sufficient to establish its agreement to provisional application. The Swedish Government has also criticized the phrase "by reason of its conduct" on the ground that its application in particular cases might cause difficulties and disputes. It is obvious that the words do involve that kind of risk, but it is sometimes convenient for States to accept a treaty relationship by conduct rather than by express notification. This may be so particularly in cases of provisional application. Therefore, it would seem wiser, at the present stage, in spite of the difficulties mentioned by the Swedish Government, to retain the words "or by reason of its conduct" is to be considered as having so agreed". If the words are not wanted, they can easily be deleted when the draft articles are converted into a convention.

338. The United Kingdom Government have suggested that the expression "newly independent State" should be used instead of "successor State" as in the other articles in part III of the draft. This change would make the drafting of article 22 consistent with the drafting of the earlier articles in part III.

339. The United Kingdom Government have also suggested that, in the case of multilateral treaties, pro-

<sup>254</sup> *Ibid.*, Twenty-eighth Session, Sixth Committee, 1398th meeting, para. 16.

<sup>255</sup> See paras. 27, 29 and 30 above.

<sup>256</sup> See paras. 3 and 5 of the commentary.

<sup>257</sup> See para. 30 above.

visional application should be possible between the newly independent State and the predecessor State, but this possibility is excluded by the use of the term "another State party" which by definition excludes the "predecessor State". There is here a difference between multilateral and bilateral treaties. In the case of the former (unlike the latter), the succession of States may lead to the establishment of treaty relationships between the newly independent State and the predecessor State. In the ordinary course of events, when a notification of succession to a multilateral treaty is made, both States will be parties to the treaty. Therefore, it would seem to be logical that provisional application of the treaty should also be possible between the newly independent State and the predecessor State. Accordingly, the Special Rapporteur proposes that paragraph 1 of article 22 should be amended so as to cover that case.

340. The United Kingdom Government further commented to the effect that paragraph 1 appeared to permit a newly independent State to pick and choose between the existing parties to a treaty. The wording of the paragraph might be open to that interpretation and the intention is not made very clear by the commentary.<sup>258</sup> However, such an interpretation would be contrary to the principle applied in articles 12 and 13, where no such freedom of choice is allowed, and cannot have been intended when paragraph 1 was drafted. Accordingly, the Special Rapporteur proposes that the drafting of paragraph 1 should be adjusted so as to make the intention clear. It might be sufficient for this purpose to amend the words "its wish that the treaty should be so applied" to read "its wish that the treaty should be applied provisionally", but some further redrafting might improve the article.

#### Paragraph 2

341. The Spanish delegation has commented on the involved wording of *inter alia* paragraph 2 of article 22, but this is a criticism, not so much of the drafting of that paragraph, as of the classification of treaties for the purposes of articles 12 and 13. As regards that classification, it is unnecessary to add here to the observations made above in connexion with those articles.<sup>259</sup> The drafting of paragraph 2 is not in itself "involved" and would not be simplified by the addition of further classes of multilateral treaties. On the other hand, the relationship between paragraph 2 and paragraph 1 is not as clear as it might be. For example, it is not made clear whether the procedure by notification applies in the case of "a treaty which falls under article 12, paragraph 3". The meaning might be made clearer by combining the two paragraphs of article 22 and by some rewording of what is now paragraph 2.

342. In the light of the above considerations, the Special Rapporteur proposes that article 22 be redrafted as follows:

If at the date of a succession of States a multilateral treaty was in force in respect of the territory to which the succession of States relates and the newly independent State notifies the parties or the

depository of its wish that the treaty should be applied provisionally, the treaty shall so apply

(a) in the case of a treaty which falls under article 12, paragraph 3, in the relations between the newly independent State and the parties if all the parties consent to such provisional application, or

(b) in the case of any other multilateral treaty, in the relations between the newly independent State and any party to the treaty if the party expressly agrees or by reason of its conduct is considered as having agreed to such provisional application.

### Article 23. Bilateral treaties

#### Comments of Governments

##### Oral comments

343. *Zambia*. The Zambian delegation said that, if treaty relations between a newly independent State and another State party were to continue in force, the latter must accept, tacitly at least, the provisional application of the treaty. A unilateral declaration and the acceptance, express or tacit by the other State party had been used by the Zambian Government as a provisional method for maintaining most of its treaty relationships. It had preferred that procedure to negotiating the express revival of a lapsed treaty or a new treaty to replace it. The Zambian Government therefore was entirely satisfied with the provisions of article 23, which embodied its own practice.<sup>260</sup>

##### Written comments

344. *Sweden*.<sup>261</sup>

*United Kingdom*.<sup>262</sup>

#### Observations and proposals of the Special Rapporteur

345. So far as the comments on article 23 are the same as those on article 22 it is unnecessary to repeat the observations made on the latter article. It may, however, be observed that the comments of the Zambian delegation tend to confirm the utility of the provision for agreement by conduct which is made in sub-paragraph (b) of article 23.

346. In accordance with the suggestion of the United Kingdom Government, it would be appropriate to substitute the term "the newly independent State" for "the successor State" in article 23.

### Article 24. Termination of provisional application

#### Comments of Governments

##### Oral comments

347. *Spain*. The Spanish delegation commented on the involved wording of paragraph 1 (c) of article 24.<sup>263</sup>

<sup>260</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1326th meeting, para. 7.*

<sup>261</sup> See para. 335 above, under article 22.

<sup>262</sup> *Ibid.*

<sup>263</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1320th meeting, para. 25.*

<sup>258</sup> Para. 3 of the commentary.

<sup>259</sup> See paras. 221-229 above.

*Written comments*348. *Sweden*.<sup>264</sup>*United Kingdom*.<sup>265</sup>*Observations and proposals of the Special Rapporteur*

349. To save repetition, reference is here made to the observations under article 22 with regard to the comments of the Swedish Government, the United Kingdom Government and the Spanish Government.<sup>266</sup>

350. For the reasons indicated in connexion with article 22, it would seem right for the purposes of article 24 to substitute the expression "the newly independent State" for "the successor State" and, in the case of multilateral treaties, to avoid the use of the expression "the other State party" which appears in paragraph 1 (b).

351. It is unnecessary to set out the whole of the text of article 24 as it would be if these suggestions were adopted but it may be worth indicating that paragraph 1 (b) might read as follows:

...

(b) either the newly independent State or the party provisionally applying the treaty \* gives reasonable notice of such termination and the notice expires; or . . .

352. Apart from possible minor changes of drafting such as those indicated above, article 24 appears to be generally acceptable and accordingly the Special Rapporteur proposes that it be adopted.

## SECTION 5. STATES FORMED FROM TWO OR MORE TERRITORIES

*Article 25. Newly independent States formed from two or more territories**Comments of Governments**Oral comments*

353. *Spain*. In addition to commenting on the involved wording of sub-paragraphs (a) and (c) of article 25, the Spanish delegation said that the exception to the continuity of a treaty in cases where a succession radically changed the conditions for the operation of the treaty was satisfactorily provided for in articles 25, sub-paragraph (a); 26, paragraph 1 (b); 27, paragraph 2 (b); and article 28, paragraph 1 (b), which dealt respectively with newly independent States formed from two or more territories, the uniting of States, the dissolution of a State and the separation of part of a State.<sup>267</sup>

*El Salvador*. The delegation of El Salvador said that the Commission had succeeded in dealing with an

\* Words in bold type are replacements for or additions to the original draft.

<sup>264</sup> See para. 335 above, under article 22.

<sup>265</sup> *Ibid.*

<sup>266</sup> See above, para. 336 under article 22, paras. 338-339 under article 22, para. 1, and para. 341 under article 22, para. 2.

<sup>267</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1320th meeting, para. 26.*

extremely complex and difficult subject in an amazingly small number of articles, which not only covered the existing situation with regard to succession of States in respect of treaties but also looked to the future. Article 25, for instance, specified that, with certain exceptions, any treaty which was continued in force under articles 12 to 21 would be considered as applying in respect of the entire territory of a newly independent State formed from two or more territories.<sup>268</sup>

*Written comments*

354. *Netherlands*.<sup>269</sup> The Netherlands Government commented as follows:

In cases of union of two or more dependent territories into one newly independent State, articles 12 to 21 are applicable. Treaties which are continued as a result of this application are, under article 25, considered as being in force for the *entire* territory of the new State. This means that the other States parties to treaties that were applicable in only one part of the new State prior to independence will be confronted with a much larger area of application than the area in respect of which they originally agreed to apply those treaties. They may well see objection to this in respect of certain treaties. This illustrates the point made by the Netherlands Government . . . above; <sup>270</sup> the principle of equality of all parties to a treaty demands that in all cases of State succession mentioned in parts II, III and IV of the draft the other States parties have the right to *object* to continuation of their treaties vis-à-vis a successor State. The Netherlands Government would call attention to the possibility of *conflicting treaties* that were in force in the separate parts of the component State before the merger into one State. Such

<sup>268</sup> *Ibid.*, 1323rd meeting, para. 11.

<sup>269</sup> As the comments of the Netherlands Government were received too late to be incorporated in the earlier part of the present report, they are quoted only under articles 25 *et seq.* For the full text of the comments, see p. 318 below, document A/9610/Rev.1, annex I.

<sup>270</sup> In paras. 7 and 8 of the Government's comments, which read as follows:

7. The continued validity of the treaties of the predecessor State for the remainder of its territory, as well as the continued applicability of its treaties in respect of successor States laid down in *articles 25 to 28*, are subject to an exception resulting from another important rule of treaty law, codified in article 62 of the Vienna Convention: the possibility of invoking a *fundamental change of circumstances* as a ground for termination of or withdrawal from a treaty. The Netherlands Government would assume that the fact of a State succession may well be *in itself* a fundamental (radical) change of circumstances, which may be invoked by *all States concerned* (predecessor State, successor State, other States parties), as an exception to continued applicability of a treaty. In this respect the draft might be more clear. The possibility of invoking a fundamental change of circumstances is mentioned only in articles 25 to 28, but should be clearly set out before the parts II, III and IV as a second "umbrella-article", covering, for instance, the case of article 10.

8. The principle of equality of all parties to a treaty is acknowledged by the Commission in *article 4; article 12, paragraph 3; article 13, paragraph 3; article 19, and articles 22 to 24*. Here it is not only the newly independent State which has the right to apply for admittance as a party, but the "other States parties" (of article 2, paragraph 1 (m)) rightly have a "say" in the matter of the continued applicability of their treaties in respect of a successor State. The Netherlands Government would suggest that this important principle be also acknowledged in other cases of State succession to multilateral treaties; in such a way that each "other State party" would have a right to *refuse* establishing relations under the treaty in respect of a certain successor State, *unless* this refusal would be incompatible with the object and purpose of the treaty, as would, for instance, be the case if the treaty allowed for participation by "all States".

treaties cannot be applied at the same time in the entire territory of the new State. In such cases the component State will have to choose between issuing a declaration of succession to only one of the treaties, or letting both of them lapse.

*United Kingdom.* The United Kingdom Government commented as follows:

The rule in sub-paragraph (a) has two alternative tests—compatibility and “radical change of conditions”. Only the former is proposed in article 10, sub-paragraph (b). The compatibility test is not always easy to apply, in practice, regarding reservations. The test of a radical change of conditions, which sounds similar to that of fundamental change of circumstances, is new and may also give rise to different interpretations in practice. The right proposed in sub-paragraph (b) would seem possibly to go beyond what is provided in article 29 of the Vienna Convention.

*United States.* The United States Government said that article 25 provided that, when a newly independent State was formed from two or more territories which had differing treaty régimes prior to independence, any multilateral treaty continued in force pursuant to the prior articles relating to newly independent States was applicable either to the entire territory of the new State or only to the former territory to which it applied at the option of the new State. The Government questioned whether this was a reasonable rule, taking, for example, the possibility that the rule could result in the application of the Vienna Convention on Consular Relations to a consular district in one section of a State while a consular district in another section could be subjected to a different set of requirements. Another example given was that the immunities of a diplomatic agent might vary according to whether he was in the part of the State covered by the Vienna Convention on Diplomatic Relations or not. The Government suggested that sub-paragraph (b) of the article should be deleted. The newly independent State was not required to maintain the treaty in effect and sub-paragraph (a) afforded sufficient protection to take care of the unusual case. The only difficult point not covered by sub-paragraph (a) was the situation when multilateral treaty obligations applicable in one section would conflict with treaty obligations applicable in another section. In such cases, the newly independent State, if it wished to maintain both treaties in effect, should be entitled to limit application to the original territory.

#### *Observations and proposals of the Special Rapporteur*

355. There has been no challenge to the principle of article 25, which provides a presumption, in the case of a newly independent State formed from two or more territories, that a treaty continued in force by a notification of succession is considered as applying in respect of the entire territory of that State. The Netherlands Government, however, has pointed out that the possible expansion of the area of application of a treaty that may result from that provision emphasizes the inequality created by the draft articles as between a newly independent State and other States parties to a multilateral treaty. The Netherlands Government, relying on the principle of the equality of all parties to a treaty, seeks provision, not only in the case of article 25, but also in all other cases of State succession mentioned in parts II, III and IV of the draft articles, that the other States parties shall

have the right to object to continuation of their treaties vis-à-vis a successor State.

356. The problem of “inequality” has been considered elsewhere in the present report, especially in connexion with article 12.<sup>271</sup> It would be possible to avoid such inequality by giving another State party to the multilateral treaty the right to prevent entry into force of the treaty between itself and the newly independent State by making an objection to the notification of succession. The Special Rapporteur, however, concluded that the introduction of a system of objections for the purposes of the second and third paragraphs of articles 12 and 13 “would be contrary to the general intent of the articles in part III of the draft”.<sup>272</sup> But that conclusion is not necessarily decisive with respect to article 25. Indeed, it may be said that the extension of a treaty to additional territory by the unilateral act of the newly independent State without the agreement (express or implied) of the other State party is contrary to the basic principle of consent. On the other hand, such relevant practice as there is seems to support the presumption for which article 25 provides and the principle embodied in the article has attracted some support and no criticism other than that implicit in the Netherlands Government’s comments.<sup>273</sup> In these circumstances, it appears to be advisable to retain the main provision in article 25 as it stands, even though there are considerations in favour of giving another State party to a multilateral treaty the right to refuse to accept the extension of the application of the treaty beyond the territory to which it applied before the succession of States.

#### *Sub-paragraph (a)*

357. There are, in effect, three different comments on sub-paragraph (a). First, the Spanish delegation would add to several articles the exclusion of cases where the succession would radically “change the conditions for the operation of the treaty”. The Netherlands Government has suggested the inclusion in part I of an “umbrella” article providing for the possibility of invoking a fundamental change of circumstances, not only with respect to articles 25 to 28, but also with respect to the other cases covered by parts II, III and IV. The United Kingdom Government, on the other hand, has criticized the last condition in sub-paragraph (a) on the grounds that, while similar to the condition of “fundamental change of circumstances”, it is new and that it may give rise to different interpretations in practice.

358. The Special Rapporteur, without following the views of the Spanish delegation in the case of all the articles mentioned by it, has already given support to the addition in article 10, sub-paragraph (b), of the provision concerning radical change in the conditions for the operation of the treaty.<sup>274</sup> The underlying reason is, of course,

<sup>271</sup> See paras. 221-253 above.

<sup>272</sup> See para. 252 above.

<sup>273</sup> The mention of conflicting treaties by the Netherlands Government is taken to be intended, not as a criticism of the draft, but to call attention to a problem that may face a newly independent State formed from two or more territories.

<sup>274</sup> See paras. 207-209 above.

that a transfer of territory may have effects similar to those of the creation of a newly independent State from two or more territories. In cases falling under article 25, the territorial changes, while not necessarily having consequences that would justify the invocation of a fundamental change of circumstances under article 62 of the Vienna Convention on the Law of Treaties, might so alter the conditions for the operation of the treaty that it would be grossly unfair to enable the newly independent State to insist on the extension of the treaty to the whole of its territory. Indeed, the inclusion of this provision goes some way towards meeting the comments of the Netherlands Government considered above.<sup>275</sup>

359. If the last part of sub-paragraph (a) were no more than a re-statement of the provisions of article 62 of the Vienna Convention, the words used would surely be inadequate. It is because the words are different in effect that they are useful and necessary. As indicated elsewhere in the present report, the Special Rapporteur would not favour piecemeal repetition of the provisions of the Vienna Convention in the draft articles, unless there are sound reasons for doing so in the case of a particular provision. In general, unless the situation contemplated requires some special provision in the context of the draft articles, no attempt should be made to incorporate some articles, but not others, of the Vienna Convention. Subject to the provisions required by the succession of States, the general law of treaties should apply.

360. Having regard to the above considerations, the Special Rapporteur would not advise the deletion of the words "or the effect of the combining of the territories is radically to change the conditions for the operation of the treaty", or the addition of a provision on fundamental change of circumstances as an "umbrella" article in part I of the draft.

#### *Sub-paragraph (b)*

361. The United Kingdom Government commented that the right proposed in sub-paragraph (b) would seem possibly to go beyond what is provided in article 29 of the Vienna Convention. This may be so, but the point is not absolutely clear. Although as a rule, according to article 29 of the Vienna Convention, a treaty is binding upon each party in respect of its entire territory, a different intention may be "otherwise established". It is not contrary to the spirit of that provision to allow a newly independent State, in the circumstances in which article 25 applies, to establish a different intention in its notification of succession. In any event, this is just the kind of "question" which could properly be regarded as not "prejudged" by the provisions of the Vienna Convention (see article 73 thereof).

362. Finally, there is the suggestion of the United States Government that sub-paragraph (b) should be deleted or rather that it should be limited to the situation where multilateral treaty obligations applicable in one section of the newly independent State would conflict with treaty obligations applicable in another section. This is a refinement that might be adopted, but there

do not seem to be any compelling reasons for its adoption. Cases, such as the examples given in the comments of the United States Government, could arise, but they would occur as a result of the manner in which the choice conferred by article 25 was exercised by the newly independent State, rather than as a result of the right to choose as such. On balance, it might be wiser to run the risk of errors being made by the newly independent State rather than to run the risk of creating difficulties in unforeseen cases by limiting the scope of sub-paragraph (b).

363. For the reasons indicated above the Special Rapporteur makes no proposals for the amendment of article 25.

## PART IV

### UNITING, DISSOLUTION AND SEPARATION OF STATES

#### *Article 26. Uniting of States*

##### *Comments of Governments*

##### *Oral comments*

364. *Netherlands.* The Netherlands delegation, when commenting on law-making treaties and the position of newly independent States, said that they must of course be able to withdraw from such conventions but there was no need to presume that they would wish to do so. The delegation then, remarking that, in its draft, the Commission had taken a more positive approach in favour of the effectiveness of multilateral treaties, drew attention to the commentary<sup>276</sup> to article 26.<sup>277</sup>

*Australia.* Having discussed the draft articles relating to newly independent States, the Australian delegation said that a somewhat different problem arose when a new State was formed by the uniting of two or more States. The delegation agreed with the Commission that in such a situation any treaty in force between any of those States and other States should continue in force. The delegation, however, reserved its position with respect to article 26, paragraph 2. Although that paragraph was a strict application of the principle of consent, the delegation wondered whether there might not be a strong case for relaxing that principle in such a situation so as to make the treaty applicable to the successor State as a whole.<sup>278</sup>

*Poland.* The Polish delegation drew attention to the commentaries on the uniting, dissolution and separation of States contained in part IV of the draft articles and said that those were problems of the future with which modern international law would have to deal.<sup>279</sup>

*Denmark.* The Danish delegation said that the Commission had adopted important provisions with regard

<sup>276</sup> Para. 30 of the commentary.

<sup>277</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1317th meeting, para. 19.*

<sup>278</sup> *Ibid.*, 1319th meeting, para. 6.

<sup>279</sup> *Ibid.*, 1320th meeting, para. 18.

<sup>275</sup> See paras. 355-356 above.

to the uniting, dissolution and separation of States. Those were the forms of succession which were likely to occur in the future, and the Commission had been well advised to seek legal regulation of them.<sup>280</sup>

*Spain.* The Spanish delegation commented on the involved wording of paragraph 2 (c) of article 26.<sup>281</sup>

*India.* The delegation of India said that the Commission had shown commendable foresight in drafting provisions concerning State succession to cover cases of uniting, dissolution or separation of States. It was in that area that future problems of succession were likely to arise.<sup>282</sup>

*Ghana.* The delegation of Ghana agreed completely with the Netherlands delegation regarding the problems that would arise more and more frequently in the future in cases of unification, dissolution or separation of States. In the opinion of the delegation, political unity or integration could be said to have occurred only when States which had previously been independent and sovereign were placed, in whole or in part, under one common political authority.<sup>283</sup>

*Egypt.* The Egyptian delegation considered that there was a certain disproportion between the part of the draft articles which dealt with newly independent States and the other part dealing with the uniting, dissolution and separation of States, particularly as the most common form of succession in the future would arise from such situations. Article 26, sub-paragraph 1 (b) and article 27, paragraph 2 were too general in scope and thus lent themselves to different interpretations. The whole purpose of codification was the establishment of rules which would create conditions of stability. The Egyptian delegation did not believe that such would be the result if those articles were maintained in their present form.<sup>284</sup>

*El Salvador.* The delegation of El Salvador remarked that part IV of the draft established that treaties would generally continue in force in cases of uniting, dissolution and separation of States.<sup>285</sup>

*Kuwait.* The Kuwaiti delegation felt that more thorough consideration should be devoted to the question of the union, amalgamation and dissolution of States, such situations being frequent in the contemporary world.<sup>286</sup>

*New Zealand.* The New Zealand delegation said that, when dealing with rules which related primarily not to an era of decolonization now largely past but to the union of States and their dissolution, the Commission placed far more emphasis on the continuity of treaty relations. In his delegation's view, that approach was justified

both by the important precedents of the United Republic of Tanzania and the United Arab Republic and also by the need to ensure stability in the event of amalgamations which could well prove to be the most common case of State succession in the future.<sup>287</sup>

*Canada.* The Canadian delegation said that articles 26 to 28 raised complex questions on which most Governments would wish to reflect at leisure.<sup>288</sup>

*Belgium.* The Belgian delegation said that the Commission had felt able to link the clean slate principle to the principle of self-determination. It might have been more logical to base the clean slate principle on State sovereignty, which implied that a State could not be bound by a treaty without its consent. In that context, the clean slate principle would automatically be established because it was an essential attribute of the autonomy of the new State with respect both to internal matters and to international relations. In that connexion, it might perhaps be said that the Commission had let itself be impressed unduly by the phenomenon of decolonization, which had led it to draw an artificial distinction between "newly independent States" and States resulting from the separation of part of an existing State, the uniting of two or more States or the dissolution of a State. The Belgian delegation felt that one category would have sufficed, that of the "new State", which would have made it possible to save words and entire articles.<sup>289</sup>

*United Republic of Tanzania.* The Tanzanian delegation said that in view of the almost completed process of decolonization one wondered whether there would ever arise a situation where the articles in part III of the draft would be invoked in practice. It would be well, therefore, to concentrate on cases of uniting, dissolution and separation of States, as several other delegations had suggested.<sup>290</sup>

#### *Written comments*

365. *Netherlands.* The Netherlands Government said that, in part III of the draft, the rights of a successor State to complete the signature of its predecessor (by ratification, reservations, choice of different provisions) were carefully worked out. Such provisions would be equally useful in the cases of States succession mentioned in articles 26 and 27.

*Poland.* The Government of the Polish People's Republic said that for the question of inheritance of treaties, the only just approach had been adopted by the Commission—namely, the principle of "continuity" in the cases of the different types of succession, such as "uniting", or "dissolution" of States.

*Sweden.* The Swedish Government said that it was not apparent why the principle of self-determination should require clean slate for newly independent States and for States emerging by separation (article 28) but not for States created by uniting of States or dissolution of a State (articles 26 and 27).

<sup>280</sup> *Ibid.*, 1321st meeting, para. 35.

<sup>281</sup> *Ibid.*, 1320th meeting, para. 25. See also para. 353 above under article 25.

<sup>282</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1321st meeting, para. 46.*

<sup>283</sup> *Ibid.*, 1322nd meeting, para. 36.

<sup>284</sup> *Ibid.*, 1323rd meeting, para. 4. In fact according to this paragraph, the representative of Egypt referred to article 25, paragraph (b) and article 27. As to the former article, however, it seems to the Special Rapporteur that his comments have greater relevance to article 26, para. 1 (b).

<sup>285</sup> *Ibid.*, para. 11.

<sup>286</sup> *Ibid.*, para. 16.

<sup>287</sup> *Ibid.*, para. 31.

<sup>288</sup> *Ibid.*, 1324th meeting, para. 16.

<sup>289</sup> *Ibid.*, para. 23.

<sup>290</sup> *Ibid.*, 1325th meeting, para. 29.

*United Kingdom.* The United Kingdom Government said that the two tests in paragraph 1 (b) were similar to those proposed in sub-paragraph (a) of article 25, but they were applied to different questions—in article 26 to that of the continuance in force of a treaty and in article 25 to that of the extent of a treaty's application. In article 26, the latter question was dealt with by an entirely different approach in paragraph 2. The justification for those differences was not clear.

#### *Observations and proposals of the Special Rapporteur*

366. The Commission considered the meaning to be attributed to a "uniting of States" and the underlying principle to be applied to a succession of States in such circumstances at its 1177th to 1179th meetings.<sup>291</sup> A large majority of the Commission favoured the principle of *ipso jure* continuity over that of consent in this instance. While it was recognized that there was little support in State practice for this principle, and that its adoption would involve an element of progressive development, it was accepted for the purposes of draft article 26.

367. The adoption of the principle was thoroughly considered by the Commission and the wisdom of its choice has been underlined by the general support given in the comments of delegations and Governments. Only the comments of the Belgian delegation in the Sixth Committee preferred the clean slate principle to the principle of continuity in the case of the uniting of States.

368. In these circumstances, one might be tempted to suggest that article 26 should be adopted by the Commission without much discussion. The Commission might be encouraged in following that course by the absence of many comments on the details and the implications of the article. It may be observed, however, that, while the meaning of "a union of States" and the basic principle were thoroughly considered by the Commission, it is not so apparent that detailed consideration was given to all the implications of the adoption of the principle. Some further consideration and clarification may be necessary not only by virtue of the comments of Governments but also because of the place that article 26 finds in the draft as a whole and the need to ensure that its application will, in practice, be as satisfactory as possible. In this connexion, it may be helpful to make some observations on the cases to which the article would apply as well as on the provisions of the article itself.

#### (a) *Uniting of States*

369. When the Special Rapporteur, Sir Humphrey Waldock, submitted his alternative texts entitled "Article 19. Formation of unions of States", he also put forward a definition of "union of States".<sup>292</sup> This was an expression which had commonly been used by writers on international law and it was natural that initially it should be used by the Special Rapporteur. In the event, however,

<sup>291</sup> *Yearbook . . . 1972*, vol. I, pp. 158 *et seq.*, 1177th meeting, paras. 62-82, 1178th meeting, and 1179th meeting, paras. 1-64 (Consideration of article 19 of the draft articles proposed by Sir Humphrey Waldock.)

<sup>292</sup> See *Yearbook . . . 1972*, vol. II, p. 18, document A/CN.4/256 and Add.1-4, article 19 and proposed sub-paragraph (h) for article 1.

the Commission did not adopt the definition suggested or indeed any definition of "union of States". In fact, the Commission re-drafted the title to read: "Article 26. Uniting of States". In effect, it defined what was meant by "uniting of States" by saying at the beginning of paragraph 1 "on the uniting of two or more States in one State".

370. On the face of it, these words cover any case where two or more States are united in a single State whatever may be the constitutional structure of the State after that event. This interpretation is confirmed by the commentary. The paragraph which is most particularly relevant concludes by saying, "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".<sup>293</sup>

371. Having regard to the all-embracing character of the meaning attributed to a "uniting of States", it may be necessary to consider the relation between a "transfer of territory" under article 10 and a "uniting of States" under article 26. If article 10 is limited to a transfer of territory from one State to another, no problem arises and the two articles would seem to be complementary to one another. If, on the other hand, article 10 is intended to apply also to the case in which the territory of a State is wholly absorbed by that of another State, there would appear to be an overlap and possibly conflict between the provisions of the two articles. If one State absorbs the entire territory of another State, it is at first sight difficult to see how that differs from a case in which two or more States unite, which falls within article 26. In any event, having regard to the provisions of articles 6 and 31, which would exclude from the scope of the draft articles a case in which one State absorbs another as a result of the use of force, it is difficult to see what scope there could be for the application of article 10 in a case in which the entire territory of a State is absorbed into the territory of another State. If it is thought that a distinction should be drawn on the basis of the internal constitutional structure after the absorption or the uniting of States, this would seem to run contrary to the concept of a "uniting of States" adopted for the purposes of article 26.

372. It seems to the Special Rapporteur that there is a question here which requires further thought and on which it might be advisable to make some clarification, if not by an adjustment of the text of article 10 or article 26, at least by some explanation in the commentary.

#### (b) *The provisions of the article*

373. A number of delegations commented on the complexity of the questions involved in article 26 and the need for more thorough consideration of the articles in part IV. A contrast was drawn between the detailed provisions relating to newly independent States in part III and the comparatively short provisions in articles 26, 27 and 28.

374. As a general observation, it may be said that the complexity of the provisions in part III arises from the nature of the solution offered and, in particular, the

<sup>293</sup> Para. 2 of the commentary to article 26.

option given to a newly independent State to continue multilateral treaties by making a notification of succession. Where, as in the case of article 26, there is a provision for *ipso jure* continuity, it may be thought that there is no need to make such detailed provisions, e.g. provisions corresponding to article 17 (notification of succession) and article 18 (effects of a notification of succession). The fact that the provisions of part III are more detailed is not in itself a reason for seeking to make those of part IV more complicated. Nevertheless, it may be desirable to consider in the light of the provisions of part III whether adequate attention has been paid to the provisions of part IV. In the light of the comments of Governments, however, it is not thought that the Commission ought to search too far. For example, while the Canadian delegation said that articles 26 to 28 raised complex questions on which most Governments would wish to reflect at leisure, the Canadian Government has not in the event submitted any comments on those articles. It may be a fair inference that on reflection most Governments have come to the conclusion that although the articles are short they do not need much by way of supplementary provisions.

375. Bearing in mind these general observations, it may now be convenient to consider each of the paragraphs of article 26 in turn and then the suggestion of the Netherlands Government for additional provisions.

#### *Paragraph 1*

376. The Egyptian delegation considered that paragraph 1 (b) was too general in scope and lent itself to different interpretations. According to that delegation, the purpose of condensation was the establishment of relations which would create conditions of stability and it did not believe that stability would result from the provisions in their present form. The comments of the United Kingdom Government, although couched in the form of a request for justification of differences in certain of the provisions of articles 25 and 26, having regard to that Government's comments on article 25, should probably be read as a criticism somewhat similar in effect to that of the Egyptian delegation. The question that is raised is whether it is satisfactory to take as a test for the exclusion of a treaty from continuity under paragraph 1 of article 26 incompatibility or a radical change in the conditions for the operation of the treaty. Since there can surely be no objection of principle to the incompatibility test, this really amounts to a question whether the test of radical change in conditions is either too wide or too vague to be applied.

377. It may be observed that many provisions of the draft articles may be difficult to apply unless there is good will on the part of all the States concerned. But this has not deterred the Commission from adopting provisions which it has considered to be right in principle. Moreover, on the whole this approach to the drafting of the articles has not attracted serious criticism from Governments. Of course, where certainty is possible, this is desirable. But a provision which is sound in principle should not, in the opinion of the Special Rapporteur, be rejected merely because it may give rise to difficulty in application. There may be room for further discussion in connexion

with the final words of paragraph 1 (b), but the Special Rapporteur would align himself with those who have supported the inclusion of the words "or the effect of the uniting of States is radically to change the conditions for the operation of the treaty". Of course, if the words can be made more precise, this should be done, but the Special Rapporteur does not propose their deletion.

378. On the other hand, it may be desirable in the commentary to explain more fully why these words have been used and what it is anticipated their effect will be. It might also be desirable to provide some explanation, in answer to the questions raised by the United Kingdom Government.

#### *Paragraph 2*

379. The Australian delegation reserved its position with respect to paragraph 2. While recognizing that the paragraph was a strict application of the principle of consent, the delegation wondered whether there might not be a strong case for relaxing that principle in such a situation so as to make the treaty applicable to the successor State as a whole. The comment of the Australian delegation is the only one to have been made in the sense indicated. In the absence of any obvious reasons, it is difficult to see what "strong case" there is for abandoning the principle of consent and modifying the provisions of paragraph 2. The point, of course, should be considered by the Commission, but the Special Rapporteur has no proposal to make in this connexion.

#### *Paragraph 3*

380. The Special Rapporteur has not found any comments of Governments on paragraph 3, but would observe that the effect of the paragraph as drafted does not clearly correspond with the intention expressed in the commentary. The intention seems to be to deal with the case where "a further State unites with States already united as one State".<sup>294</sup> No doubt what is in mind is the case in which one succession of States is rapidly followed by another where the succession occurs because of the uniting of States. Effect does not seem to be given to this intention by the use of the expression "a successor State".

381. Moreover, it is open to question whether the paragraph is necessary because, when a succession has taken place by the uniting of two or more States in one State, the latter is by hypothesis established as a State and, in the next process of uniting, will be not "a successor State" but "a predecessor State". The Special Rapporteur does not make any specific proposal in this connexion but suggests that the Commission should reconsider both the necessity for the paragraph and its drafting.

#### *(c) Completion of signature*

382. The Netherlands Government has called attention to the fact that in part III of the draft the rights of a successor State to complete the signature of its predecessor (by ratification, reservations, choice of different provisions) were carefully worked out and has suggested that such provisions would be equally useful in the cases

<sup>294</sup> Para. 31 of the commentary.

of State succession mentioned in articles 26 and 27. The Government's comments refer to both articles 26 and 27 but, as the circumstances are different, the comments will be considered under each article separately.

383. The articles to which the Netherlands Government has referred appear to be article 13 (Participation in treaties not yet in force), article 14 (Ratification, acceptance or approval of a treaty signed by the predecessor State), article 15 (Reservations) and article 16 (Consent to be bound by part of a treaty and choice between differing provisions). Each of those articles involves different considerations and it is still open to question whether the Commission will retain article 14.

384. It may be noted that, as they stand, articles 26 and 27 proceed from the same basis as article 12, i.e. they concern treaties in force at the date of the succession of States. This is not the case with respect to all the provisions of articles 13, 14, 15 and 16. For the purpose of considering this comment of the Netherlands Government, it is necessary to examine each of those articles in turn.

385. By hypothesis, article 13 is dealing with a multilateral treaty which has not entered into force at the date of the succession of States if before that date the predecessor State had become a contracting State. Subject to the provisions of article 13, it enables a newly independent State by a notification of succession to establish its status as a contracting State to the treaty. The effect of article 26, as it stands, would appear to be to deprive a State formed by the uniting of States of the benefit of the status of one of the predecessor States as a contracting State in cases in which the treaty was not in force before the date of the succession. As a matter of logic, it is a little difficult to see why a newly independent State should be able to take advantage of such a situation, but that the uniting of States where there is *ipso jure* continuity of treaties should have the effect of destroying the effects of a consent to be bound given by one or more of the States which are uniting. There may be good reasons for the distinction, but they are not obvious. There is, of course, a distinction in that the newly independent State, when making a notification of succession, is in fact expressing its own consent to be bound, whereas a State formed by the uniting of States will be bound *ipso jure*. Nevertheless, if the consideration of encouraging participation in multilateral treaties is borne in mind, it may be that provision should be made for the new State in such cases to be considered as bound by the consent given by one or more of the predecessor States.

386. In the view of the Special Rapporteur, however, the reasons for making such a provision are not so clear and strong as to justify the submission of a proposal to the Commission as regards article 26, but he suggests that consideration should be given to the point by the Commission.

387. So far as the provisions of article 14 are concerned, they relate to a case in which the predecessor State has not given its consent to be bound but the newly independent State nevertheless is given the right to take advantage of the signature by ratification, acceptance or approval of the treaty. Although one can imagine *ipso*

*jure* continuity in a case in which a State has given its consent to be bound, it is difficult to think that this would be reasonable in a case where a State is not bound but has merely signed the treaty. Of course, a discussion of article 14 itself may throw further light on this question, but meanwhile the Special Rapporteur would not advise making the benefits of article 14 available in the case of a uniting of States.

388. As regards article 15 on reservations, the *ipso jure* continuity for which article 26 provides would leave no occasion on which it would be appropriate for reservations to be made. Article 15 is directly related to the provision for a notification of succession which is treated as corresponding to one of the occasions on which a State may formulate a reservation under article 19 of the Vienna Convention. There does not appear to be any reason why a State formed by the uniting of two or more independent States should thereupon acquire the right to alter existing reservations or to make new ones. The underlying principle is that, in cases falling under article 26, the successor State takes the treaties of the predecessor State as they stand at the date of the succession of States. Accordingly, the Special Rapporteur proposes that the Commission should not adopt the suggestion of the Netherlands Government so far as it relates to reservations.

389. For similar reasons, the Special Rapporteur does not advise the Commission to adapt the provisions of article 16 for the purposes of article 26.

## Article 27. Dissolution of a State

### Comments of Governments

#### Oral comments

390. *Finland*. The Finnish delegation said that article 27, concerning dissolution of a State, favoured the principle of continuity. While the application of that principle seemed perfectly legitimate in the case of a dissolution of a union of States, the members of which frequently had some degree of international personality, the delegation doubted whether it was acceptable in the case of a union State [unitary State?], where the clean slate principle should be applied.<sup>295</sup>

*Spain*.<sup>296</sup>

*Belgium*. The Belgian delegation commented that article 15 should, like the preceding articles, have been based on the clean slate principle and should have provided that the new State would have to renew the reservation made by the predecessor State if it intended to maintain it with respect to itself. The same observation was applicable to article 27: it might be asked if the clean slate principle should not have led to a conclusion directly opposite to that which the Commission had reached.<sup>297</sup>

<sup>295</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1320th meeting, para. 3.*

<sup>296</sup> See para. 353 above, under article 25.

<sup>297</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1324th meeting, para. 24. See also para. 364 above, under article 26.*

*Zambia.* With regard to articles 27 and 28, the Zambian delegation found it difficult to appreciate the necessity for distinguishing between the dissolution of a State and the separation of a State and for providing that, in the first place, treaty relations should continue whereas, in the second case, the clean slate principle would be applicable. It would be advisable, if only for reasons of consistency, that the same provision should be applied to both situations, unless it was made clear that the dissolution related to a union of former independent States.<sup>298</sup>

#### Written comments

391. *Czechoslovakia.* The Czechoslovak Government said that article 27 dealt with succession in respect of treaties of States that were newly established following disintegration of a former State formation. In its opinion, the clean slate principle should be set in such cases as a rule. The present formulation, which referred to this principle in paragraph 2 as an exception only, was insufficient. (Czechoslovakia, which had come into existence in 1918 as an independent State upon the disintegration of Austria-Hungary, had proceeded from the clean slate principle in its practice.)

*German Democratic Republic.* The Government of the German Democratic Republic said that for several reasons it was not in a position to accept the establishment of the principle of *ipso jure* continuity in the case of the dissolution of a State as envisaged in article 27. Unlike uniting (article 26), the dissolution of a State as a rule took place without a treaty, which meant against the will of the existing State. In terms of social conditions, any such States were new States whose position after succession must, as a matter of principle, not be inferior to that of "newly independent States". It was, therefore, hard to understand why article 27 contained the same provisions as article 26. The Government continued by commenting that, although article 27, paragraph 2, provided for exceptions from *ipso jure* continuity, thus allowing a limited option for the successor State, that was certainly not satisfactory. A dissolution of States could, in essence, be compared with decolonization rather than with the uniting of States, it was the opinion of the Government that the principle of clean slate should be established here as a rule and not as an exception. Besides, the Government wished to underline its position that the interest in having largely preserved the existing state of international treaty relations in so far as these have come about in conformity with the established principles of international law, should receive more attention in the draft.

*Netherlands.* The Netherlands Government commented as follows:

*Articles 27 and 28.* These articles are of special interest to the Kingdom of the Netherlands. The Kingdom consists of three component countries: the Netherlands, the Netherlands Antilles and Surinam. If the Netherlands Antilles and Surinam in the near future become independent States, from a purely legal point of view article 27 of the present draft would be applicable, in view of the constitutional rules embodied in the *Statuut voor het Koninkrijk*.

From a historical point of view, however, it might be more appropriate to apply article 28, paragraph 2, to the Antilles and Surinam and article 28, paragraph 1, to the Netherlands. Generally speaking, in most cases of dismemberment the personality of the original State is, from a historical point of view, continued by one of the component parts. Several treaties of the Kingdom have been concluded or denounced in respect of only one or two of the component parts; this is mentioned in the instrument of ratification or denunciation. If article 28 should be applied, it is not clear whether this case is covered by the words in paragraph 1(b) "[unless] it appears from the treaty or from its object and purpose . . .". In that respect, the phrasing of article 29 of the Vienna Convention: "Unless a different intention appears from the treaty or is otherwise established \* . . ." would seem better to serve the purpose.<sup>299</sup>

*United States of America.* The United States Government said that the distinction between the dissolution of a State (article 27) and the separation of part of a State (article 28) was quite nebulous. The principal criterion appeared to be that, in dissolution the predecessor State ceased to exist, while in separation of part of a State, the remaining part continued to be the predecessor State. This differentiation seemed largely nominal. If State A split in half and the half called itself State B and the other State C, should this produce different results than if State A split in half and the half called itself State B and the other half State A, or *vice versa*? The practice cited in the commentaries to the two articles did not provide substantial assistance in sharpening the distinction between the two situations. The Government suggested that article 28 added an unnecessary element of complexity to the draft articles and that the concept of "newly independent State" was sufficiently broad to encompass the separation of part of a State in all those cases in which application of the rules in part III was indicated.

#### Observations and proposals of the Special Rapporteur

392. There are two basic questions that arise out of the comments of Governments on article 27. First, is there sufficient distinction between the "dissolution of a State" (article 27) and "the separation of part of a State" (article 28) to justify treating the former as a category of its own? Secondly, if the "dissolution of a State" is to be treated as a distinct category should the article be based on the principle of *ipso jure* continuity, the principle of consent or the clean slate principle? If there is no real distinction between the two categories, it is unnecessary to have two articles to deal with them. On the other hand, even if there is a real distinction, it does not follow automatically that there must be a different solution for each of them.

#### (a) Distinction between "dissolution" and "separation of a part"

393. It is clear from the discussion in the Commission<sup>300</sup> of what was then article 20 (dissolution of a union of States) was coloured by the traditional meaning of a "union of States" and the implication that the component parts of the union retained a measure of individual

\* Italics supplied by Netherlands Government.

<sup>299</sup> See also para. 365 above, under article 26.

<sup>300</sup> *Yearbook . . . 1972*, vol. I, pp. 183, *et seq.*, 1180th meeting, paras. 15-72 and 1181st meeting, paras. 1-43.

<sup>298</sup> *Ibid.*, 1326th meeting, para. 10.

identity during the existence of the union. This concept may have affected, perhaps imperceptibly, the view of members of the Commission on the distinction between dissolution and separation of part of a State. The Commission, however, did not retain the concept of a "union of States" for either article 19 or 20 (now articles 26 and 27). On the contrary, for article 27, as well as for article 26, the concept of "the State" was taken as the starting-point for the draft article. The implication is that for the purposes of article 27, as well as for those of article 26, the internal structure of the State is regarded as immaterial: this point is made very clear in the commentary to article 27.<sup>801</sup> From the view-point of modern international law, this seems to be a sound approach, but it does give rise to the question whether, in that event, there is any real difference between a State that dissolves into parts and one from which a part separates. It may be said that in both cases the State divides into parts.

394. This kind of thinking is reflected in the comments of the Finnish delegation and the United States Government. The United States Government said that the distinction between the two categories was quite nebulous. The Government identified the principal criterion as being that in dissolution the predecessor State ceased to exist, while in separation of part of a State, the remaining part continued to be the predecessor State, and described the differentiation as "largely nominal".

395. In the view of the Special Rapporteur, there is a clear theoretical distinction between dissolution and separation of part of a State. Indeed, the United States Government has itself identified the distinction. In the former case, the predecessor State disappears; in the latter case, the predecessor State continues to exist after the separation. This theoretical distinction may well have implications in the field of succession in respect of treaties. Let us take an example, which is not difficult to imagine: State A consists of four parts, each of which is in some measure territorially distinct and in each of which there is a different ethnic and cultural background. If one part separates from State A, the international personality of State A will continue. If, on the other hand, the State dissolves and each of the four parts becomes independent, the international personality of State A will disappear. It is, of course, possible in this event that one of the four parts may continue to be regarded as State A and to continue to enjoy its international personality. Then, what would otherwise be a case of dissolution will be regarded as a case of separation of parts of a State.

396. The fact that, in particular cases, it may be difficult to determine whether there has been a dissolution or a separation does not affect the theoretical distinction; nor, in the view of the Special Rapporteur, does it alter the importance of maintaining that distinction so that it may be applied where appropriate.

(b) *Consequences of the distinction between dissolution and separation of part of a State*

397. If it is accepted that there is at least a theoretical distinction between dissolution and separation of part of

a State, it does not necessarily follow that the effects of the succession of States in the two categories of cases must be different for the parts which become new States. In other words, it would be possible to treat the new States resulting from the dissolution of an old State as if they were parts that were separating, leaving the old State in existence. It would, however, in any event be necessary to provide for the continuation in force of treaties with respect to the old State in cases in which it continues to exist after the separation.

398. A number of the comments of Governments have raised the question whether, in the case of a dissolution of a State, the principle of continuity or the clean slate principle should be applied. The tendency of many of the comments is in favour of the application of the latter principle: these include the comments of the Finnish, Belgian and Zambian delegations, and of the Governments of Czechoslovakia, the German Democratic Republic, the Netherlands and the United States of America. It is in reality with respect to the consequences that some of these comments question the validity of the distinction between a dissolution of a State and a separation of part of a State. They suggest that there is no sound basis for applying the principle of continuity to new States created upon a dissolution, while applying the clean slate principle to States emerging by separation from an existing State.

399. Unfortunately, the precedents are few and the arguments based on principles of international law, including those relating to treaties, are far from conclusive. In both categories of cases, one may argue from the principle of self-determination as applied to a new State and from the need to maintain the stability and continuity of treaty relations.

400. In the comments of Governments, the case for assimilating the provisions of article 27 to those of article 28 is argued most strongly by the Government of the German Democratic Republic, which said that it was not in a position to accept the establishment of the principle of *ipso jure* continuity in the case of the dissolution of a State as envisaged in article 27. The Government pointed out that a dissolution of a State as a rule took place without a treaty, against the will of an existing State and that, in terms of social conditions, the States so created were new States whose position "must as a matter of principle not be inferior to that of 'newly independent States'". The Government did not consider the exceptions for which provision was made in paragraph 2 sufficient for the successor State. By contrast with the uniting of States, the Government said that dissolution was to be compared with decolonization, and concluded that the clean slate principle should be established as the rule and not as an exception in cases of dissolution. It may, however, be pointed out that the comments of the Government of the German Democratic Republic continued by stressing its interest in preserving the existing state of international treaty relations and saying that this should receive more attention in the draft. This, on the face of it, appears to be an argument in favour of maintaining the principle embodied in article 27.

<sup>801</sup> Para. 12 of the commentary.

401. As against the arguments of the German Democratic Republic, it may be observed that there is a basic distinction of substance between cases falling under article 27 and the case of a newly independent State. Where there is dissolution of a State, a treaty concluded by the predecessor State will have been made on behalf of the State as a whole. It may be presumed to have been made with the consent of the people of all parts of the State and, so long as the State remains in existence, to be binding on the entire State. This is a very different situation from that of a dependent territory which, although it may be consulted about the extension of the treaty, does not normally play any part in the actual government of the State concerned, and cannot therefore be regarded as responsible for the conclusion of the treaty as such. The same observation may be made about the position of a part of a State that breaks away and becomes independent. However, in this case, it is more likely that the part will have been in a position more akin to that of a dependent territory. Indeed, it is quite possible that the attempt to impose the application of a particular treaty may be the cause of the secession of part of the State.

402. Whether in the case of a dissolution of a State the principle of continuity or the clean slate principle should apply is a question that the Commission will have to consider with care. For his own part, the Special Rapporteur finds it difficult to form a clear-cut view one way or the other. However, on balance, having regard to considerations such as those mentioned in the preceding paragraphs including, in particular, the desirability of maintaining the continuity and stability of treaty relationships wherever possible, he would be inclined to maintain article 27 and the distinction drawn between that article and article 28.

(c) *Details of the draft article*

403. Only the comments of the Egyptian delegation and the Netherlands Government touch on the drafting of the article. So far as the comments of the Egyptian delegation criticize the breadth of the exception in paragraph 2 of article 27, the Special Rapporteur has nothing to add to the observations made in connexion with article 26.<sup>302</sup> The question of drafting raised by the Netherlands Government is related to article 28 and will be considered in connexion with paragraph 1 (b) of that article.

(d) *Completion of signature*

404. As indicated above,<sup>303</sup> the comments of the Netherlands Government have the effect of raising the question whether the provisions of articles 13, 14, 15 and 16 should be applied to cases falling under articles 26 and 27. In connexion with article 26, the position with respect of each of those articles was considered in turn.<sup>304</sup> The tentative conclusion reached was that while it might be appropriate to adapt the provisions of article 13 for the purposes of cases falling under article 26, it

would not be appropriate to do so as regards articles 14, 15 and 16.

405. This conclusion was based mainly on the nature of *ipso jure* continuity and, although the circumstances are different in cases falling under article 27, essentially the same considerations seem to apply. Accordingly, the Special Rapporteur is of the opinion that while the provisions of article 13 might be adapted for the purposes of cases under article 27, this course would not be advisable with respect to articles 14, 15 and 16.

*Article 28. Separation of part of a State*

*Comments of Governments*

*Oral comments*

406. *France.* The French delegation wondered what compelling technical reasons had led the Commission to distinguish in its draft between what it termed "newly independent States" and States emerging from the "separation" of a State. That was a vague extra-judicial concept, and the fact that the Commission had finally adopted an identical solution for both cases meant that there was even less justification for it. The Commission would probably have been well advised to concentrate on legal concepts that were more commonly used in international legal terminology and particularly on the problems which might arise in the case of a protectorate, mandate or trusteeship agreement.<sup>305</sup>

*Spain.* The Spanish delegation commented that the concept of identity or continuity of the State, as a concept opposed to that of succession, appeared only in article 28, and that the Commission could consider the possibility of examining the idea of continuity in a more general context.<sup>306</sup>

*Belgium.*<sup>307</sup>

*Zambia.*<sup>308</sup>

*Written comments*

407. *Netherlands.*<sup>309</sup>

*United Kingdom.* The United Kingdom Government considered that paragraph 1 of the article should be included in part III which could be broadened to cover successor States which were not newly independent. Paragraph 2 would become unnecessary if the definition proposed in the United Kingdom comments for the term "newly independent State" (article 2, paragraph 1 (f)) were adopted.

*United States of America.*<sup>310</sup>

<sup>305</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1318th meeting, para. 14.*

<sup>306</sup> *Ibid.*, 1320th meeting, para. 24. See also para. 353 above, under article 25.

<sup>307</sup> See para. 364 above, under article 26.

<sup>308</sup> See para. 390 above, under article 27.

<sup>309</sup> See para. 391 above, under article 27.

<sup>310</sup> *Ibid.*

<sup>302</sup> See paras. 376-378 above.

<sup>303</sup> See paras. 382-383 above, under article 26.

<sup>304</sup> See paras. 385-389 above.

*Observations and proposals of the Special Rapporteur*

408. In the comments made by delegations and Governments, there is no challenge to the principles underlying article 28. Indeed, as already observed under article 27, if anything the comments have tended to suggest that the case of new States resulting from the dissolution of a State should be treated in the same way as parts emerging by separation from a State.

409. However, in connexion with article 28, a number of comments suggest in effect that a new State resulting from separation should be treated as a "newly independent State". The comments of the French and Belgian delegations, and the United Kingdom and United States Governments, are in that sense. As expressed in the comments of the United States Government, the suggestion is that the concept of "newly independent State" is broad enough to encompass the separation of part of a State in all those cases in which application of the rules in part III is indicated. The implication of these comments seems to be that article 28 should be absorbed into the provisions of part III and that the definition of "newly independent State" in paragraph 1 (*f*) of article 2 should be amended accordingly. In fact the United Kingdom Government have suggested an amendment to the definition, designed to cover this point. That Government has suggested the substitution of the words "part of the territory of the predecessor State" for the words "a dependent territory for the international relations of which the predecessor State was responsible".

410. Earlier in the present report,<sup>311</sup> the Special Rapporteur suggested that the Commission should postpone a decision on this comment of the United Kingdom until it had dealt with article 28. If the Commission decides to maintain article 28 as a separate article distinct from part III of the draft, then the United Kingdom amendment will hardly require further consideration. If, on the other hand, the Commission decides to incorporate article 28 in part III, then in due course the amendment suggested to article 2, paragraph 1 (*f*) will fall to be considered. In other words, the definition should follow the decision of substance and not *vice versa*.

411. The French delegation also suggested that the Commission should concentrate on problems which might arise in the case of a protectorate, mandate or trusteeship agreement. These, however, are matters raised for consideration in 1972 by what was article 18, submitted by the previous Special Rapporteur, which the Commission did not approve. At this stage, the Special Rapporteur does not consider that this question should be re-opened.

412. In connexion with the general question raised by the comments, the Special Rapporteur would refer to that part of the present report which deals with the arrangement of the draft articles, and in particular to the last paragraph of his own observations.<sup>312</sup> It is there observed that paragraph 1 of article 28 clarifies the position of the State which survives where part of its

territory becomes a State by separation, and that the cases dealt with in part III of the draft articles are different from those dealt with in article 28. Part III is concerned with new States that were formerly *dependent* territories, whereas article 28 is concerned with new States which were formerly an integral part of the territory of a State. The provisional view was expressed that during the process of drafting it seemed to be advisable to deal with the two cases separately.<sup>313</sup>

413. On reflection, in the light of the comments of Governments and of the commentaries and the deliberations of the Commission, the Special Rapporteur sees no reason to alter that provisional view. Even though it is true that the provisions with respect to "newly independent States" are applied by article 28 to States emerging by separation from an existing State, the cases are essentially different because of the pre-independence status of the territories. Whatever the apparent logic may be in support of combining article 28 with part III of the draft, the Special Rapporteur considers that it would be better in the present draft articles to maintain article 28 as a separate provision.

414. The only other comment on article 28 which seems to require consideration is the amendment to paragraph 1 (*b*) suggested by the Netherlands Government. The Netherlands Government said that several treaties of the Kingdom had been concluded or denounced in respect of only one or two of the component parts and that this was mentioned in the instrument of ratification or denunciation. If article 28 should be applied to the dismemberment of the Netherlands by the separation of the Netherlands Antilles or Surinam, the Government thought that it was not clear whether the case would be covered by the words in paragraph 1 (*b*)—"... unless: ... (*b*) it appears from the treaty or from its object and purpose. . .". In that respect, it was suggested that the phrasing of article 29 of the Vienna Convention might be better. If this suggestion were adopted, the passage would read: "... unless: ... (*b*) a different intention appears from the treaty or is otherwise established".

415. The point, of course, is that the intention that the treaty should relate only to the territory which has become independent on separation would, in the examples mentioned by the Netherlands Government, appear not from the treaty or from its object and purpose but from another source such as the instrument of ratification. The suggestion of the Netherlands Government seems to be reasonable and the Special Rapporteur suggests that it be given serious consideration.

416. Subject to the above observations and to possible points of drafting, the Special Rapporteur proposes that article 28 should be approved by the Commission.

<sup>311</sup> See para. 138 above.

<sup>312</sup> See paras. 62-65 above.

<sup>313</sup> See para. 65 above.

## PART V

BOUNDARY RÉGIMES OR OTHER TERRITORIAL  
RÉGIMES ESTABLISHED BY A TREATY*Article 29. Boundary régimes**Article 30. Other territorial régimes*<sup>314</sup>*Comments of Governments**Oral comments*

417. *Afghanistan.* The delegation of Afghanistan said that, while parts I to IV of the draft articles were a good basis for a convention, some of the proposed articles should be reviewed; for example, those in part V which dealt with boundary régimes. In the view of the delegation, that was a topic which was not germane to State succession and which might lead to the establishment of an unclear rule in that sector of law that could give rise to politically explosive situations.

The delegation, clarifying its position with regard to articles 29 and 30, said that if it was true, as the Commission had stated in its commentary on those articles, that the question of territorial treaties was at once "important, complex and controversial",<sup>315</sup> then there was no need in the present circumstances to deal with that question, to which a solution could easily be found by political accommodation between the parties concerned. The permanency of boundary treaties and succession thereto by other States could not be recognized if the treaty was not lawful, in the first place, and if its continuation was a source of tension and instability. Moreover, certain other kinds of territorial treaties, such as treaties concerning international waterways or treaties on fisheries, must be dealt with separately. The delegation noted that eminent jurists, such as Lord McNair and Sir Gerald Fitzmaurice, had been cautious on that subject. The Committee should bear in mind that modern international law did not give prominence to the real right attached as such to the territory but to the right attached to the people of the territory.

Leaving aside the question of territorial treaties which affected a large number of States and which should be respected in the interests of the international community and referring to the topic of bilateral treaties, Mr. Charles Rousseau had rightly observed that, in the case of boundaries, succession occurred only through the tacit agreement of the neighbouring countries. Where there was a lawful boundary agreement that had the tacit assent of the neighbouring countries, no dispute would occur, but it was not proper for other nations to impose a treaty against the wishes of the State concerned or contrary to the principle of *rebus sic stantibus*, where such treaty might validly be terminated.

If other jurists had been cautious, if the International Law Association had avoided making a distinction between treaties of a territorial character and other kinds of treaties, the Committee should not rush to

establish rules which might create problems. The reference to article 62, paragraph 2 (a), of the Vienna Convention, which appeared in the Commission's commentary on articles 29 and 30,<sup>316</sup> made it clear that a very large majority of the States at the United Nations Conference on the Law of Treaties had endorsed the view that treaties establishing a boundary were an exception to the fundamental change of circumstances rule; at that Conference Sir Humphrey Waldock had explained that the exception provided for in paragraph 2 (a) in no way hampered the independent operation of the principle of self-determination and other valid principles. Once again, however, the attempt to apply paragraph 2 (a) in a different context, in the drafting of article 29, would create more problems than it would solve.

In the Commission's commentary on articles 29 and 30,<sup>317</sup> reference was made to article III, paragraph 3, of the Charter of the Organization of African Unity, which maintained the principle of respect for sovereignty and territorial integrity of each State. If that Charter stressed the importance of maintaining African boundaries, that was because those boundaries had originally been established to serve the interests of the colonial Powers and because, if those boundaries were touched, the whole African fabric would shatter; however, that was a principle which applied to a special case and which did not necessarily apply to the rest of the world. The delegation further observed that in Latin America most boundary disputes had been settled by arbitration and that one could not say, in the circumstances, that the old principle of *uti possidetis* had been applied. For its part, the delegation shared the view of those writers on the topic who considered that questions relating to international boundaries should be settled by arbitration. In the delegation's view, a boundary was not a geometrical line but an area inhabited by millions of people whose sentiments and right to self-determination should be respected. In view of the political and psychological aspects of the question, the Committee should carefully consider part V of the draft, which dealt with boundary régimes.<sup>318</sup>

*France.* The French delegation believed that for the principle of the absence of any general obligation upon the successor State to consider itself bound by treaties concluded by its predecessor to be acceptable, it was essential that certain types of treaties should be regarded as having binding force on the successor State. The only treaties of that kind which the Commission had included in articles 29 and 30 of its draft were treaties relating to boundary régimes and other forms of territorial régimes; the question arose whether the Commission should not have considered placing other types of treaties in that category.<sup>319</sup>

*Australia.* The Australian delegation said that in articles 29 and 30 the Commission had reflected the accepted rule of international law concerning boundary

<sup>314</sup> So many of the comments referred to both articles 29 and 30 that it seemed convenient to set out the comments on those articles together.

<sup>315</sup> Para. 1 of the commentary.

<sup>316</sup> Para. 10 of the commentary.

<sup>317</sup> Para. 11.

<sup>318</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1318th meeting, paras. 4-8.*

<sup>319</sup> *Ibid.*, para. 13.

régimes or other territorial régimes established by treaty. In the delegation's view, it was highly desirable not to affect treaties establishing such régimes simply because a case of State succession had occurred. The guiding philosophy which should be followed was that of preserving peace and tranquillity.<sup>320</sup>

*Finland.* The Finnish delegation said that articles 29 and 30 were unobjectionable, but the drafting of article 30 could be condensed so as to avoid pointless repetition.<sup>321</sup>

*Greece.* The Greek delegation considered that articles 29 and 30 should be retained since they reflected positive international law in the matter.<sup>322</sup>

*Spain.* The Spanish delegation, without challenging the fundamental considerations on which the Commission had based articles 29 and 30, felt that it should give the delicate problem of territorial régimes more detailed study and elaborate on its conclusions, which were now drafted in a purely negative form. Those articles should be considered within the context of the draft as a whole and, in particular, article 6.<sup>323</sup>

*Denmark.* The Danish delegation was able to accept, in principle, the provisions of articles 29 and 30.<sup>324</sup>

*India.* The Indian delegation said that part V of the draft articles embodied the accepted legal principle of respect for established boundaries and constituted a useful supplement to article 62 of the Vienna Convention.<sup>325</sup>

*Cuba.* The Cuban delegation said that part V contained a general exception to the clean slate principle in respect of so-called territorial treaties, in accordance with the traditional theory that such treaties were not affected by a succession of States. Thus, article 29 contained provisions analogous to those of article 62 of the Vienna Convention as exceptions to the principle *rebus sic stantibus*. Article 30, however, went much further by stipulating that a succession of States did not as such affect obligations relating to the use of a particular territory, and the Cuban delegation believed that the scope of the provision should be made clear because, with its present wording, it seemed to apply indiscriminately to all the many kinds of territorial treaties, including those concerning the establishment of military bases. It was unacceptable to the delegation that succession should not affect such treaties because, in the case of a radical change in the sovereignty of a State, there could not be continuity in respect of responsibilities of that kind.<sup>326</sup>

*Liberia.* The Liberian delegation was happy to note that the clean slate principle had not been given a sweeping interpretation, because otherwise some of the benefits to be achieved by the attainment of independence would have been lost. For example, with regard to treaties

establishing a legal bond attaching to a territory, third States bound by such treaties with the predecessor State would necessarily have had to enjoy a similar freedom to the detriment of the international position of the new State, which might have found certain doors closed to it. The latter had, for its part, an obligation to respect, for example, boundary régimes established prior to its accession to independence as well as customary rules or international law in the same way as all other members of the international community. In any event, the attainment of sovereignty conferred upon the new State the right to review and change, within the scope allowed by international law, questions affecting its national interests and all treaties, including dispositive treaties.<sup>327</sup>

*Ghana.* Regarding the question of boundary régimes and other territorial régimes, the delegation of Ghana supported most of the views expressed by previous speakers.<sup>328</sup>

*Egypt.* The Egyptian delegation said that it could understand why the Commission had singled out boundary régimes and other territorial régimes for separate treatment. Yet the Commission tended to take the view that it was not the treaties themselves which constituted a special category so much as the situations resulting from their implementation, and that it was not so much a question of succession in respect of the treaty itself as of the boundary or other territorial régime established by it. Accordingly, the Commission had drafted those two articles from the standpoint that the question was not the continuance in force of a treaty but that of the obligations and rights which devolved upon a successor State. It could rightly be asked how, in legal theory, the rights and obligations of parties emanating from a certain treaty could be separated from the international instrument which had created those rights and obligations. Even if that question could be satisfactorily answered, the solution would beg the question whether it would not be more appropriate to include the relevant provisions in the draft articles pertaining to State succession in respect of matters other than treaties.<sup>329</sup>

*El Salvador.* The delegation of El Salvador said that the Commission had decided that succession of States should not affect treaties establishing a boundary or obligations and rights established by such a treaty and relating to the régime of a boundary. A similar reservation was provided in the case of treaties concerning the use of a particular territory or restrictions upon its use. That was a matter of particular importance to El Salvador in view of the growing movement towards Central American economic, social and cultural integration which was taking place within the framework of the Organization of Central American States. All the countries involved in that integration movement had, in the course of their existence and by virtue of their sovereignty, concluded multilateral and bilateral treaties which would be given legal endorsement by provisions such as those contained in the draft articles.<sup>330</sup>

<sup>320</sup> *Ibid.*, 1319th meeting, para. 7.

<sup>321</sup> *Ibid.*, 1320th meeting, para. 3.

<sup>322</sup> *Ibid.*, para. 9.

<sup>323</sup> *Ibid.*, para. 28.

<sup>324</sup> *Ibid.*, 1321st meeting, para. 34.

<sup>325</sup> *Ibid.*, para. 46.

<sup>326</sup> *Ibid.*, 1322nd meeting, para. 4.

<sup>327</sup> *Ibid.*, para. 24.

<sup>328</sup> *Ibid.*, para. 36.

<sup>329</sup> *Ibid.*, 1323rd meeting, para. 3.

<sup>330</sup> *Ibid.*, para. 12.

*Kuwait.* While endorsing the clean slate principle, the delegation of Kuwait felt that it should not apply to boundary treaties.<sup>331</sup>

*Romania.* The Romanian delegation expressed the view that it would be appropriate to adopt a criterion of general scope which could be applied to all treaties. Accordingly, the delegation felt some misgivings concerning the solution adopted by the Commission, namely to provide for a series of departures from the application of the principle of self-determination in respect of certain categories of treaties—the so-called “localized” treaties. Contrary to the Commission’s belief that in certain circumstances other principles should take precedence over the clean slate rule, the delegation felt that the principle of self-determination had the character of *jus cogens* and that no departures from it were admissible. For those reasons, the delegation found the solutions provided in articles 29 and 30 of the draft to be questionable. Furthermore, the Commission itself, in its commentary on those articles,<sup>332</sup> recognized that the solution adopted 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. That very reasoning pointed to the need to apply consistently and in all cases the principle of self-determination, rather than introducing an artificial distinction between the succession of States in respect of treaties and the possibility of States requesting the eventual revision or termination of such treaties. Nor was the analogy with the Vienna Convention convincing. The delegation failed to understand how the emergence of a new State resulting from the liberation of a people from colonial domination could be regarded as a fundamental change of circumstances within the meaning of article 62 of that Convention. Furthermore, certain provisions of article 30 would have the effect of imposing on a successor State the obligation to respect the advantages granted to other States by the former colonial Power. The appropriate solution would be to provide that the successor State, by virtue of good-neighbourly relations, could maintain facilities granted to neighbouring or other States in its territory—for instance, the right of transit—only to the extent that it deemed the maintenance of such facilities to be consonant with its sovereignty and its right to dispose of its natural resources.<sup>333</sup>

*New Zealand.* In the view of the New Zealand delegation, the approach taken by the Commission in the draft articles, which related to boundary régimes and other territorial régimes established by a treaty, was unavoidable. In that area above all others, stability was so important as to override other considerations. It was, however, open to doubt whether the Commission had finally resolved the doctrinal issue which had clearly perplexed it: whether the rules in articles 29 and 30 should be formulated in terms of the boundary or régime resulting from the dispositive effects of a treaty, or

whether they should relate to succession in respect of the treaty.<sup>334</sup>

*Nigeria.* With regard to the boundary régimes dealt with in part V of the draft articles, the Nigerian delegation said that the diversity of opinions made it difficult to see on what basis international law placed territorial treaties in a special category for the purposes of the law applicable to succession of States. Further progress should be achieved in that area, in the light of the African States’ peculiar position deriving from their former colonial status, and the desire to preserve peace should be the basic criterion.<sup>335</sup>

*Kenya.* The delegation of Kenya was in full agreement with the tenor of article 29. Kenya’s unilateral declaration showed that it had a clear understanding of the effects of its succession to the territory formerly administered by the United Kingdom and to the agreement relating to that territory. On the other hand, the delegation said, article 30 should not be placed on the same footing as article 29 and the question of other territorial régimes should be dealt with separately. Treaties concluded between several colonial Powers, such as the Berlin Act of 1885, could not be regarded as binding on the successor States if they were newly independent States. What could be said to survive the succession were rights and interests created by usage, which could be the subject of new arrangements on the basis of the principle of good neighbourliness.<sup>336</sup>

*Canada.* The Canadian delegation said that articles 29 and 30 on boundary régimes and other territorial régimes reflected the attitude of Canada on this subject.<sup>337</sup>

*Pakistan.* The Pakistan delegation said that the clean slate doctrine was bound to have exceptions, because a successor State did not come into existence in a vacuum: such a State had its own will and was entitled to exercise it, but there were realities which did not depend upon its will. The terrain of the territory of such a State and the area of the territory in which it replaced the predecessor State, for example, were such realities. The territory was the body which it had inherited; all that was tied up to the territory was unalterable by reason of succession only. Inherent in the concept of replacement was that of the continuity of the same territory. When a new State came into existence in a territory, the territory remained the same, only the State changed.<sup>338</sup>

*United Republic of Tanzania.* Having expressed approval for the adoption by the Commission of the clean slate principle, the Tanzanian delegation said that on the question of territorial treaties the Commission had been hesitant to draw what was, in the delegation’s view, the logical conclusion, namely that the Administering Authority of a Trust Territory could not conclude a treaty on behalf of the Trust Territory so as to bind it in perpetuity. In respect of Tanganyika, for example, the United Kingdom, as the Administering Authority of the

<sup>331</sup> *Ibid.*, para. 16.

<sup>332</sup> Paras. 16 and 19.

<sup>333</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1323rd meeting, para. 21.*

<sup>334</sup> *Ibid.*, para. 31.

<sup>335</sup> *Ibid.*, 1324th meeting, para. 3.

<sup>336</sup> *Ibid.*, para. 9.

<sup>337</sup> *Ibid.*, para. 16.

<sup>338</sup> *Ibid.*, 1325th meeting, para. 22.

Trust Territory, had had no power to grant a lease in perpetuity because the trusteeship had not been in perpetuity.<sup>339</sup>

*Zambia.* As to the draft articles relating to boundary régimes and other territorial régimes established by a treaty, the Zambian delegation said that the Commission, in a laudable effort from the standpoint of ensuring peace and tranquillity, had adopted provisions which belied not only existing facts, but also appeared to cut across the principles of self-determination, equal rights and the sovereign equality of States that underlay the remainder of the draft. Colonial frontiers had been drawn up for strategic or economic reasons without any regard for geographic or ethnic considerations. The fact that most States members of the Organization of African Unity had pledged themselves to respect the borders existing on their achievement of national independence did not necessarily mean that the measure, which they had adopted in the interests of stability in Africa, should be consecrated as a rule of international law. Under both the Vienna Convention and international customary law, a State could only be bound by a treaty through an act of will establishing consent to be bound. That rule was applicable in respect of boundaries and territorial régimes. Furthermore, a question arose as to whether, in the case of the accession of a State to independence, the change of circumstances was not so fundamental that the exception for which provision was made in article 62, paragraph 2 (a), of the Vienna Convention should not be applicable. That did not mean that all territorial treaties should be considered lapsed. Yet it was certain that the question should be re-examined with a view to the formulation of rules in keeping with current realities and in harmony with widely accepted rules of international law.<sup>340</sup>

*Morocco.* The delegation of Morocco said that the wording of some of the draft articles should be clarified, particularly that of article 30, and provision should be made for arbitration in the event that the rules laid down in articles 29 and 30—which appeared to favour the disputed principle of the intangibility of boundaries—conflicted with the principle of self-determination of the peoples involved or were disputed by a State, as in the case of certain parts of Asia particularly, declaring itself not bound by a treaty considered to be unequal. The role played by arbitration and conciliation in boundary conflicts both in Latin America and, in a more limited way, in Africa should not be underestimated. It would probably be easier to find an appropriate solution for each particular problem that might arise in that field through arbitration rather than through the rigid framework proposed by the Commission.<sup>341</sup>

*Guyana.* The delegation of Guyana was not persuaded that the criticisms which had been advanced in relation to the boundary régime provisions of article 29 were well conceived. In the delegation's view, those provisions made sense not only in themselves but also with respect to the many instances of State practice given in the commentary.

<sup>339</sup> *Ibid.*, para. 28.

<sup>340</sup> *Ibid.*, 1326th meeting, para. 11.

<sup>341</sup> *Ibid.*, para. 19.

It had been argued that a succession of States was a fundamental change of circumstances which should be opposable to the continuance of a boundary established by treaty, regardless of the contrary provisions of article 62, paragraph 2 (a) of the Vienna Convention. It had also been maintained that the continuance of such a boundary in the case of a newly independent State was inconsistent with the right to self-determination and the clean slate principle which derived from it. It was not clear to the delegation how a succession of States could properly constitute a fundamental change of circumstances. If it was really true that the question of a fundamental change of circumstances could arise only between two States which had a subsisting treaty relationship, the problem at succession was not whether a fundamental change had occurred in a subsisting treaty relationship between the two States, but whether such relationship was still in existence. That there was some relationship could hardly be denied in the light of past practice. The argument that a succession was a fundamental change of circumstances which released the successor State from all obligations of the treaty was equally unacceptable. Such treaties were made in full awareness that political control was transmissible and often transmitted. Thus, the very logic of the situation required that the treaties should endure, regardless of any transmission of political control over any part of a particular territory. It was, therefore, artificial to seek to divorce the question of succession of States from the essential framework of the Vienna Convention in particular article 62, paragraph 2 of the Convention, which provided that a fundamental change of circumstances might not be invoked as a ground for terminating or withdrawing from a treaty; "(a) if the treaty establishes a boundary . . .". The rule set forth in the Commission's draft was obviously analogous, but it should be noted that the Commission had been careful to avoid saying that a succession of States was a fundamental change of circumstances and that it had simply referred, in the commentary on articles 29 and 30,<sup>342</sup> to the considerations which had led it to make that exception to the fundamental change of circumstances rule. The various instances of State practice set out in the commentary amply supported the distinction made in the draft articles between a boundary treaty as such and the boundary régime derived from it. Boundary treaties, which were intended to define the limits of sovereignty throughout the world, must be capable of enduring, regardless of any transfer of sovereignty. It seemed, in fact, that sovereignty could be transferred only on the basis of the boundaries which defined it.

As to the contention that article 29 ignored the principle of self-determination, it was not a question of the status of the principle, which was one of *jus cogens*, but of its scope. The principle of self-determination could not be extended to the point or removing the very foundation of the existence of the new State from the moment of its creation. Were it otherwise, the old colonial world would have become an unbounded chaos. No one maintained that such a birthright should be the con-

<sup>342</sup> Para. 10.

sequence of the exercise of the right of self-determination. The Organization of African Unity had wisely perceived that the newly independent States would be the last to benefit from such an interpretation of the right to self-determination. It was clearly preferable to choose continuity, which offered them stability and strengthened world security.<sup>343</sup>

*Bulgaria.* The Bulgarian delegation said that the Commission had been correct in article 11 in adopting the "clean slate" principle as a general rule. Articles 29 and 30 could be regarded as an exception to the rule. It was well-known that the boundaries established by the colonial Powers had served only their interests. It was also true that, if the clean slate principle was applied strictly to boundaries and boundary régimes, it might give rise to international disputes. The delegation was inclined to favour the rules adopted by the Commission because they were designed to protect both the interests of the newly independent countries and those of the international community as a whole.<sup>344</sup>

*Venezuela.* The Venezuelan delegation commented as follows:

The codification of the question of boundary régimes and other territorial régimes established by a treaty was probably the most sensitive area of all. Article 29 stated categorically that a succession of States should 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. Obviously, territorial treaties were of special international significance and, in many cases, were a continuous source of profound differences and confrontations, which were not always peaceful. Article 62 of the Vienna Convention had been adopted by 93 votes to 3, with 9 abstentions. That made it very clear that the international community tended to the position that a fundamental change of circumstances could not be invoked as a ground for terminating or withdrawing from a treaty, if the treaty established a boundary. During the United Nations Conference on the Law of Treaties, there had been much comment, however, on the scope and application of principles such as *rebus sic stantibus*, *pacta sunt servanda*, *jus cogens* and self-determination. It had been made clear that the intention had not been to give the impression that boundaries could not be changed, although article 62 of the Vienna Convention did not afford any grounds for terminating a boundary treaty. The issue having been translated to the context of succession of States, the Commission had stated in paragraph 10 of the commentary on articles 29 and 30 that the considerations which had led it and the Vienna Conference to make that exception to the fundamental change of circumstances rule appeared to apply with the same force to a succession of States. It had further pointed out, in paragraph 15 of the commentary on that article, that there were a number of other modern instances in which a successor State had become involved in a boundary dispute and that in those instances the succession of States had merely provided the opportunity for reopening or raising grounds for revising the boundary which was independent of the law of succession. In paragraph 16 of the commentary, the Commission pointed out that the provision would relate exclusively to the effect of the succession of States on the boundary settlement and that 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 and, finally, that the mere occurrence of a succession of States would not consecrate the existing boundary if it was open to challenge.

<sup>343</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1326th meeting, paras. 26-27.

<sup>344</sup> *Ibid.*, para. 45.

He pointed out that, during the Conference and during the current debate, various delegations had taken the firm position that the concept of a régime established by treaty necessarily implied that the treaties had been concluded lawfully, free from any pressures or influences flowing from the circumstances of their conclusion—in other words, that only just and equal treaties were covered by the provisions in question. In the context of the draft articles, therefore, it was the view of the Venezuelan delegation that, in the light of all those considerations—which were the background against which the letter and spirit of sub-paragraph (a) of article 29 should be understood—the expression "as such" at the beginning of the article was a clear indication that, whether it referred to succession in respect of a boundary or in respect of a treaty, all territorial claims which had arisen prior to the succession were maintained and their validity was unaffected, in accordance with the precedent established on the occasion of the conclusion of the Agreement between the United Kingdom and Venezuela to which he had referred. That statement of principle did not rule out the possibility that the Venezuelan Government, in transmitting its observations on the draft articles, would make specific proposals with regard to the more accurate determination of the scope of article 29 or any other article.<sup>345</sup>

*Somalia.* Commenting in the General Assembly on the report of the Commission<sup>346</sup> and the report of the Sixth Committee thereon,<sup>347</sup> the delegation of Somalia said that some of the draft articles required clarification and also contained specific questions of direct concern to Somalia. Therefore, the delegation entered strong reservations on behalf of the Government of Somalia, particularly with regard to the part relating to the boundary régime and other territorial régimes established by treaty.

Stating how the Government of Somalia considered the treaties of which the report spoke, the delegation said:

The Somali Democratic Republic does not recognize the legal validity of treaties concluded between other parties against the interests and without the consent of its people. As far as my country is concerned, we consider these treaties devoid of any legality since they were stipulated between foreign colonial Powers without the supreme will, or even the knowledge, of our people. The treaties to which the report refers with regard to my country are probably the 1897 Anglo-Ethiopian Treaty,<sup>348</sup> the 1908 Italo-Ethiopian Treaty<sup>349</sup> and the 1924 Anglo-Italian Treaty,<sup>350</sup> none of which the Somali Democratic Republic recognizes for the reasons I have just stated.

It is common knowledge that such treaties were meant to serve solely the interests of the colonial Powers. The distinguished jurists who so laboriously prepared this extensive report know that colonial peoples were not required to give, and in fact had not given, their

<sup>345</sup> *Ibid.*, 1327th meeting, paras. 22-23.

<sup>346</sup> See foot-note 3 above.

<sup>347</sup> See foot-note 4 above.

<sup>348</sup> G. F. de Martens, ed., *Nouveau Recueil général de traités*, 2nd series, vol. XXVIII (Leipzig, Dieterich, 1902), p. 435.

<sup>349</sup> G. F. de Martens, ed., *Nouveau Recueil général de traités*, 3rd series, vol. II (Leipzig, Dieterich, 1910), p. 121 (English text in *British and Foreign State Papers, 1907-1908*, vol. 101 (London, H. M. Stationery Office, 1912), p. 1000). Article 4 of the 1908 Treaty refers to "the line accepted by the Somali Government in 1897". References to that line may be found in *The Somali Peninsula* (Information Services of the Somali Government, 1962), pp. 59 *et seq.* and "Report of the Italian Government on the progress of direct negotiations between the Governments of Ethiopia and of Italy concerning the delimitation of the frontier between the Trust Territory of Somaliland under Italian administration and Ethiopia" (*Official Records of the General Assembly, Eleventh Session, Annexes*, agenda item 40, document A/3463).

<sup>350</sup> League of Nations, *Treaty Series*, vol. XXXVI, p. 379.

consent to such arbitrary treaties. Furthermore, these treaties have, especially in Africa, caused tremendous problems to many new nations. They have created fatal misunderstandings, and have even led to serious conflicts among neighbouring States. The Somali Democratic Republic is ready, however, to assume full obligations under present-day international law in conformity with the principles of the Charter of the United Nations vis-à-vis treaties entered into freely by us with any other party or parties. In fact, when the historic event of our revolution took place on 21 October 1969, the Supreme Revolutionary Council of my country announced in its first declaration the basic guidelines of the general programme of the Revolutionary Government, both in terms of internal and external policies. Article 6 of part II of that declaration states that the Somali Democratic Republic recognizes and respects all legal international commitments undertaken by the Somali people.

The report now before us makes some comments on boundary disputes between States, and in a specific reference to my country mentions the boundary disputes between the Somali Democratic Republic, Ethiopia and Kenya. Indeed, there are outstanding boundary disputes between the Somali Democratic Republic and its neighbouring States, disputes for which we are seeking friendly and peaceful settlement. The President of the Supreme Revolutionary Council of my country, Major General Mohamed Siad Barre, said in a recent policy statement with regard to this question:

“What we intend to do is to press for peaceful and amicable settlement of all disputes with our neighbours, which, if left unresolved, will sow the seeds of suspicion and hatred between the peoples and Governments of our part of the world.”

Thus, the Somali Democratic Republic has chosen to resort to the policy of pacific settlement of disputes between States as laid down in the Charter of the United Nations and in the Charter of the Organization for African Unity to demonstrate its genuine desire for peace in our region.

As regards the question of our borders with Ethiopia, I wish to make it clear that they are provisional administrative boundaries pending their final demarcation and the solution of the dispute. In a letter dated 15 March 1950 addressed to the President of the Trusteeship Council, the late Count Sforza, then Minister for Foreign Affairs of Italy, referring to the unilateral extension of the provisional administrative line, wrote:

“It is clear from the letter of 1 March 1950, which is reproduced in the above-mentioned document,<sup>351</sup> and from a similar letter transmitted direct to the Italian Government by the United Kingdom Government, that as the retiring Administering Authority the latter has felt bound, in view of the possible difficulties entailed in tripartite negotiations, to fix the provisional administrative line itself unilaterally.

“The Italian Government, while stating that it has no intention of questioning the procedure adopted and noting that the decision in question is of a provisional nature and in no way prejudices the final settlement of the problem, nevertheless deems it appropriate to point out that the provisional line was fixed without its being consulted, and, as protector of the rights of Somaliland, to reserve its position with regard not only to the legal aspects of the question but also to certain practical difficulties which may arise from the line so fixed.”<sup>352</sup>

The Somali Democratic Republic has, ever since its independence and admission to membership in the United Nations, insisted on those same reservations which were expressed by the Italian

Government, in its capacity of the Administering Authority, 22 years ago.<sup>353</sup>

*Ethiopia.* The delegation of Ethiopia said:

My delegation voted in favour of the draft resolutions on the report of the International Law Commission. I am taking the floor not so much to explain my vote with regard to those draft resolutions as to reserve the right of my delegation, particularly in view of the statement made by the representative of Somalia, regarding some treaties validly entered into between two sovereign States: Ethiopia and the sovereign authority in the Territory formerly known as Somaliland.<sup>354</sup>

*Kenya.* In explaining its vote, the delegation of Kenya said:

We should like to reiterate our position in connexion with draft article 29 on boundary régimes. We fully subscribe to the conclusions of the International Law Commission in that article. A State can only succeed to the territory previously held by its predecessor. In our opinion this has nothing to do with the exercise of self-determination: it is purely a matter of one State succeeding to the sovereignty formerly exercised by another State over a given territory.

The inviolability of existing treaties has been fully recognized and enshrined in the Charter of the Organization of African Unity; it is a principle which the International Law Commission has also endorsed; and it is the guiding principle of the Government of Kenya.

As far as the Kenya-Somali boundary is concerned, there is absolutely no room for dispute: the boundary was clearly demarcated by the Anglo-Italian Treaty of 1924, and we stand by that boundary—not because it was concluded by the colonialists, but because it clearly spells out the areas of sovereignty of the two States. Our full position on this subject was reiterated in the statement we made before the Sixth Committee<sup>355</sup> which we should like to incorporate by reference into the record of this meeting.<sup>356</sup>

*Afghanistan.* The delegation of Afghanistan said that the draft articles could serve as a basis for the preparation of a convention if part V on boundary régimes was left out, as that question did not relate to succession of States.

The delegation was of the opinion that, at the present stage of the development of international law, it was not necessary to deal with the questions covered by articles 29 and 30, which the Commission considered to be a complex and controversial matter. These questions might be better and more easily resolved through political arrangements between the parties concerned. Treaties defining frontiers should exclude the rule of fundamental change of circumstances. Since a frontier was only an imaginary line separating peoples, the right of peoples to self-determination must be respected. The Commission should, therefore, pay particular attention to draft articles 29 and 30 in a spirit of respect for the principles of human liberty and freedom of choice in order not to contribute to the creation of legal situations which did not correspond to tangible and obvious realities. The delegation hoped that the Commission would take its views into account in its future work on succession of States in respect of treaties.<sup>357</sup>

<sup>351</sup> “Negotiation and adoption of a draft trusteeship agreement for Italian Somaliland: letter dated 1 March 1950 received by the President of the Trusteeship Council from the Permanent United Kingdom representative on the Trusteeship Council” (*Official Records of the Trusteeship Council, Sixth Session, Annex, vol. I, p. 112, document T/484*).

<sup>352</sup> *Ibid.*, p. 114, document T/527.

<sup>353</sup> *Official Records of the General Assembly, Twenty-seventh Session, Plenary Meetings, 2091st meeting, paras. 9-12.*

<sup>354</sup> *Ibid.*, para. 31.

<sup>355</sup> *Ibid.*, Sixth Committee, 1324th meeting, paras. 5-11.

<sup>356</sup> *Ibid.*, Plenary Meetings, 2091st meeting, paras. 32-34.

<sup>357</sup> *Ibid.*, Twenty-eighth Session, Sixth Committee, 1406th meeting, paras. 62 and 64.

*Written comments*

418. *Czechoslovakia.* The Government of Czechoslovakia said that it would be suitable to amend the formulation of article 30 so as to make it evident that the provision concerned territorial régimes that served the interests of international co-operation and were in accordance with international law and the United Nations Charter and to exclude any misapplication of the article in favour of régimes established by treaties based on inequality of rights.

*German Democratic Republic.* The Government of the German Democratic Republic fully supported the automatic succession into boundary treaties as provided for in article 29. The same held true for the same principle in respect of other territorial régimes as contained in article 30. As far as article 30 was concerned, it had to be added, however, that the present version was not satisfactory because practically it might be used to justify the existence of those territorial régimes which had come into being and continued to exist on the basis of unequal treaties. In the Government's view, that article should, therefore, be supplemented to the effect that its provisions would regulate State succession only in the case of territorial régimes which served the interests of peaceful international co-operation in accordance with the purposes and principles of the Charter of the United Nations.

*Netherlands.* The Netherlands Government agreed that certain treaties, fixing territorial régimes, should be inherited by the successor State. It pointed out, however, that the reasons why that was desirable applied not only to territorial arrangements but also to certain treaties containing rules in respect of the fundamental legal position of the *population* of the territory in question, like treaties with respect to minorities, the right to opt for a particular nationality, and other treaties guaranteeing fundamental rights and freedoms to the population of the territory which was involved in a change of sovereignty.

*Poland.* The Government of the Polish People's Republic considered that treaties relating to certain territorial problems and, in particular, those establishing State boundaries were a category apart, not affected by cases of succession. These treaties constituted a specific category in international law—also in respect of succession of States. The principle of absolute continuity in respect of the boundary treaties—in the field of succession—was a consequence of the existence in international law of the *jus cogens* rule which made it mandatory to respect the territorial integrity of States. It was the Government's view that that principle, expressed in article 29 of the draft, also corresponded with the best interests of the newly independent States. At the same time, that principle, duly safeguarding the most vital interests of third States, thereby served the international community as a whole. The Government firmly supported the inclusion of that principle in the future convention on succession of States in respect of treaties.

*Somalia.* With reference to the articles in part V of the draft and the commentaries on them, the Government of the Somali Democratic Republic stressed the need for accuracy as to both the historical record and the legal interpretations of the Somali-Ethiopian and Somali-

Kenyan territorial disputes which appeared in the report of the Commission,<sup>358</sup> and commented as follows:

It should be stated at the outset that the main position of the Somali Democratic Republic with regard to the draft articles on treaties and boundary régimes is that it does not recognize the legal validity of treaties concluded between foreign colonial powers without the consent or knowledge and against the interests of the Somali people.

A brief account of the background and the circumstances leading to the division of the Somali people by imperial powers during the colonial period will serve to clarify this position. Long before the era of colonization, the Somali people constituted a single national entity. Being a homogeneous people with a common culture, language and faith, and inhabiting a recognized area of land, they were able to maintain their national identity and their traditional heritage in the Somali Peninsula.

With the opening of the Suez Canal in 1869, the horn of Africa assumed considerable strategic importance to the European powers. Between 1865 and 1892 France established a foothold around the port of Djibouti, French Somaliland; in 1887 Britain established a protectorate to the east of Djibouti and in 1908 Italy established its claim to other parts of the Somali Coast. An additional factor in this situation was that Ethiopia was also at that time seeking to expand its frontier. To avoid increasing friction over their respective spheres of influence, it became expedient for the European powers to attempt to fix the inland borders of the protectorates they had established.

The report of the International Law Commission refers to treaties that were drawn up with regard to Somali territory in the colonial period. The relevant treaties were those of 1897 and 1908<sup>359</sup> between Ethiopia and Italy and that of 1897 between Ethiopia and Britain<sup>360</sup> and the Anglo-Italian Treaty of 1924.<sup>361</sup>

The first two of these treaties, which dealt with the boundaries between Italian Somaliland and Ethiopia called for a marking of the frontier on the ground, but, since this was never carried out, disagreement continued over the exact interpretation of the provisions. The continued dispute over the exact demarcation of the frontier between Ethiopia and Italian Somaliland, and in particular over the Somali territory of Ogaden, led eventually to the invasion of Ethiopia by Italy in 1935.

The Treaty of 1897 between Ethiopia and Britain was concluded through secret negotiations and its implementation involved the ceding to Ethiopia of a large area of Somali territory—the Haud—where Somali nomadic pastoralists had grazed their herds from time immemorial.

The Anglo-Italian treaty of 1924 became the basis of the *de facto* frontier between Italian Somaliland and Kenya. In 1926, the border of Kenya with Ethiopia was demarcated by the colonial powers, and the Northern Frontier District (the NFD), an area exclusively inhabited by Somalis, was included in the territory of Kenya, although it was administered as an entirely separate province.

After the Italians had been ousted from East Africa in 1942 and sovereignty restored to Ethiopia, Britain placed Italian Somaliland under a British Military Administration and for some years retained control over the Haud and Ogaden areas. In 1946 the proposal of Mr. Ernest Bevin, then British Foreign Secretary, that all the Somali territories should be unified under the United Nations Trusteeship system was rejected by certain members of the United Nations. While the former Italian Somaliland became a United Nations Trust Territory under Italian Administration, the British Government placed the Ogaden illegally under Ethiopian administration. The boundary problem remained unsettled and persistent efforts by

<sup>358</sup> See para. 12 of the commentary to articles 29 and 30.

<sup>359</sup> See foot-note 349 above.

<sup>360</sup> See foot-note 348 above.

<sup>361</sup> See foot-note 350 above.

the United Nations Trusteeship Council and the United Nations General Assembly during the 1950s to arrive at a solution, before Somalia became independent, ended in failure.

The boundary dispute between the Protectorate of British Somaliland and Ethiopia also developed to serious proportions and led to the establishment by Britain of a provisional boundary line in 1950, for, with the transfer of the administration of the Haud to Ethiopia, the people of British Somaliland became fully aware of their dismemberment through artificial and arbitrary boundaries.

It is important to emphasize, at this point, that when Somalia achieved independence in 1960, it refused to recognize the validity of the treaties made by the colonial powers for the partition of the Somali people and it has never changed this position.

In all international conferences in which Somalia has participated, the Somali Government has consistently maintained a firm and unequivocal position *vis-à-vis* the Somali territories under foreign domination. Thus, for example, Somalia rejected the Organization of African Unity resolution on the question of frontiers, passed in Cairo on 21 July 1964.<sup>362</sup> The Somali Government also reserved its position with regard to similar resolutions passed by other international conferences, for example, the Non-Aligned Conference held in Cairo in 1964.<sup>363</sup>

The Somali territorial disputes with Ethiopia and Kenya raise some fundamental issues of principle in the field of international law. The arguments put forward by some jurists which hinge primarily on the principle of territorial integrity and the corollary concept of the inviolability of frontiers are not applicable to the Somali case. For one thing, the principle of respect for another's territorial integrity presupposes that the State is in legal possession of that territory. It has always been the stand of the Government of the Somali Democratic Republic that Ethiopia and Kenya are unlawfully exercising sovereignty over Somali territories to which they are not entitled. This is because the *de facto* Somali-Ethiopian and Somali-Kenyan boundaries are based on the provisions of illegal treaties which are in conflict with prior treaties of protection signed between protecting colonial powers and the Somali people. Furthermore, the principle of territorial integrity has no application to the Somali case because it is inconsistent with the right of self-determination—an internationally accepted principle which is enshrined in the Charters of the United Nations and the Organization of African Unity and in the Declaration of Non-Aligned Conference.

It should be noted in this context that self-determination is not only a general concept in international relations but is also established as a legal doctrine by Article 1 of the United Nations Charter which makes it one of the purposes of the organization "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". Indeed the principle has been given practical application by the United Nations in cases like those of Togo and the Cameroon.

The doctrine of inviolability or sanctity of frontiers is only invoked in cases where the boundaries are demarcated on just and equitable grounds and where such demarcation is based on mutual agreements with the parties concerned.

In this connexion, it should be clearly understood that Somalia's borders with Ethiopia are provisional administrative boundaries pending final demarcation and solution of the dispute. In a letter dated 15 March 1950, addressed to the President of the Trusteeship Council, the late Count Sforza, then Minister for Foreign Affairs of Italy, referring to the unilateral fixing of the provisional administrative line, wrote:

"2. It is clear from the letter of 1 March 1950, which is reproduced in the above-mentioned document,<sup>364</sup> and from a

<sup>362</sup> AHG/Res.16 (1).

<sup>363</sup> Conference of Heads of State and Government of Non-Aligned Countries.

<sup>364</sup> See foot-note 351 above.

similar letter transmitted direct to the Italian Government by the United Kingdom Government that as the retiring Administering Authority, the latter has felt bound, in view of the possible difficulties entailed in tripartite negotiations, to fix the provisional administrative line itself unilaterally.

"3. The Italian Government, while stating that it has no intention of questioning the procedure adopted and noting that the decision in question is of a provisional nature and in no way prejudices the final settlement of the problem, nevertheless deems it appropriate to point out that the provisional line was fixed without its being consulted and, as protector of the rights of Somaliland, to reserve its position with regard not only to the legal aspects of the question, but also to certain practical difficulties which may arise from the line so fixed . . ." <sup>366</sup>

The International Law Commission appears to have based its comments on the demarcation of frontiers primarily on precedent and on customary international law as reflected by the traditional norms and principles applied by European Powers during the era of colonization. But under present-day international law, the obligations of Members of the United Nations under the Charter of the United Nations prevail over any pre-existing treaty obligations (see Article 103 of the Charter). The Charter recognition of the right to self-determination therefore prevails over rights which Somalia's neighbours claim under earlier treaties.

The legal problems posed by the arbitrary demarcation of boundaries and territorial régimes by the former colonial powers provide the International Law Commission with a golden opportunity to develop an important area of international law on the basis of principles which stem not from an outmoded colonialism but from the Charter itself. It must formulate institutional procedures to deal with the colonial legacy of serious territorial problems, such as Somalia's, which are a threat to the peace and stability of many newly independent countries.

*Sweden.* The Swedish Government commented that the phrase "a succession of States shall not as such affect" might be reconsidered. It was obvious that boundary régimes and other territorial régimes might be affected by a succession of States. By such a succession a new boundary State might emerge or the territory under a special territorial régime might become part of another (new) State. What was meant was presumably that the successor State was bound by the boundary régime or the territorial régime. If so, the negative formula used should be replaced by some wording affirming that such régimes continue in force in regard to successor States. A similar positive formula was used in article 26 on uniting of States and in article 27 on dissolution of a State, which were based on the same principle of continuity of treaties in relation to the succession of States.

*United Kingdom.* The United Kingdom Government said that the point in the commentary <sup>366</sup> might with advantage be included in the text of the draft articles. "Territory" should be defined so as to include "all or any part" of a State's territory.

*United States of America.* The United States Government commented as follows:

Articles 29 and 30 are valuable from the point of view that they seek to avoid permitting the fact of a succession to be used as an argument for exacerbating territorial disputes. The underlying logic is simple and incontrovertible. A successor State can only acquire as its territorial domain the territory and territorial rights of the

<sup>365</sup> See foot-note 352 above.

<sup>366</sup> Para. 39 of the commentary.

predecessor. If the territory as held by the State had boundaries firmly fixed and settled by treaty with an established and well-working régime for keeping those boundaries delineated then the successor State inherits all this. If the territory as held by the predecessor State included obligations by an upstream riparian State established by treaty to release water from its river dams so as to aid the irrigation projects in the territory, the new State receives its territory with those benefits. On the other hand, if the territory as held by the predecessor State had a poorly-defined boundary as a consequence of a poorly-drafted treaty or was subject to an obligation to control its releases of water to assist irrigation in a downstream riparian State then the successor State acquires what the predecessor had, territory with badly defined boundaries or subject to an obligation to help the downstream State.

Failure to state the rules set forth in articles 29 and 30 would give rise to an assumption that the fact of succession could be used to support claims for territorial change or abolition of territorial rights. The result would be that an effort to codify international law would have resulted in undermining friendly relations among States. The United States, therefore, favours retention of articles 29 and 30.

Article 30, however, would benefit from simplification. The structure and drafting are complicated by a requirement in paragraph 1 that rights and obligations have to attach to a particular territory in the State obligated and a particular territory in the State benefited. This latter requirement seems both unnecessary and unduly confusing. If a land-locked State has transit rights to send certain commodities through a neighbouring State to a port, should it make any difference whether the commodities are grown or manufactured throughout the land-locked State or only in certain areas? Even if grown in a certain area the sale of the commodities benefits the State as a whole as well as the area directly concerned. Consequently, the United States would propose that this requirement be eliminated from the article.

*Kenya.* The Government of Kenya referred to the statement of the Kenya representative in the Sixth Committee<sup>387</sup> and commented on article 29 as follows:

It has become necessary to comment on the above article, to which the Kenya Government fully subscribes, in view of the observations made by the Somali Democratic Republic, on its specific application, *inter alia*, to the Somali-Kenya boundary.<sup>388</sup>

It is the opinion of the Kenya Government that the International Law Commission took the correct legal position on boundary régimes as reflected in the draft article 29 and the commentary thereon, because the purpose of a boundary treaty is to mark out with precision the limits of a particular State sovereignty. Once this is done, the relevance of the treaty, except for evidentiary purposes, disappears. When succession of a State, i.e. . . . "when the replacement of one State by another in the responsibility for the international relations of territory . . ." takes place, the successor State steps into the shoes of the predecessor State in so far as the State's boundaries are concerned, not because of the boundary treaty, but because of the very existence of the boundaries as a fact, delimiting the predecessor State's sovereignty. It is irrelevant and confusing to bring in the issue of self-determination in such a situation in this context, as the Somali Democratic Republic seeks to do.

When the report of the International Law Commission was discussed by the General Assembly during the adoption of the resolution of the Sixth Committee on the item, the Somali representative, in the explanation of his country's vote, made a statement containing arguments similar to those contained in their note verbale. This prompted a reply from the Permanent Representative of Kenya.<sup>389</sup>

<sup>387</sup> See para. 417 above.

<sup>388</sup> See entry for "Somalia" above.

<sup>389</sup> For the text of the reply, see para. 417 above, second entry for Kenya.

The principle of the respect for the sovereignty and territorial integrity of each State and the inviolability of existing boundaries has been enshrined, not only in the Charter of the United Nations, but also in the Charter of the Organization of African Unity, and the charters of various other regional bodies. In the Organization of African Unity resolution AHG/Res.16(1), the Assembly of Heads of State and Government meeting in the First Ordinary Session in Cairo, restated the pledge of all the member States:

"1. Solemnly reaffirms the strict respect by all Member States of the Organization for the principles laid down in paragraph 3 of Article III of the Charter of the Organization of African Unity;

"2. Solemnly declares that all Member States pledge themselves to respect the borders existing on their achievement of national independence."

This is a pledge by which the Kenya Government will always abide with respect to its neighbours and which it expects all the other States to respect.

#### *Observations and proposals of the Special Rapporteur*

419. The history of articles 29 and 30 goes back to "Article 4: Boundaries resulting from treaties" presented by Sir Humphrey Waldock in his first report on succession of States and Governments in respect of treaties.<sup>370</sup> That article dealt with boundaries and, in his commentary, Sir Humphrey Waldock distinguished "localized" treaty stipulations and reserved these for consideration at a later stage in connexion with the different cases of succession.<sup>371</sup> It is worth noting that article 4 presented in the first report was included in the first chapter containing the "General provisions".

420. It is not necessary to trace the subsequent history of boundary régimes and other territorial régimes in the deliberations of the Commission, but it is significant that these are matters that have been under consideration since the earliest stages in 1968. Whatever may be said about the details, the essential principles of articles 29 and 30 represent the considered views of the Commission.

421. From this point of departure it now becomes the task of the Special Rapporteur to analyse the comments of Governments on the two articles and to make suggestions for their alteration so far as this may appear to be necessary in the light of those comments. With this end in view and having regard to the importance and difficulty of the subject matter, the comments have been set out at some length. But, in order to complete the story as it emerged during the debate in the Sixth Committee at the twenty-seventh session of the General Assembly in 1972, it is desirable to add here the remarks on the debate made by the Chairman of the Commission.

422. Speaking on 10 October 1972, he said that articles 29 and 30 had been the subject of the most comments, probably because they touched on the most difficult problems. It appeared that a majority in the Committee recognized the need to include in the draft articles rules relating to boundary régimes and other territorial régimes. He recalled that one representative had observed that a new State did not come into existence out of the void and that its territory was precisely what it inherited and on what it was based. On the other hand, it had been

<sup>370</sup> *Yearbook . . . 1968*, vol. II, p. 92, document A/CN.4/202.

<sup>371</sup> *Ibid.*, p. 93, para. 3 of the commentary.

said that the inheritance of a boundary régime infringed the right to self-determination and the contractual freedom of new States. The Chairman remarked that that argument would have more validity if there were not on the other side of the boundary another State which also enjoyed the same rights and the same freedom. He stressed that articles 29 and 30 were confined strictly to the right of succession. The rule which the Commission had sought to propose was that succession could not be invoked as a means of modifying boundary régimes or other territorial régimes unilaterally. The rule it had laid down did not, however, affect the validity of other reasons that might be invoked to contest such régimes.

423. He continued by saying that article 30 had seemed to raise more problems than article 29. He remarked in particular, as regards agreements relating to military bases, that the intention of the Commission had been to exclude them and pointed out, with reference to agreements governing the use of the waters of an international river, that a new State might be just as likely to be harmed as helped if succession were to be made a ground for the termination of a territorial régime.<sup>372</sup>

424. As has already been noted, the comments of Governments have tended to deal with articles 29 and 30 together. However, the articles do raise different questions and it is apparent that article 30 involves more difficulty than article 29. In these circumstances, the Special Rapporteur will now make general observations on articles 29 and 30 together and will then consider the form and drafting of the articles.

#### *General observations*

425. Having regard to the comments of Governments, it is clear that article 29, and to a somewhat lesser extent, article 30, have received a very wide measure of support. The voices of clear-cut opposition have been comparatively few. It is not in every case easy to classify the comments of each delegation or Government as if they amounted to a vote for or against or an abstention. Nevertheless, broadly speaking, and subject to particular remarks in certain cases, it may be said that the following delegations gave general support to the articles. These (in the order in which they spoke) were the delegations of France, Australia, Finland, Greece, Denmark, India, Cuba, Liberia, Ghana, New Zealand, Kenya, Canada, Pakistan, Guyana, Bulgaria and Venezuela (article 29 only). The articles also received support in the written comments of the Governments of Czechoslovakia (by implication), the German Democratic Republic, the Netherlands, Poland, Sweden (by implication), the United Kingdom (by implication) and the United States of America. The support of the Cuban delegation was qualified by a statement that the provisions of article 30 should be clarified so that it would not apply indiscriminately to all the many kinds of territorial treaties, including those concerning the establishment of military bases. The support of the Liberian delegation was qualified by a statement that the attainment of sovereignty conferred

upon a new State the right to review and change, within the scope allowed by international law, questions affecting its national interests and all treaties including dispositive treaties. The New Zealand delegation raised the question whether the articles should be formulated in terms of the boundary or régime resulting from the dispositive effects of the treaty or with relation to succession in respect of the treaty. The delegation of Kenya said that treaties concluded between several colonial Powers, such as the Berlin Act of 1885, could not be regarded as binding on the successor States if they were newly independent States, but what could be said to survive the succession were rights and interests created by usage.

426. An almost totally negative attitude was expressed by the delegations of Afghanistan and Romania and the delegation of Zambia was opposed to the articles in their present form. The position of the Government of Somalia, as expressed both through its delegation and in writing, may be said to be opposed to the articles and in particular to article 29 having regard to its disputes with Ethiopia and Kenya.

427. Doubts of various kinds were raised by five delegations. The Spanish delegation did not challenge the fundamental considerations on which articles 29 and 30 were based but felt that the Commission should give the problem of territorial régimes more detailed study and elaborate its conclusion. The Egyptian delegation questioned the separate treatment of the rights and obligations arising under a treaty from the treaty which created them and suggested that it would be more appropriate in any event to include the relevant provisions in the draft articles pertaining to State succession in respect of matters other than treaties. The delegation of Nigeria questioned the legal basis for placing territorial treaties in a special category for the purposes of the law applicable to succession of States. The delegation of the United Republic of Tanzania might perhaps be regarded as having supported the draft articles subject to the clarification that the administering authority of a trust territory could not conclude a treaty on behalf of the trust territory so as to bind it in perpetuity. Finally, the Moroccan delegation thought that article 30 should be clarified and that there should be a provision for arbitration if the rules laid down in articles 29 and 30 should conflict with the principle of self-determination or if the treaty was considered to be unequal.

428. It would be fruitless to attempt a full and precise account of the views of Governments that have supported or opposed or expressed doubts on articles 29 and 30. On the other hand, taking a broad view, it clearly emerges from the oral and written comments that a large majority of the Governments that have expressed views are, in principle at least, in favour of these two articles. Nevertheless, it may be helpful to try to summarize the arguments for and against the articles.

429. The central legal considerations in support of the principle underlying articles 29 and 30 are given in the commentary in the report of the Commission.<sup>373</sup> These considerations are reinforced by an examination of State

<sup>372</sup> See *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1328th meeting, para. 18.

<sup>373</sup> Paras. 1-8 of the commentary.

practice with respect to boundary treaties<sup>374</sup> and other territorial treaties.<sup>375</sup> The essence of the case is put succinctly in the beginning of the commentary.<sup>376</sup> It is there observed that, both in the writings of jurists and in State practice frequent reference is made to certain categories of treaties, variously described as a "territorial", "dispositive", "real" or "localized" character, as binding upon the territory affected notwithstanding any succession of States: and that 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.

430. In the paragraphs of the commentary that follow, certain cases are mentioned which are at least consistent with the traditional doctrine and which could hardly have been dealt with as they were except on the basis of an underlying principle of continuity. The evidence in support of the traditional doctrine may be indirect but it is strong. The cases mentioned are: the case concerning the *Free Zones of Upper Savoy and the District of Gex* before the Permanent Court of International Justice, the matter of the demilitarization of the Åland Islands considered by the Committee of Jurists, the case concerning the *Temple of Preah Vihear* and the case concerning *Right of Passage over Indian Territory*.<sup>377</sup>

431. The underlying principle of continuity of boundary and territorial rights and obligations may be expressed in different ways. It may be said that a successor State can only acquire such rights as it was within the power of the predecessor State to give and that the territory of the successor State must be subject to such limitations and obligations as adhered to the territory before the succession of States. It may be said that some treaties create real rights and obligations which are valid as against all the world. It may be said that certain territorial rights have the character of servitudes. So far as boundaries are concerned, it may well be said that the successor State cannot inherit a larger territory than fell within the boundaries enjoyed by the predecessor State. A successor State which, for example, emerges to independence by seceding from another State cannot by that act automatically enlarge its boundaries and acquire territory at the expense of a third State.

432. While the point can be more easily expressed with respect to boundaries, the same basic considerations also apply to rights and obligations which, although they do not actually concern the boundary as such, do directly affect the rights that may be enjoyed in respect of a particular territory. If one has regard to the general principles of law, rights and obligations of this kind should not be destroyed merely as a result of a succession of States. Moreover, to allow a succession of States in itself to provide a ground for unilateral rejection of settled boundaries or of territorial rights and obligations would tend towards uncertainty and instability, and would not, generally speaking, be in the interests of the maintenance of international peace and security.

<sup>374</sup> Paras. 10-16 of the commentary.

<sup>375</sup> Paras. 20-34 of the commentary.

<sup>376</sup> Paras. 1 and 2.

<sup>377</sup> See paras. 3-8 of the commentary.

433. Although it is comparatively simple to make provision in this context for boundaries but difficult to define with precision territorial rights and obligations which survive a succession of States, both categories of cases are affected by the main considerations indicated above which militate in favour of the application of the principle of continuity rather than that of the clean slate in these exceptional cases.

434. Various arguments have been made against the inclusion of articles 29 and 30 in the draft. For example, the Nigerian delegation questioned generally the basis in international law which justified placing territorial treaties in a special category for the purposes of the law applicable to succession of States. The delegation of Afghanistan, calling attention to the complexity and controversial character of the articles, suggested that they should be left out. The delegation also said that the topic was not germane to State succession. The Egyptian delegation, on the other hand, suggested that these articles were concerned rather with succession of States in respect of matters other than treaties and should appear in that set of draft articles rather than in the set dealing with succession of States in respect of treaties.

435. Arguments of this kind tend to ignore the underlying principle of the articles considered above and the practical need for some exception to the clean slate principle to deal with boundary and territorial régimes. Otherwise, in the case of every succession of States where the clean slate principle applied, the successor State would have a unilateral right to repudiate existing boundaries and territorial rights and obligations created by treaty. When one views the possibilities from this angle, the need for provisions such as those in articles 29 and 30 is apparent. The disturbance to international relations that might follow from such a right of unilateral repudiation is not one that could be lightly contemplated. It may be that in some cases the doctrine of continuity of boundary and territorial régimes may lead to political tension, as maintained by the delegation of Afghanistan, but this is unlikely in the large majority of cases. Indeed, the disturbance of existing boundaries is much more likely to create chaos than their maintenance.

436. There are, however, certain arguments of principle that have been urged against articles 29 and 30. It has been said that the permanency of boundary and territorial treaties could not be recognized if the treaty was not lawful in the first place. This kind of argument has been presented, for example, by Afghanistan, the United Republic of Tanzania and Somalia. This argument, however, does not really touch the essence of article 29 and 30, which deal with the boundaries or rights and obligations relating to territory and do not purport to continue in existence the relevant treaties. There is nothing in article 29 or article 30 to prevent the original treaty from being attacked on any legal ground that may be available to the successor State under international law.

437. It has also been argued that those articles are contrary to the principle of self-determination (for example by the Romanian delegation) and the principle of the sovereign equality of States (for example by the

delegation of Zambia). At first sight, it may appear that there is some force in these arguments, but when one considers that a dispute of a territorial character will always involve the interests not only of the new State but also of a third State, it is apparent that the principles of self-determination and sovereign equality require respect for the boundaries and territorial rights and obligations of the third State just as much as those of the new State. Indeed, in the case of a newly independent State which has acquired independence by the exercise of self-determination, it may well be said that it can only acquire the territory in respect of which self-determination has been exercised and not part of the territory of a neighbouring State. If the principle of self-determination is to be applied, it should surely be applied equally with respect to the part of the territory of the neighbouring State which is claimed by the newly independent State. In any event, as pointed out by the Government of Poland, one also has to take into account the principle of respect for the territorial integrity of States.

438. Finally, there has been some criticism of the reliance placed by the Commission on article 62, paragraph 2 (a), of the Vienna Convention.<sup>378</sup> For example, the Romanian delegation said that it failed to understand how the emergence of a new State resulting from the liberation of a people from colonial domination could be regarded as a fundamental change of circumstances within the meaning of article 62 of the Vienna Convention. On the other hand, the Zambian delegation seemed to take an opposite point of view when it said that a question arose as to whether, in the case of the accession of a State to independence, the change of circumstances was not so fundamental that the exception for which provision was made in article 62, paragraph 2 (a), of the Vienna Convention should not be applicable. It may be thought that these two comments tend to cancel each other.

439. Having regard to all the foregoing considerations, the Special Rapporteur is of the opinion that the case for the maintenance of articles 29 and 30 is virtually overwhelming, but their form and drafting may require further consideration.

440. Special care should be taken with the commentary to ensure that the intention is made clear, particularly with respect to the point that the provisions of the articles would leave untouched any other ground for claiming the revision or setting aside of a boundary settlement whether self-determination or the invalidity or termination of the treaty.<sup>379</sup> In this connexion, it may be noted that no special mention has been made above of the disputes which Somalia has with Ethiopia and Kenya. This is not due to oversight but because it is considered that, in accordance with its normal practice, the Commission should do its best to avoid giving the appearance of making decisions which may be regarded as influencing the settlement of a particular dispute one way or the other. Nevertheless, the materials submitted by Somalia, Ethiopia and Kenya have been borne in mind

and, if the commentary does not at present accurately reflect the position of the three Governments, special care should be taken to ensure accuracy in the final version of the commentary.

#### Articles 29 and 30

441. The comments specifically relating to the form and drafting of article 29 are relatively few, and they all also affect article 30. In order to avoid repetition they will be considered here in connexion with both articles. The comments on article 30 will be considered separately below.

442. Probably the most far-reaching comments are those of the Zambian delegation which said that the question of territorial treaties should be re-examined "with a view to the formulation of rules in keeping with current realities and in harmony with widely accepted rules of international law". The delegation considered that the articles drafted by the Commission cut across the principles of self-determination and sovereign equality of States and "belied . . . existing facts". It criticized "colonial frontiers" because they had been drawn up "without any regard for geographic or ethnic considerations", and stressed that the principle, that a State could only be bound by a treaty by giving its consent to be bound, applied in respect of boundary and territorial régimes. The delegation, while not intending that all territorial treaties should be disregarded, also questioned whether the exception to the *rebus sic stantibus* rule stated in article 62, paragraph 2 (a), of the Vienna Convention should be applicable in the case of the accession of a State to independence.<sup>380</sup>

443. In the view of the Special Rapporteur, these comments of the Zambian delegation amount to a challenge to the principle on which articles 29 and 30 are based. They have, in effect, been answered in the general observations made above, but have been restated here in case they raise any point of which further account should be taken by the Commission.

444. The Egyptian delegation posed the question how in legal theory the rights and obligations of parties emanating from a certain treaty could be separated from the international instrument which had created those rights and obligations. While supporting the approach taken by the Commission in the draft articles, the New Zealand delegation also asked the question: "Whether the rules in articles 29 and 30 should be formulated in terms of the boundary or régime resulting from the dispositive effects of a treaty, or whether they should relate to succession in respect of the treaty".<sup>381</sup> This is a question that was considered by the Commission at its twenty-fourth session in 1972. The decision to draft the articles in terms of the boundary or the obligations and rights established by a treaty may be regarded as a deliberate choice. In the view of the Special Rapporteur, it is a wise choice because in a treaty establishing a boundary, for example, there may be many other provisions, some of a "personal" character, which should be subject to the ordinary rules affecting

<sup>378</sup> See paragraph 17 of the commentary, to articles 29 and 30.

<sup>379</sup> See paras. 16 and 19 of the commentary.

<sup>380</sup> See para. 417 above, entry for "Zambia" and foot-note 340.

<sup>381</sup> *Ibid.*, entry for "New Zealand" and foot-note 334.

succession in respect of treaties and should not form part of the exception merely because they are contained in a treaty which establishes a boundary. Moreover, it also seems as a matter of principle that it is the nature of the effects of the treaty which gives rise to the element of permanence (what are often called the "dispositive" effects) and not the general character of the treaty as such. This is particularly apparent in the case of treaties of peace where the provisions may range over a wide scope, some dealing with boundaries and disposition of territories and others, for example, adjusting financial claims and even providing for ordinary commercial and similar matters. Another advantage of the form adopted by the Commission is that it avoids providing a ground for saying that an unlawful treaty would be perpetuated by the articles. By speaking of the boundaries or the obligations and rights established by a treaty, the way is clearly left open to an attack on the validity of the treaty if there should be grounds for it. Moreover, the majority of the comments appear to have accepted the approach adopted by the Commission. In these circumstances, the Special Rapporteur advises that the form of article 29 (and of article 30) should in this respect be maintained.

445. The Swedish Government has suggested that the negative form of the introductory words "a succession of States shall not as such affect" should be replaced by some wording affirming that the régimes continue in force in regard to successor States. The Spanish delegation also raised some doubt about the negative form of the articles and suggested that they should be the subject of more detailed study in the context of the draft as a whole and in particular article 6.

446. As regards the last remark, articles 29 and 30 in their present form seem to fit well with article 6, which excludes the application of the articles to a so-called succession which may occur unlawfully. There is, however, room for consideration as to whether articles 29 and 30 should be cast in a negative or a positive form. Again the choice of form appears to have been made deliberately by the Commission. It has the advantage of clearly limiting the scope of articles 29 and 30 to a succession of States, within the meaning of article 2, paragraph 1 (b), and article 6. The negative form also has the advantage of leaving open the possibility of attack on the treaty itself if there should be good grounds, other than the succession of States itself, for such an attack. For these reasons, the Special Rapporteur does not propose any change in this respect in the form of article 29 or 30.

447. Finally, there is the suggestion of the delegation of Morocco that provision should be made for arbitration if the rules laid down in articles 29 and 30 conflict with the principle of self-determination of the peoples involved or were disputed by a State declaring itself not bound by a treaty considered to be unequal. Reference was made to experience in Latin America and, in a more limited way, in Africa. The delegation commented that it would probably be easier to find an appropriate solution for each particular problem that might arise in the field through arbitration rather than through the rigid framework proposed by the Commission.

448. These comments may be read either as an attack on articles 29 and 30 as such or as a suggestion that, at least in certain circumstances, disputes arising in their application should be subject to arbitration. On the first interpretation, the Special Rapporteur has nothing to add to the general observations made above. The question of arbitration falls for consideration in connexion with the general question of the settlement of disputes to be dealt with subsequently.<sup>382</sup>

#### *Article 30*

449. To facilitate the exposition of the points raised, the comments on article 30 will be considered under the following sub-headings:

- (a) Distinction between articles 29 and 30;
- (b) Unequal treaties;
- (c) Simplification and clarification;
- (d) Extension to analogous cases;
- (e) Definition of "territory".

#### *(a) Distinction between articles 29 and 30*

450. The delegation of Kenya commented that article 30 should not be placed on the same footing as article 29 and that the question of other territorial régimes should be dealt with separately. The delegation said that treaties concluded between several colonial Powers, such as the Berlin Act of 1885, could not be regarded as binding on the successor States if they were newly independent States. What could be said to survive the succession were rights and interests created by usage, which could be the subject of new arrangements on the basis of the principle of good-neighbourliness.

451. The exact intent of these comments is difficult to assess. They may be read as suggesting, like those of the Egyptian delegation, that territorial régimes should not be dealt with in articles on succession of States in respect of treaties. If so, there is nothing to add to what has been said above in that connexion. On the other hand, the comments of the delegation of Kenya may be interpreted as meaning that certain kinds of treaties, such as the Berlin Act of 1885, may be open to invalidation, but that the rights and interests which such treaties purported to create have in fact become well founded by usage. If this is the right interpretation, then the rights and interests in question would not, of course, fall within article 30 and, not having been established by treaty, would not properly come within the articles on succession of States in respect of treaties. However, even if there are treaties that may be considered as invalid, there are undoubtedly many treaties establishing territorial régimes which are regarded as valid and the possibility of some treaties being open to attack is not a good reason for failing to make provisions, such as those contemplated in article 30. It may be that it will be necessary, in the draft articles on succession of States in respect of matters other than treaties, to make provision for cases such as those contemplated by the delegation of Kenya. But, so long as article 30 does not exclude the possibility of questioning

<sup>382</sup> See para. 8 and foot-note 10 above.

the validity of treaties on grounds other than the succession of States, the comments of the delegation of Kenya do not seem to raise good grounds for omitting article 30 from the draft.

(b) *Unequal treaties*

452. The Governments of Czechoslovakia and of the German Democratic Republic have suggested that article 30 should be amended so that it should not be used to justify the existence of territorial régimes based on "unequal treaties". They suggest, in effect, that the article should be supplemented by a provision which would limit its application to cases of territorial régimes which serve the interests of international co-operation and are in accordance with the purposes and principles of the Charter of the United Nations.

453. In considering this suggestion, it is necessary to distinguish between the validity of the treaty creating a territorial régime and the nature of the régime itself. So far as the nature of the régime is concerned, the position would seem to be regulated by Article 103 of the Charter, at least in the case of Members of the United Nations. By virtue of that Article, if their obligations under the treaty were in conflict with their obligations under the Charter, the latter would prevail and to that extent the régime would be inoperative. It would not, therefore, seem to be necessary to make any provision in the draft articles providing for cases of conflict between a territorial régime and the Charter of the United Nations. On the other hand, if the validity of the treaty is to be brought into question, this would raise issues concerning the application of the rules of international law relating to treaties, including those contained in the Vienna Convention. Up to the present stage, it has been the consistent view of the Special Rapporteur that the draft articles should deal only with matters relating to the effects of a succession of States and should not attempt to reiterate rules, such as those relating to the validity of treaties. So long as it is absolutely clear that article 30 does not prejudice any grounds that there may be for invalidating or terminating a treaty, there is not, in the view of the Special Rapporteur, any good reason for departing from the general approach adopted in the case of the other articles.

(c) *Simplification and clarification*

454. The delegation of Finland and the United States Government have suggested the simplification of the drafting of article 30. The Finnish comment is general: it would presumably imply combining sub-paragraphs (a) and (b) in each of the two paragraphs. It might be possible in both paragraphs to deal together with obligations and rights, as in sub-paragraph (b) of article 29. This is worth consideration as a matter of drafting but care should be taken not to distort the meaning or to detract from the clarity of the text.

455. The United States Government, however, has made a more specific comment, namely that it is unnecessary and unduly confusing to provide in paragraph 1 that the rights and obligations have to attach to a particular territory in the State obligated and a particular territory in

the State benefited. This is a point that calls for careful consideration because one of the criticisms that may be levelled against article 30 is that it does not define with sufficient precision the categories of cases to which it applies, and the relation of the rights and obligations to particular territories is one way of tending to ensure that the article is not too broad in its scope. On the other hand, there may be cases, such as the example of transit rights accorded to a land-locked State mentioned by the United States Government, which might be excluded—perhaps wrongly excluded—by the requirement of attachment to a particular territory. In the view of the Special Rapporteur, the considerations in this respect are fairly evenly balanced and the point should be further considered by the Commission.

456. By contrast with the comments of the United States Government, the Cuban delegation expressed the relief that the scope of article 30 should be clarified because with its present wording it seemed to apply indiscriminately to all the many kinds of territorial treaties, including those concerning the establishment of military bases. It does not appear to have been the intention of the Commission to include such treaties, which may be regarded as conferring a benefit on a foreign State with respect to a particular territory but which is not for the benefit of a particular part of the territory of the foreign State. It may be that some further clarification of article 30 is needed to exclude this kind of case, but it does appear that, if the suggestion of the United States Government were adopted, it would be more difficult to argue that treaties establishing military bases are excluded from article 30 than if the present wording were maintained.

457. The delegation of Morocco made a general comment that the wording of some of the draft articles should be clarified, particularly that of article 30. It is a pity that the delegation did not indicate in what way it considered that the wording of that article might be clarified, but the comment does reflect a trend which is perhaps more implied than expressed in a number of the comments of delegations and Governments. It is difficult to see how the cases to which article 30 applies could be more clearly and specifically defined, yet it is difficult to avoid the feeling that some greater degree of precision is desirable. The Special Rapporteur regrets that at the moment he is unable to offer any more precise draft, but he does suggest that care should be taken not to make the language of either paragraph 1 or paragraph 2 more general than it is in the present draft.

(d) *Extension to analogous cases*

458. The Netherlands Government has suggested that the reasons for providing for the inheritance of territorial arrangements also apply to certain treaties containing rules in respect of the fundamental legal position of the population of the territory in question. Examples given by the Government are: treaties with respect to minorities, the right to opt for a particular nationality and other treaties guaranteeing fundamental rights and freedoms to the population of the territory involved in a succession of States.

459. While the Special Rapporteur recognizes the basic merits of the suggestion made by the Netherlands Government, it seems to him that this suggestion goes well beyond the type of territorial régime to which article 30 relates. It raises again the question whether, apart from territorial régimes, there should be other exceptions to the clean slate principle. The view of the Special Rapporteur already expressed above is that it would not be feasible to make provisions of that kind for special categories of treaties. However, the matter is of considerable importance and is one that is worthy of consideration by the Commission at every stage of its work.

(e) *Definition of "territory"*

460. The United Kingdom Government has suggested that the term "territory" should be defined so as to include "all or any part" of a State's territory. This suggestion is inspired by the commentary, which said that "territory" for the purposes of article 30 was intended to denote "any part of the land, water or air space of a State". The commentary explained that 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.<sup>383</sup>

461. It may be worth recalling that in alternative A and alternative B of article 22 (*bis*) (the predecessor of article 30) submitted to the Commission at its twenty-fourth session, Sir Humphrey Waldock included a definition of the term "territory".<sup>384</sup> On the recommendation of the Drafting Committee the definition was abandoned.<sup>385</sup> The Special Rapporteur does not see any good reason for reconsidering that decision.

*Conclusion*

462. The conclusion of the Special Rapporteur in the light of the foregoing considerations is that, subject to any possible simplification or clarification of article 30, articles 29 and 30 should be retained substantially in their present form. However, particular care should be taken to ensure the clarity and accuracy of the commentary having regard to the comments of Governments.

PART VI

MISCELLANEOUS PROVISIONS

*Article 31. Cases of military occupation,  
State responsibility and outbreak of hostilities*

*Comments of Governments*

*Oral comments*

463. *Finland.* The Finnish delegation said that the presence of article 31, which restated article 73 of the Vienna Convention, did not seem absolutely necessary

in an instrument that dealt strictly with the succession of States in respect of treaties.<sup>386</sup>

*Romania.* The delegation of Romania said that there could be no justification for including in the draft a provision relating to cases of military occupation. Under the principles of modern international law prohibiting the use of force in relations between States, situations arising from the use of force, such as military occupation, were, in the delegation's view, illegal and could not lead to the annexation of territories. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations stated that the territory of a State should not be the object of military occupation and that no territorial acquisition resulting from the threat or use of force should be recognized as legal. Accordingly, and in view of the fact that cases of military occupation were not covered by article 73 of the Vienna Convention, the delegation felt that that provision should be deleted from the draft articles. Consideration should also be given to the possibility of deleting the remainder of article 31, in view of the absence of any connexion between its contents and the question of succession of States.<sup>387</sup>

*Kenya.* The delegation of Kenya said that it could not see the utility of article 6, particularly as the Commission had included in article 31 rules concerning cases of military occupation and outbreak of hostilities.<sup>388</sup>

*Union of Soviet Socialist Republics.* The delegation of the USSR said that it should be noted that the draft articles applied only to cases of succession occurring in conformity with international law, as stated in article 6, but agreed with the Finnish delegation's view that cases of military occupation, State responsibility and outbreak of hostilities, referred to in article 31 should not affect succession in respect of treaties in force.<sup>389</sup>

*Written comments*

464. *Czechoslovakia.* The Czechoslovak Government observed that article 31 was based on article 73 of the Vienna Convention and it had no objections of principle to its inclusion. The Government could not agree, however, with the article mentioning "occupation of territory". As a rule, occupation of a territory resulted from the use or threat of force prohibited by current international law. Accordingly, a formulation of the article including the occupation of territory would not be in harmony with the above principle of international law, which was among the most important, not to mention the fact that military occupation had always been regarded as a temporary situation which did not change anything in the international status of the occupied territory. A question arose, therefore, what did occupation have in common with a succession of States? Proceeding from the above arguments, it was recommended that the reference to occupation of territory be deleted from the draft.

<sup>386</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1320th meeting, para. 3.*

<sup>387</sup> *Ibid.*, 1323rd meeting, para. 22.

<sup>388</sup> *Ibid.*, 1324th meeting, para. 6.

<sup>389</sup> *Ibid.*, para. 35.

<sup>383</sup> Para. 39 of the commentary.

<sup>384</sup> *Yearbook . . . 1972*, vol. I, p. 247, 1192nd meeting, para. 71.

<sup>385</sup> *Ibid.*, p. 275, 1197th meeting, para. 7.

The Government also pointed out that there was no such reference in article 73 of the Vienna Convention.

*Poland.* The Government of the Polish People's Republic considered that the provisions of the draft articles could be applied solely to cases of State succession which arose while the principles of international law, and in particular the principles enshrined in the Charter of the United Nations, were being respected. The provisions of articles 6 and 31 expressing this proposition dispelled any doubts concerning both the scope of the term "succession of States" and the scope of certain other provisions of the draft. It was useful, therefore, to retain those provisions in their present form.

*Observations and proposals of the Special Rapporteur*

465. Article 31 has attracted few comments. Such comments as there are relate to the retention or deletion of the article or part of it.

466. The Romanian delegation urged consideration of the possibility of deleting the whole of article 31 because there could be no justification for including a provision relating to military occupation and, as regards the remainder of the article, because it had no connexion with the question of succession of States. The Finnish delegation also said that the article was not absolutely necessary. The delegation of the Soviet Union, while not actually suggesting the deletion of the article, agreed with the Finnish delegation that the factors mentioned in article 31 should not affect succession in respect of treaties in force. On the other hand, the delegation of Kenya and the Governments of Czechoslovakia and Poland have, by implication or expressly, supported the retention of the article. Hence, the comments do not provide any clear-cut view of Governments as to the retention of article 31 except so far as the lack of adverse comment may be regarded as indicating an absence of dissent.

467. Reasons for the inclusion of article 31 are given in the report of the Commission on the work of its twenty-fourth session,<sup>390</sup> and in the commentary. The second and third matters excluded, namely questions arising in regard to a treaty from the international responsibility of a State or from the outbreak of hostilities reflect the exclusions made by article 73 of the Vienna Convention. Since the articles on succession of States in respect of treaties have been drafted within the framework of the Vienna Convention, it could easily give rise to misunderstanding if they did not contain a provision similar to article 73. Of course, it would be otiose in articles on succession of States to include the reference to that matter made in article 73. Otherwise, in order to avoid undesirable implications that might arise from the omission of provisions corresponding to article 73 of the Vienna Convention, it seems to be necessary to include provision as to the second and third matters excluded by article 31.

468. Different considerations apply, however, to the exclusion of questions arising in regard to a treaty "from

the military occupation of a territory". The Romanian delegation and the Government of Czechoslovakia have urged the deletion of that provision. On the other hand, it has received general support from the Government of Poland, and particular support by the delegation of Kenya in so far as the latter, in suggesting that there was no utility in article 6, relied on the fact that the Commission had included cases of military occupation and outbreak of hostilities in article 31. The reasons for excluding the mention of "military occupation of a territory" may be summarized as follows. The matter is not mentioned in article 73 of the Vienna Convention on which article 31 is based. Moreover, occupation of territory usually results from the use or threat of force which is prohibited by current international law. Such a situation is accordingly illegal. Finally, military occupation is a temporary situation which does not change anything in the international status of the occupied territory.

469. It is apparent from the commentary,<sup>391</sup> that the Commission was aware of these considerations. "Military occupation" was deliberately added to the cases mentioned in article 73 of the Vienna Convention. The decision was taken after the matter had been considered in the Drafting Committee, as appears from the record of the discussion in the Commission.<sup>392</sup> Of course, in an article that is based on provisions of the Vienna Convention, it is undesirable to add something new unless that is necessary having regard to the requirements of the subject matter of succession of States in respect of treaties.

470. In this connexion, it should be borne in mind that article 31 is itself an exclusion clause. The mere fact that a military occupation may be the result of the illegal use or threat of force is not in itself a conclusive argument for failing to make it clear that the draft articles do not prejudice any question that may arise in regard to a treaty from such occupation. If there is a risk that it might be argued that a military occupation may have factors in common with a succession of States and that the rules relating to succession of States in respect of treaties should apply by analogy, it is safer to provide expressly that such questions are not prejudged by the draft articles. It might more convincingly be argued that article 6, which limits the application of the articles to the effects of a lawful succession of States, may make the provision in article 31 unnecessary. However, as pointed out in the commentary,<sup>393</sup> it is doubtful whether article 6 would be adequate to cover every case of military occupation. In the view of the Special Rapporteur, the very fact that in most cases a military occupation will be unlawful makes it desirable to be quite clear that no questions relating to the effect of such an event on a treaty is intended to be prejudged by the present articles.

471. In the light of these considerations, the Special Rapporteur proposes that article 31 should be retained substantially in its present form.

<sup>391</sup> See in particular para. 1 of the commentary.

<sup>392</sup> See *Yearbook . . . 1972*, vol. I, p. 267, 1196th meeting, paras. 1-2 (discussion of article X, which later became article 31).

<sup>393</sup> Para. 1 of the commentary.

<sup>390</sup> See *Yearbook . . . 1972*, vol. II, pp. 228-229, document A/8710/Rev.1, para. 44 and foot-note 35.

**DOCUMENT A/CN.4/L.206**

**Article for insertion in Part I of the draft articles on succession  
of States in respect of treaties proposed by Mr. Ushakov**

*[Original: Russian]*  
*[31 May 1974]*

Without prejudice to the application of any of the rules set forth in the present articles to which the effects of succession would be subject under international law independently of these articles, they shall apply only to the effects of a succession of States occurring after the entry into force of these articles.



# SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

[Agenda item 5]

DOCUMENT A/CN.4/282

**Seventh report on succession of States in respect of matters other than treaties,  
by Mr. Mohammed Bedjaoui, Special Rapporteur**

*Draft articles on succession to public property, with commentaries*

[Original: French]  
[3 July 1974]

## CONTENTS

	<i>Page</i>
<i>Abbreviations</i> . . . . .	93
<i>Explanatory note: italics in quotations</i> . . . . .	93
<i>Chapter</i>	
<b>I. Draft articles on succession of States in respect of matters other than treaties</b> . . . . .	<b>93</b>
INTRODUCTION . . . . .	94
PART I: SUCCESSION TO STATE PROPERTY . . . . .	94
<i>Section 1. General provisions</i> . . . . .	94
<i>Section 2. Provisions relating to each type of succession of States</i> . . . . .	94
	<i>Paragraphs</i>
<b>II. Introduction to the seventh report</b> . . . . .	<b>1-5 96</b>
<b>III. Text of the introduction and of the articles relating to succession to State property adopted provisionally by the Commission</b> . . . . .	<b>96</b>
INTRODUCTION . . . . .	96
Article 1. Scope of the present articles . . . . .	96
Article 2. Cases of succession of States covered by the present articles . . . . .	97
Article 3. Use of terms . . . . .	97
PART I: SUCCESSION TO STATE PROPERTY . . . . .	97
<i>Section 1. General provisions</i> . . . . .	97
Article 4. Scope of the articles in the present Part . . . . .	97
Article 5. State property . . . . .	97
Article 6. Rights of the successor State to State property passing to it . . . . .	97
Article 7. Date of the passing of State property . . . . .	97
Article 8. Passing of State property without compensation . . . . .	97
	<i>Paragraphs</i>
<b>IV. Commentaries and observations on the other provisions of the draft relating to State property</b> . . . . .	<b>7-16 97</b>
<i>Section 1. General provisions (continued)</i> . . . . .	97
A. General principle of the passing of all State property . . . . .	97
<i>Article 9. General principle of the passing of all State property</i> . . . . .	97
<i>Commentary</i> . . . . .	97
B. Rights in respect of the authority to grant concessions . . . . .	98
<i>Article 10. Rights in respect of the authority to grant concessions</i> . . . . .	98
<i>Commentary</i> . . . . .	98

	<i>Page</i>
C. Succession to State debt-claims . . . . .	98
<i>Article 11. State debt-claims</i> . . . . .	98
<i>Commentary</i> . . . . .	98
	<i>Paragraphs</i>
D. Property of third States . . . . .	9-12
(1) Definition of a third State . . . . .	99
<i>Article X. Definition of a third State</i> . . . . .	99
<i>Commentary</i> . . . . .	99
(2) Determination of the property of a third State . . . . .	100
<i>Article Y. Determination of the property of a third State</i> . . . . .	100
<i>Commentary</i> . . . . .	100
(3) Treatment of the property of a third State . . . . .	101
<i>Article Z. Treatment of the property of a third State</i> . . . . .	101
<i>Commentary</i> . . . . .	101
	<i>Paragraphs</i>
<i>Section 2. Provisions relating to each type of succession of States</i> . . . . .	13-16
Sub-section 1. Transfer of part of a territory . . . . .	103
<i>Article 12. Currency</i> . . . . .	103
<i>Commentary</i> . . . . .	103
(a) Deletion of paragraph 1 of former article 12 and of the identical paragraphs in the other corresponding articles (paragraph 1 of articles 16, 20 and 28) . . . . .	103
(b) Other observations on the wording of article 12 . . . . .	104
<i>Article 13. State funds and Treasury</i> . . . . .	105
<i>Commentary</i> . . . . .	105
<i>Article 14. State archives and libraries</i> . . . . .	105
<i>Commentary</i> . . . . .	105
(a) The principle of the transfer of archives to the successor State . . . . .	106
(i) Sources . . . . .	106
(ii) Archives as an instrument of evidence . . . . .	106
(iii) Archives as an instrument of administration . . . . .	106
(iv) Historical component of archives . . . . .	107
(b) Archives situated outside the territory (archives which have been removed or established outside the territory) . . . . .	107
(c) Time-limits for handing over the archives . . . . .	108
(d) State libraries . . . . .	108
<i>Article 15. State property situated outside the transferred territory</i> . . . . .	108
<i>Commentary</i> . . . . .	108
Sub-section 2. Newly independent States . . . . .	109
<i>Article 16. Currency</i> . . . . .	109
<i>Commentary</i> . . . . .	109
<i>Article 17. Treasury and State funds</i> . . . . .	109
<i>Commentary</i> . . . . .	109
<i>Article 18. State archives and libraries</i> . . . . .	110
<i>Commentary</i> . . . . .	110
(a) Background . . . . .	111
(b) Principle of the transfer of archives to the successor State . . . . .	111
(c) Archives situated outside the territory: Archives which have been removed . . . . .	112
<i>Article 19. State property situated outside the territory of the newly independent State</i> . . . . .	112
<i>Commentary</i> . . . . .	112
Sub-section 3. Uniting of States and dissolution of unions . . . . .	112
<i>Article 20. Currency</i> . . . . .	112
<i>Commentary</i> . . . . .	113
<i>Article 21. Treasury and State funds</i> . . . . .	113
<i>Commentary</i> . . . . .	113

	<i>Page</i>
<i>Article 22. State archives and libraries</i> . . . . .	113
<i>Commentary</i> . . . . .	113
<i>Article 23. State property situated outside the territory of the union</i> . . . . .	114
<i>Commentary</i> . . . . .	114
Sub-section 4. Disappearance of a State through partition or absorption . . . . .	114
[Articles 24 to 27]	
[Sub-section deleted]	
Sub-section 5. Secession or separation of one or more parts of one or more States . . . . .	114
<i>Article 28. Currency</i> . . . . .	114
<i>Commentary</i> . . . . .	114
<i>Article 29. Treasury and State funds</i> . . . . .	114
<i>Commentary</i> . . . . .	114
<i>Article 30. State archives</i> . . . . .	115
<i>Commentary</i> . . . . .	115
<i>Article 31. Property situated outside the detached territory</i> . . . . .	115
<i>Commentary</i> . . . . .	115
	<i>Paragraphs</i>
<b>Conclusion</b> . . . . .	17-20    115

ABBREVIATIONS

- IMF                    International Monetary Fund
- PCIJ                  Permanent Court of International Justice
- PCIJ, Series A*    *PCIJ, Collection of Judgments*
- UNESCO             United Nations Educational, Scientific and Cultural 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.

*Chapter I*

**Draft articles on succession of States in respect of matters other than treaties**

NOTE: The articles whose numbers are followed by one asterisk—articles 1 to 8—were provisionally adopted by the International Law Commission at its twenty-fifth session.<sup>1</sup>

The articles followed by two asterisks—articles X, Y and Z, which concern the property of third States and are

inserted after article 11 at the end of section I, which deals with general provisions—are new articles designed to supplement the Special Rapporteur’s sixth report.<sup>2</sup>

Those articles whose numbers are not followed by an asterisk—articles 9 to 11 and 12 to 31—reproduce the corresponding articles of the sixth report with slight or substantial changes.

Articles 32 to 40, concerning public property other than State property, which were included in the sixth report, have been omitted from the present report, which deals exclusively with State property.

<sup>1</sup> See *Yearbook . . . 1973*, vol. II, pp. 202 *et seq.*, document A/9010/Rev.1, para. 92.

<sup>2</sup> *Ibid.*, p. 3, document A/CN.4/267.

## INTRODUCTION

*Article 1. \* Scope of the present articles*

The present articles apply to the effects of succession of States in respect of matters other than treaties.

*Article 2. \* 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.

*Article 3. \* Use of terms*

For the purposes of the present articles:

(a) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "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.

## PART I

## SUCCESSION TO STATE PROPERTY

## SECTION 1. GENERAL PROVISIONS

*Article 4. \* Scope of the articles in the present Part*

The articles in the present Part apply to the effects of succession of States in respect of State property.

*Article 5. \* State property*

For the purposes of the articles in the present Part, "State property" means property, rights and interests which, on the date of the succession of States, were according to the internal law of the predecessor State, owned by that State.

*Article 6. \* Rights of the successor State to State property passing to it*

A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State property as passes to the successor State in accordance with the provisions of the present articles.

*Article 7. \* Date of the passing of State property*

Unless otherwise agreed or decided, the date of the passing of State property is that of the succession of States.

*Article 8. \* Passing of State property without compensation*

Without prejudice to the rights of third parties, the passing of State property from the predecessor State to the successor State in accordance with the provisions of the present articles shall take place without compensation unless otherwise agreed or decided.

*Article 9. General principle of the passing of all State property*

State property necessary for the exercise of sovereignty over the territory to which the succession of States relates shall pass from the predecessor State to the successor State.

*Article 10. Rights in respect of the authority to grant concessions*

1. For the purposes of the present article, the term "concession" means the act whereby the State confers, in the territory within its national jurisdiction, on a private enterprise, a person in private law or another State, the management of a public service of the exploitation of a natural resource.

2. Irrespective of the type of succession of States, the successor State shall replace the predecessor State in its rights of ownership of all public property covered by a concession in the territory affected by the change of sovereignty.

3. The existence of devolution agreements regulating the treatment to be accorded to concessions shall not affect the right of eminent domain of the State over public property and natural resources in its territory.

*Article 11. State debt-claims*

1. The successor State shall become the beneficiary of the (State) debt-claims of all kinds receivable by the predecessor State by virtue of the exercise its sovereignty or its activity in the territory to which the succession of States relates.

## PROPERTY OF THIRD STATES

*Article X. \*\* Definition of a third State*

For the purposes of the articles in the present Part, "third State" means a State which, while neither predecessor nor successor, owned property on the date of the succession of States in the territory to which that succession of States relates.

*Article Y. \*\* Determination of the property of a third State*

For the purposes of the articles in the present Part, "property of a third State" means property, rights and interests which, on the date of the succession of States, were, according to the internal law of the predecessor State, owned by the third State in the territory to which the succession of States relates.

*Article Z. \*\* Treatment of the property of a third State*

The rights of a third State pertaining to its property situated in the territory to which the succession of States relates shall not be affected by the succession, except where this is contrary to the public policy (*ordre public*) of the successor State.

## SECTION 2. PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

## SUB-SECTION 1. TRANSFER OF PART OF A TERRITORY

*Article 12. Currency*

1. Currency, gold and foreign exchange reserves, and, in general, monetary tokens of all kinds placed in circulation or stored by the predecessor State in the transferred territory and allocated to that territory shall pass to the successor State.

2. The assets of the central institution of issue in the predecessor State, including those allocated for the backing of issues for the transferred territory, shall be apportioned in proportion to the volume of currency circulating or held in the territory in question.

*Article 13. Treasury and State funds*

1. Liquid or invested funds of the predecessor State, situated in the transferred territory and allocated to that territory, shall pass to the successor State.

2. The successor State shall receive the assets of the Treasury and shall assume responsibility for costs relating thereto and for budgetary and Treasury deficits. It shall also assume the liabilities on such terms and in accordance with such rules as apply to succession the public debt.

*Article 14. State archives and libraries*

1. State archives and libraries of every kind relating directly to or belonging to the transferred territory shall, irrespective of where they are situated, pass to the successor State.

2. Indivisible State archives shall be copied and apportioned.

*Article 15. State property situated outside the transferred territory*

The ownership of property belonging to the predecessor State which is situated in a third State shall pass to the successor State in the proportion indicated by the contribution of the transferred territory to the creation of such property.

## SUB-SECTION 2. NEWLY INDEPENDENT STATES

*Article 16. Currency*

1. The successor State shall have at its disposal the currency, gold and foreign exchange reserves and all monetary tokens placed in circulation or stored by the predecessor State in the territory which has become independent and allocated to that territory.

2. It shall have at its disposal the assets of the central institution of issue in proportion to the volume of currency circulating or held in the territory which has become independent.

*Article 17. Treasury and State funds*

1. Liquid or invested funds which have been allocated by the predecessor State to the territory to which the succession of States relates shall pass to the newly independent State.

2. The assets and holdings of the Treasury which have been allocated by the predecessor State to the territory to which the succession of States relates shall pass to the newly independent State.

*Article 18. State archives and libraries*

1. State archives and documents of every kind which, irrespective of where they are situated,

(a) relate directly to the administration of the territory which has become independent; or

(b) belonged to it before its colonization or relate to the pre-colonial period,

and State libraries situated in that territory, shall pass from the predecessor State to the newly independent State.

2. The newly independent State shall not refuse to hand over copies of the items referred to in subparagraph (a) above to the predecessor State or to any third State concerned, upon the request and at the expense of the latter State, save where considerations of security or sovereignty require otherwise.

3. The predecessor State shall not refuse to hand over copies of its political archives relating to the territory which has become independent to the newly independent State, upon the request and at the expense of the latter State, save where considerations of security or sovereignty require otherwise.

*Article 19. State property situated outside the territory of the newly independent State*

Property of the predecessor State which is situated in a third State shall be apportioned between the predecessor State and the newly independent State proportionately to the contribution of the territory which has become independent to the creation of such property.

## SUB-SECTION 3. UNITING OF STATES AND DISSOLUTION OF UNIONS

*Article 20. Currency*

1. The union shall receive the assets of the institution of issue and the gold and foreign exchange reserves of each of its constituent States, except where the degree of their integration in the union or treaty provisions allow each State to retain all or part of such State property.

2. In the event of dissolution of the union, the assets of the joint institution of issue and the gold and foreign exchange reserves of the union shall be apportioned in proportion to the volume of currency circulating or held in the territory of each of the successor States.

*Article 21. State funds and Treasury*

1. The union shall receive as its patrimony the State funds and Treasuries of each of its constituent States, except where the degree of their integration in the union or treaty provisions allow each State to retain all or part of such property.

2. In the event of dissolution of the union, the funds and Treasury of the union shall be apportioned equitably between its constituent States.

*Article 22. State archives and libraries*

1. Except where otherwise specified in treaty provisions aimed at the establishment of a collection of common central archives, archives and documents of every kind belonging to a State which unites with one or more other States, and its libraries, shall remain its property.

2. In the event of dissolution, the central archives of the union and its libraries shall be placed in the charge of the successor State to which they relate most closely or apportioned between the successor States in accordance with any other criteria of equity.

*Article 23. State property situated outside the territory of the union*

1. State property situated outside the territory of the union and belonging to the constituent States shall, unless otherwise stipulated by treaty, become the property of the union.

2. Property of the union situated outside its territory shall, in the event of dissolution of the union, be apportioned equitably between the successor States.

## SUB-SECTION 4. DISAPPEARANCE OF A STATE THROUGH PARTITION OR ABSORPTION

[Sub-section deleted]

## SUB-SECTION 5. SUCCESSION OR SEPARATION OF ONE OR MORE PARTS OF ONE OF MORE STATES.

*Article 28. Currency*

1. The successor State shall have at its disposal the currency, gold and foreign exchange reserves and all monetary tokens placed in circulation or stored by the predecessor State in the detached territory and allocated to that territory.

2. It shall have at its disposal the assets of the institution of issue in proportion to the volume of currency circulating or held in the detached territory.

*Article 29. State funds and Treasury*

1. Liquid or invested funds which have been allocated by the predecessor State to the detached territory shall pass to the successor State.

2. The assets and holdings of the Treasury which have been allocated by the predecessor State to the detached territory shall pass to the successor State.

*Article 30. State archives*

1. State archives and documents of every kind relating directly to a territory which has become detached in order to form a separate State shall, irrespective of where they are situated, pass to the latter State.

2. The successor State shall not refuse to hand over copies of such items to the predecessor State or to any third State concerned, upon the request and at the expense of the latter State, save where considerations of security or sovereignty require otherwise.

*Article 31. Property situated outside the detached territory*

Property of the predecessor State which is situated in a third State shall become the property of the successor State in proportion to the contribution of the detached territory to the creation of such property.

## Chapter II

### Introduction to the seventh report

1. In accordance with the priority given to the study of succession of States in economic and financial matters, the Special Rapporteur submitted at the twenty-fifth session of the International Law Commission a sixth report,<sup>3</sup> containing 40 draft articles, with commentaries, on succession of States to public property. The draft was divided into two series of articles. The first series concerned "Preliminary provisions relating to succession of States in respect of matters other than treaties", bearing on the topic entrusted to the Special Rapporteur as a whole. It contained articles 1, 2 and 3, which concerned the scope of the whole draft, the cases of succession covered and the meaning of certain terms used.

2. The second series of articles, (articles 4-40) was concerned exclusively, as its title indicated, with "succession to public property". It was divided into seven parts. Part I contained preliminary provisions in articles 4 and 5, dealing with the sphere of application of the articles concerning succession to public property, and the definition and determination of such property. Part II contained, in articles 6 to 8, general provisions relating to the transfer of public property as it exists, the date of its transfer, and the general treatment of public property according to ownership. Part III set forth the provisions common to all types of succession of States, contained in

articles 9 to 11 concerning the general principle of the transfer of all State property, rights in respect of the authority to grant concessions, and succession to public debt-claims. Articles 12 to 31 comprised part four, which concerned the provisions relating to each type of succession of States. These provisions dealt, for each type of succession of States, with problems concerning currency and the privilege of issue, Treasury and public funds, archives and public libraries, and property situated outside the territory affected by the change of sovereignty, following on the whole the typology adopted by the Commission in its draft articles on succession of States in respect of treaties. Parts V (articles 32-35), VI (articles 36-39) and VII (article 40), comprised special provisions relating to public establishments, territorial authorities and property of foundations.

3. On the basis of this sixth report, the International Law Commission at its twenty-fifth session continued its consideration of succession of States in respect of matters other than treaties, to which it devoted its 1219th to 1229th, 1230th to 1232nd and 1239th-1240th meetings.

4. Following its usual practice, it decided to divide the draft articles into an *introduction* containing the provisions applying to the draft as a whole and a *number of parts*, each devoted to one category of specific matters.

5. On the proposal of the Special Rapporteur, the Commission, which had provisionally adopted three articles for inclusion in the *introduction*, decided to order the problems better by devoting *part I* exclusively to "succession of States in respect of *State property*", while retaining the possibility of considering at a later date property of territorial authorities other than States and of public enterprises or public bodies, and also property of the territory affected by the State succession. The Commission adopted five articles for part I, *section 1* of which contains provisions which are common to all State property, whatever its nature and whatever the type of succession envisaged, while the following sections concern the various types of succession or particular types of property.

## Chapter III

### Text of the introduction and of the articles relating to succession to State property adopted provisionally by the Commission<sup>4</sup>

*Draft articles on succession of States in respect of matters other than treaties*

#### INTRODUCTION

*Article 1. Scope of the present articles*

The present articles apply to the effects of succession of States in respect of matters other than treaties.

<sup>3</sup> *Yearbook* . . . 1973, vol. II, p. 3, document A/CN.4/267.

<sup>4</sup> *Ibid.*, pp. 202 *et seq.*, document A/9010/Rev.1, para. 92.

**Article 2. 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.

**Article 3. Use of terms**

For the purposes of the present articles:

(a) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "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.

PART I

SUCCESSION TO STATE PROPERTY

SECTION 1. GENERAL PROVISIONS

**Article 4. Scope of the articles in the present Part**

The articles in the present Part apply to the effects of succession of States in respect of State property.

**Article 5. State property**

For the purposes of the articles in the present Part, "State property" means property, rights and interests which, on the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

**Article 6. Rights of the successor State to State property passing to it**

A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State property as passes to the successor State in accordance with the provisions of the present articles.

**Article 7. Date of the passing of State property**

Unless otherwise agreed or decided, the date of the passing of State property is that of the succession of States.

**Article 8. Passing of State property without compensation**

Without prejudice to the rights of third parties, the passing of State property from the predecessor State to

the successor State in accordance with the provisions of the present articles shall take place without compensation unless otherwise agreed or decided.

\* \* \*

6. At the twenty-eighth session of the General Assembly, the Sixth Committee considered these eight articles, upon which various representatives made certain observations.<sup>5</sup> In accordance with the Commission's practice, the Special Rapporteur does not intend to reopen the discussion concerning these observations on the eight articles, which were adopted on an entirely provisional basis. The Commission will have an opportunity to consider these observations at a later stage, probably together with other observation on the same articles.

**Chapter IV**

**Commentaries on the other provisions of the draft relating to State property**

7. The purpose of this report is to revise the sixth report<sup>6</sup> in the spirit of the discussion in the Commission, in other words as a sequel to the eight articles above considered as provisionally adopted.

SECTION 1. GENERAL PROVISIONS (*continued*)

A. GENERAL PRINCIPLE OF THE PASSING OF ALL STATE PROPERTY

8. Upon reflection, the Special Rapporteur is proposing an article 9 which is similar, apart from its form, to the provision bearing the same number in his sixth report,<sup>7</sup> but makes no reference to "devolution, automatically and without compensation", which is mentioned in article 8 as adopted by the Commission.

**Article 9. General principle of the passing of all State property**

State property necessary for the exercise of sovereignty over the territory to which the succession of States relates shall pass from the predecessor State to the successor State.

COMMENTARY<sup>8</sup>

(1) The Commission provisionally adopted article 8, given above, concerning "Passing of State property without compensation". The article was adopted *in place of* draft articles 8 and 9 in the Special Rapporteur's sixth report. But the article 8 adopted by the Commission does

<sup>5</sup> See *Official Records of the General Assembly, Twenty-eighth Session, Annexes*, agenda item 89, document A/9334, paras. 59-76.

<sup>6</sup> *Yearbook . . . 1973*, vol. II, p. 3, document A/CN.4/267.

<sup>7</sup> *Ibid.*, pp. 22-24, document A/CN.4/267, article 9 and commentary.

<sup>8</sup> *Ibid.*

not provide the key for the automatic identification of the State property which does in fact pass to the successor State. Mention is made only of the passing of State property "in accordance with the provisions of the present articles".

(2) In fact, the draft articles which follow article 9 in the sixth report indicate the conditions in which *certain previously identified categories of property*, such as debt-claims, currency, institutions of issue, the Treasury, public funds, archives and libraries, pass to the successor State. There are, however, many other kinds of State property, such as military buildings or civilian immovable property belonging to the State, and article 8, in the form adopted by the Commission, gives no indication as to whether such property passes to the successor State. In other words, article 8 as provisionally adopted does not specify which property passes to the successor State: it merely considers the problem solved and indicates that the passing of such State property, which is presumed to have taken place, must be carried out *without compensation*. The reference to the principle that the property passes without payment indicates *how* this passing occurs, or on what conditions. It is now even more necessary to specify *if* passing occurs.

(3) The Special Rapporteur does not feel that the present wording of article 8 answers this question. He submitted to the Drafting Committee of the Commission a draft article 8 to replace draft articles 8 and 9 of his sixth report, taking this question into account. By adopting article 8, the Commission chose first to settle the problem of the right to compensation. However, the other question still remains. Before considering the *lex specialis* concerning the passing of property such as currency, institutions of issue, debt-claims and public funds, it is necessary to consider a *lex generalis* containing a general norm concerning the passing of State property.

Such was the purpose of article 9 of the sixth report, which the Special Rapporteur is therefore now submitting to the Commission in the version given above. That version leaves out all reference, now superfluous, to the fact that the passing of State property is effected without payment, already incorporated into article 8.

(4) The question may naturally be raised whether this draft article 9 embodies *a rule of international law and of succession of States*. A highway, a river, a barracks, an aqueduct, a State enterprise and an administrative building housing a State service, all of which belonged to the predecessor State, clearly cannot but pass to the successor State. It is hard to see how the former could retain them (without the consent of the latter) in a territory where one sovereign authority has replaced another. Is this not rather an "inherent" or "natural" right of the State in the sense of Article 51 of the Charter of the United Nations, context apart? If so, such a right, by its self-evidence—one might even say by its prior existence, would not even need to have a place in the international law of succession of States, which, as may fittingly be recalled here, has been defined as the "replacement of one State by another in the responsibility for the international relations of the territory" (article 3, sub-paragraph (a)).

(5) In submitting draft article 9, the Special Rapporteur has not adopted a final position. He has sought primarily to remedy the deficiencies of the preceding article 8. If the Commission decides to dispense with the proposed article 9, on the grounds that its legal content is as self-evident as its formulation is difficult owing to the vagueness of the expression "property necessary for the exercise of sovereignty", it will still have to provide a suitable commentary on the problem at the appropriate time.

#### B. RIGHTS IN RESPECT OF THE AUTHORITY TO GRANT CONCESSIONS

##### *Article 10. Rights in respect of the authority to grant concessions*

1. For the purposes of the present article, the term "concession" means the act whereby the State confers, in the territory within its national jurisdiction, on a private enterprise, a person in private law or another State, the management of a public service of the exploitation of a natural resource.

2. Irrespective of the type of succession of States, the successor State shall replace the predecessor State in its rights of ownership of all public property covered by a concession in the territory affected by the change of sovereignty.

3. The existence of devolution agreements regulating the treatment to be accorded to concessions shall not affect the right of eminent domain of the State over public property and natural resources in its territory.

#### COMMENTARY

The Special Rapporteur has retained draft article 10 of his sixth report. He is concerned here only with the *rights* of the conceding authority in the context of these articles, which are concerned with *public property*, that is, more particularly State property, rights and interests. He has left pending for the time being the problem of the *obligations* of the conceding authority, merely stating that the rights in respect of the authority to grant concessions automatically belong to the successor State as essential attributes of its sovereignty.<sup>9</sup>

#### C. SUCCESSION TO STATE DEBT-CLAIMS

##### *Article 11. State debt-claims*

The successor State shall become the beneficiary of the (State) debt-claims of all kinds receivable by the predecessor State by virtue of the exercise of its sovereignty or its activity in the territory to which the succession of States relates.

#### COMMENTARY

(1) The Special Rapporteur has retained in part the provisions contained in draft article 11 of his sixth report.

<sup>9</sup> See *Yearbook . . . 1973*, vol. II, p. 27, document A/CN.4/267, part four, paras. 15-17 of the commentary to article 10.

However, in conformity with the Commission's decision, for the present he is concerned exclusively with *State debt-claims*. He has therefore temporarily set aside the question to which paragraph 1 of the 1973 draft article 11 referred, concerning public debt-claims proper to the territory to which the succession of States relates. The new article 11 is therefore similar, apart from its form, to paragraph 2 of draft article 11.

(2) The Special Rapporteur does not see any objection to deleting the expression "State", which appears in parentheses in the above text of article 11. Debt-claims cannot be anything but State debt-claims from the moment that they are receivable by the predecessor State.

#### D. PROPERTY OF A THIRD STATE

9. The Special Rapporteur wishes to supplement the foregoing general provisions, which constitute section of part one, concerning State property, with rules relating to the property of third States.

10. Theoretically, there are two ways in which a third State may be affected by a succession of States in respect of State property: first, it may own property in the territory to which the succession of States relates; in such cases it will be necessary to determine the treatment to be accorded to such property of the third State. Secondly, the problem also arises of determining what treatment should be accorded to property situated *in* the third State, which belongs to the predecessor State or to the territory to which the succession of States relates.

11. The second aspect of the question cannot be examined in the context of section 1 (General provisions) of part I, concerning State property. The subject can be taken up in the next section, under each type of succession of States. Moreover, the question of *property proper* to the territory to which the succession of States relates (and situated in a third State) will have to be deferred, since the Commission decided to devote part I to State property, to the exclusion of property belonging either to territorial authorities other than State authorities, to public establishments or public bodies, or to the territory affected by the succession of States.

12. This examination of the question of the property of third States will focus on: (a) the definition of a third State, (b) the determination of the property of the third State and (c) the treatment to be accorded to such property following State succession.

#### (1) *Definition of a third State*<sup>10</sup>

##### *Article X. Definition of a third State*<sup>11</sup>

**For the purposes of the articles in the present Part, "third State" means a State which, while neither prede-**

**cessor nor successor, owned property on the date of the succession of States in the territory to which that succession of States relates.**

#### COMMENTARY

(1) The *Dictionnaire de la terminologie du droit international* defines the term "third party" as an entity which, in respect of a legal instrument, arbitral or judicial proceedings and the decision resulting therefrom, or a particular case, is not a party to such instrument or proceedings or is a stranger to such case.<sup>12</sup>

It is not an easy task to formulate an "objective" technical definition of a third State. What makes a State a third State varies, and is "relative" to a situation or a legal instrument. *Everything hinges on the thing in relationship to which an entity is or becomes a third party.* The successor State itself may be considered a third State in relation to the legal instruments whose author is the State to which it succeeds.<sup>13</sup>

(2) The Convention on the Law of Treaties adopted at Vienna on 23 May 1969 defined a third State as "a State not a party to the treaty".<sup>14</sup>

(3) This is roughly the same definition as that used by Mr. Endre Ustor in another context in his draft articles on the most-favoured-nation clause: in this case, the term "Third State" means a State not a party to the treaty in question (i.e., the treaty containing the clause).<sup>15</sup> The third State therefore is not the beneficiary State, which, however, is in some respects a *third party* in relation to the collateral treaty granting certain advantages to another State, but which became a contracting State in the treaty containing the clause. The Special Rapporteur indicated that in most cases the third State, as he defined it, was the State which was a *party* to the collateral treaty concluded between it and the granting State.

(4) In another context, Mr. Paul Reuter, in his second report on treaties concluded between States and international organizations or between two or more international organizations, showed, in connexion with the topic with which he was dealing, the extreme difficulty of the question of the effects of agreements with respect to third parties.<sup>16</sup>

<sup>12</sup> *Dictionnaire de la terminologie du droit international* (Paris, Sirey, 1960), p. 603.

<sup>13</sup> Ph. Braud, *loc. cit.*, p. 42, who states that a distinction must, however, be drawn between a situation in which the successor State undergoes changes and a situation in which the successor State benefits from the changes. In point of fact, in some cases the successor State is even more of a "stranger" or a "third party" in respect of an earlier agreement or earlier instruments since it did not exist when those instruments were concluded.

<sup>14</sup> Article 2, para. 1 (h). Sir Gerald Fitzmaurice, in his fifth report on the law of treaties, offered the following definition:

"For the purposes of the present articles, the term 'third State' in relation to any treaty, denotes any State not actually a party to that treaty, irrespective of whether or not such State is entitled to become a party, by signature, ratification, accession or other means; so long as such faculty, where existing, has not yet been exercised".

(*Yearbook* . . . 1960, vol. II, p. 75, document A/CN.4/130, I, article 1, para. 1).

<sup>15</sup> *Yearbook* . . . 1972, vol. II, p. 162, document A/CN.4/257 and Add.1, article 1 (f).

<sup>16</sup> *Yearbook* . . . 1973, vol. II, pp. 89 *et seq.*, document A/CN.4/271, paras. 89-107.

<sup>10</sup> See Ph. Braud: "Recherches sur l'Etat tiers en droit international public", *Revue générale de droit international public* (Paris), 3rd series, vol. XXXIX, No. 1 (January-March 1968), pp. 17-96.

<sup>11</sup> For the time being, article X and the two articles which follow (Y and Z) have not been numbered in sequence following the preceding articles in order to ensure that their insertion at this point does not interfere with the continuous numbering of the articles or make it difficult to compare the draft articles in the present report and those in the sixth report.

(5) In its draft articles on succession of States in respect of treaties, the International Law Commission sought to define "the third State", which, with the predecessor State and the successor State, forms the *triangular relationship* proper to succession of States in respect of treaties. The Commission defined the third State by the term "other State party", which "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".<sup>17</sup>

The commentary on this article defining terms explains why the Commission avoided using both the terms "third State" (in the technical sense) and "other Party" (in its general, ordinary sense), which were used in the Vienna Convention on the Law of Treaties, and why it considered it appropriate to use the term "other State party".<sup>18</sup>

(6) It is obvious that, in view of the variety of situations covered by the concept of a third State, none of the foregoing definitions is precisely suited to the present draft articles. A third State cannot be referred to as a "non-party to a treaty" or as "another party to the treaty," since what is involved here is succession to State property, and not succession to a treaty. A definition must be found for the third State which was a "former partner" of the predecessor State in so far as State property is concerned. Moreover, the third State must be considered only in respect of its property situated in the territory to which the succession of States relates, namely in the territory of the successor State. What is relevant here, accordingly, is not all the "real" relations, i.e., those relating to the movable and immovable property of the third State situated in the territory or the part of the territory of the predecessor State which is not affected by the succession of States. The effects of the succession of States cannot cover such property. Therefore, what is involved is solely the property of the third State situated in the territory to which the succession of States relates.

(7) One of the fundamental principles retained in connexion with succession of States in respect of treaties is the consent or absence of consent to be bound by an agreement. The successor State may choose to remain a third party with respect to a treaty concluded by the predecessor State and another State or, on the contrary, it may consider itself bound by the treaty, provided that such faculty is open to it under the treaty. However, in respect of public property or State property the third State is characterized essentially by the fact that it has the nature or status of stranger to the succession of States. It is *paenitus extranei*. However, while remaining a third party with respect to the succession of States, it is affected, so far as its property is concerned, by the juridical effects of the succession.

*Against this background, a third State is thus neither the State which cedes nor the State which succeeds. It is neither the State which undergoes a change nor the beneficiary of the change. It is the State which, by virtue*

<sup>17</sup> Yearbook . . . 1972, vol. II, p. 230, document A/8710/Rev.1, chap. II, C, article 2, para. 1 (m).

<sup>18</sup> *Ibid.*, p. 232, para. 9 of the commentary to article 2.

*of having previously established a patrimonial relationship with the predecessor State, is affected by the succession of States.*

(8) Accordingly, the Special Rapporteur suggests the wording used in article X, a definition which has two aspects: on the one hand, the third State is a stranger to the actual phenomenon involving the replacement of one State by another in the responsibility for the international relations of the territory, a fact which distinguishes the third State from the successor State and the predecessor State; on the other hand, the third State is nevertheless affected by the succession of States since it owns property in the territory, a fact which distinguishes it from all other States, which are not affected.

(9) As drafted, this is a very specific definition of succession of States in respect of State property, and the Special Rapporteur therefore proposes that it should be used provisionally only in this context. For this reason, he suggests that it should not be included in a separate paragraph for insertion in draft article 3, relating to the "use of terms" throughout the draft articles on succession of States in respect of matters other than treaties.

#### (2) *Determination of the property of a third State*

##### *Article Y. Determination of the property of a third State*

**For the purposes of the articles in the present Part, "property of a third State" means property, rights and interests which, on the date of the succession of States, were, according to the internal law of the predecessor State, owned by the third State in the territory to which the succession of States relates.**

#### COMMENTARY

(1) It would be most prejudicial to have two different definitions of State property, depending on whether it belongs to a third State or to a predecessor or successor State. Article 5 adopted provisionally by the Commission at its twenty-fifth session, and mentioned earlier,<sup>19</sup> provides a general and satisfactory definition of State property. The Special Rapporteur believes that that definition has the merit of also being applicable to cases involving property belonging to a third State.

(2) It may, however, appear odd to refer to the legislation of the predecessor State when determining the property of the third State. But the property in question is not the entire property of the third State—and particularly does not include that which is situated in its own territory and which can be identified only by reference to its own legislation. It is necessary to refer to the legislation of the predecessor State because for the purposes of the present articles we are concerned only with the property of the third State which is situated in the territory to which the succession of States relates. Accordingly, if the Commission deems it essential at this stage in its work to specify, as would be expedient, that the property of the third State may be determined

<sup>19</sup> See chap. III above.

by reference to the legislation of the predecessor State only if such property is situated in the territory affected by the succession of States, it will have to supplement the general definition of State property contained in article 5 by adding at the end that what is envisaged is property situated "in the territory to which the succession of States relates". That is the purpose of article Y under consideration, which differs from article 5 only in that it mentions this point at the end.

(3) The Commission could not dispense with this article unless it wished to include the same point in article 5. The Special Rapporteur believes that it cannot do so at the present stage of its work, because it would then exclude State property situated *outside the territory* to which the succession of States relates, in particular, property situated in the predecessor State. For, as concerns the latter type of property, and in certain types of succession of States, the Commission does not yet know whether the property passes to the successor State or whether, on the contrary, it is shared with the predecessor State. It would therefore appear wiser for the time being provisionally to retain article Y.

(4) Normally, a State acquires property in the territory of another State by virtue of an act, agreement, convention or some other document having legal force. The legal nature of such property, as the *property of a foreign State*, is determined by this instrument. Where the legal nature is determined unilaterally by the acquiring State, it may have been accepted tacitly or expressly by the State in whose territory the property in question is situated, or it may have been challenged and then been settled by treaty. In both cases, the legal nature of the property of the acquiring State is recognized by the two States. Accordingly, the status of property of a third State situated in the territory to which the succession of States relates was recognized by the predecessor State, according to its legislation, at the date of the succession of States.

### (3) *Treatment of the property of a third State*

#### *Article Z. Treatment of the property of a third State*

**The rights of a third State pertaining to its property situated in the territory to which the succession of States relates shall not be affected by the succession, except where this is contrary to the public policy (*ordre public*) of the successor State.**

#### COMMENTARY

(1) To begin with, it should be clearly recalled that "property of a third State" in this case means only the *State property* of the third State, and not the property of *nationals* of the third State.

The Special Rapporteur is referring to a situation in which a third State possesses real property in the territory to which the succession relates, such as a consulate, cultural office or trade mission. The Special Rapporteur has done a great deal of research on the data available to him concerning diplomatic practice. Although this research did not yield any particularly

significant precedents, it did confirm him in his conviction—that no disputes have arisen in connexion with the matter. He therefore feels justified in believing in the intangibility of such property belonging to a third State and in affirming the principle of intangibility in the draft article under consideration.<sup>20</sup>

(2) If such a principle is not included, or if it is affected by State succession, international relations themselves would become precarious or difficult. In fact it is necessary, in the normal interplay of these relations, for States to acquire in each other's territory various kinds of real property in order to discharge their task of representation in the broad sense.

(3) Without having to refer to the case of succession of States, the Vienna Convention on Consular Relations protected consular property in the following manner, in the event of abolition or restriction of the right of ownership of the foreign State:

The consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility. If expropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions, and prompt, adequate and effective compensation shall be paid to the sending State.<sup>21</sup>

(4) However, let us consider a type of State property other than that required for the official representation of one State in another. A situation may arise in which *mixed companies of States* exercise a commercial, agricultural or industrial activity in the territory of any one of the participating States. Mixed companies of States are common in the USSR and the peoples' democracies.

(5) Furthermore, a United Nations study listed certain "treaty rights of States in foreign territory pertaining to natural resources".<sup>22</sup> The

<sup>20</sup> Daniel Bardonnet (*La succession d'Etats à Madagascar — Succession au droit conventionnel et aux droits patrimoniaux* (Paris, Librairie générale de droit et de jurisprudence, 1970)) refers to a case which is now solely of historical interest, since it involves the annexation of a territory, a method which has been rendered invalid by contemporary international law. When France changed Madagascar from a protectorate into a colony, a decree of 9 June 1896 eliminated the consular jurisdictions of the United States, Great Britain and Italy. The text contained no provisions concerning the treatment to be accorded to the real property in which the courts sat. The decree was interpreted as applying only to the consular function, the real property having been recognized as belonging to the countries concerned (Bardonnet, *op cit.*, pp. 99 *et seq.*).

<sup>21</sup> Article 31, para. 4 of the 1963 Vienna Convention on Consular Relations. For the text of the Convention, see United Nations, *Treaty Series*, vol. 596, p. 261. Certain representatives went even further, although their views were not adopted by the Conference (see *Official Records of the United Nations Conference on Consular Relations*, vol. I (United Nations publication, Sales No. 63.X.2), pp. 21 *et seq.*, eighth plenary meeting, paras. 10-47). The representative of the Ukrainian Soviet Socialist Republic, for example, believed that international law:

"did not permit execution of the property of foreign States without their agreement. Absolute immunity from execution [on the property of a foreign State] was a basic principle of national sovereignty . . ." (*ibid.*, pp. 23-24, para. 29).

<sup>22</sup> See I. *The status of permanent sovereignty over natural resources: Study by the Secretariat—II. Report of the Commission on Permanent Sovereignty over Natural Resources* (United Nations publication, Sales No. 62.V.6), chap. II, Sect. B. Not all the examples cited, however, refer to cases involving State property.

Treaty rights thus enjoyed by a State or States in the territory of another State or States are localized in the sense that the rights are granted for certain purposes in particular parts of the territory of the grantor State(s). They include transit rights, mining rights, rights in connexion with the construction of international pipelines and water rights.<sup>23</sup>

(6) What treatment is accorded to such property when it belongs to a foreign State which becomes a third State in the case of State succession? It should be noted, firstly, that there exist situations which are the opposite of those described in the United Nations study and which occur even more frequently: a great many States are subject to legislation and occasionally even to a constitution which *restrict the right of another State to own in the former's territory State property other than that required for its official representation*. Therefore, if such States become successor States—as is always possible given particular circumstances—there is reason to fear that their constitution, basic laws or internal juridical order in general may prevent them from permitting the third State to retain its right of ownership. There would then be a conflict between the public policy (*ordre public*) of such States and the rule of the inviolability of the property of the third State, assuming no exceptions to the rule were permitted.

(7) The problem is far from being theoretical. Numerous examples could be cited of internal legislation which restricts the rights of ownership of third States.<sup>24</sup> Only a few examples will be cited here. It is obvious from the outset that, given the diversity of social and economic systems in the world, uniform acceptance of ownership rights of one State in another can hardly be expected. There are countries in which certain, if not all, sectors of the economy are the exclusive domain of national State enterprises. Some countries have adopted measures excluding foreign enterprises—privately owned and, *a fortiori*, State-owned—from various sectors of the national economy. The United Nations study referred to above mentions legislative and even constitutional measures excluding enterprises controlled by foreign Governments in countries whose economies have not, however, been totally nationalized.<sup>25</sup>

(8) It was in order to take account of such situations of conflict between the “internal public policy” (*ordre public*) of the successor State and the definitive maintenance of the right of ownership of the third State that the Special Rapporteur provided for an exception in the article under consideration. However, this exception obviously does not confer on the successor State any discretionary rights in respect of the property of the third State.

## SECTION 2. PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

13. The Special Rapporteur indicated in his sixth report the theoretical and practical difficulties encountered

<sup>23</sup> *Ibid.*, chap. II, para. 63.

<sup>24</sup> *Ibid.*, chaps. I and IV.

<sup>25</sup> *Ibid.*, chap. I, sect. E, 3.

in attempting to classify the various cases of State succession.<sup>26</sup> He pointed out that from a purely logical standpoint one could envisage a double classification of cases according to whether a new State was created and whether the predecessor State disappeared. One would then have the following four cases:

(a) Succession without the creation or disappearance of a State (case of transfer of part of the territory of a State);

(b) Succession by creation of a State not entailing the disappearance of the predecessor State (case of newly independent States);

(c) Succession by creation of a State and disappearance of the predecessor State or States (cases of uniting of States, dissolution of unions, merger and creation of “composite” States);

(d) Succession without the creation of a State but entailing the disappearance of the predecessor (absorption, extinction, complete integration, and partition among several States).

14. The Special Rapporteur also included in the list the special case of separation of part of a State (secession), which the International Law Commission decided to treat separately in connexion with its draft articles on succession of States in respect of treaties.

15. However, the Special Rapporteur was of the view that category (d), entailing the disappearance of the predecessor State by absorption, was invalid in the context of contemporary international law, which prohibited the annexation, partition or absorption of a State by one or more other States, notwithstanding the fact that in practice, particularly in armed conflicts, cases of this kind do arise,<sup>27</sup> and the fact that in theory it is possible to envisage a State disappearing following a popular referendum in favour of attaching the State completely or partially to one or more neighbouring States.

16. The Special Rapporteur accordingly proposes that in future category (d) should be omitted from the draft articles under consideration; *this means that articles 24, 25, 26 and 27 contained in the sixth report are unnecessary*. The final categories proposed by the Rapporteur are therefore as follows:

(a) Transfer of part of a territory;

(b) Newly independent States;

(c) Uniting of States and the dissolution of unions;

(d) Secession or separation of one or more parts of one or more territories.

<sup>26</sup> See *Yearbook . . . 1973*, vol. II, pp. 29 *et seq.*, document A/CN.4/267, paras. 20 *et seq.*

<sup>27</sup> See *Yearbook . . . 1968*, vol. II, p. 94, document A/CN.4/204; *Yearbook . . . 1969*, vol. II, p. 69, document A/CN.4/216/Rev.1; *Yearbook . . . 1970*, vol. II, p. 131, document A/CN.4/226. See also *Yearbook . . . 1971*, vol. II (Part One), pp. 162 *et seq.*, document A/CN.4/247 and Add.1, commentary to article 1, and *Yearbook . . . 1973*, vol. II, pp. 14, 33, 54 and 56, document A/CN.4/267, part three, commentary to article 2; *ibid.*, part four, paras. 45 *et seq.*; *ibid.*, para. 2 of the commentary to article 24 and paras. 6 and 7 of the commentary to article 27.

## SUB-SECTION 1. TRANSFER OF PART OF A TERRITORY

*Article 12. Currency*

1. Currency, gold and foreign exchange reserves, and, in general, monetary tokens of all kinds placed in circulation or stored by the predecessor State in the transferred territory and allocated to that territory shall pass to the successor State.

2. The assets of the central institution of issue in the predecessor State, including those allocated for the backing of issues for the transferred territory, shall be apportioned in proportion to the volume of currency circulating or held in the territory in question.

## COMMENTARY

(a) *Deletion of paragraph 1 of former article 12 and of the identical paragraphs in the corresponding articles (paragraph 1 of articles 16, 20 and 28):*<sup>28</sup>

(1) The concept of "property, rights and interests" was referred to in the definition of State property. This leads one, when considering matters relating to currency, to examine the question of the privilege of issue, a recognized regalian right of the State. In his earlier reports, the Special Rapporteur took care to include in the article or articles relating to currency a provision to the effect that "the privilege of issue shall belong to the successor State". The privilege of issue is in fact an attribute of every State. As the Special Rapporteur emphasized in these various reports,<sup>29</sup> the text he had proposed, as drafted, did not mean that the privilege of issue was the subject of a succession or a transfer. The predecessor State loses its privilege of issue in the territory to which the succession of States relates and the successor State exercises its own privilege of issue, which it derives from its own sovereignty. Just as the successor does not derive its sovereignty from the predecessor, as the Special Rapporteur has always asserted,<sup>30</sup> so also it does not receive from the predecessor an attribute of sovereignty such as the privilege of issue. The proposed paragraph simply stated that this privilege "belongs" to the successor State in the territory henceforth within its jurisdiction, just as it belongs to every State in its own territory. The privilege of issue is not inherited.

(2) The Special Rapporteur was particularly anxious to state an obvious fact in this provision, because he feared that *treaty* restrictions established in the past on the exercise of the privilege of issue of the successor State might give rise to some doubt concerning the recognition of this privilege as a natural attribute of that State in the territory to which the succession of States relates.<sup>31</sup>

<sup>28</sup> Article 24, paragraph 1, has already been deleted in view of the elimination of articles 24, 25, 26 and 27 concerning the category—which has now been rejected—relating to the disappearance of a State by partition or absorption.

<sup>29</sup> See in particular *Yearbook . . . 1973*, vol. II, p. 35, document A/CN.4/267, part four, paras. 5 *et seq.* of the commentary to article 12.

<sup>30</sup> See *Yearbook . . . 1969*, vol. II, p. 77, document A/CN.4/216/Rev.1, para. 29.

<sup>31</sup> With reference to these treaty restrictions, see *Yearbook . . . 1973*, vol. II, p. 35, paras. 7-9 of the commentary to article 12 and *ibid.*, pp. 45-46, paras. 2-9 of the commentary to article 16.

(3) Monetary authority is a fundamental component of State sovereignty, the privilege of issue being only one aspect of that authority. The replacement of one currency system by another is not always the result of territorial changes; it can occur within a State, without State succession. The Special Rapporteur earlier recommended making a distinction, as in the case of any right, between the possession and the exercise of the privilege of issue, in order to ensure that historical examples of limitations of that right by treaty were correctly interpreted.<sup>32</sup> When one State replaces another in the international responsibility for a territory, the successor State is the real holder of the privilege of issue, even if it delegates the exercise of the privilege by treaty. Any limitation unilaterally imposed on the successor State would be unlawful. The Permanent Court of International Justice, in its 1927 judgement on the *case of the S.S. "Lotus"*, affirmed that "Restrictions upon the independence of States cannot . . . be presumed"<sup>33</sup> and likewise affirmed in its judgements Nos. 14 and 15 of 12 July 1929 that "It is . . . a generally accepted principle that a State is entitled to regulate its own currency".<sup>34</sup>

(4) The Special Rapporteur, however, is really not sure whether the rule embodied in the 1973 version of paragraph 1 of article 12, on the privilege of issue, is, in fact, norm of public international law. It is more in the nature of a "primary" rule based on the constitutive and originating aspect of every State. In this sense it is a rule of internal public law.<sup>35</sup> For that reason the Special Rapporteur intends to omit it from the new version of article 12 proposed above, and from subsequent articles dealing

<sup>32</sup> *Ibid.*, pp. 35 *et seq.*, paras. 7 *et seq.* of the commentary to article 12.

<sup>33</sup> *P.C.I.J.*, Series A, No. 10, Judgement No. 9, p. 18.

<sup>34</sup> *P.C.I.J.*, Series A, Nos. 20/21, Judgement No. 14, p. 44. The fact that, in the opinion of some writers (D. Carreau, *Souveraineté et coopération monétaire internationale* (Paris, Cujas, 1970), p. 10), in monetary matters interdependence and co-operation are more characteristic of our era than political sovereignty does not significantly alter the factual basis of the problem under consideration. First, at the political level this international co-operation scarcely conceals the restrictive *dirigisme*—itself at present under attack—of the small number of Powers forming the club which governs the international monetary order. Secondly, at the legal level, the imposition of limitations on political sovereignty in monetary matters is acceptable only on the basis of treaties, which do not necessarily preclude monetary changes deemed to be necessary within the domestic legal order. The Bretton Woods Agreements on IMF provide that "A member may change the par value of its currency without the concurrence of the Fund if the change does not affect the international transactions of members of the Fund" (United Nations, *Treaty Series*, vol. 2, p. 50, article IV, section 5 (e)). "The Fund shall concur in a proposed change . . . if it is satisfied that the change is necessary to correct a fundamental disequilibrium" (*ibid.*, section 5 (f)). In short, if the *monetary policy* of the State is susceptible, to some degree, to voluntary limitation by treaty, the privilege of issue, as a regalian right, is not thereby affected in the present circumstances of international co-operation.

<sup>35</sup> The association of the privilege of issue with the holder of the sovereign Power goes back to antiquity; Darius—the first person, apparently, to do so—made use of it five centuries before the Christian era (A. Nussbaum, *Money in the Law, National and International* (Brooklyn, Foundation Press, 1950), p. 32; and D. Carreau, *op. cit.*, 1970, p. 24). "The monopoly of the Government (or constitutionally competent organ)", writes Carreau (*op. cit.*, p. 26), "over the domestic monetary system is affirmed unanimously by the precedents and by the laws and constitutions"; he cites numerous illustrations.

with the currency problem in other types of State succession (articles 16, 20 and 28). However, in order to avoid any misunderstanding of the intent of this deletion, the Special Rapporteur urges the International Law Commission to draw attention in its commentary on this article (and on articles 16, 20 and 28) to the self-evident principle that the privilege of issue belongs to the successor State in the territory to which the succession of States relates.

(b) *Other observations on the wording of article 12*

(5) In article 12 the International Law Commission deals with the complex problems of currency. A *definition of currency* for the purpose of international law should take account of the following three fundamental elements: (a) currency is an attribute of sovereignty, (b) it circulates in a given territory and (c) it represents purchasing power.<sup>36</sup> Dominique Carreau observes that this legal definition

necessarily relies on the concept of statehood or, more generally, that of *de jure* or *de facto* sovereign authority. It follows from this proposition that media of exchange in circulation are, legally speaking, not currency unless their issue has been established or authorized by the State, and, *a contrario*, that currency cannot lose its status otherwise than through formal demonetization.<sup>37</sup>

(6) For the purposes of our subject, this means that the predecessor State loses and the successor State exercises its own monetary authority in the territory to which the succession of States relates. That should mean that at the same time the State patrimony associated with the expression of its monetary sovereignty in that territory (gold and foreign exchange reserves, and real property and assets of the institution of issue situated in that territory) must pass from the predecessor State to the successor State.

(7) *The normal relationship between currency and territory* is expressed in the idea that currency can circulate only in the territory of the issuing authority. The concept of the State's "territoriality of currency" or "monetary space" implies, first, the complete surrender by the predecessor State of monetary powers in the territory considered and, secondly, its replacement by the successor State in the same prerogatives in that territory. But both the withdrawal and the assumption of powers must be organized on the basis of a factual situation, namely the impossibility of leaving a territory without any currency in circulation on the day on which the State succession occurs. The currency inevitably left in circulation in the territory by the predecessor State and retained temporarily by the successor State justifies the latter in claiming the gold and foreign exchange security or backing for that currency. Similarly, the real property and assets of any branches of the central institution of issue in the territory to which the State succession relates pass to the successor State under this principle of the State's "currency territoriality" or "monetary space". It is because the circulation of currency implies security or backing—the public debt, in the final analysis—that *currency in circulation cannot be dissociated from its base or normal support, which is formed by all the gold or*

*foreign exchange reserves and all assets of the institution of issue. This absolute inseparability is, after all, merely the expression of the global and "mechanistic" character of the monetary phenomenon itself.*

(8) As the Special Rapporteur has pointed out<sup>38</sup> the circulation of paper money in a territory has the double function of public property and public debt. One writer has recently argued that.

The currency aspects of State succession must be conceived as the complete succession of one monetary system to another and not merely as an appendage to succession to public debts.<sup>39</sup>

In the world monetary system as it exists today, *currency has value only through the existence of its gold backing, and it would be futile to try, in the succession of States, to dissociate a currency from its backing.* For that reason it is essential that the successor State, exercising its jurisdiction in a territory in which there is inevitably paper money in circulation, should receive in gold and foreign exchange the equivalent of the backing for such issue. The Special Rapporteur would point out, however, that this does not always happen in practice.

(9) Incidentally, the wording of article 12 in the sixth report may have given rise to an interpretation which the Special Rapporteur had not contemplated. Paragraph 2 of that article stated that "Currency, gold and foreign exchange reserves, and, in general, monetary tokens of all kinds circulating or stored in the territory shall pass to the successor State". This wording has led one writer to conclude that

there is no good reason why monetary tokens of all kinds should automatically pass to the successor State. In particular, it may happen that individuals or banks possess, either directly or through approved intermediaries, gold or foreign currency, and State succession cannot in itself lead to the expropriation of such private assets.<sup>40</sup>

There is, in reality, only one case to be considered, that of *public* property, and only *State* property, at that. The Special Rapporteur made no reference in this context to private property. In any event it was clearly impossible to make reference to private property, since in the paragraph in question the property "circulating or stored" was "*monetary*" tokens of all kinds, gold and foreign exchange reserves, and *currency*. But in modern systems currency cannot be private property. However, in order to obviate any possible misinterpretation, the Special Rapporteur has revised the text of the paragraph in question (which has become paragraph 1 of the present article 12), and it now makes reference to the currency, gold and foreign exchange reserves, and monetary tokens "placed in circulation or stored by the predecessor State in the transferred territory".

(10) Moreover, the Special Rapporteur has deemed it necessary to add the phrase "*and allocated to that terri-*

<sup>36</sup> D. Carreau, *op. cit.*, p. 23.

<sup>37</sup> *Ibid.*, p. 27.

<sup>38</sup> See *Yearbook . . . 1971*, vol. II (Part One), pp. 179 *et seq.*, document A/CN.4/247 and Add.1, commentary to article 7; and *Yearbook . . . 1973*, vol. II, p. 34, document A/CN.4/267, paras. 2-4 of the commentary to article 12.

<sup>39</sup> G. Burdeau, "Les successions de systèmes monétaires en droit international", Université de droit, d'économie et de sciences sociales, Paris (Paris II) (1974) (thesis), p. 126.

<sup>40</sup> *Ibid.*, pp. 274-275.

tory". The principle of allocation or assignment of monetary tokens to the territory to which the succession of States relates is essential here. If currency, gold and foreign exchange reserves, and monetary tokens of all kinds belonging to the predecessor State are temporarily or fortuitously present in the transferred territory without the predecessor State's having intended to allocate them to that territory, obviously they have *no link or relationship with the territory* and cannot pass to the successor State. The gold owned by the Banque de France which was held in Strasbourg during the Franco-German War of 1870 could not have passed to Germany after Alsace-Lorraine was annexed to that country unless it had been established that that gold had been "allocated" to the transferred territory.

#### Article 13. State funds and Treasury

1. Liquid or invested funds of the predecessor State situated in the transferred territory and allocated to that territory shall pass to the successor State.
2. The successor State shall receive the assets of the Treasury and shall assume responsibility for costs relating thereto and for budgetary and Treasury deficits. It shall also assume the liabilities on such terms and in accordance with such rules as apply to the public debt.

#### COMMENTARY

(1) In the previous report article 13 had three paragraphs.<sup>41</sup> In this version paragraph 2, which read

Irrespective of where they are situated, public funds, liquid or invested, which are proper to the transferred territory shall continue to be allocated and to belong to the transferred territory

has been dropped. At the twenty-fifth session the Special Rapporteur proposed and the Commission agreed that for the moment only *State property* should be considered, so that the problem of property which was *proper to the transferred territory* is outside the scope of the present study. Paragraphs 1 and 3 have consequently become paragraphs 1 and 2 of article 13.

(2) Some drafting changes have been made in paragraph 1, on State funds. For the sake of consistency with the terminology used by the Commission at its twenty-fifth session, the Special Rapporteur has used the wording "funds of the predecessor State... shall pass to the successor State" in preference to "[the] funds... shall pass into the patrimony of the successor State", which were used in the sixth report. But the Special Rapporteur's chief concern was to specify, in order to avoid any misinterpretation, that the funds in question, liquid or invested, had genuinely been "allocated" to the territory to which the succession of States relates. The principle of assignment or allocation is decisive in this case. It is obvious, after all, that funds of the predecessor State in transit through the territory or temporarily or fortuitously situated in the territory do not pass to the successor State.

(3) It will be noted that in paragraph 2 of the article, on the Treasury, the words used by the Special Rapporteur

in his sixth report "Upon closure of the public accounts relating to Treasury operations in the transferred territory" have been deleted. This phrase deals with a specific situation, a visible event, an operation which will take place in any case. It does not in itself embody a normative act or rule. Accordingly, it is as well to delete it from paragraph 2 of article 13.

#### Article 14. State archives and libraries

State archives and libraries of every kind relating directly to or belonging to the transferred territory shall, irrespective of where they are situated, pass to the successor State.

Indivisible State archives shall be reproduced and apportioned.

#### COMMENTARY

(1) The text of article 14 above, on "State archives and libraries", replaces article 14 ("Archives and public libraries") in the 1973 report.<sup>42</sup> Article 14 has been redrafted by the Special Rapporteur in accordance with the approach suggested by the Commission. It is therefore confined to the disposal of *State* libraries and archives, excluding archives and libraries belonging to territorial authorities (municipal, provincial or other) or to public establishments or agencies.

(2) Whether the State archives are situated in the transferred territory, in that of the predecessor State or in that of a third State is immaterial. It is sufficient that these State archives relate directly to the transferred territory, that is to say, that they should have a direct administrative or historical link with that territory. There may, however, be State archives which, although not relating to the transferred territory, belong to it: this would be the case of historical archives and of papers or collections having a cultural value.

(3) If the central State archives are an indivisible entity, the predecessor State and the successor State will agree to reproduce them in the most suitable way and to apportion them between themselves according to such procedures as they may choose. One example not to be emulated is that provided by the Treaty of Turin of 16 March 1816<sup>43</sup> between the Kingdom of Sardinia and the Swiss Confederation establishing the frontiers of Savoy and the State of Geneva, they went so far as to tear books apart or cut pages out of common land registers with scissors in order to give each of the parties

<sup>42</sup> The Special Rapporteur has dealt extensively with the problem of archives, particularly in his third, fifth and sixth reports (*Yearbook... 1970*, vol. II, pp. 152 *et seq.*, document A/CN.4/226, part two, commentary to article 7; *Yearbook... 1972*, vol. II, pp. 68 *et seq.*, document A/CN.4/259, paras. 46 *et seq.*; *Yearbook... 1973*, vol. II, pp. 37 *et seq.*, document A/CN.4/267, commentary to article 14; *ibid.*, pp. 48 *et seq.*, commentary to article 18; *ibid.*, p. 53, commentary to article 22; and *ibid.*, p. 57, commentary to article 30.

<sup>43</sup> Treaty between H.M. the King of Sardinia, the Swiss Confederation and the Canton of Geneva (G. F. de Martens, ed., *Nouveau Recueil de traités* (Göttingen, Dieterich, 1880, vol. IV (1808-1819) (reprint), p. 214).

<sup>41</sup> See *Yearbook... 1973*, vol. II, p. 36 *et seq.*, document A/CN.4/267, part four, article 13 and commentary.

its due.<sup>44</sup> Nowadays, of course, the solution to problems of this kind is greatly facilitated by the existence of sophisticated modern techniques of document reproduction.

(4) Such is the general scheme of the new article 14 on State archives and libraries. *It embodies the application of two basic principles: a principle of "territorial origin" or "territoriality of archives", according to which all papers and documents<sup>45</sup> originating in the territory to which the succession of States relates must pass to the successor State, and the "principle of pertinence", according to which papers<sup>46</sup> concerning the territory in question, irrespective of where they are kept, are likewise handed over.*

(5) These principles can easily be illustrated by examples drawn from the practice of States. To that end, the Special Rapporteur will first give a brief summary of the information he has already supplied, making reference to the series of historical precedents in his earlier reports,<sup>47</sup> and will then supplement those reports by some details which further research has shown to be useful.

(6) Further discussion of the importance or the definition of archives and documents is unnecessary. "Archives" must be interpreted as broadly as possible. Diplomatic practice demonstrates that the principle of the transfer to the successor State is unquestioned, the legal foundation for that principle having been the subject of research for evidentiary purposes, first administrative and later historical.

(7) In his earlier reports the Special Rapporteur stressed the following points:

The need for the archives-territory link in the case of archives acquired by the territory or on its behalf and in that of papers of interest to the territory because of the organic link between them and the territory;

The problem of archives situated outside the territory to which the succession of States relates, the successor State having the right to claim such archives wherever they may be, and whether they have been removed or were established outside the territory.

The following questions were also reviewed: (a) the question of the "ownership" of archives (successor State or transferred territory), which depends on the circumstances, the essential point being that these items cannot remain in the patrimony of the predecessor State; (b) the problem of the special obligations of the successor State: the handing over of copies to the predecessor State and the obligation to preserve documents; (c) the question of time-limits for handing over the archives, which varies from 3 to 18 months according to the agreements considered; (d) question of the principle of transfer to the successor State free of cost.

<sup>44</sup> France, Direction des archives de France, *Actes de la Sixième Conférence internationale de la Table ronde des archives, Les archives dans la vie internationale* (Paris, Imprimerie nationale, 1963), p. 20.

<sup>45</sup> Only State archives are involved here, but the principle is equally applicable to documents of territorial authorities or public agencies.

<sup>46</sup> Same comment as in the previous foot-note.

<sup>47</sup> See the references cited in foot-note 42.

(8) The material which follows complements the above information and deals only with the problem of State archives.

(a) *The principle of the transfer of archives to the successor State*

(i) *Sources*

(9) This principle, which seems to be unquestioned, originated long ago in territorial transfers carried out in the Middle Ages. France and Poland provide examples of them.<sup>48</sup>

In France in 1194, King Philippe-Auguste founded his Trésor des Chartes, in which he assembled the documents relating to his kingdom. In 1271, Philippe III (the Bold), upon inheriting the estates of his uncle, Alphonse de Poitiers (almost the whole of southern France), had the archives immediately incorporated into the Trésor: title-deeds to the estates, cartularies, registers of letters, surveys and administrative accounts. This was the practice followed over the centuries, as the Crown acquired new lands. The same practice was followed in Poland, from the fourteenth century onwards, as the kingdom generally became unified through the absorption of the ducal provinces: the archives of the dukes were transferred to the king at the same time as the duchy.

The principle of transfer has accordingly been applied for a very long period, although, as will be seen, the reason invoked has varied.

(ii) *Archives as an instrument of evidence*

(10) In old treaties, archives were handed over to the successor State primarily as instruments of evidence and as titles to property. Indeed, the feudal concept was that archives represented a legal title proving a right. For that reason, the victors in wars were careful to carry off the archives relating to their acquisitions, seizing them is necessary by force from the vanquished: their right to properties was assured only by the possession of land registers. One may adduce the example of the Swiss Confederates who in 1415 removed *manu militari* the archives of the former possessions of the Hapsburgs, which were kept in the castle of Baden.<sup>49</sup>

(iii) *Archives as an instrument of administration*

(11) From the sixteenth century onwards, it was realized that while archives constituted an effective legal title, they were also an instrument for administering a country. The idea then prevailed that, when territory was transferred, *the successor should be left as viable a territory as possible* in order to avoid a breakdown in administration and help to ensure that the territory was properly and easily governable. Two cases may arise.

<sup>48</sup> France, *Les archives dans la vie internationale* (op. cit.), pp. 12 and 13.

<sup>49</sup> As these archives related not only to the territories of the Confederates, but also to an extensive part of south-west Germany, in 1474 the Hapsburgs of Austria were able to recover those which did not refer to Confederate territory.

### 1. Case of a single successor State

(12) All instruments of administration pass from the predecessor to the successor, the said instruments being understood in the broadest sense: taxation documents of all kinds, cadastral and property registers, administrative documents, registers of births, marriage and death registers, land registers, judicial and penitentiary archives, and so forth. . . Hence the custom of leaving to the territory all the written, graphic and photographic material needed for the continuance of proper administrative functioning.

For instance, when the provinces of Jämtland, Härjedalen, Gottland and Ösel were ceded, the treaty of Brömsbro of 13 August 1645 between Sweden and Denmark made obligatory the transfer to the Queen of Sweden of all instruments, registers and cadastral documents relating to justice (article 29) as well as any information relating to the fiscal situation of the ceded provinces. Similar stipulations were incorporated by both Powers in the subsequent peace treaties of Roskilde (26 February 1658) (article 10) and Copenhagen (27 May 1660) (article 14).<sup>50</sup>

Article 69 of the Münster Treaty of 30 January 1648 between the Netherlands and Spain provided that "all registers, maps, letters, archives and papers, together with all documents relating to lawsuits, concerning any of the United Provinces, associated countries, towns . . . located in courts, chancelleries, councils and chambers, shall be handed over . . .".<sup>51</sup>

In the Treaty of Utrecht of 11 April 1713, Louis XIV ceded to the States General (of the Netherlands) Luxembourg, Namur and Charleroi "with all the papers, letters, documents and archives concerning the said Netherlands".<sup>52</sup>

All the treaties concerning a transfer of territory in fact contain a clause relating to the transfer of the archives; thus it is impossible to list them all. The treaties are sometimes even supplemented by a special convention relating solely to that point. Thus, following on the peace treaties which ended the First World War, the convention between Hungary and Romania, signed at Bucharest on 16 April 1924,<sup>53</sup> relates to the exchange of legal documents, land registers and registers of civil status, and specifies the manner in which the transfer is to be effected.

### 2. Case of several successor States

(13) The examples we have quoted, which are old and isolated, cannot be held to constitute a custom, but the Special Rapporteur felt that they were worth mentioning because modern reproduction methods would make the solution adopted very simple nowadays.

The Barrier Treaty of 15 November 1715, concluded between the Holy Roman Empire, England and Holland, provided in article 18 that the archives of the dismembered

territory, Gelderland, would not be divided among the three successor States but would remain intact and that an inventory would be drawn up and a copy given to each of the three parties, which would be able to consult the documents freely.<sup>54</sup>

Similarly, the convention concluded between Prussia and Saxony on 18 May 1815<sup>55</sup> mentions "deeds and papers which . . . are of common interest to the two parties". The solution chosen was that Saxony would keep the originals and be responsible for giving Prussia certified copies.

(14) Therefore, according to the principle of respecting collections which arose from the desire to facilitate administrative continuity, whatever the number of successors, the entire collection of archives remains intact. However, that same principle and desire will lead to numerous contestations when applied today, owing to the distinction that has arisen between administrative and historical archives.

#### (iv) Historical component of archives

(15) According to some authors, administrative archives should be handed over in their entirety to the successor State but historical archives, according to the principle of respect for collections, should remain part of the patrimony of the predecessor State, save where they have been established within the territory affected by the succession during the normal operation of its own institutions.

This is contradicted by practice: there are many cases on record of archives, including historical documents, being transferred.

The Vienna Treaty of 30 October 1866 by which Austria ceded Venetia to Italy provided in article 18 for the handing over to Italy of all "title-deeds, administrative and judicial documents . . . political and historical documents of the former Republic of Venice", while each of the two parties pledged to let the other copy "historical and political documents that might concern the territories remaining in the possession of the other Power and which, in the interests of knowledge, cannot be taken from the archives to which they belong."<sup>56</sup>

It is easy to extend the list of examples of this point. The treaty of peace between Finland and Russia signed at Dorpat on 14 October 1920<sup>57</sup> provides in article 29, paragraph 1, that

The Contracting Powers undertake at the first opportunity to restore Archives and documents which belong to public authorities and institutions which may be within their respective territories and which refer entirely or mainly to the other Contracting Power or its history.

#### (b) Archives situated outside the territory (archives which have been removed or established outside the territory)

(16) There seems to be ample justification for accepting as a rule that adequately reflects the practice of States

<sup>50</sup> France, *Les archives dans la vie internationale* (op. cit.), p. 16.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*, p. 17.

<sup>53</sup> League of Nations, *Treaty Series*, vol. XLV, p. 330.

<sup>54</sup> France, *Les archives dans la vie internationale* (op. cit.), p. 17.

<sup>55</sup> G. F. de Martens, ed., *Nouveau Recueil de traités* (Göttingen, Dieterich, 1818), vol. II (1814-1815), p. 276.

<sup>56</sup> France, *Les archives dans la vie internationale* (op. cit.), p. 27.

<sup>57</sup> League of Nations, *Treaty Series*, vol. III, p. 72.

the fact that the successor State receives all the archives, historical and other, relating to the territory affected by the change of sovereignty, even where those archives have been removed or are situated outside the territory.

The treaties of Paris (1814) and Vienna (1815) required the return to the original place of deposit of the State archives which had been concentrated in Paris during the Napoleonic period.<sup>58</sup>

Under the Treaty of Tilsit of 7 July 1807, Prussia, which had returned the part of Polish territory which it had conquered, was obliged to hand over to the new Grand Duchy of Warsaw not only the current local or regional archives relating to the returned territory but also the State documents (Berlin archives) relating to it.<sup>59</sup>

Similarly, Poland recovered the central archives of the former Polish State which had been transferred to Russia at the end of the eighteenth century and those of the former autonomous Kingdom of Poland of 1815 to 1863 and of its continuation up to 1876. In addition, it received the documents of the Secretariat of State of the Kingdom of Poland, which operated at St. Petersburg as a central Russian department, from 1815 to 1863, those of the Czar's Chancellery for Polish Affairs and, finally, the documents from the Office of the Russian Minister of the Interior responsible for land reform in Poland.<sup>60</sup>

(17) The case of the Schleswig archives can be added to the examples cited in previous reports of the Special Rapporteur. Under the Treaty of Vienna of 30 October 1864, Denmark was to cede the three duchies of Schleswig, Holstein and Lauenburg. Article 20 of the treaty in question therefore stipulated that: "title-deeds, administrative documents, documents relating to civil justice concerning the ceded territories situated in the archives of the Kingdom of Denmark" were to be handed over, together with "all parts of the Copenhagen archives which belonged to the ceded duchies and which were taken from their archives".<sup>61</sup>

(18) Even though it has a different application, we could also cite in support of the principle the following resolution of the General Conference of UNESCO:

*The General Conference,*

*Recognizing* the role of mass media in all aspects of human development, in fostering international understanding and as an instrument for the acceleration of human development,

*Recommends* to Member States:

...

(d) to co-operate in the return of original manuscripts and documents, or, if this is not possible for special reasons, of copies of them, to the countries of origin;<sup>62</sup>

The logic and form of the language can only be interpreted to mean that the expression "countries of origin" denotes the territory concerned by the archives, that is

<sup>58</sup> France, *Les archives dans la vie internationale* (op. cit.), pp. 19 and 20.

<sup>59</sup> *Ibid.*, p. 20.

<sup>60</sup> *Ibid.*, pp. 35-36.

<sup>61</sup> *Ibid.*, pp. 26.

<sup>62</sup> UNESCO, *Records of the General Conference, Sixteenth Session, Resolutions* (Paris, 1970), p. 89, resolution q.134.

to say, the successor State in the event that there has been a succession of States.

(c) *Time-limits for the handing over of archives*

(19) These time-limits vary, depending on the agreement. The best example of celerity is undoubtedly to be found in the treaty of 26 June 1816 between the Netherlands and Prussia, article XLI of which states that "the archives, maps and documents . . . shall be handed over to the new authorities at the same time as the territories".<sup>63</sup>

(d) *State libraries*

(20) The Special Rapporteur has already pointed out, in his third report, the difficulty of obtaining information on libraries.<sup>64</sup>

Three peace treaties signed after the First World War nevertheless expressly state that libraries shall be returned together with the archives. They are the Treaty of Riga between Russia and Latvia of 11 August 1930, article 11;<sup>65</sup> the Treaty of Moscow between Russia and Lithuania of 12 July 1920, article 9;<sup>66</sup> and the Treaty of Riga between Poland, Russia and the Ukraine of 18 March 1921, article 11, paragraph 1.<sup>67</sup> The formula used is as follows:

The Russian Government shall return at its own expense . . . and shall hand over . . . the *libraries*,\* archives, museums, objects of vertu, educational supplies, documents and other property of educational establishments, scientific, governmental, religious, communal and professional institutions, in so far as the said objects have been evacuated from the confines of . . . during the world war of 1914-1917 and which actually shall prove to be in the keeping of the governmental or communal establishments of Russia.

**Article 15. State property situated outside the transferred territory**

**The ownership of property belonging to the predecessor State which is situated in a third State shall pass to the successor State in the proportion indicated by the contribution of the transferred territory to the creation of such property.**

COMMENTARY

(1) Article 15 above reproduces the text of paragraph 2 of the same article, as contained in the sixth report. Paragraph 1 was dropped pursuant to the Commission's decision to consider for the time being only the treatment to be accorded to *State property*. The paragraph will therefore have to be set aside as it relates to "public property proper to the transferred territory".

(2) For elucidation of article 15 above, the Special Rapporteur refers the Commission to his 1973 Commentary.<sup>68</sup>

<sup>63</sup> G. F. de Martens, ed., *Nouveau Recueil de traités* (Göttingen, Dieterich, 1818), vol. III (1808-1812) (reprinted), p. 41.

<sup>64</sup> *Yearbook . . . 1970*, vol. II, p. 161, document A/CN.4/226, paras. 47 et seq. of the commentary to article 7.

<sup>65</sup> League of Nations, *Treaty Series*, vol. II, p. 221.

<sup>66</sup> *Ibid.*, vol. III, p. 129.

<sup>67</sup> *Ibid.*, vol. VI, p. 139.

<sup>68</sup> See *Yearbook . . . 1973*, vol. II, pp. 43-4, document A/CN.4/267, part four, paras. 3, 6, 14 and 15 of the commentary to article 15.

## SUB-SECTION 2. NEWLY INDEPENDENT STATES

*Article 16. Currency*

1. The successor State shall have at its disposal the currency, gold and foreign exchange reserves and all monetary tokens placed in circulation or stored by the predecessor State in the territory which has become independent and allocated to that territory.

2. It shall have at its disposal the assets of the central institution of issue in proportion to the volume of currency circulating or held in the territory which has become independent.

## COMMENTARY

(1) In the sixth report, article 16 reads as follows:

1. The privilege of issue shall belong to the new sovereign throughout the newly independent territory.

2. Currency, gold and foreign exchange reserves, and, in general, monetary tokens of all kinds which are proper to the territory concerned shall pass to the successor State.

3. In consideration of the foregoing, the successor State shall assume responsibility for the exchange of the former monetary instruments, with all the legal consequences which this substitution of currency entails.<sup>69</sup>

(2) For the reasons stated above,<sup>70</sup> the Special Rapporteur has eliminated from the articles relating to currency all mention of the privilege of issue, which naturally is an inherent right of any State. Article 16, paragraph 1, in the 1973 report therefore had to be deleted.

(3) Paragraph 2 had to be amended in so far as in this part the Commission is to deal with State property, to the consequent exclusion of property "proper to the territory" mentioned in that paragraph.

This paragraph, which now becomes paragraph 1 of the article, therefore refers to the general, concrete situation observable on the date of the succession of States in a territory which has become independent: at that time there is a currency in circulation—this is an obvious fact. If the currency was issued by an institution of issue of the territory, independence will not change the situation. However, if the currency was issued for the territory by and under the responsibility of a metropolitan institution of issue, it must be backed by gold and reserves if it is to be kept in circulation.

Determination of the total amount of currency to be shared [writes one author] . . . is based on the idea that the entire assets of the institution of issue under the heading backing for the issue guarantee all currency issued by the institution in the interest of the country as a whole.<sup>71</sup>

(4) For the reasons mentioned above in the commentary on article 12, the Special Rapporteur has made it clear in the new version of paragraph 1, that the monetary tokens in question are those "placed in circulation or stored by the predecessor State \* in the territory which has become independent and allocated to that territory \*\*". The Special Rapporteur was in fact thinking of cases

where the monetary gold of the predecessor State might be located in the dependent territory *temporarily* or *fortuitously*, for example, where as a result of an armed conflict the colonial Power had thought to safeguard its gold reserves by placing them in a territory which at the time was still under its domination. All the gold of the Banque de France was thus evacuated to west Africa during the Second World War. Obviously, in such circumstances the gold and foreign exchange reserves stored in the territory had not been "allocated" to the territory.

(5) The Commission will decide whether the wording of the paragraph can be simplified by speaking only of currency, gold and foreign exchange "allocated" to the territory, without mentioning their being "placed in circulation" or "stored" in the territory.

(6) Some may have wondered whether the new paragraph 2 does not duplicate paragraph 1 of the article. In the opinion of the Special Rapporteur it does not. Paragraph 1 places the monetary tokens at the disposal of the successor State. Paragraph 2 does the same for the assets of the institution of issue. These are two separate realities. The assets of the institution of issue do not consist only of gold and foreign exchange: they also include real estate and even the debts receivable by the institution of issue.

(7) In addition, it will have been noted that in the new article the Special Rapporteur no longer refers to the "responsibility [assumed by the successor State] for the exchange of the former monetary instruments, with all the legal consequences which this substitution of currency entails".<sup>72</sup> First, the Special Rapporteur has some doubts about the nature of such a rule, which seems to relate to internal public law rather than international law. Secondly, in any event the exchange of the bills places us chronologically beyond the succession of States, that is to say, outside the sphere of succession proper.

*Article 17. Treasury and State funds*

1. Liquid or invested funds which have been allocated by the predecessor State to the territory to which the succession of States relates shall pass to the newly independent State.

2. The assets and holdings of the Treasury which have been allocated by the predecessor State to the territory to which the succession of States relates shall pass to the newly independent State.

## COMMENTARY

(1) The Special Rapporteur proposes a new article 17 which is markedly different from the 1973 article.<sup>73</sup> In the first place, he has taken into account the fact that at present only the question of State property is under consideration, which should exclude from article 17 the question of the public funds and Treasury which are

<sup>69</sup> See the commentaries on this article (*ibid.*, pp. 45-47).

<sup>70</sup> See above, paras. 1-4 of the commentary to article 12.

<sup>71</sup> G. Burdeau, *op. cit.*, p. 276.

<sup>72</sup> Paragraph 3 of the 1973 article.

<sup>73</sup> *Yearbook . . . 1973*, vol. II, p. 47, document A/CN.4/267, article 17 and commentary.

proper to the territory to which the succession of States relates.

(2) In drafting the new article, the Rapporteur had in mind the case in which funds, holdings or assets of the Treasury of the predecessor State might be provisionally or fortuitously situated in the territory to which the succession of States relates. Such State property cannot, under the new version, pass to the successor State except inasmuch as it was allocated to the territory by the predecessor State. This provision establishes a parallel with the corresponding paragraphs of articles 12 and 16 concerning currency "allocated" to the territory and of article 13 concerning the funds and assets of the Treasury also allocated to the territory.<sup>74</sup> As a result, article 17 contains the useful distinction based on the principle of the allocation or assignment of the property to the territory.

(3) The two paragraphs of article 17 may be combined in a single paragraph relating to "liquid or invested funds and the assets and holdings of the Treasury, allocated by the predecessor State to the territory to which the succession of States relates", which would provide for their passing to the newly independent State.

#### *Article 18. State archives and libraries*

**1. State archives and documents of every kind which, irrespective of where they are situated,**

**(a) relate directly to the administration of the territory which has become independent; or**

**(b) belonged to it before its colonization or relate to the pre-colonial period,**

**and State libraries situated in that territory, shall pass from the predecessor State to the newly independent State.**

**2. The newly independent State shall not refuse to hand over copies of the items referred to in subparagraph (a) above to the predecessor State or to any third State concerned, upon the request and at the expense of the latter State, save where considerations of security or sovereignty require otherwise.**

**3. The predecessor State shall not refuse to hand over copies of its political archives relating to the territory which has become independent, to the newly independent State, upon the request and at the expense of the latter State, save where considerations of security or sovereignty require otherwise.**

#### COMMENTARY

(1) The new article above differs from the 1973 article<sup>75</sup> essentially in respect of paragraph 1. In the previous article that paragraph laid upon the predecessor State the obligation to hand over to the successor State all the archives "relating directly or belonging to the territory that has become independent". The new version of paragraph 1 concerns only archives which (a) relate directly to the

administration of the territory or (b) belonged to it before its colonization, or relate to the pre-colonial period. There is a clear difference from the former draft inasmuch as the archives relating to the sovereignty of the colonial Power are excluded from the transfer.

(2) *However, the exclusion of such "political" or "sovereignty archives" must not be total.* The diplomatic, military or political documents by which the *dominium* and *imperium* of the colonial Power over the dependent territory were expressed in the past do not concern the former metropolitan country alone. They clearly "relate" to the dependent territory with which they are concerned. On becoming independent, that territory may feel the need to have the colonial, political or diplomatic archives at its disposal, for example, in the case of a dispute concerning the demarcation of its frontiers, or where it must reach a decision concerning its succession to treaties concluded by the colonial Power for the territory in question. The hesitation shown by newly independent States to notify their succession to certain treaties arises on occasion from uncertainty as to whether the treaties did in fact formerly apply to their territory or concerning the very contents of the instruments, no trace of which is to be found in the archives left in the territory by the colonial Power.<sup>76</sup>

(3) That is why the Special Rapporteur proposes that the fact that the "colonial archives of sovereignty" relating to the territory are not handed over should be moderated by the obligation of the predecessor State to hand over copies of such archives to the successor State in case of need. That is the purpose of the new paragraph 3 of article 18, which is symmetrical with paragraph 2, which lays a similar obligation upon the successor State.

(4) Paragraph 2 itself draws the inference from paragraph 1, since inasmuch as the archives preceding colonization (which belonged to the territory or relate to it) constitute the *historical cultural or documentary sources* of that territory and therefore concern it alone, it cannot be obliged to hand over copies to the predecessor State, much less to any third State.

(5) It may be wondered whether paragraph 1 (b) of the article is still within the sphere of *State property*, since it concerns archives, and therefore property, which belonged or relate to a *territory*. However, since it concerns historical documents that antedate colonization, there are many cases involving archives relating to *States which disappeared* as a result of colonial conquest. Such archives are undeniably State historical property (as well as being property which is "proper" to the territory, as is the case at least for those archives which did in fact belong to the territory before colonization).

(6) To justify the new formulation of article 18, the Special Rapporteur wishes to add some details and examples to his previous commentaries, to which the reader is referred for the core of the matter.<sup>77</sup>

<sup>76</sup> Cf. the work of the International Law Commission on succession of States in respect of treaties, in connexion with newly independent States.

<sup>77</sup> See *Yearbook . . . 1970*, vol. II, pp. 151-161, and in particular, p. 159, document A/CN.4/226, part two, commentary to article 7; and *Yearbook . . . 1973*, vol. II, pp. 48 *et seq.*, document A/CN.4/267, part four, commentary to article 18.

<sup>74</sup> See above, para. 10 of the commentary to article 12; para. 2 of the commentary to article 13 and para. 4 of the commentary to article 16.

<sup>75</sup> See *Yearbook . . . 1973*, vol. II, pp. 47-49, document A/CN.4/267, article 18 and commentary.

(7) He recalls that archives relating to newly independent territories may be divided into three categories: first, historical archives proper, which antedate the beginning of colonization, second, archives of the colonial period, relating to the *imperium* and *dominium* and, generally, to the policy of the colonial Power in the territory, and third, purely administrative and technical archives relating to the current administration of the territory.

There is no doubt that the principle of transfer should be respected as concerns the first and third categories. However, it would be unrealistic to expect the *immediate return of all* the archives referred to under the second.

(8) The Special Rapporteur considers it useful to add the following commentaries:

(a) *Background*

(9) The problem raised by the attribution of the archives of overseas territories is wholly contemporary. In the past the colonial Powers gave scant consideration to the question when ceding or abandoning one of their territories. There were two possibilities. Either the archives remained in the territory and shared its destiny. Such was the case of the local archives of the Spanish possessions in America. The new States of Latin America therefore had at their disposal a nucleus for constituting their own collections. Or else, as happened most frequently, the colonial Power repatriated the archives either by force or by agreement. Thus Spain, having ceded Louisiana to France in 1802, immediately repatriated all the archives and agreed to hand over to France only papers "relating to the limits and demarcation of the territory".<sup>78</sup>

Similarly, in 1864 Great Britain authorized the Ionian Islands to unite with Greece and transferred all the archives to London.<sup>79</sup>

France at an early stage practised a particular form of repatriation of archives: a royal edict of 1776 set up the *Dépôt des papiers publics des colonies*, which was to receive every year, in Versailles, "copies of registers of births, marriages and deaths, notaries' records, papers, court records etc."<sup>80</sup> This department still exists today, but now only receives the registers of births, marriages and deaths.

(10) Many examples could be given; not until the period following the Second World War, with decolonization, was an attempt made to find a uniform solution with regard to the devolution of archives. Decolonization revived the problem of archives and posed it in different terms, as until that time the question had always related to the passing of a territory from one sovereignty to another already constituted sovereignty, whereas it then became a question of a territory obtaining or recovering its own sovereignty.

<sup>78</sup> France, *Les archives dans la vie internationale*, *op. cit.*, pp. 41-42. However, when France in turn sold Louisiana to the United States, the Franco-American Treaty of 30 April 1803 provided for the handing over of "archives, papers, and documents relating to the lands and to sovereignty". (*ibid.*)

<sup>79</sup> *Ibid.*, p. 42.

<sup>80</sup> C. Laroche: "Les archives françaises d'outre-mer", *Comptes rendus mensuels des séances de l'Académie des sciences d'outre-mer*, (Paris), vol. XXVI, No. III (March 1966), pp. 124-125.

(b) *Principle of the transfer of archives to the successor State*

(11) Although it seems that there should be no doubt concerning the principle, this question has not yet been satisfactorily settled. This may be explained in part by the diversity of situations: variety of local conditions, of the preceding status and of the degree of administrative organization left by the colonial Power in the territory.

(12) The attribution of archives therefore seems to have been decided case by case, naturally on the basis of the degree of importance of the documents for the newly independent territory and for the former metropolitan country, but especially on the basis of the "balance of power". It is stated in the publication of the French Direction des archives already quoted that

It appears undeniable that the metropolitan country should hand over to States that achieve independence in the first place the archives which antedate the colonial régime\*, which are without question the property of the territory. It also has the duty to hand over all documents which make it possible to ensure the continuity of administrative activity and to preserve the interests of the local population\*. . . As a result, the titles to property of the State and of semi-public institutions, documents concerning public buildings, railways, public highways, cadastral documents, census results, local registers of births, marriages and deaths etc., shall normally be handed over with the territory itself. This supposes the regular handing over of the local administrative archives to the new authorities. It is regrettable that the conditions in which the passing of power from one authority to another occurred did not always make it possible to ensure the regularity of this handing over of archives, which may be considered indispensable.<sup>81</sup>

(13) Continuing to consider the question, the Conference puts forward the opinion, also expressed by the Special Rapporteur in his previous reports, that the principle of transfer may be difficult to apply to archives connected with the *imperium* and *dominium* of the former metropolitan country:

There have appeared to be legal grounds for distinguishing in the matter of archives between sovereignty collections and administrative collections: the former, concerning essentially the relations between the metropolitan country and its representatives in the territory, whose competence extended to diplomatic, military and high policy matters, fall within the jurisdiction of the metropolitan country, whose history they directly concern.\*<sup>82</sup>

(14) Another author expresses the same opinion:

Emancipation raises a new problem. The right of new States to possess the archives which are indispensable to the defence of their rights, the fulfilment of their obligations, the continuity of the administration of the population, remains unquestionable. However, there are other categories of archives kept in a territory, of no immediate practical interest to the successor State, which concern primarily the colonial Power. On closer consideration, such archives are of the same kind as those which, under most circumstances in European history, unquestionably remain the property of the ceding States.<sup>83</sup>

<sup>81</sup> France, *Les archives dans la vie internationale*, *op. cit.*, pp. 43-44.

<sup>82</sup> *Ibid.* It should, however, be noted that, as the Special Rapporteur has already pointed out (see paras. 2 and 3 above) that the documents also directly concern the history of the newly independent State.

<sup>83</sup> C. Laroche, *loc. cit.*, p. 130 (the author was Chief Conservator of the Overseas section of the French national archives). (This judgement should be tempered, as the Special Rapporteur has indicated in foot-note 82 and paras. 2, 3 and 13 above.)

(15) According to this view, the archives connected with *imperium* would absolutely not belong to the territory. This is no doubt an exaggerated point of view in that the exception made to the principle of transfer for archives connected with *imperium* relates less to the principle of belonging than to considerations of expediency and politics: what is involved, of course, is the importance of good relations between the predecessor State and the successor State, and also at times the viability of the newly independent State.

In the interest of such relations it may perhaps be advisable to avoid argument on the subject of "political" archives or archives "connected with sovereignty", since they refer to the policy followed by the colonial Power *within* its dependent territory. For example, archives concerning general policy with regard to the territory, or a repressive policy against its liberation movements, are not to be confused with administrative archives or archives concerning the day-to-day management of the territory, but form part of the political archives or archives connected with sovereignty. It is probably unrealistic to expect the predecessor State to hand them over. But the section of the political archives or archives connected with sovereignty which is concerned with policy carried on *outside* the territory and on its behalf by the colonial Power (conclusion of treaties applied to the territory, diplomatic documents concerning the relations between the colonial Power and third States in respect of the territory, and in particular diplomatic documents concerning the delimitation of its frontiers), unquestionably concern *also* (and sometimes even *primarily*, in the event of a dispute or conflict with a third State) the newly independent State.

(16) In practice decolonization has unfortunately not taken these aspects of the problem sufficiently into account. For example Algeria, in the frontier disputes it faced upon gaining its independence, was unable to obtain access to the diplomatic documents held by France relating to the problem during the colonial period.<sup>84</sup> Similarly, France transferred to Viet-Nam the archives established by the Imperial Government before the French conquest together with the archives necessary for the administration of the country,<sup>85</sup> but it retained all the archives connected with its own internal and external sovereignty in diplomatic, military and political matters.<sup>86</sup> France seems to have followed a similar policy with regard to its former dependencies in Africa.

The United Kingdom and Belgium have followed an analogous policy: "In all cases the local archives of the territories were handed over, with the exception of papers relating to the sovereignty of the metropolitan country alone".<sup>87</sup>

<sup>84</sup> The case mentioned was all the more regrettable in that Algeria was also unable to recover its archives which *antedated* colonization. See *Yearbook . . . 1970*, vol. II, p. 159, document A/CN.4/226, part two, para. 37 of the commentary to article 7; and *Yearbook . . . 1973*, vol. II, p. 49, document A/CN.4/267, part four, para. 9 of the commentary to article 18.

<sup>85</sup> Agreement of 15 June 1950 concerning the apportionment of the archives of Indo-China.

<sup>86</sup> C. Laroche, *loc. cit.*, p. 132.

<sup>87</sup> France, *Les archives dans la vie internationale (op. cit.)*, p. 45.

(c) *Archives situated outside the territory (archives which have been removed)*

(17) The Special Rapporteur refers the reader to his previous reports, and recalls that this question is of particular importance in this type of succession, given the frequency with which archives are repatriated by the former metropolitan country. The "Journées d'études sur les archives et l'histoire africaines" (Seminar on African archives and history) held at Dakar from 1 to 8 October 1965, recognized its importance and therefore made the following recommendation:

Considering the successive disruptions of the political and administrative structures of African countries, the participants hope that wherever transfers have infringed the principles of the territoriality of archives and the indivisibility of collections, the situation will be remedied by restitution, or by other appropriate measures.<sup>88</sup>

(18) UNESCO, too, has taken action in this field. Reference has already been made to its resolution on the subject.<sup>89</sup> Its intervention would seem to be beneficial, for it takes timely action as the international organization more concerned than any other with the preservation of historical and cultural heritages, and is free from any preoccupation with national pride.

#### *Article 19. State property situated outside the territory of the newly independent State*

**Property of the predecessor State which is situated in a third State shall be apportioned between the predecessor State and the newly independent State proportionately to the contribution of the territory which has become independent to the creation of such property.**

#### COMMENTARY

(1) The previous article 19 in the 1973 report contained two paragraphs, the first of which dealt with public property proper to the territory which had become independent. Since only the problem of State property is being considered at present, paragraph 1 has been dropped from the new article.

(2) Article 19 is therefore reduced to paragraph 2 of the former text. The end of the paragraph, in the 1973 text, read: "proportionately to the latter's [the newly independent State's] contribution to the creation of such property". It was, of course, the *territory* which later became independent which contributed to the creation of the property in question.

(3) With regard to the substance, the Special Rapporteur refers the reader to his commentaries to the 1973 version of article 19.<sup>90</sup>

#### SUB-SECTION 3. UNITING OF STATES AND DISSOLUTION OF UNIONS

##### *Article 20. Currency*

**1. The union shall receive the assets of the institution of issue and the gold and foreign exchange reserves of**

<sup>88</sup> C. Laroche, *loc. cit.*, p. 139.

<sup>89</sup> See above, para. 18 of the commentary to article 18.

<sup>90</sup> See *Yearbook . . . 1973*, vol. II, p. 52, document A/CN.4/267, paras. 14-16 of the commentary to article 19.

each of its constituent States, except where the degree of their integration in the union or treaty provisions allow each State to retain all or part of such State property.

2. In the event of dissolution of the union, the assets of the joint institution of issue and the gold and foreign exchange reserves of the union shall be apportioned in proportion to the volume of currency circulating or held in the territory of each of the successor States.

#### COMMENTARY

(1) Article 20 leaves aside the question of the privilege of issue for the reasons stated a number of times in this report.<sup>91</sup>

(2) Paragraph 1 of the article fills a loophole left by the 1973 article. This paragraph envisages the normal situation in which union is accompanied by monetary unification, which involves amalgamation of the institutions of issue and the pooling of gold and foreign exchange reserves. The text is quite straightforward and calls for no special observations.

(3) Paragraph 2 relates to the reverse phenomenon of dissolution of a union and reproduces the corresponding paragraph of the former article, but contains in addition a reference to gold and foreign exchange reserves and clarifies the *pro parte* sharing formula used in the sixth report. The apportionment of the assets of the joint institution of issue and of gold and foreign exchange reserves must, to be fully equitable, be made in proportion to the volume of currency circulating or held in each territory of the union which becomes a successor State.

(4) This form of apportionment was used at the dissolution of the Federation of Rhodesia and Nyasaland.<sup>92</sup> With one variation, the same method was used at the dissolution of the East African Currency Board, following the establishment of the institutions of issue of Kenya, Tanzania and Uganda.<sup>93</sup> Once again, the principle of a *pro rata* distribution of assets according to the volume of currency in circulation proper to each territory seems to be authoritative in this respect.

It is considered that, in this case, it fulfils the requirements of equity better than the previous formula set out in the sixth report. The term "*pro parte*" in effect eschews all economic, financial or even geographical considerations, relying only on the principle of legal equality. This equality would be destroyed, however, if one territory within a union contributing more than another territory to the economic life of that union found, upon the apportionment of assets, that it had been deprived of a portion of the results of its capacity.

Distribution in proportion to the number of States involved is carried out mainly in respect of assets other

<sup>91</sup> See above, paras. 1 *et seq.* of the commentary to article 12 and paras. 2 and 3 of the commentary to article 16.

<sup>92</sup> D. P. O'Connell, *State Succession in Municipal and International Law*, vol. I, *Internal Relations* (Cambridge, University Press, 1967), p. 196.

<sup>93</sup> *Ibid.*, p. 197.

than reserves, such as the immovable property of the institution of issue.<sup>94</sup>

#### Article 21. Treasury and State funds

1. The union shall receive as its patrimony the State funds and Treasuries of each of its constituent States, except where the degree of their integration in the union or treaty provisions allow each State to retain all or part of such property.

2. In the event of dissolution of the union, the funds and Treasury of the union shall be apportioned equitably between its constituent States.

#### COMMENTARY

Article 21 above corresponds to the 1973 article 21, to the commentary to which the Special Rapporteur refers the reader.<sup>95</sup>

#### Article 22. State archives and libraries

1. Except where otherwise specified in treaty provisions aimed at the establishment of a collection of common central archives, archives and documents of every kind belonging to a State which unites with one or more other States, and its libraries, shall remain its property.

2. In the event of dissolution, the central archives of the union and its libraries shall be placed in the charge of the successor State to which they relate most closely or apportioned between the successor States in accordance with any other criteria of equity.

#### COMMENTARY

(1) Article 22 above is almost identical with article 22 of the sixth report. Accordingly, the Special Rapporteur refers the reader to his commentary on that article.<sup>96</sup>

(2) It will be recalled that the principle applied in cases of uniting of States left the predecessor State in possession of its archives, except where otherwise specified in treaty provisions, on the grounds that historical archives are of interest and the administrative archives are of use to that State alone. In this connexion, an old but significant example which can be added to those given is that of the *unification of Spain* during the fifteenth and sixteenth centuries. That union was effected in such a way that the individual kingdoms received varying degrees of autonomy, embodied in appropriate organs such as councils and viceroalties. Consequently, there was no centralization of archives. The present organization of Spanish archives is still profoundly influenced by that system.<sup>97</sup>

<sup>94</sup> See Convention on the transfer of the department of issue to Mali of 21 July 1962 in M. Leduc: *Les institutions monétaires africaines* (Paris, Pédone, 1965), p. 264. See also G. Burdeau (*op. cit.*), pp. 278-288, who also provides a number of examples relating to apportionment, together with the derogations from provisions which have occurred in practice.

<sup>95</sup> See *Yearbook . . . 1973*, vol. II, pp. 52-53, document A/CN.4/267, part four, commentary to article 21.

<sup>96</sup> *Ibid.*, pp. 53-54.

<sup>97</sup> France, *Les archives dans la vie internationale (op. cit.)*, p. 13.

(2) In the event of dissolution of the union, each successor State receives the archives relating to its territory. If they are divisible, the central archives of the union are apportioned among the successors or, if they are not divisible, are placed in the charge of the successor State to which they relate most closely. The Special Rapporteur, who has cited the case of the Icelandic archives, reclaimed following the dissolution of the Union between Denmark and Iceland,<sup>98</sup> also refers the reader to Professor Verzijl's recent study of this problem.<sup>99</sup>

**Article 23. State property situated outside the territory of the union**

1. State property situated outside the territory of the union and belonging to the constituent States shall, unless otherwise stipulated by treaty, become the property of the union.

2. Property of the union situated outside its territory shall, in the event of dissolution of the union, be apportioned equitably between the successor States.

COMMENTARY

As article 23 reproduces without modification the corresponding article in the sixth report, the Special Rapporteur refers the reader to his commentary to that article.<sup>100</sup>

SUB-SECTION 4. DISAPPEARANCE OF A STATE THROUGH PARTITION OR ABSORPTION

[Articles 24-27]  
[Sub-section deleted]

As the Special Rapporteur has deleted the disappearance of States from his list of types of State succession, articles 24, 25, 26 and 27 no longer serve any purpose.

SUB-SECTION 5. SECESSION OR SEPARATION OF ONE OR MORE PARTS OF ONE OR MORE STATES

**Article 28. Currency**

1. The successor State shall have at its disposal the currency, gold and foreign exchange reserves and all monetary tokens placed in circulation or stored by the predecessor State in the detached territory and allocated to that territory.

2. It shall have at its disposal the assets of the institution of issue in proportion to the volume of currency circulating or held in the detached territory.

<sup>98</sup> See *Yearbook . . . 1970*, vol. II, p. 156, document A/CN.4/226, part two, para. 22 of the commentary to article 7; *Yearbook . . . 1973*, vol. II, p. 53, document A/CN.4/267, part four, para. 5 of the commentary to article 22.

<sup>99</sup> See J. H. W. Verzijl, *International Law in historical perspective* (Leyden, Sijthoff, 1974), vol. VII, p. 153.

<sup>100</sup> See *Yearbook . . . 1973*, vol. II, p. 54, document A/CN.4/267, commentary to article 23.

COMMENTARY

(1) For the reasons already explained in respect of other types of succession of States (articles 12, 16 and 20), the question of privilege of issue is no longer mentioned in this article.

(2) This article is very similar to article 16 relating to currency in territories which have become independent. It is also similar to article 12 concerning currency in cases of transfer of territory. This similarity will facilitate the task of the Commission in bringing together, when the time comes, under a single rule the various provisions dealing with the currency questions involved in each type of succession.

108. Accordingly, for the sake of convenience, the Special Rapporteur refers the reader to commentary articles 12 and 16 in his sixth report<sup>101</sup> and in the present report, at least as concerns the considerations of a general nature which apply equally to the article currently being examined and to the two others mentioned.

**Article 29. State funds and Treasury**

1. Liquid or invested funds which have been allocated by the predecessor State to the detached territory shall pass to the successor State.

2. The assets and holdings of the Treasury which have been allocated by the predecessor State to the detached territory shall pass to the successor State.

COMMENTARY

(1) The 1973 article 29 read as follows:

1. Irrespective of their geographical location, public funds and Treasury which are proper to the detached territory shall not be affected by the change of sovereignty.

2. The State fortune—its public funds and Treasury assets—shall be apportioned between the predecessor State and the successor State, due regard being had to the criteria of viability of each of the States.

(2) Paragraph 1 refers to property *proper* to the detached territory and should therefore be deleted, since we are concerned here only with State property. Paragraph 2 relates essentially to a peaceful separation of territory, taking place with the consent of the predecessor State and allowing an equitable apportionment of State funds and the Treasury. Such a situation is rare, as witness recent events in Bangladesh.

(3) For this reason, after lengthy consideration, the Special Rapporteur thinks it better to propose a new article 29 based directly on article 17 relating to the situation of newly independent States, which most closely resembles the situation of secession or separation. Accordingly, the Special Rapporteur proposes a more modest solution which simply states that the funds and Treasury situated in the seceding territory should revert to that territory, which cannot realistically expect to obtain anything more, such as, for example, its share of the central funds and Treasury. In the case of the present

<sup>101</sup> *Ibid.*, pp. 34-36 and 45-47.

article 29, as in that of article 17, the International Law Commission will decide whether it is possible to go further in seeking an equitable and viable solution for each of the two separating parties.

(4) As in the case of article 17, the Commission may combine the two paragraphs of the present article 29 in a single paragraph providing that "Liquid or invested funds and Treasury assets and holdings which have been allocated by the predecessor State to the detached territory shall pass to the successor State."

#### *Article 30. State archives*

1. State archives and documents of every kind relating directly to a territory which has become detached in order to form a separate State shall, irrespective of where they are situated, pass to the latter State.

2. The successor State shall not refuse to hand over copies of such items to the predecessor State or to any third State concerned, upon the request and at the expense of the latter State, save where considerations of security or sovereignty require otherwise.

#### COMMENTARY

(1) The above article resembles article 30 in the sixth report.<sup>102</sup> However, the case of archives "belonging to the territory" has been omitted from paragraph 1, since such archives are not the property of the State but are proper to the territory and there is no doubt as to what should be done with them. For the same reasons, the Special Rapporteur has made no reference to "libraries belonging to the territory" (which has entailed amending both the title and paragraph 1 of the article).

(2) Paragraph 2 of the article, apart from some changes of style, corresponds to paragraph 2 of article 30 in the sixth report.

#### *Article 31. Property situated outside the detached territory*

Property of the predecessor State which is situated in a third State shall become the property of the successor State in proportion to the contribution of the detached territory to the creation of such property.

#### COMMENTARY

Paragraph 1 of the 1973 article 31, which concerned property belonging to the detached territory, has been

deleted. As far as the remainder of the article is concerned, the Special Rapporteur refers the reader to his commentaries on the previous article 31.<sup>103</sup>

### Conclusion

17. With article 31, the Special Rapporteur concludes his study of *succession of States in respect of State property*. The other categories of public property (property proper to the territory to which the succession of States relates, property of public establishments, property of territorial authorities, property of foundations), which were dealt with in articles 32 to 40 of the Special Rapporteur's sixth report, will be considered later by the International Law Commission, if time permits. Consequently, the Special Rapporteur presents for consideration by the Commission only draft articles 1 to 31, relating to succession of States in respect of State property. As the Commission provisionally adopted articles 1 to 8 at its twenty-fifth session, it now remains for it to consider articles 9 to 31 together with articles X, Y and Z inserted after article 11 at the end of the general provisions and relating to questions of the property of third States.

18. As it proceeds with its consideration of these articles, the Commission may wish to reduce their number by combining various articles and by devoting only one to each subject (currency, State funds and Treasury, State archives, property situated outside the territory).

19. Having completed this first part on the subject of State property, the Special Rapporteur is of the opinion that, before considering the other categories of public property, the Commission should give careful consideration to the question of *public debts*. To ensure a parallel approach, the Special Rapporteur intends to devote his next report to *State debts*. In this way, consideration of the first part (*succession of States in respect of State property*), which is the subject of the present report, can be followed immediately by consideration of a second part dealing with *succession of States in respect of State debts*. In view of the extent and complexity of the question of succession of States in respect of matters other than treaties, and since the International Law Commission's very heavy programme has delayed consideration of this question, *the Special Rapporteur therefore suggests that the Commission confine itself to consideration of State property and immediately afterwards to consideration of State debts*. If time permits, the Commission can consider the other categories of public property and public debts later.

<sup>102</sup> *Ibid.*, pp. 57-58, article 30 and commentary.

<sup>103</sup> *Ibid.*, pp. 58-59, article 31 and commentary.



# MOST-FAVoured-NATION CLAUSE

[Agenda item 6]

DOCUMENT A/CN.4/280

Fifth report on the most-favoured-nation clause by Mr. Endre Ustor, Special Rapporteur

*Draft articles with commentaries\**

[Original: English]  
[26 April 1974]

## CONTENTS

	<i>Page</i>
<i>Abbreviations</i> . . . . .	117
Article 6 <i>bis</i> Effect of an unconditional most-favoured-nations clause . . . . .	118
Article 6 <i>ter</i> Effect of a most-favoured-nation clause conditional on material reciprocity . . . . .	118
Commentary on articles 6 <i>bis</i> and 6 <i>ter</i> . . . . .	118
Article 6 <i>quater</i> Observance of the laws and regulations of the granting State . . . . .	121
Commentary . . . . .	121
Article 7 <i>bis</i> The scope of the most-favoured-nation clause regarding persons and things . . . . .	122
Commentary . . . . .	122
Article 9 National treatment clause . . . . .	124
Article 10 National treatment . . . . .	124
Commentary on articles 9 and 10 . . . . .	124
Article 10 <i>bis</i> National treatment in federal States . . . . .	125
Commentary . . . . .	126
Article 11 Effect of an unconditional national treatment clause . . . . .	126
Article 12 Effect of a national treatment clause conditional on material reciprocity . . . . .	126
Commentary on articles 11 and 12 . . . . .	126
Article 13 The right of the beneficiary State under a most-favoured-nation clause to national treatment . . . . .	126
Commentary . . . . .	126
Article 14 Cumulation of national treatment and most-favoured-nation treatment . . . . .	128
Commentary . . . . .	128
Article 15 The commencement of the functioning of a most-favoured-nation clause . . . . .	129
Commentary . . . . .	130
Article 16 Termination or suspension of the functioning of a most-favoured-nation clause . . . . .	132
Commentary . . . . .	132

## ABBREVIATIONS

GATT	General Agreement on Tariffs and Trade
I.C.J.	International Court of Justice
<i>I.C.J. Reports</i>	I.C.J., Reports of Judgments, Advisory Opinions and Orders

\* For the text of draft articles 1 to 8, see the third and fourth reports.

**Article 6 bis. Effect of an unconditional most-favoured-nation clause**

1. Under an unconditional most-favoured-nation clause the beneficiary State acquires the right to treatment not less favourable than that accorded by the granting State to a third State, without the obligation to reciprocate the same treatment in kind to the granting State.

2. Paragraph 1 applies irrespective of whether the treatment in question has been accorded by the granting State to a third State gratuitously, or subject to material reciprocity or against any other compensation.

**Article 6 ter. Effect of a most-favoured-nation clause conditional on material reciprocity**

1. Under a most-favoured-nation clause conditional on material reciprocity the beneficiary State acquires the right to treatment not less favourable than that accorded by the granting State to a third State only against reciprocating the same treatment in kind to the granting State.

2. Paragraph 1 applies irrespective of whether the treatment in question has been accorded by the granting State to a third State gratuitously or subject to material reciprocity or against any other compensation.

COMMENTARY TO ARTICLES 6 bis AND 6 ter

(1) Articles 6 bis and 6 ter are an elaboration on the rule proposed in article 6.<sup>1</sup> In case of their adoption the wording of article 6 could be reduced to its first phrase: "Except when in appropriate cases most-favoured-nation treatment is accorded under the condition of material reciprocity, the most-favoured-nation clause is unconditional".

(2) Article 6 states first a simple presumption which clearly follows from the general rules of interpretation but it also implies that for the purpose of the codification of the living rules of international law pertaining to the clause we have to deal with two kinds of clause only: the unconditional one and the one coupled with the proviso that the beneficiary State can claim the benefits accorded by the granting State to a third State only if it (the beneficiary State) reciprocates in kind, i.e., if it accords the same favours to the granting State (material reciprocity).<sup>2</sup>

(3) The purpose of article 6 bis is to explain the functioning, the operation of an unconditional most-favoured-nation clause. This explanation is useful also because definition is not very simple. Indeed, the promise of most-favoured-treatment is in most cases bilateral or multilateral. Hence it is in fact tied to a reciprocal grant. However, the promise to accord most-favoured-treatment does not become conditional by the mere fact that it is coupled with a counter-promise of the beneficiary to treat the grantor equally on a most-favoured-nation basis, i.e. by the establishment of a formal reciprocity. What makes a most-favoured-nation clause conditional (condi-

tional on material reciprocity) is the coupling of the reciprocal promises of most-favoured-nation treatment with the proviso that such treatment is due only if the respective beneficiary States will not only formally but materially reciprocate, i.e., they will grant each other (their respective nationals etc.) the same favours as they (their nationals etc.) expect to enjoy from the other. What is promised by and expected from an unconditional clause is the same treatment in relation to the treatment of others. In the case of a clause conditional upon material reciprocity the promise of the grantor is also treatment on the same level as that accorded to any other third State but only on the condition that the granting State (its nationals etc.) will receive materially the same favours from the beneficiary as the latter (its nationals etc.) expect to enjoy from the granting State.

(4) Article 6 bis—as all other articles—is based on the assumption that in all most-favoured-nation clauses of treaties—except the relatively rare unilateral grants—each party is at the same time granting State and beneficiary State, i.e., that, in the case of a bilateral treaty, there are at least two reciprocal promises.<sup>3</sup> It follows that in the case of a bilateral clause the grant of unconditional most-favoured-nation treatment against a promise of a similar grant in turn is not considered to be a "condition" in this context, although it may actually have that effect. (If it is withdrawn, the reciprocal grant may be terminated in retaliation.) A clause becomes conditional only if the promise of most-favoured-nation treatment is bound to some other condition than a counter-promise of (unconditional) most-favoured-nation treatment. This other condition could be in principle anything, any event or any grant (prestation) from the beneficiary. The practical case is, however, that the condition to which the promise is bound is a materially identical or similar treatment to be accorded by the beneficiary to the granting State. Hence article 6 bis, paragraph 1 may not be satisfactory from the point of principle. From that point of view the last phrase of the sentence "without the obligation to reciprocate . . ." would be better substituted by the words "without any conditions". However, to avoid a rule suffering from the defect of an *idem per idem* definition and because of practical considerations,<sup>4</sup> the Special Rapporteur decided to submit tentatively the text as drafted in article 6 bis, paragraph 1.

(5) Not only the clauses but also the favours accorded by the granting State to third States can be classified in a similar manner: they can be granted unilaterally as a gift—in theory at least—or they can be accorded against some kind of compensation. For example, State X reduces its tariffs on oranges imported from State Y against the reduction by State Y of its tariff on textiles imported from X. If State X has made a most-favoured-nation pledge to State A, it has to concede the same reduced rate of tariffs on the oranges imported from that State as it has conceded to State Y, and it has no right to claim from State A a reduction of its tariffs on textiles or any other concession in turn.

<sup>1</sup> See *Yearbook . . . 1973*, vol. II, p. 98, document A/CN.4/266.

<sup>2</sup> *Ibid.*, pp. 99-101 and 102, paras. 11-17 and 21 of the commentary to article. 6.

<sup>3</sup> *Ibid.*, p. 214, document A/9010/Rev.1, chap. IV, B, para. 4 of the commentary to article 2.

<sup>4</sup> See para. 2 above.

(6) The deal between State X (the granting State) and State Y (a third State) described above—the reciprocal tariff-reduction on oranges and textiles—can of course be called material, in the sense that it may be based on a precise calculation of the mutual advantages accruing therefrom for each party. This is, however, not the stipulation of material reciprocity as understood for the purpose of the present report. To explain this notion we have to depart from the field of commerce and customs duties, where the absolute identity of the mutual grants is relatively unusual: two contracting States rarely export and import the same goods or commodities to and from each other. Material or effective reciprocity (*réciprocité trait pour trait*) appears—the reader is reminded—in treaties on consular immunities and functions, on matters of private international law, on establishment, etc. Here the contracting parties grant each other the same immunity for their nationals, the same facilities concerning access to courts and the same exemption from depositing a *cautio judicatum solvi*, etc.

(7) Seen from this angle and simplified for the present purposes, the possible cases which have to be dealt with fall in the following four categories:

(a) an unconditional most-favoured-nation clause and favours granted to a third State not conditional on material reciprocity or not conditional on any other compensation;

(b) an unconditional most-favoured-nation clause and favours accorded to a third State on condition of effective reciprocity or on condition of other compensation;

(c) a most-favoured-nation clause conditional on material reciprocity and favours accorded to a third State not conditional upon material reciprocity or on any other compensation; and

(d) a most-favoured-nation clause as under (c) and favours accorded to a third State conditional on material reciprocity or against other compensation.

(a) and (b) are the cases dealt with by article 6 *bis*, and (c) and (d) by article 6 *ter*.

(8) The situation is relatively simple if in the case of an unconditional most-favoured-nation clause the favours in question, i.e. those accorded by the granting State to a third State, are not themselves coupled with the condition of material reciprocity (case (a)). If they are, then the question arises: will an unconditional most-favoured-nation clause attract benefits granted subject to material reciprocity, without compensation, i.e., can a State beneficiary of an unconditional most-favoured-nation clause claim the favours accorded by the granting State to a third State on condition of material reciprocity, even if the beneficiary State itself does not offer material reciprocity to the granting State for the favours it claims?

(9) There is a contradictory practice regarding the question just posed. In certain cases the courts reached conclusions different from that proposed in article 6 *bis*. Thus the highest court of Argentina rejected in 1919 an appeal against a decision of the High Court of Santa Fé and ruled:

... that neither the appellant's invocation of the powers conferred upon consuls under the treaties concluded with the United Kingdom

in 1825 (article 13) and with the Kingdom of Prussia and the States of the German Customs Union in 1857 (article 9), which he claims extend to consuls of the Kingdom of Italy by virtue of the most-favoured-nation clause inserted in the agreements concluded with that Kingdom, nor precedent—if any— would affect the settlement of the point at issue under federal law. In the first place, since these were concessions granted subject to reciprocity, it would have been necessary to show that the Italian Government granted, or was prepared to grant, those same concessions to consuls of Argentina ...<sup>5</sup>

(10) A German court in 1922 rejected an appeal by a French plaintiff against an order to deposit security for costs in an action brought by him against a German subject. Section 110 of the German Code of Civil Procedure laid down that aliens appearing as plaintiffs before German courts must at the defendant's request deposit a security for costs. This provision did not apply to aliens whose own State did not demand security for costs from Germans appearing as plaintiffs. In article 291 (I) of the Treaty of Versailles Germany undertook to secure to the Allied and Associated Powers, and to the officials and nationals of the said Powers, the enjoyment of all the rights and advantages of any kind which she may have granted to Austria, Hungary, Bulgaria or Turkey, or to the officials and nationals of these States by treaties, conventions or arrangements concluded before August 1, 1914, so long as those treaties, conventions or arrangements remain in force.

There existed between Germany and Bulgaria a treaty providing for the exemption, on the basis of reciprocity, from the duty to deposit security for costs. In a note, communicated to Germany in April 1921, the French Government informed the German Government that it wished to avail itself of the relevant provisions of the Treaty between Germany and Bulgaria. The plaintiff did not prove that in France subjects were exempt from depositing security for costs in actions brought against French subjects. The Upper District Court held that the appeal must be dismissed. Article 291 of the Treaty of Versailles, according to the court, did not oblige Germany to grant to French subjects wider privileges than those granted to the subjects of the former Central Power. The court said that the treaty with Bulgaria was based on reciprocity and that, as France did not grant such reciprocal treatment, her subjects were not entitled to an exemption from the duty to deposit security for costs.<sup>6</sup>

(11) The practice of the French courts seems to differ from the above-quoted Argentine and German decisions. The following instance, although coloured with references to French internal legislation, reveals the French thinking on the problem at issue. The brothers Betsou, Greek subjects, in 1917 leased certain premises in Paris for commercial use. The lease expired in 1926. The lessors refused to renew the lease, whereupon the plaintiffs claimed 200,000 francs as damages for eviction. Their claim was based on the provisions of the Law of 30 June 1926, which granted certain privileges to those engaged in business activities. In support of their claim to the privileges of this law in spite of their foreign nationality, they cited the Franco-Greek Convention of 8 September 1926, and through the operation of the most-

<sup>5</sup> See *Yearbook* ... 1973, vol. II, p. 117, document A/CN.4/269, foot-note 2.

<sup>6</sup> *Ibid.*, p. 128, document A/CN.4/269, paras. 24-25.

favoured-nation clause, the Franco-Danish convention of 9 February 1910, Denmark being in this regard the most-favoured-nation. Article 19 of the Law of 1926 provided that aliens should be entitled to its privileges only subject to reciprocity. The Civil Tribunal of the Seine held for the plaintiffs and said that through the operation of the most-favoured-nation clause, Greek subjects in France enjoyed the same privileges in commerce and industry as Danish subjects. The Franco-Danish Convention stipulated that in the exercise of their commercial activities Danes enjoyed all the privileges granted to French nationals by subsequent legislation. The Law of 30 June 1926 undoubtedly conferred privileges upon those who were engaged in commerce. Although the terms of article 19 of the Convention required reciprocity in legislation as an absolute and imperative rule, and although there was no legislation on commercial property in Denmark, the French law should be interpreted in accordance with the Franco-Danish convention. Danish subjects could not be deprived of their rights and privileges by subsequent French legislation. The Tribunal said:

A convention between nations, as a contract between private persons, is a reciprocal engagement which should be observed by both parties so long as the treaty is not denounced or replaced by a new treaty which restricts the effects of the original contract.

The Court of Appeal of Paris, reversing the decision of the Tribunal of the Seine, held that the brothers Betsou could not claim a right to the renewal of their lease. The Law of 30 June 1926 clearly showed that it construed the right of commercial property as *un droit civil stricto sensu*, that is to say, as a right subject to the provision of article 11 of the Civil Code which made the enjoyment of rights by foreigners dependent upon the reciprocal treatment of French subjects abroad. In the Franco-Danish treaty it had been carefully stated that the nationals of the two States would only enjoy the rights and privileges stipulated in so far as those rights and privileges were compatible with the existing legislation of the two States, and Danish legislation did not recognize the rights of foreigners to hold commercial property in Denmark.<sup>7</sup>

(12) An important French source finds the solution of the lower court, the Civil Tribunal of the Seine, justified. According to this source, "reciprocity (whether that of article 11 of the Civil Code or that deriving from a reciprocity clause) is concrete reciprocity. On the other hand, the most-favoured-nation clause, when it is bilateral, establishes a kind of abstract reciprocity."<sup>8</sup>

(13) A convincing motivation for the solution proposed in article 6 *bis* can be found in a Greek decision reported as follows: The Convention concerning Establishment and Judicial Protection concluded between Greece and Switzerland on 1 December 1927 provides in article 9 that in no case shall the nationals of either of the Contracting Parties be subjected on the territory of the other Contracting Party to charges, customs duties, taxes, dues or contributions of any nature different from or higher than those which are or will be imposed on subjects of the most-favoured-nation.

<sup>7</sup> *Ibid.*, p. 129, document A/CN.4/269, paras. 28-30.

<sup>8</sup> P. Level, "Clause de la nation la plus favorisée" in *Encyclopédie Dalloz—Droit international* (Paris, Dalloz, 1968), vol. I, p. 338.

Article II, which relates to commercial, industrial, agricultural and financial companies, duly constituted according to the laws of one of the Contracting Parties and having their *siège* on its territory, provides that the said companies

shall enjoy, in every respect, the benefits accorded by the most-favoured-nation clause to similar companies, and, in particular they shall not be subjected to any fiscal contribution or charge, of whatever kind and however called, different from or higher than those which are or will be levied on companies of the most-favoured-nation.

The appellant in this case, a Swiss company whose head office was situated in Geneva, claimed exemption from income tax, invoking in support of that claim the Anglo-Greek Convention of 1936 for the Reciprocal Exemption from Income Tax on Certain Profits or Gains Arising from an Agency. Under that convention, the profits or gains arising in Greece to a person resident, or to a body corporate whose business is managed and controlled in the United Kingdom, were exempted from income tax on condition of reciprocity. It was held that the appellant was entitled to fiscal exemption. It was said:

Whereas, in economic treaties in particular, the purpose of the most-favoured-nation clause is to avoid the danger that the subjects of Contracting States might possibly be placed in an unfavourable position compared with subjects of other States in the context of international economic competition. Through the operation of that clause, each of the two Contracting States grants to the other the favours which it has already granted to a third State and undertakes to grant it any favour which it may grant to a third State in future, for the duration of the treaty. Provided that there is no stipulation to the contrary in the agreement, such latter favour accrue *ipso jure* to the beneficiary of the clause, which does not have to furnish any additional compensation, even where the concessions granted to the third State are not unilateral but are subject to reciprocity. When interpreted in that sense, the clause achieves the purpose for which it was designed, namely, assimilation in each of the two States, in respect of the matters to which the clause relates, of the subjects or enterprises of the other State to the subjects or enterprises of a third and favoured country.

Whereas, in the current case, the most-favoured-nation clause embodied in the convention between Greece and Switzerland is simply stated without restriction or onerous conditions, and as such confers upon Swiss enterprises operating in Greece the right to fiscal exemption under the conditions under which the same exemption is granted to British enterprises, even if Greek enterprises do not enjoy in Switzerland the favour which they enjoy in Great Britain. Consequently, the impugned decision . . . should for that reason be set aside.<sup>9</sup>

(14) Article 6 *ter* does not need a lengthy explanation. It elucidates simply the operation of the clause conditional on material reciprocity without going into a detailed consideration of the difficulties of interpretation involved.<sup>10</sup> As to paragraph 2 of article 6 *ter*, it is believed that it follows from the foregoing that from the point of view of the operation of a clause conditional on material reciprocity it is also irrelevant whether or not the favour accorded by the granting State to the third State is granted against material reciprocity.

<sup>9</sup> *Yearbook . . . 1973*, vol. II, p. 138, document A/CN.4/269, paras. 58-59.

<sup>10</sup> *Ibid.*, p. 100, document A/CN.4/266, para. 16 of the commentary to article 6. See also H. Batiffol, *Droit international privé*, 4th ed. (Paris, Librairie Générale de droit et de jurisprudence, 1967), pp. 213-216.

**Article 6 quater. Observance of the laws and regulations of the granting State**

**Without prejudice to the right to most-favoured-nation treatment acquired by the beneficiary State under a most-favoured-nation clause the persons and things enjoying the favours deriving from that treatment are subject to the laws and regulations of the granting State.**

COMMENTARY

(1) An unconditional most-favoured-nation clause entitles the beneficiary State to the exercise or the enjoyment of the rights indicated in the clause without compensation and without any conditions. These rights are exercised or enjoyed in ordinary cases by the nationals, ships, products, etc. of the beneficiary State. The meaning of the expression "without any conditions" in this context is that the right of the beneficiary State and the right of its nationals, ships, products, etc. derived therefrom cannot be made dependent on the right exercised or enjoyed by the granting State (its nationals, ships, products, etc.) in the beneficiary State. The element of unconditionality, however, cannot be stretched so wide as to absolve the beneficiary State, i.e. its nationals, ships, products, etc. from the duty of respecting the internal laws and regulations of the granting State and to comply with them inasmuch as such compliance is expected and exerted from a third State, i.e. from its nationals, products, etc.

(2) The following case of recent vintage, decided by the French Court of Cassation explains fully the underlying idea of article 6 quater.

The appellant, an Italian citizen, was convicted under article 1 of the Decree of 12 November 1938 for having failed, as an alien, to obtain a trader's permit. He maintained that he was not required to be in possession of a trader's permit because by virtue of the most-favoured-nation clause contained in the Franco-Italian agreement of 17 May 1946 he was entitled to rely on the Franco-Spanish treaty of 7 January 1862, which gave Spanish citizens the right to carry on trade in France. The Public Prosecutor contended that the Franco-Spanish treaty did not exempt Spanish citizens from the requirements of obtaining a trader's permit, and that a letter of the French Minister for Foreign Affairs dated 15 April 1957 which stated that foreign nationals entitled to rely on treaties conferring the right to trade in France were not exempt from the requirement of obtaining traders' permits, was binding on the courts. The appeal was dismissed. The Court said:

The judgement under appeal, in view of the letter of the Minister for Foreign Affairs dated April 15, 1957, finds that the exercise of the right to trade in France which is granted to foreign nationals by international agreements does not exempt foreign nationals from the need to satisfy the necessary—as well as sufficient—requirement, namely, to be in possession of a traders' permit, and that this applies in particular to Italian nationals by virtue of the Franco-Italian Agreement of May 17, 1946.

The judgement under appeal thus arrived at a correct decision, without violating any of the provisions referred to in the notice of appeal.

Notwithstanding that international agreements can only be interpreted by the Contracting Parties, the interpretation thereof,

as far as France is concerned, is within the competence of the French Government, which alone is entitled to lay down the meaning and scope of a diplomatic document. The Franco-Italian agreement of May 17, 1946, provides that Italian nationals are entitled to the benefit of the most-favoured-nation clause, and the Treaty of January 7, 1862, between France and Spain, on which the appellant relies and which applies to Italian nationals with regard to the exercise of trading activities must, according to the interpretation given by the Minister for Foreign Affairs, be understood as follows: Although the provisions which are applicable to foreign nationals must not, if they are not to violate the provisions of the international agreements, result in restricting the enjoyment of the rights which the Treaty confers on Spanish nationals, the duty imposed upon a Spanish trader to be in possession of a special trader's permit does not affect the enjoyment of those rights but only the conditions of their exercise. To be in possession of a trader's permit is therefore a necessary as well as sufficient condition, which must be satisfied where a foreign national is to be entitled to rights which are granted to French nationals.<sup>11</sup>

(3) In some cases the clause itself contains a reference to the laws of the granting State and expressly stipulates that the rights in question must be exercised "conformably with the laws" of that State. Such a case has been dealt with in the following instance:

The decedent was at the time of his death a resident of New York State. He died intestate. He was a citizen and subject of the Kingdom of Italy, and all of his next of kin were residents of Italy. He left no next of kin residing in the State of New York, and it was alleged in the petition that there were no creditors. The petitioner was the Consul-General of the Kingdom of Italy. The public administrator, though duly cited, made default. The petitioner asserted a right to administration without giving any security, and in preference to the public administrator, and based his claim on the facts as to treaty provisions in the consular treaty of 1878 between the United States and Italy. The letters of administration were granted. The Court said:

Conceding that, under the "most-favored-nation" clause in the provision of the treaty with Italy relating to the rights, prerogatives, immunities, and privileges of consuls general, the stipulation contained in the treaty of July 27, 1853 with the Argentine Republic<sup>12</sup> becomes a part of the treaty with Italy, I do not find in that stipulation any justification for the conclusion sought. A right to intervene "conformably with the laws" of the state of New York is something different from a right to set aside the laws of the state, and take from a person who, by those laws, is the officer entrusted with the administration of estates of persons domiciled here, and who leave no next of kin within the jurisdiction, the right and duty of administering their assets. And, when the laws of the state required an administrator to give a bond to be measured by the value of assets, nothing in the treaty provisions grants to the consul an immunity from this requirement to be obtained merely by asserting, in substance, that he has no knowledge of the existence

<sup>11</sup> *Yearbook . . . 1973*, vol. II, pp. 139-140, document A/CN.4/269, para. 63.

<sup>12</sup> Article IX of the treaty between the United States of America and Argentina reads:

"If any citizen of the 2 contracting parties shall die without will or testament in any of the territories of the other, the consul-general or consul of the nation to which the deceased belonged, or the representative of such consul-general or consul in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs."

of any debts... Therefore, the petitioner may have letters on giving the usual security, but that this is done pursuant to our local law, and because the public administrator has refused to act.<sup>13</sup>

(4) In other cases the duty of respecting the internal laws of the granting State is laid down in a separate provision of the treaty containing the most-favoured-nation clause. Thus, e.g., the Long-term Trade Agreement of 1962 between the Union of Soviet Socialist Republics and the United Arab Republic contained the following provision (article 6):

The circulation of goods between the USSR and the United Arab Republic shall take place in accordance with the provisions of this Agreement and with the import laws and regulations in force in the two countries provided that these laws and regulations are applied to all countries.<sup>14</sup>

(5) The rule proposed in article 6 *quater* is expressed by a German source in this way:

The conditions attaching to the grant of a specific type of more favourable treatment claimed under the most-favoured-nation clause are not to be confused with the conditional form of the most-favoured-nation clause. What is involved here is not reciprocal treatment within the meaning of the conditional form of the most-favoured-nation clause but requirements relating to the factual content of the more favourable treatment itself (e.g. a certificate of qualification as a requirement for the licensing of an alien to engage in a particular trade, certificates of origin or of analysis for purposes of proof of origin and customs classification of goods). Such factual requirements must, however, be objectively related to the advantage which is to be granted and must not be used for the purpose of engaging in concealed discrimination.<sup>15</sup>

The last sentence of the quotation draws attention to the requirement of good faith. This is of course not restricted to this particular situation.

(6) Although the commentaries and precedents refer to cases of unconditional most-favoured-nation clauses it seems to be self-evident that the rule proposed applies also to cases where the most-favoured-nation clause is coupled with the requirement of material reciprocity. The rule proposed therefore is kept in general language and does not differentiate between the two types of clause.

(7) The rule proposed in article 6 *quater* is in a certain relationship with article 41 of the Vienna Convention on Diplomatic Relations,<sup>16</sup> article 55 of the Vienna Convention on Consular Relations<sup>17</sup> and article 47 of the Convention on Special Missions.<sup>18</sup> Its roots, however, can be traced further and ultimately to the principle of sovereignty and equality of States. Obviously beyond the limits of the privileges granted by the State, its laws and regulations must be generally observed on its territory.

#### *Article 7 bis. The scope of the most-favoured-nation clause regarding persons and things*

##### **1. The scope of the persons or things to whose most-favoured-nation treatment the right of the beneficiary**

<sup>13</sup> *Yearbook*... 1973, vol. II, p. 149, document A/CN.4/269, para. 89.

<sup>14</sup> United Nations, *Treaty Series*, vol. 472, p. 74.

<sup>15</sup> G. Jaenicke, in K. Strupp, *Wörterbuch des Völkerrechts*, 2nd ed. [Schlochauer] (Berlin, de Gruyter, 1961), vol. II, p. 499.

<sup>16</sup> United Nations, *Treaty Series*, vol. 500, p. 95.

<sup>17</sup> *Ibid.*, vol. 596, p. 261.

<sup>18</sup> General Assembly resolution 2530 (XXIV), annex.

State extends under a most-favoured-nation clause is confined to the class of persons or things expressly specified in the clause or in the treaty containing it or implicitly indicated by the agreed sphere of relations where the clause applies.

2. From among the persons or things falling within the scope of paragraph 1 the beneficiary State may claim actual most-favoured-nation treatment for those

(a) belonging to the same class of persons or things as the class of persons or things that are accorded favours under the right of a third State by the granting State and

(b) being in the same relationship with the beneficiary State as the latter are with a third State.

#### COMMENTARY

(1) It would have been simpler if the title of this article had referred only to the "personal scope"<sup>19</sup> of the clause. For the sake of completeness a somewhat more elaborate title was chosen.

(2) This article is a corollary to the *ejusdem generis* rule and its validity is believed to be self-evident. As to the question whether the rule of article 7 *bis* is not covered by the *ejusdem generis* rule as stated in article 7, the Special Rapporteur's view is in the negative. While the *ejusdem generis* rule settles the material scope of the clause, article 7 *bis* intends to clarify the scope of the persons and things on behalf of which the beneficiary State may claim most-favoured-nation treatment. (It was felt that no special drafting was needed to cover the infrequent case where the treatment was due to the beneficiary State itself, e.g., to its embassies.)

(3) What is the *ejusdem generis* rule saying? One may refer to draft article 7 contained in the Special Rapporteur's fourth report<sup>20</sup> or to the definition of Fitzmaurice quoted in his second report:

... clauses conferring most-favoured-nation rights in respect of a certain matter, or class of matter, can only attract the rights conferred by other treaties in regard to the same matter or class of matter".<sup>21</sup>

Hence in respect of the subject-matter the right of the beneficiary State deriving from a most-favoured-nation clause is restricted in two ways: first by the clause itself which always refers to a certain matter<sup>22</sup> and second by the right conferred by the granting State on the third State.

(4) The situation is similar, though not identical, in respect of the subjects in the interest of which the beneficiary State is entitled to claim most-favoured-nation

<sup>19</sup> This expression is used by G. Schwarzenberger in "The Most-Favoured-Nation Standard in British Practice", *The British Year Book of International Law*, 1945 (London), vol. 27, p. 107.

<sup>20</sup> See *Yearbook*... 1973, vol. II, p. 102, document A/CN.4/266.

<sup>21</sup> *Yearbook*... 1970, vol. II, p. 210, document A/CN.4/228 and Add. 1, para. 68.

<sup>22</sup> With very few exceptions, there is no clause in modern times which would not be restricted to a certain sphere of relations, e.g., commerce, establishment and shipping. See *Yearbook*... 1973, vol. II, p. 217, document A/9010/Rev.1, chap. IV, B, paras. 14 and 15 of the commentary to article 4.

treatment. The clause itself may indicate the scope of those persons, ships, products, etc., but it does not necessarily do so. The clause may simply state that the beneficiary State is accorded most-favoured-nation treatment in respect of customs duties, or in the field of commerce, shipping, establishment etc., without specifying the persons or the things that will be given most-favoured treatment. In such cases the indications of the field of operation of the clause implicitly denotes the class of persons and things in whose interest the beneficiary may exercise its rights. This is stated in paragraph 1.

(5) Paragraph 2 makes an attempt to unfold further the operation of the clause. Sub-paragraph (a) tries to explain that the beneficiary State cannot claim most-favoured-nation treatment but for that class of persons or things (merchants, commercial travellers, persons taken into custody, companies, vessels, distressed or wrecked vessels, products, goods, textiles, wheat, sugar, etc.) which receives or is entitled to receive certain treatment, certain favours under the right of a third State. And further sub-paragraph (b) would require that the persons and things in respect of which most-favoured-nation treatment is claimed must be in the same relationship with the beneficiary State as are the comparable persons and things with the third State. (Nationals, resident nationals, companies having their seat in the country, companies established under the law of the country, companies controlled by nationals, imported goods, goods manufactured in the country, products originating in the country, etc.)<sup>23</sup>

(6) The following French case can serve as an illustration of the proposed rule:

Alexander Serebriakoff, a Russian subject, brought an action against Mme d'Oldenburg, also a Russian subject, alleging the nullity of a will under which she was a beneficiary. The defendant, after having obtained French citizenship by naturalization obtained an *ex parte* decision from the Court of Appeal of Paris ordering Serebriakoff to furnish 100,000 francs security. Against this *ex parte* decision Serebriakoff appealed, claiming *inter alia* that he was exempt from furnishing security by the terms of the Franco-Russian agreement of 11 January 1934. The Court held that the appeal must be dismissed. The Court said:

Whereas the Decree of 23 January 1934 ordering the provisional application of the Trade Agreement concluded on 11 January 1934 between France and the USSR . . . is not applicable in the current case; and Alexander Serebriakoff is not entitled to claim the benefit of that agreement; and, while the Agreement does provide, on the basis of reciprocity, free and unrestricted access by Russian subjects to French courts, the privilege thus granted to such subjects is limited strictly to merchants and industrialists; and this conclusion results inevitably from both the agreement as a whole and from the separate consideration of each of its provisions; and the Agreement in question is entitled "Trade Agreement"; and the various articles of which it is composed confirm that description, and its article 9, on which Serebriakoff specifically relies, in determining the beneficiaries of the provisions in question, begins with the words: "Save in so far as may be otherwise provided subsequently, French

merchants and manufacturers, being natural or legal persons under French law, shall be not less favourably treated . . . than nationals of the most-favoured-nation . . ."<sup>24</sup>

(7) In another case the Tribunal de grande instance de la Seine held that the most-favoured-nation clause embodied in the Franco-British Convention of 28 February 1882 as supplement by an exchange of letters of interpretation of 21 and 25 May 1929, a clause that would entitle British subjects to rely on treaties stipulating the assimilation of foreigners to nationals applied solely to British subjects settled in France. The Tribunal said:

. . . a British national domiciled in Switzerland, may not rely on a treaty of establishment which grants the benefit of the most-favoured-nation clause only to British nationals established in France and therefore entitled to carry on a remunerative activity there on a permanent basis.<sup>25</sup>

(8) The proposed rule of article 7 *bis* is drafted with the intention of implicitly stating the rule regarding the controversial notion of "like articles" or "like products". It is not uncommon for commercial treaties to state explicitly that in respect to customs duties or other charges the products, goods, articles etc., of the beneficiary State will be accorded any favours accorded to like products etc. of the third State.<sup>26</sup> Obviously, even in the absence of such an explicit statement, the beneficiary State may not claim most-favoured-nation treatment for but the goods specified in the clause or belonging to the same category as the goods enjoying favoured treatment by the third State. This is what rule of article 7 *bis* attempts—among other things—to convey.

(9) It is not proposed that the Commission delve into all the intricacies of the notion of "like products". The following brief account is for information only: As to exactly what is meant by this expression as it appears in commercial treaties Hawkins has this to say:

One test in such cases is a comparison of the intrinsic characteristics of the goods concerned. Such a test would prevent the classification of articles on the basis of external characteristics. If products are intrinsically alike, they should be considered to be like products, and differing rates of duty on them would contravene the most-favoured-nation clause. For example, in the Swiss cow case cited earlier the question arises whether a cow raised at a certain elevation is "like" a cow raised at a lower level. Applying the intrinsic-characteristics test gives a simple answer to the question. The cows are intrinsically alike, and a tariff classification based on such an extraneous consideration as the place where the cows are raised is clearly designed to discriminate in favour of a particular country.<sup>27</sup>

In other situations the application of the intrinsic characteristic test would show clearly that a classification was *not* objectionable. To invent such a case: under the tariff law of the United States, apples are dutiable and bananas are free of duty. If Canada and the

<sup>24</sup> *Ibid.*, p. 132, document A/CN.4/169, para. 40.

<sup>25</sup> *Ibid.*, p. 145, document A/CN.4/169, para. 78.

<sup>26</sup> See article I of the GATT, quoted in the Special Rapporteur's second report (*Yearbook . . . 1970*, vol. II, p. 220, document A/CN.4/228 and Add.1, para. 144).

<sup>27</sup> With reference to the Swiss cow case, see *Yearbook . . . 1968*, vol. II, p. 170, document A/CN.4/L.127, para. 31, but cf. also the critical remarks of FAO quoted in the second report (*Yearbook . . . 1970*, vol. II, pp. 221-222, document A/CN.4/228 and Add.1, para. 148).

<sup>23</sup> *Ibid.*, pp. 218-219, document A/9010/Rev.1, para. 3 of the commentary to article 5.

United States have a treaty providing that products of either party will be accorded treatment no less favourable than that accorded to "like articles" of any third country, Canada might argue that apples should be free of duty. Any such claim would have to be based on the argument that since both bananas and apples are used for the same purpose (eating), they are "like articles". Applying the test of intrinsic characteristics in this case would promptly settle the question, since apples and bananas are intrinsically different products.<sup>28</sup>

(10) That the difficulties caused by the interpretation of the phrase are not insurmountable between parties acting in good faith is shown by an exchange of views in the Preparatory Committee of the International Conference on Trade and Employment.

... the United States said:

"This phrase had been used in the most-favored-nation clause of several treaties. There was no precise definition but the Economic Committee of the League of Nations had put out a report that 'like product' meant 'practically identical with another product'..."

This lack of definition, however, in the view of the British delegate, "has not prevented commercial teaties from functioning, and I think it would, not prevent our Charter from functioning until such time as the ITO [International Trade Organization] is able to go into this matter and make a proper study of it. I do not think we could suspend other action pending that study."

and Australia further noted:

"All who have had any familiarity with customs administration know how this question of 'like products' tends to sort itself out. It is really adjusted through a system of tariff classification, and from time disputes do arise as to whether the classification that is placed on a thing is really a correct classification. I think while you have provision for complaints procedure through the Organization you would find that this issue would be self-solving".<sup>29</sup>

#### *Article 9. National treatment clause*

"National treatment clause" means a treaty provision whereby a State undertakes to accord national treatment to another State in an agreed sphere of relations.

#### *Article 10. National treatment*

"National treatment" means treatment by the granting State of persons or things in a determined relationship with the beneficiary State, not less favourable than treatment of persons or things in the same relationship with itself.

#### COMMENTARY TO ARTICLES 9 AND 10

(1) There is a close relationship between a most-favoured-nation clause and a national treatment clause. Such clauses often appear in treaties side by side and sometimes in combination.<sup>30</sup> Because of that and in

<sup>28</sup> H. C. Hawkins, *Commercial Treaties and Agreements: Principles and Practice* (New York, Rinehart and Co., 1951), pp. 93-94.

<sup>29</sup> John H. Jackson, *World Trade and the Law of GATT (A Legal Analysis of the General Agreement on Tariffs and Trade)* (Indianapolis, Bobbs-Merrill, 1969), pp. 260-261. Excerpts from the reports of the Economic Committee of the League of Nations are annexed to the Special Rapporteur's first report (see *Yearbook* ... 1969, vol. II, p. 175, document A/CN.4/213, annex I).

<sup>30</sup> See para. 11 below.

order to be able to deal with important questions arising from the cumulation of the two,<sup>31</sup> the Special Rapporteur ventures to submit these and the following articles.

(2) National treatment means, according to Wickersham, that the nationals of one of the contracting parties shall be treated in the respects agreed to, in the territory of the other contracting party, just as if they were nationals of the second contracting party. That is, it prevents discrimination against the nationals of the contracting parties in any way, in regard to the points stipulated in the treaty.<sup>32</sup>

(3) The main field where national treatment is usually applied is the treatment of aliens. Right to practise religion, to engage in commercial, industrial, financial and other activities for gain, to acquire, to lease or dispose of property, protection of literary, artistic and scientific works, aspects of social security, taxation, right of access to courts, exemption from *cautio judicatum solvi* are but examples in respect of which national treatment may be—but not necessarily is—stipulated.

(4) National treatment clauses are also used in treaties concluded in the economic field where they are usually not restricted to treatment of natural persons. They may deal with treatment of legal persons, companies, goods, products, etc. A national treatment clause of the General Agreement on Tariffs and Trade (Art. III, para. 4) runs as follows:

The products of the territory of any contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use...<sup>33</sup>

(5) National treatment would not apply to customs duties on imports and exports because national products are of course not imported<sup>34</sup> and foreign goods are not exported.<sup>35</sup> On the other hand, because vessels enter both their own and foreign ports in the same manner as, and in competition with, vessels of other countries, national treatment clauses in this field are widespread.

(6) Both national treatment, or "inland parity", and most-favoured-nation treatment, or "foreign parity", are antidiscriminatory, i.e., both guarantee equality. The difference between them lies in the choice of base upon which equality is to be measured. By granting inland parity, a nation places the citizens of a foreign

<sup>31</sup> See articles 13 and 14.

<sup>32</sup> G. W. Wickersham's report to the League of Nations Committee of Experts for the Progressive Codification of International Law (C.205.M.79.1927), as cited in L. F. L. Oppenheim, *International Law: A Treatise*, 7th ed. [H. Lauterpacht] (London, Longmans, Green and Co., 1948), vol. 1, para. 580, foot-note 2.

<sup>33</sup> GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No. GATT/1969-1), p. 6.

<sup>34</sup> Now that the colonial régime has practically disappeared, the exceptional case of "colonial" trade has become obsolete.

<sup>35</sup> See W. McClure, "German-American commercial relations", in *American Journal of International Law* (Washington, D.C.), vol. 19, No. 4 (October 1925), p. 692, quoted by G. Schwarzenberger, *International Law and Order* (London, Stevens, 1971), p. 157, foot-note 121.

country on an equal footing with *its own citizens*, not with those of any other foreign country.<sup>36</sup>

(7) It is by now generally admitted that in the field of international trade the equal treatment of nations on the ground of most-favoured-nation clause would satisfy the conditions of formal equality but would involve explicit discrimination against the weaker members of the international community.<sup>37</sup> Similar or even more forceful considerations apply against the formal equality established by national treatment clauses in fields of trade and other economic competition between nationals and companies of countries of different level of economic development in systems based on free enterprise.

(8) As explained by Usenko:

The practice of granting foreigners equal rights with the nationals of a given country, which was an outgrowth of the bourgeois revolutions, was unquestionably a progressive development. However, since this grant of equality related not only to the protection of foreigners' lives, freedom, property and honour, not only to their legal capacity to the extent required in order to satisfy the individual's physical and spiritual needs, but also to matters of commercial and industrial activity (as must inevitably be the case under the conditions of capitalism), it contained deep contradictions within it from the outset. Where foreigners possess more capital than national industrialists and businessmen, they will in time, availing themselves of "equal rights", unquestionably occupy a dominant position in the country concerned. In the realm of economic activity, the development of capitalism quickly led to the replacement of the individual foreigner by foreign bodies corporate—large stock companies and other types of concerns. Under these conditions, it became quite obvious that the extension of national treatment to the domain of the foreign economic relations of States in effect deprives national industry and trade in weaker countries of State protection against competition from more powerful foreign capital. . . . Under the conditions of capitalism, what national treatment essentially does is thus to afford greater opportunities to the stronger side.

All of this is a sufficient explanation of the fact that socialist States are opposed as a matter of principle to the application of national treatment in the field of international economic relations.<sup>38</sup>

(9) With regard to the application of national treatment clauses in treaties of socialist States, Usenko adds the following:

However, the over-all negative attitude of socialist States toward the broad application of national treatment in the field of international economic relations does not preclude its use in their mutual relations and also in their relations with third countries in specific areas where this cannot have adverse effects and, moreover, is fully justified. For example, socialist States accord national treatment for humanitarian reasons in providing assistance at sea.

<sup>36</sup> R. C. Snyder, *The Most-Favored-Nation Clause: An Analysis with Particular Reference to Recent Treaty Practice and Tariffs* (New York, King's Crown Press, Columbia University, 1948), p. 11.

<sup>37</sup> See *Yearbook . . . 1973*, vol. II, p. 220, document A/9010/Rev.1, chap. IV, B, para. 9 of the commentary to article 5.

<sup>38</sup> E. T. Usenko, *Formy regulirovaniia sotsialisticheskogo mezhdunarodnogo razdeleniia truda* (Forms of the regulation of the Socialist International Division of Labour), *Mezhdunarodnye otnosheniia* (Moscow, 1965), pp. 251-252. German edition: *Sozialistische internationale Arbeitsteilung und ihre rechtliche Regelung* (Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1966), p. 211.

Some trade treaties also provide for national treatment (in combination with most-favoured-nation treatment) in the levying of domestic taxes and other charges on imported goods. An example of this solution of the problem is article 4 of the Soviet-Hungarian Treaty of Commerce and Navigation of 15 July 1947:<sup>39</sup>

"Where internal charges are payable in its territory on the production, processing, distribution or consumption of goods of a certain category, each of the Contracting Parties shall accord goods of the same category of the other Party the treatment established by it for its domestic goods, or most-favoured-nation treatment, whichever is more advantageous to the other Party."

The matter is dealt with in similar fashion in trade treaties between the USSR and Poland, Czechoslovakia and Romania.<sup>40</sup>

(10) Technically the most-favoured-nation clause is a *renvoi* to another treaty, whereas the national treatment clause is a *renvoi* to municipal law.<sup>41</sup>

(11) When inland parity (national treatment) and foreign parity (most-favoured-nation treatment) are provided for side by side in the same treaty this may take place in the form that in one respect national treatment, in another most-favoured-nation treatment is pledged. Thus, e.g., the 1951 Convention relating to the Status of Refugees<sup>42</sup> assures national treatment to refugees in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi* (art. 16) and most-favoured-nation treatment as regards the right to engage in wage-earning employment (art. 17).

(12) The case where both national treatment and most-favoured-nation treatment are stipulated in respect of the same subject-matter is dealt with separately.<sup>43</sup>

(13) Articles 9 and 10 are drafted on the pattern of articles 4 and 5 as adopted by the Commission.<sup>44</sup> The reason for using the expression "persons or things in a determined relationship" [with a State] in article 10 is the same as that explained in paragraph 3 of the commentary to article 5.

(14) Article 10, unlike article 5, contains no reference to the treatment of a State. It is believed that there is no practice which would substantiate such reference.

(15) If articles 9 and 10 are retained by the Commission, then appropriate changes will be necessary *inter alia* in article 2, where the expressions "granting State" and "beneficiary State" are defined solely in relation to the most-favoured-nation clause and most-favoured-nation treatment.

#### *Article 10 bis. National treatment in federal States*

**If the granting State is a federal State, and treatment of persons or things in the agreed sphere of relations is**

<sup>39</sup> United Nations, *Treaty Series*, vol. 216, p. 247.

<sup>40</sup> Usenko, *op. cit.*, p. 253 (German edition, p. 212).

<sup>41</sup> Statement by Mr. Reuter at the sixteenth session of the International Law Commission (*Yearbook . . . 1964*), vol. I, p. 113, 741st meeting, para. 14.

<sup>42</sup> United Nations, *Treaty Series*, vol. 189, p. 137.

<sup>43</sup> See article 14 below.

<sup>44</sup> See *Yearbook . . . 1973*, vol. II, pp. 215 and 218, document A/9010/Rev.1, chap. IV, B.

not identical in all of its member States, then national treatment means treatment of persons and things in a determined relationship with the beneficiary State in one of the member States of the granting State on terms not less favourable than those of the treatment accorded in that member State to persons and things in the same relationship with other member States of the granting State.

#### COMMENTARY

(1) National treatment has a special feature in some of the federal States. When Switzerland grants national treatment to another country, that does not mean that the nationals of that foreign country shall be treated in Valais as Valaisans, but that they shall be treated there as citizens of another Swiss canton; and if there are differences of treatment between the citizens of the various cantons, as of the least well-treated canton. It is indeed impossible to imagine that a foreigner would be better treated in Switzerland than any Swiss national.<sup>46</sup>

(2) In the Federal Republic of Germany the laws of the *Länder* are also highly complex and it is not always easy to ascertain the exact significance of the national treatment enjoyed by a foreigner in an individual *Land*.<sup>46</sup>

(3) The situation in the United States is also such that national treatment has not the same content in the individual States. This is expressly spelled out, e.g., in article XIV, paragraph 2 of the Convention of Establishment between France and the United States of America signed at Paris on 25 November 1959. The text of article XIV reads as follows:

1. The term "national treatment" means treatment accorded to nationals and companies of either High Contracting Party within the territories of the other High Contracting Party upon terms no less favorable than the treatment therein accorded, in like situation, to the nationals and companies, as the case may be, of such other High Contracting Party.

2. National treatment accorded under the provisions of the present Convention to French companies shall, in any State, territory or possession of the United States of America, be the treatment accorded therein to companies constituted in other States, territories and possessions of the United States of America.<sup>47</sup>

(4) The proposed rule does not cover in detail all possible cases. It presumes that in a member State of a federal State all citizens of the federal State are treated alike. Thus it does not refer to the notion of "the citizen of the least-well treated canton".<sup>48</sup>

#### *Article 11. Effect of an unconditional national treatment clause*

Under an unconditional national treatment clause the beneficiary State acquires the right to national treatment from the granting State without the obligation to reciprocate the same treatment in kind to the latter State.

<sup>46</sup> A. Piot, "Of Realism in Conventions of Establishment", *Journal du droit international*, 88th Year, No. 1, January-March 1961, p. 67.

<sup>46</sup> *Ibid.*

<sup>47</sup> United Nations, *Treaty Series*, vol. 401, pp. 90-92.

<sup>48</sup> See para. 1 above.

#### *Article 12. Effect of a national treatment clause conditional on material reciprocity*

Under a national treatment clause conditional on material reciprocity the beneficiary State acquires the right to national treatment from the granting State against reciprocating the same treatment in kind to the latter State.

#### COMMENTARY TO ARTICLES 11 AND 12

(1) Articles 11 and 12 are drafted on the pattern of articles 6 *bis* and 6 *ter* and need no further explanation.

The Foreign Minister of France in his letter of 22 July 1929 cited below<sup>49</sup> has expressly stated:

"... when treaties provide for national treatment without making such treatment conditional on reciprocity, the question of whether a French national enjoys the same advantages in the territory of the other country no longer arises."<sup>50</sup>

This thesis corresponds to the rule proposed in article 11 and from it follows *a contrario* the rule of article 12.

#### *Article 13. The right of the beneficiary State under a most-favoured-nation clause to national treatment*

1. The beneficiary State acquires under a most-favoured-nation clause the right to national treatment if the granting State has accorded national treatment to a third State.

2. Paragraph 1 applies irrespective of whether national treatment has been accorded by the granting State to a third State unconditionally or subject to material reciprocity or against any other compensation.

#### COMMENTARY

(1) The rule proposed in article 13 seems to be at first sight self-evident. When two States promise each other national treatment (inland parity) and then promise other States most-favoured-nation treatment, the latter group may legitimately claim that they are also entitled to be treated on a "national basis", for otherwise they are not being treated as favourably as the most-favoured-nation (assuming that there is a material difference in treatment as a result of different promises made).<sup>51</sup>

(2) This is also the British practice regarding the relation between national treatment and treatment accorded under a most-favoured-nation clause. According to Schwarzenberger,

the m.f.n. standard fulfils the function of generalizing the privileges granted under the national standard to any third State among the beneficiaries of m.f.n. treatment in the same field."<sup>52</sup>

(3) The same view is held by an author from the German Democratic Republic:

Since national treatment generally embraces a maximum number of rights and the rights accorded are clearly defined, States often seek to have their nationals placed on an equal footing with those of other countries. If national treatment is thus granted to the most-

<sup>49</sup> Para. 4 of the commentary to article 13.

<sup>50</sup> Quoted by Mme M. Simon-Depitre in *Juris-classeur de droit international* (Paris, Editions techniques), vol. V, fasc. 523, p. 26.

<sup>51</sup> Snyder, *op. cit.*, pp. 11-12.

<sup>52</sup> "The Most-Favoured-Nation Standard..." (*loc. cit.*), p. 119.

favoured nation, all other entitled States can also claim it for their nationals by invoking the most-favoured-nation clause.<sup>53</sup>

(4) This effect of the most-favoured-nation clause has been explicitly recognized in France. The French Foreign Minister in a letter of 22 July 1929<sup>54</sup> published a list of countries enjoying national treatment in France. The Minister added:

A greater number of conventions were entered into on the basis of the treatment reserved for the nationals of the most-favoured-nation. Aliens capable of availing themselves of a convention of that nature are entitled to be treated in France as the nationals of the above-listed countries.<sup>55</sup>

The official French view on this has not changed ever since.

(5) This position manifests itself also in the practice of French courts:

[French] legal thinking has, on the whole, taken the view that national treatment is to be applied to those who invoke it on the strength of a most-favoured-nation clause.<sup>56</sup>

Thus—among many other cases—a French court, in this instance the Tribunal correctionnel de la Seine, said:

Whereas Sciama, being of Italian nationality, may legitimately claim the benefit of article 2 of the treaty of establishment of 23 August 1951 between France and Italy, which provides: "The nationals of each of the High Contracting Parties shall enjoy in the territory of the other party most-favoured-nation treatment with regard to . . . the practice of trade. . ."; and whereas, consequently, he is entitled to rely on the provisions of article 1 of the Convention concluded on 7 January 1862 between France and Spain, which provides that: "The subjects of both countries may travel and reside in the respective territories on the same footing as nationals . . . practise both wholesale and retail trade operations. . .".<sup>57</sup>

(6) The Supreme Court of the United States also had the occasion to discuss the effect of a most-favoured-nation clause when combined with a national treatment clause of another treaty. The most-favoured-nation clause in question was the one in an 1881 treaty between the United States and Serbia. The relevant portion of that clause ran as follows:

In all that concerns the right of acquiring, possessing or disposing of every kind of property, real or personal, citizens of the United States in Serbia and Servian subjects in the United States, shall enjoy the rights which the respective laws grant or shall grant in each of these States to the subjects of the most favoured nation.

Within these limits, and under the same conditions as the subjects of the most favoured nation, they shall be at liberty to acquire and dispose of such property, whether by purchase, sale, donation, exchange, marriage contract, testament, inheritance, or in any other manner whatever, without being subject to any taxes, imposts or charges whatever, other or higher than those which are or shall be levied on natives or on the subjects of the most favoured State. . .<sup>58</sup>

<sup>53</sup> K. Becher, "Das Prinzip der Meistbegünstigung und die Völkerrechtskommission der Vereinten Nationen", in *Deutschen Aussenpolitik* (East Berlin), 17th year, No. 4 (July-August 1972), p. 774.

<sup>54</sup> France, *Journal officiel de la République française, Lois et décrets* (Paris), 12-13 August, 1929, 61st year, No. 189.

<sup>55</sup> Piot, *loc. cit.*, p. 45.

<sup>56</sup> Level, *loc. cit.*, p. 338.

<sup>57</sup> See *Yearbook . . . 1973*, vol. II, p. 145, document A/CN.4/269, para. 77.

<sup>58</sup> *British and Foreign State Papers, 1880-1881*, vol. 72, (London, Ridgway, 1888), p. 1131.

The Court said:

The 1881 Treaty clearly declares its basic purpose to bring about "reciprocally full and entire liberty of commerce and navigation" between the two signatory nations so that their citizens "shall be at liberty to establish themselves freely in each other's territory". Their citizens are also to be free to receive, hold and dispose of property by trading, donation, marriage, inheritance or any other manner "under the same conditions as the subjects of the most favored nation". Thus, both paragraphs of Art. II of the Treaty which have pertinence here contain a "most favored nation" clause with regard to "acquiring, possessing or disposing of every kind of property". This clause means that each signatory grants to the other the broadest rights and privileges which it accords to any other nation in other treaties it has made or will make. In this connection we are pointed to a treaty of this country made with Argentina before the 1881 Treaty with Serbia, and treaties of Yugoslavia with Poland and Czechoslovakia, all of which unambiguously provide for the broadest kind of reciprocal rights of inheritance for nationals of the signatories which would precisely protect the right of these Yugoslavian claimants to inherit property of their American relatives.<sup>59</sup>

The national treatment clause (article IX) of the Treaty of Friendship, Commerce, and Navigation between the United States and the Argentine Confederation of 1853 provided:

In whatever relates to . . . acquiring and disposing of property of every sort and denomination, either by sale, donation, exchange, testament, or in any other manner whatsoever, . . . the citizens of the two contracting parties shall reciprocally enjoy the same privileges, liberties and rights as native citizens. . .<sup>60</sup>

The Court concluded:

We hold that under the 1881 Treaty, with its "most favoured nation" clause, these Yugoslavian claimants have the same right to inherit their relatives' personal property as they would if they were American citizens living in Oregon. . .<sup>61</sup>

(7) The solution sustained in practice and proposed in article 13 has been questioned in the writings of several authors. According to Level:

It may be argued against the affirmative solution that, among the concessions mutually granted by the High Contracting Parties, the most-favoured-nation clause is of a lower order than the national treatment clause and that it is paradoxical for the former to produce the same effects as the latter. It may also be wondered whether the special nature of the two clauses does not bar their cumulative application. As clauses which grant equal treatment, in one case, with the most-favoured foreigner and, in the other case, with nationals, they have no effect by virtue of their content but by mere reference. Is the intent of the contracting States truly reflected by thus linking one clause to the other to the point of producing an effect which is not in keeping with the meaning of the first of the two clauses? <sup>62</sup>

(8) This idea has been developed in some depth in the Institute of International Law in the provisional and definitive reports of Pescatore on the topic: "The most-

<sup>59</sup> See *Yearbook . . . 1973*, vol. II, p. 144, document A/CN.4/269, para. 73.

<sup>60</sup> United States of America, *The Statutes at Large and Treaties of the United States of America from December 1925 to March 1927*, vol. X (Washington, D.C., U.S. Government Printing Office, 1927), p. 1009. Text also in *British and Foreign State Papers, 1852-1853*, vol. 42 (London, Ridgway, 1864), p. 722.

<sup>61</sup> See *Yearbook . . . 1973*, vol. II, p. 144, document A/CN.4/269, para. 73.

<sup>62</sup> *loc. cit.*, p. 338.

favoured-nation clause in multilateral conventions." He writes in his definitive report:

... the two standards of treatment are so different in nature that it cannot be said that the most-favoured-nation clause can, in relevant cases, enable the beneficiary State to benefit from national treatment as well. In order that this problem—rather abstruse, it is true, but important in its practical effects—may be properly understood, let us recall in more concrete terms what it involves.

Let us assume that State A has granted most-favoured-nation treatment to one or more other States—States B, C, D, etc. It subsequently concludes with State X a treaty dealing with the same subject, e.g. the right of establishment or the protection of persons, which is based not on the standard of most-favoured-nation treatment but on the principle of national treatment, i.e. on granting nationals of State X the same status as nationals of State A. Can it not be said that, as a result of the treaty concluded by State A with State X, the most-favoured-nation standard henceforth encompasses national treatment? In other words, the most-favoured-nation clause will permit States B, C, D, etc. to enjoy the benefits of national treatment.

The question is a controversial one because the equation we have just made is open to the objection that the two clauses in question are different in nature inasmuch as the obligation assumed by a State under the most-favoured-nation clause never goes beyond granting the most favourable treatment enjoyed by a foreigner, which is not the same thing as granting the same treatment as that enjoyed by the State's own nationals. A further objection can also be made: the argument that the most-favoured-nation clause confers upon the beneficiary State the advantages of national treatment if that treatment is granted to any other State would have the inequitable effect of enabling States benefiting from the most-favoured-nation clause henceforth to claim national treatment without being themselves bound to grant it. That brings us back to the problem of reciprocity in the application of the clause. We are confronted with the fact that national treatment is normally granted only on the basis of reciprocity, and it would indeed be going very far to bestow the same advantage on countries which continue, under the clause, to grant only the same treatment as that accorded to foreigners.

The Rapporteur therefore holds to the view that the most-favoured-nation clause cannot afford more than the most favourable possible treatment which is accorded to foreigners and that the granting of national treatment, on the other hand, represents a *transitio ad aliud genus* which cannot be effected by means of the clause.

Judging from the replies received, this conclusion is not open to debate in cases where the principle of national treatment is an integral part of the constitutional framework of an economic integration scheme embracing a number of States.<sup>63</sup>

In consideration of certain comments made and doubts expressed by members of the Institute (Castañeda and Guggenheim), Pescatore then seemed willing to restrict the validity of this thesis to economic relations when he stated:

... as far as international economic relations are concerned, the Rapporteur holds strongly to his view that the granting of national treatment by a State to the trade and economic activities of a third country does not obligate that State to extend the same treatment to all beneficiaries of the most-favoured-nation clause.<sup>64</sup>

It has to be noted that this thesis of Pescatore has not been embodied in his draft resolutions and thus the Institute as a whole was not put in the position to pronounce itself on the matter.

<sup>63</sup> *Annuaire de l'Institut de droit international*, 1969 (Basle), vol. 53, t. I, pp. 201-202.

<sup>64</sup> *Ibid.*, p. 203.

One of the purposes of Pescatore—perhaps the main one—was to prove that the advantages granted to each other by member States of an economic union cannot be attracted by a most-favoured-nation clause of a treaty entered into between a member and a non-member State. His argument was that the advantages accorded within the framework of an economic union were not *eiusdem generis* in relation to a most-favoured-nation pledge in favour of an outsider<sup>65</sup> and even less so if the advantages in question consisted—as it was frequently the case in such unions—in the assimilation of each other's nationals in certain respects. However, even if it were true that the advantages granted within an economic union could not be attracted by most-favoured-nation clauses—a thesis which is open to serious doubt and by far not substantiated by practice—it would not prove the existence of a rule that national treatment grants in economic matters are not susceptible to be covered by most-favoured-nation clauses.

(9) Basing his views on the practice of States, the Special Rapporteur does not have any reason to depart from the conclusion which follows from the ordinary meaning of the clause which assimilates its beneficiary to the nation most favoured: if the most, the highest, favour accorded to a third State consists in national treatment, then it is this treatment which is, in conformity with the promise, due to the beneficiary. If a State wishes to exclude previous or future national treatment grants from its most-favoured-nation pledge, it is free to do so. If such exception is not written in the treaty, then the consequences are to be taken even if the national treatment promise follows the most-favoured-nation treaty. This situation requires nothing but a certain circumspection from statesmen involved in treaty-making, and they can rightly be expected to abstain from rash decisions.

#### *Article 14. Cumulation of national treatment and most-favoured-nation treatment*

**If in an agreed sphere of relations both most-favoured-nation treatment and national treatment are stipulated by the granting State, the beneficiary State has the right to claim that treatment which it deems more favourable.**

#### COMMENTARY

(1) It is not uncommon that both national treatment and most-favoured-nation treatment are stipulated in respect of the same subject matter. Nolde refers to the Portuguese-English treaty of 1642 in article 4 of which Portugal promised

[t] hat the subjects of the Most Renowned King of Great Britain ... shall [not] be more burdened with Customs, Impositions, or other Taxes other than the Inhabitants and Subjects of the said Lands [Kingdoms, Provinces, Territories and Islands of the King of Portugal, in Europe], or other Subjects of any Nation whatsoever in league with the Portugals ...<sup>66</sup>

<sup>65</sup> See *Yearbook* ... 1973, vol. II, pp. 106-107, document A/CN.4/266, para. 13 of the commentary to article 7.

<sup>66</sup> B. Nolde, "La clause de la nation la plus favorisée et les tarifs préférentiels," *Recueil des cours de l'Académie de droit international de la Haye*, 1932-I (Paris, Sirey, 1932), vol. 39, p. 27.

An example of a more recent vintage is the provision of article 6, paragraph 1 of the multilateral Convention on Cooperation in Maritime Commercial Navigation signed at Budapest on 3 December 1971 by Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Poland, Romania and the USSR running as follows:

1. Vessels flying the flags of the Contracting Parties shall enjoy in ports of the respective countries, on the basis of reciprocity, the most favourable treatment accorded to national vessels engaged in international traffic or, also on the basis of reciprocity, the most favourable treatment accorded to vessels of other countries in all matters relating to their entry into, stay in and departure from a port, the use of ports for loading and unloading operations, the taking on and setting down of passengers, and the use of navigation services.

(2) In some clauses it is specified that the basis of the treatment in question shall be that of the granting country's nationals or the nationals of the most-favoured-nation "whichever is more favorable". See, e.g., article 38 of the Treaty on Friendship, Commerce and Navigation between the Federal Republic of Germany and Italy of 21 November 1957.<sup>67</sup>

(3) The Secretariat of the Economic Commission for Europe in a paper analysing the compatibility of these two kinds of grants whether embodied in one or more instruments came to the following conclusion:

... the problem of the compatibility of general most-favoured-nation treatment and the grant of "national treatment" to commercial shipping does not, in fact, appear to arise. Where both these systems exist side by side, the provisions for "national treatment" has overriding force—always provided that no more favourable concession has been made to a third country. In such a case, it is this more favourable treatment which must be granted to shipping of the country eligible for both "national treatment" and most-favoured-nation treatment. Such a solution, undoubtedly prevailing in treaties of commerce which, like that between Norway and the USSR, contain the "national treatment" clause for commercial shipping side by side with a general most-favoured-nation clause, seems equally applicable both in the case of a multilateral convention containing both clauses and in the case of multilateral convention containing only the general most-favoured-nation clause faced with bilateral conventions containing the "national treatment" clause for particular questions relating to commerce or navigation.<sup>68</sup>

(4) It is generally presumed that national treatment is at least equal or superior to the treatment of the most-favoured foreign country and therefore the former implies the latter. This has been explicitly stated in a protocol forming part of the Treaty of Commerce and Navigation between the United Kingdom and Turkey, signed on 1 March 1930. The protocol reads:

It is understood that, wherever the present Treaty stipulates national treatment, this implies the treatment of the most favoured foreign country, the intention of the High Contracting Parties clearly being that national treatment in their respective territories is at least equal or superior to the treatment of the most favoured foreign country.<sup>69</sup>

The presumption is, however, open to rebuttal. There may be cases where foreigners enjoy advantages not granted to nationals. Should such case occur, most-favoured-nation treatment surpasses national treatment.

A specific stipulation to this effect may be found in the United Kingdom-Switzerland Treaty on Friendship, Commerce and Reciprocal Establishment of 6 September 1855, article VIII of which runs as follows:

In all that relates to the importation into, the warehousing in, the transit through, and the exportation from, their respective territories, of any article of lawful commerce, the two contracting parties engage that their respective subjects and citizens shall be placed upon the same footing as subjects and citizens of the country, or as the subjects and citizens of the most favoured nation in any case where the latter may enjoy an exceptional advantage not granted to natives.<sup>70</sup>

(5) According to Sauvignon:

[National treatment] is sometimes granted concurrently with the most-favoured-nation clause. In such cases, it is the more favourable of the two types of treatment—normally national treatment—that applies. In exceptional cases, however, most-favoured-nation treatment may be more advantageous than national treatment. This is the case when a State which wishes to expand its industrial production grants foreign enterprises tax exemptions and other advantages greater than those accorded to national enterprises. It would therefore be quite false to suppose that the granting of national treatment automatically encompasses most-favoured-nation treatment.<sup>71</sup>

(6) According to Schwarzenberger:

... two or more of the standards may also be employed in the same treaty for the better attainment of the same or different objectives. Thus, the coupling of m.f.n. and national-treatment clauses may lead to treatment more advantageous to nationals of the other contracting party than could be achieved by the employment of one or the other standard in relation to, for instance, exemption from civil defence duties. In such cases, the typical intention of contracting parties is that the application of several standards should be cumulative. Therefore a presumption exists in favour of their cumulative interpretation.<sup>72</sup>

#### *Article 15. The commencement of the functioning of a most-favoured-nation clause*

**1. An unconditional most-favoured-nation clause commences to function at the time of its entry into force provided that at that time the treatment specified in the clause has been accorded by the granting State to a third State. If that treatment is accorded later, the clause commences to function at the time of the according of that treatment.**

**2. A most-favoured-nation clause subject to material reciprocity commences to function at the time defined in paragraph 1 provided that at that time material reciprocity has been established between the granting State and the beneficiary State in respect of the treatment specified in the clause. If that reciprocity is established later, the clause commences to function at the time of the establishment of that reciprocity.**

<sup>70</sup> United Kingdom, Foreign Office, *Handbook of Commercial Treaties etc. with Foreign Powers*, 4th ed. (London, H.M. Stationery Office, 1931), p. 669.

<sup>71</sup> E. Sauvignon, *La clause de la nation la plus favorisée* (Grenoble, Presses universitaires de Grenoble, 1972), p. 6.

<sup>72</sup> "The principles and standards of international economic law", *Recueil des cours... 1966-I* (Leiden, Sijthoff, 1967), vol. 117, p. 69.

<sup>67</sup> K. Strupp, *op. cit.*, p. 500.

<sup>68</sup> E/ECE/270, Part II, para. 42 (h).

<sup>69</sup> League of Nations, *Treaty Series*, vol. CVIII, p. 432.

## COMMENTARY

(1) The first task of the commentary is to explain the use of the expression "functioning" in relation to the most-favoured-nation clause. In the first drafts of the Special Rapporteur the words "operate" and "operation" were used, these being the terms commonly used for conveying the idea which has to be expressed. The term "operation" of a treaty, however, is used in the 1969 Vienna Convention on the Law of Treaties,<sup>73</sup> although not defined in its article 2 on the use of terms. Still it is obvious that what is meant in the convention by "operation" of a treaty is that it has entered into force and has not been terminated, suspended or invalidated. This follows most clearly from the expression "suspension of the operation of the treaty" as used in part V of the convention. Hence in the terminology of the 1969 Convention a treaty containing a most-favoured-nation clause—and the clause itself as a provision of a treaty—is "in operation" from the moment of its entry into force until its termination, suspension etc. It being the desire of the Commission to keep the terminology of the articles on the most-favoured-nation clause as close as possible to that of the 1969 Convention, a word other than "operation" has to be found to express the idea that the clause in itself, by its mere entry into force—by the beginning of its "operation", to use the terminology of the 1969 Convention—does not really become operative, i.e., it does not really function, in the absence of the granting State's undertaking to third States. Its functioning—here we would rather say "its operation" if this word was not reserved by the Convention for expressing another notion—begins only if such undertakings are made by the granting State, i.e., if a third State has been actually put in a favoured position.

(2) The presence of two elements is necessary to put into action an unconditional most-favoured-nation clause: (a) a valid clause contained in a treaty in force, (b) a grant of favours by the granting State to a third State. A third element is needed in the case of a clause subject to material reciprocity: the establishment of that reciprocity. If one of the necessary elements is lacking, there is no such thing as an operating or a functioning clause.<sup>74</sup> The moment of the beginning of the functioning is the one when the last (in the case of an unconditional clause, a second, and in that of a clause subject to reciprocity, a third) element enters the scene.

(3) Paragraphs 1 and 2 of article 15 spell out also the generally admitted rule that a most-favoured-nation clause—unless otherwise agreed—attracts benefits granted to a third State both before and after the entry into force of the treaty containing the clause. The reason of this rule is explained by Sauvignon as follows:

... since the purpose of the clause is to place the beneficiary State on an equal footing with third States, it would be an act of bad faith to confine that equality existing at the time of the treaty or to future legal situations. A "pro futuro" clause or a clause directed towards

<sup>73</sup> For text 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.

<sup>74</sup> As Schwarzenberger (*International Law and Order* (op. cit.), p. 130), puts it, "In the absence of undertakings to third States, the m.f.n. standard is but an empty shell".

the past cannot be deemed to exist unless it is worded in unequivocal fashion. Otherwise, the clause must extend to the beneficiary all advantages granted both in the past and in the future."<sup>75</sup>

(4) This view is sustained in practice as evidenced by the following case:

The special legislation of Belgium regulating the duration of tenancies rendered nationals of countries which were either neutral or allied to Belgium during the First World War eligible to share in its benefits, on condition of reciprocal treatment. The claimant complained that the privilege of the legal extension of her tenancy had been denied her because of her French nationality and of the lack of reciprocal treatment of Belgian nationals in France. The Court held for the claimant. Pursuant to the Franco-Belgian convention of 6 October 1927, the nationals of each of the High Contracting Parties "shall enjoy in the territory of each other most-favoured-nation treatment in all questions of residence and establishment, as also in the carrying on of trade, industry and the professions" (article 1). This privilege was extended to cover the possession, acquisition and leasing of real or personal property (article 2). The Treaty concluded between Belgium and Italy on 11 December 1882 provided (article 3) that the nationals of each of the High Contracting Parties should enjoy within each other's territory full civil rights on an equal footing. The court said:

It follows, then, that by virtue of the most-favoured-nation clause, French nationals in Belgium are completely assimilated to Belgian nationals for the purposes of their civil rights, and consequently share in the legislation regulating rents. It is immaterial whether these treaties precede or succeed the legislation in question . . .

The Franco-Belgian treaty of 6 October 1927 was concluded by the Belgian Government in the hope of securing of its nationals in France the benefit of all legislation affecting tenancies and commercial property, in order that the nationals of each country should be treated on an equal footing . . .

The claimant, as a French national, is therefore entitled to claim a legal extension of her tenancy of the premises by virtue of the treaty of 6 October 1927.<sup>76</sup>

(5) The question has also been raised and discussed, whether the beginning of the functioning of a most-favoured-nation clause cannot retroactively influence the position of the beneficiary State, i.e. the position of the persons who derive their rights from that State.

## According to Level:

What is at issue here is whether the clause shall follow the time-of-application provisions of the treaty from which it derives its content or those of the treaty which provides for most-favoured-nation treatment. In the latter case, nationals of the beneficiary State can it is true, claim the advantages previously granted to the favoured State, but this treatment takes effect only on the date of the entry into force of the treaty containing the most-favoured-nation clause [ . . . ]. If the first assumption is correct and the clause is also subject to the time-of-application provisions of the treaty concluded with the favoured State, nationals of the beneficiary State are in exactly the same position as those of the favoured State and are thus entitled to claim that the advantages in question were applicable

<sup>75</sup> *Op. cit.*, p. 21, note 1. In the same sense S. Basdevant, "Clause de la nation la plus favorisée," in A. de Lapradelle et J. P. Niboyet, *Répertoire de droit international* (Paris, Sirey, 1929), vol. III, p. 488.

<sup>76</sup> See *Yearbook . . . 1973*, vol. II, pp. 129-130, document A/CN.4/269, para. 31.

to them prior to the publication of the treaty containing the clause, i.e. as from the entry into force of the treaty concluded between the favoured State and the granting State. Thus, in the second of the two posited cases, nationals of the beneficiary State would be entitled to retroactive application—in relation to the date of publication of the treaty containing the clause—of most-favoured-nation treatment.

French legal thinking has rejected the idea of giving the clause this kind of retroactive effect. Nationals of the beneficiary State can claim the advantages granted to the favoured State only on the date of the entry into force of the treaty containing the clause. "The actual formulation of the clause does not warrant retroactive assimilation to foreigners who already enjoy favoured status." . . . "If existing advantages are automatically made applicable, this applies only to the future". [ . . . ] Of course, under the rule governing time of application, the High Contracting Parties may, by expressly so stipulating, provide for retroactive application of the clause . . . The view upheld by French legal thinking is in keeping with the analysis of the nature of the clause contained in the judgement rendered by the International Court of Justice in the Anglo-Iranian case. The enjoyment of advantages under the clause derives from the clause itself and not from the treaty containing the substantive provisions whose application is sought. Although the clause permits enjoyment of the advantages granted to nationals of the favoured State, it does not retroactively make the beneficiary State a party to the treaty concluded between the granting State and the favoured State.<sup>77</sup>

In the same sense Christian Gavaldà writes:

The clause does not do away with past differences between the various national legal systems. The "standard" rule, which calls for an "inopportune" international legal situation to cease to exist at the earliest possible time . . . does not prevail against the international legal principle of non-retroactivity . . .

Most-favoured nation treatment is, as Scelle puts it, "automatically communicated", but this applies only to the future. It should be noted that the same reasoning can be employed in determining the application in time of a treaty containing a *reciprocity clause*. The advantages granted on this basis to nationals of a given State also do not extend back to the time when our nationals first enjoyed this right (*de facto, de jure* or by treaty) in the country concerned.<sup>78</sup>

This reasoning seems to be correct and it is in conformity with the rule set out above.

(6) McNair, in *The Law of Treaties* examined the question "Whether the operation of a most-favoured-nation clause is contingent upon a third State merely becoming entitled to claim certain treatment, or whether it operates only when the third State actually claims and begins to enjoy the treatment".

It seems relevant to quote here his reasoning:

Supposing that Great Britain is entitled to most-favoured-nation treatment under a treaty with State A, and by reason of a treaty between State A and State B the latter is or becomes entitled to claim for itself or its nationals certain treatment from A, e.g. exemption from income-tax or from some legislation affecting the occupation of houses, when is Great Britain entitled to claim from A the treatment due to B? At once or only when B has succeeded in asserting its treaty right to this treatment? In answer to this question two views are possible. The first is that Great Britain has no *locus standi* to claim the treatment until she can point to its actual exercise and enjoyment by B or B's nationals. This view places Great Britain at the mercy of the degree of vigilance exerted by B or the degree of importance of the matter to B; for instance, B might have no

nationals residing in the territory of A and earning a taxable income. The second view is that the most-favoured-nation clause in the treaty with Great Britain, automatically and absolutely, invests her and her nationals with all rights *in pari materia* which may be possessed at any time when the treaty is in force by B and its nationals, irrespective of the question whether those rights are in fact being exercised and enjoyed or not, that is, irrespective of the question whether B has claimed them or neglected to claim them or had no occasion to claim them. The United Kingdom Government has been advised by its law officers that the second view is the right one, that is to say, that while the question "must depend upon the true construction of the most-favoured-nation clause upon which it may arise, . . . speaking generally . . . the right extends to the treatment which the most-favoured-nation is entitled to, whether actually claimed or exercised or not." The United Kingdom has asserted, and succeeded in maintaining, this second view.<sup>79</sup>

According to the same source, the same position was taken by the United Kingdom in cases where it was not the beneficiary but the granting State.

On 11 April 1906 on a question relating to the right of aliens to receive British pilotage certificates, the law officers, when asked whether the right claimable by subjects of the nations indicated was an absolute right by reason of the operation of the most-favoured-nation clause, or whether the right was one which was claimable only if and when the subjects of States who had been granted national treatment had claimed and received the particular privilege then under consideration, said that the answer to this question "must depend upon the true construction of the particular most-favoured-nation clause upon which it may arise; but speaking generally, we are of opinion that the right extends to the treatment which the most-favoured-nation is entitled to, whether actually claimed or not. On the other hand, the treatment accorded in actual practice would be very material upon the construction of the treaty upon which it depends."<sup>80</sup>

A further source shows that this view is not restricted to British practice.

In 1943 the American Embassy in Santiago took the position that the unconditional most-favoured-nation clause in the United States-Chilean commercial agreement gave the right to duty-free importation of United States lumber "of those species of woods specified in the memoranda exchanged between the Peruvian and Chilean Governments [providing duty-free treatment for such species of Peruvian lumber imported into Chile] and [that] this position holds regardless of whether there have been any imports into Chile from Peru or any other country of the particular species of wood specified in the memoranda". Thus, the most-favoured-nation clause was interpreted to accord those rights legally accorded to products of another country, whether or not there was in fact any enjoyment of such right with reference to such products.<sup>81</sup>

(7) As provided for in article 15, besides the entry into force of the most-favoured-nation clause it is the according of benefits to the third State which brings the clause into action. This "according" can also take place by the conclusion of a treaty or by any other kind of agreement reached between the granting State and the third State. Is the effect the same if the grant is not based on a treaty but on the internal law of the granting State? According to McNair:

This question is frequently settled without any doubt by the wording of the relevant clause, for instance, the following clause is common:

<sup>79</sup> A. D. McNair, *The Law of Treaties* (Oxford, Clarendon Press, 1961), pp. 278-279.

<sup>80</sup> *Ibid.*, pp. 279-280.

<sup>81</sup> M. Whiteman, *Digest of International Law*, vol. 14 (Washington, D.C., U.S. Government Printing Office, 1970), p. 750.

<sup>77</sup> *Loc. cit.*, pp. 336-337.

<sup>78</sup> *Revue critique du droit international privé* (Paris), No. 3 (July-September 1961), p. 538.

"The subjects of each of the High Contracting Parties in the territories of the other shall be at full liberty to acquire and possess every description of property . . . which the laws of the other High Contracting Party permit the subjects of any foreign country to acquire and possess."

On the other hand, where the treaty merely provides that the nationals of A are entitled to whatever rights and privileges B may "grant" to the nationals of C, the question may arise whether the clause refers to grant by treaty or to grant by any means whatever. The British answer to this question is that the clause includes grant by any means whatever.<sup>82</sup>

(8) According to Nolde, "it is quite immaterial whether the advantages granted to 'any third country' derive from the domestic law of the other Contracting Party or from agreements concluded by the latter with 'any third country' ".<sup>83</sup> Further he calls this rule "a rule which has long been established and is absolutely unchallengeable".<sup>84</sup>

(9) The 1936 resolution of the Institute of International Law is also explicit: "The most-favoured-nation clause confers upon the beneficiary the régime granted by the other contracting party to the nationals, goods and ships of any third country by virtue of its municipal law and its treaty law".<sup>85</sup>

(10) It is obvious that the answer to the question dealt with in the previous paragraphs depends on the interpretation of the given clause. The purpose of the proposed rule is precisely to give guidance in cases where the wording of the clause is such that it refers purely and simply to most-favoured-nation treatment without containing details as to its functioning. It is believed that in such cases it can be presumed that the intention of the parties consists in bringing the beneficiary in the same legal position as the third State. This idea and the theory—already adopted by the Commission<sup>86</sup>—according to which the source of the beneficiary's right lies in the treaty containing the clause, sufficiently warrant the submission of the rule as proposed in article 15.

#### *Article 16. Termination or suspension of the functioning of a most-favoured-nation clause*

**1. The functioning of an unconditional most-favoured nation clause shall be considered as terminated or suspended at the time of the termination or suspension of the operation of the clause—or at the time of the termination or suspension of the according of the favoured treatment by the granting State to a third State—whichever is earlier.**

**2. The functioning of a most-favoured-nation clause subject to reciprocity shall be considered as terminated or suspended at the time defined in paragraph 1 or at the time of the termination or suspension of the material reciprocity between the granting State and the beneficiary State in respect of the treatment specified in the clause—whichever is earlier.**

<sup>82</sup> *Op. cit.*, p. 280.

<sup>83</sup> *Loc. cit.*, p. 48.

<sup>84</sup> *Ibid.* Similarly Sauvignon, *op. cit.*, p. 22.

<sup>85</sup> See *Yearbook . . . 1969*, vol. II, p. 181, document A/CN.4/213, annex II.

<sup>86</sup> See *Yearbook . . . 1973*, vol. II, p. 221, document A/9010/Rev.1, chap. IV, B, article 7.

#### COMMENTARY

(1) Paragraph 1 uses the term "termination or suspension of the operation" of the clause with the meaning with which that expression is used in part V of the 1969 Convention.

(2) There is no special rule as to the separability of the most-favoured-nation clause from the other provisions of the treaty. The general rules apply. Each case has to be decided on its own merits.<sup>87</sup> The problem of separability does not arise in cases where the whole treaty consists of a single most-favoured-nation pledge.

(3) Should the parties to a most-favoured-nation clause decide by common accord to modify their agreement so as to exclude certain benefits from the operation of the clause this would of course have the same effect as a partial termination or suspension of the clause.

(4) That the functioning of the clause ceases with its own termination or suspension is almost a tautology and needs no explanation. What is a special feature of the clause and follows from its very nature is that the right of the beneficiary State—and hence the functioning of the clause—ceases when the third State loses its privileged position. The privilege having disappeared, the fact which put the clause into operation no longer exists, and therefore the clause ceases to have effect. *Cessante causa, cessat effectus*.<sup>88</sup>

(5) Thus the Supreme Court of Administration of Finland in the case of the application of the Trade Agreement between Finland and the United Kingdom passed a judgement on 12 March 1943 in the following sense:

The duties imposed on certain goods in the trade agreement between Finland and the United Kingdom were to be applied also to goods imported from Germany in accordance with the most-favoured-nation clause between Finland and Germany. The court decided that after the United Kingdom had declared war on Finland, the most-favoured-nation clause was no longer applicable to Germany, and consequently, the duties imposed on goods imported from Germany should be treated autonomously and not according to the trade agreement between Finland and the United Kingdom.<sup>89</sup>

(6) This characteristic of the most-favoured-nation clause has been expressed by the Institute of International Law in its 1936 resolution in the following manner:

The duration of the effects of the most-favoured-nation clause is limited by that of the conventions with third States which led to the application of that clause.<sup>90</sup>

In the course of the discussion on the codification of the law of treaties the following draft provision was submitted by Mr. Jiménez de Aréchaga:

When treaty provisions granting rights or privileges have been abrogated or renounced by the parties, such provisions can no

<sup>87</sup> Basdevant, *loc. cit.*, p. 481; D. P. O'Connell, "State succession and problems of treaty interpretation," *American Journal of International Law* (Washington, D.C.), vol. 58, No. 1 (January, 1964), p. 45.

<sup>88</sup> Snyder, *op. cit.*, p. 37; Sibert, *Traité de droit international public* (Paris, Dalloz, 1951), vol. II, p. 255.

<sup>89</sup> *Yearbook . . . 1973*, vol. II, p. 124, document A/CN.4/269, para. 13.

<sup>90</sup> *Yearbook . . . 1969*, vol. II, p. 181, document A/CN.4/213, annex II.

longer be relied upon by a third State by virtue of a most-favoured-nation clause.<sup>91</sup>

Both texts are limited to the case where the favour granted by the granting State to a third State was embodied in a treaty.

(7) The will of the parties can of course under special circumstances change the operation of the clause. That such special circumstances existed in the case was contended by the American party before the International Court of Justice in the case concerning rights of nationals of the United States of America in Morocco.<sup>92</sup> The Court interpreted the most-favoured-nation clauses in the treaties between the United States and Morocco in accordance with the general nature and purpose of the most-favoured-nation clauses.

In the words of the Court:

The second consideration [of the United States] was based on the view that the most-favoured-nation clauses in treaties made with countries like Morocco should be regarded as a form of drafting by reference rather than as a method for the establishment and maintenance of equality of treatment without discrimination amongst the various countries concerned. According to this view, rights or privileges which a country was entitled to invoke by virtue of a most-favoured-nation clause, and which were in existence at the date of its coming into force, would be incorporated permanently by reference and enjoyed and exercised ever after the abrogation of the treaty provisions from which they had been derived.

From either point of view, this contention is inconsistent with the intentions of the parties now in question. This is shown both by the wording of the particular treaties, and by the general treaty pattern which emerges from the examination of the treaties . . . These treaties show that the intention of the most-favoured-nation clauses was to establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned.<sup>93</sup>

In the same judgement the Court held also:

It is not established that most-favoured-nation clauses in treaties with Morocco have a meaning and effect other than such clauses in other treaties or are governed by different rules of law. When provisions granting fiscal immunity in treaties between Morocco and third States have been abrogated or renounced, these provisions can no longer be relied upon by virtue of a most-favoured-nation clause.<sup>94</sup>

(8) A notable instance of changing the general pattern of the operation of the clause is that of the General Agreement on Tariffs and Trade. The key provision of the General Agreement is a general most-favoured-nation clause in respect of customs duties and other charges in article I, paragraph 1.<sup>95</sup>

Article II, paragraph 1 (a) of the General Agreement however provides:

Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.<sup>96</sup>

According to Curzon:

It can even be maintained that Article II (i)—safeguarding of schedules—is of greater significance than the most-favoured-nation

clause itself . . . This paragraph of Article II is a completely new phenomenon in international commercial legislation and an addition to the most-favoured-nation clause of no mean import. The "Schedules" are the consolidated list of all concessions made by all contracting parties in their negotiations with their trading partners and maximum rates. The difference this addition makes to the most-favoured-nation clause is the protection it offers against the raising of the tariff on scheduled items. The traditional clause, while ensuring unconditional most-favoured-nation treatment, only provides equality of treatment against tariff changes . . .<sup>97</sup>

According to Hawkins, GATT

goes beyond the most-favoured-nation principle in this respect. Each member giving a concession is directly obligated to grant the same concession to all other members in their own right; this is different from making the latter rely on continued agreement between the Party granting the concession and the Party that negotiated it.<sup>98</sup>

(9) A French author gives the following picture of the operation of the clause:

. . . the clause can be pictured as a float, which enables its possessor to maintain itself at the highest level of the obligations accepted towards foreign States by the grantor State; if that level falls, the float cannot turn into a balloon so as to maintain the beneficiary of the clause artificially above the general level of the rights exercised by other States.<sup>99</sup>

In the system of GATT, as has been shown, the provision of article II, paragraph 1 has indeed transformed the float of the clause into a balloon (the concessions once given cannot be withdrawn but through a complicated and cumbersome procedure of consultations with the contracting parties in accordance with article XXVIII of the General Agreement). It is submitted, however, that the special system of the General Agreement constitutes an exception to the general rule of the functioning of the clause and that this rule is by no means affected by the different functioning of the most-favoured-nation clause in the GATT which owes its existence to a specific agreement of the contracting parties.

(10) From the point of view of the termination or suspension of the functioning of the clause, it is irrelevant what caused the termination of the benefits granted to third States. The proposed rule being dispositive, the parties to a treaty containing the clause are free to agree to the continuation of their respective favoured treatment even after the expiry of the grant of benefits to the third State. They may uphold their respective favoured position also on the basis of special arrangements. A historic example is provided by Sauvignon as follows:

The Italo-Abyssinian War provides a final example of the preservation of an advantage for a State benefiting from the clause beyond the duration of the treatment of the favoured third country. The sanctions against Italy resulted in the denunciation by States Members of the League of Nations of their trade treaties with Rome.

<sup>96</sup> GATT, *op. cit.*, p. 3.

<sup>97</sup> G. Curzon, *Multilateral Commercial Diplomacy: The General Agreement on Tariffs and Trade and Its Impact on National Commercial Policies and Techniques* (New York, Praeger, 1966).

<sup>98</sup> *Op. cit.*, p. 226, note on chapter VIII.

<sup>99</sup> Cl. Rossillion, "La clause de la nation la plus favorisée dans la jurisprudence de la Cour internationale de justice," *Journal du droit international* (Paris), 82nd year, No. 1 (January-March 1955), p. 106.

<sup>91</sup> *Yearbook* . . . 1964, vol. I, p. 184, 752nd meeting, para. 1.

<sup>92</sup> *I.C.J. Reports* 1952, p. 176.

<sup>93</sup> *Ibid.*, pp. 191-192.

<sup>94</sup> *Ibid.*, p. 204.

<sup>95</sup> See GATT, *op. cit.*, p. 2. The text is reproduced in *Yearbook* . . . 1970, vol. II, p. 221, document A/CN.4/228 and Add.1, para. 144.

The advantages conferred by those treaties should normally have ceased at the same time to accrue to third countries benefiting from the clause. They were, however, preserved for the countries in question on the basis of Article 16, paragraph 3, of the Covenant, under which the Members of the League agreed that they would mutually support one another in the financial and economic measures taken as sanctions "in order to minimise the loss and inconvenience resulting from the above measures".<sup>100</sup>

---

<sup>100</sup> *Op. cit.*, pp. 96-97.

According to the same author:

Article 49 of the United Nations Charter [mutual assistance in carrying out measures decided upon by the Security Council] can also justify a request along these lines by a beneficiary State, perhaps after the latter has undertaken the consultation envisaged by Article 50.<sup>101</sup>

---

<sup>101</sup> *Ibid.* For details of the Ethiopian-Italian case, see League of Nations, *Official Journal, Special Supplement No. 145*, p. 26 and *Special Supplement No. 150*, pp. 11-12.

**QUESTION OF TREATIES CONCLUDED BETWEEN STATES  
AND INTERNATIONAL ORGANIZATIONS OR BETWEEN  
TWO OR MORE INTERNATIONAL ORGANIZATIONS**

[Agenda item 7]

DOCUMENT A/CN.4/279 \*

**Third 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**

*Draft articles with commentaries*

[Original: French]  
[29 March 1974]

**CONTENTS**

	<i>Page</i>
<i>Abbreviations</i> . . . . .	135
	<i>Paragraphs</i>
Preface . . . . .	1-6 136
Draft articles and commentaries . . . . .	137
Part I: Introduction . . . . .	137
Article 1. Scope of the present articles . . . . .	137
Commentary . . . . .	137
Article 2. Use of terms . . . . .	138
Paragraph 1 (a) . . . . .	138
Commentary . . . . .	139
Paragraph 1 (d) . . . . .	141
Commentary . . . . .	141
Paragraph 1 (e) . . . . .	141
Commentary . . . . .	141
Paragraph 1 (f) . . . . .	141
Commentary . . . . .	141
Paragraph 1 (i) . . . . .	142
Commentary . . . . .	142
Paragraph 2 . . . . .	143
Commentary . . . . .	143
Article 3. International agreements not within the scope of the present articles . . . . .	144
Commentary . . . . .	144
Article 4. Non-retroactivity of the present articles . . . . .	145
Commentary . . . . .	145
Article 6. Capacity of international organizations to conclude treaties . . . . .	145
Commentary . . . . .	145

**ABBREVIATIONS**

FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
IBRD	International Bank for Reconstruction and Development
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>
WIPO	World Intellectual Property Organization

\* Incorporating document A/CN.4/279/Corr.1.

## Preface

1. In its report on the work of its twenty-fifth session, the International Law Commission, while expressing its intention to concentrate at its twenty-sixth session on succession of States in respect of treaties and State responsibility, stated that, time permitting, it would also consider the remaining topics in its programme of work, including the question of treaties concluded between States and international organizations or between two or more international organizations.<sup>1</sup>

When that report was considered by the Sixth Committee of the General Assembly, many representatives expressed their views on that topic and the way in which it had been dealt with by the Commission. Their observations constitute a valuable guide for the Commission and the Special Rapporteur, which will now make it possible to reach a new stage in the work relating to this question.

2. In addition to comments on specific points, which will be referred to later in the present report, the representatives in the Sixth Committee generally expressed the hope that the work of the Commission in this sphere would be given a new impetus<sup>2</sup> by the speedy submission of a set of draft articles,<sup>3</sup> although the subject was not particularly urgent<sup>4</sup> and its consideration seemed still to be at the stage of theory.<sup>5</sup> The prevailing view seems to be reflected in the invitation to begin the preparation of a set of draft articles. If it is objected that more information should be obtained from international organizations, it is easy to reply that substantial information has already been gathered and that it is better to draw the attention of international organizations to a set of draft articles which, perhaps because of their very imperfections, will reattract their attention in a specific way; this will elicit observations more valuable than those which might be obtained in reply to additional questionnaires.<sup>6</sup> In the communications which they addressed to the Secretary-General of the United Nations on the occasion of the twenty-fifth anniversary of the International Law Commission, some international organizations mentioned the assistance they had already given the Commission in connexion with this topic and their interest in the future draft articles in terms

<sup>1</sup> See *Yearbook . . . 1973*, vol. II, p. 231, document A/9010/Rev.1, para. 178.

<sup>2</sup> See *Official Records of the General Assembly, Twenty-eighth Session, Annexes*, agenda item 89, document A/9334, paras. 81-84, and the statements by the representatives of the following States: United States of America and Byelorussian Soviet Socialist Republic (*ibid.*, *Twenty-eighth Session, Sixth Committee*, 1398th meeting, paras. 7 and 30), German Democratic Republic and Finland (*ibid.*, 1399th meeting, paras. 31 and 38), Ghana (1404th meeting, para. 43), Austria, New Zealand and France (*ibid.*, 1405th meeting, paras. 6, 11 and 43) and Indonesia (*ibid.*, 1406th meeting, para. 38).

<sup>3</sup> Statements by the representatives of Kenya, Greece and Brazil (*ibid.*, paras. 15, 44 and 58).

<sup>4</sup> Statement by the Federal Republic of Germany (*ibid.*, 1402nd meeting, para. 22).

<sup>5</sup> Statement by Poland (*ibid.*, para. 9).

<sup>6</sup> A very pertinent observation to this effect was made by the representative of the United States of America with regard to States, but the comment is even more applicable in the case of international organizations (*ibid.*, 1398th meeting, para. 7).

which can only be taken as an encouragement to complete the undertaking.<sup>7</sup>

3. This third report, and those which follow it will therefore be devoted to a set of draft articles prepared according to the traditions of the International Law Commission. The method used has been determined by one basic fact: the essential purpose of the work to be done is to permit, as far as possible, the extension of the provisions of the 1969 Vienna Convention on the Law of Treaties<sup>8</sup> to agreements concluded between States and international organizations or between two or more international organizations. Of course, this aim does not exclude adaptations which go beyond matters of drafting, nor even substantial additions, as appropriate, but it implies that the International Law Commission should remain as faithful as possible to the Vienna Convention on the Law of Treaties.<sup>9</sup>

4. However, the question whether the draft articles will be submitted to an international conference so that they may become a codification treaty or will take another form has been left open. Without in any way anticipating the decision to be taken at the appropriate time by the General Assembly, the articles have been drafted on the assumption that they will ultimately be submitted to a conference. This provisional solution has the advantage of making for a more effective and economical presentation.<sup>10</sup>

5. The work which follows is accordingly based on the articles of the 1969 Convention, and follows the same order. The draft articles have also been given the same numbers as the corresponding articles of the 1969 Convention. When provisions specific to treaties between States and international organizations or between two or more international organizations are necessary, the articles in question will be given a number *bis*, *ter*, *quater* and so on, so as to incorporate them into the draft articles without changing, for the time being, the correspondence established between the numbers of the draft articles and those of the 1969 Convention. When an article of that Convention does not call for a corresponding provision in the draft articles, its number will provisionally be omitted in the numbering of the draft articles. A parallel between the 1969 Convention and the draft articles will thus be maintained as long as possible.

<sup>7</sup> See A/9159, p. 6 (IBRD), p. 4 (FAO), p. 11 (WIPO).

<sup>8</sup> 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 Convention is referred to hereafter as "the 1969 Convention".

<sup>9</sup> This has always been the position of the International Law Commission. See *Yearbook . . . 1971*, vol. II (Part One), p. 349, document A/8410/Rev.1, chap. IV, annex, para. 10; *Yearbook . . . 1972*, vol. II, p. 194, document A/CN.4/258, para. 76; *Yearbook . . . 1973*, vol. II, p. 77, document A/CN.4/271, paras. 9-12; *ibid.*, vol. I, pp. 201-202, 1241st meeting, paras. 34 and 43. This point was stressed by some representatives in the Sixth Committee: Brazil (*Official Records of the General Assembly, Twenty-eighth Session, Sixth Committee*, 1401st meeting, para. 58); Australia (*ibid.*, 1404th meeting, para. 29) and Byelorussian Soviet Socialist Republic (*ibid.*, 1398th meeting, para. 30).

<sup>10</sup> *Yearbook . . . 1972*, vol. II, pp. 173, 175, 183, 185 and 191, document A/CN.4/258, paras. 3, 12, 42, 48 and 64.

It will sometimes be necessary to depart provisionally from the order adopted in the 1969 Convention; this will be so in the case of some initial provisions ("Use of terms"), consideration of which cannot be dissociated from other articles placed closer to the beginning in the Convention.

6. One last remark concerning methodology is essential. The Special Rapporteur has noted that during the consideration of the report of the International Law Commission by the Sixth Committee of the General Assembly in 1973, some representatives expressed the wish that the documents of the International Law Commission should be shorter and should omit certain doctrinal or theoretical considerations.<sup>11</sup> In the present report an effort has been made to take those wishes into account by reducing to a minimum both discussion and theoretical references, so that reference to this document may be made as easy as possible.

## Draft articles and commentaries

### PART I. INTRODUCTION

#### *Article 1. Scope of the present articles*<sup>12</sup>

**The present articles apply to treaties concluded between States and international organizations or between two or more international organizations. Article 3 (c) of the Vienna Convention on the Law of Treaties<sup>13</sup> does not apply to such treaties.**

#### COMMENTARY

(1) Draft article 1 deals with a question of terminology and several substantive questions. With regard to the first aspect, the draft article uses a terminology which has not been called in question since the United Nations Conference on the Law of Treaties and which uses the term "treaty" and not the term "agreement" to designate the conventional acts which are the subject of the present draft articles, and describes these conventional acts by the formula "treaties concluded between States and international organizations or between two or more international organizations". These two points will be considered briefly.

(2) With regard to the use of the term "treaty" rather than the term "agreement", a certain doubt might arise if

<sup>11</sup> Statements by the representatives of Nigeria and Israel (*Official Records of the General Assembly, Twenty-eighth Session, Sixth Committee*, 1401st meeting, para. 5 and 1404th meeting, para. 15).

<sup>12</sup> Corresponding provision of the 1969 Convention:

"Article 1. *Scope of the present Convention*

"The present Convention applies to treaties between States."

<sup>13</sup> "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."

one refers to article 2, paragraph 1 (a) of the 1969 Convention. That provision reserves the term "treaty" for conventional acts concluded between States in written form; moreover, article 3 of the same Convention uses the term "international agreement" for all other conventional acts, whether not in written form or concluded between States and other subjects of international law or between two or more subjects of international law. In order to remain faithful to the terminology used in the 1969 Convention, would it not then be necessary to use the term "international agreement" to designate conventional acts concluded between States and international organizations or between two or more international organizations? The Special Rapporteur does not think so, for the following reasons.

(3) The preparation of the present draft articles implies frequent references to the 1969 Convention, and it is obvious that the two texts will be used together both in theory and in practice. It is therefore essential to avoid all ambiguity in the terminology common to the two conventions (on the assumption that the draft articles will become a convention). One point is clear: the term "treaty" used in isolation must have the same meaning in the draft articles as in the 1969 Convention; that is, it must signify a conventional act concluded between States in written form. The term "international agreement" is clearly the most general expression used in the 1969 Convention, and covers all international conventional acts which have no special designation or special régime. In the context of the 1969 Convention, such a designation and régime are applicable to international conventional acts concluded between States in written form, which constitute "treaties". But in the draft articles, international conventional acts concluded in written form between States and international organizations or between two or more international organizations will be subject to a special régime and should have a special designation; it is therefore not logical to use the designation "international agreement" for that purpose. The latter term should retain its wider connotation, even if special régimes gradually make it inappropriate to use that term on many occasions. The designation to be reserved for the conventional acts which are the subject of the present draft articles is thus "treaties concluded between States and international organizations or between two or more international organizations". The disadvantage of this designation is its length and the practical impossibility of replacing it by a shorter expression; its advantage is that it avoids confusion and remains faithful to a usage sanctioned by the authoritative resolution adopted by the United Nations Conference on the Law of Treaties.<sup>14</sup>

<sup>14</sup> The reference here is to the well-known resolution of the Conference by 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 question of 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. Resolution relating to Article 1 of the Vienna Convention on the Law of Treaties).

(4) However, this long designation, which juxtaposes two different categories of treaties in order, it might be supposed, to draw a distinction between them as much as to associate them, immediately raises a question of substance. Is it not necessary, *from the outset*, to separate treaties concluded between States and international organizations from treaties concluded between two or more international organizations? Traces of concern about this issue are to be found in the discussion on the work of the Commission.<sup>15</sup> Without anticipating future developments, it can already be stated that in treaties concluded between States and international organizations certain rules of the 1969 Convention relating to the consent of a State, considered in isolation, may be applicable; of course, they are not applicable in the case of treaties concluded between two or more international organizations.

(5) It is therefore possible and even certain that in the case of certain specific problems it will be necessary to draw a distinction between the two categories mentioned above. But in the opinion of the Special Rapporteur, this is not a sufficient reason to separate them *from the outset* as though this were a fundamental distinction on which the International Law Commission ought to base its work. Two substantial considerations militate against such a solution.

(6) Firstly, the very bases of the 1969 Convention are common to treaties between States, treaties between States and international organizations and treaties between two or more international organizations, and to begin by dividing into two fundamentally distinct categories the treaties with which the present draft articles are to deal would be a very disquieting first step towards the basic objective of departing as little as possible from the 1969 Convention. The underlying unity of all these juridical régimes derives from the basic value of consensualism, which is present in all the provisions of the 1969 Convention.

(7) Secondly, careful study of the lengthy debates of the International Law Commission on the law of treaties between States shows that the Commission was on many occasions tempted to introduce traditional distinctions: bilateral and plurilateral treaties (not to mention general multilateral treaties), formal treaties and treaties in simplified form, and so on, and that finally it avoided any *systematic* reference to classifications, confining itself in some articles to drawing, in terms as simple and precise as possible, distinctions whose purpose is always limited to that of the article in question. This attitude of the Commission reflects the desire both to maintain for all treaties the unity of the régime applicable and to avoid any reference to doctrinal concepts: it is essential to remain faithful to that spirit.

(8) We have still not examined the second sentence of the proposed text, which refers to article 3 (c) of the

1969 Convention. It concerns a point which is not essential, but to which the attention of the International Law Commission should be drawn. Mention has already been made of the origin of this text, which was added at the Conference on the initiative of the Drafting Committee, in order to allay the concern of some States which were afraid that the future convention on the law of treaties might not cover so-called "trilateral" treaties,<sup>16</sup> that is, treaties in which two States which have decided to enter into relations involving assistance or the supply of goods associate with that agreement, as a third party, an international organization, which is responsible for carrying out or supervising certain operations (in particular transfers of fissionable materials). In order to avoid excluding such treaties completely from the scope of the codification, the conventional relations arising from a trilateral treaty were divided into two groups: the relations between States bound by virtue of an express provision of the 1969 Convention, and the others, that is, the relations between the States and the organization, which were covered by the customary régime.

(9) This improvised solution, embodied in article 3 (c), is merely a clever but debatable expedient. From the standpoint of principles, it has not been shown that the unity of the conventional régime can be thus disrupted without also disrupting the unity of the treaty, especially in the case of a treaty in which the various parties are not in a symmetrical position in relation to each other: is not the organization almost constantly intervening in the relations between the States? However, whatever view may be held of article 3 (c) within the existing system of the 1969 Convention, it must be acknowledged that such an article no longer has any justification as soon as the rules of the 1969 Convention have been extended as far as possible to treaties between States and international organizations, as is the intention in the present draft articles. It thus becomes quite natural to eliminate the provision contained in article 3 (c) of the 1969 Convention and to restore their unity of régime to conventional relations.

It may be felt that the proposed wording makes the preliminary article too long, and that this article should be concise, like the corresponding provision of the 1969 Convention; in that case, it will be necessary to find a more appropriate place for the second sentence at a later stage.

## Article 2. Use of terms

### 1. For the purposes of the present articles:

(a) "Treaty concluded between States and international organizations or between two or more international organizations" means an international agreement concluded between States and international organizations or between two or more international organizations in written form

<sup>15</sup> See the question put by Mr. Ushakov at the twenty-fifth session of the International Law Commission (*Yearbook . . . 1973*, vol. I, p. 189, 1238th meeting, para. 76), or the observation by the representative of Israel in the Sixth Committee of the General Assembly (*Official Records of the General Assembly, Twenty-eighth Session, Sixth Committee*, 1404th meeting, para. 14).

<sup>16</sup> See *Yearbook . . . 1973*, vol. I, p. 189, 1238th meeting, para. 75. See also *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. 7.

and governed principally by general international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.<sup>17</sup>

## COMMENTARY

(1) The wording of the 1969 Convention is followed exactly, except for two new elements introduced into the phrase "governed by international law" by the addition of the words "principally" and "general". As will be explained, these two minor additions—and particularly the first one—are not absolutely essential, but are useful. With regard to the remainder of the text, since the exclusion from the scope of the draft articles of agreements not concluded in written form was originally the subject of a decision by the International Law Commission, no further commentary on it is called for.<sup>18</sup>

(2) The use of the term "principally" is intended to resolve a difficulty which may arise in connexion with the distinction between "treaties" and "contracts". It is generally agreed that the distinction between a treaty and a State contract may be drawn on the basis of the law which will govern these instruments: treaties are governed by international law, whereas contracts are governed by any national law chosen by the parties. If the parties have not expressed their intentions in this regard in sufficiently clear terms, the question must be resolved by taking into consideration the *purpose* of the conventional act and the *circumstances* which surrounded its conclusion.<sup>19</sup> No special attention was given to this problem in the preparatory work on the 1969 Convention. Does it involve special aspects in so far as international organizations are concerned?

(3) At first sight, the question arises in the same manner for treaties between States and for treaties between States and international organizations or between two or more international organizations. Certain members of the International Law Commission emphasized, however, that the problem would be more important in the case of international organizations, because of the special functions which some of them perform in the financial, commercial or scientific fields<sup>20</sup> or because

in practice certain agreements are governed "in some respects by international law and in other respects by the law of a particular State".<sup>21</sup> These are extremely interesting and pragmatic questions which are more germane to the law of international and transnational contracts than to the law of treaties, although the body of legal writings on these questions contains works by a number of experts in public international law.<sup>22</sup> Indeed, the main issue is thus which specific régime governs certain contracts concluded between States and organizations, on the one hand, and individuals, on the other hand; these would therefore be "international agreements", which would in this case not fall within the sphere of application of either the 1969 Convention or the present draft articles. This may be why the International Law Commission did not consider this question in depth when preparing the draft articles on the law of treaties.<sup>23</sup>

(4) In any case, it is quite possible to deal with the problem which arises when a conventional act binding an international organization to a State or to another international organization is subject partly to international law and partly to the national law of a State. This case may not arise very frequently, but it is by no means extraordinary or inconceivable. It often happens that a legal situation is covered as a whole by international law but some of its aspects are subject to rules and concepts of national law; this is a quite common phenomenon of *renvoi*, in the widest sense of the term.<sup>24</sup> A treaty governed by international law may legitimately refer to national law for questions which today are normally covered by national law, such as procedure for transfer of ownership, an insurance régime or a monetary definition. On the other hand, a conventional act which, as a contract, is subject to one or more specific national laws may for certain of its elements be subject to international law, not only because such rules of international law are an integral part of a system of applicable national law (which is natural), but also because the

<sup>21</sup> Mr. Ustor (*ibid.*, p. 204, 1242nd meeting, para. 21).

<sup>22</sup> See the references in D. P. O'Connell, *International Law*, 2nd ed. (London, Stevens, 1970), vol. II, pp. 976 *et seq.*; see also, on the subject of a different but similar problem, A. Broches "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States", in *Recueil des Cours de l'Académie de droit international de La Haye, 1972-II* (Leyden, Sijthoff, 1973), vol. 136, p. 330.

<sup>23</sup> See *Yearbook . . . 1965*, vol. I, p. 7, 776th meeting, paras. 49 *et seq.*, and 77th meeting; also *ibid.*, vol. II, p. 12, paragraph 6 of the Special Rapporteur's observations and proposals relating to draft article 1, para. 1 (a) and references.

<sup>24</sup> It should, however, be noted that such reference to national law has major disadvantages in certain respects, either because it is difficult to determine what is the applicable national law, or because the unity of the applicable régime breaks down; this is why there is often a tendency for public international law to supersede national law; a recent example is the definition of the régime of the limited liability company, which the International Court of Justice transferred from national law to public international law, when this régime is invoked in connexion with diplomatic protection in the *Barcelona Traction* case (Barcelona, Traction, Light and Power Company Limited, *I.C.J. Reports 1970*, p. 3). See P. Reuter, "L'extension du droit international aux dépens du droit national devant le juge international", in *Mélanges offerts à Marcel Waline — le juge et le droit public* (Paris, Librairie générale de droit et de jurisprudence, 1974), vol. I, p. 241.

<sup>17</sup> Corresponding provision of the 1969 Convention:

"Article 2. *Use of terms*

"1. For the purposes of the present Convention: (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;".

<sup>18</sup> See the report of the Sub-Committee on treaties concluded between States and international organizations or between two or more international organizations (*Yearbook . . . 1971*, vol. II (Part One), p. 349, document A/8410/Rev.1, chap. IV, annex, para. 7; See also *Yearbook . . . 1972*, vol. II, p. 149, document A/CN.4/258, para. 80; and *Yearbook . . . 1973*, vol. II, p. 77, document A/CN.4/271, para. 9.

<sup>19</sup> See the arbitral award of 10 June 1955 [between the United Kingdom and Greece] in the diverted cargoes case (United Nations, *Reports of International Arbitral Awards* (United Nations publication, Sales No. 63.V.3), p. 65).

<sup>20</sup> Mr. Kearney (*Yearbook . . . 1973*, vol. I, p. 200, 1241st meeting, para. 20).

parties to the contract have expressly so agreed or because a treaty applicable to the question has so provided.<sup>25</sup>

(5) In principle, however, such cases do not pose problems. There is always a general legal régime which applies "principally" and it is this régime which makes it possible to establish whether the conventional act is a treaty or a contract. Consequently, if the International Law Commission wishes to dispel any doubt on this subject, the term "principally" may be added. This addition does make the text of the 1969 Convention more explicit, but this improvement is not absolutely essential and is not particularly necessitated by features peculiar to the treaties dealt with in the present draft articles. The Commission will therefore have to weigh the advantages and disadvantages of such an addition.

(6) On the other hand, the reference in the proposed article to "general international law" is designed to clarify a point which is peculiar to agreements concluded by international organizations. A case might exist in which an international organization evolved a highly developed legal system of its own, to which it intended that a conventional act should be subject in its entirety. An example of such a case would be a financial institution which adopted "regulations", "codes" or "guidelines" governing completely any relations between it and a State following a financial transaction embodied in a conventional act between it and that State. This situation could be analysed as an example of a conventional act subject to a special system of international law, entirely defined by the organization concerned. A still more general situation could be envisaged in which it was the relations between the organization and the member States that were removed in their entirety from the sphere of general international law and were subject to a system which was decidedly special and which could be described as an international system, even though in an increasing number of treaties this system would no longer have many of the "traditional" features of public international law. In view of the possibility of situations of this kind, it would perhaps be appropriate for such conventional acts, although not constituting "contracts subject to national law", no longer to be considered as "treaties subject to general public international law"; this would be achieved by the insertion

<sup>25</sup> Article 42 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States is a good example of this possibility, since it provides that, in a conventional régime subject in principle to a specific national law, certain elements borrowed from international law may also be taken into consideration. Cf. the commentary by A. Broches (*loc. cit.*, pp. 387-391). In the case of an agreement concerning a loan granted to a State by an international banking organization, if the connexion with a legal system is not specified sufficiently clearly, it will be necessary to ascertain with which system the loan is "principally" connected. Neither reference to a system of national law "frozen" at a particular point in time, nor reference to the general principles of law or any other transnational reference, is sufficient to indicate that "it is" public international law which "principally" governs a conventional act or to show that a treaty is involved; nor is it sufficient to include a clause specifying that the rights and obligations of the parties cannot be altered by a unilateral act by one of them. Cf. A. Broches, "International legal aspects of the operations of the World Bank", *Recueil des Cours de l'Académie de droit international de La Haye*, 1959—III, vol. 98 (Leiden, Sijthoff, 1960), p. 301.

of the adjective "general" to qualify "international law", as proposed in the draft article under consideration.

(7) But so far only hypothetical situations have been considered. Does the situation just described currently reflect real problems of international society? On this point, the Special Rapporteur has consulted a number of international organizations, through the Secretary-General of the United Nations, and it would seem that in general the relevance of the hypothesis considered is not for the time being clearly apparent.<sup>26</sup> In the opinion of the Special Rapporteur, it should not be forgotten that international organizations are always, despite everything, in the process of developing and that an attempt at codification must take account of a future which is inescapable even if its timing is a matter of uncertainty. It is therefore necessary to take into consideration the possible implications of the fundamental principle underlying the preceding considerations which appears frequently in this work: the fact that each organization has a set of rules which constitute the law peculiar to that organization and which limit the application of the *general* rules of public international law in the matter of treaties. This principle is not the fruit of theoretical imagination; it is formally embodied in article 5 of the 1969 Convention:

The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

(8) This reservation concerning "any relevant rules of the organization" is the expression of the internal autonomy of the organization and, as the Special Rapporteur wrote in 1973:

[This principle] affirms the existence of a law peculiar to each organization and recognizes, with respect to treaties, its precedence over the general rules of the law of treaties. As we have already said, but must repeat, what is true of treaties between States "adopted within an international organization" should be even more true of agreements concluded "within" an international organization to which either the international organization itself or some of its organs are parties.<sup>27</sup>

In view of prospects for the future and of the importance of these principles, the Special Rapporteur has therefore

<sup>26</sup> See *Yearbook . . . 1973*, vol. II, pp. 88-89, document A/CN.4/271, para. 83. It will be noted, however, that—with the exception of information from IBRD—no information has been received from the financial institutions, which might have been most concerned by this question. Nevertheless, more concrete situations could already be imagined on the basis of the analyses just made. For example, for the practical operation of a peace-keeping force, the United Nations may conclude agreements which, rather than being governed by general public international law, will remain strictly subordinate not only to the Charter but also to a complex system of administrative and financial decisions and rules which in fact constitute the special law of the United Nations. The European Communities, which are more similar to a pre-federal system, are only gradually accepting the concept of "internal" agreements of the Communities; cf., however, the decision of the Court of Justice of the European Communities in case 2-68 (*Recueil de la jurisprudence de la Cour*, 1968 (Luxembourg), vol. XIV-V, p. 635); and P. Reuter, *Organisations européennes* (Paris, P.U.F., 1965), pp. 267-268.

<sup>27</sup> See *Yearbook . . . 1973*, vol. II, p. 89, document A/CN.4/271, para. 84.

proposed an addition to the text of the 1969 Convention to adapt it to the special case of international organizations.

*Article 2, paragraph 1 (d)* <sup>28</sup>

**“Reservation” means a unilateral statement, however phrased or named, made by a State or by an international organization, when signing, ratifying, accepting or approving a treaty concluded between States and international organizations or between two or more international organizations, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.**

COMMENTARY

There is apparently no theoretical or practical reason to depart from the definition of reservations given in the 1969 Convention. It will be noted, however, that the fact that international organizations are not parties to multilateral treaties would suffice to explain why the practice of reservations does not exist among international organizations.<sup>29</sup> The few drafting changes made in the corresponding provision of the 1969 Convention do not call for any special comment.

*Article 2, paragraph 1 (e)* <sup>30</sup>

**“Negotiating State” means a State which took part in the drawing up and adoption of the text of the treaty; “negotiating organization” means an organization which took part, as a potential party to the treaty, in the drawing up and adoption of the text of the treaty.**

COMMENTARY

It is impossible to place an international organization on the same footing as a State with regard to the definition of participation as a negotiator. It often happens that an international organization takes part in the drawing up and adoption of the text of a treaty to which it is not destined to become a party. In modern practice, international organizations take part in the most varied ways

<sup>28</sup> Corresponding provision of the 1969 Convention:

*“Article 2: Use of terms*

“1. For the purposes of the present Convention:

“*(d)* “Reservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding 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.”

The description of the provisions of the draft articles which may correspond to the definitions given in article 2, paragraphs 1 (*b*), (*c*), (*g*) and (*h*) of the 1969 Convention will be given in the commentary to the articles dealing with the subject-matter of these definitions.

<sup>29</sup> See *Yearbook . . . 1972*, vol. II, pp. 175 and 193, document A/CN.4/258, paras. 12 and 70.

<sup>30</sup> Corresponding provision of the 1969 Convention:

*“Article 2: Use of terms*

“1. For the purposes of the present Convention:

“*(e)* “negotiating State” means a State which took part in the drawing up and adoption of the text of the treaty;”

in the drawing up and adoption of treaties between States: preparation of a draft treaty by international secretariats or by specialized organs, discussion and amendment of the draft within an organ of the organization, signature, by a high-ranking official of the organization or by the chairman of an organ, of the draft agreed on in the course of deliberations within an organ of the organization and so on. All this does not prevent the treaty from remaining a treaty between States; it does not become a treaty between States and organizations or between two or more organizations. As such, a treaty of this kind remains subject to the provisions of the 1969 Convention; this is the meaning of article 5, which states that the Convention applies, *inter alia*:

to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

If this is true of treaties adopted “within an international organization”, it is even more true of those adopted “under the auspices of an organization”, when the organization may have taken part in the drawing up of the treaties.<sup>31</sup>

It seems that, in order to avoid any confusion, it would be sufficient to specify that the present draft article can govern only cases in which the international organization has taken part in the drawing up and adoption of the text in the same conditions as States—in other words, with the idea of becoming a party to the treaty which will result from that text.

*Article 2, paragraph 1 (f)* <sup>32</sup>

**“Contracting State” or “contracting organization” means a State or organization which has consented to be bound by the treaty, whether or not the treaty has entered into force.**

COMMENTARY

The change, purely of a drafting nature, made in the corresponding provision of the 1969 Convention calls for no comment.

<sup>31</sup> See *Yearbook . . . 1972*, vol. II, pp. 186-187, document A/CN.4/258, para. 51. One incidental comment may be added, to show how the “participation” of international organizations in the history and life of treaties between States may take organic forms without making the treaties lose their character of treaties between States. It is quite common, at least as regards certain secondary provisions, for constituent instruments to provide for a simplified revision procedure which allows the organization itself, by an instrument issued exclusively by one or more of its organs, to undertake the revision. In this case, the whole of the revised constituent instrument remains subject to the 1969 Convention, even with regard to its revised provisions. There could be no question of the revised provisions falling within the scope of these draft articles. Consequently, for example, invalidity which could result from failure to respect the revision procedure would be governed by article 43 of the 1969 Convention, under which invalidity may result from the provisions of the treaty concerned.

<sup>32</sup> Corresponding provision of the 1969 Convention:

*“Article 2: Use of terms*

“1. For the purposes of the present Convention:

“*(f)* “Contracting State” means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;”

No useful consideration of the two other definitions given in article 2, paragraph 1 (g) and (h), of the 1969 Convention, with a view to transposition of their provisions to treaties between States and international organizations or between two or more international organizations, can take place pending an examination of the substantive provisions of the 1969 Convention concerning the questions dealt with, which are the concepts of "party" and "third party". This would seem at first sight to be a particularly complicated question.<sup>33</sup>

*Article 2, paragraph 1 (i)* <sup>34</sup>

**"International organization" means an intergovernmental organization.**

COMMENTARY

(1) The exact reproduction, in this draft article, of the definition given in the 1969 Convention does not raise any problems with regard to the exclusion of non-governmental organizations, although it is likely that some non-governmental institutions such as the International Committee of the Red Cross conclude conventional acts similar to those of intergovernmental organizations. On the other hand, as regards its positive aspect, the maintenance of this definition has two consequences which call for comment.

(2) Firstly, this wording refrains from defining the organization by reference to other international institutions, such as the international conference or the elements which within an international organization constitute an entity enjoying a certain degree of autonomy vis-à-vis the organization, whatever their designation ("organization", "subsidiary organs", "connected organs", etc.). In practice, however, it will be seen that there is little confusion as to the concept itself. Similarly, the 1969 Convention refrained from defining the concept of "State", and rightly so: definitions of such general terms almost always raise theoretical issues on which it is difficult to reach a broad consensus and whose usefulness is limited to exceptional cases.

(3) Secondly, this definition of "international organization" has one very important consequence: the treaties of all international organizations, both regional and universal, would be governed by the draft articles. On this point, the Special Rapporteur had already in 1972 <sup>35</sup>

<sup>33</sup> See *Yearbook* . . . 1972, vol. II, p. 189, document A/CN.4/258, paras. 58-60; *Yearbook* . . . 1973, vol. II, pp. 78-81, document A/CN.4/271, paras. 23-33; comments by the representative of the Federal Republic of Germany (*Official Records of the General Assembly, Twenty-eighth Session, Sixth Committee, 1402nd meeting, para. 22*); comments by Mr. Pinto (*Yearbook* . . . 1973, vol. I, p. 199, 1241st meeting, para. 6); Mr. Ushakov (*ibid.*, p. 200, paras. 10, 11 and 17); Mr. Kearney, (*ibid.*, p. 201, paras. 26-27); Mr. Tammes (*ibid.*, p. 203, 1242nd meeting, paras. 5-6); Mr. Ustor (*ibid.*, p. 205, para. 25) and Sir Francis Vallat (*ibid.*, p. 207, para. 45).

<sup>34</sup> Corresponding provision of the 1969 Convention:

*"Article 2: Use of terms*

"1. For the purposes of the present Convention:

" . . .

"(i) 'International organization' means in intergovernmental organization;"

<sup>35</sup> *Yearbook* . . . 1972, vol. II, p. 195, document A/CN.4/258, para. 77; see also *Yearbook* . . . 1971, vol. II (Part One), p. 349, document A/8410/Rev.1, chap. IV, annex, para. 8.

expressed an opinion confirmed by the prevailing view of the members of the Sub-Committee of the International Law Commission which had been requested to prepare the study on the subject: it is *a priori* highly desirable that the sphere of application of the draft articles should extend to agreements concluded by all international organizations without distinction. That was the position already adopted in the 1969 Convention, which does not deal directly with the question but which contains numerous provisions concerning international organizations and drawing no distinction between them; a departure from the approach of the 1969 Convention would have serious disadvantages. In addition, the goal of codification is the unification of legal rules as well as the stabilization of their development. How much authority with regard to the law of treaties would be carried by codification instruments which disregarded, for example, agreements concluded by regional organizations? <sup>36</sup>

(4) Considerable attention has been paid to this problem in the International Law Commission. Some members approached the problem from the very broad standpoint of the law of international organizations and admitted the possibility of limiting the draft articles to certain organizations; some even recommended that solution, referring to the precedent provided by the draft articles on the representation of States in their relations with international organizations,<sup>37</sup> which deal only with organizations of universal character.

(5) Accordingly, the Special Rapporteur has reconsidered the question. It is quite obvious that the bulk of the legal rules which concern an international organization are, *de jure* and *de facto*, rules peculiar to that organization; they are essentially the rules contained in its constituent instrument, or in the agreements which it has concluded or which its member States have concluded on the subject of its status, for example with regard to the immunities involved in its operation; this law of the organization also consists of all the rules which it may have formulated itself to regulate its administrative and financial dealings and sometimes even to apply to its member States or to individuals over whom it has authority, when it has been authorized to do so. These rules vary from one organization to another. It may seem desirable to standardize such rules, at least on certain points. A draft convention will then be formulated, as was the case with the International Law Commission's draft articles on the representation of States in their relations with international organizations,<sup>38</sup> adopted at its twenty-third session and to be submitted to an international conference scheduled for 1975.

(6) In formulating such a draft, the methods followed are the same as those applied in the search for *uniform law* or, to quote a striking term "comparative organic law".<sup>39</sup>

<sup>36</sup> *Yearbook* . . . 1973, vol. I, p. 188, 1238th meeting, para. 71.

<sup>37</sup> *Yearbook* . . . 1971, vol. II (Part One), p. 284, document A/8410/Rev.1, chap. II, D.

<sup>38</sup> This is the only aspect of the law of international organizations which has been singled out and made the subject of a uniform law.

<sup>39</sup> Term used by the representative of Zaire in the Sixth Committee (*Official Records of the General Assembly, Twenty-eighth Session, Sixth Committee, 1399th meeting, para. 18*).

It is therefore normal to limit the unification effort to certain particular points from the body of law peculiar to each organization; it is even more normal to limit the undertaking to *certain organizations with comparable features*. Any attempt to abolish by a treaty the differences which inevitably and legitimately differentiate one organization from another would undoubtedly be doomed to failure. For this reason, the draft articles mentioned above were limited to a strictly circumscribed subject and to a group of organizations with common features.

(7) Is this the kind of case which is involved when treaties are concluded between States and international organizations or between two or more international organizations? *Obviously not*: the peculiarity of such treaties is that they bind an organization to one or more States or to one or more organizations; neither their binding force nor their régime can be derived from the law peculiar to an international organization, but only from the rules of general international law binding on States and on international organizations.<sup>40</sup> This binding force and this régime are indeed already established: thousands of treaties of this kind have been concluded over the years; they exist and have existed because of the profound conviction of States and organizations that they had a definite legal value similar to that of treaties between States. Consequently, since a treaty between a universal organization and a regional organization, for example, has a legal value and since its legal régime cannot depend either on the law of the universal organization or on the law of the regional organization, it must be admitted that the treaty derives this value from general international law.

(8) The sole aim of the work currently being undertaken by the International Law Commission is to examine whether the texts adopted on the subject of treaties between States should be in any way altered and supplemented in order to apply to the treaties of international organizations; the aim is not to unify the law of all the international organizations. There is therefore no reason to exclude from the sphere of application of the draft articles treaties to which organizations in any particular category are parties: to do so would be to confuse general international law with the law peculiar to each organization or, at best, with comparative law. This would be as serious an error as if the authors of the 1969 Convention had sought to limit the Convention to treaties concluded by certain States having similar constitutional or political régimes.

(9) This does not mean that it is possible to ignore the fact that in certain matters the relationship between general international law and the law of each organization may raise delicate problems of terminology and of substance; but the 1969 Convention encountered such problems and solved them with regard to the relationship

between general international law and the constitutional law of States; it encountered them with regard to organizations and stated the general rule which should make it possible to solve them: the reservation concerning the relevant rules of each organization (article 5).

(10) The distinction between general international law and the law peculiar to an organization, which has just been considered at length, not only determines the organizations whose treaties will be subject to the draft articles but also has much broader implications. It is this distinction which should make it possible in all doubtful or controversial cases to determine whether or not a question comes within the scope of the draft articles. The aim of the draft articles is not to formulate a system of uniform law based on a comparative study of the law peculiar to each international organization, but to identify and formulate the rules necessary for the consolidation and development of a solidly based practice recognizing the legal value of the treaties of international organizations, irrespective of the special features which may characterize each organization.

#### *Article 2, paragraph 2*<sup>41</sup>

**The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms with the meanings which may be given to them in the internal law of any State or in the law peculiar to any international organization.**

#### COMMENTARY

(1) The adaptation of article 2, paragraph 2, of the 1969 Convention raises a question of terminology, and perhaps also of substance: should the draft articles refer to the "internal law" of an organization, in the same way as the 1969 Convention refers to the "internal law" of the State, or is it preferable, as has been done in the text proposed above, to use the expression "law peculiar to any international organization"? This problem of terminology goes beyond the scope of article 2, paragraph 2, of the 1969 Convention; that Convention also mentions the "internal law" [of States] in its articles 27 and 46; this same question will therefore also arise in connexion with those articles.

(2) In the course of its work, the International Law Commission has on occasion used the term "internal law of an international organization", without this expression having given rise to any objections or even any comments.<sup>42</sup> Admittedly, however, it may lead to a twofold ambiguity. In the first place, the term "internal" is often used in opposition to the term "international"; this cannot be the case here, since it is applied to a set of rules which constitute "special" international law, "peculiar to

<sup>40</sup> For a very clear explanation of this distinction, see the statement by the delegation of the United States of America at the United Nations Conference on the Law of Treaties (*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. 43, eighth meeting of the committee of the Whole, para. 20).

<sup>41</sup> Corresponding provision of the 1969 Convention:  
"Article 2: Use of terms

"...  
"2. The provisions of paragraph 1 regarding the use of terms in the present Convention 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."

<sup>42</sup> See *Yearbook . . . 1972*, vol. II, p. 181, document A/CN.4/258, para. 33; and *Yearbook . . . 1973*, vol. II, pp. 88-89, document A/CN.4/271, para. 83.

an international organization", and not "national" law.<sup>43</sup> In the second place, since the term "internal law" usually refers to State law, it thereby suggests a stratified legal system which is all-inclusive and unified by a centralized legislature and judiciary; it might be claimed that the terms is inappropriate for the entire system constituted by the law peculiar to an organization. In most cases, the latter system retains the general features of international law, characterized by the lack of real legislative power and of any power of the organization to judge or to compel the States which are members of it. The adjective "internal" is appropriate only for the rules which govern the relationship between the organization and its officials, the rules of procedure of the organization's organs and the "internal" administrative and financial regulations; the description "internal" is sometimes applied to relationships or decisions involving these elements, which do not represent the essential part of the organization's activity. It might therefore be claimed that the term "internal" is ambiguous and that in many cases the relationship between the organization and its member States is too similar to the relationships which are governed by general international law for it to be described as "internal".

These objections to the use of the expression "internal law of any international organization" are not entirely convincing from the point of view of logic. But, since the expression has connotations which are perhaps best avoided, the draft article uses the expression "law peculiar to any international organization", which is more neutral.

**Article 3. International agreements  
not within the scope of the present articles<sup>44</sup>**

**The fact that the present articles do not apply to international agreements concluded between international organizations and subjects of international law other than States or international organizations, or to agreements between States and international organizations or between two or more international organizations not in written form, shall not affect:**

- (a) the legal force of such agreements;
- (b) the application to them of any of the rules set forth in the present articles to which they would be subject under international law independently of the articles;

<sup>43</sup> Statements by Mr. Tammes and Mr. Quentin-Baxter at the twenty-fifth session of the International Law Commission (*Yearbook . . . 1973*, vol. I, pp. 203 and 206, 1242nd meeting, paras. 7 and 38).

<sup>44</sup> Corresponding provision of the 1969 Convention:  
"Article 3. *International agreements not within the scope of the present Convention*

"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:

- "(a) the legal force of such agreements;
- "(b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;
- "(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".

**(c) the application of the articles to the relations between States and organizations or to the relations of organizations as between themselves under international agreements to which subjects of international law other than States or international organizations are also parties.**

COMMENTARY

(1) The adoption of a text corresponding to that of article 3 of the 1969 Convention raises problems more difficult than would appear at first sight. It is not in fact sufficient to replace some terms by others: the effects which would result from combining article 3 of the 1969 Convention with article 3 of the draft articles must also be taken into account. The fact that a set of draft articles will henceforth deal with agreements between States and international organizations or between two or more international organizations makes it necessary to break down the simple concept mentioned in article 3 of the 1969 Convention—"subjects of international law other than States"—into two elements: "international organizations", on the one hand, and "subjects of international law other than States or international organizations", on the other.

(2) According to this analysis, it is possible to distinguish the following categories among the agreements to which the 1969 Convention does not apply:<sup>45</sup>

In the case of agreements in written form: (1) agreements between States and international organizations; (2) agreements between two or more international organizations; (3) agreements between States and subjects of international law other than States or international organizations; (4) agreements between international organizations and subjects of international law other than States or international organizations; (5) agreements between two or more subjects of international law other than States or international organizations;

In the case of agreements not in written form, those corresponding to the five categories mentioned above, and unwritten agreements between States.

(3) The problem is to distribute between the 1969 Convention and the draft articles those agreements to which neither the Convention nor the draft articles apply directly but to which the provisions of both might possibly be extended under article 3. The draft articles apply by hypothesis to the following groups: (1) written agreements between States and international organizations; (2) written agreements between two or more international organizations. It is quite natural to think that the provisions of the draft articles, more than those of the 1969 Convention, can, if necessary, be applied to unwritten agreements corresponding to these groups (1) and (2), and one might be tempted to say the same of agreements in group (4), agreements between international organizations and subjects of international law other than States or international organizations, whether in written form or not.

<sup>45</sup> To the categories mentioned might be added international agreements to which States, international organizations and subjects of international law other than States or international organizations are simultaneously parties, but it might be considered that draft article 3 (c) does apply to such agreements.

This leaves two groups about which there might be some hesitation: group (3), agreements between States and subjects of international law other than States or international organizations, and group (5), agreements between two or more subjects of international law other than States or international organizations.

(4) The reply concerning this question may depend on what entities it is felt might be placed in this residuary category of subjects of international law: international institutions such as the Holy See,<sup>46</sup> the International Committee of the Red Cross, or the Bank for International Settlements? Insurgents after they have been recognized? Even individuals? In order to avoid the necessity of a discussion on which it would be very difficult to achieve unanimity, another consideration might be taken into account. The Vienna Convention will certainly enter into force before the draft articles; moreover, the Vienna Convention is the convention which will in fact be applied most extensively: it would therefore be natural to attach to it cases as uncertain as those which might fall within the category: "Subjects of international law other than States or international organizations". The problem would, of course, be greatly simplified if it could be shown that that category is void of any content and that the provisions concerning it could disappear; however, the use of the term in the 1969 Convention makes it difficult to uphold the thesis that States and international organizations are the only subjects of international law.<sup>47</sup>

*Article 4. Non-retroactivity of the present articles*<sup>48</sup>

Without prejudice to the application of any rules set forth in the present articles to which treaties between States and international organizations or between two or more international organizations would be subject under international law independently of the articles the articles apply only to such treaties which are concluded after the entry into force of the present articles with regard to such States and organizations.

COMMENTARY

The adoption of a draft article 4 corresponding to that of the 1969 Convention rests on the hypothesis that the draft articles are destined to become an international convention to which States and, in a manner to be discussed, international organizations, can become parties, otherwise the article would have no meaning or would have to be given a different formulation. Since the

<sup>46</sup> Supposing, of course, that one holds that the Vatican City is not a State, or that it is not a party to the treaty under consideration, but that it is the "Holy See" which has the status of a party.

<sup>47</sup> See *Yearbook . . . 1962*, vol. II, pp. 36 *et seq.*, document A/CN.4/144, paras. 2 *et seq.* of the commentary to article 3.

<sup>48</sup> Corresponding provision of the 1969 Convention:

"Article 4: *Non-retroactivity of the present Convention*

"Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States."

outset of his work,<sup>49</sup> the Special Rapporteur has drawn attention to the important problem thus raised; it is not for him to resolve it and it is not the intention that this article should prejudge the question for the future.

\* \* \*

It is obvious that there can be no article in the draft articles similar to article 5 of the 1969 Convention.<sup>50</sup>

*Article 6. Capacity of international organizations to conclude treaties*<sup>51</sup>

**In the case of international organizations, capacity to conclude treaties is determined by the relevant rules of each organization.**

COMMENTARY

(1) The Special Rapporteur has already substantially developed the question of the capacity of international organizations to conclude treaties in his previous reports;<sup>52</sup> on the basis of both theoretical and practical considerations, he placed before the Commission his doubts as to the advisability and possibility of proposing an article on the capacity of international organizations to conclude treaties. Following a debate on this question in the International Law Commission at its twenty-fifth session, in view of the importance attached, to the matter and the diversity of opinions expressed, he was able to conclude, on 6 July 1973:

The conclusion he drew from the discussion, therefore, was that he should propose one or more draft articles on capacity. He would accordingly abandon the opinion he had expressed in his second report, propose a choice of wording accompanied by commentaries, and try to work out solutions acceptable to as many members of the Commission as possible.<sup>53</sup>

(2) The debates which took place in 1973 in the Sixth Committee of the General Assembly confirmed those of the International Law Commission; despite the purely preliminary nature of the statements dealing with treaties concluded between States and international organizations or between two or more international organizations, eight out of the eleven States which touched on that subject during the consideration of the report of the International Law Commission made observations on the question of the capacity of international organizations

<sup>49</sup> See *Yearbook . . . 1972*, vol. II, pp. 191 and 192, document A/CN.4/258, paras. 64-67; *Yearbook . . . 1973*, vol. II, pp. 81-83, document A/CN.4/271, paras. 38-52.

<sup>50</sup> Article 5:

"The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization."

<sup>51</sup> Corresponding provision of the 1969 Convention,

"Article 6: *Capacity of States to conclude treaties*

"Every State possesses capacity to conclude treaties."

<sup>52</sup> See *Yearbook . . . 1972*, vol. II, pp. 178-182, document A/CN.4/258, paras. 25-36; *Yearbook . . . 1973*, vol. II, pp. 81-83, document A/CN.4/271, paras. 38-52.

<sup>53</sup> *Yearbook . . . 1973*, vol. I, p. 209, 1243rd meeting, para. 16.

to conclude treaties.<sup>54</sup> On that occasion, it was observed, quite rightly, that whatever the final position taken in a future set of draft articles, it was essential to elicit the observations of governments and international organizations on this point and that it was therefore important to submit draft articles dealing with the capacity of organizations to conclude treaties.<sup>55</sup>

(3) It is in these circumstances that the Special Rapporteur proposes to the International Law Commission draft article 6 set out above. Before commenting on the elements of that draft article and showing how it can meet the various, and sometimes conflicting, concerns expressed during the debates, it is important to sum up the broad outlines of the situation in which the Special Rapporteur found himself.

(4) Two trends emerged during the debate in the International Law Commission, both inspired by equally respectable concerns: one in favour of the growing extension of the capacity of international organizations to conclude treaties,<sup>56</sup> and the other concerned over the need to respect the will of the States members of an organization, a will manifested above all by the constituent instrument of the organization. It is inevitable that divergent views should persist on this point when it is a question of resolving a specific problem relating to a given organization. But the Special Rapporteur has great hopes that these trends will converge and that agreement will be reached on the general wording to be included in the draft articles, because such wording should in fact possess the great flexibility essential if it is to be adapted to the different situations of the various international organizations.

(5) The most important question, in fact, is whether all international organizations—both universal and regional, serving a general or a specific purpose—have the *same* capacity to conclude treaties. On that point, a firm negative reply can be given at once. As far as its capacity to perform legal acts, of whatever kind, is concerned, any international organization is a highly individualized entity which cannot *a priori* be assimilated to any other. An intergovernmental organization, the only international organization which needs to be considered here, is based on a treaty between States; each intergovernmental organization is shaped individually by the will of its founders, and subsequently of its members. This is one of the points on which the clearest distinction can be made between States and international organizations. States can *all*, without any exception, perform the same legal acts: *a sovereign equality* prevails among them.

<sup>54</sup> Iraq (*Official Records of the General Assembly, Twenty-eighth Session, Sixth Committee, 1397th meeting, para. 10*); United States of America (*ibid.*, 1398th meeting, para. 7); Byelorussian Soviet Socialist Republic (*ibid.*, para. 30); German Democratic Republic (*ibid.*, 1399th meeting, para. 31); Kenya (*ibid.*, 1401st meeting, para. 15); Greece (*ibid.*, para. 44); Brazil (*ibid.*, para. 58); Philippines (*ibid.*, 1402nd meeting, para. 42); USSR (*ibid.*, 1406th meeting, para. 20).

<sup>55</sup> United States of America (*ibid.*, 1398th meeting, para. 7). The same thought was expressed in a more general way by Austria (*ibid.*, 1405th meeting, para. 7).

<sup>56</sup> For example, the position expressed by Mr. E. Hambro at the twenty-fifth session of the International Law Commission (*Yearbook . . . 1973*, vol. I, p. 201, 1241st meeting, para. 30).

Organizations are, on the contrary, fundamentally unequal: the structure and powers of each organization are entirely dominated by its constituent instrument, which itself has been drawn up essentially with a view to serving functions which vary from one organization to another.

(6) It necessarily results that, if we consider the specific content of the capacity of an international organization, this capacity depends essentially on the law peculiar to each organization.<sup>57</sup> In theory, admittedly, it is conceivable that it might be wished to subject a limited number of selected organizations to uniform rules on this point, as has been attempted on other points. But that would no longer be an important practical question; it would be a very minor one, like that of the immunities of representatives of States, and not an essential question touching on the very existence of organizations; the usefulness of the undertaking is *a priori* doubtful since organizations meet highly individualized needs and situations. If governments shape the legal physiognomy of the organizations which they create, case by case, there would appear to be no reason why they should subsequently attempt to reshape that physiognomy into a single mould in some cases, even where the organizations are related. There are striking examples which prove how disinclined Governments are to unify existing organizations, especially with regard to their capacity in matters relating to international relations.<sup>58</sup>

<sup>57</sup> Statement by the representative of Iraq in the Sixth Committee: "... such capacity existed only if it was recognized by the law peculiar to the organization concerned" *Official Records of the General Assembly, Twenty-eighth Session, Sixth Committee, 1397th meeting, para. 10*. It appears that the same conclusion can be deduced from the observations made by Mr. Ushakov in the debate in the International Law Commission at its twenty-fifth session (*Yearbook . . . 1973*, vol. I, p. 200, 1241st meeting, paras. 10 *et seq.*) to the effect that the question of the capacity of international organizations to conclude treaties was outside the scope of the topic of the draft articles.

<sup>58</sup> There is no more conclusive example than that of the European Communities. The first to be established, the European Coal and Steel Community, has a capacity broadly defined by the first and second paragraphs of article 6 of its constituent instrument:<sup>a</sup>

"The Community shall have juridical personality.

"In its international relationships, the Community shall enjoy the juridical capacity necessary to the exercise of its functions and the attainment of its ends."

However, the same instrument denies the Community the capacity to conclude trade agreements relating to coal and steel (art. 71). The European Economic Community, whose capacity in the matter of treaties is defined more narrowly, has, however, been given the capacity to conclude tariff or trade agreements (art. 113).<sup>b</sup> The member States unified the institutions of the three Communities to a large extent by a new treaty of 8 April 1965,<sup>c</sup> without however thereby changing the arrangements with regard to the law peculiar to each Community, particularly in the matter of external relationships. Thus, at present, the three Communities which have the same States members and the same organs have three régimes relating to capacity in the matter of external relationships, and in particular the conclusion of treaties, which are clearly different, despite an attempt by the Court of Justice of the European Communities, under cover of a functional interpretation of the Treaty of Rome, to extend the capacity of the European Economic Community. When, therefore, extensive tariff negotiations are undertaken, such as those generally known as the Kennedy Round (Final Act of 30 June 1967),<sup>d</sup> the bargaining is carried out and the conclusion reached according to rules of competence which are

(7) In any event, the very fact that the task entrusted to the Special Rapporteur must take the 1969 Convention as a starting-point, and that its purpose is to propose adaptations and modifications which will enable the provisions of the Convention to be extended to treaties to which international organizations are parties means that the present articles cannot be intended to standardize the law relating to the capacity of international organizations. As has been shown above<sup>59</sup> that task could, moreover, be conceived only in relation to a group of similar organizations presenting such similarities that it might be possible to envisage common provisions relating to their capacity. If such a group exists, it is not easy to identify and it would probably include only minor organizations. In any event, this group would not include the organizations of the United Nations family; even the specialized agencies and the International Atomic Energy Agency present differences in relation to each other which are so considerable that there can be no question of submitting them to a "uniform law" in the matter of their external relations; as for the United Nations, it is obviously a special case and it is impossible even to imagine assimilating its situation to that of any other international organization.<sup>60</sup>

(8) The foregoing analyses show clearly the possible purpose of a draft article on the capacity of international organizations: it must be to point out the fundamental rule of the constitutional autonomy of each organization; since each organization has a law peculiar to it, its capacity is determined by the relevant rules of the organization.

(9) The preceding considerations have not, however, exhausted the problem and they call for further study in two directions: first of all, in that of the functional competence of international organizations, and secondly, that of determining the possible role of general public international law in the capacity of international organizations to conclude treaties.

(10) In the first place, it can be said that it is by no means a question of defining the capacity of international organizations at an identical level by seeking to establish a uniform law, but of affirming the value of a principle applicable to all international organizations while respecting their diversity; this principle is that of the functional competence of organizations: organizations would have in the matter of treaties the necessary capacity to conclude any treaties essential to the performance of their "functions" and their "missions", or, more simply, to the attainment of their "purposes"; this is what is sometimes

called the theory of the functional competence of organizations. Such a concept necessarily goes beyond the scope of external relations and the law of treaties and extends to all the powers, to all the areas of competence of the organisation. It pertains to this analysis to use the concepts of "purpose", "objective" and "mission", not in order to limit the exercise of the competence of the organization, which is generally acknowledged, but to provide a *source* of *new* areas of competence: organizations would be automatically competent to conclude any treaties which corresponded to their functions and their purposes and the constituent instrument of the organization would have to include an explicit prohibition in order to limit the capacity of the organization.<sup>61</sup>

(11) This concept calls for several observations. Both the precedents in legal practice which it invokes (which will be taken up later) and the literature on which it is based<sup>62</sup> relate above all to the question of the interpretation of treaties. In this case, the question is whether these individual treaties which constitute the constituents charters of international organizations call for an interpretation governed by specific rules. This manner of posing the question, even if it does not cover all the aspects, is essential in the elaboration of a set of draft articles designed to extend the sphere of application of the rules of the 1969 Convention.

(12) The 1969 Convention applies, under article 5, "to any treaty which is the constituent instrument of an international organization" and contains two articles (articles 31 and 32) relating to the interpretation of treaties. At no time, neither during the proceedings of the International Law Commission, nor during those of the United Nations Conference on the Law of Treaties, was it envisaged that special rules of interpretation should be established with regard to the constituent instruments of international organizations. If it is accepted, therefore, in accordance with legal practice and the literature, that the question of the capacity of international organizations to conclude treaties depends on the interpretation of the constituent instruments, it should be noted that the 1969 Convention contains no provision on this point relating specifically to problems of interpretation raised by the constituent instruments of international organizations. Some people might criticize this silence and even assert that, since the 1969 Convention is not yet in force, it in no way precludes claiming that there is a specific rule on this matter, or wishing to state such a rule. It is nevertheless true that to proceed in this manner, would be to modify

different in the case of coal and steel from those applicable to other products.

<sup>a</sup> For the text of the Treaty instituting the European Coal and Steel Community, see United Nations, *Treaty Series*, vol. 261, p. 140.

<sup>b</sup> For the text of the Treaty establishing the European Economic Community (known as the "Treaty of Rome"), see United Nations, *Treaty Series*, vol. 298, p. 3.

<sup>c</sup> Treaty establishing a single Council and a single Commission of the European Communities.

<sup>d</sup> See GATT, *Basic instruments and selected documents, Supplement No. 15* (Sales No. GATT/1968-1), p. 4.

<sup>59</sup> See above, para. 6 of the commentary to article 2, para. 1 (i).

<sup>60</sup> It is also important to take into account the fact that the International Law Commission is not competent to discuss individual legal situations, nor to interpret individual constituent instruments.

<sup>61</sup> See *Yearbook . . . 1973*, vol. II, p. 82, document A/CN.4/271, para. 39.

<sup>62</sup> It is indeed on the level of the interpretation of treaties that the International Court of Justice has placed the consideration of several problems relating to the competence of the United Nations, in particular its opinion on "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. 157). It is also on this level that the problem has been considered on several occasions by Charles de Visscher, in particular in *Problèmes d'interprétation judiciaire en droit international public* (Paris, Pédone, 1963), p. 140. Attention should be drawn to the restraint with which the eminent author has dealt with these questions and the limits which he has assigned to teleological interpretation.

the 1969 Convention. It is difficult, within the framework of the work of the International Law Commission, to embark at present on this course, which is contrary to the guidelines so far followed.

(13) But study of the 1969 Convention gives rise to still more interesting, and above all more constructive, comments. The Convention in no way rules out the possibility that, through the interpretation of constituent instruments, an international organization may be made to appear to have the capacity to conclude treaties, even where such capacity is not explicitly specified in the constituent instrument. But such capacity would then derive, not from the text or the context, but from the fact that there shall be taken into account (art. 31, para. 3 (b)):

any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

If reference is made to the commentary of the International Law Commission on that provision in its report to the General Assembly of the United Nations, it will be noted that:

the phrase "the understanding of the parties" necessarily means "the parties as a whole". It [the International Law Commission] omitted the word "all" merely to avoid any possible misconception that every party must . . . have engaged in the practice where it suffices that it should have accepted the practice.<sup>63</sup>

(14) Such formulas open the door to a certain amount of discussion,<sup>64</sup> particularly when they are applied to the constituent instruments of international organizations,<sup>65</sup> but they establish two essential facts concerning the question of the capacity of international organizations to conclude treaties: the individual character, peculiar to each organization, of the capacity to conclude treaties and the variety of possible solutions. The individual character peculiar to each organization results not only from the character of the constituent instrument of each organization, but also from the particular character of

<sup>63</sup> See *Yearbook . . . 1966*, vol. II, p. 222, document A/6309/Rev.1, part II, chap. II, para. 15 of the commentary to article 27.

<sup>64</sup> Does not "practice" thus defined go beyond the limits of interpretation and become a modification of the treaty in question? Does it refer to explicit or tacit agreements, or also to custom?

<sup>65</sup> To take the formula in article 31, paragraph 3 (b) of the 1969 Convention literally, it would never be a question of anything but practice emanating from the Parties, in other words from States. But when it is a question of practice relating to the constituent instrument of an international organization, the practice also emanates from the acts of organs of the organization. Even leaving aside those organs which are not composed of representatives of States, nevertheless a certain number of such acts could be performed by majority decisions. Would a series of majority decisions make it possible to establish a "practice" which, on the very vague basis of a teleological principle, would develop the capacity of an international organization to conclude treaties? This precise point has been discussed in connexion with a judgement of the Court of Justice of the European Communities handed down in case 22-70, known as the A.E.T.R. Case, cf. R. Kovar, "L'affaire de l'A.E.T.R. devant la Cour de justice des Communautés européennes et la compétence internationale de la C.E.E. (Communauté économique européenne)", *Annuaire français de droit international*, 1971 (Paris), vol. XVII (1972), p. 386. On the more general level of the competence of international organizations, cf. the divergent points of view of Sir Gerald Fitzmaurice and Sir Percy Spender in *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *Advisory Opinion of 20 July 1962*, *I.C.J. Reports 1962*, pp. 191 and 201.

the "practice" relating to the interpretation of the constituent instrument within the meaning of article 31 of the 1969 Convention. The diversity of possible solutions derives directly from this. In the case of certain organizations, the practice with regard to the conclusion of treaties by the organization is negative: the very character of the organization, or quite simply the policy of the member States, rules out such capacity of the organization apart from cases specified in the constituent instrument. In other cases, practice proves to be very liberal with regard to certain types of agreement relating mainly to the administrative aspects of the life of the organization, but very restrictive with regard to all other agreements. In the case of other organizations, practice proves to be liberal even with regard to agreements of the greatest importance. Thus, while there is indeed a general principle common to all organizations, whatever the diversity of the constituent instruments, this principle which can be attached to the interpretation of treaties in the end only confirms the diversity of the organizations, since it concerns the autonomy of the *practice* of each one of them.

(15) But all these conclusions can be set aside by rejecting the principle on which they are based: if the capacity of international organizations to conclude treaties does not depend on methods of interpreting treaties but, rather, directly on a law of international organizations which has its basis in customary law, it is permissible to reach other solutions. Within the very specific framework assigned to his work, the Special Rapporteur feels that, for reasons both of principle and of expediency, it is unnecessary for him to explore all the possibilities which might derive from this concept.

(16) As far as principles are concerned, there is little doubt that the formulas used by the International Court of Justice in its practice have been taken as a basis by all those who, in one way or another, consider that *by its very nature* the capacity of international organizations to conclude treaties necessarily extends to what is necessary in the discharge of their functions. It is to the opinion of the International Court of Justice on reparation for injuries suffered in the service of the United Nations, to the opinion on the Effect of awards of compensation made by the United Nations Administrative Tribunal,<sup>66</sup> and to the opinion on "Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)" that reference is most frequently made by citing formulas such as the following:

It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.<sup>67</sup>

Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.<sup>68</sup>

<sup>66</sup> Effect of awards of compensation made by the U.N. Administrative Tribunal, *Advisory Opinion of 13 July 1954: I.C.J. Reports 1954*, p. 47.

<sup>67</sup> Reparation for injuries suffered in the service of the United Nations, *Advisory Opinion of 11 April 1949: I.C.J. Reports 1949*, p. 179.

<sup>68</sup> *Ibid.*, p. 182.

But when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization.<sup>69</sup>

(17) But if the text of these advisory opinions is read attentively, it will be noted that their scope is more limited than the isolated quotations would imply. In the first place, it will be noted that the Court has never proceeded to an arbitrary construction, detached from the behaviour of those concerned. On the contrary, it has based its opinions essentially on the facts of an existing situation, emphasizing the *practice* in various ways. Among other examples, the following passage, in particular, may be noted:

Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.<sup>70</sup>

It seems therefore that these opinions attach a certain importance to practice; in reality, they appear to be more a justification of a practice which at a certain moment is disputed rather than an innovation on which a court of justice has suddenly taken the initiative. The least that can be said, therefore, is that they do not depart radically from the analyses which have just been presented on the importance of *practice* in the interpretation of treaties.

(18) Moreover, the International Court of Justice has always argued on the case of a given organization, which presents characteristics that would preclude its being assimilated to any other organization, on account of both the universality of its membership and the broad scope of its functions.<sup>71</sup> In the most general opinion and the one in which the greatest number of reasons for the decision are stated, that relating to "Reparation for injuries suffered in the service of the United Nations", the Court indeed makes a discreet allusion to "instances of action upon the international plane by certain entities

<sup>69</sup> *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.

<sup>70</sup> *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion of 11 April 1949: I.C.J. Reports 1949*, p. 180. "Practice" is also mentioned in several passages in the opinion on certain expenses of the United Nations (Article 17, para. 2, of the Charter) (*Advisory Opinion of 20 July 1962: I.C.J. Reports 1962*, pp. 160 and 165), and, as certain individual opinions show, has been at the centre of the Court's preoccupations (cf. footnote 65 above); while the opinion on the "Effect of awards of compensation made by the U.N. Administrative Tribunal" does not mention practice, it should not be forgotten that what the Court had been asked to do was to say that a tribunal which had been functioning for several years was really a tribunal. Even the judgement of the Court of Justice of the European Communities handed down in the case known as the A.E.T.R. Case (Case 22-70) (*Recueil de la jurisprudence de la Cour 1971-3 (Luxembourg)*, vol. XVII, p. 263) pointed out (paragraph 29) that practice at the level of an organ composed of representatives of member States had confirmed the solution adopted by the Court, although, as far as principles are concerned, the Court adopts a concept of the competence of the Community based on a clearly teleological analysis.

<sup>71</sup> It goes without saying that the Court of Justice of the European Communities has only argued cases for the European Communities, regarded as original entities which cannot be assimilated to any other type.

which are not States" and to the multiplicity of "subjects of law" which are not identical "in any legal system". The Court does not therefore disregard the fact that there are international organizations other than the United Nations. However, throughout the text of the opinion, the term "international organization" is constantly used in the singular, to designate the United Nations, never in the plural. It would certainly be a mistake to hold that none of the principles defined by the Court apply to any international organization other than the United Nations; but it would be just as incorrect to conclude from this opinion that the principles defined apply to all international organizations. What is certain is that the Court in this opinion did not establish a set of rules on the capacity of *all* international organizations, in particular with regard to the conclusion of treaties.<sup>72</sup> This does not mean that the wealth of substance in these opinions cannot be used for the purposes of theoretical elaboration, but that on this subject the restraint shown by the most authoritative commentators should be observed.<sup>73</sup>

(19) The Special Rapporteur remains firmly convinced that a general formula relating to the capacity of international organizations to conclude treaties must be flexible enough to cover all possible solutions and respect the great diversity of a phenomenon which is at present too much subject to the wishes of States for limitations to be placed on the free choice of those States. Whatever the validity of the reasons given for departing from that position, objections would be encountered which would impede the work of codification. Mention has already been made of the difficulties encountered by the International Law Commission when, at an earlier stage, it took up the question of the capacity of international organizations to conclude treaties;<sup>74</sup> it is worth pointing out that, of the observations made on that subject by representatives of Governments in the Sixth Committee of the General Assembly in 1973, observations which must be regarded as being altogether of a preliminary nature, a fairly large number will be found to be rather in favour of formulas emphasizing the law peculiar to each organization and even the importance of the constituent instruments of each organization.<sup>75</sup>

<sup>72</sup> In the opinion on "Reparation for injuries suffered in the Service of the United Nations", the Court does not proceed from a general concept to the capacity to conclude treaties—rather the reverse:

"[The Charter] has defined the position of the Members in relation to the Organization . . . by providing for the conclusion of agreements between the Organization and its Members. Practice—in particular the conclusion of conventions to which the Organization is a party—has confirmed this character of the Organization, which occupies a position in certain respects in detachment from its Members . . ." *I.C.J. Reports 1949*, pp. 178 and 179.

<sup>73</sup> Ch. de Visscher, *op. cit.*, p. 150: "Out of an equal concern for institutional purposes and principles and for respect for texts, a sound interpretation ensures a balance between the wills of which treaties are the expression".

<sup>74</sup> See *Yearbook . . . 1972*, vol. II, pp. 178-182, document A/CN.4/258, paras. 25-38.

<sup>75</sup> ". . . the capacity . . . to conclude agreements depended on the law peculiar to the organization concerned" (Iraq (*Official Records*

(20) Nevertheless, it will perhaps be regretted that the proposed article 6, while stating a precise rule, remains silent on the role of general international law in the very establishment of the capacity of international organizations to conclude treaties. Admitting that it is the relevant rules of each organization which determine whether a given organization has capacity to conclude a given treaty, it must be pointed out that if this effect of the law peculiar to each organization exists, it exists by virtue of a general rule of international law authorizing it. In other words, the very fact that organizations can be "subjects of international law" implies a radical—and to some extent a structural—change in the international community; this change would result from a general rule of public international law which would be permissive in character and would make this particular effect of constituent instruments possible. If such an analysis prevailed, draft article 6 might be worded as follows:

The extent of the capacity of international organizations to conclude treaties, a capacity acknowledged in principle by international law, is determined by the relevant rules of each organization.

(21) An article so worded would differ from the draft article prepared by the Special Rapporteur at the theoretical rather than the practical level. Indeed, it would be understood that this alternative wording would not prevent some international organizations from possessing, according to the case, a capacity to conclude treaties which might be non-existent, limited or broad, and the solution peculiar to each organization would remain highly individualized. This new wording might therefore be criticized on the grounds that it complicated article 6 unnecessarily. Even its necessity from the theoretical standpoint may be questioned; it can be argued that the general principle of public international law which authorizes the attribution of capacity to international organizations is well known: it is the principle *pacta sunt servanda*. The capacity of international organizations to conclude treaties (like all their other capacities) is merely the result of the creative power of treaties embodied in the constituent instrument. There is thus a risk that a number of differences of opinion may arise on this point, which may not be as theoretical as they seem.

(Foot-note 75 continued)

of the General Assembly, Twenty-eighth Session, Sixth Committee, 1397th meeting, para 10)); the representative of the German Democratic Republic "attached great importance to constitutional documents... In most cases, such documents expressed very clearly the extent to which States had granted legal and treaty-making capacity to the international organizations concerned" (*ibid.*, 1399th meeting, para. 31); "an international organization did not have the inherent capacity to conclude international agreements and could only do so if authorized by its constituent instrument" (Kenya (*ibid.*, 1401st meeting, para. 15); "the extent of [the] capacity [of international organizations] depended basically on the constitution of each international organization" (Greece (*ibid.*, para. 44)); "The capacity of international organizations to conclude treaties should be governed by the their respective statutes" (Brazil (*ibid.*, para. 58)); "It seemed advisable to leave the question of determining the capacity of representation of an international organization to the charter of that organization" (Philippines (*ibid.*, 1402nd meeting, para. 42)); "In particular, the limited competence of international organizations to conclude international treaties should be noted" (USSR (*ibid.*, 1406th meeting, para. 20)).

(22) The Special Rapporteur, whose task is to explore every possibility with a view to reaching a broad consensus, feels obliged to point out that a similar, indeed a related, question gave rise to much discussion in the International Law Commission and especially at the United Nations Conference on the Law of Treaties.<sup>76</sup> Does the treaty-making capacity of members of federal unions derive solely from the federal constitutions? Does it derive from the federal constitutions by *renvoi* from international law? Does it derive from international law itself? These questions, which might have seemed somewhat academic, provoked a lively discussion at the Conference when it became clear that the final formulations submitted by the International Law Commission might have certain consequences with regard to current political problems. Thus, at the second session of the Conference, after an animated discussion, all reference to federal questions was deleted from what became article 6 of the 1969 Convention.<sup>77</sup>

(23) In any case, the Special Rapporteur feels that if a text which refers to general international law in connexion with the *principle* of the capacity of international organizations to conclude treaties is retained, it will be understood that it in no way prejudices questions relating to the *recognition* of that capacity by other subjects of international law.<sup>78</sup> The 1969 Convention at no point touches on the questions relating to recognition in the case of States, and there is no reason why it should be otherwise in the case of international organizations in this draft article. It is true that the International Court of Justice has, on two occasions, expressed the view that the Charter of the United Nations could have effects with regard to States which were not parties to it,<sup>79</sup> but

<sup>76</sup> For the original text, which dealt simultaneously with the capacity of States, of international organizations and of federal structures, see report on the law of treaties, see *Yearbook . . . 1962*, vol. II, pp. 36 *et seq.*, document A/CN.4/144, commentary to article 3 and for the debates, *ibid.*, vol. I, pp. 57 *et seq.*, 639th and 640th meetings, pp. 187 *et seq.*, 658th meeting and pp. 239 *et seq.*, 666th meeting. The discussion was resumed in 1965 on the basis of a simplified text: see *Yearbook . . . 1965*, vol. I, pp. 23 *et seq.*, 777th and 778th meetings, pp. 239 *et seq.*, 810th and 811th meetings and pp. 280 *et seq.*, 816th meeting. See also P. Reuter, "Confédération et fédération: vetera et nova", *Mélanges offerts à Charles Rousseau — La communauté internationale* (Paris, Pédone, 1974), p. 199.

<sup>77</sup> See *Official Records of the United Nations Conference on the Law of Treaties, First session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), pp. 58 *et seq.*, eleventh and twelfth meetings of the Committee of the Whole (in particular, the statement of Mr. Jiménez de Aréchaga (*ibid.*, p. 67, twelfth meeting of the Committee of the Whole, para. 22)), and *ibid.*, *Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), p. 12, eighth plenary meeting, para. 22.

<sup>78</sup> See *Yearbook . . . 1972*, vol. II, p. 179, document A/CN.4/258, para. 26, with the references to the debates in the International Law Commission and the position taken by the Japanese Government.

<sup>79</sup> In its advisory opinion on "Reparation for injuries suffered in the service of the United Nations", the Court decided unanimously that "fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone" (*I.C.J. Reports 1949*, p. 185). In its advisory opinion on the "Legal consequences for States of

that is a solution which is irrelevant to the question of recognition and cannot be dissociated from the quite exceptional character of the organization and whose general application is not justified by current international practice.

(24) The International Law Commission will have to decide, in the light of the preceding explanations, whether it considers it preferable to retain the text of the draft article in its original form or in the completed form.<sup>80</sup> Whatever its choice, however, the basic provision, namely the reference to the "relevant rules of each organization" will remain unchanged. Some comments on the latter expression are now called for.

(25) In 1972, the Special Rapporteur described the evolution of the vocabulary which the International Law Commission had used in the course of its work to designate what was also called "the law peculiar to each international organization".<sup>81</sup> Starting with the term "constituent treaty" or even "constituent instrument", the Commission considered the expression "constitution" in the sense of the "constitution as a whole—the constituent treaty together with the rules in force in the organization" and finally decided to use, in what was to become article 5 of the 1969 Convention, "any relevant rules of the organization", an expression whose very wide scope has never been questioned and which is to be found in the draft articles on the representation of States in their relations with international organizations (article 3).<sup>82</sup> For all these reasons, which are too obvious to need emphasis, the Special Rapporteur considers it advisable to retain the proposed wording.

(26) He feels it necessary, however, to revert once again to the exact scope of this formula, by specifying what is to be understood by "the relevant rules of each organization".<sup>83</sup> The most important point is to bear constantly in mind that these terms do not necessarily cover the same sources for each organization; this is a basic constitutional fact which in itself derives from the law of each organization. It may happen that in the case of a given organization this expression covers only the constituent instrument interpreted as an ordinary treaty: this will be the case when the member States have chosen for it what might be called a "rigid constitution". It has sometimes

the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)" (*I.C.J. Reports 1971*, p. 56, para. 126), the Court decided by 11 votes to 4, that "the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law". It should be observed, however, that in both cases the Court did not give explicit reasons for its opinions, which may have been based on different grounds.

<sup>80</sup> See para. 20 above *in fine*.

<sup>81</sup> *Yearbook . . . 1972*, vol. II, pp. 178 *et seq.*, document A/CN.4/258, paras. 25 *et seq.*

<sup>82</sup> See *Yearbook . . . 1971*, vol. II (Part One), pp. 287-288, document A/8410/Rev.1, chap. II, D, article 3 and commentary.

<sup>83</sup> Of course, the two expressions "any relevant rules of the organization" (article 5 of the 1969 Convention) and "the relevant rules of each organization" express the same concept and the differences in wording have no substantive implications.

been suggested that this should be so when the machinery for the revision of the constituent instrument involves procedures sufficiently flexible to justify the conclusion that they have excluded extensive interpretations or constructive "practices" which are tantamount to *de facto* revisions.<sup>84</sup> However, this formula does not exclude the case of an organization whose constitution could be said to be "semi-customary", either because the constituent charter is drafted in such a way as to open the door to extensive developments,<sup>85</sup> or because the existence within the organization of a judicial organ has given rise to a particularly constructive judicial practice. It should be understood that the expression "the relevant rules of each organization" is as neutral as possible: it imposes nothing but excludes nothing, and leaves the question of determining the solution chosen for a given organization to the principles and procedures of each organization.

(27) The sources of the capacity of international organizations which are not excluded by the expression "the relevant rules of each organization" include the *practice* of international organizations. This is an idea which must be developed briefly. The concern of international organizations regarding the scope of their *practice* has already been noted.<sup>86</sup> The statements made at the United Nations Conference on the Law of Treaties show clearly that "the relevant rules of international organizations" include "established practices", that is, the practices which must be considered equivalent to legal rules.<sup>87</sup> However, in the context of the 1969 Convention, although the question

<sup>84</sup> This theory has been advanced several times in connexion with the European Coal and Steel Community, notably to make the theory of "implicit powers" inapplicable to that Community (M. Lagrange, "Les pouvoirs de la Haute Autorité et l'application du Traité de Paris", *Revue du droit public et de la science politique en France* (Paris), No. 1 (January-February 1961), p. 40). It could also be applied, with even greater justification, to the European Economic Community: article 235 of the constituent instrument of the Community establishes a particularly flexible procedure designed to complete the "gaps" in the treaty, but although the member States of that Community have for some time had extensive recourse to article 235, the Court of Justice of the European Communities has developed a particularly "constructive" judicial practice which evokes the federal dynamism of implicit powers.

<sup>85</sup> To the Special Rapporteur's knowledge, the only example of an international organization possessing a capacity to conclude international agreements defined in a purely functional way in its constituent instrument is the European Coal and Steel Community, in accordance with article 6 of the Treaty of Paris (see foot-note 58 above). However, the practice which has developed since 1954 in the case of that Community has sterilized the possibilities of that article, thus demonstrating the importance of *practice*, which generally tends to extend the capacity of international organizations but may have the opposite effect.

<sup>86</sup> See *Yearbook . . . 1972*, vol. II, pp. 186-187, document A/CN.4/258, para. 251.

<sup>87</sup> See the statement by Sir Humphrey Waldock, Expert Consultant of the United Nations Conference on the Law of Treaties: "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, 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. 57, tenth meeting of the Committee of the Whole, para. 40); and the statement

was not formally settled, it may be wondered whether a practice which is in the process of being established, that is, which is not yet established, is or is not covered by article 5 of the 1969 Convention. This is a very serious question. If it is assumed that that Convention is binding on international organizations and that only "established" practices can derogate from its rules with regard to the constituent instruments of international organizations and the treaties adopted within an international organization (article 5 of the 1969 Convention), it would follow that the entry into force of the 1969 Convention would prohibit any *new* customary development of the law of international organizations that was contrary to the 1969 Convention.<sup>88</sup>

(28) It is the view of the Special Rapporteur that—without infringing in any way upon the interpretation of other conventions, such as the 1969 Convention—it must

(Foot-note 87 continued)

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, twenty-eighth meeting of the Committee of the Whole, para. 15).

<sup>88</sup> This explains the fairly sharp reactions of international organizations to the draft articles on the representation of States in their relations with international organizations (see *Yearbook . . . 1972*, vol. II, pp. 186-187, document A/CN.4/258, para. 51, foot-note 131).

be acknowledged without hesitation that the expression "the relevant rules of each organization" covers practices which are not yet established but are liable to become so. This expression basically reserves the constitutional régime of each organization: it is this régime, and not the draft articles, which will determine the scope of the "practice". If, therefore, under this régime, the constitution of the organization is partly customary in origin and practice may in that connexion play a role going beyond that provided for in article 31, paragraph 3 (b) of the 1969 Convention, it is this régime which will be applicable. To adopt any other solution would be to give written conventional law precedence over unwritten law as a source of the law peculiar to each organization, prevent the progressive development of the law of each organization and give rise to an unacceptable infringement of the constitutional autonomy of each organization; this, in the final analysis, is the meaning of draft article 6.<sup>89</sup>

<sup>89</sup> Although in theory it may very well be acknowledged that the States members of an international organization may give the latter a very rigid constitution, it must be acknowledged that such cases are relatively rare: in fact, the law peculiar to each organization is almost always flexible and evolves according to processes whose analysis and description (custom, consensus, unwritten agreements) may be debatable but which often take a form other than that of a written agreement.

## CO-OPERATION WITH OTHER BODIES

[Agenda item 10]

DOCUMENT A/CN.4/L.214

**Report on the twenty-first session of the European Committee on Legal Co-operation  
by Mr. A. H. Tabibi, observer for the Commission**

[Original: English]  
[8 July 1974]

1. The European Committee on Legal Co-operation (CCJ) held its twenty-first session at Strasbourg (France) from 24 June to 28 June 1974. I had the honour, on behalf of the International Law Commission, to take part in the proceedings at the first meeting held at 3 p.m. on 24 June, during which I delivered a statement.<sup>1</sup>

2. The Chairman and members of the CCJ, as well as the Director of Legal Affairs of the Council of Europe, Mr. Golsong, paid very warm tribute to the work of the International Law Commission. Members of the CCJ expressed their support for the usefulness of the exchange and co-operation between the Commission and the CCJ. I was asked by the Chairman of the CCJ to convey to the Chairman and members of the International Law Commission their warm greetings on the occasion of the twenty-fifth anniversary of the Commission.

3. I should like to express my profound appreciation for the kindness, hospitality and warm reception accorded to me by the Committee as well as by the Director of Legal Affairs, Mr. H. Golsong.

4. A copy of the draft Agenda of the twenty-first meeting of the CCJ is annexed to the present report.<sup>2</sup>

### ANNEX I

**Text of the statement made by Mr. A. H. Tabibi, observer for the International Law Commission, at the meeting held in Strasbourg by the European Committee on Legal Co-operation on 24 June 1974**

It is, indeed, a very pleasant duty for me to convey, on behalf of the International Law Commission and our current Chairman, Mr. Endre Ustor, who on account of his heavy duties is unable to participate, their warmest greetings to you and to all the members of the European Committee on Legal Co-operation

We are grateful to Your committee for sending Mr. Golsong every year to our Commission to explain your committee's annual achievements on the vital tasks before you. I personally have greatly benefited from Mr. Golsong's high juridical knowledge since 1952, when I first took part in the work of the Commission. I believe that the collabor-

ation established between the International Law Commission and other legal institutions such as yours is very useful for a better understanding of each other's views in the important task of codification and progressive development of international law. The annual exchange of views of our two bodies which are pursuing the same noble task is beneficial not only to the work ahead of us, but also to the whole juridical circle. The rest of the world benefits more from you because historically Europe is ahead of the rest of the world in the task of codification and progressive development of international law and for this reason I am certain and confident that the fruitful co-operation between your Committee and our Commission will enhance further our object.

Since I am an Asian jurist and have followed the work of other regional committees such as the Asian-African Legal Consultative Committee, I find it appropriate to state here that since, on the basis of their Statute, the Asian-African Committee is dealing directly with the topics before the International Law Commission, both bodies, in this respect, derive benefit from this institutionalization of their work. In my view, if the European Committee also tries to follow to some degree the same pattern of work, I believe it will be of great assistance not only to the Commission, but also to the countries of Europe whose representatives in the United Nations and plenipotentiary conferences participate in the final adoption of various texts produced by the Commission. Since the regional committees serve the same noble task, which is the furtherance of the role of law for the preservation of peace and co-operation among States, and closer ties, the following of the same pattern of work by this Committee and our Commission will be beneficial to us all. I must add, however, that I am personally interested in two items which you have undertaken:

1. The Justice Ministers of Europe, as the Chairman stated, concluded their meeting<sup>a</sup> recently in Vienna. I know, as a former Minister of Justice of my country, that this role is a very sensitive and important one indeed. The exchange of information between countries will help to facilitate the smooth operation of the activities which are the backbone of social life in each country. This will help greatly the newly independent countries of Asia and Africa which need guidance in this field.

2. The other item is the offering of technical assistance for training young jurists of Asia and Africa. It was more than a decade ago that I first raised the question of technical assistance and wider appreciation of international law in the Sixth Committee of the General Assembly which was designed mainly for this purpose. An International Law Seminar for young jurists of the world is held every year during the meeting of the Commission, but direct training of Asian

<sup>1</sup> See annex I below.

<sup>2</sup> See annex II below.

<sup>a</sup> Ninth Conference of European Ministers of Justice.

and African jurists by your Committee or by member countries of your Committee will greatly help the establishment of a better legal system in the newly independent countries. They need this no less than they need economic and social development. In my view, if there is not a sound constitution or a good system of law, these countries cannot benefit properly from the cherished independence acquired.

This year is the year for the commemoration of the 25th anniversary of the International Law Commission which, following the General Assembly's commemoration, we commemorated in Geneva on 27 May. In those 25 years, the members of the Commission who are alive or dead were among the most eminent European jurists, who dedicated themselves to the noble and lifelong task of the progressive development of international law and its codification. There is no doubt that jurists, particularly in Europe, made many attempts to codify international law, beginning as early as the 18th century, but most of these attempts remained without universal approval, until the establishment of the United Nations and the functioning of the International Law Commission. It was the Commission that as early as 1949 took up the marathon task of codification of the whole field of international law and embarked on a task which has always been a lifelong dream of world jurists. The Commission, in this short span of 25 years has, out of the initial fourteen topics selected at its first session, already produced scientific drafts on seven of them and others are currently under consideration. The work on the topics of *State responsibility, the question of treaties concluded between States and international organizations or between two or more international organizations, succession in respect of matters other than treaties*, as well as the topic of *the most-favoured-nation clause*, are progressing satisfactorily at our current session. At this session we have also begun our work on *the law of the non-navigational uses of international watercourses*. So far, ten conventions have been concluded by the Commission and six of the main conventions already have come into force. The topic of succession of States in respect of treaties will be finalized at our current session. The Commission, in addition to the initial list adopted on the basis of the Survey of international law, produced also several other legal drafts, which were not included in the original list but had subsequently been referred to it by the General Assembly. The Commission has on its current agenda an item concerning review of its original list and its future work. We believe that in order to harmonize our task, it will be useful if the European Committee also have a look at reviewing its activities to help the Commission in its vital duty of codification of international law.

Looking at your agenda, I find that you have a heavy task before you, therefore I do not wish to take up more of your valuable time, but I want to conclude with my warmest appreciation for giving me this early opportunity to make my statement and hope that your representative will as usual give us the pleasure of his presence during the current session of the Commission.

One more word and that is my hope that you will accept my regrets for not being able to stay longer with you because our Commission is in the midst of its work and I have to return soon but our Commission found it vital that I should come here to extend to you our good wishes and wish you a very pleasant session. Thank you.

#### ANNEX II \*

##### Draft agenda of the twenty-first meeting of the European Committee on Legal Co-operation (CCJ)

1. Opening of the meeting
2. Adoption of the agenda

\* This annex reproduces a document of the CCJ. The references in square brackets are to documents of that body.

3. Action taken by the Committee of Ministers on the proposals made by the CCJ  
Working document:  
Report by the Secretariat  
[CCJ (74) 7]
4. Report on the work of the Sub-committees, Committees of experts and ad hoc Committees established by the CCJ  
Working documents:  
Report by the Secretariat  
[CCJ (74)]  
Report by the Secretariat on study visits abroad  
[CCJ (74) 1]
5. Reports of Sub-committees, Committees of experts and ad hoc Committees to the CCJ
  - A. Protection of the individual in relation to acts of administrative authorities  
Working document:  
Report by the Sub-Committee  
[CCJ (74) 12]
  - B. Symposium of judges  
Working document:  
Report by the Sub-Committee on fundamental legal concepts  
[CCJ (74) 10]
6. Final consideration of draft Conventions and draft Resolutions
  - A. Draft European Convention on the legal status of children born out of wedlock  
Working documents:  
Draft Convention and draft Explanatory Report  
[CCJ (75) 37]  
Comments by Governments (Luxembourg, Federal Republic of Germany, Norway, Sweden, Austria, Denmark)  
[CCJ (74) 4, 5, 11, 13, 14 and 19]
  - B. Draft Resolution on the protection of the privacy of individuals vis-à-vis electronic data banks in the public sector and future work of the Committee of Experts  
Working documents:  
Draft Resolution and draft Explanatory Report  
[CCJ (74) 3]  
Memorandum of the Directorate of Legal Affairs  
[CCJ (74) 8]  
Report of the Committee of Experts on Human Rights  
[CM (74) 106]  
Comments by Governments (Switzerland)  
[CCJ (74) 22]
  - C. Draft Resolution relating to compensation for physical injury or death  
Working documents:  
Draft Resolution and draft Explanatory Report  
[CCJ (73) 44]  
Comments by Governments (Switzerland, Norway, Sweden, Netherlands)  
[CCJ (74) 15, 17, 18, 21]
7. Preliminary examination of the results of the Ninth Conference of European Ministers of Justice  
Working document:  
Conclusions of the Ninth Conference  
[CMJ/Concl (74)]

8. Forms to accompany judicial and extrajudicial documents sent abroad <sup>a</sup>
- Working documents:
- Report on the 20th meeting of the CCJ  
[CCJ (73) 46, item 5, No. 5]
- Conclusions of the Ninth Conference of European Ministers of Justice  
[CMJ/Concl (74)]
9. Practical guide to the recognition and enforcement of foreign judicial decisions (for information)
- Statement by the Director of Legal Affairs
10. Privileges and immunities of international organizations (Request by States participating in European Co-operation in the field of scientific and technical research (COST))
- Working documents:
- Memorandum by the Directorate of Legal Affairs  
[CCJ (74) 9]
- Request by States participating in COST  
[CM (73) 242]
11. Creation of ad hoc Committees for an exchange of view on legislative matters
- Working documents:
- Report on the 20th meeting of the CCJ (transplanting of human organs)  
[CCJ (73) 46, item 7 A]
- Conclusions of the Ninth Conference of European Ministers of Justice  
[CMJ/Concl (74)]
12. Publicity for resolutions and conventions prepared within the framework of the CCJ
- Working document:
- Report on the 20th meeting of the CCJ  
[CCJ (73) 46, item 13]
13. Opinion to be submitted to the Committee of Ministers on Recommendation 716 (1973) on the control of tobacco and alcohol advertising and on measures to curb consumption of these products
- Working documents:
- Recommendation 716 (1973) of the Consultative Assembly  
Report on the draft Recommendation  
[Doc 3323]
- Comments by Governments (Sweden and Belgium)  
[CCJ (74) 2 and 16]
14. Legal problems dealt with within the framework of the Council of Europe outside the CCJ
- Working document:
- Memorandum by the Directorate of Legal Affairs  
[CCJ (74)]
15. Exchange of views on the work in other international organizations
- A. International Commission on Civil Status
- Working document:
- Report of activities 1972/73  
[CCJ (74) 6]
- B. UNCITRAL (including Diplomatic Conference on prescription)
- C. International Law Commission of the United Nations
16. Exchange of views on the state of signatures and ratification of the conventions of the Council of Europe (especially the European Convention on State Immunity and the European Convention relating to stops on bearer securities in international circulation) (see report on the 20th meeting of the CCJ, item 18)
- Working document:
- Chart of signatures and ratifications  
[CCJ (74)]
17. Items for reference only:
- (a) Legal status of the married woman with a view to full equality between spouses (see report on the 20th meeting of the CCJ, item 5, No. 2);
- (b) Rights and duties of the individual with a view to protecting and improving his environment (see report on the 20th meeting of the CCJ, item 5, No. 10);
- (c) Mutual assistance in administrative matters (see report on the 20th meeting of the CCJ, item 5, No. 1).
18. Questions which might be included in the agenda of the 22nd meeting of the CCJ
19. Dates of the 22nd and 23rd meeting of the CCJ
20. Other business

<sup>a</sup> Following the decision taken by the Deputies which is mentioned in document CCJ (74) 7 under item 3 of the draft agenda, this question will have to be worded as follows: "Forms designed for the harmonization of the content of judicial and extrajudicial documents sent abroad".



# REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

DOCUMENT A/9610/Rev.1

Report of the International Law Commission on the work of its twenty-sixth session  
6 May-26 July 1974

[Original: English/French/Spanish/Russian]

## CONTENTS

		<i>Page</i>
<i>Abbreviations</i> . . . . .		159
<i>Explanatory note</i> . . . . .		159
<i>Chapter</i>	<i>Paragraphs</i>	
I. ORGANIZATION OF THE SESSION . . . . .	1-17	160
A. Membership and attendance . . . . .	2-5	160
B. Officers . . . . .	6	160
C. Drafting Committee . . . . .	7	160
D. Sub-Committee on the law of the non-navigational uses of international watercourses . . . . .	8	161
E. Secretariat . . . . .	9	161
F. Agenda . . . . .	10-11	161
G. Visit by the Secretary-General . . . . .	12-14	161
H. Commemoration of the twenty-fifth anniversary of the opening of the Commission's first session . . . . .	15-17	162
II. SUCCESSION OF STATES IN RESPECT OF TREATIES . . . . .	18-85	162
A. Introduction . . . . .	18-83	162
1. Summary of the Commission's proceedings . . . . .	18-44	162
2. State practice . . . . .	45-47	167
3. The concept of "succession of States" which emerged from the study of the topic . . . . .	48-50	167
4. Relationship between succession in respect of treaties and the general law of treaties . . . . .	51-56	168
5. The principle of self-determination and the law relating to succession in respect of treaties . . . . .	57-60	168
6. General features of the draft articles . . . . .	61-83	169
(a) Form of the draft . . . . .	61-64	169
(b) Scope of the draft . . . . .	65-70	170
(c) Scheme of the draft . . . . .	71-83	172
B. Recommendation of the Commission . . . . .	84	174
C. Resolution adopted by the Commission . . . . .	85	174
D. Draft articles on succession of States in respect of treaties . . . . .		174
<i>Part I. General provisions</i> . . . . .		174
<i>Part II. Succession in respect of part of territory</i> . . . . .		208
<i>Part III. Newly independent States</i> . . . . .		211
Section 1. General rule . . . . .		211
Section 2. Multilateral treaties . . . . .		214
Section 3. Bilateral treaties . . . . .		236
Section 4. Provisional application . . . . .		244
Section 5. Newly independent States formed from two or more territories . . . . .		248

	<i>Page</i>
<i>Part IV. Uniting and separation of States</i> . . . . .	252
<i>Part V. Miscellaneous provisions</i> . . . . .	268
<i>Chapter</i>	<i>Paragraphs</i>
III. STATE RESPONSIBILITY . . . . .	86-123 269
A. Introduction . . . . .	86-122 269
1. Historical review of the work of the Commission . . . . .	86-106 269
2. General remarks concerning the draft articles . . . . .	107-122 272
(a) Form of the draft . . . . .	107 272
(b) Scope of the draft . . . . .	108-113 273
(c) Structure of the draft . . . . .	114-122 274
B. Draft articles on State responsibility . . . . .	123 276
1. Text of draft articles 1-9 adopted by the Commission at its twenty-fifth and twenty-sixth sessions . . . . .	276
2. Text of draft articles 7-9 and commentaries thereto as adopted by the Commission at its twenty-sixth session . . . . .	277
IV. QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS . . . . .	124-145 290
A. Introduction . . . . .	124-145 290
1. Historical review of the work of the Commission . . . . .	124-135 290
2. General remarks concerning the draft articles . . . . .	136-145 292
(a) Form of the draft . . . . .	136 292
(b) Relationship to the Vienna Convention . . . . .	137-141 292
(c) Consultations with international organizations . . . . .	142 293
(d) Method followed in the preparation of the draft . . . . .	143-145 293
B. Draft articles on treaties concluded between States and international organizations or between international organizations . . . . .	294
<i>Part I. Introduction (articles 1-4)</i> . . . . .	294
<i>Part II. Conclusion and entry into force of treaties</i> . . . . .	298
Section 1. Conclusion of treaties (article 6) . . . . .	298
V. THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES . . . . .	146-159 300
<i>Annex. Report of the Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses</i> . . . . .	301
VI. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION . . . . .	160-219 304
A. Succession of States in respect of matters other than treaties . . . . .	160 304
B. The most-favoured-nation clause . . . . .	161 304
C. Long-term programme of work . . . . .	162-163 304
D. Organization of future work . . . . .	164-165 305
E. Co-operation with other bodies . . . . .	166-189 305
1. Asian-African Legal Consultative Committee . . . . .	166-173 305
2. European Committee on Legal Co-operation . . . . .	174-181 306
3. Inter-American Juridical Committee . . . . .	182-189 307
F. Date and place of the twenty-seventh session . . . . .	190 308
G. Representation at the twenty-ninth session of the General Assembly . . . . .	191 308
H. Remarks on the report of the Joint Inspection Unit . . . . .	192-212 308
I. International Law Seminar . . . . .	213-218 311
J. Supplement to the Guide to the documents of the Commission . . . . .	219 312

## ANNEXES

<i>Annex</i>	<i>Page</i>
I. Observations of Member States on the draft articles on succession of States in respect of treaties adopted by the Commission at its twenty-fourth session . . . . .	313
II. Comparative tables of the numbering of the articles of the provisional and final drafts on succession of States in respect of treaties adopted by the Commission . . . . .	331

## 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>
<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
<i>P.C.I.J., Series A</i>	<i>P.C.I.J., Collection of Judgments</i>
<i>P.C.I.J., Series A/B</i>	<i>P.C.I.J., Judgments, Orders and Advisory Opinions</i>
<i>P.C.I.J., Series C</i>	<i>P.C.I.J., Pleadings, Oral Statements and Documents</i>
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNITAR	United Nations Institute for Training and Research
UPU	Universal Postal Union
WHO	World Health Organization

\* \* \*

## EXPLANATORY NOTE: ITALICS IN QUOTATIONS

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

## 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-sixth session at the United Nations Office at Geneva from 6 May to 26 July 1974. 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 39 draft articles and commentaries thereto, as finally approved by the Commission. Chapter III, on State responsibility, contains a description of the Commission's work on that topic, together with nine draft articles provisionally adopted by the Commission at its twenty-fifth and twenty-sixth sessions, as well as commentaries to three articles provisionally adopted at the twenty-sixth session. Chapter IV, on the question of treaties concluded between States and international organizations or between two or more international organizations, contains a description of the Commission's work on that question together with five draft articles and commentaries thereto, as provisionally adopted by the Commission. Chapter V is devoted to the law of the non-navigational uses of international watercourses, and the report of the Sub-Committee on that subject is annexed to it. Chapter VI is concerned 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. Robert AGO (Italy);  
 Mr. Mohammed BEDJAOUI (Algeria);  
 Mr. Ali Suat BILGE (Turkey);  
 Mr. Juan José CALLE y CALLE (Peru);  
 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. Alfredo MARTÍNEZ MORENO (El Salvador);  
 Mr. C. W. PINTO (Sri Lanka);  
 Mr. R. Q. QUENTIN-BAXTER (New Zealand);  
 Mr. Alfred RAMANGASOAVINA (Madagascar);  
 Mr. Paul REUTER (France);  
 Mr. Zenon ROSSIDES (Cyprus);  
 Mr. Milan ŠAHOVIĆ (Yugoslavia);  
 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. N. A. USHAKOV (Union of Soviet Socialist Republics);  
 Mr. Endre USTOR (Hungary);  
 Sir Francis VALLAT (United Kingdom of Great Britain and Northern Ireland);  
 Mr. Mustafa Kamil YASSEEN (Iraq).

3. On 6 May 1974, at its 1250th meeting, the Commission observed one minute's silence in tribute to the memory of Mr. Milan Bartoš, who had served as a member of the Commission since 1957, and decided to hold a special meeting to honour his memory. The Commission devoted its 1276th meeting, held on 12 June 1974, to tributes to the memory of Mr. Bartoš, former Chairman, Vice-Chairman, Rapporteur and Special Rapporteur of the Commission.

4. On 9 May 1974, the Commission elected Mr. Milan Šahović (Yugoslavia) to fill the vacancy caused by the death of Mr. Milan Bartoš.

5. With the exception of Mr. Rossides, all members attended meetings of the twenty-sixth session of the Commission. The newly elected member, Mr. Šahović, attended from 20 May 1974.

#### B. Officers

6. At its 1250th meeting, held on 6 May 1974, the Commission elected the following officers:

*Chairman:* Mr. Endre Ustor  
*First Vice-Chairman:* Mr. José Sette Câmara  
*Second Vice-Chairman:* Mr. Abdul Hakim Tabibi  
*Chairman of the Drafting Committee:* Mr. Edvard Hambro  
*Rapporteur:* Mr. Doudou Thiam

#### C. Drafting Committee

7. On 20 May 1974, at its 1260th meeting, the Commission appointed a Drafting Committee composed of the following members: Mr. Roberto Ago, Mr. Juan José Calle y Calle, Mr. Taslim O. Elias, Mr. Abdullah El-Erian, Mr. Richard D. Kearney, Mr. Alfredo Martínez Moreno, Mr. R. Q. Quentin-Baxter, Mr. Paul Reuter, Mr. Abdul Hakim Tabibi, Mr. N. A. Ushakov, and Sir Francis Vallat. Mr. Edvard Hambro was elected by the Commission to serve as Chairman of the Drafting Committee. Mr. Doudou Thiam also took part in the Committee's work in his capacity as Rapporteur of the Commission.

#### D. Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses

8. At its 1256th meeting, held on 14 May 1974, the Commission set up a Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses composed as follows:

*Chairman:* Mr. Richard D. Kearney;

*Members:* Mr. Taslim O. Elias, Mr. Milan Šahović, Mr. José Sette Câmara and Mr. Abdul Hakim Tabibi.

#### E. Secretariat

9. Mr. Erik Suy, Legal Counsel, attended the 1250th to 1255th, 1265th, 1267th and 1269th meetings, held on 6 to 10 May, 27 May, 29 May and 31 May respectively, 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 and Mr. Santiago Torres-Bernárdez acted as Deputy Secretaries to the Commission and Mr. Eduardo Valencia-Ospina and Mr. Larry D. Johnson served as Assistant Secretaries to the Commission.

#### F. Agenda

10. The Commission adopted an agenda for the twenty-sixth session, consisting of the following items:

1. Filling of casual vacancies on the Commission (article 11 of the Statute).
2. Commemoration of the twenty-fifth anniversary of the opening of the Commission's first session.
3. State responsibility.
4. Succession of States in respect of treaties.
5. Succession of States in respect of matters other than treaties.
6. Most-favoured-nation clause.
7. Question of treaties concluded between States and international organizations or between two or more international organizations.
8. Long-term programme of work, including:
  - (a) Consideration of recommendation concerning commencement of the work on the law of non-navigational uses of international watercourses (para. 4 of General Assembly resolution 3071 (XXVIII));
  - (b) Consideration of recommendation concerning undertaking at an appropriate time a separate study of the topic of international liability for injurious consequences arising out of the performance of activities other than internationally wrongful acts (para. 3 (c) of General Assembly resolution 3071 (XXVIII)).
9. Organization of future work.
10. Co-operation with other bodies.
11. Date and place of the twenty-seventh session.
12. Other business.

11. In the course of the session, the Commission held 52 public meetings (1250th to 1301st meetings) and one

private meeting (on 9 May 1974). In addition, the Drafting Committee held 26 meetings and the Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses held three meetings. Also, the Expanded Bureau of the Commission held four meetings. Pursuant to the recommendations made by the General Assembly in paragraph 3 of resolution 3071 (XXVIII) of 30 November 1973, the Commission concentrated on agenda item 4 (Succession of States in respect of treaties) in order to complete the second reading of the draft articles on the topic, and continued on a priority basis its work on agenda item 3 (State responsibility) with a view to the preparation of a first set of draft articles on responsibility of States for internationally wrongful acts. The Commission also continued its study of agenda item 7 (Question of treaties concluded between States and international organizations or between two or more international organizations) and prepared initial draft articles on the topic. In spite of the great difficulty of completing a final set of draft articles on agenda item 4 and of proceeding with the preparation of draft articles on agenda items 3 and 7 during the time at its disposal, the Commission considered all the items in its agenda with the exception of items 5 (Succession of States in respect of matters other than treaties) and 6 (Most-favoured-nation clause).

#### G. Visit by the Secretary-General

12. The Secretary-General of the United Nations addressed the Commission at its 1288th meeting held on 2 July 1974.

13. The Secretary-General, recalling that at its present session the Commission was commemorating the twenty-fifth anniversary of its first session, stressed that during its twenty-five years of existence, the Commission had made an admirable contribution to the codification and progressive development of international law and thus to the fostering of friendly relations and co-operation among States and to the strengthening of international peace and security. The importance and difficulties of the continuing process of the codification and progressive development of international law were illustrated by the items included in the agenda of the Commission's present session in accordance with the recommendations of the General Assembly. He called attention to the important and difficult tasks before the Commission in its work on the topics of State responsibility, succession of States, most-favoured-nation clause and the question of treaties concluded between States and international organizations or between two or more international organizations. In conclusion, he emphasized that the Commission's work on those topics, as well as on the topics contained in the programme of its future work, represented a substantial contribution to the strengthening of the legal basis of world-wide co-operation, which was especially important at a time when the trend towards international *détente* was dominant in international relations.

14. In reply, the Chairman said it was gratifying that that was the second occasion that the Secretary-General had found time to address the Commission since the beginning of his term of office. The Commission was,

indeed, greatly appreciative of the Secretary-General's words of praise and was proud that the high office of Secretary-General was held by a trained jurist. The Chairman emphasized that the Commission was pleased that the Secretary-General shared its views on the importance of the codification and progressive development of international law, and that in him it had a friend on whose comprehension and help it could count when problems confronted it. In that connexion, he noted the Commission's need, in view of the increased demands of its work, for more assistance in the area of research projects and studies, which could hardly be achieved except by enlarging the competent and efficient staff which serviced the Commission. He recalled that the Commission had recommended that the staff of the Codification Division of the Office of Legal Affairs be increased.<sup>1</sup> In conclusion, he thanked the Secretary-General on behalf of the Commission for his visit and assured him of the high esteem in which he was held by the members of the Commission.

#### H. Commemoration of the twenty-fifth anniversary of the opening of the Commission's first session

15. Pursuant to a decision taken by the Commission at its twenty-fifth session in 1973,<sup>2</sup> the Commission at its present session commemorated the twenty-fifth anniversary of the opening of its first session (12 April to 9 June 1949). The 1265th meeting, held on 27 May 1974, was devoted to a solemn commemoration of that occasion. The Commission was addressed by Mr. Erik Suy, Under-Secretary-General, the Legal Counsel, who spoke on behalf of the Secretary-General; by Sir Humphrey Waldock, Judge of the International Court of Justice and former member of the Commission, who spoke on behalf of the International Court of Justice; by Mr. Roberto Ago, Mr. Mustafa Kamil Yasseen, Mr. N. A. Ushakov, Mr. Taslim O. Elias, Mr. Senjin Tsuruoka, and Mr. Richard D. Kearney, former Chairmen of the Commission; and by Mr. Endre Ustor, Chairman of the Commission at its present session. The ceremony was also attended by former members of the Commission, high government officials of the host country and city,

<sup>1</sup> *Yearbook* . . . 1968, vol. II, p. 223, document A/7209/Rev.1, para. 98 (c).

<sup>2</sup> *Yearbook* . . . 1973, vol. II, document A/9010/Rev.1, para. 209.

high officials of the United Nations and other international organizations, diplomatic and academic personalities and members of the International Law Seminar.

16. The statements made highlighted the importance for international law of the work accomplished by the Commission over a quarter of a century. During the twenty-five years of its existence the Commission, acting in accordance with recommendations of the General Assembly, had submitted final drafts or reports on the following eighteen topics: draft declaration on rights and duties of States; ways and means for making the evidence of customary international law more readily available; formulation of the Nürnberg principles; question of international criminal jurisdiction; reservations to multilateral conventions; question of defining aggression; draft codes of offences against the peace and security of mankind; nationality, including statelessness; law of the sea; arbitral procedure; diplomatic intercourse and immunities; consular relations; extended participation in general multilateral treaties concluded under the auspices of the League of Nations; law of treaties; special missions; relations between States and international organizations; the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law; and succession of States in respect of treaties, on which work would be completed at the present session.

17. The number and the importance of the international instruments which had resulted from the Commission's final drafts or reports during its first twenty-five years was truly impressive, especially in the three major works of codification undertaken, namely, diplomatic and consular law, law of the sea, and the law of treaties. In these three fields alone nine conventions had been adopted by the General Assembly or plenipotentiary conferences on the basis of the drafts prepared by the Commission. The Commission's success, however, was not to be measured simply by those instruments. The Commission's work had exercised a definite influence on the formation of legal opinion throughout the international community, in the International Court of Justice, in the decisions of national Courts, in the offices of legal advisers to Governments, in the writings of jurists, and in universities and learned institutions where international law was studied. Also, the Commission participated directly in helping to disseminate international law through the International Law Seminar.

## Chapter II

### SUCCESSION OF STATES IN RESPECT OF TREATIES

#### A. Introduction

##### 1. SUMMARY OF THE COMMISSION'S PROCEEDINGS

18. At its first session, held in 1949, the International Law Commission listed the topic "Succession of States

and Governments" among the fourteen selected for codification but did not give priority to its study.<sup>3</sup> At its fourteenth session, held in 1962, the Commission decided to include that topic on its programme of work,

<sup>3</sup> *Yearbook* . . . 1949, p. 281, document A/925, para. 16.

in view of the fact that by paragraph 3 (a) of General Assembly resolution 1686 (XVI) of 18 December 1961 entitled "Future work in the field of codification and progressive development of international law", the General Assembly had recommended that the Commission should include "on its priority list the topic of Succession of States and Governments".<sup>4</sup>

19. During its fourteenth session, at the 637th meeting, held on 7 May 1962, the Commission set up a Sub-Committee on the Succession of States and Governments, which it requested to submit suggestions on the scope of the subject, the method of approach for a study and the means of providing the necessary documentation. The Sub-Committee consisted of the following ten members: Mr. Lachs (Chairman), Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Liu, Mr. Rosenne, Mr. Tabibi and Mr. Tunkin.<sup>5</sup> The Sub-Committee held two closed meetings, on 16 May and 21 June 1962.<sup>6</sup>

20. In the light of the Sub-Committee's suggestions, the Commission took some procedural decisions at its 668th and 669th meetings, held on 26 and 27 June 1962. It decided, *inter alia*, that the Sub-Committee should meet at Geneva in January 1963 to continue its work, the Secretariat should undertake specific studies,<sup>7</sup> and the agenda for the Commission's fifteenth session should include the item "Report of the Sub-Committee on Succession of States and Governments".<sup>8</sup>

21. The Secretary-General sent a circular note to the Governments of Member States, in accordance with the relevant provisions of the Commission's Statute, inviting them to submit the text of any treaties, laws, decrees, regulations, diplomatic correspondence etc., concerning the procedure of succession relating to the States which had achieved independence after the Second World War.<sup>9</sup>

22. By its resolution 1765 (XVII) of 20 November 1962, the General Assembly recommended that the Commission should

continue its work on the succession of States and Governments, taking into account the views expressed at the seventeenth session of the General Assembly and the report of the Sub-Committee on the Succession of States and Governments, with appropriate reference to the views of States which have achieved independence since the Second World War.

23. The Sub-Committee on the Succession of States and Governments met at Geneva from 17 to 25 January 1963 and again on 6 June 1963, at the beginning of the International Law Commission's fifteenth session. On concluding its work, the Sub-Committee approved a report by its Chairman, which was annexed to the report of the International Law Commission on the work of its fifteenth session.<sup>10</sup> The Sub-Committee's report contains its conclusions on the scope of the topic of suc-

cession of States and Governments and its recommendations on the approach the Commission should adopt in its study. In the *Yearbook of the International Law Commission, 1963*, the Sub-Committee's report is accompanied by two appendices, reproducing respectively the summary records of the meetings held by the Sub-Committee in January 1963 and on 6 June of the same year, and the memoranda and working papers submitted to the Sub-Committee by Mr. Elias, Mr. Tabibi, Mr. Rosenne, Mr. Castrén, Mr. Bartoš, and Mr. Lachs (Chairman of the Sub-Committee).<sup>11</sup>

24. The report of the Sub-Committee on the Succession of States and Governments was discussed by the Commission during its fifteenth session (1963), at the 702nd meeting, after being introduced by the Chairman of the Sub-Committee, who explained the Sub-Committee's conclusions and recommendations. The Commission unanimously approved the Sub-Committee's report and gave its general approval to the recommendations contained therein. The Sub-Committee proposed that the Commission should remind Governments of the Secretary-General's circular note,<sup>12</sup> and the Commission gave instructions to the Secretariat with a view to obtaining further information on the practice of States. At the same time, the Commission appointed Mr. Lachs as Special Rapporteur on the topic of the succession of States and Governments.<sup>13</sup>

25. The Commission endorsed the Sub-Committee's view that the objectives should be "a survey and evaluation of the present state of the law and practice in the matter of State succession and the preparation of draft articles on the topic in the light of new developments in international law". Several members emphasized that in view of the modern phenomenon of decolonization, "special attention should be given to the problems of concern to the new States". The Commission considered that "the priority given to the study of the question of State succession was fully justified" and stated that the succession of Governments would, for the time being, be considered "only to the extent necessary to supplement the study on State succession". Likewise, the Commission considered it "essential to establish some degree of co-ordination between the Special Rapporteurs on, respectively, the law of treaties, State responsibility, and the succession of States". The Sub-Committee's opinion that succession in the matter of treaties should be "considered in connexion with the succession of States rather than in the context of the law of treaties" was also endorsed by the Commission. The broad outline, the order of priority of the headings and the detailed division of the topic recommended by the Sub-Committee were agreed to by the Commission, it being understood that the purpose was to lay down "guiding principles to be followed by the Special Rapporteur" and that the Commission's approval was "without prejudice to the position of each member with regard to the substance of the questions included in the

<sup>4</sup> *Yearbook . . . 1962*, vol. II, p. 190, document A/5209, para. 60.

<sup>5</sup> *Ibid.*, p. 189, para. 54.

<sup>6</sup> *Ibid.*, pp. 189-190 and 191, paras. 55 and 70-71.

<sup>7</sup> *Ibid.*, pp. 191-192, para. 72.

<sup>8</sup> *Ibid.*, p. 192, para. 74.

<sup>9</sup> *Ibid.*, p. 192, para. 73.

<sup>10</sup> *Yearbook . . . 1963*, vol. II, p. 260, document A/5509, annex II.

<sup>11</sup> See *Yearbook . . . 1963*, vol. II, pp. 262 and 282, document A/5509, annex II, appendices I and II.

<sup>12</sup> See para. 21 above.

<sup>13</sup> See *Yearbook . . . 1963*, vol. II, pp. 224-225, document A/5509, paras. 56-61.

programme". The headings into which the topic was divided, were as follows: (a) succession in respect of treaties; (b) succession in respect of rights and duties resulting from sources other than treaties; (c) succession in respect of membership of international organizations.

26. In its resolution 1902 (XVIII) of 18 November 1963, the General Assembly, noting that the work of codification of the topic of succession of States and Governments was proceeding satisfactorily, recommended that the International Law Commission should continue its work on the topic,

taking into account the views expressed at the eighteenth session of the General Assembly, the report of the Sub-Committee on the Succession of States and Governments and the comments which may be submitted by Governments, with appropriate reference to the views of States which have achieved independence since the Second World War.

27. At its sixteenth session, in 1964, the Commission adopted its programme of work for 1965 and 1966 and decided to devote its sessions during those two years to the work of codification then in progress on the law of treaties and on special missions. That decision was taken having regard, in particular, to the fact that the term of office of the members of the Commission would expire at the end of 1966 and that some considerable time would be needed to complete the work on both topics. Succession of States and Governments would be dealt with as soon as the study of those two other topics and of relations between States and intergovernmental organizations had been completed.<sup>14</sup> Consequently, the Commission did not consider the topic of succession of States at its sixteenth (1964), seventeenth (1965/1966) and eighteenth (1966) sessions.<sup>15</sup> In 1966, the Commission decided to place the topic of the succession of States and Governments on the provisional agenda for its nineteenth session (1967).<sup>16</sup>

<sup>14</sup> *Yearbook . . . 1964*, vol. II, p. 226, document A/5809, paras. 36-37.

<sup>15</sup> The final draft articles on the law of treaties adopted by the Commission in 1966 did not contain provisions concerning the succession of States in respect of treaties, which the Commission considered could be more appropriately dealt with under the item on its agenda relating to succession of States and Governments (*Yearbook . . . 1966*, vol. II, pp. 177 and 256, document A/6309/Rev.1, part II, para. 30 of the report and para. 6 of the commentary to article 58 of the draft articles on the law of treaties). Article 73 of the Vienna Convention on the Law of Treaties embodies the reservation on this matter which was originally included in article 69 of the draft articles on the law of treaties. The text of article 73 provides in part: "The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States . . ." (*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. 299)). The position of the Commission was in accordance with the decision of principle which it had adopted in 1963 in the context of the topic "Succession of States and Governments" (see para. 25 above). However, in the process of codifying the law of treaties reference was made to the succession of States and Governments, in 1963, in connexion with the extinction of the international personality of a State and the termination of treaties (*Yearbook . . . 1963*, vol. II, p. 206, document A/5509, chap. II, sect. B, para. 3 of the commentary to article 43 of the draft articles on the law of treaties), and in 1964, with regard to the territorial scope of treaties (*Yearbook . . . 1964*, vol. II, pp. 175-176, document A/5809, para. 18).

<sup>16</sup> *Yearbook . . . 1966*, vol. II, p. 278, document A/6309/Rev.1, part II, para. 74.

28. In its resolutions 2045 (XX) of 8 December 1965 and 2167 (XXI) of 5 December 1966, the General Assembly noted with approval the Commission's programme of work referred to in the reports on its sixteenth, seventeenth and eighteenth sessions. In resolution 2045 (XX) the Assembly recommended that the Commission should continue, "when possible", its work on succession of States and Governments, "taking into account the views and considerations referred to in General Assembly resolution 1902 (XVIII)". Resolution 2167 (XXI) in turn recommended that the Commission should continue that work, "taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII)".

29. At its nineteenth session, in 1967, the Commission made new arrangements for the work on succession of States and Governments.<sup>17</sup> In doing so it took account of the broad outline of the subject laid down in the report submitted by its Sub-Committee in 1963,<sup>18</sup> and of the fact that Mr. Lachs, the Special Rapporteur on the topic had ceased to be a member of the Commission, upon his election to the International Court of Justice in December 1966. Acting on a suggestion previously made by Mr. Lachs and in order to advance its study more rapidly, the Commission decided to divide the topic of succession of States and Governments among more than one Special Rapporteur. On the basis of the division of the topic into three headings originally proposed in the report of the Sub-Committee, which was agreed to by the Commission, it decided to appoint Special Rapporteurs for two of these. Sir Humphrey Waldock, formerly Special Rapporteur on the law of treaties, was appointed Special Rapporteur for "succession in respect of treaties" and Mr. Mohammed Bedjaoui, Special Rapporteur for "succession in respect of rights and duties resulting from sources other than treaties". The Commission decided to leave aside, for the time being, the third heading in the division made by the Sub-Committee, namely, "succession in respect of membership of international organizations", which it considered to be related both to succession in respect of treaties and to relations between States and intergovernmental organizations. Consequently, the Commission did not appoint a Special Rapporteur for this heading.

30. With regard to "succession in respect of treaties", the Commission observed that it had already decided in 1963 to give priority to this aspect of the topic, and that the convocation by General Assembly resolution 2166 (XXI) of 5 December 1966 of a conference on the law of treaties in 1968 and 1969 had made its codification more urgent. The Commission therefore decided to advance its work on that aspect of the topic as rapidly as possible as from its twentieth session in 1968. The Commission considered that the second aspect of the topic, namely, "succession in respect of rights and duties resulting from sources other than treaties", was a diverse and complex matter which would require some preparatory study. At its twentieth session, in 1968, the Commission deemed it

<sup>17</sup> *Yearbook . . . 1967*, vol. II, p. 368, document A/6709/Rev.1/Corr.1, paras. 38-41.

<sup>18</sup> See paras. 25 and 26 above.

desirable to complete the study of succession in respect of treaties during the remainder of the Commission's term of office in its present composition.<sup>19</sup>

31. The Commission's decisions referred to in paragraphs 29 and 30 above received general support in the Sixth Committee at the General Assembly's twenty-second and twenty-third sessions. The Assembly, in its resolution 2272 (XXII) of 1 December 1967, noted with approval the International Law Commission's programme of work for 1968, and, repeating the terms of its resolution 2167 (XXI), recommended that the Commission should continue its work on succession of States and Governments, "taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII)". At the General Assembly's twenty-third session, it was noted with satisfaction that the International Law Commission, following the recommendation of the General Assembly, had begun to consider in depth the topic of succession of States and Governments, and that some progress had already been achieved at the Commission's twentieth session. Once again, the General Assembly, in its resolution 2400 (XXIII) of 11 December 1968, noted with approval the programme of work planned by the International Law Commission and recommended that the Commission 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 same recommendation was made by the Assembly in its resolution 2501 (XXIV) of 12 November 1969.

32. Sir Humphrey Waldock, the Special Rapporteur on succession in respect of treaties, submitted five reports in the period 1968-1972. The first report,<sup>20</sup> 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.<sup>21</sup> 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. A summary of the views expressed was included for information in the Commission's report on the session.<sup>22</sup> It was also agreed that it would be for the Special Rapporteur to take account, in so far as they might also have relevance to succession in respect of treaties, of the aspects of the general debate on succession in respect of matters other than treaties, held at the same session of the Commission.<sup>23</sup>

<sup>19</sup> *Yearbook . . . 1968*, vol. II, pp. 223-224, document A/7209/Rev.1, paras. 100-101 and 103-104.

<sup>20</sup> *Ibid.* p. 87, document A/CN.4/202.

<sup>21</sup> *Ibid.* p. 221, document A/7209/Rev.1, paras. 80-81.

<sup>22</sup> *Ibid.*, pp. 221-222, document A/7209/Rev.1, paras. 82-91.

<sup>23</sup> *Ibid.*, pp. 216-221, document A/7209/Rev.1 paras. 45-79.

33. At its twenty-first session, in 1969, the Commission, owing to the lack of time, did not consider the second report submitted by the Special Rapporteur.<sup>24</sup> At its twenty-second session, in 1970, the Commission considered together, in a preliminary manner, the draft articles in the second and third reports, submitted by the Special Rapporteur in 1969 and 1970.<sup>25</sup> The four 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.

34. 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.<sup>26</sup> 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 the draft articles on succession of States in respect of treaties.

35. At the Commission's twenty-third session, in 1971, the Special Rapporteur submitted his fourth report<sup>27</sup> 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.<sup>28</sup>

36. At the Commission's twenty-fourth session, in 1972, the Special Rapporteur submitted his fifth report<sup>29</sup> 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

<sup>24</sup> See *Yearbook . . . 1969*, vol. II, p. 225, document A/7610/Rev.1, para. 33.

<sup>25</sup> See *Yearbook . . . 1969*, vol. II, p. 45, document A/CN.4/214 and Add.1-2 and *Yearbook . . . 1970*, vol. II, p. 25, document A/CN.4/224 and Add.1.

<sup>26</sup> *Yearbook . . . 1970*, pp. 301 *et seq.*, document A/8010/Rev.1, paras. 37-63.

<sup>27</sup> *Yearbook . . . 1971*, vol. II (Part One), p. 143, document A/CN.4/249.

<sup>28</sup> *Yearbook . . . 1971*, vol. II (Part One), pp. 339-340, document A/8410/Rev.1, paras. 62-70.

<sup>29</sup> *Yearbook . . . 1972*, vol. II, p. 1, document A/CN.4/256 and Add.1-4.

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.

37. 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 the General Assembly in its resolution 2780 (XXVI) of 3 December 1971.

38. 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. In view of the time required for the preparation of the observations of Governments and for their study by the Special Rapporteur, the Commission decided not to consider at its twenty-fifth session the topic of succession of States in respect of treaties.<sup>30</sup>

39. The General Assembly, in part I of resolution 2926 (XXVII) of 28 November 1972, recommends that the Commission should "proceed with further consideration on succession of States in respect of treaties in the light of comments received from Member States" on the provisional draft.

40. At its twenty-fifth session (1973), the Commission decided, in view of the fact that Sir Humphrey Waldock, Special Rapporteur on the topic of succession of States in respect of treaties, had resigned from membership of the Commission upon being elected to the International Court of Justice, to appoint Sir Francis Vallat as the new Special Rapporteur for the topic.<sup>31</sup>

41. The General Assembly, by resolution 3071 (XXVIII) of 30 November 1973, recommended that the Commission should complete at its twenty-sixth session, in the light of comments received from Member States, the second reading of the draft on succession of States in respect of treaties.

42. At its present session the Commission re-examined the draft articles in the light of the comments of Governments.<sup>32</sup> It had before it the first report submitted by the new Special Rapporteur, Sir Francis Vallat (A/CN.4/278 and Add.1-6)<sup>33</sup> which summarized the written comments

of Governments and also those made orally by delegations in the General Assembly, and contained proposals on the revision of the articles.

43. The Commission considered the first report of the Special Rapporteur at its 1264th, 1266th to 1273rd, 1279th to 1284th and 1286th to 1290th meetings. At its 1285th, 1286th, 1290th and 1293rd to 1296th meetings it considered the reports of the Drafting Committee. At its 1301st meeting, the Commission adopted with one abstention, the final text in English, French and Spanish of its draft articles on succession of States in respect of treaties, as a whole. In accordance with its Statute it submits them herewith to the General Assembly, together with a recommendation.<sup>34</sup>

44. Since 1962, the Secretariat has 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";<sup>35</sup> (b) a memorandum on "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary";<sup>36</sup> (c) a study entitled "Digest of the decisions of international tribunals relating to State succession"<sup>37</sup> and a supplement thereto;<sup>38</sup> (d) a study entitled "Digest of decisions of national courts relating to succession of States and Governments";<sup>39</sup> (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)<sup>40</sup> "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),<sup>41</sup> 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);<sup>42</sup> (f) three studies in the series "Succession of States in respect of bilateral treaties", entitled respectively "Extradition treaties" (study I),<sup>43</sup> "Air transport agreements"

<sup>34</sup> See para. 84 below.

<sup>35</sup> *Yearbook . . . 1962*, vol. II, p. 101, document A/CN.4/149 and Add.1.

<sup>36</sup> *Ibid.*, p. 106, document A/CN.4/150.

<sup>37</sup> *Ibid.*, p. 131, document A/CN.4/151.

<sup>38</sup> *Yearbook . . . 1970*, vol. II, p. 170, document A/CN.4/232.

<sup>39</sup> *Yearbook . . . 1963*, vol. II, p. 95, document A/CN.4/157.

<sup>40</sup> *Yearbook . . . 1968*, vol. II, p. 1, document A/CN.4/200 and Add.1-2.

<sup>41</sup> *Yearbook . . . 1969*, vol. II, p. 23, document A/CN.4/210.

<sup>42</sup> *Yearbook . . . 1970*, vol. II, p. 61, document A/CN.4/225.

<sup>43</sup> *Ibid.*, p. 102, document A/CN.4/229.

<sup>30</sup> *Yearbook . . . 1972*, vol. II, p. 324, document A/8710/Rev.1, para 78.

<sup>31</sup> *Yearbook . . . 1973*, vol. II, document A/9010/Rev.1, para. 177.

<sup>32</sup> See annex I below.

<sup>33</sup> See p. 1 above.

(study II), and "Trade agreements" (study III);<sup>44</sup> (g) a volume of the United Nations Legislative Series entitled *Materials on succession of States*,<sup>45</sup> containing the information provided or indicated by Governments of Member States in response to the Secretary-General's request; and a supplement to the foregoing volume.<sup>46</sup>

## 2. STATE PRACTICE

45. 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 due 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 that arise in respect of *treaties* are inevitably problems which by their very nature involve consensual relations with other existing States which, in the case of some multilateral treaties, are very large in number. 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.

46. 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 separation of parts 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 problems of succession are likely to arise in future. 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.

47. 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 interdependence of States, which has in some measure affected the policy of successor States 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

48. 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.

49. 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.

50. 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 territory, thus leaving aside from the definition all

<sup>44</sup> *Yearbook . . . 1971*, vol. II (Part Two), p. 111, document A/CN.4/243 and Add.1.

<sup>45</sup> United Nations publication, Sales No. E/F.68.V.5.

<sup>46</sup> A/CN.4/263.

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

51. 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 could 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.

52. 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),<sup>47</sup> 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.

53. 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 to 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.<sup>48</sup>

54. Accordingly, the draft articles now submitted presuppose the existence of the provisions, wording and terminology of the Vienna Convention. Several of the

introductory provisions of the present draft—such as those concerning its scope, the use of terms, ceases 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 the Vienna Convention. In one instance, article 19 (reservations), an express cross-reference is made to the relevant articles of the Vienna Convention; in other instances, as in article 21 (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.

55. Having regard to the approach indicated in the foregoing paragraphs, the Commission has prepared the draft articles on the basis of the principle that they should deal only with the effects of a succession of States as such on the treaties of the predecessor State. So far as possible the Commission has avoided re-stating in the present draft articles general rules applicable to treaties. It has left questions falling outside the scope of the effects of a succession of States in respect of treaties to be governed by whatever rules of international law may otherwise be applicable in respect of treaties. In some instances, however, for example as regards devolution agreements (article 8) and unilateral declarations (article 9) it has been considered necessary to clarify the legal position because of the direct relevance to the question of the effects of a succession of States in respect of treaties. Nevertheless, such provisions have, in accordance with the general approach of the Commission, been limited to those aspects of the matter which fall within the scope of that question. Other aspects of such matters are left to be governed by the pertinent rules of international law, and in particular those rules as stated in the Vienna Convention.

56. It also follows from the approach adopted that the Commission has similarly proceeded on the basis of the principle that the articles will be interpreted and applied in accordance with the rules of interpretation as stated in the Vienna Convention, and in particular taking into account the relevant rules of international law applicable in the relations between the parties, as provided in article 31, paragraph 3 (c) of the Convention. However, it has been considered necessary to include certain provisions of a general character, such as article 13 (questions relating to the validity of a treaty), so as to remove the possibility of misunderstanding as to the implications of the articles.

#### 5. THE PRINCIPLE OF SELF-DETERMINATION AND THE LAW RELATING TO SUCCESSION IN RESPECT OF TREATIES

57. 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 jurists<sup>49</sup> that the modern law does, or

<sup>47</sup> For the text of the Vienna Convention on the Law of Treaties, referred to hereafter as the Vienna 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.

<sup>48</sup> See also foot-note 15 above.

<sup>49</sup> 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].

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.

58. The Commission, after a study of State and depositary practice, concluded that in modern international law, having regard to the need for the maintenance of the system of multilateral treaties and of the stability of treaty relationships, as a general rule the principle of *de jure* continuity should apply. On the other hand, 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 as it is applicable in the case of newly independent States. The clean slate principle was well-designed to meet the situation of newly independent States, namely, those 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 the traditional clean slate principle as the underlying norm for cases of newly independent States or for cases that may be assimilated to them.

59. 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 affect the position of a newly independent State in relation to its predecessor’s treaties. In the first place, as the commentaries to articles 16 and 17 make clear, modern treaty practice recognizes that a newly independent State has the right under certain conditions to establish itself as a “party” or as a “contracting State” 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 the succession of States. 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 newly independent State creates a legal nexus between that territory and the treaty in virtue of which the newly independent 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 newly independent 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 con-

cerned. 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.

60. 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*

61. As recommended by the General Assembly, the Commission cast its study of the succession of States in respect of treaties in the form of a group of draft articles. 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 the decision taken by the Assembly. 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.

62. At its present session, the Commission, in the light of the comments of Governments, re-examined the question whether or not the final form of the codification of the law relating to succession of States in respect of treaties should be effected in the form of a convention. As indicated in the introduction to the 1972 draft<sup>50</sup> the question may be raised as to the value of codifying the law of the succession of States in respect of treaties in the

<sup>50</sup> *Yearbook . . . 1972*, vol. II, p. 228, document A/8710/Rev.1, para. 41.

form of a convention, in view of the fact that 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, 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 in respect of treaties 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 State until the latter had become a party. The Commission recognized that participation by successor States would involve problems relating to the method of giving, and the retroactive effect of, consent to be bound by the convention given by the successor State. Article 7 (non-retroactivity of the present articles) raises an aspect of the latter problem, but otherwise the Commission considered that these were questions to be answered by Governments when drafting the final clauses for inclusion in the Convention.

63. In the Commission's view, the consideration mentioned in the preceding paragraph does not 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 in respect of treaties. 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. Although much the same might be said of a declaratory code or a model, experience has shown that a convention is likely to be regarded as more authoritative in character, and accordingly, to be more effective as a guide. Moreover, 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. The extent to which this might in fact prove to be the case would depend, of course, on the intrinsic merit of the draft articles, as reflecting customary international law or as providing sensible and acceptable solutions in areas of doubt, and on the support consequently given by States to the convention. If the majority of States became parties to the convention within a reasonable period of time, the establishment of a convention would have proved worthwhile. On the assumption that a convention on succession of States in respect of treaties would receive wide support, the contribution to the development of customary international law does appear to be a good reason for adopting this form. Besides, there has been general support for the view that the draft articles on succession of States in respect of treaties should be drafted on the basis of and in parallel with the provisions of the Vienna Convention. This being so, it seems right to regard the articles on succession of States in respect of treaties as supplementary to the provisions of the Vienna

Convention. Accordingly, it would be appropriate to give these articles the same status as the Vienna Convention, *i.e.*, to establish them in the form of a convention. If satisfactory provision was made in the final clauses for the participation of a successor State in the convention with effect from the date of the succession, the convention would have the merit of making possible the regulation by treaty of the effects for the successor State of the succession of States in respect of the treaties of the predecessor State. A convention would also regulate and clarify the relevant treaty relations between the predecessor State and other States parties to the treaties in question on the assumption that they were all parties to the convention. Thus, to this extent a convention would have direct legal value for the parties to it.

64. In submitting the final text of the draft articles on the succession of States in respect of treaties the Commission reaffirms the view which it accepted at the outset of its work on the topic and which it expressed when submitting its provisional draft to the consideration of Governments. A corresponding recommendation is made below.<sup>51</sup>

#### (b) *Scope of the draft*

65. 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".<sup>52</sup> 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.

66. At its present session the Commission, in the light of the comments of Governments, considered the question whether or not to include any form of social revolution among the circumstances giving rise to a succession of States for the purposes of the articles on succession of States in respect of treaties. The Commission concluded that it was appropriate to exclude from the scope of the draft articles problems of succession arising as a result of changes of régime brought about by social or other forms of revolution. In its view, in the majority of cases, a revolution or coup d'état of whatever kind brings about a change of *government* while the identity of the State remains the same. The problem of the effect of a revolution, as regards the question of succession in respect of treaties, then falls within the scope of "succession of governments" rather than within that of "succession of States". It might be argued that a distinction should be drawn between different kinds of revolution; but such a

<sup>51</sup> See para. 84.

<sup>52</sup> See para. 25 above.

course would involve very difficult questions of definition which would not be solved simply by describing a particular kind of change of régime as a "social revolution". Moreover, such questions go beyond the realm of succession and relate to the very conception of what a State is, and are, therefore, inevitably charged with overtones of a political and philosophical character which make them more appropriate to be dealt with by other bodies.

67. The limitation of the draft articles to succession in respect of *treaties* is the consequence of the Commission's decision in 1967 to study succession in respect of treaties as a distinct part of the topic of succession of States.<sup>54</sup> The scope of the draft articles is also narrowed by the meaning given to the term "treaty" in article 2, paragraph 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 held at Vienna in 1968 and 1969 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.

68. With reference, in particular, to treaties concluded by international organizations, their exclusion from the scope of the draft was criticized in the Sixth Committee by one delegation. In the opinion of that delegation, such exclusion would leave outside the scope of the draft cases of succession resulting from the participations of States in certain hybrid unions, like customs unions and common markets. Such unions might obtain an exclusive right to enter into certain types of agreement, as in the case of the European Economic Community under the Treaty of Rome. Parties to trade agreements concluded, before the establishment of the union, with States which later became members of the union, might not be adequately compensated by a provision entitling them to claim damages from the State entering the union. They might have a real interest in obtaining some legal relationship with the successor organization. In such a context, a sharp distinction between treaties made by States and treaties made by international organizations would seem objectionable. The Commission, however, was not able to agree with that position. In addition to the considerations made in the preceding paragraph, which are also applicable to the instant case, the Commission noted that its study of the question of treaties concluded between States and international organizations or between two or more

international organizations was still in its early stages.<sup>54</sup> Besides, it would not be consistent with reliance on the Vienna Convention "as an essential framework" to extend the draft articles so as to comprise cases of succession of international organizations in respect of treaties.

69. Finally, there are difficulties of principle in the way of the above suggestion. The kind of "succession" contemplated would be different in character from the kind of "succession" contemplated in the draft articles. According to article 2, paragraph 1 (b) "succession of States" means "the replacement of one State by another in the responsibility for the international relations of territory". "Replacement" contemplates *complete* replacement and not *partial* transfer or conferment of powers to conclude treaties. The fact of succession by replacement is one thing; the conferment of exclusive powers in a limited field is something quite different. The legal consequences of giving an international organization exclusive powers to negotiate and conclude treaties either on its own behalf or on behalf of its members are likely to be regulated by the international instrument by which they are given. These consequences may vary from case to case. The mere fact that exclusive powers in a certain field are conferred on an international organization will not necessarily mean that the existing treaty obligations of the member States will be immediately and automatically terminated, or indeed that they will necessarily be terminated otherwise than through negotiation. This will depend on the terms of the treaty establishing the organization or conferring the relevant powers on it. In principle, it is in that context that the States concerned should safeguard the legal position with respect to the other parties to any treaty that may be affected.

70. The Vienna Convention 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". 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 and the outbreak of hostilities. The Commission therefore, as in the case of the general law of treaties and for the same reasons,<sup>55</sup> decided to insert a provision (article 38) in the draft articles including a general reservation in regard to these questions. In addition, the Commission decided to 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 would

<sup>54</sup> 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 (op. cit.)*, p. 285). For an account of the work accomplished on the topic see chapter IV, below.

<sup>55</sup> *Yearbook . . . 1966*, vol. II, pp. 176-177, document A/6309/Rev.1, paras. 29-31.

<sup>53</sup> See para. 29 above.

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.<sup>56</sup>

(c) *Scheme of the draft*

71. The topic of succession of States in respect of treaties has traditionally been expounded in terms of the effect upon the treaties of the predecessor State 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 one or more new States as a result of the separation of parts of the territory of a State; formation of a union of States; 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) succession in respect of part of territory; (b) newly independent States; (c) uniting and separation of States.

72. 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 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.

73. 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 I of the draft articles.

74. Part V contains two "miscellaneous" provisions which make a general reservation concerning any question that may arise in regard to a treaty from State responsibility or the outbreak of hostilities and from military occupation of a territory.

75. Late in the session, two proposals were submitted by members of the Commission. The first was a draft

<sup>56</sup> See below, articles 38 (Cases of State responsibility and outbreak of hostilities) and 39 (Cases of military occupation) and the commentary thereto.

"article 12 bis" entitled "Multilateral treaties of universal character" which was submitted together with an explanatory note. The second was a draft "article 32" entitled "Settlement of disputes". As there was not sufficient time to discuss these proposals, it was decided that they should be mentioned and reproduced in the introductory part of the present report.

*Multilateral treaties of universal character*<sup>57</sup>

76. The purpose of the proposed draft article is to ensure that certain treaties which are of a "worldwide scale, open to participation by all States" should continue in force for a newly independent State until such time as the newly independent State gives notice of termination. As may be seen from paragraphs (8) to (14) of the commentary to article 15, the Commission confirmed its decision that it could not distinguish between "law-making" and other treaties for the purposes of articles 15 and 16. Some members expressed dissatisfaction with the effects of this decision in connexion with certain classes of treaties, and others expressed particular concern about treaties of a general or universal character.

77. Particular attention was paid to the Geneva Humanitarian Conventions negotiated under the auspices of the Red Cross. Unfortunately, the Commission was unable to find any satisfactory way of providing for continuity in the case of those conventions in a manner

<sup>57</sup> The text of the proposed draft article 12 bis (A/CN.4/L.215 and Corr.2) reads as follows:

*"Multilateral treaties of universal character"*

"1. Any multilateral treaty of universal character which at the date of a succession of States is in force in respect of the territory to which the succession of States relates shall remain in force between the newly independent State and the other States parties to the treaty until such time as the newly independent State gives notice of termination of the said treaty for that State.

"2. Reservations to a treaty and objections to reservations made by the predecessor State with regard to any treaty referred to in paragraph 1 shall be in force for the newly independent State under the same conditions as for the predecessor State.

"3. The consent of the predecessor State, under a treaty referred to in paragraph 1, to be bound by only a part of the treaty; or the choice by the predecessor State, under a treaty referred to in paragraph 1, of different provisions thereof,

"Shall be in force for the newly independent State under the same conditions as for the predecessor State.

"4. Notice of termination of a treaty referred to in paragraph 1 shall be given by the newly independent State in accordance with article 17 [article 21 of the final draft].

"5. A treaty referred to in paragraph 1 shall cease to be in force for the newly independent State three months after it has transmitted the notice referred to in paragraph 4."

The foregoing text was accompanied by a proposed "new paragraph for inclusion in article 2" reading as follows:

"(x) 'multilateral treaty of universal character' means an international agreement which is by object and purpose of world-wide scale, open to participation by all States, 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."

The explanatory note on the proposal concerning article 12 bis reads as follows:

"It is, of course, clear to the members of the Commission by this time that no multilateral treaty can be considered to be in

that would be compatible with the draft articles, and in particular with the clean slate principle as embodied in articles 15 and 16. The Commission considered in particular whether it could assimilate the Red Cross to an international organization within the meaning of article 4, but it concluded that this would not be feasible.

78. Nevertheless, the attention paid to this matter demonstrated the anxiety that some members of the Commission felt about the effects of the "clean slate" principle as embodied in the draft articles in the case of the humanitarian conventions and other types of multilateral treaties which are of a "worldwide scale". In the time at its disposal, however, the Commission was not able to find a solution to this problem.

#### *Settlement of disputes*<sup>58</sup>

79. Several of the comments of Governments drew attention to the need for some procedure for the settlement of disputes, having regard to the nature of the provisions of the draft articles. These articles in many instances lay down tests which are considered by the Commission to be right in principle, but which may lead to difficulties in their application. Some members of the Commission were of the opinion that the articles should not be submitted to the General Assembly or to Governments without the addition of satisfactory provisions for the settlement of disputes. Accordingly, one member of the Commission submitted the proposed draft article on settlement of disputes: this comprises a short article for inclusion in an eventual convention together with an annex providing for a conciliation procedure in any

force from the date of succession unless, between the date of succession and the date of notification of succession to it, it has been applied by the newly independent State. In other words, a treaty cannot be given retroactive force. It is possible and permissible to provide that a multilateral treaty shall be deemed to be in force from the date of succession for the newly independent State and for any other party to the treaty if, by their conduct towards each other, they should be deemed to have expressed the necessary consent. However, such cases will obviously be the rare exception.

"It is nevertheless of the utmost importance to the newly independent State and to the international community as a whole that such multilateral universal conventions as the humanitarian conventions, the ILO conventions, the Covenants on Human Rights, the Universal Postal Convention and the like, the Treaty banning nuclear weapon tests, the Treaty on the Non-Proliferation of Nuclear Weapons, the Treaty on the peaceful uses of outer space and so on and so forth, if they have already been applied in respect of the territory to which the succession relates, should not cease to be in force for the newly independent State.

"It is taken as axiomatic that this is clearly in the interests both of the newly independent State and in those of the community of States as a whole.

"However, it is also important not to impair the clean-slate principle. This last condition will be met if the newly independent State reserves the right to declare any such multilateral universal convention, at any time (within a reasonable time-limit), terminated for that State."

<sup>58</sup> The text of the proposed draft article 32 (A/CN.4/L.221) reads as follows:

#### *"Settlement of Disputes"*

"1. In any dispute between two or more parties regarding the interpretation or application of these articles, which is not settled

case regarding the interpretation or application of the articles which is not settled through negotiation. The provisions are based on article 66 of the Vienna Convention, and the proposed annex is identical with the annex to that Convention.

80. Some members of the Commission were in favour of including this draft article in the present draft. Several were inclined to agree that in a convention which was supplementary to the Vienna Convention on the Law of Treaties it would be right to adopt procedures for the settlement of disputes based on the provisions of that convention. The general sense of the Commission, however, was that it was too late in the session to consider the matter thoroughly and that, on balance, the Commission should not pursue the matter further without reference to the General Assembly.

81. The Commission is willing, if this should be the wish of the General Assembly, to consider the question of the settlement of disputes for the purposes of the present articles at its twenty-seventh session and to prepare a report for the General Assembly so that it may be available to Governments if and when the articles are being prepared at a conference or in the General Assembly for inclusion in a convention.

through negotiation, any one of the parties to the dispute may set in motion the procedure specified in the annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

"2. Nothing in the foregoing paragraph shall affect the rights or obligations of the parties, under any provisions in force binding the parties with regard to the settlement of disputes.

#### *"Annex"*

"1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

"2. When a request has been made to the Secretary-General under article [32], the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

"The State or States constituting one of the parties to the dispute shall appoint:

"(a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

"(b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

"The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

"The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

"If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the

(Continued on next page)

82. Taking into account the above points, the Commission has arranged the draft articles as follows:

- Part I: General provisions (articles 1 to 13);
- Part II: Succession in respect of part of territory (article 14);
- Part III: Newly independent States (articles 15 to 29);
- Part IV: Uniting and separation of States (articles 30 to 37);
- Part V: Miscellaneous provisions (articles 38 and 39).

83. The Commission's work on succession of States in respect of treaties constitutes both codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the Commission's Statute. The articles it has formulated contain elements of both progressive development as well as of codification of the law and, as in the case of several previous drafts, it is not practicable to determine into which category each provision falls.

#### B. Recommendation of the Commission

84. At the 1301st meeting, on 26 July 1974, the Commission decided, in conformity with article 23 of its Statute, to recommend that the General Assembly should invite Member States to submit their written comments and observations on the Commission's final draft articles on succession of States in respect of treaties and convene an international conference of plenipotentiaries to study the draft articles and to conclude a convention on the subject.

#### C. Resolution adopted by the Commission

85. The Commission, at its 1301st meeting, on 26 July 1974, adopted by acclamation the following resolution:

(Foot-note 58 continued)

International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

"Any vacancy shall be filled in the manner prescribed for the initial appointment.

"3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

"4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

"5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

"6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

"7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations."

*The International Law Commission,*

*Having adopted the draft articles on succession of States in respect of treaties,*

*Desires to express to the Special Rapporteur, Sir Francis Vallat, its deep appreciation of the outstanding contribution he has made to the treatment of the topic by his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its work on the draft articles on the succession of States in respect of treaties.*

#### D. Draft articles on succession of States in respect of treaties

##### PART I

##### GENERAL PROVISIONS

##### *Article 1.<sup>59</sup> Scope of the present articles*

**The present articles apply to the effects of a succession of States in respect of treaties between States.**

##### *Commentary*<sup>60</sup>

(1) This article corresponds to article 1 of the Vienna Convention<sup>61</sup> 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.<sup>62</sup> It therefore underlines that the provisions which follow are designed for application only to "the effects of succession of in respect of treaties *between States*.\*" This restriction also finds expression in article 2, 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 the effects of a 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 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 the effects of a succession of *States* in respect of

<sup>59</sup> 1972 draft, article 1. For the text of the 1972 draft, see *Yearbook* . . . 1972, vol. II, p. 230, document A/8710/Rev.1, chap. II, C.

<sup>60</sup> In order to avoid unnecessary complication, the commentaries do not, in most cases, mention minor drafting changes made to the 1972 text of the articles.

<sup>61</sup> 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 publication, Sales No. E.70.V.5), p. 289.

<sup>62</sup> See above, paras. 67-69.

treaties.<sup>63</sup> The use of the words "succession of States\*" in 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, 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\*".

#### Article 2.<sup>64</sup> 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 successor 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 expressing its consent to be considered as bound by the treaty;

(h) "full powers" means in relation to a notification of succession or a notification referred to in article 37 a document emanating from the competent authority of a State designating a person or persons to represent the State for communicating the notification of succession or, as the case may be, 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 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) Paragraph 1 (a) reproduces the definition of the term "treaty" given in article 2, paragraph 1 (a), of the Vienna Convention. 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.<sup>65</sup> 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) 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.<sup>66</sup>

(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

<sup>63</sup> See above, paras. 65-66.

<sup>64</sup> 1972 draft, article 2.

<sup>65</sup> See above, para. 67.

<sup>66</sup> See above, paras. 48-50.

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 38 of the present draft.

(5) The meanings attributed in *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 *paragraph 1 (b)* and do not appear to require any comment.

(6) The expression "newly independent State", defined in *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*. In order to make clear that, for the purposes of the draft articles, a newly independent State is a successor State, the Commission inserted at the present session the word "successor" before "State" in the first line of the definition given in *paragraph 1 (f)*.

(7) 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. 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 States 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 varied considerably and that the rule to be applied would depend on the particular circumstances of each association.

(8) Consequently, the definition given in *paragraph 1 (f)* includes any case of emergence to independence of any former dependent territories, whatever its particular type may be. Although drafted in the singular for the sake of simplicity, it is also to be read as covering the case—envisaged in article 29—of the formation of a newly independent State from two or more territories. 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, or of a uniting of two or more existing States. 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".

(9) *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 treaty 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 dealt with in article 21. That article provides in particular that the notification of succession shall be transmitted by the newly independent State to the depositary or, if there is no depositary, to the parties or the contracting States. Accordingly, at the present session, the Commission deleted a clause to that effect which appeared in the 1972 text of *paragraph 1 (g)*.

(10) The 1972 text of *paragraph 1 (h)* defined the term "full powers" in relation only to a notification of succession. The definition corresponded to the phraseology used in article 2, *paragraph 1 (c)*, of the Vienna Convention. Having added to the draft at the present session the provisions of article 37, the Commission expanded the definition of "full powers" to cover the notifications referred to in that article. It also replaced the expression "for making the notification" at the end of the 1972 text by "for communicating the notification" since the word "communicating" and not "making" is used both in article 21, *paragraph 2*, and in article 37, *paragraph 2*, of the draft articles.

(11) The terms and expressions "ratification", "acceptance" and "approval" (*paragraph 1 (i)*), "reservation" (*paragraph 1 (j)*), "contracting State" (*paragraph 1 (k)*), "party" (*paragraph 1 (l)*) and "international organization" (*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.

(12) In drafting rules regarding succession of States 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, *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 *paragraph 1 (m)*. (13) Lastly, *paragraph 2* corresponds to paragraph 2 of article 2 of the Vienna Convention. The provision is designed to safeguard in matters of terminology the position of States in regard to their internal law and usages.

**Article 3.<sup>67</sup> Cases not within the scope of the present articles**

The fact that the present articles do not apply to the effects of a 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 a 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. 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 rules stated in 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 in some respects from article 3 of the Vienna Convention. First, the words "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 irrelevant 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.<sup>68</sup> Treaties constituting international organizations and treaties adopted within an international organization**

The present articles apply to the effects of a 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. 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.<sup>69</sup>
- (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

<sup>67</sup> 1972 draft, article 3.

<sup>68</sup> 1972 draft, article 4.

<sup>69</sup> See above, para. 29.

and a 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:

that when a new State is created, whatever may be the territory and the populations which it comprises and whether or not they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.<sup>70</sup>

New States have, therefore, been regarded as entitled to become Members of the United Nations only by admission, and not by succession. The same practice has been followed in regard to membership of the specialized agencies and of numerous other organizations.<sup>71</sup>

(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.<sup>72</sup> The position is similar in regard to IMCO and was explained to Nigeria by the Secretary-General of that Organization as follows:

In accordance with the provisions of article 9 of the Convention, the Federation of Nigeria was admitted as an associate member of IMCO on 19 January 1960. Since that date Nigeria has attained independence and has been admitted as a Member of the United Nations. The Secretary-General (of IMCO), in drawing attention to the fact that the Convention contains no provision whereby an associate member automatically becomes a full member, advised Nigeria of the procedure to be followed, as set out in articles 6 and 57 of the Convention, should it wish to become a full member of the Organization. The Secretary-General's action was approved by the Council at its fourth session.<sup>73</sup>

<sup>70</sup> *Yearbook . . . 1962*, vol. II, p. 103, document A/CN.4/149 and Add.1, para. 16.

<sup>71</sup> *Ibid.*, p. 124, document A/CN.4/150, para. 145. See also International Law Association, *The Effect of Independence on Treaties: A Handbook* (London, Stevens, 1965), chap. 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.

<sup>72</sup> *Yearbook . . . 1962*, vol. II, p. 124, document A/CN.4/150, para. 145.

<sup>73</sup> *Ibid.*, p. 118, para. 98; also *ibid.*, p. 124, paras. 145-146.

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 21 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.<sup>74</sup>

(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,<sup>75</sup> 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.<sup>76</sup> This practice appears to have met with the approval of the other parties to the instruments.

(5) Some constituent treaties provide expressly for a right of succession to membership, notably for States whose territory was "represented" at the conference at which the treaty was drawn up. These treaties fall under article 10 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.<sup>77</sup> The Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes provided that (a) States represented at or invited to the Peace Conference might either ratify or accede, and (b) accession by other States was to form the subject of a "subsequent agreement between the Contracting Powers."<sup>78</sup> 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

<sup>74</sup> ICAO and ITU are examples of other organizations in which the same principle is applied.

<sup>75</sup> *Yearbook . . . 1968*, vol. II, pp. 12-26, document A/CN.4/200 and Add.1 and 2, paras. 20-98.

<sup>76</sup> *Ibid.*, pp. 57-72, paras. 243-314.

<sup>77</sup> *Ibid.*, pp. 28-32, paras. 109-127.

<sup>78</sup> *Ibid.*, p. 27, para. 104.

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.<sup>79</sup> 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.<sup>80</sup> Both organizations require new States to comply with the normal admission procedures applicable to Members of the United Nations or, as the case may be, to other States. Both organizations, however, have at the same time adopted the principle that a former associate member which, after independence, indicates its wish to become a member, remains subject to the obligations and entitled to the rights of an associate member during the interval before it obtains full membership.

(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,<sup>81</sup> several newly independent States, after their admission to the Organization, have claimed the right to consider themselves as continuing to be parties to the Agreement, and this claim has not been questioned either by the depositary, the United States of America, or by the other parties to the Agreement.<sup>82</sup> Similarly, although membership of UNESCO or of the United Nations is necessary for participation in the Agreement on the Import-

ation of Educational, Scientific and Cultural Materials (1950)<sup>83</sup> this has not prevented a number of newly independent States, after acquiring membership, from notifying their succession to this Agreement.<sup>84</sup> Again, some eighteen newly independent States have transmitted notifications of succession to the 1946 Convention on the Privileges and Immunities of the United Nations<sup>85</sup> 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,<sup>86</sup> but it has now become so invariable that it has been said to be inconceivable that a new State should ever in future become a member without 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 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 Organization has little significance in relation to the Conventions. *A fortiori*, therefore, the fact that the treaty has been adopted within an organization is no obstacle to a newly indepen-

<sup>79</sup> 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.

<sup>80</sup> Ghana (1958), Malaysia (1959), Nigeria (1961), Zaire (1962), Sierra Leone (1962), Cyprus (1962), Rwanda (1963), Trinidad and Tobago (1966), Malta (1968), Mauritius (1969), and Fiji (1972). 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* (United Nations publication, Sales No. E.73.V.7), pp. 336-337.

<sup>81</sup> United Nations, *Treaty Series*, vol. 1, p. 15.

<sup>82</sup> Sri Lanka (Ceylon) (1948), Viet-Nam (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.

<sup>79</sup> See *Yearbook . . . 1970*, vol. II, p. 61, document A/CN.4/225.

<sup>80</sup> See International Law Association, *The effect . . . (op. cit.)*, pp. 256-258, 327-330 and 334-339.

<sup>81</sup> Article VI. See United Nations, *Treaty Series*, vol. 84, p. 396.

<sup>82</sup> For instance, Pakistan (1948), Sri Lanka (Ceylon) (1957), Malaysia (Federation of Malaysia) (1959), Madagascar (1962) and Dahomey (1963). See United Nations, *Materials on Succession of States* (United Nations publication, Sales No. E/F.68.V.5), pp. 224-226.

dent State's becoming a party by "succession" rather than "accession".<sup>87</sup>

(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 normally 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 separation from 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 adapted within an international organization. During the re-examination of the draft articles at its twenty-sixth session, the Commission considered in the light of comments made by the ILO whether any further provision should be made to help to ensure the continuity of obligations under ILO conventions. The Commission, while not changing its position as to the status of the ILO practice in this connexion,

<sup>87</sup> Six States have transmitted notifications of succession to the Secretary-General in respect of the Convention on the Political Rights of Women and eight States also in respect of the Convention on the Nationality of Married Women (see United Nations, *Multilateral Treaties . . . 1972 (op. cit)*, pp. 349, 350 and 356).

decided that the matter should be left to be governed by the relevant rules of the organization as provided in the 1972 draft.

(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 Vienna Convention 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.<sup>88</sup>

(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.<sup>89</sup> Obligations imposed  
by international law independently of a treaty*

**The fact that a treaty is not considered to be in force in respect of a State by virtue of the application of the present articles shall not in any way impair the duty of that State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.**

*Commentary*

(1) Article 5 is modelled on article 43 of the Vienna Convention which reproduces almost verbatim article 40 of the Commission's draft articles 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:

<sup>88</sup> *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.

<sup>89</sup> 1972 draft, article 5.

... 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.<sup>90</sup>

(2) 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 a State of obligations embodied in the treaty which were also obligations to which it would be subject under international law independently of the treaty.

(3) The Commission replaced the words "a treaty is not in force" in the 1972 draft by "a treaty *is not considered*\* to be in force". The question whether a treaty is in force belongs to the law of treaties and, in the context of the effects of succession of States in respect of treaties, it seemed to be more appropriate to use the expression "*considered to be*\* in force" which appears in other provisions of the draft, such as, for instance, paragraph 1 of article 23.

(4) The Commission deleted the word "successor" from the expression "a successor State" and consequently altered "any State" to "that State". The word "successor" was deleted because under the rules in the draft articles, in particular article 23, a treaty may be considered not to be in force, not only in respect of successor States, but also in respect of other States. The Commission also replaced the words "*as a result of*\* the application of the present articles" by the more flexible wording "*by virtue of*\* the application of the present articles". This alteration was considered desirable because several articles, such as article 23, lay down the conditions under which treaties in a certain category are considered to be in force and only by implication determine the conditions under which such treaties are *not* to be considered as being in force.

#### *Article 6.<sup>91</sup> 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 international law relating to normal situations naturally assumes that those 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 United Nations Conference on the Law of Treaties—otherwise assumed that the provisions of the Vienna Convention would apply to facts occurring and situations established in conformity with international law.

(2) In 1972, 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 would 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 among 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 and, in particular, the principle of international law embodied in the Charter of the United Nations.

(3) There were few comments by delegations or Governments on article 6 of the 1972 draft. Opinions were divided as to the necessity for its inclusion, but the tendency was in favour of its retention. One Government, however, suggested that the article might be redrafted in such a way as to make it clear that, although the benefits of the draft articles could not be enjoyed in "unlawful" cases, obligations should apply in all cases. At its present session, the weight of opinion in the Commission was in favour of keeping the article in the form in which it was drafted in 1972. It was considered that it was right in principle to restrict the application of the present articles to situations occurring in conformity with international law. Accordingly, the Commission decided to keep article 6 in its 1972 form.

#### *Article 7.<sup>92</sup> Non-retroactivity of the present articles*

**Without prejudice to the application of any of the rules set forth in the present articles to which the effects of a succession of States would be subject under international law independently of these articles, the present articles**

<sup>90</sup> *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (op. cit.)*, p. 57.

<sup>91</sup> 1972 draft, article 6.

<sup>92</sup> New article.

**apply only in respect of a succession of States which has occurred after the entry into force of these articles except as may be otherwise agreed.**

#### *Commentary*

(1) During the discussion of article 6 at the present session of the Commission, some members expressed doubts as to the possible implications of the article with respect to events that had occurred in the past. It was observed that reference to the Charter of the United Nations might not have the effect of limiting these implications to recent events or even to those which had occurred since the Charter came into force. One member of the Commission attached particular importance to establishing beyond doubt that article 6 had no retroactive effect. Accordingly, he submitted a draft article which, after consideration and some redrafting by the Commission, is now included as article 7.

(2) The decision to include the article, however, was adopted by a narrow majority<sup>93</sup> after criticism had been expressed by several members of the Commission. They considered that, as non-retroactivity was a general principle of the law relating to treaties reflected in article 28 of the Vienna Convention, it was unnecessary and undesirable to include an article in that sense in the present set of articles. Some members thought that the article might give an erroneous impression that the draft articles were largely irrelevant to the current interests of many States and that the text of the article was unduly wide and vague in its effect. The view was also expressed that non-retroactivity was a matter to be considered by Governments in due course in connexion with the final clauses for inclusion in a convention incorporating the draft articles.

(3) Article 7 is modelled on article 4 of the Vienna Convention but is drafted having regard to the provisions on the non-retroactivity of treaties in article 28 of that Convention. The article has two parts. The first, corresponding to the first part of article 4 of the Vienna Convention, is a saving clause which makes clear that the non-retroactivity of the present articles will be without prejudice to the application of any of the rules set forth in the articles to which the effects of a succession of States would be subject under international law independently of the articles. The second part limits the application of the present articles to cases of succession of States which occur after the entry into force of the articles except as may be otherwise agreed. The second part speaks only of "a succession of States," because it is possible that the effects of a succession of States which occurred before the entry into force of the articles might continue after their entry into force and this possibility might cause confusion in the application of the article. The expression "entry into force" refers to the general entry into force of the articles rather than the entry into force for the individual State, because a successor State could not become a party to a convention embodying the articles until after the date of succession of States.

<sup>93</sup> At the 1296th meeting of the Commission, on 18 July 1974, the article was adopted by 8 votes to 4, with 5 abstentions.

Accordingly, a provision which provided for non-retroactivity with respect to "any act or fact . . . which took place before the *date of the entry into force of the treaty with respect to that party*,"\* as in article 28 of the Vienna Convention, would, if read literally, prevent the application of the articles to any successor State on the basis of its participation in the convention. The words "except as may be otherwise agreed" are included to provide a measure of flexibility and reflect the sense of the introductory words to article 28 of the Vienna Convention.

(4) Although the draft of the article was submitted to the Commission in relation to article 6, it is cast in general terms. This is necessary because, if an article were to provide for non-retroactivity in respect of one article alone, this would obviously raise implications and doubts as to the retroactive effect of the other articles. Accordingly, article 7 is drafted as a general provision and is placed in Part I of the draft immediately after article 6.

#### *Article 8.<sup>94</sup> Agreements for the devolution of treaty obligations or rights from a predecessor State to a successor State*

**1. The obligations or 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 or rights of the successor States towards other States parties to those treaties in consequence only of the fact that the predecessor State and the successor State 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 8 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

<sup>94</sup> 1972 draft, article 7.

which they have taken a certain position—negative or otherwise—in regard to the devolution of treaties concluded by the predecessor State with reference to their territory. These declarations, although they have affinities with devolution agreements, are clearly distinct types of legal acts and are therefore considered separately in article 9 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 Samoa<sup>95</sup> 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.<sup>96</sup> Analogous agreements were concluded between Italy and Somalia<sup>97</sup> and between the Netherlands and Indonesia.<sup>98</sup> As to France, it concluded devolution agreements in a comprehensive form with, respectively, Laos and Viet-Nam<sup>99</sup> and an agreement in more particular terms with Morocco<sup>100</sup> but devolution agreements do not seem to have been usual between France and her former African territories.<sup>101</sup> 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 (1974)<sup>102</sup> providing for the special cases of India and Pakistan, the agreements are in the form of treaties; and,

<sup>95</sup> Exchange of letters of 30 November 1962 (see United Nations, *Treaty Series*, vol. 476, pp. 4 and 6).

<sup>96</sup> 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.

<sup>97</sup> Treaty of Friendship (with Exchange of Notes) concluded between Italy and Somalia, Mogadiscio, 1 July 1960. For the original Italian text see *Diritto Internazionale*, vol. XVI (1962), pp. 440-442. English text provided by the United Kingdom Government appears in United Nations, *Materials on Succession of States (op. cit.)*, pp. 169-170.

<sup>98</sup> Draft Agreement on Transitional Measures included in the Round-Table Conference Agreement between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia of 27 December 1949 (see United Nations, *Treaty Series*, vol. 69, p. 266).

<sup>99</sup> *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).

<sup>100</sup> Convention diplomatique franco-marocaine (20 May 1956) (see *Annuaire français de droit international, 1956* (Paris, 1957), vol. II, p. 133).

<sup>101</sup> One such Agreement seems to have been made between France and the Ivory Coast.

<sup>102</sup> *British and Foreign State Papers, 1947* (London, H.M. Stationery Office, 1955), Part I, vol. 147, pp. 158-176.

with some exceptions, notably the French agreements, they have been registered as such with the Secretariat of the United Nations.

(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 15. 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 in 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.<sup>103</sup> 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.<sup>104</sup>

(5) The question of the legal effects of such an agreement as between the parties to it, namely as between the predecessor State 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, 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 the preceding paragraph, suffices to show that the intention of the parties to these agreements is to make provision *as between themselves*

<sup>103</sup> United Nations, *Treaty Series*, vol. 279, p. 287.

<sup>104</sup> *Ibid.*, p. 288.

for their own obligations and rights under the treaties concerned and is not to make provision for obligations or rights of third States, within the meaning of articles 35 and 36 of the Vienna Convention. It may be that, in practice, the real usefulness of a devolution agreement is in facilitating the continuance of treaty links between a territory newly independent and other States. But the language of devolution agreements does not 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 contains no provisions regarding the assignment either of treaty rights or of treaty obligations. The reason is that the institution of "assignment" found in some national systems of law by which, under certain conditions, contract rights may be transferred without the consent of the other party to the contract does not appear to be an institution recognized in international law. 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 14, 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 State parties, the agreement does not *of its own force* establish any treaty nexus between the successor State and other State 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 the 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 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 State 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.<sup>105</sup>

(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?

(12) The Secretary-General's own practice as depositary of multilateral treaties seems to have begun by attributing

<sup>105</sup> For an assessment of the value of devolution agreements, see International Law Association, *The Effect . . . (op. cit.)*, chap. 9.

largely automatic effects to devolution agreements<sup>106</sup> 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.\*<sup>107</sup>

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 its 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 multilateral 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.<sup>108</sup> But in its general practice as depositary of this and of other Conventions, including the Geneva Humanitarian Conventions, the Swiss Government does not seem to have treated a devolution agreement as a sufficient basis for considering a successor State as a party to the convention but has acted only upon a declaration or notification of the State in question.<sup>109</sup> 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*<sup>110</sup> that the United States also acts only upon a declaration or notification of the successor State, not upon its conclusion of a devolution treaty, in determining whether that State should be considered a party to a multilateral treaty for which the United States is the depositary.

(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.<sup>111</sup> On the other hand, Nigeria declined to treat its devolution agreement as committing it to assume the United Kingdom's obligations under certain extradition treaties.<sup>112</sup>

In any event, the United Kingdom seems previously to have advised the Government of Burma rather differently in regard to that same Warsaw Convention.<sup>113</sup> Moreover, when looking at the matter as a "third State", the United Kingdom has declined to attribute any automatic effects to a devolution agreement. Thus, when informed by Laos that it considered the Anglo-French Civil Procedure Convention of 1922 as continuing to apply between Laos and the United Kingdom in consequence of a devolution agreement, the United Kingdom expressed its *willingness* that this should be so but added that the United Kingdom

wished it to be understood that the Convention continued in force not by virtue of the 1953 Franco-Laotian Treaty of Friendship, but because Her Majesty's Government and the Government of Laos were agreed that the 1922 Anglo-French Civil Procedure Convention

<sup>106</sup> 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.

<sup>107</sup> *Yearbook . . . 1962*, vol. II, p. 122, document A/CN.4/150, para. 133.

<sup>108</sup> *Yearbook . . . 1968*, vol. II, pp. 13-14, document A/CN.4/200 and Add.1-2, paras. 26-29.

<sup>109</sup> *Ibid.*, pp. 16 *et seq.*, paras. 35-85, and pp. 39 *et seq.*, paras. 158-224.

<sup>110</sup> *Op. cit.*, pp. 224-228.

<sup>111</sup> *Ibid.*, p. 181.

<sup>112</sup> *Ibid.*, pp. 193-194.

<sup>113</sup> *Ibid.*, pp. 180-181.

should continue in force as between the United Kingdom and Laos.<sup>114</sup>

The Laos Government, it seems, acquiesced in this view. Similarly, in the case concerning the Temple of Preah Vihear,<sup>115</sup> 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.<sup>116</sup> 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.<sup>117</sup>

(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.<sup>118</sup> In the case of other general multilateral treaties the position seems to be broadly the same.<sup>119</sup> 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.<sup>120</sup> Neither this Note nor a previous Note addressed by the Indonesian Government to the United Kingdom in similar terms in January 1961<sup>121</sup> 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.<sup>122</sup> Equally, in correspondence with the United Kingdom concerning extradition treaties Nigeria seems to have considered itself as possessing a wide liberty of appreciation in regard to the continued application of this category of treaties,<sup>123</sup> as also in correspondence with the United States.<sup>124</sup> Even where the successor State is in general disposed in pursuance of its devolution agreement to recognize the continuity of its predecessor's treaties, it not infrequently finds it necessary or desirable to enter into an agreement with a third State providing specifically for the continuance of a particular treaty.<sup>125</sup>

(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 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.<sup>126</sup>

<sup>114</sup> *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).

<sup>115</sup> 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.

<sup>116</sup> 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.

<sup>117</sup> 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.

<sup>118</sup> For example, Indonesia and Somalia (see *Yearbook . . . 1962*, vol. II, pp. 110 and 111, document A/CN.4/150, paras. 21 and 31-33, and *ibid.*, p. 119, para. 106).

<sup>119</sup> *Yearbook . . . 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.

<sup>120</sup> 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).

<sup>121</sup> *Ibid.*, p. 186.

<sup>122</sup> *Ibid.*, pp. 211-213.

<sup>123</sup> *Ibid.*, pp. 193-194.

<sup>124</sup> See International Law Association, *Report on 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).

<sup>125</sup> 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).

<sup>126</sup> Another consideration to be taken into account is the difficulty in some cases of identifying the treaties covered by a devolution agreement.

(19) In the light of the foregoing, *paragraph 1* of the present article declares that the obligations or 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 or rights of the successor State towards other States parties in consequence *only* of the fact that the predecessor State and the successor State 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 that 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 might 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 might 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 predecessor State'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 codified in the Vienna Convention, 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 53.

(22) During the second reading of the draft articles the Commission again considered the relationship between article 8 and the general law of treaties. It had been said in the written comments submitted by one Government

that the article as drafted in 1972 left some doubt as to its relationship to articles 35, 36 and 37 of the Vienna Convention, which are concerned with treaties and third States. The Commission, however, confirmed its view that article 8 is in accord with the principle that a treaty does not create an obligation for a third State unless the third State expressly accepts the obligation and that otherwise the possible effects of devolution agreements as treaties should be left to be governed by the relevant rules of international law. Throughout the Commission has proceeded on the basic assumption that the draft articles should be understood and applied in the light of the rules of international law relating to treaties, and in particular of the rules of law stated in the Vienna Convention, and that matters not regulated by the draft articles would be governed by the relevant rules of the law of treaties. This is the fundamental approach which underlies the drafting of the articles. It is of particular importance in relation to article 8 which as drafted does not detract from the possible application, for example, of the rules stated in articles 35, 36 and 37 of the Vienna Convention.

(23) The Commission also considered, in the light of the comments of Governments, whether the drafting of article 8 could be simplified in the form of a single paragraph and whether the text might otherwise be improved. It concluded, however, that the combination of the two propositions contained in the article in a single paragraph might upset the delicate balance of the article and cast undesirable doubts on the value of devolution agreements. Accordingly, subject to minor changes of drafting, the Commission retained the 1972 text of the article.

*Article 9.<sup>127</sup> Unilateral declaration by a successor State regarding treaties of the predecessor State*

**1. The obligations or 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 or rights of the successor States 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 8, 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

<sup>127</sup> 1972 draft, article 8.

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 it—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 its territory, on a basis of reciprocity, the terms of all such treatments 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 or termination, confirmation of succession or accession. During such interim period of review any party to a multilateral treaty which has prior to independence been applied or extended to Tanganyika may, on a basis of reciprocity, rely as against Tanganyika on the terms of such treaty.<sup>128</sup>

At Tanganyika's express request, the Secretary-General circulated the text of its declaration to all Members of the United Nations.

The United Kingdom then in turn wrote to the Secretary-General requesting him to circulate to all Members of the United Nations a declaration couched in the following terms:

I have the honour . . . to refer to the Note dated 9 December 1961 addressed to your Excellency by the then Prime Minister of Tanganyika, setting out his Government's position in relation to international instruments concluded by the United Kingdom, whose provisions applied to Tanganyika prior to independence. Her Majesty's Government in the United Kingdom hereby declare that, upon Tanganyika becoming an independent Sovereign on 9th of December 1961, they ceased to have the obligations or rights, which they formerly had, as the authority responsible for the administration of Tanganyika, as a result of the application of such international instruments to Tanganyika.<sup>129</sup>

In other words, the United Kingdom caused to be circulated to all Members of the United Nations a formal disclaimer, so far as concerned the territory of Tanganyika, of any obligations or rights of the United Kingdom under treaties applied by it to that territory prior to independence.

(3) The precedent set by Tanganyika<sup>130</sup> has been followed by a number of other newly independent States whose unilateral declarations have, however, taken varying forms.<sup>131</sup>

<sup>129</sup> *Ibid.*, p. 178.

<sup>130</sup> 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.

<sup>131</sup> Tonga made a declaration in 1970 which is different from the other declarations mentioned in the commentary. The text of the declaration reads as follows:

"1. I have the honour to inform you that the Government of the Kingdom of Tonga has given consideration to the question of the effect upon its treaty relations with other countries of the Exchange of Notes between it and the United Kingdom pursuant to which the United Kingdom ceased on 4 June 1970 to have any responsibility for the external relations of the Kingdom of Tonga.

"2. Relations between Her Britannic Majesty's Government in the United Kingdom and the Government of the Kingdom of Tonga have been governed by—

The Treaty of Friendship of 29 November 1879;  
The Treaty of Friendship of 18 May 1900;  
The Agreement of 18 January 1905;  
The Agreement of 7 November 1928;  
The Agreement of 20 May 1952;  
The Treaty of Friendship of 26 August 1958;  
The Treaty of Friendship of 30 May 1968.

"3. Although those of the above instruments of date earlier than 26 August 1958 did not define the powers of the United Kingdom with respect to the external relations of the Kingdom of Tonga, the latter acknowledged in practice that the relationship between States of protection is one which necessarily implies acceptance by the State enjoying protection of limitations of its sovereignty in the sphere of external relations. At the time of negotiation of the Treaty of 18 May 1900, an undertaking was given in unpublished instruments by the King of Tonga to conduct his relations with foreign Powers under the sole advice and through the channels of the United Kingdom and this undertaking constituted the basis on which the external affairs of Tonga were conducted until 26 August 1858.

"4. Article III of the Treaty of 26 August 1958 provided that the external relations of the Kingdom of Tonga should be conducted by and be the responsibility of the Government of the Kingdom of Tonga. By a Despatch on External Relations of the same date the Government of the Kingdom of Tonga was authorized:

"(a) to negotiate and conclude agreements of purely local concern (other than agreements relating to matters of defence and security and civil aviation) with the administrations of neighbouring Pacific Islands and the Governments of Australia and New Zealand, including arrangements with them for the exchange of representatives;

<sup>128</sup> United Nations, *Materials on Succession of States (op. cit.)*, pp. 177-178.

(4) Botswana in 1966 and Lesotho in 1967<sup>132</sup> 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*:

“(b) to negotiate and conclude trade agreements, whether bilateral or multilateral, relating solely to the treatment of goods;  
 (c) to become a member of any international technical organization for membership of which the Kingdom of Tonga is eligible under the terms of the instrument constituting the organization; and to conduct any external relations (not being relations excluded from the competence of that Government by international law) arising out of any such agreement concluded by the Government of Tonga or out of membership of any international organization.

“5. Paragraph (2) of said Article III placed on the Government of the United Kingdom the general obligation to consult the Government of Tonga regarding the conduct of its external relations, and paragraph (3) laid the responsibility on the sovereign of the Kingdom of Tonga to take such steps as might be necessary to give effect to international agreements entered into on behalf of the Government of Tonga.

“6. Article II of the Treaty of 30 May 1968 provided that the Government of the United Kingdom should have full and sole responsibility for, and for the conduct of, the external relations of the Kingdom of Tonga—

“(a) with the United Nations;

“(b) with all international organizations of which neither the United Kingdom nor the Kingdom of Tonga was for the time being a member;

“(c) with respect to the accession or adherence by the Kingdom of Tonga to any alliance or political grouping of States;

“(d) with respect to defence;

“(e) with respect to establishment matters, merchant shipping and civil aviation, except in so far as the Government of the United Kingdom might declare that responsibility for, or responsibility for the conduct of, such relations should be vested in the Government of the Kingdom of Tonga.

“7. Where, in accordance with the said Article, the Government of the United Kingdom had full and sole responsibility for, or for the conduct of, the external relations of the Kingdom of Tonga, paragraph (3) of that Article provided that they should consult with the Government of Tonga regarding the conduct of such external relations, and in particular should consult with the Government of Tonga before entering into any international agreement in respect of the Kingdom of Tonga.

“8. Subject to the provisions of the said Treaty, paragraph (4) of the said Article provided that the external relations of the Kingdom of Tonga should be conducted by, the Government of Tonga, except in so far as the Government of the United Kingdom might, at the request of the Government of Tonga, undertake responsibility for, or responsibility for the conduct of, such relations.

“9. 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.

The Government of the Kingdom of Lesotho wishes it to be understood that this is merely a transitional arrangement. Under no circumstances should it be implied that by this Declaration Lesotho has either acceded to any particular treaty or indicated continuity of any particular treaty by way of succession.<sup>133</sup>

(5) In 1958 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.*”<sup>134</sup> 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*

“10. 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 instrument, and respecting which, if any, such treaties are so affected by the 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.

“11. 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.

“12. 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 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.

“13. 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.

“14. The Government of the Kingdom of Tonga desires that this letter be circulated to all members of the United Nations, so that they will be effected with notice of the Government's attitude.”

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. For the Commission's conclusions regarding protected States, see para. 7 of the commentary to article 2.

<sup>132</sup> *Ibid.*, Treaties, Botswana and Lesotho.

<sup>133</sup> *Ibid.*, Treaties, Lesotho.

<sup>134</sup> See paragraph 2 above.

existence\*<sup>135</sup> 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.<sup>136</sup>

(6) Uganda, in a Note to the Secretary-General of 12 February 1963,<sup>137</sup> made a declaration applying a single procedure of provisional application to both bilateral and multilateral treaties. The declaration stated that in respect of all treaties validly concluded by the United Kingdom on behalf of the Uganda Protectorate or validly extended to it before 9 October 1962 (the date of independence) Uganda would continue to apply them, on the basis of reciprocity, until the end of 1963, unless they should be abrogated, or modified by agreement with the other parties concerned. The declaration added that at the end of that period, or of any subsequent extension of it notified in a similar manner, Uganda would regard the treaties as terminated except such as "must by the application of the rules of customary international law be regarded as otherwise surviving". The declaration also expressed Uganda's hope that before the end of the period prescribed the normal processes of diplomatic negotiations would have enabled it to reach satisfactory accords with the States concerned upon the possibility of the continuance or modification of the treaties; and, in the case of multilateral treaties, it expressed its intention within that same period to notify the depositary of the steps it wished to take in regard to each treaty. Like Tanganyika, Uganda expressly stated that, during the period of review, the other parties to the treaties might, on the basis of reciprocity, rely on their terms as against Uganda.<sup>138</sup>

Kenya<sup>139</sup> and Malawi<sup>140</sup> subsequently requested the Secretary-General to notify Members of the United Nations of declarations made by them in the same forms as Uganda. Kenya's declaration contained an additional paragraph which is of some interest in connexion with so-called dispositive treaties and which reads:

Nothing in this Declaration shall prejudice or be deemed to prejudice the existing territorial claims of the State of Kenya against third parties and the rights of a dispositive character initially vested in the State of Kenya under certain international treaties or administrative arrangements constituting agreements.

<sup>135</sup> 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 1 January 1972*, Dept. of State publication No. 8628 (Washington, D.C., U.S. Government Printing Office), p. 169.

<sup>136</sup> Full text of the declaration in communication dated 28 May 1968 transmitted by the Secretary-General on 2 July 1968 (LE 222 NAURU).

<sup>137</sup> 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.

<sup>138</sup> In Uganda's declaration the statement in terms refers only to multilateral treaties; but Uganda's intention seems clearly to be that parties to any of the treaties should be able, on the basis of reciprocity, to rely on their terms as against itself during the period of review.

<sup>139</sup> 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.

<sup>140</sup> *Ibid.*, Treaties, Malawi.

(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 end 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.

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.<sup>141</sup>

Subsequently, declarations in the same form were made by Guyana, Barbados, Mauritius, the Bahamas and Fiji.<sup>142</sup> The declarations of Barbados, Mauritius, the Bahamas and Fiji 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 the 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 Kingdom<sup>143</sup> in the same terms as in the case of Tanganyika.<sup>144</sup>

<sup>141</sup> *Ibid.*, Treaties, Zambia.

<sup>142</sup> *Ibid.*, Treaties, Guyana, Barbados and Mauritius. The text of the Bahamas declaration is contained in a communication dated 10 July 1973 transmitted by the Secretary-General on 3 August 1973 (LE 222 BAHAMAS). That of Fiji is contained in a communication dated 10 December 1970 transmitted by the Secretary-General on 16 December 1970 (LE 222 FIJI).

<sup>143</sup> 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.

<sup>144</sup> See para. 2 above.

(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.<sup>145</sup>

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.

(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.<sup>146</sup>

The Note concluded by requesting the Secretary-General to communicate its contents to all Member States of the United Nations, to all organs, principal and subsidiary of the United Nations, and to the specialized agencies. The Note did not in terms continue in force, or refer to in any way, the previous declaration made by Tanganyika in 1961.<sup>147</sup> 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.

<sup>145</sup> 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.

<sup>146</sup> 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.

<sup>147</sup> See para. 2 above.

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.<sup>148</sup>

(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.

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 modification and termination of international instruments;

(6) The agreements in question must not be contrary to the letter or the spirit of the Constitution of the Kingdom of Burundi.

When this period has expired,\* any agreement which has not been renewed by the parties or has terminated under the rules of customary international law will be regarded by the Government of Burundi as having lapsed.

Similarly, any agreement which does not comply with the reservations stated above will be regarded as null and void.

With regard to bilateral agreements concluded by independent Burundi the Government intends to submit such agreements to the Secretary-General for registration once internal constitutional procedures have been complied with.

II. The Government of Burundi is prepared to succeed to *multilateral agreements* subject to the following reservations:

(1) that the matters dealt with in these agreements are still of interest;

(2) that these agreements do not, under article 60 of the Constitution of the Kingdom of Burundi, involve the State in any expense or bind the Burundi individually. By the terms of the Constitution, such agreements cannot take effect unless they have been approved by Parliament.

In the case of multilateral agreements which do not meet the conditions stated above, the Government of Burundi proposes to make known its intention explicitly in each individual case. This also applied 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

\* Extended for a further period of two years by a Note of December 1966.

<sup>148</sup> 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.

it intends to be bound in its own right by accession of through succession.

With regard to multilateral agreements open to signature, the Government will shortly appoint plenipotentiaries holding the necessary powers to execute formal acts of this kind.

III. In the intervening period, however, the Government will put into force the following *transitional provisions*:

(1) any party to a regional multilateral treaty or a multilateral treaty of universal character which has been effectively applied on a basis of reciprocity can continue to rely on that treaty as of right in relation to the Government of Burundi until further notice;

(2) the transitional period will terminate on 1 July 1966;

(3) no provision in this Declaration may be interpreted in such a way as to infringe the territorial integrity, independence or neutrality of the Kingdom of Burundi.

The Ministry requests the Secretary-General to be so good as to issue this Declaration as a United Nations document for circulation among Member States and takes this opportunity to renew to the Secretary-General the assurances of its highest consideration.<sup>149</sup>

In this declaration, it will be noted, the express provision that during the period of review the other parties may continue to rely on the treaties as against Burundi appears to relate only to multilateral treaties.

(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 deter-

mination 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 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 definitively that it considers itself, or desires to have itself considered, as a party to treaties, or certain treaties, of its predecessor applied to its territory prior to independence. Even then, since the declaration would not, as such, be binding on other

<sup>149</sup> See International Law Association, *Report on the Fifty-third Conference, Buenos Aires, 1968* (op. cit.), 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).

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 successor States other than newly independent States. Accordingly, the Commission decided to formulate in article 9 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 8).

(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 8 (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. Certain differences between devolution agreements and unilateral declarations had been mentioned in the comments of Governments. However, the Commission, when re-examining the draft articles, thought that these were differences of a political rather than of a legal character and that they were sufficiently reflected in the commentaries to articles 8 and 9. Reference was made in this connexion to paragraph 21 of the commentary to article 8. It was also noted that there was a difference in tone between paragraph 2 of article 8 which began with the words "Notwithstanding the conclusion of such an agreement. . ." and paragraph 2 of article 9 in which the corresponding words were "In such a case . . .".

(21) Accordingly, *paragraph 1* of this article states that the obligations or 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 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.

(22) At its twenty-sixth session, the Commission decided to keep article 9 in its original form for the same reasons as given in paragraph 23 of the commentary to article 8 and made only three minor drafting changes.

#### *Article 10.*<sup>150</sup> *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 considered.**

**3. In cases falling under paragraph 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 the 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. Sometimes they have been included in treaties when the process of the emergence of one or more successor States was at 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:

If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, *such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party*.<sup>151</sup>

<sup>150</sup> 1972 draft, article 9.

<sup>151</sup> United Nations, *Treaty Series*, vol. 278, p. 204.

This clause, which was included in the original text of the General Agreement<sup>152</sup> seems to have been designed to enable certain self-governing *dependent* territories to become separate contracting parties to GATT rather than to furnish a means of providing for the continuation as parties to GATT of *newly independent States*.<sup>153</sup> In fact, however, the great majority of the newly independent States which have become parties to GATT have done so through the procedure set out in the clause. Moreover, the contracting parties by a series of recommendations have found it desirable to supplement that clause with a further procedure of "provisional application", called "*de facto* application".<sup>154</sup>

(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-five others have become contracting parties by sponsoring and declaration after a period of provisional *de facto* application. In application, some newly independent States are maintaining a *de facto* application of the General Agreement in accordance with the recommendations, pending their final decisions as to whether they should become contracting parties.<sup>155</sup> It may be added that States which become contracting parties to the General Agreement under Article XXVI, paragraph 5c, 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 Second<sup>156</sup> and Third<sup>157</sup> International Tin Agreements of 1960 and 1965; the 1962 International Coffee Agreement,<sup>158</sup> and the 1968 International Sugar Agreement.<sup>159</sup> 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.

<sup>152</sup> 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* . . . 1968, vol. II, p. 73, document A/CN.4/200 and Add.1-2, foot-note 548).

<sup>153</sup> Burma, Ceylon and Southern Rhodesia were the territories concerned (*ibid.*, foot-note 549).

<sup>154</sup> *Ibid.*, p. 74, paras. 321-325, for the details of these recommendations.

<sup>155</sup> *Ibid.*, pp. 76 *et seq.*, paras. 332-350.

<sup>156</sup> United Nations, *Treaty Series*, vol. 403, p. 3.

<sup>157</sup> *Ibid.*, vol. 616, p. 317.

<sup>158</sup> *Ibid.*, vol. 469, p. 169.

<sup>159</sup> *United Nations Sugar Conference, 1968: Summary of Proceedings* (United Nations publication, Sales No. E.69.II.D.6), p. 56, annex III.

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)<sup>160</sup> 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 providing for automatic participation, there has not apparently 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 seem to have preferred to follow this procedure rather than to invoke the automatic participation provision in paragraph 6 of article XXII. The case of Ruanda-Urundi likewise indicates that the automatic participation provision was not intended to be taken literally. Belgium signed the Agreement on behalf of herself and Ruanda-Urundi, and then expressly limited her instrument of ratification to Belgium in order to leave Ruanda and Urundi free to make their own decision.

(6) The International Coffee Agreement of 1962 again makes provision for the emergence of a territory to independent statehood, but does so rather in terms of *conferring a right* upon the new State to become a party to the Agreement after independence if such should be its wish. Thus, article 67, having authorized in paragraph 1 the extension of the Agreement to dependent territories, provides in paragraph 4:

The Government of a territory to which the Agreement has been extended under paragraph (1) of this Article and which has subsequently become independent may, *within 90 days after the attainment of independence, declare by notification to the Secretary-General of the United Nations that it has assumed the rights and obligations of a Contracting Party to the Agreement.\** It shall, as from the date of such notification, become a party to the Agreement.<sup>161</sup>

No territory, after becoming an independent State, exercised its right to notify the Secretary-General—who is the depositary—of its assumption of the character of a separate contracting party. Of the two States which qualified to invoke paragraph 4, one—Barbados—recognized that it possessed the right to become a party under that paragraph to the extent of notifying the Secretary-General, with express reference to article 67, paragraph 4, that it did *not* wish to assume the rights

<sup>160</sup> Zaire (Congo (Leopoldville)) and Nigeria (United Nations, *Treaty Series*, vol. 403, pp. 4, 115 and 116).

<sup>161</sup> United Nations, *Treaty Series*, vol. 469, p. 238. This paragraph is reproduced in the 1968 Coffee Agreement (*ibid.*, vol. 647, p. 3), as article 65, paragraph 4.

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.<sup>162</sup>

(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 ratifying the Agreement.<sup>163</sup>

(8) The only other multilateral treaty containing a similar clause appears to be yet another commodity agreement, the International Sugar Agreement (1968),<sup>164</sup> article 66, paragraph 2 of which is couched in much the same terms as article 67, paragraph 4, of the 1962 Coffee Agreement. On 20 December 1968, the Government of the United Kingdom notified the extension of the 1968 International Sugar Agreement to certain territories, including Fiji. Subsequently, in a communication dated 10 October 1970, received by the Secretary-General on 17 October 1970, the Government of Fiji notified him as follows:

... Fiji attained independence on 10th October, 1970 and the Government of Fiji declares pursuant to paragraph 2 of article 66 of the International Sugar Agreement that as from the date of this notification it has assumed the rights and obligations of a Contracting Party to the Agreement.<sup>165</sup>

(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 British Guiana (Geneva, 1966)<sup>166</sup> 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 the Agreement's entry into force between itself and the United Kingdom, drew special

<sup>162</sup> See United Nations, *Multilateral Treaties... 1972 (op. cit.)*, pp. 377 and 378.

<sup>163</sup> *Ibid.*, p. 377.

<sup>164</sup> See note 159 above. The 1958 Sugar Agreement (United Nations, *Treaty Series*, vol. 385, p. 137), had not contained this clause, and the emergence to independence of dependent territories to which the Agreement had been "extended" had given rise to problems.

<sup>165</sup> United Nations, *Multilateral Treaties... 1972 (op. cit.)*, pp. 383 and 386.

<sup>166</sup> United Nations, *Treaty Series*, vol. 561, p. 321.

attention to the provision in article VIII under which the Government of Guyana would become a party after attaining independence. Guyana in fact attained its 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. 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. The expression "or, failing any such provisions, in conformity with the provisions of the present articles" contemplates therefore the case of treaties providing for the option referred to in the first part of paragraph 1 but containing no provision indicating the means by which the option might be exercised. In these circumstances, the appropriate procedure in the case of newly independent States would be in conformity with the provisions of article 21, and in other cases in conformity with the provisions of article 37.

(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. 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. Certain Governments having raised the question of the advisability of requiring, in the present context, express acceptance in writing for the successor State, the Commission at its present session considered again the possibility of introducing in this respect a measure of flexibility into paragraph 2 of the article. The Commission decided, however, to maintain the requirement of express acceptance in writing as in the 1972 draft. In doing so, the Commission was guided by the need for avoiding any risk that a treaty providing that the successor State *shall be considered as a party* might be construed as imposing on it an obligation to become a

party by the will of the original parties. 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 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. Nevertheless, the Commission wished to stress that paragraph 2 only deals with the application of the provisions of the treaty itself, and is not intended to exclude the application where appropriate of other provisions in the draft articles. For example, in a case of *de jure* continuity under Part IV of the draft, the treaty would continue in force in respect of the successor State, and this would not be prevented by a provision in the treaty that "the successor State shall be considered as a party".

(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, as in the case of treaties like the 1962 International Coffee Agreement and the 1968 International Sugar Agreement referred to above,<sup>167</sup> and the freedom of the parties. At its present session, the Commission considered whether paragraph 3 should be amended having regard to the changes made in article 22 which would normally have the effect of making a multilateral treaty operative in respect of a newly independent State from the date of making of the notification of succession, rather than from the date of the succession of States. The

<sup>167</sup> The case of the participation of Fiji in the 1968 International Sugar Agreement mentioned in paragraph 8 of the commentary to the present article illustrates this point. Fiji became a party not as from the date of the succession of States (10 October 1970) but as from the date of its notification it has assumed the rights and obligations of a contracting Party, in accordance with the terms of article 66, paragraph 2, of the 1968 International Sugar Agreement.

Commission concluded, however, that where a treaty makes an express provision designed to facilitate continuity in the application of the treaty, as in cases such as those contemplated in paragraphs 1 and 2 of this article, it would be reasonable to maintain the residual rule in the form in which it appears in paragraph 3. Therefore, the Commission did not add a provision for suspension of the operation of the treaty corresponding to paragraph 2 of article 22.

(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 10 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.

#### *Article 11.*<sup>168</sup> *Boundary régimes*

**A succession of States does 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 12.*<sup>169</sup> *Other territorial régimes*

**1. A succession of States does not as such affect:**

- (a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of any territory of a foreign State and considered as attaching to the territories in question;**
- (b) rights established by a treaty for the benefit of any territory and relating to the use, or to restrictions upon the use, of any territory of a foreign State and considered as attaching to the territories in question.**

**2. A succession of States does not as such affect:**

- (a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty 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 for the benefit of a group of States or of all States and relating to the use of any 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

<sup>168</sup> 1972 draft, article 29.

<sup>169</sup> 1972 draft, article 30.

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 of that territory.\*<sup>170</sup>

This pronouncement was reflected in much the same terms in the Court's final judgment in the second stage of the case.<sup>171</sup> 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,<sup>172</sup> speaking of the concept servitudes in connexion with the Free Zones.<sup>173</sup> 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 judgments<sup>174</sup> 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 judgement, 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 obligation to maintain the demilitarization 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".<sup>175</sup> 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.<sup>176</sup> The second was the question of Finland's obligation to maintain the demilitarization of the islands. In its opinion, the Committee of Jurists,

<sup>172</sup> P.C.I.J., Series C, No. 17-I, Case of the Free Zones of Upper Savoy and District of Gex, vol. III, p. 1654.

<sup>173</sup> *Ibid.*, vol. I p. 415.

<sup>174</sup> e.g. P.C.I.J., Series A/B, No. 46 at p. 148.

<sup>175</sup> *British and Foreign State Papers, 1855-1856* (London, Foreign Office, 1865), p. 24.

<sup>176</sup> *Yearbook... 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.

<sup>170</sup> Order of 6 December 1930 (P.C.I.J., Series A, No. 24, p. 17).

<sup>171</sup> P.C.I.J., Series A/B, No. 46, p. 145.

having observed that "the existence of international servitudes, in the true technical sense of the term, is not generally admitted",<sup>177</sup> 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 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 more 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 settlement relating to its territory.\*<sup>178</sup>

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,<sup>179</sup> 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 by 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.

<sup>177</sup> League of Nations, *Official Journal, Special Supplement No. 3* (October 1920), p. 16.

<sup>178</sup> *Ibid.*, p. 18.

<sup>179</sup> *I.C.J. Reports 1962*, pp. 6-146.

(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 prove 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.*\*<sup>180</sup>

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, it 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.\*<sup>181</sup>

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<sup>182</sup> 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

<sup>180</sup> *I.C.J. Pleadings, Temple of Preah Vihear*, vol. I, pp. 145-146.

<sup>181</sup> *Ibid.*, p. 165 [translation by the Secretariat].

<sup>182</sup> *I.C.J. Reports 1960*, p. 6.

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".<sup>183</sup>

(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.

#### *Boundary treaties*

(10) Mention must first be made of article 62, paragraph 2 (a), of the Vienna Convention 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 Zone* 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 accepting treaties establishing a boundary from its scope the present article would not exclude the operation of the principle of self-determination in any case where the conditions for its legitimate operation existed. 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.<sup>184</sup>

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 a 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.<sup>185</sup> 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. 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".<sup>186</sup> But in 1964, with reservations only from Somalia and Morocco, the Assembly 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".<sup>187</sup> 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, according to the written observations of the Government of the Somali Democratic Republic on the draft articles,<sup>188</sup> Somalia has consistently challenged the validity of the 1897 Anglo-Ethiopian Treaty on the ground that it was a treaty "concluded between foreign colonial powers without the consent or knowledge and against the interests of the Somali people". According to

<sup>183</sup> See para. 6 above.

<sup>184</sup> United Nations, *Treaty Series*, vol. 479, p. 74.

<sup>185</sup> *Ibid.*, p. 40.

<sup>186</sup> 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 (op. cit.)*, p. 79).

<sup>187</sup> 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.

<sup>188</sup> See below, annex I to the present report.

those observations, apart from the 1897 Anglo-Ethiopian Treaty, the relevant treaties were those of 1897 and 1908 between Ethiopia and Italy and the Anglo-Italian Treaty of 1924, and "when Somalia achieved independence in 1960, it refused to recognize the validity of the treaties made by the colonial powers for the partition of the Somali people and it has never changed this position." On the other hand, 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.

(13) 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.<sup>189</sup>

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. According to the observations of the Government of Ethiopia, its position has been and still is that, following the termination of the United Kingdom's responsibilities for the Somaliland Protectorate "the boundary and the grazing provisions of the 1897 Anglo-Ethiopian Agreement remain in force but that only the 'special arrangement' of the 1954 Anglo-Ethiopian Agreement" has lapsed.<sup>190</sup>

(14) 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

<sup>189</sup> United Nations, *Materials on Succession of States (op. cit.)*, p. 185.

<sup>190</sup> See below, annex I to the present report.

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".<sup>191</sup>

(15) 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.*<sup>192</sup>

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.<sup>193</sup> 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.

(16) 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

<sup>191</sup> United Nations, *Materials on Succession of States (op. cit.)*, p. 190.

<sup>192</sup> *Ibid.*, p. 187.

<sup>193</sup> *Ibid.*, pp. 1-5. Mention should also be made of a letter from the British Representative to Sardar-i-Ala, the Afghan Foreign Minister, appended to the 1921 Treaty, which recognized that there were tribes on both sides of the frontier which were of interest to the Government of Afghanistan (*ibid.*, p. 5), and a statement by the Government of the United Kingdom of 3 June 1947 on the occasion of the independence of India and Pakistan, which dealt with the special case of the North-West Frontier Province and the interests of the tribes of the North-West Frontier of India (*ibid.*, pp. 5-6).

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 Morocco-Algeria, Surinam-Guyana, and Venezuela-Guyana<sup>194</sup> 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 it 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.

(17) 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 might 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 legally established boundary, if such it was at the date of the succession of States.

(18) The Commission, at its twenty-fourth session in 1972, then examined how such a provision should be formulated. The analogous provision in the Vienna Convention appears in article 62, paragraph 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* established 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 15 of the present draft. It would seem rather to be a general rule

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.

(19) 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 had constitutive effects and established a legal and factual situation which thereafter had its own separate existence; and that it was this situation, rather than the treaty, which passed 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 calls 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 comprised 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.

(20) In 1972, 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 11 was drafted to provide 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<sup>195</sup> 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

<sup>194</sup> See above, para. 9 of the commentary to article 10.

<sup>195</sup> See para. 17 above.

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.

#### *Other territorial treaties*

(21) The Commission has drawn attention<sup>196</sup> 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.<sup>197</sup> Another is the reply of the Commonwealth Office to the International Law Association.<sup>198</sup> A further statement of a similar kind may be found in *Materials on Succession of States*,<sup>199</sup> the occasion being discussions with the Cyprus Government regarding article 8 of the Treaty concerning the Establishment of the Republic of Cyprus.

(22) 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 propriety or quasi-proprietary rights*,\* . . .<sup>200</sup>

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.<sup>201</sup> On the other hand, Canada did recognize as binding upon it a condition precluding the operation of com-

mercial aircraft from certain bases in Newfoundland leased to the United States of America before the former became a part of Canada. Furthermore, it 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.

(23) 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 Kingoma 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 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 Governments of Zaire (Congo (Léopoldville)), Rwanda and Burundi both of Tanganyika's statement and of its own reply.<sup>202</sup> In the National Assembly Prime Minister Nyerere explained<sup>203</sup> 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 its request for the evacuation of the sites, Zaire (Congo (Léopoldville)), Rwanda and Burundi, which had all now attained independence,

<sup>196</sup> See below, para. 15 of the commentary to article 15.

<sup>197</sup> See para. 3 of the commentary to article 15.

<sup>198</sup> See para. 17 of the commentary to article 15.

<sup>199</sup> United Nations, *Materials on Succession of States (op. cit.)*, p. 183.

<sup>200</sup> *Yearbook . . . 1971*, vol. II (Part Two), pp. 132-133, document A/CN.4/243, para. 85.

<sup>201</sup> *Ibid.*, pp. 133-135, paras. 86-101.

<sup>202</sup> United Nations, *Materials on Succession of States (op. cit.)*, pp. 187-188.

<sup>203</sup> 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.

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.

24) 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 Belbas 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 trust 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.

(25) 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 should continue to bind it after independence.<sup>204</sup> 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".<sup>205</sup> 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.<sup>206</sup>

<sup>204</sup> 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.

<sup>205</sup> *Ibid.*, p. 79.

<sup>206</sup> *Ibid.*, pp. 72-76.

(26) 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.<sup>207</sup> The provisions concerning the Shatt-el-Arab in the Treaty of Erzerum, concluded in 1874 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 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.

(27) 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.\*<sup>208</sup>

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 its 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 United Arab Republic, for its part, maintained that pending further agreement, the 1929 Nile Waters Agreement, which had so far regulated the

<sup>207</sup> 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.

<sup>208</sup> 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 [to be published in *Yearbook . . . 1974*, vol. II (Part Two)], paras. 100-107.

use of the Nile waters, remained 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.

(28) 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,<sup>209</sup> 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."<sup>210</sup> 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.

(29) 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.<sup>211</sup> 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.<sup>212</sup> Without entering into the question of 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.

(30) 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 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.<sup>213</sup> 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 on 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 had 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 resulted 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 expect 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 an 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.

(31) Reference has already been made to two of the principal precedents<sup>214</sup> 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

<sup>209</sup> See United Nations, *Legislative Texts and Treaty Provisions...* (*op. cit.*), pp. 287-288.

<sup>210</sup> *Ibid.*, p. 288.

<sup>211</sup> e.g. certain Finnish frontier arrangements, the demilitarization of Hünningen, the Congo leases, etc.

<sup>212</sup> e.g. the draft convention on the law of treaties in 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.

<sup>213</sup> See *Yearbook . . . 1964*, vol. I, pp. 96 *et seq.*, 738th to 740th meetings; and *ibid.*, vol. II, pp. 27-34, document A/CN.4/167 and Add.1-3, commentary to article 63; and *Yearbook . . . 1964*, vol. II, pp. 184-185, document A/5809, chap. II, sect. B, commentary to article 62.

<sup>214</sup> See paras. 3-5 above.

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 before the Revolution. Although Belgium questioned whether it would 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,<sup>215</sup> 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.<sup>216</sup> 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.

(32) 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 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.<sup>217</sup>

(33) 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.

(34) 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, which 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.<sup>218</sup> 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.

<sup>215</sup> *British and Foreign State Papers, 1814-1815* (London, Foreign Office, 1839), pp. 45-46.

<sup>216</sup> *Ibid.*, 1919 (London, H.M. Stationery Office, 1922), vol. 112, p. 206.

<sup>217</sup> See *American Journal of International Law* (Washington, D.C.), vol. 57, No. 4 (October 1963), pp. 879-880.

<sup>218</sup> United Nations, *Materials on Succession of States (op. cit.)*, pp. 157-158.

(35) 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.

(36) 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, in 1972, 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.

(37) Accordingly, article 30 of the 1972 draft, like article 29 of the same draft, stated the law regarding other forms of territorial régime simply in terms of the way in which a succession of States affects—or rather does not affect—the régime in question. The difficulty was to find language which adequately defined and limited the conditions under which the article applied. The article was 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).

(38) Paragraph 1 (a) of article 30 of the 1972 draft provided 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) provided 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 indicate the relevance of the dispositive element, the establishment of the régime through the execution of the treaty.

(39) Paragraph 2 contained similar provisions for objective régimes, with the exception that here the requirement of attachment to *particular territory* applied only to the territory in respect of which the *obligation* was established; there was 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.

(40) “Territory” for the purposes of the 1972 article 30 was 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.

#### *Re-consideration at the twenty-sixth session*

(41) Paragraphs 1 to 40 above reproduce with a few amendments the commentary to articles 29 and 30 of the 1972 draft in the report of the Commission on the work of its twenty-fourth session. A few amendments have been made to take account of comments made by Governments and certain observations made during the consideration of the articles at the present session. This method of presentation has been used so as to show clearly the basis on which the draft articles were originally adopted and the reasons for the decisions taken by the Commission at its present session.

(42) Articles 29 and 30 of the 1972 draft have provoked more comments by delegations and Governments than any other provision in the draft articles with the possible exception of the clean slate principle as expressed in articles 15, 16 and 17. A substantial majority of those who have commented have supported the inclusion of articles 29 and 30 of the 1972 draft and, broadly speaking, have supported the way in which they have been drafted. Nevertheless, certain comments have expressed strong opposition to their inclusion, at least in anything like the form in which they appeared in the 1972 draft.

(43) During the second reading of the draft articles at its present session, the Commission again examined articles 29 and 30 of the 1972 draft carefully and thoroughly in the light of the comments made by delegations and Governments. On the whole, the discussion confirmed the basis for the articles explained in the 1972 commentary and the need for their inclusion, having regard to other provisions in the draft such as those in articles 14 and 15. Most members of the Commission were in favour of their retention in the form in which they appeared in the 1972 draft. Nevertheless, certain members expressed doubts and one member urged the omission of the articles because, in his view they were not well founded and they might have the effect of prejudging a boundary dispute where one of the parties challenged the treaty by which the boundary had been established. Other members, however, felt just as strongly that the articles should be retained.

(44) Among the main arguments against the articles which appeared from the comments of Governments were, first, that the articles were contrary to the principle of self-determination and, secondly, that they would be prejudicial to the position, particularly of newly independent States, which challenged a boundary on the ground that it was established by a treaty that was itself invalid. Most members, however, were of the opinion that the draft articles were in accordance with the principle of self-determination, as well as with the principle of the sovereign equality of States, and that nothing in the articles would prevent the exercise of self-determination in any case in which this might otherwise be appropriate. They were also of the opinion that the articles, as drafted, were limited to the question of the effects of a succession of States as such on the boundary, or the boundary or other territorial régimes established by treaty and did not affect, in any way, the validity of the treaty itself, or indeed any other grounds that there might be for contesting the boundary or the régime. In spite of the expression of these views, the fears of some members as to the prejudicial effects of the articles were not allayed. They did not think that the negative form of the articles or the explanations given in the commentary were sufficient to remove these fears. Accordingly, the Commission considered the possibility of the inclusion of a provision in the draft articles which would make the position clear. It was suggested that this might be done by adding a suitable clause to article 11 or to article 12 but, after considerable discussion, the Commission concluded that it would be more satisfactory to have a separate article.

(45) The Commission considered whether it should include a provision stating that "nothing in article 11 or in article 12 shall be considered as prejudicing in any respect a question relating to the validity of a treaty". However, some members objected to this wording which, in their view, would imply that any article other than article 11 or 12 could prejudice questions relating to the validity of treaties. The Commission accordingly decided to add such an article but that it should not refer to any specific articles in the draft. In these circumstances, the Commission decided to include an article in general terms which now appears as article 13. However, since

the new article would be general in character, and articles 11 and 12 are themselves made necessary by articles in different parts of the draft, the Commission decided to put all three articles in part I of the draft, entitled "General Provisions".

(46) On the basis of this arrangement, articles 11 and 12 were adopted with little change. The only change in article 11<sup>219</sup> was the replacement of the word "shall" by "does" in the introductory words of the English text. It was thought that the word "does" was more in accord with the statement of an established principle than the mandatory form implicit in the word "shall". The Commission, however, also considered whether the drafting of sub-paragraph (b) could be improved. In particular, it considered whether the words "and relating to the régime of a boundary" should be replaced by "and forming an integral part of the régime of a boundary". Ultimately the Commission decided against the use of the words "and forming an integral part of" because it would be very difficult in practice to determine what does or does not form an integral part of the régime of a boundary.

(47) As in the case of article 11, and for the same reasons, the Commission replaced the word "shall" by "does" in the introductory words to paragraph 1 and paragraph 2 of article 12.<sup>220</sup> The Commission also deleted the word "specifically" from each of the sub-paragraphs of paragraphs 1 and 2 because it did not seem to clarify, or to add anything to, the meaning of the text. In paragraph 1 (a) the Commission amended the words "relating to the use of a particular territory" to read "relating to the use of any territory" and "for the benefit of a particular territory of a foreign State" to read "for the benefit of any territory of a foreign State". The Commission considered that the use of the expression "of a particular territory" might unduly restrict the effect of the article and possibly exclude, for example, transit rights which could not be regarded as adhering for the benefit of a "particular" territory. Similar changes were made in paragraph 1 (b) and in paragraph 2.

(48) Having regard to the comments of one Government, the Commission considered in particular whether article 12 could be drafted so as to provide directly for obligations or rights established for the benefit of the inhabitants of a territory. On the whole, the Commission thought that this was neither feasible nor necessary. Although rights pertaining to territory must in the last resort benefit the inhabitants, the Commission did not consider it advisable to include any express provision relating to the inhabitants because that might have been interpreted as the adoption by the Commission of a view concerning the position of individuals in international law.

(49) In the light of the comments of one Government, the Commission also considered again whether it should

<sup>219</sup> For the effect of article 11, as drafted in 1972, see paragraph 20 above.

<sup>220</sup> For the effect of article 12, as drafted in 1972, see paragraphs 38 and 39 above.

include a definition of the term "territory" for the purposes of article 12, but it confirmed the decision made in 1972 mentioned above.<sup>221</sup>

**Article 13.** <sup>222</sup> *Questions relating to the validity of a treaty*

**Nothing in the present articles shall be considered as prejudicing in any respect any question relating to the validity of a treaty.**

*Commentary*

(1) The Commission decided to include article 13 in the draft for the reasons mentioned above.<sup>223</sup> It is intended to avoid any implication that the effects of a succession of States, for which the present articles provide, could in any way prejudice any question relating to the validity of a treaty. Although the article was introduced with specific reference to articles 11 and 12, it was cast in general form, as explained in the commentary to those articles. Accordingly, it has been included in Part I, "General Provisions", together with articles 11 and 12.

(2) Article 13 provides that *nothing* in the present articles shall be considered *as prejudicing* in any respect *any question* relating to the *validity* of a treaty.

PART II

SUCCESSION IN RESPECT OF  
PART OF TERRITORY

**Article 14.** <sup>224</sup> *Succession in respect of part of territory*

**When part of the territory of a State, or when any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State;**

**(a) treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of States; and**

**(b) treaties of the successor State are in force in respect of the territory to which the succession of States relates from the date of the succession of States, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.**

*Commentary*

(1) This article concerns the application of a rule, which is often referred to by writers at 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 with another, and equally do 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—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 in question 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 such 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 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

<sup>221</sup> See para. 40 above.

<sup>222</sup> New article.

<sup>223</sup> See paras. 43-45 of the commentary to articles 11 and 12.

<sup>224</sup> 1972 draft, article 10.

the several Principal Allied and Associated Powers.<sup>225</sup> 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,<sup>226</sup> while a number of neutral Powers, including Denmark, the Netherlands, Spain, Sweden and Switzerland, also appear 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*.<sup>227</sup>

(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,<sup>228</sup> the extension of Ethiopian treaties to Eritrea in 1952, when Eritrea became an autonomous unit federated with Ethiopia,<sup>229</sup> the extension of Indian treaties to the former French<sup>230</sup> and Portuguese possessions on their absorption into India, and the extension of Indonesian treaties to West Iran after the transfer of that territory from the Netherlands to Indonesia.<sup>231</sup>

(6) Article 14 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 articles 38 and 39 concerning cases of military occupation, etc. Article 14 is limited to normal changes in the sovereignty or in the responsibility for the international relations of a territory. Article 39 makes it plain that the present article does not cover the case of a military occupant. 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) The scope of the article is defined in its *opening phrase* which in the 1972 text read as follows: "When territory under the sovereignty or administration of a State becomes part of another State:". It was however observed by Governments and members of the Commission that, in the first place, such a wording did not

make it sufficiently clear that the article did not apply to the case of the incorporation of the entire territory of a State into the territory of an existing State and, in the second place, that the words "territory . . . under the administration of a State" should be replaced by an expression based on the definition of "succession of States" given in article 2, paragraph 1 (b), for the purposes both of clarity and consistency. The Commission, at its present session, found that there was substance in those observations and decided to reword the opening phrase of the article to read: "When part of the territory of a State, or when any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State:". The article would thus not include cases of total incorporation, which would be covered as instances of the "uniting of States". The words "or when any territory, not being part of the territory of a State, for the international relations of which that State is responsible" have been used in order to cover cases in which the territory in question was not under the sovereignty of the predecessor State, but only under an administering Power responsible for its international relations.<sup>232</sup> Having reached these conclusions, the Commission decided likewise to modify the *title* of Part II and of the article by replacing the heading "Transfer of territory" by the heading "Succession in respect of part of territory."

(8) The Commission was aware that the words "becomes part of the territory of another State" might exclude the application of the article as such to a case in which a dependent territory was transferred from one administering Power to another. It recognized that such cases might occur, but observed that they were likely to be very rare. During the course of the second reading, other instances of unusual cases were mentioned which might require the application of special rules. In general, the Commission considered that it would be wiser not to complicate the present draft articles by adding detailed provisions to cover such cases. In the instance of a change in the responsibility for the international relations of a territory from one administering Power to another, the Commission considered that the moving treaty-frontiers rule would not necessarily apply. In such a case, regard should be had to the circumstances in which the change occurred and so far as necessary the rules set out in the present articles should be applied by analogy.

(9) Sub-paragraph (a) of article 14 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

<sup>225</sup> United Kingdom, *Treaty Series* (1919), No. 17 [Cmd. 461] (London, H.M. Stationery Office, 1919), p. 94.

<sup>226</sup> See G. H. Hackworth, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1940-1944), 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.

<sup>227</sup> 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.

<sup>228</sup> See, for example, *Yearbook . . . 1971*, vol. II (Part Two), pp. 132-135, document A/CN.4/243, paras. 85-101, and *ibid.*, p. 176, document A/CN.4/243/Add.1, para. 137.

<sup>229</sup> See "Summary of the practice of the Secretary-General as depositary of multilateral agreements" (ST/LEG/7), p. 63; and *Yearbook . . . 1970*, vol. II, p. 87, document A/CN.4/225, paras. 102-103. See also *Yearbook . . . 1971*, vol. II (Part Two), p. 175, document A/CN.4/243/Add.1, para. 128.

<sup>230</sup> See, for example, *Yearbook . . . 1970*, vol. II, p. 93, document A/CN.4/225, paras. 127-128.

<sup>231</sup> *Ibid.*, p. 94, paras. 132-133.

<sup>232</sup> In this connexion it may be recalled that the principle of equal rights and self-determination of peoples embodied 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, approved by resolution 2625 (XXV) of the General Assembly, states:

"The establishment of a sovereign and independent State, the free association or integration with an independent State \* or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people."

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 or fundamental change of circumstances (articles 29, 61 and 62 of the Vienna Convention). Accordingly, the rights and obligations under a treaty cease in respect of territory which is no longer within the sovereignty or under the responsibility, for its international relations, of the State party concerned. The only drafting changes made by the Commission in sub-paragraph (a) at the second reading were the substitution of the words "the territory to which the succession of States relates" for the words "that territory", a consequential change also made in sub-paragraph (b), and the replacement of the words "the succession" by the expression "the succession of States" since it is the latter expression—and not the term "succession"—which is defined in article 2.

(10) 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 responsibility for international relations. 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 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".

(11) 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.

(12) Sub-paragraph (b) of article 14 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 the 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 the natural consequence of its having become part of the territory of the State now responsible for its international relations.

(13) 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. Moreover, the Commission considered, at its present session, that the exception should also cover cases in which the application of a treaty of the successor State to the newly acquired territory is radically to change the conditions for the operation of the treaty, as was provided for in other articles of the 1972 draft such as, for instance, in articles 25, 26, 27 and 28. This explains the addition to sub-paragraph (b) of the proviso "unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty". The word "particular" which in the 1972 treaty appeared before the word "treaty" was considered unnecessary and therefore deleted at the second reading.

(14) As stated in the 1972 draft, 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.<sup>233</sup>

Although the words "or would radically change the conditions for the operation of the treaty" are an adaptation of the words in paragraph 1 (b) of article 62 (Fundamental change of circumstances) of the Vienna Convention, the Commission did not consider that in cases of the succession of States it would be appropriate to incorporate all the conditions for which that article provides. On the other hand, it thought that in most, if not all, cases of succession of States the territorial changes might result in "incompatibility with the object and purpose of the treaty" or "radical change in the conditions for the operation of the treaty". Accordingly, the formula used in article 14 as now drafted has been repeated in a number of other articles where it seemed to be appropriate. The commentaries on those articles do not, however, repeat the explanation of the formula given here.

<sup>233</sup> *Yearbook* . . . 1972, vol. II, p. 292, document A/8710/Rev.1, chap. II, C, para. 29 of the commentary to article 26.

(15) Lastly, article 14 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 11 and 12.

### PART III

#### NEWLY INDEPENDENT STATES

##### SECTION 1. GENERAL RULE

###### *Article 15. <sup>234</sup> Position in respect of the Treaties of the predecessor State*

**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 States, 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.<sup>235</sup>

(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,<sup>236</sup> the Secretariat advised:

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

In international law, the situation is analogous to the separation of the Irish Free State from Great Britain, and of Belgium from the Netherlands. In these cases, the portion which separated was considered a new State; the remaining portion continued as an existing State with all the rights and duties which it had before.<sup>237</sup>

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"<sup>238</sup> and in the publication *Materials on Succession of States*.<sup>239</sup> For instance, Afghanistan invoked

<sup>235</sup> See A. D. McNair, *The Law of Treaties* (Oxford, Clarendon Press, 1961), p. 605. See also *Yearbook* ... 1970, vol. II, p. 122, document A/CN.4/229, para. 109.

<sup>236</sup> This assumption was disputed by Pakistan.

<sup>237</sup> See *Yearbook* ... 1962, vol. II, p. 101, document A/CN.4/149 and Add.1, para. 3.

<sup>238</sup> See above, sect. A, para. 44.

<sup>239</sup> United Nations, *Materials on Succession of States* (*op. cit.*).

<sup>234</sup> 1972 draft, article 11.

the clean slate doctrine in connexion with its dispute with Pakistan regarding the frontier resulting from the Anglo-Afghan Treaty of 1921.<sup>240</sup> 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,<sup>241</sup> although it afterwards *agreed* to regard the Treaty as in force between itself 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.<sup>242</sup>

(6) The metaphor of the clean slate is a convenient way of expressing the basic concept that a newly independent 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 categoric.<sup>243</sup> It is too broad in that it suggests that, so far as concerns the newly independent 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 categoric 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 new independent State is without any *right* to establish itself as a party to them.

(7) Writers, when they refer to the so-called principle of clean slate, seem primarily to have in mind the absence of any *general obligation* upon a newly independent 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 respect 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 16 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 is 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 of 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.<sup>244</sup>

(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

<sup>240</sup> *Ibid.*, p. 2.

<sup>241</sup> *Ibid.*, pp. 6-7.

<sup>242</sup> *Ibid.*, pp. 41-42; see also *Yearbook . . . 1950*, vol. II, pp. 206-218, document A/CN.4/19.

<sup>243</sup> See above, para. 59.

<sup>244</sup> See *Yearbook . . . 1962*, vol. II, p. 122, document A/CN.4/150, para. 134.

continuity or of an instrument of accession.<sup>245</sup> As to the practice of individual States, quite a number have notified their acceptance of the Geneva Conventions in terms of a declaration of continuity, and some have used language indicating recognition of an obligation to accept the Conventions as successors to their predecessor's ratification. 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.<sup>246</sup> 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.<sup>247</sup> 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 without some expression of its will to continue as, or to become, a party. In one case, 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.<sup>248</sup> 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 manifestation 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.<sup>249</sup>

(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.<sup>250</sup> 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*.<sup>251</sup> In the event twelve new States

have expressed the desire to be considered as parties in virtue of their predecessors' 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 1899 or 1907 Convention and numerous others have not yet signified their intentions in regard to the Conventions. In the case of the Hague Conventions it is true that to become a party means also to participate in the Permanent Court of Arbitration. But again, the practice seems inconsistent with the existence of a customary rule requiring a new State to accept the obligations of its predecessor. Here the notion of succession seems to have manifested itself in the recognition of a new State's *right* to become a party without at the same time seeking to impose upon it an *obligation* to do so.

(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.<sup>252</sup>

(14) The evidence of State practice therefore is 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 newly independent 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<sup>253</sup> and the Uganda<sup>254</sup> 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

<sup>245</sup> *Yearbook . . . 1968*, vol. II, pp. 32 *et seq.*, document A/CN.4/200 and Add.1 and 2, paras. 128-232.

<sup>246</sup> *Ibid.*, pp. 38 *et seq.*, paras. 152-184.

<sup>247</sup> *Ibid.*, pp. 7 *et seq.*, paras. 4-98.

<sup>248</sup> See above, para. 14 of the commentary to article 8.

<sup>249</sup> *Yearbook . . . 1968*, vol. II, pp. 54 *et seq.*, document A/CN.4/200 and Add.1 and 2, paras. 233-314.

<sup>250</sup> *Ibid.*, pp. 26 *et seq.*, paras. 99-127.

<sup>251</sup> *Ibid.*, p. 29, para. 113.

<sup>252</sup> United Nations, *Materials on Succession of States (op. cit.)*, pp. 224-228.

<sup>253</sup> See above, para. 2 of the commentary to article 9.

<sup>254</sup> *Ibid.*, para. 6.

customary international law could be regarded as otherwise surviving. The Zambian<sup>255</sup> 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 newly independent 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 independence by territories formerly dependent internationally on the United Kingdom" transmitted by the Commonwealth Office to the International Law Association, for example, explains the United Kingdom's appreciation of the legal position as follows:

Under customary international law certain treaty rights and obligations of an existing State are inherited automatically by a new State formerly part of the territories for which the existing State was internationally responsible. Such rights and obligations are generally described as those which relate directly to territory within the new State (for example those relating to frontiers and navigation on rivers); but international law on the subject is not well settled and it is impossible to state with precision which rights and obligations would be inherited automatically and which would not be.<sup>256</sup>

(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 rela-

tions. 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 or "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 relevant provisions of the present articles. Those provisions 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. They also preserve the position of any interested State with regard to the so-called "localized", "territorial", or "dispositive" treaties dealt with in articles 11 and 12 of the present draft.

(20) To emphasize those limitations, the Commission, at its twenty-fourth session in 1972, inserted at the beginning of this article the proviso "subject to the provisions of the present articles". At the present session, however, the Commission decided to delete the proviso, since it merely reflected a well-known principle of interpretation of treaties. Moreover, if the proviso were retained, it might cast doubt on the applicability of that principle to the articles of the draft which contain no similar reservation.

(21) The general rule in article 15, as indicated, concerns only the case of newly independent States and applies, subject to the above-mentioned limitation, "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 international law embodied in those treaties. But it felt that this point would more appropriately be covered by including in the draft a general provision safeguarding the application to a newly independent 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 16.*<sup>257</sup> *Participation in treaties in force at the date of the succession of States*

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.

<sup>255</sup> *Ibid.*, para. 7.

<sup>256</sup> International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (op. cit.), 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.

<sup>257</sup> 1972 draft, article 12.

2. Paragraph 1 does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with its object and purpose or would radically change the conditions for the operation of the 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 newly independent State may establish its status as a party to the treaty only with such consent.

#### Commentary

(1) The articles of this section deal with the participation of a newly independent State in multilateral treaties to which at the date of the succession of States, the predecessor State was a party, a contracting State or a signatory in respect of the territory to which the succession of States relates. Section 3 deals with the position of a newly independent State in relation to its predecessor's bilateral treaties. The present article deals 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.

(2) The question whether a newly independent State is entitled to consider itself a party to its predecessor's treaties, as already pointed out in the commentary to article 15, is legally quite distinct from the question whether it is under an *obligation* to do so. Moreover, although modern depositary and State practice does not support the thesis that a newly independent 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 newly independent 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*.<sup>258</sup>

(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 implicit in the practice already discussed in the commentaries to articles 8, 9 and 15 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 addressed 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.<sup>259</sup> 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 predecessors' participation;<sup>260</sup> and this is true also of the Geneva Humanitarian Conventions in regard to which the Swiss Federal Council is the depositary.<sup>261</sup> 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 States to declare itself a party to the conventions on its own behalf.<sup>262</sup>

(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 newly independent 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 newly independent 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 resolution of its Buenos Aires Conference already

<sup>259</sup> *Yearbook . . . 1962*, vol. II, p. 122, document A/CN.4/150, paras. 133-134.

<sup>260</sup> *Yearbook . . . 1968*, vol. II, pp. 22 *et seq.*, document A/CN.4/200 and Add.1-2, paras. 71-98.

<sup>261</sup> *Ibid.*, pp. 38 *et seq.*, paras. 152-180.

<sup>262</sup> United Nations, *Materials on Succession of States (op. cit.)*, pp. 224-228.

<sup>258</sup> See also para. 12 below.

mentioned,<sup>263</sup> stated the law in terms of a presumption that a multilateral treaty is to continue in force as between a newly independent State and the existing parties unless within a reasonable time after independence the former shall have made a declaration to the contrary. In other words, that body envisaged the case as one in which the new State would have a *right to contract out of*, rather than to contract into, the treaty. Even so, recognition of a right to contract out of a multilateral treaty would seem clearly to imply, *a fortiori*, recognition of a right to contract into it; and it is the latter right which seems to the 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 17 (participation in treaties not in force at the date of the succession of States) and article 18 (participation in treaties signed by the predecessor State subject to ratification, acceptance or approval).

(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.<sup>264</sup> This is simply a question of the interpretation of the treaty and of the act by which the predecessor State established its consent to be bound, and of the principle expressed in article 29 of the Vienna Convention. 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 procedures for extension to dependent territories, and it can readily be ascertained whether the treaty was extended to the territory in question. Other treaties are limited in their geographical scope; for example, certain League of Nations treaties on opium are limited to the Far Eastern territories of the parties, and the Secretary-General, in reply to inquiries by some African States, has informed them that it is im-

possible for them either to succeed or accede to those treaties. Some United Nations treaties are likewise regional in scope; for example, the Convention regarding the Measurement and Registration of Vessels Employed in Inland Navigation, done at Bangkok on 22 June 1956, is open only to States falling within the geographical scope of the Economic Commission for Asia and the Far East, and States outside that area cannot become bound by it.<sup>265</sup>

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, the treaty was binding on the predecessor State in respect of its entire territory and, therefore, in respect of all its dependent territories.<sup>266</sup> For example, the Vienna Convention on Diplomatic Relations and the four Geneva Conventions on the Law of the Sea contain no provisions regarding their territorial application, and the Secretary-General has assumed that any ratifications of these Conventions by predecessor States embraced all their territories so as to entitle any 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*.<sup>267</sup> 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 the cases, the alternative will be open to a independent 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 newly independent State's right to notify its succession to a treaty neither requires, nor usually finds, any mention in the final clauses.<sup>268</sup> It arises under general international law from the relationship which existed at the date of the succession between the treaty, the predecessor State and the territory which has now passed to the newly independent State.

(9) Whether this rights 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 newly independent 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

<sup>263</sup> *Yearbook* . . . 1962, vol. II, pp. 122-123, document A/CN.4/150, para. 137.

<sup>266</sup> *Ibid.*, p. 123, para. 138.

<sup>267</sup> *Ibid.*, para. 139.

<sup>268</sup> For some cases where a treaty does specifically make provision for the participation of successor States in the treaty, see the commentary to article 10.

<sup>263</sup> See foot-note 49 above.

<sup>264</sup> In this connexion it is important to distinguish between the incorporation of the treaty in the municipal law of the territory and the extension of the treaty on the international plane to the territory.

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 newly independent 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 newly independent 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 Protocol 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 it by reason of the United Kingdom's ratification should now be regarded as terminated.<sup>269</sup> 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,<sup>270</sup> an important distinction—analogue to that made in article 20, paragraph 2, of the Vienna Convention—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 newly independent State in the treaty should be subject to the concurrence of all the parties. Sometimes these treaties may be constituent instruments of a 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 newly independent State's option to consider itself a party to a multilateral treaty. The appropriate rule must then be that a newly independent 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 or where its participation would radically change the conditions for the operation of the treaty. *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.

(15) Purely as a matter of drafting, the Commission noted that while paragraph 1 of article 12 of the 1972 draft used the expression "a newly independent State", paragraphs 2 and 3 used the expression "the successor State", when all three paragraphs referred to the same State. In order to avoid any doubts in this respect, the

<sup>269</sup> See M.-A. Eissen, *The British Year Book of International Law, 1968-1969* (London, 1970), vol. 43, pp. 190-192.

<sup>270</sup> See para. 2 above.

Commission replaced the expression "the successor State" by "newly independent State" in paragraphs 2 and 3 of the draft article as well as in other subsequent provisions of the draft where it was appropriate to do so. Paragraph 2 has been redrafted to provide for the incompatibility test and for radical change in the conditions for the operation of the treaty in accordance with the decision of the Commission explained above.<sup>271</sup>

*Article 17.*<sup>272</sup> *Participation in treaties not in force at the date of the succession of States*

1. Subject to paragraphs 3 and 4, a newly independent State may, by a notification of succession, establish its status as a contracting State to a multilateral treaty which is not in force if at the date of the succession of States the predecessor State was a contracting State in respect of the territory to which that succession of States relates.

2. Subject to paragraphs 3 and 4, a newly independent State may, by a notification of succession, establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States if at the date of the succession of States the predecessor State was a contracting State in respect of the territory to which that succession of States relates.

3. Paragraphs 1 and 2 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

4. 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 or of all the contracting States, the newly independent State may establish its status as a party or as a contracting State to the treaty only with such consent.

5. When a treaty provides that a specified number of contracting States 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 contracting State for the purpose of that provision unless a different intention appears from the treaty or is otherwise established.

*Commentary*

(1) The present article deals with the participation of a newly independent State in a multilateral treaty not 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 in respect of the territory in question. In other words, the article regulates the newly independent 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".<sup>273</sup>

(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,<sup>274</sup> 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 on 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 at that date becomes the territory of the newly independent State.

(4) Sometimes this criterion is expressed in terms that might appear to require the *actual* previous application of the treaty in respect of the territory which becomes the newly independent 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".<sup>275</sup> 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.<sup>276</sup> These States seem, however, to have been concerned more to explain their reasons for not accepting the treaty than to raise a question as to their *right* to accept it if they had so wished.

(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 newly independent 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

<sup>273</sup> For the meaning in the present draft of the terms "contracting State" and "party", see article 2, paras. 1 (k) and (l), of these draft articles.

<sup>274</sup> See above, para. 6 of the commentary to article 16.

<sup>275</sup> *Yearbook . . . 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 on the Fifty-third Conference, Buenos Aires, 1968* (op. cit.), p. 596. (Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors)).

<sup>276</sup> 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 . . . 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).

<sup>271</sup> See para. 14 of the commentary to article 14.

<sup>272</sup> 1972 draft, article 13.

the matter, as established by 1962, was summarized as follows:

The lists of treaties sent to new States have since 1958 included not only treaties which are in force, but also treaties which are *not yet in force*,\* in respect of which the predecessor State has taken final action to become bound and to extend the treaty to the territory which has later become independent. France in 1954 ratified and Belgium in 1958 acceded to the 1953 Opium Protocol, which is not yet in force; both countries also notified the Secretary-General of the extension of the Protocol to their dependent territories. Cameroon, the Central African Republic, the Congo (Brazzaville), the Congo (Léopoldville) 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 ratification.<sup>277</sup> It may also be mentioned that Pakistan in 1953 spontaneously informed the Secretary-General that it was bound by the action of the United Kingdom in respect of a League treaty<sup>278</sup> which was not yet in force.<sup>279</sup>

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 contrary, 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"<sup>280</sup> of Nigeria and Sierra Leone toward the number of twenty-two".<sup>281</sup> Since then, the entry into force of the Convention on the Territorial Sea and Contiguous Zone has been notified by the Secretary-General on the basis of counting 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 newly independent State as equivalent to a ratification, accession, acceptance, or approval would seem to be in conformity with the general intention of the clauses here in question, for the intention of these clauses is essentially to ensure that a certain number of States shall have definitively accepted the obligations of the treaty before they become binding on any one State.<sup>282</sup> To adopt the contrary position would almost be 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 this article along the lines of the corresponding provisions of article 16 with the adjustments required by the present context. In particular, at its present session the Commission considered how to improve the drafting of the provision contained in paragraph 1 of the 1972 draft in order to avoid some problems as to the scope of the provision which might arise from the use of the expression "contracting State" and comparison with the provisions of the preceding article. The Commission considered that paragraph 1, which dealt with treaties which were not in force at the date of the succession of States, should

<sup>277</sup> These two States did so at dates before the Conventions in question had come into force.

<sup>278</sup> Protocol relating to a Certain Case of Statelessness (1930). See United Nations, *Multilateral Treaties . . . 1971* (op. cit.), p. 410.

<sup>279</sup> *Yearbook . . . 1962*, vol. II, pp. 123-124, document A/CN.4/150, para. 143.

<sup>280</sup> Notification of succession.

<sup>281</sup> See *Yearbook . . . 1962*, vol. II, p. 124, document A/CN.4/150, para. 143.

<sup>282</sup> 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* (op. cit.), 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)).

cover both the cases where (a) the treaty was still not in force at the date of the notification of succession; and (b) the treaty came into force before the date of such notification. If a contrary interpretation of the original text was given, the cases mentioned under (b) would not have been covered by the draft article, thus creating a serious lacuna since those cases are by no means exceptional. To avoid such a possible misunderstanding the Commission decided to provide in two separate paragraphs, numbered 1 and 2, for each of the two situations apparently envisaged in paragraph 1 of article 13 of the 1972 draft. In addition, the Commission, in the light of the comments of Governments, amended the last clause of paragraph 1 of the 1972 text in order to make clear that the consent to be bound given by the predecessor (contracting) State referred to the territory to which the succession of States relates.

(9) Consequently, *paragraph 1* reproduces with some drafting changes the wording of paragraph 1 of the 1972 text. It enables the newly independent State to become a "contracting State". *Paragraph 2*, which relates to the cases where the treaty comes into force after the date of the succession of States, but before the notification of succession, enables the newly independence State to become a "party". *Paragraphs 3, 4 and 5* of the text reproduce the wording of paragraphs 2, 3 and 4 of the 1972 text of article 13, with some modifications in terminology consequential upon the use of the term "party" in the new paragraph 2. In addition to those modifications, the Commission made a drafting change in the opening phrase of paragraph 4 of the 1972 text, now paragraph 5, replacing the word "parties" by "contracting States". Indeed, before the entry into force of a treaty, there are no parties, but only contracting States.

(10) Lastly, paragraph 5 makes a notification of succession by a newly independent State equivalent to a definitive signature, ratification, etc., for the entry into force of the treaty, in accordance with the conclusion reached above.

**Article 18.**<sup>283</sup> *Participation in treaties signed by the predecessor State subject to ratification, acceptance or approval*

1. Subject to paragraphs 3 and 4, 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 as if it had signed that treaty and may thereby become a party or a contracting State to it.

2. For the purpose of paragraph 1, unless a different intention appears from the treaty or is otherwise established, the signature by the predecessor State of a treaty is considered to express the intention that the treaty should extend to the entire territory for the international relations of which the predecessor State was responsible.

3. Paragraph 1 does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

4. 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 or of all the contacting States, the newly independent State may become a party or a contacting State to the treaty only with such consent.

*Commentary*

(1) The view has been expressed in the commentaries to articles 16 and 17 that a newly independent State inherits a 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.<sup>284</sup>

<sup>283</sup> 1972 draft, article 14.

<sup>284</sup> *Yearbook . . . 1962*, vol. II, p. 124, document A/CN.4/150, para. 151.

(3) 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 memorandum seems to leave open the question whether a successor State is entitled to ratify such a treaty.

(4) 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.<sup>285</sup> 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 on several occasions,<sup>286</sup> 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.

(5) On the other hand, both the opinion of the International Court of Justice on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide<sup>287</sup> and article 18 of the Vienna Convention 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.

(6) This solution, the most favourable both to successor States and to the effectiveness of multilateral treaties, is the one embodied in the present article. In 1972, doubts about the justification of the article were expressed by some members of the Commission, but it was included in the draft to enable Governments to express their views on the matter so that the Commission might reach a clear conclusion on this point during the second reading of the draft. However, little comment on the point was made by delegations and Governments and the few views expressed were divided as to whether the article should be retained. In the absence of clear guidance, the Commission reconsidered the question of inclusion on its merits, but again views were divided. Nevertheless, the Commission, bearing in mind the considerations already mentioned<sup>288</sup> decided to retain the article partly in the interests of the symmetry of the draft as a whole and

partly to enable Governments in due course to make their own decision on its retention.

(7) As the Commission observed in 1972, 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.<sup>289</sup> The question, however, is a general one and some members of the Commission felt that the possibility of a newly independent State's liberty to ratify a treaty on the basis of the predecessor State's signature assuming importance in the future in connexion with multilateral treaties could not be altogether excluded, although it would normally be open to a newly independent State to accede to the treaty.

(8) In its written comments, one Government objected to the article as drafted in 1972 on the ground that it would create inequality between the newly independent State and signatories to the treaty because the newly independent State would not be bound by the good faith obligation incumbent on the predecessor State and other signatories. In this connexion, the Commission confirmed the view expressed in 1972 that, even if the article were adopted, 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. The Commission, however, did not consider that this was, in itself, sufficient reason for omitting the article from the draft.

(9) Re-examination of the draft article in the light of the comments of Governments exposed certain problems as to its content and drafting. The text of article 14 in the 1972 draft was based on article 14 of the Vienna Convention which relates to signature followed by ratification, acceptance or approval. It is, however, possible for authentication of the text of a treaty to be by methods other than signature and for consent to be bound by a treaty to be given otherwise than by ratification, acceptance or approval. For example, a treaty might be initialled rather than signed and consent to be bound might be expressed by subsequent signature. Reference to article 11 of the Vienna Convention raised the question whether provision should be made in draft article 14 of the 1972 draft (if retained) for cases where consent to be bound by a treaty was to be expressed after authentication of the text by some agreed means other than ratification, acceptance or approval. Nevertheless, the Commission considered that the procedure under article 14 of the Vienna Convention was the normal one and that draft article 14 of the 1972 draft should not be extended to cover possible cases beyond the scope of that article. It was pointed out that signature has particular significance in the context of the Vienna Convention and that this justified the limitation of the

<sup>285</sup> 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 275 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.

<sup>286</sup> For example in the North Sea Continental Shelf Cases (*I.C.J. Reports 1969*, p. 3).

<sup>287</sup> *I.C.J. Reports 1951*, p. 28.

<sup>288</sup> See paras. 3-5 above.

<sup>289</sup> *Yearbook ... 1963*, vol. II, pp. 217 *et seq.*, document A/5509, paras. 18-50.

draft article to signature subject to ratification, acceptance or approval.

(10) The comments of one Government called attention to the ambiguity of the second part of the introductory words to paragraph 1 of the draft article, which read "by the signature intended that the treaty should extend to the territory to which the succession of States relates". It is not in practice always made clear on signature to which territories it is intended that a treaty should extend. The Commission decided that the point should be clarified by a provision relating to signature on the lines of article 29 of the Vienna Convention concerning the territorial scope of treaties.

(11) Attention was also called to the complicated effect of the cross references in paragraph 1 of the draft article and the desirability of simplifying the text as far as possible. Finally, doubts were expressed about the exact meaning of the clause in paragraph 2 "under conditions similar to those which apply to ratification".

(12) Having regard to the above considerations, the Commission decided to re-draft the article in the form which now appears as article 18, which is simplified and avoids the use of cross references to other articles. *Paragraph 1* provides that where a multilateral treaty has been signed by the predecessor State before the date of the succession of States subject to ratification, acceptance or approval, with the intention that the treaty should extend to the territory to which the succession of States relates, the newly independent State may itself ratify, accept or approve the treaty. *Paragraph 2* provides a presumption that the signature by the predecessor State expresses the intention that the treaty should extend to the entire territory for the international relations of which it was responsible. *Paragraph 3* excludes the application of paragraph 1 if the application of the treaty in respect of the newly independent State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty. *Paragraph 4* contains the usual requirement in the case of "restricted multilateral treaties" of the consent of all the parties or of all the contracting States to participation in the treaty by the newly independent State.

#### *Article 19.*<sup>290</sup> *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 under article 16 or 17, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject matter as that reservation.**

**2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty under article 16 or 17, a newly independent**

**State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of sub-paragraph (a), (b) or (c) of article 19 of the Vienna Convention on the Law of Treaties.**

**3. When a newly independent State formulates a reservation in conformity with paragraph 2, the rules set out in articles 20, 21, 22 and 23 of the Vienna Convention on the Law of Treaties apply in respect of that reservation.**

#### *Commentary*

(1) The general rules of international law governing reservations to multilateral treaties are now to be found stated in articles 19 to 23 of the Vienna Convention. Under those articles, in the event of a succession, the predecessor State may be a State which has formulated a reservation, with or without objection from other States, or which has itself accepted or objected to the reservation of another State. Those articles at the same time provide for the withdrawal of reservations and also of objections to reservations. The question then arises as to the position of the newly independent 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 newly independent 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 newly independent 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 to 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"<sup>291</sup> 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 itself and the Netherlands East Indies. Each of these three States omitted its reservations when acceding to later texts: the United Kingdom and the Netherlands when becoming parties to the Rome Act of 1928 and France when

<sup>290</sup> 1972 draft, article 15.

<sup>291</sup> See above, para. 44.

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.<sup>292</sup> 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.<sup>293</sup> Among these reservations is one made by the United Kingdom with respect to article 68, paragraph 2, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949).<sup>294</sup> Some newly independent States, to which this Convention was formerly applicable as dependent territories of the United Kingdom, have notified the depositary that they consider themselves as continuing to be bound by that Convention in virtue of its ratification by the United Kingdom.<sup>295</sup> The notifications of these States do not refer explicitly to the United Kingdom's reservation. The point of departure for 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, some 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.<sup>296</sup> They have sometimes exercised their right to become a party by depositing an instrument of accession and sometimes by transmitting

to the Secretary-General a "notification of succession". When becoming a party by accession, a new State has in some cases repeated a reservation made by its predecessor and applicable to the territory before independence.<sup>297</sup> In such a case the reservation is, of course, to be regarded as an entirely new reservation so far as concerns the 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,<sup>298</sup> and Cyprus and Gambia expressly confirmed their maintenance of that same reservation which had likewise been made applicable to each of their territories.<sup>299</sup> Other examples are the repetition by Trinidad and Tobago of a United Kingdom reservation to the International Convention to Facilitate the Importation of Commercial Samples and Advertising Material (1952) made specifically for Trinidad and Tobago;<sup>300</sup> and by Barbados, Cyprus, Fiji, Jamaica and Sierra Leone of United Kingdom reservations made to the 1949 Convention on Road Traffic, with annexes.<sup>301</sup>

(6) It is, no doubt, desirable that a State, on giving notice of succession, should at this time specify its intentions in regard to its predecessor's reservations. This, indeed, was the case when Barbados and Fiji submitted their notices of succession to the Convention relating to the Status of Stateless Persons (1954) and indicated which reservations, extended to their respective territories by the United Kingdom, were maintained and which were withdrawn.<sup>302</sup> Fiji likewise indicated which reservations were maintained and which were withdrawn when notifying its succession to the Convention relating to the Status of Refugees (1951)<sup>303</sup> the Convention on the Political Rights of Women (1953),<sup>304</sup> and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962).<sup>305</sup> But it would be going too far to conclude that, if a reservation

<sup>292</sup> *Yearbook . . . 1968*, vol. II, pp. 24-25, document A/CN.4/200 and Add.1-2, paras. 86-92.

<sup>293</sup> *Ibid.*, p. 35, para. 138.

<sup>294</sup> United Nations, *Treaty Series*, vol. 75, p. 287.

<sup>295</sup> *Yearbook . . . 1968*, vol. II, pp. 41-42, document A/CN.4/200 and Add.1-2, paras. 170-174.

<sup>296</sup> United Nations, *Multilateral treaties . . . 1972* (*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).

<sup>297</sup> For example, in acceding to the Additional Protocol to the Convention concerning Customs Facilities for Touring, relating to the Importation of Tourist Publicity Documents and Material (1954), Uganda and the United Republic of Tanzania repeated a reservation which had been made by the United Kingdom specifically for those territories. See United Nations, *Multilateral treaties . . . 1972* (*op. cit.*), pp. 240-241.

<sup>298</sup> *Ibid.*, pp. 97-98.

<sup>299</sup> *Ibid.*, pp. 95 and 96 respectively.

<sup>300</sup> *Ibid.*, p. 232.

<sup>301</sup> *Ibid.*, pp. 260, 261 and 262.

<sup>302</sup> *Ibid.*, pp. 105 and 106.

<sup>303</sup> *Ibid.*, p. 96.

<sup>304</sup> *Ibid.*, p. 352.

<sup>305</sup> *Ibid.*, p. 360.

is not repeated at the time of giving notice of succession, it does not pass to the newly independent State. Indeed, in certain other cases newly independent 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.<sup>306</sup> Malta, also after an interval of some weeks, similarly informed the Secretary-General.<sup>307</sup> Both these States acted in the same manner in regard to their predecessors' reservations to the Convention Concerning Customs Facilities for Touring (1954).<sup>308</sup> Both would therefore seem to have thought that a predecessor's reservations would continue to be applicable unless disclaimed by the successor. The same view of the law was evidently taken by the Office of Legal Affairs of the Secretariat in its Memorandum to the Regional Representative of the United Nations High Commission for Refugees on the succession by Jamaica to rights and obligations under the Convention relating to the Status of Refugees (1951).<sup>309</sup> The Swiss Government<sup>310</sup> 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-General that, as successor to the United Kingdom, it considered itself 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.<sup>311</sup> 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.<sup>312</sup>

(8) On 25 February 1969 Botswana notified the Secretary-General 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 had been 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.<sup>313</sup> In circulating the notification, the Secretary-General reproduced the text of Botswana's new reservations and at the same time informed the interested States where they would find the text of the earlier reservations made by the United Kingdom which Botswana was maintaining.

(9) On 18 July 1969 Mauritius informed the Secretary-General 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.<sup>314</sup> 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

<sup>306</sup> *Ibid.*, p. 245, foot-note 9.

<sup>307</sup> *Ibid.*, foot-note 10.

<sup>308</sup> *Ibid.*, p. 237, foot-notes 11 and 12.

<sup>309</sup> See United Nations, *Juridical Yearbook, 1963* (United Nations publication, Sales No. 65.V.3), pp. 181-182.

<sup>310</sup> See para. 3 above.

<sup>311</sup> Secretary-General's circular letter of 16 August 1968 (C.N. 123, 1968, Treaties-2).

<sup>312</sup> Secretary-General's circular letter of 3 December 1968 (C.N. 18 2, 1968, Treaties-4).

<sup>313</sup> Secretary-General's circular letter of 21 May 1969 (C.N. 80, 1969, Treaties-1).

<sup>314</sup> Secretary-General's circular letter of 11 September 1969 (C.N. 168, 1969, Treaties-5).

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 day 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 nineteenth 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 right 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 sparse. The series of Secretariat studies entitled "Succession of States to multilateral treaties"<sup>315</sup> apart from a single mention of the existence of this question, contains no reference to succession in respect of objections to reservations; nor is anything to be found in *Materials on succession of States*.<sup>316</sup> The information published in *Multilateral treaties in respect of which the Secretary-General performs depositary functions*,<sup>317</sup> however, throws some 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 its 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 of Genocide, make any allusion to Belgium's objection to similar reservations formulated in regard to this Convention. The United Kingdom lodged a series of formal objections to reservations formulated by various States to the three 1958 Conventions on the Territorial Sea and Contiguous Zone, on the High Seas and on the Continental Shelf, and several of its former dependent territories afterwards became parties to one or other of these Conventions by transmitting a notification of succession. Some of those States, however, indicated their position with regard to the objections made by the United Kingdom. Tonga informed the Secretary-General that, in the absence of any other statement expressing a contrary intention, it wished to maintain all objections communicated to him by the United Kingdom to the reservations or declarations made by States with respect to *any* conventions of which the Secretary-General performs depositary functions. Thus, Tonga is considered as maintaining the United Kingdom objections to certain reservations and declarations made by States with respect to the Convention on the Territorial Sea and the Contiguous Zone.<sup>318</sup> Fiji expressly maintained the objections made by the United Kingdom with regard to that Convention.<sup>319</sup> Both Fiji and Tonga expressly maintained United Kingdom objections to certain reservations or declarations concerning the Convention on the Continental Shelf.<sup>320</sup> With regard to the Convention on the High Seas, both Fiji and Tonga withdrew the "observations" made by the United Kingdom with respect to one State's reservation to that Convention and each substituted its own "observation".<sup>321</sup> The remaining United Kingdom objections were maintained: expressly by Fiji and impliedly by Tonga, in virtue of its general statement concerning the maintenance of objections, referred to above. 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.<sup>322</sup> The United Kingdom held the same position with regard to two other States and in addition did not regard as valid the reservations made by four States concerning article 37, paragraph 2, of the Convention. When Tonga notified its succession to that Convention, it indicated its adoption of the United

<sup>318</sup> *Ibid.*, p. 399.

<sup>319</sup> *Ibid.*, p. 398.

<sup>320</sup> *Ibid.*, p. 412.

<sup>321</sup> *Ibid.*, pp. 404 and 406.

<sup>322</sup> *Ibid.*, p. 53.

<sup>315</sup> See above, para. 44, and foot-notes 40-42.

<sup>316</sup> United Nations, *Materials on Succession of States* (op. cit.).

<sup>317</sup> United Nations, *Multilateral treaties . . . 1972* (op. cit.).

Kingdom objections respecting the reservations and statements to those nine States.<sup>323</sup> When Barbados notified the Swiss Government of its succession to the 1949 Geneva Conventions relative to the Treatment of Prisoners of War and to the Protection of Civilian Persons in time of War, it repeated a declaration which had been made by the United Kingdom concerning the reservations made by certain States with respect to those Convention.<sup>324</sup>

(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),<sup>325</sup> 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 too great a concern on the part of newly independent States with the objections of their predecessor to reservations formulated by other States.

(15) In the light of these considerations, the Commission made no provision with respect to objections to reservations in its 1972 draft. However, the matter was raised again in the comments of Governments. One Government suggested that there should be a presumption that a predecessor State's objections were withdrawn unless the newly independent State expressed a contrary intention when making its notification of succession, and another Government mentioned objections in the context of the question of the retroactivity of reservations formulated by the newly independent State. Consequently, the Commission again considered whether it was necessary to make any express provision as regards acceptances of or objections to reservations. In the light of the legal position indicated in the preceding paragraph, the Commission concluded that it would be better, in accordance with its fundamental method of approach to the draft articles, to leave these matters to be regulated by the ordinary rules applicable to acceptances and objections on the assumptions that, unless it was necessary to make some particular provision in the context of the succession of States, the newly independent State would "step into the shoes of the predecessor State".

(16) 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, the Commission decided to adopt a pragmatic and flexible approach to the treatment of reservations 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 as its predecessor. But once it is accepted that succession in respect of treaties does not occur automatically but is dependent on an act of will by the newly independent State, the way is open for the law to regulate the conditions under which that act of will is to become effective.

(17) Since the general rule is that a reservation may be withdrawn unilaterally and at any time, the question whether a predecessor State's reservations attach to a newly independent State would seem to be simply a matter of the latter's intention at the time of making its notification of succession. If the newly independent 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 newly independent 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 newly independent State might be irrevocably defeated; whereas, if it were made and the presumption did not correspond to the newly independent State's intention, the latter could always redress the matter by withdrawing the reservations.

(18) Certain comments by delegations and Governments suggested that the article on reservations should reverse the presumption in favour of the maintenance of reservations made by the predecessor State. At its present session, however, the Commission, in view of the above reasons, decided to maintain the presumption stated in paragraph 1 of the 1972 draft article. However, in the light of the comments of Governments, certain changes were made in paragraph 1. First, the Commission decided that the test of incompatibility for which the paragraph provided might be difficult to apply and that, if the newly independent State were to formulate a reservation relating to the same subject-matter as that of the reservation made by the predecessor State, it could reasonably be presumed to intend to withdraw that reservation. The Commission also decided that it was unnecessary to provide expressly, as was done in article 15, paragraph 1 (b) of the 1972 draft, for the exclusion of a reservation which was applicable only in relation to the

<sup>323</sup> Secretary-General's circular letter of 26 February 1973 (C.N. 27, 1973, Treaties-2).

<sup>324</sup> United Nations, *Treaty Series*, vol. 278, pp. 266-268 and *ibid.*, vol. 653, p. 454.

<sup>325</sup> This rule does not apply in the case of constituent instruments of international organizations or in that of treaties concluded between a "limited number of States" within the meaning of paragraph 2 of article 20.

predecessor State because by hypothesis that reservation could not be regarded as applicable in respect of the newly independent State. As a matter of drafting, the Commission considered that it might be confusing to describe a reservation formulated by the newly independent State as a "new" reservation.

(19) Accordingly, *paragraph 1* of the present article provides that a notification of succession shall be considered as subject to a reservation made by the predecessor State unless a contrary intention is expressed by the newly independent State or the newly independent State formulates a reservation which relates to the same subject-matter.

(20) *Paragraph 2* of the article provides for the case where the successor State formulates reservations of its own when establishing its status as a party or a contracting State to a multilateral treaty under article 16 or 17 of the 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 establishing 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 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 which wishes to continue to participate in 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. For these reasons, notwithstanding criticism in the comments of one delegation and one Government, the Commission decided at its present session to retain paragraph 2. Of course, the possibility for a successor State to formulate 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 whose sub-paragraphs (a), (b) and (c) are incorporated by reference in paragraph 2 of the present article.

(21) In 1972, the Commission decided to use the method of drafting by reference for the purposes of paragraph 3 because to reproduce in the paragraph all the relevant provisions of the Vienna Convention would have made article 15 of the 1972 draft very long and heavy. The Commission also took into account the fact that the draft articles were 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. It was pointed out that the references to the Vienna Convention in that paragraph would give an opportunity to Governments to express their views on the whole question of drafting by

reference in the context of codification. While there was some reserve on the general question, such comments as were made by Governments tended to support the use of the method of drafting by reference in this instance. Accordingly, although at the present session of the Commission there was some opposition to the use of the method of drafting by reference, the Commission decided that it was justified in using the method not only for the purposes of paragraph 3 but also for those of paragraph 2.

(22) One Government suggested the inclusion of a provision to make clear that a reservation formulated by a newly independent State when making its notification of succession would not have retroactive effect. The draft articles, however, do not contain any provision that such a reservation would have retroactive effect. Therefore, having regard to the general position that a reservation can only be effective at the earliest from the date when it is made, the Commission decided that it would be better not to include such a provision but once more to leave the matter to be regulated by the ordinary rules of international law relating to treaties.

(23) *Paragraph 3* of the present article provides that, when a newly independent State formulates a reservation in conformity with paragraph 2 of the article, the rules set out in articles 20, 21, 22 and 23 of the Vienna Convention apply *in respect of that reservation*. This provision is made only with respect to a reservation formulated by a newly independent State under article 19 because it was only for that purpose that it seemed necessary to make any express provision. The paragraph corresponds to article 15, paragraph 3 (a), of the 1972 draft. However, the words "in respect of that reservation" have been added to make clear that the references to the Vienna Convention in paragraph 3 of the present draft article are limited to a reservation formulated in conformity with paragraph 2 of the article and that the article makes no provision concerning other questions that may arise with respect to reservations, acceptances or objections, which are left to be governed by the general rules. Paragraph 3 has the effect of ensuring that any reservation formulated by a newly independent State in the exercise of the right conferred by paragraph 2 would be subject to the rules of law set out in the Vienna Convention concerning acceptances and objections to reservations, legal effects of reservations and relevant rules of the procedure regarding reservations. In order to avoid any possible misinterpretation of the references to the Vienna Convention, the reference in the 1972 draft to article 23, paragraphs 1 and 4, has been amended so as to include a reference to the whole of that article.

(24) In the light of the limitation of paragraph 3 to purposes connected with the formulation of a new reservation by the newly independent State and the fact that participation in a treaty of the kind contemplated in article 20, paragraph 2 of the Vienna Convention on the Law of Treaties will in any event be subject to the agreement of all the parties or all the contracting States to that treaty, paragraph 3 (b) of the 1972 draft article was considered unnecessary. Accordingly the Commission decided to omit it.

**Article 20.** <sup>326</sup> *Consent to be bound by part of a treaty and choice between differing provisions*

1. When making a notification of succession under article 16 or 17 establishing its status as a party or contracting State to a multilateral treaty, a newly independent State may express its consent to be bound by part of the treaty or make a choice between differing provisions under the conditions laid down in the treaty for expressing such consent or making such choice.

2. 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 consent or choice made by itself or made by the predecessor State in respect of the territory to which the succession of State relates.

3. If the newly independent State does not in conformity with paragraph 1 express its consent or make a choice, or in conformity with paragraph 2 withdraw or modify the consent or choice of the predecessor State, it is considered as maintaining:

(a) the consent of the predecessor State, in conformity with the treaty, to be bound, in respect of the territory to which the succession of States relates, by part of that treaty; or

(b) the choice of the predecessor State, in conformity with the treaty, between differing provisions in the application of the treaty in respect of the territory to which the succession of States relates.

*Commentary*

(1) This article deals with questions analogous to those covered in article 19. 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 different provisions, that is, to the situations envisaged in paragraphs 1 and 2, respectively, of article 17 of the Vienna Convention. 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 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.<sup>327</sup> When extending the application of the Convention to Barbados, Cyprus, Fiji and Sierra Leone, the United Kingdom specifically made that extension subject to the same exclusion.<sup>328</sup> In the case of Malta, on the other hand, the declaration excluded only annex 1,<sup>329</sup> while in

the case of Jamaica the declaration contained a reservation on a certain point but made no allusion to annexes 1 and 2.<sup>330</sup> On becoming independent, these six countries transmitted to the Secretary-General notifications of succession to the Convention. Five of them, Barbados, Cyprus, Fiji, Malta and Sierra Leone, accompanied their notifications with declarations maintaining the particular exclusions in force in respect of their territories before independence.<sup>331</sup> Jamaica, on the other hand, to which the exclusions had not been applied before independence, did not content itself with simply maintaining the reservation made by the United Kingdom on its behalf; it added a declaration excluding annexes 1 and 2.<sup>332</sup>

(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 Barbados, Cyprus, Fiji and Sierra Leone.<sup>333</sup> These declarations were maintained by these countries in their notifications of succession.<sup>334</sup> 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,<sup>335</sup> added to its notification a declaration in terms similar to the declaration made by the United Kingdom in respect of Barbados, Cyprus, Fiji and Sierra Leone and maintained by these countries in their respective notifications of succession.<sup>336</sup>

(4) Another Convention illustrating the question of choice of different provisions is the 1951 Convention relating to the Status of Refugees, article 1, section B, of which permits a choice between "events occurring in Europe before 1 January 1951," or "events occurring in Europe or elsewhere\* before 1 January 1951" for determining the scope of the obligations accepted under the Convention.<sup>337</sup> The United Kingdom's ratification specified the wider form of obligation "in Europe or elsewhere" and in this form the Convention was afterwards extended to Cyprus, Fiji, Gambia and Jamaica.<sup>338</sup> When in due course these countries notified the Secretary-General of their succession to the Convention, their notifications maintained the choice of provisions previously in force in respect of their territories.<sup>339</sup> France,

<sup>330</sup> *Ibid.*, p. 265.

<sup>331</sup> *Ibid.*, pp. 260, 261 and 262.

<sup>332</sup> *Ibid.*, p. 261. The United Kingdom extended likewise the application of the Convention to Singapore in 1959 subject to the exclusion of annexes 1 and 2. Following its separation from Malaysia Singapore in 1972 transmitted to the Secretary-General a notification of succession to the Convention with the declaration that it did not wish to maintain the exclusions of annexes 1 and 2 made by the United Kingdom at the time of notification of territorial application of the Convention (*ibid.*, p. 262).

<sup>333</sup> *Ibid.*, pp. 265, 266 and 267.

<sup>334</sup> *Ibid.*, pp. 260 and 262.

<sup>335</sup> *Ibid.*, p. 265.

<sup>336</sup> *Ibid.*, p. 261.

<sup>337</sup> *Ibid.*, p. 94.

<sup>338</sup> *Ibid.*, p. 101.

<sup>339</sup> *Ibid.*, pp. 94, 95, 96 and 97.

<sup>326</sup> 1972 draft, article 16.

<sup>327</sup> See United Nations, *Multilateral treaties . . . 1972 (op. cit.)*, p. 263.

<sup>328</sup> *Ibid.*, pp. 265-267.

<sup>329</sup> *Ibid.*, p. 266.

in contrast with the United Kingdom, specified initially the narrower form of obligation "in Europe"; and it was in the narrower form that it extended the Convention to all its dependent territories,<sup>340</sup> twelve of which afterwards transmitted notifications of succession to the Secretary-General.<sup>341</sup> Of these twelve countries four accompanied their notifications with a declaration that they extended their obligations under the Convention by adopting the wider alternative "in Europe or elsewhere."<sup>342</sup> The other eight countries in the first instance all simply declared themselves "bound by the Convention the application of which had been extended to their territory before the attainment of independence"; and it is clear that they assumed this to mean that France's choice would continue to govern the application of the Convention to their territory. For not long after notifying their succession to the Secretary-General, three of them<sup>343</sup> informed him of the extension of their obligations under the Convention by the adoption of the wider formula; and four others<sup>344</sup> did the same after intervals varying from eighteen months to nine years. The remaining one country<sup>345</sup> 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.<sup>346</sup> In 1960 Malaysia and in 1966 Malta notified the Secretary-General<sup>347</sup> of their succession to this League of Nations treaty. Their notifications did not make mention of the limitation.<sup>348</sup> In 1968, 1971 and 1972, Cyprus, Fiji and Tonga submitted notifications of succession to the Convention specifying that they maintained the limitation subject to which the Convention was made applicable to their respective territories before the attainment of independence.<sup>349</sup>

(6) Another treaty giving rise to a case of succession in respect of choice of provisions is the 1921 Additional Protocol to the Convention on the Régime of Navigable Waterways of International Concern. Article 1 permitted the obligations of the Protocol to be accepted either "on all navigable waterways" or "on all *naturally*\* navigable

waterways." The United Kingdom accepted the first wider, formula in respect of itself and of most of its dependent territories,<sup>350</sup> including Fiji and Malta, each of which subsequently transmitted to the Secretary-General a notification of succession. The notifications indicated that Fiji and Malta continued to consider themselves bound by the Protocol in the form in which it had been extended to their respective territories by their predecessor.<sup>351</sup>

(7) The General Agreement on Tariffs and Trade also furnishes evidence of practice on this question. Article XIV permits a party to elect to be governed by the provisions of Annex J in lieu of certain provisions of the article<sup>352</sup> and in 1948 this election was made by the United Kingdom. In 1957, Ghana and the Federation of Malaya became independent and, on the sponsorship of the United Kingdom, both were declared by the contracting parties to be deemed to be parties to the Agreement. At the same time the contracting parties declared that the United Kingdom's election of Annex J should be deemed to apply to both the newly independent States.<sup>353</sup> 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 1955, Belgium, France and the United Kingdom all invoked this provision and thereby excluded the application of GATT in their relations with Japan.<sup>354</sup> A large number of the former dependencies of those countries which have since been deemed to be parties to the Agreement have considered themselves as inheriting their predecessor's invocation of Article XXXV, paragraph 1, as against Japan. Although the three predecessor States themselves and some of their successor States have now withdrawn their invocations of that provision, it is still in force for several of their successors.<sup>355</sup>

(8) 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 newly independent State the same

<sup>340</sup> In 1971, France notified the adoption of the wider form of obligation "in Europe or elsewhere" (*ibid.*, p. 94).

<sup>341</sup> *Ibid.*, pp. 93 and 94.

<sup>342</sup> Algeria, Guinea, Morocco and Tunisia (*ibid.*, p. 94, foot-note 3).

<sup>343</sup> Cameroon, Central African Republic and Togo (*ibid.*, p. 94, foot-note 4).

<sup>344</sup> Dahomey, Ivory Coast, Niger and Senegal (*ibid.*).

<sup>345</sup> Congo (*ibid.*, p. 94).

<sup>346</sup> *Ibid.*, p. 451.

<sup>347</sup> The functions of the depositary had been transferred to him on the dissolution of the League of Nations.

<sup>348</sup> United Nations, *Multilateral Treaties . . . 1972 (op. cit.)*, p. 452.

<sup>349</sup> *Ibid.*, and foot-note 6.

<sup>350</sup> *Ibid.*, p. 462.

<sup>351</sup> *Ibid.*, p. 463.

<sup>352</sup> See *Yearbook . . . 1968*, vol. II, p. 76, document A/CN.4/200 and Add.1-2, para. 330.

<sup>353</sup> *Ibid.*, p. 82, para. 362.

<sup>354</sup> *Ibid.*, para. 359.

<sup>355</sup> *Ibid.*, paras. 360-361.

rights of choice as it would have under the terms of the treaty if it were becoming a party by accession. *Paragraph 1* of article 20 accordingly permits a newly independent State when making a notification of succession to exercise any right of choice provided for in the treaty. The newly independent State may therefore exercise such a right under the same conditions as a State establishing its consent to be bound by a procedure other than a notification of succession. The Commission made some drafting changes in the corresponding provision (former paragraph 2) of the 1972 text and added a cross-reference to articles 16 and 17.

(9) Treaties which accord a right of choice in respect of parts of the treaty or between different provisions not infrequently provide for a power alterwards to modify the choice.<sup>356</sup> 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 if the treaty contains no provision governing the matter. As to a newly independent 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 2* of article 20 so provides. The wording of this paragraph (former paragraph 3) has been reviewed in the light of the drafting changes introduced in paragraph 1. Moreover, for the sake of precision, it has been added that the newly independent State may withdraw or modify any consent or choice "made by itself or made by the predecessor State in respect of the territory to which the succession of States relates."

(10) In 1972, the Commission reached the conclusion that if 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. This conclusion was based on considerations similar to those indicated with respect to reservations. 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 provide for a presumption in favour of the maintenance of the predecessor's choice. Here, there would be less justification for the reversal of the presumption than in the case of reservations. The newly independent State which makes a notification of succession inherits a treaty as it stands at the date of the

succession of States subject to such additional choice that may be conferred on it. *Paragraph 3* of article 20, former paragraph 1, accordingly states the rule in terms of a presumption in favour of the maintenance of the predecessor State's consent to be bound by part of a treaty and choice between differing provisions. Drafting changes consequential to those made in paragraphs 1 and 2 of the article were also made in this paragraph.

#### *Article 21.*<sup>357</sup> *Notification of succession*

**1. A notification of succession in respect of a multilateral treaty under article 16 or 17 must be made in writing.**

**2. If the notification of succession is not signed by the Head of State, Head of Government or Minister of 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) be transmitted by the newly independent State to the depositary or, if there is no depositary, to the parties or the contracting States;**

**(b) be considered to be made by the newly independent State on the date on which it has been received by the depositary or, if there is no depositary, on the date on which it has been received by all the parties or, as the case may be, by all the contracting States.**

**4. Paragraph 3 does not affect any duty that the depositary may have, in accordance with the treaty or otherwise, to inform the parties or the contracting States of the notification of succession or any communication made in connexion therewith by the newly independent State.**

**5. Subject to the provisions of the treaty, such notification of succession or such communication shall 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 21 concerns the procedure through which a newly independent State may exercise its right under article 16 or 17 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.*<sup>358</sup>

<sup>356</sup> E.g., article 1 B (2) of the 1951 Convention relating to the Status of Refugees (United Nations, *Treaty Series*, vol. 189, p. 154, article 2 (2) of the 1949 Convention on Road Traffic (*ibid.*, vol. 125, p. 24).

<sup>357</sup> 1972 draft, article 17.

<sup>358</sup> See *Yearbook . . . 1962*, vol. II, p. 122, document A/CN.4/150, para. 134.

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 their Permanent Mission to the United Nations, acting under instructions,<sup>359</sup> 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.<sup>360</sup> Similarly in the case of the Geneva Humanitarian Conventions of 1864, 1906, 1929 and 1949, of which the Swiss Federal Council is the depositary, the communication of a "declaration of continuity" has been the normal procedure through which newly independent States have become parties by succession.<sup>361</sup> Any other formula, such as "declaration of application" or "declaration of continuance of application," is accepted by the Swiss Federal Council as sufficient, provided that the 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.

(5) The practice of other depositaries is on similar lines. The practice of the United States, for example, has been

<sup>359</sup> *Ibid.*, p. 125, para. 162.

<sup>360</sup> *Yearbook . . . 1968*, vol. II, p. 22, document A/CN.4/200 and Add.1-2, para. 72.

<sup>361</sup> *Ibid.*, p. 50, para. 215. The Geneva Humanitarian Convention, it should be pointed out, also allow simplified forms of "accession" (*ibid.*, para. 214).

to recognize the right of newly independent States "...to declare themselves bound uninterruptedly by multilateral treaties of a non-organizational type concluded in their behalf by the parent State before the new State emerged to full sovereignty."<sup>362</sup> Again, as depositary of the Hague Conventions of 1899 and 1907 for the Pacific Settlement of Disputes, the Netherlands appears to have accepted as effective any expression of the newly independent State's will to be considered as a party communicated by it in a diplomatic note or letter.<sup>363</sup>

(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,<sup>364</sup> and in 1937 when the United Kingdom notified to it the participation of Burma in the Geneva Humanitarian Conventions of 1929.<sup>365</sup> It has also done so in one instance since the Second World War: namely, in 1949 when it accepted as sufficient a communication from the Netherlands Government expressing the view of the 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 unusual 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.<sup>366</sup> But every consideration of principle—and not the 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 the 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, should 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 acceptance of the Netherlands Government's communication regarding Indonesia's succession to the Berne Convention, mentioned in the

<sup>362</sup> United Nations, *Materials on Succession of States (op. cit.)*, p. 224.

<sup>363</sup> See *Yearbook . . . 1968*, vol. II, p. 31, document A/CN.4/200 and Add.1-2, para. 124.

<sup>364</sup> *Ibid.*, p. 12, paras. 22-23.

<sup>365</sup> Burma, although separated from India, was not then an independent State; but it is treated as having become a party to the Conventions in 1937 (*ibid.*, p. 39, para. 160 and p. 50, para. 216).

<sup>366</sup> This was so in the case of the former British Dominions.

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.<sup>367</sup>

(8) As indicated above, a newly independent State may notify its succession in respect of a treaty not only under article 16, when its predecessor was a party to the treaty at the date of succession, but also under article 17, when its predecessor was a contracting State. For this reason a "notification of succession" is defined in article 2, paragraph 1 (g), as meaning in relation to a multilateral treaty "any notification, however, phrased or named, made by a successor State 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, which contains provisions regarding the instruments required for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty. That article requires that the notification of any claim to invoke a ground of invalidity, termination, etc., shall be in writing (paragraph 1); that any act declaring invalid, terminating, etc., a treaty shall be carried out through an instrument communicated to the other parties; and that if the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the production of full powers may be called for (paragraph 2).

(9) Accordingly, the phraseology of *paragraphs 1 and 2* of article 21 reflects the language used in article 67 of the Vienna Convention. They provide that a notification of succession under article 16 or 17 must be made in writing and that, if it is not signed by the Head of State, Head of Government or Minister of Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers. Those paragraphs are identical to the 1972 text except that in paragraph 2 the words "of succession" have been added after the word "notification" since, as indicated above, article 2 defines the expression "notification of succession" and not the term "notification."

(10) Paragraph 3 of the 1972 text was drafted to specify the moment at which the notification of succession should be considered as having been made on the basis of the system provided for in article 78 of the Vienna Convention. 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. 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 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..." These were *mutatis mutandis* the provisions reproduced in paragraph 3 of the 1972 text of the present article.

(11) At the present session, the Commission reviewed the matter and concluded that the 1972 system was not completely satisfactory, in particular with regard to the determination of the date on which a notification of succession should be considered as having been made by the newly independent State. Precision in the determination of such a date being essential in the context of the present draft articles for all States concerned as well as, in general, for certainty and security in treaty relations, the Commission decided to modify the text adopted in 1972. The changes introduced in article 22 of the draft provided an additional justification for such a modification.

(12) A notification of succession being an act similar in kind to the deposit or notification of an instrument establishing the consent of a State to be bound by a treaty, the Commission thought that the relevant rules laid down in article 16 of the Vienna Convention should be applied here by analogy. Article 16 of the Vienna Convention states that, unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of the 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 their 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 States<sup>368</sup> concerned.

(13) In the light of the foregoing considerations, *paragraph 2(b)* of this article sets forth the rule that, unless the treaty otherwise provides, the notification of succession shall be *considered to be made* by the newly independent State on the date on which it has been *received* by the *depositary*, or, if there is no depositary, on the date on which it has been *received* by *all the parties* or, as the case may be, by *all the contracting States*. Consequently, if there is a depositary, by analogy with sub-paragraphs (b) and (c) of article 16 of the

<sup>367</sup> *Yearbook* . . . 1968, vol. II, pp. 13-14, document A/CN.4/200 and Add.1-2, paras. 26-31.

<sup>368</sup> The expression "contracting States" is defined in article 2, paragraph 1 (f) of the Vienna Convention as meaning "a State which has consented to be bound by the treaty, whether or not the treaty has entered into force."

Vienna Convention, the notification of succession of the newly independent State is considered to have been made on the date on which it was received by the depositary and it is as from that date that the legal nexus is established between the notifying newly independent State and any other party or contracting State. If there is no depositary, by analogy with sub-paragraph (c) of article 16 and sub-paragraph (b) of article 78 of the Vienna Convention, the notification of succession is considered to have been made on the date on which it was received by all the parties or, as the case may be, by all the contracting States and it is from that date that the legal nexus is established between the notifying newly independent State and any other party or contracting State. *Sub-paragraph 3 (a)* of the article, as sub-paragraph (a) of article 78 of the Vienna Convention, lays down that, unless the treaty otherwise provides, the notification of succession shall be transmitted by the newly independent State to the depositary or, if there is no depositary, to the parties or the contracting States. The Commission replaced the somewhat vague expression "transmitted . . . to the States for which it is intended" of the 1972 text by the expression "transmitted . . . to the parties or the contracting States".

(14) *Paragraph 4* of the article then provides that the rule set forth in paragraph 3 does not affect any duty that the depositary may have, in accordance with the treaty or otherwise,<sup>369</sup> to inform the parties or the contracting States of the notification of succession or any communication made in connexion therewith by the newly independent State. The main purpose of this provision, which was not included in the 1972 text, is to make it clear that although according to paragraph 3, if there is a depositary, the notification of succession is considered as having been made by the newly independent State on the date on which it has been received by the depositary it does not imply any derogation whatsoever from any duty that the depositary may have "to inform" the parties or the contracting States of the notification of succession or any communication made in connexion therewith. Lastly, the interest of the States concerned is likewise protected, if there is a depositary, by the provision set forth in *paragraph 5* of this article which corresponds to paragraph 3 (c) of the 1972 text. It provides that, subject to the provisions of the treaty, the notification of succession or any other communication herewith shall be considered *as received* by the State for which it was intended only when the latter State has been informed by the depositary. Paragraph 5 is concerned with the transmission of information by the depositary and does not affect the operation of paragraph 3, which determines the date of making of a notification of succession.

#### **Article 22.** <sup>370</sup> *Effects of a notification of succession*

**1. Unless the treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a noti-**

<sup>369</sup> For instance, under article 77 of the Vienna Convention.

<sup>370</sup> 1972 draft, article 18.

**fication of succession under article 16 or article 17, paragraph 2, shall be considered a party to the treaty from the date of the succession of States or from the date of entry into force of the treaty, whichever is the later date.**

**2. Nevertheless, the operation of the treaty shall be considered as suspended as between the newly independent State and the other parties to the treaty until the date of making of the notification of succession except so far as that treaty may be applied provisionally in accordance with article 26 or as may be otherwise agreed.**

**3. Unless the treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession under article 17, paragraph 1, shall be considered a contracting State to the treaty from the date on which the notification of succession is made.**

#### *Commentary*

(1) This article deals with the legal effects of a notification of succession made by a newly independent State under article 16 or 17 of the present draft. It determines the date on which that State is to be considered a party or, as the case may be, a contracting State to the treaty in question following the making of its notification of succession, namely once the consent of the newly independent State to be bound by the treaty has been given as provided for in article 21 of the present draft.

(2) The treaty practice appears to confirm that, on making 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.<sup>371</sup>

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.<sup>372</sup> 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

<sup>371</sup> *Yearbook . . . 1962*, vol. II, p. 126, document A/CN.4/150, para. 164.

<sup>372</sup> 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.

Secretary-General, in the exercise of his depositary functions, communicates to all interested States, is to consider the new State as a party in its own name to the treaty concerned as of the date of independence, thus preserving the continuity of the application of the treaty in its territory . . .<sup>373</sup>

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 to notifications of succession of treaty provisions imposing a period of delay for the entry into force for a particular State of a treaty upon deposit of an instrument giving its consent to be bound even if the treaty is already in force generally. This could be justified on the ground that the right to notify succession normally derives not from the treaty itself but from customary law. Moreover, 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.

(3) 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 its 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*.

(4) 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 that State's territory by the predecessor State.<sup>374</sup> Sri Lanka [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.<sup>375</sup> 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.<sup>376</sup>

(5) 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.<sup>377</sup> 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 . . ."<sup>378</sup> Giving examples of this practice, the United States mentioned Sri Lanka [Ceylon] and Malaysia [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,<sup>379</sup> 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.<sup>380</sup>

(6) 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. 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 that the newly independent States which have expressed themselves as becoming parties

<sup>373</sup> *Yearbook . . . 1962*, vol. II, p. 122, document A/CN.4/150, para. 134.

<sup>374</sup> *Yearbook . . . 1968*, vol. II, pp. 22-23, document A/CN.4/200 and Add.1-2, paras. 78-82.

<sup>375</sup> One month after the deposit of the instrument (*ibid.*, p. 23, para. 81).

<sup>376</sup> *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).

<sup>377</sup> *Ibid.*, p. 31, para. 125.

<sup>378</sup> United Nations, *Materials on Succession of States (op. cit.)*, p. 224.

<sup>379</sup> *Ibid.*, p. 225.

<sup>380</sup> *Ibid.*

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, States which had entered into a "devolution agreement" with their predecessor State.<sup>381</sup> But it is equally difficult to believe that, by entering into a devolution agreement in however wide terms,<sup>382</sup> they intended to do more than assume thenceforth in respect of the territory the international responsibility for the future performance of the treaty which had previously attached to their predecessor.

(7) The 1972 text of the article provided that, while a newly independent State which makes a notification of succession to a treaty which was in force at the date of the succession of States would be considered a *party* to the treaty *on the receipt of the notification* (former paragraph 1), the treaty would be considered as being *in force* in respect of that newly independent State from *the date of the succession of States* subject to certain specific exceptions (former paragraph 2). The comments of delegations and Governments on articles 12, 13 and 18 of the 1972 draft called the attention of the Commission to a number of problems that would be created by these provisions.

(8) Article 18 of the 1972 draft would have given retroactive effect to a notification of succession by a newly independent State so that, even if the notification of succession was delayed for a long period after the date of the succession of States, a multilateral treaty would as a general rule be regarded as in force between that State and other parties with effect from the date of the succession of States. In this respect, other parties to the treaty would have had no choice, but the newly independent State would have been able to choose a later date if the retroactive application of the treaty was inconvenient from its point of view. At the present session, several members of the Commission observed that if this were the rule it would create an impossible legal position for the States parties to the treaty which would not know during the interim period whether or not they were obliged to apply the treaty in respect of the newly independent State. Such a State might make a notification of succession years after the date of the succession of States and, in these circumstances, a party to the treaty might be held to be responsible retroactively for breach of the treaty.

(9) In this connexion, some members of the Commission thought that there was an inherent contradiction between paragraphs 1 and 2 of article 18 of the 1972 draft because by definition a party to a treaty means one for which the treaty is in force and, according to paragraph 1, a newly independent State would only become a party from the date of making of the notifi-

cation of succession while, according to paragraph 2, the treaty would be considered as in force in respect of the newly independent State from the date of the succession of States. Other members expressed the view that paragraph 1 did not entirely accord with the practice of the Secretary-General, who normally regarded a newly independent State as a party to the treaty from the date of the succession of States and not from the date of the making of a notification of succession.

(10) In the light of such considerations, the Commission concluded that article 18 of the 1972 draft should be redrafted so as to provide for the element of continuity consistent with the concept of a succession of States, bearing in mind the legal nexus between a multilateral treaty and the territory of the newly independent State at the date of the succession. It decided that this could be done by providing in principle that the newly independent State making a notification of succession with respect to a multilateral treaty should be regarded as a *party* from the date of the succession of States.

(11) On the other hand, the Commission considered that some provision should be adopted to avoid the unsatisfactory consequences which would result from giving retroactive effect to the notification of succession so far as concerned the rights and obligations under the treaty as between the newly independent State and the parties to it. During the present session, the Commission considered several means of alleviating the retroactive effects that would follow if the newly independent State were considered as a party to the treaty from the date of the succession of States without qualification. It considered the possibility of inserting in articles 16 and 17 or in article 22 time-limits for the making of a notification of succession. It was, however, not possible to agree on what might be regarded as a reasonable period for this purpose and several members of the Commission objected in principle to the use of time-limits. They would not in any event have solved completely the problems involved in the retroactive effect of article 18, paragraph 2 of the 1972 draft. Finally, the Commission concluded that the most satisfactory solution would be to regard the operation of the treaty as suspended between the date of a succession of States and the date of making of the notification of succession. The Commission considered that if the States concerned wished to apply the treaty during the interim period this could normally be done by means of provisional application in accordance with article 26. It was, however, pointed out that in certain circumstances, for example in cases relating to the application of the 1929 Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air, to which some of the comments of Governments had called attention, it might be desirable to allow the retroactive application of the treaty if the parties so agreed.

(12) A solution on the lines indicated in the preceding paragraph would make a notification of succession under article 16 or article 17, paragraph 2 of the present draft retroactive in effect as regards the status of the newly independent State as a *party* to the treaty but would avoid the serious consequences of regarding the

<sup>381</sup> For example, Sri Lanka [Ceylon] and Cyprus.

<sup>382</sup> The usual formula found in United Kingdom devolution agreements reads:

"All international obligations and responsibilities of the Government of the United Kingdom which arise from any valid international instrument shall henceforth, in so far as such instruments may be held to have application to [the new State], be assumed by the Government of [the new State]."

treaty as operative between the newly independent State and the other parties with retroactive effect. It would, of course, involve certain additional duties for the depositary who might have to transmit to the newly independent State information concerning the treaty received between the date from which the newly independent State is considered as a party and the date on which the notification of succession is made. From the point of view of the newly independent State, however, this would have the advantage of putting it into the same position in this respect as other parties with effect from the date of the succession of States or from the date of entry into force of the treaty, as the case might be.

(13) Some members of the Commission observed that to suspend the operation of the treaty so far as the newly independent State was concerned would be virtually the same as saying that it was not in force and that this would be contrary to the definition of "party" which means "a State . . . for which the treaty is in force." Strictly speaking, however, this would not be the case because the treaty would be in force although its operation would be suspended. Moreover, suspension of the operation of the treaty would be subject to the exceptions mentioned in paragraph 11 above. On the whole, the Commission thought that this solution, while it might not be in strict compliance with all the provisions of the Vienna Convention, would be in accord with the spirit of article 28 on the non-retroactivity of treaties and with the possibility of suspension of the operation of a treaty by consent of the parties for which article 57 provides. In any event, the Commission took the view that this was a case in which it could properly rely on article 73 of the Vienna Convention which provides expressly that the Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States.

(14) In the light of the above considerations, *paragraph 1* of the present article provides that "unless the treaty otherwise provides or it is otherwise agreed," when a newly independent State makes a notification of succession under article 16 or article 17, paragraph 2, it shall be considered a *party* to the treaty from the *date of the succession of States* or from the *date of the entry into force of the treaty*, whichever is the later.

(15) Notwithstanding that under paragraph 1 the newly independent State may be regarded as a party to the treaty from the date of the succession of States or some later date before the making of the notification of succession, *paragraph 2* provides that the operation of the treaty shall be considered as *suspended* as between the newly independent State and the other parties to the treaty until the *date of making of the notification of succession except* so far as the treaty may be applied *provisionally* or as may be *otherwise agreed*. If the parties so agree, the operation of the treaty may be made retroactive to the date of the succession of States.

(16) Lastly, *paragraph 3* deals with the case of a notification of succession made under article 17, paragraph 1, namely the case where the predecessor State was a contracting State in respect of the territory to which the succession of States relates at the date of the succession

but the treaty is not in force at the date when the notification of succession is made. The paragraph states that, unless the treaty otherwise provides or it is otherwise agreed, a newly independent State which makes such a notification of succession shall be considered a *contracting State* to the treaty from the *date on which the notification is made*. This provision corresponds in effect to article 18, paragraph 1 in the 1972 draft.

### SECTION 3. BILATERAL TREATIES

#### *Article 23.*<sup>383</sup> *Conditions under which a treaty is considered as being in force in the case of a succession of States*

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 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 provisions 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 newly independent 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,<sup>384</sup> the question whether a newly independent 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 15 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 newly independent 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 15, 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 obligation to take over the treaties of its predecessor. The

<sup>383</sup> 1972 draft, article 19.

<sup>384</sup> See above, para. 2 of the commentary to article 15.

evidence is plain that a treaty in force with respect to a territory at the date of a succession is frequently applied afterwards as between the newly independent 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 newly independent 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 newly independent 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, necessarily 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 newly independent 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 in 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 newly independent 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 newly independent and predecessor States. No doubt, the newly independent 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 newly independent 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 newly independent State continue in force unless the contrary is declared within a reasonable time after the newly independent State's attainment of independence.<sup>385</sup> 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

<sup>385</sup> 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* (op. cit.), p. xiii and pp. 589-632.

example, the case with the air transport agreements and trade agreements examined in the second and third Secretariat studies on "Succession in respect of bilateral treaties."<sup>386</sup>

(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 newly independent State and the other interested State will wish any existing air services to continue at least provisionally until new arrangements are made.<sup>387</sup> Again, international trade is an integral part of modern international relations; and practice shows that both the newly independent 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.<sup>388</sup>

(6) Agreements for technical or economic assistance are another category of treaties where the practice shows a large measure of continuity.<sup>389</sup> An example may be seen in an Exchange of Notes between the United States of America and Zaire [Congo (Leopoldville)] 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*.<sup>390</sup> 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".<sup>391</sup>

(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.<sup>392</sup> Continuity is also a feature of the practice in regard to bilateral treaties of a

<sup>386</sup> *Yearbook . . . 1971*, vol. II (Part Two), p. 111, document A/CN.4/243 and p. 149, document A/CN.4/243/Add.1.

<sup>387</sup> 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.

<sup>388</sup> 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.

<sup>389</sup> See International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (op. cit.), p. 576.

<sup>390</sup> United Nations, *Materials on Succession of States* (op. cit.), pp. 219-220. See also an Exchange of Notes between United States of America and the Somali Republic in 1961 (*ibid.*, pp. 216 and 217).

<sup>391</sup> 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 on the Fifty-second Conference, Helsinki, 1966* (op. cit.), p. 564.

<sup>392</sup> International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (op. cit.), p. 577.

"territorial" or "localized" character. But these categories of treaties raise special issues which have been examined separately in the commentary to articles 11 and 12 above.

(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 newly independent 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 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 9 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 8<sup>393</sup> 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 newly independent State.

(9) Further State practice to the same effect is contained in *Materials on Succession of States*.<sup>394</sup> 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."<sup>395</sup> 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.<sup>396</sup> 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.<sup>397</sup> But such language generally occurs in cases where the other party was evidently in agreement with the newly independent 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 newly independent State. Moreover, in the particular case mentioned the newly independent 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."<sup>398</sup> 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*.<sup>399</sup> Numerous examples can also be seen in the first of the Secretariat studies on "Succession in respect of bilateral treaties,"<sup>400</sup> which is devoted to extradition treaties.

(10) Continuity of bilateral treaties, as is emphasized in the Secretariat studies,<sup>401</sup> 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.<sup>402</sup>

(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

<sup>393</sup> *Ibid.*, p. 230.

<sup>394</sup> *Ibid.*, pp. 211-224.

<sup>395</sup> *Yearbook . . . 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).

<sup>396</sup> *Ibid.*, pp. 127 and 128, paras. 134 and 135. See also *Yearbook . . . 1971*, vol. II (Part Two), pp. 146-147, document A/CN.4/243, paras. 177-187, and *ibid.*, pp. 181-183, document A/CN.4/243/Add.1, paras. 169-177.

<sup>397</sup> Some instances can certainly be found where one or other interested States 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 States, 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, 140-141, document A/CN.4/243, paras. 122-123 and 138-143.)

<sup>398</sup> See above, paras. 5 and 6 of the commentary to article 8.

<sup>399</sup> United Nations, *Materials on Succession of States (op. cit.)*.

<sup>400</sup> *Ibid.*, pp. 6 and 7.

<sup>401</sup> *Ibid.*, pp. 211-213.

<sup>402</sup> *Ibid.*, pp. 229 and 230.

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 the new State specifying which bilateral agreements between the United States and the former parent State shall be considered as continuing to apply. In most cases the new State is not prepared in the first years of its independence to undertake a commitment in such specific terms. To date the United States-Ghana exchange is the only all-inclusive formal understanding of this type arrived at, although notes have 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.<sup>403</sup>

That the United Kingdom regards the continuity of bilateral treaties as a matter of consent on both sides clearly appears from its reply to an 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.*<sup>404</sup>

A recent statement of Canadian practice 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 than 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 State 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.<sup>405</sup>

<sup>403</sup> International Law Association, *The Effect . . .* (*op. cit.*), pp. 385 and 386. See also para. 16 of the commentary to article 8.

<sup>404</sup> United Nations, *Materials on Succession of States* (*op. cit.*), p. 192.

<sup>405</sup> See *The Canadian Yearbook of International Law*, vol. VII (1969) (Vancouver, B.C.), pp. 329-331.

(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 newly independent 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 newly independent 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 newly independent 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 newly independent State's territory at the date of the succession. Where there is an express agreement, as in the Exchange of Notes mentioned above,<sup>406</sup> 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,<sup>407</sup> a general presumption of continuity has sometimes been derived from the considerable measure of continuity found in modern practice and the ever-growing 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,

<sup>406</sup> See para. 9 above.

<sup>407</sup> See para. 5 above.

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 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 case. 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.<sup>408</sup>

(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 8 and 9 even where the States may appear in such instruments to express a general intention to continue their predecessors' 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 intention 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 (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.

(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. 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 newly independent 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 newly independent 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 newly independent 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 made<sup>409</sup> of the question whether the newly independent 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

<sup>408</sup> Cf., for example, the Vienna Convention, articles 12-15 (consent to be bound), 20 (acceptance of an 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).

<sup>409</sup> See para. 13 above.

this is also true of the provisional application of multi-lateral 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 24.** <sup>410</sup> *The position as between the predecessor State and the newly independent State*

**A treaty which under article 23 is considered as being in force between a newly independent State and the other State party is not by reason only of that fact to be considered as in force also in the relations between the predecessor States and the newly independent State.**

*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 the territory of a newly independent State 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 by agreement between the new sovereign of the territory and the other State party. 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,<sup>411</sup> 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.

<sup>410</sup> 1972 draft, article 20.

<sup>411</sup> See above, para. 3 of the commentary to article 23.

(3) The rule is supported by practice inasmuch as neither newly independent States 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 23 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.

(5) At its present session, the Commission again considered, in the light of the comments of Governments, whether it was necessary to retain this article. It concluded that it was advisable to do so for reasons substantially the same as those which had led it to include the article in the 1972 draft.

**Article 25.** <sup>412</sup> *Termination, suspension of operation or amendment of the treaty as between the predecessor State and the other State party*

**1. When under article 23 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 between them by reason only of the fact that it has subsequently been terminated as between the predecessor State and the other State party;**

**(b) is not suspended in operation as between them by reason only of the fact that it has subsequently been suspended in operation as between the predecessor State and the other State party;**

**(c) is not amended as between them by reason only of the fact that it has subsequently been amended as 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 as 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 to be in force, or, as the case may be, in operation as between the newly independent State and the other State party if it is established in accordance with article 23 that they so agreed.**

**3. The fact that a treaty has been amended as 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 to be in force under article 23 as between the newly independent 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 the succession of States, a bilateral treaty is terminated, suspended in operation or amended as between the predecessor State and the other State party.

<sup>412</sup> 1972 draft, article 21.

(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.

(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 newly independent 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 specifically 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, 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.<sup>413</sup> Another appears in the Secretariat study of trade agreements where mention is made of the expiry of Franco-Italian and Franco-Greek trade agreements, which were applicable to Morocco and Tunisia, some months after the attainment of independence by these countries.<sup>414</sup>

(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 newly independent State and the other State party.<sup>415</sup> The Secretariat study on air transport agreements provides an example in the India-United States of America Agreement of 1946.<sup>416</sup> 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, it gave notice of termination separately to India,<sup>417</sup> Pakistan,<sup>418</sup> and Sri Lanka [Ceylon]<sup>419</sup> Correspondingly, 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,<sup>420</sup> Norway,<sup>421</sup> France,<sup>422</sup> the Netherlands<sup>423</sup> and New Zealand.<sup>424</sup> Malaysia's termination of the 1946 United Kingdom-United States Air Transport Agreement does not appear to be any exception.<sup>425</sup> 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-Canada double taxation agreement which had been applied to the Gold Coast

<sup>413</sup> *Yearbook* . . . 1971, vol. II (Part Two), p. 128, document A/CN.4/243, para. 54.

<sup>414</sup> *Ibid.*, p. 163, document A/CN.4/243/Add.1, para. 71.

<sup>415</sup> 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 (op. cit.)*, 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]).

<sup>416</sup> *Yearbook* . . . 1971, vol. II (Part Two), p. 122, document A/CN.4/243, paras. 17-19.

<sup>417</sup> *Yearbook* . . . 1970, vol. II, p. 109, document A/CN.4/229, para. 25.

<sup>418</sup> *Ibid.*, p. 110, para. 32.

<sup>419</sup> *Ibid.*, p. 111, para. 38.

<sup>420</sup> *Yearbook* . . . 1971, vol. II (Part Two), p. 139, document A/CN.4/243, para. 131.

<sup>421</sup> *Ibid.*

<sup>422</sup> *Ibid.*, para. 135.

<sup>423</sup> *Ibid.*, p. 141, para. 146.

<sup>424</sup> *Ibid.*, para. 147.

<sup>425</sup> *Ibid.*, p. 142, para. 151; see also p. 138, para. 125.

in 1957.<sup>426</sup> 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, a 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.<sup>427</sup>

(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, 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 the predecessor 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 as between the predecessor State and the other State party 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 of air transport agreement.<sup>428</sup> 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 equality 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.<sup>429</sup> 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 kind France sometimes expressly acted on behalf of the French Community;<sup>430</sup> more usually those of the new ex-French African States which 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.<sup>431</sup> 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, though this is perhaps more properly to be

<sup>426</sup> International Law Association, *Report on the Fifty-third Conference, Buenos Aires, 1968* (op. cit.), 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].

<sup>427</sup> See para. 13 below.

<sup>428</sup> *Yearbook . . . 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.

<sup>429</sup> *Ibid.*, pp. 164-165, document A/CN.4/243/Add.1, paras. 73-80.

<sup>430</sup> In many of these cases the object of the amending instrument was essentially to prolong the existing trade agreement.

<sup>431</sup> *Yearbook . . . 1971*, vol. II (Part II), pp. 169-171, document A/CN.4/243/Add.1, paras. 95-104.

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 would accede to the 1931 Treaty or negotiate another treaty on their own.<sup>432</sup>

(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 subsequently been amended in the relations between the predecessor State and the other 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 23 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 in force or, as the case may be, in operation between the newly independent State and the other State party if it is established in accordance with article 23 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 23 in the relations between the newly independent State and the other State party, unless it is established that they intended the treaty as amended to apply between them.

(15) In the light of the comments of Governments, the Commission at its present session reconsidered the need for this article and considered whether the drafting of the article, in particular of paragraph 1, could be simplified. The Commission concluded that, although the rules formulated might be regarded as self-evident, it was advisable to include the article in the interests of clarity and certainty. It also concluded, for similar reasons, that it would be better to maintain the article in the form of the 1972 draft, than to try to deal with the different cases in a single provision.

#### SECTION 4. PROVISIONAL APPLICATION

##### *Article 26.*<sup>433</sup> *Multilateral treaties*

1. If, at the date of the succession of States, a multilateral treaty was in force in respect of the territory to which the succession of States relates and the newly independent State gives notice of its intention that the treaty should be applied provisionally in respect of its territory, that treaty shall apply provisionally between the newly independent State and any party which expressly so agrees or by reason of its conduct is to be considered as having so agreed.

2. Nevertheless, in the case of a treaty which falls within the category mentioned in article 16, paragraph 3, the consent of all the parties to such provisional application is required.

3. If, at the date of the succession of States, a multilateral treaty not yet in force was being applied provisionally in respect of the territory to which the succession of States relates and the newly independent States gives notice of its intention that the treaty should continue to be applied provisionally in respect of its territory, that treaty shall apply provisionally between the newly independent State and any contracting State which expressly so agrees or by reason of its conduct is to be considered as having so agreed.

<sup>432</sup> *Yearbook . . . 1970*, vol. II, pp. 107-108, document A/CN.4/229, para. 13.

<sup>433</sup> 1972 draft, article 22.

4. Nevertheless, in the case of a treaty which falls within the category mentioned in article 16, paragraph 3, the consent of all the contracting States to such continued provisional application is required.

5. Paragraphs 1 to 4 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

#### Commentary

(1) The Commission, as mentioned already,<sup>484</sup> 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 27 cover respectively multilateral and bilateral treaties, and article 28 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 9, 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 16 and 17 to establish its status as a party or contracting State by its own act alone.

(4) Where the multilateral treaty is one of a restricted character which falls under article 16, paragraph 3, or article 17, paragraph 4, 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 in-

dependent 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) Article 26 as drafted in 1972 was limited to multilateral treaties *in force* at the date of a succession of States in respect of the territory in question. During the reconsideration of the article at the present session, it was observed that in some cases, as for example in that of the GATT, the treaty although technically not in force may be applied provisionally in respect of the territory to which the succession of States relates. This position may continue for a long time after the succession of States. During that time the newly independent State may establish its status as a contracting State in accordance with article 17 but meanwhile may wish to apply the treaty provisionally on a reciprocal basis with States which are already contracting States. Accordingly, it was thought advisable to provide for this possibility by the addition of paragraph 3. This made necessary the addition of paragraph 4 to deal with the case of restricted multilateral treaties. It was, however, observed during the discussion that the provisional application of a multilateral treaty as between one of the parties or one of the contracting States and a newly independent State, even though this was on a *bilateral* basis, might be incompatible with the object and purpose of the treaty or radically change the conditions for its operation. Accordingly, in order to provide against this risk, the Commission decided to add paragraph 5.

(6) The question was also raised whether it was necessary to make any provision with respect to reservations, acceptance or objections, but on balance and without reaching a firm conclusion, the Commission considered that this was not essential because in each case the multilateral treaty would be applied provisionally on the basis of bilateral arrangements and it would be possible to deal with any questions concerning reservations in any such arrangements.

(7) Accordingly, *paragraph 1* of the present article states that if, at the date of the succession of States, a multilateral treaty was *in force* in respect of the territory to which the succession of States relates and the newly independent State gives notice of its intention that the treaty should be applied provisionally in respect of its territory, that treaty shall be so applied between that State and any *party* which *expressly* so agrees or *by reason of its conduct* is to be considered as having so agreed. *Paragraph 2* states that nevertheless, in the case of a restricted multilateral treaty the consent of *all* the parties to such provisional application is required.

(8) In addition, *paragraph 3* or article 26 provides that if, at the date of the succession of States, a multilateral treaty *not in force* was being applied provisionally in respect of the territory to which the succession of States relates and the newly independent State gives notice of its intention that the treaty should continue to be applied provisionally in respect of its territory, that treaty shall be so applied between that State and any *contracting State* which *expressly* so agrees or *by reason of its conduct*

<sup>484</sup> See above, para. 19 of the commentary to article 9.

is to be considered as having so agreed. *Paragraph 4* states that nevertheless, in the case of a restricted multilateral treaty, the consent of *all* the contracting States to such continued provisional application is required.

(9) Finally, *paragraph 5* states that paragraphs 1 to 4 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

#### *Article 27.*<sup>435</sup> *Bilateral treaties*

**A bilateral treaty which at the date of a succession of States was in force or was being provisionally applied in respect of the territory to which the succession of States relates is considered as applying provisionally between the newly independent State and the other State concerned when:**

(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 23 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 9. 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 implicitly the offer of the newly independent State, it is necessarily an agreement for the *provisional application* of the treaty which arises.<sup>436</sup>

(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 in-

attention 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) The Commission, at the present session, decided to cover in the articles of the draft devoted to provisional application not only the case of the provisional application between the newly independent State and the other States or State party to treaties in force at the date of the succession of States in respect of the territory to which the succession of States relates, but also the case of the provisional application between the newly independent State and the other contracting States or State to treaties not yet in force which were applied provisionally in respect of that territory at the date of the succession of States. The reasons to cover the latter case have been explained in the commentary to article 26 relating to the provisional application of multilateral treaties, paragraphs 3 and 4 of which deal with multilateral treaties not yet in force but provisionally applied in respect of the territory to which the succession of States relates at the date of such a succession. So far as bilateral treaties are concerned the point is covered in the present article by the words "or was being provisionally applied" added by the Commission to the 1972 text. As a consequential change, the words "and the other State party" have been replaced by the words "and the other State concerned".

(4) Article 27 accordingly provides that a bilateral treaty which at the date of a succession of States was in force or was being provisionally applied in respect of the territory to which the succession of States relates is considered as applying provisionally between the newly independent State and the other State concerned 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 28.*<sup>437</sup> *Termination of provisional application*

**1. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a multilateral treaty under article 26 may be terminated:**

(a) by reasonable notice of termination given by the newly independent State or the party or contracting State provisionally applying the treaty and the expiration of the notice; or

(b) in the case of a treaty which falls within the category mentioned in article 16, paragraph 3, by reasonable notice of termination given by the newly independent

<sup>435</sup> 1972 draft, article 23.

<sup>436</sup> See, for example, the three Secretariat studies on succession in respect of bilateral treaties: *Yearbook . . . 1970*, vol. II, p. 102, document A/CN.4/229; and *Yearbook . . . 1971*, vol. II (Part Two), pp. 111 and 149, documents A/CN.4/243 and A/CN.4/243/Add.1.

<sup>437</sup> 1972 draft, article 24.

State or the parties or, as the case may be, the contracting States, and the expiration of the notice.

2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a bilateral treaty under article 27 may be terminated by reasonable notice of termination given by the newly independent State or the other State concerned and the expiration of the notice.

3. Unless the treaty provides for a shorter period for its termination or it is otherwise agreed, reasonable notice of termination shall be twelve months' notice from the date on which it is received by the other State or States provisionally applying the treaty.

4. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a multilateral treaty under article 26 shall be terminated if the newly independent State gives notice of its intention not to become a party to the treaty.

#### Commentary

(1) Article 28 sets out the grounds for the termination of the provisional application of treaties under article 26 or 27. For the reasons stated in the introduction to this chapter of the report,<sup>488</sup> it deals only with the grounds which fall within the law of succession of States and does not refer to those which come under the general law of treaties such as the mutual agreement of the States applying the treaty provisionally or the conclusion by those States of a new treaty relating to the same subject-matter and incompatible with the application of the earlier treaty. With this limitation of the scope of the article in mind, the Commission, at the present session, deleted, in paragraphs 1 and 2 of the corresponding article of the 1972 draft, the references to the termination of provisional application by mutual agreement and reworded the introductory part of each of those paragraphs in order to emphasize that they do not attempt to give an exhaustive list of grounds for the termination of provisional application.

(2) *Paragraph 1* deals with the termination of the provisional application of multilateral treaties. Subject to the reservation in the opening clause "Unless the treaty otherwise provides or it is otherwise agreed", the paragraph states that the provisional application of a multilateral treaty may be terminated by the giving of reasonable notice and the expiration of the notice. When it is a question of termination by the giving of notice, one of the main points is to identify the State or States which may give notice.

(3) As regards the termination of the provisional application of multilateral treaties in general, *sub-paragraph (a)* of paragraph 1 provides that reasonable notice of such termination may be given by the newly independent State "or the party or contracting State provisionally applying the treaty". The reference in that clause to the giving of notice by a party corresponds to the case—envisaged in paragraph 1 of article 26—where the treaty was in force at the date of the succession of States in respect of the territory to which the succession relates. The reference to the giving of notice by a con-

tracting State corresponds to the case—envisaged in paragraph 3 of that article—where the treaty was not yet in force at the date of the succession of States but was being applied provisionally in respect of the territory in question. As regards the termination of the provisional application of restricted multilateral treaties, that is treaties falling within the category mentioned in paragraph 3 of article 16, *sub-paragraph (b)* of paragraph 1 of article 28 provides that reasonable notice of such termination may be given by the newly independent State "or the parties or, as the case may be, the contracting States". The question arises whether in such a case the notice must be given by *all* the parties or contracting States. The Commission considered that in principle the termination of provisional application of a restricted multilateral treaty vis-à-vis a successor State was a matter that concerned all the parties, or contracting States, but thought it was not necessary to specify that the notice should be given by all of them.

(4) *Paragraph 2* of article 28 deals with the termination of the provisional application of bilateral treaties. Subject to the same reservation as in paragraph 1, it provides that the provisional application of a bilateral treaty may be terminated by reasonable notice given by the newly independent State "or the other State concerned and the expiration of the notice". The expression "other State concerned" covers both cases envisaged in article 27, that is the case where the bilateral treaty was in force at the date of the succession of States in respect of the territory to which the succession of States relates and the case where it was being provisionally applied in respect of that territory.

(5) The requirement of reasonable notice in paragraphs 1 and 2 is for the protection of both the newly independent State and other States concerned since the abrupt termination of provisional application might create administrative and other difficulties. The Commission noted that article 56 of the Vienna Convention, 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. Accordingly, *Paragraph 3* of article 28 states that, unless the treaty provides for a shorter period for its termination or it is otherwise agreed, reasonable notice of termination of provisional application shall be twelve months' notice from the date on which it is received by the other State or States provisionally applying the treaty.

(6) At the present session, the Commission added a further provision to article 28 which appears in *paragraph 4*. That paragraph states that, unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a multilateral treaty under article 26 shall be terminated if the newly independent

<sup>488</sup> See above, para. 55.

State gives notice of its intention not to become a party to the treaty. The Commission considered that it would be incongruous in such a case to continue the provisional application of the treaty. On the other hand, since the article is not intended to cover exhaustively all the ways in which provisional application might be terminated, the Commission did not consider it necessary to provide for the case where a newly independent State establishes its status as a party to a treaty by making a notification of succession. In this case, provisional application would obviously cease.

#### SECTION 5. NEWLY INDEPENDENT STATES FORMED FROM TWO OR MORE TERRITORIES

##### *Article 29. 439 Newly independent States formed from two or more territories*

1. Articles 15 to 28 apply in the case of a newly independent State formed from two or more territories.

2. When a newly independent State formed from two or more territories is considered as or becomes a party to a treaty by virtue of articles 16, 17 or 23 and at the date of the succession of States the treaty was in force, or consent to be bound had been given, in respect of one or more, but not all, of those territories, the treaty shall apply 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 in respect of the entire territory would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty;

(b) in the case of a multilateral treaty not falling under article 16, paragraph 3, or under article 17, paragraph 4, the notification of succession is restricted to the territory in respect of which the treaty was in force at the date of the succession of States, or in respect of which consent to be bound by the treaty had been given prior to that date;

(c) in the case of a multilateral treaty falling under article 16, paragraph 3, or under article 17, paragraph 4, the newly independent State and the other States parties or, as the case may be, the other contracting States otherwise agree; or

(d) in the case of a bilateral treaty, the newly independent State and the other State concerned otherwise agree.

3. When a newly independent State formed from two or more territories becomes a party to a multilateral treaty under article 18 and by the signature or signatures of the predecessor State or States it had been intended that the treaty should extend to one or more, but not all, of those territories, the treaty shall apply in respect of the entire territory of the newly independent State unless:

(a) it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty;

(b) in the case of a multilateral treaty not falling under article 18, paragraph 4, the ratification, acceptance or approval of the treaty is restricted to the territory or territories to which it was intended that the treaty should extend; or

(c) in the case of a multilateral treaty falling under article 18, paragraph 4, the newly independent State and the other States parties or, as the case may be, the other contracting States otherwise agree.

#### *Commentary*

(1) Article 29 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*. This case is to be differentiated from the uniting of two or more States in one State dealt with in article 30 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 territories.<sup>440</sup> 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 or a contracting State 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 newly independent 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.<sup>441</sup> The treaty situation on the eve of independence has been broadly estimated as follows:<sup>442</sup> of the 78 multilateral treaties affecting parts of Nigeria before independence, 37 applied to all territories, 31 to

<sup>440</sup> 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 (op. cit.)*, 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)).

<sup>441</sup> Although there was a consolidation of some of these 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.

<sup>442</sup> 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.

<sup>439</sup> 1972 draft, article 25.

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<sup>443</sup> nor in its notifications or acknowledgements does Nigeria seem to have distinguished between treaties previously applicable in respect on 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 to Nigeria as a whole and not merely within the respective regions in regard to which they had been applicable before independence. Both depositaries<sup>444</sup> and other contracting parties appear to have acquiesced in this point of view, for they also refer simply to Nigeria.<sup>445</sup>

(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<sup>446</sup> 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<sup>447</sup> 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.<sup>448</sup> In the case of bilateral treaties the practice available

<sup>443</sup> For the text, see *Yearbook . . . 1962*, vol. II, p. 127, document A/CN.4/150, annex, No. 10.

<sup>444</sup> E.g. the Secretary-General's letter of enquiry of 28 February 1961 (*ibid.*, p. 117, para. 96).

<sup>445</sup> See, for example, United States, Department of State, *Treaties in Force . . . 1972 (op. cit.)*, pp. 179-180.

<sup>446</sup> See United Nations, *Materials on Succession of States (op. cit.)*, p. 76.

<sup>447</sup> *Ibid.*, pp. 87-88.

<sup>448</sup> See the Secretary-General's letter of enquiry of 9 December 1957 in *Yearbook . . . 1962*, vol. II, p. 112, document A/CN.4/150, para. 44; and United Nations, *Multilateral Treaties . . . 1972 (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.

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 concerned 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.<sup>449</sup>

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

<sup>449</sup> The United Nations, *Juridical Yearbook, 1963* (United Nations publication, Sales No. 65.V.3), p. 163.

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.<sup>450</sup>

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.<sup>451</sup> 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*<sup>452</sup> 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 if Malaya and the treaties as automatically applicable in respect of Malaysia as a whole.<sup>453</sup> 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.<sup>454</sup>

(7) The circumstances of the Federation of Rhodesia and Nyasaland in 1953, 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 of States" 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 Trust 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*.<sup>455</sup> 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 Gold Coast and Ashanti alone and only five to all four parts of Ghana.

(9) After independence Ghana notified its 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 its territory. There is no indication in the Secretary-General's practice that Ghana's notifications of successions 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*.<sup>456</sup> In other words, the presumption seems to have been made that Ghana's acceptance of succession was intended to apply to the whole of its 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.<sup>457</sup> 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

<sup>450</sup> *Ibid.*, p. 178.

<sup>451</sup> See above, para. 5 of the commentary to article 14.

<sup>452</sup> United Nations, *Multilateral Treaties . . . 1972* (*op. cit.*).

<sup>453</sup> See *Yearbook . . . 1969*, vol. II, pp. 38 and 41, document A/CN.4/210, paras. 53 and 63, and *Yearbook . . . 1970*, vol. II, pp. 90-91, document A/CN.4/225, paras. 114-115.

<sup>454</sup> *Yearbook . . . 1968*, vol. II, p. 84, document A/CN.4/200 and Add.1-2, para. 371.

<sup>455</sup> United Nations, *Multilateral Treaties . . . 1972* (*op. cit.*).

<sup>456</sup> United Nations, *Materials on Succession of States* (*op. cit.*).

<sup>457</sup> See *Yearbook . . . 1962*, vol. II, p. 119, document A/CN.4/150, para. 106.

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 it recognized as continuing in force but only in respect of the part of its territory to which they had been applicable. It appears that Somalia adopts the same attitude in regard to extradition treaties; and that it 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 its 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 it has not recognized its succession to any of the multilateral treaties of which the Secretary-General is the depositary.<sup>458</sup> As to these 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 itself as bound by them, it would be considered as having become a party to them in its 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.\*<sup>459</sup>

This passage seems to deny to Somalia the possibility of notifying its 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 succession was signed or in force, or consent to be bound had been given, in respect of one or more, but not all, of the territories which formed the newly independent State when that State takes the appropriate steps for the purpose of participation in the treaty.

(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 to which it was previously made applicable or extended 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 present article, like the corresponding article of the 1972 text, is formulated on the basis of such a rule. At the second reading, however, the Commission considered it necessary, for reasons both of precision and consistency with other provisions of part III of the present draft articles, to supplement and redraft the text of the article adopted in 1972.

(15) As adopted at the present session, *paragraph 1* of the article provides that articles 15 to 28 apply in the case of a newly independent State formed from two or more territories. The purpose of this provision is to remove any possible doubt there might otherwise be that a newly independent State formed from two or more territories is subject to the same basis rules as any other newly independent State with regard to the participation in multilateral or bilateral treaties, or their provisional application, on the basis of the present draft articles.

(16) *Paragraph 2* states, in its introductory sentence, that when a newly independent State formed from two or more territories is considered as or becomes a party to a treaty by virtue of article 16, 17 or 23 and at the date of the succession of States the treaty was in force, or consent to be bound had been given, in respect of one or more, but not all, of those territories, the treaty shall apply in respect of the entire territory of that State. At the same time, sub-paragraphs (a) to (d) except from the “entire territory” presumption four cases. The first exception relates to a case in which it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory would be incompatible with its object and purpose or would radically 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, or in respect of which consent to be bound had been given, prior to the date of the succession of States (*sub-paragraph (b)*). Finally, for restricted multilateral treaties and bilateral treaties the “entire territory” presumption may be negated by agreement between the newly independent State and the other States or State concerned (*sub-paragraphs (c) and (d)*). Some drafting changes notwithstanding, these four exceptions to the “entire territory” presumption are similar to the ones included in the 1972 text. More substantive in character are the changes made in the introductory sentence of the paragraph, particularly the

<sup>458</sup> *Ibid.*

<sup>459</sup> *Ibid.*, p. 118, para. 103.

use of the words "is considered as or becomes a party to a treaty by virtue of article 16, 17 or 23" and the reference not only to treaties in force at the date of the succession of States, as in the 1972 text, but also to treaties in respect of which "consent to be bound had been given" at that date by the predecessor State.

(17) *Paragraph 3* has been added in order to extend the "entire territory" presumption to the case of ratification, acceptance or approval by the newly independent State of a treaty signed by the predecessor State, as provided for in article 18 of the present draft. Accordingly, the introductory sentence of this paragraph states that when a newly independent State formed from two or more territories becomes a party to a multilateral treaty under article 18 and by the signature or signatures of the predecessor State or States it had been intended that the treaty should extend to one or more, but not all, of those territories, the treaty shall apply in respect of the entire territory of the newly independent State. The three exceptions to the presumption set forth in *sub-paragraphs* (a), (b) and (c) parallel the exceptions of the corresponding sub-paragraphs of paragraph 2 referred to above. The exception contained in sub-paragraph (d) of paragraph 2 is not relevant in the present context, article 18 of the present draft dealing exclusively with multilateral treaties.

#### PART IV

### UNITING AND SEPARATION OF STATES

*Article 30.*<sup>460</sup> *Effects of a uniting of States in respect of treaties in force at the date of the succession of States*

1. When two or more States unite and so form one successor State, any treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the successor State unless:

(a) the successor State and the other State party or States parties otherwise agree; or

(b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

2. Any treaty continuing in force in conformity with paragraph 1 shall apply only in respect of the part of the territory of the successor State in respect of which the treaty was in force at the date of the succession of States unless:

(a) in the case of a multilateral treaty other than one falling within the category mentioned in article 16, paragraph 3, the successor State makes a notification that the treaty shall apply in respect of its entire territory;

(b) in the case of a multilateral treaty falling within the category mentioned in article 16, 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. Paragraph 2 (a) does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

*Article 31.*<sup>461</sup> *Effects of a uniting of States in respect of treaties not in force at the date of the succession of States*

1. Subject to paragraphs 3 and 4, a successor State falling within article 30 may, by making a notification, establish its status as a contracting State to a multilateral treaty which is not in force if, at the date of the succession of States, any of the predecessor States was a contracting State to the treaty.

2. Subject to paragraphs 3 and 4, a successor State falling within article 30 may, by making a notification, establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States if at that date any of the predecessor States was a contracting State to the treaty.

3. Paragraphs 1 and 2 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

4. If the treaty is one falling within the category mentioned in article 16, paragraph 3, the successor State may establish its status as a party or as a contracting State to the treaty only with the consent of all the parties or of all the contracting States.

5. Any treaty to which the successor State becomes a contracting State or a party in conformity with paragraph 1 or 2 shall apply only in respect of the part of the territory of the successor State in respect of which consent to be bound by the treaty had been given prior to the date of the succession of States unless:

(a) in the case of a multilateral treaty not falling within the category mentioned in article 16, paragraph 3, the successor State indicates in its notification made under paragraph 1 or 2 that the treaty shall apply in respect of its entire territory; or

(b) in the case of a multilateral treaty falling within the category mentioned in article 16, paragraph 3, the successor State and all the parties or, as the case may be, all the contracting States otherwise agree.

6. Paragraph 5 (a) does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

<sup>460</sup> 1972 draft, article 26.

<sup>461</sup> New article.

*Article 32.*<sup>462</sup> *Effects of a uniting of States in respect of treaties signed by a predecessor State subject to ratification, acceptance or approval*

1. Subject to paragraphs 2 and 3, if before the date of the succession of States one of the predecessor States had signed a multilateral treaty subject to ratification, acceptance or approval, a successor State falling within article 30 may ratify, accept or approve the treaty as if it had signed that treaty and may thereby become a party or a contracting State to it.

2. Paragraph 1 does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

3. If the treaty is one falling within the category mentioned in article 16, paragraph 3, the successor State may become a party or a contracting State to the treaty only with the consent of all the parties or of all the contracting States.

4. Any treaty to which the successor State becomes a party or a contracting State in conformity with paragraph 1 shall apply only in respect of the part of the territory of the successor State in respect of which the treaty was signed by one of the predecessor States unless:

(a) in the case of a multilateral treaty not falling within the category mentioned in article 16, paragraph 3, the successor State when ratifying, accepting or approving the treaty gives notice that the treaty shall apply in respect of its entire territory; or

(b) in the case of a multilateral treaty falling within the category mentioned in article 16, paragraph 3, the successor State and all the parties or, as the case may be, all the contracting States otherwise agree.

5. Paragraph 4 (a) does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

*Commentary*

(1) These articles deal 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. They cover the case where one State merges with another State even if the international personality of the latter continues after they have united. The case of the emergence of a newly independent State from the combining of two or more territories, not already States at the date of the succession, has been dealt with separately in part III, article 29. 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 14.

(2) The succession of States envisaged in the present articles does not take into account 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 these articles.

(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 articles; 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 Rome<sup>463</sup> 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). In other words, pre-Community treaties are dealt with in the Rome Treaty in the context of the compatibility of treaty obligations and not of the succession of States. The same is true of the instruments which established the other two European Communities.<sup>464</sup> Furthermore, the Treaty of Accession of 22 January 1972<sup>465</sup> 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.

(5) Numerous other economic unions have been created in various forms and with varying degrees of

<sup>463</sup> Treaty instituting the European Economic Community. See United Nations, *Treaty Series*, vol. 294, p. 17 (text in French).

<sup>464</sup> 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).

<sup>465</sup> 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, 15th year, No. L73, pp. 14-15.

<sup>462</sup> New article.

"community" machinery; e.g. EFTA, LAFTA and other free-trade areas and the Benelux. In general, the constitutions of these economic unions leave in no doubt their essential character as intergovernmental organizations. In these cases of the Belgium-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. 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 only 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 overriding 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".<sup>466</sup> 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".<sup>467</sup>

(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 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 effect it was treated as 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 itself from its 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

<sup>466</sup> C. Hilty, *Les constitutions fédérales de la Confédération suisse* (Neuchâtel, Attinger, 1891), p. 439.

<sup>467</sup> "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 paramericanos* (Managua, Tipografía y Encuadernación Nacional, 1922), pp. 212-213.

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 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. 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 separation of parts of unions that these precedents are cited.<sup>468</sup> 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 Constitution<sup>469</sup> 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 United Arab Republic 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 United Arab Republic.

(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 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.<sup>470</sup>

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.<sup>471</sup> As to the treatment accorded to the United Arab Republic in regard to membership of the United Nations,<sup>472</sup> 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 [the Foreign Minister's Note informing the Secretary-General of the formation of the United Republic] of 1 March 1958.<sup>473</sup>

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";<sup>474</sup> 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. In the case of ITU 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

<sup>468</sup> The union of Austria and Hungary in the Dual Monarchy is another case sometimes cited, but only in regard to the effect of a separation of parts of a union on treaties.

<sup>469</sup> For the text of the Provisional Constitution of the United Arab Republic, see *The International and Comparative Law Quarterly* (London), vol. 8 (1959), pp. 374-380.

<sup>470</sup> *Yearbook . . . 1962*, vol. II, p. 113, document A/CN.4/150, para. 48.

<sup>471</sup> *Ibid.*

<sup>472</sup> *Ibid.*, p. 104, document A/CN.4/149 and Add.1, paras. 17-21.

<sup>473</sup> *Ibid.*, para. 19.

<sup>474</sup> *Ibid.*, para. 20.

those previously contained in the ratifications of those two States.<sup>475</sup>

(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.<sup>476</sup> 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.<sup>477</sup> 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, 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) Although both Tanganyika and Zanzibar were independent States in 1964 when they united in the United 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 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 United Republic of Tanzania. Tanganyika, on beginning life as a new State, had made the Nyerere declaration by which, in effect, it gave notice that pre-independence treaties would be considered by it as continuing in force only on a provisional basis during an interim period, pending a decision as to their con-

tinuance, termination or renegotiation.<sup>478</sup> It 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, it clearly considered itself 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 its territory had terminated or were in force only provisionally. Except for possible "localized treaties", it was bound only by such treaties as it had taken steps to continue in force. As to Zanzibar, there seems to be little doubt that, leaving aside the question of localized treaties, it was not bound to consider any pre-independence treaties as in force at the moment when it joined with Tanganyika in forming the United 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).<sup>479</sup> 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 with the regional limits prescribed on their conclusion and in accordance with the principles of international law.<sup>480</sup>

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 United Arab Republic, and 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 united State 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.

(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*.

<sup>475</sup> *Yearbook . . . 1970*, vol. II, p. 89, document A/CN.4/225, para. 108.

<sup>476</sup> *Ibid.*, pp. 129-130 and 127, document A/CN.4/229, paras. 147 and 130-131. See also *Yearbook . . . 1971*, vol. II (Part Two), pp. 142-146 and 148, document A/CN.4/243, paras. 152-175 and 190, and pp. 179-181 and 183-184, document A/CN.4/243/Add.1, paras. 149-166 and 181.

<sup>477</sup> 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 (op. cit.)*, paras. 26-28.

<sup>478</sup> See above, para. 2 of the commentary to article 9.

<sup>479</sup> United Nations, *Multilateral Treaties . . . 1972 (op. cit.)*, p. 7, foot-note 8.

<sup>480</sup> *Ibid.*

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.<sup>481</sup> 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.<sup>482</sup> 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 its 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.<sup>483</sup> 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.<sup>484</sup> 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.<sup>485</sup> The situation at the moment of union differed in the case of GATT, in that Zanzibar, although it 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<sup>1</sup> of its 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.<sup>486</sup> 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.<sup>487</sup> In ITU, the effect of the creation of the united State seems to have been determined on similar lines.<sup>488</sup>

(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 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 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.

<sup>481</sup> 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 the White Slave Traffic as amended by Protocols signed at New York in 1949; the Conventions for the Suppression of the Circulation of, and Traffic in, Obscene Publications; the Agreement of 1963 establishing the African Development Bank, etc. (See United Nations, *Multilateral Treaties . . . 1972* (op. cit.), pp. 33, 38, 47, 55, 56, 169, 173, 180, 182, 212.)

<sup>482</sup> *Ibid.*, pp. 7 and 189.

<sup>483</sup> *Yearbook . . . 1968*, vol. II, p. 41, document A/CN.4/200 and Add.1-2, para 171.

<sup>484</sup> See United States, Department of State, *Treaties in Force . . . 1972* (op. cit.), p. 364, foot-note 3.

<sup>485</sup> *Yearbook . . . 1968*, vol. II, p. 59, document A/CN.4/200 and Add.1-2, para. 258 and foot-note 466.

<sup>486</sup> *Ibid.*, pp. 84 and 86, paras. 373 and 382.

<sup>487</sup> *Yearbook . . . 1969*, vol. II, pp. 38 and 42, document A/CN.4/210, paras. 52 and 70.

<sup>488</sup> *Yearbook . . . 1970*, vol. II, p. 90, document A/CN.4/225, paras. 111-112.

(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 into 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 its declaration of 6 May 1964 Tanzania qualified its 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 30 as the corresponding article of the 1972 draft, 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 agreement of the States concerned, the compatibility of the treaties in force prior to the uniting of the States with the situation resulting from it, the effects of the change on the operation of the treaty and the territorial scope which those treaties had under their provisions. The Commission introduced,

for the sake of clarity and precision, a certain number of drafting changes in the corresponding 1972 text, but the rules embodied in the article, as adopted at the present session, are in substance the same as in 1972. However, there is one clarification which involves an important point of substance. Article 14 and the present article have been drafted so as to make it clear that, where one State is incorporated into another State and thereupon ceases to exist, the case falls not within article 14 but within the present article. The Commission considered that this was more in accord with the principles of modern international law and that, where a State voluntarily united with an existing State which continued to possess its international personality, it was better to provide for the *de jure* continuity of treaties than to apply the moving treaty-frontier rule.

(29) On reconsideration, the Commission decided to delete former paragraph 3 which provided that the rules set forth in paragraph 1 and 2 of the article "apply also when a *successor State* \* itself unites with another State". The Commission observed that such a case actually referred to two distinct and not simultaneous successions of States, each of which should be treated separately in accordance with the rules of the present draft articles relating to the uniting of States.

(30) *Paragraph 1* or *article 30* states, therefore, that when two or more States unite and so form one successor State, any treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the successor State except as provided for in sub-paragraphs (a) and (b). *Paragraph 1* (a) merely sets aside the *ipso jure* continuity rule when the successor State and the other State party or States parties so agree. *Paragraph 1* (b) then, excepts from the *ipso jure* continuity rule cases where it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

(31) *Paragraph 2* of article 30 takes care of the territorial scope element by providing that any treaty continuing in force in conformity with paragraph 1 shall apply only in respect of the part of the territory of the successor State in respect of which the treaty was in force at the date of the succession of States. This general rule limiting the territorial scope of the treaties to the parts of the territory in respect of which they were applicable at the date of the succession of States admits, however, the three exceptions enumerated in sub-paragraphs (a), (b) and (c) of paragraph 2. The exception in sub-paragraph (a) entitles the successor State unilaterally to make a notification that the treaty shall apply in respect of its entire territory. This appeared to the Commission to be justifiable on the basis of actual practice and as favouring the effectiveness of multilateral treaties. *Sub-paragraphs* (b) and (c) relating to restricted multilateral treaties and bilateral treaties provide that such treaties may also be extended to the entire territory of the successor State when the other States parties or State party so agree. *Paragraph 3* excepts from the right of the successor State to make a notification under paragraph 2 (a) extending the application of the treaty to its entire territory

cases where such application would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

(32) Since article 30, like the corresponding 1972 article, relates only to treaties in force at the date of the succession of States, the Commission decided to amend the title to read: "Effects of a uniting of States in respect of treaties in force at the date of the succession of States". At the same time, the Commission observed that because of this limitation of the scope of article 30, there was no provision in the draft articles which would enable a successor State formed by a uniting of States to become a party, or a contracting State, to a treaty which was not in force at the date of the succession through procedures similar to those established by articles 17 and 18 for newly independent States. Having reached the conclusion that there was no valid reason for such a difference in treatment between those two categories of successor States—the newly independent and those formed by a uniting of States—the Commission decided to add to the draft two new articles, *articles 31* and *32*, entitled "Effects of a uniting of States in respect of treaties not in force at the date of the succession of States" and "Effects of a uniting of States in respect of treaties signed by a predecessor State subject to ratification, acceptance or approval" respectively.

(33) *Article 31, paragraphs 1 to 4*, is based on paragraphs 1 to 4 of article 17. Under conditions similar to those applying to newly independent States, it enables a successor State formed by a uniting of States to establish, by making a notification, its status as a party or a contracting State to a multilateral treaty which was not in force at the date of the succession of States. The introductory part and *sub-paragraphs* (a) and (b) of *paragraph 5* of article 31 relating to the territorial scope element reflect the provisions of the introductory part and *sub-paragraphs* (a) and (b) of *paragraph 2* of article 30. *Paragraph 6* of article 31 also reflects the provisions of article 30 concerning incompatibility with the object and purpose of the treaty and radical change in the conditions for the operation of the treaty.

(34) *Article 32, paragraphs 1 to 3*, is based on paragraphs 1, 3 and 4 of article 18. Paragraph 1 of article 32 does not, however, contain the proviso in paragraph 1 of article 18 that by its signature the predecessor State intended that the treaty should extend to the territory to which the succession of States relates, because such a proviso has clearly no relevance to a uniting of States. Paragraph 2 of article 18, which relates exclusively to that proviso, has consequently been omitted from article 32. Provisions in *paragraphs 4 and 5* of article 32 are similar to those in paragraphs 5 and 6 of article 31.

(35) Lastly, the Commission considered that the rules governing a uniting of States should be the same whether the uniting was established by treaty or by other instruments. 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 articles are intended

therefore to apply equally to cases of a uniting of States established by treaty. They take precedence over the rules of the general law of treaties embodied in article 30 of the Vienna Convention (application of successive treaties relating to the same subject-matter) to the extent that those rules might otherwise be applicable.

**Article 33.** <sup>489</sup> *Succession of States in cases of separation of parts of a State*

1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

(a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;

(b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.

2. Paragraph 1 does not apply if:

(a) the States concerned otherwise agree; or

(b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

3. Notwithstanding paragraph 1, if a part of the territory of a State separates from it and becomes a State in circumstances which are essentially of the same character as those existing in the case of the formation of a newly independent State, the successor State shall be regarded for the purposes of the present articles in all respects as a newly independent State.

**Article 34.** <sup>490</sup> *Position if a State continues after separation of part of its territory*

When, after separation of any part of the territory of a State, the predecessor State continues to exist, any treaty which at the date of the succession of States was in force in respect of the predecessor State continues in force in respect of its remaining territory unless:

(a) it is otherwise agreed;

(b) it is established that the treaty related only to the territory which has separated from the predecessor State; or

(c) it appears from the treaty or is otherwise established that the application of the treaty in respect of the predecessor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

<sup>489</sup> 1972 draft, articles 27 and 28.

<sup>490</sup> 1972 draft, article 28.

*Commentary*

(1) These articles deal with questions of succession in respect of treaties in cases where a part or parts of the territory of a State separate to form one or more independent States. The situations covered by the articles presuppose a predecessor State and one or more successor States, namely, the new State or States established in part or parts of the former territory of the predecessor State. The articles regulate the effect of such a succession of States on treaties in force at the date of the succession of States in respect of the whole or part of the territory of the predecessor State from the standpoint of:

(a) the successor or successor States, whether or not the predecessor State continues to exist (article 33) and

(b) of the predecessor State, when it continues to exist (article 34).

*Separation of parts of a State when the predecessor State ceases to exist*

(2) Almost all the precedents of separation of parts of a State when the predecessor State has ceased to exist have concerned the so-called "union of States". One of the older precedents usually referred to in this connexion is the separation of parts 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 separation, 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, although 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 separation 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 their separating from the union each State addressed identical notifications to foreign Powers in which they stated their view of the effect of such separation. 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 specific-

ally 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 its separation from 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 1918 appears to have been a case of separation of parts of a union in so far as it concerns Austria and Hungary and the other territories of the Empire. The extinction 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 were regulated by the peace treaties. Austria in its relations with States outside the peace treaties appears to have adopted a more reserved attitude towards the question of its obligation to accept the continuance in force of Dual Monarchy treaties in its relations with certain countries, Austria persisted in the view that it was a new State not *ipso jure* bound by those treaties. Hungary, on the other hand, appears generally to have accepted that it 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 succession 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.*\* <sup>491</sup>

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.<sup>492</sup> 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".<sup>493</sup> 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 different 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.<sup>494</sup>

(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 separation from the union 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 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.<sup>495</sup>

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.<sup>496</sup>

As to multilateral treaties, it is understood that, after its separation from the union 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*

<sup>491</sup> *Yearbook* ... 1970, vol. II, p. 123, document A/CN.4/229, para. 115.

<sup>492</sup> *Ibid.*, para. 116.

<sup>493</sup> *Yearbook* ... 1971, vol. II (Part Two), p. 172, document A/CN.4/243/Add.1, para. 110.

<sup>494</sup> *Yearbook* ... 1968, vol. II, pp. 28 and 29, document A/CN.4/200 and Add.1-2, paras. 110-112.

<sup>495</sup> *Yearbook* ... 1970, vol. II, p. 122, document A/CN.4/229, para. 111.

<sup>496</sup> *Yearbook* ... 1971, vol. II (Part II), pp. 171-172, document A/CN.4/243/Add.1, para. 109.

*depository functions* Denmark is in a number of cases listed today as a party to a League of Nations treaty, but not Iceland.<sup>497</sup> In some cases, moreover, Denmark and Iceland are both bound by the treaty or Denmark is bound and the treaty is open to accession by Iceland.<sup>498</sup> 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 30. Some two and a half years after its formation the union ceased to exist 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".<sup>499</sup> 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 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.<sup>500</sup>

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 of separation from the union 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 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.<sup>501</sup> 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".<sup>502</sup> 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 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 its membership after the extinction 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,<sup>503</sup> the Convention for the Protection of Industrial Property<sup>504</sup> and the Geneva Humanitarian Conventions.<sup>505</sup> 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 transport and trade agreements confirm that the practice was similar.<sup>506</sup>

(11) The case of the Mali Federation is sometimes cited in the present connexion. But the facts concerning 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 agreements 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 its ratification of the constitution and was afterwards recognized as

<sup>497</sup> e.g. Protocol on Arbitration Clauses (1923), Convention for the Execution of Foreign Arbitral Awards (1927), etc. See United Nations, *Multilateral Treaties . . . 1972 (op. cit.)*, pp. 438 *et seq.*

<sup>498</sup> Signatures, ratifications and accessions in respect of agreements and conventions concluded under the auspices of the League of Nations. See League of Nations, *Official Journal, Special Supplement No. 193* (1944).

<sup>499</sup> United Nations, *Multilateral Treaties . . . 1972 (op. cit.)*, p. 3, foot-note 3.

<sup>500</sup> *Ibid.*

<sup>501</sup> See above, commentary to article 30.

<sup>502</sup> United Nations, *Multilateral Treaties . . . 1972 (op. cit.)*, p. 3, foot-note 3.

<sup>503</sup> See *Yearbook . . . 1968*, vol. II, p. 18, document A/CN.4/200 and Add.1-2, paras. 50 and 51.

<sup>504</sup> *Ibid.*, pp. 67-68, paras. 296-297.

<sup>505</sup> *Ibid.*, pp. 49-50, para 211.

<sup>506</sup> See *Yearbook . . . 1971*, vol. II (Part Two), pp. 142-146, document A/CN.4/243, paras. 152-175 and *ibid.*, pp. 180-181, document A/CN.4/243/Add.1, paras. 161-166.

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 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.<sup>507</sup>

The French Government replied that it shared this view. Mali, on the other hand, which had contested the legality of Senegal's separation from the Federation 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 practice in regard to the case of this Federation.

*Separation of parts of a State when the predecessor State continues to exist*

(12) When part or parts of the territory of a State separate from it and become themselves independent States, and the State from which they had sprung, the predecessor State continues its existence unchanged except for its diminished territory, the effect of the separation is the emergence of a new State by secession. 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. 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.

(13) 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 the view 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".<sup>508</sup>

(14) The termination of the Austro-Hungarian Empire has already been discussed in so far as it concerned the Dual Monarchy itself.<sup>509</sup> In so far as it concerned other territories of the Empire, those other territories, which seem to fall into the category of secession, were Czechoslovakia and Poland.<sup>510</sup> 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.

(15) 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 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.<sup>511</sup>

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

<sup>508</sup> See above, para. 3 of the commentary to article 15.

<sup>509</sup> See para. 5 above.

<sup>510</sup> Poland was formed out of territories previously under the sovereignty of three different States: Austro-Hungarian Empire, Russia and Germany.

<sup>511</sup> *Yearbook ... 1970*, vol. II, p. 108, document A/CN.4/229, para. 15.

<sup>507</sup> *Ibid.*, p. 146, document A/CN.4/243, para. 176.

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.

(16) 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 Convention on 16 April 1907.<sup>512</sup> 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.<sup>513</sup> 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.<sup>514</sup>

(17) 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 being neither bound nor entitled *ipso jure* to the continuance of pre-independence treaties.<sup>515</sup> This is also to a large extent true in regard to bilateral treaties,<sup>516</sup> 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 15 appears to be an application of the principle that on separation such a 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. In all the circumstances, the emergence of Pakistan to independence may be regarded as being in essence a case of the formation of a newly independent State.

(18) The adherence of Singapore to the Federation of Malaysia in 1963 has already been referred to.<sup>517</sup> 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.<sup>518</sup> Similarly, as the entries in *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions*<sup>519</sup> 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.

#### *Reconsideration at the twenty-sixth session*

(19) The main provisions of the 1972 text of articles 33 and 34 may be summarized as follows: Article 27 of the 1972 draft was entitled "Dissolution of a State". It was based on the assumption that parts of a State became individual States and that the original State ceased to exist. Paragraph 1 of the article was divided into three sub-paragraphs laying down the following rules which, by hypothesis, concerned only the successor States, that is the parts which had become individual States. Under sub-paragraph (a), any treaty concluded by the predecessor States in respect of its entire territory continued in force in respect of each successor State emerging from the dissolution. Under sub-paragraph (b), any treaty concluded by the predecessor State in respect only of a particular part of its territory which had become an individual State continued in force in respect of this State alone. Sub-paragraph (c) contemplated the case of the dissolution of a State previously constituted by the uniting of two or more States. Paragraph 2 of article 27 of the 1972 draft listed two exceptions to the rules laid down in paragraph 1. These exceptions were set out in sub-paragraphs (a) and (b).

(20) Article 28 of the 1972 draft was entitled "Separation of part of a State". It was based on the assumption

<sup>512</sup> *Yearbook . . . 1968*, vol. II, pp. 38-39, document A/CN.4/200 and Add.1-2, paras. 154-158.

<sup>513</sup> *Ibid.*, p. 13, para. 25.

<sup>514</sup> 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 . . . 1972 (op. cit.)*, pp. 173 and 185).

<sup>515</sup> See above, paras. 4 and 5 of the commentary to article 15. See also *Yearbook . . . 1968*, vol. II, pp. 16, 29-30 and 40-41, document A/CN.4/200 and Add.1-2, paras. 38, 115-117, and 166-167; *Yearbook . . . 1969*, vol. II, p. 37, document A/CN.4/210, para. 49; and *Yearbook . . . 1970*, vol. II, pp. 71 *et seq.*, document A/CN.4/225, paras. 24-33.

<sup>516</sup> *Ibid.*, pp. 109 *et seq.*, document A/CN.4/229, paras. 28-34. See also *Yearbook . . . 1971*, vol. II (Part Two), pp. 121-122, document A/CN.4/243, paras. 11-19, and *ibid.*, pp. 155-156, document 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.

<sup>517</sup> See above, paras. 5 and 6 of the commentary to article 29.

<sup>518</sup> See foot-note 402 above. See also, *Yearbook . . . 1970* vol. II, p. 118, document A/CN.4/229, para. 89.

<sup>519</sup> United Nations, *Multilateral Treaties . . . 1972 (op. cit.)*.

that the part which separated became an individual State but, unlike the case contemplated in article 27 of the 1972 draft, the predecessor State continued to exist. Article 28 of the 1972 draft laid down two rules concerning the treaty position of the original State and of the new State arising from the separation. The first, set out in the introductory part of paragraph 1, concerned the predecessor State. It provided that any treaty which was in force in respect of that State continued to bind it in relation to its remaining territory. Exceptions to that rule were listed in sub-paragraphs (a) and (b) of paragraph 1. The second rule, set out in paragraph 2, concerned the successor State. It provided that the State was 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.

(21) At the present session, the Commission re-examined the articles in the light of the comments of Governments. Two basic questions arose out of those comments particularly in connexion with article 27 of the 1972 draft. First, was there sufficient distinction between the "dissolution of a State" (former article 27) and "the separation of part of a State" (former article 28) to justify treating the former as a category on its own? If there was no material distinction between the two categories, was it right to have two articles to deal with them? Secondly, if the "dissolution of a State" was to be treated as a distinct category, should the article be based on the principle of *ipso jure* continuity, the principle of consent or the clean slate principle? Even if there was a material distinction between the two categories, should it follow automatically that there must be a different solution for each of them?

(22) As it appears from the commentary to article 27 in the 1972 draft, almost all of the practice relating to the disintegration of a State resulting in its extinction concerned the "dissolution" of what traditionally has been regarded as a union of States, which implied that the component parts of the union retained a measure of individual identity during the existence of the union. This concept was in the background of the distinction between dissolution and separation of part of a State. The Commission, however, did not retain in 1972 the concept of a "union of States" for either article 26 or 27. On the contrary, for article 27, as well as for article 26 of the 1972 draft, the concept of "the State" was taken as the starting point. The implication was that for the purposes of article 27, as well as those of article 26 of the 1972 draft, the internal structure of the State was regarded as immaterial: this point was made very clear in the 1972 draft.<sup>520</sup> With this starting-point, the question arises whether, in modern international law, there is any material difference between a State that dissolves into parts and one from which a part separates. It may be that in both cases the State divides into parts.

(23) From a purely theoretical point of view, there may be a distinction between dissolution and separation of part of a State. In the former case, the predecessor

State disappears; in the latter case, the predecessor State continues to exist after the separation. This theoretical distinction might have implications in the field of succession in respect of treaties, but it does not necessarily follow that the effects of the succession of States in the two categories of cases must be different for the parts which become new States. In other words, it is possible to treat the new States resulting from the dissolution of an old State as parts separating from that State.

(24) Irrespective of whether or not there is a theoretical distinction between the two categories of cases, the question remains whether the principles of continuity or the clean slate principle should be applied to them.

(25) As regards "dissolution", already in 1972 the Commission 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. The Commission concluded that although some discrepancies might be found in State practice, still that 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. The fact that the situation may be regarded as one of "separation of part or parts of a State" rather than one of "dissolution" does not alter this basic conclusion.

(26) In cases of secession the practice prior to the United Nations era, while there may be one or two inconsistencies, provides support for the clean slate rule in the form in which it is expressed in article 15 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.

<sup>520</sup> See *Yearbook . . . 1972*, vol. II, p. 295, document A/8710/Rev.1, chap. II, C, para. 12 of the commentary to article 27.

(27) The available evidence of practice during the United Nations period appears to indicate that, at least in some circumstances, the separated territory which becomes a sovereign State may be regarded as a newly independent State to which in principle the rules of the present draft articles concerning newly independent States should apply. 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 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.

(28) 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 the elements which have to be taken into account.

(29) In the light of the foregoing the Commission, with regard to the second rule of article 28 of the 1972 draft, decided that the scope of the rule should be limited to cases where the separation occurred in circumstances which were essentially of the same character as those existing in the case of the formation of a newly independent State. In addition, with reference to the provisions of paragraph 1 (c) of article 27 of the 1972 draft the Commission observed that it contemplated the case of the dissolution of a State previously constituted by the uniting of two or more States and referred, therefore, to two distinct and not simultaneous successions of State, each of which should be considered separately. Accordingly, as in conformity with a decision which it had taken in a similar situation arising in connexion with article 30, the Commission decided that the provisions of paragraph 1 (c) of article 27 of the 1972 draft should be deleted from the final text.

(30) Having taken the two decisions referred to in the preceding paragraph, the Commission sought to present the provisions of articles 27 and 28 of the 1972 draft in a clearer and more systematic manner. It came to the conclusion that they should be re-arranged so that one article would contain the provisions concerning the successor State and the other, the provisions concerning the predecessor State.

(31) *Article 33* is entitled "Succession of States in cases of separation of parts of a State." As is expressly stated in the opening clause, the article deals with the case where a part or parts of the territory of a State separate to form one or more States, *whether or not the predecessor State continues to exist*, that is to say, whether or not it is dissolved, to use the terminology of the 1972 draft. The article, therefore, covers both the situation dealt with in the former article 27, and the situation dealt with in the former article 28, but it covers those

situations exclusively from the standpoint of the successor State. *Sub-paragraphs (a) and (b) of paragraph 1* reproduce, with some drafting changes, the rules set out in the corresponding sub-paragraphs of the former article 27. *Paragraph 2* reproduces, again with drafting changes, the exceptions to those rules set out in paragraph 2 of the former article 27.

(32) *Paragraph 3* provides for a further exception to paragraph 1. That exception concerns the successor States which separate from the predecessor States in circumstances essentially of the same character as those existing in the case of the formation of a newly independent State. It reflects paragraph 2 of the former article 28 with the limitations in scope already mentioned.<sup>521</sup> By contrast with cases under paragraph 1 where the predecessor State may or may not survive the succession of States, in cases to which paragraph 3 applies, the predecessor State would always continue to exist. This is implicit in the idea of "dependency" which provides the key to the meaning of "newly independent State" as defined in article 2, paragraph 1 (f).

(33) The new text of *article 34* is entitled "Position if a State continues after separation of part of its territory." As is expressly stated in the opening clause, the new text concerns—as did the former article 28—the case where, after the separation of any part of the territory of a State, the predecessor State continues to exist, but it deals with that case exclusively from the standpoint of the predecessor State. The introductory part of the new text of article 34 reproduces, with several drafting changes, the rule appearing in the introductory part of paragraph 1 of the 1972 text of the article. The paragraphs of the article designated by the letters (a), (b) and (c), list three exceptions to that rule. *Paragraph (a)* corresponds to sub-paragraph (a) of paragraph 1 of the 1972 text. *Paragraph (b)* corresponds to the first clause of sub-paragraph (b) of paragraph 1 of the 1972 text and *paragraph (c)* to the second clause of that sub-paragraph.

*Article 35.*<sup>522</sup> *Participation in treaties not in force at the date of the succession of States in cases of separation of parts of a State*

1. Subject to paragraphs 3 and 4, a successor State falling within article 33, paragraph 1, may by making a notification, establish its status as a contracting State to a multilateral treaty which is not in force if, at the date of the succession of States, the predecessor State was a contracting State to the treaty in respect of the territory to which the succession of States relates.

2. Subject to paragraphs 3 and 4, a successor State falling within article 33, paragraph 1, may by making a notification, establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States if at that date the predecessor State was a contracting State to the treaty in respect of the territory to which the succession of States relates.

<sup>521</sup> See para. 29 above.

<sup>522</sup> New article.

3. Paragraphs 1 and 2 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

4. If the treaty is one falling within the category mentioned in article 16, paragraph 3, the successor State may establish its status as a party or as a contracting State to the treaty only with the consent of all the parties or of all the contracting States.

*Article 36.<sup>523</sup> Participation in cases of separation of parts of a State in treaties signed by the predecessor State subject to ratification, acceptance or approval*

1. Subject to paragraphs 2 and 3, if before the date of the succession of States the predecessor State had signed a multilateral treaty subject to ratification, acceptance or approval and the treaty, if it had been in force at that date, would have applied in respect of the territory to which the succession of States relates, a successor State falling within article 33, paragraph 1, may ratify, accept or approve the treaty as if it had signed that treaty and may thereby become a party or a contracting State to it.

2. Paragraph 1 does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

3. If the treaty is one falling within the category mentioned in article 16, paragraph 3, the successor State may become a party or a contracting State to the treaty only with the consent of all the parties or of all the contracting States.

*Commentary*

(1) Both article 33 in the final text and the corresponding article in the 1972 text relate exclusively to treaties which were in force at the date of the succession of States. Accordingly, the successor State in the case of separation of parts of a State would be unable to succeed to a treaty which was not in force at that date by procedures similar to those provided for by articles 17 and 18 for newly independent States, procedures which the Commission extended in articles 31 and 32 to successor States formed by a uniting of States.

(2) At the present session, the Commission came to the conclusion that there was no valid reason for such a difference of treatment between two categories of successor States, namely, newly independent States and States formed by a uniting of States, on the one hand, and, on the other, successor States in cases of separation of parts of a State. Accordingly, it prepared two new articles, numbered 35 and 36. *Article 35* adapts the provisions of article 17 to the case of a successor State falling within article 33, paragraph 1, that is, a successor State emerging from a separation of part of a State. Similarly, *article 36* adapts the provisions of article 18 to the case of such a successor State.

<sup>523</sup> New article.

*Article 37.<sup>524</sup> Notification*

1. Any notification under article 30, 31 or 35 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 shall:

(a) be transmitted by the successor State to the depositary or, if there is no depositary, to the parties or the contracting States;

(b) be considered to be made by the successor State on which it has been received by the depositary or, if there is no depositary, on the date on which it has been received by all the parties or, as the case may be, by all the contracting States.

4. Paragraph 3 does not affect any duty that the depositary may have, in accordance with the treaty or otherwise, to inform the parties or the contracting States of the notification or any communication made in connexion therewith by the successor State.

5. Subject to the provisions of the treaty, such notification or communication shall 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) For purposes that are in a sense comparable to those for which a newly independent State may make a *notification of succession* under the articles in part III of the draft, certain articles in part IV provide for the making of a *notification* by a successor State. These are articles 30, 31 and 35. However, the term "notification" has been used in these articles in order to maintain a clear distinction between the case of newly independent States covered by part III, and the cases of other successor States falling within part IV. Nevertheless, the Commission considered that it would be right to adapt the provisions of article 21 for the purpose of notifications made under the articles in part IV.

(2) Accordingly, *paragraphs 1 and 2* provide that a notification under article 30, 31 or 35 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.

(3) *Paragraph 3 (a)* of the article, as sub-paragraph (a) of article 78 of the Vienna Convention lays down that, unless the treaty otherwise provides, the notification shall be transmitted by the successor State to the depositary or, if there is no depositary, to the parties or the contracting States.

(4) *Paragraph 3 (b)* of this article sets forth the rule that, unless the treaty otherwise provides, the notification shall be *considered to be made* by the successor State on the date on which it has been *received* by the

<sup>524</sup> New article.

*depository*, or, if there is no depository, on the date on which it has been *received* by *all* the *parties* or, as the case may be, by *all* the *contracting States*. Consequently, if there is a depository, by analogy with sub-paragraphs (b) and (c) of article 16 of the Vienna Convention, the notification of the successor State is considered to have been made on the date on which it was received by the depository and it is as from that date that the legal nexus is established between the notifying successor State and any other party or contracting State. If there is no depository, by analogy with sub-paragraph (c) of article 16 and sub-paragraph (b) of article 78 of the Vienna Convention, the notification is considered to have been made on the date on which it was received by all the parties or, as the case may be, by all the contracting States and it is from that date that the legal nexus is established between the notifying successor State and any other party or contracting State.

(5) *Paragraph 4* of the article then provides that the rule set forth in paragraph 3 does not affect any duty that the depository may have, in accordance with the treaty or otherwise,<sup>526</sup> to inform the parties or the contracting States of the notification or any communication made in connexion therewith by the successor State.

(6) *Paragraph 5* of this article provides that, subject to the provisions of the treaty, the notification or any other communication made in connexion herewith shall be considered *as received* by the State for which it was intended only when the latter State has been informed by the depository. Paragraph 5 is concerned with the transmission of information by the depository and does not affect the operation of paragraph 3, which determines the date of making of a notification of succession.

## PART V

### MISCELLANEOUS PROVISIONS

#### *Article 38.*<sup>526</sup> *Cases of State responsibility and outbreak of hostilities*

The provisions of the present articles shall not prejudice any question that may arise in regard to the effects of a succession of States in respect of a treaty from the international responsibility of a State or from the outbreak of hostilities between States.

#### *Article 39.*<sup>527</sup> *Cases of military occupation*

The provisions of the present articles do not prejudice any question that may arise in regard to a treaty from the military occupation of a territory.

#### *Commentary*

(1) The provisions of articles 38 and 39 constituted in the 1972 draft a single article—numbered 51—which

excluded from the scope of the draft articles three specific matters, namely, “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”. The reasons, however, for the exclusion of the first matter—questions arising from the military occupation of a territory—were different from those for the exclusion of the other two.

(2) The military occupation of a territory does not constitute a succession of States. While it may have an impact on the operation of the law of treaties, it has no impact on the operation of the law of succession of States. It can, however, give rise to problems analogous to those of a succession of States and this could lead to a misunderstanding of its true nature in relation to a succession of States. It is to avoid any such misunderstanding that the Commission found it desirable to exclude specifically from the scope of the draft questions arising from the military occupation of a territory. On the other hand, it excluded the two other matters referred to in the article 31 of the 1972 draft—questions arising from the international responsibility of a State or from the outbreak of hostilities, but for different reasons.

(3) Questions arising from the international responsibility of a State were also excluded from the Vienna Convention 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 article<sup>528</sup> its reasons 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 and the possibility of an impact of the rules of State responsibility on the operation of the law of succession of States made it desirable, in the Commission's view, to insert in the text of the article a general reservation covering questions arising from the international responsibility of a State.

(4) Questions arising from the outbreak of hostilities were likewise excluded from the Vienna Convention by article 73. This exclusion was inserted in article 73 not by the International Law Commission but by the United

<sup>525</sup> For instance, under article 77 of the Vienna Convention.

<sup>526</sup> 1972 draft, article 31.

<sup>527</sup> *Idem*.

<sup>528</sup> Article 69. See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (op. cit.)*, p. 87.

Nations Conference on the Law of Treaties 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 Conventions". 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.

(5) At the present session, the Commission came to the Conclusion that the difference in the reasons for the exclusion from the scope of the draft of the three matters

referred to in the text of article 31 of the 1972 draft should be reflected both in the arrangement and in the wording of the provisions relating to that exclusion. As regards arrangement, the Commission divided that text into two articles. The first—*article 38*—is devoted to the exclusion of questions arising from the international responsibility of a State or from the outbreak of hostilities between States. The second—*article 39*—is devoted to the exclusion of questions arising from the military occupation of a territory. As regards wording, article 38, following the normal style for the drafting of legal rules, states that "the provisions of the present articles *shall*\* not prejudice" any of the questions referred to therein while article 39, which is an assertion for the avoidance of doubt, states that those provisions "*do*\* not prejudice" such questions. Furthermore, the expression in article 38 "any question that may arise in regard to *the effects of a succession of States in respect of a treaty*\*" was replaced in article 39 by "any question that may arise *in regard to a treaty*\*" because the military occupation of territory is not to be confused with a succession of States. Accordingly, there can be no question in the case of military occupation of the *effects* of a succession of States.

### Chapter III

#### STATE RESPONSIBILITY

##### A. Introduction

##### 1. HISTORICAL REVIEW OF THE WORK OF THE COMMISSION

86. At its first session, in 1949, the International Law Commission included the question of State responsibility in the list of fourteen topics of international law selected for codification. In 1955, following the adoption by the General Assembly of resolution 799 (VIII) of 7 December 1953, the Commission appointed Mr. F. V. García Amador Special Rapporteur for the topic. Between 1956 and 1961 Mr. García Amador submitted to the Commission six successive reports on State responsibility. Being occupied throughout those years with the codification of other branches of international law, such as arbitral procedure and diplomatic and consular intercourse and immunities, the Commission was not able to undertake the codification of the topic of State responsibility, although from time to time, particularly in 1956, 1957, 1959 and 1960, it held some general exchanges of views on the question.<sup>529</sup>

87. In 1960 the question of the codification of State responsibility was raised in the Sixth Committee of the General Assembly for the first time since 1953. It was considered in 1961 and 1962 by the Sixth Committee and by the International Law Commission in the context

of the programme of future work in the field of the codification and progressive development of international law. The discussion brought out differences of opinion regarding the approach to the subject, in particular as to whether the Commission should begin by codifying the rules governing State responsibility as a general and separate topic, or whether it should take up certain particular topics of the law of nations, such as the status of aliens, and at the same time, within this context, should set out to codify the rules whose violation entailed international responsibility, as well as the rules of responsibility in the proper sense of the term. Finally it was agreed, both in the General Assembly and in the International Law Commission, that it was a question not merely of continuing work already begun but of taking up the subject again *ex novo*, that State responsibility should be included among the priority topics, and that measures should be taken to speed up work on its codification. As Mr. García Amador was no longer a member, the Commission agreed in 1962 that it would be necessary to carry out some preparatory work before a special rapporteur was appointed, and it entrusted this task to a Sub-Committee on State Responsibility of ten members.<sup>530</sup>

88. The work of the Sub-Committee on State Responsibility was reviewed by the Commission at its 686th

<sup>529</sup> For a detailed history of the question up to 1969, see *Yearbook . . . 1969*, vol. II, p. 229, document A/7610/Rev.1, chap. IV.

<sup>530</sup> Mr. Ago (Chairman), Mr. Briggs, Mr. Gros, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Tunkin, Mr. Tsuruoka and Mr. Yasseen.

meeting, during its fifteenth session (1963), on the basis of the report submitted by the Chairman of the Sub-Committee, Mr. Ago.<sup>531</sup> All the members of the Commission who took part in the discussions agreed with the general conclusions formulated by the Sub-Committee, namely: (a) that, with a view to the codification of the topic, priority should be given to the definition of the general rules governing international responsibility of the State; (b) that there would be no question of neglecting the experience and material gathered on certain particular aspects of the topic, especially that of responsibility for injuries to the person or property of aliens; and (c) that careful attention should be paid to the possible repercussions which new developments in international law might have had on State responsibility. The members of the Commission also approved the programme of work proposed by the Sub-Committee. After having unanimously approved the report of the Sub-Committee, the Commission at the same session appointed Mr. Robert Ago as Special Rapporteur for the topic of State responsibility. It was also agreed that the Secretariat should prepare a number of working papers on the topic.<sup>532</sup>

89. The Commission decided not to begin its consideration of the substance of the question of State responsibility until it had completed its study of the law of treaties and special missions; it was unable to do so until 1969. Before this, in 1967, having before it a note on State responsibility submitted by the Special Rapporteur,<sup>533</sup> the Commission, as newly constituted, confirmed the instructions given him in 1963.<sup>534</sup>

90. In 1969, at the twenty-first session of the Commission, the Special Rapporteur submitted his first report on the international responsibility of States.<sup>535</sup> The report contained a review of previous work on the codification of the topic and reproduced, as annexes, the most important texts prepared in the course of earlier codification work, both individual and collective, official and unofficial.<sup>536</sup>

<sup>531</sup> *Yearbook . . . 1963*, vol. II, p. 227, document A/5509, annex I. For the summary records of the 2nd to the 5th meetings of the Sub-Committee and the memoranda submitted by its members, see *Yearbook . . . 1963*, vol. II, pp. 228 and 237, document A/5509, annex I, appendices I and II.

<sup>532</sup> In 1964, the Secretariat prepared and circulated, in accordance with the Commission's request, a working paper containing a summary of the discussions in various United Nations organs and the resulting decisions (*Yearbook . . . 1964*, vol. II, p. 125, document A/CN.4/165) and a digest of the decisions of international tribunals relating to State responsibility (*ibid.*, p. 132, document A/CN.4/169). A supplement to each of these two documents, bringing them up to date, was issued by the Secretariat in 1969 (*Yearbook . . . 1969*, vol. II, p. 114, document A/CN.4/209 and *ibid.*, p. 101, document A/CN.4/208).

<sup>533</sup> *Yearbook . . . 1967*, vol. II, p. 325, document A/CN.4/196. The note was considered at the Commission's 934th and 395th meetings (see *Yearbook . . . 1967*, vol. I, pp. 225-226 and 226-227).

<sup>534</sup> See *Yearbook . . . 1967*, vol. II, p. 368, document A/6709/Rev.1 and Rev.1/Corr.1, para. 42.

<sup>535</sup> *Yearbook . . . 1969*, vol. II, p. 125, document A/CN.4/217 and Add.1.

<sup>536</sup> A list of these texts appears in the report of the International Law Commission on the work of its twenty-fifth session (*Yearbook . . . 1973*, vol. II, document A/9010/Rev.1, foot-note 14).

91. As the Special Rapporteur explained when introducing it before the Commission,<sup>537</sup> his report was intended to provide the Commission with a conspectus of what had been done so far, by studying which it could derive the maximum benefit for its future work and at the same time avoid committing the errors which in the past had stood in the way of codification of this important branch of international law.

92. In concluding his analysis, the Special Rapporteur reviewed the ideas which had guided the International Law Commission since the time when, having been forced to recognize that its previous efforts had led nowhere, it decided to take up the study of the topic of responsibility again, but from a fresh viewpoint; in particular, he summarized the plan adopted by the Sub-Committee on State Responsibility set up in 1962, and confirmed by the Commission itself at its fifteenth (1963) and nineteenth (1967) sessions, on the strength of which the Commission had decided to try to give a fresh impetus to the work of codification and reach some positive results, in pursuance of the recommendations of the General Assembly in resolutions 1765 (XVII), 1902 (XVIII), 2045 (XX), 2167 (XXI), 2272 (XXII) and 2400 (XXIII).

93. The Commission discussed the Special Rapporteur's first report in detail at its 1011th to 1013th and 1036th meeting.<sup>538</sup> The debate revealed a considerable identity of views in the Commission as to the most appropriate way of continuing the work on State responsibility and as to the criteria that should govern the preparation of the different parts of the draft articles which the Commission proposed to undertake. The Commission's conclusions in that regard were subsequently set out in its report on the work of its twenty-first session.<sup>539</sup>

94. The conclusions reached by the Commission at its twenty-first session were favourably received at the twenty-fourth session of the General Assembly.<sup>540</sup> The over-all plan for the study of the topic, the successive stages for the execution of the plan for the study of the topic, the successive stages for the execution of the plan and the criteria for the different parts of the draft was laid down by the Commission, met with the general approval of the Sixth Committee. In the light of the Committee's report, the General Assembly, in resolution 2501 (XXIV) of 12 November 1969, in which it referred to its resolution 2400 (XXIII), recommended that the Commission should continue its work on State responsibility.

95. On the basis of the directives laid down by the International Law Commission and the recommendations of the General Assembly, the Special Rap-

<sup>537</sup> See *Yearbook . . . 1969*, vol. I, pp. 104-106, 1011th meeting, paras. 2-19.

<sup>538</sup> *Ibid.*, pp. 104-117 and 239-242.

<sup>539</sup> *Yearbook . . . 1969*, vol. II, p. 233, document A/7610/Rev.1, paras. 80-84.

<sup>540</sup> *Official Record of the General Assembly, Twenty-fourth Session, Sixth Committee*, 1103rd-1111th and 1119th meetings; and *ibid.*, Annexes, agenda items 86 and 94 (b), document A/7746, paras. 86-89.

porteur began to consider, in succession, the many and diverse questions raised by the topic as a whole. He submitted to the Commission at its twenty-second session, in 1970, a second report on State responsibility, entitled "The origin of international responsibility".<sup>541</sup> The introduction to the report contained a detailed plan of work for the first phase of the study of the topic, in which attention is to be focused on the subjective and objective conditions for the existence of an internationally wrongful act. The introduction was followed by a first chapter dealing with a number of general fundamental principles governing the topic as a whole. The Special Rapporteur presented his second report at the 1074th and 1075th meetings of the Commission.<sup>542</sup> At the same time he submitted a questionnaire listing a number of points on which he wished to know the views of members of the Commission for the purposes of the continuation of his work.<sup>543</sup>

96. At its 1075th, 1076th, 1079th, and 1080th meetings, the Commission discussed the Special Rapporteur's second report in a general manner by way of a first broad review, and postponed more detailed consideration of specific points till a later session.<sup>544</sup> At the 1081st meeting, the Special Rapporteur summarized the main conclusions as to method, substance and terminology to be drawn from the Commission's broad review.<sup>545</sup> It was agreed that the Special Rapporteur's third report and those to follow it would contain a detailed analysis of the various conditions which must be met for a State to be regarded as having committed an internationally wrongful act and as having thereby incurred international responsibility.<sup>546</sup>

97. At the twenty-fifth session of the General Assembly, the Sixth Committee found that the conclusions reached by the Commission at its 1970 session were generally acceptable.<sup>547</sup> In resolution 2634 (XXV) of 12 November 1970, the General Assembly recommended that the Commission should continue its work on State responsibility.

98. At the twenty-third session of the Commission, in 1971, the Special Rapporteur submitted his third report, entitled "The internationally wrongful act of the State, source of international responsibility".<sup>548</sup> This report began with an introduction setting out the various conclusions reached by the Commission following its consideration of the second report. The introduction as followed by a first chapter ("General principles"), divided into four sections (articles 1-4). In this chapter

the Special Rapporteur reproduced the material included in chapter I of his second report, revised and supplemented in the light of the discussion in the Commission at its twenty-second session, namely: the principle that any internationally wrongful act of the State entails the State's international responsibility; the conditions for the existence of an internationally wrongful act; the subjects which may commit internationally wrongful acts; and the irrelevance of municipal law to the characterization of an act as internationally wrongful. The report ended with sections 1 to 6 (articles 5 to 9) of chapter II of the draft ("The 'act of the State' according to international law"); in all, this chapter is to comprise ten sections dealing with the conditions for the attribution to the State, as a subject of international law, of an act which might constitute a source of international responsibility. Sections 1 to 6, included in the third report, present some preliminary considerations on the subject matter of the chapter and also examine the following points: the attribution to the State of the acts of its organs; the irrelevance of the position of an organ in the distribution of powers and in the internal hierarchy of the State; the attribution to the State of acts of organs of public institutions separate from the State; the attribution to the State of acts of private persons in fact performing public functions or in fact acting on behalf of the State; and the attribution to the State of the acts of organs placed at its disposal by another State or by an international organization.

99. Consideration of the conditions for attributing to the State, as a subject of international law, an act which might constitute a source of international responsibility was continued and completed in the fourth report by the Special Rapporteur,<sup>549</sup> which was submitted in 1972 at the Commission's twenty-fourth session. This report contains sections 7 to 10 (articles 10 to 13) of chapter II of the draft ("The 'act of the State' according to international law"), which deal with problems relating to the attribution to the State of acts or omissions on the part of organs acting outside their competence or contrary to the rules concerning their activity, and with problems which arise in the same context with regard to the conduct of private individuals acting in that capacity, the conduct of organs of another subject of international law, and the conduct of organs of an insurrectional movement whose structures have subsequently become, in whole or in part, the structures of a State.

100. Being occupied with the preparation of draft articles on the representation of States in their relations with international organizations, on the succession of States in respect of treaties and on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, the Commission was unable, for lack of time, to consider the topic of State responsibility either at its twenty-third session (1971) or at its twenty-fourth session (1972). The Commission included in its reports on those sessions, however, a brief statement of the position with regard to the study

<sup>541</sup> *Yearbook* . . . 1970, vol. II, p. 177, document A/CN.4/233.

<sup>542</sup> *Ibid.*, vol. I, pp. 175-178 and 181-187.

<sup>543</sup> *Ibid.*, pp. 175-176.

<sup>544</sup> *Ibid.*, pp. 181-192 and 209-222.

<sup>545</sup> *Ibid.*, pp. 223-227.

<sup>546</sup> *Yearbook* . . . 1970, vol. II, pp. 307-309, document A/8010/Rev.1, paras. 70-83.

<sup>547</sup> *Ibid.*, *Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, paras. 98-107.

<sup>548</sup> *Yearbook* . . . 1971, vol. II (Part One), p. 199, document A/CN.4/246 and Add.1-3. At the same time, the Special Rapporteur submitted a second addendum to his first report (*ibid.*, p. 193, document A/CN.4/217/Add.2).

<sup>549</sup> *Yearbook* . . . 1972, vol. II, p. 71, document A/CN.4/264 and Add.1.

of State responsibility undertaken by the Special Rapporteur.<sup>550</sup>

101. At the General Assembly's twenty-sixth session (1971) the view was taken in the Sixth Committee that the Special Rapporteur's work made a valuable contribution likely to speed up the preparation by the Commission of draft articles on the subject.<sup>551</sup> In its resolution 2780 (XXVI) of 3 December 1971 the General Assembly recommended that the Commission should continue its work on State responsibility with a view to making substantial progress in the preparation of draft articles on the topic. At the General Assembly's twenty-seventh session (1972), a number of representatives in the Sixth Committee considered that the International Law Commission should give the highest priority to the study of State responsibility,<sup>552</sup> and the Assembly, in resolution 2926 (XXVII) of 28 November 1972, recommended that the Commission should prepare a first set of draft articles on the topic.

102. In 1973, at its twenty-fifth session, the Commission began the preparation of a set of draft articles on State responsibility in accordance with the General Assembly's recommendations. Having considered at its 1202nd to 1213th and 1215th meetings chapter I and chapter II, sections 1 to 3, of the third report by the Special Rapporteur, the Commission adopted on first reading, at its 1225th and 1226th meetings, the text proposed by the Drafting Committee for draft articles 1 to 6: i.e. the articles of chapter I ("General principles") of the draft (articles 1 to 4) and the first two articles (articles 5 and 6) of chapter II ("The 'act of the State' according to international law"). The text of these articles and the commentaries thereto were reproduced in the Commission's report on the work of its twenty-fifth session.<sup>553</sup>

103. The limitation of the scope of the present draft articles to responsibility for internationally wrongful acts, the distinction made between "primary" and "secondary" rules and the inductive method followed by the Special Rapporteur and the Commission in the preparation of the draft articles were approved by most of the representatives who took part in the discussion in the Sixth Committee at the General Assembly's twenty-eighth session.<sup>554</sup> On the whole, the provisions of the draft adopted by the Commission in 1973 also elicited favourable comments. The General Assembly, by its resolution 3071 (XXVIII) of 30 November 1973, paragraph 3 (b) and (c), recommended that the Commission should continue on a priority basis at its twenty-sixth

session its work on State responsibility, taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII), 1902 (XVIII), 2400 (XXIII) and 2926 (XXVII), with a view to the preparation of a first set of draft articles on responsibility of States for internationally wrongful acts, and that the Commission should undertake at an appropriate time a separate study of the topic of international liability for injurious consequences arising out of the performance of other activities.<sup>555</sup>

104. At its current session the Commission continued its consideration of draft chapter II ("The 'act of the State' according to international law"), i.e., of the provisions relating to the conditions for the attribution to the State, as a subject of international law, of an act which may be a source of international responsibility. At its 1251st to 1253rd and 1255th to 1263rd meetings, the Commission examined chapter II, sections 4-6, of the Special Rapporteur's third report and referred the articles proposed in these sections to the Drafting Committee. At its 1278th meeting, the Commission examined the text of articles 7-9 as proposed by the Drafting Committee and adopted the text of those articles on first reading.

105. The consideration of the Special Rapporteur's third report has thus been completed. At its twenty-seventh session the Commission will resume its study of this topic at the point where it left off at the current session. It will thus begin by examining, on the basis of the relevant sections contained in the Special Rapporteur's fourth report, questions which fall within chapter II of the draft and have not yet been discussed. The Commission will then take up for consideration the objective element of the internationally wrongful act, i.e. draft chapter III ("Breach of an international obligation"), which the Special Rapporteur is now preparing.

106. The text of all the draft articles on State responsibility adopted by the Commission so far, and also the text of articles 7-9 and commentaries thereto as adopted at the current session, are reproduced below for the information of the General Assembly.<sup>556</sup>

## 2. GENERAL REMARKS CONCERNING THE DRAFT ARTICLES <sup>557</sup>

### (a) *Form of the draft*

107. The final form to be given to the codification of State responsibility is obviously a question which will

<sup>550</sup> *Yearbook . . . 1971*, vol. II (Part One), p. 344, document A/8410/Rev.1, chap. III, sect. C); *Yearbook . . . 1972*, vol. II, p. 323, document A/8710/Rev.1, chap. IV, sect. B.

<sup>551</sup> *Official Records of the General Assembly, Twenty-sixth Session, Annexes*, agenda item 88, document A/8537, paras. 137 and 138.

<sup>552</sup> *Ibid.*, *Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, para. 195.

<sup>553</sup> *Yearbook . . . 1973*, vol. II, document A/9010/Rev.1, chap. II, sect. B. The text of the draft articles is also reproduced in section B, 1 below.

<sup>554</sup> *Official Records of the General Assembly, Twenty-eighth Session, Annexes*, agenda item 89, document A/9334, paras. 25-58.

<sup>555</sup> With regard to the action taken by the Commission on this last recommendation of the General Assembly, see below, para. 163.

<sup>556</sup> See below, sect. B, 1 and 2.

<sup>557</sup> The general considerations which follow are based largely on the conclusions reached and decisions taken by the Commission in 1963, during its consideration of the report of the Sub-Committee on State Responsibility, and in 1969, 1970 and 1973 during its consideration of the first, second and third reports by Mr. Ago, Special Rapporteur. They constitute the framework for the present work on the preparation of a set of draft articles on State responsibility.

have to be settled later, when the Commission has completed the draft. The Commission, in accordance with its statute, will then formulate the recommendation it considers appropriate. Without prejudging this recommendation, the Commission has decided to give its study on State responsibility the form of a *set of draft articles*, as expressly recommended by the General Assembly in resolutions 2780 (XXVI), 2926 (XXVII) and 3071 (XXVIII). The Commission too, feels that the preparation of a set of draft articles is the most effective method of discerning and developing rules of international law concerning State responsibility. The articles now being prepared are drafted in a form which will permit their being used as a basis for concluding a convention, if that is eventually decided.

(b) *Scope of the draft*

108. As with other topics it has undertaken to codify in the past, the Commission intends to limit its study of international responsibility, for the time being, to *State responsibility*. It does not underrate the importance of studying questions relating to the responsibility of subjects of international law other than States. The overriding need for clarity in the examination of the topic and the organic nature of the draft, however, clearly makes it necessary to defer consideration of these other questions.

109. The draft articles under consideration relate solely to the responsibility of States for *internationally wrongful acts*. The Commission fully recognizes the importance, not only of questions relating to responsibility for internationally wrongful acts, but also of those concerning liability for possible injurious consequences arising out of the performance of certain lawful activities, especially those which because of their nature give rise to certain risks. The Commission takes the view, however, that questions in this latter category should not be dealt with jointly with those in the former category. Owing to the entirely different basis of the so-called responsibility for risk and the different nature of the rules governing it, as well as its content and the forms it may assume, a joint examination of the two subjects could only make both of them more difficult to grasp. Being obliged to accept the possible risks arising from the exercise of an activity which is itself lawful, and being obliged to face the consequences—which are not necessarily limited to compensation—of the breach of a legal obligation, are two different matters. It is only because of the relative poverty of legal language that the same term is habitually used to designate both. In the light of these considerations and in order to avoid any misunderstanding, the Commission, while reserving for later consideration the question of a final title for the present draft, wishes to emphasize that, as it has already pointed out, the expression “State responsibility” which appears in the title of the draft articles is to be understood as meaning solely “responsibility of States for internationally wrongful acts”.<sup>558</sup>

110. The limitation of the present draft articles to the responsibility of States for internationally wrongful acts will not, of course, prevent the Commission from undertaking in due time a separate study of the topic of international liability for injurious consequences arising out of the performance of certain activities that are not prohibited by international law, as recommended by the General Assembly in its resolution 3071 (XXVIII), paragraph 3 (c). What the Commission should not do is to deal in one and the same draft with two matters which, though possessing certain common features and characteristics, are quite distinct. For reasons of this kind the Commission considered that it was particularly necessary to adopt, for the definition of the principle stated in article 1 of the present draft, a formulation which, while indicating that the internationally wrongful act is a source of international responsibility, does not lend itself to an interpretation that might automatically exclude the existence of another possible source of “responsibility”.

111. International responsibility bears some very different aspects from other topics of which the Commission has hitherto undertaken the codification. In its previous drafts, the Commission has generally concentrated on defining the rules of international law which, in one or another sector of inter-State relations, impose specific obligations on States and may, in a certain sense, be termed “primary”. In dealing with the topic of responsibility, on the other hand, the Commission is undertaking to define other rules which, in contradistinction to those mentioned above, may be described as “secondary” inasmuch as they are concerned with determining the legal consequences of failure to fulfil obligations established by the “primary” rules. In preparing the present draft, therefore, the Commission intends to concentrate on determining the *rules which govern responsibility*, maintaining a strict distinction between this task and that of defining the rules which impose on States obligations the violation of which may be a source of responsibility. This strict distinction seemed to the Commission to be essential if the topic of international responsibility was to be placed in its proper perspective and viewed as a whole.

112. The need to take into consideration the content, nature and scope of the obligations laid on the State by the “primary” rules of international law and to distinguish on that basis between different categories of international obligations will undoubtedly become plainly apparent when the objective element of the internationally wrongful acts comes up for study. In order to be able to assess the gravity of the internationally wrongful act and to determine the consequences attributable to that act, it will undoubtedly be necessary to take into consideration the fact that the importance attached by the international community to respect for some obligations—for example, those concerned with peace-keeping—will be of a completely different order from that attached to respect for other obligations, specifically because of the content of the former. It will also be necessary to distinguish some obligations from others according to the aims they pursue and the results sought from them if we are to be able to determine in each case whether or not there has

<sup>558</sup> See *Yearbook . . . 1973*, vol. II, document A/9010/Rev.1, para. 38.

been a breach of an international obligation and, if so, to fix the time of commission of the internationally wrongful act. These various aspects will be gone into at the appropriate time. But they must not be allowed to obscure the essential fact that it is one thing to define a rule and the obligation it imposes, and another to determine whether there has been a breach of that obligation and what should be the consequences of the breach. Only the second aspect comes within the sphere of responsibility proper; to encourage any confusion on this point would be to raise an obstacle which might once again frustrate any hope of successful codification. That is clear from past experience.

113. In the present draft articles, the Commission is proposing to codify the rules governing the responsibility of States for internationally wrongful acts *in general*, and not only in regard to certain particular sectors such as responsibility for acts causing injury to the person or property of aliens. The international responsibility of the State is a situation which results not just from the breach of certain specific international obligations, but from the breach of *any* international obligation, whether established by the rules governing one particular matter or by those governing another matter. The draft articles accordingly deal with the *general rules of the international responsibility of the State for internationally wrongful acts*; that is to say, the rules which govern all the new legal relationships that may follow from an internationally wrongful act of a State, regardless of the particular sector to which the rule violated by the act may belong.

#### (c) Structure of the draft

114. In broad outline, and subject to any decisions which the Commission may take later, the structure of the proposed draft articles corresponds to the plan for studying the international responsibility of States adopted by the Commission at earlier sessions on the basis of the proposals of the Special Rapporteur. The preparation of the draft will therefore comprise two distinct main phases. Speaking generally, the first will deal with the origin of international responsibility, and the second with the content of the responsibility. More precisely, the first will determine on the basis of what facts and in what circumstances there exists on the part of a State an internationally wrongful act which, as such, is a source of international responsibility. The second will determine the consequences attached by international law to an internationally wrongful act in the various cases, in order to derive therefrom a definition of the content, forms and degrees of international responsibility. Once these two essential tasks have been accomplished, the Commission may possibly decide whether a third should be added: namely, to consider certain problems concerning what has been termed the "implementation" (*mise en œuvre*) of the international responsibility of the State, and questions concerning the settlement of disputes arising out of the application of the rules relating to responsibility.

115. Within this general framework, the first task in preparing a set of draft articles to cover the question of the responsibility of the State for internationally wrongful acts is to formulate the basic general principles.

Once these principles have been established, the next step will be to deal with all the questions relating to the subject element of the internationally wrongful act: that is to say, questions concerning the possibility of attributing particular conduct (a particular act or omission) to the State as a subject of international law, and hence of considering this conduct as an act of the State in international law. It will then be necessary to solve the problems which arise with regard to the objective element of the internationally wrongful act: in other words, to establish in what circumstances the conduct attributed to the State must be considered as constituting a breach of an international legal obligation. In this way it will be possible to bring together the conditions for an act of the State to be characterized as an internationally wrongful act giving rise, as such, to State responsibility at the inter-State level. The next step will be to examine the questions which arise in connexion with the possible participation of more than one State in the same unlawful situation, or with the responsibility which a State may sometimes incur through the internationally wrongful act of another State. It will also be necessary to analyse the various circumstances whose existence may possibly exclude any wrongfulness of the conduct attributed to the State. It will then be possible to pass on to the second phase of the work, that relating to the content, forms and degrees of international responsibility.

116. In the light of the foregoing considerations, *chapter I* of the draft articles is devoted to "general principles". It contains, first, a definition of the fundamental principle attaching responsibility to every internationally wrongful act of the State (*article 1*). Next it states the principle, closely linked to the first, that every State is subject to the possibility of being held, under international law, to have committed an internationally wrongful act entailing its international responsibility (*article 3*). This is followed logically by the principle which states the two elements, subjective and objective, for the existence of a wrongful act of the State under international (*article 3*). The chapter ends with the definition of a fourth general principle—namely, the principle of the irrelevance of the internal law of a State to the characterization of an act of that State as internationally wrongful (*article 4*). The text of these provisions was adopted provisionally by the Commission in 1973, at its twenty-fifth session.<sup>559</sup>

117. *Chapter II* of the draft ("The act of the State under international law") is devoted to the subjective element of the internationally wrongful act and, therefore, to the determination of the conditions in which particular conduct must be considered as an "act of the State" under international law. After an introductory commentary containing preliminary considerations designed to take into account certain theoretical difficulties and to assert in any case the autonomy of international law in this matter, the chapter contains a series of rules in the form of articles. These rules deal first with the question of establishing what persons may be the authors of conduct which may be considered as an act of the State according to international law. First comes the principal category, State organs—those so

<sup>559</sup> See above para. 102 and foot-note 553.

characterized according to the internal law of the State. Next comes conduct whose authors do not, strictly speaking, form part of the organization of the State but which is also considered as an act of the State according to international law. Secondly, it is necessary to decide within this general context whether conduct falling under all these different categories should or should not, in certain particular conditions, be attributed to the State according to international law. Thirdly, the analysis concludes on a negative note by stating the rules which indicate the categories of conduct for which attribution to the State is excluded, while examining what may be the international situation of the State in relation to such conduct.

118. At its twenty-fifth and twenty-sixth sessions the Commission examined the *introduction* to chapter II and the first five articles. These articles form only a part of the provisions which are to appear in this chapter of the draft. The first article of the chapter (*article 5*) defines the rule which, in this sphere, constitutes the starting point—the rule that an act or omission may be taken into consideration for the purposes of attribution to the State as an internationally wrongful act if it has been committed by an organ of the State: that is to say, by an organ possessing that status according to the internal legal order of the State and acting in that capacity in the case in question. As a corollary to this rule, the second article (*article 6*) states that, for purposes of attribution of its conduct to the State, it is immaterial whether the organ in question belongs to any of the main branches of the State structure, whether its functions concern international relations or are of a purely internal character, or whether it holds a superior or subordinate position in the organization of the State. The third article (*article 7*) concerns the attribution to the State, as a subject of international law, of the conduct of organs, not of the State itself, but of other entities empowered by the international law of the State to exercise elements of the governmental authority (territorial governmental entities, entities not forming part of the formal structure of the State or of a territorial governmental entity). The fourth article (*article 8*) deals with the attribution to the State—again with a view to establishing its international responsibility—of the conduct of persons or groups of persons who do not formally possess the status of organs of the State or of one of the entities referred to in article 7 but who acted in fact on behalf of the State or were in fact exercising, in certain circumstances, elements of the governmental authority. The fifth article (*article 9*) lays down the conditions for attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization.<sup>560</sup>

119. The second and third group of questions raised in chapter II of the draft are dealt with by the Special Rapporteur in his fourth report, which has not yet been

examined by the Commission. Section 7 of the report (*article 10*) deals essentially with the highly controversial question of that attribution to the State of the conduct of an organ which has exceeded its authority or acted contrary to specific instructions or to the general requirements of the exercise of its activity. An effort is also made to clarify the situation which may arise where a person has continued to act as an organ when in fact, even if not formally, he has lost that status. Section 8 (*article 11*) excludes in principle, for the purposes of State responsibility, the possibility of attributing to the State under international law the conduct of private individuals who have acted as such, and it then examines the sense and the circumstances in which the existence of an internationally wrongful act on the part of the State can nevertheless be contemplated in connexion with certain conduct of private individuals. Section 9 (*article 12*) considers whether it is possible to attribute to the State acts or omissions of organs of another subject of international law (a State, an international organization, or an insurrectional movement possessing international personality) acting in its territory, or whether such acts or omissions should be attributed only to the other subject of international law in question. In the same context the Special Rapporteur deals in section 10 (*article 13*) with the specific question of retroactive attribution to a State of the acts of organs of a successful insurrectional movement.

120. Once the above-mentioned sections of the Special Rapporteur's fourth report have been examined, the Commission will have completed the study of the requirements for the characterization of specific conduct as an "act of the State" with a view to establishing its international responsibility. It will then have to take up *chapter III* of the draft, dealing with the various aspects of what has been called the objective element of the internationally wrongful act: the breach of an international obligation. In his fifth report the Special Rapporteur will first examine, in a section devoted to preliminary considerations on the lines of chapter II, section 1, the general questions which arise in connexion with the second constituent element of an internationally wrongful act. Following these considerations, the Special Rapporteur will examine in particular the fundamental question whether the source of the international legal obligation breached—customary, conventional or other—has any bearing on the question whether the breach is or is not an internationally wrongful act. Next to be examined will be the various problems relating to the determination of different categories of breaches of international obligations. An essential question which will arise in this context is whether in these days it is necessary to recognize the existence of a distinction based, as was indicated above, on the importance to the international community of the obligation breached, and accordingly whether contemporary international law should acknowledge a separate and more serious category of internationally wrongful acts, which might perhaps be described as international crimes. Another question which will arise in the same context is: what distinction should be made between the breach of an obligation requiring specific conduct on the part of the State and

<sup>560</sup> The text of all these articles is reproduced below in section B, 1 of this chapter. For the text of articles 5 and 6, with the commentaries thereto, as adopted by the Commission at its twenty-fifth session, see *Yearbook . . . 1973*, vol. II, document A/9010/Rev.1, chap. II, sect. B, and for the text of articles 7 to 9, with the commentaries thereto, as adopted at the present session see below, section B, 2, of this chapter.

the breach of an obligation requiring it only to ensure that a particular event does not occur (wrongful acts of conduct and wrongful acts of event)? An effort will be made later to deal with the different characteristics of the breach of obligation according to whether the obligation breached is one of those which specifically require a certain act or omission or is one of those which require in general terms that a certain result shall be ensured, without specifying the means by which the result is to be obtained. Another matter which will be examined in this context is the validity of the rule that local remedies must be exhausted before, for example, the breach of certain obligations relating to the treatment of aliens can be established. Next to be examined will be the various questions relating to the determination of the *tempus commissi delicti*, both in relation to the requirement that the obligation whose breach is complained of shall have been in force at the time when the conduct resulting in the breach took place, and in relation to cases where the act of the State takes the form of a continuing situation or the sum of a series of separate and successive actions. Once these points have been settled—and the above list is not intended to be either exhaustive or indicative of a final order of priority—some special problems, as already noted will still remain to be considered: for example, the possibility of attributing an internationally wrongful act simultaneously to more than one State in respect of one and the same situation, and the possibility of making a State responsible, in certain circumstances, for an internationally wrongful act committed by another State. Such problems could form the subject matter of a later chapter. The first phase of the study of State responsibility for internationally wrongful acts could then be completed with another chapter, devoted to detailed consideration of various circumstances which exclude wrongfulness—*force majeure* or act of God, consent of the injured State, legitimate application of a sanction, self-defence, state of emergency and so on—and of possible mitigating circumstances. The Commission will then be ready to move on to the second phase, concerning the content, forms and degrees of international responsibility.

121. The Commission felt that it would be better to postpone any decision concerning the desirability of prefacing the draft articles on State responsibility with an article giving definitions or an article indicating what matters would be excluded from the scope of the articles. When solutions to the various problems have reached a more advanced stage, it will be easier to see whether or not such preliminary clauses are needed in the general structure of the draft. Care should be taken to avoid definitions or initial formulations that might prejudice solutions to be adopted later. The first part of the draft will be based on a general notion of responsibility, that term denoting the set of new legal relationships to which an internationally wrongful act on the part of a State may give rise in various cases. Later it will be for the Commission to say whether, for example, such relationships may arise only between the State concerned and the State whose rights have suffered injury, or also between the State concerned and other subjects of

international law, or possibly even with the international community as a whole. For the time being the Commission will confine itself to explaining in the commentaries to the articles, whenever necessary, the meaning of expressions used.

122. Lastly, the Commission agreed that the topic of international responsibility was one of those where the progressive development of international law could be particularly important especially—as the Special Rapporteur has shown—with regard to the distinction between different categories of breaches of international obligations and to the content and degrees of responsibility. The Commission wishes expressly to state, however, that in its view the relative importance of progressive development and of the codification of accepted principles cannot be settled according to any pre-established plan. It must emerge in practical form from the pragmatic solutions adopted to the various problems.

## B. Draft articles on State responsibility <sup>561</sup>

123. The text of articles 1 to 9 as adopted by the Commission at the twenty-fifth session and at the present session, and the text of articles 7 to 9 with the commentaries thereto, as adopted by the Commission at the present session, are reproduced below for the information of the General Assembly.

### 1. Text of draft articles 1-9 as adopted by the Commission at its twenty-fifth and twenty-sixth sessions

#### Chapter I

#### GENERAL PRINCIPLES

##### *Article 1. Responsibility of a State for its internationally wrongful acts*

Every internationally wrongful act of a State entails the international responsibility of that State.

##### *Article 2. Possibility that every State may be held to have committed an internationally wrongful act*

Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility.

##### *Article 3. Elements of an internationally wrongful act of a State*

There is an international wrongful act of a State when:

(a) conduct consisting of an action or omission is attributable to the State under international law; and

(b) that conduct constitutes a breach of an international obligation of the State.

<sup>561</sup> As was stated in paragraph 109 above, the draft articles relate only to the responsibility of States for internationally wrongful acts. The question of the final title of the draft will be examined by the Commission at a later date.

*Article 4. Characterization of an act of a State as internationally wrongful*

An act of a State may only be characterized as internationally wrongful by international law. Such characterization cannot be affected by the characterization of the same act as lawful by internal law.

**Chapter II**

THE ACT OF THE STATE UNDER INTERNATIONAL LAW

*Article 5. Attribution to the State of the conduct of its organs*

For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.

*Article 6. Irrelevance of the position of the organ in the organization of the State*

The conduct of an organ of the State shall be considered as an act of that State under international law, 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 organization of the State.

*Article 7. Attribution to the State of the conduct of other entities empowered to exercise elements of the governmental authority*

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not a part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.

*Article 8. Attribution to the State of the conduct of persons acting in fact on behalf of the State*

The conduct of a person or group of persons shall also be considered as an act of the State under international law if

(a) it is established that such person or group of persons was in fact acting on behalf of that State; or

(b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.

*Article 9. Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization*

The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.

2. Text of draft articles 7-9 commentaries thereto as adopted by the Commission at its twenty-sixth session

*Article 7. Attribution to the State of the conduct of other entities empowered to exercise elements of the governmental authority*

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not a part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.

*Commentary*

(1) In article 5 of the present draft articles, the Commission laid down the basic principle for determining what are "acts of the State" under international law: the first kind of conduct to be attributed to the State as a possible source of international responsibility is the conduct of those who, under the internal law of the State in question, are its own "organs". In stating this principle, however, the Commission in no way wished to affirm that the conduct of such "organs" would be the only conduct that could be attributed to the State with a view to establishing the international responsibility, if any, of the State. The purpose of article 5 is merely to indicate the most important category of conduct which can be attributed to the State. Article 7 supplements article 5 by indicating that under international law the actions and omissions attributed to the State also include those of organs of entities which, while having under internal law a legal personality separate from that of the State itself, are nevertheless entities empowered by this same law to exercise some elements of the governmental authority. By analogy with what was pointed out in relation to the conduct of State organs, only the private conduct of the individuals composing the organs of the entities in question is excluded in principle from attribution to the State.

(2) The principle of attribution to the State of the conduct referred to is the corollary of the unity of the State from the international point of view. The action of the State as a subject of international law is, indeed, performed first and foremost through the action of organs belonging to the machinery of the State proper; but to this action must be added that of organs of the machinery of all the other entities which have been empowered by internal law to exercise elements of the governmental authority. This is true both when the basis of their separate existence is the local or territorial setting which they act (as in the case of municipalities, provinces, regions, cantons, component States of a federal State and so on) and when this basis is, instead, the special nature of the functions performed (as may be the case of a bank of issue, a transport company entitled to exercise police powers, and so forth). In other words,

the principle stated in article 6 of the draft—namely, the irrelevance of the position of a State organ in the organization of the State for the purpose of attributing to the State, as a possible source of international responsibility, the actions or omissions of that organ—is not the only corollary of the fundamental idea of the unity of the State from the international point of view. The same principle should also lead us to disregard, for that purpose, the distinction between the various entities which, under internal law, perform specific services for the community and, in so doing, exercise functions which constitute elements of the governmental authority.

(3) Some members of the Commission, although fully in agreement on the fundamental idea mentioned above and on the consequences which quite naturally flow from it in the matter of determining what are “acts of the State” under international law, expressed doubts about the need to include in the draft articles a rule expressly stating the principle that conduct regarded as an act of the State includes that of organs of entities which, although legally separate from the State under internal law, are nevertheless empowered by that law to exercise elements of the governmental authority. The real point of those doubts was whether the entities in question and in particular territorial governmental entities, should in fact be regarded as entities separate from the State under its internal law. It is obvious that where such entities formed an integral part of the machinery of the State itself, the conduct of their organs would automatically be subject to the rule laid down in article 5, concerning the attribution to the State of the acts of its own organs. In reply to these doubts, however, it was pointed out that while there may be State legal systems under which territorial governmental entities are integrated into the structure of the State, so that the organs of these entities are regarded as organs of the State itself under its internal law, that is not the case under the majority of State legal systems. As a general rule such entities are endowed under internal law with a legal personality separate from that of the State, and consequently their organs are not regarded as organs of the State itself. The Commission therefore considered that the deletion of article 7, or even the deletion of paragraph 1 of the article, would leave a dangerous loophole in the codification of the topic—a loophole through which a State might evade international responsibility for the actions or omissions of organs of the entities in question.

(4) The principle that the State is responsible for acts and omissions of organs of territorial governmental entities, such as municipalities, provinces and regions, has long been unequivocally recognized in international judicial decisions and the practice of States.<sup>562</sup> With regard to judicial decisions, a recent reaffirmation of the principle will be found in the award made on 15 September 1951 by the Franco-Italian Conciliation Com-

mission established under article 83 of the Treaty of Peace of 10 February 1947, in the case concerning the *Heirs of the Duc de Guise*. The Commission expressed the following opinion:

For the purposes of reaching a decision in the present case it matters little that the decree of 29 August 1947 was not enacted by the Italian State but by the region of Sicily. For the Italian State is responsible for implementing the Peace Treaty, even for Sicily, notwithstanding the autonomy granted to Sicily in internal relations under the public law of the Italian Republic.<sup>563</sup>

With regard to the practice of States, the most conclusive expression of the conviction held by States in this matter is found in the opinions given during the preparatory work for the Conference for the Codification of International Law held at The Hague in 1930. Point VI of the request for information addressed to Governments by the Preparatory Committee of the Conference expressly asked the question whether the State became responsible as a result of “acts or omissions of bodies exercising public functions of a legislative or executive character (communes, provinces, etc.)”. All Governments answered in the affirmative.<sup>564</sup> This principle was also acknowledged in the codification drafts on State responsibility from official and private sources,<sup>565</sup> and is accepted without discussion by all modern writers who have dealt with the question.<sup>566</sup>

<sup>563</sup> *Ibid.*, vol. XIII (United Nations publication, Sales No. 64.V.3), p. 161 [translation by the United Nations Secretariat].

<sup>564</sup> League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (document C.75.M.69.1929.V.) pp. 90 *et seq.*; and *Supplement to Volume III* (document C.75 (a) M.69 (a) 1929.V), pp. 3 and 18.

<sup>565</sup> The principle referred to is expressly stated in Basis of Discussion No. 16 prepared by the Preparatory Committee for the Hague Codification Conference (*Yearbook . . . 1956*, vol. II, p. 223, document A/CN.4/96, annex 2); in article II of the resolution adopted by the Institute of International Law in 1927 (*ibid.*, p. 228, annex 8; in article III of the draft convention prepared by the Harvard Law School in 1929 (*ibid.*, p. 229, annex 9) and in article 17, para. 1 (d) of the draft prepared by the same School in 1961 (*Yearbook . . . 1969*, vol. II, p. 146, document A/CN.4/217 and Add. 1, annex VII); in article 14, para. 1 of the revised preliminary draft prepared by Mr. F. V. García Amador in 1961 (*Yearbook . . . 1961*, vol. II, p. 48, document A/CN.4/134, addendum); in article VII of the “Principles of international law that govern the responsibility of the State in the opinion of the United States of America”, prepared by the Inter-American Juridical Committee in 1965 (*Yearbook . . . 1969*, vol. II, p. 154, document A/CN.4/217 and Add.1, annex XV); and in section 170 of the *Restatement of the law by the American Law Institute of 1965* (*Yearbook . . . 1971*, vol. II (Part One), p. 194, document A/CN.4/217/Add.2).

<sup>566</sup> See, for example, C. Fenwick, *International Law*, 3rd ed., rev. and augm. (New York, Appleton-Century-Crofts, 1948), pp. 297-298; G. Schwarzenberger, *International Law*, 3rd ed. (London, Stevens, 1957), vol. I, pp. 625 *et seq.*; H. Accioly, “Principes généraux de la responsabilité internationale d’après la doctrine et la jurisprudence”, *Recueil des cours de l’Académie de droit international de la Haye, 1959-1* (Leyden, Sijthoff, 1960), vol. 96, pp. 338 *et seq.*; I. von Münch, *Das völkerrechtliche Delikt in der modernen Entwicklung der Völkerrechtsgemeinschaft* (Frankfurt-am-Main, Kessler, 1963), pp. 199-200; C. F. Amersingh, “Imputability in the law of State responsibility for injuries to aliens”. *Revue égyptienne de droit international* (Cairo), vol. 22 (1966), pp. 119 *et seq.*; P. A. Steiniger, “Die allgemeinen Voraussetzungen der völkerrechtlichen Verantwortlichkeit der Staaten”, *Wissenschaftliche Zeitschrift des Humboldt-Universität zu Berlin, (Gesellschafts- und Sprachwissenschaftliche Reihe, Berlin)*, vol. XXII, No. 6 (1973), p. 447.

<sup>562</sup> For example, an affirmation of the responsibility of the State for the acts or omissions of the organs of a municipality will be found in the opinion expressed by Umpire F. Plumley in connexion with the award made on 14 August 1905 by the French-Venezuelan Mixed Claims Commission established by the protocol of 19 February 1902 in the *Piere Dominique and Co. Case* (United Nations, *Reports of International Arbitral Awards*, vol. X (United Nations publication, Sales No. 60.V.4), p. 156).

(5) As to the question whether the component states of a federal State are to be included among the territorial governmental entities dealt with in the present article, it should be noted first of all that a consistent series of legal decisions has affirmed the principle of the international responsibility of the federal State for the conduct of organs of component states amounting to a breach of an international obligation of the federal State, even in situations in which internal law does not provide the federal State with means of compelling the organs of component states to abide by the deferal State's international obligations. The award in the *Case of the "Montijo"*, made on 26 July 1875 by the United States-Colombian arbitral tribunal established under the agreement of 17 August 1874, is the starting point for this consistent series of decisions.<sup>567</sup> This principle has been reaffirmed in many decisions since that time. In this connexion, reference may be made to the awards rendered by the United States of America/Venezuela Claims Commission established by the Convention of 5 December 1885,<sup>568</sup> the French-Venezuela Mixed Commission established under the protocol of 19 February 1902,<sup>569</sup> the British-Venezuelan Mixed Commission established under the protocols of 13 February and 7 May 1903,<sup>570</sup> the Mexico/United States of America General Claims Commission established by the Convention of 8 September 1923<sup>571</sup> and the France/Mexico Claims Commission established by the Convention of 12 March 1927. Thus, for example, in the award made on 7 June 1929 in the *Pellat Case*, the last-mentioned Commission reaffirmed "the principle of the international responsibility . . . of a federal State for all the acts of its separate States which give rise to claims by foreign States" and noted specially that such responsibility ". . . cannot be denied, not even in cases where the federal Constitution denies the central Government the right of control over the separate States or the right to require them to comply, in their conduct, with the rules of international law".<sup>572</sup>

(6) With regard to the practice of States it may be noted in particular that, according to the Governments which replied to the request for information addressed to them by the Preparatory Committee for the 1930 Codification Conference, the fact that the component states of a federal State have broad autonomy under internal law in no way rules out the possible international responsibility of the federal State for the conduct of organs of the

component States.<sup>573</sup> Attempts made in the past by some States with a federal structure to resist claims for compensation in respect of the conduct of organs of a component state have become increasingly rare in this century and have finally ceased.<sup>574</sup>

(7) The substantial unanimity found in the international judicial decisions and in the practice of States in affirming the principle that a federal State is internationally responsible for the conduct of organs of its component states is not matched by a similar unanimity with regard to the grounds for that principle. The international responsibility of a federal State for the conduct of organs of its component states is sometimes presented as international responsibility for its own act, the conduct of an organ of the component state being regarded as attributable internationally to the federal State on the same grounds as the conduct of its own organs. In some judgements and statements of opinion, on the other hand, the international responsibility of a federal State in the cases considered here is conceived in terms of responsibility for the act of another—that is, of indirect responsibility of a subject of international law for the act of another subject—and the conduct of the organ of the component state is then attributed to that state alone.

(8) The two different ways of presenting and justifying the responsibility of a federal State for the conduct of organs of its component states are also to be found in some learned works. Most international jurists tend nowadays to see the structure of a federal State merely as an advanced form of decentralization of a State which, in outward appearance, remains basically unitary. Hence the holders of this view logically regard the principle of responsibility of a federal State, in the cases considered here, merely as the consequence of the attribution to that State, from the point of view of international law, of actions and omissions of organs of the component states. In the view of these authors, therefore, such attribution is made on the same basis as the attribution of the conduct of organs of a municipality, a region or the like.<sup>575</sup> The

<sup>573</sup> League of Nations, *Bases of Discussion . . . (op. cit.)*, vol. III, pp. 121 *et seq.*; and *Supplement to Volume III (op. cit.)*, p. 4.

<sup>574</sup> A typical example of this is to be found in the practice of the United States of America. After resisting, in the nineteenth century, the idea that the federation was responsible for the acts or omissions of organs of the component states, the United States Government adopted a much more flexible position and finally accepted such responsibility without reservation, as shown by the instructions sent to the United States agent before the Mexico/United States of America General Claims Commission in 1926 (G. H. Hackworth, *Digest of International Law*, vol. V (Washington, D.C., U.S. Government Printing Office, 1943), pp. 594-595) and by the reply given in 1929 to point X of the request for information addressed to the United States Government by the Preparatory Committee for the Hague Codification Conference (League of Nations, *Supplement to Volume III (op. cit.)*, p. 21).

<sup>575</sup> See for example C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), pp. 32 *et seq.*; R. Ago, "La responsabilità indiretta nel diritto internazionale", *Archivio di diritto pubblico*, January-April, 1936-XIV (Padua, CEDAM, 1936) vol. I, fasc. I; H. Accioly, "Principes généraux . . . (loc. cit.)", pp. 390-391; C. F. Amerasinghe, "Imputability . . . (loc. cit.)", pp. 119 *et seq.*; A. P. Sereni, *Diritto internazionale* vol. II (Milan, Giuffrè, 1958), pp. 310 *et seq.* and *ibid.*, vol. III

<sup>567</sup> 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. II, p. 1440.

<sup>568</sup> *De Brissot and others Case* (J. B. Moore, *History and Digest . . . (op. cit.)*, vol. III, pp. 2967, 2970 and 2971).

<sup>569</sup> *Pieri Dominique and Co. Case* (United Nations, *Reports of International Arbitral Awards* vol. X (*op. cit.*)), p. 156.

<sup>570</sup> *Davy Case (ibid.)*, vol. IX, United Nations publication, Sales No. 59.V.5), p. 468).

<sup>571</sup> *James (ibid.)*, vol. IV (United Nations publications, Sales No. 1951.V.1), p. 86, *Swinney (ibid.)*, p. 101, *Quintanilla (ibid.)*, p. 103, *Youmans (ibid.)*, p. 116, *Mallén (ibid.)*, p. 177, *Venable (ibid.)*, p. 230 and *Tribolet (ibid.)*, p. 601) *Cases*.

<sup>572</sup> *Ibid.*, vol. V (United Nations publications, Sales No. 1952.V.3), p. 536 [translation by the United Nations Secretariat].

influence of this view is to be seen in several codification drafts.<sup>576</sup> Other jurists, however—admittedly, mainly the older ones—regard the federal State much less as a composite State, that is, a State made up of states, than as a union of states in which the international personality of the federal State and the personality, however limited it may be, of the component states co-exist. Consequently, if an organ of a component State commits an act or omission relating to a sphere in which that State does not appear to have any international obligations directly incumbent upon it, the act or omission in question should be regarded under international law as an act or omission of the federal State, on the same footing as the conduct of organs of a municipality, and, as such, entails the federal State's responsibility. On the other hand, where an organ of a component state engages in conduct which amounts to a specific breach of an obligation incumbent upon the component state as a separate subject of international law, such conduct cannot be attributed to the federal State. The international responsibility of the federal State can all the same be invoked but as an indirect responsibility.<sup>577</sup> Some codification drafts also reflect this approach.<sup>578</sup>

(9) The differences of opinion thus revealed in judicial decisions, in the practice of States and in learned works with regard to the grounds on which a federal State bears international responsibility for the conduct of organs of its component states possess, perhaps, more theoretical interest than practical significance. At all events they seem to be due essentially to the fact that one and the

same term—"federal State"—is used to denote entities having very different structures. It is an undeniable fact that no distinction is drawn in public international law between, on the one hand most of the federal States in existence today, and on the other a State with a unitary structure, and that the component states of such a federal State in no way figures as internationally separate entities. There are, however, federations whose component states retain to varying degrees an international personality of their own, and it is quite possible that fresh example of structures of this kind may emerge in the future. Indeed, many different situations exist in practice, for cases are also known in which some of the component states of one and the same federal State enjoy personality under internal law only, whereas other components of the same State are regarded as separate subjects of international law. This plurality of situations cannot but have repercussions on the theoretical basis of international responsibility.

(10) In the Commission's opinion, all that need be said on this point is that, if the component states of a particular federal State do not possess a separate international personality, even within narrow limits, and if, therefore, they do not at any time have international rights and obligations, there can be no doubt that they are no different, so far as the problem considered here is concerned, from the other territorial governmental entities dealt with in this article. The actions or omissions of organs of component states are then simply to be regarded under international law as acts of the federal State. In the cases—comparatively rare nowadays—in which component states retain an international personality of their own with a relatively restricted legal capacity, it seems evident that the conduct of their organs is likewise attributable to the federal State where such conduct amounts to a breach of the federal State's international obligations. On the other hand, where the conduct of organs of a component state amounts to a breach of an international obligation incumbent upon the component state, such conduct is to be attributed to the component state and not to the federal State. The international responsibility of the federal State can then be invoked only as the responsibility of one subject of international law for the act of another subject of international law.

(11) In connexion with the foregoing considerations the Commission discussed whether, after the statement of the principle of attribution to the State, as a possible source of international responsibility, of the conduct of organs of territorial governmental entities, an exception should be made to the principle in order to deal, in particular, with the case of component states of a federation which might have retained, in certain specific matters, an international legal personality and capacity of their own, separate from those of the federation. The Commission did not, however, find it necessary to make such a reservation. The purpose of the present article is simply to determine whether, under international law, the conduct of organs of territorial governmental entities of a State—be it federal or unitary—should be regarded as acts of the State: assuming, of course, that those organs have acted in a sphere in which their action may

(Foot-note 575 continued)

(1962), p. 1508; 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. 69 *et seq.*; P. A. Steiniger, "Die allgemeinen Voraussetzungen . . ." (*loc. cit.*), p. 447.

<sup>576</sup> See for example article 17 of the draft prepared by the Harvard Law School in 1961; article 14 of the revised preliminary draft prepared by F. V. García Amador in 1961; article VII of the "Principles of international law that govern the responsibility of the State in the opinion of the United States of America", section 170 of the *Restatement of the law*" by the American Law Institute (for references, see above, foot-note 565); and article 2 of the draft agreement on responsibility in international law prepared by B. Graefrath and P. A. Steiniger in 1973. *Wissenschaftliche Zeitschrift der Humboldt-Universität zu Berlin (op. cit.)*, p. 467.

<sup>577</sup> The thesis summarized here has been particularly developed by H. Triepel, *Völkerrecht und Landesrecht* (Leipzig, Mohr (Siebeck), 1899), pp. 359 *et seq.* and 366 *et seq.*; with minor variations from one writer to another, this view is also supported by K. Strupp, "Das völkerrechtliche Delikt", *Handbuch des Völkerrechts* pp. 109 *et seq.*; (Stuttgart, Kohlhammer, 1920), vol. III, part. 4, pp. 109 *et seq.*; Ch. de Visscher, "La responsabilité des Etats", *Bibliotheca Visseriana* (Leyden, Brill, 1924), vol. II, pp. 105-106; A. Verdross, "Theorie der mittelbaren Staatenhaftung," *Oesterreichische Zeitschrift für öffentliches Recht* (Vienna), vol. I, No. 4 (new series) (1948), pp. 395 *et seq.*; D. B. Levin, *Otvetsvennost gosudarstv v sovrennom mezhdunarodnom prave* (Moscow, Mezhdunarodnye otnoshenia, 1966), pp. 41 *et seq.* Some of these authors also advance the possibility of a direct responsibility of the component State in certain cases in which its acts take place within its own sphere of international competence.

<sup>578</sup> See for example, Basis of Discussion No. 23 of the Preparatory Committee for the Hague Conference (*Yearbook . . . 1965*, vol. II, p. 223, document A/CN.4/96, annex 2); article IX of the resolution adopted by the Institute of International Law in 1927 (*ibid.*, p. 228, annex 8); and article 4 of the draft prepared by the Deutsche Gesellschaft für Völkerrecht in 1930 (*Yearbook . . . 1969*, vol. II, p. 150, document A/CN.4/217 and Add.1, annex VIII).

come up against the existence of international obligations of the State in question. Where an organ of a component state of a federal State acts in a sphere in which the component state has international obligations that are incumbent on it and not on the federal State, that component state clearly emerges at the international level, as a subject of international law separate from the federal State, and not merely as a territorial government entity subordinate to the federal State. It stands to reason that in this case the conduct of the organ in question is, in virtue of article 5 of the present draft, the act of the component state; the problem of attributing the conduct in question to the federal State does not even arise in this hypothetical case, which thus automatically falls outside the scope of those covered by this article. It will, of course, be another matter to determine in such a case, not to what subject of international law the act is to be attributed, but what subject is to be held internationally responsible for that act. This entirely different aspect of the matter will logically come up for consideration in another chapter and will form the subject of another article of the present draft.

(12) The question also arose whether the rule of attribution to the State of the acts or omissions of organs of territorial governmental entities was not open to an exception in the case where such acts or omissions amounted to a breach of a contractual obligation assumed by such an entity under internal law. In this context it has often been affirmed as a principle that the State cannot be held internationally responsible for the breach of contracts entered into by the organs of a territorial governmental entity in connexion, for instance, with loans. In the Commission's view, however, the question whether the conduct under consideration can or cannot entail the international responsibility of the State is not a matter of whether or not such conduct should be regarded as attributable to the State. To find the right answer to such a question it is necessary to determine whether or not, in the specific case in point, the State is under an international obligation, for example in virtue of a treaty, requiring that State in its international relations to honour certain contractual obligations under internal law, whether those obligations have been incurred by organs of the State itself or by organs of a territorial governmental entity. Hence, even where the question whether the State has an international responsibility or not was answered in the negative, that answer would be dictated, not by the fact that such conduct of an organ of a territorial governmental entity, amounting to non-fulfilment of a contractual obligation of that entity, was not attributable under international law to the State, but by the fact that the second condition for the existence of an internationally wrongful act of the State—i.e. the breach of an international obligation of the State—would not be met in the case in question. Consequently no exception whatsoever need be made in this connexion to the principle laid down in paragraph 1 of the present article.

(13) The general rule laid down in article 7, paragraph 1, providing for the attribution to the State of the conduct of organs of territorial governmental entities obviously does not exclude the possibility that States may, by

treaty, adopt a different, special rule designed to prevail over the general rule in specified matters. For instance, some treaties to which federal States are parties include a so-called "federal clause" exempting the federal State from responsibility in the event that non-performance of the treaty is due to the failure of the federal State's constitution to provide it with means of compelling its component states to abide by the treaty. This is clearly an exception to the general rule, applicable solely in relations between the States parties to the treaty in question and in the matters which the treaty covers.

(14) The rule laid down in article 7, paragraph 2, stems from, and is designed to cover, the need to take into account a typical phenomenon of our times: the proliferation of entities which, within a given community, are empowered to exercise some governmental authority. The manifold causes of this phenomenon need not be dwelt upon here. Suffice it to note that there is a tendency, within State communities, to set up more and more establishments, institutions—in a word, "entities"—which are required under internal law to perform certain tasks in the interest of the community but which possess, in the eyes of the law, an organization and a personality of their own, separate from those of the State. Among these various "entities"—whatever the régime by which they are governed—there are some whose particular characteristic is that the internal legal system confers upon them, to a greater or lesser extent, the exercise of certain elements of the governmental authority, usually of a regulatory or executive nature.

(15) Since this phenomenon is a relatively recent development, it is only to be expected that the practice of States has few precedents to offer. The request for information sent to Governments by the Preparatory Committee for the 1930 Codification Conference did not include any point dealing expressly with the case of entities other than territorial governmental entities exercising "public functions of a legislative or executive character" (point VI). However, in their replies to the questions raised in point VI, some Governments observed that the State was responsible also for acts or omissions of collective entities other than those of a local character, in so far as such entities were also required to exercise public functions of the same nature.<sup>579</sup> The most interesting reply from this standpoint was that from the German Government, according to which:

... when, by delegation of powers, bodies act in a public capacity, e.g. police an area or exercise sovereign rights as in the case when they levy taxes for their own needs... the principles governing the responsibility of the State for its organs apply with equal force. From the point of view of international law, it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or less extent, to autonomous bodies.

When, however, these bodies, acting outside their allotted sphere, are guilty of behaviour towards foreigners which is contrary to international law, the principles set out in No. VII (concerning the conditions under which the State becomes responsible for foreigners injured by private individuals in their rights recognized under international law) will also apply.

<sup>579</sup> League of Nations, *Bases of Discussion ... (op. cit.)*, pp. 90 et seq.

The remarks in this connexion apply in practice principally to legal entities, and particularly administrative bodies possessing the right of self-government; but they are also applicable when the State, as an exceptional measure, invests private organizations with public powers and duties or authorizes them to exercise sovereign rights, as in the case of private railway companies permitted to maintain a police force.<sup>580</sup>

The Preparatory Committee accordingly came to the conclusion that it should refer both to territorial government entities such as communes and provinces and more generally to "autonomous institutions" which exercise public functions of a legislative or administrative character. It therefore prepared the following basis of discussion:

A State is responsible for damage suffered by a foreigner as the result of acts or omissions of such corporate entities (communes, provinces, etc.) or autonomous institutions as exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State.<sup>581</sup>

Unfortunately the Third Committee of the Conference did not have time to examine and adopt that basis of discussion.

(16) The few modern authors who have studied the problem have put forward the logical reasons which require that the conduct of organs of the entities here considered should be attributed, at the international level, to the State.<sup>582</sup> Moreover the principle of such attribution is restated, in varied forms and at greater or lesser length, in certain codification drafts.<sup>583</sup>

(17) In the Commission's view, the question whether the conduct of organs of its territorial governmental entities should be attributed to the State under international law, calls for the same affirmative answer when the organs involved are organs of entities whose separate existence meets a need for decentralization not *ratione loci* but *ratione materiae*, and for the same reasons. In both cases it is important that the State should not be able to evade its international responsibility

<sup>580</sup> *Ibid.*, p. 90.

<sup>581</sup> *Ibid.*, p. 92.

<sup>582</sup> See, for instance, G. Dahm, *Völkerrecht* (Stuttgart, Kohlhammer, 1961), vol. III, p. 193; G. Balladore Pallieri, *Diritto internazionale pubblico*, 8th ed., rev. (Milan, Giuffrè, 1962), p. 129; Münch, *op. cit.*, pp. 200-201; Amerasinghe, "Imputability . . . (*loc. cit.*)", p. 103.

<sup>583</sup> Professor Roth used a very wide formulation in article 1 of his draft (*Yearbook . . . 1969*, vol. II, p. 152, document A/CN.4/217 and Add.1, annex X), attributing to the State, as a source of responsibility, the acts "of any individuals whom or corporations which it entrusts with the performance of public functions". The draft prepared in 1930 by the Deutsche Gesellschaft für Völkerrecht mentioned in article 1, paragraph 3 (*ibid.*, p. 149, document A/CN.4/217 and Add.1, annex VIII) together with various State powers, "corporations and agencies which perform public functions". Article 17 of the draft prepared in 1961 by the Harvard Law School (*ibid.*, p. 146, document A/CN.4/217 and Add.1, annex VII), points to the conclusion that acts of organs of non-commercial or even commercial entities which possess a personality separate from the State but for which the State would invoke immunity at the international level may be considered attributable to the State. This conclusion is confirmed by the comment made on section 169 of the *Restatement of the Law* prepared by the American Law Institute in 1965 (American Law Institute, *Restatement of the Law, Second, Foreign Relations Law of the United States* (St. Paul, Minnesota, American Law Institute publishers, 1965), pp. 512-513).

in certain circumstances solely because it has entrusted the exercise of some elements of the governmental authority to entities separate from the State machinery proper. The Commission, for its part, feels able to conclude that there is already an established rule on the subject; but it is also convinced that, even if that were not the case, the requirements of clarity in international relations and the very logic of the principles governing them would make it necessary to affirm such a rule in the course of the progressive development of international law.

(18) The choice of criteria for designating the entities to be covered by paragraph 2 of the present article is not easy, for the entities in question vary widely in characteristics, in the matters falling within their field of activity and, sometimes, in the régimes which govern them. The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital or, more generally, in the ownership of its assets, and the fact that it is not subject to State control, or that it is subject to such control to a greater or lesser extent, and so on, do not emerge as decisive criteria for the purposes of attribution or non-attribution to the State of the conduct of its organs. Hence the Commission has come to the conclusion that the most appropriate solution is to refer to the real common feature which these entities have: namely that they are empowered, if only exceptionally and to a limited extent, to exercise specified functions which are akin to those normally exercised by organs of the State. The justification for attributing to the State, under international law, the conduct of an organ of one or other of the entities here considered still lies, in the final analysis, in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority. It stands to reason that, if it is to be regarded as an act of the State for purposes of international responsibility, the conduct of the organ of an entity of this kind must relate to a sector of activity in which the entity in question is entrusted with the exercise of the elements of governmental authority concerned. Thus, for example, the conduct of an organ of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it falls within the exercise of those powers.

(19) With regard to the formulation of the rule, the Commission felt it preferable to cover in a single article all the cases of conduct of organs of entities which under the internal law of the State have a personality separate from the State but which are empowered by the same law to exercise certain elements of the governmental authority, whether through the application of a normal criterion of decentralization *ratione loci* of the exercise of the governmental authority, or in order to meet a more exceptional and more limited need for decentralization *ratione materiae* of certain elements of the governmental authority. For this purpose, the term "entity" has been used in the title of the article as being the most neutral term and the easiest to translate into the various languages, and also as a term wide enough in meaning to cover bodies as different as territorial governmental entities, public corporations, semi-public entities, public

agencies of various kinds and even, in special cases, private companies.

(20) In paragraph 1 of the French text of the article, the expression "*collectivité publique territoriale de cet Etat*" has been used in preference to others because it is traditionally used in French to cover all the various categories of entities, from communes to the component states of a federal State, that satisfy a criterion of decentralization *ratione loci* of the governmental authority. It makes clear what entities are referred to and dispenses with the need to list the entities in question, which is always a risky process. Moreover, a corresponding expression is used in Spanish and the Romance languages in general. In English the expression "territorial governmental entity within a State" has been adopted as having the same meaning as that French expression. In paragraph 2 the expression "entity . . . empowered . . . to exercise elements of the governmental authority" seemed the best calculated to meet the need to indicate in the various languages the nature of the functions which the entity in question must be called upon to exercise in order to come within the scope of this article.

**Article 8. Attribution to the State of the conduct of persons acting in fact on behalf of the State**

**The conduct of a person or group of persons shall also be considered as an act of the State under international law if**

**(a) it is established that such person or group of persons was in fact acting on behalf of that State; or**

**(b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.**

*Commentary*

(1) Article 5 and 7 of this draft dealt with the attribution to the State *qua* subject of international law, as a possible source of its responsibility, of the conduct of organs which are part of the formal structure of the State and the conduct of organs of territorial governmental entities of the State and the conduct of organs of territorial governmental entities of the State or other entities similarly empowered by internal law to exercise certain elements of the governmental authority. We have thus covered the whole broad category of persons formally appointed in one way or another, under the internal law of a State, to act on behalf of the community. Article 8 is intended to supplement these two articles by providing for the possible attribution to the State, as a subject of international law, of the conduct of persons (individuals or private entities) or groups of persons who have in particular circumstances acted in fact on behalf of the State without, however, having been formally appointed as organs for that purpose under the State's legal system. Sub-paragraph (a), on the one hand, refers to persons or groups of persons who have committed certain acts when in fact prompted to do so by organs of

the State or of one of the other entities mentioned in article 7 or who have been instructed by such organs to perform certain functions or certain activities, though not by way of formal appointment as an organ. Sub-paragraph (b), on the other hand, covers the case of persons or groups of persons who, although unconnected by any formal or *de facto* link with the machinery of the State or the machinery of any of the other entities mentioned in article 7, have acted in exceptional circumstances by assuming on their own initiative the exercise of certain elements of the governmental authority.

(2) The hypothesis contemplated in sub-paragraph (a) was intended by the Commission mainly to cover cases in which the organs of the State supplement their own action and that of their subordinates by the action of private persons or groups who act as "auxiliaries" while remaining outside the official structure of the State. In the same context the Commission wished to deal with the familiar cases in which the organs of the State or of one of the other entities empowered by internal law to exercise elements of the governmental authority prefer, for varied and in any case self-evident reasons, not to undertake certain duties directly or not to carry out certain tasks themselves. They then make use of persons who are not formally part of the State machinery or of the machinery of any of the other entities mentioned; they call upon private individuals or groups of private individuals to take on the duties and tasks in question, although here again these individuals or groups are not thereby formally attached to the structures in question and do not, in other words, thereby become *de jure* organs of the State or of the other entities mentioned. The Commission, also bearing in mind the important role played by the principle of effectiveness in the international legal order, considered that that order must of necessity take into account, in the cases contemplated, the existence of a real link between the person performing the act and the State machinery rather than the lack of a formal legal nexus between them. The conduct in which the persons or groups in question thus engage in fact on behalf of the State should therefore be regarded under international law as acts of the State: that is to say, as acts which may, in the event, become the source of an international responsibility incumbent on the State.

(3) The validity of this conclusion is confirmed by international judicial decisions and international practice, even though the former have only occasionally had to deal with the acts of the persons referred to in sub-paragraph (a). The cases which have actually arisen in international life relate mainly to situations in which the activities of the persons concerned were especially liable to bring them into contact with foreign countries. The main forms of conduct which have been taken into consideration for attribution to the State as acts generating international responsibility are, first, the conduct of private individuals or groups of private individuals who, while remaining such, are employed as auxiliaries in the police or armed forces or sent as "volunteers" to neighbouring countries, and secondly, the acts of persons employed to carry out certain missions in foreign territory.

(4) As an example of the first set of situations, mention may be made of the award given on 30 November 1925 by a Great Britain/United States arbitral tribunal in the *D. Earnshaw and Others (Zafiro) Case*. The tribunal found that the conduct of the crew of a United States merchant vessel was attributable to the United States of America and engaged the international responsibility of that State, because it had been established that the vessel, although private, was in fact acting as a supply ship for United States naval operations. Its captain and crew were for this purpose under the command of a United States naval officer.<sup>584</sup> A further example is to be found in the decision in the *Stephens Case*, given by the Mexico/United States of America General Claims Commission on 15 July 1927. Referring to a group of guards who were not part of the Mexican army but whom it had employed as auxiliaries, the Claims Commission observed:

It is difficult to determine with precision the status of these guards as an irregular auxiliary of the army, the more so as they lacked both uniforms and insignia; but at any rate they were "acting for" Mexico.

On this basis the Claims Commission concluded that the act of a person who was part of these groups of guards employed as auxiliaries engaged Mexico's responsibility on the same basis as the act of members of the regular armed forces.<sup>585</sup>

(5) With regard to the second set of situations, reference may be made to the *Black Tom* and *Kingsland* cases, concerning acts of sabotage committed in the United States of America during the First World War by persons acting on behalf of Germany. In its decision of 16 October 1930 the United States and Germany Mixed Claims Commission established under the agreement of 10 August 1922 declared that, if it were proved that the damage complained of was due to the acts of the persons in question, Germany must be held responsible.<sup>586</sup> In the same context, reference may also be made to the positions taken by States on the occasion of incidents concerning notorious cases in which persons have been abducted from the territory of another State: the Rossi,<sup>587</sup> Jacob,<sup>588</sup> Eichmann<sup>589</sup> and Argoud<sup>590</sup> cases.

<sup>584</sup> United Nations, *Reports of International Arbitral Awards*, vol. VI (United Nations publication, Sales No. 1955.V.3), pp. 160 *et seq.*

<sup>585</sup> *Ibid.*, vol. IV (United Nations publications, Sales No. 1951.V.1), p. 267.

<sup>586</sup> *Lehigh Valley Railroad Company and Other Cases (Black Tom and Kingsland cases)*, United Nations, *Reports of International Arbitral Awards*, vol. VIII (United Nations publication, Sales No. 58.V.2), pp. 84 *et seq.* In this decision the Commission held that the burden of proof had not been sustained and it consequently decided the case in Germany's favour. It was later proved, on the basis of new information, that the damage had in fact been caused by German saboteurs; the Commission therefore set aside its previous decision and held Germany responsible for the damage caused (decision of 15 June 1939, *ibid.*, pp. 458-459). On this case, see L. H. Woolsey, "The arbitration of the sabotage claims against Germany", *American Journal of International Law* (Washington, D.C.), vol. 33, No. 4, October 1939, pp. 737 *et seq.*

<sup>587</sup> This was an abduction carried out in Switzerland in 1928 by persons probably acting by agreement with the Italian police. On this case, see Scheuner, "Der Notenwechsel zwischen der Schweiz und

In every case, the dispute between the State in whose territory the abduction had taken place and the State on whose behalf the abductors were suspected of having acted dealt solely with the facts, and not with the point—generally recognized by both parties—that, if the persons in question could be proved to have acted in concert with and at the instigation of the organs of a State, the action of abduction must be regarded as an act of that State.

(6) In addition to the two sets of situations just mentioned, reference may be made to certain positions taken on the occasion of incidents caused by the conduct of the press, radio, television, etc. It has happened that the country considering itself injured has claimed the existence of international responsibility for such conduct on the grounds that, in the country where the conduct occurred, the press and other mass information media were really controlled by the Government.<sup>591</sup>

(7) It does not seem necessary to dwell on further specific examples of the application of the principle stated in sub-paragraph (a) of the present article, since this principle is practically undisputed. The attribution to the State, as a subject of international law, of the conduct of persons who are in fact acting on its behalf, though without thereby acquiring the status of organs either of the State itself or of some other entity empowered to exercise elements of the governmental authority, is unanimously upheld by the writers on international law who have dealt with this question.<sup>592</sup>

(8) The Commission wishes nevertheless to make it quite clear that, in each specific case in which inter-

Italien in der Angelegenheit Cesare Rossi", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Berlin), vol. I, part II (1929), pp. 280 *et seq.*

<sup>588</sup> Berthold Jacob was abducted from Swiss territory in 1935 by persons manifestly employed for this work by the Gestapo, and taken to Germany. On this incident, see Quéneudec, *op. cit.*, p. 49; and "Die deutsch-schweizerische Schiedsordnung im Falle Jacob", *die Friedens-Warte* (Geneva), vol. 35, No. 4 (1935), pp. 157-158.

<sup>589</sup> The abduction of Adolf Eichmann took place in Argentine territory in 1960. For a detailed analysis of this case, see the account given in the *Revue générale de droit international public* (Paris), 3rd series, vol. XXXI, No. 4 (Oct.-Dec. 1960), pp. 772 *et seq.*, and in connexion with it the article by H. Silving, "In re Eichmann: A dilemma of law and morality", *American Journal of International Law* (Washington, D.C.), vol. 55, No. 2, April 1961, pp. 311 *et seq.*

<sup>590</sup> Colonel Argoud was abducted from German territory and taken to France in 1963 by persons suspected of acting on behalf of the French police. See on this subject the information given in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Stuttgart), vol. 25, No. 2 (May 1965), pp. 295 *et seq.*; vol. 27, No. 1-2 (1967), pp. 188-189; and A. Cocarte-Zilgien, *L'Affaire Argoud—Considérations sur les arrestations internationalement irrégulières* (Paris, Pédone, 1965).

<sup>591</sup> For examples drawn from practice see also E. Zellweger, *Die völkerrechtliche Verantwortlichkeit des Staats für die Presse* (Zurich, Polygraphischer Verlag, 1949), pp. 40 *et seq.*

<sup>592</sup> See B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953), pp. 196-197; P. Reuter, "La responsabilité internationale", *Droit international public (cours)*, (Paris, Les Nouvelles Institutes, 1955-1956), pp. 90 *et seq.*; Quéneudec, *op. cit.*, pp. 47 *et seq.*; G. Ténékidès, "Responsabilité internationale", *Répertoire de droit international* (Paris, Dalloz, 1969), vol. II, p. 787; P. Kuris, *Mezhdunarodnye pravonarushenia i otvetstvennost gosudarstva* (Vilnius, Mintis, 1973), p. 178.

national responsibility of the State has to be established, it must be genuinely proved that the person or group of persons were actually appointed by organs of the State to discharge a particular function or to carry out a particular duty, that they performed a given task at the instigation of those organs. Where such proof is lacking, the conduct of the persons concerned can only fall under the provisions of a subsequent draft article which is to deal with the conduct engaged in by individuals or groups of individuals as private persons. For these reasons the text adopted by the Commission for article 8, sub-paragraph (a), begins with the words "it is established".

(9) With regard to the hypothesis contemplated in sub-paragraph (b), the Commission focused its attention mainly on circumstances in which, for one reason or another, the regular administrative authorities have disappeared. During the Second World War, for example, in belligerent countries and any other country invaded, local administrations fled before the invader, or, later, before the armies of liberation. It then sometimes happened that persons acting on their own initiative provisionally took over, in the interests of the community, the management of certain public concerns or that committees of private persons provisionally took charge of the administration, issued ordinances, performed legal acts, administered property, pronounced judgements, etc., in other words, exercised elements of the governmental authority. In such circumstance it may also happen that private persons acting on their own initiative assume functions of a military nature; for example, when the civilian population of a threatened city takes up arms and organizes its defence.<sup>593</sup> There are other situations in which the organs of administration are lacking as a result of natural events such as an earthquake, a flood or some other major disaster. Here again, private persons who do not hold any public office under internal law may come to assume public functions in order to carry on services which cannot be interrupted, or which must be provided precisely because of the exceptional situation.<sup>594</sup>

(10) What sets the cases now envisaged apart from those dealt with in sub-paragraph (a) is that the persons or group of persons referred to here have assumed

<sup>593</sup> It may be pointed out that article 2 of the Regulations respecting the Laws and Customs of War on Land (Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed., J. R. Scott, ed. (New York, Oxford University Press, 1918), pp. 107-108)), annexed to the IVth Hague Convention of 18 October 1907, extends consideration as "belligerents" to the inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves. According to A. Verdross (*Völkerrecht*, 5th ed. (Vienna, Springer, 1964), p. 350), the acts of these inhabitants are attributable to the State and the State is responsible for them. Similar reflections may be made on article 4, para. A (6), of the Geneva Convention of 12 August 1949 on the Treatment of Prisoners of War (United Nations, *Treaty Series*, vol. 75, p. 140).

<sup>594</sup> For examples see E. Sayagués-Laso, *Tratado de derecho administrativo* (Montevideo, tip. Bianchi-Altuna, 1953), vol. I, p. 301; M. Waline, *Droit administratif*, 8th ed. (Paris, Sirey, 1959), p. 401; C. Mortati, *Istituzioni di diritto pubblico*, 8th ed. (Padua, CEDAM, 1969) vol. I, pp. 219-220; A. Grisel, *Droit administratif suisse* (Neuchâtel, Ides et Calendes, 1970), pp. 236-237.

the exercise of the functions in question on their own initiative instead of being appointed to or entrusted with them by organs of the State or of one of the entities referred to in article 7. Moreover, in many cases, they act without the knowledge of the official organs. There is thus no formal or real link with the machinery of the State or of one of the entities entrusted by the internal law of the State with the exercise of elements of the governmental authority.

(11) The question then arises whether such conduct should also be regarded under international law as acts of the State that are capable of entailing its international responsibility if they constitute a breach of an international obligation of the State. International practice in this matter is very limited, and this is hardly surprising in view of the rather exceptional nature of the situations envisaged and, in particular, of the hypothesis that the conduct in question may constitute internationally wrongful acts. The Commission has found, however, that national laws often regard such conduct as conduct of the State under internal law and even hold the State responsible for such acts. In the Commission's view the State, as a subject of international law, should *a fortiori* bear the responsibility for such conduct when it has led to a breach of an international obligation of that State.<sup>595</sup> The criterion which, it would seem, should guide international law in this matter is that the nature of the activity performed should be given more weight than the existence of a formal link between the agent and the organization of the State or of one of the entities referred to in article 7. This view is shared by the few writers that have dealt with the case of private individuals who, in exceptional circumstances, assume on their own initiative the exercise of certain elements of the governmental authority.<sup>596</sup> However, the Commission wishes to stress that, since the persons under consideration have no prior link to the machinery of the State or to any of the other entities entrusted under internal law with the exercise of elements of the governmental authority, the attribution of their conduct to the State is admissible only in genuinely exceptional cases. The Commission is unanimous in indicating that, for this purpose, the following conditions must be met: in the first place, the conduct of the person or group of persons must effectively relate to the exercise of elements of the governmental authority. In the second place, the conduct must have been engaged in because of the absence of official authorities (that is, organs of the State or of one of the entities dealt with in article 7) and, furthermore, in circumstances which justified the exercise of these elements of authority by private persons: that is to say, in the last resort, in one of the circumstances mentioned in the commentary to the present article.<sup>597</sup>

(12) The Commission wishes to point out that the case of persons acting in fact on behalf of the State in the circumstances covered by the present article should not be confused with the case of what are called "*de facto*

<sup>595</sup> This is, of course, true even where the internal law of the State does not regard such conduct as attributable to the State.

<sup>596</sup> See, for example, Reuter, *La responsabilité internationale* (*loc. cit.*), p. 90; Quéneudec (*op. cit.*), p. 45; Kuris (*op. cit.*), p. 178.

<sup>597</sup> See para. 9 above.

governments". The case of the persons considered in the present article presupposes the existence of a government in office and of State machinery whose place they take or whose action they supplement in certain circumstances, themselves remaining outside that machinery but behaving in fact as though they formed part of it. A *de facto* government, on the other hand, is itself a State apparatus which has replaced the State machinery that existed previously. The term "*de facto* government", or "general *de facto* government",<sup>598</sup> is sometimes used to denote a government which, though not invested with power in accordance with the previously established constitutional forms, has fully and finally taken power, the previous government having disappeared. The adjective in question then merely reflects the existence of a problem of legitimacy concerning the origin of the new government—a problem which, moreover, subsists only from the point of view of a constitutional rule that will probably cease to exist itself, being replaced by a new written or unwritten rule. All this is without relevance to the problems of international responsibility, in which no distinction may be made between a State ruled by a *de facto* government and one ruled by a *de jure* government. A State whose Government has been established in full compliance with the prescribed constitutional forms and a State whose Government was born of a revolutionary change incur international responsibility under exactly the same conditions and for the same reasons. The State organization exists in the one case as in the other; and the persons who are part of it are no less "organs"—true organs—of the State because the Government has a *de facto* rather than a *de jure* origin.<sup>599</sup> It is therefore article 5 of the present draft which makes their actions or omissions attributable to the State.

(13) With regard to the formulation of the rule, the Commission found it preferable to deal in one and the same article with the various hypotheses regarding the conduct of persons acting on behalf of the State, as a subject of international law, without having received any formal appointment as organs under the internal law of that State. It was thought desirable, however, to draw a distinction within this single article between the case of

<sup>598</sup> In addition, the expression "local *de facto* Government" is used to describe the machinery of an insurrectional movement which, in the course of its struggle against the *de jure* Government, has succeeded in establishing itself in a part of the State's territory. The specific problem of attributing to a State the conduct of the organs of an insurrectional movement directed against that State will be dealt with in a later article of the draft. It is sufficient to stress here that even the case of the acts of the organs of a "local *de facto* Government" does not fall within the scope of the provisions of article 8.

<sup>599</sup> This aspect has long been brought out in international judicial decisions. See, for example, the award of 17 October 1923 by the Arbitrator, Mr. W. H. Taft, in the *Aguilar-Amory and Royal Bank of Canada Claims (Tinoco Case)*, in United Nations, *Reports of International Arbitral Awards*, vol. I (United Nations publication, Sales No. 1948.V.2), pp. 381-382. See also the other cases cited by B. Cheng (*op. cit.*), pp. 188-189. On the problem of the responsibility of the State for the conduct of *de facto* Governments, see 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. 172 *et seq.*; J. A. Frowein, *Das de facto-Regime in Völkerrecht (Cologne, Heymanns, 1968)*, pp. 70-71.

persons acting at the instigation of an organ of the State (or of any of the entities mentioned in article 7) and the case of private persons who, in exceptional circumstances, assume on their own initiative functions involving the exercise of elements of the governmental authority. As to the order in which the two cases are stated, the priority is given to what is, so to speak, the more "usual" case. With regard to terminology, the word "person" is preferred to "individual" so as to include both a private individual and, for instance, an association or private company. The term "official authorities" was chosen so as to cover both the organs of the State and the organs of the entities mentioned in article 7.

**Article 9. Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization**

The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.

*Commentary*

(1) Where a State places one of its organs at the disposal of another State in order that that organ may temporarily act for the benefit and under the authority of that other State, there is a possibility that, notwithstanding the provisions of the previous articles, the conduct of that organ may be regarded under international law as an act of the State at whose disposal it has been placed, and not of the State whose organ it is. An analogous situation may arise where an organ is "lent" to a particular State, not by another State, but by an international organization. These exceptional situations form the subject-matter of the provisions of the present article, which is intended chiefly to specify the conditions that have to be met for the exceptional change of attribution to take place. There are three essential conditions for this: (a) the organ placed at the disposal of a State by another State or by an international organization must possess the legal status of an "organ" of that other State or of that organization at the time when it acts under the authority of the State to which it has been "lent"; (b) the beneficiary State must actually have the "lent" organ at its disposal at the time when the organ engages in the conduct likely to give rise to international responsibility; and (c) the conduct in question must have been engaged in by the "lent" organ in the exercise of elements of the governmental authority of the beneficiary State.

(2) The first of these conditions is easily defined: the present article refers solely to the case where a State or an international organization has placed *one of its organs* at the disposal of another State and that organ has not lost its original status merely by temporarily performing functions under the authority of a State other than its own. Consequently article 9 does not apply to the

conduct of persons or groups of persons who, according to the legal order of the sending State or international organization, are mere private individuals at the time of such conduct, either because they have never had the legal status of an organ of that State or organization or because they have lost that status on being placed at the disposal of another State. For example, "experts" placed at the disposal of a State under technical assistance programmes are more often than not to be regarded under the legal system of the sending State or organization as private individuals, not as "organs"; and in many cases, even if they had the status of an "organ" previously, they have lost it on being seconded to another State. The State at whose disposal an expert is placed may if it wishes confer on him, under its own internal legal order, the status of an organ of the State or of one of the other entities contemplated in article 7 of the present draft. It is even conceivable that the State in question may in fact entrust him with the performance of certain functions or duties on its behalf in accordance with article 8. The conduct of the expert can then be attributed under international law to the beneficiary State as a possible source of international responsibility for that State, but by virtue of articles 5 to 8, not article 9, of the present draft. If, on the other hand, the beneficiary State confines itself to using the services of the expert "lent" to it by another State, or by an international organization, in the same way as the services of any other national or foreign expert—i.e. if the "lent" expert remains a private individual—his conduct is not subject to the possibility of being considered as an act of the beneficiary State. In such circumstances, international responsibility cannot conceivably attach to that State except upon the usual conditions on which a State may generally incur responsibility in connexion with the activities of mere private individuals.

(3) It is not, however, essential that the organ placed at the disposal of a State by another State should be an organ forming part of the State machinery proper under the internal legal order of the latter State. It may equally well be an organ of a territorial governmental entity or, more generally, of any entity empowered by the internal law of the sending State to exercise elements of the governmental authority. For example, a town may suffer a disaster and the municipality of a foreign town may place its fire brigade temporarily at the former town's disposal. Again, a city may come to the assistance of a foreign city suffering for example, from over-rapid growth and make its town-planning services temporarily available to the foreign city. In both cases it is possible that the organs thus "lent" may, in the exercise of their functions, encroach upon foreign rights or interests. The provision in article 9 should therefore be understood to cover also the case in which a State places at the disposal of another State an organ belonging, not to its own machinery, but to that of another entity empowered by the internal legal order to exercise elements of the governmental authority.

(4) The second of the conditions stated above which must be met in order for a specific situation to be among those covered by article 9 is that the conduct in question should be engaged in by an organ of a State or of an

international organization which has genuinely been *placed at the disposal of another State*. This logically excludes from the scope of article 9 the most common cases of activities carried on by organs of a State or of an international organization in the territory of another State: namely, those in which these organs merely perform in foreign territory functions which are and remain functions of the State or international organization to which they belong. In such cases no functional link is established between the organ acting and the machinery of the State in whose territory it is called upon to act. This applies both to actions performed by the organ in question without the consent, or even against the will, of the territorial State (such as military operations against that State) and to functions performed with the consent of that State (diplomatic or consular functions, for instance, or representational functions for an international organization). In both these cases it is obviously out of the question to attribute to the territorial State the conduct of the organs concerned. By virtue of article 5 of the draft, such actions on the part of the State organs can only be regarded as acts of the State to whose machinery the organs belong. In any case, this point will be considered in detail in a later article of this draft, in which particular attention will be paid to the conduct, in the territory of a State, of organs of another subject of international law.

(5) The condition that the organ in question shall have been "placed at the disposal" of a State does not mean only that the organ must be appointed to perform functions appertaining to the State at whose disposal it is placed. It also requires that, in performing the functions entrusted to it by the beneficiary State, the organ shall act in conjunction with the machinery of that State and under its exclusive direction and control, not on instructions from the sending State.

(6) The second condition therefore excludes from the scope of the rule stated in article 9 situations in which certain functions of the allegedly "beneficiary" State are performed without its freely given consent, as happens when a State placed in a position of dependence, protectorate, unequal union, territorial occupation or the like is compelled to allow the acts of its own machinery to be set aside and replaced to a greater or lesser extent by those of the machinery of another State. In situations of this kind, whatever language may sometimes be used to save appearances, the dominant, protecting, etc. State is in no sense placing its own organs "at the disposal" of the dependent, protected or similar State; it is merely replacing, in specific sectors, the activities of the latter State's organs by those of its own organs, which obviously go on acting under its own direction and control. In such situations, therefore, no genuine "placing at the disposal" of one State of organs belonging to another State has taken place. It is a case of "transfer" of functions rather than transfer of "organs"; and this is in reverse, inasmuch as the exercise of certain functions normally discharged by the organs of the territorial State is transferred to the organs of another State, which discharge them under the latter State's authority and control. From the standpoint of international law, therefore, there is no doubt that the actions and omissions

of the organs concerned are actions and omissions of the State to which the organs belong, and that such cases fall solely within the scope of article 5 of the present draft.

(7) Furthermore, the second of the conditions under consideration excludes from the scope of the rule stated in article 9 those situations in which the organs of a State or of an international organization perform functions appertaining to another State in the territory of that other State and with its consent, but nevertheless act under the authority, direction and control of the sending State or organization. Such a situation can arise, for example, where a State sends a contingent of its own personnel to the territory of another State that is faced with a specific emergency, but without placing them at the latter State's disposal, i.e. where the former State continues to direct and control the operations of the personnel sent to the foreign territory. It is true that the organ then acts in the interests of a State other than the State to which it belongs and that it performs duties which normally fall to the organs of the beneficiary State; but what is important is that in doing so the organ in question continues to act as part of the machinery of the sending State and under its aegis, and that no real functional link is established with the machinery of the beneficiary State. There is consequently no need for a proviso excepting such cases from the general rule laid down in article 5 of the draft; from the standpoint of international law, the conduct of the organs in question still constitutes an act of the State to which those organs belong.

(8) To conclude, it cannot be held that an organ of a State or of an international organization has been "placed at the disposal" of another State, and hence that the present article is applicable, unless the organ in question acts in the exercise of functions appertaining to the State at whose disposal it has been placed, and under that State's authority, direction and control, and is required to obey any instructions it may receive from that State and not instructions from the State to which it belongs.

(9) The third condition that has to be met for a given situation to be one of those contemplated in article 9 is that the organ placed at the disposal of a State by another State or by an international organization should be *acting in the exercise of elements of the governmental authority* of the beneficiary State. In other words, the rule in article 9 cannot be held to apply where an organ of a State or of an international organization, placed as such at the disposal of a given State, is acting within the internal legal order of the beneficiary State, but as a mere private individual. It frequently happens that a State places one of its organs at the disposal of another State and that the beneficiary State confines itself to using that organ as a mere expert or adviser, or in some such capacity, and does not entrust it with the exercise of official duties normally performed by its own organs. Unless this last essential condition is met, the conduct of the organ placed at the disposal of the beneficiary State obviously cannot be considered to be an act of that State in international law. There will be an act of the State only where the organ lent by a foreign State is actually instructed to act as though it were an organ of the bene-

ficiary State: i.e. where the conduct in question takes place in a sphere in which the organ has been entrusted with the exercise of functions embodying genuine elements of the governmental authority and not simply with tasks which, however important they may be, are to be performed in an exclusively personal capacity.

(10) As examples of situations in which application of the rule stated in article 9 might be entertained, reference was made in the Commission to the case in which certain conduct is engaged in by a detachment of police placed at the disposal of another State to deal with internal disturbances; by a section of the health service or some other unit placed under the orders of another country to assist in overcoming an epidemic or the consequences of a natural disaster; by officials of a State or of an international organization appointed by another State to administer in its territory a public service which its own officials are unable, in certain circumstances, to administer; by judicial organs appointed in particular cases to act as judicial organs of another State; and so on. Specific instances were cited: for example, that of the United Kingdom Privy Council acting as the highest court of appeals for New Zealand and that of judicial organs of Nigeria appointed to serve also as Chief Justices of Botswana and Uganda and as President of the Court of Appeal of the Gambia. It was pointed out that Nigeria has also placed some of its civil servants at the disposal of other African States to take temporary charge of organizing the civil service of the beneficiary State.

(11) As to the cases in which the rule in article 9 might apply, the Commission also considered whether those cases might include the dispatch of armed contingents by a State to the territory of another State to be stationed there or employed in military operations. It was made clear, however, that situations of that kind generally lie outside the operation of the rule stated in the present article. Armed forces sent by a State to foreign territory for defensive or offensive military purposes are not forces "placed at the disposal" of the State to whose territory they are sent, at least not in the sense in which the expression "placed at the disposal" is to be understood in article 9. We should not be misled by the use of that or similar expressions in a different sense. Sending troops to the territory of another State to engage in concerted operations, based on that territory, against a third State, or to assist in withstanding an attack from such a State; stationing contingents of a State's own forces in the territory of another State in peace-time in order to defend the country, in the common interest, against external threats; using a State's own military forces to help the territorial State in a civil war in progress there: all those are situations which can be called military "aid" to another State—lawful or unlawful according to the circumstances—but not a "placing at the disposal" of that State of forces sent to its territory. The forces in question usually remain at the disposal of the State to which they belong; they act under its orders, control and instructions; and, what is more important, they exercise through their actions a characteristic element of the governmental authority of that State, not of the territorial State. By any token, the activities of such forces or of their members are acts of the State to which they

belong. It could happen that the territorial State incurs joint responsibility, but for quite different reasons: for example, by tolerating certain actions on the part of the foreign troops or even, in some cases, by merely permitting their presence in its territory; however, that responsibility would flow from the application of the provisions of other rules and not of the rule stated in the present article.

(12) This does not, of course, mean that it is necessary to rule out altogether the possibility of exceptional cases in which a State genuinely places at the disposal of another State a contingent of its own armed forces, so that the other State may employ that contingent under its authority and control and assign it to tasks which may involve the exercise of elements of the beneficiary State's governmental authority. But in such cases, the contingent in question will probably be assigned to special tasks different from those on which armed forces are usually employed. In this connexion it was recalled that, at the time of the earthquake which devastated Peru in 1970, contingents of the Soviet army and the United States navy and a Swedish engineer regiment were placed, through the United Nations, at the Peruvian Government's disposal for relief operations, which were carried out under that Government's control and instructions and which certainly involved the exercise of elements of the governmental authority. Other similar examples were also mentioned. Hence the Commission unanimously recognized that in cases of this kind it is perfectly possible for situations to arise in which the provisions of article 9 should be applied.

(13) The problem of determining to what State conduct should be attributed as a possible source of international responsibility where the conduct is that of an organ of a State placed at the disposal of another State, and therefore acting under the latter State's authority and in the exercise of elements of its governmental authority, was considered in the arbitral award made on 9 June 1931 in the *Chevreau Case* by Judge Beichmann, who was appointed arbitrator under the *compromis* of 4 March 1930 between France and the United Kingdom.<sup>600</sup> The arbitrator had before him a French claim concerning damage suffered by Julien Chevreau, a French national resident in Persia who had been arrested by British forces operating near the Caspian Sea, and who had subsequently been detained on suspicion of intelligence with the enemy and deported. The question at issue was whether the United Kingdom was required to compensate Chevreau for the loss of certain property, books and documents which, according to Chevreau, had been in his rooms at the time of his arrest and had subsequently been stolen or lost owing to the negligence of the British consular authorities. In fact, at the request of the French Consul at Resht, who was away from Persia at the time, Chevreau's books and documents had been sent to the British Consul who, in the absence of the French consular authority, was running the French Consulate. In his award the arbitrator rejected the French claim, stating that "the British

Government cannot be held responsible for negligence by its Consul *in his capacity as the person in charge of the Consulate of another Power.*" \*<sup>601</sup> The situation in question thus corresponded precisely to one of the cases envisaged above: that in which the organ of one State is required to run a public service of another State, under the authority of the latter State and in place of one of the latter State's organs that is unable to perform its functions itself. The conclusion reached by the arbitrator, ruling out the possibility of attributing to the United Kingdom negligence committed by an organ of the British State at a time when it was performing a typical public function of the French State, was obviously based on recognition of the principle which, in the Commission's opinion, should govern the matter: namely, that an act or omission on the part of an organ of one State acting in exceptional circumstances under the authority of another State and in the exercise of elements of that other State's governmental authority should be considered under international law to be an act of that other State and not of the State to which the organ belongs.

(14) Those authors of learned works on international law who have studied the problem of the international responsibility of a State for the conduct of organs placed at its disposal by another State or by an international organization also express themselves in favour of attributing such conduct to the State receiving the "loan" in question, providing that the organs concerned have *genuinely* been placed at the disposal of the beneficiary State: that is to say, that they are subject in their actions to the authority and control of that State, not to those of the sending State or international organization.<sup>602</sup>

(15) In the Commission's view there can be no doubt about the validity of the rule stated in article 9. The principle of the attribution to a particular State of the conduct of an organ of another State or of an international organization that has been effectively placed at the disposal of the former State is a logical inference from the criteria governing the rules stated in the previous articles. An organ which is "lent" by one State to another State, and which consequently performs its activities under the authority and control of the latter State, is not acting as an organ of the State to which it belongs. Its acts are no more attributable to the last-mentioned State than acts committed by that organ as a private individual would be. On the other hand, the conduct in which that organ engages in the exercise of elements of the governmental authority of the State at

<sup>601</sup> *Ibid.*, p. 1141, [translation by the United Nations Secretariat].

<sup>602</sup> On this subject, see J. P. Ritter, "La protection diplomatique à l'égard d'une organisation internationale", *Annuaire français de droit international*, 1962 (Paris) vol. VIII (1963), p. 444, I. Brownlie, *Principles of Public International Law* (Oxford, Clarendon Press, 1966), p. 376; F. Durante, *Responsabilità internazionale e attività cosmiche* (Padua, CEDAM, 1969), pp. 40 *et seq.*; P. Kuris, *op. cit.*, pp. 178 *et seq.*; P. A. Steiniger, "Die allgemeine Voraussetzungen . . .", *Wissenschaftliche Zeitschrift . . . (loc. cit.)*, pp. 448-449. The last-named writer (who also refers to article 4 of the draft agreement prepared by himself and B. Graefrath in 1973) (for reference, see above, foot-note 576) states that in certain cases an international responsibility might be laid upon the sending State; the possible cases he considers are, however, those examined below in paragraph 16 of this commentary, which in reality fall outside the provisions of article 9.

<sup>600</sup> United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No. 1949, V.1), pp. 117 *et seq.*

whose disposal it has been placed is of necessity an act of that State, even if that State has not granted it the status of an organ in its own legal system. Even in this case, the conduct of the "lent" organ is an act of the State receiving the loan", just as the conduct of an individual in fact exercising elements of the governmental authority of that State would be. That State would have to bear the responsibility if the act should be characterized as internationally wrongful.

(16) In formulating the rule stated in article 9, the Commission discussed whether or not express provision should be made in its text for the case in which the very act of placing some of a State's organs at the disposal of another State would in itself constitute a breach of an international obligation incumbent on one or the other of the two States concerned or on both of them. A State may be internationally bound not to furnish aid of any kind—and therefore not to "lend" any of its organs—to another State against which, for example, the Security Council may have ordered the adoption of sanctions. Again, the act of placing specific organs at the disposal of another State with a view to their use in the commission of an internationally wrongful act may certainly amount to a breach of an international obligation. Conversely, it is possible that the action of a State in admitting to its territory organs placed at its disposal by another State may, in specific cases, constitute a breach of an international obligation incumbent on it. The Commission did not, however, consider that such possibilities made it necessary to formulate an exception to the rule in article 9. A loan of one of its organs by a State to another State is one act; the subsequent conduct of the lent organ acting under the authority and control of the beneficiary State is another. Even in the case where the first act was in itself an internationally wrongful act of the lending State entailing, as such, its international responsibility, the conduct of the wrongfully lent organ acting henceforth under the authority of the beneficiary State and in the exercise of that State's governmental authority would nevertheless have to be regarded as an act of the latter State.

(17) The Commission likewise saw no need to make a special reservation for the case where criteria for attribution different from those prescribed in article 9 might be specified in the agreement by which a subject of international law undertakes to place some of its organs

at the disposal of another subject of international law. The Commission held that such a reservation would be unnecessary in the relations between the State to which organs were lent and the lending State because such relations would in any case be governed by the international agreement concluded between them. In relations with third States—the most important aspect of the question—a reservation of this kind might lead to misunderstandings and provide the State bearing responsibility under the rule laid down in the present article with an inadmissible pretext for evading that responsibility. The agreement concluded between the two parties to the "loan" of organs must in no case be allowed to prejudice the situation of third States or to affect claims by which such third States might invoke, under general international law, the international responsibility of one or other of the two parties in question.

(18) With regard to the formulation of the rule, it has already been noted that, in using in article 9 the words "organ . . . placed at the disposal of a State by another State", the intention was to include in the scope of this expression also an organ of one of the entities separate from the State proper which are taken into consideration in article 7. The words "placed at the disposal" were preferred to others, such as "lent" or "transferred" because they seemed to convey more clearly the essential condition for the attribution of an act to the State to which the foreign organ has been sent: namely, that that organ should be subject in its actions to the authority, direction and control of that State. Lastly, the phrase "if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed" was selected as that best calculated to make it clear (a) that the conduct of the organ placed at the disposal of a State by another State or by an international organization cannot be attributed as a possible source of international responsibility to the State receiving the "loan" in the case where such conduct has been engaged in as part of activities carried on by the "lent" organ in an exclusively personal capacity, and (b) that such attribution is likewise excluded in cases where the conduct complained of has been engaged in as part of activities which are carried on officially but which involve the exercise of elements of the governmental authority of the State to which the organ belongs and not of the State at whose disposal the organ has been placed.

## Chapter IV

### QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

#### A. Introduction

##### 1. HISTORICAL REVIEW OF THE WORK OF THE COMMISSION

124. During the preparation of the draft articles on the law of treaties from 1950 to 1966, the International Law Commission considered on several occasions the question whether the draft articles should apply not only to

treaties between States but also to treaties concluded by other entities, and in particular by international organizations.<sup>608</sup> The course finally adopted was to confine the study undertaken by the Commission to

<sup>608</sup> See the first report of the Special Rapporteur (*Yearbook . . . 1972*, vol. II, p. 171, document A/CN.4/258), and the historical survey in the working paper published by the Secretariat (A/CN.4/L.161 and Add.1 and 2).

treaties between States. The Commission accordingly included in the final draft articles<sup>604</sup> an article 1 which read: "The present articles relate to treaties concluded between States". The draft articles were subsequently transmitted<sup>605</sup> as the basic proposal to the United Nations Conference on the Law of Treaties, which, having met at Vienna in 1968 and 1969, adopted on 22 May 1969, the Vienna Convention on the Law of Treaties.<sup>606</sup> Article 1 of the Commission's draft became article 1 of the Convention, reading as follows: "The present Convention applies to treaties between States." However, in addition to the provision of article 1, the Conference adopted the following resolution:

*Resolution relating to article 1 of the Vienna  
Convention on the Law of Treaties*

*The United Nations Conference on the Law of Treaties,*

Recalling that the General Assembly of the United Nations, by its resolution 2166 (XXI) of 5 December 1966, referred to the Conference the draft articles contained in chapter II of the report of the International Law Commission on the work of its eighteenth session,

Taking note that the Commission's draft articles deal only with treaties concluded between States,

Recognizing the importance of the question of treaties concluded between States and international organizations or between two or more international organizations,

Cognizant of the varied practices of international organizations in this respect, and

Desirous of ensuring that the extensive experience of international organizations in this field be utilized to the best advantage,

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 question of treaties concluded between States and international organizations or between two or more international organizations.<sup>607</sup>

125. The General Assembly, having discussed that resolution, dealt with it in paragraph 5 of its resolution 2501 (XXIV) of 12 November 1969, in which the Assembly

Recommends that the International Law Commission should study, in consultation with the principal international organizations, as it may consider appropriate in accordance with its practice, the question of treaties concluded between States and international organizations or between two or more international organizations, as an important question.

126. In 1970, at its twenty-second session, the Commission decided to include the question referred to in resolution 2501 (XXIV), paragraph 5, in its general programme of work, and it set up a Sub-Committee composed of thirteen members to make a preliminary study.<sup>608</sup> The Sub-Committee submitted two reports,

<sup>604</sup> *Yearbook . . . 1966*, vol. II, p. 177, document A/6309/Rev.1, part II, chap. II.

<sup>605</sup> The draft articles were transmitted to the Conference by the Secretary-General under paragraph 7 of General Assembly resolution 2166 (XXI) of 5 December 1966.

<sup>606</sup> Referred to hereafter as the "Vienna Convention". For all references to the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (op. cit.)*, p. 289.

<sup>607</sup> *Ibid.*, p. 285.

<sup>608</sup> See *Yearbook . . . 1970*, vol. II, p. 310, document A/8010/Rev.1, para. 89.

the first in the course of the Commission's twenty-second session<sup>609</sup> and the second during its twenty-third session.<sup>610</sup> In 1971, on the basis of the second report, the Commission appointed Mr. Paul Reuter Special Rapporteur for the question of treaties concluded between States and international organizations or between two or more international organizations.<sup>611</sup> In addition, it confirmed a decision taken in 1970 requesting the Secretary-General to prepare a number of documents, including an account of the relevant practice of the United Nations and the principal international organizations, "it being understood that the Secretary-General will, in consultation with the Special Rapporteur, phase and select the studies required for the preparation of that documentation".<sup>612</sup>

127. To facilitate the task of carrying out that decision, the Special Rapporteur addressed a questionnaire to the principal international organizations, through the Secretary-General, with a view to obtaining information on their practice in the matter.<sup>613</sup> The Secretariat, in its turn, prepared the following studies and documents between 1970 and 1974:

(a) A document containing a short bibliography, a historical survey of the question and a preliminary list of the relevant treaties published in the United Nations *Treaty Series*;<sup>614</sup>

(b) A selected bibliography on the question (A/CN.4/277);<sup>615</sup>

(c) A study of the possibilities of participation by the United Nations in international agreements on behalf of a territory (A/CN.4/281).<sup>616</sup>

128. Meanwhile the General Assembly, by its resolution 2634 (XXV), paragraph 4 (e), and paragraph 4 (d), of Section I, its resolution 2780 (XXVI), recommended that the Commission should continue its consideration of the question of treaties concluded between States and international organizations or between two or more international organizations.

129. In 1972 the Special Rapporteur, submitted his first report<sup>617</sup> on the topic referred to him. This report reviewed the discussions which the Commission and after it the Conference, while examining the law of treaties, had held on the question of the treaties of international organizations. In the light of that review, 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 precise meaning of the

<sup>609</sup> *Ibid.*

<sup>610</sup> See *Yearbook . . . 1971*, vol. II (Part One), p. 348, document A/8410/Rev.1, chap. IV, annex.

<sup>611</sup> *Ibid.*, para. 118.

<sup>612</sup> *Ibid.*

<sup>613</sup> *Yearbook . . . 1973*, vol. II, document A/CN.4/271, annex.

<sup>614</sup> A/CN.4/L.161 and Add.1 and 2.

<sup>615</sup> To be printed in *Yearbook . . . 1974*, vol. II (Part Two).

<sup>616</sup> *Idem.*

<sup>617</sup> See foot-note 603.

reservation concerning "any relevant rules of the organization" which appears in article 5 of the Vienna Convention.

130. The same year the General Assembly, by section I, paragraph 3 (e) of its resolution 2926 (XXVII), renewed its previous recommendations to the Commission concerning consideration of the question of treaties concluded between States and international organizations.

131. In 1973 the Special Rapporteur submitted to the Convention for its twenty-fifth session, a second report<sup>618</sup> supplementing the first in the light of, *inter alia*, the substantial information since communicated by international organizations in reply to the questionnaire which had been addressed to them.<sup>619</sup>

132. Mr. Reuter's first two reports were discussed by the Commission at its 1238th and 1241st to 1243rd meetings, held at its twenty-fifth session (1973). The opinions expressed by the members concerning those reports are reflected in the Commission's report on the work of that session.<sup>620</sup> The same year the General Assembly, after examining the Commission's report, recommended in its resolution 3071 (XXVIII), paragraph 3 (f) that the Commission should continue its study of the question of treaties concluded between States and international organizations or between two or more international organizations.

133. In 1974, for the Commission's present session, the Special Rapporteur submitted a third report (A/CN.4/279).<sup>621</sup> This contained the text, accompanied by commentaries, of five articles intended to form part I, entitled "Introduction", of a set of draft articles on the question of treaties concluded between States and international organizations or between two or more international organizations. These five articles bore the following titles: article 1, "Scope of the present articles"; article 2, "Use of terms"; article 3, "International agreements not within the scope of the present articles"; article 4, "Non-retroactivity of the present articles"; and article 6, "Capacity of international organizations to conclude treaties". Article 2 contained only some of the provisions which it will eventually have to include, and no text was submitted for an article 5.<sup>622</sup>

134. The draft articles set forth in the Special Rapporteur's third report were examined by the Commission at its 1274th, 1275th, 1277th and 1279th meetings. The Commission referred all these provisions to the Drafting Committee and at its 1291st meeting adopted, on first reading, on the basis of the Committee's report, the texts of article 1; article 2, paragraph 1 sub-paragraphs (a), (d), (e), (f) and (i), and paragraph 2; and articles 3, 4 and 6, as reproduced in the present chapter.<sup>623</sup>

135. The Commission wishes to make it clear that the texts adopted at the present session form only the initial

provisions of the set of draft articles which it proposes to prepare later on, and which is described in general outline below.<sup>624</sup> It also wishes to emphasize that, as will be explained,<sup>625</sup> the text of these articles is provisional.

## 2. GENERAL REMARKS CONCERNING THE DRAFT ARTICLES

### (a) *Form of the draft*

136. As in the other work undertaken by the Commission over the past ten years and more, the form adopted for the present codification is that of a set of *draft articles* capable of constituting the substance of a convention at the appropriate time. This approach to the topic does not prejudice the decision which will be taken later when the draft articles have been completed; the Commission will then, in accordance with its Statute, recommend whatever procedure it considers most appropriate. Even at this stage, however, a set of draft articles, because of the strict requirements it imposes upon the preparation and drafting of the text, appears the most suitable form in which to deal with questions concerning treaties concluded between States and international organizations or between international organizations.

### (b) *Relationship to the Vienna Convention*

137. By comparison with others, the present codification possesses some distinctive characteristics owing to the extremely close relationship between the draft articles and the Vienna Convention.

138. Historically speaking, the provisions which will constitute the draft articles now under consideration would have found a place in the Vienna Convention had the Conference not decided that, in order to complete its task within the prescribed period, it would confine its attention to treaties between States. Consequently the further stage in the codification of the law of treaties represented by the preparation of draft articles on treaties concluded between States and international organizations or between international organizations cannot be divorced from the basic text on the subject, namely the Vienna Convention.

139. That Convention has provided the general framework for the present draft articles. This means, firstly, that the draft articles will deal with the same questions as formed the substance of the Vienna Convention; they will therefore disregard the problems corresponding to those which the Convention set aside so far as treaties between States were concerned: agreements not in written form (article 3 of the Vienna Convention); State succession, international responsibility and outbreak of hostilities (article 73); and recognition. The subject-matter of the draft articles will therefore be those major questions which are dealt with in the Vienna Convention. The Commission can have no better guide than to take the text of each of the articles of that Convention in turn and consider what changes of drafting

<sup>618</sup> *Yearbook* . . . 1973, vol. II, document A/CN.4/271.

<sup>619</sup> See foot-note 613.

<sup>620</sup> *Yearbook* . . . 1973, vol. II, document A/9010/Rev.1, paras. 127-133.

<sup>621</sup> See p. 135 above.

<sup>622</sup> See below, para. 143 and foot-note 638.

<sup>623</sup> See below, section B.

<sup>624</sup> See paras. 139-140.

<sup>625</sup> See below, para. 144.

or of substance are needed in formulating a similar article dealing with the same problem in the case of treaties concluded between States and international organizations or between international organizations.

140. This task, as the Commission envisages it, calls for a very flexible approach. On considering what changes should be made in an article of the Vienna Convention in order to give it the form of an article applicable to treaties concluded between States and international organizations, the Commission may be presented with an opportunity to draft a provision containing additions to or refinements on the Vienna Convention that might also be applicable to treaties between States, for example in connexion with a definition of treaties concluded in written form or the consequences of the relationship between a treaty and other treaties or agreements. Where such an opportunity occurs, the Commission will in principle refrain from pursuing it and from proceeding with any formulation which would give the draft articles, on certain points, a structure more detailed or more refined than the Vienna Convention. The position will be different where, because of the subject-matter under consideration, namely treaties between States and international organizations or between international organizations, new and original provisions are required to deal with problems or situations unknown to treaties between States.

141. Unfortunately these considerations do not dispose of all the difficulties raised by the relationship between the draft articles and the Vienna Convention. The preparation of a set of draft articles that may become a convention presents, as regards the future relationship between the articles and the Vienna Convention, awkward problems of law and drafting which will not become fully apparent until the draft is completed. Nevertheless, certain general features are readily perceptible even now. The draft articles must be so worded and assembled as to form an entity independent of the Vienna Convention; if the text later becomes a convention in its turn, it may enter into force for parties which are not parties to the Vienna Convention possibly including, it must be remembered, all international organizations. Even so, the terminology and wording of the draft articles could conceivably have been brought into line with the Vienna Convention in advance, so as to form a homogeneous whole with that Convention. The Commission has not rejected that approach outright and has not ruled out the possibility of the draft articles as a whole being revised later with a view to providing for States which are parties both to the Vienna Convention and to such convention as may emerge from the draft articles, a body of law as homogeneous as possible, particularly in terminology. In the present version of the text submitted to the General Assembly, however, the Commission has not allowed this consideration to weigh and has given preference to clarity and simplicity of expression.

(c) *Consultation with international organizations*

142. Both the United Nations Conference on the Law of Treaties and the General Assembly recommended that

the Commission should pursue its work "in consultation with the principal international organizations".<sup>626</sup> The most effective form of consultation has been the gathering of a wealth of information from the principal organizations concerned, in the form of studies and of replies to the questionnaire drawn up by the Special Rapporteur; this will be supplemented by such observations on the present draft articles as the international organizations see fit to submit concurrently with States. The Commission is open to any suggestions which may be made to enable it to benefit from the assistance of such organizations in as broad and generous a measure as it has from the help of the United Nations Secretariat. It is not yet possible to say in what manner the organizations concerned will participate in the final stage of the present codification, because the eventual form of the codification is still undecided.

(d) *Method followed in the preparation of the draft*

143. In conformity with the general conception of the relationship which the draft articles should naturally bear to the Vienna Convention, it was decided to keep the order of that Convention so far as possible, so as to permit continuous comparison between the draft articles and the corresponding articles of the Conventions. Accordingly, for the time being at least, the draft articles bear the same numbers as those of the Vienna Convention and the text of the corresponding article of the Vienna Convention is reproduced as a foot-note to each draft article. The gaps which, purely temporarily, thus appear here and there in the numbering are due to the fact that some provisions of the Vienna Convention are closely linked with others and must consequently be examined in conjunction with them; moreover there are some articles in the Vienna Convention which do not give rise to corresponding provisions in the present draft articles. Any articles of the present draft which do not correspond to an article of the Vienna Convention will be numbered *bis*, *ter* and so forth in order to preserve the parallel between the Vienna Convention and the draft articles.

144. It is scarcely necessary to add that the results of this work, submitted to the General Assembly on first reading, are strictly provisional. This, of course, is because the present draft, like all drafts of the same kind, has not yet had the benefit of observations from Governments (and, in this particular case, from international organizations). However, the text is all the more tentative inasmuch as it is already apparent that the difficulties will be very unequally apportioned between the major divisions of the topic, and because the final formulation of the relationship between the draft and the Vienna Convention, and hence the wording of the articles themselves, will depend very much on the ultimate use to be made of them.

145. In these circumstances it may be thought that it would have been better to begin the examination of the draft articles with provisions concerning the conclusion

<sup>626</sup> See above, paras. 124 and 125.

and entry into force of treaties (articles 6 to 25 of the Vienna Convention) rather than with general provisions such as those of article 1 and the succeeding articles. The course which, despite that consideration, has been adopted seemed essential in order to settle from the outset a few basic questions of principle on which the whole design of the draft depends. Hence the articles reproduced below will be found to contain a significant sample of the problems which the International Law Commission will encounter as its work proceeds. This topic not only presents drafting difficulties and calls, in places, for subtle adjustments in relation to the Vienna Convention, but sometimes raises new and fundamental problems.

## B. Draft articles on treaties concluded between States and international organizations or between international organizations

### PART I. INTRODUCTION

#### *Article 1. Scope of the present articles*<sup>627</sup>

The present articles apply to:

- (a) treaties concluded between one or more States and one or more international organizations, and
- (b) treaties concluded between international organizations.

#### *Commentary*

(1) The title of the draft articles is a slightly simplified version of the title of the topic as it appears in several General Assembly resolutions and in the resolution relating to article 1 of the Convention adopted by the United Nations Conference on the Law of Treaties. The titles of part I and article 1 are in the same form as those in the Vienna Convention. The scope of the draft articles is described in the body of article 1 in more precise terms than in the title in order to avoid any ambiguity. Furthermore the two categories of treaties concerned have been presented in two separate sub-paragraphs because this distinction will often have to be made in the treaty régime to which the draft articles apply. This is the case in article 2, paragraph 1 (a), and more generally in the draft articles dealing with the expression of consent to be bound by a treaty. For the purposes of the expression of such consent, the case of a State party to a treaty with one or more international organizations will be dealt with in a manner closely modelled on the Vienna Convention; on the other hand, the case of such organizations themselves will be governed by specific and perhaps different provisions. The separation into two sub-paragraphs, (a) and (b), is therefore justified but does not affect the fact that many of the draft articles will apply indiscriminately to both the categories distinguished here.

<sup>627</sup> The corresponding provision of the Vienna Convention reads as follows:

#### PART I. INTRODUCTION

#### *Article 1. Scope of the present Convention*

"The present Convention applies to treaties between States."

(2) The term "treaty", which is used in the draft articles in a sense different from the meaning assigned to it in the Vienna Convention, has been preferred to the far more general term "agreement"; the latter should be kept to denote conventional acts, whatever the parties to them and whatever their form.

#### *Article 2. Use of terms*<sup>628</sup>

1. For the purpose of the present articles:

(a) "treaty" means an international agreement governed by international law and concluded in written form:

(i) between one or more States and one or more international organizations, or

(ii) between international organizations, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation;

...

(d) "reservation" means a unilateral statement, however phrased or named, made by a State or by an international organization when signing or consenting [by any agreed means]<sup>629</sup> to be bound by 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 or to that international organization;

(e) "negotiating State" and "negotiating organization" mean respectively:

(i) a State,

(ii) an international organization which took part in the drawing up and adoption of the text of the treaty;

<sup>628</sup> The corresponding provisions of the Vienna Convention reads as follows:

#### *Article 2. Use of terms*

"1. For the purposes of the present Convention:

"(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;

"(d) 'reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding 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;

"(e) 'negotiating State' means a State which took part in the drawing up and adoption of the text of the treaty;

"(f) 'contracting State' means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

"(i) 'international organization' means an intergovernmental organization.

"2. The provisions of paragraph 1 regarding the use of terms in the present Convention 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."

<sup>629</sup> Square brackets [ ] around an expression indicate that the Commission intends to revert to it at a later stage in its work when it has examined other draft articles to which the expression relates.

(f) “contracting State” and “contracting organization” mean respectively:

- (i) a State,
- (ii) an international organization which has consented to be bound by the treaty, whether or not the treaty has entered into force;

...

(i) “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 meaning which may be given to them in the internal law of any State or by the rules of any international organization.

#### Commentary

(1) *Paragraph 1 (a)* defining the term “treaty,” follows the corresponding provision of the Vienna Convention but takes into account article 1 of the present draft. No further details have been added to the Vienna Convention text. It became evident during the discussions in the Commission that it would not always be easy to establish whether a conventional act was governed by international law or by some system of national law. It was also pointed out that certain acts might be governed in some respects by international law but in others by national law and that in order to determine the nature of the conventional act it would be necessary to establish which of the two aspects predominated; but this view was disputed, and in any case the Commission thought it preferable to leave those particular problems to be solved by practice.

(2) Another debatable point was whether in some organizations—still few and far between at present—there might not be some conventional acts concluded between the organization and some of its members which were wholly governed by the rules of the organization and which should be removed from the scope of the draft articles. This, however, is a somewhat isolated case peculiar to certain integrated organizations such as the European Communities; furthermore the provisions of the present draft articles are to be understood as subject to the rules of the organization, and it seemed unnecessary to place any other special limitation on the scope of the draft.<sup>630</sup>

(3) Apart from the addition of international organizations, *paragraph 1 (d)*, dealing with the term “reservation” follows the corresponding provision of the Vienna Convention and does not call for any special comment except on one point. In article 11 of the Vienna Convention, listing the means of expressing the consent of a State to be bound by a treaty, the expression “signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession” is followed by the words “or by any other means if so

<sup>630</sup> The question whether the draft should include provisions corresponding to those of article 2, paragraph 1, sub-paragraphs (b) and (c), of the Vienna Convention will be examined after the Commission has studied the articles relating to ratification, acceptance, approval and accession and the article relating to full powers.

agreed”. This addition did not appear in the text submitted by the Commission; it is due to an amendment by Poland and the United States of America,<sup>631</sup> and its effect is to remove all formalism from the expression of consent to be bound by a treaty. It would have been logical to amplify article 19, on the formulation of reservations, and article 2, paragraph 1 (d), in the same way; however, the States participating in the Conference omitted to do so. In addition they might perhaps have simplified the wording of those provisions by discarding the enumeration of ratification, acceptance, approval and accession and by covering these and all other possible cases by the expression “by any agreed means”.

(4) In the case of the present draft articles it might seem more appropriate to defer consideration of the definition of the term “reservation” until the Commission has examined the articles corresponding to articles 11 and 19 of the Vienna Convention. However, it emerged that, instead of waiting, the Commission could provisionally adopt a wording for article 2, paragraph 1 (d), that had the twofold advantage of being simpler than the corresponding provision of the Vienna Convention and of leaving in abeyance the question whether the terms “ratification”, “acceptance”, “approval”, and “accession” could also be used in connexion with acts whereby an organization expressed its consent to be bound by a treaty. The provision here proposed has the further advantage of stressing the non-formalistic nature of the rules for concluding international treaties, which holds good for international organizations at least as much as for States. The wording proposed remains provisional; the Commission will consider later whether the expression “agreed means” is adequate or should be replaced by a somewhat broader form of words such as “recognized or agreed means”.

(5) *Paragraph 1 (e)* defines the terms “negotiating State” and “negotiating organization”. It follows the corresponding provision of the Vienna Convention but takes into account article 1 of the present draft. Since the term “treaty” refers here to a category of conventional acts different from that covered by the same term in the Vienna Convention, the wording need not allow for the fact that international organizations sometimes play a special role in the negotiation of treaties *between States* by participating through their organs in the preparation, and in some cases even the establishment, of the text of certain treaties.

(6) *Paragraph 1 (f)*, also follows the corresponding provision of the Vienna Convention, taking into account article 1 of the present draft.<sup>632</sup>

(7) *Paragraph 1 (i)* gives the term “international organization” a definition identical with that in the Vienna Convention. This definition should be understood in the sense given to it in practice: that is to say,

<sup>631</sup> See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (op. cit.)*, p. 124, document A/CONF.39/14, para. 104 (a).

<sup>632</sup> The question whether the draft articles should include provisions corresponding to those of article 2, paragraph 1, sub-paragraphs (g) and (h), of the Vienna Convention will be examined after the articles relating to “parties” and “third States” have been considered.

as meaning an organization composed mainly of States, and in some cases having associate members which are not yet States or which may even be other international organizations; some special situations have been mentioned in this connexion, such as that of the United Nations within ITU, EEC within GATT or other international bodies, or even the United Nations acting on behalf of Namibia, through the Council for Namibia, within WHO after Namibia became an associate member of WHO.<sup>633</sup>

(8) It should, however, be emphasized that the adoption of the same definition of the term "international organization" as that used in the Vienna Convention has far more significant consequences in the present draft than in that Convention.

(9) In the present draft, this very elastic definition is not meant to prejudge the régime that may govern, within each organization, entities (subsidiary or connected organs) which enjoy some degree of autonomy within the organization under the rules in force in it. Likewise no attempt has been made to prejudge the amount of legal capacity which an entity requires in order to be regarded as an international organization within the meaning of the present draft. The fact is—and we shall revert to this point in the commentary to article 6—that the main purpose of the present draft is to regulate, not the status of international organizations, but the régime of treaties to which one or more international organizations are parties. The present draft articles are intended to apply to such treaties irrespective of the status of the organizations concerned.

(10) Attention should be drawn to a further very important consequence of the definition proposed. The present draft articles are intended to apply to treaties to which international organizations are parties, whether the purpose of those organizations is relatively general or relatively specific, whether they are universal or regional in character, and whether admission to them is relatively open or restricted; the draft articles are intended to apply to the treaties of all international organizations.

(11) Here the present draft differs profoundly from another text prepared by the Commission, namely the draft articles on the representation of States in their relations with international organizations,<sup>634</sup> which cover basically international organizations of universal character.

(12) The difference stems from the very purpose of the two drafts. The draft articles on the representation of States in their relations with international organizations are concerned with the law of international organizations and their purpose is to unify, within a limited area, the specific rules of certain organizations. Consequently, if the draft is limited to certain organizations possessing similar characteristics, namely universal character, there is no good reason why each organization should be

endowed, in that particular area, with a régime of its own. The present draft articles, however, deal not with the law of international organizations but with the law of treaties; the legal force and the régimes of the treaties considered therein derive their substance, not from the rules of each organization—that is to say, rules which would have to be unified—but from general international law. Hence the rules that govern a treaty between the United Nations and the ILO should be the same as those that govern a treaty between the ILO and the Council of Europe, for both sets of rules derive from the same principles.

(13) The inference from this basic legal analysis is that the scope of the present draft should include treaties to which all international organizations are parties. Historical and practical considerations point to the same conclusion. This was certainly what the United Nations Conference on the Law of Treaties and the General Assembly had in mind when they requested the Commission to undertake this study. Since the Conference did not have time to adopt the provisions required in order to settle in a single convention the position with regard both to treaties between States and to treaties between States and international organizations or between international organizations, the whole topic should at least be confined to no more than two instruments. The very aim of codification, which is a matter of unity, clarity and simplicity, would be jeopardized if, beyond the scope of two texts, a large area of treaty relations between States and organizations, or between organizations, had still to be left in doubt.

(14) *Article 2, paragraph 2* extends to international organizations the provisions of article 2, paragraph 2, of the Vienna Convention. This extension has raised a question of terminology which is especially important inasmuch as it affects other provisions of the present draft.

(15) It is scarcely disputed that what article 2, paragraph 2 of the Vienna Convention calls "the internal law of any State" is matched, in the case of international organizations, by a corresponding notion covering rules whose special characteristic is that they are proper to each organization. In the first place there are the rules embodied in the organization's constituent instrument. In the second place there are the rules which have developed from that instrument, or pursuant to it, either in written form or in practice. The legal potential, the scope and the form of such rules deriving from a constituent instrument obviously vary from one organization to another.

(16) What term, therefore, should be used to denote this body of rules which are specific to each international organization? The Commission encountered this problem in preparing and discussing several of its draft articles on treaties between States, in particular the text which became article 5 of the Vienna Convention.<sup>635</sup> The Commission chose the expression "the rules of any international organization", a general formula corresponding to the expression used in a specific context

<sup>633</sup> In connexion with situations in which an organization is called upon to act specifically on behalf of a territory, see the Secretariat study on "Possibilities of participation by the United Nations in international agreements on behalf of a territory" (A/CN.4/281) (to be printed in *Yearbook . . . 1974*, vol. II (Part Two)).

<sup>634</sup> *Yearbook . . . 1971*, vol. II (Part One), p. 275, document A/8410/Rev.1, chap. II, D.

<sup>635</sup> See *Yearbook . . . 1972*, vol. II, pp. 179-182, document A/CN.4/258, paras. 28-36.

in article 5 of the Vienna Convention, namely "any relevant rules of the organization". Other expressions such as "internal law of an organization", "law proper to an organization" and the like were discarded for substantive reasons or for the sake of simplicity.

*Article 3. International agreements not within the scope of the present articles*<sup>636</sup>

The fact that the present articles do not apply

(i) to international agreements to which one or more international organizations and one or more entities other than States or international organizations are [parties];

(ii) or to international agreements to which one or more States, one or more international organizations and one or more entities other than States or international organizations are [parties];

(iii) or to international agreements not in written form concluded between one or more States and one or more international organizations, or between international organizations shall not affect:

(a) the legal force of such agreements;

(b) the application to such agreements of any of the rules set forth in the present articles to which they would be subject under international law independently of the articles;

(c) the application of the present articles to the relations between States and international organizations or to the relations of international organizations as between themselves, when those relations are governed by international agreements to which other entities are also [parties].

*Commentary*

(1) It is pretty well beyond dispute that the situation under international law of certain international agreements not within the scope of the present articles needs to be safeguarded by a provision on the lines of article 3 of the Vienna Convention. Suffice it to point out that it is not unusual for an international agreement to be concluded between an international organization and an entity other than a State or than an international organization. Reference might be made here (if the Vatican City were not recognized as possessing the

<sup>636</sup> The corresponding provisions of the Vienna Convention read as follows:

*"Article 3. International agreements not within the scope of the present Convention"*

"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:

(a) the legal force of such agreements;

(b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;

(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."

characteristics of a State) to agreements concluded between the Holy See and international organizations. Similarly there can be little doubt that agreements concluded between the International Committee of the Red Cross and an international organization (such as those concluded with EEC under the World Food Programme) are indeed governed by international law. The development of world humanitarian law and its extension for the benefit of entities which have not yet been constituted as States will provide further examples of this kind, and there will even be agreements concluded between one or more international organizations, one or more States and one or more entities which are neither States nor international organizations.

(2) On the other hand there is no need to labour the frequency and importance of agreements not in written form concluded between one or more States and one or more international organizations. There may indeed be some doubt as to whether agreements resulting from an offer made by a State and accepted by an international organization at a meeting of which only a summary record is to be kept are written agreements; it must also be borne in mind that many agreements between organizations are set down, for example, in the verbatim records of conferences or co-ordination committees. Lastly, the development of telecommunications necessarily leads to a proliferation of unwritten international agreements on a variety of matters ranging from peace-keeping to intervention on economic markets—so much so that voices have been raised against what has sometimes been considered the abuse of such agreements. However, even if such comment may in some cases be deemed justified, they do not affect the principle of such agreements. It is for each organization, under the rule to be laid down further on in article 6 of the draft, so to organize the régime of agreements not concluded in written form that no organ goes beyond the limits of the competence conferred on it by the relevant rules of the organization.

(3) It therefore seemed to the Commission that some agreements should have the benefit of provisions similar to those of article 3, sub-paragraphs (a), (b) and (c), of the Vienna Convention. The text of those sub-paragraphs of the Convention has been adopted for draft article 3, subject, in the case of sub-paragraph (c) to the changes obviously necessitated by the difference in scope between the Vienna Convention and the draft articles.

(4) On the other hand a problem might arise in defining the agreements to which the rules laid down in sub-paragraphs (a), (b) and (c) apply. The Commission considered that for the sake of clarity it should enumerate those agreements, and it discarded global formulae which, though simpler in form, were less precise; it has accordingly enumerated the agreements in question in separate categories in sub-paragraphs (i), (ii) and (iii) of draft article 3; categories (i) and (ii), as is implicit in the general meaning of the term "agreement", include both agreements in written form and agreements not in written form.

(5) On considering the three categories referred to in sub-paragraphs (i), (ii) and (iii) it will be seen that the

Commission has excluded agreements between States, whether or not concluded in written form, and agreements between entities other than States or than international organizations, whether or not concluded in written form. It took the view that after the Vienna Convention there was no need to reiterate that agreements between States, whatever their form, were subject to international law. Agreements concluded between entities other than States or than international organizations seem too heterogeneous a group to constitute a general category, and the relevant body of international practice is as yet too exiguous for the characteristics of such a general category to be inferred from it.

(6) Lastly, mention should be made of an important point on which draft article 3 differs from article 3 of the Vienna Convention. To designate the agreements to which the rules of its article 3 relate, the Vienna Convention makes use, without defining it, of the notion of "subject of international law". The use of this expression despite the disputes it may provoke has no great disadvantages in a convention which, like the Vienna Convention, touches only very remotely upon agreements concluded by "subjects of international law other than States". That does not apply, however, to the present draft articles; they are wholly concerned with agreements to which one or more international organizations are parties. More particularly, in view of the very broad and very flexible definition given to "international organization" in article 2, the possibility is by no means excluded that an "international organization" may possess the capacity to conclude an international treaty even though there is no likelihood of its being recognized as possessing other rights which it would need in order to have the status of a "subject of international law". The purpose of this remark is not to question the fact that many organizations, especially the large organizations of universal character, are "subjects of international law" but merely to point out that, in view of the great variety of international organizations, the notions of "international organization" and "subject of international law" would both have to be defined much more precisely if they were to be defined in terms of each other. All reference to the notion of "subject of international law" has therefore been eliminated from draft article 3 and the entirely neutral term "entity" has been used. The results is that, on this point at least, the draft articles are more flexible, broader and, it may perhaps be said, more dynamic than the Vienna Convention; for, in recognizing that entities which are not yet "subject to international law" can be parties to international agreements that are subject to international law, they show that, through treaty-making, new entities can gain progressively wider access to international relations.

**Article 4. Non-retroactivity  
of the present articles** <sup>637</sup>

**Without prejudice to the application of any rules set forth in the present articles to which treaties between one**

<sup>637</sup> The corresponding provision of the Vienna Convention reads as follows:

**or more States and one or more international organizations or between international organizations would be subject under international law independently of the articles, the articles apply only to such treaties after the [entry into force] of the said articles as regards those States and those international organizations.**

*Commentary*

This provision repeats the text of article 4 of the Vienna Convention, subject only to the adjustments necessitated by draft article 1.<sup>638</sup> The expression "entry into force" is to be regarded as provisional and has accordingly been placed in square brackets. Taken literally, that expression might be construed as implying that, in order to be enforceable against international organizations, the present draft articles would have to be embodied in a convention to which those international organizations were parties. However, the question of the final use to be made of the draft articles has been left in abeyance, and the question whether international organizations should be parties to a convention incorporating the proposed articles has not yet been examined by the Commission. This is an important and difficult question on which the Commission hopes to receive the comments of Governments and interested organizations.

**PART II. CONCLUSION AND ENTRY INTO FORCE  
OF TREATIES**

**SECTION 1. CONCLUSION OF TREATIES**

**Article 6. Capacity of international organizations  
to conclude treaties** <sup>639</sup>

**The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization.**

*Commentary*

(1) Up to the end of its work at the present session, the Commission remained divided on the question of

*"Article 4. Non-retroactivity of  
the present Convention*

"Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States."

<sup>638</sup> The present draft articles cannot include any provision corresponding to article 5 of the Vienna Convention, which reads as follows:

*"Treaties constituting international organizations  
and treaties adopted within an international organization*

"The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization."

<sup>639</sup> The Vienna Convention has the same titles for part II and section 1, and an article 6 which reads as follows:

*"Capacity of States to conclude treaties"*

"Every State possesses capacity to conclude treaties."

an article dealing with the capacity of international organizations to conclude treaties. Varied and finely differentiated views were expressed on this subject by the members. With some slight simplification, these may be reduced to two general points of view. According to the first, such an article would be of doubtful utility or should at least be limited to stating that an organization's capacity to conclude treaties depends only on the organization's rules; the proposal for a draft article 6 submitted as a first choice by the Special Rapporteur in his third report (A/CN.4/279)<sup>640</sup> conformed, up to a point, to that view. According to the second point of view, the article should at least mention that international law lays down the principle of such capacity; from this it follows, at least in the opinion of some members of the Commission, that in the matter of treaties the capacity of international organizations is the ordinary law rule, which can be modified only by express restrictive provisions of the constituent instruments. The alternative proposal submitted by the Special Rapporteur in his third report<sup>641</sup> went some way to meet that second view.

(2) The wording eventually adopted by the Commission for article 6 is the result of a compromise based essentially on the finding that this article should in no way be regarded as having the purpose or effect of deciding the question of the status of international organizations at international law; that question remains open, and the proposed wording is compatible both with the conception of general international law as the basis of international organizations' capacity and with the opposite conception. The purpose of article 6 is merely to lay down a rule relating to the law of treaties; the article indicates, for the sole purposes of the régime of treaties to which international organizations are parties, by what rules their capacity to conclude treaties should be assessed. Some members of the Commission, however, took the view that draft article 6, as at present worded, would not suffice to solve all the problems which the Commission would encounter in its further work on the draft articles, for example when it had to draw up, for application to international organizations, rules to match those laid down for States in articles 27 and 46 of the Vienna Convention.

(3) Thus set in context, article 6 is nevertheless of great importance. It reflects the fact that every organization has its own distinctive legal image which is recognizable, in particular, in the individualized capacity of that organization to conclude international treaties. Article 6 thus applies the fundamental notion of "rules of any international organization" already laid down in article 2, paragraph 2, of the present draft and developed in the commentary<sup>642</sup> to that provision. The addition, in article 6, of the adjective "relevant" to the expression "rules of that organization" is due simply to the fact that, while article 2, paragraph 2, relates to the "rules of any organization" as a whole, article 6 concerns only

some of those rules, namely those which are relevant in settling the question of the organization's capacity.

(4) A question naturally arises as to the nature and characteristics of the "relevant rules" in the matter of an organization's capacity, and it might be tempting to answer this question in general terms, particularly with regard to the part played by *practice*. That would obviously be a mistake which the text of draft article 6 seeks to avert by specifying that "the capacity of an international organization to conclude treaties is governed by the relevant rules of *that* \* organization".

(5) It should be clearly understood that the question how far practice can play a creative part, particularly in the matter of international organizations' capacity to conclude treaties, cannot be answered uniformly for all international organizations. This question, too, depends on the "rules of the organization"; indeed, it depends on the highest category of those rules—those which form, in some degree, the constitutional law of the organization and which govern in particular the *sources* of the organization's rules. It is theoretically conceivable that, by adopting a rigid legal framework, an organization might exclude practice as a source of its rules. Even without going as far as that, it must be admitted that international organizations differ greatly from one another as regards the part played by practice and the form which it takes, *inter alia* in the matter of their capacity to conclude international agreements. There is nothing surprising in this; the part which practice has played in this matter in an organization like the United Nations, faced in every field with problems fundamental to the future of all mankind, cannot be likened to the part played by practice in a technical organization engaged in humble operational activities in a circumscribed sector. For these reasons, practice was not mentioned in article 6; practice finds its place in the development of each organization in and through the "rules of the organization", and that place varies from one organization to another.

(6) These considerations should make it possible to clear up another point which has been of keen concern to international organizations in other contexts<sup>643</sup> but which is open to no misunderstanding so far as the present draft articles are concerned. In matters, such as the capacity to conclude treaties, which are governed by the rules of each organization, there can be no question of fixing those rules as they stand at the time when the codification undertaken becomes enforceable against each organization. In reserving the practice of each organization in so far as it is recognized by the organization itself, what is reserved is not the practice *established at the time of entry into force of the codification* but the very *faculty* of modifying or supplementing the organization's rules by practice to the extent permitted by those rules. Thus, without imposing on the organizations the constraint of a uniform rule which is ill suited to them, article 6 recognizes the right of each of them to have its own legal image.

<sup>640</sup> See p. 135 above.

<sup>641</sup> See p. 150 above, document A/CN.4/279, paragraph 20 of the commentary to article 6.

<sup>642</sup> Paras. 15 and 16.

<sup>643</sup> See *Yearbook... 1972*, vol. II, pp. 186-187, document A/CN.4/258, para. 51.

## Chapter V

## THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

146. In paragraph 1 of resolution 2669 (XXV) of 8 December 1970, the General Assembly recommended that the International Law Commission should, as a first step, take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification and, in the light of its scheduled programme of work, should consider the practicability of taking the necessary action as soon as the Commission deemed it appropriate.

147. Pursuant to that recommendation the Commission, at its twenty-third session, held in 1971, decided to include a question entitled "Non-navigational uses of international watercourses" in its general programme of work without prejudging the priority to be given to its study. It would be for the Commission in its new composition to decide what priority the topic should be given and what other action should be taken, bearing in mind the current programme of work of the Commission as well as its revised long-term programme.<sup>644</sup>

148. The Commission agreed that for undertaking the substantive study of the rules of international law relating to the non-navigational uses of international watercourses with a view to its progressive development and codification on a world-wide basis, all relevant materials on State practice should be compiled and analysed. The Commission noted that a considerable amount of such material had already been published in the Secretary-General's report on "Legal problems relating to the utilization and use of international rivers" (A/5409)<sup>645</sup> prepared pursuant to General Assembly resolution 1401 (XIV) of 21 November 1959, as well as in the *United Nations Legislative Series*.<sup>646</sup> On the other hand, in paragraph 2 of resolution 2669 (XXV), the General Assembly requested the Secretary-General to continue the study initiated in accordance with General Assembly resolution 1401 (XIV) in order to prepare a "supplementary report" on the legal problems relating to the question, "taking into account the recent application in State practice and international adjudication of the law of international watercourses and also inter-governmental and non-governmental studies of this matter".<sup>647</sup>

149. In paragraph 5, section I of resolution 2780 (XXVI) of 3 December 1971, 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".

<sup>644</sup> *Yearbook . . . 1971*, vol. II (Part One), p. 350, document A/8410/Rev.1, para. 120).

<sup>645</sup> To be printed in *Yearbook . . . 1974*, vol. II (Part Two).

<sup>646</sup> United Nations, *Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes than Navigation* (United Nations publications, Sales No. 63.V.4).

<sup>647</sup> *Yearbook . . . 1971*, vol. II (Part One), p. 350, document A/8410/Rev.1, para. 121.

150. At its twenty-fourth session, held in 1972, the Commission indicated its intention to take up the foregoing recommendation of the General Assembly when it came to discuss its long-term programme of work. At that session, the Commission reached the conclusion that the problem of pollution of international waterways was one of both substantial urgency and complexity and accordingly requested the Secretariat to continue compiling the material relating to the topic with special reference to the problems of the pollution of international watercourses.<sup>648</sup>

151. In paragraph 5, section I of resolution 2926 (XXVII) of 28 November 1972, the General Assembly noted the Commission's intention, in the discussion of its long-term programme of work, to decide upon the priority to be given to the topic. By the same resolution (paragraph 6, section I) the General Assembly requested the Secretary-General to submit, as soon as possible, the study on the legal problems relating to the non-navigational uses of international watercourses requested by the Assembly in resolution 2669 (XXV), and to present an advance report on the study to the International Law Commission at its twenty-fifth session.

152. Pursuant to the foregoing decision of the General Assembly, the Secretary-General submitted to the Commission at its twenty-fifth session, an advance report<sup>649</sup> on the progress of work in the preparation of the supplementary report requested by the Assembly.

153. At its twenty-fifth session, the Commission gave special attention to the question of the priority to be given to the topic. Taking into account the fact that the supplementary report on international watercourses<sup>650</sup> would be submitted to members by the Secretariat in the near future, the Commission considered that a formal decision on the commencement of work on the topic should be taken after members had had an opportunity to review the report.<sup>651</sup>

154. By paragraph 4 of resolution 3071 (XXVIII) of 30 November 1973 the General Assembly recommended that the Commission should at its twenty-sixth session commence its work on the law of the non-navigational uses of international watercourses by, *inter alia*, adopting preliminary measures provided for under article 16 of its statute. Also, by paragraph 6 of the same resolution, the General Assembly requested the Secretary-General to complete the supplementary report requested in resolution 2669 (XXV), in time to submit it to the Commission before the beginning of its twenty-sixth session.

155. At its twenty-sixth session the Commission had before it the supplementary report on the legal problems

<sup>648</sup> *Yearbook . . . 1972*, vol. II, p. 324, document A/8710/Rev.1, para. 77.

<sup>649</sup> *Yearbook . . . 1973*, vol. II, document A/CN.4/270.

<sup>650</sup> See para. 148 above.

<sup>651</sup> *Yearbook . . . 1973*, vol. II, document A/9010/Rev.1, para. 175.

relating to the non-navigational uses of international watercourses submitted by the Secretary-General pursuant to General Assembly resolution 2669 (XXV) (A/CN.4/274).<sup>652</sup>

156. Pursuant to the recommendation contained in paragraph 4 of General Assembly resolution 3071 (XXVIII) the Commission, at the present session, set up a Sub-Committee composed of Mr. Kearney (Chairman), Mr. Elias, Mr. Šahović, Mr. Sette Câmara and Mr. Tabibi which was requested to consider the question and to report to the Commission.

157. During the twenty-sixth session, the Sub-Committee held three meetings. Members of the Sub-Committee submitted memoranda which were reproduced in a working paper (ILC (XXVI) SC.1/WP.1). On the basis of those memoranda and the discussions thereon, the Sub-Committee adopted and submitted to the Commission a report (A/CN.4/283) which is annexed to this chapter.

158. The Commission considered the report of the Sub-Committee at its 1297th meeting held on 22 July 1974 and adopted it without change.

159. The Commission also unanimously appointed Mr. Richard D. Kearney Special Rapporteur for the question of the law of the non-navigational uses of international watercourses.

## ANNEX

### Report of the Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses<sup>653</sup>

#### I. INTRODUCTION

1. The Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses was set up by the International Law Commission at its 1256th meeting of 14 May 1974, pursuant to the recommendation contained in paragraph 4 of General Assembly resolution 3071 (XXVIII) of 30 November 1973. The members of the Sub-Committee are: Mr. Kearney (Chairman), Mr. Elias, Mr. Šahović, Mr. Sette Câmara and Mr. Tabibi.

2. The Sub-Committee was requested to consider the question of the law of the non-navigational uses of international watercourses which had been included by the Commission in its general programme of work at its twenty-third session in 1971, and to report to the Commission.

3. During the Commission's twenty-sixth session, the Sub-Committee held three meetings on 23 May and 1 and 15 July 1974.

4. The Sub-Committee had before it background documentation submitted by the Secretariat, including the records of the consideration of the matter in the General Assembly and, in particular, the report of the Secretary-General on the "Legal Problems relating to the utilization and uses of international rivers" (A/5409) and the supplement thereto (A/CN.4/274, vols. I and II) the latter prepared pursuant to the request made by the General Assembly in resolution 2669 (XXV) of 8 December, as well as a volume of the *United Nations Legislative Series* entitled *Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for Other Purposes than Navigation*.<sup>654</sup>

<sup>652</sup> To be printed in *Yearbook . . . 1974*, vol. II (Part Two).

<sup>653</sup> Document A/CN.4/283.

<sup>654</sup> See foot-note 645, 646 and 652 above.

5. Members of the Sub-Committee submitted memoranda setting forth suggestions on the content of a working plan as well as on organizational and substantive matters having a bearing on such a plan. Those memoranda are reproduced in a working paper (ILC(XXVI)/SC.1/WP.1).

6. On the basis of these memoranda and the discussions thereon, the Sub-Committee reached the following conclusions, which it submits to the Commission for its consideration.

#### II. THE NATURE OF INTERNATIONAL WATERCOURSES

7. The threshold question that arises in a study of the legal aspects of non-navigational uses of international watercourses is determination of the meaning and scope that should be given to the term "international watercourses". Some of the more recent multilateral treaties relating to international uses of water have used "river basin" as the measure of scope of application. The 1963 Convention between Guinea, Mali, Mauritania and Senegal deals with the general development of "the Senegal River Basin" (see A/CN.4/274, paras. 36-39). Article 13 states that the Senegal River, including its tributaries, is "an international river". The 1964 Convention between the same States (*ibid.*, paras. 45-50) provides that the Inter-State Committee, established by the 1963 Convention, shall be responsible, *inter alia*, for assembling basic data relating to the River basin as a whole and informing the riparian States of all projects or problems concerning the development of the River basin (article 11). Also in 1963, Cameroon, Chad, Dahomey, Guinea, the Ivory Coast, Mali, Niger, Nigeria and Upper Volta concluded the Act regarding navigation and economic co-operation between the States of the Niger basin (*ibid.*, paras. 40-44, which provides that the utilization of the River Niger, its tributaries and subtributaries, is open to each riparian State in respect of the portion of the Niger River basin lying in its territory and without prejudice to its sovereign rights in accordance with the principles defined in the Act and in the manner that may be set forth in subsequent special agreements (article 2).

8. The 1964 Convention and Statutes between Cameroon, Chad, Niger and Nigeria relating to the development of the Chad Basin (*ibid.*, paras. 51-56), provides that the exploitation of the Basin and especially the utilization of surface and underground waters has the widest meaning and refers in particular to the needs of domestic and industrial and agricultural development and the collecting of its flora and fauna products (Statutes, article 4). In this case, the term "basin" may, because of the inclusion of underground waters, have a somewhat broader meaning and be the equivalent of "drainage basin".

9. In this context, it should be noted that the International Rivers Sub-Committee of the Afro-Asian Legal Consultative Committee has been basing its work on the concept of "international drainage basin" (*ibid.*, paras. 364-367).

10. The Inter-American Juridical Committee, in its draft conventions on the industrial and agricultural use of international rivers and lakes of 1965 (*ibid.*, para. 379), restricted its coverage to contiguous and successive international rivers and international lakes. On the other hand, in 1966, the Inter-American Economic and Social Council adopted a resolution on control and economic utilization of hydrographic basins and streams in Latin America (*ibid.*, para. 380). In this resolution, the Council recommended to the member countries of the Alliance for Progress joint studies on "control and economic utilization of the hydrographic basins and streams of the region of which they are a part, for the purpose of promoting, through multinational projects, their utilization for the common good . . ."

11. The major multilateral convention on the subject in South America is the Treaty on the River Plate Basin, signed by Argentina, Bolivia, Brazil, Paraguay and Uruguay on 23 April 1969 (*ibid.*, paras. 60-64). This is an agreement in which the Parties agree to combine their efforts for promoting the harmonious development and physical integration of the River Plate Basin, and of its areas of influence

which are immediate and identifiable. The agreement contemplates the drafting of operating agreements and legal instruments with the end of ensuring reasonable utilization of water resources, particularly through regulation of watercourses and their multiple and equitable uses. Article II of the Treaty provides for annual meetings of the Foreign Ministers of the River Plate Basin States to draft policy directions to achieve the objectives of the Treaty.

12. At the Fourth Meeting in 1971 the Foreign Ministers adopted the "Act of Asunción" (*ibid.*, para. 326), to which were annexed 25 resolutions. These resolutions carried further the work of "promoting the harmonious development and physical integration of the River Plate Basin" (*ibid.*, para. 61). The treaty does not contain any specific definition of "basin". In resolution No. 25 which deals with the use of international rivers, the concepts of successive international rivers and contiguous international rivers are taken as a basis for the solution of legal problems in the following way:

"1. In contiguous international rivers, which are under dual sovereignty, there must be a prior bilateral agreement between the riparian States before any use is made of waters.

"2. In successive international rivers, where there is no dual sovereignty, each State may use the water in accordance with its needs provided that it causes no appreciable damage to any other State of the Basin."

Certain recent South American bilateral agreements adopt a somewhat different approach by using differing terminology for pollution problems and for utilization. For example, the Argentine-Chile "Act of Santiago concerning hydrologic basins" (*ibid.*, para. 327) of 1971 states: "The Parties shall avoid polluting their river and lake systems in any manner" (paragraph 2 of the Act). With respect to use, however, the terms "contiguous reaches of international rivers", "common lakes" and "successive international rivers" are employed (paragraphs 3-5 of the Act). The indication is that broader coverage is intended for dealing with "pollution" than for dealing with "uses".

13. The Great Lakes Water Quality Agreement of 1972 between Canada and the United States of America is concerned with "the boundary waters of the Great Lakes system (A/CN.4/274, para. 106). However, in order to raise the quality of the boundary waters, it was found necessary to provide for programmes to reduce pollution from sewage, industrial sources, agricultural, forestry and other land use activities (Art. V) in the entire Great Lakes system which is defined as "all of the streams, rivers, lakes and other bodies of water that are within the drainage basin of the St. Lawrence River . . ." (Art. 1 (d)).

14. For the purpose of ascertaining the meaning and the scope of the concept of international watercourses due consideration should be given to the 1911 resolution of the Institute of International Law entitled "International Regulations regarding the use of International Watercourses".<sup>655</sup> However, there is no use of the term "watercourses" but instead reference to "stream" and "lake" in the text of the Resolution itself. Fifty years later, the resolution of the Institute of International Law on "Utilization of non-maritime international Waters (except for navigation)" (1961)<sup>656</sup> adopted the concept of hydrographic basin as a synonym for "watercourses". Article 1 of the Resolution provides:

"The present rules and recommendations are applicable to the utilization of waters which form part of a watercourse or hydrographic basin which extends over the territory of two or more States."

<sup>655</sup> *Annuaire de l'Institut de droit international, 1911* (Paris), vol. 24 (1911), pp. 365-367. For an English translation of the text, see F. Berber, *Rivers in International Law* (London, Stevens, 1959), p. 27.

<sup>656</sup> *Annuaire de l'Institut de droit international 1961*, (Basle), vol. 49 (1962), t. II, p. 381. The text of the resolution is reproduced in A/5409, para. 1076 (to be printed in *Yearbook . . . 1974*, vol. II (Part Two)).

And Article 2 reads:

"Every State has the right to utilize waters which traverse or border its territory, subject to the limits imposed by international law and, in particular, those resulting from the provisions which follow.

"This right is limited by the right of utilization of other States interested in the same watercourses or hydrographic basin."

15. The International Law Association, at its Helsinki Conference of 1966, prepared a set of articles on the Uses of the Waters of International Rivers (Helsinki Rules), which is based on the concept of "international drainage basin". The term is defined in article II as:

"An international drainage basin is a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus."<sup>657</sup>

These studies, though not having the weight of State practice, provide additional examples of the various terms that have been used to denote "international watercourses".

16. Further examples are available from treaties, State practice, studies of regional organizations, and the researches of legal organizations to show that the term "international watercourses" does not possess a sufficiently well-defined meaning to delimit, with any degree of precision, the scope of the work which the Commission should undertake on the uses of fresh water. It is also clear that the nature of the problems studied may have an effect upon the scope of the work.

17. In view of these uncertainties, the Sub-Committee proposes that States be requested to comment on the following questions:

- (a) What would be the appropriate scope of the definition of an international watercourse, in a study of the legal aspects of fresh water uses on the one hand and of fresh water pollution on the other hand?
- (b) Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of non-navigational uses of international watercourses?
- (c) Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of the pollution of international watercourses?

### III. NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

18. Another question that must be considered at the outset is what activities are included within the term "non-navigational uses". Fresh water is put to a manifold number of uses and an exhaustive listing is not only impossible but unnecessary. However, at least the outlines of the Commission's field of activity should be fixed by determining the major uses to be considered.

19. The most general characterization would be to consider uses as (a) agricultural; (b) commercial and industrial; (c) social and domestic.

20. Agricultural uses account for the major proportion of fresh water use, at least in the sum of the amount of water removed from watercourses for irrigation and other farming purposes which is not returned directly to the watercourse. Nevertheless, there is a considerable amount of direct water return as well as return by seepage. In many cases, however, the quality of this return water has been debased to a greater or lesser extent by fertilizers, insecticides and various farm wastes.

21. In areas where, at least on a seasonal basis, water is in excess rather than in short supply, another agricultural use is the reduction in the moisture content of the soils through drainage. This use can

<sup>657</sup> *International Law Association, Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484-485.

give rise to erosion problems. It is connected, however, with a much larger problem that does not concern a "use" as such but is an essential element in river-planning. This is the problem of flood control. In view of the very substantial dangers and losses that result from flooding, a study of the legal aspects of international watercourses would appear to be incomplete without the inclusion of a consideration of this problem.

22. There is a question whether commercial fishing and other food production activities fall within the area of agricultural uses or of commercial and economic uses. At all events the flora and fauna of international watercourses are an essential part of a study of legal aspects of fresh water uses, particularly because the increase in the demands for water and the increase in pollution of international watercourses by all kinds of waste have had markedly adverse effects upon aquatic life in many areas throughout the world.

23. The limitation of the Commission's study to "non-navigational uses" causes certain difficulties. It would not seem feasible to consider non-navigational uses without taking account of the effect those uses have upon navigation; and, contrariwise, it would be short-sighted not to take account of the effect of navigation upon non-navigational uses. Thus, timber floating and navigation are, in the absence of strict control, not compatible uses, because of the dangers of collision. Hydro-electric production and navigation are also incompatible uses because the dam cuts off the passage of vessels unless locks are built to carry them round it. Consideration should be given to this interaction and the views of States sought on the point. In addition, the attention of the Sixth Committee, which proposed the scope of the study, should be drawn to the problem.

24. Manufacturing of all kinds give rise to constantly increasing requirements for fresh water. These demands are particularly high in connexion with the processing of raw materials. Much production is geared to the use of watercourses as a means for the disposal of industrial wastes. The growth of industry in many cases has exceeded the capacity of rivers to deal with these wastes. The problem has been complicated by the production of a great range of synthetic materials which are impervious to the natural processes of decomposition.

25. The social and domestic uses of fresh water are probably the most important to mankind as a whole. Urban civilization, which is becoming the dominant pattern of life in the second half of this century, requires the availability of large supplies of fresh water of substantially good quality. Most of the water used for domestic consumption is returned to the drainage system—even if not to the same watercourse from which it is taken. There is, therefore, not a great loss in quantity of available water, but usually a very substantial drop in quality as a result of using the watercourse for waste disposal.

26. As industry is usually a part of an urban complex, the combination of industrial wastes and domestic wastes has had disastrous effects upon lakes and rivers. Also, as in industrial wastes, a wide variety of synthetic materials are found in domestic wastes that are non-biodegradable.

27. The combination of these factors generally has an adverse effect of some magnitude upon the social uses of watercourses. These uses, while not having the economic importance of those previously discussed, are still high on this list of human values. Recreation of all kinds has always been one of the most appealing aspects of lakes and rivers. Sport, fishing, swimming, boating and like activities are uses that should be preserved. They are, like other uses, dependent upon the two basic factors of water quantity and water quality. It is worth noting that they may be particularly affected by a variety of recent developments such as the discharge of large quantities of heated water into the watercourse as a result of certain industrial processes or energy production.

28. From what has been said, it is clear that the major effects of various uses upon watercourses is to change the quantity of water available, the rate of flow of water and the quality of water. All of these effects are interrelated. Thus, from the point of view of irrigation, a reduction in water quality, among other consequences, may reduce the quantity of usable water available because the lower

quality of the water may require the use of a larger quantity of water to produce the same effect. Because there is only a limited quantity of water available, it is also clear that increasing demand, which is the chronic condition because of increasing population, results in competition among the various uses for the available water.

29. When the water concerned is that of an international drainage basin or an international watercourse, the competition among the various users can become an international competition, and the problem which faces the Commission is largely, though not entirely, to determine and to formulate the legal principles which should be applied to regulate this competition. This will require, as the first step, an examination of existing international practice, and particularly practice as reflected in conventions or administrative arrangements, for dealing with trans-boundary water problems.

30. Because uses can be conflicting, both on the national and on the international level, this examination should be directed to the consequences of a reasonably broad range of water uses in the international context. The Sub-Committee believes that the views of States should be sought as to the range of uses that the Commission should take account of in its work. In addition, certain special problems, such as those previously referred to above, need to be considered. The Sub-Committee recommends that the following questions should be put to States:

A. Should the Commission adopt the following outline of fresh water uses as the basis for its study?

1. Agricultural uses
  - (a) Irrigation
  - (b) Drainage
  - (c) Waste disposal
  - (d) Aquatic food production
2. Economic and commercial uses
  - (a) Energy production (hydroelectric, nuclear and mechanical)
  - (b) Manufacturing
  - (c) Construction
  - (d) Transportation other than navigation
  - (e) Timber floating
  - (f) Waste disposal
  - (g) Extractive (mining, oil production, etc.)
3. Domestic and social
  - (a) Consumptive (drinking, cooling, washing, laundry, etc.)
  - (b) Waste disposal
  - (c) Recreational (swimming, sport, fishing, boating, etc.)

B. Are there any other uses that should be included?

C. Should the Commission include flood control and erosion problems in its study?

D. Should the Commission take into account in its study of the interaction between use for navigation and other uses?

#### IV. ORGANIZATION OF WORK

31. The uses to which international watercourses are put vary widely according to factors such as climate, the physical characteristics of the watercourse, the availability of raw materials for industrial production, and the stages of economic and social development in the basin States. This variety of existing uses could give rise to the viewpoint that it may be desirable to give priority to the study of particular uses, such as industrial uses, in view of the continually mounting demand for water by industry or agriculture because of the obvious requirement for much greater food production in the light of the rapidly multiplying world population.

32. The Sub-Committee does not consider that it would be wise to accord priority to any specific use. The discussion of the various uses indicate a series of complex relationships among them which require simultaneous exploration. However, the discussion of uses

also has indicated that there are two principal limitations upon the use of fresh water—the quantity and the quality of water available. Although, as previously mentioned, there is a definite interrelationship between these two limitations, each nevertheless raises legal considerations of a different character. The problem of quantity raises an issue of distributive justice, namely: to what extent is a State as a territorial sovereign entitled to divert water for its own uses when that diversion makes the water unavailable for use by another State which, without the diversion, would be able to make use of the water?

33. The problem of quality in relation to quantity involves issues that lie more in the field of the limits of liability for fault. The question really is: at what point does the legitimate use of an international watercourse for waste disposal become illegitimate because of the nature or amount of the waste which is passing into the territory of another State?

34. It would be possible to concentrate first on the question of quality, that is, pollution problems, or on the question of quantity. Taking up one first, however, would not mean that all consideration of the other should be postponed. For example, establishment of principles to bring waste disposal within acceptable limits would have a direct impact upon the other uses of water.

35. Whether to take up the study of uses in general or the problem of pollution first, is a close issue. There is a somewhat greater amount of State practice available regarding general uses, for example in respect of hydro-electric production and irrigation, than there is regarding waste disposal. On the other hand, there is the fact that waste disposal is a use that affects all the other uses of fresh water, whether as an essential element of the use, e.g. irrigation, industrial production, etc., or as destruction of the use, e.g. recreation or domestic uses, if the pollution is by dangerous chemicals or radioactive wastes. This would appear to afford a somewhat better opportunity to work out general principles and thus make it advantageous to deal with as the first stage. For these reasons the Sub-Committee considers that it would be desirable to ask States if they support taking up the pollution problem first. The Sub-Committee recommends that States be requested to reply to the following question:

Are you in favour of the Commission taking up the problem of pollution of international watercourses at the initial stage in its study?

#### V. CO-OPERATION WITH OTHER AGENCIES

36. As the excellent report of the Secretary-General on the "Legal Problems Relating to the Utilization and Uses of International Rivers" of 1963, together with the supplementary report of 1974, make clear, the specialized agencies of the United Nations and other international organizations have produced a great volume of technical and scientific work in the area of uses of fresh water. Such studies are currently being carried out. Exhaustive work is being done in many of the fields that relate to pollution as a result of the United Nations Conference on the Human Environment, held at Stockholm in 1972, and the establishment of the United Nations Environment Programme. The Commission should make full use of these studies in its work. The Sub-Committee recommends that the Secretary-General be requested to advise all international organizations that are engaged in studies of international watercourses of the legal work being carried on by the Commission and to request their co-operation in this work, particularly by designating an officer or officers of these organizations to serve as the channel of information and co-operation.

37. A further question is whether the technical, scientific and economic aspects of this area of study are both sufficiently complex and of such importance to the formulation of effective legal principles that special steps should be taken to ensure receipt by the Commission of the most competent and useful advice. In this connexion, the precedent of the Committee of Experts established to assist the Commission in dealing with certain aspects of the law of the sea and related conventions, might be taken into account. This again is a matter upon which the views of States should be solicited and, to this end, the Sub-Committee recommends the following question:

Should special arrangements be made for ensuring that the Commission is provided with the technical, scientific and economic advice which will be required through such means as the establishment of a Committee of Experts?

## Chapter VI

### OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

#### A. Succession of States in respect of matters other than treaties

160. At the present session of the Commission, Mr. Mohammed Bedjaoui, Special Rapporteur, submitted his seventh report (A/CN.4/282)<sup>658</sup> on the succession of States in respect of matters other than treaties. The Commission, however, was unable to resume the consideration of the topic, as in pursuance of paragraph 3 (a) and (b) of General Assembly resolution 3071 (XXVIII) of 30 November 1973, it had to devote most of the time of the session to the second reading of the draft articles on succession of States in respect of treaties and to the preparation of a first set of draft articles on State responsibility.

<sup>658</sup> See p. 91 above.

#### B. The most-favoured-nation clause

161. At the present session of the Commission, Mr. Endre Ustor, Special Rapporteur, submitted his fifth report (A/CN.4/280)<sup>659</sup> on the most-favoured-nation clause. For the reasons indicated in the preceding paragraph, the Commission was unable to resume the consideration of the topic at its present session.

#### C. Long-term programme of work

162. The consideration by the Commission of the recommendation contained in paragraph 4 of General Assembly resolution 3071 (XXVIII), concerning commencement of work on the law of non-navigational uses

<sup>659</sup> See p. 117 above.

of international watercourses (agenda item 8 (a)) is dealt with in chapter V of the present report.

163. As regards the recommendation contained in paragraph 3 (c) of resolution 3071 (XXVIII) concerning undertaking at an appropriate time a separate study of the topic of international liability for injurious consequences arising out of the performance of activities other than internationally wrongful acts (agenda item 8 (b)), the Commission decided to place that topic on its general programme of work.

#### D. Organization of future work

164. Having concluded at its present the session second reading of the draft articles on succession of States in respect of treaties as recommended by the General Assembly, the Commission intends to continue at its twenty-seventh session, as a matter of priority, its study of the topic of State responsibility and the preparation of the draft articles relating thereto. It also proposes to consider other topics in its current programme of work on which a first set of draft articles has already been prepared, namely: the most-favoured-nation clause, succession of States in respect of matters other than treaties and the question of treaties concluded between States and international organizations. This is without prejudice to the possibility, time permitting, of giving some time to the consideration of the topic of the law of the non-navigational uses of international watercourses.

165. The Commission has become increasingly aware, during recent years, that an annual session of ten weeks duration is insufficient to meet the demands of its programme of work. The twelve-week session of 1974 has permitted the preparation of the final draft articles on succession of States in respect of treaties, further progress on State responsibility and the preparation of the initial articles on treaties concluded between States and international organizations. This was accomplished only by intensive effort. If the session had been limited to ten weeks, it would not have been possible to complete the draft on succession of States in respect of treaties. In the light of this experience, as well as the experience in previous years, the Commission is convinced that the twelve-week session should be adopted as the minimum duration on a permanent basis. Accordingly it recommends that the General Assembly approve a twelve-week session as the minimum standard period of work for the Commission, as from the next session.

#### E. Co-operation with other bodies

##### 1. ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

166. The Chairman of the twenty-fifth session, Mr. Jorge Castañeda, attended the fifteenth session of the Asian-African Legal Consultative Committee held at Tokyo in January 1974, as an observer for the Commission. He reported orally on his attendance, at the opening meeting of the present session (1250th meeting) of the Commission.

167. The Asian-African Legal Consultative Committee was represented at the twenty-sixth session of the Commission by its President, Mr. K. Nishimura, who addressed the Commission at its 1278th meeting.

168. Mr. Nishimura expressed the profound admiration of the Asian-African Legal Consultative Committee for the work which the Commission had accomplished during the past twenty-five years. It was a matter of gratification that in spite of the meticulous care and thought which the Commission devoted to the drafting of each article, it had been able to complete its recommendations on as many as eighteen different topics, some of which had had a tremendous impact on the development of international law and had received general acceptance by the world community through their incorporation in multilateral conventions. In that connexion, he made special mention of the topics of the law of the sea, diplomatic intercourse and immunities, consular relations and the law of treaties. The codification of those topics would not have been possible without the efforts and work of the Commission.

169. He stressed the importance which his organization attached to the close links between the Commission and the Asian-African Legal Consultative Committee and expressed satisfaction that, in its work, the Commission had shown its willingness not only to co-operate with, but also to take into account the work done by, various regional bodies. The co-operation and exchanges between the Commission and the Committee had always been extremely fruitful. He expressed his sincere hope that they would not only be maintained but further strengthened in the years to come.

170. Turning to the work of the Committee, Mr. Nishimura noted that it had been confronted with much heavier responsibilities during the past four years, due to the increase in its membership, which had now risen to 26, requests of its member Governments for assistance in various legal fields, particularly in connexion with the work of UNCTAD and UNCITRAL, as well as the general desire to use the Committee as a forum for Asian-African co-operation in legal matters.

171. He emphasized that four of the last five sessions of the Committee as well as several sub-committee meetings had been devoted to exchanges of views on the law of the sea. The Committee's secretariat had been engaged in collecting and analysing various data with a view to assisting its member Governments to prepare for the Third United Nations Conference on the Law of the Sea. He said that at the Committee's last session, a statement of principle had been submitted to it on behalf of the land-locked countries in preparation for the Conference. Nevertheless, the Committee had not neglected other subjects studied by the Commission, such as State succession and State responsibility, which were of great importance to many new States.

172. He added that the Committee closely followed the studies prepared by other United Nations organs and bodies such as UNCTAD and UNCITRAL on legal matters of common interest. It had similarly devoted considerable time to an exchange of views on the rule of foreign office legal advisers. Finally, he informed the

Commission that the Committee was also interested in the non-navigational uses of international watercourses, a subject which presented great problems for the countries of Asia and Africa in general.

173. The Commission was informed that the sixteenth session of the Committee, to which it had a standing invitation to send an observer, would be held at Teheran in 1975. The Commission requested its Chairman, Mr. Endre Ustor, to attend the session or, if he was unable to do so, to appoint another member of the Commission for this purpose.

## 2. EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

174. Mr. Ali Suat Bilge attended the twentieth session of the European Committee on Legal Co-operation held at Strasbourg in December 1973, as an observer for the Commission. Mr. Abdul Hakim Tabibi attended the twenty-first session of the Committee, held at Strasbourg in June 1974, as an observer for the Commission, and made a statement before the Committee (A/CN.4/L.214, annex 1).<sup>660</sup>

175. The European Committee on Legal Co-operation was represented at the twenty-sixth session of the Commission by Mr. H. Golsong, Director of Legal Affairs of the Council of Europe, who addressed the Commission at its 1292nd meeting.

176. Mr. Golsong recalled that he had conveyed in a message addressed to the General Assembly on the occasion of its celebration of the twenty-fifth anniversary of the Commission the sentiments of admiration of the European Committee on Legal Co-operation for the Commission's accomplishments during its twenty-five years of existence. The Committee had wished to associate itself with that anniversary celebration by stressing, at its own tenth anniversary, the objectives which linked it with the Commission, namely, the codification and progressive development of international law.

177. Turning to one of the main activities of the Committee, the international protection of human rights, Mr. Golsong referred to recent developments concerning the Convention for the Protection of Human Rights and Fundamental Freedoms, noted that twenty-five years after its signature, the Convention naturally gave rise to procedural problems with regard to its application. For that reason, studies had recently been undertaken with a view to simplifying and speeding up that procedure.

178. With regard to the Committee's work on the protection against pollution of water resources and particularly of international watercourses, a topic in which the Commission would no doubt be interested because of its commencement of work on the law of the non-navigational uses of international watercourses, Mr. Golsong informed the Commission that the draft convention which had been prepared on the subject (see A/CN.4/274, para. 377)<sup>661</sup> was now before the Committee of Ministers of the Council of Europe. In some

respects, that draft contained legal innovations which were of some importance. It took the form of a basic instrument which laid down the obligations for future contracting parties to enter into negotiations with each other with a view to concluding co-operation agreements between the riparian States of the same international watercourse. In its present form, that *pactum de contrahendo* was without precedent. The draft also imposed specific material obligations on contracting States to maintain the quality of the waters in accordance with minimum quality standards, and to enact regulations to prohibit or restrict the discharge into the waters of certain dangerous or harmful substances. The obligations laid down in the draft convention raised the question of the international responsibility that would arise from their breach. A long discussion on that question had led to the formulation of a provision (article 21) which read:

The provisions of this Convention shall not affect the rules applicable under general international law to any liability of States for damage caused by water pollution. (*Ibid.*)

That provision therefore left it to general international law to determine the consequences of the breach of an international obligation of the kind specified in the draft convention. On that point, the draft thus relied on the results of the work in progress in the Commission on the subject of State responsibility. On the other hand, the system embodied in the draft for the settlement of disputes was more specific. It was based on the obligation to submit any dispute to an *ad hoc* arbitral tribunal set up for each individual case. Provision had had to be made for cases that were perhaps peculiar to problems of the pollution of an international watercourse crossing the territory of several States, namely, cases in which the dispute involved several States not having the same interests. It was difficult, when providing for *ad hoc* arbitration, to devise a system that would satisfy a diversity of interests. A tentative formula was embodied in an appendix to the draft, which made provision for the establishment of links between two or more arbitral tribunals seized of applications with identical or analogous subject-matter.

179. With regard to the practice of the Committee relating to the law of treaties, he drew attention to the increasing difficulties arising from the simultaneous existence of several treaties covering more or less the same subject-matter or related subject-matters. That had led to an overlapping of international treaty obligations, because in the Council of Europe treaties were not binding on member States unless they individually expressed their consent to be bound. Studies were now in progress with a view to finding solutions to the problems of overlapping raised by the application of such treaties. He also drew attention to problems arising from the possibility that the European Communities might wish, in order to co-ordinate various conventions relating to the same subject-matter, to accede to certain conventions. It was not clear what would happen, for example, if the European Communities acceded to the Paris Convention for the Prevention of Marine Pollution from Land-Based Sources adopted on 21 February 1974, at the same time as one or more of their member States. Such problems were related to the item on the Com-

<sup>660</sup> See p. 153 above.

<sup>661</sup> To be printed in *Yearbook . . . 1974*, vol. II (Part Two).

mission's agenda concerning treaties concluded between States and international organizations or between two or more international organizations.

180. Finally, Mr. Golsong mentioned the problems of the final stage of the codification of international law and expressed doubts about the wisdom of adopting resolutions in the United Nations General Assembly instead of concluding international codification treaties negotiated in diplomatic conferences. The Committee was faced with a similar problem and was attempting to find ways of solving it. A major factor in that respect was the political will of States. Both the Committee and the Commission were in duty bound to seek in their respective spheres legal solutions which were conducive to the progressive development of law and which were acceptable to as many States as possible.

181. The Commission was informed that the next 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. Endre Ustor, 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

182. The Commission was regrettably unable to be represented by an observer, either its Chairman or another member of the Commission appointed by him for the purpose, at the session held by the Inter-American Juridical Committee at Rio de Janeiro in January and February 1974.

183. The Inter-American Juridical Committee was represented at the twenty-sixth session of the Commission by Mr. A. Gómez Robledo, who addressed the Commission at its 1259th meeting.

184. He paid tribute to the Commission for its important contribution to the codification and progressive development of international law and emphasized the great interest with which its work was received on the American continent. He also expressed the hope that the increasingly close and fruitful co-operation between the International Law Commission and the Inter-American Juridical Committee would contribute to the establishment of an international order based on peace and justice.

185. Turning to the question of the codification of private international law, one of the matters dealt with by the Committee, he emphasized that in America, and particularly in Latin America, the codification of private international law—and the unification of the law on certain subjects relevant to international trade—had been pursued as vigorously as that of public international law. The Inter-American Specialized Conference on Private International Law, which was to be held at Panama in January 1975, was expected to explore the possibility of bridging the gap between the two systems of private international law now existing in Latin America as it dealt with the specific items on the agenda of the Conference. Those topics included commercial companies—multinational companies, in particular—international sale of goods, international bills of exchange, international commercial arbitration and ship-

ping. The Committee had prepared draft conventions on most of those topics for submission to the Conference.

186. Another matter dealt with by the Committee in 1973 was the topic of territorial colonialism in America, both extra-continental and intra-continental, which had been on its agenda for the last few sessions. He stressed that the Committee was anxious to implement in the region the relevant General Assembly resolutions on the elimination of colonialism. In February 1973, the Committee had adopted, by the unanimous vote of all the Latin American members present, a resolution which expressly referred in its preamble to certain situations and which in its operative part offered the Committee's full co-operation in the study and settlement of the Panama Canal Zone situation and specifically suggested that the General Assembly of OAS should appoint a special commission to recommend measures which would lead to the abolition, within a short time, of all forms of colonialism, neo-colonialism and usurpation of territory by alien States in the American continent.

187. He said that the Committee had closely followed developments in regard to the law of the sea. Although naturally mindful of regional interests, the Committee had always tried to suggest approaches and solutions that were generally acceptable to the international community as a whole. The Committee had undertaken the study of the régime of the International sea-bed area. The resolution it had adopted on that subject contained certain novel elements which deserved comment. In the first place, the Committee had reaffirmed its position that the limits of the international sea-bed area should coincide with those of the areas of national jurisdiction, which extended to a maximum distance of 200 nautical miles measured from the baseline used for the territorial sea, or with the outer limit of the continental rise, where that limit extended beyond 200 miles. The Committee had adopted a geomorphological criterion for purposes of defining the outer limit of the continental shelf. Another novel feature of the resolution was the inclusion of minerals in suspension in the waters of the high seas as part of the international sea-bed area, and hence of the common heritage of mankind. The Committee believed that minerals in suspension were, by their nature, outside the scope of fisheries and that their inclusion in the sea-bed régime conformed with the spirit, if not the letter, of the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction (General Assembly resolution 2749 (XXV) of 17 December 1970). The Committee had also dealt with the difficult problem of the authority or institution which would be called upon to administer or manage the international sea-bed area and had adopted an eclectic approach. It had, however, stressed that, regardless of the régime to be adopted, the exploration and exploitation of the area must constitute an international public service under the supervision of organs genuinely representing the international community.

188. Finally, Mr. Gómez Robledo informed the Commission that the Inter-American system was undergoing a process of revision during which the question of the co-ordination of the United Nations system with

that of OAS or of conflicts of jurisdiction between the two organizations—had once again come to the fore. The time had perhaps come for an objective and dispassionate reappraisal of the scope of the jurisdiction of regional organizations in conformity with the Charter of the United Nations, the supremacy of which was expressly recognized by the Charter of OAS. Because of the manifestly legal character of that question, the Committee had placed it on its agenda and had appointed two rapporteurs, both of whom had submitted reports, which would be considered at the Committee's next session.

189. The Commission was informed that the next session of the Committee, to which it had a standing invitation to send an observer, would be held at Rio de Janeiro, in September 1974. The Commission requested its Chairman, Mr. Endre Ustor, to attend the session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

#### **F. Date and place of the twenty-seventh session**

190. The Commission decided to hold its next session at the United Nations Office at Geneva starting on 5 May 1975.

#### **G. Representation at the twenty-ninth session of the General Assembly**

191. The Commission decided that it should be represented at the twenty-ninth session of the General Assembly by its Chairman, Mr. Endre Ustor.

#### **H. Remarks on the report of the Joint Inspection Unit**

192. The Commission learned, towards the end of the session, of the existence of a report by the Joint Inspection Unit on the pattern of conferences of the United Nations and the possibilities for more rational and economic use of its conference resources.<sup>662</sup>

193. The Commission noted with surprise that the report contained certain passages relating to the Commission, which had been drafted without any kind of consultation with the Commission or its secretariat. This failure on the part of the inspectors concerned to carry out what would appear to be an elementary requirement for the preparation of an accurate report is reflected in the considerations and the suggestions contained in the report. Nevertheless, these developments give the Commission occasion to place before the General Assembly its own estimate of the nature and requirements of the task of codification and progressive development of international law entrusted to it by the General Assembly.

194. The composition of the Commission and its procedures, as set forth in the Commission's Statute approved by the General Assembly and evolved in practice, as well as the organization of the sessions of the

Commission, were conceived and determined bearing essentially in mind the very special nature of the task performed by the Commission and its needs. As has been frequently recognized by the General Assembly, the accomplishments of the Commission during the 25 years of its existence prove beyond all doubt the soundness of the established system. The misconception reflected in the conclusions and suggestions advanced by the authors of the report in question lies probably in the failure to grasp the essential unity of the system and the interconnexion existing between its elements.

195. The Commission does not intend to comment in detail on all the conclusions and suggestions contained in the report, but nevertheless considers it desirable to call attention to the interconnexion mentioned above and to the disruptive impact that the suggested changes in the present pattern would necessarily have on the effectiveness of the Commission and the quality of its work, to the detriment of the codification of international law and its progressive development.

196. Evidence that the authors of the report in question did not possess enough information on the nature and task of the Commission is reflected, on the one hand, in the conclusions and suggestions they made in connexion with the methods of work followed by the Commission, and, on the other hand, by the tendency to assimilate the position and role of the International Law Commission to those of other United Nations bodies.

197. With regard to the first point, it should be pointed out that the Commission's work can only be done on the basis of learned studies, prepared in advance, relating to the recondite and complex areas of international law. This explains the system of special rapporteurs provided for in the Statute of the Commission. The special rapporteurs, an essential feature of the Commission's method of work, study and analyse, on a continuing basis over a lengthy period, the law relating to the subject assigned to them.

198. Members of the Commission require substantial time to study the reports submitted by the special rapporteurs and to prepare themselves for discussion in the Commission. It is through such discussion that, on the basis of the reports submitted by the special rapporteurs, the Commission arrives at the meeting-point between the conceptions and tendencies of the different legal systems as well as the most appropriate balance between tradition and progressive development in the formulation of the rules concerning a given subject. All this requires preparatory work by the members of the Commission, whether or not they are special rapporteurs, not only when they are attending meetings during the sessions, but also when the Commission is not meeting.

199. While the session of the Commission is in progress, the special rapporteurs have to study the remarks and criticisms made by the members during the discussion and prepare new texts with commentaries explaining the reasons for the new formulations. This is also true to a great extent for other members of the Commission, particularly when they consider it necessary to submit alternative proposals of their own. Members work not

<sup>662</sup> JIU/REP/74/4. Later circulated as document A/9795.

only in the public and private meetings of the Commission, but also during the hours which they devote to studying the Commission's documents and other legal publications, during the consultations held outside the conference room with a view to finding solutions to the problems under discussion, and so on. Several members also give lectures to the annual seminar which is held under the auspices and during the sessions of the Commission.

200. Those who suggest that the Commission could save time by increasing the number of plenary meetings held during the session or by establishing working groups seem to be unaware of the special nature of the work performed by the Commission, its subsidiary bodies and its members. That work consists essentially in elaborating drafts of international legal norms. Apart from the great care and thoroughness that this work demands because of its importance, the task of elaborating norms is by definition a process of abstraction, of synthesis, that is to say, the kind of work that calls for the highest degree of concentration. It must be added that apart from this need for reflection, the search for doctrinal and judicial antecedents and for State practice represents a very specific aspect of particular importance which also distinguishes the work of the Commission from the work done within other United Nations bodies.

201. An increase in the number of meetings would involve a risk of lowering the quality of the Commission's work, when it is precisely because of that quality that the reports and drafts prepared by the Commission have met with almost complete acceptance both in the General Assembly and in the diplomatic conferences where they have been considered. It is by keeping the quality of the Commission's drafts at the present level that the process of codification may advance at a reasonable pace with safeguards for all. The lowering of present standards would inevitably lead to failures at the final codification stage, either at diplomatic conferences or at the General Assembly. It should also be noted that the method of discussion, which avoids unnecessary repetition, results in a considerable economy in the use of time at meetings.

202. As regards the establishment of working groups, those who suggest that the Commission should have recourse also to that means of work would seem to be unaware that the drafting committee, constituted at each annual session by the Commission and comprising approximately half its membership, is actually a standing working group which holds several private meetings a week throughout the session. The Drafting Committee prepares texts of draft articles for consideration by the Commission embodying solutions not only to drafting problems but also to problems of substance referred to it by the Commission. Moreover, whenever necessary, *ad hoc* working groups are also set up by the Commission to deal with specific subjects, as, for instance, has been the case at the present session in connexion with the preliminary questions involved in the study of the topic concerning the law of the non-navigational uses of international watercourses. If to this it is added that the meetings of the expanded Bureau of the Commission, which includes the Bureau of the session, the former Chairmen of the Commission and the special rap-

porteurs, it will be seen that on the average the members of the Commission are required to attend far more meetings than the daily public meeting of the plenary of the Commission. This is a higher, not a lower, average than that of other United Nations bodies. In this connexion, it should be borne in mind that, *elected in a personal capacity, the members of the Commission must give their personal attention to the work done in the Commission and cannot be replaced by alternates or advisers.*

203. Another suggestion made is that the Commission could split into two or more sub-committees. Here again the Commission faces unfair criticism because a suggestion of that kind seems to ignore the fact that one of the basic principles of the Commission's Statute is, as already stated, the representation at the different stages of the Commission's work of the main forms of civilization and of the principal legal systems of the world. It is obvious that a balanced representation cannot be assured if the Commission, which has 25 members, is divided into several sub-committees. The Commission cannot endorse a suggestion contrary to this basic principle of its Statute. This principle has proved to be in practice one of the reasons for the success of the Commission's drafts and reports in diplomatic conferences and in the General Assembly. Suffice it to compare the very positive achievements of the diplomatic conferences which have considered drafts prepared by the Commission after a long and learned preparation in a body which represents fully the principal legal systems of the world with the failures of former attempts at codifying international law on the basis of work which did not have the same scientific and diplomatic guarantees. Moreover, the division of the Commission's work among sub-committees could be disruptive of the unity and coherence of the process of codification and progressive development of international law as a whole.

204. The success of the Commission's present procedures and methods of work is undoubtedly due to the continuous interaction of scientific expertise and governmental responsibility throughout the preparation of a codification draft. Although such interaction requires much time, the fate of previous attempts at codification clearly shows that it is the only way to achieve practical results. The question today is not whether codification should be rapid or slow but how to achieve a lasting codification generally accepted and corresponding to the present needs of the international society.

205. Moreover, taking into consideration the procedure established by the Statute of the Commission, which requires the comments of Governments, particularly between the first and the second reading, to submit to the General Assembly every two or three years a final set of draft articles of high technical value and degree of acceptability to the whole international community on essential areas of international law, is not, in the Commission's view, a slow pace at all. It is probably the maximum pace that States themselves are in a position to follow. For instance, in 1971, the Commission submitted to the General Assembly its final draft articles on the representation of States in their relations with international organizations, but the diplomatic conference

entrusted with the task of examining the draft will not meet until 1975. To impose a still quicker pace at any price, even in the highly hypothetical case that it could be done without impairing the technical value or acceptability of the drafts, would lay on States a burden which could in the last resort jeopardize the entire process of the codification and progressive development of international law undertaken under the auspices of the United Nations.

206. With regard to the second point referred to above, the tendency to assimilate the Commission to United Nations bodies composed of representatives of States, the inspectors seem to overlook altogether the great progress that the establishment of a body such as the Commission represents for the codification and progressive development of international law. Codification work, in order to be successful, requires two distinct stages, the second of which is the only one that should be entrusted to a diplomatic conference or to the General Assembly, as bodies composed by representatives of States. The first one, on the contrary, must by its very nature be entrusted to a body of jurists such as the Commission. Working independently of States, although in close contact with them through the Sixth Committee of the General Assembly and the procedure of written comments, the Commission is enabled to formulate texts embodying an objective determination of the legal rules governing the particular area of international relations concerned, as well as taking into account the different trends existing today in the principal legal systems of the world in order to facilitate the progressive development of international law in a coherent manner and in accordance with the current interests, structures and needs of the international community as a whole.

207. The members of the Commission, as stated in the Commission's Statute, are persons who are elected by the General Assembly, who individually possess recognized competence and qualifications in both doctrinal and practical aspects of international law and who collectively represent the principal legal systems of the world. Therefore, to assimilate the Commission to an expert working group is not only inaccurate but is prejudicial to the work of the Commission in view of the tendency to apply to its unique position general patterns which may be justified in the case of an expert working group but which are completely inadequate and unjustified for a body such as the Commission.

208. If a comparison must be made between the Commission and another United Nations body, it is with the International Court of Justice that such a comparison should be made. The Court is entrusted with the task of applying international law to controversies between States, while the Commission performs the task of formulating draft rules of international law. The work done by the Court, at the judicial level, and that done by the Commission, at the legislative level, are complementary and make those bodies, respectively, the principal judicial and legal organs of the United Nations system.

209. As to the seat of the Commission, the General Assembly in 1955 expressly amended article 12 of the Commission's Statute to provide that the Commission

was to sit at the United Nations Office at Geneva. This decision of the General Assembly was not taken lightly but after a thorough examination of all aspects of the matter and on the basis of the requirements of the Commission's work. The basic assumption on which this decision of the Assembly was taken remains as valid today as it was in 1955. The United Nations Office at Geneva affords the best possible conditions for the Commission's work. The Palais des Nations has an exceptionally specialized library, originally constituted in the days of the League of Nations and including collections of works and periodicals going back for several decades. This is an absolutely indispensable working instrument both for the special rapporteurs—some of whom come to Geneva at their own expense between sessions expressly to prepare their work—and for the members of the Commission in general. The translators, revisers, interpreters and others of the staff of the Palais des Nations have, over the years, become familiar with the Commission's work. They are acquainted with the 25 years of accumulated precedent resulting from the work of the Commission. Besides, Geneva is the most suitable place for the work of a body such as the Commission which is called upon to solve legal problems in a quiet and studious atmosphere. Geneva is also the meeting-place of the International Law Seminar, organized annually by the United Nations Office at Geneva, which is closely linked with the Commission's sessions: members of the Commission give lectures to the Seminar, and the participants have the opportunity of attending the Commission's meetings—an arrangement which constitutes one of the salient features of the Seminar.

210. Another important factor to be borne in mind is that the members of the Commission, a body which is not in permanent session, are persons working in the academic and diplomatic fields with professional responsibilities outside the Commission, as required by their respective Governments or professions, a fact which enables the Commission to proceed with its work not in an ivory tower but in close touch with the realities of international life. Many of the members have made permanent arrangements to be present in Geneva and during the Commission's sessions. For instance, several members have been appointed permanent representatives in Geneva or have made Geneva one of the main centres of their activities. In this connexion, it should be recalled that, as already indicated, the members of the Commission being elected by the General Assembly in their personal capacity, cannot be replaced by alternates or advisers. If the seat of the Commission were transferred outside Geneva it would be extremely difficult for many members to attend meetings of the Commission, and this would negate one of the basic principles of the Statute of the Commission, namely to ensure the presence in the Commission of the most qualified representatives of the main forms of civilization and principal legal systems of the world. All these considerations apply equally to the suggestion that the sessions of the Commission should be held in two or more places in rotation: a suggestion which from the standpoint of continuity, would also have a negative effect on the conditions of the Commission's work.

211. Another point to which the Commission would like to draw attention is the timing of its sessions. With the exception of the second part of its seventeenth session (an exceptional winter session), the Commission has been convened annually in the spring or early summer. In the light of experience, this time of the year has been found to be the most appropriate for facilitating the full attendance of its members. It is the best possible compromise between the requirements of members mainly engaged in academic and legal adviser activities and those of members having diplomatic and representative functions. To convene the Commission at a time of the year closer to the opening or the closing of the annual session of the General Assembly or of the academic year in most countries, would deprive the Commission of the attendance of many of its members. The opening date of a session of the Commission is sometimes adjusted to events such as the convening of a codification conference by the General Assembly, and the closing date depends also on certain factors such as the length of the session which, owing to the requirements of the work, has been more and more frequently of over ten weeks' duration.<sup>663</sup> These adjustments of dates do not, however, derogate from the Commission's established practice of holding its sessions in the spring and early summer, a practice which the Commission considers it also essential to maintain if the accomplishment of its task is not to be adversely affected.

212. In conclusion, the Commission is unanimously of the opinion that the present composition, procedures, methods of work, and organizational pattern of the Commission are correct and appropriate and that they also represent the most effective means of carrying out the task entrusted to it by the General Assembly under Article 13, paragraph 1 (a) of the Charter. Hence, the Commission sees no reason why its Statute should be amended or the present basic method of work and organizational pattern modified.

### I. International Law Seminar

213. Pursuant to General Assembly resolution 3071 (XXVIII) of 30 November 1973 the United Nations Office at Geneva organized during the Commission's twenty-sixth session a tenth session of the International Law Seminar intended for advanced students of that discipline and junior officials of government departments whose functions habitually include consideration of questions of international law. In order to associate the Seminar with the Commission's tribute to the memory of Mr. Milan Bartoš, this tenth session was named the "Milan Bartoš session".

214. Between 27 May and 14 June 1974 the Seminar held ten meetings, devoted to lectures followed by discussion.

215. Twenty-four students, each from a different country, participated in the Seminar; they also attended meetings of the Commission during that period, in-

cluding the meeting commemorating the twenty-fifth anniversary and the meeting devoted to tributes to the memory of Milan Bartoš. The participants had access to the facilities of the Palais des Nations Library and an opportunity to attend a film show given by the United Nations Information Service.

216. Seven members of the Commission generously gave their services as lecturers. The lectures dealt with various subjects including some connected with the past, present or future work of the Commission, namely the determination of *jus cogens* (Mr. Yasseen), the Commission's long-term programme of work (Mr. El-Erian), national treatment and most-favoured-nation treatment (Mr. Ustor) and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (Mr. Šahović). One lecturer (Mr. Elias) dealt with the question of the hijacking of aircraft and international law; one lecture was devoted to the future of Antarctic co-operation (Mr. Hambro) and another to State sovereignty and international law (Mr. Ushakov).

217. In addition, under General Assembly resolution 3032 (XXVII) of 18 December 1972, Mr. Pilloud, Director of the Department of Principles and Law of the International Committee of the Red Cross, spoke on the international humanitarian law applicable in armed conflicts. Mr. Rybakov, Director of the Codification Division of the United Nations Office of Legal Affairs, dealt with the work of the Sixth Committee of the General Assembly on some contemporary problems of international law. Mr. Raton, Director of the Seminar, gave an introductory talk on the International Law Commission and its work.

218. 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, Finland, the Federal Republic of Germany, Israel, the Netherlands, Norway and Sweden made fellowships available to participants from developing countries. Such fellowships, ranging in value from US\$1,200 to US\$3,000, were awarded to 13 candidates. The award of fellowships 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. In 1965, when the Seminar held its first session, only one candidate from a developing country was able, in the absence of fellowships, to participate, whereas between 1966 and 1974, out of 228 participants of 85 different nationalities, 107 have had the benefit of fellowships, 88 of which were provided by the States mentioned above and 19 by UNITAR. This result, although gratifying, needs to be improved upon still further. It is therefore to be hoped that the above-mentioned Governments will continue to be generous or will become even more so and that, if possible, additional fellowships will be granted so as to make it unnecessary to refuse fellowships to accepted candidates for lack of funds, as happened this year. It should be noted that the names of those to be awarded fellowships are made

<sup>663</sup> In this connexion, see the recommendation of the Commission that the length of its sessions should permanently be increased to 12 weeks (para. 165 above).

known to the donor Governments and that the recipients are likewise informed of the source of their fellowships.

**J. Supplement to the Guide to the documents of the Commission**

219. The Commission was informed that the United Nations Library at Geneva was prepared to bring up to date the guide to the documents of the International Law

Commission issued from 1949 to 1969,<sup>664</sup> which it had made available in 1970, by compiling a supplement covering the years 1969-1974. The Commission expresses its appreciation of the initiative taken by the Library at Geneva; it is convinced that, like the guide, the supplement will be of value to the Commission and to jurists throughout the world.

<sup>664</sup> ST/GENEVA/LIB/SER.B/Ref. 2. See also *Yearbook . . . 1970*, vol. II, p. 313, document A/8010/Rev.1, para 111.

## ANNEXES

## ANNEX I

**Observations of Member States on the draft articles on succession of States in respect of treaties  
adopted by the Commission at its twenty-fourth session \***

## CONTENTS

	<i>Page</i>		<i>Page</i>
Austria . . . . .	313	Pakistan . . . . .	318
Czechoslovakia . . . . .	313	Poland . . . . .	320
Denmark . . . . .	314	Somalia . . . . .	321
Ethiopia . . . . .	314	Sweden . . . . .	323
German Democratic Republic . . . . .	315	Syrian Arab Republic . . . . .	326
Kenya . . . . .	316	United Kingdom of Great Britain and Northern Ireland . . . . .	326
Netherlands . . . . .	317	United States of America . . . . .	328

## NOTE

For the text of the draft articles on succession of States in respect  
of treaties, see *Yearbook* . . . 1972, vol. II, p. 230, document  
A/8710/Rev.1, chap. II, sect. C.

## Austria

TRANSMITTED BY A LETTER DATED 11 OCTOBER 1973 FROM  
THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original: English]

The Austrian Federal Government concurs with the opinion expressed by the International Law Commission that the preparation of draft articles has been the most appropriate and effective method of studying and identifying the rules of international law relating to succession of States in respect of treaties. As divergent views on this matter have in the past been expounded by eminent scholars of international law it is an important task to arrive at a solution of the problems arising in connexion with the succession of States in respect of treaties which will gain as widespread an acceptance as possible by the international community.

The present provisional draft articles adopted by the International Law Commission represent basically a system which has, *inter alia*, already been propounded by American jurists. Austria therefore entirely agrees with the general outline as well as the basic content of these draft articles. A specific comment on *article 15*, paragraph 2, stipulating that a newly independent State may, under certain conditions, formulate a new reservation when establishing its status as a party or a contracting State to a multilateral treaty under *article 12* or *13* has, however, to be made. The idea embodied in this provision seems to arise from a misunderstanding of the concept of succession. A new State inherits conventions in precisely the same state in which they apply to its territorial predecessor and therefore inherits the latter's reservations. It may waive these reservations because that is also the right of its predecessor, but it may not make new ones since its predecessor cannot do so. If a newly independent State wishes to make reservations it ought to, in the view of Austria, use the process of ratification or accession to become a party to the multilateral treaty.

\* The observations reproduced in this annex were circulated in documents A/CN.4/275 and Add.1-2, A/CN.4/L.205 and A/9610/Add.1 and 2.

## Czechoslovakia

TRANSMITTED BY A *note verbale* OF 11 OCTOBER 1973 FROM  
THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original: English]

1. It can be stated that the submitted draft of the articles on succession of States in respect of treaties, prepared by the International Law Commission, reflects in its subject the current international practice, proceeds from the requirements of newly established States and is in harmony with the fundamental principles of current international law, particularly the principles of sovereign equality of States and self-determination of nations. Therefore the draft can, in substance, be regarded as a good foundation for a future codification of the questions involved. In this connexion the Czechoslovak authorities would wish to note that, quite naturally, there is a close connexion with the problems involved in the succession of States in respect of treaties and the other questions of succession of States, and that, therefore, in elaborating on individual problems of the succession of States, it is necessary to proceed consistently from the same principles and to respect the necessity for a balanced relationship between individual cases of succession.

2. In giving consideration to the articles on succession of States in respect of treaties, the Czechoslovak authorities have a favourable view of particularly the clean-slate principle on which the substance of the draft is based, applied to the relation of States which emerged from former dependent territories to the international treaties concluded by their former metropolitan powers, under which such a newly independent State is not committed to the treaties concluded by former metropolitan powers. In this connexion, however, the Czechoslovak authorities wish to point to the fact that new States come into existence not only in the process of decolonization, but also by other ways. In this context, the Czechoslovak authorities would like to draw attention to the States which came into being as a result of a social revolution. Proceeding from this fact, the Czechoslovak authorities note that the definition of "newly independent State" contained in *article 2*, paragraph 1(f), does not cover all the possibilities and hold that the formulation in question

should be supplemented in the above sense or possibly, after appropriate modification of paragraph 1 (d) of the same article dealing with the term "successor State," be deleted from the draft.

3. The proposed draft does not touch upon the question of the relation between recognition and succession of States. As is evident from experience, however, inasmuch as a refusal of recognition may be used for the purpose of preventing the successor State from making use of the rights ensuing in respect of that State from succession, it would be useful to specify in the draft that succession in respect of multilateral international treaties under conditions contained in the draft articles exists irrespective of whether the new State is or is not recognized by all other States parties to the treaty in question.

4. As concerns other comments and notes on individual draft articles, the Czechoslovak authorities wish to point out the following:

(a) *Article 2*, paragraph 1 (e) clarifies the term of time when succession of States starts. In the opinion of the Czechoslovak authorities it would be appropriate in this connexion to take into consideration the fact that a succession of States is part of a certain process which the successor State undergoes and to give thought to a formulation that would allow an undisputable determination of the moment when succession starts.

(b) *Article 27* deals with the succession in respect of treaties of those States that were newly established following a disintegration of a former State formation. In the opinion of the Czechoslovak authorities the clean-slate principle should be set in such cases as a rule. The present formulation, which refers to this principle in paragraph 2 as an exception only, is insufficient. (Czechoslovakia, which came into existence in 1918 as an independent State upon the disintegration of Austria-Hungary proceeded from the "clean-slate" principle in its practice.)

(c) *Article 30* regulates the question of other territorial régimes in relation to succession. In the opinion of the Czechoslovak authorities it would be suitable to amend the formulation of the article so as to make it evident that the provision concerns such territorial régimes that serve the interests of international co-operation and are in accordance with international law and the United Nations Charter and to exclude any misuse of the application of the article in favour of régimes established by treaties based on inequality of rights.

(d) *Article 31* is evidently based on article 73 of the Vienna Convention<sup>a</sup> and the Czechoslovak authorities have no objections of principle to its inclusion. They cannot agree, however, with the article mentioning "occupation of territory." As a rule, occupation of a territory results from the use or threat of force prohibited by current international law. Accordingly, a formulation of the article including an occupation of territory would not be in harmony with the above principle of international law which is among the most important, not mentioning the fact that a military occupation has always been regarded as a temporary situation which does not change anything in the international status of the occupied territory. A question arises, therefore, what does occupation have in common with a succession of States? Proceeding from the above arguments, it is recommended that the reference to occupation of territory be deleted from the draft. The Czechoslovak authorities also point out in this context that there is no such reference in article 73 of the Vienna Convention.

<sup>a</sup> For all references to the Vienna Convention on the Law of Treaties (hereafter referred to as the Vienna 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.

## Denmark

TRANSMITTED BY A *note verbale* OF 19 NOVEMBER 1973 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original: English]

It is the opinion of the Danish Government that the present attempt at codification of the topic on State succession in respect of treaties is generally acceptable with respect not only to the structuring and delimitation of the draft, which underscore the relationship with the Vienna Convention on the Law of Treaties, but also to the individual articles. Particularly the implications of the "clean-slate" principle in relation to bilateral treaties should today—in the light of the practice of States and the basic principle of equal rights and self-determination of peoples—be considered accepted customary rules of international law. This view is also in keeping with the practice observed so far in Denmark when dealing with specific cases of treaty succession.

The proposed draft articles may be used in the preparation either of a convention on the topic or of a code which is not legally binding.

In the opinion of the Danish Government it seems preferable to aim at the adoption of a legally binding convention. The fact that a convention, as a result of the general rule on non-retroactivity of treaties, will normally not be binding upon a successor State in respect of its own terms of succession is hardly a sufficient argument against using the convention as an instrument, as has also been pointed out by the International Law Commission.<sup>a</sup> A convention rather than a non-binding code may serve more adequately to determine what shall be considered generally accepted international law regarding succession in respect of treaties and consequently be a guide to all States. A convention will moreover, in any event, be binding in the relationship which, with respect to State succession emerges between a predecessor State and third States when these States have become parties to the convention. It might finally be considered whether to insert in a prospective convention an optional clause on retroactivity relative to new States.

If the convention is chosen as the instrument of the present codification the Danish Government will be of the opinion that the draft, as has also been suggested by members of the International Law Commission,<sup>b</sup> ought to be supplemented with provisions on the settlement of disputes stemming from the application or interpretation of the draft rules. Such provisions may ensure uniform understanding of the adopted rules.

The Danish Government reserves the right to submit its commentary to the individual articles at a later date.

<sup>a</sup> *Yearbook . . . 1972*, vol. II, p. 228, document A/8710/Rev.1, para. 41.

<sup>b</sup> *Ibid.*, p. 229, document A/8710/Rev.1, para. 50.

## Ethiopia

TRANSMITTED BY A LETTER DATED 15 MAY 1974 FROM THE PERMANENT MISSION OF ETHIOPIA TO THE UNITED NATIONS

[Original: English]

I have the honour to refer to the report of the International Law Commission on the work of its twenty-fourth session and, in particular, to its commentary on the text of its draft articles on the succession of States in respect of treaties relating to boundary régimes.

Referring to the grazing provisions of the 1897 Anglo-Ethiopian Agreement relating to the boundary between Ethiopia and the former British Somaliland Protectorate, the Commission, in its commentary to draft articles 29 and 30, states that Ethiopia "declined to recognize that the ancillary provisions, which constituted one of the

conditions of that settlement, would remain binding upon it."<sup>a</sup> In that same commentary, the Commission also mentions that Somalia has denounced the Agreement "in response to Ethiopia's unilateral withdrawal of the grazing provisions . . ."<sup>b</sup> The Government of Ethiopia takes exception to these passages in the Commission's commentary.

In clarifying the position of my Government, I would like to inform you that at no time has the Government of Ethiopia stated that it is not bound by the grazing arrangements of the 1897 Anglo-Ethiopian Agreement. Neither has it taken any action to withdraw those arrangements. The Government of Ethiopia has at all times been consistent in its position that the boundary clauses as well as the grazing provisions of the 1897 Anglo-Ethiopian Agreement remain valid and that they are binding upon both Ethiopia and Somalia.

Furthermore, the Commission refers to the view of the United Kingdom expressed following the termination of its responsibilities for the Protectorate that the boundary and the grazing provisions of the 1897 Anglo-Ethiopian Agreement remain in force but that only the "special arrangement" of the 1954 Anglo-Ethiopian Agreement would lapse. Such also has been and still is the position of the Government of Ethiopia.

The Government of Ethiopia, prior to the termination of the Somaliland Protectorate, had notified the Government of the United Kingdom that the "special arrangement" of the 1954 Agreement would automatically come to an end. That notification has been considered as an official expression of the position of the Government of Ethiopia that all the provisions of the 1897 Agreement together with the grazing arrangements remain valid and unimpaired. No subsequent events have taken place to warrant any suggestion to the effect that the Government of Ethiopia has terminated the grazing arrangements.

I would be grateful if you would kindly transmit the foregoing observations of my Government to the International Law Commission and I wish to express the hope that the Government will take into account those observations in preparing its commentary to articles 29 and 30 in its final report on the succession of States in respect of treaties.

<sup>a</sup> Para. 12 of the commentary to draft articles 29 and 30.

<sup>b</sup> The text of the sentence as it appears in the Committee's report reads as follows: "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."

#### German Democratic Republic

TRANSMITTED BY A LETTER DATED 5 DECEMBER 1973 FROM  
THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original: English]

1. The Ministry of Foreign Affairs of the German Democratic Republic welcomes the provisional draft articles on succession of States in respect of treaties presented by the International Law Commission and, in general, considers them to be a suitable basis for a future codification of the questions of succession of States. In this connexion, however, it is deemed necessary to underline the close interrelation which no doubt exists between succession in respect of treaties and succession in respect of matters other than treaties. Proceeding from the fact that succession of States is a homogeneous institution of international law, the Ministry of Foreign Affairs of the German Democratic Republic expresses itself in favour of a single convention comprising both aspects of State succession; in case separate regulations were to be adopted, at least uniform principles should be established in their texts.

2. The Ministry of Foreign Affairs of the German Democratic Republic considers with regard to State succession in general that it is a matter important for the development of international relations, both as a result of national liberation and social revolution and of the uniting, separation or dissolution of States. Future rules on succession of States should facilitate the entry into international relations of the successor State and should therefore be such as to enable the latter to enjoy its rights as a sovereign, equal State without hindrance or delay. At the same time it is in the interest of all States that cases of State succession should not disturb international treaty and other relations which were established in accordance with the principles of international law in force and that the previous state of such relations should be maintained.

3. The provisional draft articles on succession of States in respect of treaties proceed from the principle of clean slate in cases of succession resulting from decolonization. In the view of the Ministry of Foreign Affairs of the German Democratic Republic this is a basically correct point of departure in this context. In its hard core the draft covers decolonization comprehensively, but it does not sufficiently take account of the fact that the process of decolonization has come to its end, save for a few exceptions. Therefore, it appears appropriate to call attention to the fact that new States may also emerge by way of social revolution and that the same principles should be applicable to them as are applied to States emerging by way of decolonization. Bearing this in mind, it is obvious that the term "newly independent State" contained in *article 2*, paragraph 1 (*f*) is inadequate in these respects. The Ministry of Foreign Affairs of the German Democratic Republic holds the view that the term in question should be replaced with a notion of successor State which would cover all successor States in so far as they are new States. That means that those successor States which have emerged from social revolution should also be covered, along with those which have emerged from the uniting of States, the dissolution of States and from the separation of States.

4. Concerning the date of succession (*article 2*, paragraph 1 (*e*)) the draft leaves the question open at which date the succession occurs and who determines such date. Since, in international practice, succession normally takes place as a process, it would be advisable, to avoid any legal uncertainty, to include in the draft a formula which would stipulate unambiguously that the successor State, exercising the right of self-determination of its people, determines the date of succession and notifies that date to other States.

5. A clearer wording would seem to be necessary for the provisions of *article 12*, paragraph 2, and *article 13*, paragraph 2, according to which a successor State cannot notify its participation in a multilateral treaty in force or not yet in force, if the object and purpose of the treaty are incompatible with the participation of the successor State in that treaty. The Ministry of Foreign Affairs of the German Democratic Republic does not hold the present version adequate to exclude arbitrary hindrance of successor States from becoming parties to treaties.

6. The Ministry of Foreign Affairs of the German Democratic Republic is for several reasons not in a position to accept the establishment of the principle of *ipso jure* continuity in the case of the dissolution of a State as envisaged in draft *article 27*. Unlike uniting (*article 26*), the dissolution of a State, as a rule, takes place without a treaty, that means against the will of the existing State. In terms of social conditions any such States are new States whose position after succession must, as a matter of principle, not be inferior to that of "newly independent States." It is therefore hard to understand why *article 27* contains the same provisions as *article 26*. Though *article 27*, paragraph 2, provides for exceptions from *ipso jure* continuity, thus allowing a limited option for the successor State, this is certainly not satisfactory. As dissolutions of States can, in essence, be compared with decolonization rather than with the uniting of States, it is the opinion of the Ministry of Foreign Affairs of the German Democratic Republic that the principle of clean slate should be established here as a rule and not as an exception.

Besides, the Ministry of Foreign Affairs of the German Democratic Republic wishes to underline its position that the interest in having largely preserved the existing state of international treaty relations in so far as these have come about in conformity with the established principles of international law, should receive more attention in the draft.

7. The Ministry of Foreign Affairs of the German Democratic Republic fully supports the automatic succession into boundary treaties as provided for in *article 29*. The same holds true for the same principle in respect of other territorial régimes as contained in *article 30*. As far as *article 30* is concerned, it has to be added, however, that the present version is not satisfactory because practically it may be used to justify the existence of those territorial régimes which came into being and continue to exist on the basis of unequal treaties. In the view of the Ministry of Foreign Affairs of the German Democratic Republic that article should, therefore, be supplemented to the effect that its provisions would regulate State succession only in the case of territorial régimes which serve the interests of peaceful international co-operation in accordance with the purposes and principles of the Charter of the United Nations.

8. The present draft of the International Law Commission does not refer to the relationship between recognition and State succession. The position of the Ministry of Foreign Affairs of the German Democratic Republic on this point is that the absence of recognition of a successor State must not result in that State being prevented from or hindered in exercising the rights and obligations ensuing from succession. Apart from succession in respect of bilateral treaties, which can hardly be realized without mutual recognition, the Ministry of Foreign Affairs of the German Democratic Republic would deem it necessary to include in the draft articles a provision making it clear that succession in respect of multilateral treaties occurs independently of the recognition of a State. This would also take account of the generally recognized principle of international law that the international personality of a State exists independently of its recognition. In the opinion of the Ministry of Foreign Affairs of the German Democratic Republic a formula patterned on article 74 of the Vienna Convention could be adequate for this purpose.

#### Kenya

TRANSMITTED BY A *note verbale* OF 26 APRIL 1974 FROM  
THE PERMANENT MISSION TO THE UNITED NATIONS

[*Original: English*]

The comments of the Kenya Government were made by the Kenya representative to the Sixth Committee on 6 October 1972, during the debate on the item.<sup>a</sup> Nevertheless, the Kenya Government wishes to put on record its views with respect to article 29 of the International Law Commission draft on boundary régimes, which states as follows:

"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."

It has become necessary to comment on the above article, to which the Kenya Government fully subscribes, in view of the observations made by the Somali Democratic Republic, on its specific application, *inter alia*, to the Somali-Kenya boundary.<sup>b</sup>

<sup>a</sup> *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1324th meeting, paras. 5-11.*

<sup>b</sup> See below, Somalia, *note verbale* of 6 June 1973.

It is the opinion of the Kenya Government that the International Law Commission took the correct legal position on boundary régimes as reflected in the draft article 29 and the commentary thereon, because the purpose of a boundary treaty is to mark out with precision the limits of a particular State sovereignty. Once this is done, the relevance of the treaty, except for evidentiary purposes, disappears. When succession of a State, i.e. . . . "when the replacement of one State by another in the responsibility for the international relations of territory . . ." takes place, the successor State steps into the shoes of the predecessor State in so far as the State's boundaries are concerned, not because of the boundary treaty, but because of the very existence of the boundaries as a fact, delimiting the predecessor State's sovereignty. It is irrelevant and confusing to bring in the issue of self-determination in such a situation in this context, as the Somali Democratic Republic seeks to do.

When the report of the International Law Commission was discussed by the General Assembly during the adoption of the resolution of the Sixth Committee on the item, the Somali representative, in the explanation of his country's vote, made a statement containing arguments similar to those contained in their *note verbale*. This prompted a reply from the Permanent Representative of Kenya who stated as follows:

"In explaining the vote of my delegation, we should like to reiterate our position in connexion with article 29 on boundary régimes. We fully subscribe to the conclusions of the International Law Commission in that article. A State can only succeed to the territory previously held by its predecessor. In our opinion, this has nothing to do with the exercise of self-determination: it is purely a matter of one State succeeding to the sovereignty formerly exercised by another State over a given territory.

"The inviolability of existing treaties has been fully recognized and enshrined in the Charter of the Organization of African Unity; it is a principle which the International Law Commission has also endorsed; and it is the guiding principle of the Government of Kenya.

"As far as the Kenya-Somali boundary is concerned, there is absolutely no room for dispute: the boundary was clearly demarcated by the Anglo-Italian Treaty of 1924, and we stand by that boundary—not because it was concluded by the colonialists, but because it clearly spells out the areas of sovereignty of the two States. Our full position on this subject was reiterated in the statement we made before the Sixth Committee, which we should like to incorporate by reference into the record of this meeting."<sup>c</sup>

The principle of the respect for the sovereignty and territorial integrity of each State and the inviolability of existing boundaries has been enshrined, not only in the Charter of the United Nations, but also in the charter of the Organization of African Unity, and the charters of various other regional bodies. In the Organization of African Unity resolution A.H.G./Res. 16 (1), the assembly of Heads of State and Government meeting in the First Ordinary Session in Cairo, restated the pledge of all the member States:

"1. Solemnly reaffirms the strict respect by all Member States of the Organization for the principles laid down in paragraph 3 of Article III of the Charter of the Organization of African Unity;

"2. Solemnly declares that all Member States pledge themselves to respect the borders existing on their achievement of national independence."

This is a pledge by which the Kenya Government will always abide with respect to its neighbours and which it expects all the other States to respect.

<sup>c</sup> *Officials Records of the General Assembly, Twenty-seventh Session, Plenary Meetings, 2091st meeting*

## Netherlands

TRANSMITTED BY A *note verbale* OF 9 APRIL 1974 FROM  
THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original: English]

## General remarks

1. The Netherlands Government welcomes the present set of 31 draft articles in an important field of international law, in which up to the present time few generally accepted rules could be discerned; State practice has shown a considerable variety of conduct in this field. Therefore the present project undertaken by the International Law Commission, that is to codify and develop the law of State succession to treaties, is an important and difficult one.
2. The Commission has rightly considered the question of the effects of a State's succession to treaties as falling within the framework of the law of treaties.<sup>a</sup> It states that the present draft articles "presuppose the existence of the provisions, wording and terminology of the Convention on the Law of Treaties."<sup>b</sup> In *article 15*, paragraph 3, an express reference is made to certain articles of the Vienna Convention. However it should be noted that article 73 of the Vienna Convention may be interpreted as excluding the applicability of all provisions of that Convention to cases of State succession. Accordingly the present articles should define *completely* the impact of State succession on treaties.
3. It is apparent that the Commission has primarily paid attention to the position of *newly independent States vis-à-vis* treaties concluded by their predecessor States for their territories prior to independence. In *part III* of the draft the rights of a successor State to *complete* the signature of its predecessor (by ratification, reservations, choice of different provisions) are carefully worked out. Such provisions are equally useful in the cases of State succession mentioned in *articles 26 and 27*.
4. The Commission has opted for a moderate version of the clean slate principle in respect of newly emerging States as one of the basic rules of the present draft. The Netherlands Government has carefully considered the question of the advisability of this approach. Continuity has carefully considered the question of the advisability of this approach. Continuity of treaty relations is a goal well worth pursuing, in the interest of both the newly emerging States and the treaty-partners of predecessor States. The Commission explains in its commentary that it has attempted to strike a balance between the well-recognized principle of self-determination of peoples and the fact of the "legal nexus" between the treaty régime and the territory of the new State prior to its independence. The Netherlands Government agrees with this approach. It would stress that the fact of the legal nexus points to the desirability of continuance of such treaties as are appropriate to be continued, for the benefit of both the new State and the treaty partners of its predecessor. In this respect, the Netherlands Government would suggest consideration of the possibility that certain general multilateral conventions of world-wide applicability, embodying important rules of international law, would escape the application of the clean slate rule. In cases where such conventions already were applicable in territory of a newly independent State prior to its independence, a presumption of *continuity*, together with the possibility to opt out, might be considered. The decision whether a certain convention would be subject to such a régime could be made by the General Assembly of the United Nations or by the diplomatic conference adopting the text of the convention in question.
5. It is clear that a "Convention on state succession in respect of treaties" would have great value as a *confirmation* of the rules of law in this field. This confirmative element will have to be stressed in the

<sup>a</sup> *Yearbook . . . 1972*, vol. II, p. 226, document A/8710/Rev.1, para. 32.

<sup>b</sup> *Ibid.*, para. 34.

preamble to the Convention. In so far as the Convention would codify already accepted rules of general international law, a newly emerging State would be bound to those rules whether it was a party or not.<sup>c</sup>

6. One important, basic rule of the law of State succession to treaties is not clearly mentioned *as such* in the present draft. It is the general rule of treaty law that a treaty is binding upon a State party in respect of its entire territory, unless a different intention appears from the treaty or is otherwise established.<sup>d</sup> This rule is mentioned in the present draft only in the *articles 10*, paragraph (a) and *28*, paragraph 1. As it is a basic rule for the position of the States concerned in all cases of State succession where the predecessor State continues to exist (see, for instance, part III), or the successor State is an already existing State, it should be formulated as an "umbrella-article" before parts II, III and IV of the draft.
7. The continued validity of the treaties of the predecessor State for the remainder of its territory, as well as the continued applicability of its treaties in respect of successor States laid down in *articles 25 to 28*, are subject to an exception resulting from another important rule of treaty law, codified in article 62 of the Vienna Convention: the possibility of invoking a *fundamental change of circumstances* as a ground for termination of or withdrawal from a treaty. The Netherlands Government would assume that the fact of a State succession may well be *in itself* a fundamental (radical) change of circumstances, which may be invoked by *all* States concerned (predecessor State, successor State, other States parties), as an exception to continued applicability of a treaty. In this respect the draft might be more clear. The possibility of invoking a fundamental change of circumstances is mentioned only in articles 25 to 28, but should be clearly set out before the parts II, III and IV as a second "umbrella-article," covering, for instance, the case of article 10.
8. The principle of equality of all parties to a treaty is acknowledged by the Commission in *article 4: article 12*, paragraph 3; *article 13*, paragraph 3; *article 19*, and *articles 22 to 24*. Here it is not only the newly independent State which has the right to apply for admittance as a party, but the "other States parties" (of article 2, paragraph 1 (m)) rightly have a "say" in the matter of the continued applicability of their treaties in respect of a successor State. The Netherlands Government would suggest that this important principle be also acknowledged in other cases of State succession to multilateral treaties; in such a way that each "other State party" would have a right to *refuse* establishing relations under the treaty in respect of a certain successor State, *unless* this refusal would be incompatible with the object and purpose of the treaty, as would, for instance, be the case if the treaty allowed for participation by "all States".
9. Lastly, there is the important aspect of the *procedure* for settling disputes between the States parties to this convention on its application and interpretation. The Netherlands Government would strongly advise the drafting of articles on settlement of such disputes, analogous to articles 65 and 66 of the Vienna Convention.

## Comments on separate articles

10. *Article 7*. The Netherlands Government would welcome a more positive attitude of the Commission towards devolution agreements between a predecessor State and its former dependent territories at the time they achieve independence. Such achievement of independence is in most cases the result of a gradual process of emancipation, in close co-operation between the still-administering State and the still-being-administered territory. The negative rule formulated in article 7 is from a legal point of view of course quite correct, and even self-evident. Article 34 of the Vienna Convention embodies the same rule, but this article is followed by articles 35 and 36, in which the *positive* aspect is mentioned of treaties providing for rights or duties of third States. The Netherlands Government fails to see

<sup>c</sup> Cf. article 5; also article 43 of the Vienna Convention.

<sup>d</sup> See article 29 of the Vienna Convention.

why this positive aspect should be denied to devolution agreements if all the States parties concerned should agree to this. Devolution agreements can have a distinct value as an indication of the new State's awareness of which treaties were in force in respect of its territory at the time it became independent, and its willingness to continue them. Of course it is up to the "third State" to accept or decline this offer. (See the comments in paragraph 8 above in respect of the "third State's" right to object in cases of multilateral treaties.)

11. *Article 8.* The same applies to a great extent to unilateral declarations of new States, a practice much used by newly independent African States. Here too the positive aspect of such declarations, expressing the new State's awareness of the treaties which were in force in respect of its territory, and its willingness to continue them, should be more strongly emphasized.

12. *Article 12.* See the comments in paragraph 8 above on the right to object of the other States parties and in paragraph 4 above on the question of "inheritance *ipso jure*" of certain general law-making conventions, with a possibility to opt out.

13. *Article 13.* After comparing the proposal by the International Law Association<sup>e</sup> and the opposite proposal of the Commission on the question whether or not to count declarations or succession for the purpose of fixing the number of ratifications or accessions required for the entry into force of a treaty, the Netherlands Government accepts the choice of the Commission, as laid down in article 13, paragraph 4, as the most logical system. The *ratio* of the requirement is, after all, that a sufficient number of States declare their willingness to abide by the provisions of the treaty in question.

14. *Articles 17 and 18.* In reply to the Commission's question "whether any time-limit ought to be placed on the exercise of the option to notify succession to a multilateral treaty,"<sup>f</sup> the Netherlands Government would state that in *itself* a time-limit for declarations of succession would appear to be unnecessary (*cf.* the right of accession). However, if a declaration of succession is considered as having retroactive effect, as the Commission proposes in article 18, paragraph 2, this amounts to an important difference with declarations of accession. In order to avoid uncertainty as to the legal régime applying to the territory of the new State in the period between the date of succession and the date of the declaration of succession, the Netherlands Government could accept the retroactive effect of declarations of succession, *provided* they are subject to a time-limit. For this purpose the time-limit of one year (proposed by the Commission in article 24, paragraph 3 (b) as a "reasonable notice of termination" of provisional application) might be suitable. If the new State is not ready to state its position within that time, it still has the right to accede, with legal effect *ex nunc*.

15. *Article 19, paragraph 1 (b)* recognizes the possibility of tacit continuation of bilateral treaties. The Netherlands Government, though in favour of any system that may promote continuity of legal relations between States, would point out that the desirability of a possible tacit continuation may differ according to the character of the treaty in question. From the point of view of legal security it is preferable that both the new State and the treaty-partner of the predecessor State *expressly* state their willingness to apply the treaty in the relations between them.

16. *Articles 22 to 24.* The same point is even more pressing in cases of *provisional application* of treaties. This possibility has the advantage of promoting continuity of treaty relations, but the disadvantage of promoting legal insecurity. Provisional application is seldom allowed for under the text of the treaty itself.<sup>g</sup> Therefore it is desirable that

<sup>e</sup> See International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), pp. 602-603.

<sup>f</sup> *Yearbook . . . 1972*, vol. II, p. 229, document A/8710/Rev.1, para. 51.

<sup>g</sup> One of the rare examples is the Protocol of Provisional Application of the London Fisheries Convention of 9 March 1964 (United Nations, *Treaty Series*, vol. 581, p. 76).

this exceptional way of applying a treaty is *expressly* agreed upon by the other State party and the successor State.

17. *Article 25.* In cases of union of two or more dependent territories into one newly independent State articles 12 to 21 are applicable. Treaties which are continued as a result of this application are, under article 25, considered as being in force for the *entire* territory of the new State. This means that the other States parties to treaties that were applicable in only one part of the new State prior to independence will be confronted with a much larger area of application than the area in respect of which they originally agreed to apply those treaties. They may well see objection to this in respect of certain treaties. This illustrates the point made by the Netherlands Government in paragraphs 7 and 8 above: the principle of equality of all parties to a treaty demands that in all cases of State succession mentioned in parts II, III and IV of the draft the other States parties have the right to *object* to continuation of their treaties vis-à-vis a successor State. The Netherlands Government would call attention to the possibility of *conflicting treaties* that were in force in the separate parts of the component State before the merger into one State. Such treaties cannot be applied at the same time in the entire territory of the new State. In such cases the component State will have to choose between issuing a declaration of succession to only one of the treaties, or letting both of them lapse.

18. *Articles 27 and 28.* These articles are of special interest to the Kingdom of the Netherlands. The Kingdom consists of three component countries: the Netherlands, the Netherlands Antilles and Surinam. If the Netherlands Antilles and Surinam in the near future become independent States, from a purely legal point of view article 27 of the present draft would be applicable, in view of the constitutional rules embodied in the *Statuut voor het Koninkrijk*. From a historical point of view, however, it might be more appropriate to apply article 28, paragraph 2, to the Antilles and Surinam and article 28, paragraph 1, to the Netherlands. Generally speaking, in most cases of dismemberment the personality of the original State is, from a historical point of view, continued by one of the component parts. Several treaties of the Kingdom have been concluded or denounced in respect of only one or two of the component parts; this is mentioned in the instrument of ratification or denunciation. If article 28 should be applied, it is not clear whether this case is covered by the words in paragraph 1 (b) "[unless] It appears from the treaty or from its object and purpose . . ." In that respect, the phrasing of article 29 of the Vienna Convention: "Unless a different intention appears from the treaty or is otherwise established \* . . ." would seem better to serve the purpose.

19. *Articles 29 and 30.* The Netherlands Government agrees that certain treaties, fixing territorial régimes, should be inherited by the successor State. It would point out, however, that the reasons why this is desirable apply not only to *territorial* arrangements but also to certain treaties containing rules in respect of the fundamental legal position of the *population* of the territory in question, like treaties with respect to minorities, the right to opt for a particular nationality, and other treaties guaranteeing fundamental rights and freedoms to the population of the territory which is involved in a change of sovereignty.

\* Italics supplied.

#### Pakistan

TRANSMITTED BY A *note verbale* DATED 12 SEPTEMBER 1974  
FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original: English]

*Article 2, paragraph 1 (e): Date of the succession of States*

*Proposal:* Some formula must be devised to determine the date of succession of States.

*Comments:* The definition, it seems, covers only the situation where the predecessor State has been replaced by the successor State peacefully on a definite date. In the case of succession of States after a protracted civil war, the time when the successor State becomes responsible for the international relations of territory is always open to varying interpretations. As the date of succession of States is an important factor so far as the rights, obligations, and responsibilities of the successor State are concerned, it is advisable that some formula for determination of the date of succession of States should be devised.

*Article 2, paragraph 1 (h): Full powers*

*Proposal:* The words "a State" should be substituted by the words "the successor State", occurring after the words "competent authority of"—"Full powers means in relation to a notification of succession a document emanating from the competent authority of the successor State designating a person or persons to represent the State for making the notification."

*Comments:* The definition is in identity, as mentioned in the commentary, with the definition given in article 2, paragraph 1 (c), of the Vienna Convention. However, that provision is meant for the States in general, while the present provision speaks only of the successor State. Thus, it is preferable that the words "a State" after the words "competent authority of" be substituted by the words "the successor State" to avoid any ambiguity.

*Article 6: Cases of succession of States covered by the present articles*

*Proposals:* Delete the words "international law and, in particular" and add the word "as" between the words "law" and "embodied".

*Comments:* In draft article 6 it is stipulated that the transfer of territory brought about "in conformity with international law" and also in accordance with the "principles of international law embodied in the Charter of the United Nations," shall be covered by the present articles.

In these articles the succession of States can be brought about in two different ways:

(a) in accordance with generally accepted principles of international customary law; and

(b) in accordance with the principles laid down in the Charter of the United Nations.

However, it is a well-known fact that the principles of international law are not only uncertain but may also come into conflict with some of the provisions of the Charter. For instance, customary international law recognizes the principles of *debellatio*. This principle lays down that if, as a result of legal, as distinct from illegal, war, the international personality of one of the belligerents is totally destroyed, victorious powers may do one of three things:

(a) they may annex the territories of the defeated State or hand over portions of it to another State or States;

(b) they may leave it untouched as *territorium nullius* to be occupied by any other subject of international law;

(c) they may recognize one or several new subjects of international law in the area by creating such entities. In such cases they may recognize that entity or entities and then leave it to other subjects of international law who may be prepared to recognize this situation and treat one or all of them as successors of the defunct entity.

It may be noted that the Charter does not recognize any type of war as legal. The very purpose of the Charter was to abolish war and this is evident from the Preamble which reads, *inter alia*:

"... to save succeeding generations from the scourge of war, which twice in our life-time has brought untold sorrow to mankind,  
 "...

*And for these ends*

"to practice tolerance and live together in peace with one another as good neighbours, and

"to unite our strength to maintain international peace and security, and

"to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest,  
 "..."

According to article 31, paragraph 2, of the Vienna Convention a preamble is always taken as an integral part of the text of the convention.

Apart from the Preamble to the Charter of the United Nations, Article 1 of the Charter further states that:

"The Purposes of the United Nations are:

"1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;  
 "..."

Further, according to Article 2, paragraphs 2, 3 and 4, of the Charter:

"2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

"3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

"4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

From the above-mentioned Article it becomes clear that the Charter recognizes the principles of sovereign equality of all States and prevents the use of force by one State against the territorial integrity of another sovereign State. The only case where the use of force is permitted under Charter is referred to in Article 51 which states, *inter alia*, that:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations..."

As is clear from the language of Article 51, this right of use of force can only be exercised if there has actually been an aggression against the Member State.

It may further become apparent from Article 51 that this right of "individual or collective self-defence" is not an unlimited one. There are certain qualifications to it. For instance when "measures [are] taken by Members in exercise of this right of self-defence" the Member State is under an obligation to "immediately" report "to the Security Council" that such a situation has arisen and it is then left to the Security Council to take "such action as it deems necessary in order to maintain or restore international peace and security".

The Charter enumerates certain cases where States come into existence through peaceful means. These are embodied in Article 76, sub-paragraph b which states:

"to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each

territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement.”

This Article envisages many situations, namely:

(a) where there is a duty on the trust State to prepare the Trust Territory for independence and grant independence when it feels that the time has come to do so;

(b) where the people of a certain Trust Territory express their desire for independence;

(c) where by special agreement it is provided that the Territory shall be granted independence under certain circumstances.

The twentieth century has witnessed another phenomenon—that of intervention. The powerful neighbouring States in their desire to extend their sphere of influence, instead of resorting to aggression usually take advantage of internal unrest in another neighbouring State and resort to inciting and aiding and abetting the insurgents with the aim of separating a part of that State and establishing a separate international personality. Sometimes such intervention even leads to a war thereby endangering peace and security in the world. This is also against the spirit of the Charter which guarantees sovereign equality of all States irrespective of their size or population. To prevent this sort of intervention it is proposed that while drafting further articles it must be made incumbent on the community of nations not to recognize a State that has come into existence as a result of intervention and which therefore should not take benefits that accrue under the draft articles on succession of States.

#### Article 7: Devolution agreements

*Proposal:* The following paragraph 3 should be added:

“3. This rule is without prejudice to the provisions of articles 29 and 30.”

*Comments:* It is true that the devolution agreement does not create any legal nexus between the successor State and the other State parties to the treaties. However, this rule has conspicuous exceptions which have been embodied in articles 29 and 30.

Paragraph 2 of article 7 by using the words “. . . governed by the present articles,” may give an impression that the above-mentioned exceptions as laid down in articles 29 and 30 are covered. However, the Commission’s commentary is silent on the point. Thus, it becomes advisable, to avert any difference of opinion, to add paragraph 3 as proposed.

#### Article 15: Reservations

*Proposal:* Renumber sub-paragraphs (a) and (b) of paragraph 3 as follows:

Sub-paragraph (a) should be paragraph 3, and

Sub-paragraph (b) should be paragraph 4.

*Comments:* The form of paragraph 3 is improper. Sub-paragraph (a) deals with the formulation of a new reservation by a newly independent State, while sub-paragraph (b) talks of the objection by the newly independent State to a reservation made by another State party. As both sub-paragraphs deal with different aspects of reservations, it will be more proper to divide the provisions into two paragraphs.

#### Article 19: Conditions under which a treaty is considered as being in force

*Comments:* The applicability of paragraph 2 of this article: The clean slate principle in the case of a newly independent State is quite understandable. However, it is questionable to allow the other State party to absolve itself of its treaty obligations by the mere fact that a succession of States has taken place. The other State party will remain obliged to fulfil its treaty obligations if the successor State desires to continue such treaty in force.

#### Part V: Boundary régimes or other territorial régimes established by a treaty—articles 29 and 30.

The Pakistan Government, being aware of the catastrophic results of making the boundaries established under a treaty challengeable by the mere fact that a succession of States has taken place, fully supports the existence of article 29. It has proposed certain amendments to the previous articles and also the addition of paragraphs to give added strength to the provisions of article 29, and also to avoid any contrary interpretations.

To challenge territorial régimes established under treaties, as mentioned in article 30, would mean creating a chaos in international relations which can never be the object of a convention like the present one. Thus the Pakistan Government also supports the inclusion of such an article in the draft articles.

#### Poland

TRANSMITTED BY A *note verbale* OF 12 FEBRUARY 1974  
FROM THE PERMANENT MISSION TO THE UNITED NATIONS

[Original: English]

With reference to the United Nations Secretary-General’s note No. LE 113 (2-2), the Government of the Polish People’s Republic has the honour to inform him that it welcomes with great satisfaction the transmitted text of the draft articles on succession of States in respect of treaties, produced by the International Law Commission. The draft constitutes a further step towards codification of the international law.

In the opinion of the Government of the Polish People’s Republic the draft correctly takes into account the specific characteristics of the various types of succession of States; in particular, the International Law Commission rightly applied the clean slate principle in the case of the newly independent States—as required by the principle of self-determination of nations and sovereignty of States, while for the question of inheritance of treaties, the only just approach has been adopted by the Commission—namely the principle of “continuity” in the cases of the different types of succession such as “uniting” or “dissolution” of States.

Simultaneously, the Government of the Polish People’s Republic considers that treaties relating to certain territorial problems and, in particular, those establishing State boundaries are a category apart, not affected by cases of succession. These treaties constitute a specific category in international law—also in respect of succession of States. The principle of absolute continuity in respect of the boundary treaties—in the field of succession—is a consequence of the existence in the international law of the *jus cogens* rule which makes it mandatory to respect the territorial integrity of States. It is the view of the Government of the Polish People’s Republic that this principle, expressed in article 29 of the draft, also corresponds with the best interests of the newly independent States. At the same time this principle, duly safeguarding the most vital interests of third States, thereby serves the international community as a whole. The Government of the Polish People’s Republic firmly supports the inclusion of this principle in the future convention on the succession of States in respect of treaties.

The Government of the Polish People’s Republic considers that the provisions of the draft articles can be applied solely to such cases of State succession as arises while the principles of the international law, and in particular the principles enshrined in the Charter of the United Nations, are being respected. The provisions of articles 6 and 31 expressing this proposition dispel any doubts concerning both the scope of the term of succession of States and the scope of certain other provisions of the draft. It is useful, therefore, to retain these provisions in their present form.

The Government of the Polish People's Republic deems that the question of succession of States in respect of treaties should be considered with due regard to the provisions of the Vienna Convention and that the codification of norms regulating succession of States in respect of treaties should also have the form of a convention, as the provisions of the codification being drafted should enjoy a legal standing equal to the Vienna Convention.

While presenting the foregoing general remarks on the draft elaborated by the International Law Commission, the Government of the Polish People's Republic wishes to offer the following comments of a more specific nature meant to improve and supplement the provisions of the draft itself:

(1) It is highly desirable to establish a time-limit, be it even remote (seven or even ten years) during which a newly independent State could use its right to notify its succession in respect of a multilateral treaty. Then it would be clear, at least from a certain point in time, what is the legal position—e.g., other States parties would know the date wherefrom they should take into account an eventuality of the retroactive application of a treaty in relation to newly independent States. On the other hand in the event of expiry of the term, a newly independent State would always have the right to accede to the treaty.

(2) There are no provisions in the draft seeking to regulate the legal status of the other States parties to the multilateral treaty vis-à-vis newly independent States during the period between succession of States and notification of succession in respect of the treaty (*inter alia*, in the light of the fact that notification of succession has retroactive effects). This question raises some doubts, e.g., whether the fact that the legal nexus existing between the other States parties and territory which became the territory of a newly independent State has been broken on the day of assumption of independence by that State results in the termination of all treaty obligations of other States parties in respect of this territory, or whether they have at least the same obligations as States in the period of suspension of the treaty (i.e., the obligation to restrain themselves from acts tending to obstruct the resumption of the operation of the treaty). It is also unclear whether because of retroactive effects of the notification of succession, other States parties can be held responsible for acts inconsistent with the treaty and committed after the assumption of independence by a newly independent State and before the date of succession of such State in respect of the treaty. Poland, as well as certain other parties to various multilateral treaties, is interested in the proper regulation of these questions.

(3) In the occasionally very long lapse between the date of a State's succession and notification of succession, different situations may occur, e.g., termination or suspension of the treaty in relation to the predecessor State, complete termination of the treaty or its amendment either in relation to all parties or to some of them only (including, for instance, the predecessor State.) The draft, in *article 21, paragraphs 2 and 3*, covers similar problems in respect of bilateral treaties. Explicit regulation of these problems also in relation to multilateral treaties would seem desirable.

(4) Another question breeding a number of reflections is that of the relation between the succession of States in respect of treaties and the institution of reservations to multilateral treaties. In the draft, this question has been solved in respect of one type of succession only, namely in respect to the newly independent States (*article 15*), whereas the problem of reservations and objections to multilateral treaties relates to all types of succession. It would be desirable, therefore, to fill this gap by adding both an appropriate supplementary paragraph to *article 10* and a comprehensive article to *part IV* of the draft covering these types of succession in respect of which the principle of continuity is applied.

(5) As far as the question of reservations and objections in the context of succession of the newly independent State is concerned,

the Government of the Polish People's Republic feels that the clean slate principle should be applicable also to the succession in respect to reservations of the predecessor States. Since the act of succession in respect of a treaty itself is of a constitutive—and not declaratory—nature, it seems logical that it should be so treated in every respect—also in respect of the scope of the treaty covered by that act. Besides, in the case of the newly independent States formed of two or more territories (*article 25*), the present presumption in favour of automatic inheritance of the reservations could cause some difficulties; for instance, if the reservations applied to the different territories are not mutually reconcilable. Therefore, the presumption formulated in *article 15*, paragraph 1 of the draft should be reversed.

(6) The question of inheritance of objections has been completely omitted in the draft. In practice, however, a newly independent State on three occasions took clear positions with regard to objections of the predecessor States. Thus Barbados added a declaration to its notification of succession in respect of the 1949 Geneva Conventions on the Protection of War Victims, in which it submitted objections identical to those previously formulated by the United Kingdom.<sup>a</sup> Two other cases concern the Geneva Conventions on the Law of the Sea of 1958. Fiji and Tonga, while withdrawing an objection of the United Kingdom in respect of reservations of Indonesia, declared that they maintained all other objections.<sup>b</sup> Taking into account the acts presented above, it seems necessary to include in *article 15* a provision providing that predecessor States' objections do not devolve upon the newly independent State unless expressly maintained in the notification of succession. In the opinion of the Government of the Polish People's Republic, supported by the practice quoted above, this is a correct presumption. The International Law Commission in its commentary<sup>c</sup> rightly points to a universal lack of interest on the part of the newly independent States in the maintaining of objections made by metropolitan States. The practice shows that metropolitan States made their objections, primarily, in pursuit of their own interests. It seems desirable to regulate the question of reservations and objections in two separate articles. One of them could deal with the predecessor States' reservations and objections and the other with new reservations and objections.

<sup>a</sup> United Nations, *Treaty Series*, vol. 653, p. 454; and *ibid.*, vol. 278, pp. 266-268.

<sup>b</sup> See *Multilateral treaties in respect of which the Secretary-General Performs Depositary Functions: List of Signatures, Ratifications, Accessions, etc. as at 31 December 1972* (United Nations publication, Sales No. E.73.V.7), pp. 398, 399, 404-406, and 412.

<sup>c</sup> See para. 14 of the commentary to article 15.

## Somalia

TRANSMITTED BY A *note verbale* OF 6 JUNE 1973 FROM THE  
PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original: English]

In accordance with General Assembly resolution 2926 (XXVII) of 28 November 1972, on the report of the International Law Commission which recommends, in paragraph 3 (b) of section I, that the Commission should proceed with further consideration on succession of States in respect of treaties in the light of comments received from Member States, the Government of the Somali Democratic Republic submits the following observations on certain questions contained in Part V of the draft articles in chapter II, C of the report, which are of direct concern to the Somali Democratic Republic. In this part, which deals with boundary régimes and other territorial régimes established by treaty, direct reference is made to

Somalia's boundary disputes with Ethiopia and Kenya.<sup>a</sup> It is of course essential, since inferences of great international import are to be drawn from the examples quoted in the report, that both the historical background and the legal questions inferred should be established with the greatest care and after the fullest examination of the questions under study. However, both the accuracy of the historical record and the legal interpretations of the Somali-Ethiopian and Somali-Kenyan territorial disputes which appear in the report can be strongly challenged.

It should be stated at the outset that the main position of the Somali Democratic Republic with regard to the draft articles on treaties and boundary régimes is that it does not recognize the legal validity of treaties concluded between foreign colonial powers without the consent or knowledge and against the interests of the Somali people.

A brief account of the background leading to the division of the Somali people by imperial powers during the colonial period will serve to clarify this position. Long before the era of colonization, the Somali people constituted a single national entity. Being a homogeneous people with a common culture, language and faith, and inhabiting a recognized area of land, they were able to maintain their national identity and their traditional heritage in the Somali Peninsula.

With the opening of the Suez Canal in 1869, the horn of Africa assumed considerable strategic importance to the European powers. Between 1865 and 1892 France established a foothold around the port of Djibouti, French Somaliland; in 1887 Britain established a protectorate to the east of Djibouti and in 1908 Italy established its claim to other parts of the Somali Coast. An additional factor in this situation was that Ethiopia was also at that time seeking to expand its frontier. To avoid increasing friction over their respective spheres of influence, it became expedient for the European powers to attempt to fix the inland borders of the protectorates they had established.

The report of the International Law Commission refers to treaties that were drawn up with regard to Somali territory in the colonial period. The relevant treaties were those of 1897 and 1908<sup>b</sup> between Ethiopia and Italy and that of 1897 between Ethiopia and Britain<sup>c</sup> and the Anglo-Italian Treaty of 1924.<sup>d</sup>

The first two of these treaties, which dealt with the boundaries between Italian Somaliland and Ethiopia, called for a marking of the frontier on the ground, but, since this was never carried out, disagreement continued over the exact interpretation of the provisions. The continued dispute over the exact demarcation of the frontier between Ethiopia and Italian Somaliland, and in particular over the Somali territory of Ogaden, led eventually to the invasion of Ethiopia by Italy in 1935.

The Treaty of 1897 between Ethiopia and Britain was concluded through secret negotiations and its implementation involved the ceding to Ethiopia of a large area of Somali territory—the Haud—where Somali nomadic pastoralists had grazed their herds from time immemorial.

<sup>a</sup> See para. 12 of the commentary to articles 29 and 30.

<sup>b</sup> G. F. de Martens, ed. *Nouveau Recueil général de traités*, 3rd series, vol. II (Leipzig, Dieterich, 1910), p. 121 (English text in *British and Foreign State Papers, 1907-1908*, vol. 101 (London, H. M. Stationery Office, 1912), p. 1000). Article 4 of the 1908 Treaty refers to "the line accepted by the Italian Government in 1897." References to that line may be found in *The Somali Peninsula* (Information Services of the Somali Government, 1962), pp. 59 *et seq.* and "Report of the Italian Government on the progress of direct negotiations between the Trust Territory of Somaliland under Italian administration and Ethiopia" *Official Records of the General Assembly, Eleventh Session, Annexes*, agenda item 40, document A/3463).

<sup>c</sup> G. F. de Martens, ed. *Nouveau Recueil général de traités*, 2nd series, vol. XXVIII, (Leipzig, Dieterich, 1902), p. 435.

<sup>d</sup> League of Nations, *Treaty Series*, vol. XXXVI, p. 379.

The Anglo-Italian treaty of 1924 became the basis of the *de facto* frontier between Italian Somaliland and Kenya. In 1926, the border of Kenya with Ethiopia was demarcated by the colonial Powers, and the Northern Frontier District (the NFD), an area exclusively inhabited by Somalis, was included in the territory of Kenya, although it was administered as an entirely separate province.

After the Italians had been ousted from East Africa in 1942 and sovereignty restored to Ethiopia, Britain placed Italian Somaliland under a British Military Administration and for some years retained control over the Haud and Ogaden areas. In 1946 the proposal of Mr. Ernest Bevin, then British Foreign Secretary, that all the Somali territories should be unified under the United Nations Trusteeship system was rejected by certain members of the United Nations. While the former Italian Somaliland became a United Nations Trust Territory under Italian Administration, the British Government placed the Ogaden illegally under Ethiopian administration. The boundary problem remained unsettled and persistent efforts by the United Nations Trusteeship Council and the United Nations General Assembly during the 1950s to arrive at a solution, before Somalia became independent, ended in failure.

The boundary dispute between the Protectorate of British Somaliland and Ethiopia also developed to serious proportions and led to the establishment by Britain of a provisional boundary line in 1950, for, with the transfer of the administration of the Haud to Ethiopia, the people of British Somaliland became fully aware of their dismemberment through artificial and arbitrary boundaries.

It is important to emphasize, at this point, that when Somalia achieved independence in 1960, it refused to recognize the validity of the treaties made by the colonial Powers for the partition of the Somali people and it has never changed this position.

In all international conferences in which Somalia has participated, the Somali Government has consistently maintained a firm and unequivocal position vis-à-vis the Somali territories under foreign domination. Thus, for example, Somalia rejected the Organization of African Unity resolution on the question of frontiers, passed in Cairo on 21 July 1964.<sup>e</sup> The Somali Government also reserved its position with regard to similar resolutions passed by other international conferences, for example, the Non-Aligned Conference held in Cairo in 1964.<sup>f</sup>

The Somali territorial disputes with Ethiopia and Kenya raise some fundamental issues of principles in the field of international law. The arguments put forward by some jurists which hinge primarily on the principle of territorial integrity and the corollary concept of the inviolability of frontiers are not applicable to the Somali case. For one thing, the principle of respect for another's territorial integrity presupposes that the State is in legal possession of that territory. It has always been the stand of the Government of the Somali Democratic Republic that Ethiopia and Kenya are unlawfully exercising sovereignty over Somali territories to which they are not entitled. This is because the *de facto* Somali-Ethiopian and Somali-Kenyan boundaries are based on the provisions of illegal treaties which are in conflict with prior treaties of protection signed between protecting colonial Powers and the Somali people. Furthermore, the principle of territorial integrity has no application to the Somali case because it is inconsistent with the right of self-determination—an internationally accepted principle which is enshrined in the Charters of the United Nations and the Organization of African Unity and in the Declaration of Non-Aligned Conferences.

It should be noted in this context that self-determination is not only a general concept in international relations but is also established as a legal doctrine by Article 1 of the United Nations Charter which makes it one of the purposes of the organization "to develop friendly relations among nations based on respect for the principle

<sup>e</sup> AHG/Res.16 (1).

<sup>f</sup> Conference of Heads of State and Government of Non-Aligned Countries.

of equal rights and self-determination of peoples." Indeed the principle has been given practical application by the United Nations in cases like those of Togo and the Cameroon.

The doctrine of inviolability or sanctity of frontiers is only invoked in cases where the boundaries are demarcated on just and equitable grounds and where such demarcation is based on mutual agreements with the parties concerned. In this connexion, it should be clearly understood that Somalia's borders with Ethiopia are provisional administrative boundaries pending final demarcation and solution of the dispute. In a letter dated 15 March 1950, addressed to the President of the Trusteeship Council, the late Count Sforza, then Minister of Foreign Affairs of Italy, referring to the unilateral fixing of the provisional administrative line, wrote:

"2. It is clear from the letter of 1 March 1950, which is reproduced in the above-mentioned document<sup>g</sup> and from a similar letter transmitted direct to the Italian Government by the United Kingdom Government that as the retiring Administrative Authority, the latter has felt bound, in view of the possible difficulties entailed in tripartite negotiations, to fix the provisional administrative line itself unilaterally.

"3. The Italian Government, while stating that it has no intention of questioning the procedure adopted and noting that the decision in question is of a provisional nature and in no way prejudices the final settlement of the problem, nevertheless deems it appropriate to point out that the provisional line was fixed without its being consulted and, as protector of the rights of Somaliland, to reserve its position with regard not only to the legal aspects of the question, but also to certain practical difficulties which may arise from the line so fixed . . ."<sup>h</sup>

The International Law Commission appears to have based its comments on the demarcation of frontiers primarily on precedent and on customary international law as reflected by the traditional norms and principles applied by European Powers during the era of colonization. But under present-day international law, the obligations of Members of the United Nations under the Charter of the United Nations prevail over any pre-existing treaty obligations (see Article 103 of the Charter). The Charter recognition of the rights to self-determination therefore prevails over rights which Somalia's neighbours claim under earlier treaties.

The legal problems posed by the arbitrary demarcation of boundaries and territorial régimes by the former colonial Powers provide the International Law Commission with a golden opportunity to develop an important area of international law on the basis of principles which stem not from an outmoded colonialism but from the Charter itself. It must formulate institutional procedures to deal with the colonial legacy of serious territorial problems, such as Somalia's, which are a threat to the peace and stability of many independent countries.

<sup>g</sup> "Negotiation and adoption of a draft trusteeship agreement for Italian Somaliland: letter dated 1 March 1950 received by the President of the Trusteeship Council from the Permanent United Kingdom Representative on the Trusteeship Council" (*Official Records of the Trusteeship Council, Sixth Session, Annex, vol. I, p. 112, document T/484*).

<sup>h</sup> *Ibid.*, p. 114, document T/527.

#### Sweden

TRANSMITTED BY A *note verbale* OF 3 JANUARY 1974 FROM  
THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original: English]

By letter dated 18 January 1973, the Legal Counsel of the United Nations, on behalf of the Secretary-General, drew the attention of the Swedish Government to the report of the International Law

Commission on the work of its twenty-fourth session, held at Geneva from 2 May to 7 July 1972, containing a provisional draft of 31 articles on succession of States in respect of treaties. Pursuant to a decision taken by the Commission in accordance with articles 16 and 21 of its Statute to transmit the provisional draft articles to Governments of Member States for their observations, the Secretary-General invited the Swedish Government to present its views on the draft not later than 1 October 1973, in order to enable the Special Rapporteur on the topic to take them into account in preparing the report which he will submit to the Commission in 1974.

The Swedish Government wishes to submit the following observations concerning the Commission's draft.

The Government is aware of the high quality of the draft and appreciates the excellent work performed, in particular, by the Special Rapporteur, Sir Humphrey Waldock. The extensive research carried out by the Secretariat in relevant international practice also deserves praise. The draft and the commentaries pertaining thereto constitute a most valuable contribution to the study of a difficult and vital problem in international law and organization.

The present observations of the Swedish Government are of preliminary character and as they refer to provisional draft articles, their purpose is to offer comments and suggestions at a stage when the Commission is still working on its final draft. Accordingly, the remarks submitted below are without prejudice to the position the Government may feel justified in taking at later stages of the work.

Some of the observations concern the draft as a whole, others refer to individual articles.

#### General comments

A salient feature of the draft is that more than one half concerns State succession in the case of so-called newly independent States, while only three or four articles out of 31 deal with other categories of successor States. As will be argued later on under *article 2*, the definition offered in that article of "newly independent State" is less than complete. There is, however, no doubt that the term alludes above all to States which have achieved independence since the Second World War. The Commission in its commentaries recalls that the General Assembly, by 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 those States. So it is understandable that the Commission has—in its words—"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".<sup>a</sup> On the other hand, the Commission observes that the era of decolonization is nearing its completion and that it is in connexion with other cases—such as secession, dismemberment of an existing State, the formation of unions of States and the dissolution of a union of States—that in the future problems of succession are likely to arise. In view of this forecast which is shared by the Swedish Government, it seems somewhat impractical to let rules related to a temporary and perhaps exceptional situation dominate a draft of articles intended for future application over a longer period of time. Moreover, the draft articles on newly independent States hardly solve the problem to what extent treaties concluded by predecessor States are still valid for States which have achieved independence since the Second World War. They rather tend to confirm the prevailing uncertainty in that respect. The General Assembly's wishes might better be met by seeking a separate solution to treaty problems related to succession connected with decolonization, i.e., by an *ad hoc* settlement of an *ad hoc* situation.

The relevant articles are based on a so-called clean slate doctrine. Its fundamental principle is, as expressed in article 11 of the draft,

<sup>a</sup> *Yearbook . . . 1972*, vol. II, p. 225, document A/8710/Rev.1, para. 25.

that 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.

This negative aspect does not, however, exhaust the clean slate doctrine as formulated by the Commission. The newly independent State also has the right by a notification to effect its adherence to general multilateral treaties concluded by its predecessor. As regards restricted multilateral treaties the newly independent State may establish its status as a party with the consent of all the parties, and in the case of bilateral treaties, through express or tacit agreement between the newly independent State and the other State party. It is obvious that this combination of non-obligation and right to establish status as a party (in some cases without, in others with the consent of other parties) may prolong the uncertainty regarding the new State's treaty relations instead of offering workable solutions.

For the Commission the clean slate doctrine is a codification of existing international law. The Commission considers that the doctrine derives from State practice and is confirmed by the principle of self-determination. The description of practice given in the Commission's commentaries rather shows, however, that conflicting views have been expressed and followed in practice, and that consequently practice is far from being consistent.

With respect to general multilateral treaties the Commission relies to a large extent on the practice of the Secretary-General and other depositaries. It should, however, not be overlooked that, unless the parties otherwise agree, the functions of a depositary are limited and, on the whole, merely of an administrative character (article 77 of the Vienna Convention). The practice of depositaries cannot in itself bind the parties. Furthermore, silence of a party in regard to action taken by the depositary or to information received from him, does not necessarily mean consent. If a new State notifies the depositary that it will not consider itself obligated by a treaty concluded by the predecessor, and a party to the treaty, when informed by the depositary, omits any protest, this attitude does not necessarily imply that the party agrees or concedes that the new State is not bound. The party may well be of the opinion that the treaty is binding on the new State, but, in view of the fact that in international law the matter is controversial, consider that it should not intervene. The party may even wish to await the results of the work carried on by the Commission on the question before committing itself one way or the other. It is, in other words, doubtful whether it is possible to deduce an adequate *opinio juris* from the practice of depositaries and parties in this matter. As concerns the attitude of the newly independent States, it appears from the Commission's commentaries that some have declared themselves free of predecessor treaties of this kind while others, in particular with respect to the Geneva Red Cross Conventions, "have used language indicating recognition of an obligation to accept the Conventions as successors to their predecessors' ratifications".<sup>b</sup> Also the practice of newly independent States seems not to be wholly consistent.

Similarly, with respect to bilateral treaties, the Commission states that there is a "considerable measure of continuity found in practice"<sup>c</sup> in regard to certain categories of treaties, such as air transport and trade agreements, agreements for technical or economic assistance, etc. This tendency towards continuity is obviously based on strong practical needs of both old and new States and will therefore certainly not prove to be of transient nature. In these circumstances it is difficult to see how a clean slate principle can be derived from current State practice with respect to bilateral treaties.

Nor does it seem possible to base the clean slate doctrine on the principle of self-determination. This principle is admittedly vague and might be stretched in various directions, but its substance is that nations or peoples have a right to political independence. It would appear to be an overstatement of the principle to assert that it

implies that a newly independent State enters the international community free of the predecessor's treaties (with the exception of so-called territorial treaties) and, in addition, has the right, at its convenience, to step into the predecessor's shoes in respect of general multilateral treaties. Furthermore, it is not apparent why the principle of self-determination should require clean slate for newly independent States and for States emerging by separation (article 28) but not for States created by uniting of States or dissolution of a State (article 26 and 27).

These considerations lead to the conclusion that there is a case for the view that in this field State practice is large ambiguous and undecided, and that general principles such as self-determination of peoples do not give sure guidance. Accordingly, the task to be accomplished seems to be not so much codification of existing customary law as progressive development of the law. When customary international law in the field is non-existent or controversial, practice considerations could and should be allowed to influence the preparations of written rules of international law.

From the practical point of view the clean slate doctrine is apt to cause serious inconvenience. According to the doctrine the newly independent State is presumed to make its appearance free from the predecessor's treaties but it can by notification or by agreement with the other parties adhere to these treaties as from the date of succession or, in some cases, from a later date. Even if there are nuances to the doctrine, which are omitted in this description, it is obvious that its application will, as pointed out above, result in great uncertainty and confusion as to the treaty relations of the new State. It is doubtful whether for the new State the disadvantage of unsettled treaty relations is sufficiently counterbalanced by the advantage of a certain freedom of action. In any case, confusion in international treaty relations is a distinct inconvenience to the international community as a whole. As the clean slate doctrine is apt to create or maintain such confusion, it is arguable that the doctrine is not in conformity with the general interest of States. Such general interest should, it would seem, be accorded priority as against the particular interest of an individual State or group of States. This does not necessarily mean that particular interests must be neglected. On the contrary, solutions should be sought whereby also these could be satisfied to a reasonable degree.

In view of these considerations, it might be worth while attempting to create a system or model based not on the clean slate doctrine but on the opposite principle that the new State continues to be bound by the treaties concluded by the predecessor State. The application of that principle would seem to maintain stability and clarity in treaty relations. The understandable wish of a successor State not to be bound by treaties in the conclusion of which it has not taken part and which are contrary to its interests, could be satisfied by attributing to that State an extensive right to denounce undesirable treaties. It might also be possible to provide that certain categories of treaties would not be binding on the successor State, e.g., treaties of alliance and military treaties. If so, those categories should, however, be clearly defined so as to avoid differences of interpretation. There are obviously many other features and details of such a system which would have to be studied and worked out. In particular, various problems regarding the right of denunciation would have to be solved, such as whether there should be a time-limit to the exercise of that right, whether the denunciation should be immediately effective, and whether other parties should, for the sake of equality, have a corresponding right of denunciation.

The establishment of an alternative model on these lines would in any case be a great help to Governments in deciding what attitude to take with respect to the very difficult problems related to State succession in regard to treaties. As has already been stressed, the present observations of the Swedish Government are of a preliminary character. The Government is not in a position at the present stage to express a definitive opinion on the clean slate model or on an opposite system. There are, in its opinion, disadvantages connected with clean slate. The Government would therefore welcome an

<sup>b</sup> Para. 10 of the commentary to article 11.

<sup>c</sup> Para. 4 of the commentary to article 19.

alternative draft of articles based on the opposite assumption that the new State inherits the treaties of the predecessor (possibly with the exception of certain categories) but has the right in a manner to be regulated in the draft to denounce such treaties (with the exception of "territorial" treaties). It would then be possible closely to examine the two systems and compare their respective advantages and disadvantages.

It might be objected that the alternative system would not be satisfactory to the States which have achieved independence since the Second World War. As has been repeatedly emphasized, it is doubtful whether the present draft solves the problems of their treaty relations, despite the extensive part devoted to them.

It may be asked if the problems of these States are not better served by separate solutions of concrete and practical measures. The drafting of rules for the future would thereby also be much simplified. Many of the provisions contained in the part dealing with "newly independent States" (such as, e.g., those on "provisional application") would be unnecessary, and this part and the part dealing with "separation of part of a State" could be combined, which would eliminate a distinction which seems rather artificial or in any case difficult to define.

#### *Observations on particular articles*

##### *Article 2*

The definition of the term "succession of States" in paragraph 1 (b) as "the replacement of one State by another in the responsibility for the international relations of territory" raises doubts. "Responsibility" in this context obviously means something else than "State responsibility" in the technical sense, and it is not evident what it does mean. In any case the term is not clear enough to form part of a definition. Equally vague and obscure is the expression "international relations of territory". Does it imply that "territory" already is a subject of international law having relations to States governed by that law, such as treaty relations? If so, what becomes of the clean slate theory? If not, what kind of international relations is meant?

It seems preferable to return to the expression earlier used by the Special Rapporteur, namely "the replacement of one State by another in the sovereignty of territory".<sup>d</sup> If that expression is considered too limited, because of the word "sovereignty", the term "administration" might be added, so that paragraph 1 (b) might read:

"Succession of States means that the sovereignty over or administration of a territory passes from one State to another."

"Notification of succession" as defined in paragraph 1 (g) does not mean notification of a "succession of States" as defined in subparagraph 1 (b), but notification of the consent of a successor State to be bound by a multilateral treaty, i.e., succession to a treaty. The use of the same term "succession" for these two different events is hardly consistent with the statement in the commentaries that the Commission's approach "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".<sup>e</sup>

The definition in paragraph 1 (f) of "newly independent State" is not complete. The crucial term used in the definition is "dependent territory" and that term is not defined. It is obvious that in the view of the Commission "dependent territory" is something different from "part of a State" (used in the title of *article 28*) but the difference is not clarified by definitions, as would be desirable.

<sup>d</sup> See *Yearbook . . . 1969*, vol. II, p. 50, document A/CN.4/214 and Add.1 and 2, article 1 (a).

<sup>e</sup> *Yearbook . . . 1972*, vol. II, p. 226, document A/8710/Rev.1, para. 29.

##### *Article 3*

The principles contained in this article are not controversial, and it might be sufficient to refer to them in the commentary. If the article is maintained, its title should perhaps be changed. After all, the article is dealing with cases in which the provisions of the draft *are* applicable, under sub-paragraph (a) in substance and under sub-paragraph (b) also formally.

##### *Article 5*

As in the case of article 3, the content of this article might be transferred to the commentary.

##### *Article 12*

In its report, the Commission intimated that it would like to receive the views of Governments on the questions whether a time-limit ought to be placed on the exercise of the option to notify continued adherence to a general multilateral treaty.<sup>f</sup> As the option is apt to cause uncertainty as to the validity of these treaties for new States, it seems to be a minimum requirement that such a time-limit should be set. For similar reasons, it might be desirable to provide a time-limit also for the agreements by which restricted multilateral treaties, under *article 12*, paragraph 3, and bilateral treaties, under *article 19*, are continued.

##### *Article 13*

The intended sense of the phrase "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 . . ." is better expressed in the commentary by the wording "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".<sup>g</sup> The text of the article would accordingly be improved by replacing the first-mentioned phrase by the latter one.

##### *Article 14*

The Commission included this article in order to enable Governments to express their views on it, and thereby assist the Commission in reaching a clear conclusion as to whether it should be maintained in the draft. The article seems to be in line with the clean slate doctrine and at the same time demonstrates its tendency to lead to inequality between States. It is stated in the commentary 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".<sup>h</sup> The successor State would in other words be able to take advantage of a right established by the predecessor's signature of a treaty without assuming the obligation of good faith pertaining to that right. In these circumstances the inclusion of the article can hardly be recommended.

##### *Article 15*

Paragraph 2 of the article provides that a newly independent State, when establishing its status as a party or a contracting State to a multilateral treaty, may, subject to certain exceptions, formulate new reservations. In support of this provision the Commission states that

"the Secretary-General is now treating a newly independent State 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".<sup>i</sup>

<sup>f</sup> *Ibid.*, p. 229, document A/8710/Rev.1, para. 51.

<sup>g</sup> Para. 1 of the commentary to article 13.

<sup>h</sup> Para. 8 of the commentary to article 14.

<sup>i</sup> Para. 11 of the commentary to article 15.

It hardly needs to be pointed out that it is not within the authority of a depositary to agree to reservations and that consequently his practice cannot be the basis of a rule of customary international law. Nor does the fact that parties to a treaty in individual cases have not protested against new reservations submitted by newly independent States necessarily mean that these parties recognize that there is a general right in favour of these new States to formulate their own reservations.

Paragraph 2 must therefore be considered as a proposal *de lege ferenda*. As such it is not appropriate, because in general reservations are not desirable and practical reasons why additional ones should be allowed in this case are not apparent.

In article 15, there is included by reference the content of a number of articles, dealing with reservations of the Vienna Convention on the Law of Treaties. The Commission states in the commentary that thereby Governments will be given an opportunity "to express their views on the whole question of drafting by reference in the context of codification".<sup>j</sup> As far as the present article is concerned the reference method seems justified as otherwise the article would no doubt have been very long and heavy, and as the present draft, in any event, has a close connexion to the Vienna Convention. Regarding the general question of drafting by reference, it is not possible to give a positive or negative answer valid for all occasions. Reasons for and against vary both in kind and weight with circumstances and the decision will have to be based on the situation in the particular case.

#### Article 16

As with the right to form new reservations, it seems exaggerated to accord to a newly independent State the right to declare its own choice in respect of parts of a treaty or between alternative provisions.

#### Article 18

A provision that the newly independent State in its notification of succession may specify a date for its adherence later than the date of the succession of States seems hardly justified, as it would introduce another element of uncertainty in treaty relations.

#### Article 19

Regarding a time-limit, see comments above under *article 12*.

#### Articles 22 to 24

The provisions regarding "provisional application" seem to be needed in order to correct practical inconveniences of the clean slate doctrine. As formulated, they lead to additional inequality between States concerned. A newly independent State will be committed to provisional application of a multilateral treaty only after it has made a formal notification to that effect, while a State party to the treaty will be so committed also "by reason of its conduct". The justification of this difference is not apparent.

It may be added that the interpretation of the phrase "by reason of its conduct" in particular cases in regard to both multilateral and bilateral treaties is apt to cause difficulties and disputes.

As already pointed out, the complications of a provisional application would be avoided in the alternative model referred to above.

#### Articles 29 and 30

The phrase "a succession of State shall not as such affect" might be reconsidered. It is obvious that boundary régimes and other territorial régimes may be affected by a succession of States. By such a succession a new boundary State may emerge or the territory under a special territorial régime may become part of another (new) State. What is meant is presumably that the successor State is bound by the boundary régime or the territorial régime. If so, the negative formula used should be replaced by some wording affirming that

such régimes continue in force in regard to successor States. A similar positive formula is used in *article 26* on uniting of States and in *article 27* on dissolution of a State, which are based on the same principle of continuity of treaties in relation to the succession of States.

#### Syrian Arab Republic

TRANSMITTED BY A LETTER DATED 26 JUNE 1973 FROM THE  
PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original: English]

With reference to your letter No. LE 113 (2-2) dated 18 January 1973 concerning the provisional draft articles on succession of States in respect of treaties adopted by the International Law Commission at its twenty-fourth session held in Geneva from 2 May to 7 July 1972, I have the honour to inform you that the Government of the Syrian Arab Republic is in general agreement with these provisional draft articles.

#### United Kingdom of Great Britain and Northern Ireland

TRANSMITTED BY A *note verbale* OF 29 OCTOBER 1973 FROM  
THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original: English]

#### General observations

1. The provisional draft articles on succession of States in respect of treaties, adopted by the International Law Commission in 1972, are a useful basis for further work on this topic. The United Kingdom Government support the decision of the Commission to take the provisions of the Vienna Convention (which the United Kingdom has ratified) as an essential framework of the law relating to succession of States in respect of treaties.

2. In paragraphs 35 and 36 of the introduction to the draft articles the Commission refers to the principles of the United Nations Charter. It is noted that these principles, and in particular that of self-determination, are considered by the Commission to have "implications" in the modern law concerning succession in respect of treaties, the main implication in their opinion being "to confirm" the clean slate principle.<sup>a</sup> The United Kingdom Government continue to have doubts as to whether full weight has been given to the many instances in which, without controversy, States concerned have continued to apply treaties after a succession of States. Where there have been controversies, these have usually been satisfactorily resolved without too much difficulty. Whilst a succession of States marks a time of change, it is usually in the interests of all States concerned to maintain as much of the essential fabric of international society (in which treaties play an important part) as is consistent with the change. This is especially the case with multilateral treaties of a law-abiding character or which establish international standards.

3. With regard to the form of the draft, the United Kingdom favour the drawing up by the Commission of a final set of draft articles for a convention. Whilst noting the temporal element in any codification and development of law of succession of States, a convention is considered to be the best type of instrument in the present state of international society. In this connexion, it is noted that the International Court of Justice in some of its recent judgements has cited the Vienna Convention even though it is not in force and when in force will not be retrospective.

4. Provisions for the settlement of disputes arising out of the application of interpretation of any convention on this topic will

<sup>j</sup> Para. 18 of the commentary to article 15.

<sup>a</sup> *Yearbook* . . . 1972, vol. II, p. 227, document A/8710/Rev.1, paras. 35-36.

be desirable. The United Kingdom Government favour procedures which will be compulsory rather than merely optional. The topic is one where conciliation, mediation, arbitration or adjudication would be appropriate. As regards the latter, the United Kingdom Government support the principle of recourse to the International Court of Justice.

#### *Observations on specific draft articles*

*Article 2, paragraph 1 (b):* Whilst the phrase "in the responsibility for the international relations of territory" has been used in State practice, the present definition is not altogether satisfactory. Quite apart from the possibility of confusion with the notion of "State responsibility", the meaning of the phrase is not entirely free from doubt in all cases and it can give rise to difficulties, e.g., as regards protected States. A possible improvement to get over the latter difficulty would be to add the words "previously forming the territory or part of the territory of the first State". However, the first alternative in the commentary ("in the sovereignty in respect of territory")<sup>b</sup> might be preferable. A consequential amendment would then be necessary to article 2, paragraph 1 (e).

*Article 2, paragraph 1 (f):* In the light of article 28 and the observation thereon, the following is suggested:

"'newly independent State' means a *successor State* the territory of which immediately before the date of the succession of States was *part of the territory of the predecessor State*". (Additions in italics.)

The first change (the insertion of the word "successor") would emphasize the fact that a newly independent State is a category of successor State.

The scope and meaning in particular cases of the term "dependent territory for the international relations of which the predecessor State was responsible" is not completely clear.

*Article 2, paragraph 1 (g):* The words "considered as" might usefully be omitted here and elsewhere in the draft.

*Article 2, paragraph 1 (i):* A reference to accession could be added, in line with paragraph 1 (j) of the article.

*Article 6:* The United Kingdom Government consider that this article is superfluous for the reason given in paragraph 1 of the commentary; and that, if included, the article might be open to different interpretations in particular cases.

*Article 9, paragraph 2:* The Commission's proposals that express acceptance in writing is required appears to be unduly restrictive. In the sort of situation under consideration tacit consent should be permitted.

*Article 10:* The reference to "administration" goes too far and may lead to uncertainty. The point in the commentary<sup>c</sup> should be included in the terms of the draft article, e.g., by beginning "subject to the provisions of the present articles", as in draft article 11. In the final phrase of sub-paragraph (b) the compatibility test which exists in relation to reservations is proposed: this requires careful study. It would be preferable to make a more direct reference to the example of a treaty intended or expressed to have a restricted territorial scope which is given in the commentary.<sup>d</sup> The questions of impossibility of performance and fundamental change of circumstances also need to be considered in this connexion.

*Article 11:* Reference is made to paragraph 2 ("General observations") above.

*Article 12:* Although the rule proposed in paragraph 1 is subject to the exceptions in paragraphs 2 and 3, it is considered that insufficient weight is given to the intention of the parties to a particular treaty. As regards paragraph 2, whilst not opposing the proposal

that a notification of succession may be made even though the accession provisions of a particular treaty do not cover a certain newly-independent State<sup>e</sup> the intention of the parties could appear from the wording of the treaty as well as from its object and purpose.

*Article 13:* The observations of article 12 apply equally to article 13.

*Article 14:* The United Kingdom Government favour the effectiveness of multilateral treaties.<sup>f</sup> However, the proposal in this article is not free from difficulty. It is the practice of the United Kingdom Government to consult the Government of each British dependent territory about its attitude to a particular treaty after signature and before ratification. Moreover, it has not been the practice of the United Kingdom Government to include treaties signed but not ratified in the list of treaties compiled for each dependent territory before its independence. On balance, it is considered that the need for the proposed new rule is not great enough to outweigh its difficulties.

*Article 15:* In paragraph 1 (a), the test of compatibility between two reservations may be difficult to apply in practice. The formulation of a new reservation on the same subject as an existing one should imply an intention to replace the latter with the former. Thus, the words "and is incompatible with the said reservation" might be omitted with advantage.

As regards paragraph 1 (b), a reservation which "must be considered as applicable only in relation to the predecessor State" could hardly be "applicable in respect of the territory in question at the date of the succession of States". Accordingly, paragraph 1 (b) is unnecessary.

In paragraph 2, a cross-reference might usefully be made to "the rules set out in article 19 of the Vienna Convention on the Law of Treaties", instead of repeating them *in extenso*.

*Article 16:* As regards paragraph 3, once a newly independent State has established its status as a party, it has all the rights and obligations of a party. Thus, the need for this paragraph is doubtful.

*Article 18:* Where a newly independent State makes a notification of succession some considerable time after independence, other States may, in good faith, have acted in the meantime on the assumption that the treaty was not applicable between them and the newly independent State. Should the newly independent State insist upon the date of independence as the effective date, the other States would presumably not be open to allegations of breach for having failed to apply the treaty in the meantime. This aspect of the question is not dealt with in the Commission's proposals. In paragraph 2 (b), it should be possible for all the parties to agree on a later date *in all cases* and not merely in those falling under article 12, paragraph 3.

*Article 19:* In the commentary reference is made to United Kingdom practice. Too much has been read into the italicized words in the quotation.<sup>g</sup> The qualification of the Foreign Office reply was dictated by the need not to interfere in the external affairs of the newly independent countries. The purpose of the words "in conformity with the provisions of the treaty" in paragraph 1 is not clear. Paragraph 1 (b) appears to be concerned with tacit agreement by conduct.

*Article 21:* Paragraphs 2 and 3 of this article appear to restate the rules in its paragraph 1. The drafting of the article could probably be much simplified.

*Article 22:* The term "successor State" appears in this article (and articles 23 and 24) although the articles appear in part III on "newly independent States". As well as to "another State party", reference should be made to the "predecessor State": in contrast to the position under article 19, a *multilateral* treaty can of course be applied provisionally between the successor State and the predecessor State. More generally, the proposals, as drafted, would appear to permit a newly independent State to pick and choose between the existing

<sup>b</sup> Para. 4 of the commentary.

<sup>c</sup> Para. 12 of the commentary.

<sup>d</sup> Para. 11 of the commentary.

<sup>e</sup> Para. 8 of the commentary.

<sup>f</sup> Para. 5 of the commentary.

<sup>g</sup> Para. 11 of the commentary.

parties to a treaty. The desirability of such discrimination is open to question, especially when it is not permitted under the general law on multilateral treaties. It could lead to different "schools" of States within a single treaty system.

The commentary indicates that a right of choice is not intended. The notifications referred to have been made, in the case of declarations, to the Secretary-General of the United Nations, rather than to individual States parties to or depositaries of particular treaties.<sup>h</sup>

*Article 25:* The rule in sub-paragraph (a) has two alternative tests—compatibility and "radical change of conditions". Only the former is proposed in article 10, sub-paragraph (b). The compatibility test is not always easy to apply, in practice, regarding reservations. The test of a radical change of conditions, which sounds similar to that of fundamental change of circumstances, is new and may also give rise to different interpretations in practice. The right proposed in sub-paragraph (b) would seem possibly to go beyond what is provided in article 29 of the Vienna Convention.

*Article 26:* The two tests in sub-paragraph 1 (b) are similar to those proposed in sub-paragraph (a) of article 25. But they are applied to different questions—in article 26 to that of the continuance in force of a treaty and in article 25 to that of the extent of a treaty's application. In article 26, the latter question is dealt with by an entirely different approach in paragraph 2. The justification for these differences is not clear.

*Article 27:* The drafting of paragraph 1 could be simplified by referring to treaties "in force" at the material time, rather than to treaties "concluded" beforehand.

*Article 28:* It is considered that paragraph 1 of this article should be included in part III which could be broadened to cover successor States which are not newly independent. As regards paragraph 2, this would become unnecessary where the definition proposed in these observations for the term "newly independent State" (article 2, paragraph 1 (f)) to be adopted.

*Articles 29 and 30:* The point in the commentary<sup>i</sup> might with advantage be included in the text of the draft articles. "Territory" should be defined so as to include "all or any part" of a State's territory.

The question of the obligations of the predecessor State is dealt with in part II of the draft articles (in article 10, sub-paragraph (a)) and in part IV (in article 28, paragraph 1). However, it is not dealt with in part III; the Commission may wish to consider this possible lacuna in their proposals.

<sup>h</sup> See paras. 3 and 5 of the commentary.

<sup>i</sup> Para. 39 of the commentary.

#### United States of America

TRANSMITTED BY A *note verbale* OF 7 FEBRUARY 1974 FROM  
THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original: English]

The Government of the United States considers that the articles on succession of States in respect of treaties proposed in first reading by the International Law Commission at its twenty-fourth session in 1972 constitute a sound basis for consideration of this difficult topic. The difficulties inherent in preserving a proper balance between the objectives of preserving continuity in international relationships on the one hand while on the other taking account of the necessities of an emergent State have, to a large extent, been met in the proposed articles. In commenting thereon, the United States will concentrate upon what it considers to be the major points of principle raised by the draft articles.

The decision of the Commission to maintain, particularly in part I ("General provisions") a substantial parallelism with the Vienna Convention is a sensible one. The unification of international law

is prompted by the adoption of substantially identical texts to the greatest extent that varying subject-matter permits. This procedure is all the more desirable when, as in the present case, the project under consideration lies within the general field of the law of treaties. Accordingly, the United States supports articles 1 through 5 as proposed by the Commission.

The purpose of *article 6*, to make clear that succession with regard to territory which does not take place in accordance with the requirements of international law should not be considered as the type of succession that is envisaged in the draft articles, is laudable. There is a question however, whether the formulation of the article achieves the end sought. To the extent that the articles impose obligations upon successor States that are designed to promote the principles of the Charter of the United Nations there is no reason for excluding the imposition of such obligations upon any State that claims to be a successor State in respect of territory. Thus, the provision in article 29 that a succession shall not as such affect a boundary established by a treaty should apply in the case of any territorial change. Its applicability, in fact, may be more necessary in the case of a territorial change having elements of illegitimacy than in cases where there is no question as to the legality of the succession.

It would be desirable to clarify article 6 to make it clear that the obligations in the draft articles apply in all cases. The article could be recast so as to provide that the rights conferred upon successors in the articles may be exercised only by States whose succession has taken place in conformity with international law. It would also seem advisable to revise the commentary. The position that the Commission drafts on the assumption that the rules it lays down would normally apply to facts occurring and situations established in conformity with international law appears too broad. The entire subject of State responsibility, for example, is concerned with rules applying to situations when there has been a breach of international law. In preparing the Vienna Convention on Diplomatic Relations<sup>a</sup> the Commission was concerned with formulating the normal rules for diplomatic intercourse among States. But in preparing the draft on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons,<sup>b</sup> the Commission was dealing with conduct in violation of the Vienna Diplomatic Conventions and other treaties and of basic principles of international law.

*Articles 7 and 8* might be clarified in each case by combining paragraphs 1 and 2 into a single paragraph which would say, in effect, that notwithstanding the conclusion of a devolution agreement, or a unilateral declaration by the successor State regarding continuance in force of treaties, the present articles govern the effects of the succession with respect to treaties in force in the territory on the date of succession. As presently drafted article 7 leaves some doubts as to its relationship to articles 35, 36 and 37 of the Vienna Convention and article 8 raises some questions as to the law of unilateral acts. Examination of the commentaries to these articles, such as the commentary to article 7,<sup>c</sup> and of the commentary to article 8,<sup>d</sup> establishes the desirability of eliminating doubt on these points.

With regard to *article 10*, the United States considers that for purposes both of clarity and consistency it would be desirable to replace the phrase "under the sovereignty or administration of a State" with a phrase based on article 2, paragraph 1 (b), such as, "when territory as to which one State has responsibility for international relations . . ."

The United States supports the general approach taken in part III of the draft articles, regarding newly independent States. There are,

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

<sup>b</sup> See *Yearbook . . . 1972*, vol. II, p. 312, document A/8710/Rev.1, chap. III, sect. B.

<sup>c</sup> Paras. 15 to 17.

<sup>d</sup> Paras. 16 and 17.

however, a number of improvements which could be made. *Article 12* permits any newly independent State to become party to a multilateral treaty that applied to its territory prior to independence subject, *inter alia*, to the requirement that the participation of the State is not incompatible with the object and purpose of the treaty. A requirement of this type is reasonable, but the question arises whether the test to be applied could be made more precise. A further question is how is a determination to be made whether succession to the treaty is or is not consistent with its object and purpose.

Regarding the first issue, it would appear that whenever a successor State may accede to a treaty there should not be any reasonable doubt as to its right to succeed to the treaty. While this would appear to be a reasonably obvious conclusion, it might be included in the article. Where the question of compatibility is unclear, however, and the treaty concerned has no provisions for dealing with the situation, a number of difficult questions arise. If a party to the treaty objects on the ground of incompatibility, is this sufficient to prevent succession? If not, does the objection result in barring treaty relationships between that party and the successor State? Questions of the same character arise also with respect to a number of other articles in which the requirement of compatibility with object and purpose is laid down—*article 13*, paragraph 2, *article 14*, paragraph 1 and *article 15*, paragraph 2 (c). The United States considers that the Commission should, in its second reading, attempt to reduce this area of uncertainty to the extent possible although it recognizes that a number of questions regarding interpretation and application of the articles must be left to solution on a case by case basis.

*Article 18* provides that a newly independent State which submits a notification of succession is considered as a party to the treaty as of the date of receipt thereof, but that the treaty is considered as being in force between the parties from the date of succession. The commentary states that his application of the principle of continuity is supported by practice although States have deviated from the rule in relation to certain successions and treaties. The United States accepts the principle as a logical corollary to the theory of succession but considers that it may raise some difficult problems in application. For example, a new State is established. A dispute between private individuals develops which includes as a major issue whether a multilateral agreement applicable to the territory prior to independence remains in force within the new State. No notification of succession having been given by the new State the court decides the case on the basis that the treaty is inapplicable. Thereafter, the new State deposits a notice of succession to the treaty. What effect, if any, does bringing the treaty into effect retroactively have upon the judgement? Is the judgement open to collateral attack? Is the situation affected by whether the time for appeal has expired and no appeal has been taken; by whether an appeal is pending? Is it equitable to make provision in the articles for reopening a final decision in such a case? If so, what of settlements agreed between the parties, whether or not approved by a court, based on the assumption that the treaty was inapplicable?

This set of problems is further complicated by the factor that in authorizing the new State to make a declaration of succession, *article 12* does not contain any limitation as to time. A State could make such a notification five, ten, or twenty-five years after becoming independent, and the declaration would have retroactive effect for the entire period. The possible effects upon long-settled legal relationships are sufficiently extreme to require some protective measures. It would be desirable to provide a time-limit within which the right to notify succession must be expressed. The period should be long enough so that the new State has time enough to conduct a review of possibly applicable multilateral treaties while not being so long that private rights or the rights of other States party to the treaty would be seriously impaired by the retroactive effect of notification. A period of three years would seem to be sufficient for the new State to reach a determination while not being so long that private litigants or a court, for example, could not postpone a judgement pending clarification

of the applicability of a treaty. In this connexion, an additional protective step would be to provide that periods of prescription or limitation would not run with respect to claims involving the applicability of a treaty during the three-year period.

An even more complicated timing problem arises in connexion with *articles 15 and 16*. *Article 15* permits a new State at the time it notifies succession to withdraw reservations previously applicable to the territory concerned or, subject to certain limitations, to make new reservations. Any old reservation inconsistent with a new reservation is replaced by the new reservation. It is not clear whether the retroactive effect of *article 18* applies to the varying situations dealt with in *article 16*. Certainly it would seem reasonable to consider that a reservation maintained in effect under the notification of succession should be considered as having remained in effect during the period between independence and notification if the treaty is considered in effect for that period. But to give a new reservation should retroactive effect would be quite another matter since it could lead to arbitrary and inequitable consequences that the other parties would be totally unable to guard against. Paragraph 3 of *article 15* provides some protection in that the reference to *article 20* of the Vienna Convention would presumably permit other States party to object to the reservation within 12 months from the date of notification. However, it is possible that the third State might have no objection to the reservation as such but would have objection to its being retroactive. Similar problems arise when the new reservation is inconsistent with an old reservation. The Commission should eliminate these complications by making it clear that new reservations take effect when made, that is, at the date of notification of succession.

The right of the new State under paragraph 2 of *article 16* to change the predecessor State's choice in respect of parts of the treaty or between differing provisions raises the same problems of uncertainty and possible prejudice, if the choice is given retroactive effect, as are raised by new reservations. Accordingly, such choice should have effect only from the notification of succession.

The difficulties encountered with regard to *articles 15 and 16* emphasize the need for establishing a time-limit within which the new State should notify succession.

*Article 25* provides that, when a newly independent State is formed from two or more territories which had differing treaty régimes prior to independence, any multilateral treaty continued in force pursuant to the prior articles relating to newly independent States is applicable either to the entire territory of the new State or only to the former territory to which it applied at the option of the new State. Is this rule a reasonable one? For example, this rule could result in the application of the Vienna Convention on Consular Relations to a consular district in one section of a State while a consular district in another section could be subjected to a different set of requirements. Or the immunities of a diplomatic agent might vary according to whether he was in the part of the State covered by the Vienna Convention on Diplomatic Relations or not. It is suggested that sub-paragraph (b) of the article should be deleted. The new State is not required to maintain the treaty in effect and sub-paragraph (a) affords sufficient protection to take care of the unusual case. The only difficult point not covered by sub-paragraph (a) is the situation when multilateral treaty obligations applicable in one section would conflict with treaty obligations applicable in another section. In such cases, the new State, if it wished to maintain both treaties in effect, should be entitled to limit application to the original territory.

The distinction between the dissolution of a State (*article 27*) and the separation of part of a State (*article 28*) is quite nebulous. The principal criterion appears to be that in dissolution the predecessor State ceases to exist while in separation of part of a State, the remaining part continues to be the predecessor State. This differentiation seems largely nominal. If State A splits in half and the half calls itself State B and the other State C, should this produce different results than if State A splits in half and the half calls itself State B

and the other half State A, or vice versa? The practice cited in the commentaries to the two articles does not provide substantial assistance in sharpening the distinction between the two situations. It is suggested that article 28 adds an unnecessary element of complexity to the draft articles and that the concept of "newly independent State" is sufficiently broad to encompass the separation of part of a State in all those cases in which application of the rules in part III is indicated.

The question whether the application of a treaty is incompatible with its object and purpose arises in a substantial number of the draft articles. In *articles 25, 26 and 27* (as well as 28 if retained) the additional question of whether certain actions radically change the conditions for the operation of a treaty is raised. These are concepts of a general nature whose application to individual cases of succession may well result in strong differences of opinion. Other problems of interpretation and application have been pointed out in the comments of the United States, such as, for example, the difficulties in applying the rules relating to the time of succession.

It is clear, therefore, that differences between Governments will develop with regard to varying aspects of succession to treaties. Consequently, the Government of the United States urges the Commission to include provision for the settlement of disputes that may arise among the parties regarding the interpretation and execution of the articles.

*Articles 29 and 30* are valuable from the point of view that they seek to avoid permitting the fact of a succession to be used as an argument for exacerbating territorial disputes. The underlying logic is simple and incontrovertible. A successor State can only acquire as its territorial domain the territory and territorial rights of the predecessor. If the territory as held by the State had boundaries firmly fixed and settled by treaty with an established and well-working régime for

keeping those boundaries delineated then the successor State inherits all this. If the territory as held by the predecessor State included obligations by an upstream riparian State established by treaty to release water from its river dams so as to aid the irrigation projects in the territory, the new State receives its territory with those benefits. On the other hand, if the territory as held by the predecessor State had a poorly-defined boundary as a consequence of a poorly-drafted treaty or was subject to an obligation to control its releases of water to assist irrigation in a downstream riparian State then the successor State acquires what the predecessor had, territory with badly defined boundaries or subject to an obligation to help the downstream State.

Failure to state the rules set forth in articles 29 and 30 would give rise to an assumption that the fact of succession could be used to support claims for territorial change or abolition of territorial rights. The result would be that an effort to codify international law would have resulted in undermining friendly relations among States. The United States, therefore, favours retention of articles 29 and 30.

Article 30, however, would benefit from simplification. The structure and drafting are complicated by a requirement in paragraph 1 that rights and obligations have to attach to a particular territory in the State obligated and a particular territory in the State benefited. This latter requirement seems both unnecessary and unduly confusing. If a land-locked State has transit rights to send certain commodities through a neighbouring State to a port, should it make any difference whether the commodities are grown or manufactured throughout the land-locked State or only in certain areas? Even if grown in a certain area the sale of the commodities benefits the State as a whole as well as the area directly concerned. Consequently, the United States would propose that this requirement be eliminated from the article.

## ANNEX II

**Comparative tables of the numbering of the articles of the provisional and final drafts  
on succession of States in respect of treaties adopted by the Commission \***

In connexion with the topic "Succession of States in respect of treaties", the International Law Commission prepared a provisional and a final draft of articles. The provisional draft was adopted by the Commission at its twenty-fourth session, in 1972 and is included in the Commission's report on the work of that session.<sup>a</sup> That draft is the subject of the observations of Member States.<sup>b</sup> The final draft, adopted at the twenty-sixth session, is included in the present report.<sup>c</sup>

The two tables below indicate the correspondence between the articles, sections and parts of the two drafts. It should be noted that where an article in the final draft has no corresponding article in the provisional draft, the fact is indicated in the relevant column by a dash (—).

\* Originally circulated as document A/9610/Add.3.

<sup>a</sup> *Yearbook . . . 1972*, vol. II, p. 219, document A/8710/Rev.1.

<sup>b</sup> See annex I above.

<sup>c</sup> See above, chap. II.

TABLE 1

Articles of the final draft in numerical order and  
corresponding articles of the provisional draft

TABLE 2

Articles of the provisional draft in numerical order  
and corresponding articles of the final draft

<i>Final draft</i>			<i>Provisional draft</i>			<i>Provisional draft</i>			<i>Final draft</i>		
<i>Article</i>	<i>Section</i>	<i>Part</i>	<i>Article</i>	<i>Section</i>	<i>Part</i>	<i>Article</i>	<i>Section</i>	<i>Part</i>	<i>Article</i>	<i>Section</i>	<i>Part</i>
1		I	1		I	1		I	1		I
2		I	2		I	2		I	2		I
3		I	3		I	3		I	3		I
4		I	4		I	4		I	4		I
5		I	5		I	5		I	5		I
6		I	6		I	6		I	6		I
7		I	—		—	7		I	8		I
8		I	7		I	8		I	9		I
9		I	8		I	9		I	10		I
10		I	9		I	10		II	14		II
11		I	29		V	11	1	III	15	1	III
12		I	30		V	12	2	III	16	2	III
13		I	—		—	13	2	III	17	2	III
14		II	10		II	14	2	III	18	2	III
15	1	III	11	1	III	15	2	III	19	2	III
16	2	III	12	2	III	16	2	III	20	2	III
17	2	III	13	2	III	17	2	III	21	2	III
18	2	III	14	2	III	18	2	III	22	2	III
19	2	III	15	2	III	19	3	III	23	3	III
20	2	III	16	2	III	20	3	III	24	3	III
21	2	III	17	2	III	21	3	III	25	3	III
22	2	III	18	2	III	22	4	III	26	4	III
23	3	III	19	3	III	23	4	III	27	4	III
24	3	III	20	3	III	24	4	III	28	4	III
25	3	III	21	3	III	25	5	III	29	5	III
26	4	III	22	4	III	26		IV	30		IV
27	4	III	23	4	III	27		IV	33		IV
28	4	III	24	4	III	28		IV	33 and 34		IV
29	5	III	25	5	III	29		V	11		I
30		IV	26		IV	30		V	12		I
31		IV	—		—	31		VI	38 and 39		V
32		IV	—		—						
33		IV	27 and 28		IV						
34		IV	28		IV						
35		IV	—		—						
36		IV	—		—						
37		IV	—		—						
38		V	31		VI						
39		V	31		VI						



## CHECK LIST OF DOCUMENTS REFERRED TO IN THIS VOLUME

NOTE. This list includes all United Nations documents identified by their symbols for which no detailed reference is given in a foot-note.

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/9159	General Assembly, twenty-eighth session: observance of the twenty-fifth anniversary of the International Law Commission: note by the Secretary-General	Offset
A/9795	General Assembly, twenty-ninth session: report of the Joint Inspection Unit on the pattern of conferences of the United Nations and the possibilities for more rational and economic use of its conference resources	<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)	Mimeographed.
E/ECE/270, Part II	Economic Commission for Europe, twelfth session: European Agreement on economic co-operation—analytical summary of the observations on the proposal of the USSR received by the Executive Secretary	<i>Idem.</i>
ILC (XXV)/Misc.2	Succession of States in respect of treaties: Letter dated 30 April 1973 addressed to the Secretary-General of the United Nations by the Prime Minister and Minister of Foreign Affairs of Tonga	Mimeographed
ILC (XXVI)/SC.1/ WP.1	Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses: memoranda submitted by members of the Sub-Committee (working paper)	
ST/GENEVA/LIB/ SER.B/Ref.2	International Law Commission—A guide to the documents, 1949-1969	United Nations Office at Geneva, Library, Reference lists
ST/LEG/7	Summary of the practice of the Secretary-General as depositary of multilateral treaties	Mimeographed.



**CHECK LIST OF DOCUMENTS OF THE TWENTY-SIXTH SESSION  
NOT REPRODUCED IN VOLUME II**

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/273 and Rev.1	Provisional agenda	Mimeographed. For the agenda as adopted, see p. 161 above (A/9610/Rev.1, para. 10).
A/CN.4/275 and Add.1-2	Observations of Member States on the draft articles on succession of States in respect of treaties adopted by the Commission at its twenty-fourth session	Reproduced in A/9610/Rev., annex I (see p. 313 above).
A/CN.4/276/Add.1	Filling of casual vacancies: Addendum to the note by the Secretariat—nomination and <i>curriculum vitae</i>	Mimeographed.
A/CN.4/283	Report of the Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses	Reproduced in A/9610/Rev.1, chap. V, annex (see p. 301 above).
A/CN.4/L.205	Observations of Member States on the draft articles on succession of States in respect of treaties adopted by the Commission at its twenty-fourth session: observations of Ethiopia	Reproduced in A/9610/Rev.1, annex I (see p. 314 above).
A/CN.4/L.207	Draft articles on State responsibility: texts adopted by the Drafting Committee—title of chap. II and articles 7-9	Texts reproduced in the summary record of the 1278th meeting (vol. I).
A/CN.4/L.208	<i>Idem</i> : Text for article 9, proposed by Mr. Ushakov	Withdrawn. See the summary record of the 1278th meeting (vol. I), para. 32.
A/CN.4/L.209 and Add.1, Add.2 and Corr.1 and Add.3-5	Draft articles on succession of States in respect of treaties: texts adopted by the Drafting Committee—titles of parts I, II, III (sects. 1-5), IV, and VI, and arts. 1-6, 6 <i>bis</i> , 7-26, 26 <i>bis</i> , 26 <i>ter</i> , 27, 28, 28 <i>bis</i> , 28 <i>ter</i> , 29, 30, 30 <i>bis</i> , 31, 31 <i>bis</i> and 31 <i>ter</i>	Texts reproduced in the summary records of the 1285th, 1286th, 1290th and 1293rd to 1296th meetings (vol. I).
A/CN.4/L.210	Draft articles on treaties concluded between States and international organizations or between two or more international organizations: texts adopted by the Drafting Committee—titles of the draft articles and of parts I and II (and of sect. 1) and arts. 1-4 and 6	<i>Idem</i> , 1291st meeting (vol. I).
A/CN.4/L.211	Draft report of the International Law Commission on the work of its twenty-sixth session (chap. IV)	Mimeographed. For the final text, see A/9610/Rev.1 (p. 290 above).
A/CN.4/L.212	Draft articles on succession of States in respect of treaties: text of article 32 proposed by Mr. Kearney	Replaced by A/CN.4/L.221. See 1296th meeting (vol. I), para. 87.
A/CN.4/L.213	Succession of States in respect of treaties: note by the Secretariat transmitting a letter dated 2 July 1974 from the Legal Adviser of the International Labour Office to the Chairman of the Commission	Mimeographed.
A/CN.4/L.215 and Corr.2	Draft articles on succession of States in respect of treaties: article 12 <i>bis</i> (with new paragraph for insertion in article 2) proposed by Mr. Ushakov	Mimeographed. Reproduced in A/9610/Rev.1, foot-note 57 (see p. 172 above).
A/CN.4/L.216 and Add.1, A/CN.4/L.217 and Corr.1 and Add.1-2, Add.3 and Corr.1, Add.4 and Corr.1, and Add.5-14, A/CN.4/L.218 and Add.1-3, A/CN.4/L.219, A/CN.4/L.220 and Add.1-2	Draft report of the International Law Commission on the work of its twenty-sixth session (chaps. I, II, III, V and VI)	Mimeographed. For the final text, see A/9610/Rev.1, (p. 157 above).

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.221	Draft articles on succession of States in respect of treaties: text of article 32 proposed by Mr. Kearney	Text reproduced in the summary record of the 1296th meeting (vol. I). See also A/9610/Rev.1, foot-note 58 (p. 173 above).
A/CN.4/L.222	<i>Idem</i> , texts adopted by the Drafting Committee—arts. 6 and 6 <i>bis</i>	Reproduced in the summary record of the 1296th meeting (vol. I).
A/CN.4/L.223 and Corr.1 and Add.1	<i>Idem</i> , Final text adopted by the Drafting Committee	Adopted by the Commission. See A/9610/Rev.1, chap. II, D (p. 174 above).
A/CN.4/L.224	Financial implications of extending the duration of the Commission's session from 10 weeks to 12 weeks: Note by the Secretary-General	Mimeographed.
A/CN.4/L.225	Succession of States in respect of treaties: draft resolution submitted by Mr. El-Erian	Adopted. Reproduced in the summary record of the 1301st meeting (vol. I). See also A/9610/Rev.1, para. 85 (p. 174 above).
A/CN.4/SR.1250-1301	Provisional summary records of the 1250th to 1301st meetings of the International Law Commission	Mimeographed. For the final text, see vol. I.
ILC (XXVI)/Conf. Room doc.2	Draft articles on State responsibility: proposals by Mr. Kearney concerning articles 7, 8 and 11	Reproduced in the summary record of the 1258th meeting (vol. I), para. 11.



---

### كيفية الحصول على منشورات الأمم المتحدة

يمكن الحصول على منشورات الأمم المتحدة من المكتبات ودور التوزيع في جميع أنحاء العالم - استلم عنها من المكتبة التي تتعامل معها أو اكتب إلى : الأمم المتحدة ، قسم البيع في نيويورك أو في جنيف

#### 如何购取联合国出版物

联合国出版物在全世界各地的书店和经营处均有发售。请向书店询问或写信到纽约或日内瓦的联合国销售组。

#### HOW TO OBTAIN UNITED NATIONS PUBLICATIONS

United Nations publications may be obtained from bookstores and distributors throughout the world. Consult your bookstore or write to: United Nations, Sales Section, New York or Geneva.

#### COMMENT SE PROCURER LES PUBLICATIONS DES NATIONS UNIES

Les publications des Nations Unies sont en vente dans les librairies et les agences dépositaires du monde entier. Informez-vous auprès de votre libraire ou adressez-vous à : Nations Unies, Section des ventes, New York ou Genève.

#### КАК ПОЛУЧИТЬ ИЗДАНИЯ ОРГАНИЗАЦИИ ОБЪЕДИНЕННЫХ НАЦИЙ

Издания Организации Объединенных Наций можно купить в книжных магазинах и агентствах во всех районах мира. Наводите справки об изданиях в вашем книжном магазине или пишите по адресу : Организация Объединенных Наций, Секция по продаже изданий, Нью-Йорк или Женева.

#### COMO CONSEGUIR PUBLICACIONES DE LAS NACIONES UNIDAS

Las publicaciones de las Naciones Unidas están en venta en librerías y casas distribuidoras en todas partes del mundo. Consulte a su librero o diríjase a: Naciones Unidas, Sección de Ventas, Nueva York o Ginebra.

---