

**Draft articles on Succession of States in respect of Treaties**  
**with commentaries**  
1974

Text adopted by the International Law Commission at its twenty-sixth session, in 1974, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 85). The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 1974*, vol. II, Part One.



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 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>257</sup> 1972 draft, article 12.

<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.

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

<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.

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



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 multi-lateral 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.

<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.

(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>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.