REPORT

OF THE

INTERNATIONAL LAW COMMISSION

on the work of its twenty-fourth session

2 May – 7 July 1972

GENERAL ASSEMBLY

OFFICIAL RECORDS: TWENTY-SEVENTH SESSION

SUPPLEMENT No. 10 (A/8710/Rev.1)

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131 p.)

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NOTE

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

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* The observations contained in this annex were originally distributed as documents A/8710/Add.1 and A/8710/Add.2.

ABBREVIATIONS

Benelux	Customs and economic union between Belgium, Netherlands and Luxembourg
BIRPI	United International Bureaux for the Protection of Intellectual Property
CMEA	Council for Mutual Economic Assistance
EEC	European Economic Community
EFTA	European Free Trade Association
EURATOM	European Atomic Energy Community
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade (also the Contracting Parties and the secretariat)
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
ILO	International Labour Organisation
IMCO	Inter-Governmental Maritime Consultative Organization
ITU	International Telecommunication Union
LAFTA	Latin American Free Trade Association
OAS	Organization of American States
OAU	Organization of African Unity
UAR	United Arab Republic
UNCITRAL	United Nations Commission on International Trade Law
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNITAR	United Nations Institute for Training and Research
UPU	Universal Postal Union
WHO	World Health Organization

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EXPLANATORY NOTE: ITALICS IN QUOTATIONS

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

Chapter I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its twenty-fourth session at the United Nations Office at Geneva from 2 May to 7 July 1972. The work of the Commission during this session is described in the present report. Chapter II of the report, on succession of States in respect of treaties, contains a description of the Commission's work on that topic, together with 31 draft articles and commentaries thereon, as provisionally adopted by the Commission. Chapter III, on the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, contains a description of the Commission's work on that topic, together with 12 draft articles and commentaries thereon, as approved by the Commission. Chapter IV contains a description of the Commission's progress of work on the following topics on its agenda: (1) succession of States in respect of matters other than treaties; (2) State responsibility; (3) the most-favoured-nation clause; (4) the question of treaties concluded between States and international organizations or between two or more international organizations. Chapter V deals with the organization of the Commission's future work and a number of administrative and other questions.

A Membership and attendance

2. The Commission consists of the following members:

Mr. Roberto AGO (Italy);
Mr. Gonzalo ALCÍVAR (Ecuador);
Mr. Milan BARTOS (Yugoslavia);
Mr. Mohammed BEDJAOUI (Algeria);
Mr. Suat BILGE (Turkey);
Mr. Jorge CASTAÑEDA (Mexico);
Mr. Abdullah EL-ERIAN (Egypt);
Mr. Taslim O. ELIAS (Nigeria);
Mr. Edvard HAMBRO (Norway);
Mr. Richard D. KEARNEY (United States of America);
Mr. NAGENDRA SINGH (India);
Mr. Robert QUENTIN-BAXTER (New Zealand);
Mr. Alfred RAMANGASOAVINA (Madagascar);
Mr. Paul REUTER (France);
Mr. Zenon ROSSIDES (Cyprus);
Mr. José María RUDA (Argentina);
Mr. José SETTE CÂMARA (Brazil);
Mr. Abdul Hakim TABIBI (Afghanistan);
Mr. Arnold J. P. TAMMES (Netherlands);
Mr. Doudou THIAM (Senegal);
Mr. Senjin TSURUOKA (Japan);
Mr. Nikolai USHAKOV (Union of Soviet Socialist Republics);
Mr. Endre USTOR (Hungary);
Sir Humphrey WALDOCK (United Kingdom of Great Britain and Northern Ireland);
Mr. Mustafa Kamil YASSEEN (Iraq).

3. All members attended meetings of the twenty-fourth session of the Commission.

B. Officers

4. At its 1149th meeting, held on 2 May 1972, the Commission elected the following officers:

Chairman: Mr. Richard D. Kearney;
First Vice-Chairman: Mr. Endre Ustor;
Second Vice-Chairman: Mr. Alfred Ramangasoavina;
Rapporteur: Mr. Gonzalo Alcívar.

C. Drafting Committee

5. At its 1158th meeting, held on 15 May 1972, the Commission appointed a Drafting Committee composed as follows:

Chairman: Mr. Endre Ustor;

Members: Mr. Roberto Ago, Mr. Jorge Castañeda, Mr. Taslim O. Elias, Mr. Nagendra Singh, Mr. Robert Quentin-Baxter, Mr. Paul Reuter, Mr. Arnold J. P. Tammes, Mr. Nikolai Ushakov, Sir Humphrey Waldock and Mr. Mustafa Kamil Yasseen.

Mr. Gonzalo Alcívar took part in the Committee's work in his capacity as Rapporteur of the Commission.

D. Working Group on the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law

6. At its 1150th meeting, held on 3 May 1972 the Commission set up a Working Group on the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, composed as follows:

Chairman: Mr. Senjin Tsuruoka;
Members: Mr. Roberto Ago, Mr. Edvard Hambro, Mr. José Sette Câmara, Mr. Doudou Thiam and Mr. Nikolai Ushakov.

It was also decided that the Chairman of the Commission Mr. Richard D. Kearney, would attend the meetings of the Working Group as required.

E. Secretariat

7. Mr. Constantin A. Stavropoulos, Legal Counsel, attended the 1177th to 1179th meetings, held from 12 to 14 June 1972, and represented the Secretary-General on those occasions. Mr. Yuri M. Rybakov, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General at the other meetings of the session, and acted as Secretary to the Commission. Mr. Nicolas Teslenko acted as Deputy Secretary to the Commission and Mr. Santiago Torres-Bernárdez as Senior Assistant Secretary. Miss Jacqueline Dauchy and Mr. Eduardo Valencia-Ospina served as assistant secretaries.

F. Agenda

8. The Commission adopted an agenda for the twenty-fourth session, consisting of the following items:

1. Succession of States:
   (*a*) Succession in respect of treaties;
   (*b*) Succession in respect of matters other than treaties.
2. State responsibility.
3. Most-favoured-nation clause.
4. Question of treaties concluded between States and international organizations or between two or more international organizations.
5. Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law (para. 2 of section III of General Assembly resolution 2780 (XXVI).
6. (*a*) Review of the Commission's long-term programme of work: "Survey of International Law" prepared by the Secretary-General (A/CN.4/245); [1]
   (*b*) Priority to be given to the topic of the law of the non-navigational uses of international watercourses (para. 5 of section I of General Assembly resolution 2780 (XXVI)).
7. Organization of future work.
8. Co-operation with other bodies.
9. Date and place of the twenty-fifth session.
10. Other business.

9. In the course of the session, the Commission held 51 public meetings (1149th to 1199th meetings). In addition, the Drafting Committee held 10 meetings and the Working Group on the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law also held 10 meetings. The Commission concentrated on agenda items 1 (Succession of States: (a) succession in respect of treaties) and 5 (Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law); in connexion with each of these items, it adopted a complete set of draft articles. In view of the great difficulties of completing two sets of draft articles in the course of a ten-week session, the Commission did not consider the other topics on its agenda. However, taking into account the fact that at this session further reports were submitted by Special Rapporteurs on some of those topics, the Commission decided to include in chapter IV of the present report an account of the progress of work thereon resulting from the submission of those reports.

G. Address by the Secretary-General

10. The Secretary-General of the United Nations addressed the Commission at its 1194th meeting, held on 4 July 1972.

11. The Chairman of the Commission paid a tribute to the Secretary-General, who, since taking office, had actively striven to solve difficult problems by means based on respect for legal principles. The Secretary-General was not only a trained jurist, who, as Chairman of the Committee on the Peaceful Uses of Outer Space, had contributed to the development of outer space law, but also came from a country which had produced a number of eminent lawyers and was closely linked with the progress of international law, as shown by the very titles of several important codification conventions adopted under United Nations auspices.

12. The Secretary-General stressed the importance of international law and its role in modern life. He emphasized that, without strict respect for the rules of international law and the basic principles embodied in the United Nations Charter, it would be impossible to safeguard peace and promote the general welfare of nations. There was no long-term alternative to a policy of peaceful coexistence within the framework of international law, and differences in ideologies and social systems must not constitute obstacles to normal international relations based on principles such as those which had been solemnly proclaimed by the General Assembly in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), annex). After stressing the importance and quality of the work done by the Commission, the Secretary-General observed that, as a result of developments in political, economic and social life and of the scientific and technological revolution, urgent demands were being made on all the means which man had devised to achieve and maintain international order and particularly on international law. In that connexion the Secretary-General expressed the hope that when the Commission reviewed its long-term programme of work, it would take the opportunity to enhance the role of international law in the United Nations system. It was important that the codification and progressive development of international law should be pursued even more energetically in the future than in the past. In conclusion, the Secretary-General stressed the practical and doctrinal importance of the topics discussed at the twenty-fourth session and said he was confident that, in its report to the General Assembly, the Commission would once again fulfil the high expectations placed in its work.

[1] To be printed in *Yearbook of the International Law Commission, 1971*, vol. II (Part Two).

13. The Chairman referred in turn to the need for the Commission to move forward more rapidly in its important task. He emphasized that the Commission had so many topics on its agenda which demanded priority attention that it was impossible for it to deal with them all with its present resources and by the methods currently employed. He therefore expressed the hope that if the Commission were to make proposals in that connexion, the Secretary-General would give them favourable consideration.

Chapter II

SUCCESSION OF STATES: SUCCESSION IN RESPECT OF TREATIES

A. Introduction

1. Summary of the Commission's proceedings

14. At its nineteenth session in 1967, the International Law Commission made new arrangements for dealing with the topic "Succession of States and Governments".[2] It decided to divide the topic among more than one special rapporteur, the basis for the division being the three main headings of the broad outline of the subject laid down in the report submitted in 1963 by the Sub-Committee on Succession of States and Governments[3] and agreed to by the Commission the same year, namely: (*a*) succession in respect of treaties, (*b*) succession in respect of matters other than treaties,[4] and (*c*) succession in respect of membership of international organizations.

15. In 1967, the Commission also appointed Sir Humphrey Waldock Special Rapporteur for succession in respect of treaties and Mr. Mohammed Bedjaoui Special Rapporteur for succession in respect of matters other than treaties. The Commission decided to leave aside, for the time being, the third heading of the division, namely succession in respect of membership of international organizations.[5]

16. The Commission's decisions referred to above received general support in the Sixth Committee at the General Assembly's twenty-second session. By its resolution 2272 (XXII) of 1 December 1967, the General Assembly, repeating the terms of its resolution 2167 (XXI), recommended that the Commission should continue its work on succession of States and Governments "taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII)". Subsequently, the General Assembly made the same recommendation in its resolutions 2400 (XXIII) of 11 December 1968 and 2501 (XXIV) of 12 November 1969.

17. Sir Humphrey Waldock, the Special Rapporteur on succession in respect of treaties, submitted from 1968 to 1972 five reports on the topic. The first report,[6] which was of a preliminary character, was considered by the Commission at its twentieth session in 1968. Following the discussion of the report, the Commission concluded that it was not called upon to take any formal decision.[7] The Commission noted the Special Rapporteur's interpretation of his task as strictly limited to succession in respect of treaties, i.e. to the question how far treaties previously concluded and applicable with respect to a given territory might still be applicable after a change in the sovereignty over that territory; and his proposal to proceed on the basis that the present topic is essentially concerned only with the question of succession in respect of the treaty as such.[8] A summary of the views expressed was included for information in the Commission's report on the session.[9] It was also agreed that it would be for the Special Rapporteur to take account of the aspects of the general debate on succession in respect of matters other than treaties, held at the same session of the Commission,[10] in so far as they might also have reference to succession in respect of treaties.

18. At its twenty-second session, the Commission considered together, in a preliminary manner, the draft articles in the second[11] and third[12] reports, submitted by the Special Rapporteur in 1969 and 1970. The four draft

[2] For a detailed account of the historical background of the topic as a whole, see *Official Records of the General Assembly, Twenty-third Session, Supplement No. 9* (A/7209/Rev.1), pp. 21 *et seq.*, paras. 29-42 (*Yearbook of the International Law Commission, 1968*, vol. II, pp. 213 *et seq.*, document A/7209/Rev.1, paras 29-42) and *ibid., Twenty-fourth Session, Supplement No. 10* (A/7610/Rev.1), pp. 19 *et seq.*, paras. 20-34 (*ibid., 1969*, vol. II, pp. 222 *et seq.*, document A/7610/Rev.1, paras. 20-34).

[3] *Ibid., Eighteenth Session, Supplement No. 9* (A/5509), p. 41, annex II (*ibid., 1963*, vol. II, p. 260, document A/5509, annex II).

[4] Originally called "Succession in respect of rights and duties resulting from sources other than treaties". See *Official Records of the General Assembly, Twenty-third Session, Supplement No. 9* (A/7209/Rev.1), p. 25, para 46 (*Yearbook of the International Law Commission, 1968*, vol. II, p. 216, document A/7209/Rev.1, para 46).

[5] *Ibid., Twenty-second Session, Supplement No. 9* (A/6709/Rev.1), p. 24, paras 38-41 (*ibid., 1967*, vol. II, p. 368, document A/6709/Rev.1, paras, 38-41).

[6] *Yearbook of the International Law Commission, 1968*, vol. II, p. 87, document A/CN.4/202.

[7] *Official Records of the General Assembly, Twenty-third Session, Supplement No. 9* (A/7209/Rev.1), p. 29, paras 80-81 (*Yearbook of the International Law Commission, 1968*, vol. II, p. 221, document A/7209/Rev.1, paras 80-81).

[8] *Ibid.*, para 82 (*ibid.*, para 82).

[9] *Ibid.*, pp. 29 *et seq.*, paras 83-91 (*ibid.*, pp. 221 *et seq.*, paras 83-91).

[10] *Ibid.*, pp. 24 *et seq.*, paras 45-79 (*ibid.*, pp. 216 *et seq.*, paras. 45-79).

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

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

articles of the second report deal with the use of certain terms, the area of territory passing from one State to another (principle of "moving treaty frontiers"), devolution agreements, and unilateral declarations by successor States. The third report contains additional provisions on the use of terms, eight draft articles concerning treaties providing for the participation of "new States", the general rules governing the position of "new States" in regard to multilateral treaties and a note on the question of placing a time-limit on the exercise of the right to notify succession.

19. Having regard to the nature of the discussion, the Commission confined itself to endorsing the Special Rapporteur's general approach to the topic and did not take any formal decision on the substance of the draft articles considered. The Commission did, however, include in its 1970 report to the General Assembly extensive summaries both of the Special Rapporteur's proposals and of the views expressed by members who took part in the discussion.[13] By resolution 2634 (XXV), of 12 November 1970, the General Assembly recommended that the Commission should continue its work with a view to completing the first reading of draft articles on succession of States in respect of treaties.

20. At the Commission's twenty-third session, in 1971, the Special Rapporteur submitted his fourth report[14] containing an additional provision on the use of terms and five more draft articles on the general rules governing the position of "new States" in regard to bilateral treaties. Occupied with the completion of its draft on the representation of States in their relations with international organizations, the Commission, owing to lack of time, did not consider the topic of the succession of States in respect of treaties. It decided, however, to include in chapter III of its report on the session a section, prepared by the Special Rapporteur, containing an account of the progress of work on the topic.[15]

21. At the present session, the Special Rapporteur submitted his fifth report (A/CN.4/256 and Add.1-4)[16] designed to complete the series of draft articles in his second, third and fourth reports. The report is devoted to the rules applicable to particular categories of succession and to the "dispositive", "localized" or "territorial" treaties. It contains seven more draft articles. The part relating to particular categories of succession deals with protected States, mandates and trusteeships, colonies, and associated States, formation of non-federal and federal unions of States, dissolutions of a union of States and other dismemberments of a State into two or more States. It includes also a definition of "union of States" as well as an excursus on States, other than unions of States, which are formed from two or more territories.

22. The Commission considered the second, third, fourth and fifth reports submitted by the Special Rapporteur at its 1154th to 1181st, 1187th, 1190th and 1192nd to 1195th meetings and referred the draft articles contained therein to the Drafting Committee. At its 1176th, 1177th, 1181st, 1187th, 1196th and 1197th meetings, the Commission considered the reports of the Drafting Committee, which was also entrusted with the task of preparing the text of certain general provisions. At its 1197th meeting the Commission adopted a provisional draft on succession of States in respect of treaties as recommended by General Assembly resolution 2780 (XXVI) of 3 December 1971. The text of the draft articles and the commentaries thereto as adopted by the Commission are reproduced in section C below.

23. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit the provisional draft articles, through the Secretary-General, to Governments of Member States for their observations.

24. Since 1962, the Secretariat had prepared and distributed, in accordance with the Commission's requests, the following documents and publications relating to the topic: (*a*) a memorandum on "The succession of States in relation to membership in the United Nations";[17] (*b*) a memorandum on "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depository";[18] (*c*) a study entitled "Digest of the decisions of international tribunals relating to State succession"[19] and a supplement thereto;[20] (*d*) a study entitled "Digest of decisions of national courts relating to succession of States and Governments";[21] (*e*) seven studies in the series "Succession of States to multilateral treaties", entitled respectively "International Union for the Protection of Literary and Artistic Works: Berne Convention of 1886 and subsequent Acts of revision" (study I), "Permanent Court of Arbitration and The Hague Conventions of 1889 and 1907" (study II), "The Geneva Humanitarian Conventions and the International Red Cross" (study III), "International Union for the Protection of Industrial Property: Paris Convention of 1883 and subsequent Acts of revision and special agreements" (study IV), "The General Agreement on Tariffs and Trade (GATT) and its subsidiary instruments" (study V),[22] "Food and Agriculture Organization of the United Nations: Constitution and multilateral conventions and agreements concluded within the Organization and deposited with its Director-General" (study VI),[23] and "International Telecommunication Union: 1932 Madrid and 1947 Atlantic City International Telecommunication Conventions and subsequent revised Conventions and Telegraph, Telephone, Radio and Addi-

[13] *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 10* (A/8010/Rev.1), pp. 31 *et seq.*, paras 37-63 (*Yearbook of the International Law Commission, 1970*, vol. II, pp. 301 *et seq.*, document A/8010/Rev.1, paras 37-63).

[14] *Yearbook of the International Law Commission, 1971*, vol. II (Part One), document A/CN4/249.

[15] *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 10* (A/8410/Rev.1), pp. 63 *et seq.*, paras 62-70 (*Yearbook of the International Law Commission, 1971*, vol. II (Part One), document A/8410/Rev.1, paras 62-70).

[16] To be printed in *Yearbook of the International Law Commission, 1972*, vol. II.

[17] *Yearbook of the International Law Commission, 1962*, vol. II, p. 101, document A/CN.4/149 and Add.1.

[18] *Ibid.*, p. 106, document A/CN.4/150.

[19] *Ibid.*, p. 131, document A/CN.4/151.

[20] *Ibid., 1970*, vol. II, p. 170, document A/CN.4/232.

[21] *Ibid., 1963*, vol. II, p. 95, document A/CN.4/157.

[22] *Ibid., 1968*, vol. II, p. 1, document A/CN.4/200 and Add.1-2.

[23] *Ibid., 1969*, vol. II, p. 23, document A/CN.4/210.

tional Radio Regulations" (study VII);[24] (*f*) three studies in the series "Succession of States in respect of bilateral treaties", entitled respectively "Extradition treaties" (study I),[25] "Air transport agreements" (study II), and "Trade agreements" (study III);[26] (*g*) a volume of the United Nations Legislative Series entitled *Materials on succession of States*,[27] containing the information provided or indicated by Governments of Member States in response to the Secretary-General's request. A supplement to the volume was circulated at the present session of the Commission as document A/CN.4/263.

2. State practice

25. The General Assembly in its resolutions 1765 (XVII), of 20 November 1962, and 1902 (XVIII), of 18 November 1963, recommended that the Commission should proceed with its work on succession of States "with appropriate reference to the views of States which have achieved independence since the Second World War". The case of those new States, most of which emerged from former dependent territories, is the commonest form in which the issue of succession has arisen during the past twenty-five years and the stress laid on it by the General Assembly's recommendations needs neither justification nor explanation at the present moment in history. The Commission has therefore given special attention throughout the study of the topic to the practice of the newly independent States referred to in the above-mentioned resolutions of the General Assembly without, however, neglecting the relevant practice of older States. On the emergence of a newly independent State, the problems of succession which arise in respect of *treaties* are inevitably problems which by their very nature involve consensual relations with other existing States and, in the case of some multilateral treaties, a very large number of other States. Today, moreover, on the emergence of a new State, the problems of succession will touch as many recently emerged new States as it will old States.

26. It is in the nature of things that more recent practice must be accorded a certain priority as evidence of the *opinio juris* of today, especially when, as in the case of succession of States in respect of treaties, the very frequency and extensiveness of the modern practice tends to submerge the earlier precedents. No purpose would, however, be served by distinguishing sharply between the value of earlier and later precedents, since the basic elements of the situations giving rise to the questions of succession in respect of treaties in the earlier precedents were much the same as in modern cases. Moreover, if recent practice is extremely rich in matters relating to new States emerging from a dependent territory, the same cannot be said for other cases, such as, for instance, secession, dismemberment of an existing State, the formation of unions of States and the dissolution of a union of States. Nor can the Commission fail to recognize that the era of decolonization is nearing its completion and that it is in connexion with these other cases that in future problems of succession are likely to arise. The Commission has therefore taken into account, as appropriate, earlier precedents that throw light on these cases. In considering the various precedents, the Commission has tried to discern with sufficient clearness how far the State practice was an expression simply of policy and how far and in what points an expression of legal rights or obligations.

27. In addition, the Commission has borne in mind that new factors have come into play that affect the context within which State practice in regard to succession takes place today. Particularly important is the much greater interdependence of States, which has affected the policy of successor States in some measure in regard to continuing the treaty relations of the territory to which they have succeeded, and the fact that the modern precedents reflect the practice of States conducting their relations under the régime of the principles of the Charter of the United Nations. Important also is the enormous growth of international organizations and the contribution which they have made to the development of depositary practice and the collection and dissemination of information regarding the treaty relationships of successor States.

3. The concept of "succession of States" which emerged from the study of the topic

28. Analogies drawn from municipal law concepts of succession are frequent in the writings of jurists and are sometimes also to be found in State practice. A natural enough tendency also manifests itself both among writers and in State practice to use the word "succession" as a convenient term to describe any assumption by a State of rights and obligations previously applicable with respect to territory which has passed under its sovereignty without any consideration of whether this is truly succession by operation of law or merely a voluntary arrangement of the States concerned. Municipal law analogies, however suggestive and valuable in some connexions, have to be viewed with caution in international law, for an assimilation of States to individuals as legal persons neglects fundamental differences and may lead to unjustifiable conclusions derived from municipal law.

29. The approach to succession adopted by the Commission after its study of the topic of succession in respect of *treaties* is based upon drawing a clear distinction between, on the one hand, the fact of the replacement of one State by another in the responsibility for the international relations of a territory and, on the other, the transmission of treaty rights and obligations from the predecessor to the successor State. A further element in the concept is that a consent to be bound given by the predecessor State in relation to a territory prior to the succession of States, establishes a legal nexus between the territory and the treaty and that to this nexus certain legal incidents attach.

30. In order to make clear the distinction between the fact of the replacement of one State by another and the transmission of rights and obligations, the Commission inserted in article 2 a provision defining the meaning of

[24] *Ibid.*, *1970*, vol. II, p. 61, document A/CN.4/225.

[25] *Ibid.*, p. 102, document A/CN.4/229.

[26] To be printed in *Yearbook of the International Law Commission, 1971*, vol. II, Part Two, documents A/CN.4/243 and A/CN.4/243 Add.1.

[27] United Nations publication, Sales No. E/F.68.V.5.

the expression "succession of States" for the purpose of the draft. Under this provision the expression "succession of States" is used throughout the articles to denote simply a change in the responsibility for the international relations of a territory, thus leaving aside from the definition all questions of the rights and obligations as a legal incident of that change. The rights and obligations in respect of treaties deriving from a "succession of States", as defined in the draft, are then to be ascertained from the specific provisions of the articles themselves.

4. Relationship between succession in respect of treaties and the general law of treaties

31. A close examination of State practice afforded no convincing evidence of any general doctrine by reference to which the various problems of succession in respect of treaties could find their appropriate solution. The diversity in regard to the solutions adopted makes it difficult to explain this practice in terms of any fundamental principle of "succession" producing specific solutions to each situation. Nor is the matter made any easier by the fact that a number of different theories of succession are to be found in the writings of jurists. If any one specific theory were to be adopted, it would almost certainly be found that it could not be made to cover the actual practice of States, organizations and depositaries without distorting either the practice or the theory. If, however, the question of succession in respect of treaties is approached more from the point of view of the law of treaties some general rules are discernible in practice.

32. The task of codifying the law relating to succession of States in respect of treaties appears, in the light of State practice, to be rather one of determining within the law of treaties the impact of the occurrence of a "succession of States" than *vice versa*. It follows that, in approaching questions of succession of States in respect of treaties, the implications of the general law of treaties have constantly to be borne in mind. As today the most authoritative statement of the general law of treaties is that contained in the Vienna Convention on the Law of Treaties (1969),[28] the Commission felt bound to take the provisions of that Convention as an essential framework of the law relating to succession of States in respect of treaties.

33. Indeed, the question of the treatment to be accorded to succession of States arose during the codification of the law of treaties and the commentaries of the Commission to its draft articles on the law of treaties contained several references on the matter. It was for reasons of convenience, linked mainly to the need not to delay further the conclusion of the codification of the general law of treaties, that the Commission decided finally to insert in its draft a similar general reservation with regard to the problems arising from a succession of States to that which is embodied today in article 73 of the Vienna Convention with respect to the law of treaties generally.

34. Accordingly, the draft articles now submitted presuppose the existence of the provisions, wording and terminology of the Convention on the Law of Treaties. Several of the introductory provisions of the present draft—such as those concerning its scope, the use of terms, cases not within the scope of the draft, treaties constituting international organizations or adopted within them, and obligations imposed by international law independently of a treaty (articles 1-5)—follow closely the language of the corresponding provisions of the Vienna Convention. In one instance, article 15 (reservations), an express cross-reference is made to the relevant articles of the Vienna Convention; in other instances, as in article 17 (notification of succession), certain provisions of the Vienna Convention are reproduced with the adjustments necessary to fit them into the context of the present topic.

5. The principle of self-determination and the law relating to succession in respect of treaties

35. The Commission has taken account of the implications of the principles of the Charter of the United Nations, in particular self-determination, in the modern law concerning succession in respect of treaties. For this reason it has not felt able to endorse the thesis put forward by some jurists[29] that the modern law does, or ought to, make the presumption that a "newly independent State" consents to be bound by any treaties previously in force internationally with respect to its territory, unless within a reasonable time it declares a contrary intention. Those who advocate the making of that presumption are no doubt influenced by the ever-increasing interdependence of States, the consequential advantages of promoting the continuity of treaty relations in cases of succession and the considerable extent to which in the era of decolonization newly independent States have accepted the continuance of the treaties of the predecessor States. The presumption, however, touches a fundamental point of principle affecting the general approach to the formulation of the law relating to the succession of a newly independent State.

36. The Commission, after a study of State practice, concluded that it is one thing to admit on the plane of policy the general desirability of a certain continuity in treaty relations upon the occurrence of a succession and another thing to convert that policy into a legal presumption. The traditional principle that a new State begins its treaty relations with a clean slate, if properly understood and limited, was in the opinion of the Commission more consistent with the principle of self-determination. At the same time this principle was well-designed to meet the situation of newly independent States which emerge from former dependent territories. Consequently, the Commission was of the opinion that the main implication of the principle of self-determination in the law concerning succession in respect of treaties was precisely to confirm as the underlying norm for cases of newly independent

[28] For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

[29] See International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), pp. xiii-xv [Resolutions] and 596-632 [Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors].

States the traditional clean slate principle, which derived from the treaty practice relating to cases of secession.

37. The "clean slate" metaphor, the Commission wished to emphasize, is merely a convenient and succinct way of referring to the newly independent State's general freedom from obligation in respect of its predecessor's treaties. But that metaphor is misleading if account is not taken of other principles which effect the position of a newly independent State in relation to its predecessor's treaties. In the first place, as the commentaries to articles 12 and 13 make clear, modern treaty practice recognizes that a newly independent State has the right under certain conditions to establish itself as a party to any multilateral treaty, except one of a restricted character, in regard to which its predecessor State was either a "party" or a "contracting State" at the date of independence. In other words, the fact that prior to independence the predecessor State had established its consent to be bound by a multilateral treaty and its act of consent related to the territory now under the sovereignty of the successor State creates a legal nexus between that territory and the treaty in virtue of which the successor State has the right, if it wishes, to participate in the treaty on its own behalf as a separate party or contracting State. In the case of multilateral treaties of a restricted character and bilateral treaties, the successor State may invoke a similar legal nexus between its territory and the treaty as a basis for achieving the continuance in force of the treaty with the consent of the other State or States concerned. Accordingly, the so-called clean slate principle, as it operates in the modern law of succession of States, is very far from normally bringing about a total rupture in the treaty relations of a territory which emerges as a newly independent State. The modern law, while leaving the newly independent State free under the clean slate principle to determine its own treaty relations, holds out to it the means of achieving the maximum continuity in those relations consistent with the interests of itself and of other States parties to its predecessor's treaties. In addition, the clean slate principle does not, in any event, relieve a newly independent State of the obligation to respect a boundary settlement and certain other situations of a territorial character established by treaty.

38. The principal new factor which has appeared in the practice regarding succession of States during the United Nations period has been the use of agreements, commonly referred to as "devolution" or "inheritance" agreements, which are concluded between a predecessor and successor State and provide for the continuity of treaty rights and obligations or, alternatively, "unilateral declarations" by a successor State designed to regulate its treaty position after the succession of States. As to devolution agreements, quite apart from any question that may arise concerning their legal validity under the general law of treaties, it is clear that a devolution agreement cannot by itself alter the position of a successor State vis-à-vis other States parties to the predecessor State's treaties. The same is true *a fortiori* of purely unilateral declarations. In short, however useful such instruments as devolution agreements and unilateral declarations may be in promoting continuity of treaty relations, they still leave the effects of a succession of States to be governed essentially by the general law concerning succession in respect of treaties.

6. General features of the draft articles

(a) *Form of the draft*

39. The final form of the codification of the law relating to succession of States in respect of treaties and its precise relationship with the Vienna Convention on the Law of Treaties are clearly matters to be decided at a later stage, when the Commission has completed the second reading of the draft articles in the light of the comments and observations of Governments. At that time, in accordance with the provisions of its Statute, the Commission will make the recommendations on those matters which it considers appropriate.

40. Without prejudging those recommendations, the Commission has cast its study of the succession of States in respect of treaties in the form of a group of draft articles as recommended by the General Assembly. The draft articles have been prepared in a form to render them capable of serving as a basis for the conclusion of a convention should this be decided upon. The Commission was in any event of the view that the preparation of draft articles was the most appropriate and effective method of studying and identifying the rules of international law relating to succession of States in respect of treaties.

41. In this connexion, the Commission thought it desirable to comment briefly on the temporal element in any codification of the law of succession of States. Under the general law of treaties a convention is not binding upon a State unless and until it is a party to the convention. Moreover, under a general rule, now codified in article 28 of the Vienna Convention on the Law of Treaties, the provisions of a treaty, in the absence of a contrary intention "do not bind a party in relation to any act or fact which took place [...] before the date of the entry into force of the treaty with respect to that party." Since a succession of States in most cases brings into being a new State, a convention on the law of succession of States would *ex hypothesi* not be binding on the successor State unless and until it took steps to become a party to that convention; and even then the convention would not be binding upon it in respect of any act or fact which took place before the date on which it became a party. Nor would other States be bound by the convention in relation to the new State until the latter had become a party. Accordingly, the question may be raised as to the value of codifying the law of succession of States in the form of a convention. In the Commission's view, the consideration just mentioned does not really detract substantially from the value of a codifying convention as an instrument for consolidating legal opinion regarding the generally accepted rules of international law concerning succession of States. Such a convention has important effects in achieving general agreement as to the content of the law which it codifies and thereby establishing it as the accepted customary law on the matter. A new State, though not formally bound by the convention, would find in its provisions the norms by which to be guided in dealing with questions arising from the succession of States.

(b) *Scope of the draft*

42. The draft articles, as the title to the present chapter indicates, are limited to succession of *States* in respect of *treaties*. The topic of succession on the Commission's programme was entitled "Succession of States and Governments". But in 1963 the Commission decided that priority should be given to succession of States and that succession of Governments should be studied "only to the extent necessary to supplement the study on State succession." [30] This decision having been endorsed by the General Assembly, the Commission has limited its draft on succession in respect of treaties to questions arising in connexion with the succession of *States*. It also follows that the draft does not deal with any questions concerning the succession of subjects of international law other than States, in particular international organizations.

43. The limitation of the draft articles to succession in respect of *treaties* is the consequence of the Commission's decision in 1967 [31] to study succession in respect of treaties as a distinct part of the topic of succession of States. The scope of the draft articles is also narrowed by the meaning given to the term "treaty" in article 2, subparagraph 1 (*a*), which confines the treaties covered by the draft to treaties "concluded between States" and "in written form". This provision excludes from the scope of the draft succession of States in respect of: (*a*) treaties concluded between States and other subjects of international law; (*b*) treaties concluded between such other subjects of international law; and (*c*) international agreements not in written form. The Commission decided to limit the scope of the draft in these respects for several reasons. First, the considerations which led the Commission and the United Nations Conference on the Law of Treaties to exclude these three categories of international agreements from the scope of the codification of the general law of treaties in the Vienna Convention appear to apply with equal force to the codification of the present topic. Secondly, since the present articles are designed to supplement the Vienna Convention by codifying the general law governing succession in respect of treaties, it seems desirable in the interests of uniformity in codification that they should cover the same range of treaties as that Convention. Thirdly, so far as concerns treaties to which subjects of international law other than States are parties, the Commission noted that its study of the question of treaties concluded between States and international organizations or between two or more international organizations is still in its early stages.[32]

44. The Convention on the Law of Treaties, in article 73, excluded specifically from its purview "any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States." [33] Clearly, the exclusion of questions of succession of States is out of place in the present draft. But this is not so with the exclusion of questions concerning State responsibility and the outbreak of hostilities. The Commission therefore considered that, as in the case of the general law of treaties and for the same reasons,[34] a provision should be inserted in the draft articles including a general reservation in regard to these questions. In addition, the Commission considered that it should make a similar reservation excluding from the purview of the present draft any question that may arise in regard to a treaty from a *military occupation*. Although military occupation may not constitute a "succession of States" within the meaning given to that term in article 2 of the present draft, it may raise analogous problems.[35]

(c) *Scheme of the draft*

45. The topic of succession of States in respect of treaties has traditionally been expounded in terms of the effect upon the predecessor State's treaties of various categories of events, notably: annexation of territory of the predecessor State by another State; voluntary cession of territory to another State; birth of a new State as a result of the separation of part of the territory of a State; formation of a union of States; dissolution of a union; entry into the protection of another State and termination of such protection; enlargement or loss of territory. In addition to studying the traditional categories of succession of States, the Commission took into account the treatment of dependent territories in the Charter of the United Nations. It concluded that for the purpose of codifying the modern law of succession of States in respect of treaties it would be sufficient to arrange the cases of succession of States under three broad categories: (*a*) transfers of territory; (*b*) newly independent States; (*c*) the uniting of States, the dissolution of a State and the separation of part of a State.

46. In dealing with the various cases of succession of States the Commission found it necessary in a number of instances to distinguish between three categories of treaties: (*a*) multilateral treaties in general; (*b*) multilateral treaties of a restricted character; and (*c*) bilateral treaties. The distinction between multilateral treaties in general and multilateral treaties of a restricted character was also made in article 20, paragraph 2, of the Vienna Convention on the Law of Treaties in connexion with the acceptance of reservations. In the present articles, the Commission found it necessary to include a separate provision for multilateral treaties of a restricted character

[30] *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9* (A/5509), p. 36, para 57 (*Yearbook of the International Law Commission, 1963*, vol. II, p. 224, document A/5509, para. 57).

[31] See paras 14-15 above.

[32] This topic has been taken up by the Commission in accordance with the recommendation of the General Assembly in resolution 2501 (XXIV), of 12 November 1969, following upon the resolution adopted by the United Nations Conference on the Law of Treaties entitled "Resolution relating to article 1 of the Vienna Convention on the Law of Treaties" (*Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publications, Sales No. E.70.V.5), p. 285).

[33] *Ibid.*, p. 229.

[34] See the introduction to the draft articles on the law of treaties adopted by the Commission: *Official Records of the General Assembly, Twenty-first Session, Supplement No. 9* (A/6309/Rev.1), part II, p. 9, paras 29-31 (*Yearbook of the International Law Commission, 1966*, vol. II, pp. 176-177, document A/6309/Rev.1, part II, paras 29-31).

[35] See below, Article 31 (Cases of military occupation, State responsibility and outbreak of hostilities) and the commentary thereto.

in several places, and in doing so it used language modelled on that used in the above-mentioned provision of the Vienna Convention.

47. The Commission further found it necessary to distinguish a particular category of treaties by reference to the particular substance and effect of their provisions; or, more accurately, to distinguish the régimes established by such treaties as constituting particular cases for purposes of the law of succession of States. These particular cases concern boundaries and régimes of a territorial character established by treaty and are covered in part V of the draft articles.

48. Part IV contains a "miscellaneous" article which makes a general reservation concerning any question that may arise in regard to a treaty from military occupation of territory, State responsibility or the outbreak of hostilities.

49. Taking into account the above points, the Commission has provisionally arranged the draft articles as follows:

Part I: General provisions (articles 1 to 9);

Part II: Transfer of territory (article 10);

Part III: Newly independent States (articles 11 to 25);

Part IV: Uniting, dissolution and separation of States (articles 26 to 28);

Part V: Boundary régimes or other territorial régimes established by a treaty (articles 29 and 30);

Part VI: Miscellaneous provisions (article 31).

50. Some members of the Commission stressed the importance of examining in due course the question of the possible need for provisions concerning the settlement of disputes arising out of the interpretation and application of the present draft articles. The Commission considered it premature to take up this question at the present session.

51. In the course of its study of the case of newly independent States the Commission considered the question whether any time-limit ought to be placed on the exercise of the option to notify succession to a multilateral treaty. It felt that there were considerations both against and in favour of such a time-limit, and that it would be in a better position to arrive at a decision on the point after receiving the comments of Governments on the draft articles. Accordingly, it did not include any provision on the point in the draft articles at the present stage of its work.

52. In conclusion, the Commission points out that the articles that it has formulated on succession of States in respect of treaties in the present report contain elements of progressive development as well as of codification fo the law.

B. Resolution adopted by the Commission

53. The Commission at its 1199th meeting, on 7 July 1972, after adopting, on the basis of the proposals made by the Special Rapporteur, the text of the draft articles on succession of States in respect of treaties and the commentaries, adopted by acclamation the following resolution:

The International Law Commission,

Having adopted provisionally the draft articles on succession of States in respect of treaties,

Desires to express its deep appreciation and thanks to the Special Rapporteur, Sir Humphrey Waldock. The draft articles on that subject and the commentaries thereto illustrate the invaluable contribution of wisdom, learning and devoted effort that Sir Humphrey Waldock has made to the development of the law of treaties.

C. Draft articles on succession of States in respect of treaties

PART I.

GENERAL PROVISIONS

Article 1. Scope of the present articles

The present articles apply to the effects of succession of States in respect of treaties between States.

Commentary

(1) This article corresponds to article 1 of the Vienna Convention on the Law of Treaties [36] and its purpose is to limit the scope of the present articles in two important respects.

(2) First, it gives effect to the Commission's decision that the scope of the present articles, as of the Vienna Convention itself, should be restricted to matters concerning treaties concluded between States.[37] It therefore underlines that the provisions which follow are designed for application only to "the effects of succession of State in respect of treaties *between States* *." This restriction also finds expression in article 2, sub-paragraph 1 (*a*), which gives to the term "treaty" the same meaning as in the Vienna Convention, a meaning which specifically limits the term to "an international agreement concluded between States".

(3) It follows that the present articles have not been drafted so as to apply to succession of States in respect of treaties to which other subjects of international law, and in particular international organizations, are parties. At the same time, the Commission recognized that the principles which they contain may in some measure also be applicable with reference to treaties to which other subjects of international law are parties. Accordingly, in article 3 it has made a general reservation on this point analogous to that in article 3 of the Vienna Convention.

(4) Secondly, articles 1 gives effect to the Commission's decision that the present articles should be confined to succession of *States* in respect of treaties.[38] By using the words "the effects of succession of *States* *", the article is designed to exclude both "succession of governments" and "succession of other subjects of international law", notably international organizations, from the scope of the present articles. This restriction of their scope finds

[36] For all references to the Vienna Convention on the Law of Treaties, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publications, Sales No. E.70.V.5), p. 289,

[37] See above, sect. A, para 43.

[38] *Ibid.*, para 42.

further expression in article 2, sub-paragraph 1 (*b*), which provides that the term "succession of States" means for the purposes of the present draft "the replacement of one *State by another in the responsibility for the international relations of territory* *".

Article 2. Use of terms

1. For the purposes of the present articles:

(*a*) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(*b*) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(*c*) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(*d*) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(*e*) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

(*f*) "newly independent State" means a State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible;

(*g*) "notification of succession" means in relation to a multilateral treaty any notification, however phrased or named, made by a successor State to the parties or, as the case may be, contracting States or to the depositary expressing its consent to be considered as bound by the treaty;

(*h*) "full powers" means in relation to a notification of succession a document emanating from the competent authority of a State designating a person or persons to represent the State for making the notification;

(*i*) "ratification", "acceptance" and "approval" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(*j*) "reservation" means a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty or when making a notification of succession to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

(*k*) "contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(*l*) "party" means a State which has consented to be bound by the treaty and for which the treaty is in force;

(*m*) "other State party" means in relation to a successor State any party, other than the predecessor State, to a treaty in force at the date of a succession of States in respect of the territory to which that succession of States relates;

(*n*) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Commentary

(1) This article, as its title and the introductory words of paragraph 1 indicate, is intended only to state the meaning with which terms are used in the draft articles.

(2) *Sub-paragraph 1* (a) reproduces the definition of the term "treaty" given in article 2, sub-paragraph 1 (*a*), of the Vienna Convention on the Law of Treaties. It results from the general conclusions reached by the Commission concerning the scope of the present draft articles and its relationship with the Vienna Convention.[39] Consequently, the term "treaty" is used throughout the present draft articles, as in the Vienna Convention, as a general term covering all forms of international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

(3) *Sub-paragraph 1* (b) specifies the sense in which the term "succession of States" is used in the draft articles and is of cardinal importance for the whole structure of the draft. The definition corresponds to the concept of "succession of States" which emerged from the study of the topic by the Commission. Consequently, the term is used as referring exclusively to *the fact of the replacement* of one State by another in the responsibility for the international relations of territory, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event. The rights and obligations deriving from a "succession of States" are those specifically provided for in the present draft articles.[40]

(4) The Commission considered that the expression "in the responsibility for the international relations of territory" is preferable to other expressions such as "in the sovereignty in respect of territory" or "in the treaty making competence in respect of territory", because it is a formula commonly used in State practice and more appropriate to cover in a neutral manner any specific case independently of the particular status of the territory in question (national territory, trusteeship, mandate, protectorate, dependent territory, etc.). The word "responsibility" should be read in conjunction with the words "for the international relations of territory" and does not intend to convey any notion of "State responsibility", a topic currently under study by the Commission and in respect of which a general reservation has been inserted in article 31 of the present draft.

(5) The meanings attributed in *sub-paragraph 1* (c), *1* (d) and *1* (e) to the terms "predecessor State", "suc-

[39] *Ibid.*, para 43.

[40] *Ibid.*, paras 28-30.

cessor State" and "date of the succession of States" are merely consequential upon the meaning given to "succession of States" in sub-paragraph 1 (*b*) and do not appear to require any comment.

(6) The expression "newly independent State", defined in *sub-paragraph 1* (f), signifies a State which has arisen from a succession of States in a territory which immediately before the date of the succession of States *was a dependent territory for the international relations of which the predecessor State was responsible*. After studying the various historical types of dependent territories (colonies, trusteeships, mandates, protectorates, etc.), the Commission concluded that their characteristics do not today justify differences in treatment from the standpoint of the general rules governing succession of States in respect of treaties.[41] Consequently, the definition includes any case of emergence to independence of a former dependent territory whatever its particular type may be. On the other hand, the definition excludes cases concerning the emergence of a new State as a result of a separation of part of an existing State, of a uniting of two or more existing States or of a dissolution of an existing State. It is to differentiate clearly these cases from the case of the emergence to independence of a former dependent territory that the expression "newly independent State" has been chosen instead of the shorter expression "new State".

(7) *Sub-paragraph 1* (g) defines the term "notification of succession". This term connotes the act by which a successor State establishes on the international plane its consent to be bound by a multilateral 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 further dealt with in article 17, but in general any notification containing the requisite declaration of will of the successor State suffices. The successor State's notification of succession should be addressed to the parties or, as the case may be, contracting States or to the depositary.

(8) The definition of the term "full powers" in relation to a notification of succession (*sub-paragraph 1* (h)) corresponds with the phraseology used for the definition of that term in article 2, sub-paragraph 1 (*c*), of the Vienna Convention on the Law of Treaties. The terms and expressions "ratification", "acceptance" and "approval" (*sub-paragraph 1* (i)), "reservation" (*sub-paragraph 1* (j)), "contracting State" (*sub-paragraph 1* (k)), "party" (*sub-paragraph 1* (l) and "international organization" (*sub-paragraph 1* (n)) reproduce the wording of the corresponding terms and expressions of the Vienna Convention and are used with the sense given to them in that Convention.

(9) In drafting rules regarding succession in respect of treaties, particularly in respect of bilateral treaties, there is a need for a convenient expression to designate the other parties to treaties concluded by the predecessor State and in respect of which the problem of succession arises. The expression "third State" is not available since it has already been made a technical term in the Vienna Convention denoting "a State *not* * a party to the treaty" (article 2, sub-paragraph 1 (*h*)). Simply to speak of "the other party to the treaty" does not seem entirely satisfactory because the question of succession concerns the *triangular* position of the predecessor State, the successor State and the other State which concluded the treaty with the predecessor State. Moreover, the expression "other party" has too often to be used—and is too often used in the Vienna Convention—in its ordinary general sense for its use as a term of art in the present articles with a special meaning to be acceptable. It therefore seems necessary to find another expression to use as a term of art denoting the other parties to a predecessor State's treaties. The Commission considered that the expression "other State party" was an appropriate one for this purpose and accordingly inserted it with the corresponding definition in article 2 as *sub-paragraph* 1 (m).

(10) Lastly, *paragraph 2* corresponds to paragraph 2 of article 2 of the Vienna Convention on the Law of Treaties. The provision is designed to safeguard in matters of terminology the position of States in regard to their internal law and usages.

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

The fact that the present articles do not apply to the effects of succession of States in respect of international agreements concluded between States and other subjects of international law or in respect of international agreements not in written form shall not affect:

(*a*) The application to such cases of any of the rules set forth in the present articles to which they would be subject under international law independently of these articles;

(*b*) The application as between States of the present articles to the effects of succession of States in respect of international agreements to which other subjects of international law are also parties.

[41] The Commission recognized that in the traditional law of succession of States, protected *States* have in some degree been distinguished from other dependencies of a State. Thus, treaties of the protected State concluded prior to its entry into protection have been considered as remaining in force; and treaties concluded by the protecting Power specifically in the name and on behalf of the protected State have been considered as remaining in force for the protected State after termination of the protectorate. But the Commission did not think that a codification of the law of succession of States today need or should provide for the case of "protected States". The Commission also discussed whether any special provision should be included in the draft in regard to possible cases in future of a succession of States relating to an "associated State". It felt, however, that the arrangements for such associations vary considerably and that the rule to be applied would depend on the particular circumstances of each association.

Commentary

(1) This article corresponds to article 3 of the Vienna Convention on the Law of Treaties. Its purpose is simply to prevent any misconception which might result from the express limitation of the scope of the draft articles to succession of States in respect of treaties concluded between States and in written form.

(2) The reservation in *sub-paragraph* (a) recognizes that certain of the provisions of the draft may be of general application and relevant also in cases excluded from the scope of the present articles. It therefore preserves the possibility of the "application to such cases of any of the rules set forth in the present articles to which they would be subject under international law independently of these articles".

(3) The reservation in *sub-paragraph* (b), is based on a provision added by the United Nations Conference on the Law of Treaties to the Commission's draft articles on the law of treaties. It safeguards the application of the rules set forth in the draft articles *to the relations between States* in cases of a succession of States in respect of an international agreement to which not only States but also other subjects of international law are likewise parties. The reservation underlines the general character of the codification of the law on State succession embodied in the present draft articles so far as the relations between States are concerned, notwithstanding the formal limitation of the scope of the draft articles to succession of States in respect of treaties between States.

(4) In addition, however, to the necessary drafting changes, this article differs from article 3 of the Vienna Convention on the Law of Treaties in some respects. First, the 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. Treaties constituting international organizations and treaties adopted within an international organization

The present articles apply to the effects of succession of States in respect of:

(*a*) Any treaty which is the constituent instrument of an international organization without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization;

(*b*) Any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

Commentary

(1) This article parallels article 5 of the Vienna Convention on the Law of Treaties. As with the general law of treaties, it seems essential to make the application of the present articles to treaties which are constituent instruments of an international organization subject to any relevant rules of the organization. This is all the more necessary in that succession in respect of constituent instruments necessarily encroaches upon the question of admission to membership which in many organizations is subject to particular conditions and therefore involves the law of international organizations. This was indeed one of the reasons why the Commission in 1967 decided to leave aside for the time being the subject of succession in respect of membership of international organizations.[42]

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

> 2. That when a new State is created, whatever may be the territory and the populations which it comprises and whether or not they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.[43]

New States have, therefore, been regarded as entitled to become members of the United Nations only by admission, and not by succession. The same practice has been followed in regard to membership of the specialized agencies and of numerous other organizations.[44]

(3) The practice excluding succession is clearest in cases where membership of the organization is dependent on a

[42] *Official Records of the General Assembly, Twenty-second Session, Supplement No. 9* (A/6709/Rev.1), p. 25, para 41 (*Yearbook of the International Law Commission*, 1967, vol. II, p. 368, document A/6709/Rev.1, para 41).

[43] *Yearbook of the International Law Commission, 1962*, vol. II, p. 103, document A/CN.4/149 and Add.1, paras 15-16.

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

formal process of admission, but it is not confined to them. It appears to extend to cases where accession or acceptance of the constituent treaty suffices for entry, but where membership of the organization is a material element in the operation of the treaty. Thus, any Member of the United Nations may become a member of WHO simply by the acceptance of the WHO Convention but "notifications of succession" are not admitted in the practice of WHO from new States even if they were subject to the régime of the Convention prior to independence and are now Members of the United Nations.[45] The position is similar in regard to IMCO and was explained to Nigeria by the Secretary-General of that Organization as follows:

> In accordance with the provisions of article 9 of the Convention, the Federation of Nigeria was admitted as an associate member of IMCO on 19 January 1960. Since that date Nigeria has attained independence and has been admitted as a Member of the United Nations. The Secretary-General [of IMCO], in drawing attention to the fact that the Convention contains no provision whereby an associate member automatically becomes a full member, advised Nigeria of the procedure to be followed, as set out in articles 6 and 57 of the Convention, should it wish to become a full member of the Organization. The Secretary-General's action was approved by the Council at its fourth session.[46]

In other words, membership of the organization being in issue, the new State cannot simply notify the depositary of its succession by a notification made, for instance, in accordance with article 17 of the present draft articles. It must proceed by the route prescribed for membership in the constituent treaty—i.e. deposit of an instrument of acceptance.[47]

(4) On the other hand, when a multilateral treaty creates a weaker association of its parties, with no formal process of admission, it seems that the general rule prevails and that a new State may become a party and a member of the association by transmitting a notification of succession to the depositary. Thus the Swiss Government, as depositary, has accepted notifications of succession from new States in regard to the Berne Convention (1886) and subsequent Acts of revision which form the International Union for the Protection of Literary and Artistic Works;[48] and it has done the same in regard to the Paris Convention (1883) and subsequent Acts of revision and special agreements which form the International Union for the Protection of Industrial Property.[49] This practice appears to have met with the approval of the other parties to the instruments.

(5) Some constituent treaties provide expressly for 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 9 of the present draft articles and are referred to in the commentary to that article. Succession to membership is, of course, then open to an appropriately qualified new State; but the new State's right is one conferred by the treaty rather than a true right of succession. This may possibly be the explanation of the practice in regard to membership of the Permanent Court of Arbitration.[50] The Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes provided that (*a*) States represented at or invited to the Peace Conferences might either ratify or accede, and (*b*) accession by other States was to form the subject of a "subsequent agreement between the Contracting Powers".[51] By decisions of 1955, 1957 and 1959, the Administrative Council of the Court directed the Netherlands Government, as depositary, to ask new States whether they considered themselves a party to either of the Conventions. All the Contracting Parties to the Conventions were consulted before the invitation was issued, so that this may have been a case of a subsequent agreement to create a right of succession. If not, the case seems to belong to those mentioned in paragraph (4) of the present commentary, where the element of membership is not sufficiently significant to oust the general principles of succession of States in respect of multilateral treaties.

(6) In the case of some organizations the question of succession may be complicated by the fact that the constituent treaty admits the possibility of separate or associate membership for dependent territories. Examples of such organizations are ITU, UNESCO, UPU and WHO. The practice in regard to such separate or associate membership has not been entirely uniform. The two "Unions" [ITU and UPU] seem, in general, to have allowed a succession to membership in cases where the new State already had a separate identity during its existence as a dependent territory having the status of a member, but to have insisted on "admission" or "accession" where it had been merely one part of a collective "dependent" member, e.g. one of a number of dependencies grouped together as a single member.[52] The majority of new States have therefore experienced a formal break in their membership of the two Unions during the period between the date of independence and their admission or accession to membership. On the other hand, they appear to have been dealt with *de facto* during that period as if they still continued to be within the Unions. As to the two other agencies, neither UNESCO nor WHO recognizes any process of succession converting an associate into a full member on the attainment of independence.[53] Both organizations require new States to comply with the normal admission procedures applicable to Members of the United Nations or, as the case may be, to other States. Both organizations, however, have at the same time adopted the principle that a former associate member which, after independence, indicates its wish to become a member, remains subject to the obligations and entitled to the rights of an associate member during the interval before it obtains full membership.

(7) With regard to treaties adopted within an international organization, membership may again be a factor

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[45] *Yearbook of the International Law Commission, 1962*, vol. II, p. 124, document A/CN.4/150, paras. 145.

[46] *Ibid.*, p. 118, para. 98; also *ibid.*, p. 124, paras. 145-146.

[47] ICAO and ITU are examples of other organizations in which the same principle is applied.

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

[49] *Ibid.*, pp. 57-72, paras. 246-314.

[50] *Ibid.*, pp. 28-32, paras. 109-127.

[51] *Ibid.*, p. 27, para. 104.

[52] *Ibid., 1970*, vol. II, p. 61, document A/CN.4/225.

[53] See International Law Association, *The Effect... (op. cit.)*, pp. 256-258, 327-330 and 334-339.

to be taken into account in regard to a new State's participation in these treaties. This is necessarily so when participation in the treaty is indissolubly linked with membership of the organization. In other cases, where there is no actual incompatibility with the object and purpose of the treaty, admission to membership may be a precondition for notifying succession to multilateral treaties adopted within an organization, but the need for admission does not exclude the possibility of a new State's becoming a party by "succession" rather than by "accession". Thus, although the International Air Services Transit Agreement (1944) is open for acceptance only by members of ICAO,[54] several newly independent States, after their admission to the organization, have claimed the right to consider themselves as continuing to be parties to the Agreement, and this claim has not been questioned either by the depositary, the United States of America, or by the other parties to the Agreement.[55] Similarly, although membership of UNESCO or of the United Nations is necessary for participation in the Agreement on the Importation of Educational, Scientific and Cultural Materials (1950)[56] this has not prevented a number of newly independent States, after acquiring membership, from notifying their succession to this Agreement.[57] Again, some seventeen newly independent States have transmitted notifications of succession to the 1946 Convention on the Privileges and Immunities of the United Nations[58] which, under its Final Article (section 31), is open only to accession by Members of the Organization.

(8) In the case of international labour conventions, which also presuppose that their contracting parties will be members of the ILO, membership has been used by the organization as a means of bringing about succession to labour conventions. Beginning with Pakistan in 1947, a practice has grown up under which, on being admitted to membership, every newly independent State makes a declaration recognizing that it continues to be bound by the obligations entered into in respect of its territory by its predecessor. This practice, initiated through the secretariat of the ILO in its early stages, had one or two exceptions,[59] but it has now become so invariable that it has been said to be inconceivable that a new State should ever in future become a member without recognizing itself to be bound by labour conventions applicable in respect of its territory on the date of its independence. Furthermore, although these declarations are made in connexion 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 independent State's becoming a party by "succession" rather than "accession".[60]

(10) In the light of the foregoing, the question may even be asked whether the law of succession applies to constituent instruments of international organizations at all. For example, the right of participation of a newly independent State in multilateral treaties in force by a notification of succession cannot 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 dissolution of a union of States in which the question of the participation in the organization of the separated States has been approached from the standpoint of the law concerning succession in respect of treaties. In addition, succession in respect of a constituent instrument is not necessarily linked to matters relating to membership. For instance, the "moving treaty frontiers" rule applies in the case of treaties constituting an international organization. In short, while the rules of succession of States frequently do not apply in respect of a constituent instrument of an international organization, it would be incorrect to say that they do not apply at all to this category of treaties. In principle, the relevant rules

[54] Article VI. See United Nations, *Treaty Series*, vol. 84, p. 396.

[55] Pakistan (1948), Ceylon (1957), Federation of Malaya (1959), Madagascar (1962) and Dahomey (1963) (see United Nations, *Materials on Successions of States* (United Nations publication, Sales No. E/F.68.V.5), pp. 224-226.

[56] Article IX. See United Nations, *Treaty Series*, vol. 131, p.32. Under this article other States may be invited to become parties, but no such invitations appear to have been issued.

[57] Ghana (1958), Malaysia (1959), Nigeria (1961), Zaire (1962), Sierra Leone (1962), Cyprus (1963), Rwanda (1964), Trinidad and Tobago (1966), Malta (1968) and Mauritius (1969). See United Nations, *Multilateral treaties in respect of which the Secretary-General performs depositary functions: List of signatures, ratifications, accessions etc. as at 31 December 1971* (United Nations publication, Sales No. E.72.V.7), pp. 318-319.

[58] United Nations, *Treaty Series*, vol. 1, p. 15.

[59] Ceylon (1948), Vietnam (1950) and Libya (1952), preferred to declare that they would give early consideration to the formal ratification of the conventions. Indonesia (1950) at first made a similar declaration, but later decided to take the position that it considered itself as continuing to be bound by its predecessor's ratifications.

[60] Five States have transmitted notifications of succession to the Secretary-General in respect of the Convention on the Political Rights of Women and seven States also in respect of the Convention on the Nationality of Married Women (see United Nations, *Multilateral Treaties... 1971 (op. cit.)*, pp. 329, 330 and 335).

of the organization are paramount, but they do not exclude altogether the application of the general rules of succession of States in respect of treaties in cases where the treaty is a constituent instrument of an international organization.

(11) As to "treaties adopted within an international organization", the possibility clearly exists that organizations should develop their own rules for dealing with questions of succession. For example, as already mentioned, the ILO has developed a consistent practice regarding the assumption by "successor" members of the organization of the obligations of ILO conventions previously applicable within the territory concerned. Without taking any position as to whether this particular practice has the status of a custom or of an internal rule of that organization, the Commission considers that a general reservation of relevant rules of organizations is necessary to cover such practices with regard to treaties adopted within an international organization.

(12) The basic principle for both categories of treaties dealt with in the article is therefore the same, namely that the rules of succession of States in respect of treaties apply to them "without prejudice to" any relevant rules of the organization in question. Having regard, however, to the fundamental importance of the rules concerning the acquisition of membership in relation to succession of States in respect of constituent instruments, the Commission thought it advisable to make special mention of rules concerning acquisition of membership in cases involving constituent instruments. Accordingly, since this point arises only in connexion with constituent instruments the Commission has divided the article into two sub-paragraphs and in the first sub-paragraph has referred specifically to both "rules concerning acquisition of membership" and "any other relevant rules of the organization".

(13) As to the meaning of the term "rules" in article 4, it may be useful to recall the statement made by the Chairman of the Drafting Committee of the United Nations Conference on the Law of Treaties, according to which the term "rules" in the parallel article of the Convention on the Law of Treaties applies both to written rules and to unwritten customary rules of the organization, but not to mere procedures which have not reached the stage of mandatory legal rules.[61]

(14) Having inserted in the present article these general provisions concerning the application of the rules embodied in the draft to constituent instruments of international organizations and to treaties adopted within international organizations, the Commission has not made specific reservations in this regard in later articles.

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

The fact that a treaty is not in force in respect of a successor State as a result of the application of the present articles shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

Commentary

Article 5 is modelled on article 43 of the Vienna Convention on the Law of Treaties which reproduces almost verbatim article 40 of the Commission's draft 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:

... The Commission considered that although the point might be regarded as axiomatic, it was desirable to underline that the termination of a treaty would not release the parties from obligations embodied in the treaty to which they were also subject under any other rule of international law.[62]

For the same reason, the Commission deemed it desirable to include a general provision in part I of the present draft making it clear that the non-continuance in force of a treaty upon a succession of States as a result of the application of the draft in no way relieved the successor State of obligations embodied in the treaty which were also obligations to which it would be subject under international law independently of the treaty.

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

The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

Commentary

(1) The Commission in preparing draft articles for the codification of the rules of general international law normally assumes that these articles are to apply to facts occurring and situations established in conformity with international law. Accordingly, it does not as a rule state that their application is so limited. Only when matters not in conformity with international law call for specific treatment or mention does it deal with facts or situations not in conformity with international law. Thus, in its draft articles on the law of treaties the Commission included, among others, specific provisions on treaties procured by coercion and treaties which conflict with the norms of *jus cogens* as well as certain reservations in regard to the specific subjects of State responsibility, outbreak of hostilities and cases of aggression. But the Commission—and the Conference on the Law of Treaties—otherwise assumed that the provisions of the Convention on the Law of Treaties would apply to facts occurring and situations established in conformity with international law.

[61] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), p. 147, 28th meeting of the Committee of the Whole, para. 15.

[62] *Ibid., Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 57.

(2) Some members of the Commission considered that it would suffice to rely upon the same general presumption in drafting the present articles and that it was unnecessary to specify that the articles would apply only to the effects of a succession of States occurring in conformity with international law. Other members, however, were of the opinion that, in regard particularly to transfers of territory, it was desirable to underline that only transfers occurring in conformity with international law 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 amongst the general articles a provision safeguarding the question of the lawfulness of the succession of States dealt with in the present articles. Accordingly, article 6 provides that the present articles relate only to the effects of a succession of States occurring in conformity with international law.

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

1. A predecessor State's obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State towards other States parties to those treaties in consequence only of the fact that the predecessor and successor States have concluded an agreement providing that such obligations or rights shall devolve upon the successor State.

2. Notwithstanding the conclusion of such an agreement, the effects of a succession of States on treaties which, at the date of that succession of States, were in force in respect of the territory in question are governed by the present articles.

Commentary

(1) Article 7 deals with the legal effects of agreements by which, upon a succession of States, the predecessor and successor States have sought to make provision for the devolution to the successor of the obligations and rights of the predecessor under treaties formerly applicable in respect of the territory concerned. Those agreements, commonly referred to as "devolution agreements", have been quite frequent particularly, although not exclusively, in cases of the emergence of a dependent territory into a sovereign State in the post-war process of decolonization.

(2) Some of the newly independent States which have not concluded devolution agreements have taken no formal step to indicate their general standpoint regarding succession in respect of treaties; such is the case, for example, with States which have emerged from former French African territories. Quite a number of newly independent States, however, have made unilateral declarations of a general character, in varying terms, by which they have taken a certain position—negative or otherwise—in regard to the devolution of treaties concluded by the predecessor State with reference to their territory. These declarations, although they have affinities with devolution agreements, are clearly distinct types of legal acts and are therefore considered separately in article 8 of the draft. The present article is concerned only with *agreements* between the predecessor and successor State purporting to provide for the devolution of treaties.

(3) The conclusion of "devolution agreements" seems to be due primarily to the fact that it was the established practice of the United Kingdom to propose a devolution agreement to its overseas territories on their emergence as independent States and to the fact that many of these territories entered into such an agreement. New Zealand also concluded a devolution agreement with Western Samoa [63] on the same model as that of the United Kingdom agreement with its overseas territories, as did also Malaysia with Singapore on the latter's separation from Malaysia.[64] Analogous agreements were concluded between Italy and Somalia [65] and between the Netherlands and Indonesia.[66] As to France, it concluded devolution agreements in a comprehensive form with, respectively, Laos and Viet-Nam [67] and an agreement in more particular terms with Morocco,[68] but devolution agreements do not seem to have been usual between France and her former African territories.[69] The terms of these agreements vary to some extent, more especially when the agreement deals with a particular situation, as in the case of the France-Morocco and Italy-Somalia Agreements. But, with the exception of the Indian Independence (International Arrangements) Order (1947) [70] providing for the special cases of India and Pakistan, the agreements are in the form of treaties; and, with some exceptions, notably the French agreements, they have been registered as such with the Secretariat of the United Nations.

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[63] Exchange of letters of 30 November 1962 (see United Nations, *Treaty Series*, vol. 476, pp. 4 and 6).

[64] Agreement between Malaysia and Singapore relating to the separation of Singapore from Malaysia as an independent and sovereign State, signed at Kuala Lumpur on 7 August 1965. See document A/CN.4/263 (supplement prepared by the Secretariat to *Materials on Succession of States (op. cit.)*), Singapore, Treaties.

[65] Treaty of Friendship (with Exchange of Notes) concluded between Italy and Somalia, Mogadiscio, 1 July 1960. For the original Italian text see *Diritto Internazionale*, vol. XVI, 1962, pp. 440-442. English text provided by the United Kingdom Government appears in United Nations, *Materials on Succession of States (op. cit.)*, pp. 169-170.

[66] Draft Agreement on Transitional Measures included in the Round-Table Conference Agreement between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia of 27 December 1949 (see United Nations *Treaty Series*, vol. 69, p. 266.)

[67] Traité d'amitié et d'association entre le Royaume du Laos et la République française (22 October 1953), article 1, in United Nations *Materials on Succession of States (op. cit.)*, p. 72, and Treaty of Independence, signed 4 June 1954, between Viet-Nam and the French Republic, article 2 (*British and Foreign State Papers, 1954* (London, H.M.S.O., 1963), vol. 161, p. 649.

[68] Convention diplomatique franco-marocaine (20 May 1956) (see *Annuaire français de droit international, 1956* (Paris 1957), vol. II, p. 133).

[69] One such Agreement seems to have been made between France and the Ivory Coast.

[70] *British and Foreign State Papers, 1947*, (London, H.M.S.O., 1955), Part I, vol. 147, pp. 158-176.

(4) Devolution agreements are of interest from two separate aspects. The first is the extent to which, if any, they are effective in bringing about a succession to or continuance of the predecessor State's treaties; and the second is the evidence which they may contain of the views of States concerning the customary law governing succession of States in respect of treaties. The second aspect is considered in the commentary to article 11. The present article thus deals only with the legal effects of a devolution agreement as an instrument purporting to make provisions concerning the treaty obligations and rights of a newly independent State. The general feature of devolution agreements is that they provide for the transmission from the predecessor to the successor State of the obligations and rights of the predecessor State in respect of the territory under treaties concluded by the predecessor and applying to the territory. A typical example of a devolution agreement is, for instance, the agreement concluded in 1957 between the Federation of Malaya and the United Kingdom by an Exchange of Letters.[71] The operative provisions, contained in the United Kingdom's letter, read as follows:

I have the honour to refer to the Federation of Malaya Independence Act, 1957, under which Malaya has assumed independent status within the British Commonwealth of Nations, and to state that it is the understanding of the Government of the United Kingdom that the Government of the Federation of Malaya agree to the following provisions:

(i) All obligations and responsibilities of the Government of the United Kingdom which arise from any valid international instrument are, from 31 August, 1957, assumed by the Government of the Federation of Malaya in so far as such instruments may be held to have application to or in respect of the Federation of Malaya.

(ii) The rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to or in respect of the Federation of Malaya are from 31 August, 1957, enjoyed by the Government of the Federation of Malaya.

I shall be grateful for your confirmation that the Government of the Federation of Malaya are in agreement with the provisions aforesaid and that this letter and your reply shall constitute an agreement between the two Governments.[72]

(5) The question of the legal effects of such an agreement as between the parties to it, namely as between the former sovereign and the successor State, cannot be separated from that of its effects vis-à-vis third States, for third States have rights and obligations under the treaties with which a devolution agreement purports to deal. Accordingly, it seems important to consider how the general rules of international law concerning treaties and third States, that is articles 34 to 36 of the Vienna Convention on the Law of Treaties, apply to devolution agreements, and this involves determining the intention of parties to those agreements. A glance at a typical devolution agreement, like that reproduced in that preceding paragraph, suffices to show that the intention of the parties to these agreements is to make provision *as between themselves for their own obligations and rights* under the treaties concerned and is not to make provision for obligations or rights of third States, within the meaning of articles 35 and 36 of the Vienna Convention. It may be that, in practice, the real usefulness of a devolution agreement is in facilitating the continuance of treaty links between a territory newly independent and other States. But the language of devolution agreements does not normally admit of their being interpreted as being intended to be the means of establishing obligations or rights for third States. According to their terms they deal simply with the transfer of the treaty obligations and rights of the predecessor to the successor State.

(6) A devolution agreement has then to be viewed, in conformity with the apparent intention of its parties, as a purported assignment by the predecessor to the successor State of the former's obligations and rights under treaties previously having application to the territory. It is, however, extremely doubtful whether such a purported assignment *by itself* changes the legal position of any of the interested States. The Vienna Convention on the Law of Treaties contains no provisions regarding the assignment either of treaty rights or of treaty obligations. The reason is that the institution of "assignment" found in some national system of law by which, under certain conditions, contract rights may be transferred without the consent of the other party to the contract does not appear to be an institution recognized in international law. In international law the rule seems clear that an agreement by a party to a treaty to assign either its obligations or its rights under the treaty cannot bind any other party to the treaty without the latter's consent. Accordingly, a devolution agreement is in principle ineffective by itself to pass either treaty obligations or treaty rights of the predecessor to the successor State. It is an instrument which, *as a treaty*, can be binding only as between the predecessor and successor States and the direct legal effects of which are necessarily confined to them.

(7) Turning now to the direct legal effects which devolution agreements may have as between the predecessor and the successor State, and taking the assignment of obligations first, it seems clear that, from the date of independence, the treaty obligations of the predecessor State cease automatically to be binding upon itself in respect of the territory now independent. This follows from the principle of moving treaty frontiers which is as much applicable to a predecessor State in the case of independence as in the case of the mere transfer of territory to another existing State dealt with in article 10, because the territory of the newly independent State has ceased to be part of the entire territory of the predecessor State. Conversely, on the date of succession, the territory passes into the treaty régime of the newly independent State; and, since the devolution agreement is incapable by itself of effecting an assignment of the predecessor's treaty obligations to the successor State without the assent of the other States parties, the agreement does not *of its own force* establish any treaty nexus between the successor State and other States parties to the treaties of the predecessor State.

(8) As to the assignment of rights, it is crystal clear that a devolution agreement cannot bind the other States parties to the predecessor's treaties (who are "third States" in relation to the devolution agreement) and cannot, therefore, operate by itself to transfer to the successor State any rights vis-à-vis those other States parties. Consequently, however, wide may be the lan-

[71] United Nations, *Treaty Series*, vol. 279, p. 287.

[72] *Ibid.*, p. 288.

guage of a devolution agreement and whatever may have been the intention of the predecessor and successor States, the devolution agreement cannot of its own force pass to the successor State any treaty rights of the predecessor State which would not in any event pass to it independently of that agreement.

(9) It is also evident that in the great majority of cases the treaties of the predecessor State will involve both obligations and rights in respect of the territory. In most cases, therefore, the passing of obligations and the passing of rights to the successor State under a treaty are questions which cannot be completely separated from each other.

(10) Consequently, it must be concluded that devolution agreements do not by themselves materially change for any of the interested States (successor State, predecessor State, other States parties) the position which they would otherwise have. The significance of such an agreement is primarily an indication of the intentions of the newly independent State in regard to the predecessor's treaties and a formal and public declaration of the transfer of responsibility for the treaty relations of the territory. This follows from the general principles of the law of treaties and appears to be confirmed by State practice. At the same time devolution agreements may play a role in promoting continuity of treaty relations upon independence.[73]

(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 largely automatic effects to devolution agreements[74] but to have evolved afterwards in the direction of regarding them rather as a general expression of intention. The present practice of the Secretary-General appears to be based on the view that, notwithstanding the conclusion of a devolution agreement, a newly independent State ought not to be included among the parties to a multilateral treaty without first obtaining confirmation that this is in accord with its intention. Thus the Secretariat memorandum on "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary", dated 1962, explains that, when a devolution agreement has been registered or has otherwise come to the knowledge of the Secretary-General, a letter is written to the new State which refers to the devolution agreement and continues on the following lines:

> It is the understanding of the Secretary-General, based on the provisions of the aforementioned agreement, that your Government recognizes itself bound, as from [the date of independence], by all international instruments which had been made applicable to [the new State] by [its predecessor] and in respect of which the Secretary-General acts as depositary. The Secretary-General would appreciate it if you would confirm this understanding *so that in the exercise of his depositary functions he could notify all interested States accordingly.** [75]

Again, when considering whether to regard a new State as a party for the purpose of counting the number of parties needed to bring a convention into force, it is the new State's specific notification of its will with regard to that convention, not its devolution agreement, which the Secretary-General has treated as relevant.

(13) The Secretary-General does not receive a devolution agreement in his capacity as a depositary of multilateral treaties but under Article 102 of the United Nations Charter in his capacity as registrar and publisher of treaties. The registration of a devolution agreement, even after publication in the United Nations *Treaty Series*, can therefore not be equated with a notification by the newly independent State to the Secretary-General, as depositary, of his intention to become a separate party to a specific multilateral treaty. Some further manifestation of will on the part of the newly independent State with reference to the particular treaty is needed to establish definitively the newly independent State's position as a party to the treaty in its own name.

(14) The practice of other depositaries of multilateral treaties equally does not seem to support the idea that a devolution agreement, as such, operates to effect or perfect a succession to a multilateral treaty without any notification of the State's will specifically with reference to the treaty in question. Occasionally, some reliance seems to have been placed on a devolution agreement as a factor in establishing a State's participation in a 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.[76] But in its general

[73] For an assessment of the value of devolution agreements, see International Law Association, *The Effect... (op. cit.)*, chapter 9.

[74] See "Summary of the practice of the Secretary-General as Depositary of multilateral treaties" (ST/LEG/7), paras 108-134.; and legal opinion given to the United Nations High Commissioner for Refugees in United Nations, *Juridical Yearbook, 1963* (United Nations publication, Sales No. 65.V.3), pp. 181-182.

[75] *Yearbook of the International Law Commission, 1962*, vol. II, p. 122, document A/CN.4/150, p. 122, para. 133.

[76] *Ibid., 1968*, vol. II, pp. 13-14, document A/CN.4/200 and Add. 1-2, paras. 26-29.

practice as depositary of this and of other Conventions, including the Geneva humanitarian conventions, the Swiss Government does not seem to have treated a devolution agreement as a sufficient basis for considering a successor State as a party to the convention but has acted only upon a declaration or notification of the State in question.[77] Indonesia also has made it plain in another connexion that it does not interpret its devolution agreement as committing it in respect of individual treaties. Furthermore, it appears from the practice of the United States published in *Materials on Succession of States*[78] that the United States also acts only upon a declaration or notification of the successor State, not upon its conclusion of a devolution treaty, in determining whether that State should be considered a party to a multilateral treaty for which the United States is the depositary.

(15) The practice of individual States, whether "successor" States or interested "third" States, may be less clear cut but it also appears to confirm the limited significance of devolution agreements. The United Kingdom has sometimes appeared to take the view that a devolution agreement may suffice to constitute the successor State a party to United Kingdom treaties previously applied to the territory in question. Thus, in 1961 the United Kingdom appears to have advised the Federation of Nigeria that its devolution agreement would suffice to establish Nigeria as a separate party to the Warsaw Convention of 1929 and Nigeria appears on that occasion ultimately to have accepted that point of view.[79] On the other hand, Nigeria declined to treat her devolution agreement as committing her to assume the United Kingdom's obligations under certain extradition treaties.[80] In any event, the United Kingdom seems previously to have advised the Government of Burma rather differently in regard to that same Warsaw Convention.[81] Moreover, when looking at the matter as a "third State", the United Kingdom has declined to attribute any automatic effects to a devolution agreement. Thus, when informed by Laos that it considered the Anglo-French Civil Procedure Convention of 1922 as continuing to apply between Laos and the United Kingdom in consequence of a devolution agreement, the United Kingdom expressed its *willingness* that this should be so but added that the United Kingdom

wished it to be understood that the Convention continued in force not by virtue of the 1953 Franco-Laotian Treaty of Friendship, but because Her Majesty's Government and the Government of Laos were agreed that the 1922 Anglo-French Civil Procedure Convention sh ld continue in force as between the United Kingdom and Laos.[8-]

The Laos Government, it seems, acquiesced in this view. Similarly, in the case concerning the Temple of Preah Vihear[83] Thailand in the proceedings on its preliminary objections formally took the position before the International Court of Justice that in regard to "third States" devolution agreements are *res inter alios acta* and in no way binding upon them.

(16) A devolution agreement is treated by the United States as an "acknowledgement in general terms of the continuance in force of agreements" justifying the making of appropriate entries in its *Treaties in Force* series.[84] But the United States does not seem to regard the devolution agreement as conclusive of the attitude of the newly independent State with respect to individual treaties; nor its own entry of an individual treaty against the name of the new State in the *Treaties in Force* series as doing more than record a presumption or probability as to the continuance in force of the treaty vis-à-vis that State. The practice of the United States seems rather to be to seek to clarify the newly independent State's intentions and to arrive at a common understanding with it in regard to the continuance in force of individual treaties.[85]

(17) Many newly independent States which have entered into devolution agreements have recognized themselves as bound by some at least of the multilateral conventions of which the Secretary-General is depositary previously applied with respect to their territories. Some of these States, on the other hand, have not done so.[86] In the case of other general multilateral treaties the position seems to be broadly the same.[87] In the case of bilateral treaties, newly independent States appear not to regard a devolution agreement as committing them vis-à-vis third States to recognize the continuance in force of each and every treaty but reserve the right to make known their intentions with respect to each particular treaty. The Government of Indonesia, for instance, took this position very clearly in a Note of 18 October 1963 to the Embassy of the Federal Republic of Germany.[88] Neither this Note nor a previous Note addressed by the Indonesian

[77] *Ibid.*, pp. 16 *et seq.*, paras. 35-85, and pp. 39 *et seq.*, paras. 158-224.

[78] *Op. cit.*, pp. 224-228.

[79] *Ibid.*, p. 181.

[80] *Ibid.*, pp. 193-194.

[81] *Ibid.*, pp. 180-181.

[82] *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).

[83] See *I.C.J. Pleading, 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.

[84] 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).

[85] 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.

[86] For example, Indonesia and Somalia (see *Yearbook of the International Law Commission, 1962*, vol. II, pp. 110 and 111, document A/CN.4/150, paras. 21 and 31-33, and *ibid.*, p. 119, para. 106).

[87] *Ibid., 1968*, vol. II, p. 1, document A/CN.4/200 and Add.1-2. The case of international labour conventions is special owing to the practice of the ILO requiring new States to recognize the continuance of labour conventions on their admission to the organization.

[88] United Nations, *Materials on Succession of States (op. cit.,)*, p. 37. In the Westerling case, Indonesia invoked the Anlo-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).

Government to the United Kingdom in similar terms in January 1961 [89] appears to have met with any objection from the other State. While referring to its devolution agreement as evidence of its willingness to continue certain United Kingdom-United States treaties in force after independence, Ghana in its correspondence with the United States reserved a certain liberty to negotiate regarding the continuance of any particular clause or clauses of any existing treaties.[90] Equally, in correspondence with the United Kingdom concerning extradition treaties Nigeria seems to have considered herself as possessing a wide liberty of appreciation in regard to the continued application of this category of treaties,[91] as also in correspondence with the United States.[92] Even where the successor State is in general disposed in pursuance of its devolution agreement to recognize the continuity of its predecessor's treaties, it not infrequently finds it necessary or desirable to enter into an agreement with a third State providing specifically for the continuance of a particular treaty.[93]

(18) The practice of States does not admit, therefore, the conclusion that a devolution agreement should be considered as by itself creating a legal nexus between the successor State and third States parties in relation to treaties applicable to the successor State's territory prior to its independence. Some successor States and some third States parties to one of those treaties have undoubtedly tended to regard a devolution agreement as creating a certain presumption of the continuance in force of certain types of treaties. But neither successor States not 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.[94]

(19) In the light of the foregoing, *paragraph 1* of the present article declares that the obligations and rights of a predecessor State under treaties in force in respect of a territory at the date of a succession of States do not become the obligations and rights of the successor State towards other States parties in consequence *only* of the fact that the predecessor and successor States have concluded a devolution agreement. In order to remove any possible doubt on the point, it spells out the rule, which emerges both from general principles and State practice, that a devolution agreement does not of its own force create any legal nexus between the successor State and other States parties.

(20) *Paragraph 2* of the article then provides that, even if a devolution agreement has been concluded, "the effects of a succession of States" on treaties which at the date of a succession were in force in respect of the territory in question are governed by the present articles. This does not deny the relevance which a devolution agreement may have as a general expression of the successor State's policy in regard to continuing its predecessor's treaties in force nor its significance in the process of bringing about the continuance in force of a treaty. What the paragraph says is that notwithstanding the conclusion of a devolution agreement the effects of a succession of States are governed by the rules of general international law on succession of States in respect of treaties codified in the present articles. It emphasizes that a devolution agreement cannot *of itself* pass to the successor State vis-à-vis other States parties any treaty obligations or rights which would not in any event pass to it under general international law.

(21) Lastly, on the question of the intrinsic validity as treaties of "devolution agreements", some members considered that this question should be approached from the point of view of "coercion", and in particular of political or economic coercion. They felt that devolution agreements may be the price paid to the former sovereign for freedom and that in such cases the validity of a devolution agreement could not be sustained. Other members observed that, although the earlier devolution agreements may in some degree have been regarded as part of the price of independence, later agreements seem rather to have been entered into for the purpose of obviating the risk of a total gap in the treaty relations of the newly independent State and at the same time recording the former sovereign's disclaimer of any future liability under its treaties in respect of the territory concerned. Having regard to the fact that the question of the validity of a devolution agreement is one which necessarily falls under the general law of treaties recently codified in the Vienna Convention, on the Law of Treaties, the Commission concluded that it was not necessary to include any special provision on the point in the present articles. The validity of a devolution agreement in any given case should, in its view, be left to be determined by the relevant rules of the general law of treaties as set out in the Vienna Convention, in particular in articles 42 to 43.

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

1. A predecessor State's obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States parties to those treaties in consequence only of the fact that the successor

[89] *Ibid.*, p. 186.

[90] *Ibid.*, pp. 211-213.

[91] *Ibid.*, pp. 193-194.

[92] See International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), p. 630 [Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors, annex E].

[93] For example, agreements between India and Belgium (see Belgium, *Moniteur belge* (Brussels), 26 February 1955, Year 1955, No. 57, p. 967); Pakistan and Belgium (United Nations, *Treaty Series*, vol. 133, pp. 200-202); Pakistan and Switzerland (Switzerland, *Recueil officiel des lois et ordonnances de la Confédération suisse* (Bern), 15 December 1955, Year 1955, No. 50, p. 1168); Pakistan and Argentina (United Nations, *Materials on Succession of States (op. cit.)*, pp. 6-7); United States and Trinidad and Tobago and United States and Jamaica (*ibid.*, pp. 220-224).

[94] Another consideration to be taken into account is the difficulty in some cases of identifying the treaties covered by a devolution agreement.

State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory.

2. In such a case the effects of the succession of States on treaties which at the date of that succession of States were in force in respect of the territory in question are governed by the present articles.

Commentary

(1) As indicated in paragraph (2) of the commentary to article 7, a number of the newly independent States have made unilateral declarations of a general character whereby they have stated a certain position in regard to treaties having application in respect of their respective territories prior to the date of the succession of States. The present article deals with the legal effect of these unilateral declarations in the relations between the declarant State and other States parties to the treaties in question.

(2) In March 1961 the United Kingdom Government suggested to the Government of Tanganyika that, on independence, it should enter into a devolution agreement by exchange of letters, as had been done by other British territories on their becoming independent States. Tanganyika replied that, according to the advice which it had received, the effect of such an agreement might be that it (*a*) would enable third States to call upon 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 treaties for a period of two years from the date of independence (i.e., until 8 December 1963) unless abrogated or modified earlier by mutual consent. At the expiry of that period, the Government of Tanganyika will regard such of these treaties which could not by the application of the rules of customary international law be regarded as otherwise surviving, as having terminated.
>
> It is the earnest hope of the Government of Tanganyika that during the aforementioned period of two years, the normal processes of diplomatic negotiations will enable it to reach satisfactory accord with the States concerned upon the possibility of the continuance or modification of such treaties.
>
> The Governement of Tanganyika is conscious that the above declaration applicable to bilateral treaties cannot with equal facility be applied to multilateral treaties. As regards these, therefore, the Government of Tanganyika proposes to review each of them individually and to indicate to the depositary in each case what steps it wishes to take in relation to each such instrument —whether by way of confirmation of termination, confirmation of succession or accession. During such interim period of review any party to a multilateral treaty which has prior to independence been applied or extended to Tanganyika may, on a basis of reciprocity, rely as against Tanganyika on the terms of such treaty.[95]

At Tanganyika's express request, the Secretary-General circulated the next of its declaration to all Members of the United Nations.

The United Kingdom then in turn wrote to the Secretary-General requesting him to circulate to all Members of the United Nations a declaration couched in the following terms:

> I have the honour [. . .] to refer to the Note dated 9 December 1961 addressed to your Excellency by the then Prime Minister of Tanganyika, setting out his Government's position in relation to international instruments concluded by the United Kingdom, whose provisions applied to Tanganyika prior to independence. Her Majesty's Government in the United Kingdom hereby declare that, upon Tanganyika becoming an independent Sovereign on 9th of December 1961, they ceased to have the obligations or rights, which they formerly had, as the authority responsible for the administration of Tanganyika, as a result of the application of such international instruments to Tanganyika.[96]

In other words, the United Kingdom caused to be circulated to all Members of the United Nations a formal disclaimer, so far as concerned the territory of Tanganyika, of any obligations or rights of the United Kingdom under treaties applied by it to that territory prior to independence.

(3) The precedent set by Tanganyika [97] has been followed by a number of other newly independent States whose unilateral declarations have, however, taken varying forms.[98]

(4) Botswana in 1966 and Lesotho in 1967 [99] made declarations in the same terms as Tanganyika. In 1969 Lesotho requested the Secretary-General to circulate to all Members of the United Nations another declaration extending the two-year period of review for bilateral treaties specified in its 1967 declaration for a further period of two years. At the same time, it pointed out that its review of its position under multilateral treaties was still in progress and that, under the terms of its previous declaration, no formal extension of the period was necessary. The new declaration concluded with the following *caveat*:

> The Government of the Kingdom of Lesotho wishes it to be understood that this is merely a transitional arrangement. Under no circumstances should it be implied that by this Declaration Lesotho has either acceded to any particular treaty or indicated continuity of any particular treaty by way of succession.[100]

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[95] United Nations, *Materials on Succession of States (op. cit.)*, pp. 177-178.

[96] *Ibid.*, p. 178.

[97] For the subsequent declaration made by the United Republic of Tanzania on the Union of Tanganyika with Zanzibar, see paragraph 10 of the present commentary.

[98] For the declaration of Tonga, see document A/CN.4/263 (Supplement prepared by the Secretariat to *Materials on Succession of States (op. cit.)*), United Kingdom of Great Britain and Northern Ireland, Treaties, Tonga.

[99] *Ibid.*, Treaties, Botswana and Lesotho.

[100] *Ibid.*, Treaties, Lesotho.

(5) In 1968 Nauru also made a declaration which, with some minor differences of wording, follows the Tanganyika model closely. But the Nauru declaration does differ on one point of substance to which attention is drawn because of its possible interest in the general question of the existence of rules of customary law regarding succession in the matter of treaties with respect to bilateral treaties. The Tanganyika declaration provides that on the expiry of the provisional period of review Tanganyika will regard such of them as "*could not by the application of the rules of customary international law be regarded as otherwise surviving*,* as having terminated".[101] The Nauru declaration, on the other hand, provides that Nauru will regard "each such treaty as having terminated *unless it has earlier agreed with the other contracting party to continue that treaty in existence* *" [102] without any reference to customary law. In addition, Nauru requested the circulation of its declaration to members of the specialized agencies as well as to States Members of the United Nations.[103]

(6) Uganda, in a Note to the Secretary-General of 12 February 1963,[104] made a declaration applying a single procedure of provisional application to both bilateral and multilateral treaties. The declaration stated that in respect of all treaties validly concluded by the United Kingdom on behalf of the Uganda Protectorate or validly extended to it before 9 October 1962 (the date of independence) Uganda would continue to apply them, on the basis of reciprocity, until the end of 1963, unless they should be abrogated, or modified by 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.[105]

Kenya[106] and Malawi[107] subsequently requested the Secretary-General to notify Members of the United Nations of declarations made by them in the same forms a 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.

(7) In September 1965 Zambia communicated to the Secretary-General a declaration framed on somewhat different lines:

> I have the honour to inform you that the Government of Zambia, conscious of the desirability of maintaining existing legal relationships, and conscious of its obligations under international law to honour its treaty commitments, acknowledges that many treaty rights and obligations of the Government of the United Kingdom in respect of Northern Rhodesia were succeeded to by Zambia upon independence by virtue of customary international law.
>
> Since, however, it is likely that in virtue of customary international law, certain treaties may have lapsed at the date of independence of Zambia, it seems essential that each treaty should be subjected to legal examination. It is proposed, after this examination has been completed, to indicate which, if any, of the treaties which may have lapsed by customary international law the Government of Zambia wishes to treat as having lapsed.
>
> The question of Zambia's succession to treaties is complicated by legal questions arising from the entrustment of external affairs powers to the former Federation of Rhodesia and Nyasaland. Until these questions have been resolved it will remain unclear to what extent Zambia remains affected by the treaties contracted by the former Federation.
>
> It is desired that it be presumed that each treaty has been legally succeeded to by Zambia and that action be based on this presumption until a decision is reached that it should be regarded as having lapsed. Should the Government of Zambia be of the opinion that it has legally succeeded to a treaty and wishes to terminate the operation of the treaty, it will in due course give notice of termination in the terms thereof.
>
> The Government of Zambia desires that this letter be circulated to all States members of the United Nations and the United Nations specialized agencies, so that they will be effected with notice of the Government's attitude.[108]

Subsequently, declarations in the same form were made by Guyana, Barbados and Mauritius.[109] The declarations of Barbados and Mauritius did not contain anything equivalent to the third paragraph of the Zambia declaration. The Guyanese declaration, on the other hand, did contain a paragraph similar to that third paragraph, dealing with Guyana's special circumstances, and reading as follows:

> Owing to the manner in which British Guiana was acquired by the British Crown, and owing to its history previous to that date,

[101] See paragraph 2 above.

[102] United States of America, Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1972*, Dept. of State publication No. 8628 (Washington D.C., U.S. Government Printing Office), p. 169.

[103] Full text of the declaration in communication dated 28 May 1968 transmitted by the Secretary-General on 2 July 1968 (LE 222 NAURU).

[104] See United Nations, *Materials on Succession of States (op. cit.)*, pp. 179-180. See also the explanatory statement of the Government of Uganda in Sessional Paper No. 2 of 1963 in International Law Association, *The Effect... (op. cit.)*, p. 386.

[105] In Uganda's declaration the statement in terms refers only to multilateral treaties; but Uganda's intention seems clearly to be that parties to any of the treaties should be able, on the basis of reciprocity, to rely on their terms as against itself during the period of review.

[106] For the text of Kenya's declaration, see document A/CN.4/263 (Supplement prepared by the Secretariat to *Materials on Succession of States (op. cit.)*), United Kingdom of Great Britain and Northern Ireland, Treaties, Kenya.

[107] For the text of Malawi's declaration, *ibid.*, Malawi, Treaties.

[108] *Ibid.*, United Kingdom of Great Britain and Northern Ireland, Treaties, Zambia.

[109] *Ibid.*, Treaties, Guyana, Barbados and Mauritius.

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[110] in the same terms as in the case of Tanganyika.[111]

(9) Swaziland, in 1968, framed its declaration in terms which are at once simple and comprehensive:

I have the honour [...] to declare on behalf of the Government of the Kingdom of Swaziland that for a period of two years with effect from 6 September, 1968, the Government of the Kingdom of Swaziland accepts all treaty rights and obligations entered into prior to independence by the British Government on behalf of the Kingdom of Swaziland, during which period the treaties and international agreements in which such rights and obligations are embodied will receive examination with a view to determining, at the expiration of that period of two years, which of those rights and obligations will be adopted, which will be terminated, and which of these will be adopted with reservations in respect of particular matters.[112]

The declaration was communicated to the Secretary-General with the request that it should be transmitted to all States Members of the United Nations and members of the specialized agencies.

(10) In 1964 the Republic of Tanganyika and the People's Republic of Zanzibar were united into a single sovereign State which subsequently adopted the name of United Republic of Tanzania. Upon the occurrence of the union the United Republic addressed a Note to the Secretary-General informing him of the event and continuing:

The Secretary-General is asked to note that the United Republic of Tanganyika and Zanzibar declares that it is now a single Member of the United Nations bound by the provisions of the Charter, and that all international treaties and agreements in force between the Republic of Tanganyika or the People's Republic of Zanzibar and other States or international organizations will, to the extent that their implementation is consistent with the constitutional position established by the Articles of Union, remain in force within the regional limits prescribed on their conclusion and in accordance with the principles of international law.[113]

The Note concluded by requesting the Secretary-General to communicate its contents to all Member States of the United Nations, to all organs, principal and subsidiary of the United Nations, and to the specialized agencies. The Note did not in terms continue in force, or refer to in any way, the previous declaration made by Tanganyika in 1961.[114] But equally it did not annul the previous declaration which seems to have been intended to continue to have effects according to its terms with regard to treaties formerly in force in respect of the territory of Tanganyika.

(11) Two States formerly dependent upon Belgium have also made declarations which have been circulated to States Members of the United Nations. Rwanda's declaration, made in July 1962, was in quite general terms:

The Rwandese Republic undertakes to comply with the international treaties and agreements, concluded by Belgium and applicable to Rwanda, which the Rwandese Republic does not denounce or which have not given rise to any comments on its part.

The Government of the Republic will decide which of these international treaties and agreements should in its opinion apply to independent Rwanda, and in so doing will base itself on international practice.

These treaties and agreements have been and will continue to be the subject of detailed and continuous investigations.[115]

(12) Burundi, on the other hand, in a Note of June 1964, framed a much more elaborate declaration which was cast somewhat on the lines of the Tanganyika declaration. It read:

The Ministry of Foreign Affairs and Foreign Trade of the Kingdom of Burundi presents its compliments to U Thant, Secretary-General of the United Nations, and has the honour to bring to his attention the following Declaration stating the position of the Government of Burundi with regard to international agreements entered into by Belgium and made applicable to the Kingdom of Burundi before it attained its independence.

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:

[110] See United Nations, *Materials on Succession of States (op. cit.)*, pp. 178 and 180, and document A/CN.4/263 (Supplement prepared by the Secretariat to *Materials on Succession of States*), United Kingdom of Great Britain and Northern Ireland, Treaties, Kenya, Malawi, Zambia, Guyana, Botswana, Lesotho, Barbados, Mauritius.

[111] See para. 2 above.

[112] See document A/CN.4/263 (Supplement prepared by the Secretariat to *Materials on Succession of States (op. cit.)*), United Kingdom of Great Britain and Northern Ireland, Treaties, Swaziland.

[113] See International Law Association, *The Effect... (op. cit.)*, pp. 381-382; and United States, Department of State, *Treaties in Force—A List of Treaties and other International Agreements of the United States in Force on January 1, 1968* (Washington D.C., U.S. Government Printing Office, 1968), p. 200.

[114] See para. 2 above.

[115] See United Nations, *Materials on Succession of States (op. cit.)*, p. 146. This declaration was transmitted to the Secretary-General by the Belgian Government in 1962.

(1) that the matters dealt with in these agreements are still of interest;

(2) that these agreements do not, under article 60 of the Constitution of the Kingdom of Burundi, involve the State in any expense or bind the Burundi individually. By the terms of the Constitution, such agreements cannot take effect unless they have been approved by Parliament.

In the case of multilateral agreements which do not meet the conditions stated above, the Government of Burundi proposes to make known its intention explicitly in each individual case. This also applies to the more recent agreements whose provisions are applied tacitly, as custom, by Burundi. The Government of Burundi may confirm their validity, or formulate reservations, or denounce the agreements. In each case it will inform the depositary whether it intends to be bound in its own right by accession or through succession.

With regard to multilateral agreements open to signature, the Government will shortly appoint plenipotentiaries holding the necessary powers to execute formal acts of this kind.

III. In the intervening period, however, the Government will put into force the following *transitional provisions*:

(1) any party to a regional multilateral treaty or a multilateral treaty of universal character which has been effectively applied on a basis of reciprocity can continue to rely on that treaty as of right in relation to the Government of Burundi until further notice;

(2) the transitional period will terminate on 1 July 1966;

(3) no provision in this Declaration may be interpreted in such a way as to infringe the territorial integrity, independence or neutrality of the Kingdom of Burundi.

The Ministry requests the Secretary-General to be so good as to issue this Declaration as a United Nations document for circulation among Member States and takes this opportunity to renew to the Secretary-General the assurances of its highest consideration.[116]

* Extended for a further period of two years by a Note of December 1966.

In this declaration, it will be noted, the express provision that during the period of review the other parties may continue to rely on the treaties as against Burundi appears to relate only to multilateral treaties.

(13) The declarations here in question do not fall neatly into any of the established treaty procedures. They are not sent to the Secretary-General in his capacity as registrar and publisher of treaties under Article 102 of the Charter. The communications under cover of which they have been sent to the Secretary-General have not asked for their registration or for their filing and recording under the relevant General Assembly resolutions. In consequence, the declarations have not been registered or filed and recorded; nor have they been published in any manner in the United Nations *Treaty Series*. Equally the declarations are not sent to the Secretary-General in his capacity as a depositary of multilateral treaties. A sizeable number of the multilateral treaties which these declarations cover may, no doubt, be treaties of which the Secretary-General is the depositary. But the declarations also cover numerous bilateral treaties for which there is no depositary, as well as multilateral treaties which have depositaries other than the Secretary-General. The declarations seem to be sent to the Secretary-General on a more general basis as the international organ specifically entrusted by the United Nations with functions concerning the publication of acts relating to treaties or even merely as the convenient diplomatic channel for circulating to all States Members of the United Nations and members of the specialized agencies notifications of such acts.

(14) Unlike devolution agreements, the declarations are addressed directly to the other interested States, that is, to the States parties to the treaties applied to the newly independent State's territory prior to its independence. They appear to contain, in one form or another, an engagement by the declarant State, on the basis of reciprocity, to continue the application of those treaties after independence provisionally, pending its determination of its position with respect to each individual treaty. Thus, the first purpose of the declaration would seem to be the creation, in a different context, of a treaty relation analogous to that which is the subject of article 25 of the Vienna Convention on the Law of Treaties concerning provisional application of a treaty pending its entry into force. The question of the definitive participation of the newly independent State in the treaties is left to be determined with respect to each individual treaty during a period of review, the situation being covered meanwhile by the application of the treaty provisionally on the basis of reciprocity.

(15) Notwithstanding certain variations of formulation, the terms of the Tanganyika, Uganda, and Swaziland type declarations confirm what is said in the previous paragraph. Even the Zambia-type declarations, more affirmative in their attitude toward succession to the predecessor State's treaties, expressly recognize that in virtue of customary law certain treaties may have lapsed at the date of independence; they furnish no indications which might serve to identify either the treaties which are to be considered as succeeded to by the declarant State or those which are to be considered as likely to have lapsed by virtue of customary law; and they expressly state it to be essential that *each* treaty should be subject to legal examination with a view to determining whether or not it has lapsed.

(16) Although addressed to a large number of States among which are, for the most part, to be found other States parties to the treaties applied to the declarant State's territory prior to its independence, the declarations are *unilateral acts* the legal effects of which for the other parties to the treaties cannot depend on the will of the declarant State alone. This could be so only if a newly independent State might be considered as possessing under international law a right to the provisional application of the treaties of its predecessor for a certain period after independence. But such a right does not seem to have any basis in State practice; indeed, many of the declarations themselves clearly assume that the other parties to the treaties are free to accept or reject the declarant State's proposal to apply its predecessor's treaties provisionally. Equally, the treaties themselves do not normally contemplate the possibility either of "provisional parties" or of a "provisional application". Accordingly, the legal effect of the declarations seems to be that they furnish bases for a *collateral* agreement in simplified form between the newly independent State and

[116] See International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), pp. 617-619 [Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors, annex A, VI].

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 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 8 the rule concerning the legal effect of unilateral declarations as one of general scope and to include it among the general provisions of part I alongside the article dealing with devolution agreements (article 7).

(19) At the same time, since the principal importance of provisional application of treaties upon a succession of States seems in practice to be in cases of newly independent States, the Commission decided to deal with this subject separately, and to place provisions necessary for this purpose in a special section (section 4) in part III of the present draft articles.

(20) As to the present article, the Commission decided to formulate it along the lines of article 7 (devolution agreements), because the negative rule specifying the absence of any direct effects of a successor State's declaration upon the other States parties to the predecessor's treaties applies in both cases, even although the legal considerations on which the rule is based may not be precisely the same in the case of declarations as in the case of devolution agreements.

(21) Accordingly, *paragraph 1* of this article states that a predecessor State's obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States parties to those treaties in consequence *only* of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory. And *paragraph 2* provides that in such a case "the effects of the succession of States" on treaties which at the date of succession of States were in force in respect of the territory in question are governed by the present articles.

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

1. When a treaty provides that, on the occurrence of a succession of States, a successor State shall have the option to consider itself a party thereto, it may notify its succession in respect of the treaty in conformity with the provisions of the treaty or, failing any such provisions, in conformity with the provisions of the present articles.

2. If a treaty provides that, on the occurrence of a succession of States, the successor State shall be considered as a party, such a provision takes effect only if the successor State expressly accepts in writing to be so considered.

3. In cases falling under paragraphs 1 or 2, a successor State which establishes its consent to be a party to the treaty is considered as a party from the date of the succession unless the treaty otherwise provides or it is otherwise agreed.

Commentary

(1) This article, as its title indicates, concerns the case of participation by a successor State in a treaty by virtue of a clause of the treaty itself, as distinct from the case where the right of participation arises from general law of succession. Although clauses of that kind have not been numerous, there are treaties, mainly multilateral treaties, which contain provisions purporting to regulate *in advance* the application of the treaty on the occurrence of a succession of States. The clauses may refer to a certain category of States or to a particular State. Frequently, they have been included in treaties when the process of the emergence of one or more successor States was in an advanced stage at the time of the negotiations of the original treaty or of an amendment or revision of the treaty.

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

> If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, *such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party.** [117]

This clause, which was included in the original text of the General Agreement,[118] seems to have been designed to enable certain self-governing *dependent* territories to become separate contracting parties to GATT rather than

[117] United Nations, *Treaty Series*, vol. 278, p. 204.

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

to furnish a means of providing for the continuation as parties to GATT of *newly independent States*.[119] In fact, however, the great majority of the newly independent States which have become parties to GATT have done so through the procedure set out in the clause. Moreover, the contracting parties by a series of recommendations have found it desirable to supplement that clause with a further procedure of "provisional application", called "*de facto* application".[120]

(3) The net result has been that under paragraph 5*c* of article XXVI of GATT, five newly independent States have become contracting parties to the General Agreement through the simple sponsoring of them by their predecessor State followed by a declaration by the existing Contracting Parties; and that some twenty-four others have become contracting parties by sponsoring and declaration after a period of provisional *de facto* application. In addition, some eight newly independent States are maintaining a *de facto* application of the General Agreement in accordance with the recommendations, pending their final decisions as to whether they should become contracting parties.[121] It may be added that States which become contracting parties to the General Agreement under Article XXVI, paragraph 5*c*, 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[122] and Third[123] International Tin Agreements of 1960 and 1965; the 1962 International Coffee Agreement;[124] and the 1968 International Sugar Agreement.[125] Article XXII, paragraph 6, of the Second International Tin Agreement, reads:

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

This clause, taken literally, would appear to envisage the *automatic translation* of the newly independent State into a separate contracting party. It has, however, been ascertained from the depositary that the newly independent States which have become parties to the Second Tin Agreement (1960)[126] have not done so under paragraph 6 of article XXII. Similarly, although the Third International Tin Agreement (1965) also contains, in article XXV, paragraph 6, a clause apparently providing for automatic participation, there has not, according to the depositary, been any case of a newly independent State's having assumed the character of a party under the clause.

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

(6) The International Coffee Agreement of 1962 again makes provision for the emergence of a territory to independent statehood, but does so rather in terms of *conferring a right* upon the new State to become a party to the Agreement after independence if such should be its wish. Thus, article 67, having authorized in paragraph 1 the extension of the Agreement to dependent territories, provides in paragraph 4:

> The Government of a territory to which the Agreement has been extended under paragraph (1) of this Article and which has subsequently become independent *may, within 90 days after the attainment of independence, declare by notification to the Secretary-General of the United Nations that it has assumed the rights and obligations of a Contracting Party to the Agreement.** It shall, as from the date of such notification, become a party to the Agreement.[127]

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

(7) Like the Second Tin Agreement (1960), the 1962 Coffee Agreement laid down in its final provisions —article 62—that it should be open for signature by the Government of any State represented before independence

[119] Burma, Ceylon and Southern Rhodesia were the territories concerned (*ibid.*, foot-note 549).

[120] *Ibid.*, p. 74, paras. 321-325, for the details of these recommendations.

[121] *Ibid.*, pp. 76 *et seq.*, paras. 332-350.

[122] United Nations, *Treaty Series*, vol. 403, p. 3.

[123] *Ibid.*, vol. 616, p. 317.

[124] *Ibid.*, vol. 469, p. 169.

[125] *United Nations Sugar Conference, 1968: Summary of Proceedings* (United Nations publication, Sales No. E.69.II.D.6), p. 56, annex III.

[126] Zaire [Republic of Congo (Leopoldville)] and Nigeria (United Nations, *Treaty Series*, vol. 403, pp. 4, 115 and 116).

[127] United Nations, *Treaty Series*, vol. 469, p. 238, This paragraph is reproduced in the 1968 Coffee Agreement as Article 65, paragraph 4.

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 [128] the Agreement.

(8) The only other multilateral treaty containing a similar clause appears to be yet another commodity agreement, the International Sugar Agreement (1968), article 66, paragraph 2, of which is couched in much the same terms [129] as those of article 67, paragraph 4, of the 1962 Coffee Agreement. The earlier 1958 Sugar Agreement had not contained this clause, and the emergence to independence of dependent territories to which the Agreement had been "extended" had given rise to problems. The new Sugar Agreement is, however, too recent for the clause in paragraph 2 of article 66 to have been tested in practice.

(9) An example of a bilateral agreement containing a clause providing for the future participation of a territory after its independence is the Agreement to resolve the controversy over the frontier between Venezuela and British Guiana (Geneva, 1966) [130] concluded between the United Kingdom and Venezuela shortly before British Guiana's independence. The Agreement, which stated in its preamble that it was made by the United Kingdom "in consultation with the Government of British Guiana" and that it took into account the latter's forthcoming independence, provided in article VIII:

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

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

(10) In the light of the State practice referred to in the preceding paragraphs, the Commission considered it desirable to enunciate separately the two rules set forth in *paragraphs 1 and 2* of the present article. *Paragraph 1* deals with the more frequent case, namely, where the successor State has *an option* under the treaty to consider itself as a party thereto. These cases would seem to fall within the rule in article 36 (treaties providing for rights for third States) of the Vienna Convention on the Law of Treaties. But, whether or not a successor State is to be regarded as a third State in relation to the treaty, it clearly may exercise the right to become a party for which the treaty itself specifically provides. At the same time, the exercise of that right would of course, be subject to the provisions of the treaty as to the procedure, or failing any such provisions, to the general rules on succession of States in respect of treaties contained in the present draft articles; and this is so stated in *paragraph 1*.

(11) *Paragraph 2* concerns those cases where a treaty purports to lay down that, on a succession of States, the successor State *shall be considered as a party*. In those cases the treaty provisions not merely confer a right of option on the successor State to become a party but appear to be intended as the means of establishing automatically an obligation for the successor State to consider itself a party. In other words, these cases seem to fall within article 35 (treaties providing for obligations for third States) of the Vienna Convention on the Law of Treaties. Under that article, the obligation envisaged by the treaty arises for the third State only if the third State expressly accepts it in writing. The question then is whether it should make any difference that the treaty was previously binding with respect to the successor State's territory when the territory was under the sovereignty of its predecessor. The Commission agreed that it should not. Otherwise, the original parties would be able to impose succession on the newly independent State, and to do this in conflict with the general rule governing succession in respect of treaties laid down for newly independent States set out in the present articles. Consequently, *paragraph 2* states that the treaty provision that the successor State shall be considered as a party "takes effect only if the successor State expressly accepts in writing to be so considered". Under the paragraph, therefore, the successor State would be considered as being under no obligation at all to become a party by virtue of the treaty clause alone. The treaty clause, whatever its wording, would be considered an option, not an obligation of the successor State to become a party to the treaty. The words "shall be considered as a party" are intended to cover all related expressions found in treaty language, such as "shall be a party" or "shall be deemed to be a party".

(12) The Commission thought it preferable to require some evidence of subsequent acceptance by the successor State in all cases, in spite of the fact that in some instances, particularly where the territory was already in an advanced state of self-government at the time of the conclusion of the treaty, representatives of the territory might have been consulted in regard to future participation in the treaty after independence.

(13) The question of the continuity of application of the treaty during the intervening period between the date of the succession of States and the time of the successor State's expression of consent having been raised by certain members, the Commission decided to add the provision contained in paragraph 3. *Paragraph 3*, therefore, intends to ensure continuity of application by providing that, as a general rule, the successor State, if it consents to be considered as a party, in cases falling under paragraphs 1 or 2 of the article, will be so considered *as from the date of the succession of States*. This general rule is qualified by the concluding proviso "unless the treaty

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[128] United Nations, *Multilateral Treaties... 1971 (op. cit)*, p. 357.

[129] See *United Nations Sugar Conference, 1968: Summary of Proceedings* (United Nations publication, Sales No.: E.69.II.D.6), Annex III, p. 73.

[130] United Nations, *Treaty Series*, vol. 561, p. 321.

otherwise provides or it is otherwise agreed" which safeguards the provisions of the treaty itself and the freedom of the parties.

(14) Although the recent precedents recorded in this commentary relate to newly independent States, and mainly to multilateral treaties, the Commission considered it advisable, given the matters of principle involved, to formulate the provisions of article 9 in general terms, in order to make them applicable to all cases of succession of States and to all types of treaty. This being so, it included the article among the general provisions of the present draft.

PART II

TRANSFER OF TERRITORY

Article 10. Transfer of territory

When territory under the sovereignty or administration of a State becomes part of another State:

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

(*b*) Treaties of the successor State are in force in respect of that territory from the same date, unless it appears from the particular treaty or is otherwise established that the application of the treaty to that territory would be incompatible with its object and purpose.

Commentary

(1) This article concerns the application of a rule, which is often referred to by writers as the "moving treaty frontiers" rule, in cases where territory not itself a State undergoes a change of sovereignty and the successor State is an already existing State. The article thus concerns cases which do not involve a union of States or merger of one State in another, and equally to not involve the emergence of a newly independent State. The moving treaty frontiers principle also operates in varying degrees in certain other contexts. But in these other contexts it functions in conjunction with other rules, while in the cases covered by the present article—the mere addition of a piece of territory to an existing State by transfer—the moving treaty frontiers rule appears in pure form Although in a sense the rule underlies much of the law regarding succession of States in respect of treaties, the present case constitutes a particular category of succession of States, which the Commission considered should be in a separate part. Having regard to its relevance in other contexts, the Commission decided to place it in part II of the draft, immediately after the general provisions in part I.

(2) Shortly stated, the moving treaty frontiers rule means that, on a territory's undergoing a change of sovereignty, it passes automatically out of the treaty régime of the predecessor sovereign into the treaty régime of the successor sovereign. It thus has two aspects, one positive and the other negative. The positive aspect is that the treaties of the successor State begin automatically to apply in respect of the territory as from the date of the succession. The negative aspect is that the treaties of the predecessor State, in turn, cease automatically to apply in respect of the territory as from that date.

(3) The rule, since it envisages a simple substitution of one treaty régime for another, may appear *prima facie* not to involve any succession of States in respect of treaties. Nevertheless the cases covered by the rule do involve a "succession of States" in the sense that this concept is used in the present draft articles, namely a replacement of one State by another in the responsibility for the international relations of territory. Moreover, the rule is well established in State practice and is commonly included by writers among the cases of succession of States. As to the rationale of the rule, it is sufficient to refer to the principle embodied in article 29 of the Vienna Convention on the Law of Treaties under which, unless a different intention is established, a treaty is binding upon each party in respect of its entire territory. This means generally that at any given time a State is bound by a treaty in respect of any territory of which it is sovereign, but is equally not bound in respect of territory which it no longer holds.

(4) On the formation of Yugoslavia after the First World War, the former treaties of Serbia were regarded as having become applicable to the whole territory of Yugoslavia. If some have questioned whether it was correct to treat Yugoslavia as an enlarged Serbia rather than as a new State, in State practice the situation was treated as one where the treaties of Serbia should be regarded as applicable *ipso facto* in respect of the whole of Yugoslavia. This seems to have been the implication of article 12 of the Treaty of Saint-Germain-en-Laye so far as concerns all treaties concluded between Serbia and the several Principal Allied and Associated Powers.[131] The United States of America afterwards took the position that Serbian treaties with the United States both continued to be applicable and extended to the whole of Yugoslavia,[132] while a number of neutral Powers, including Denmark, the Netherlands, Spain, Sweden and Switzerland, also appeared to have recognized the continued application of Serbian treaties and their extension to Yugoslavia. The United States position was made particularly clear in a memorandum filed by the State Department as *amicus curiae* in the case of *Ivancevic* v. *Artukovic*.[133]

(5) Among more recent examples of the application of this rule may be mentioned the extension of Canadian

[131] United Kingdom, *Treaty Series* (1919), No. 17 [Cmd. 461] (London, H.M.S.O., 1919), p. 94.

[132] See G. H. Hackworth, *Digest of International Law* (Washington D.C., U.S. Government Printing Office, 1940-44), vol. V, pp. 374-375; *Foreign Relations of the United States (1927)* (Washington D.C., U. S. Government Printing Office, 1942), vol. III, pp. 842-843.

[133] See M. M. Whiteman, *Digest of International Law* (Washington D.C., U.S. Government Printing Office, 1963), vol. 2, pp. 940-945, and especially at pp. 944-945.

treaties to Newfoundland upon the latter's becoming part of Canada,[134] the extension of Ethiopian treaties to Eritrea in 1952, when Eritrea became an autonomous unit federated with Ethiopia,[135] the extension of Indian treaties to the former French [136] and Portuguese possessions on their absorption into India, and the extension of Indonesian treaties to West Irian after the transfer of that territory from the Netherlands to Indonesia.[137]

(6) Article 10 sets out the two aspects of the moving treaty frontiers rule mentioned above. This article, like the draft articles as a whole, has to be read in conjunction with article 6 which limits the present articles to lawful situations and with the saving clause of article 31 concerning cases of military occupation, etc. Article 10 is limited to normal changes in the sovereignty or administration of territory; and article 31 makes it plain that despite the use of the words "or administration" in the opening phrase, the article does not cover the case of a military occupant. The words "or administration" have been used in order to cover cases in which the territory transferred was not under the sovereignty of the predecessor State, but only under an administering Power responsible for its international relations. As to article 6, although the limitation to lawful situations applies throughout the draft articles, some members of the Commission considered it to be of particular importance in the present connexion.

(7) *Sub-paragraph (a)* of article 10 states the negative aspect, namely that the treaties of the predecessor State cease to be in force from the date of the succession of States in respect of territory which has become part of another State. From the standpoint of the law of treaties, this aspect of the rule can be explained by reference to certain principles, such as those governing the territorial scope of treaties, supervening impossibility of performance of fundamental change of circumstances (articles 29, 61 and 62 of the Vienna Convention on the Law of Treaties). Accordingly, the rights and obligations under a treaty cease in respect of territory which is no longer within the sovereignty or administration of the State party concerned.

(8) *Sub-paragraph (a)* does not, of course, touch the treaties of the predecessor State otherwise than in respect of their application to the territory which passes out of its sovereignty or administration. Apart from the contraction in their territorial scope, its treaties are not normally affected by the loss of the territory. Only if the piece of territory concerned had been the object, or very largely the object, of a particular treaty might the continuance of the treaty in respect of the predecessor's own remaining territory be brought into question on the ground of impossibility of performance or fundamental change of circumstances. In such cases, the question should be settled in accordance with the general rules of treaty law codified by the Vienna Convention on the Law of Treaties and did not seem to require any specific rule in the context of the present draft articles. In this connexion, however, certain members recalled that under sub-paragraph (*b*) of paragraph 2 of article 62 (fundamental change of circumstances) of the Vienna Convention, a fundamental change of circumstances might not be invoked as a ground for terminating or withdrawing from a treaty "if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty".

(9) In the case of some treaties, more especially general multilateral treaties, the treaty itself may still be applicable to the territory after the succession, for the simple reason that the successor State also is a party to the treaty. In such a case there is not, of course, any succession to or continuance of the treaty rights or obligations of the predecessor State. On the contrary, even in these cases the treaty régime of the territory is changed and the territory becomes subject to the treaty exclusively in virtue of the successor State's independent participation in the treaty. For example, any reservation made to the treaty by the predecessor State would cease to be relevant while any reservation made by the successor State would become relevant in regard to the territory.

(10) *Sub-paragraph (b)* of article 10 provides for the positive aspect of the moving treaty frontiers rule in its application to cases where territory is added to an already existing State, by stating that treaties of the successor State *are in force in respect of* that territory from the date of succession of States. Under this sub-paragraph the treaties of the successor State are considered as applicable of their own force in respect of the newly acquired territory. Even if in some cases the application of the treaty régime of the successor State to the newly acquired territory may be said to result from an agreement, tacit or otherwise, between it and the other States parties to the treaties concerned, in most cases the moving of the treaty frontier is an automatic process. The change in the treaty régime applied to the territory is rather assumed to be the natural consequence of its passing under the sovereignty or administration of the State now responsible for its foreign relations.

(11) Exception should be made, however, of certain treaties, for example those having a restricted territorial scope which does not embrace the territory newly acquired by the successor State. This explains the addition to sub-paragraph (*b*) of the provisio "unless it appears from the particular treaty or is otherwise established that the application of the treaty to that territory would be incompatible with its object and purpose."

(12) Lastly, article 10 should be read in conjunction with the specific rules relating to boundary régimes or other territorial régimes established by a treaty set forth in articles 29 and 30 of part V of the present draft articles.

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[134] See, for example, documents A/CN.4/243, paras, 85-101, and A/CN.4/243/Add.1 (see foot-note 26 above), para. 137.

[135] See "Summary of the practice of the Secretary-General as depositary of multilateral agreements" (ST/LEG/7), p. 63; and *Yearbook of the International Law Commission, 1970*, vol. II, p. 87, document A/CN.4/225, paras. 102-103. See also document A/CN.4/243/Add.1 (see foot-note 26 above), para. 128.

[136] See, for example, *Yearbook of the International Law Commission, 1970*, vol. II, p. 93, document A/CN.4/225, paras. 127-128.

[137] *Ibid.*, p. 94, paras. 132-133.

PART III

NEWLY INDEPENDENT STATES

SECTION 1. GENERAL RULE

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

Subject to the provisions of the present articles, a newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that, at the date of the succession of States, the treaty was in force in respect of the territory to which the succession of States relates.

Commentary

(1) This article formulates the general rule concerning the position of a newly independent State in respect of treaties previously applied to its territory by the predecessor State.

(2) The question of a newly independent State's inheritance of the treaties of its predecessor has two aspects: (*a*) whether that State is under an *obligation* to continue to apply those treaties to its territory after the succession of 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 which a clean slate, except in regard to "local" or "real" obligations. The clean slate is generally recognized to be the "traditional" view on the matter. It has been applied to earlier cases of newly independent States emerging either from former colonies (i.e. the United States of America; the Spanish American Republics) or from a process of secession or dismemberment (i.e., Belgium, Panama, Ireland, Poland Czechoslovakia, Finland). Particularly clear on the point is a statement made by the United Kingdom defining its attitude towards Finland's position in regard to Russian treaties applicable with respect to Finland prior to its independence:

> ... I am advised that in the case of a new State being formed out of part of an old State there is no succession by the new State to the treaties of the old one, though the obligations of the old State in relation to such matters as the navigation of rivers, which are in the nature of servitudes, would normally pass to the new State. Consequently there are no treaties in existence between Finland and this country.[138]

(4) It is also this view of the law which is expressed in the legal opinion given by the United Nations Secretariat in 1947 concerning Pakistan's position in relation to the Charter of the United Nations. Assuming that the situation was one in which part of an existing State had broken off and become a new State,[139] the Secretariat advised:

> The territory which breaks off, Pakistan, will be a new State; it will not have the treaty rights and obligations of the old State, and will not, of course, have membership in the United Nations.
>
> In international law, the situation is analogous to the separation of the Irish Free State from Great Britain, and of Belgium from the Netherlands. In these cases, the portion which separated was considered a new State; the remaining portion continued as an existing State with all the rights and duties which it had before.[140]

Today the practice of States and organizations concerning the participation of newly independent States in multilateral treaties, as it has developed, may call for some qualification of that statement and for a sharper distinction to be drawn between participation in multilateral treaties in general and participation in constituent instruments of international organizations. Even so, the Secretariat's opinion, given in 1947, that Pakistan, as a new State, would not have *any* of the treaty rights of its predecessor was certainly inspired by the "clean slate" doctrine and confirms that this was the "traditional" and generally accepted view at that date.

(5) Examples of the "clean slate" doctrine in connexion with bilateral treaties are to be found in the Secretariat studies on "Succession of States in respect of bilateral treaties" [141] and in the publication *Materials on Succession of States*.[142] For instance, Afghanistan invoked the "clean slate" doctrine in connexion with her dispute with Pakistan regarding the frontier resulting from the Anglo-Afghan Treaty of 1921.[143] Similarly, Argentina seems to have started from the basis of the "clean slate" principle in appreciating Pakistan's position in relation to the

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[138] A. D. McNair, *The Law of Treaties: British Practice and Opinions*, rev. ed. (Oxford, Clarendon Press, 1961), p. 605. See also *Yearbook of the International Law Commission, 1970*, vol. II, p. 122, document A/CN.4/229, para 109.

[139] This assumption was disputed by Pakistan.

[140] See *Yearbook of the International Law Commission, 1962*, vol. II, p. 101, document A/CN.4/149 and Add.1, para 3.

[141] See above, sect. A, para. 24.

[142] United Nations, *Materials on Succession of States (op. cit.)*.

[143] *Ibid.*, p. 2.

Anglo-Argentine Extradition Treaty of 1889,[144] although she afterwards *agreed* to regard the Treaty as in force between herself and Pakistan. Another if special manifestation of the "clean slate" doctrine would appear to be the position taken by Israel in regard to treaties formerly applicable with respect to Palestine.[145]

(6) The metaphor of the "clean slate" is a convenient way of expressing the basic concept that a new State begins its international life free from any *obligation* to continue in force treaties previously applicable with respect to its territory simply by reason of that fact. But even when that basic concept is accepted, the metaphor appears in the light of existing State practice to be at once too broad and too categoric.[146] 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 newly 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 successor State to consider itself bound by its predecessor's treaties. At any rate, as already indicated, the evidence of State practice supports the traditional view that a newly independent State is not under any general obligation to take over the treaties of its predecessor previously applied in 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 12 of the present draft, is of the opinion that a difference does exist and should be made between bilateral treaties and certain multilateral treaties in regard to a newly independent State's *right* to be a party to a treaty concluded by its predecessor. But it seems to it very difficult to sustain the proposition that a newly independent State is to be considered as automatically subject to the obligations of multilateral treaties of a law-making character concluded by its predecessor applicable in respect of the territory in question. On the point of principle, the assimilation of law-making treaties to custom is not easy to admit even in those cases where the treaty embodies customary law. Clearly, the law contained in the treaty, in so far as it reflects customary rules, will affect the newly independent State by its character as generally accepted customary law. But it is quite another thing to say that, because a multilateral treaty embodies custom, a newly independent State must be considered as *contractually* bound by the *treaty as a treaty*. Why, the newly independent State may legitimately ask, should it be bound *contractually* by the treaty any more than any other existing State which has not chosen to become a party thereto? A general multilateral treaty, although of a law-making character, may contain purely contractual provisions as, for example, a provision for the compulsory adjudication of disputes. In short, to be bound by the treaty is by no means the same thing as to be bound by the general law which it contains. *A fortiori* may the newly independent State ask that question when the actual content of the treaty is of a law-creating rather than of a law-consolidating character.

(9) State and depositary practice confirms that the clean slate principle applies also to general multilateral treaties and multilateral treaties of a law-making character. No distinction 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 to the newly independent State's territory prior to its independence. It is only when he receives some indication of the newly independent State's will to be considered as a party to a particular treaty that he enters it in the records as a party to that treaty. *A fortiori* is this the case when the newly independent State has not entered into a devolution agreement or made a unilateral declaration of a general character.[147]

(10) The practice of other depositaries appears also to be based upon the hypothesis that a newly independent State to whose territory a general multilateral treaty was applicable before independence is not bound *ipso jure* by the treaty as a successor State and that some manifestation of its will with reference to the treaty is first necessary. Despite the humanitarian objects of the Geneva Red Cross Conventions and the character of the law which they contain as general international law, the Swiss Federal Council has not treated a newly independent State as automatically a party in virtue of its predecessor's ratification on accession. It has waited for a specific manifestation of the State's will with respect to each Convention in the form either of a declaration of continuity or of an instrument of accession.[148] As to the practice of individual States, quite a number have notified their acceptance of the Geneva Conventions in terms of a declaration of continuity, and some have used language indicating recognition of an obligation to accept the Conventions as suc-

[144] *Ibid.*, pp. 6-7.

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

[146] See above, sect. A, para. 37.

[147] *Yearbook of the International Law Commission, 1962*, vol. II, p. 122, document A/CN.4/150, para. 134.

[148] *Ibid., 1968*, vol. II, pp. 32 *et seq.*, document A/CN.4/200 and Add.1 and 2, paras. 128-232.

cessors to their predecessor's ratifications. On the other hand, almost as large a number of new States have not acknowledged any obligation derived from their predecessors, and have become parties by depositing instruments of accession.[149] In general, therefore, the evidence of the practice relating to the Geneva Conventions does not seem to indicate the existence of any customary rule of international law enjoining the automatic acceptance by a new State of the obligations of its predecessor under humanitarian Conventions.

(11) The practice of the Swiss Federal Council in regard to the Berne Convention of 1886 for the Protection of Literary and Artistic Works and the subsequent Acts revising it is the same.[150] The Swiss Government, as depositary, has not treated a newly independent State as bound to continue as a party to the Convention formerly applicable to its territory. It does not appear ever to have treated a newly independent State as bound by the Convention without some expression of its will to continue as, or to become, a party. In one case,[151] the Swiss Government does seem to have treated the conclusion of a general devolution agreement as sufficient manifestation of a newly independent State's will. But that seems to be the only instance in which it has acted on the basis of a devolution alone and, in general, it seems to assume the need for some 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.[152]

(12) A somewhat similar pattern has been followed in regard to the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes, of which the Netherlands Government is the depositary.[153] In 1955 the Netherlands Government suggested to the Administrative Council of the Permanent Court of Arbitration that certain new States, which had formerly been part of one of the High Contracting Parties, could be considered as parties to the Conventions. The Administrative Council then sought the approval of the existing Parties for the recognition of the new States as parties. No objection having been voiced to this recognition, the Administrative Council decided to recognize as Parties those of the new States *which had expressed a desire to that effect.*[154] In the event twelve new States have expressed the desire to be considered as a party in virtue of their predecessor's participation, while three have preferred to become parties by accession. One new State expressly declared that it did not consider itself bound by either the 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.[155]

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

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

[149] *Ibid.*, pp. 38 *et seq.*, paras. 152-184.

[150] *Ibid.*, pp. 7 *et seq.*, paras. 4-98.

[151] See above, commentary to article 7, para. 14.

[152] *Yearbook of the International Law Commission, 1968*, vol. II, pp. 54 *et seq.*, document A/CN.4/200 and Add.1 and 2, paras. 233-314.

[153] *Ibid.*, pp. 26 *et seq.*, paras. 99-127.

[154] *Ibid.*, p. 29, para. 113.

[155] United Nations, *Materials on Succession of States (op. cit.)*, pp. 224-228.

assumed that there are *particular* categories in regard to which they may inherit the obligations of their predecessor.

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

(17) This seems to be confirmed by statements of the United Kingdom, by reference to whose legal concepts the framers of the devolution agreements and unilateral declarations in many cases guided themselves. The "Note on the question of treaty succession on the attainment of 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 antomatically and which would not be.[160]

(18) The present article seeks only to establish the general rule in regard to a newly independent State's *obligation* to inherit treaties. The general rule deducible from State practice is clearly, in the view of the Commission, that a newly independent State is not, *ipso jure*, bound to inherit its predecessor's treaties, whatever may be the practical advantage of continuity in treaty relations. This is the rule provided for in the present article with regard to the newly independent State's position in respect of the treaties applied to its territory by the predecessor State prior to the date of the succession of States. The newly independent State "is not bound to maintain in force" those predecessor State's treaties nor "to become a party" thereto.

(19) That general rule is without prejudice of the rights and obligations of the States concerned as set forth in the present draft, as expressly indicated by the opening proviso "Subject to the provisions of the present articles". The purpose of this proviso is twofold. First, it sets out to safeguard the newly independent State's position with regard to its participation in multilateral treaties by a notification of succession, and to obtaining the continuance in force of bilateral treaties by agreement. Secondly, the proviso preserves the position of any interested State with regard to the so-called "localized", "territorial", or "dispositive" treaties dealt with in articles 29 and 30 of the present draft.

(20) The general rule in article 11, as indicated, concerns only the case of newly independent States and applies subject to the above-mentioned reservation, to "any treaty". It covers, therefore, multilateral as well as bilateral treaties. With regard to multilateral instruments of a law-making character or general multilateral treaties embodying principles or customary rules of international law, the Commission recognizes the desirability of not giving the impression that a newly independent State's freedom from an obligation to assume its predecessor's treaties means that it has a clean slate also in respect of principles of general unilateral law embodied in those treaties. But it felt that this point would more appropriately be covered by including in the draft a general provision safeguarding the application to a successor State of rules of international law to which it would be subject independently of the treaties in question. Such a general provision is contained in article 5.

SECTION 2. MULTILATERAL TREATIES

Article 12. Participation in treaties in force

1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates.

2. Paragraph 1 does not apply if the object and purpose of the treaty are incompatible with the participation of the successor State in that treaty.

3. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties, the successor State may establish its status as a party to the treaty only with such consent

Commentary

(1) This article and the other articles of this section deal with the participation of a newly independent State, by a notification of succession, in multilateral treaties which at the date of the succession of States were in force in respect of the territory which has become the newly independent State's territory. Section 3 deals with the position of a newly independent State in relation to its predecessor's bilateral treaties.

(2) The question whether a new State is entitled to consider itself a party to its predecessor's treaties, as already pointed out in the commentary to article 11, is legally quite distinct from the question whether it is under an *obligation* to do so. Moreover, although modern State practice does not support the thesis that a new State is under any general obligation to consider itself a

[160] International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), p. 619 [Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors, annex B]. Cf. also the advice given to Cyprus on the interpretation of article 8 of the Treaty concerning the Establishment of the Republic of Cyprus (United Nations, *Materials on Succession of States (op. cit.)*), pp. 182-183.

successor to treaties previously applicable in respect of its territory, it does appear to support the conclusion that a new State has a general *right of option* to be a party to certain categories of multilateral treaties in virtue of its character as a successor State. A distinction must, however, be drawn in this connexion between multilateral treaties in general and multilateral treaties of a restricted character, for it is only in regard to the former that a newly independent State appears to have an actual right of option to establish itself as a party *independently of the consent of the other States parties and quite apart from the final clauses of the treaty*.[157]

(3) In the case of multilateral treaties in general, the entitlement of a newly independent State to become a party in its own name seems well settled, and is indeed implicit in the practice already discussed in the commentaries to articles 7, 8 and 11 of this draft. As indicated in those commentaries, whenever a former dependency of a party to multilateral treaties of which the Secretary-General is the depositary emerges as an independent State, the Secretary-General addresses to it a letter inviting it to confirm whether it considers itself to be bound by the treaties in question. This letter is sent in all cases: that is, when the newly independent State has entered into a devolution agreement, when it has made a unilateral declaration of provisional application, and when it has given no indication as to its attitude in regard to its predecessor's treaties.[158] The Secretary-General does not consult the other parties to the treaties before he writes to the newly independent State, nor does he seek the views of the other parties or await their reactions when he notifies them of any affirmative replies received from the newly independent State. He appears, therefore, to act upon the assumption that a newly independent State has the right, if it chooses, to notify the depositary of its continued participation in any general multilateral treaty which was applicable in respect of its territory prior to the succession. Furthermore, so far as is known, no existing party to a treaty has ever questioned the correctness of that assumption; while the newly independent States themselves have proceeded on the basis that they do indeed possess such a right of participation.

(4) The same appears, in general, to hold good for multilateral treaties which have depositaries other than the Secretary-General. Thus, the practice followed by the Swiss Government as depositary of the Convention for the Protection of Literary and Artistic Works and subsequent Acts of revision and by the States concerned seems clearly to acknowledge that successor States, newly independent, possess a right to consider themselves parties to these treaties in virtue of their predecessors' participation;[159] and this is true also of the Geneva Humanitarian Conventions in regard to which the Swiss Federal Council is the depositary.[160] The practice in regard to multilateral conventions of which the United States of America is depositary has equally been based on a recognition of the right of a newly independent State to declare itself a party to the conventions on its own behalf.[161]

(5) Current treaty practice in cases of succession therefore seems to provide ample justification for the Commission to formulate a rule recognizing that a newly independent State may establish itself as a separate party to a general multilateral treaty, by notifying its continuance of, or succession to, the treaty. With certain exceptions, writers, it is true, do not refer—or do not refer clearly—to a successor State's *right of option* to establish itself as a party to multilateral treaties applicable in respect of its territory prior to independence. The reason seems to be that they direct their attention to the question whether the successor State automatically inherits the rights and obligations of the treaty rather than to the question whether, in virtue of its status as a successor State, it may have the right, if it thinks fit, to be a party to the treaty in its own name. The International Law Association, in the already mentioned resolution of its Buenos Aires Conference,[162] stated the law in terms of a presumption that a multilateral treaty is to continue in force as between a newly independent State and the existing parties unless within a reasonable time after independence the former shall have made a declaration to the contrary. In other words, that body envisaged the case as one in which the new State would have a *right to contract out* of, rather than to contract into, the treaty. Even so, recognition of a right to contract out of a multilateral treaty would seem clearly to imply, *a fortiori*, recognition of a right to contract into it; and it is the latter right which seems to the Commission to be more consonant both with modern practice and the general law of treaties.

(6) As for the basis of the right of option of the newly independent State, it was agreed in the Commission that the treaty should be one that was *internationally applicable*, at the date of the succession of States, in respect of the territory to which the succession relates. Consequently the criterion accepted by the Commission is *that by its acts, the predecessor State should have established a legal nexus of a certain degree between the treaty and the territory;* in other words, it should either have brought the treaty into force or have established its consent to be bound or have at least signed the treaty. The present article concerns the case in which that legal nexus is complete, namely when the treaty is *in force* in respect of the territory at the date of the succession of States. Two other cases where the legal nexus between the treaty and the territory is less complete are examined in the commentaries to article 13 (participation in treaties not yet in force) and article 14 (ratification, acceptance or approval of a treaty signed by the predecessor State).

(7) In applying the criterion referred to above, the essential point is not whether the treaty had come into force *in the municipal law of the territory* prior to independence, but whether the treaty, as a treaty, was in

[157] See also para. 12 below.

[158] *Yearbook of the International Law Commission, 1962*, vol. II, p. 122, document A/CN.4/150, paras. 133-134.

[159] *Ibid. 1968*, vol. II, pp. 22 *et seq.*, document A/CN.4/200 and Add.1-2, paras. 71-98.

[160] *Ibid.*, pp. 38 *et seq.*, paras. 152-180.

[161] United Nations, *Materials on Succession of States (op. cit.)*, pp. 224-228.

[162] See foot-note 29 above.

force *internationally* in respect of the territory.[163] This is simply a question of the interpretation of the treaty and of the act by which the predecessor State established its consent to be bound, the governing principle being expressed in article 29 of the Vienna Convention on the Law of Treaties. The operation of this principle is well explained by the summary of the Secretary-General's depositary practice given in the Secretariat's memorandum "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary":

> In ascertaining whether a treaty was applicable in the territory, the terms of the treaty, if any, on territorial application are first examined. Some treaties have territorial clauses providing procedures for extension to dependent territories, and it can readily be ascertained whether the treaty was extended to the territory in question. Other treaties are limited in their geographical scope; for example, certain League of Nations treaties on opium are limited to the Far Eastern territories of the parties, and the Secretary-General, in reply to inquiries by some African States, has informed them that it is impossible for them either to succeed or accede to those treaties. Some United Nations treaties are likewise regional in scope; for example, the Convention regarding the Measurement and Registration of Vessels Employed in Inland Navigation, done at Bangkok on 22 June 1956, is open only to States falling within the geographical scope of the Economic Commission for Asia and the Far East, and States outside that area cannot become bound by it.[164]

When the treaty contains no provision on territorial application, the Secretary-General proceeds on the basis that, as provided in article 29 of the Vienna Convention on the Law of Treaties, the treaty was binding on the predecessor State in respect of its entire territory and, therefore, in respect of all its dependent territories.[165] For example, the Vienna Convention on Diplomatic Relations and the four Geneva Conventions on the Law of the Sea contain no provisions regarding their territorial application, and the Secretary-General has assumed that any ratifications of these Conventions by predecessor States embraced all their territories so as to entitle any newly independent States which were their dependencies at the time of ratification, to notify their succession to any of the Conventions.

(8) The Secretariat memorandum emphasizes that, in identifying the treaties to which new States may notify their succession, the relevant point is the previous legal nexus between the new State's territory and the treaty, *and not the qualifications of the new State to become a party under the provisions of the treaty.*[166] In other words, a newly independent State's right to be considered as a party in its own name is wholly independent of the question whether the treaty is open to its participation through a provision for accession of the like under the final clauses. In many cases, even in the majority of cases, the alternative will be open to a successor State of becoming a party to the treaty by exercising a right to do so specifically provided for in the treaty—usually a right of accession. But a successor State's right to notify its succession to a treaty neither requires, nor usually finds, any mention in the final clauses.[167] It arises under general international law from the relationship which existed at the date of the succession between the treaty, the predecessor State and the territory which has now passed to the successor State.

(9) Whether this right is properly to be regarded as deriving from a principle of the law of treaties or from a principle of "succession" seems to the Commission to be primarily a doctrinal question. What seems more important is to identify the elements of the principle with as much precision as possible. If the conclusions drawn by the Commission from the modern practice are correct, what the principle confers upon a successor State is simply a *right of option* to establish itself as a separate party to the treaty in virtue of the legal nexus established by its predecessor between the territory to which the succession of States relates and the treaty. It is not a right to "succeed" to its predecessor's participation in the treaty in the sense of a right to step exactly, and only to step exactly, into the shoes of its predecessor. The successor State's right is rather to *notify its own consent to be considered as a separate party to the treaty.* In short, a newly independent State whose territory was subject to the régime of a multilateral treaty at the date of the State's succession is entitled, simply in virtue of that fact, to establish itself as a separate party to the treaty.

(10) This general principle is not without some qualifications as to its exercise. The first concerns the constituent instruments of international organizations and treaties adopted with an international organization. In such cases, the application of the general principle is subject to the "relevant rules" of the organisation in question and, notably, in the case of constituent instruments to the rules concerning acquisition of membership. This point has been dealt with in the commentary to article 4 and needs no further elaboration here.

(11) Secondly, the successor State's participation in a multilateral treaty may be actually incompatible with the object and purpose of the treaty. This incompatibility may result from various factors or a combination of factors: when participation in the treaty is indissolubly linked with membership in an international organization of which the State is not a member; when the treaty is regional in scope; or when participation in a treaty is subject to other preconditions. The European Convention for the Protection of Human Rights and Fundamental Freedoms, for example, presupposes that all its contracting parties will be member States of the Council of Europe, so that succession to the Convention and its several Protocols is impossible without membership of the organization. Accordingly, when in 1968 Malawi asked for information regarding the status of former dependent territories in relation to the Convention, the Secretary-General of the Council of Europe pointed out the association of the Convention with membership of the Council of Europe. Malawi then notified him, as depositary, that any legal connexion with the Convention which devolved upon her

[163] In this connexion it is important to distinguish between the incorporation of the treaty in the municipal law of the territory and the extension of the treaty on the international plane to the territory.

[164] *Yearbook of the International Law Commission, 1962*, vol. II, pp. 122-123, document A/CN.4/150, para. 137.

[165] *Ibid.*, p. 125, para. 138.

[166] *Ibid.*, para. 139.

[167] For some cases where a treaty does specifically make provision for the participation of successor States in the treaty, see the commentary to article 9.

by reason of the United Kingdom's ratification should now be regarded as terminated.[168] Clearly, in cases such as this the need for a party to be a member of an international organization will operate as a bar to succession to the treaty by States not eligible for membership, the reason being that succession to the treaty by the newly independent State concerned is, in the particular circumstances, really incompatible with the regional object and purpose of the treaty.

(12) Thirdly, as already indicated,[169] an important distinction—analogous to that made in article 20, paragraph 2, of the Vienna Convention on the Law of Treaties—has to be made in the present context between treaties drawn up by a limited number of States and other multilateral treaties. In the context of the admissibility of reservations the Commission and the United Nations Conference on the Law of Treaties took the view that the limited number of the negotiating States may show that the application of the provisions of the treaty in their entirety between all the parties is intended to be an essential condition of the consent of any one of them to be bound by it. They did not think this to be by itself conclusive indication of such an intention, but did consider that the limited number of the negotiating States combined with the object and purpose of a particular treaty would suffice to establish such an intention. The limited number of the negotiating States combined with the object and purpose of the treaty may similarly establish an intention to confine the circle of possible parties to the negotiating States. In this case it seems logical also to conclude that the participation of a *successor* State in the treaty should be subject to the concurrence of all the parties. Sometimes these treaties may be constituent instruments of a limited international organisation or treaties adopted within such an organization, in which case the matter will be covered by the general reservation in article 4. But there are other cases where these factors are not present and in these cases the Commission considered that an exception must be made to the successor State's option to consider itself a party to a multilateral treaty. The appropriate rule must then be that a successor State may consider itself a party to a restricted multilateral treaty of this type only with the consent of all the parties.

(13) Having regard to the various considerations set out in the preceding paragraphs, the present article lays down in *paragraph 1*, as the *general* rule for multilateral treaties, that a newly independent State is entitled to establish its status as a party, by a notification of succession, to any multilateral treaty which at the date of the succession was in force in respect of the territory to which the succession of States relates, subject to the exceptions provided for in paragraphs 2 and 3 of the article. *Paragraph 2* then excepts from the general rule cases where it would be incompatible with the object and purpose of the treaty to allow the newly independent State to become a party. *Paragraph 3* further excepts from the general rule any treaty which under its own terms or by reason of the limited number of the negotiating States and the object and purpose of the treaty must be considered as requiring the consent of all the parties for the participation of any additional State. In such cases, the paragraph provides that the consent of all the parties to the treaty is required.

(14) The application of the article to constituent instruments of international organizations and to treaties concluded within an international organization being subject to the general provision of article 4, it is unnecessary to cover the point again here.

Article 13. Participation in treaties not yet in force

1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession, establish its status as a contracting State to a multilateral treaty, which at the date of the succession of States was not in force in respect of the territory to which that succession of States relates, if before that date the predecessor State had become a contracting State.

2. Paragraph 1 does not apply if the object and purpose of the treaty are incompatible with the participation of the successor State in that treaty.

3. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the contracting States, the successor State may establish its status as a contracting State to the treaty only with such consent.

4. When a treaty provides that a specified number of parties shall be necessary for its entry into force, a newly independent State which establishes its status as a contracting State to the treaty under paragraph 1 shall be reckoned as a party for the purpose of that provision.

Commentary

(1) The present article, which parallels article 12, deals with the participation of a newly independent State in a multilateral treaty not yet in force at the date of the succession of States, but in respect of which at that date the predecessor State had established its consent to be bound with reference to the territory in question. In other words, the article regulates the successor State's participation in a multilateral treaty in cases when, at the date of the succession, the predecessor State although not an actual "party" to the treaty was a "contracting State".[170]

(2) A substantial interval of time not infrequently elapses between the expression by a State of its consent to be bound by a treaty and the entry into force of the treaty. This is almost inevitable where the treaty provides that it shall not enter into force until a specified number of States shall have established their consent to be bound. In such cases, at the date of a succession of States, a pre-

[168] See M.-A. Eissen, *The British Year book of International Law, 1968-1969* (London, Oxford University Press, 1970), vol. 43, pp. 190-192.

[169] See para. 2 above.

[170] For the meaning in the present draft of the terms "contracting State" and "party", see article 2, sub-paragraphs 1(*k*) and 1(*l*), of these draft articles and article 2, sub-paragraphs 1(*f*) and 1(*g*), of the Vienna Convention on the Law of Treaties.

decessor State may have expressed its consent to be bound, by an act of consent extending to the territory to which the succession relates, without the treaty's having yet come into force.

(3) As already indicated,[171] the right of option of a newly independent State to participate on its own behalf as a separate party in a multilateral treaty, under the law of succession, is based in the legal nexus formerly established by the predecessor State between the treaty and the territory. The treaty must be *internationally applicable*, at the date of the succession of States, to the territory which afterwards becomes the territory of the successor State.
(4) Sometimes this criterion is expressed in terms that might appear to require the *actual* previous application of the treaty in respect of the territory which becomes the successor State's territory. Indeed, the letter addressed by the Secretary-General to a newly independent State drawing its attention to the treaties of which he is the depositary used the expression "multilateral treaties *applied* * in [the] territory".[172] In a few cases, newly independent States have also replied that they did not consider themselves to be bound by a particular treaty for the reason that it had not been applie : to their territory before independence.[173] These States seem, however, to have been concerned more to explain their reasons for not accepting the treaty than to raise a question as to their *right* to accept it if they had so wished.

(5) It also seems clear that in his letter the Secretary-General intended by his words to indicate treaties *internationally applicable*, rather than actually applied, in respect of the successor State's territory. Indeed, in the Secretariat memorandum "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary" the practice on the matter, as established by 1962, was summarized as follows:

> The lists of treaties sent to new States have since 1958 included not only treaties which are in force, but also treaties which are *not yet in force*,* in respect of which the predecessor State has taken final action to become bound and to extend the treaty to the territory which has later become independent. France in 1954 ratified and Belgium in 1958 acceded to the 1953 Opium Protocol, which is not yet in force; both countries also notified the Secretary-General of the extension of the Protocol to their dependent territories. Cameroon, the Central African Republic, the Congo (Brazzaville), the Congo (Leopoldville) and the Ivory Coast have recognized themselves as bound by the instruments deposited by their respective predecessors. In March 1960 the United Kingdom ratified the 1958 Conventions on the Territorial Sea and Contiguous Zone, on the High Seas, and on Fishing, which do not contain any territorial application clauses. Nigeria and Sierra Leone have recognized themselves as bound by these ratifications.[174] It may also be mentioned that Pakistan in 1953 spontaneously informed the Secretary-General that it was bound by the action of the United Kingdom in respect of a League treaty [175] which was not yet in force.[176]

So far as is known to the Commission, other States have not questioned the propriety of the Secretary-General's practice in this matter or the validity of the notifications of succession in the above-mentioned cases. On the 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[177] of Nigeria and Sierra Leone toward the number of twenty-two".[178] Since then, the entry into force of the Convention on the Territorial Sea and Contiguous Zone has been notified by the Secretary-General on the basis of counting notifications of succession by the same two States towards the required total of twenty-two; and also that of the Convention on Fishing and Conservation of the Living Resources of the High Seas on the basis of notifications of succession by three new States. The practice of the Secretary-General as depositary therefore seems settled in favour of treating the notifications of succession of newly independent States as in all respects equivalent to a ratification, accession, etc., for the purpose of treaty provisions prescribing a specified number of parties for the entry into force of the treaty. So far as is known, no State has questioned the propriety of the Secretary-General's practice with respect to these important treaties.

(7) The final clauses here in question normally refer expressly to the deposit of a specified number of instruments of ratification or accession or, as the case may be, of acceptance or approval, by States to which participation is open under the terms of the treaty. Accordingly, to count notifications of succession for the purpose of arriving at the prescribed total number may be represented as modifying in some degree the application of the final clauses of the treaty. But any such modification that may occur results from the impact of the general law of succession of States upon the treaty, and this general law the

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[171] See above, commentary to article 12, para. 6.

[172] *Yearbook of the International Law Commission, 1962*, vol. II, p. 122, document A/CN.4/150, para. 134. The International Law Association, it may be added, formulated the criterion as follows: a treaty which was "internationally in force with respect to the entity or territory corresponding with it prior to independence..." (International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), p. 596 [Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors].

[173] For example, Zaire [Congo Republic (Léopoldville)] did not consider itself bound by the Convention on the Privileges and Immunities of the United Nations on this ground (*Yearbook of the International Law Commission, 1962*, vol. II, p. 115, document A/CN.4/150, para. 74); nor did the Ivory Coast with regard to the 1953 Convention on the Political Rights of Women (*ibid.*, p. 116, para 83.)

[174] These two States did so at dates before the Conventions in question had come into force.

[175] Protocol relating to a Certain Case of Statelessness (1930). See United Nations, *Multilateral Treaties... 1971 (op. cit.)*, p. 410.

[176] *Yearbook of the International Law Commission, 1962*, vol. II, pp. 123-124, document A/CN.4/150, para. 143.

[177] Notification of succession.

[178] See *Yearbook of the International Law Commission, 1962*, vol. II, p. 124, document A/CN.4/150, para 143.

negotiating States must be assumed to have accepted as supplementing the treaty. Nor is the modification involved in counting a notification of succession as relevant in connexion with these treaty clauses much greater than that involved in admitting that newly independent States may become separate parties to the treaty by notifications for which the final clauses make no provision; and the practice of admitting notifications of succession for this purpose is now well settled. Moreover, to count the notification of a successor State as equivalent to a ratification, accession, acceptance, or approval would seem to be in conformity with the general intention of the clauses here in question, for the intention of these clauses is essentially to ensure that a certain number of States shall have definitively accepted the obligations of the treaty before they become binding on any one State.[179] To adopt the contrary position would almost mean to assume that a newly independent State is not to be considered as sufficiently detached from its predecessor to be counted as a separate unit in giving effect to that intention. But such an assumption hardly appears compatible with the principles of self-determination, independence and equality. The Commission concluded, therefore, that the present article should state the law in terms which accord with these considerations and with the Secretary-General's depositary practice, as now firmly established.

(8) In the light of the foregoing, the Commission decided to model the provisions of *paragraphs 1, 2 and 3* of this article along the lines of the corresponding provisions of article 12 with the adjustments required by the present context. Consequently paragraphs 1, 2 and 3 of article 13 are identical to paragraphs 1, 2 and 3 of article 12, except that: (*a*) the words "its status as a party" are replaced in paragraphs 1 and 3 by the words "its status as a contracting State"; (*b*) the words "was in force" are replaced in paragraph 1 by the words "was not in force"; and (*c*) the words "if before that date the predecessor State had become a contracting State" are added at the end of paragraph 1.

(9) Lastly, *paragraph 4* makes a notification of succession by a newly independent State as equivalent to a definitive signature, ratification, etc., for the entry into force of the treaty, in accordance with the conclusion reached above.

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

1. If before the date of the succession of States, the predecessor State signed a multilateral treaty subject to ratification and by the signature intended that the treaty should extend to the territory to which the succession of States relates, the successor State may ratify the treaty and thereby establish its status:

(*a*) As a party, subject to the provisions of article 12, paragraphs 2 and 3;

(*b*) As a contracting State, subject to the provisions of article 13, paragraphs 2, 3 and 4.

2. A successor State may establish its status as a party or, as the case may be, contracting State to a multilateral treaty by acceptance or approval under conditions similar to those which apply to ratification.

Commentary

(1) The view has been expressed in the commentaries to articles 12 and 13 that a newly independent State inherits a right, if it wishes, to become a party or contracting State in its own name to a multilateral treaty in virtue of the legal nexus established between the territory and the treaty by *the acts* of the predecessor State. As indicated in those commentaries, a well established practice already exists which recognizes the option of the successor State to become a party or a contracting State on the basis of its predecessor's having established its *consent to be bound*, irrespective of whether the treaty was actually in force at the moment of the succession of States. The present article deals with the case of a predecessor State's signature which was still subject to ratification, acceptance or approval when the succession of States occurred.

(2) There is, of course, an important difference between the position of a State which has definitely committed itself to be bound by a treaty and one which has merely signed it subject to ratification, acceptance or approval. The question, therefore, arises whether a predecessor State's signature, still subject to ratification, acceptance or approval, creates a sufficient legal nexus between the treaty and the territory concerned on the basis of which a successor State may be entitled to participate in a multilateral treaty under the law of succession. The Secretariat memorandum "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary" of 1962 made the following comment on this point:

> The lists of treaties sent to new States have not included any treaties which have been only signed, but not ratified, by predecessor States. No case has yet arisen in practice in which a new State, in reliance on a signature by its predecessor, has submitted for deposit an instrument of ratification to a treaty. There is considerable practice to the effect that a new State can inherit the legal consequences of a ratification by its predecessor of a treaty which is not yet in force; but it is not yet clear whether the new State can inherit the legal consequences of a simple signature of a treaty which is subject to ratification. The case presents some practical importance, since numerous League of Nations treaties, some of which were signed, but never ratified, by France, the United Kingdom, etc., are not now open to accession by new States, and new States have sometimes indicated an interest in becoming parties to those treaties.[180]

[179] The Committee on the Succession of New States of the International Law Association in an explanatory note accompanying the draft resolution submitted to the Buenos Aires Conference in 1968 took up a position which led it to a conclusion opposite to that proposed in the present article (International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), pp. 602-603 [Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors, Notes]).

[180] *Yearbook of the International Law Commission, 1962*, vol. II, p. 124, document A/CN.4/150, para. 151.

(3) A possible point of view might be that in such a case the conditions do not exist for the transmission of any obligation or right from a predecessor to a successor State.[181] The predecessor did not have any definitive obligations or rights under the treaty at the moment of the succession of States, nor were any such obligations or rights then applicable with respect to the successor State's territory. As the International Court of Justice has stated on several occasions,[182] a signature subject to ratification, acceptance or approval does not bind the State. This is also the law codified by article 14 of the Vienna Convention on the Law of Treaties.

(4) On the other hand, the opinion of the International Court of Justice both on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide[183] and article 18 of the Vienna Convention on the Law of Treaties do recognize that a signature subject to ratification creates for the signatory State certain limited obligations of good faith and a certain legal nexus in relation to the treaty. Thus, it seems possible to justify the recognition of the option of a newly independent State to establish its consent to be bound by a treaty in virtue of its predecessor's bare signature of the treaty subject to ratification, acceptance or approval.

(5) This solution, the most favourable both to successor States and to the effectiveness of multilateral treaties, is the one embodied in the present article, notwithstanding doubts expressed by some members of the Commission as to its justification. The article has been included in the draft to enable Governments to express their views on the matter so that the Commission may reach a clear conclusion on this point when it undertakes its revision of the present draft. If the opposite solution were adopted the practical difference would appear to be marginal, because occasions for the exercise of the right provided for in the article are likely to be rare. Moreover, not only is the number of possible cases likely to be small but in many cases the treaty will normally be open to accession by the newly independent State. The question had a special interest some years ago in relation to certain League of Nations treaties, but the participation of newly independent States in those treaties ceased to present any problem as a result of the adoption by the General Assembly of its resolution 1903 (XVIII) of 18 November 1963, following the study of the problem made by the International Law Commission in its 1963 report to the Assembly.[184]

(6) The question, however, is a general one and some members of the Commission felt that the possibility of a successor State's liberty to ratify a treaty on the basis of its predecessor's signature assuming importance in future in connexion with multilateral treaties could not be altogether excluded. In its 1963 report to the General Assembly, the Commission merely noted the existence of the problem without expressing any opinion upon it. Similarly, although it has not been the practice of the Secretary-General to include in the lists of treaties sent to successor States any treaty merely signed and not ratified by the predecessor State, the passage cited from the Secretariat memorandum[185] seems to leave open the question whether a successor State is entitled to ratify such a treaty.

(7) In the light of the above considerations, the present article provides that, if before the date of the succession of States, the predecessor State signed a multilateral treaty subject to ratification, acceptance or approval, and by the signature intended that the treaty should extend to the territory to which the succession of States relates, the newly independent State may ratify, accept or approve the treaty and thereby establish its status as a "party" if the treaty was in force, or as a "contracting State" if the treaty was not yet in force.

(8) Lastly, the Commission considered that even on the assumption of the adoption of this article, it would not be appropriate to regard the successor State as bound by the obligation of good faith contained in article 18 of the Vienna Convention until it had at least established its consent to be bound and become a contracting State. In other words, the recognition of a successor State's right to ratify, etc., a treaty on the basis of its predecessor's signature ought not to have the result of bringing the successor State within article 18, sub-paragraph (*a*), of the Vienna Convention.

Article 15. Reservations

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining any reservation which was applicable in respect of the territory in question at the date of the succession of States unless:

(*a*) In notifying its succession to the treaty, it expresses a contrary intention or formulates a new reservation which relates to the same subject matter and is incompatible with the said reservation; or

(*b*) The said reservation must be considered as applicable only in relation to the predecessor State.

2. When establishing its status as a party or a contracting State to a multilateral treaty under article 12 or 13, a newly independent State may formulate a new reservation unless:

(*a*) The reservation is prohibited by the treaty;

(*b*) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

[181] This seems to have been the view on the matter taken by the International Law Association's Committee on the Succession of New States. It should be recalled, however, that the Association took the position that a legal nexus existed between the treaty and the territory when the treaty was *in force* in respect of the territory at the date of succession of States (see foot-note 172 above). From this standpoint it was consistent for the Association to consider that a legal nexus did not exist on the basis of a bare predecessor State's signature subject to ratification, acceptance or approval.

[182] For example, in the North Sea Continental Shelf Cases (*I.C.J. Reports 1969*, p. 3).

[183] *I.C.J. Reports 1951*, p. 28.

[184] *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9* (A/5509), pp. 30 *et seq.*, paras. 18-50 (*Yearbook of the International Law Commission, 1963*, vol. II, pp. 217 *et seq.*, document A/5509, paras. 18-50).

[185] See para. 2 above.

(c) In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

3. (a) When a newly independent State formulates a new reservation in conformity with the preceding paragraph the rules set out in articles 20, 21, 22 and article 23, paragraphs 1 and 4, of the Vienna Convention on the Law of Treaties apply.

(b) However, in the case of a treaty falling under the rules set out in paragraph 2 of article 20 of that Convention, no objection may be formulated by a newly independent State to a reservation which has been accepted by all the parties to the treaty.

Commentary

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

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

(3) The Secretariat studies entitled "Succession of States to multilateral treaties" [186] contain some evidence of practice in regard to reservations. Some cases concern the Berne Convention for the Protection of Literary and Artistic Works. Thus, the United Kingdom made a reservation to the Berlin Act (1908) regarding retroactivity on behalf of itself and all its dependent territories with the exception of Canada; France, on behalf of itself and all its territories, made a reservation to the same Convention regarding works of applied art; and the Netherlands also made three separate reservations to that Convention on behalf both of herself and the Netherlands East Indies. Each of these three States omitted their reservations when adhering to later texts: the United Kingdom and the Netherlands when becoming parties to the Rome Act of 1928 and France when becoming a party to the Brussels Act of 1948. In all the cases of succession occurring in respect of these three States, the Swiss Government as depositary has treated the successor State as inheriting such of its predecessor's reservations as were binding upon the successor's territory in relation to each particular Convention at the date of independence. Moreover, in these cases the Swiss Government appears to have regarded the inheritance of the reservations, when it occurred, as automatic and not dependent upon any "confirmation" of the reservation by the successor State.[187] Another case relates to the Geneva Humanitarian Conventions of which the Swiss Government is also the depositary. No mention is made of reservations in the final clauses of these Conventions, but reservations have been formulated by a considerable number of States.[188] Among these reservations is one made by the United Kingdom with respect to article 68, paragraph 2, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949).[189] Five newly independent States, to which this Convention was formerly applicable as dependent territories of the United Kingdom, have notified the depositary that they consider themselves as continuing to be bound by that Convention in virtue of its ratification by the United Kingdom.[190] The notifications of these States do not refer explicitly to the United Kingdom's reservation. The point of departure for all these States was however that the Convention had been made applicable to their territories by the United Kingdom prior to independence; and that application was clearly then subject to the United Kingdom's reservation. Moreover, four of the States concerned expressly referred in their notifications to the United Kingdom's ratification of the Convention, and of that "ratification" the reservation was an integral part. As a matter of law, it would seem that the States concerned, in the absence of any indication of their withdrawal of their predecessor's reservation, must be presumed to have intended the treaty to continue to apply to their territory on the same basis as it did before independence, i.e. subject to the reservation. It is also not without relevance that the same depositary Government, when acting as depositary of the Berne Convention for the Protection of Literary and Artistic Works and subsequent Acts of revision, seems to have assumed that reservations are inherited automatically in cases of succession in the absence of any evidence of their withdrawal.

(4) The practice of successor States in regard to treaties for which the Secretary-General is the depositary appears

[186] See above, sect. A, para. 24.

[187] *Yearbook of the International Law Commission, 1968*, vol. II, pp. 24-25, document A/CN.4/200 and Add.1-2, paras. 86-92.

[188] *Ibid.*, p. 35, para. 138.

[189] United Nations, *Treaty Series*, vol. 75, p. 287.

[190] *Yearbook of the International Law Commission, 1968*, vol. II pp. 41-42, document A/CN.4/200 and Add.1-2, paras. 170-174.

to have been fairly flexible.[191] They have sometimes exercised their right to become a party by depositing an instrument of accession and sometimes by transmitting to the Secretary-General a "notification of succession". When becoming a party by accession, a new State has in some cases repeated a reservation made by its predecessor and applicable to the territory before independence.[192] In such a case the reservation is, of course, to be regarded as an entirely new reservation so far as concerns the newly independent State, and the general law governing reservations to multilateral treaties has to be applied to it accordingly as from the date when the reservation is made. It is only in cases of notification of succession that problems arise.

(5) Equally, when transmitting a notification of succession newly independent States have not infrequently repeated or expressly maintained a reservation made by their predecessor; especially in cases where their predecessor had made the reservation at the time of "extending" the treaty to their territory. Thus, Jamaica, in notifying its "succession" to the Convention relating to the Status of Refugees (1951), repeated textually a reservation which had been made by the United Kingdom specifically with reference to its territory;[193] and Cyprus and Cambia expressly confirmed their maintenance of that same reservation which had likewise been made applicable to each of their territories.[194] Other examples are the repetition by Malta of a United Kingdom objection to a reservation to the 1961 Vienna Convention on Diplomatic Relations;[195] by Trinidad and Tobago of a United Kingdom reservation to the International Convention to Facilitate the Importation of Commercial Samples and Advertising Material (1952) made specifically for Trinidad and Tobago;[196] and by Cyprus, Jamaica and Sierra Leone of United Kingdom reservations made to the 1949 Convention on Road Traffic, with annexes.[197] In the last mentioned case, Cyprus and Jamaica omitted from the repeated reservation a territorial application clause irrelevant to their own circumstances.

(6) It is, no doubt, desirable that a State, on giving notice of succession, should at the same time specify its intentions in regard to its predecessor's reservations. But it would be going too far to conclude from the practice mentioned in the preceding paragraph that, if a reservation is not repeated at the time of giving notice of succession, it does not pass to the successor State. Indeed, in certain other cases successor States seem to have assumed the contrary. Thus, both Rwanda and Malta transmitted notifications of succession to the Customs Convention on the Temporary Importation of Private Road Vehicles (1954), without referring to the reservations which had been made by their respective predecessors, Belgium and the United Kingdom. Rwanda, some two months after giving notice of succession, informed the Secretary-General that it did not intend to maintain Belgium's reservations.[198] Malta, also after an interval of some weeks, similarly informed the Secretary-General.[199] Both these States acted in the same manner in regard to their predecessors' reservations to the Convention Concerning Customs Facilities for Touring (1954).[200] Both would therefore seem to have thought that a predecessor's reservations would continue to be applicable unless disclaimed by the successor. The same view of the law was evidently taken by the Office of Legal Affairs of the Secretariat in its Memorandum to the Regional Representative of the United Nations High Commissioner for Refugees on the succession by Jamaica to rights and obligations under the Convention relating to the Status of Refugees (1951).[201] The Swiss Government[202] 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[203] that, as successor to the United Kingdom, she considered herself bound by the Additional Protocol to the Convention concerning Customs Facilities for Touring, relating to the Importation of Tourist Publicity Documents and Material (1954), the application of which had been extended to her territory before independence without any reservation whatever. Malta's notification nevertheless contained a reservation on article 3 of the Protocol, while article 14 provided that a reservation was not to be admissible if within a period of 90 days it had been objected to by one-third of the interested States. Accordingly, in circulating the notification of succession, the Secretary-General drew attention to the reservation and to the provision in article 14 of the Protocol; and Poland did in fact object to the reservation. In the event, this was the only objection lodged against the reservation within the prescribed period and the Secretary-General then formally notified the interested

[191] United Nations, *Multilateral treaties... 1971 (op. cit.)* and United Nations, *Multilateral treaties in respect of which the Secretary-General performs depositary functions, Annex: Final Clauses* (United Nations publication, Sales No. E.68.V.4).

[192] For example, in acceding to the Additional Protocol to the Convention concerning Customs Facilities for Touring, relating to the Importation of Tourist Publicity Documents and Material (1954), Uganda and the United Republic of Tanzania repeated a reservation which had been made by the United Kingdom specifically for those territories. See United Nations, *Multilateral treaties ... 1971 (op. cit.)*, pp. 232-233.

[193] *Ibid.*, p. 93.

[194] *Ibid.*, pp. 91 and 92 respectively.

[195] *Ibid.*, p. 51.

[196] *Ibid.*, pp. 224 and 225.

[197] *Ibid.*, pp. 251, 252 and 253 respectively.

[198] *Ibid.*, p. 236, foot-note 9.

[199] *Ibid.*, p. 237, foot-note 10.

[200] *Ibid.*, p. 229, foot-notes 11 and 12.

[201] See United Nations, *Juridical Yearbook, 1963* (United Nations publication, Sales No. 65.V.3), pp. 181-182.

[202] See para. 3 above.

[203] Secretary-General's circular letter of 16 August 1968 (C.N.123, 1968, Treaties-2).

States of the acceptance of Malta's reservation in accordance with article 14.[204]

(8) On 25 February 1969 Botswana notified the Secretary-General[205] that it regarded itself as "continuing to be bound" by the Convention of 1954 relating to the Status of Stateless Persons to the same extent as the United Kingdom was so bound in relation to the Bechuanaland Protectorate "subject, however, to the following additional reservations"; and it then formulated new reservations to articles 31, 12 (1) and 7 (2) of the Convention. In circulating the notification, the Secretary-General reproduced the text of Botswana's new reservations and at the same time informed the interested States where they would find the text of the earlier reservations made by the United Kingdom which Botswana was maintaining.

(9) On 18 July 1969 Mauritius informed the Secretary-General[206] that it considered itself bound as from the date of independence by the Convention on the Political Rights of Women (1953), the application of which had been extended to its territory before independence. At the same time, without any allusion to the reservations which had been made to article 3 by the United Kingdom, Mauritius formulated two reservations of its own to that article. One of these (recruitment and conditions of service in the armed forces) corresponded to a general reservation made by the United Kingdom; the other (jury service) had been made by the United Kingdom with respect to certain territories but not with respect to Mauritius itself. The Secretary-General, also making no allusion to the previous reservations of the United Kingdom, simply circulated the text of Mauritius' two reservations to the interested States.

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

> Therefore, it is the understanding of the Secretary-General that the Government of Zambia, on declaring formally its succession to the Convention in the instrument in question, decided to withdraw the old reservations pursuant to paragraph 2 of article 42 of the Convention, and expressed its consent to continue to be bound henceforth by the Convention subject to the new reservations, the *latter reservations to become effective on the date when they would have done so, pursuant to the pertinent provisions of the Convention, had they been formulated on accession.** Accordingly, the said reservations will take effect on the ninetieth day after the deposit of the instrument of succession by the Government of Zambia, that is to say, on 23 December 1969.

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

(11) The practice examined in the preceding paragraphs appears to show unmistakably that the Secretary-General is now treating a newly independent State as entitled to become a party to a treaty by "succession" to its predecessor's participation in the treaty, and yet at the same time to modify the conditions of that participation by formulating new reservations.

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

(13) There remains the question of objections to reservations, in regard to which the published practice is extremely sparse. The series of Secretariat studies entitled "Succession of States to multilateral treaties",[207] apart from a single mention of the existence of this question, contains no reference to succession in respect of objections to reservations; nor is anything to be found in *Materials on succession of States*.[208] Even the information published in *Multilateral treaties in respect of which the Secretary-General performs depositary functions*[209] throws comparatively little light on the practice in regard to objections to reservations. In the case of the 1946 Convention on the Privileges and Immunities of the United Nations, the

[204] Secretary-General's circular letter of 3 December 1968 (C.N. 182, 1968, Treaties-4).

[205] Secretary-General's circular letter of 21 May 1969 (C.N.80, 1969, Treaties-1).

[206] Secretary-General's circular letter of 11 September 1969 (C.N. 168, 1969, Treaties-5).

[207] *Yearbook of the International Law Commission, 1968*, vol. II p. 1 document A/CN.4/200 and Add.1-2; *ibid., 1969*, vol. II, p. 23, document A/CN.4/210; and *ibid., 1970*, vol. II, p. 61, document A/CN.4/225.

[208] United Nations, *Materials on Succession of States (op. cit.)*.

[209] United Nations, *Multilateral treaties... 1971 (op. cit.)*.

United Kingdom lodged an objection to the reservations of certain States regarding recourse to the International Court of Justice for the settlement of disputes, and subsequently a number of her former dependent territories became parties by transmitting a notification of succession. None of these newly independent States, it appears, made any allusion to the United Kingdom's objection to those reservations. Nor did Zaire, when it notified its succession to the 1948 Convention on the Prevention and Punishment of the Crime Genocide, make any allusion to Belgium's objection to similar reservations formulated in regard to this Convention. Again, the United Kingdom lodged a series of formal objedtions to reservations formulated by various States to the three 1958 Conventions on the Territorial Sea and Contiguous Zone, on the High Seas and on the Continental Shelf, and several of her former dependent territories afterwards became parties to one or other of these Conventions by transmitting a notification of succession; but none of them apparently made any allusion to any of the United Kingdom's objections. Only one case has been found in which a successor State has referred to its predecessor's comment upon another State's reservation, and even this was not, strictly speaking, a case of an "objection" to a reservation. In ratifying the Vienna Convention on Diplomatic Relations the United Kingdom declared that it did not regard statements which had been made by three Socialist States with reference to article 11, paragraph 1 (size of a diplomatic mission), as modifying any rights or obligations under this paragraph. Malta, an ex-United Kingdom dependency which became a party by succession, repeated the terms of this declaration in its notification of succession.[210]

(14) According to the provisions of the Vienna Convention on the Law of Treaties concerning objections to reservations (article 20, paragraph 4 (*b*), in conjunction with article 21, paragraph 3),[211] unless the objecting State has definitely indicated that by its objection it means to stop the entry into force of the treaty as between the two States, the *legal* position created as between the two States by an objection to a reservation is much the same as if no objection had been lodged. But, if an objection has been accompanied by an indication that it is to preclude the entry into force of the treaty as between the objecting State and the reserving State, the treaty will not have been in force at all in respect of the successor State's territory at the date of the succession of States *in relation to the reserving State*. The evidence of practice, however, does not seem to indicate any great concern on the part of newly independent States with the objections of their predecessor to reservations formulated by other States. The simplest course might be to treat an objection as particular to the objecting predecessor State and to leave it to the successor State to lodge its own objections to reservations which are already to be found in the ratifications, accessions, etc., of other States when it notifies its succession.

(15) In the light of the considerations in the foregoing paragraphs and having regard to the nature of modern multilateral treaties and to the system of law governing reservations in articles 19 to 23 of the Vienna Convention on the Law of Treaties, the Commission decided to adopt a pragmatic and flexible approach to the treatment of reservations and objections thereto in the context of the present draft articles on succession of States in respect of treaties. When a newly independent State transmits a notification of succession, this may clearly be interpreted as an expression of a wish to be considered as a party to the treaty on the same conditions in all respects as its predecessor. But once it is accepted that succession in respect of treaties does not occur automatically but is dependent on an act of will by the successor State, the way is open for the law to regulate the conditions under which that act of will is to become effective.

(16) Since the general rule is that a reservation may be withdrawn unilaterally and at any time, the question whether a predecessor State's reservation attaches to a successor State would seem to be simply a matter of the latter's intention at the time of giving notice of succession. If the successor State expressly maintains them, the answer is clear. If it is silent on the point, the question is whether there should be a presumption in favour of an intention to maintain the reservations except such as by their very nature are applicable exclusively with respect to the predecessor State. The Commission concluded that for various reasons such a presumption should be made. First, the presumption of an intention to maintain the reservations was indicated by the very concept of succession to the predecessor's treaties. Secondly, a State is in general not to be understood as having undertaken more onerous obligations unless it has unmistakably indicated an intention to do so; and to treat a successor State, on the basis of its mere silence, as having dropped its predecessor's reservations would be to impose upon it a more onerous obligation. Thirdly, if presumption in favour of maintaining reservations were not to be made, the actual intention of the successor State might be irrevocably defeated; whereas, if it were made and the presumption did not correspond to the successor State's intention, the latter could always redress the matter by withdrawing the reservations. *Paragraph 1* of the present article accordingly lays down that a notification of succession shall be considered as subject to the predecessor State's reservation, unless: (*a*) a contrary intention is expressed by the successor State (*sub-paragraph* a); (*b*) the successor State formulates a new reservation which relates to the same subject matter and is incompatible with the predecessor State's reservation (*sub-paragraph* a); (*c*) the predecessor State's reservation must be considered as applicable only in relation to itself (*sub-paragraph* b).[212] In the case of these exceptions the presumption of an intention to maintain the predecessor State's reservation is thus negatived.

(17) *Paragraph 2* of the article provides for the case where the successor State formulates new reservations of

[210] *Ibid.*, p. 53.

[211] This rule does not apply in the case of constituent instruments of international organizations or in that of treaties concluded between a "limited number of States" within the meaning of paragraph 2 of Article 20.

[212] Examples of reservations appropriate only in relation to the predecessor State are United Kingdom reservations regarding the extension of the treaty to dependent territories.

its own when establishing its status as a party or a contracting State to a multilateral treaty under articles 12 or 13 of the present draft articles. Logically, as already pointed out, there may be said to be some inconsistency in claiming to become a party or a contracting State in virtue of the predecessor's act and in the same breath establish a position in relation to the treaty different from that of the predecessor. The alternatives would seem to be either (*a*) to decline to regard any notification of succession made subject to new reservations as a true instrument of succession and to treat it in law as a case of accession, or (*b*) to accept it as having the character of a succession but at the same time apply to it the law governing reservations as if it were a wholly new expression of consent to be bound by the treaty. The latter alternative is the one embodied in paragraph 2 of this article. It corresponds to the practice of the Secretary-General as depositary, and it has the advantage of making the position of a newly independent State, anxious to continue the participation of its territory in the régime of the treaty, as flexible as possible. It may also ease the position of a newly independent State in any case where the treaty is not, for technical reasons, open to its participation by any other procedure than succession. Of course, the possibility for a successor State to formulate new reservations in a notification of succession is subject to the limitations of the general law governing the formulation of reservations by any State, namely by article 19 of the Vienna Convention on the Law of Treaties whose sub-paragraphs (*a*), (*b*) and (*c*) are incorporated in paragraph 2 of the present article.

(18) *Sub-paragraph 3* (a) of article 15 goes on to lay down that when a newly independent State formulates a new reservation in conformity with paragraph 2 of the article, the rules set out in articles 20, 21, 22 and 23, paragraphs 1 and 4, [213] of the Vienna Convention on the Law of Treaties apply. In other words, the general law of treaties concerning acceptance of and objections to reservations, legal effects of reservations and of objections to reservations, withdrawal of reservations and of objections to reservations, and relevant rules of the procedure regarding reservation will be applicable. Although some opposition was expressed to the method of drafting by reference, the Commission decided to follow that method because to reproduce in the paragraph all the provisions in question would have rendered article 15 very long and heavy. The Commission also took into account the fact that the present draft articles was intended to complement the articles on the general law of treaties contained in the Vienna Convention and to form part of a coherent codification of the whole law of treaties. At any rate, the references to the Vienna Convention in the present article will give an opportunity to Governments to express their views on the whole question of drafting by reference in the context of codification.

(19) Lastly, *sub-paragraph 3* (b) deals with a specific case, namely when the predecessor State itself has "accepted" the reservation and all other State parties have done likewise, in the context of a multilateral treaty of the kind envisaged in article 20, paragraph 2, of the Vienna Convention on the Law of Treaties. In such a case, it would seem inadmissible to allow a successor State to object to a reservation already formulated and accepted *and thereby exclude the reserving State from participation in the treaty*. If that were allowed, it would be to empower a successor State, in effect, to compel the withdrawal from a treaty of a State which was already a party. In order to rule out any such possibility, paragraph 3 (*b*) provides that in cases falling under article 20, paragraph 2, of the Vienna Convention no objection may be formulated by a newly independent State to a reservation which has been accepted by all the parties to the treaty.

Article 16. Consent to be bound by part of a treaty and choice between differing provisions

1. Except as provided in paragraphs 2 and 3, when a newly independent State establishes its status as a party or contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining the predecessor State's:

(*a*) Consent, in conformity with the treaty, to be bound only by part of its provisions; or

(*b*) Choice, in conformity with the treaty, between differing provisions.

2. When so establishing its status as a party or contracting State, a newly independent State may, however, declare its own choice in respect of parts of the treaty or between differing provisions under the conditions laid down in the treaty for making any such choice.

3. A newly independent State may also exercise, under the same conditions as the other parties or contracting States, any right provided for in the treaty to withdraw or modify any such choice.

Commentary

(1) This article deals with questions analogous to those covered in article 15. It refers to cases where a treaty permits a State to express its consent to be bound only by part of a treaty or to make a choice between differing provisions, that is, to the situations envisaged in paragraphs 1 and 2, respectively, of article 17 of the Vienna Convention on the Law of Treaties. If its predecessor State has consented to be bound only by part of a treaty or, in consenting to be bound, has declared a choice between differing provisions, the question arises as to what will be the position of a State which notifies its succession to the treaty.

(2) An example of a predecessor State's having consented to be bound only by part of a treaty is furnished by the 1949 Convention on Road Traffic, article 2, paragraph 1, of which permits the exlusion of annexes 1 and 2 from the application of the Convention. The United Kingdom's instrument of ratification, deposited in 1957, contained a declaration excluding those annexes.[214] When extending

[213] Paragraphs 2 and 3 of article 23 of the Vienna Convention are irrelevant in the present context.

[214] See United Nations, *Multilateral treaties... 1971 (op. cit.)*, p. 253.

the application of the Convention to Cyprus and Sierra Leone, the United Kingdom specifically made that extension subject to the same exclusions.[215] In the case of Malta, on the other hand, the declaration excluded only annex 1,[216] while in the case of Jamaica the declaration contained a reservation on a certain point but made no allusion to annexes 1 and 2.[217] On becoming independent, these four countries transmitted to the Secretary-General notifications of succession to the Convention. Three of them, Cyprus, Malta and Sierra Leone, accompanied their notifications with declarations reproducing the particular exclusions in force in respect of their territories before independence.[218] Jamaica, on the other hand, to which the exclusions had not been applied before independence, did not content itself with simply reproducing the reservation made by the United Kingdom on her behalf; it added a declaration excluding annexes 1 and 2.[219]

(3) The 1949 Convention on Road Traffic furnishes also an example of choice between differing provisions: annex 6, section IV (*b*) permits a party to declare that it will allow "trailer" vehicles only under certain specified conditions, and declarations to that effect were made by the United Kingdom in respect of Cyprus and Sierra Leone.[220] These declarations were reproduced by both countries in their notifications of succession.[221] Malta, in respect of which no such declaration had been made, said nothing on the matter in her notification. Jamaica, on the other hand, in respect of which also no such declaration had been made,[222] added to its notification a declaration in terms similar to those of Cyprus and Sierra Leone.[223]

(4) Another Convention illustrating the question of choice of differing provisions is the 1951 Convention relating to the Status of Refugees, article 1, section B, of which permits a choice between "events occurring in Europe before 1 January 1951", or "events occurring in Europe *or elsewhere* * before 1 January 1951" for determining the scope of the obligations accepted under the Convention.[224] The United Kingdom's ratification specified the wider form of obligation "in Europe or elsewhere" and in this form the Convention was afterwards extended to Cyprus, Gambia and Jamaica.[225] When in due course these three countries notified the Secretary-General of their succession to the Convention, their notifications maintained the choice of provisions previously in force in respect of their territories.[226] France, in contrast with the United Kingdom, specified the narrower form of obligation "in Europe"; and it was in the narrower form that it extended the Convention to all its dependent territories, twelve of which afterwards transmitted notifications of succession to the Secretary-General.[227] Of these twelve countries four accompanied their notifications with a declaration that they extended their obligations under the Convention by adopting the wider alternative "in Europe elsewhere".[228] The other eight countries in the first instance all simply declared themselves "bound by the Convention the application of which had been extended to their territory before the attainment of independence"; and it is clear that they assumed this to mean that France's choice would continue to govern the application of the Convention to their territory. For not long after notifying their succession to the Secretary-General, three [229] of them informed him of the extension of their obligations under the Convention by the adoption of the wider formula; and four others [230] did the same after intervals varying from eighteen months to nine years. The remaining one country [231] has not changed its notification and is therefore still bound by the more restricted formula.

(5) The Convention on the Stamp Laws in connexion with Bills of Exchange and Promissory Notes (1930) did not itself offer a choice of provisions, but a Protocol to it created an analogous situation by permitting a State to ratify or accede to the Convention in a form limiting the obligation to bills presented or payable elsewhere than in the country concerned. It was subject to this limitation that on various dates between 1934 and 1939 Great Britain extended the Convention to many of its dependent territories.[232] In 1960 Malaysia and in 1966 Malta notified the Secretary-General [233] of their succession to this League of Nations treaty. Their notifications did not make mention of the limitation, but it can hardly be doubted that they intended to continue the application of the treaty in the same form as before independence.

(6) Another treaty giving rise to a case of succession in respect of choice of provisions is the Additional Protocol to the Convention on the Régime of Navigable Waterways of International Concern. Article 1 permitted the obligations of the Protocol to be accepted either "on all navigable waterways" or "on all *naturally* * navigable waterways". The United Kingdom accepted the first wider, formula in respect of itself and of most of its dependent territories,[234] including Malta, which subsequently transmitted to the Secretary-General a notification of succession. This indicated that Malta continues to consider itself bound by the Protocol in the form in which it has been extended to the territory by her predecessor.[235]

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[215] *Ibid.*, pp. 255 and 257.

[216] *Ibid.*, p. 256.

[217] *Ibid.*

[218] *Ibid.*, pp. 251, 252 and 253.

[219] *Ibid.*, p. 252.

[220] *Ibid.*, pp. 255 and 257.

[221] *Ibid.*, pp. 251 and 253.

[222] *Ibid.*, p. 256.

[223] *Ibid.*, p. 252.

[224] *Ibid.*, p. 90.

[225] *Ibid.*, p. 98.

[226] *Ibid.*, pp. 91, 92 and 93.

[227] *Ibid.*, p. 90 and foot-note 4.

[228] Algeria, Guinea, Morocco and Tunisia (*ibid.*, p. 90, foot-note 3).

[229] Cameroon, Central African Republic and Togo (*ibid.*, p. 90, foot-note 4).

[230] Dahomey, Ivory Coast, Niger, Senegal *(ibid.)*.

[231] Congo (*ibid.*, p. 90).

[232] *Ibid.*, pp. 427-428.

[233] The functions of the depositary had been transferred to him on the dissolution of the League of Nations.

[234] United Nations, *Multilateral treaties... 1971 (op. cit.)*, p. 438.

[235] *Ibid.*, p. 439.

(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 [236] 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.[237] A somewhat different, but still analogous, form of election is offered to a party to GATT under Article XXXV, paragraph 1, which provides:

> This Agreement, or alternatively Article II of this Agreement shall not apply as between any contracting party and any other contracting party if:
>
> (*a*) The two contracting parties have not entered into tariff negotiations with each other, and
>
> (*b*) Either of the contracting parties, at the time either becomes a contracting party, does not consent to such application.

When Japan became a party to GATT in 1955, Belgium, France and the United Kingdom all invoked this provision and thereby excluded the application of GATT in their relations with Japan.[238] A large number of the former dependencies of those countries which have since been deemed to be parties to the Agreement have considered themselves as inheriting their predecessor's invocation of Article XXXV, paragraph 1, as against Japan. Although the three predecessor States themselves and some of their successor States have now withdrawn their invocations of that provision, it is still in force for the majority of their successors.[239]

(8) The Commission came to the conclusion that the same general considerations apply here as in the case of reservations. If, therefore, a newly independent State transmits a notification of succession without referring specifically to its predecessor's choice in respect of parts of the treaty or between differing provisions, and without declaring a choice of its own, then it should be presumed to intend to maintain the treaty in force in respect of its territory on the same basis as it was in force at the date of independence; in other words, on the basis of the choice made by its predecessor. The Secretary-General normally seeks to obtain clarification of the newly independent State's intention in this regard when it transmits its notification of succession, and it is no doubt desirable that the State should make its position clear. But this does not always occur, and then it is both logical and necessary (otherwise, there might be no means of determining which version of the provisions was binding on the newly independent State) to consider the newly independent State as maintaining the choice of its predecessor. *Paragraph 1* of article 16 accordingly states the general rule in terms of a presumption in favour of the maintenance of the predecessor's choice.

(9) On the other hand, for reasons similar to those given in the case of reservations, the Commission was of the opinion that a State notifying its succession to a multilateral treaty should have the same rights of choice under the terms of the treaty as are allowed to States establishing their consent to be bound by any other procedures. Once succession is conceived not as an automatic replacement of the predecessor but as an option to continue the territory's participation in the treaty by an act of will establishing consent to be bound, there can be no objection to allowing a successor State the same rights of choice as it would have under the terms of the treaty if it were becoming a party by accession. *Paragraph 2* of article 16 accordingly permits a State, when notifying its succession, to exercise any right of choice provided for in the treaty under the same conditions as the other parties.

(10) Treaties which accord a right of choice in respect of parts of the treaty or between differing provisions not infrequently provide for a power afterwards to modify the choice.[240] Indeed where the choice has the effect of limiting the scope of the State's obligations under the treaty, a power to cancel the limitation by withdrawing the election is surely to be implied. As to a successor State, when it has established itself as a party to the treaty in its own right, it must clearly be considered as having the same right as any other party to withdraw or modify a choice in force in respect of its territory; and *paragraph 3* of article 16 so provides.

Article 17. Notification of succession

1. A notification of succession in respect of a multilateral treaty under article 12 or 13 must be made in writing.

2. If the notification is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

3. Unless the treaty otherwise provides, the notification of succession shall:

(*a*) If there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;

(*b*) Be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(*c*) If transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary.

[236] See *Yearbook of the International Law Commission, 1968*, vol. II, p. 76, document A/CN.4/200 and Add.1-2, para. 330.

[237] *Ibid.*, p. 82, para. 362.

[238] *Ibid.*, para. 359.

[239] *Ibid.*, paras. 360-361.

[240] e.g., article 1, B (2) of the 1951 Convention relating to the Status of Refugees (United Nations, *Treaty Series*, vol. 189, p. 154); article 2 (2) of the 1949 Convention on Road Traffic (*ibid.*, vol. 125, p. 24).

Commentary

(1) Article 17 concerns the procedure through which a newly independent State may exercise its right under article 12 or 13 to establish its status as a party or contracting State to a multilateral treaty by way of succession.

(2) An indication of the practice of the Secretary-General in the matter may be found in the letter which he addresses to newly independent States inquiring as to their intentions concerning treaties of which he is the depositary. This letter contains the following passage:

> Under this practice, the new States generally acknowledge themselves to be bound by such treaties *through a formal notification addressed to the Secretary-General by the Head of the State or Government or by the Minister for Foreign Affairs.** [241]

However, although the notifications received by the Secretary-General have for the most part been signed by the Head of State or Government or by the Minister for Foreign Affairs, a few States have sent communications signed by an official of the Foreign Ministry or by the Head of its Permanent Mission to the United Nations, acting under instructions,[242] and these have been accepted as sufficient by the Secretary-General.

(3) Under the depositary practice of the Secretary-General, therefore, the deposit of a formal instrument, such as would be required for ratification or accession, is not considered necessary. All that is needed is a written notification in which the State expresses its will that its territory should continue to be bound by the treaty. Moreover, although the Secretary-General considers it desirable that the notification should emanate from the Head of State or Government or from the Minister for Foreign Affairs, any signature which sufficiently evidences the authority of the State to make the notification is considered adequate.

(4) The depositary practice of the Swiss Government also appears to accept as adequate any communication which expresses authoritatively the will of a newly independent State to continue to be bound by the treaty. Thus, in the case of the Berne Convention for the Protection of Literary and Artistic Works and its subsequent Acts of revision, of which it is the depositary, the Swiss Government has accepted the communication of a "declaration of continuity" as the normal procedure for a newly independent State to adopt today in exercising its right to become a party by succession.[243] Similarly in the case of the Geneva Humanitarian Conventions of 1864, 1906, 1929 and 1949, of which the Swiss Federal Council is the depositary, the communication of a "declaration of continuity" has been the normal procedure through which newly independent States have become parties by succession.[244] Any other formula, such as "declaration of application" or "declaration of continuance of application", is accepted by the Swiss Federal Council as sufficient, provided that the newly independent State's intention to consider itself as continuing to be bound by the treaty is clear. The Swiss Federal Council also accepts the communication of a declaration of continuity in almost any form, provided that it emanates from the competent authorities of the State: for example, a note, a letter or even a cable; and the signature not only of a Head of State or Government and Foreign Minister but also of an authorized diplomatic representative is considered by it as sufficient evidence of authority to make the declaration on behalf of the State. Such declarations of continuity, on being received by the Swiss Federal Council, are registered by it with the United Nations Secretariat in the same way as notifications of accession.

(5) The practice of other depositaries is on similar lines. The practice of the United States, for example, has been to recognize the right of newly independent States "... to declare themselves bound uninterruptedly by multilateral treaties of a non-organizational type concluded in their behalf by the parent State before the new State emerged to full sovereignty".[245] Again, as depositary of the Hague Conventions of 1899 and 1907 for the Pacific Settlement of Disputes, the Netherlands appears to have accepted as effective any expression of the newly independent State's will to be considered as a party communicated by it in a diplomatic note or letter.[246]

(6) In some instances the Swiss Government has accepted a notification not from the newly independent State itself but from the predecessor State. It did so before the Second World War when in 1928 the United Kingdom notified to it the desire of Australia, British India, Canada, New Zealand and South Africa to be considered as parties to the Berne Convention for the Protection of Literary and Artistic Works,[247] and in 1937 when the United Kingdom notified to it the participation of Burma in the Geneva Humanitarian Conventions of 1929.[248] It has also done so in one instance since the Second World War: namely, in 1949 when it accepted as sufficient a communication from the Netherlands Government expressing the view of that Government that the new Republic of Indonesia should be considered as a member of the Berne Union.

(7) But the cases of the former British Dominions were very particular owing both to the circumstances of their emergence to independence and to their special relation to the British Crown at the time in question. Accordingly, no general conclusion should be drawn from these cases that the notification of a predecessor State is *as such* sufficient evidence of the newly independent State's will to be considered as continuing to be bound by a treaty. Clearly, a newly independent State in the early days of

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[241] See *Yearbook of the International Law Commission, 1962*, vol. II, p. 122, document A/CN.4/150, para. 134.

[242] *Ibid.*, p. 125, para 162.

[243] *Ibid., 1968*, vol. II, p. 22, document A/CN.4/200 and Add.1-2, para. 72.

[244] *Ibid.*, p. 50, para. 215. The Geneva Humanitarian Conventions, it should be pointed out, also allow simplified forms of "accession" (*ibid.*, para. 214).

[245] United Nations, *Materials on Succession of States (op. cit.)*, p. 224.

[246] See *Yearbook of the International Law Commission, 1968*, vol. II, p. 31, document A/CN.4/200 and Add.1-2, para. 124.

[247] *Ibid.*, p. 12, paras. 22-23.

[248] Burma, although separated from India, was not then an independent State; but it is treated as having become a party to the Conventions in 1937 (*ibid.*, p. 39, para. 160 and p. 50, para. 216).

its independence may find it convenient to employ the diplomatic services of the predecessor State for the purpose of making a communication to a depositary.[249] But every consideration of principle—and not least the principles of independence and self-determination—demands that the act expressing a newly independent State's will to be considered a party to a treaty in the capacity of a successor State should be its own and not that of the predecessor State. In other words, a notification of succession, in order to be effective, must either emanate directly from the competent authorities of the newly independent State or be accompanied by evidence that it is communicated to the depositary expressly by direction of those authorities. If the Swiss Government's acceptance of the Netherlands Government's communication regarding Indonesia's succession to the Berne Convention, mentioned in the preceding paragraph, is to be understood as based upon a different view, it is not a precedent which could be endorsed by the Commission. The very fact that the Republic of Indonesia took early action to denounce the Convention confirms the desirability of requiring a notification of succession to emanate from the competent authorities of the newly independent State.[250]

(8) As was indicated above, a newly independent State may notify its succession in respect of a treaty not only under article 12, when its predecessor is a party to the treaty at the date of succession, but also under article 13, when its predecessor is a contracting State. For this reason a "notification of succession" is defined in article 2, subparagraph 1 (*g*), as meaning in relation to a multilateral treaty "any notification, however phrased or named, made by a successor State to the parties or, as the case may be, contracting States or to the depositary expressing its consent to be considered as bound by the treaty". This definition assumes that the deposit of a formal instrument of succession is not required, and that assumption is fully confirmed by the analysis of the practice which has been given in the preceding paragraphs of the present commentary. The question therefore is: what are the minimum formal requirements with which a notification of succession should comply? Although the two cases are not exactly parallel, the Commission considered that guidance may be found in article 67 of the Vienna Convention on the Law of Treaties, which contains 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 17 is inspired by that in article 67 of the Vienna Convention. They provide that a notification of succession under article 12 or 13 must be made in writing and that, if it is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers. *Paragraph 3*, which parallels article 78 of the Vienna Convention, adds that, if there is no depositary, the notification shall be transmitted direct to the States for which it is intended, or, if there is a depositary, to the latter. In each case, the paragraph specifies the moment at which the notification shall be considered as having been made.

Article 18. Effects of a notification of succession

1. Unless a treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession under article 12 or 13 shall be considered a party or, as the case may be, contracting State to the treaty:

(*a*) On its receipt by the depositary; or

(*b*) If there is no depositary, on its receipt by the parties or, as the case may be, contracting States.

2. When under paragraph 1 a newly independent State is considered a party to a treaty which was in force at the date of the succession of States, the treaty is considered as being in force in respect of that State from the date of the succession of States unless;

(*a*) The treaty otherwise provides;

(*b*) In the case of a treaty which falls under article 12, paragraph 3, a later date is agreed by all the parties;

(*c*) In the case of other treaties, the notification of succession specifies a later date.

3. When under paragraph 1 a newly independent State is considered a contracting State to a treaty which was not in force at the date of the succession of States, the treaty enters into force in respect of that State on the date provided by the treaty for its entry into force.

Commentary

(1) The present article deals with the legal effects of a notification of succession by a newly independent State, made under articles 12 or 13 of the present draft articles. Three articles of the Vienna Convention on the Law of Treaties have particularly to be borne in mind in regard to this matter: article 78, concerning notifications and communications; article 16, concerning the deposit of instruments of ratification, acceptance, approval or accession; article 24, concerning entry into force.

(2) Paragraph (*a*) of article 78 of the Vienna Convention in substance provides that any notification or communication to be made by any State under the Convention is to be transmitted to the depositary, if there is one, and, if not, direct to the States for which it is intended. This purely procedural provision is already reflected in article 17 of the present draft and needs no further

[249] This was so in the case of the former British Dominions.

[250] *Yearbook of the International Law Commission, 1968*, vol. II, pp. 13-14, document A/CN.4/200 and Add.1-2, paras. 26-31.

statement here. Paragraph (*b*) of article 78 then provides that any such notification or communication is to "be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary." Paragraph (*c*), however, adds that, if transmitted to a depositary, it is to "... be considered as received by the State for which it was intended only when the latter State has been informed by the depositary..." Under these two sub-paragraphs, therefore, the legal nexus between the notifying State and any other State party or, as the case may be, contracting State is not finally established until the latter has itself received the notification or been informed of it by the depositary.

(3) Article 16 of the Vienna Convention, on the other hand, states that, unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty *upon their deposit with the depositary* or upon their notification to the contracting States or to the depositary, *if so agreed*. The effect of these provisions is that under the procedure of "deposit" the consent to be bound is established at once upon the deposit of the instrument with the depositary; and that the same is true under the procedure of "notification" where the treaty in question provides for the notification to be made to the depositary. On the other hand, where the treaty provides for notification to the other contracting States, articles 78 of the Vienna Convention applies and the consent to be bound is established only upon the receipt of the notification by the contracting State concerned.

(4) In the present instance, the right to notify succession does not derive from any stipulation in the treaty, except in the comparatively few cases dealt with in article 9 of the present draft. It derives from customary law. Nevertheless, in every case the multilateral treaty in question will be one which either does or does not have a depositary. Furthermore, a notification of succession is an act similar in kind to the deposit or notification of an instrument. Accordingly, where a notification of succession is made in respect of a treaty for which there is a depositary, it is thought that the rules laid down in article 16, paragraphs (*b*) and (*c*), of the Vienna Convention should be applied by analogy. In short, the notification should be considered as establishing the consent of the successor State to be bound upon its receipt by the depositary. On the other hand, where there is no depositary, it would seem natural to apply by analogy the rule in article 78, paragraph (*b*), of the Vienna Convention; and in that event the legal nexus between the notifying newly independent State and any other interested State will not be established until the receipt of the notification by the latter.

(5) *Paragraph 1* of this article, therefore, states that "unless a treaty otherwise provides or it is otherwise agreed", when a newly independent State makes a notification of succession, under articles 12 or 13 of the present articles, it shall be considered a party or, as the case may be, a contracting State to the treaty upon the receipt of the notification by the depositary or, if there is no depositary, upon the receipt of the notification by the parties or the contracting States concerned.

(6) The moment of the establishment of the newly independent State's status as a "party" or a "contracting State" to a multilateral treaty is not necessarily the same as the moment of the entry into force of the treaty with respect to that State. It is on this point that reference has to be made to article 24 of the Vienna Convention. Paragraphs 1 and 2 of that article deal with the entry into force of the treaty itself. They lay down that this occurs in such manner and upon such date as the treaty may provide or the negotiating States may agree or, in the absence of any such provision or agreement, as soon as the consent of all the negotiating States to be bound has been established. Paragraph 3 adds that, after the treaty itself has once come into force, the date of its entry into force for any further individual State coincides with the date on which the latter establishes its consent to be bound, unless the treaty otherwise provides. Some multilateral treaties contemplate that they shall enter into force immediately upon the deposit (or notification) of a prescribed number of ratifications, accessions etc., and that afterwards they shall enter into force for any further individual State immediately upon deposit (or notification) of its instrument of ratification, accession etc. But today it is very common for a treaty to provide for a delay of thirty days or of three, or even six, months after the deposit (or notification) of the last of the number of instruments prescribed for the treaty's entry into force; and for a delay of the same period for the subsequent entry into force of the treaty for individual States. This is, endeed, the case with the great majority of the multilateral treaties of which the Secretary-General is the depositary—a category of treaties which have quite frequently been the subject of notifications of succession. The question arises, therefore, whether a treaty provision prescribing such a period of delay for instruments of ratification, accession etc., should be considered as extending by analogy to notifications of succession.

(7) The treaty practice appears rather to confirm that, on transmitting a notification of succession a newly independent State is to be considered as being a party to the treaty *from the date of independence*. The Secretariat memorandum "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary" comments on this point as follows:

> In general, new States that have recognized that they continue to be bound by treaties have considered themselves bound from the time of their attainment of independence. With regard to international labour conventions, however, it is the custom for new States to consider themselves bound only as of the date on which they are admitted to the International Labour Organisation.[251]

Furthermore, the letter sent by the Secretary-General to newly independent States in his capacity as depositary of multilateral treaties makes no reference to the periods of delay contained in some of the treaties mentioned in his letter. It simply observes:

> ... the new States generally acknowledge themselves to be bound by such treaties through a formal notification addressed to the Secretary-General [...] The effect of such notification, which the Secretary-General, in the exercise of his depositary functions, com-

[251] See *Yearbook of the International Law Commission, 1962*, vol. II, p. 126, document A/CN.4/150, para. 164.

municates to all interested States, is to consider the new State as a party in its own name to the treaty concerned as of the date of independence, thus preserving the continuity of the application of the treaty in its territory...[252]

It follows that periods of delay are not treated as relevant to notifications of succession in the depositary practice of the Secretary-General. It therefore seems as if the notion of continuity, inherent in "succession", has been regarded as excluding the application of a provision imposing a period of delay on entry into force. On the other side, it could be said that, as article 28 of the Vienna Convention clearly assumes, the date of entry into force of a treaty and the date from which its provisions are to apply need not coincide. Nevertheless, notifications of succession, *ex hypothesi*, presuppose a relation between the territory in question and the treaty that has already been established by the predecessor State, and it appears justifiable for that reason to regard them as not falling within the general intention of the negotiating States to make entry into force subject to a period of delay. Moreover, as previously stressed, the right to notify succession normally derives not from the treaty itself but from customary law.

(8) The statement in the Secretariat memorandum quoted above regarding labour conventions needs a word of explanation. Notifications of succession to labour conventions take the form of declarations of continuity which are made in connexion with the new State's acceptance of or admission to membership of the ILO; and the date of their registration with the United Nations Secretariat is that of their acquisition of membership. Equally, the date of the entry into force of the convention for the new State is the date of its acquisition of membership, since that is the date on which its declaration of continuity takes effect and establishes its consent to be bound by the convention. But the fact remains that in the practice of the ILO a State which makes a declaration of continuity is thereafter considered as a party to the convention concerned *as from the date of its independence.*

(9) A similar view of the matter seems to be taken in regard to the multilateral treaties of which the Swiss Government is the depositary. Thus, in the case of the Berne Convention for the Protection of Literary and Artistic Works and its subsequent Acts of revision a newly independent State which transmits a notification of succession is regarded as continuously bound by the Convention as from the date of independence. Indeed, it seems that the principle followed is that the Convention is regarded as applying uninterruptedly to the successor State as from the date when it was extended to its territory by the prececessor State.[253] Ceylon and Cyprus, for example, are listed as having become parties to the Rome Act on 1 October 1931, the date of its extension to these countries by Great Britain. By contrast, when a new State establishes its consent to be bound by means of *accession*, it is regarded as a party only from the date on which the instrument of accession takes effect.[254] In the case of the Geneva Humanitarian Conventions, the rule now followed by the Swiss Federal Council is that a newly independent State which transmits a notification of succession is to be considered as a party from the date on which it attained independence; and it now usually states this when registering the notification with the United Nations Secretariat.[255]

(10) The Netherlands Government, as depositary of the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes, appears to adopt a position close to that of the Swiss Government in regard to the Conventions for the Protection of Literary and Artistic Works. In its table of signatures, ratifications, accessions etc., it records successor States as parties not from the date of their own independence but from that of their predecessor State's ratification or accession.[256] The depository practice of the United States of America is to recognize the right of new States "to declare themselves bound uninterruptedly by multilateral treaties of a non-organizational type concluded in their behalf by the parent State...".[257] Giving examples of this practice, the United States mentions Ceylon and Malaya as cases where newly independent States have explicitly taken the position that they consider themselves as parties to the International Air Services Transit Agreement (1944) as from the date of its acceptance by their predecessor, the United Kingdom,[258] and it lists Pakistan as a case where the newly independent State was considered to have become a party as from the date of independence—the date of its partition from India.[259]

(11) The practice is therefore consistent in applying the principle of continuity in cases of notification of succession, but shows variation in sometimes taking the date of independence and sometimes the date when the predecessor State became a party to the treaty as the relevant date. The more general practice, and the settled practice of the Secretary-General as depositary of a large number of multilateral treaties, is to consider a State which transmits a notification of succession as a party to the treaty from the date of independence; that is, from the moment when the "succession" occurred. This practice seems logical since it is at this date that the newly independent State attains its statehood and acquires its international responsibility for the territory to which the succession relates. The concept of succession and continuity are fully satisfied if a newly independent State's notification of succession is held to relate back to the date of independence, for the result is that the newly independent State is considered to have assumed from that date international responsibility for the performance of the treaty in respect of the territory. To relate back the notification beyond that date would be to make the

[252] *Ibid.*, p. 122, para. 134.

[253] *Ibid., 1968*, vol. II, pp. 22-23, document A/CN.4/200 and Add.1-2, paras. 78-82.

[254] One month after the deposit of the instrument (*ibid.*, p. 23, para. 81).

[255] *Ibid.*, pp. 51-52, paras. 219-224. Only in one early case (Transjordan), has the Swiss Federal Council treated the date of notification as the date from which the provisions of the Convention bound the new State (*ibid.*, p. 52, para. 223).

[256] *Ibid.*, p. 31, para. 125.

[257] United Nations, *Materials on Succession of States (op. cit.)*, p. 224.

[258] *Ibid.*, p. 225.

[259] *Ibid.*

newly independent State responsible internationally for the *defaults* of its predecessor in the performance of the treaty prior to succession. This seems excessive, and it is difficult to believe the newly independent States which have expressed themselves as becoming parties from the date of their predecessor's notification, accession, acceptance or approval of the treaty intended such a result. True, these newly independent States are, for the most part, States which had entered into a "devolution agreement" with their predecessor State.[260] But it is equally difficult to believe that, by entering into a devolution agreement in however wide terms,[261] they intended to do more than assume thenceforth in respect of the territory the international responsibility for the future performance of the treaty which had previously attached to their predecessor.

(12) In the light of these considerations *paragraph 2* of the present article lays down that when under paragraph 1 of the article a newly independent State is considered a party to a multilateral treaty *in force* at the date of the succession of States, the treaty is considered as being in force in respect of that State *from the date of the succession of States*, except in cases falling under the provisions in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 2. This presumption, which implies a deviation from the general rule in paragraph 3 of article 24 of the Vienna Convention on the Law of Treaties, seems justified in the light of existing practice and of the very purpose normally aimed at by a notification of succession. It is a presumption which may be negatived by the provisions of the treaty itself (sub-paragraph (*a*)) or, in certain specified cases, by the agreement of the parties to the treaty (sub-paragraph (*b*)) or by the newly independent State's will (sub-paragraph (*c*)).

(13) The exception in *sub-paragraph 2 (a)* is the same as in paragraph 3 of article 24 of the Vienna Convention. The provisions of the treaty in question prevail in the matter. For example, if in a case falling under article 9 of the present articles the treaty should not only provide in advance for notifications of succession but also prescribe a period of delay before the entry into force of the treaty in respect of the notifying State, the treaty provisions would apply and the treaty will enter into force for that State after the expiry of the period of delay.

(14) *Sub-paragraph 2 (b)* concerns the specific case of a multilateral treaty which under its own terms, or by reason of the limited number of the negotiating States and the object and purpose of the treaty, must be considered as requiring the consent of all the parties for the participation of any other State. Sub-paragraph 2 (*b*) preserves the freedom of the parties to these treaties to agree upon a date later than the date of the succession of States. If they do so, the treaty is considered to be in force in respect of the notifying State at the later date agreed upon by the parties.

(15) *Sub-paragraph 2 (c)* allows the notifying State the possibility of making its participation in the treaty effective from the date of its notification rather than of its independence. When the notification of succession relates to multilateral treaties other than those mentioned in the preceding paragraph, a newly independent State is entitled to specify in its notification a date later than the date of the succession of States and such later date will be then considered as the date from which the treaty is in force for that State.

(16) Lastly, *paragraph 3* of the article provides that when a newly independent State is considered a contracting State to a multilateral treaty which *was not in force* at the date of the succession of States, the treaty enters into force in respect of the newly independent State on the date provided by the treaty for its entry into force. This rule corresponds to that contained in paragraph 1 of article 24 of the Vienna Convention.

SECTION 3. BILATERAL TREATIES

Article 19. Conditions under which a treaty is considered as being in force

1. A bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as being in force between a newly independent State and the other State party in conformity with the provision of the treaty when:

(*a*) They expressly so agree; or

(*b*) By reason of their conduct they are to be considered as having so agreed.

2. A treaty considered as being in force under paragraph 1 applies in the relations between the successor State and the other State party from the date of the succession of States, unless a different intention appears from their agreement or is otherwise established.

Commentary

(1) This article deals with the conditions under which a bilateral treaty which was in force between the predecessor State and another State at the date of the succession of States is considered as being in force between the newly independent State and the other State party. As already indicated,[262] the question whether a successor State may have a *right* to consider itself a party or a contracting State in its own name to treaties in force at the date of the succession of States is separate and different from the question whether it is under an *obligation* to do so. Article 11 of the present draft lays down the general rule that a newly independent State is not *ipso jure* bound

[260] For example, Ceylon and Cyprus.

[261] The usual formula found in United Kingdom devolution agreements reads:

"All international obligations and responsibilities of the Government of the United Kingdom which arise from any valid international instrument shall henceforth, in so far as such instrument may be held to have application to [the new State], be assumed by the Government of [the new State]."

[262] See above, commentary to article 11, para. 2.

by its predecessor State's treaties nor under any obligation to take steps to become a party or a contracting State to them. This rule applies to bilateral and multilateral treaties alike; but it still leaves the question as to whether this means that the successor State is in the position of having a clean slate in regard to bilateral treaties.

(2) The "clean slate" metaphor, as already noted in the commentary to article 11, is admissible only in so far as it expresses the basic principle that a newly independent State begins its international life free of any general obligation to take over the treaties of its predecessor. The evidence is plain that a treaty in force with respect to a territory at the date of a succession is frequently applied afterwards as between the successor State and the other party or parties to the treaty; and this indicates that the former legal nexus between the territory and the treaties of the predecessor State has at any rate some legal implications for the subsequent relations between the successor State and the other parties to the treaties. If in the case of many multilateral treaties that legal nexus appears to generate an actual right for the successor State to establish itself as a party or a contracting State, this does not appear to be so in the case of bilateral treaties.

(3) The reasons are twofold. First, the personal equation—the identity of the other contracting party—although an element also in multilateral treaties, necessarily plays a more dominant rôle in bilateral treaty relations; for the very object of most bilateral treaties is to regulate the mutual rights and obligations of the parties by reference essentially to their own particular relations and interests. In consequence, it is not possible automatically to infer from a State's previous acceptance of a bilateral treaty as applicable in respect of a territory its willingness to do so after a succession in relation to a wholly new sovereign of the territory. Secondly, in the case of a bilateral treaty there is no question of the treaty's being brought into force *between the successor State and its predecessor*, as happens in the case of a multilateral treaty. True, in respect of the predecessor State's remaining territory the treaty will continue 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 successor State, it will do so as a new and purely bilateral relation between them which is independent of the predecessor State. Nor will the treaty come into force at all as between the successor and predecessor States. No doubt, the successor and predecessor States may decide to regulate the matter in question, e.g. extradition or tariffs, on a similar basis. But if so, it will be through a new treaty which is exclusive to themselves and legally unrelated to any treaty in force prior to independence. In the case of bilateral treaties, therefore, the legal elements for consideration in appreciating the rights of a successor State differ in some essential respects from those in the case of multilateral treaties.

(4) From the considerable measure of continuity found in practice, a general presumption has sometimes been derived that bilateral treaties in force with respect to a territory and known to the successor State continue in force unless the contrary is declared within a reasonable time after the successor State's attainment of independence.[263] Some writers even see in it a general principle of continuity implying legal rights and obligations with respect to the maintenance in force of a predecessor State's bilateral treaties. In some categories of treaties, it is true, continuity in one form or another occurs with impressive regularity. This is, for example, the case with the air transport agreements and trade agreements examined in the second [264] and third [265] Secretariat studies on "Succession in respect of bilateral treaties".

(5) The prime cause of the frequency with which some measure of continuity is given to such treaties as air transport and trade agreements in the event of a succession seems to be the practical advantage of continuity to the interested States in present conditions. Air transport is as normal a part of international communications today as railway and sea transport; and as a practical matter it is extremely likely that both the successor State and the other interested State will wish any existing air services to continue at least provisionally until new arrangements are made.[266] Again, international trade is an integral part of modern international relations; and practice shows that both the successor State and the other interested States find it convenient in many instances to allow existing trade arrangements to run on provisionally until new ones are negotiated.[267]

(6) Agreements for technical or economic assistance are another category of treaties where the practice shows a large measure of continuity.[268] An example may be seen in an Exchange of Notes between the United States of America and Zaire in 1962 concerning the continuance in force of certain United States-Belgian treaties of economic co-operation with respect to the Congo, which is reproduced in *Materials on Succession of States*.[269] In general, the view of the United States, the interested other party in the case of many such treaties, has been stated to be that an economic co-operation agreement "should be regarded as continuing in force with a newly independent State if that State continues to accept benefits under it".[270]

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[263] See International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. xiii and pp. 557-595, and *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), p. xiii and pp. 589-632.

[264] Document A/CN.4/243 (see foot-note 26 above).

[265] Document A/CN.4/243/Add.1 (*idem*).

[266] The summary of the practice given in the Secretariat study of air transport agreements (A/CN.4/243, paras. 177 and 182; see foot-note 26 above) underlines the prevalence of continuity in the case of such agreements.

[267] Here also, the summary of the practice given in the Secretariat study of trade agreements (A/CN.4/243/Add.1, paras. 169 and 172; see foot-note 26 above) is suggestive of a large measure of continuity.

[268] See International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 576.

[269] United Nations, *Materials on Succession of States (op. cit.)*, pp. 219-220. See also an Exchange of Notes between the United States of America and the Somali Republic in 1961 (*ibid.*, pp. 216 and 217).

[270] See note by an Assistant Legal Adviser to the Department of State in *The American Journal of International Law* (Washington D.C.), vol. 59, No. 1 (January 1965), p. 96. Cf. the observation that "economic agreements are also not succeeded to automatically by new States. But this must not lead to unjust enrichment and to infringement of lawful interests and rights of other States" in International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 564.

(7) A measure of "*de facto* continuity" has also been found in certain other categories of treaties such as those concerning abolition of visas, migration or powers of consuls and in tax agreements.[271] Continuity is also a feature of the practice in regard to bilateral treaties of a "territorial" or "localized" character. But these categories of treaties raise special issues and will be examined separately in the commentary to articles 29 and 30.

(8) The Commission is therefore aware that State practice shows a tendency towards continuity in the case of certain categories of treaties. It does not believe however that the practice justifies the conclusion that the continuity derives from a customary legal rule rather than the will of the States concerned (the successor State and the other party to its predecessor's treaty). At any rate, practice does not seem to support the existence of a unilateral right in a newly independent State to consider a bilateral treaty as continuing in force with respect to its territory after independence *regardless of the wishes of the other party to the treaty*. This is clear from some of the State practice already set out in commentaries to previous articles. Thus, the numerous unilateral declarations by newly independent States examined in the commentary to article 8 have unmistakably been based on the assumption that, as a general rule, the continuance in force of their predecessor's bilateral treaties is a matter on which it would be necessary to reach an accord with the other party to each treaty. The Commission is aware that those declarations envisage that some categories of treaties may continue in force automatically under customary law. But apart from these possible exceptions they clearly contemplate bilateral treaties as continuing in force only by mutual consent. Again, as pointed out in the commentary to article 7,[272] even when a predecessor State purports to transmit rights under its treaties to its successor State, the express or tacit concurrence of the other contracting party has still been regarded as necessary to make a bilateral treaty enforceable as between it and the successor State.

(9) Further State practice to the same effect is contained in *Materials on Succession of States*.[273] Argentina, for example, which did not accept Pakistan's claim that the Argentine-United Kingdom Extradition Treaty (1889) should be considered as continuing in force automatically with respect to Pakistan, afterwards assented to the extension of that treaty to Pakistan "by virtue *of a new agreement* signed in 1953 and formalized by an exchange of notes".[274] Similarly, correspondence between Ghana and the United States in 1957-1958 shows that the continuance of former United Kingdom treaties in respect of Ghana was regarded as a matter to be dealt with by the conclusion of an agreement.[275] It is true that occasionally, as in the case of a United States *Aide-Mémoire* to the Federation of Malaya in 1958, language is used which might seem to imply that a new State was considered to have effected the continuance of a treaty by its unilateral act alone.[276] But such language generally occurs in cases where the other party was evidently in agreement with the successor State as to the desirability of continuing the treaty in force, and does not seem to have been based on the recognition of an actual right in the successor State. Moreover, in the particular case mentioned the sucessor State, Malaya, seems in its reply to have viewed the questions as one of concluding an agreement rather than of exercising a right: "Your *Aide-Mémoire* of 15 October 1958 and this Note are to be regarded as constituting the agreement in this matter".[277] The technique of an exchange of notes or letters regarding the continuance of a bilateral treaty, accompanied by an express statement that it is to be regarded as constituting an agreement, has indeed become very common: a fact which in itself indicates that, in general, the continuance of bilateral treaties is a matter not of right but of agreement. Instances of the use of the technique in connexion with such categories of bilateral treaties as air transport, technical co-operation and investment guarantee agreements, are to be found in documents supplied by the United States and published in *Materials on Succession of States*.[278] Numerous examples can also be seen in the first of the Secretariat studies on "Succession in respect of bilateral treaties",[279] which is devoted to extradition treaties.

(10) Continuity of bilateral treaties, as is emphasized in the Secretariat studies,[280] has been recognized or achieved on the procedural level by several different devices: a fact which in itself suggests that continuity is a matter of the attitudes and intention of the interested States. True, in certain categories of treaties—e.g. air transport agreements—continuity has quite often simply occurred; and this might be interpreted as indicating recognition of a right or obligation to maintain them in force. But even in these cases the continuity seems in most instances to be rather a tacit manifestation of the will of the interested States.[281]

(11) Individual instances of continuity have necessarily to be understood in the light of the general attitude of the States concerned in regard to succession in respect of bilateral treaties. Thus frequent reference is made by

[271] International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 577.

[272] See above, commentary to article 7, paras. 5 and 6.

[273] United Nations, *Materials on Succession of States (op. cit.)*.

[274] *Ibid.*, pp. 6 and 7.

[275] *Ibid.*, pp. 211-213.

[276] *Ibid.*, pp. 229 and 230.

[277] *Ibid.*, p. 230.

[278] *Ibid.*, pp. 211-224.

[279] *Yearbook of the International Law Commission, 1970*, vol. II, pp. 109 *et seq.*, document A/CN.4/229, paras. 23, 31, 33, 62-66, 68, 69, 71, 72, 74 and 77-79. Agreements of this kind in the form of exchanges of notes are in many cases registered with the Secretariat under Article 102 of the Charter (*ibid.*, p. 128, para. 135).

[280] *Ibid.*, pp. 127 and 128, paras. 134 and 135. See also documents A/CN.4/243, paras. 177-187, and A/CN.4/243/Add.1, paras. 169-177 (seefoot-note 26 above).

[281] Some instances can certainly be found where one or other interested State sought to place the continuity on the basis of a legal rule. An example is Japan's claim as of right to the continuance of its traffic rights into Singapore which had been granted to it in the United Kingdom-Japan Agreement for Air Services (1952). This claim was made first against Malaysia and then, after the separation of Singapore from Malaysia, against Singapore itself. But the successor 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. See document A/CN.4/243, paras. 122 and 123 and 138-143 (see footnote 26 above).

writers to the listing of treaties against the name of a successor State in the United States publication *Treaties in Force*, but this procedure has to be understood against the background of the United States' general practice which was authoritatively explained in 1965 as follows:

In practice the United States Government endeavours to negotiate new agreements, as appropriate, with a newly independent State as soon as possible. In the interim it tries, where feasible, to arrive at a mutual understanding with the new State specifying which bilateral agreements between the United States and the former parent State shall be considered as continuing to apply. In most cases the new State is not prepared in the first years of its independence to undertake a commitment in such specific terms. To date the United States-Ghana exchange is the only all-inclusive formal understanding of this type arrived at, although notes have also been exchanged with Trinidad and Tobago and Jamaica regarding continued application of the 1946 Air Services Agreement. An exchange of notes with Congo (Brazzaville) on continuation of treaty obligations is couched only in general terms.[282]

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.** [283]

A recent statement of Canadian practice [284] indicates that it is similar to that of the United States:

... the Canadian approach has been along essentially empirical lines and has been a two-stage one. Where a newly independent State has announced that it intends to be bound by all or certain categories of treaties which in the past were extended to it by the metropolitan country concerned, Canada has, as a rule, tacitly accepted such a declaration and has regarded that country as being a party to the treaties concerned. However, where a State has not made any such declaration or its declaration has appeared to Canada to be ambiguous, then, as the need arose, we have normally sought information from the Government of that State as to whether it considered itself a party to the particular multilateral or bilateral treaty in connexion with which we require such information.

The writer then added the comment:

Recent practice supports the proposition that, *subject to the acquiescence of third States*,* a former colony continues after independence to enjoy and be subject to rights and obligations under international instruments formerly applicable to it, unless considerations as to the manner in which the States came into being or as to the political nature of the subject matter render the treaty either impossible or invidious of performance by the new State.

Whether this practice should be regarded as a strict succession to a legal relationship, or as a novation, may still be an open question.[285]

(12) From the evidence adduced in the preceding paragraphs, the Commission concludes that succession in respect of bilateral treaties has an essentially voluntary character: voluntary, that is, on the part not only of the successor State but also of the other interested State. On this basis the fundamental rule to be laid down for bilateral treaties appears to be that their continuance in force after independence is a matter of agreement, express or tacit, between the successor State and the other State party to the predecessor State's treaty.

(13) A further question the Commission had to examine was that of determining when and upon what basis (i.e. definitively or merely provisionally) a successor State and the other State party are to be considered as having agreed to the continuance of a treaty which was in force in respect of the successor State's territory at the date of the succession. Where there is an express agreement, as in the Exchanges of Notes mentioned in paragraph (9) above, no problem arises. Whether the agreement is phrased as a confirmation that the treaty is considered as in force or as a consent to its being so considered, the agreement operates to continue the treaty in force and determines the position of the States concerned in relation to the treaty. There may be a point as to whether they intend the treaty to be in force definitively according to its terms (notably any provision regarding notice of termination) or merely provisionally, pending the conclusion of a fresh treaty. But that is a question of interpretation to be resolved in accordance with the ordinary rules for the interpretation of treaties.

(14) Difficulty may arise in the not infrequent case where there is no express agreement. Where the newly independent State and the other State party have applied the terms of the treaty *inter se*, the situation is simple, since the application of the treaty by both States necessarily implies an agreement to consider it as being in force. But less clear cases arise in practice: these include situations where one State may have evidenced in some manner an apparent intention to consider a treaty as continuing in force—e.g. by listing the treaty amongst its treaties in force—but the other State has done nothing in the matter; or where the newly independent State has evidenced a general intention in favour of the continuance of its predecessor's treaties but has not manifested any specific intention with reference to the particular treaty; or where neither State has given any clear indication of its intentions in regard to the continuance of bilateral treaties.

(15) As already indicated,[286] a general presumption of continuity has sometimes been derived from the considerable measure of continuity found in modern practice and the ever-growing interdependence of States. The Commission observes however that the question here in issue is the determination of the appropriate rule in a partic-

[282] International Law Association, *The Effect... (op. cit.)*, pp. 385 and 386. See also commentary to article 7, para. 16.

[283] United Nations, *Materials on Succession of States (op. cit.)*, p. 192.

[284] See *The Canadian Yearbook of International Law*, vol. VII, 1969 (Vancouver, B.C.), pp. 329-331.

[285] *Ibid.*, p. 331.

[286] See para. 4 above.

ular field of law—that of treaty relations where intention and consent play a major role. State practice, as shown in the preceding paragraphs, contains much evidence that the continuance in force of bilateral treaties, unlike multilateral treaties, is commonly regarded by both the newly independent State and the other State party as a matter of mutual agreement. Accordingly, no general rule or presumption that bilateral treaties continue in force unless a contrary intention is declared may be deduced, in the Commission's view, from the frequency with which continuity occurs. Moreover a solution based upon the principle not of "contracting out" of continuity but of "contracting in" by some more affirmative indication of the consent of the particular States concerned, is more in harmony with the principle of self-determination.

(16) Taking therefore into account both the frequency with which the question of continuity is dealt with in practice as a matter of mutual agreement and the principle of self-determination, the Commission concludes that the conduct of the particular States in relation to the particular treaty should be the basis of the general rule for bilateral treaties. The Commission is aware that a rule which hinges upon the establishment of mutual consent by inference from the conduct of the States concerned may also encounter difficulties in its application in some types of cases. But these difficulties arise from the great variety of ways in which a State may manifest its agreement to consider itself bound by a treaty, including tacit consent; and they are difficulties found in other parts of the law of treaties.[287]

(17) The Commission then had to consider the question whether the rule should seek to indicate particular acts or conduct which give rise to the inference that the State concerned has consented to the continuance of a bilateral treaty or whether it should merely be formulated in general terms. It examined whether any particular provisions should be inserted concerning the inferences to be drawn from a newly independent State's conclusion of a devolution agreement, from a unilateral declaration inviting continuance of treaties (provisionally or otherwise), from a unilateral listing of a predecessor State's treaty as in force in relation to a new State, from the continuance in force of a treaty in the internal law of a State, or from reliance on the provisions of the treaty by a newly independent State or by the other State party to it in their mutual relations. It came, however, to the conclusion that the insertion of any such provisions prescribing the inferences to be drawn from particular kinds of acts would not be justified. It noted in that respect that in the case of devolution agreements and unilateral declarations, much depends both on their particular terms and on the intentions of those who made them. As appears from the commentaries to articles 7 and 8, even where States may appear in such instruments to express a general intention to continue their 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 on the Law of Treaties (often referred to as estoppel or *préclusion*). But subject to the application of that principle, the problem is always one of establishing the consent of each State to consider the treaty as in force in their mutual relations either by express evidence or by inference from the circumstances.

(18) In general, although the context may be quite different, the questions which arise under the present article appear to have affinities with those which arise under article 45 of the Vienna Convention on the Law of Treaties. The Commission therefore felt that the language used to apply the principle of good faith (estoppel—*préclusion*) in that article would serve a similar purpose in the present context.

(19) Accordingly, *paragraph 1* of the present article provides that a bilateral treaty is considered as being in force between a successor State and the other State party to the treaty when (*a*) they expressly so agree or (*b*) when "by reason of their conduct they are to be considered as having so agreed".

(20) *Paragraph 2* deals with the question of the date on which a treaty is to be considered as becoming binding between a newly independent State and the other State party to it under the provisions of paragraph 1. The very notions of "succession" and "continuity" suggest that this date should, in principle, be the date of the newly independent State's "succession" to the territory. This is also suggested by terminology found in practice indicating that the States concerned agree to regard the predecessor's treaty as continuing in force in relation to the successor State. Accordingly, the Commission considers that the primary rule concerning the date of entry into force must be the date of the succession. On the other hand, the continuance of the treaty in force in relation to the successor State being a matter of agreement, the Commission sees no reason why the two States should not fix another date if they so wish. Paragraph 2, therefore, admits the possibility of some other dates being agreed between the States concerned.

(21) Mention has already been made [288] of the question whether the successor State and the other State party intend to continue the treaty in force definitively in conformity with its terms or only to apply it provisionally. Being essentially a question of intention it will depend on the evidence in each case, including the conduct of the parties. Where the intention is merely to continue the

[287] Cf., for example, the Vienna Convention on the Law of Treaties, articles 12-15 (consent to be bound), 20 (acceptance of and objection to reservations), and 45 (loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty).

[288] See para. 13 above.

application of the treaty provisionally, the legal position differs in some respects from that in cases where the intention is to maintain the treaty itself in force. Since this is also true of the provisional application of multilateral treaties, the Commission decided to deal with the question of provisional application, both of bilateral and multilateral treaties, separately in part III, section 4, of the present draft.

Article 20. The position as between the predecessor and the successor State

A treaty which under article 19 is considered as being in force between a newly independent State and the other State party is not by reason only of the fact to be considered as in force also in the relations between the predecessor and the successor State.

Commentary

(1) The rule formulated in this article may be thought to go without saying, since the predecessor State is not a party to the agreement between the newly independent State and the other State party which alone brings the treaty into force between the latter States. Nevertheless, the Commission thought it desirable to formulate the rule in an article, if only to remove any possibility of misconception. It is true that the legal nexus which arises between, a treaty and a newly independent State's territory by reason of the fact that the treaty concluded by its predecessor was in force in respect of its territory at the date of the succession provides a basis for the subsequent application of the treaty in the bilateral relations between the new sovereign of the territory and the other State party—by agreement between them. But it does not invest the newly independent State with a right to become a party to the actual treaty between its predecessor and the other State party, so as to bring the treaty into force also between itself and its predecessor, as would happen in the case of a multilateral treaty.

(2) The position, as has been pointed out,[289] is rather that the agreement between the newly independent State and the other State party gives rise to a collateral bilateral treaty, which exists *parallel* with the original treaty concluded between the predecessor State and the other State party. The collateral treaty, even though it may be in all respects the twin of the original treaty, operates between the successor State and the other State party as a purely bilateral relation between them which is independent of the predecessor State. Furthermore, should the successor and the predecessor State decide to regulate the same matter—e.g. extradition, tariffs, etc.—on a similar basis, it will be through a new treaty which is exclusive to themselves and legally unconnected with the treaty formerly concluded between the predecessor State and the other State party. Indeed, in many cases—e.g. air transport route agreements—the considerations motivating the provisions of the treaty between the predecessor State and the other State party may be quite different from those relevant in the bilateral relations between the predecessor State and the newly independent State.

(3) The rule is supported by practice inasmuch as neither successor nor predecessor States have ever claimed that in these cases the treaty is to be considered as in force between them as well as between the successor State and the other State party.

(4) Accordingly, the present article simply provides that a bilateral treaty, considered under article 19 as being in force for a newly independent State and the other State party, is not by reason only of that fact to be considered as in force also between the predecessor and the successor State.

Article 21. Termination, suspension of operation or amendment of the treaty as between the predecessor State and the other State party

1. When under article 19 a treaty is considered as being in force between a newly independent State and the other State party, the treaty:

(*a*) Does not cease to be in force in the relations between them by reason only of the fact that it has subsequently been terminated in the relations between the predecessor State and the other State party;

(*b*) Is not suspended in operation in the relations between them by reason only of the fact that it has subsequently been suspended in operation in the relations between the predecessor State and the other State party;

(*c*) Is not amended in the relations between them by reason only of the fact that it has subsequently been amended in the relations between the predecessor State and the other State party.

2. The fact that a treaty has been terminated or, as the case may be, suspended in operation in the relations between the predecessor State and the other State party after the date of the succession of States does not prevent the treaty from being considered as in force, or as the case may be, in operation between the successor State and the other State party if it is established in accordance with article 19 that they so agreed.

3. The fact that a treaty has been amended in the relations between the predecessor State and the other State party after the date of the succession of States does not prevent the unamended treaty from being considered as in force under article 19 in the relations between the successor State and the other State party, unless it is established that they intended the treaty as amended to apply between them.

Commentary

(1) This article deals with the case where, after a succession of States, a bilateral treaty is terminated, suspended in operation or amended as between the predecessor State and the other State party.

(2) Once it is recognized that, in general, succession in respect of bilateral treaties occurs through the express or

[289] See above, commentary to article 19, para. 3.

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 successor State and the other State party. Thus, if the treaty provides for its own termination on a specified date, it will cease to be in force on that date for the successor State and the other State party (unless they specially agree otherwise) because that provision of the treaty forms part of their own agreement. An instance of the expiry of the original treaty by the force of its own terms may be found in the Secretariat study of air transport agreements,[290] which refers to the United States of America having reminded, first, Trinidad and Tobago and, secondly, Jamaica that an Exchange of Notes of 1961 between the United States and the United Kingdom was due to expire very soon. Another appears in the Secretariat study of trade agreements[291] where mention is made of the expiry of Franco-Italian and Franco-Greek trade agreements, which were applicable to Morocco and Tunis, some months after the attainment of independence by these countries.

(4) On the other hand, a termination of the treaty as between the *predecessor* State and the other State party resulting from the initiative of one of them, (e.g. a notice of termination under the treaty as a response to a breech of the treaty) does not, *ipso jure*, affect the separate treaty or relations between the successor State and the other State party.[292] The Secretariat study on air transport agreements provides an example in the India-United States of America Agreement of 1946.[293] After Pakistan's separation from India, it agreed with the United States in an Exchange of Notes that the 1946 Agreement should be considered as in force between Pakistan and the United States. In 1954 India gave notice of termination to the United States and in 1955 the 1946 Agreement ceased to be in force with respect to India itself. With respect to Pakistan, however, it continued in force.

(5) Similarly, the principle finds expression in cases where the other State party, desirous of terminating the treaty in respect of the successor as well as the predecessor State, has taken steps to communicate its notice of termination to the successor State as well as the predecessor. Thus, when Sweden decided in 1951 to terminate the Norway and Sweden-United Kingdom Extradition Treaty of 1873, she gave notice of termination separately to India,[294] Pakistan,[295] and Ceylon.[296] 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,[297] Norway,[298] France,[299] the Netherlands [300] and New Zealand.[301] Malaysia's termination of the 1946 United Kingdom-United States Air Transport Agreement does not appear to be any exception.[302] After Malaysia's attainment of independence, this Agreement was considered by it and the United States as continuing in force between them. Then in 1965, some two months before Singapore's separation from Malaysia, Malaysia gave notice of termination to the United States and this was treated by the latter as terminating the agreement also for Singapore, although the twelve months period of notice presented in the treaty did not expire until after Singapore had become independent. In this case Malaysia was the State responsible for Singapore's external relations at the time when the notice of termination was given, and the United States presumably felt that fact to be decisive. Whether a notice of termination, which has not yet taken effect, at the date of independence, ought to be regarded as terminating the legal norms between the treaty and the new State's territory may raise a question. But it is a question which is not limited to bilateral treaties and does not affect the validity of the principle here in issue.

(6) At first sight, Canada might seem to have departed from the principle in correspondence with Ghana in 1960 concerning the United Kingdom-Canada double taxation agreement which had been applied to the Gold Coast in 1957.[303] Three years later Canada gave notice of termination to the United Kingdom but not to Ghana, which

[290] Document A/CN.4/243, para. 54 (see foot-note 26 above).

[291] Document A/CN.4/243/Add.1, para 71 *(idem)*.

[292] This point is made the subject of a specific rule by the International Law Association in its resolution No. 3 on succession in respect of treaties (see International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), p. xiv [Resolutions] and p. 601 [Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors, Note 3]).

[293] Document A/CN.4/ 243, paras. 17-19 (see foot-note 26 above).

[294] *Yearbook of the International Law Commission, 1970*, vol. II, p. 109, document A/CN.4/229, para. 25.

[295] *Ibid.*, p. 110, para 32.

[296] *Ibid.*, p. 111, para. 38.

[297] Document A/CN.4/243, para, 131. (see foot-note 26 above).

[298] *Ibid.*

[299] *Ibid.*, para 135.

[300] *Ibid.*, para. 146.

[301] *Ibid.*, para. 147.

[302] *Ibid.*, para. 151; see also para 125.

[303] International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), p. 632 [Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors, annex E].

took the position that the agreement was still in force between itself and Canada. The latter is then reported as having objected that it had understood that the United Kingdom would communicate the notice of termination to any States interested by way of succession. If such was the case, Canada would not seem to have claimed that its termination of the original treaty *ipso jure* put an end also to the operation of the treaty as between itself and Ghana. It seems rather to have maintained that its notice of termination was intended to be communicated also to Ghana and was for that reason effective against the latter. Although Ghana did not pursue the matter, the Commission doubts whether, in the light of article 78 of the Vienna Convention on the Law of Treaties, a notice of termination can be effective against a successor State unless actually received by it. This is on the assumption that when the notice of termination was given by the predecessor State, the treaty was *already in force* between the new State and the other State party. A notice of termination given by the predecessor State or by the other State party *before any arrangement had been reached between the successor State and the other State party* would present a situation of a rather different kind.[304]

(7) *Paragraph 1* a of the article accordingly provides that a treaty considered as being in force between a newly independent State and the other State party does not cease to be in force in the relations between them by reason only of the fact that it has subsequently been terminated in the relations between the predecessor State and the other State party. This, of course, leaves it open to the other State party to send a notice of termination under the treaty simultaneously to both the predecessor and successor States. But it establishes the principle of the separate and independent character of the treaty relations between the two pairs of States.

(8) For the sake of completeness, and taking account of the terminology of the Vienna Convention on the Law of Treaties, the Commission has also provided in this article for the case of *suspension* of operation of the treaty as between the predecessor State and the other State party. The case being similar to that of termination of the treaty, the relevant rules should obviously be the same. Hence the provision contained in *paragraph 1* (b).

(9) The same basic principle must logically govern the case of an amendment of a treaty which is considered as in force between a newly independent State and the other State party. An amendment agreed between the predecessor State and the other State party would be effective only between themselves and would be *res inter alios acta* for the newly independent State in its relations with the other State party. It does not, therefore, *ipso jure* effect a similar alteration in the terms of the treaty as applied in the relations between the newly independent State and the other State party. Any such alteration is a matter to be agreed between these two States, and it is hardly conceivable that the rule should be otherwise.

(10) In the case of air transport treaties, for example, it frequently happens that after the newly independent State and the other State party have agreed, expressly or tacitly, to consider the treaty as continuing in force, the original treaty is amended to take account of the new air route situation resulting from the emergence of the new State. Such an amendment obviously cannot be reproduced in the treaty as applied between the newly independent State and the other State party. Numerous instances of such amendments to the original treaty made for the purpose of changing route schedules may be seen in the Secretariat study on succession in respect of air transport agreements.[305] In these cases, although the original air-transport agreement itself is considered by the new State and the other State party as in force also in the relations between them, the fact that there are really two separate and parallel treaties in force manifests itself in the different route schedules applied, on the one hand, between the original parties and, on the other, between the newly independent State and the other State party.

(11) The principle also manifests itself in cases which recognize the need for a newly independent State's participation in or consent to an amendment of the original treaty if the amendment is to operate equally in its relations with the other State party. There are several such cases to be found in the Secretariat study of trade agreements in paragraphs giving an account of the amendment of certain French trade agreements applicable in respect of former French African territories at the date of their attainment of independence.[306] When in 1961 certain Franco-Swedish trade agreements were amended and extended in duration, and again in subsequent years, six new States authorized France to represent them in the negotiations, while a further six newly independent States signed the amending instrument on their own behalf. In other cases of a similar kind [307] sometimes France expressly acted on behalf of the French Community; more usually those of the new ex-French African States who desired to continue the application of the French trade agreements signed the amending instruments on their own behalf. The same Secretariat study also mentions a number of Netherlands trade agreements that provided for annual revising instruments in which Indonesia was to have the right to participate.[308] But Indonesia not having exercised this right, its participation in the trade agreements in question ceased. Yet another illustration of the need for a new State's consent, if a revising instrument is to affect it, can be seen in the Secretariat study of extradition treaties,[309] though this is perhaps more properly to be considered a case of termination through the conclusion of a new agreement. In 1931 the United Kingdom and United States of America concluded a new extradition treaty, which was expressed to supersede all their prior extradition treaties,

[304] See para. 13 below.

[305] See document A/CN.4/243, paras. 20, 26, 35, 40, 42, 58 and 66 (see foot-note 26 above).

[306] See document A/CN.4/243/Add.1 *(idem)*, paras. 73-80.

[307] In many of these cases the object of the amending instrument was essentially to prolong the existing trade agreement.

[308] See document A/CN.4/243/Add.1 (see foot-note 26 above), paras. 95-104.

[309] *Yearbook of the International Law Commission, 1970*, vol. II, pp. 107-108, document A/CN.4/229, para 13.

save that in the case of each of the Dominions and India the prior treaties were to remain in force unless those States should accede to the 1931 Treaty or negotiate another treaty on their own.

(12) *Paragraph 1* (c) of the present article, therefore, further provides that a bilateral treaty considered to be in force for a newly independent State and the other State party is not amended in the relations between them by reason only of the fact that it has been amended in the relations between the predecessor State and the other State party. This again does not exclude the possibility of an amending agreement's having a parallel effect on the treaty relations between the successor State and the other State party if the interested State—in this case the newly independent State—so agrees.

(13) The point remains as to whether any special rule has to be stated for the case where the original treaty is terminated, suspended in operation or amended before the newly independent State and the other State party can be considered as having agreed upon its continuance. If the treaty has been effectively terminated before the date of the succession, there is no problem—other than the effect of a notice of termination given before but expiring after the date of the succession. The treaty is not one which can be said to have been in force in respect of the newly independent State's territory at the date of the succession so that, if that State and the other State party should decide to apply the treaty in their mutual relations, it will be on the basis of an entirely new transaction between them. The problem concerns rather the possibility that the predecessor State or the other State party should terminate the treaty soon after the date of the succession and before the newly independent State and the other State party have taken any position regarding the continuance in force of the treaty in their mutual relations. The Commission is of the view that the necessary legal nexus is established for the purpose of the law of succession if the treaty is in force in respect of the newly independent State's territory at the date of succession. On this basis, there does not seem to be any logical reason why that legal nexus should be affected by any act of the predecessor State after that date.

(14) The Commission realizes that the point may not be of great importance since, as article 19 expressly recognizes, the bringing of the treaty into force in the relations between the newly independent State and the other State party is a matter for their mutual agreement. In consequence, it is open to them to disregard the termination, suspension of operation or amendment of the treaty between the original parties or to treat it as conclusive as between themselves according to their wishes. On the other hand, the point may have importance in determining the position in the case of an alleged agreement to continue the treaty in force to be implied simply from the conduct of the newly independent State and the other State party, e.g. from the continued application of the treaty. The Commission has therefore thought it better to deal with the matter in the article. *Paragraph 2* of the article in effect provides that the termination or suspension of operation of the treaty between the original parties after the date of the succession of States does not prevent the treaty from being considered as in force or, as the case may be, in operation between the successor State and the other State party if it is established in accordance with article 19 that they so agreed. *Paragraph 3* provides that the amendment of the treaty between the original parties after the date of the succession of States does not prevent the unamended treaty from being considered as in force under article 19 in the relations between the successor State and the other State party, unless it is established that they intended the treaty as amended to apply between them.

SECTION 4. PROVISIONAL APPLICATION

Article 22. Multilateral treaties

1. A multilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as applying provisionally between the sucessor State and another State party to the treaty if the successor State notifies the parties or the depositary of its wish that the treaty should be so applied and if the other State party expressly so agrees or by reason of its conduct is to be considered as having so agreed.

2. However, in the case of a treaty which falls under article 12, paragraph 3, the consent of all the parties to such provisional application is required.

Commentary

(1) The Commission, as mentioned already,[310] decided to deal with the provisional application of treaties on a succession of States separately from their continuance in force definitively. Moreover, since the principal importance of provisional application in the context of succession of States seems to be in the case of newly independent States, it also decided to assign this matter to the present section of part III. Section 4 is divided into three articles: the present article and article 23 cover respectively multilateral and bilateral treaties, and article 24 the termination of provisional application.

(2) The provisional application of a multilateral treaty as such hardly seems possible, except in the case of a "restricted" multilateral treaty and then only with the agreement of all the parties. The reason is that participation in a multilateral treaty is governed by its final clauses which do not, unless perhaps in rare cases, contemplate the possibility of participation on a provisional basis, i.e. on a basis different from that of the parties to the treaty *inter se*. Theoretically, it might be possible by a notification circulated to all the parties to obtain the consent of each one to such a provisional participation in the treaty by a newly independent State. But this would raise complex questions as to the effect of obligations of individual States. Moreover, this form of provisional application does not appear to occur in practice. The Com-

[310] See above, commentary to article 8, para. 19.

mission did not, therefore, think that it would be appropriate to recognize it in the present draft.

(3) What does occur in practice, and is indeed specifically implied by some of the unilateral declarations mentioned in the commentary to article 8, is the provisional application of a multilateral treaty on a reciprocal basis between a newly independent State and individual States parties to the treaty. But in those cases what happens is that the multilateral treaty is by a collateral agreement applied provisionally between the newly independent State and a particular party to the treaty on a *bilateral* basis. The case is thus totally different from the definitive participation of a newly independent State in virtue of the option accorded to it in articles 12 and 13 to establish its status as a party or contracting State by its own act alone.

(4) Where the multilateral treaty is one of a restricted character which falls under article 12, paragraph 3, the position is different. There is then no real obstacle to prevent the parties, limited in number as they are, from agreeing with the newly independent State to apply the treaty provisionally on whatever conditions they think fit. But in this case, having regard to the restricted character of the treaty, it seems necessary that the provisional application of the treaty should be agreed to by *all* the parties.

(5) Accordingly, *paragraph 1* of the present article states that a multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession relates is considered as applying provisionally *between the successor State and another State party* when the two following conditions are fulfilled: (*a*) the successor State notifies the parties or the depositary of its wish that the treaty should be applied provisionally; and (*b*) the other State party expressly so agrees or by reason of its conduct is to be considered as having so agreed. *Paragraph 2* specifies that in the case of a restricted multilateral treaty the consent of *all the parties* to such provisional application is required.

Article 23. Bilateral treaties

A bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as applying provisionally between the successor State and the other State and the other State party if:

(*a*) They expressly so agree; or

(*b*) By reason of their conduct they are to be considered as having agreed to continue to apply the treaty provisionally.

Commentary

(1) Under article 19 the continuance in force of a bilateral treaty as between a newly independent State and the other State party is always a question of agreement express or implied. The question being one of agreement, it is equally open to the States concerned to agree merely to continue to apply the treaty provisionally between them, rather than to continue it in force definitively in accordance with its terms. This is a procedure specifically invited by many of the unilateral declarations mentioned in the commentary to article 8. Those declarations fix a period during which the newly independent State offers to apply any bilateral treaty provisionally with a view to its replacement by a fresh treaty, or failing such replacement, its termination at the end of the period. In the case of declarations of this type, if the other State accepts either expressly or impliedly the offer of the newly independent State, it is necessarily an agreement for the *provisional application* of the treaty which arises.[311]

(2) The provisional application of bilateral treaties also arises quite frequently in practice from express agreement to that effect between the newly independent State and the other State party. These express agreements are normally in the form of an exchange of notes and provide for the provisional application of the treaty pending the negotiation of a new treaty or for a specified period, etc. When there is such an express agreement, no difficulty arises because the intention of the States concerned to apply the treaty *provisionally* is clearly indicated in the agreement. The main problem is where there is no such express agreement and the intention to continue the application of the treaty provisionally rather than definitely has to be inferred from the circumstances of the case. Not infrequently one or other party may have given a specific indication of its intention to apply the treaty provisionally, as in the case of the unilateral declarations referred to above; and in that case the inference from the conduct of the parties in favour of provisional application will be strong. In the absence of any such specific indication of the attitude of one or other State, the situation may be more problematical; but as in other contexts in the law of treaties it can only be left to be determined by an appreciation of the circumstances of the particular case.

(3) Article 23 accordingly provides that a bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as applying provisionally between the successor State and the other State party if they *expressly* so agree or *by reason of their conduct* they are to be considered as having agreed to continue to apply the treaty provisionally,

Article 24. Termination of provisional application

1. The provisional application of a multilateral treaty under article 22 terminates if:

(*a*) The States provisionally applying the treaty so agree;

(*b*) Either the successor State or the other State party gives reasonable notice of such termination and the notice expires; or

(*c*) In the case of a treaty which falls under article 12, paragraph 3, either the successor State or the parties give

[311] See, for example, the three Secretariat studies on succession in respect of bilateral treaties: *Yearbook of the International Law Commission, 1970*, p. 102, document A/CN.4/229; and documents A/CN.4/243 and A/CN.4/243/Add.1 (see foot-note 26 above).

reasonable notice of such termination and the notice expires.

2. The provisional application of a bilateral treaty under article 23 terminates if:

(*a*) The successor State and the other State party so agree; or

(*b*) Either the successor State or the other State party gives reasonable notice of such termination and the notice expires.

3. Reasonable notice of termination for the purpose of the present articles shall be:

(*a*) Such period as may be agreed between the States concerned; or

(*b*) In the absence of any agreement, twelve months' notice unless a shorter period is prescribed by the treaty for notice of its termination.

Commentary

(1) This article sets out the general rules for the termination of a treaty which is being applied provisionally between a successor State and another State party to the treaty. *Paragraph 1* deals with termination in cases of provisional application of a multilateral treaty under article 22, and *paragraph 2* with termination in cases of provisional application of a bilateral treaty under article 23. Both paragraphs envisage termination coming about either by mutual agreement or by the giving of reasonable notice of termination. No doubt, provisional application may be terminated in other ways under the general law of treaties, e.g. if the States concerned conclude a new treaty relating to the same subject matter and incompatible with the application of the earlier treaty. But the Commission considered that the present article should be confined to the rules which specifically concern the termination of the provisional application of a predecessor State's treaty between the successor State and another State party.

(2) When it is a question of termination by agreement, the main point is to identify the State or States the agreement of which is necessary. In the case of bilateral treaties there is no problem; and the same is true of a multilateral treaty provisionally applied between the successor State and individual parties under article 22. The consent of both States applying the treaty provisionally is *ex hypothesi* necessary. In the case of a multilateral treaty of a restricted character, just as the consent of all the parties and the successor State was necessary for the provisional application of the treaty, so it must be also for the termination of such provisional application.

(3) When it is a question of termination by the giving of reasonable notice, the main points are to identify the State or States which may give such notice and to determine what constitutes reasonable notice. As to the State or States which may give notice, there is again no problem in the case of a bilateral treaty and of a multilateral treaty: either the successor State or the other State party applying the treaty provisionally may give reasonable notice of termination. In the case of a multilateral treaty of a restricted character either the successor State or the parties may give notice; and then it may be a question whether the notice must be given by *all* the parties. The Commission considered that in principle the termination of provisional application of a treaty vis-à-vis a successor State was a matter that concerned all the parties, but thought it was not necessary to specify that the notice should be given by all the parties.

(4) The requirement of reasonable notice is for the protection of both the successor State and other States parties, since the abrupt termination of provisional application might create administrative and other difficulties for the other State. The Commission noted that article 56 of the Vienna Convention on the Law of Treaties, which concerns denunciation or withdrawal from a treaty, in dealing with a problem having similar aspects, prescribed a twelve months' period of notice. Having regard to the kind of treaties normally involved—e.g. trade, air transport, tax and extradition treaties—the Commission considered that a similar period of notice would be appropriate in the present context. On the other hand, if the treaty should provide for a shorter period of notice for its termination, it would be logical that this shorter period should apply also to the termination of the provisional application of the treaty under the present article.

(5) Accordingly, *paragraph 1* of the article states that the provisional application of a *multilateral treaty* under article 22 terminates of (*a*) the States provisionally applying the treaty so agree; (*b*) either the successor State or the other State party gives reasonable notice of such termination and the notice expires; or (*c*) in the case of a restricted multilateral treaty either the successor State or the parties give reasonable notice of such termination and the notice expires. *Paragraph 2* then provides that the provisional application of a *bilateral treaty* under article 23 terminates if (*a*) the successor State and the other State party so agree; or (*b*) either the successor State or the other State party gives reasonable notice of such termination and the notice expires.

(6) Lastly, *paragraph 3* specifies that a *reasonable notice of termination* for the purpose of the present articles shall be: (*a*) such period as may be agreed between the States concerned; or (*b*) in the absence of any agreement, twelve months' notice unless a shorter period is prescribed by the treaty for notice of its termination.

SECTION 5. STATES FORMED FROM TWO OR MORE TERRITORIES

Article 25. Newly independent States formed from two or more territories

When the newly independent State has been formed from two or more territories in respect of which the treaties in force at the date of the succession of States were not identical, any treaty which is continued in force under articles 12 to 21 is considered as applying in respect of the entire territory of that State unless:

(*a*) It appears from the treaty or is otherwise established that the application of the treaty to the entire territory would be incompatible with its object and purpose or the

effect of the combining of the territories is radically to change the conditions for the operation of the treaty;

(*b*) In the case of a multilateral treaty other than one referred to in article 12, paragraph 3, the notification of succession is restricted to the territory in respect of which the treaty was in force prior to the succession;

(*c*) In the case of a multilateral treaty of the kind referred to in article 12, paragraph 3, the successor State and the other States parties otherwise agree;

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

Commentary

(1) Article 25 concerns the special case of the emergence of a newly independent State formed from two or more territories, *not already States when the succession occurred*, and in respect of which the treaties in force at the date of the succession of States were not identical. This case is to be differentiated from the uniting of two or more *States* in one State dealt with in article 26 of the present articles.

(2) The underlying legal situations at the moment of the succession are not the same in the uniting of two or more States as in the creation of a State formed from two or more mere territories.[312] The States which unite in one State have prior treaty régimes of their own—an existing complex of treaties to which each of them is a party in its own name. A mere territory may have an existing complex of treaties formerly made applicable to it by its administering Power; but these treaties are not treaties to which it is itself a party at the moment when it joins other territory or territories to compose a State. On the contrary, they are treaties to which a successor State would be considered a party only after notification of succession in the case of a multilateral treaty or by agreement in the case of a bilateral treaty.

(3) One example of such a plural-territory State, of a federal type, is Nigeria, which was created out of four former territories, namely, the colony of Lagos, the two protectorates of Northern and Southern Nigeria and the northern region of the British Trust Territory of the Cameroons.[313] The treaty situation on the eve of independence has been broadly estimated as follows: [314] of the 78 multilateral treaties affecting parts of Nigeria before independence 37 applied to all territories, 31 to Lagos only, 3 to the two Protectorates only, 6 to both Lagos and the two Protectorates and 1 to the Trust Territory only. Of the 222 bilateral treaties, 151 applied equally to all four parts, 53 to Lagos only, 1 to the two Protectorates only, 13 to both Lagos and the two Protectorates, and 2 to the Trust Territory only. Nigeria is a State which entered into a devolution agreement with the United Kingdom prior to independence and has since notified or acknowledged its succession to a certain number of the above mentioned multilateral and bilateral treaties. Neither in its devolution agreement [315] nor in its notifications or acknowledgements does Nigeria seem to have distinguished between treaties previously applicable in respect of all four territories or only of some of them. Moreover, in notifying or acknowledging the continuance in force of any treaties for Nigeria, it seems to have assumed that they would apply to Nigeria as a whole and not merely within the respective regions in regard to which they had been applicable before independence. An both depositaries [316] and other contracting parties appear to have acquiesced in this point of view, for they also refer simply to Nigeria.[317]

(4) The Federation of Malaysia is a more complex case, involving two stages. The first was the formation of the Federation of Malaya as an independent State in 1957 out of two colonies, Malacca and Penang, and nine Protectorates. The bringing together of these territories into a federal association had begun in 1948 so that post-1948 British treaties were applicable in respect of the whole federation at the moment of independence; but the pre-1948 British treaties were applicable in respect only of the particular territories in regard to which they had been concluded. The devolution agreement entered into by Malaya [318] referred simply to instruments which might be held to "have application to or in respect of the Federation of Malaya". On the other hand, Article 169 of the Constitution,[319] which related to the Federal Government's power to legislate for the implementation of treaties, did provide that any treaty entered into by the United Kingdom "*on behalf of the Federation or any part thereof**" should be deemed to be a treaty *between the Federation and the other country concerned.* Exactly what was intended by this provision is not clear. But in practice neither the Federation nor depositaries appear in the case of multilateral treaties to have related Malaya's participation to the particular regions of Malaya in regard to which the treaty was

[312] The International Law Association referred to a composite State as a State "formed out of several previously separate States or territories", grouping together therefore all unions or federations whether formed from a union of *States* or merely from two or more *territories* (see the International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), p. 600 [Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors, note 2]).

[313] Although there was a consolidation of some of those territories since 1914, when Northern and Southern Nigeria were amalgamated, the whole territory being known thereafter as the Colony and Protectorate of Nigeria. The territory as a whole was then divided into three areas: the Colony of Nigeria and two groups of provinces and protectorates—Northern and Southern. The Southern was later divided into Eastern and Western. In 1951, the Northern, Eastern and Western were renamed regions. At the date of independence there were British treaties applicable in respect of different parts of Nigeria, notwithstanding such a consolidation.

[314] The figures for multilateral and bilateral treaties add up to about 300 treaties in force in respect of one or other part of Nigeria at the date of independence.

[315] For the text, see *Yearbook of the International Law Commission, 1962*, vol. II, p. 127, document A/CN./150, annex, No. 10.

[316] E.g. the Secretary-General's letter of enquiry of 28 February 1961 (*ibid.*, p. 117, para. 96).

[317] See, for example, United States, Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1972* (Washington D.C., U.S. Government Printing Office, 1972), pp. 179-180.

[318] See United Nations, *Materials on Succession of States (op. cit.)*, p. 76.

[319] *Ibid.*, pp. 87-88.

previously applicable.[320] In the case of bilateral treaties the practice available to the Commission does not indicate clearly how far continuance in force of pre-independence treaties was related to the particular regions in regard to which they were applicable.

(5) The second stage of the Federation occurred in 1963 when, by a new agreement, Singapore, Sabah and Sarawak joined the Federation, the necessary amendments being made to the Constitution for this purpose. Article 169 continued as part of the amended Constitution and was therefore in principle applicable in internal law with respect to the new territories; but no devolution agreement was entered into between the United Kingdom and the Federation in relation to these territories. In two opinions given in 1963 the United Nations Office of Legal Affairs regarded the entry of the three territories into the Federation as an enlargement of the Federation. The first 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.[321]

If that opinion concerned succession in relation to membership, the second concerned succession in relation to a treaty—a Special Fund Agreement. The substance of the advice given by the United Nations Office of Legal Affairs is as follows:

> As you know, the Agreement between the United Kingdom and the Special Fund was intended to apply to Special Fund projects in territories for the international relations of which the United Kingdom is responsible (see, e.g., the first paragraph of the preamble to the Agreement). In view of the recent changes in the international representation of Sabah (North Borneo) and Singapore, the *United Kingdom Agreement may be deemed to have ceased to apply with respect to those territories in accordance with general principles of international law*,* and this would be true notwithstanding that the Plans of Operation for the projects technically constitute part of the Agreement with the United Kingdom under article I, paragraph 2, of that Agreement. Although the Special Fund could take the position that the United Kingdom Agreement has devolved upon Malaysia and that it continues to apply to Singapore and Sabah (North Borneo), this could well result in two separate agreements becoming applicable within those territories (i.e., the United Kingdom Agreement for projects already in existence and, as explained below, the Agreement with Malaya with respect to future projects), a situation which could give rise to confusion and should be avoided if possible.
>
> As regards the Agreement between the Special Fund and Malaya, it continues in force with respect to the State now known as Malaysia since the previous international personality of the Federation of Malaya continues and has no effect on its membership in the United Nations. Similarly, the Agreement between the Special Fund and the Federation of Malaya should be deemed unaffected by the change in the name of the State in question. *Moreover, we are of the opinion that the Malayan Agreement applies of its own force and without need for any exchange of letters to the territory newly acquired by that State*,* and to Plans of Operation for future projects therein, in the absence of any indication to the contrary from Malaysia.[322]

The office of Legal Affairs 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.[323] Moreover, the same principle, that Malaya's treaties would apply automatically to the additional territories of Singapore, Sabah and Sarawak, appears to have been acted on by the Secretary-General in his capacity as depositary of multilateral treaties. Thus, in none of the many entries for "Malaysia" in *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions*[324] is there any indication that any of the treaties apply only in certain regions of Malaysia.

(6) Similarly, in the case of other multilateral treaties Malaysia appears to have been treated simply as an enlargement of Malaya and the treaties as automatically applicable in respect of Malaysia as a whole.[325] An exception is the case of GATT where Malaysia notified the Director-General that certain pre-federation agreements of Singapore, Sarawak and Sabah would continue to be considered as binding in respect of those States, but would not be extended to the States of the former Federation of Malaya; and that certain other agreements in respect of the latter States would for the time being not be extended to the three new States.[326]

(7) The circumstances of the federation of Rhodesia and Nyasaland in 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" in the normal sense.

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[320] See the Secretary-General's letter of enquiry of 9 December 1957 in *Yearbook of the International Law Commission, 1962*, vol. II, p. 112, document A/CN.4/150, para. 44; and United Nations, *Multilateral Treaties...1971 (op. cit.)*, where reference is made simply to Malaya as a party to certain of the treaties listed in the Secretary-General's letter of enquiry.

[321] United Nations, *Juridical Yearbook, 1963* (United Nations publication, Sales No. 65.V.3), p. 163.

[322] *Ibid.*, p. 178.

[323] See above, commentary to article 10, para. 5.

[324] United Nations, *Multilateral Treaties...1971 (op. cit.)*.

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

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

(8) States formed from two or more territories may equally be created in the form of unitary States, modern instances of which are Ghana and the Republic of Somalia. Ghana consists of the former colony of the Gold Coast, Ashanti, the Northern Territories Protectorate and the Trusteeship Territory of Togoland. It appears there were no treaties, multilateral or bilateral, which were applied before independence to Ashanti, the Northern Territories or Togoland which were not also applied to the Gold Coast; on the other hand, there were some treaties which applied to the Gold Coast but not to the other parts of what is now Ghana. The latter point is confirmed by the evidence in *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions*.[327] In regard to bilateral treaties it seems that of the nine United Kingdom treaties listed under Ghana in the United States publication *Treaties in Force*, three had previously applied to the Gold Coast alone, one to the Gold Coast and Ashanti alone and only five to all four parts of Ghana.

(9) After independence Ghana notified her succession in respect of a number of multilateral treaties of which the Secretary-General is the depositary, some being treaties previously applicable only in respect of parts of what is now her territory. There is no indication in the Secretary-General's practice that Ghana's notifications of succession are limited to particular regions of the State; and, similarly, there is no indication in the United States *Treaties in Force* that any of the nine United Kingdom bilateral treaties specified as in force *vis-à-vis* Ghana are limited in their application to the particular regions in respect of which they were in force prior to independence. Nor has the Commission found any practice to the contrary in the Secretariat studies of succession in respect of multilateral or of bilateral treaties or in *Materials on Succession of States*.[328] In other words, the presumption seems to have been made that Ghana's acceptance of succession was intended to apply to the whole of her territory, even although the treaty might previously have been applicable only in respect of some part of the new composite State.

(10) The Republic of Somalia is a unitary State composed of Somalia and Somaliland. Both these territories had become independent States before their uniting as the Republic of Somalia so that, technically, the case may be said to be one of a uniting of *States*. But their separate existences as independent States were very short-lived and designed merely as steps towards the creation of a unitary Republic. In consequence, from the point of view of succession in respect of treaties the case has some similarities with that of Ghana, provided that allowance is made for the double succession which the creation of the Republic of Somalia involved. The general attitude of the Somalia Government seems to have been that treaties, when continued at all, apply only to the areas to which they territorially applied before independence. This is certainly borne out by the position taken by Somalia in regard to ILO conventions previously applicable to either or both of the territories of which it was composed.[329] There were two such conventions previously applicable both to the Trust Territory and to British Somaliland and these Somalia recognized as continuing in force in respect of the whole Republic. Seven more conventions had previously been applicable to the Trust Territory but not to British Somaliland and a further six applicable to British Somaliland but not to the Trust Territory. These conventions also she recognized as continuing in force but only in respect of the part of her territory to which they had been applicable. It appears that Somalia adopts the same attitude in regard to extradition treaties; and that she accordingly would refuse extradition of a person in the Trust Territory if extradition were sought under a former British extradition treaty applicable in respect of British Somaliland.

(11) In general, Somalia has been very sparing in her recognition of succession in respect of treaties, as may be seen from the extreme paucity of references to Somalia in the Secretariat studies. It is also reflected in the fact that she has not recognized her succession to any of the multilateral treaties of which the Secretary-General is the depositary.[330] As to those treaties, the position taken by the Secretary-General in 1961 in his letter of enquiry to Somalia is of interest. He listed nine multilateral treaties previously applicable in respect of both the Trust Territory and British Somaliland and said that, upon being notified that Somalia recognized herself as bound by them, she would be considered as having become a party to them in her own name as from the date of independence. He then added:

> The same procedure could be applied in respect of those instruments which either were made applicable only to the former Trust Territory of Somaliland by the Government of Italy or only to the former British Somaliland by the Government of the United Kingdom, *provided that your Government would recognize that their application now extends to the entire territory of the Republic of Somalia.** [331]

This passage seems to deny to Somalia the possibility of notifying her succession to the treaties in question only in respect of the territory to which they were previously applicable. If so, it may be doubted whether in the light of later practice it any longer expresses the position of the Secretary-General in regard to the possibility of a succession restricted to the particular territory to which the treaty was previously applicable.

(12) The practice summarized in the preceding paragraphs indicates that cases of the formation of a State from two or more territories fall within the rules of part III (Newly independent States) of the present draft articles and that the only particular question which they raise is the territorial scope to be attributed to a treaty which at the date of the succession was not in force in all the territories which formed the newly independent State when such treaty is recognized by the latter as remaining in force.

(13) As is apparent from the recorded practice, the question of territorial scope has been dealt with in one way in some cases and in a different way in others.

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[327] United Nations, *Multilateral Treaties ... 1971 (op. cit.)*.

[328] United Nations, *Materials on Succession of States (op. cit.)*.

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

[330] *Ibid.*

[331] *Ibid.*, p. 118, para. 103.

However, once it is accepted that in a newly independent State it is a matter of consent, the differences in the practice are reconcilable on the basis that they merely reflect differences in the intentions—in the consents—of the States concerned. The question then is whether a treaty should be presumed to apply to the entire territory of the newly independent State formed from two or more territories unless a contrary intention appears, or whether a treaty should be presumed to apply only in respect of the constituent territory or territories in which it was previously in force unless an intention to apply it to the entire territory of the newly independent State appears.

(14) The Commission considered the former of these two possibilities to be the more appropriate rule. Consequently, the introductory sentence of article 25 provides that when a newly independent State has been formed from two or more territories in respect of which the treaties in force at the date of the succession of States were not identical, any treaty which is continued in force under articles 12 to 21 of the present draft articles is considered as applying in respect of the entire territory of that State.

(15) At the same time, the Commission felt it necessary to except from the "entire territory" presumption, the cases mentioned in sub-paragraphs (*a*) to (*d*) of the article. The first exception relates to a case in which it appears from the treaty or is otherwise established that the application of the treaty to the entire territory would be incompatible with its object and purpose or the effect of the combining of the territories is radically to change the conditions for the operation of the treaty (*sub-paragraph* (a)). The second exception concerns multilateral treaties other than restricted ones. In such a case, the newly independent State may indicate in its notification of succession that the application of the treaty is restricted to the territory in respect of which the treaty was in force prior to the succession (*sub-paragraph* (b)). Finally, for restricted multilateral treaties and bilateral treaties the "entire territory" presumption may be negatived by agreement the successor State and the other States parties (*sub-paragraphs* (c) *and* (d)).

PART IV. UNITING, DISSOLUTION AND SEPARATION OF STATES

Article 26. Uniting of States

1. On the uniting of two or more States in one State, any treaty in force at that date between any of those States and other States parties to the treaty continues in force between the successor State and such other States parties unless:

(*a*) The successor State and the other States parties otherwise agree; or

(*b*) The application of the particular treaty after the uniting of the States would be incompatible with its object and purpose or the effect of the uniting of the States is radically to change the conditions for the operation of the treaty.

2. Any treaty continuing in force in conformity with paragraph 1 is binding only in relation to the area of the territory of the successor State in respect of which the treaty was in force at the date of the uniting of the States unless:

(*a*) The successor State notifies the parties or the depositary of a multilateral treaty that the treaty is to be considered as binding in relation to its entire territory;

(*b*) In the case of a multilateral treaty falling under article 12, paragraph 3, the successor State and all the parties otherwise agree; or

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

3. Paragraphs 1 and 2 apply also when a successor State itself unites with another State.

Commentary

(1) This article deals with a succession of States arising from the uniting in one State of two or more *States*, which had separate international personalities at the date of the succession. The case of the emergence of a State from the combining of two or more territories, not already States at the date of the succession, falls within the rules which govern newly independent States and, accordingly, has been dealt with separately in part III, article 25. The transfer of a mere *territory* to an existing State also falls under an earlier provision of the draft articles, namely the moving treaty frontier rule set out in article 10.

(2) The succession of States envisaged in the present article involves therefore the disappearance of two or more sovereign States and, through their uniting, the creation of a new State. Nor does it matter what may be the particular form of the internal constitutional organization adopted by the successor State. The uniting may lead to a wholly unitary State, to a federation or to any other form of constitutional arrangement. In other words, the degree of separate identity retained by the original States after their uniting, within the constitution of the successor State, is irrelevant for the operation of the provisions set forth in the article.

(3) Being concerned only with the uniting of two or more States in one *State*, associations of States having the character of intergovernmental organizations such as, for example, the United Nations, the specialized agencies, OAS, the Council of Europe, CMEA, etc., fall completely outside the scope of the article; as do some hybrid unions which may appear to have some analogy with a uniting of States but which do not result in a new *State* and do not therefore constitute a succession of *States*.

(4) One example of such a hybrid is EEC, as to the precise legal character of which opinions differ. For the present purpose, it suffices to say that, from the point of view of succession in respect of treaties, EEC appears to keep on the plane of intergovernmental organizations. Thus, article 234 of the Treaty of Rome [332] unmistakably approaches the question of the pre-Community treaties of

[332] Treaty instituting the European Economic Community. See United Nations, *Treaty Series*, vol. 294, p. 17 (text in French).

member States with third countries from the angle of the rules governing the application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention on the Law of Treaties). In other words, pre-Community treaties are dealt with in the Rome Treaty in the context of compatibility of treaty obligations and not of succession or moving treaty frontiers. The same is true of the instruments which established the other two European Communities.[333] Furthermore, the Treaty of Accession of 22 January 1972,[334] which sets out the conditions under which four additional States may join EEC and Euratom, deals with the pre-accession treaties of the candidate States on the basis of compatibility of treaty obligations—of requiring them to bring their existing treaty obligations into line with the obligations arising from their accession to the Communities. Similarly, the Treaty of Accession expressly provides for the new member States to become bound by various categories of pre-accession treaties concluded by the Communities or by their original members and does not rely on the operation of any principle of succession or of moving treaty frontiers.

(5) Numerous other economic unions have been created in various forms and with varying degrees of "community" machinery; e.g. EFTA, LAFTA and other free-trade areas and the Benelux. In general, the constitutions of these economic unions leave in no doubt their essential character as inter-governmental organizations. In the case of the Belgium-Luxemburg Economic Union, if Belgium may be expressly empowered to conclude treaties on behalf of the Union, the relationship between the two countries within the Union appears to remain definitively on the international plane. In practice all these economic unions, including the closely integrated Liechtenstein-Swiss Customs Union, have been treated as international unions and not as involving the creation of a new State.

(6) In analysing the effect on treaties of a uniting of States, writers tend to make a distinction between cases in which the successor State is organized in a federal form and cases in which the successor State adopts another constitutional form of government, but they tend also to conclude that the distinction has no great significance. Among the historical examples more commonly mentioned are the formation of the United States of America, Switzerland, the German Federation of 1871, the foundation of the Greater Republic of Central America in 1895 and the former unions of Norway and Sweden and of Denmark and Iceland. The chief modern precedents are the uniting of Egypt and Syria in 1958 and of Tanganyika and Zanzibar in 1964.

(7) Various interpretations of the effect of the formation of the German Federation of 1871 upon pre-existing treaties have been advanced but the prevailing view seems to be that the treaties of the individual German States continued either to bind the federal State, as a successor to the constituent State concerned, within their respective regional limits or to bind the individual States through the federal State until terminated by an inconsistent exercise of federal legislative power. It is true that certain treaties of individual States were regarded as applicable in respect of the federation as a whole. But these cases appear to have concerned only particular categories of treaties and in general any continuity of the treaties of the States was confined to their respective regional limits. Under the federal constitution the individual States retained both their legislative and their treaty-making competence except in so far as the federal Government might exercise its over-riding powers in the same field.

(8) The Swiss Federal Constitution of 1848 vested the treaty-making and treaty-implementing powers in the federal Government. At the same time, it left in the hands of the Cantons a concurrent, if subordinate, power to make treaties with foreign States concerning "l'économie publique, les rapports de voisinage et de police".[335] The pre-federation treaties of individual Cantons, it seems clear, were considered as continuing in force within their respective regional limits after the formation of the federation. At the same time, the principle of continuity does not appear to have been limited to treaties falling within the treaty-making competence still possessed by the Cantons after the federation. It further appears that treaties formerly concluded by the Cantons are not considered under Swiss law as abrogated by reason only of incompatibility with a subsequent federal law but are terminated only through a subsequent exercise of the federal treaty-making power.

(9) Another precedent, though the federation was very short-lived, is the foundation of the Greater Republic of Central America in 1895. In that instance El Salvador, Nicaragua and Honduras signed a Treaty of Federation constituting the Greater Republic; and in 1897 the Greater Republic itself concluded a further treaty of federation with Costa Rica and Guatemala, extending the federation to these two Republics. The second treaty, like the first, invested the Federation with the treaty-making power, but it also expressly provided "former treaties entered into by the States shall still remain in force in so far as they are not opposed to the present treaty".[336]

(10) The notification made by the Soviet Union on 23 July 1923 concerning the existing treaties of the Russian, White Russian, Ukrainian and Transcaucasian Republics may perhaps be regarded as a precedent of a similar kind. The notification stated that

[333] Treaty instituting the European Coal and Steel Community, section 17 of the Convention on Transitional Provisions (United Nations, *Treaty Series*, vol. 261, pp. 297 and 299); and Treaty establishing the European Atomic Energy Community, articles 105 and 106 (*ibid.*, vol. 298, p. 205).

[334] Treaty concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community: Act concerning the conditions of accession and the adjustments to the treaties, article 4. See *Official Journal of the European Communities—Legislation*, Special Edition, Luxembourg, 27 March 1972, No. L 73, pp. 14-15.

[335] C. Hilty, *Les constitutions fédérales de la Confédération suisse* (Neuchâtel, Attinger, 1891), p. 439.

[336] "Los tratados anteriores, celebrados entre los Estados quedarán vigentes en lo que no se opongan al presente Pacto". See J. M. Bonilla, ed., *Derecho de Gentes Positivo Nicaragüense*, t. II, *Pactos internacionales panamericanos* (Managua, Tipografía y Encuadernación Nacional, 1922), pp. 212-213.

the People's Commissariat for Foreign Affairs of the USSR is charged with the execution in the name of the Union of all its international relations, including the execution of all treaties and conventions entered into by the above-mentioned Republics with foreign States which shall remain in force in the territories of the respective Republics.

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

(12) As to non-federal successor States, the "*personal unions*" may be left out of account, because they do not raise any question of succession. They entail no more than the possession, sometimes almost accidental, by two States of the same person as Head of State (e.g. Great Britain and Hannover between 1714 and 1837), and they in no way affect the treaty relations of the States concerned with other States. In any event, they appear to be obsolete. So-called "*real unions*", on the other hand, entail the creation of a composite successor State. Such a State exists when two or more States, each having a separate international personality, are united under a common constitution with a common Head of State and a common organ competent to represent them in their relations with other States. A union may have some other common organs without losing its character as a "real" rather than federal union; but the essence of the matter for present purposes is the separate identities of the individual States and the common organs competent to represent them internationally in at least some fields of activity. Amongst the older cases of real unions that are usually mentioned are the Norwegian-Swedish union under the Swedish Crown from 1814 to 1905 and the Danish-Icelandic union under the Danish Crown from 1918 to 1944. In each of these cases, however, one of the two union States (Norway and Iceland respectively) had not been independent States prior to the union, and it is only in connexion with the *dissolution* of unions that these precedents are cited.[337] More to the point are the modern precedents of the uniting of Egypt and Syria in 1958 and of Tanganyika and Zanzibar in 1964.

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

(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 [338] also provided that the Republic should consist of two regions, Egypt and Syria, in each of which there should be an executive council competent to examine and study matters pertaining to the execution of the general policy of the region. But under the Constitution of the Republic the legislative power and the treaty-making power (article 56) were both entrusted to the central organs of the united State, without any mention of the region's retaining any separate legislative or treaty-making powers of their own. *Prima facie*, therefore, the Proclamation and Provisional Constitution designed the UAR to be a new unitary State rather than a "union", either real or federal. In practice, however, Egypt and Syria were generally recognized as in some measure retaining their separate identity as distinct units of the UAR.

(14) This view of the matter was, no doubt, encouraged by the terms of article 69 of the Provisional Constitution, which provided for the continuance in force of all the pre-union treaties of both Egypt and Syria within the limits of the particular region in regard to which each treaty had been concluded. Vis-à-vis third States, however, that provision had the character of a unilateral declaration which was not, as such, binding upon them.

(15) In regard to multilateral treaties, the Foreign Minister of the UAR made a communication to the Secretary-General of the United Nations in the following terms:

> It is to be noted that the Government of the United Arab Republic declares that the Union is a single Member of the United Nations, bound by the provisions of the Charter, and that all international treaties and agreements concluded by Egypt or Syria with other countries will remain valid within the regional limits prescribed on their conclusion and in accordance with the principles of international law.[339]

The response of the Secretary-General to this communication was, during the existence of the Union, to list the UAR as a party to all the treaties to which Egypt or Syria had been parties before the Union was formed; and under the name of the UAR he indicated whether Egypt or Syria or both had taken action in respect of the treaty in question.[340] As to treatment accorded to the UAR in regard to membership of the United Nations,[341] the notification addressed by the UAR to the Secretary-General had requested him to communicate the information concerning the formation of the United Republic to all Member States and principal organs of the United Nations and to all subsidiary organs, particularly those on which Egypt or Syria, or both, had been represented. The Secretary-General, in his capacity as such, accepted credentials

[338] For the text of the Provisional Constitution of the United Arab Republic, see *The International and Comparative Law Quarterly* (London), vol. 8, pp. 374-380.

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

[340] *Ibid.*

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

issued by the Foreign Minister of the UAR for its Permanent Representative, informing Member States and all principal and subsidiary organs of his action in the following terms:

> In accepting this letter of credentials the Secretary-General has noted that this is an action within the limits of his authority, undertaken without prejudice to and pending such action as other organs of the United Nations may take on the basis of notification of the constitution of the United Arab Republic and the Note of 1 March 1958.[342] [The Foreign Minister's Note informing the Secretary-General of the formation of the United Republic.]

The upshot was that the "representatives of the Republic without objection took their seats in all the organs of the United Nations of which Egypt or Syria, or both, had been members"; and this occurred without the UAR's undergoing "admission" as a Member State.[343] It seems therefore that the Secretary-General and the other organs of the United Nations, acted on the basis that the UAR united and continued in itself the international personalities of Egypt and Syria. The Specialized Agencies, *mutatis mutandis*, dealt with the case of the UAR in a similar way. In the case of ITU it seems that the UAR was considered as a party to the constituent treaty, subject to different reservations in respect of Egypt and Syria which corresponded to those previously contained in the ratifications of those two States.[344]

(16) The practice regarding bilateral treaties proceeded on similar lines, in accord with the principles stated in article 69 of the Provisional Constitution; i.e. the pre-union bilateral treaties of Egypt and Syria were considered as continuing in force within the regional limits in respect of which they had originally been concluded. The practice examined shows that it was the case with regard to extradition treaties, commercial treaties and air transport agreements of Egypt and Syria.[345] The same view in regard to the pre-union treaties of Egypt and Syria was reflected in the lists of treaties in force published by other States. The United States, for example, listed against the United Arab Republic twenty-one pre-union bilateral treaties with Egypt and six with Syria.

(17) The uniting of Tanganyika and Zanzibar in the United Republic of Tanzania in 1964 was also a union of independent States under constituent instruments which provided for a common Head of State and a common organ responsible for the external, and therefore treaty, relations of the United Republic.[346] The constituent instruments indeed provided for a Union Parliament and Executive to which various major matters were reserved. Unlike the Provisional Constitution of the UAR, they also provided for a separate Zanzibar legislature and executive having competence in all internal matters not reserved to the central organs of the United Republic. The particular circumstances in which the United Republic was created, however, complicated this case as a precedent from which to deduce principles governing the effect of the uniting of two or more States in one State upon treaties.

(18) If both Tanganyika and Zanzibar were independent States in 1964 when they united in the Republic of Tanzania, their independence was of very recent date. Tanganyika, previously a Trusteeship territory, had become independent in 1961; Zanzibar, previously a colonial protectorate, had attained independence and become a Member of the United Nations only towards the end of 1963. In consequence the formation of Tanzania occurred in two stages, the second of which followed very rapidly after the first: (*a*) the emergence of each of the two individual territories to independence, and (*b*) the uniting of the two, now independent, States in the Republic of Tanzania. Tanganyika, on beginning life as a new State, had made the Nyerere declaration by which, in effect, she gave notice that pre-independence treaties would be considered by her as continuing in force only a provisional basis during an interim period, pending a decision as to their continuance, termination or renegotiation.[347] She recognized the possibility that some treaties might survive "by the application of rules of customary law", apparently meaning thereby boundary and other localized treaties. Otherwise, she clearly considered herself free to accept or reject pre-independence treaties. The consequence was that, when not long afterwards Tanganyika united with Zanzibar, many pre-union treaties applicable in respect of her territory had terminated or were in force only provisionally. Except for possible "localized treaties", she was bound only by such treaties as she had taken steps to continue in force. As to Zanzibar, there seems to be little doubt that, leaving aside the question of localized treaties, she was not bound to consider any pre-independence treaties as in force at the moment when she joined with Tanganyika in forming the Republic of Tanzania.

(19) In a Note of 6 May 1964, addressed to the Secretary-General, the new United Republic informed him of the uniting of the two countries as one sovereign State under the name of the United Republic of Tanganyika and Zanzibar (the subsequent change of name to Tanzania was notified on 2 November 1964).[348] It further asked the Secretary-General:

> to note that the United Republic of Tanganyika and Zanzibar declares that it is now a single member of the United Nations bound by the provisions of the Charter, and that all international treaties and agreements in force between the Republic of Tanganyika or the People's Republic of Zanzibar and other States or international organizations will, to the extent that their implementation is consistent with the constitutional position established by the Articles of the Union, remain in force within the regional limits prescribed on their conclusion and in accordance with the principles of international law.[349]

This declaration, except for the proviso "to the extent that their implementation is consistent with the constitutional

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[342] *Ibid.*, para. 19.

[343] *Ibid.*, para. 20.

[344] *Ibid., 1970*, vol. II, p. 89, document A/CN.4/225, para. 108.

[345] *Ibid.*, pp. 129-130 and 127, document A/CN.4/229, paras. 147 and 130-131. See also documents A/CN.4/243 (see footnote 26 above), paras. 152-175 and 190, and A/CN.4/243/Add.1 *(idem)*, paras. 149-166 and 181.

[346] See "Treaties and succession of States and governments in Tanzania", in Nigerian Institute for International Affairs, *African Conference on International Law and African Problems: Proceedings* (Carnegie Endowment for International Peace, 1967), paras. 26-28.

[347] See above, commentary to article 8, para. 2.

[348] United Nations, *Multilateral Treaties...1971 (op. cit.)*, p. 7, foot-note 8.

[349] *Ibid.*

position established by the Articles of the Union", follows the same lines as that of the United Arab Republic. Furthermore, the position taken by the Secretary-General in communicating the declaration to other United Nations organs and to the specialized agencies was almost identical with that adopted by him in the case of the UAR, and the specialized agencies seem to have followed the precedent of the UAR in dealing with the merger of Tanganyika and Zanzibar in the United Republic of Tanzania. At any rate, the resulting united State was treated as simply continuing the membership of Tanganyika (and also of 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*. No doubt, the United Republic's communication was expressed in those terms for the simple reason that there were no such treaties which had been signed, ratified or acceded to *on behalf of Zanzibar* during the latter's very brief period of existence as a separate independent State prior to the union. In the light of that communication, the Secretary-General listed the United Republic as a party to a number of multilateral treaties on the basis of an act of acceptance, ratification or accession by Tanganyika prior to the union. Moreover, he listed the date of *Tanganyika's* act of acceptance, ratification or accession as the commencing date of the United Republic's participation in the treaties in question.[350] Only in the cases of the Charter of the United Nations and the Constitution of WHO, to which Zanzibar had become a party by admission prior to the union, was any mention made of Zanzibar; and in these cases under the entry for Tanzania he also gave the names of Tanganyika and Zanzibar together with the separate dates of their respective admission to the United Nations.[351] In the other cases, the entry for Tanzania did not contain any indication that Tanzania's participation in the treaty was to be considered as restricted to the regional limits of Tanganyika.

(21) Tanganyika, after attaining independence, notified her succession to the four Geneva Humanitarian Conventions of 1949 and was therefore a party to them at the time of the formation of the United Republic of Tanzania.[352] Zanzibar, on the other hand, had taken no action with respect to these treaties prior to the union. Tanzania is now listed as a party, but it seems that the question whether Tanzania's participation embraces Zanzibar as well as Tanganyika is regarded as still undetermined.[353] Similarly, the Republic of Tanganyika but not Zanzibar had become a party to the Paris Convention for the Protection of Industrial Property (Lisbon text) prior to the formation of the United Republic. After the formation of the Union, BIRPI listed Tanzania as having acceded to the Paris Convention on the basis of the Lisbon text; but in this case also it was stated that the question of the application of the Convention to Zanzibar was still undetermined.[354] The situation at the moment of union differed in the case of GATT, in that Zanzibar, although she had not taken steps to become a party prior to the formation of the united State, had been an associate member of GATT before attaining independence. Otherwise, it was similar, as Tanganyika had notified the Secretary-General of her succession not only to GATT but to forty-two international instruments relating to GATT. After the uniting the United Republic of Tanzania informed GATT of its assumption of responsibility for the external trade relations of both Tanganyika and Zanzibar, and the United Republic was then regarded as a single contracting party to GATT.[355] In the case of FAO also Tanganyika, before the Union, had taken steps to become a member while Zanzibar, a former associate member had not. On being notified of the uniting of the two countries in a single State, the FAO Conference formally recognized that the United Republic of Tanzania "replaced the former member Nation, Tanganyika, and the former associate member, Zanzibar". At the same time, the membership of the United Republic is treated by FAO as dating from the commencement of *Tanganyika's* membership; and it appears that Zanzibar is considered to have had the status of a non-member State during the brief interval between its attainment of independence and the formation of the United Republic of Tanzania.[356] In ITU, the effect of the creation of the united State seems to have been determined on similar lines.[357]

(22) Bilateral treaties—leaving aside the question of localized treaties—in the case of Tanganyika were due under the terms of the Nyerere declaration to terminate two years after independence, that is on 8 December 1963 and some months before the formation of Tanzania. The position at the date of the uniting therefore was that the great majority of the bilateral treaties applicable to Tanganyika prior to its independence had terminated. In some instances, however, a pre-independence treaty had been continued in force by mutual agreement before the uniting took place. This was so, for example, in the case of a number of commercial treaties, legal procedure agreements and consular treaties, the maintenance in force of which had been agreed in exchanges of notes with the interested States. In other instances, negotiations for the mainte-

[350] e.g. the Convention of 1946 on the Privileges and Immunities of the United Nations; the Convention of 1947 on the Privileges and Immunities of the Specialized Agencies; the Vienna Convention on Diplomatic Relations and its Optional Protocols; the Paris Agreements of 1904 and 1910 for the Suppression of White Slave Traffic as amended by Protocols signed at New York in 1949; the Conventions for the Suppression of the Circulation of Obscene Publications; the Agreement of 1963 Establishing the African Development Bank, etc. (See United Nations, *Multilateral Treaties...1971 (op. cit.)*, pp. 34, 43, 49, 54, 56, 164, 167, 175, 180, 205).

[351] *Ibid.*, pp. 7 and 185.

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

[353] See United States, Department of State, *Treaties in Force... 1972 (op. cit.)*, p. 364, foot-note 3.

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

[355] *Ibid.*, pp. 84 and 86, paras. 373 and 382.

[356] *Ibid., 1969*, vol. II, pp. 38 and 42, document A/CN.4/210, paras. 52 and 70.

[357] *Ibid., 1970*, vol. II, p. 90, document A/CN.4/225, paras. 111-112.

nance 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 treaties had been applicable in respect of Zanzibar prior to its independence, it seems that the consuls continued at their posts up to the date of the uniting, so that the treaties appear to that extent to have remained in force, at any rate provisionally.

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

(24) The distinguishing elements of the uniting of Egypt and Syria and of Tanganyika and Zanzibar appear to be: (*a*) the fact that prior to each uniting both component regions were internationally recognized as fully independent sovereign States; (*b*) the fact that in each case the process of uniting was regarded not as the creation of a wholly new sovereign State or as the incorporation of one State into the other but as the uniting of two existing sovereign States into one; and (*c*) the explicit recognition in each case of the continuance in force of the pre-union treaties of both component States in relation to, and in relation *only* to, their respective regions, unless otherwise agreed.

(25) Attention is drawn to two further points. The first is that in neither of the two cases did the constitutional arrangements leave any treaty-making power in the component States after the formation of the united State. It follows that the continuance of the pre-union treaties within the respective regions was wholly unrelated to the possession of treaty-making powers by the individual regions after the formation of the Union. The second is that in her declaration of 6 May 1964 Tanzania qualified her statement of the continuance of the pre-existing treaties of Tanganyika and Zanzibar by the proviso "to the extent that their implementation is consistent with the constitutional position established by the Articles of the Union". Such a proviso, however, is consistent with a rule of continuity of pre-existing treaties *ipso jure* only if it does no more than express a limitation on continuity arising from the objective incompatibility of the treaty with the uniting of the two States in one State; and this appears to be the sense in which the proviso was intended in Tanzania's declaration.

(26) The precedents concerning the unifying of Egypt and Syria and of Tanganyika and Zanzibar appear therefore to indicate a rule prescribing the continuance in force *ipso jure* of the treaties of the individual constituent States, within their respective regional limits and subject to their compatibility with the situation resulting from the creation of the unified State. In the case of these precedents the continuity of the treaties was recognized although the constitution of the united State did not envisage the possession of any treaty-making powers by the individual constituent States. In other words, the continuance in force of the treaties was not regarded as incompatible with the united State merely by reason of the non-possession by the constituent States, after the date of the succession, of any treaty-making power under the constitution. The precedents concerning federal States are older and less uniform. Taken as a whole, however, and disregarding minor discrepancies, they also appear to indicate a rule prescribing the continuance in force *ipso jure* of the pre-federation treaties of the individual States within their respective regional limits. Precisely how far in those cases the principle of continuity was linked to the continued possession by the individual States of some measure of treaty-making power or international personality is not clear. That element was present in the cases of the German and Swiss federations and its absence in the case of the United States of America seems to have been at any rate one ground on which continuity was denied. Even in those cases, however, to the extent that they considered the principle of continuity to apply, writers seem to have regarded the treaties as remaining in force *ipso jure* rather than through any process of agreement.

(27) In the light of the above practice and the opinion of the majority of writers, the Commission concluded that a uniting of States should be regarded as in principle involving the continuance in force of the treaties of the States in question *ipso jure*. This solution is also indicated

by the need of preserving the stability of treaty relations. As sovereign States, the predecessor States had a complex of treaty relations with other States and ought not to be able at will to terminate those treaties by uniting in a single State. The point has particular weight today in view of the tendency of States to group themselves in new forms of association.

(28) Consequently, the Commission formulated the rule embodied in article 26 on the basis of the *ipso jure* continuity principle duly qualified by other elements which need also to be taken into account: i.e. the compatibility of the treaties in force prior to the uniting of the States with the situation resulting from it and the territorial scope which those treaties had under their provisions. *Paragraph 1* of the article states, therefore, that on the uniting of two or more States in one State, any treaty in force at that date between any of those States and other States parties to the treaty continues in force between the successor State and such other States parties except as provided for in sub-paragraphs (*a*) and (*b*).

(29) *Sub-paragraph 1* (a) merely sets aside the *ipso jure* continuity rule when the successor State and the other State parties so agree. *Sub-paragraph 1* (b) then, excepts from the *ipso jure* continuity rule cases where the application of the particular treaty after the uniting of the States would be incompatible with its objects and purpose or the effect of the uniting of the States is radically to change the conditions for the operation of the treaty. By such a formula, the Commission intends to lay down an *international objective legal test of compatibility* which, if applied in good faith, should provide a reasonable, flexible and practical rule. The "incompatibility with the object and purpose of the treaty" and the "radical change in the conditions for the operation of the treaty", used in other contexts by the Vienna Convention on the Law of Treaties, in the Commission's view, are the appropriate criteria in the present case to take account of the interests of all the States concerned and to cover all possible situations and all kinds of treaties.

(30) *Paragraph 2* of the article takes care of the territorial scope element by providing that any treaty continuing in force in conformity with paragraph 1 *is binding only in relation to the area of territory of the successor State in respect of which the treaty was in force at the date of the uniting of the States*. This general rule limiting the territorial scope of the treaties to the areas in respect of which they were applicable at the date of the succession of States admits, however, the three exceptions enumerated in sub-paragraphs 2 (*a*), (*b*) and (*c*). The exception in *sub-paragraph 2* (a) entitles the successor State unilaterally to notify the parties or the depositary of a multilateral treaty that the treaty is to be considered as binding in relation to its entire territory. This appeared to the Commission to be justifiable on the basis of the actual practice and as favouring the effectiveness of multilateral treaties. *Sub-paragraphs 2* (b) and (c) relating to restricted multilateral treaties and bilateral treaties provided that such treaties may also be extended to the entire territory of the successor State when this State and the other State parties so agree.

(31) *Paragraph 3* simply provides that the rules set forth in paragraphs 1 and 2 of the article apply also to the case of a uniting of the successor State with another State, in other words, when a further State unites with the States already united as one State.

(32) Lastly, the Commission considered that the rules governing a uniting of States should be the same whether the uniting is established by treaty or by other 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 article are intended therefore to apply equally to cases of a uniting of States established by treaty. To that extent, they take precedence over the rules of the general law of treaties embodied in article 30 of the Vienna Convention on the Law of Treaties (application of successive treaties relating to the same subject-matter) to the extent that those rules might otherwise be applicable.

Article 27. Dissolution of a State

1. When a State is dissolved and parts of its territory become individual States:

(*a*) Any treaty concluded by the predecessor State in respect of its entire territory continues in force in respect of each State emerging from the dissolution;

(*b*) Any treaty concluded by the predecessor State in respect only of a particular part of its territory which has become an individual State continues in force in respect of this State alone;

(*c*) Any treaty binding upon the predecessor State under article 26 in relation to a particular part of the territory of the predecessor State which has become an individual State continues in force in respect of this State.

2. Paragraph 1 does not apply if:

(*a*) The States concerned otherwise agree; or

(*b*) The application of the treaty in question after the dissolution of the predecessor State would be incompatible with the object and purpose of the treaty or the effect of the dissolution is radically to change the conditions for the operation of the treaty.

Commentary

(1) This article deals with questions of succession in respect of treaties arising from a dissolution of a State where parts of its territory become separate independent States and the original State ceases to exist. The situation covered by the article presupposes a predecessor State, namely the dissolved State, and two or more successor States, namely the new States established in parts of the former territory of the predecessor State. The article regulates the effect of such a succession of States on treaties in force at the date of the dissolution in respect of the territory of the dissolved State.

(2) One of the older precedents usually referred to in this connexion is the dissolution of Great Colombia in 1829-1831, after being formed some ten years earlier by

New Granada, Venezuela and Quito (Ecuador). During its existence Great Colombia had concluded certain treaties with foreign powers. Among these were treaties of amity, navigation and commerce concluded with the United States of America in 1824 and with Great Britain in 1825. After the dissolution, it appears that the United States of America and New Granada considered the treaty of 1824 to continue in force as between those two countries. It further appears that Great Britain and Venezuela and Great Britain and Ecuador, if with some hesitation on the part of Great Britain, acted on the basis that the treaty of 1825 continued in force in their mutual relations. In advising on the position in regard to Venezuela the British Law Officers, it is true, seem at one moment to have thought the continuance of the treaty required the confirmation of both Great Britain and Venezuela; but they also seem to have felt that Venezuela was entitled to claim the continuance of the rights under the treaty.

(3) Another of the older precedents usually referred to is the dissolution of the union of Norway and Sweden in 1905. During the union these States had been recognized as having separate international personalities, as is illustrated by the fact that the United States had concluded separate extradition treaties with the Governments of Norway and Sweden. The King of Norway and Sweden had, moreover, concluded some treaties on behalf of the union as a whole and others specifically on behalf of only one of its constituents. On the dissolution of the union each State addressed identical notifications to foreign Powers in which they stated their view of the effect of the dissolution. These notifications, analogous to some more recent notifications, informed other Powers of the position which the two States took in regard to the continuance of the union's treaties: those made specifically with reference to one State would continue in force only as between that State and the other State's parties; those made for the union as a whole would continue in force for each State but only relating to itself.

(4) Great Britain accepted the continuance in force of the union treaties vis-à-vis Sweden only pending a further study of the subject, declaring that the dissolution of the union undoubtedly afforded His Majesty's Government the right to examine, *de novo*, the treaty engagements by which Great Britain was bound to the union. Both France and the United States of America, on the other hand, appear to have shared the view taken by Norway and Sweden that the treaties of the former union continued in force on the basis set out in their notifications.

(5) The termination of the Austro-Hungarian Empire in 1919 appears to have been a case of dissolution of a union in so far as it concerns Austria and Hungary and a separation in so far as it concerns the other territories of the Empire. The dissolution of the Dual Monarchy is complicated as a precedent by the fact that it took place after the 1914-1918 war and that the question of the fate of the Dual Monarchy's treaties was regulated by the peace treaties. Austria in her relations with States outside the peace treaties appears to have adopted a more reserved attitude towards the question of her obligation to accept the continuance in force of Dual Monarchy treaties. Although in practice agreeing to the continuance of Dual Monarchy treaties in her relations with certain countries, Austria persisted in the view that she was a new State not *ipso jure* bound by those treaties. Hungary, on the other hand, appears generally to have accepted that she should be considered as remaining bound by the Dual Monarchy treaties *ipso jure*.

(6) The same difference in the attitudes of Austria and Hungary is reflected in the Secretariat's studies of 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.** [358]

Austria, on the other hand, appears to have regarded the continuity of a Dual Monarchy extradition treaty with Switzerland as dependent on the conclusion of an agreement with that country.[359] Similarly, in the case of trade agreements the Secretariat study observes: "In so far as the question was not regulated by specific provisions in the Peace Settlement, Austria took a generally negative view of treaty continuity, and Hungary a positive one".[360] And this observation is supported by references to the practice of the two countries in relation to the Scandinavian States, the Netherlands and Switzerland, which were not parties to the Peace Settlement. Furthermore, those differing attitudes of the two countries appear also in their practice in regard to multilateral treaties, as is shown by the Secretariat study of succession in respect of the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes.[361]

(7) Between 1918 and 1944 Iceland was associated with Denmark in a union of States under which treaties made by Denmark for the union were not to be binding upon Iceland without the latter's consent. During the union Iceland's separate identity was recognized internationally; indeed, in some cases treaties were made separately with both Denmark and Iceland. At the date of dissolution there existed some pre-union treaties which had continued in force for the union with respect to Iceland as well as further treaties concluded during the union and in force with respect to Iceland. Subsequently, as a separate independent State, Iceland considered both categories of union treaties as continuing in force with respect to itself and the same view of its case appears to have been taken by the other States parties to those treaties. Thus, according to the Secretariat study of the extradition treaties:

> ... a list published by the Icelandic Foreign Ministry of its treaties in force as of 31 December 1964 includes extradition treaties which were concluded by Denmark before 1914 with Belgium,

[358] *Ibid.*, p. 123, document A/CN.4/229, para. 115.

[359] *Ibid.*, para. 116.

[360] Document A/CN.4/243/Add.1 (see foot-note 26 above), para. 110.

[361] *Yearbook of the International Law Commission, 1968*, vol. II, pp. 28 and 29, document A/CN.4/200 and Add.1-2, paras. 110-112.

France, Germany (listed under "Federal Republic of Germany"), Italy, Luxembourg, Netherlands Norway, Spain, the United Kingdom (also listed under Australia, Canada, Ceylon, India and New Zealand) and the United States of America. In each case it is also indicated that the other listed countries consider that the treaty is in force.[362]

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

... includes treaties and agreements concerning trade concluded before 1914 by Denmark with Belgium, Chile, France, Hungary, Italy, Liberia, Netherlands, Norway, Sweden, Switzerland and the United Kingdom (also listed under Canada, Ceylon, India and South Africa), and trade treaties and agreements concluded between 1918 and 1944 with Austria, Bolivia, Brazil, Czechoslovakia, Finland, Greece, Haiti, Poland, Romania, Spain, the USSR and the United States of America. Seventeen of the twenty-seven listed States have also confirmed that the treaties in question remain in effect. The remainder appear to have taken no position.[363]

As to multilateral treaties, it is understood that, after the dissolution, Iceland considered itself a party to any multilateral treaty which had been applicable to it during the union. But the provision in the constitution of the union that treaties made for the union were not to be binding upon Iceland without its consent was strictly applied; and a good many multilateral treaties made by Denmark during the union, including treaties concluded under the auspices of the League of Nations, were not in fact subscribed to by Iceland. This seems to be the explanation of why in *Multilateral Treaties in respect of which the Secretary-General performs depositary functions* Denmark is in a number of cases listed today as a party to a League of Nations treaty, but not Iceland.[364] In some cases, moreover, Denmark and Iceland are given separate entries indicating either that Denmark and Iceland are both bound by the treaty or that Denmark is bound and the treaty is open to accession by Iceland.[365] The practice in regard to multilateral treaties thus only serves to confirm the separate international personality of Iceland during the union.

(8) The effect of the formation of the United Arab Republic on the pre-union treaties of Syria and Egypt has been considered in the commentary to article 26. Some two and a half years after its formation the union was dissolved through the withdrawal of Syria. The Syrian Government then passed a decree providing that, in regard to both bilateral and multilateral treaties, any treaty concluded during the period of union with Egypt was to be considered in force with respect to the Syrian Arab Republic. It communicated the text of this decree to the Secretary-General, stating that in consequence "obligations contracted by the Syrian Arab Republic under multilateral agreements and conventions during the period of the Union with Egypt remain in force in Syria".[366] In face of this notification the Secretary-General adopted the following practice:

Accordingly, in so far as concerns any action taken by Egypt or subsequently by the United Arab Republic in respect of any instrument concluded under the auspices of the United Nations, the date of such action is shown in the list of States opposite the name of Egypt. The dates of actions taken by Syria, prior to the formation of the United Arab Republic are shown opposite the name of the Syrian Arab Republic, as also are the dates of receipt of instruments of accession or notification of application to the Syrian Province deposited on behalf of the United Arab Republic during the time when Syria formed part of the United Arab Republic.[367]

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

(9) Syria made a unilateral declaration as to the effect of the dissolution on treaties concluded by the union during its existence. At the same time, Syria clearly assumed that the pre-union treaties to which the former State of Syria had been a party would automatically be binding upon it and this seems also to have been the understanding of the Secretary-General. Egypt, the other half of the union, made no declaration. Retaining the name of the United Arab Republic (the subsequent change of name to Arab Republic of Egypt (Egypt) was notified to the Secretary-General on 2 September 1971), it apparently regarded Syria as having in effect seceded, and the continuation of its own status as a party to multilateral treaties concluded by the union as being self-evident. Egypt also clearly assumed that the pre-union treaties to which it had been a party would automatically continue to be binding upon the UAR. This treaty practice in regard to Syria and the United Arab Republic has to be appreciated against the background of the treatment of their membership of international organizations.[368] Syria, in a telegram to the President of the General Assembly, simply requested the United Nations to "take note of the resumed membership in the United Nations of the Syrian Arab Republic."[369] The President, after consulting many delegations and after ascertaining that no objection had been made, authorized Syria to take its seat again in the Assembly. Syria, perhaps because of its earlier existence as a separate Member State, was therefore accorded different treatment from Pakistan in 1947 which was required to undergo admission as a new State. No question was ever raised as to the United Arab Republic's right to continue its membership after the dissolution of the union. Broadly speaking, the same solution was adopted in other international organizations.

(10) Other practice in regard to multilateral treaties is in line with that followed by the Secretary-General, as can

[362] *Ibid.*, *1970*, vol. II, p. 122, document A/CN.4/229, para 111.

[363] Document A/CN.4/243/Add.1 (see foot-note 26 above), para. 109.

[364] e.g. Protocol on Arbitration Clauses (1923), Convention for the Execution of Foreign Arbitral Awards (1927), etc. See United Nations, *Multilateral Treaties...1971 (op. cit.)*, pp. 414 *et seq.*

[365] Signatures, ratifications and accessions in respects of agreements and conventions concluded under the auspices of the League of Nations. See League of Nations, *Official Journal, Special Supplement No. 193* (1944).

[366] United Nations, *Multilateral Treaties...1971 (op. cit.)*, p. 3, foot-note 3.

[367] *Ibid.*

[368] See above, commentary to article 26.

[369] *Official Records of the Security Council, Sixteenth Year, Supplement for October, November and December 1961*, document S/4958.

be seen from the Secretariat studies of the Berne Convention for the Protection of Literary and Artistic Works,[370] the Convention for the Protection of Industrial Property[371] and the Geneva Humanitarian Conventions.[372] This is true also of the position taken by the United States of America, as depositary of the Statute of IAEA, in correspondence with Syria concerning the latter's status as a member of that Agency. As to bilateral treaties, the Secretariat studies of air transport[373] and trade[374] agreements confirm that the practice was similar.

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

> ... by virtue of the principles of international law relating to the succession of States, the Republic of Senegal is subrogated, in so far as it is concerned, to the rights and obligations deriving from the co-operation agreements of 22 June 1960 between the French Republic and the Federation of Mali, without prejudice to any adjustments that may be deemed necessary by mutual agreement.[375]

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

(12) The Commission recognized that almost all the precedents of a disintegration of a State resulting in its extinction have concerned the dissolution of a so-called union of States. The Commission also recognized that traditionally jurists have tended to emphasize the possession of a certain degree of separate international personality by constituent territories of the State during the union as an element for determining whether treaties of a dissolved State continue to be binding on the States emerging from the dissolution. After studying the modern practice, however, the Commission concluded that the almost infinite variety of constituted relationships and of kinds of "union" render it inappropriate to make this element the basic test for determining whether treaties continue in force upon a dissolution of a State. It considered that today every dissolution of a State which results in the emergence of new individual States should be treated on the same basis for the purpose of the continuance in force of treaties.

(13) Taking account of discrepancies in the practice set out above some members of the Commission were inclined to favour a rule according to which participation of the States which emerged from the dissolution of a State in treaties of the predecessor State in force at the date of the dissolution would be a matter of consent. The Commission, however, concluded that the practice was sufficiently consistent to support the formulation of a rule which, with the necessary qualifications, would provide that treaties in force at the date of the dissolution should remain in force *ipso jure* with respect to each State emerging from the dissolution. This is the rule proposed in *paragraph 1* of the present article which at the time relates its operation to the territorial scope of the treaties in question prior to the dissolution.

(14) Thus, *sub-paragraph 1* (a) states that any treaty concluded by the predecessor State *in respect of its entire territory* continues in force in respect of each State emerging from the dissolution. Then, *sub-paragraph 1* (b), provides that any treaty concluded by the predecessor State *in respect only of a particular part of its territory which has become an individual State* continues in force in respect of this State alone. Finally, *sub-paragraph 1* (c), which contemplates the case of the dissolution of a State previously constituted by the uniting of two or more States, specifies that any treaty bindng upon the predecessor State under article 26 in relation to a particular part of its territory which has become an individual State continues in force in respect of this State.

(15) *Paragraph 2* of the article qualified the application of the provision in paragraph 1 by excepting a treaty from from the rule of *ipso jure* continuity if the States concerned otherwise agree or if the application of the treaty after the dissolution of the predecessor State would be incompatible with its object and purpose or if the effect of the dissolution is radically to change the conditions for its operation.

Article 28. Separation of part of a State

1. If part of the territory of a State separates from it and becomes an individual State, any treaty which at the date of the separation was in force in respect of that State continues to bind it in relation to its remaining territory, unless:

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

[371] *Ibid.*, pp. 67 and 68, paras. 296 and 297.

[372] *Ibid.*, pp. 49 and 50, para. 211.

[373] Document A/CN.4/243 (see foot-note 26 above), paras. 152-175.

[374] Document A/CN.4/243/Add.1 *(idem)*, paras. 161-166.

[375] Document A/CN.4/243 *(idem)*, para. 176.

(a) It is otherwise agreed; or

(b) It appears from the treaty or from its object and purpose that the treaty was intended to relate only to the territory which has separated from that State or the effect of the separation is radically to transform the obligations and rights provided for in the treaty.

2. In such a case, the individual State emerging from the separation is to be considered as being in the same position as a newly independent State in relation to any treaty which at the date of separation was in force in respect of the territory now under its sovereignty.

Commentary

(1) Article 10 of the present draft articles covers the case of the separation from a State of a part of its territory which joins with another State (the moving treaty frontier rule), and article 27 deals with the complete dissolution of a State the separate parts of which become independent and sovereign States. Article 28 is concerned with another situation, namely with the case where a part of the territory of a State separates from it and becomes itself an independent State, but the State from which it has sprung, the predecessor State, continues its existence unchanged except for its diminished territory. In this type of case the effect of the separation is the emergence of a new State by secession. The present article regulates the treaty position both of the orginal State and of the new State arising from the separation.

(2) Before the era of the United Nations, colonies were considered as being in the fullest sense territories of the colonial power. Consequently some of the earlier precedents usually cited for the application of the "clean slate" rule in cases of secession concerned the secession of colonies; e.g. the secessions from Great Britain and Spain of their American colonies. In these cases the new States are commonly regarded as having started their existence freed from any 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.

(3) When Cuba seceded from Spain in 1898, Spanish treaties were not considered as binding upon it after independence. Similarly, when Panama seceded from Colombia in 1903, both Great Britain and the United States regarded Panama as having a clean slate with respect to Colombia's treaties. Panama itself took the same stand, though it was not apparently able to convince France that it was not bound by Franco-Colombian treaties. Colombia, for its part, continued its existence as a State after the separation of Panama, and that it remained bound by treaties concluded before the separation was never questioned. Again, when Finland seceded from Russia after the first world war, both Great Britain and the United States of America concluded that Russian treaties previously in force with respect to Finland would not be binding on the latter after independence. In this connexion reference may be made to a statement by the United Kingdom in which the position was firmly taken by that State that the clean slate principle applied to Finland except with respect to treaty obligations which were "in the nature of servitudes".[376]

(4) The termination of the Austro-Hungarian Empire has already been discussed [377] in the context of the dissolution of a State. The opinion was there expressed that it seemed to be a dissolution of a union in so far as it concerned the Dual Monarchy itself and a separation in so far as it concerned other territories of the Empire. These other territories, which seem to fall into the category of separation, were Czechoslovakia and Poland.[378] Both these States were required in the Peace Settlements to undertake to adhere to certain multilateral treaties as a condition of their recognition. But outside these special undertakings they were both considered as newly independent States which started with a clean slate in respect of the treaties of the former Austro-Hungarian Empire.

(5) Another precedent from the pre-United Nations era is the secession of the Irish Free State from the United Kingdom in 1922. Interpretation of the practice in this case is slightly obscured by the fact that for a period after its secession from the United Kingdom the Irish Free State remained within the British Commonwealth as a as a "Dominion". This being so, the United Kingdom Government took the position that the Irish Free State had not seceded and that, as in the case of Australia, New Zealand and Canada, British treaties previously applicable in respect of the Irish Free State remained binding upon the new Dominion. The Irish Free State, on the other hand, considered itself to have seceded from the United Kingdom and to be a newly independent State for the purposes of succession in respect of treaties. In 1933 the Prime Minister (Mr. De Valera) made the following statement in the Irish Parliament on the Irish Free State's attitude towards United Kingdom treaties:

> ... acceptance or otherwise of the treaty relationships of the older State is a matter for the new State to determine by express declaration or by conduct (in the case of each individual treaty), as considerations of policy may require. The practice here has been to accept the position created by the commercial and administrative treaties and conventions of the late United Kingdom until such time as the individual treaties or conventions themselves are terminated or amended. Occasion has then been taken, where desirable, to conclude separate engagements with the States concerned.[379]

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

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[376] See above, commentary to article 11, para. 3.

[377] See above, commentary to article 27, paras. 5 and 6.

[378] Poland was formed out of territories previously under the sovereignty of three different States: Austro-Hungarian Empire, Russia and Germany.

[379] *Yearbook of the International Law Commission, 1970*, vol. II, p. 108, document A/CN.4/229, para. 15.

that found in the practice of the post-war period concerning newly independent States.

(6) In the case of multilateral treaties, the Irish Free State seems in general to have established itself as a party by means of accession, not succession, although it is true that the Irish Free State appears to have acknowledged its status as a party to the 1906 Red Cross Convention on the basis of the United Kingdom's ratification of the Convention on 16 April 1907.[380] In the case of the Berne Union for the Protection of Literary and Artistic Works, however, it *acceded* to the Convention, although using the United Kingdom's diplomatic services to make the notification.[381] The Swiss Government, as depositary, then informed the parties to the Union of this accession and, in doing so, added the observation that the Union's International Office considered the Irish Free State's accession to the Convention as "proof that, on becoming an independent territory, it had left the Union". In other words, the Office recognized that the Free State had acted on the basis of the "clean slate" principle and had not "succeeded" to the Berne Convention. Moreover, in *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions* the Republic of Ireland is listed as a party to two conventions ratified by Great Britain before the former's independence and in both these cases the Republic became a party by accession.[382]

(7) Thus in cases of separation the practice prior to the United Nations era, if there may be one or two inconsistencies, provides strong support for the "clean slate" rule in the form in which it is expressed in article 11 of the present draft: i.e. that a seceding State, as a newly independent State, is not bound to maintain in force, or to become a party to, its predecessor's treaties. Prior to the United Nations era depositary practice in regard to cases of succession of States was much less developed than it has become in the past twenty-five years owing to the very large number of cases of succession of States with which depositaries have been confronted. Consequently, it is not surprising that the earlier practice in regard to seceding States does not show any clear concept of notifying succession to multilateral treaties, such as is now familiar. With this exception, however, the position of a seceding State with respect to its predecessor's treaties seems in the League of Nations era to have been much the same as that in modern practice of a State which has emerged to independence from a previous colonial trusteeship or protected status.

(8) During the United Nations period cases of separation resulting in the creation of a newly independent State, as distinct from a dependent territory emerging as a sovereign State, have been comparatively few. The first such case was the somewhat special one of Pakistan which, for purposes of membership of international organizations and participation in multilateral treaties, was in general treated as having seceded from India and, therefore, neither bound nor entitled *ipso jure* to the continuance of pre-independence treaties.[383] This is also to a large extent true in regard to bilateral treaties,[384] though in some instances it seems, on the basis of the devolution arrangements embodied in the Indian Independence (International Arrangements) Order 1947, to have been assumed that Pakistan was to be considered as a party to the treaty in question. Thus, the case of Pakistan has analogies with that of the Irish Free State and, as already indicated in the commentary to article 11, appears to be an application of the principle that a seceded State has a clean slate in the sense that it is not under any *obligation* to accept the continuance in force of its predecessor's treaties.

(9) The adherence of Singapore to the Federation of Malaysia in 1963 has already been referred to.[385] In 1965, by agreement, Singapore separated from Malaysia, becoming an independent State. The Agreement between Malaysia and Singapore, in effect, provided that any treaties in force between Malaysia and other States at the date of Singapore's independence should, in so far as they had application to Singapore, be deemed to be a treaty between the latter and the other State or States concerned. Despite this "devolution agreement" Singapore subsequently adopted a posture similar to that of other newly independent States. While ready to continue Federation treaties in force, Singapore regarded that continuance as a matter of mutual consent. Even if in one or two instances other States contended that it was under an obligation to accept the continuance of a treaty, this contention was rejected by Singapore.[386] Similarly, as the entries in *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions*[387] show, Singapore has notified or not notified its succession to multilateral treaties, as it has thought fit, in the same way as other newly independent States.

(10) The available evidence of practice does not therefore support the thesis that in the case of a separation of part of a State, as distinct from the dissolution of a State, treaties continue in force *ipso jure* in respect of the territory of the separated State. On the contrary, evidence strongly indicates that the separated territory which becomes a sovereign State is to be regarded as a newly independent State to which in principle the rules of the present draft articles concerning newly independent States should apply. This is the practice independently of the magnitude

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

[381] *Ibid.*, p. 13, para. 25.

[382] The International Convention for the Suppression of the White Slave Traffic (1910) and the Agreement for the Suppression of the Circulation of Obscene Publications (1910) (United Nations, *Multilateral Treaties...1971 (op. cit.)*, pp. 168 and 181).

[383] See above, commentary to article 11, paras. 4 and 5. See also *Yearbook of the International Law Commission, 1968*, vol. II, pp. 16, 29, 40, document A/CN.4/200 and Add.1-2, paras. 38, 115-117, and 166-167; *ibid., 1969*, vol. II, p. 37, document A/CN.4/210, para. 49; and *ibid., 1970*, vol. II, pp. 71 *et seq.*, document A/CN.4/225, paras. 24-33.

[384] *Ibid.*, pp. 109 *et seq.*, document A/CN.4/229, paras. 28-34. See also documents A/CN.4/243 (see foot-note 26 above), paras. 11-19, and A/CN.4/243/Add.1 *(idem)*, paras. 30-36, and United Nations, *Materials on Succession of States (op. cit.)*, pp. 1-8,137 and 138, 190 and 191, 225.

[385] See above, commentary to article 25, paras. 5 and 6.

[386] See foot-note 281 above. See also *Yearbook of the International Law Commission, 1970*, vol. II, p. 118, document A/CN.4/229, para. 89.

[387] United Nations, *Multilateral Treaties...1971 (op. cit.)*.

of the separation. Thus, the separation of East and West Pakistan from India was regarded as analogous to a secession resulting in the emergence of Pakistan. Similarly, if the recent election of WHO to admit Bangladesh as a new member together with its acceptance of West Pakistan as continuing the personality and membership of Pakistan are any guide, the virtual splitting of a State in two does not suffice to constitute the disappearance of the original State.

(11) The basic position of the State which continues in existence is clear enough since it necessarily remains in principle a party to the treaties which it has concluded. The main problem therefore is to formulate the criteria by which to determine the effect upon its participation in these treaties of the separation of part of its territory. The territorial scope of a particular treaty, its object and purpose and the change in the situation resulting from the separation are elements which have to be taken into account. Accordingly *paragraph 1* lays down that the predecessor State remains bound in relation to its remaining territory by the treaties binding upon that State at the date of the separation. The necessary safeguarding provisions to take account of the elements just mentioned are then formulated in sub-paragraphs *1* (*a*) and (*b*) as exceptions to the general rule. Under these exceptions the predecessor State will not continue to be bound if: (*a*) it is otherwise agreed (*sub-paragraph* (a); (*b*) the treaty was intended to relate only to the territory which has separated or the effect of the separation is radically to transform the obligations and rights provided for in the treaty (*sub-paragraph* (b)). The position of the predecessor State in respect of pre-separation treaties remains as before the separation, subject only to these exceptions.

(12) In the light of the recorded practice, *paragraph 2* of article 28 states that the new State emerging from the separation is to be considered as being in the same position as a newly independent State in relation to any treaty which at the date of separation was in force in respect of the territory now under its sovereignty. In other words, the basic rule governing the position of the separated State will be the so-called clean slate rule formulated in article 11 and its participation in treaties of the original State at the date of the separation will be regulated by articles 12 to 21 of the present draft articles. Some members of the Commission were inclined to question whether *paragraph 2* should apply automatically and in all cases to the separated State and reserved their position on this point until after the Commission would receive the comments of Governments.

PART V

BOUNDARY RÉGIMES OR OTHER TERRITORIAL RÉGIMES ESTABLISHED BY A TREATY

Article 29. Boundary régimes

A succession of States shall not as such affect:

(*a*) A boundary established by a treaty; or

(*b*) Obligations and rights established by a treaty and relating to the régime of a boundary.

Article 30. Other territorial régimes

1. A succession of States shall not as such affect:

(*a*) Obligations relating to the use of a particular territory, or to restrictions upon its use, established by a treaty specifically for the benefit of a particular territory of a foreign State and considered as attaching to the territories in question;

(*b*) Rights established by a treaty specifically for the benefit of a particular territory and relating to the use, or to restrictions upon the use of a particular territory of a foreign State and considered as attaching to the territories in question.

2. A succession of States shall not as such affect:

(*a*) Obligations relating to the use of a particular territory, or to restrictions upon its use, established by a treaty specifically for the benefit of a group of States or of all States and considered as attaching to that territory;

(*b*) Rights established by a treaty specifically for the benefit of a group of States or of all States and relating to the use of a particular territory, or to restrictions upon its use, and considered as attaching to that territory.

Commentary

(1) Both in the writings of jurists and in State practice frequent reference is made to certain categories of treaties, variously described as of a "territorial", "dispositive", "real" or "localized" character, as binding upon the territory affected notwithstanding any succession of States. The question of what will for convenience be called in this commentary territorial treaties is at once important, complex and controversial. In order to underline its importance the Commission need only mention that it touches such major matters as international boundaries, rights of transit on international waterways or over another State, the use of international rivers, demilitarization or neutralization of particular localities, etc.

(2) The weight of opinion amongst modern writers supports the traditional doctrine that treaties of a territorial character constitute a special category and are not affected by a succession of States. At the same time, some jurists tend to take the position, especially in regard to boundaries, that it is not the treaties themselves which constitute the special category so much as the situations resulting from their implementation. In other words, they hold that in the present context it is not so much a question of succession in respect of the treaty itself as of the boundary or other territorial régime established by the treaty. In general, however, the diversity of the opinions of writers makes it difficult to find in them clear guidance as to what extent and upon what precise basis international law recognizes that treaties of a territorial character constitute a special category for the purposes of the law applicable to succession of States.

(3) The proceedings of international tribunals throw some light on the question of territorial treaties. In its second Order in the case concerning the Free Zones of Upper Savoy and the District of Gex the Permanent Court of International Justice made a pronouncement

which is perhaps the most weighty endorsement of the existence of a rule requiring a successor State to respect a territorial treaty affecting the territory to which a succession of States relates. The Treaty of Turin of 1816, in fixing the frontier between Switzerland and Sardinia, imposed restrictions on the levying of customs duties in the Zone of St. Gingolph. Switzerland claimed that under the treaty the customs line should be withdrawn from St. Gingolph. Sardinia, although at first contesting this view of the Treaty, eventually agreed and gave effect to its agreement by a "Manifesto" withdrawing the customs line. In this context, the Court said:

> ... as this assent given by His Majesty the King of Sardinia, without any reservation, terminated an international dispute relating to the interpretation of the Treaty of Turin; as, accordingly, the effect of the Manifesto of the Royal Sardinian Court of Accounts, published in execution of the Sovereign's orders, laid down, in a manner binding upon the Kingdom of Sardinia, what the law was to be between the Parties; as the agreement thus interpreted by the Manifesto confers on the creation of the zone of Saint-Gingolph the character of a treaty stipulation *which France is bound to respect, as she succeeded Sardinia in the sovereignty over that territory.**[388]

This pronouncement was reflected in much the same terms in the Court's final judgment in the second stage of the case.[389] Although the territorial character of the Treaty is not particularly emphasized in the passage cited above, it is clear from other passages that the Court recognized that it was here dealing with an arrangement of a territorial character. Indeed, the Swiss Government in its pleadings had strongly emphasized the "real" character of the agreement,[390] speaking of the concept of servitudes in connexion with the Free Zones.[391] The case is, therefore, generally accepted as a precedent in favour of the principle that certain treaties of a territorial character are binding *ipso jure* upon a successor State.

(4) What is not, perhaps, clear is the precise nature of the principle applied by the Court. The Free Zones, including the Sardinian Zone, were created as part of the international arrangements made at the conclusion of the Napoleonic Wars; and elsewhere in its judgments [392] the Court emphasized this aspect of the agreements concerning the Free Zones. The question, therefore, is whether the Court's pronouncement applies generally to treaties having such a territorial character or whether it is limited to treaties forming part of a territorial settlement and establishing an objective treaty régime. On this question it can only be said that the actual terms of that pronouncement were quite general. The Court does not seem to have addressed itself specifically to the point whether in such a case the succession is in respect of the treaty or in respect of the situation resulting from the execution of the treaty. Its language in the passage from its Order cited above and in the similar passage in its final judgment, whether or not intentionally, refers to "*a treaty stipulation* * which France is bound to respect, as she succeeded Sardinia in the sovereignty over that territory."

(5) Before the Permanent Court had been established, the question of succession in respect of a territorial treaty came before the Council of the League of Nations with reference to Finland's 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." [393] Two major points of treaty law were involved. The first, Sweden's right to invoke the Convention although not a party to it, was discussed by the Special Rapporteur for the law of treaties in his third report on the topic in connexion with the effect of treaties on third States and objective régimes.[394] The second was the question of Finland's obligation to maintain the demilitarization of the islands. In its opinion the Committee of Jurists, having observed that "the existence of international servitudes, in the true technical sense of the term, is not generally admitted." [395] nevertheless found reasons for attributing special effects to the demilitarization Convention of 1856:

> As concerns the position of the State having sovereign rights over the territory of the 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 definite settlement of European interests and not a question of mere individual and subjective political obligations. Finland, by declaring itself independent and claiming on this ground recognition as a legal person in international law, cannot escape from the obligations imposed upon it by such a settlement of European interests.
>
> The recognition of any State must always be subject to the reservation that the State recognized will respect the obligations imposed upon it either by general international law *or by definite international settlements relating to its territory.** [396]

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

[388] Order of 6 December 1930 (*P.C.I.J.*, series A, No. 24, p. 17).

[389] *P.C.I.J.*, series A/B, No. 46, p. 145.

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

[391] *Ibid.*, vol. I, p. 415.

[392] E.g. *P.C.I.J.*, series A/B, No. 46 at p. 148.

[393] *British and Foreign State Papers, 1855-1856* (London, Foreign Office, 1865), p. 24.

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

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

[396] *Ibid.*, p. 18.

situation constituted by the treaty rather than to the contractual obligations of the treaty as such.

(6) The case concerning the Temple of Preah Vihear,[397] cited by some writers in this connexion, is of a certain interest in regard to boundary treaties, although the question of succession was not dealt with by the International Court of Justice in its judgment. The boundary between Thailand and Cambodia had been fixed in 1904 by a Treaty concluded between Thailand (Siam) and France as the then protecting Power of Cambodia. The case concerned the effects of an alleged error in the application of the Treaty by the Mixed Franco-Siamese Commission which demarcated the boundary. Cambodia had in he meanwhile become independent and was therefore in the position of a newly independent State in relation to the boundary Treaty. Neither Thailand nor Cambodia disputed the continuance in force of the 1904 Treaty after Cambodia's attainment of independence, and the Court decided the case on the basis of a map resulting from the demarcation and of Thailand's acquiescence in the boundary depicted on that map. The Court was not therefore called upon to address itself to the question of Cambodia's succession to the boundary Treaty. On the other hand, it is to be observed that the Court never seems to have doubted that the boundary settlement established by the 1904 Treaty and the demarcation, if not vitiated by error, would be binding as between Thailand and Cambodia.

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

> Under the customary international law of state succession, if Cambodia is successor to France in regard to the tracing of frontiers, she is equally bound by treaties of a local nature which determine the methods of marking these frontiers on the spot. However, the general rules of customary international law regarding state succession do not provide that, in case of succession by separation of a part of a State's territory, as in the case of Cambodia's separation from France, the new State succeeds to political provisions in treaties of the former State. [...] The question whether Thailand is bound to Cambodia by peaceful settlement provisions in a treaty which Thailand concluded with France is very different from such problems as those of the obligations of a successor State to assume certain burdens which can be identified as connected with the territory which the successor acquires after attaining its independence. *It is equally different from the question of the applicability of the provisions of the treaty of 1904 for the identification and demarcation on the spot of the boundary which was fixed along the watershed.** [398]

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

> Thailand recognizes that Cambodia is the successor to France in respect of treaties for the definition and delimitation of frontiers. It cannot arbitrarily exclude from the operation of such treaties any provisions which they contain relating to the compulsory jurisdiction rule *in so far as this rule is ancillary to the definition and delimitation of frontiers.** [399]

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

(8) The case concerning right of passage over Indian Territory [400] is also of a certain interest, though it did not involve any pronouncement by the Court on succession in respect of treaty obligations. True, it was under a Treaty of 1779 concluded with the Marathas that Portugal first obtained a foothold in the two enclaves which gave rise to the question of a right of passage in that case. But the majority of the Court specifically held that it was not in virtue of this Treaty that Portugal was enjoying certain rights of passage for civilian personnel on the eve of India's attainment of independence; it was in virtue rather of a local custom that had afterwards become established as between Great Britain and Portugal. The right of passage derived from the consent of each State, but it was a customary right, not a treaty right, with which the Court considered itself to be confronted. The Court found that India had succeeded to the legal situation created by that bilateral custom "unaffected by the change of régime in respect of the intervening territory which occurred when India became independent".[401]

(9) State practice, and more especially modern State practice, has now to be examined; and it is proposed to deal with it first in connexion with boundary treaties and then in connexion with other forms of territorial treaties.

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

> *Paragraph 2* excepts from the operation of the article two cases. The first concerns treaties establishing a boundary, a case which both States concerned in the *Free Zones* case appear to have recognized as being outside the rule, as do most jurists. Some members of the Commission suggested that the total exclusion of these treaties from the rule might go too far, and might be inconsistent with the principle of self-determination recognized in the Charter. The Commission, however, concluded that treaties establishing a boundary should be recognized to be an exception to the rule, because otherwise the rule, instead of being an instrument of peaceful

[397] *I.C.J. Reports 1962*, pp. 6-146.

[398] *I.C.J. Pleadings, Temple of Preah Vihear*, vol. I, pp. 145-146.

[399] *Ibid.*, p. 165 [translation by the Secretariat].

[400] *I.C.J. Reports 1960*, p. 6.

[401] *Ibid.*, p. 40.

change, might become a source of dangerous frictions. It also took the view that "self-determination", as envisaged in the Charter was an independent principle and that it might lead to confusion if, in the context of the law of treaties, it were presented as an application of the rule contained in the present article. By excepting treaties establishing a boundary from its scope the present article would not exclude the operation of the principle of self-determination in any case where the conditions for its legitimate operation existed. The expression "treaty *establishing* a boundary" was substituted for "treaty fixing a boundary" by the Commission, in response to comments of Governments, as being a broader expression which would embrace treaties of cession as well as delimitation treaties.[402]

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

(11) Attention has already been drawn to the assumption apparently made by both Thailand and Cambodia in the Temple of Preah Vihear Case of the latter country's succession to the boundary established by the Franco-Siamese Treaty of 1904.[403] That this assumption reflects the general understanding concerning the position of a successor State in regard to an established boundary settlement seems clear. Tanzania, although in its unilateral declaration it strongly insisted on its freedom to maintain or terminate its predecessor's treaties, has been no less insistent that boundaries previously established by treaty remain in force.[404] Furthermore, despite their initial feelings of reaction against the maintenance of "colonial" frontiers, the newly independent States of Africa have come to endorse the principle of respect for established boundaries. Article III, paragraph 3, of the OAU Charter, it is true, merely proclaimed the principle of "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence".[405] But in 1964, with reservations only from Somalia and Morocco, the Conference of Heads of State and Government held in Cairo adopted a resolution which, after reaffirming the principle in Article III, paragraph 3, solemnly declared that "all Member States pledge themselves to respect the borders existing on their achievement of national independence".[406] A similar resolution was adopted by the Conference of Heads of State or Government of Non-Aligned Countries also held in Cairo later in the same year. This does not, of course, mean that boundary disputes have not arisen or may not arise between African States. But the legal grounds invoked must be other than the mere effect of the occurrence of a succession of States on a boundary treaty.

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

> Following the termination of the responsibilities of H.M. Government for the Government of the Protectorate, and in the absence of any fresh instruments, the provisions of the 1897 Anglo-Ethiopian Treaty should, in our view, be regarded as remaining in force as between Ethiopia and the successor State. On the other hand, Article III of the 1954 Agreement, which comprises most of what was additional to the 1897 Treaty, would, in our opinion, lapse.[407]

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

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[402] Paragraph 11 of the Commission's commentary to draft article 59 [now article 62 of the Vienna Convention] (*Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 79).

[403] See para. 6 above.

[404] OAU document A.H.G./Res.16(1); see also S. Touval, "Africa's frontiers—Reactions to a colonial legacy", *International Affairs, 1966* (London), No. 4, October 1966, pp. 641-654.

[405] United Nations, *Treaty Series*, vol. 479, p. 74.

[406] OAU document A.H.G./Res.16(1).

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

Ethiopia, on the other hand, while upholding the boundary settlement, declined to recognize that the ancillary provisions, which constituted one of the conditions of that settlement, would remain binding upon it.

(13) In a number of other instances the United Kingdom recognized that rights and obligations under a boundary treaty would remain in force after a succession of States. One is the Convention of 1930 concluded between the United States of America and the United Kingdom for the delimitation of the boundary between the Philippine Archipelago and North Borneo. Upon the Philippines becoming independent in 1946, the British Government in a diplomatic Note acknowledged that as a result "the Government of the Republic of the Philippines has succeeded to the rights and obligations of the United States under the Notes of 1930".[408]

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

> The Foreign Office were advised that the splitting of the former India into two States—India and Pakistan—and the withdrawal of British rule from India had not caused the Afghan Treaty to lapse and it was hence still in force. It was nevertheless suggested that an examination of the Treaty might show that some of its provisions being political in nature or relating to continuous exchange of diplomatic missions were in the category of those which did not devolve where a State succession took place. *However, any executed clauses such as those providing for the establishment of an international boundary or, rather, what had been done already under executed clauses of the Treaty, could not be affected, whatever the position about the Treaty itself might be.** [409]

Here therefore the United Kingdom again distinguishes between provisions establishing a boundary and ancillary provisions of a political character. But it also appears here to have distinguished between the treaty provisions *as such* and the boundary resulting from their execution—a distinction made by a number of jurists. Afghanistan, on the other hand, contested Pakistan's right in the circumstances of the case to invoke the boundary provisions of the 1921 Treaty.[410] It did so on various grounds, such as the alleged "unequal" character of the Treaty itself. But it also maintained that Pakistan, as a newly independent State, had a "clean slate" in 1947 and could not claim automatically to be a successor to British rights under the 1921 Treaty.

(15) There are a number of other modern instances in which a successor State has become involved in a boundary dispute. But these appear mostly to be instances where either the boundary treaty in question left the course of the boundary in doubt or its validity was challenged on one ground or another; and in those instances the succession of States merely provided the opportunity for reopening or raising grounds for revising the boundary which are independent of the law of succession. Such appears to have been the case, for example, with the Moroccan-Algeria, Surinam-Guyana, and Venezuela-Guyana[411] boundary disputes and, it is thought, also with the various Chinese claims in respect of Burma, India and Pakistan. True, China may have shown a disposition to reject the former "British" treaties as such; but she seems rather to challenge the treaties themselves than to invoke any general concept of a newly independent State's clean slate with respect to the treaties, including boundary treaties.

(16) The weight of the evidence of State practice and of legal opinion in favour of the view that in principle a boundary stettlement is unaffected by the occurrence of a succession of States is strong and powerfully reinforced by the decision of the United Nations Conference on the Law of Treaties to except from the fundamental change of circumstances rule a treaty which establishes a boundary. Consequently, the Commission considered that the present draft must state that boundary settlements are not affected by the occurrence of a succession of States as such. Such a provision would relate exclusively to the effect of the succession of States on the boundary settlement. It would leave untouched any other ground of claiming the revision or setting aside of the boundary settlement, whether self-determination or the invalidity or termination of the treaty. Equally, of course, it would leave untouched any legal ground of defence to such a claim that may exist. In short, the mere occurrence of a succession of States would neither consecrate the existing boundary if it was open to challenge nor deprive it of its character as a legally established boundary, if such it was at the date of the succession of States.

(17) The Commission then examined how such a provision should be formulated. The analogous provision in the Vienna Convention appears in article 62, subparagraph 2 *a*, as an exception to the fundamental change of circumstances rule, and it is so framed as to relate to the treaty rather than to the boundary resulting from the treaty. For the provision reads: "A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a *treaty:* * (*a*) if the *treaty* * establishes a boundary". However, in the present draft the question is not the continuance in force or otherwise of a treaty between the parties; it is the obligations and rights which devolve upon a successor State. Accordingly, it does not necessarily follow that here also the rule should be framed in terms relating to the boundary treaty rather than to the legal situation established by the treaty; and the opinion of jurists today tends to favour the latter formulation of the rule. If the rule is regarded as relating to the situation resulting from the dispositive effect of a boundary treaty, then it would not seem properly to be an exception to article 11 of the present draft. It would seem rather to be a general rule that a succession of States is not as such to be consid[illegible]ed

[408] *Ibid.*, p. 190.

[409] *Ibid.*, p. 187.

[410] *Ibid.*, pp. 1-5.

[411] See above, commentary to article 9, para. 9.

as affecting a boundary or a boundary régime established by treaty prior to that succession of States.

(18) Some members of the Commission considered that to detach succession in respect of the boundary from succession in respect of the boundary treaty might be somewhat artificial. A boundary may not have been fully demarcated so that its precise course in a particular area may be brought into question. In that event recourse must be had to the interpretation of the treaty as the basic criterion for ascertaining the boundary, even if other elements, such as occupation and recognition, may also come into play. Moreover, a boundary treaty may contain ancillary provisions which were intended to form a continuing part of the boundary régime created by the treaty and the termination of which on a succession of States would materially change the boundary settlement established by the treaty. Again, when the validity of the treaty or of a demarcation under the treaty was in dispute prior to the succession of States, it might seem artificial to separate succession in respect of the boundary from succession in respect of the treaty. Other members, however, felt that a boundary treaty has constitutive effects and establishes a legal and factual situation which thereafter has its own separate existence; and that it is this situation, rather than the treaty, which passes to a successor State. Moreover, not infrequently a boundary treaty contains provisions unconnected with the boundary settlement itself, and yet it is only this settlement which called for special treatment in case of a succession of States. At the same time the objections raised to this approach to the matter would lose much of their force if it were recognized that the legal situation constituted by the treaty comprises not only the boundary itself but also any boundary régime intended to accompany it and that the treaty provisions combined to constitute the title deeds of the boundary.

(19) There was general agreement in the Commission upon the basic principle that a succession of States does not, as such, affect a boundary or a boundary régime established by treaty. Having regard to the various considerations mentioned in the previous paragraphs and to the trend of modern opinion on the matter, the Commission concluded that it should formulate the rule not in terms of the treaty itself but of a boundary established by a treaty and of a boundary régime so established. Accordingly, article 29 provides that a succession of States shall not as such affect: (*a*) a boundary established by a treaty; or (*b*) obligations and rights established by a treaty and relating to the régime of a boundary. In accepting this formulation the Commission underlined the purely negative character of the rule, which goes no further than to deny that any succession of States simply by reason of its occurrence affects a boundary established by a treaty or a boundary régime so established. As already pointed out,[412] it leaves untouched any legal ground that may exist for challenging the boundary, such as self-determination or the invalidity of the treaty, just as it also leaves untouched any legal ground of defence to such a challenge. The Commission was also agreed that this negative rule must apply equally to any boundary régime established by a treaty, whether the same treaty as established the boundary or a separate treaty.

(20) *Other territorial treaties.* The Commission has drawn attention [413] to the assumption which appears to be made by many States, including newly independent States, that certain treaties of a territorial character constitute a special category for purposes of succession of States. In British practice there are numerous statements evidencing the United Kingdom's belief that customary law recognizes the existence of such an exception to the clean slate principle and also to the moving treaty-frontier rule. One such is a statement with reference to Finland.[414] Another is the reply of the Commonwealth Office to the International Law Association.[415] A further statement of a similar kind may be found in *Materials on Succession of States* [416] the occasion being discussions with the Cyprus Government regarding article 8 of the Treaty concerning the Establishment of the Republic of Cyprus.

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

> This rule is subject to an important exception in the case of conventions which are not of a political character, that is to say, which were not included in relation to the actual personality of the State, but are of territorial and local application and are based on a geographical situation; the successor State, irrespective of the reason for which it succeeds, is bound to assume the burdens arising from treaties of this kind just as it enjoys the advantages specified in them.

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

> ... Newfoundland became part of Canada by a form of cession and that consequently, in accordance with the appropriate rules of international law, agreements binding upon Newfoundland prior to union lapsed, *except for those obligations arising from agreements locally connected which had established proprietary or quasi-proprietary rights,** [...] [417]

Some further light is thrown on the position taken by Canada on this question by the fact that Canada did not recognize air transit rights through Gander airport in Newfoundland granted in pre-union agreements as binding after Newfoundland became part of Canada.[418] On the other hand, Canada did recognize as binding upon her a condition precluding the operation of commercial aircraft from certain bases in Newfoundland leased to the United States of America before the former became a part of Canada. Furthermore, she does not seem to have questioned the continuance in force of the fishery rights in Newfoundland waters which were accorded by

[412] See para. 16 above.

[413] See above, commentary to article 11, para. 15.

[414] *Ibid.*, para. 3.

[415] *Ibid.*, para. 17.

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

[417] Document A/CN.4/243 (see foot-note 26 above), para. 85.

[418] *Ibid.*, paras. 86-100.

Great Britain to the United States in the Treaty of Ghent in 1818 and were the subject of the North Atlantic Fisheries Arbitration in 1910, or of the fishery rights first accorded to France in the Treaty of Utrecht (1713) and dealt with in a number of further treaties.

(22) An instructive precedent involving the succession of newly independent States is the so-called Belbases Agreements of 1921 and 1951, which concern Tanzania, on the one hand, and Zaire, Rwanda and Burundi, on the other. After the First World War the mandates entrusted to Great Britain and Belgium respectively had the effect of cutting off the central African territories administered by Belgium from their natural sea-port, Dar-es-Salaam. Great Britain accordingly entered into an Agreement with Belgium in 1921, under which Belgium, at a nominal rent of one franc per annum, was granted a lease in perpetuity of port sites at Dar-es-Salaam and Kigoma in Tanganyika. This Agreement also provided for certain customs exemptions at the leased sites and for transit facilities from the territories under Belgian mandate to those sites. In 1951, by which date the mandates had been converted into trusteeships, a further Agreement between the two administering Powers provided for a change in the site at Dar-es-Salaam but otherwise left the 1921 arrangements in force. The Belgian Government, it should be added, expended considerable sums in developing the port facilities at the leased sites. On the eve of independence, the Tanganyika Government informed the United 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, Rwanda and Burundi both of Tanganyika's statement and of its own reply.[419] In the National Assembly Prime Minister Nyerere explained[420] that in Tanganyika's view: "A lease in perpetuity of land in the territory of Tanganyika is not something which is compatible with the sovereignty of Tanganyika *when made by an* authority whose own rights in Tanganyika were for a limited duration." After underlining the limited character of a mandate or trusteeship, he added: "It is clear, therefore, that in appearing to bind the territory of Tanganyika for all time, the United Kingdom was trying to do something which it did not have the power to do." When in 1962 Tanganyika gave notice of her request for the evacuation of the sites, Zaire, Rwanda and Burundi, which had all now attained independence, countered by claiming to have succeeded to Belgium's rights under the Agreements. Tanganyika then proposed that new arrangements should be negotiated for the use of the port facilities, to which the other three successor States assented; but it seems that no new arrangement has yet been concluded and that *de facto* the port facilities are being operated as before.

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

(24) In the context, at any rate, of military bases, the relevance of the limited character of an administering Power's competence seems to have been conceded by the United States of America in connexion with the bases in the West Indies granted to it by the United Kingdom in 1941; and this in relation to the limited competence of a *colonial* administering power. In the Agreement the bases were expressed to be leased to the United States for 99 years. But on the approach of the West Indies territories to independence the United States took the view that it could not, without exposing itself to criticism, insist that restrictions imposed upon the territory of the West Indies while it was in a colonial status would continue to bind it after independence.[421] The West Indies Federation for its part maintained that "on its independence it should have the right to form its own alliances generally and to determine for itself what military bases should be allowed on its soil and under whose control such bases should come." [422] In short, it was accepted on both sides that the future of the bases must be a matter of agreement between the United States and the newly independent West Indies. In the instant case it will be observed that there were two elements: (*a*) the grant while in a colonial status and (*b*) the personal and political character of military agreements. An analogous case is the Franco-American Treaty of 1950 granting a military base to the United States of America in Morocco before the termination of the protectorate. In that case, quite apart from the military character of the agreement, Morocco objected that the agreement had been concluded by the protecting Power without any consultation with the protected State and could not be binding on the latter on its resumption of independence.[423]

(25) Treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties. Among early precedents cited is the right of navigation on the Mississippi granted to Great Britain by France in the Treaty of Paris 1863 which, on the transfer of Louisiana to Spain,

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

[420] See "Treaties and succession of States and governments in Tanzania", in Nigerian Institute for International Affairs, *African Conference on International Law and African Problems: Proceedings* (Carnegie Endowment for International Peace, 1967), para. 119.

[421] See A. J. Esgain, "Military servitudes and the new nations", in W. V. O'Brien, ed., *The New Nations in International Law and Diplomacy* (London, Stevens, 1965), pp. 77-78.

[422] *Ibid.*, p. 79.

[423] *Ibid.*, pp. 72-76.

the latter acknowledged to remain in force.[424] The provisions concerning the Shatt-el-Arab in the Treaty of Erzerum, concluded in 1847 between Turkey and Persia, are also cited. Persia, it is true, disputed the validity of the Treaty. But on the point of Iraq's succession to Turkey's right under the Treaty no question seems to have been raised. A modern precedent is Thailand's rights of navigation on the River Mekong, granted by earlier treaties and confirmed 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.

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

> Save with the previous agreement of the Egyptian Government, no irrigation or power works or measures are to be constructed or taken on the River Nile or its branches, or on the lakes from which it flows, *so far as all these are in the Sudan or in countries under British administration*,* which would, in such manner as to entail any prejudice to the interests of Egypt, either reduce the quantity of water arriving in Egypt, or modify the date of its arrival, or lower its level.* [425]

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

(27) Analogous complications obscure another modern precedent, Syria's water rights with regard to the River Jordan. On the establishment of the mandates for Palestine and Syria after the First World War, Great Britain and France entered into a series of agreements dealing with the boundary régime between the mandated territories, including the use of the waters of the River Jordan. An Agreement of 1923 provided for equal rights of navigation and fishing,[426] while a further Agreement of 1926 stated that "all rights derived from local laws or customs concerning the use of the waters, streams, canals and lakes for the purposes of irrigation or supply of water to the inhabitants shall remain as at present." [427] These arrangements were confirmed in a subsequent Agreement. After independence, Israel embarked on a hydroelectric project which Syria considered incompatible with the régime established by the above-mentioned treaties. In debates in the Security Council Syria claimed that it had established rights to waters of the Jordan in virtue of the Franco-British treaties, while Israel denied that it was in any way affected by treaties concluded by the United Kingdom. Israel, indeed, denies that it is either in fact or in law a successor State at all.

(28) Some other examples of bilateral treaties of a territorial character are cited in the writings of jurists, but they do not seem to throw much clearer light on the law governing succession in respect of such treaties.[428] Mention has, however, to be made of another category of bilateral treaties which are sometimes classified as "dispositive" or "real" treaties: namely, treaties which confer specific rights of a private law character on nationals of a particular foreign State; e.g. rights to hold land. These treaties have sometimes in the past been regarded as dispositive in character for the purposes of the rules governing the effect of war on treaties.[429] Without entering into the question whether such a categorization of these treaties is valid in that context, there does not seem to be sufficient evidence that they are to be regarded as treaties of a dispositive or territorial character under the law governing succession of States in respect of treaties.

(29) There remain, however, those treaties of a territorial character which were discussed by the Commission in 1964 at its sixteenth session under the broad designation of "treaties providing for objective régimes" in the course of its work on the general law of treaties. The examination of those treaties by the Commission and by its Special Rapporteur from the point of view of their effects upon third States may be found in the proceedings of the Commission at its Sixteenth Session.[430] The

[424] Another early precedent cited is the grant of navigation rights to Great Britain by Russia in the Treaty of 1825 relating to the Canadian-Alaska boundary, but it is hardly a very clear precedent.

[425] See United Nations, *Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for other Purposes than Navigation* (United Nations publication, Sales No. 63.V.4), p. 101; see also document A/5409, paras. 100-107.

[426] See United Nations, *Legislative Texts and Treaty Provisions... (op. cit.)*, pp. 287-288.

[427] *Ibid.*, p. 288.

[428] e.g. certain Finnish frontier arrangements, the demilitarization of Hünningen, the Congo leases, etc.

[429] e.g. the draft convention on the law of treaties prepared by the Research in International Law of the Harvard Law School (*American Journal of International Law* (October, 1935), vol. 29, supplement No. 4, part III).

[430] See *Yearbook of the International Law Commission, 1964*, vol. I, pp. 96 *et seq.*, 738th-740th meetings; and *ibid.*, vol. II, pp. 27-34, document A/CN.4/167 and Add.1-3, commentary to article 63, and pp. 184-185, document A/5809, chap. II, sect. B, commentary to article 62.

characteristic of the treaties in question is that they attach obligations to a particular territory, river, canal etc., for the benefit either of a group of States (e.g. riparian States of a particular river) or of all States generally. They include treaties for the neutralization or demilitarization of a particular territory, treaties according freedom of navigation in international waterways or rivers, treaties for the equitable use of the water resources of an international river basin and the like. The Commission in its work on the law of treaties did not consider that a treaty of this character has the effect of establishing, by its own force alone, an objective régime binding upon the territorial sovereignty and conferring contractual rights on States not parties to it. While recognizing that an objective régime may arise from such a treaty, it took the view that the objective régime results rather from the execution of the treaty and the grafting upon the treaty of an international custom. The same view of the matter was taken by the United Nations Conference on the Law of Treaties and the Vienna Convention does not except treaties intended to create objective régimes from the general rules which it lays down concerning the effects of treaties on third States. In the present context, if a succession of States occurs in respect of the territory affected by the treaty intended to create an objective régime, the successor State is not properly speaking a "third State" in relation to the treaty. Owing to the legal nexus which existed between the treaty and the territory prior to the date of the succession of States, it is not open to the successor State simply to invoke article 35 of the Vienna Convention under which a treaty cannot impose obligations upon a third State without its consent. The rules concerning succession in respect of treaties also come into play. But under these rules there are cases where the treaty intended to establish an objective régime would not be binding on a successor State, unless such a treaty were considered to fall under a special rule to that effect. Equally, if the succession of States occurs in relation to a State which is the beneficiary of a treaty establishing objective régime, under the general law of treaties and the law of succession the successor State would not necessarily be entitled to claim the rights enjoyed by its predecessor State, unless the treaty were considered to fall under such a special rule. That such a special rule exists is, in the opinion of the Commission, established by a number of convincing precedents.

(30) Reference has already been made to two of the principal precedents [431] 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 *Åland Islands* question, in both of which the tribunal considered the successor State to be bound by a treaty régime of a territorial character established as part of a "European settlement". An earlier case involving the same element of a treaty made in the general interest concerned Belgium's position, after its separation from the Netherlands, in regard to the obligations of the latter provided for by the Peace Settlements concluded at the Congress of Vienna with respect to fortresses on the Franco-Netherlands boundary. The four Powers (Great Britain, Austria, Prussia and Russia) apparently took the position that they could not admit that any change with respect to the interests by which these arrangements were regulated had resulted from the separation of Belgium and Holland; and the King of the Belgians was considered by them as standing with respect to these fortresses and in relation to the four Powers, in the same situation, and bound by the same obligations, as the King of the Netherlands previous to the Revolution. Although Belgium questioned whether it could be considered bound by a treaty to which it was a stranger, it seems in a later treaty to have acknowledged that it was in the same position as the Netherlands with respect to certain of the frontier fortresses. Another such case is article XCII of the Act of the Congress of Vienna,[432] which provided for the neutralization of Chablais and Faucigny, then under the sovereignty of Sardinia. These provisions were connected with the neutralization of Switzerland effected by the Congress and Switzerland had accepted them by a Declaration made in 1815. In 1860, when Sardinia ceded Nice and Savoy to France, both France and Sardinia recognized that the latter could only transfer to France what it itself possessed and that France would take the territory subject to the obligation to respect the neutralization provisions. France, on its side, emphasized that these provisions had formed part of a settlement made in the general interests of Europe. The provisions were maintained in force until abrogated by agreement between Switzerland and France after the First World War with the concurrence of the Allied and Associated Powers recorded in article 435 of the Treaty of Versailles.[433] France, it should be mentioned, had itself been a party to the settlements concluded at the Congress of Vienna, so that it could be argued that it was not in a position of a purely successor State. Even so, its obligation to respect the neutralization provisions seems to have been discussed simply on the basis that, as a successor to Sardinia, it could only receive the territory burdened with those provisions.

(31) The concept of international settlements is also invoked in connexion with the régimes of international rivers and canals. Thus, the Berlin Act of 1885 established régimes of free navigation on both the Rivers Congo and Niger; and in the former case the régime was regarded as binding upon Belgium after the Congo had passed to it by cession. In the Treaty of Saint Germain-en-Laye (1919) some only of the signatories of the 1885 Act abrogated it as between themselves, substituting for it a 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 agree-

[431] See paras. 3-5 above.

[432] *British and Foreign State Papers, 1814-1815* (London, Foreign Office, 1839), pp. 45-46.

[433] *Ibid., 1919* (London, H.M.S.O., 1922), vol. CXII, p. 206.

ments with EEC. Although the States concerned may have varied in the policies which they have adopted concerning the continuance of the previous régime, they seem to have taken the general position that their emergence to independence has caused the Treaty of Saint Germain and the Berlin Act to lapse. In regard to the Niger, the newly independent riparian States in 1963 replaced the Berlin Act and the Treaty of Saint Germain with a new Convention. The parties to this Convention "abrogated" the previous instruments, as between themselves and in the negotiations preceding its conclusion there seems to have been some difference of opinion as to whether abrogation was necessary. But it was on the basis of a fundamental change of circumstances rather than of non-succession that these doubts were expressed.[434]

(32) The Final Act of the Congress of Vienna set up a Commission for the Rhine, the régime of which was further developed in 1868 by the Convention of Mannheim; and although after the First World War the Treaty of Versailles reorganized the Commission, it maintained the régime of the Convention of Mannheim in force. As to cases of succession, it appears that in connexion with membership of the Commission, when changes of sovereignty occurred, the rules of succession were applied, though not perhaps on any specific theory of succession to international régimes or to territorial treaties.

(33) The question of succession of States has also been raised in connexion with the Suez Canal Convention of 1888. The Convention created a right of free passage through the Canal and, whether by virtue of the treaty or of the customary régime which developed from it, this right was recognized as attaching to non-signatories as well as signatories. Accordingly, although many new States have hived off from the parties to the Convention, their right to be considered successor States was not of importance in regard to the use of the Canal. In 1956, however, it did come briefly into prominence in connexion with the Second Conference on the Suez Canal convened in London. Complaint was there made that a number of States, who were not present, ought to have been invited to the Conference; and, *inter alia*, it was said that some of those States had the right to be present in the capacity of successor States of one or other party to the Convention.[435] The matter was not pushed to any conclusion, and the incident can at most be said to provide an indication in favour of succession in the case of an international settlement of this kind.

(34) Some further precedents of one kind or another might be examined, but it is doubtful whether they would throw any clearer light on the difficult question of territorial treaties. Running through the precedents and the opinions of writers are strong indications of a belief that certain treaties attach a régime to territory which continues to bind it in the hands of any successor State. Not infrequently other elements enter into the picture, such as an allegation of fundamental change of circumstances or the allegedly limited competence of the predecessor State, and the successor State in fact claims to be free of the obligation to respect the régime. Nevertheless, the indications of the general acceptance of such a principle remain. At the same time, neither the precedents nor the opinions of writers give clear guidance as to the criteria for determining when this principle operates. The evidence does not, however, suggest that this category of treaties should embrace a very wide range of so-called territorial treaties. On the contrary, this category seems to be limited to cases where a State by a treaty grants a right to use territory, or to restrict its own use of territory, which is intended to attach to territory of a foreign State or, alternatively, to be for the benefit of a group of States or of all States generally. There must in short be something in the nature of a territorial régime.

(35) In any event, the question arises here, as in the case of boundaries and boundary régimes, whether in these cases there is succession in respect of the treaty as such or rather whether the régime established by the dispositive effects of the treaty is affected by the occurrence of a succession of States. The evidence might perhaps suggest either approach. But the Commission considered that in formulating the rule for the effect of a succession of States upon objective régimes established by treaty, it ought to adopt the same standpoint as in the case of boundary régimes and other régimes of a territorial character established by a treaty. In other words, the rule should relate to the legal situation—the régime—resulting from the dispositive effects of the treaty rather than to succession in respect of the treaty. Moreover, in the case of objective régimes it considered that this course was also strongly indicated by the decisions of the Commission and of the United Nations Conference on the Law of Treaties with regard to treaties providing for such régimes in codifying the general law of treaties.

(36) Accordingly, article 30, like article 29, states the law regarding other forms of territorial régimes simply in terms of the way in which a succession of States affects—or rather does not affect—the régime in question. The difficulty is to find language which adequately defines and limits the conditions under which the article applies. The article is divided into two paragraphs dealing respectively with territorial régimes established for the benefit of particular territory of another States (paragraph 1) and territorial régimes established for the benefit of a group of States or all States (paragraph 2).

(37) *Paragraph 1* (a) of article 30 provides that a succession of States shall not affect obligations relating to the use of a *particular territory*, or to restrictions upon its use, established by a treaty *specifically* for the benefit of a *particular territory* of a foreign State *and considered as attaching to the territories in question*. Correspondingly, *paragraph 1* (b) provides that a succession of States shall not affect rights established by a treaty *specifically* for the benefit of a *particular territory* and relating to the use, or to restrictions upon the use of a *particular territory* of a foreign State and *considered as attaching to the territories in question*. The Commission considered that in the case of these territorial régimes there must be attachment both of the obligation and the right to a particular territory rather than to the burdened State as such or to the

[434] See *American Journal of International Law* (Washington), vol. 57, No. 4 (October 1963), pp. 879-880.

[435] United Nations, *Materials on Succession of States (op. cit.)*, pp. 157-158.

beneficiary State as such. In adding the words "and considered as attaching to the territories in question", the Commission intended not only to underline this point but also to indicate the relevance of the dispositive element, the establishment of the régime through the execution of the treaty.

(38) *Paragraph 2* contains similar provisions for objective régimes, with the exception that here the requirement of attachment to *particular territory* applies only to the territory in respect of which the *obligation* is established; there is no requirement of attachment of rights established by the treaty to any particular territory or territories because the special character of the régime with respect to the *right* established by the treaty lies in its creation in the interest of a *group* of States or of *all* States and not with regard to a particular territory or territories.

(39) "Territory" for the purposes of the present article is intended to denote any part of the land, water or air space of a State. But the Commission considered this to be the natural meaning of the word in a context like the present one and that it was unnecessary to specify it in the article.

PART VI

MISCELLANEOUS PROVISIONS

Article 31. Cases of military occupation, State responsibility and outbreak of hostilities

The provisions of the present articles shall not prejudge any question that may arise in regard to a treaty from the military occupation of a territory or from the international responsibility of a State or from the outbreak of hostilities between States.

Commentary

(1) Mention has already been made [436] of the reasons for inserting the present article in the draft. The article excludes three specific matters from the scope of the draft articles. As to the first—questions arising in regard to a treaty from the military occupation of territory—the Commission considered that although military occupation may not constitute a succession of States within the meaning given to that term in article 2 of the present draft, it may raise analogous problems. Accordingly, if only to avoid misunderstanding, it seems desirable specifically to provide that nothing in the present articles is to prejudge any question that may arise in the case of military occupation. No doubt some cases of military occupation would in any event be excluded by the general provision in article 6 limiting the draft articles to succession of States occurring in conformity with international law; but it seems doubtful whether that provision would necessarily suffice to cover every case.

(2) The second matter excluded—questions arising in regard to a treaty from the international responsibility of a State—was excluded also from the Vienna Convention on the Law of Treaties by article 73. The Commission, when proposing this exclusion in its final report on the law of treaties, explained in its commentary to the relevant article [437] 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, in the Commission's view, make it desirable to insert in the present article a general reservation covering cases of State responsibility.

(3) The third matter excluded—questions arising in regard to a treaty from the outbreak of hostilities—was likewise excluded from the Vienna Convention on the Law of Treaties by article 73. This exclusion was inserted in article 73 not by the International Law Commission but by the Vienna Conference itself. The Commission had taken the view that the outbreak of hostilities should be considered as an entirely abnormal condition and that the rules governing its legal consequences should not be regarded as forming part of the general rules of international law applicable in the normal relations between States. Without dissenting from that general point of view, the Conference decided that a general reservation concerning the outbreak of hostilities was nevertheless desirable. True, there was a special reason for inserting that reservation in the Vienna Convention; for article 42, paragraph 2, of the Convention expressly provides that the termination or the suspension of its operation "may take place only as a result of the application of the provisions of the treaty or of the present Convention". Even so, the Commission considered that in the interests of uniformity as well as because of the possible impact of the outbreak of hostilities in cases of succession it was desirable to reproduce the reservation in the present articles.

[436] See above, sect. A, para. 44.

[437] Article 69. See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 87.

Chapter III

QUESTION OF THE PROTECTION AND INVIOLABILITY OF DIPLOMATIC AGENTS AND OTHER PERSONS ENTITLED TO SPECIAL PROTECTION UNDER INTERNATIONAL LAW

A. Introduction

1. Summary of the Commission's proceedings

54. At its twenty-second session, in 1970, the Commission received from the President of the Security Council a letter dated 14 May 1970 transmitting a copy of document S/9789 which reproduced the text of a letter addressed to him by the representative of the Netherlands to the United Nations concerning the need for action to ensure the protection and inviolability of diplomatic agents in view of the increasing number of attacks on them. The Chairman of the Commission replied to the foregoing communication by a letter dated 12 June 1970 which referred to the Commission's past work in this area and stated the Commission would continue to be concerned with the matter.[438]

55. At the twenty-third session of the Commission, in 1971, in connexion with the adoption of the Commission's agenda, the suggestion was made by Mr. Kearney that the Commission should consider whether it would be possible to produce draft articles regarding such crimes as the murder, kidnapping and assaults upon diplomats and other persons entitled to special protection under international law.[439] The Commission recognized both the importance and the urgency of the matter, but deferred its decision in view of the priority that had to be given to the completion of the draft articles on the representation of States in their relations with international organizations. In the course of the session it became apparent that there would not be sufficient time to deal with any additional subject. In considering its programme of work for 1972, however, the Commission reached the decision that, if the General Assembly requested it to do so, it would prepare at its 1972 session a set of draft articles on this important subject with the view to submitting such articles to the twenty-seventh session of the General Assembly.[440]

56. By resolution 2780 (XXVI), of 3 December 1971, the General Assembly, *inter alia*, recognizing the views expressed by the Commission in paragraphs 133 and 134 of its report, in particular those on the importance and urgency of dealing with the problem of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, requested: (*a*) the Secretary-General to invite comments from Member States before 1 April 1972 on the question of the protection of diplomats and to transmit them to the International Law Commission at its twenty-fourth session; and (*b*) the Commission to study as soon as possible, in the light of the comments of Member States, the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, with a view to preparing a set of draft articles dealing with offences committed against diplomats and other persons entitled to special protection under international law for submission to the General Assembly at the earliest date which the Commission would consider appropriate.

57. In pursuance of the foregoing decision the Secretary-General, in a circular letter dated 11 January 1972, invited Member States to communicate to him, before 1 April 1972, their comments on the question of the protection of diplomats with a view ot transmitting them to the International Law Commission at its twenty-fourth session.

58. At its present session, the Commission had before it the written observations received from twenty-six Member States which are reproduced in an annex to the present report. Attached to its written observations, Denmark submitted the text of a draft convention on the question, referred to as "the Rome draft".[441] In addition, the Commission had before it a working paper containing the text of a draft convention on the question, submitted to the twenty-sixth session of the General Assembly by the delegation of Uruguay (hereinafter referred to as the "Uruguay working paper") and prepared for transmission to the Commission,[442] and a working paper prepared by Mr. Kearney, Chairman of the Commission, containing draft articles concerning crimes against persons entitled to special protection under international law (A/CN.4/L.182).[443] The Commission had also at its disposal an extensive documentation relevant to the question, made available by the Secretariat, which included in particular the Convention to Prevent and Punish the Acts of Terrorism taking the Form of Crimes against Persons and related

[438] See *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 10* (A/8010/Rev.1), pp. 2-3, para. 11 (*Yearbook of the International Law Commission, 1970*, vol. II, pp. 273-274, document A/8010/Rev.1, para. 11).

[439] See *Yearbook of the International Law Commission, 1971*, vol. I, p. 3, 1087th meeting, para. 38.

[440] *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 10* (A/8410/Rev.1), p. 76, paras. 133-134 (*Yearbook of the International Law Commission, 1971*, vol. II (Part One), document A/8410/Rev.1, paras. 133-134).

[441] See below, p. 114.

[442] A/C.6/L.822.

[443] To be printed in *Yearbook of the International Law Commission, 1972*, vol. II.

Extortion that are of International Significance, signed at Washington at the third Special Session of the General Assembly of the Organization of American States of 2 February 1971, hereinafter referred to as "the OAS Convention",[444] the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971 [445] and the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970,[446] hereinafter referred to, respectively, as "the Montreal" and "The Hague" Conventions, the latter two instruments concluded under the auspices of ICAO.

59. The Commission began its work at the present session by taking up the question, which was considered at the 1150th to 1153rd, 1182nd to 1186th, 1188th, 1189th and 1191st to 1193rd meetings. An initial general discussion was held at the 1150th to 1153rd meetings. At its 1150th meeting, the Commission set up a Working Group [447] to review the problem involved and prepare a set of draft articles for submission to the Commission.

60. In the course of the general discussion the question was raised whether the Commission should limit itself to draft articles covering persons entitled to special protection under international law. Terrorism had become widespread and many innocent people had suffered thereby. It might be better to follow the examples of the Hague and Montreal Conventions and seek to provide some means of protection against terrorist acts generally. Other members queried whether a convention of the nature envisaged would be really useful in providing protection. In this connexion, reference was made to the fact that the League of Nations Convention for the Prevention and Punishment of Terrorism of 16 November 1937 had not been ratified by any States.[448] The majority of speakers expressed the view, however, that the question of the utility as well as the scope of draft articles on the subject, had been determined by resolution 2780 (XXVI) of the General Assembly.

61. Other members expressed doubts as to the possibility of completing a set of draft articles during the twenty-fourth session of the Commission in view of the difficult questions involved and, in particular, the question how "political offences" should be treated and the necessity of upholding the principle of asylum. It was pointed out that in the OAS Convention, article 6 specifically provided that "None of the provisions of this Convention shall be interpreted so as to impair the right of asylum". It was also pointed out that the right of territorial asylum was traditional in Latin America. In the light of these difficulties and the fact that the General Assembly in resolution 2780 (XXVI) had merely referred to submitting a draft set of articles "to the General Assembly at the earliest date which the Commission considers appropriate", it was urged that the Commission follow its traditional procedure of appointing a Special Rapporteur to make a study of the subject, and then prepare draft articles for consideration by the Commission.

62. Most of the members who participated in the discussion, however, took the view that the subject was one of sufficient urgency and importance to justify the Commission adopting a more expeditious method of producing a set of draft articles than the appointment of a Special Rapporteur and that the establishment of a special working group, which would base its work upon the existing texts dealing with the protection of diplomatic agents and other officials engaged in international activities as well as those treaties concerned with specific types of terrorism, such as the hijacking of airplanes, was the most efficient means of enabling the Commission to produce a set of draft articles for submission to the General Assembly at its twenty-seventh session.

63. In the initial stage of its work the Working Group held seven meetings from 24 May to 16 June 1972, at the conclusion of which it submitted for the consideration of the Commission a first report containing a set of 12 draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons (A/CN.4/L.186).[449] In introducing the Working Group's report at the 1182nd meeting, its Chairman, Mr. Tsuruoka, pointed out that the Working Group in order to facilitate discussion in the Commission and subsequent comments of Governments, was submitting a text that aimed at ensuring the utmost protection for the persons concerned. The Commission considered the Working Group's report at its 1182nd to 1186th and 1188th and 1189th meetings and referred the set of draft articles back to the Working Group for revision in the light of the discussion. In the course of these discussions most of the members of the Commission indicated support for the general approach that had been taken in the articles. Some members of the Commission again raised the question whether the principle of territorial asylum should be specifically preserved in the context of political crimes. The general view of the Commission, however, was that crimes of the nature described in the draft articles were not political crimes. The question whether the attacker should know that the individual attacked was a specially protected person was discussed by several members in connexion with the use of the phrase "regardless of motive" in draft article 2. The consensus was that some formula should be adopted to establish a requirement for such knowledge. Among other aspects of the draft articles discussed, the Commission in general supported the conclusion that a clause eliminating the application of all periods of limitation for prosecution of the specified offences was too severe. One member considered the draft articles deficient in that they did not provide alternative provisions so that States could indicate preferred courses of action in their comments.

[444] For the text of the OAS Convention, see *Official Documents of the Organization of American States*, OEA/Ser.A/17 (Washington D.C., OAS General-Secretariat, 1971), p. 6.

[445] For the text of the Montreal Convention, see ICAO, document 8966, p. 1.

[446] For the text of the Hague Convention, see ICAO, document 8920, p. 1.

[447] See above, chap. I, para. 6.

[448] League of Nations, *Official Journal, Special Supplement No. 193* (1944), p. 54.

[449] The text of the draft articles is reproduced in *Yearbook of the International Law Commission, 1972*, vol. I, 1182nd, 1185th, 1186th, 1188th and 1189th meetings.

64. The Working Group held three additional meetings on 26, 28 and 30 June 1972 and submitted to the Commission two further reports containing a revised set of 12 draft articles (A/CN.4/L.188) and Add.1;[450] A/CN.4/L.189 [451]). The Commission considered the Working Group's second and third reports at its 1191st, 1192nd and 1193rd meetings, and provisionally adopted a draft of 12 articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons.[452] In accordance with articles 16 and 21 of its Statute, the Commission decided to submit the present provisional set of draft articles to the General Assembly, and to submit them to Governments for comments.

2. Scope, purpose and structure of the draft articles

65. In accordance with the mandate contained in paragraph 2 of section III of General Assembly resolution 2780 (XXVI),[453] the scope of the present draft is restricted to crimes committed against diplomatic agents and other persons entitled to special protection under international law. The Commission, however, recognizes that the question of crimes committed against such persons is but one of the aspects of a wider question, the commission of acts of terrorism. The elaboration of a legal instrument with the limited coverage of the present draft is an essential step in the process of formulation of legal rules to effectuate international co-operation in the prevention, suppression and punishment of terrorism. The over-all problem of terrorism throughout the world is one of great complexity but there can be no question as to the need to reduce the commission of terrorist acts even if they can never be completely eliminated. The General Assembly may consider it important to give consideration to this general problem.

66. The scope of the draft extends, *ratione personae*, to diplomatic agents and other persons entitled to special protection under international law. By making the person of diplomatic agents inviolable, international law has long since acknowledged the fact that certain immunities and privileges for such agents are essential to the conduct of relations among sovereign and independent States.[454] Inviolability includes imposing on the States to which diplomatic agents are accredited a duty of special protection, that is, a protection higher than that which they are obliged to accord to a private person. Under international law, inviolability is attached also to the premises of the diplomatic mission. These principles have been codified in articles 29 and 22 of the Vienna Convention on Diplomatic Relations (1961) [455] adopted on the basis of the draft articles on diplomatic intercourse and immunities prepared by the Commission. Those articles read as follows:

Article 29

The person of a diplomatic agent shall be inviolable. [...] The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Article 22

1. The premises of the mission shall be inviolable. [...]

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

In the commentary to article 27 of its final draft on diplomatic intercourse and immunities, which formed the basis for article 29 of the Vienna Convention, the Commission stated:

This article confirms the principle of the personal inviolability of the diplomatic agent. From the receiving State's point of view, this inviolability implies, as in the case of the mission's premises, the obligation to respect, and to ensure respect for, the person of the diplomatic agent. The receiving State must take all reasonable steps to that end, possibly including the provision of a special guard where circumstances so required. Being inviolable, the diplomatic agent is exempt from measures that would amount to direct coercion. This principle does not exclude in respect of the diplomatic agent either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing crimes or offences.[456]

Provisions concerning the protection of consular officers and consular premises are contained in the Vienna Convention on Consular Relations (1963).[457] Article 40 (protection of consular officers) provides:

The receiving State shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity.

Paragraph 3 of article 31 (inviolability of the consular premises) of the same Convention provides:

Subject to the provisions of paragraph 2 of this article, the receiving State is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.

Inviolability of the representatives of the sending State and of the members of the diplomatic staff in a special mission and of the premises of that mission are found in the 1969 Convention on Special Missions.[458] In 1971 the

[450] *Idem*, 1191st and 1192nd meetings.

[451] *Idem*, 1193rd meeting.

[452] For the text of the articles, with commentaries, see section B below.

[453] See para. 56 above.

[454] See E. M. Satow, *A Guide to Diplomatic Practice*, 4th ed. (London, Longmans, Green, 1957), pp. 176 *et seq.*; B. Sen, *A Diplomat's Handbook of International Law and Practice* (The Hague, Nijhoff, 1965), pp. 80 *et seq.*; E. de Vattel, *Le droit des gens ou Principes de la loi naturelle*, book IV, chap. VII, reproduced in *The Classics of International Law*, ed. by J. B. Scott (Washington D.C., Carnegie Institution, 1916), vol. II, pp. 314 *et seq.*

[455] For the text of the Vienna Convention in Diplomatic Relations, see United Nations, *Treaty Series*, vol. 500, p. 95.

[456] *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9* (A/3859), p. 19 (*Yearbook of the International Law Commission, 1958*, vol. II, p. 97, document A/3859, chap. III, sect. II).

[457] For the text of the Vienna Convention on Consular Relations, see United Nations, *Treaty Series*, vol. 596, p. 261.

[458] Articles 29 and 25 of the Convention. For the text of the Convention on Special Missions, see General Assembly resolution 2530 (XXIV), annex.

Commission included in its draft articles on the representation of States in their relations with international organizations a series of provisions regarding the inviolability of members of missions and delegations concerned in the operations of international organizations as well as their premises and accommodations.[459] A variety of other categories of persons who as officials of a State or an international organization are engaged in carrying on international relations are similarly accorded special protection under general international law or international agreements.[460]

67. Violent attacks against diplomatic agents and other persons entitled to special protection under international law not only gravely disrupt the very mechanism designed to effectuate international co-operation for the safeguarding of peace, the strengthening of international security and the promotion of the general welfare of nations but also prevent the carrying out and fulfilment of the purposes and principles of the Charter of the United Nations. The increasing frequency with which those crimes are being committed makes particularly urgent the task of formulating legal rules aimed at reinforcing the atmosphere of personal security and absence of coercion within which persons selected by States or international organizations to represent them in their relations with other States or organizations should carry out their responsibilities. This is the purpose of the present draft. Basing itself on the existing legal obligations that are intended to contribute effectively to the inviolability and protection of the persons in question, these draft articles seek to achieve this purpose through the promotion of international co-operation for the prevention and punishment of crimes committed against those persons.

68. Specifically, the draft seeks to ensure that safe-havens will no longer be available to a person as to whom there are grounds to believe that he has committed serious offences against internationally protected persons. To achieve this end, the draft centres on two main points: it provides the basis for the assertion of jurisdiction over such crimes by all States party and it gives to States where the alleged offender may be found the option to extradite him or to submit the case to its competent authorities for the purpose of prosecution. Provisions to this effect are found in articles 2 and 6 of the draft.

69. Further, the draft envisages international co-operation at both the levels of prevention and suppression of crimes and is structured along a logical sequence of stages between those two levels. Thus, following the determination of the scope of the draft, *ratione personae* in article 1 and *ratione materiae* in article 2, article 3 takes up the situation when commission of the crime is in the preparatory stage and provides for international collaboration in its prevention. Article 4 refers to the case where the crime has been committed and the alleged offender is presumed to have fled abroad. Article 5 relates to the action to be taken when the alleged offender is found. Article 6 establishes the option given to the State in whose territory the alleged offender is present to extradite or submit the case for prosecution; and article 7 seeks to make that option a real one as regards extradition. Articles 8 to 11 concern various aspects of the proceedings to be instituted against the alleged offender and article 12 provides for the settlement of the disputes that may arise between States party.

B. Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons

Article 1

For the purposes of the present articles:

1. "Internationally protected person" means:

(*a*) A Head of State or a Head of Government, whenever he is in a foreign State, as well as members of his family who accompany him;

(*b*) Any official of either a State or an international organization who is entitled, pursuant to general international law or an international agreement, to special protection for or because of the performance of functions on behalf of his State or international organization, as well as members of his family who are likewise entitled to special protection.

2. "Alleged offender" means a person as to whom there are grounds to believe that he has committed one or more of the crimes set forth in article 2

3. "International organization" means an intergovernmental organization.

Commentary

(1) In accordance with the practice followed in many of the conventions adopted under the auspices of the United Nations, this article deals with those expressions to which a specific meaning is attributed for the purposes of the present draft.

(2) *Paragraph 1* sets forth the meaning of the expression "internationally protected person", thus determining, *ratione personae*, the scope of the draft. For selecting that particular expression and determining its exact coverage, the Commission found guidance in the terms of its mandate as contained in paragraph 2 of section III of General Assembly resolution 2780 (XXVI).[461] Paragraph 1 of the present article describes in two separate sub-paragraphs the categories of persons to whom the expression is made applicable. In sub-paragraph (*a*) specific mention is made of a Head of State or a Head of Government. This is done on account of the exceptional protection which, under international law, attaches to such a status. The sub-paragraph emphasizes the special status of a Head of

[459] Part II (missions to international organizations), articles 23 and 28; part III (delegations to organs and to conferences), articles 54 and 59; and annex to the draft (observer delegations to organs and to conferences), articles M and N. See *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 10* (A/8410/Rev.1) pp. 24 and 26, 41 and 43, and 61 (*Yearbook of the International Law Commission, 1971*, vol. II (Part One), document A/8410/Rev.1, chap. II, sect. D).

[460] In general, see C. W. Jenks, *International Immunities* (London, Stevens, 1961).

[461] See para. 56 above.

State of Head of Government when he travels abroad and which extends to members of his family who accompany him. A Head of State or Head of Government is entitled to special protection whenever he is in a foreign State and whatever may be the nature of his visit—official, unofficial or private.[462] Some members of the Commission considered that the term "Head of State or Head of Government" included members of an organ which functioned in that capacity in a collegial fashion. Other members, however, were of the opinion that, given the criminal law character of the present draft, the categories of persons to whom the draft applied could not be extended by analogy. The Commission agreed that in enacting legislation to implement the articles, States should bear in mind the desirability of ensuring the fullest protection to all persons who have the quality of Head of State or Government.

(3) The Commission also considered whether persons of cabinet rank or holding equivalent status should also be included with the Head of State and the Head of Government as entitled to special protection at all times and in all circumstances when in a foreign State. The Commission decided that, while there was some support for extension of the principle to cabinet officers, it could not be based upon any broadly accepted rule of international law and consequently should not be proposed.[463] A cabinet officer would, of course, be entitled to special protection whenever he was in a foreign State in connexion with some official function.

(4) The other persons who under the article are to be regarded as "internationally protected persons" are defined by a series of requirements in *sub-paragraph (b)*. This sub-paragraph requires that these persons be officials of either a State or an international organization and that they be, under general international law or an international agreement, entitled to special protection for or because of the performance of functions on behalf of their State or international organization. The sub-paragraph also extends to members of the family of such officials who are likewise entitled to special protection.

(5) The Commission decided in favour of the general formulation over an enumeration of the classes specified in particular conventions as being the best means of effectuating the stated desire of the General Assembly for the broadest possible coverage. In formulating sub-paragraph (*b*) the Commission found inspiration both in article 2 of the OAS Convention which refers to "those persons to whom the State has the duty to give special protection according to international law" and in article 1 of the Rome draft which refers to:

(*a*) members of permanent or special diplomatic missions and members of consular posts;

(*b*) civil agents of States on official mission;

(*c*) staff members of international organizations in their official functions;

(*d*) persons whose presence and activity abroad is justified by the accomplishment of a civil task defined by an international agreement for technical co-operation or assistance;

(*e*) members of the families of the above-mentioned persons.

(6) Under sub-paragraph (*b*), whether or not an official of either a State or an international organization is to be regarded as an "internationally protected person" depends on his being entitled, pursuant to general international law or an international agreement, at the time when and in the place where a crime against him or his premises is committed, to special protection for or because of the performance of official functions. Thus, a diplomatic agent on vacation in a State other than a host or receiving State would not normally be entitled to special protection. Some members suggested that if the purpose of the convention was to reduce the incidence of attacks upon internationally protected persons as such the convention should apply whether they were in a foreign country on official business or in a foreign country on holiday. A kidnapping could as well be committed in the one place as the other for the purpose of bringing pressure on a host government of the sending State. The Commission in general considered that this extension of the existing rules regarding the requirements for inviolability and special protection would not be warranted. The basic purpose of the draft articles was to protect the system of communications among States and extension of special protection to, for example, diplomatic agents on leave in a third State, that might well be unaware of their presence, could not be justified under the international conventions currently in force or the applicable rules of international law.[464]

(7) As used in sub-paragraph (*b*), the expression "special protection" applies to all officials who are entitled to inviolability, as well as all others who are entitled to the somewhat more limited concept of protection. Also the use of the expression "general international law or an international agreement" makes it clear that as regards

[462] See in general P. Cahier, *Le droit diplomatique contemporain* (Geneva, Droz, 1962), Publications de l'Institut universitaire de hautes études internationales, No. 40, pp. 336-346.

[463] For the status of Heads of State, Heads of Government, Ministers for Foreign Affairs and Cabinet Ministers, see the Commission's consideration of the matter in connexion with the question of high-level special missions: *Official Records of the General Assembly, Twentieth Session, Supplement No. 9* (A/6009), p. 38 (*Yearbook of the International Law Commission, 1965*, vol. II, p. 192, document A/6009, chap. III, annex); *Yearbook of the International Law Commission, 1967*, vol. I, pp. 157-168 and 235, 923rd-925th meetings and 937th meeting, paras. 68-75; *ibid.*, vol. II, p. 36, 77 and 347, document A/CN.4/194 and Add.1-5, paras. 272-276, chap. III, article 17 *quater* (new), and document A/6709/Rev.1, chap. II, sect. D, article 21 (*Official Records of the General Assembly, Twenty-second Session, Supplement No. 9* (A/6709), p. 15, article 21).

Article 21 of the Convention on Special Missions and article 50 of the Commission's draft articles on the representation of States in their relations with international organizations (*Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 10* (A/8410/Rev.1), p. 8; *Yearbook of the International Law Commision, 1971*, vol. II (Part One), document A/8410/Rev.1, chap. II, sect. D) refer to the facilities, privileges and immunities "accorded by international law" to Heads of State, Heads of Government, Ministers for Foreign Affairs and other persons of high rank.

[464] Article 40 of the Vienna Convention on Diplomatic Relations, article 54 of the Vienna Convention on Consular Relations, article 42 of the Convention on Special Missions and article 78 of the Commission's draft articles on the representation of States in their relations with international organizations—all concerning transit through the territory of a third State—provide that the third State shall accord to the person concerned inviolability and such other immunities as may be required to ensure the transit through its territory *while proceeding to take up or return to his post or functions in the receiving or host State or when returning to the sending State.*

officials of States the internationally protected person will be the one who is in the service of a State other than the one which has the duty to afford special protection. One member drew attention to the obligation incumbent upon all persons entitled to special protection not to interfere in the internal affairs of the host or receiving State and, in particular not to interfere directly or indirectly in insurrectionist movements. The consensus in the Commission was that this duty was already adequately set forth in such provisions as article 41 of the Vienna Convention on Diplomatic Relations.[465]

(8) The expression "general international law" is used to supplement the reference to "an international agreement." In the absence of the first expression, for example, diplomatic agents stationed in a State not party to the Vienna Convention on Diplomatic Relations or a similar treaty would be excluded from the coverage of sub-paragraph (*b*). Further, the expression is designed to take into account developments in international law such as the need for protection of representatives of the sending State in a special mission and members of the diplomatic staff of the special mission within the meaning of the Convention on Special Missions; heads of mission, members of the diplomatic staff and members of the administrative and technical staff of the mission within the meaning of the draft articles on the representation of States in their relations with international organizations adopted by the Commission in 1971 as well as heads of delegations, other delegates, members of the diplomatic staff and members of the administrative and technical staff of the delegation within the meaning of the same draft articles. One member of the Commission suggested that reference should also be made to protection provided for foreign officials under the internal law of the host or receiving State as this law might encompass some categories of persons in addition to those comprehended under general international law or an international agreement as entitled to special protection. The addition was, however, considered unnecessary.

(9) Among the officials who, in the circumstances provided for in sub-paragraph (*b*), could be regarded as "internationally protected persons" by virtue of their entitlement to special protection under international agreements the following may likewise be mentioned by way of example: diplomatic agents and members of the administrative and technical staff of the mission within the meaning of the Vienna Convention on Diplomatic Relations; consular officers within the meaning of the Vienna Convention on Consular Relations; officials of the United Nations within the meaning of articles V and VII of the Convention on the Privileges and Immunities of the United Nations;[466] experts on mission for the United Nations within the meaning of article VI of the Convention on the Privileges and Immunities of the United Nations and officials of the Specialized Agencies within the meaning articles VI and VIII of the Convention on the Privileges and Immunities of the Specialized Agencies.[467] In enacting legislation to put the draft articles into effect, it would be appropriate for States, in determining the extent of coverage *ratione personae* to take account of the need to afford a wide range of foreign officials protection against terroristic activities.

(10) The entitlement to special protection referred to in sub-paragraph (*b*) must be for or because of the performance of official functions. The preposition "for" relates specifically to the special protection to be afforded by a receiving or host State; the preposition "because of" refers to the special protection to be afforded by a State of transit as required for example under article 40 of the Vienna Convention on Diplomatic Relations.

(11) As regards the members of the family envisaged also in sub-paragraph (*b*) the word "likewise" has been used to emphasize that their entitlement to special protection does not arise from the present draft but, as in the case of officials, must exist pursuant to general international law or an international agreement and, again, be applicable where and when the offence is committed. Thus, the wife of a diplomatic agent would be entitled to special protection under, and subject to the conditions of, article 37 of the Vienna Convention on Diplomatic Relations if her husband was assigned to a State party to that Convention.

(12) *Paragraph 2* concerns the meaning of the expression "alleged offender". The Commission considered it useful to employ this expression to make clear that in order to set in motion the machinery envisaged in the articles against an individual there must be grounds to believe that he has committed one of the crimes to which the draft articles apply.

(13) *Paragraph 3* reproduces the meaning of the expression "international organization", as found in article 2, paragraph 1 (*i*), of the Vienna Convention on the Law of Treaties[468] and article 1, paragraph 1 (1), of the draft articles on the representation of States in their relations with international organizations. The Commission considered whether the protection to be afforded the officials of international organizations should be limited to those of a universal character. It reached the conclusion that the special considerations that led to limiting the scope of the draft articles on the representation of States in their relations with international organizations did not apply in the case of protection. The essential and important work done by a great variety and number of such organizations led the Commission to extend the coverage of sub-paragraph (*b*) of paragraph 1 of the article to officials not only of international organizations of universal character but also of the regional and other intergovernmental organizations.

(14) The suggestion was made that, in view of their special character, major humanitarian organizations such

[465] And article 55 of the Convention on Consular Relations, article 47 of the Convention on Special Missions and article 75 of the Commission's draft articles on the representation of States in their relations with international organizations.

[466] For the text of the Convention on the Privileges and Immunities of the United Nations, see United Nations, *Treaty Series*, vol. 1, p. 15.

[467] For the text of the Convention on the Privileges and Immunities of the Specialized Agencies, see *ibid.*, vol. 33, p. 261.

[468] For the text of the Convention on the Law of Treaties, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 289.

as the International Committee of the Red Cross should likewise be included. The Commission concluded that it would not be desirable to propose extending the concept of special protection to officials of other than intergovernmental organizations.

Article 2

1. The intentional commission, regardless of motive, of:

(*a*) A violent atteck upon the person or liberty of an internationally protected person;

(*b*) A violent attack upon the official premises or the private accommodation of an internationally protected person likely to endanger his person or liberty;

(*c*) A threat to commit any such attack;

(*d*) An attempt to commit any such attack; and

(*e*) Participation as an accomplice in any such attack, shall be made by each State Party a crime under its internal law, whether the commission of the crime occurs within or outside of its territory.

2. Each State Party shall make these crimes punishable by severe penalties which take into account the aggravated nature of the offence.

3. Each State Party shall take such measures as may be necessary to establish its jurisdiction over these crimes.

Commentary

(1) The provisions of article 2 deal with two distinct though related matters: (*a*) the determination, *ratione materiae*, of the scope of the draft by setting forth the crimes to which it will apply, and (*b*) the determination of the competence of States party to prosecute and punish those crimes.

(2) The first of those aspects is dealt with in *paragraph 1*, which describes the crimes encompassed as first a violent attack either upon the person or liberty of an internationally protected person or upon the official premises or the private accommodation of such a person likely to endanger his person or liberty (sub-paragraphs (*a*) and (*b*)). This is followed by a series of ancillary offences: a threat or an attempt to commit any such attack or participation as an accomplice therein (sub-paragraphs (*c*), (*d*) and (*e*)).

(3) Articles 1 of the Montreal and The Hague Conventions, the Uruguay working paper and the Rome draft and article 2 of the OAS Convention also contain provisions describing the offences covered in those instruments. In the two latter texts specific reference is made to such individual crimes as "kidnapping, murder, and other assaults against the life or personal [physical] integrity, of those persons to whom the State has the duty to give special protection".[469] Some members of the Commission preferred this method of listing the individual crimes to be covered by the draft articles. The principal basis for supporting this approach was that articles dealing with criminal matters should be as specific as possible because interpretation of the defined crimes would be on a restrictive basis

(4) The Commission considered, however, that it would be preferable to use the general expression "violent attack", in order both to provide substantial coverage of serious offences and at the same time to avoid the difficulties which arise in connexion with a listing of specific crimes in a convention intended for adoption by a great many States. In view of the difference in definitions of murder, kidnapping or serious bodily assault that might be found in a hundred or more varying criminal systems if the method of listing individual crimes were to be used, it would seem necessary to adopt the difficult approach of including for re-incorporation into internal law a precise definition of such crimes. It appeared to the Commission that agreement upon such specific definitions might not be possible. Consequently it was decided to leave open to each individual State party the ability to utilize the various definitions which exist in its internal law for the specific crimes which are comprised within the concept of violent attack upon the person or liberty and upon official premises or accommodation, or to amend its internal law if necessary in order to implement the articles.

(5) As previously indicated, sub-paragraph 1 (*a*) of article 2 refers to a violent attack upon the person or liberty of an internationally protected person and examples of such kind of crimes are the murder, wounding or kidnapping of such a person. Sub-paragraph 1 (*b*) refers to a violent attack upon the official premises or the private accommodation of an internationally protected person, likely to endanger his person or liberty. It incorporates a principle not found in the OAS Convention, the Uruguay working paper or the Rome draft. Such violent attacks, which have taken the form of bombing an embassy, forcible entry into the premises of a diplomatic mission or discharging firearms at the residence of an ambassador, have occurred with such frequency in recent times that it was essential to include them in the present draft. Again, the general term "violent attack" permits States to define the crimes covered by the term in accordance with internal practice. It should be noted, however, that sub-paragraph (*b*) is not intended to cover minor intrusions into the protected premises. Further, the Commission did not deem it necessary to include in article 1 on the use of terms provisions regarding the expressions "official premises" and "private accommodation" as it considered that they have a precise and generally recognized meaning.

(6) Sub-paragraphs 1 (*c*) and (*d*) refer respectively to a threat and an attempt to commit any of the violent attacks referred to in sub-paragraphs (*a*) and (*b*). Sub-paragraph (*e*) refers to participation as an accomplice in any such attacks. The concept of threat appears in article 1 of The Hague Convention. Attempt and participation are likewise included in The Hague and the Montreal Conventions and in the Uruguay working paper. Threat, attempt and participation as an accomplice are well defined concepts under most systems of criminal law and do not require, therefore, any detailed explanation in the context of the

[469] For instance, article 2 of the OAS Convention reads as follows:

"For the purposes of this Convention, kidnapping, murder, and other assaults against the life or personal integrity of those persons to whom the State has the duty to give special protection according to international law, as well as extortion in connexion with those crimes, shall be considered common crimes of international significance, regardless of motive."

sent draft. It should be noted, however, that some concern was expressed regarding both the scope of the provision on threat and the need for inclusion of this type of offence.

(7) Unlike the Uruguay working paper, paragraph 1 does not include conspiracy to commit any of the violent attacks referred to in sub-paragraphs (*a*) and (*b*) because of the great differences in its definition under the various systems of criminal law. Some systems do not even recognize it as a separate crime.

(8) As it is indicated by the first sentence of paragraph 1, the acts listed in sub-paragraphs (*a*) to (*e*) are crimes when committed intentionally, regardless of motive. The word "intentional", which is similar to the requirement found in article 1 of the Montreal Convention, has been used both to make clear that the offender must be aware of the status as an internationally protected person enjoyed by the victim as well as to eliminated any doubt regarding exclusion from the application of the article of certain criminal acts which might otherwise be asserted to fall within the scope of sub-paragraphs (*a*) or (*b*), such as the serious injury of an internationally protected person in an automobile accident as a consequence of the negligence of the other party.

(9) While criminal intent is regarded as an essential element of the crimes covered by article 2, the expression "regardless of motive" restates the universally accepted legal principle that it is the intent to commit the act and not the reasons that led to its commission that is the governing factor. Such an expression is found in article 2 of the OAS Convention and article 1 of the Uruguay draft. As a consequence the requirements of the Convention must be applied by a State party even though, for example, the kidnapper of an ambassador may have been inspired by what appeared to him or is considered by the State party to be the worthiest of motives.

(10) The second important aspect of article 2 is that paragraph 1 incorporates the principle of universality as the basis for the assertion of jurisdiction in respect of the crimes set forth therein. In determining a jurisdictional basis that is comparable to that over piracy, the provision of paragraph 1 places the present draft, for the purposes of jurisdiction, in the same category as those conventions which provide for co-operation in the prevention and suppression of offences which are of concern to the international community as a whole, such as the slave trade and traffic in narcotics.[470] Each State party is, therefore, required to make the prescribed acts crimes under its internal law regardless where the acts may be committed. It should be noted that, unlike The Hague and the Montreal Conventions and the Rome draft which use the word "offence", the present article employs the term "crime". In the context of The Hague and the Montreal Conventions the use of the word "offence" was justified by the novel character of the criminal acts to which it was intended to apply. The acts covered in the present draft have normally been regarded as crimes in domestic legislation, which is why they are so labelled in article 2.

(11) The provisions of paragraph 1 are intended to provide for the exercise of jurisdiction in a broad sense, that is as regards both substantive and procedural criminal law. In order to eliminate any possible doubts on the point, the Commission decided to include in *paragraph 3* a specific requirement, such as is found in The Hague and the Montreal Conventions and in the Rome draft, concerning the establishment of jurisdiction.

(12) *Paragraph 2* of article 2 provides that the crimes set forth in paragraph 1 be made "crimes punishable by severe penalties which take into account the aggravated nature of the offence". Some members of the Commission suggested that the reference to aggravated nature of the offence should be eliminated as unwarranted and unnecessary. In their view the nature of the crime was the essential determinant of the penalty to be imposed; to require that the same act be punished by a more severe penalty if an internationally protected person rather than an ordinary citizen were the victim would be an invidious distinction. Most members of the Commission considered that the reference to the aggravated nature of the offence was warranted. It was pointed out that the official capacity of the victim was readily recognized as affecting the gravity of the offence. The murder of a policeman in the performance of his duties was cited as a common example. Furthermore, severe penalties are likewise required in article 2 of The Hague Convention and article 3 of the Montreal Convention for the offences covered by those two instruments. The last phrase of paragraph 2 of the present article has been included to stress the idea that violent attacks directed against those persons who constitute the mans for carrying on the work of the world community constitute a grave threat to the channels of communication upon which States depend for the maintenance of international peace and order. Consequently such attacks should be deterred by the imposition of penalties which take into account the importance of the world interests that are impaired by those attacks.

[470] For instance, article 36, paragraph 1, of the 1961 Single Convention on Narcotic Drugs provides that:

"Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty." (United Nations, *Treaty Series*, vol. 520, p. 252).

Article 3

States Party shall co-operate in the prevention of the crimes set forth in article 2 by:

(*a*) Taking measures to prevent the preparation in their respective territories for the commission of those crimes either in their own or in other territories;

(*b*) Exchanging information and co-ordinating the taking of administrative measures to prevent the commission of those crimes.

Commentary

(1) The provisions of article 3 are intended to result in more effective measures for the prevention of the crimes set forth in article 2, in particular through international co-operation. This is to be achieved by establishing for States party the double obligation to take measures to suppress the preparation in their territories of those crimes, irrespective of where they are to be committed, and to exchange information and co-ordinate the taking of those administrative measures which could lead to preventing such crimes from being carried out.

(2) Article 3 substantially reproduces the provisions of article 8, sub-paragraphs (*a*) and (*b*), of the OAS Convention and article 9, sub-paragraphs (*a*) and (*b*), of the Uruguay working paper. Sub-paragraph (*a*) of the present article embodies the well established principle of international law that every State must ensure that its territory is not used for the preparation of crimes to be committed in other States.[471] In addition, it expressly refers to the obligation of every State party to take preventive measures when the crimes in preparation are intended to be committed in its own territory, which constitutes compliance both with the principles of international law and the more special requirements to ensure inviolability and protection as set forth, for example, in the Vienna Conventions on diplomatic relations and on consular relations.

(3) As in other provisions of the present draft, the article limits itself to stating the general principle and does not go into the manner of implementation of the obligations imposed. Both the nature and the extent of the measures provided for in sub-paragraph (*a*), as well as of the information and administrative measures provided for in sub-paragraph (*b*), should be determined by States on the basis of their particular experience and requirements. They would, of course, include both police and judicial action as the varying circumstances might demand. In this connexion the Commission discussed the duty of host and receiving States to ensure that adequate steps were taken to guard internationally protected persons and premises. What constituted adequate steps obviously varied considerably from place to place. The type of protection required in a city with a high rate of violent crimes or with existing terrorist groups would be much more extensive than that in a city where these elements were absent. In the former case the host or receiving State might have to devote considerable resources to preventive measures but it is its clear duty to take all necessary protective measures.

Article 4

The State Party in which one or more of the crimes set forth in article 2 have been committed shall, if it has reason to believe an alleged offender has fled from its territory, communicate to all other States Party all the pertinent facts regarding the crime committed and all available information regarding the identity of the alleged offender.

Commentary

(1) The present article is the first of a series of provisions setting up the system of notifications provided for in the draft as the necessary means for effectively implementing the obligations established therein. There is no parallel obligation in The Hague, the Montreal or the OAS Conventions. The Commission considered that, in the circumstances envisaged in the article, the State party in whose territory the crime has been committed should have the obligation to communicate to all other States party all pertinents facts regarding the crime and all available information regarding the identity of the alleged offender. Full latitude is left to that State as to the manner in which the communication should be made since the appropriate means may vary from case to case.

(2) The article does not provide for any specific action to be taken by the "other States Party" upon receipt of the information. It is assumed that standard procedures with respect to wanted criminals will be put into effect. As these would vary not only from State to State but also in light of the circumstances of the individual case, a general rule regarding any specific obligations to act upon receipt of the information appeared undesirable.

Article 5

1. The State Party in whose territory the alleged offender is present shall take the appropriate measures under its internal law so as to ensure his presence for prosecution or extradition. Such measures shall be immediately notified to the State where the crime was committed, the State or States of which the alleged offender is a national, the State or States of which the internationally protected person concerned is a national and all interested States.

2. Any person regarding whom the measures referred to in paragraph 1 of this article are being taken shall be entitled to communicate immediately with the nearest appropriate representative of the State of which he is a national and to be visited by a representative of that State.

Commentary

(1) The provisions of article 5 concern the immediate action to be taken when the alleged offender is discovered on the territory of a State party following the commission of any of the crimes set forth in article 2. They must be considered in the light of the requirement stated in article 1, paragraph 2, that there be grounds to believe that the alleged offender has committed one or more of the crimes set forth in article 2. The article, while safeguarding the rights of the alleged offender, places on the State party in whose territory he is found the obligation to take the appropriate measures to prevent his escape pending that State's decision on whether he should be extradited or the case be submitted to its competent

[471] "The law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof" (United States v. Arjona, in United States of America, Supreme Court, *United States Reports*, vol. 120, October term, 1886 (New York, The Banks Law Publishing Co., 1911), p. 484).

authorities for the purpose of prosecution as provided for in article 6.

(2) Article 5 substantially reproduces the provisions of article 6 of The Hague and the Montreal Conventions. As in the latter articles, the second sentence of *paragraph 1* of article 5 specifically refers to those States which are particularly concerned, whether or not they may be parties to the instrument, to ensure that they shall be immediately notified of the measures taken. The purpose of the requirement is twofold. In the first place, it is desirable to notify States that are carrying on a search for the alleged offender that he has been found. In the second place it will permit any State with a special interest in the particular crime committed to determine if it wishes to request extradition and to commence the preparation of necessary documents and the collection of the required evidence.

(3) *Paragraph 2* of the article is designed to safeguard the rights of the alleged offender, thereby strengthening in this specific instance the general obligation established under article 8. The provision is similar to those found in many consular agreements.[472]

Article 6

The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.

Commentary

(1) Article 6 embodies the principle *aut dedere aut judicare*, which is basic to the whole draft. The same principle serves as the basis of article 5 of the OAS Convention, article 7 of The Hague and the Montreal Conventions, articles 4 of the Rome draft and article 5 of the Uruguay working paper. The article gives to the State party in the territory of which the alleged offender is present the option either to extradite him or to submit the case to its competent authorities for the purpose of prosecution. In other words, the State party in whose territory the alleged offender is present is required to carry out one of the two alternatives specified in the article, it being left to that State to decide which that alternative will be. It is, of course, possible that no request for extradition will be received, in which case the State where the alleged offender is found would be effectively deprived of one of its options and have no recourse save to submit the case to its authorities for prosecution. On the other hand, even though it has been requested to extradite, it may submit the case to its competent authorities for the purpose of prosecution, for whatever reasons it may see fit to act upon. Some members of the Commission had been concerned to ensure that there is no impairment of the principle of *non-refoulement*. The article as drafted makes this point clear. Thus, if the State where the alleged offender is found considers that he would not receive a fair trial or would be subjected to any type of abusive treatment in a State which has requested extradition, that request for extradition could, and should, be rejected.

(2) The obligation of the State party in whose territory the alleged offender is present, if it does not extradite him, is to submit the case to its competent authorities for the purpose of prosecution. Some members of the Commission considered that it should be made clear that the article is not a strait jacket for the authorities responsible for making decisions regarding prosecutions in criminal cases. As the article is drafted, it is clear that no obligation is created thereunder to punish or to conduct a trial. The obligation of the State where the alleged offender is present will have been fulfilled once it has submitted the case to its competent authorities, which will, in most States, be judicial in character, for the purpose of prosecution. It will be up to those authorities to decide whether to prosecute or not, subject to the normal requirement of treaty law that the decision be taken in good faith in the light of all the circumstances involved. The obligation of the State party in such case will be fulfilled under the article even if the decision which those authorities may take is not to commence criminal trial proceedings. To further emphasize the exact nature of the obligations created by this article, the Commission deemed it appropriate to add at the end the phrase "through proceedings in accordance with the laws of that State".

(3) Article 6 substantially reproduces the identical text of articles 7 of The Hague and the Montreal Conventions and article 4 of the Rome draft. The text of article 6 does not retain the phrase "whether or not the offence was committed in its territory", which would appear superfluous in view of the provision for extra-territorial jurisdiction contained in article 2, paragraph 1, of the present draft. On the other hand, the phrase "without undue delay" has been added in order that the actual implementation of the obligation may not be frustrated by unjustifiably allowing the passing of time; at the same time that phrase seeks to ensure that the alleged offender will not be kept in preventive custody beyond what is reasonable and fair, thus strengthening in that specific instance the general obligation laid down in article 8.

(4) The article does not include the second sentence found in the corresponding texts of the Montreal and The Hague Conventions and the Rome draft which reads as follows: "Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State". In the discussion of this article it was suggested that this second sentence should be maintained in its entirety. The point was made that the States present at The Hague and the Montreal conferences had, after substantial study, adopted this sentence in order to provide a necessary degree of tolerance to the officials charged with making the decision to prosecute or not to prosecute. Failure to include the sentence could make the draft article un-

[472] So far as consular law is concerned, the general rules on the communication and contact of consular officers with nationals of the sending State have been codified in article 36 of the Vienna Convention on Consular Relations.

acceptable to States that had sought this formula at The Hague and the Montreal conferences. As the obligation imposed on a State party is that of submitting the case to its competent authorities for the purpose of prosecution, the Commission considered it beyond the scope of the present draft to provide specific requirements as to the manner in which those authorities should exercise their functions under internal law. Furthermore, any such provision would appear redundant in view of the provisions of article 2 of the present draft, in particular paragraph 2 thereof. Finally, in so far as the above-mentioned sentence might be interpreted as aiming at guaranteeing the rights of the alleged offender, it would appear unnecessary in view of the provisions of article 8. The Commission considered, in general, that all desirable effect of that sentence in the Montreal and The Hague Conventions and in the Rome draft could be more appropriately achieved by adding the phrase "through proceedings in accordance with the laws of that State" at the end of the present draft article.

Article 7

1. To the extent that the crimes set forth in article 2 are not listed as extraditable offences in any extradition treaty existing between States Party they shall be deemed to have been included as such therein. States Party undertake to include those crimes as extraditable offences in every future extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may, if it decides to extradite, consider the present articles as the legal basis for extradition in respect of the crimes. Extradition shall be subject to the procedural provisions of the law of the requested State.

3. States Party which do not make extradition conditional on the existence of a treaty shall recognize the crimes as extraditable offences between themselves subject to the procedural provisions of the law of the requested State.

4. An extradition request from the State in which the crimes were committed shall have priority over other such requests if received by the State Party in whose territory the alleged offender has been found within six months after the communication required under paragraph 1 of article 5 has been made.

Commentary

(1) The provisions of article 7 are a corollary to those of article 6. In the discussion of the relationship of this article to article 6 concern was expressed that no doubt be allowed that the provisions of article 7 are intended to assist in implementing the option provided in article 6 and not to make the alternative of extradition controlling. The Commission considers that any such doubt has been eliminated in articles 6 and 7 as formulated.

(2) If the option recognized in article 6 is to be effective, either alternative envisaged therein should be capable of implementation when an alleged offender is found in the territory of a State party. It is desirable, therefore, to provide in the present draft the legal basis for extradition of alleged offenders in a variety of situations so that the State in which the alleged offender is present will be afforded a real rather than an illusory choice. This, article 7 seeks to do in detail. *Paragraph 1* will apply when the States concerned have an extradition treaty in effect between them which does not include the offence for which extradition is sought. *Paragraph 2* covers the situation of States party which make extradition conditional on the existence of an extradition treaty and no such treaty exists at the time when extradition is to be requested. *Paragraph 3* covers the situation between those States which do not make extradition conditional on the existence of a treaty. Similarly detailed provisions regarding the legal basis for extradition are to be found in the OAS, The Hague and the Montreal Conventions, in the Rome draft and in the Uruguay working paper.

(3) Article 7 substantially reproduces the text of articles 8 of The Hague and the Montreal Conventions and 5 of the Rome draft. The first sentence of article 8, paragraph 1, of the Montreal Convention reads as follows: "The offences shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States." The first sentence of paragraph 1 of this article is worded differently in order to emphasize the distinction between the present draft and The Hague and the Montreal Conventions. In those two Conventions the wording of article 8 was required as they deal with novel offences not found in most extradition treaties. However, the crimes described in article 2 of the present draft are for the most part serious common crimes under the internal law of practically all States and as such would normally be listed in existing extradition treaties under such categories as murder, kidnapping, bombing, breaking and entering and the like. Also, in the first sentence of paragraph 1 the word "listed" has been substituted for "included" in order to emphasize that the reference being made is to those specific provisions of an extradition treaty which describe the "extraditable offences". Those provisions may take the form of an actual list of the offences which are extraditable or may be couched in the form of a penalty test, that is, the offences for which extradition is envisaged are described by reference to the seriousness of the penalties prescribed.[473] Although the provisions of paragraph 2 of article 2 would seem in themselves sufficient to achieve, as regards extradition treaties which use the penalty test,

[473] Typical offences listed in extradition treaties include murder, murderous assault, mutilation, piracy, arson, rape, robberies, larcenies, forgeries, counterfeiting, embezzlement and kidnapping (see, for example, article III of the Treaty between the United States of America and the Republic of Mexico for the Extradition of Criminals, of 11 December 1861, in G.P. Sanger, *ed.*, *The Statutes at Large, Treaties and Proclamations, of the United States of America*, vol. XII (Boston, Little, Brown, 1865), pp. 1200-1201). For an example of a treaty provision describing offences by reference to the seriousness of the penalties prescribed, see article 1 *b* of the Convention on Extradition adopted by the Seventh International Conference of American States signed at Montevideo on 26 December 1933 (League of Nations, *Treaty Series*, vol. CLXV, p. 45). See also article 2 of the draft convention on extradition prepared by the Research in International Law of the Harvard Law School (*Supplement to the American Journal of International Law*, Washington D.C. (January and April 1935), vol. 29, Nos. 1 and 2, p. 21).

the purposes of paragraph 1 of article 7, the Commission, in order to leave no doubt on the point, deemed it necessary to stress that the paragraph is intended to cover all extradition treaties, irrespective of the manner in which the extraditable offences may be described therein.

(4) In the first sentence of paragraph 2 the phrase "if it decides to extradite" has been included in substitution of the phrase "at its option", found in the Montreal and The Hague Conventions and the Rome draft, in order to further clarify the relationship between the provisions of article 7 and those of article 6. The use of the latter phrase might create a false impression as to the priority of the alternatives open to the requested State. Under article 6 that State may, at its option, decide to extradite or to submit the case to its competent authorities for the purpose of prosecution. If it chooses to do the first, it is authorized, in the circumstances envisaged in paragraph 2 of article 7, to consider the present draft as the legal basis for the implementation of its choice in the particular case.

(5) Both in paragraphs 2 and 3 of article 7 the phrase "procedural provisions" has been substituted for the phrase in the Montreal and The Hague Conventions and the Rome draft—"other conditions provided"—in order to make clear that what is concerned is the effective implementation of the decision to extradite made by the requested State.

(6) *Paragraph 4* of article 7 is a new provision included to cover the case of conflicting requests for extradition. Among such requests as may be received by the State party in whose territory the alleged offender is present, priority is to be given to the request from the State in which the crimes were committed. In so providing, paragraph 4 is simply reaffirming the generally acknowledged primacy of the principle of territoriality in matters of jurisdiction. The system of priority thus established operates only within a six-month period following the making of the communication required under paragraph 1 of article 5. That period of time was deemed sufficient not only as a means of inducing the territorial State to submit promptly its request for extradition but also to allow for the procedural requirements connected with such a request to be fulfilled in the normal manner. In this respect the Commission deems it necessary to stress that the time limit thus fixed in no way prejudges the freedom of choice recognized for States party under article 6. If in the exercise of the option granted by that article a State party has within the six-month period already submitted the case to its competent authorities for the purpose of prosecution, the fact of its being seized with a request for extradition from the State where the crime was committed before the expiry of such period does not affect the course of the proceedings thus instituted. There would, however, be no obstacle to complying with this or any other request for extradition while terminating its own action in so far as the draft articles are concerned.

(7) Article 7 does not include a provision similar to that of paragraph 4 of the corresponding articles in The Hague and the Montreal Conventions and the Rome draft, in view of the provisions of article 2 concerning extra-territorial jurisdiction.

Article 8

Any person regarding whom proceedings are being carried out in connexion with any of the crimes set forth in article 2 shall be guaranteed fair treatment at all stages of the proceedings.

Commentary

Article 8, which finds inspiration in articles 4 and 8 (*c*) of the OAS Convention and 4 and 9 (*c*) of the Uruguay working paper, is intended to safeguard the rights of the alleged offender from the moment he is found and measures are taken to ensure his presence until a final decision is taken on the case. The expression "fair treatment" was preferred, because of its generality, to more usual expressions such as "due process", "fair hearing" or "fair trial" which might be interpreted in a narrow technical sense. The expression "fair treatment" is intended to incorporate all the guarantees generally recognized to a detained or accused person. An example of such guarantees is found in article 14 of the International Covenant on Civil and Political Rights.[474] As has been noted in the commentaries on certain other articles, specific protections for the alleged offender have been provided for when such action appeared desirable.

Article 9

The statutory limitation as to the time within which prosecution may be instituted for the crimes set forth in article 2 shall be, in each State Party, that fixed for the most serious crimes under its internal law.

Commentary

(1) This article was the subject of considerable discussion in the Commission. Some members considered that, in view of the effect of the crimes concerned upon the maintenance of international relations and the conspiratorial content of many of such crimes, the draft articles should provide that there be no limitation upon the time within which prosecution could be brought for these offences. Other members opposed any reference to the problem in the draft articles. In their view the basic purposes of prescriptive periods with respect to crimes apply with respect to the crimes dealt with in the draft articles. These purposes include the protection of innocent persons against the filing of charges after passage of so much time that evidence cannot be obtained to present a defence. Article 9 as adopted by the Commission repre-

[474] For the text of the Covenant, see General Assembly resolution 2200 A (XXI), annex. Article 14 of the Covenant states, *inter alia*, in its paragraph 1, that

> "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

Paragraphs 2 to 7 of that article set forth in detail a certain number of mimimum guarantees, particularly in connexion with the determination of a criminal charge.

sents a compromise between these points of view. A number of members, however, expressed doubts as to the desirability of the compromise.

(2) The provisions of the article are intended to prevent the frustration of the objectives of the draft by the operation of the statutes of limitation regarding the categories of crimes specified in article 2, in particular where the time-limits for prescription are relatively short. This explains the description in the article of the applicable statutory limitations by reference to the seriousness of the crimes. Under internal law the seriousness of a crime, which can be measured in terms of the gravity of the penalty ascribed to it, is normally in direct relationship to the length of the time-limit fixed for prescription. The provisions of article 9 are, therefore, consequential upon those of article 2, paragraph 2, of this draft.

(3) Article 9 deals only with the statutory limitation as to the time within which prosecution may be instituted. It does not refer to prescription as regards punishment. This distinction is a reflection of the nature of one of the two alternatives open to States party under article 6, which is not to punish but rather to submit the case to their competent authorities for the purpose of prosecution. Also, the provisions of this article are, obviously, not intended to apply to those States party whose systems of criminal law do not contain rules on prescription.

Article 10

1. States Party shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of the crimes set forth in article 2, including the supply of all evidence at their disposal necessary for the proceedings

2. The provisions of paragraph 1 of this article shall not affect obligations concerning mutual judicial assistance embodied in any other treaty.

Commentary

(1) Article 10 envisages co-operation between States party in connexion with criminal proceedings brought in respect of the crimes set forth in article 2 by providing for an obligation to afford one another the greatest measure of judicial assistance. Mutual assistance in judicial matters has been a question of constant concern to States and is the subject of numerous bilateral and multilateral treaties. The obligations arising out of any such treaties existing between States party to the present draft are fully preserved under this article.

(2) Article 10 substantially reproduces the provisions of article 10 of The Hague Convention, article 11 of the Montreal Convention and article 6 of the Rome draft. Provisions concerning mutual judicial assistance are also found in article 9, sub-paragraph *e*, of the Uruguay working paper. In *paragraph 1* of the present article the phrase "including the supply of all evidence at their disposal necessary for the proceedings" has been added in order to ensure that the article is not given a limited construction on the basis of the narrow technical meaning sometimes attributed to the expression "mutual judicial assistance". Clearly if the alleged offender is to be tried in a State other than that in which the crime was committed it will be necessary to make testimony available to the court hearing the case and in such form as the law of that State requires. In addition, part of the required evidence may be located in third States. Consequently the obligation is imposed upon all States party. Finally, the expression "assistance in criminal matters" as used in the analogous conventions has been replaced by "judicial assistance" in *paragraph 2* to eliminate any possible ambiguity.

Article 11

The final outcome of the legal proceedings regarding the alleged offender shall be communicated by the State Party where the proceedings are conducted to the Secretary-General of the United Nations, who shall transmit the information to the other States Party.

Commentary

This article completes the system of notifications established in the draft. It relates to the final outcome of the legal proceedings regarding the alleged offender. The notification of such outcome to the other States party is an effective means of assuring the protection of the interests of both these States and the individuals concerned. Provisions similar to those of article 11 are found in article 11 of The Hague Convention and article 13 of the Montreal Convention. Under the latter two articles, the Council of ICAO is made the final recipient of the notification in question. The present article 11, however, makes States party the final recipients, through the intermediary of the Secretary-General of the United Nations.

Article 12

ALTERNATIVE A

1. Any dispute between the Parties arising out of the application or interpretation of the present articles that is not settled through negotiation may be brought by any State party to the dispute before a conciliation Commission to be constituted in accordance with the provisions of this article by the giving of written notice to the other State or States party to the dispute and to the Secretary-General of the United Nations.

2. A conciliation commission will be composed of three members. One member shall be appointed by each party to the dispute. If there is more than one party on either side of the dispute they shall jointly appoint a member of the conciliation Commission. These two appointments shall be made within two months of the written notice referred to in paragraph 1. The third member, the Chairman, shall be chosen by the other two members.

3. If either side has failed to appoint its member within the time-limit referred to in paragraph 2, the Secretary-General shall appoint such member within a further period of two months. If no agreement is reached on the choice of

the Chairman within five months of the written notice referred to in paragraph 1, the Secretary-General shall within the further period of one month appoint as the Chairman a qualified jurist who is not a national of any State party to the dispute.

4. Any vacancy shall be filled in the same manner as the original appointment was made

5. The commission shall establish its own rules of procedure and shall reach its decisions and recommendations by a majority vote. It shall be competent to ask any organ that is authorized by or in accordance with the Charter of the United Nations to request an advisory opinion from the International Court of Justice to make such a request regarding the interpretation or application of the present articles.

6. If the commission is unable to obtain an agreement among the parties on a settlement of the dispute within six months of its initial meeting, it shall prepare as soon as possible a report of its proceedings and transmit it to the parties and to the depositary. The report shall include the commission's conclusions upon the facts and questions of law and the recommendations it has submitted to the parties in order to facilitate a settlement of the dispute The six months time-limit may be extended by decision of the commission.

7. This article is without prejudice to provisions concerning the settlement of disputes contained in international agreements in force between States.

ALTERNATIVE B

1. Any dispute between two or more Parties concerning the interpretation or application of the present articles which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each Party may at the time of signature or ratification of these articles or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other Parties shall not be bound by the preceding paragraph with respect to any Parties having made such a reservation.

3. Any Party having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the depositary governments.

Commentary

(1) Article 12 contains provisions regarding the settlement of disputes arising out of the application or interpretation of the articles. The article is presented in alternative formulations which provide, respectively, for the reference of the dispute to conciliation (*Alternative A*) or to an optional form of arbitration (*Alternative B*). Some members of the Commission expressed doubts as to the necessity for including provisions on disputes settlement in the draft articles as such disputes were unlikely to arise. When they did arise, their nature would be such as to make them unamenable to the application of settlement procedures. In general, however, the Commission considered that a variety of disputes could arise out of the draft articles and that it would be appropriate to suggest methods of settling them. In submitting alternative formulations, the Commission is seeking an expression of views from Governments regarding the actual means of settlement to be eventually embodied in that instrument. The Commission limited itself to suggesting a conciliation or an optional arbitration procedure since it concluded that they represent the largest measure of common ground that would appear to exist at present among governments on the question of dispute settlement. The members of the Commission favouring the method of conciliation viewed it as the settlement procedure that would obtain the widest measure of acceptance under present conditions. The view was expressed that the optional arbitration proposal was merely a variant on the optional protocol method adopted in connexion with other conventions without great acceptance. Those members favouring the optional arbitration alternative considered conciliation inappropriate for the type of dispute that might arise. They also held the view that it was desirable to have procedures, even if optional, that provided finality.

(2) The Commission deemed it sufficient to reproduce in each alternative, with the necessary formal adapatations, texts which, although established within contexts different from that of the present draft, reflect the current approach to each of the means of settlement envisaged.

(3) *Alternative A* reproduces, with the requisite adaptations, article 82 of the draft articles on the representation of States in their relations with international organizations adopted by the Commission at its twenty-third session in 1971.[475] The settlement procedure laid down in that article took into account evidence of recent State practice including article 66 of the Vienna Convention on the Law of Treaties and the Annex thereto and the Claims Commission provided for in the Convention on International Liability for Damage Caused by Space Objects.[476] The observations set forth in paragraphs 8 to 11 and 13 of the commentary to article 82 of the Commission's 1971 draft apply, in general, to the provisions of Alternative A. As an example of the kind of textual adjustment that might be found necessary to make if Alternative A were to be finally adopted, it was suggested that, since officials of the United Nations are included among the internationally protected persons envisaged in article 1, the President of the International Court of Justice should be given subsidiary or exclusive competence to appoint a member of the conciliation commission in the circumstances provided for in *paragraph 3*, which presently attribute such competence to the Secretary-General of the United Nations.

(4) *Alternative B* reproduces the text of article 14 of the Montreal Convention. It limits itself to providing for recourse to compulsory arbitration but allowing to each

[475] *Official Records of the General Assembly, Twenty-sixth session, Supplement No. 10* (A/8410/Rev.1), pp. 57-59 (*Yearbook of the International Law Commission, 1971*, vol. II (Part One), document A/8410/Rev.1, chap. II, sect. D).

[476] General Assembly resolution 2777 (XXVI), annex.

Party the possibility to enter a reservation to that particular provision. The Commission believes that this text could give rise to certain difficulties. Among other problems, the phrase "organization of the arbitration" in *paragraph 1* raises the question whether "organization" includes the appointment of members or only agreement on how members are to be appointed. In its Advisory Opinion of 18 July 1950 on the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania [477] the International Court of Justice adopted the principle that the Court does not consider itself competent to supply a basic deficiency regarding the appointment of arbitrators contained in the agreement providing for arbitration.

[477] *I.C.J. Reports 1950*, pp. 221 *et seq.*

Chapter IV

PROGRESS OF WORK ON OTHER TOPICS

70. As already indicated,[478] the Commission was unable, owing to the lack of time, to discuss several topics on the agenda of the present session. However, the Special Rapporteurs on four of those topics made further progress in their work which is reflected in the reports they submitted to the Commission. These are briefly reviewed below.

A. Succession of State: succession in respect of matters other than treaties

71. A fifth report (A/CN.4/259) [479] on succession of States in respect of matters other than treaties was submitted at the present session by the Special Rapporteur, Mr. Mohammed Bedjaoui. It reviewed and completed Mr. Bedjaoui's third [480] and fourth [481] reports, submitted respectively at the Commission's twenty-second and twenty-third sessions. The fourth report, it will be recalled, contained a set of fifteen draft articles on succession to public property. The fifth report proposed revised versions of three of those articles, namely, article 1 (irregular acquisition of territory), article 5 (definition and determination of public property), and article 6 (property appertaining to sovereignty). It suggested that a provision should be included in the draft to deal with the dual problem of, on the one hand, transferability to State property and, on the other, the amenability of jurisdiction of other public property in relation to the juridical order of the successor State. It also completed the review of State practice contained in the commentary appearing in the third report on the provision relating to archives and public libraries (article 7, renumbered 14 in the fourth report).

B. State responsibility

72. Mr. Roberto Ago, the Special Rapporteur, submitted at this session a fourth report, (A/CN.4/264),[482] designed to continue and complete the consideration of that part of the topic which relates to the conditions for attribution to the State of an act that may constitute a source of an international responsibility. The report dealt first with the particularly complex problem of attribution to the State of acts or omissions on the part of organs acting *ultra vires* or contrary to the provisions of municipal law applicable to them. It them took up the question whether acts or omissions on the part of individuals acting as such could be attributed to the State as a subject of international law; and, more generally, whether and in what sense the existence of an internationally wrongful act might be envisaged in the event of certain conduct on the part of individuals. Lastly, the report considered whether acts or omissions on the part of persons acting on the territory of a State on behalf of another subject of international law could be attributed to that State or whether the conduct of such persons should be ascribed only to the other subject in question. Also in this connexion, the report examined whether and in what sense the existence of an internationally wrongful act of the State might be envisaged in the event of certain conduct on the part of organs of another subject of international law.

73. At its twenty-fifth session, at which it proposes to begin a detailed study of the topic of international responsibility, the Commission will thus have before it two extensive reports covering a substantial part of the topic.

C. The most-favoured-nation clause

74. A third report on the most-favoured-nation clause (A/CN.4/257 and Add. 1) [483] was submitted at the present session by the Special Rapporteur, Mr. Endre Ustor. The report contained a set of draft articles on the topic with commentaries. The articles defined the terms used in the draft, in particular the terms "most-favoured-nation clause" and "most-favoured-nation treatment". The commentary pointed out that the undertaking to accord most-favoured-nation treatment was a constitutive element of any most-favoured-nation clause. The report recalled the rule that most-favoured-nation treatment can be claimed solely on the basis of a treaty provision. It

[478] See para. 9 above.

[479] To be printed in *Yearbook of the International Law Commission, 1972*, vol. II.

[480] *Ibid., 1970*, vol. II, p. 131, document A/CN.4/226.

[481] *Ibid., 1971*, vol. II (Part One), document A/CN.4/247 and Add.1.

[482] To be printed in *ibid., 1972*, vol. II.

[483] *Idem.*

pointed out that the right of the beneficiary State to claim the advantages accorded by the granting State to a third State arise from a most-favoured-nation clause. In other words, the legal bond between the granting State and the beneficiary State originates in the treaty containing such a clause and not in the collateral treaty concluded between the granting State and the third State.

75. At the suggestion of the Special Rapporteur, the Commission requested the Secretariat to prepare a study on the most-favoured-nation clauses included in the treaties published in the United Nations *Treaty Series*. The study should survey the fields of application of the clauses in question, examine their relation to national treatment clauses, the exceptions provided for in treaties, and the practice concerning succession of States in respect of most-favoured-nation clauses.

D. The question of treaties concluded between States and international organizations or between two or more international organizations

76. In pursuance of the decision set out in sub-paragraph 118 (*b*) of the Commission's report on the work of its twenty-third session,[484] Mr. Paul Reuter, Special Rapporteur on the topic, addressed through the Secretary-General a questionnaire to the principal international organizations in order to elicit information on their practice in the matter. At the present session he submitted to the Commission a first report (A/CN.4/258) [485] which was also communicated to these organizations. The report contained a historical survey of the discussion of the topic in the Commission during its consideration of the law of treaties from 1950 to 1966 and in the United Nations Conference on the Law of Treaties which met in Vienna in 1968 and 1969. In the light of that survey the report made a preliminary examination of several essential problems such as the form in which international organizations express their consent to be bound by a treaty, their capacity to conclude treaties, the question of representation, the effect of treaties concluded by international organizations and the meaning of the reservation concerning the "rules of the organization" set out in article 5 of the Vienna Convention on the Law of Treaties. As soon as he receives the replies of the organizations concerned to the questionnaire addressed to them, the Special Rapporteur intends to prepare a further report which will enable the Commission to hold a preliminary discussion on the topic in order to give him guidance for his future work.

[484] *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 10* (A/8410/Rev.1), p. 72 (*Yearbook of the International Law Commission, 1971*, vol. II (Part One), document A/8410/Rev.1, chap. IV).

[485] To be printed in *Yearbook of the International Law Commission, 1972*, vol. II.

Chapter V

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. The law of the non-navigational uses of international watercourses

77. In paragraph 5, section I, of resolution 2780 (XXVI), the General Assembly recommended that "the International Law Commission, in the light of its scheduled programme of work, decide upon the priority to be given to the topic of the law of the non-navigational uses of international watercourses". The Commission intends to take up the recommendation in general when it discusses its long-term programme of work. At the present session, the Commission reached the conclusion that the problem of pollution of international waterways was of both substantial urgency and complexity. Accordingly it requested the Secretariat to continue compiling the material relating to the topic with specific reference to the problems of the pollution of international watercourses.

B. Organization of future work

78. As already stated,[486] the Commission decided to transmit through the Secretary-General to Governments of Member States for their observations the provisional draft articles on succession of States in respect of treaties, adopted at the present session. In view of the time which will be required for the preparation of the observations of Governments and for their study by the Special Rapporteur, the Commission will be unable to consider at its twenty-fifth session the topic of succession of States in respect of treaties. The provisional agenda of that session will therefore include the remaining items on the Commission's current programme of work. These are: State responsibility; succession of States in respect of matters other than treaties; the most-favoured-nation clause; the question of treaties concluded between States and international organizations or between two or more international organizations; the review of the Commission's long-term programme of work, including the question of the priority to be given to the topic of the law of the non-navigational uses of international watercourses.

79. The Commission intends to consider at its twenty-fifth session, as matters of priority, the topics of State responsibility and of succession of States in respect of matters other than treaties. It also proposes to hold a brief discussion on the question of treaties concluded between States and international organizations or between

[486] See para. 23 above.

two or more international organizations, hopes to review its long-term programme of work, on the basis of the "Survey international law" prepared by the Secretary-General,[487] and to devote some time to the study of the most-favoured-nation clause.

C. Co-operation with other bodies

1. Asian-African Legal Consultative Committee

80. Mr. Senjin Tsuruoka submitted a report (A/CN.4/262)[488] on the thirteenth session of the Asian-African Legal Consultative Committee held at Lagos from 19 to 25 January 1972, which he had attended as an observer for the Commission.

81. The Asian-African Legal Consultative Committee was represented by its Secretary-General, Mr. Sen, who addressed the Commission at its 1194th meeting.

82. Mr. Sen began by saying that the States of Asia and Africa which had emerged as independent nations in recent years owed a particular debt of gratitude to the Commission for having adequately reflected their views in its work on the codification and progressive development of international law. The member countries of the Committee therefore attached the highest importance to maintaining close relations with the Commission and it was to be hoped that the fruitful co-operation which already existed between the two bodies would continue for the benefit not only of the African and Asian States but of the world community as a whole.

83. Mr. Sen then stressed that the Committee, whose membership had grown in the past few years from seven to twenty-two, had been glad to welcome at its last session observers not only from fifteen States of the region not members of the Committee but also from twelve other States including Australia, the United States of America, the USSR, the United Kingdom and a number of Latin American States.

84. The Committee, whose secretariat had provided member countries with compilations on such topics as the law of treaties and the law of the sea, had also extended its activities in the field of international trade law and close co-operation was being maintained with UNCITRAL. In furtherance of the United Nations programme for technical assistance in the wider dissemination of international law, it had introduced a training scheme for young officers from the foreign offices of Asian and African countries.

85. Turning to the topics on the Commission's agenda which were of particular interest to the Committee, Mr. Sen stated that he had recently received communications from African countries that were not yet members of the Committee requesting that the principles concerning rights and obligations of States arising out of State succession should be settled urgently. Since the International Law Commission had been considering the subject of State succession for a considerable time already, it had been felt that the Committee's work on the subject should only take a secondary place and that the best manner in which it could give its assistance was by preparing suggestions and comments on the basis of the Commission's drafts. The Committee was therefore greatly looking forward to studying the work of the Commission in the matter.

86. In connexion with the topic of State responsibility, the Committee had postponed consideration of State responsibility until the Commission had submitted its final recommendations on the subject.

87. Finally the Committee had been asked by two member Governments to study the questions of non-navigational uses of international watercourses and to make recommendations thereon taking into account the agricultural uses of waters and the peculiar problems of the region. Proposals by the Governments of Iraq and Pakistan were at present under consideration by a standing sub-committee as a preparatory step before consideration by the Committee itself. In that connexion, Mr. Sen expressed the hope that the Commission would be able to take up the subject soon and added that the Committee could, in his view, be of some assistance on a topic of such vital interest to Asia and Africa.

88. The Commission was informed that the fourteenth session of the Committee, to which it had a standing invitation to send an observer, would be held at a time and place to be notified later. The Commission requested its Chairman, Mr. Richard D. Kearney, to attend the session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

2. European Committee on Legal Co-operation

89. The European Committee on Legal Co-operation was represented by Mr. H. Golsong, Director of Legal Affairs of the Council of Europe, who addressed the Commission at its 1186th meeting.

90. He mentioned first, among the recent achievements of the Council of Europe in the legal field, the signature of the European Convention on State Immunity (May 1972). That convention was supplemented by a protocol setting up a regional system for the juridical settlement of disputes, under which private individuals would have access to a European court to be composed of the judges of the European Court of Human Rights.

91. With respect to the protection of fresh water against pollution, Mr. Golsong indicated that the work undertaken should lead to the adoption of a model convention containing provisions on the quality of the water in international watercourses which would impose on the contracting parties an obligation to observe a minimum purity standard and encourage them to adopt still stricter standards under individual agreements with each other. It had first been envisaged to introduce in the convention express provisions on inter-State liability for acts of pollution but the idea had been abandoned since such provisions might be superfluous in view of the general principles of international law on State responsibility.

[487] *Yearbook of the International Law Commission, 1971*, vol. II (Part Two), document A/CN.4/245.

[488] To be printed in *Yearbook of the International Law Commission, 1972*, vol. II.

Measures had been taken with a view to harmonizing national laws, both in the field of civil liability for damage resulting from the pollution of fresh water and in the field of criminal law. Another development to be noted in the matter of pollution was a proposal from the Netherlands Government that provisions be drawn up on civil liability for damage due to pollution by hydrocarbons from petroleum prospecting and extraction installations on the sea-bed.

92. Turning to international criminal law, Mr. Golsong drew attention to the signature of the European Convention on the Transfer of Proceedings in Criminal Matters (May 1972) which completed the system for penal co-operation set up under the Council of Europe.

93. In the field of human rights, Mr. Golsong referred to the first implementation by the European Court of Human Rights of article 50 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[489] Under that provision the European Court had power to afford just satisfaction to the injured party in case the violation of the Convention could not be remedied completely within the scope of the domestic law of the State concerned.

94. With respect to the question of relations between States and international organizations, he recalled that certain States members of the Council had expressed reservations on the provisional draft prepared by the International Law Commission, which in their view extended privileges and immunities to an excessive degree and did not pay enough attention to the functional criterion. Meanwhile the Commission had added in its final draft two articles, one providing for consultations between the sending State, the host State and the organization and the other for conciliation machinery. He thought that the insertion of these two provisions might favourably influence the final attitude of the member States of the Council of Europe towards the draft articles. Mr. Golsong also noted that specialized ministerial conferences, which would become more and more frequent, were not covered either by the draft articles on the representation of States in their relations with international organizations or by the Convention on Special missions.

95. Turning to the question of the protection of diplomats against acts of violence, Mr. Golsong stated that the subject was of particular concern to the States members of the Council of Europe. He added that some of them had at the outset questioned the desirability of drawing up a convention on the matter and had felt that it was essential to have the support of the main body of the international community. With regard to technical assistance to promote the teaching, study, dissemination and wider appreciation of international law—General Assembly resolution 2099 (XX)—Mr. Golsong indicated that the Council of Europe had undertaken to put the texts of the conventions drawn up within the Council on computer tape so as to provide a more rapid synchronization of legal positions and factual data. Pursuant to the same resolution a Nigerian lawyer had been invited to visit Strasbourg and valuable exchanges of views had taken place during his stay there. Lastly, Mr. Golsong drew attention to the publication of a collection containing the texts of conventions and agreements concluded under the auspices of the Council of Europe and of all statements and reservations relating thereto.

96. In conclusion, he stressed that the work of the European Committee was not duplicating that of the Commission. It was only where a universal codification of international law proved impossible that the Committee set out to draw up provisions applicable at the regional level to States which had established ties of international co-operation with each other.

97. The Commission was informed that the seventeenth session of the Committee, to which it had a standing invitation to send an observer, would be held at Strasbourg, France, in November 1972. The Commission requested its Chairman, Mr. Richard D. Kearney, to attend the session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

3. Inter-American Juridical Committee

98. Mr. José Sette Câmara attended the last session of the Inter-American Juridical Committee held at Rio de Janeiro, Brazil, in January/February 1972 as an observer for the Commission; he made a statement before the Committee.

99. The Inter-American Juridical Committee was represented by Mr. Molina-Orantes who addressed the Commission at its 1175th meeting.

100. He stated that in the course of the two regular sessions which it had held during the past year, the Committee had, at the request of OAS, analysed and evaluated a number of multilateral treaties which were in force between member States. With respect to various agreements referred to in General Assembly resolution 2021 (XX), the Committee had expressed its opinion as to the approach which should be taken to each of them by the American States. With regard to a number of inter-American treaties primarily of juridical interest or concerning educational, scientific and cultural affairs, the Committee had, after evaluation, come to the conclusion that while a number of them should be more widely acceded to, some were not accepted by OAS countries, others had been superseded by subsequent treaties of world-wide scope—a case in point being the Convention on Treaties (Havana, 1928) [490]—and still others should be brought up to date.

101. The Committee had also studied the topic of conflicts of treaties, particularly with reference to the constituent instruments of international organizations both regional and sub-regional. It had concluded that the provisions on conflicts of treaties contained in the Vienna Convention on the Law of Treaties were not only adequate and correct but also applicable in cases where the

[489] United Nations, *Yearbook of Human Rights for 1950* (United Nations publication, Sales No. 1952. XIV.1), pp. 424-425.

[490] J. B. Scott, ed., *The International Conferences of American States, 1889-1928* (New York, Oxford University Press, 1931), p. 416.

constituent instruments of regional organizations were amended, unless they presented problems of a political nature in which case OAS should lay down the relevant rules for their amendment.

102. Another topic which the Committee had examined was the question of legal means for the protection and preservation of the historic and artistic heritage of the American countries. The Committee had reached the conclusion that it was necessary to bring up to date the inter-American conventions dealing with the protection of that heritage, particularly in order to establish an effective system of international co-operation which might help to prevent the growing illicit traffic in archaeological, historical and artistic objects.

103. The Committee had also, at the request of the General Assembly of OAS, studied those treaties and conventions which constituted the inter-American system of peace and security with a view to strengthening the system. Mr. Molina-Orantes recalled in that respect that in 1948, the various pacific procedures for solving disputes—investigation, conciliation, good offices and mediation, and progressive arbitration—which had been heretofore regulated in separate conventions had been combined in a single document, the American Treaty on Pacific Settlement,[491] generally known as the Pact of Bogotá. In addition to those methods of settlement, the States signatories had accepted the obligation to resort to the International Court of Justice for the solution of disputes of a legal character and in certain cases to arbitration. The Committee had reached the conclusion that the Pact of Bogotá was a suitable juridical document for the purpose of consolidating and perfecting the inter-American system of peace and security and that it was more practical to recommend its ratification by States which had not yet done so than to embark on the long road leading to the conclusion of a new treaty. Mr. Molina-Orantes added that some members had expressed reservations with regard to article 20 of the Charter of OAS,[492] which had been signed at the same time as the Pact of Bogotá; in their opinion that article might be interpreted as restricting the right of an American State to resort directly to the organs of the United Nations for the solution of disputes, without first applying to the organs of the regional system.

104. Turning to another topic, Mr. Molina-Orantes indicated that the Committee had examined the question of the law of the sea with a view to combining in one document the common principles upheld by the majority of American States with regard to the most important aspects of international maritime law and thus contributing to the work of codification of that topic which was being prepared on a world-wide scale by the United Nations. An analysis of the legislation of the American States, as well as of various regional declarations and agreements, had revealed new trends in the law of the sea, especially with regard to the delimitation of zones of exclusive jurisdiction. The claim for exclusive jurisdiction was based mainly on the need to exploit the natural resources of the adjacent waters, which were considered of vital importance for the coastal population. Regional principles of that kind had found their expression in the Declarations of Montevideo [493] and Lima [494] of 1970, which had proclaimed the right of coastal States to establish zones in which they would exercise their sovereignty or maritime jurisdiction without affecting the freedom of international communications.

105. Lastly the Committee had approved a draft convention on the Latin American traveller's cheque. It had also made a study of the juridical status of so-called "foreign guerrillas" in the territory of States and had started a discussion on the topic of the treatment of foreign investments.

106. The Commission was informed that the next session of the Committee, to which it had standing invitation to send an observer, would be held at Rio de Janeiro (Brazil) from 17 July to 26 August 1972. The Commission requested its Chairman, Mr. Richard D. Kearney, to attend the session or, if he was unable to do so, to appoint another member of the Commission for this purpose.

D. Date and place of the twenty-fifth session

107. The Commission decided to hold its next session at the United Nations Office at Geneva from 7 May to 13 July 1973.

E. Representation at the twenty-seventh session of the General Assembly

108. The Commission decided that it would be represented at the twenty-seventh session of the General Assembly by its Chairman, Mr. Richard D. Kearney.

F. Gilberto Amado Memorial Lecture

109. In accordance with the decision taken by the Commission at its twenty-third session,[495] and thanks to a generous grant by the Brazilian Government, the first Gilberto Amado Memorial Lecture was given in the Council Chamber of the Palais des Nations on 15 June 1972. The lecture was delivered by Judge Eduardo Jiménez de Aréchaga, who spoke on "The amendments to the rules of the International Court of Justice", and was attended by members of the Commission and its secretariat, participants in the eighth session of the International Law Seminar and distinguished jurists. Judge Manfred Lachs was also present. The lecture was followed by a dinner.

110. At a meeting held on 28 June 1972, the Gilberto Amado Memorial Lecture Advisory Committee, under the chairmanship of Mr. T. O. Elias, expressed the opinion that it was desirable to print the above-mentioned lecture, at least in English and in French, with a view to bringing it to the attention of the largest possible number of specialists in the field of international law. However, the number of copies to be made available would have to be determined later after taking into consideration the cost

[491] United Nations, *Treaty Series*, vol. 30, p. 55.

[492] *Ibid.*, vol. 119, p. 58.

[493] Document A/AC.138/34.

[494] Document A/AC.138/28.

[495] See *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 10* (A/8410/Rev.1), pp. 78-79, paras. 164-169 (*Yearbook of the International Law Commission, 1971*, vol. II (Part One), document A/8410/Rev.1, paras. 164-169).

of preparing the document in both languages and the financial position of the Memorial Lecture Fund.

111. The Advisory Committee expressed its gratitude to the Brazilian Government for its gesture, which had made the Gilberto Amado Memorial Lecture possible, and hoped that the Government would find it possible to renew its financial assistance in order to keep alive the memory of this illustrious Brazilian jurist who for so many years was a member of the International Law Commission. The Commission endorsed the opinion of the Advisory Committee and asked Mr. Sette Câmara to convey its views to the Brazilian Government.

G. International Law Seminar

112. Pursuant to General Assembly resolution 2780 (XXVI) of 3 December 1971, the United Nations office at Geneva organized during the Commission's twenty-fourth session an eighth session of the International Law Seminar intended for advanced students of that discipline and young officials of government departments, mainly Ministries of Foreign Affairs, whose functions habitually include consideration of questions of international law.

113. Between 5 and 23 June 1972 the Seminar held 12 meetings devoted to lectures followed by discussion or practical work; the last meeting was set aside for the evaluation of the Seminar session by the participants.

114. Twenty-three students from 22 different countries participated in the Seminar; they also attended meetings of the Commission during that period, had access to the facilities of the Palais des Nations Library, and had the opportunity to attend two film shows held by the United Nations Information Service.

115. A judge of the International Court of Justice (Mr. Lachs) and seven members of the Commission (Mr. Bartoš, Mr. El-Erian, Mr. Reuter, Mr. Ruda, Mr. Ustor, Sir Humphrey Waldock and Mr. Yasseen) generously gave their services as lecturers. The lectures dealt with various subjects connected with the past and present work of the International Law Commission, namely special missions, the representation of States in their relations with international organizations, agreements concluded by international organizations, the outer limit of the continental shelf, the succession of States in respect of treaties and the most-favoured-nation clause. In addition two lectures were held on the International Court of Justice, one dealing with the functioning of the Court in general and the other with the review of the Court's role by the General Assembly. The participants in the Seminar also attended the Gilberto Amado Memorial Lecture given by Judge Jiménez de Aréchaga. In addition Mr. Valencia-Ospina, a member of the Secretariat, conducted a meeting devoted to practical work on the draft articles on the representation of States in their relations with international organizations; Mr. Raton, the Director of the Seminar, gave an introductory talk on the International Law Commission and conducted a meeting devoted to practical work on the subject of the Commission's programme of future work.

116. The Seminar was held without cost to the United Nations, which did not contribute to the travel or living expenses of the participants. As at previous sessions, the Governments of Denmark, the Federal Republic of Germany, Finland, Israel, the Netherlands, Norway, Sweden and Switzerland made scholarships available to participants from developing countries. Thirteen candidates were chosen to receive such scholarships, and two holders of UNITAR scholarships were also admitted to the Seminar. The grant of scholarships is making it possible to achieve a much better geographical distribution of participants and to bring from distant countries deserving candidates who would otherwise be prevented from attending the session solely by lack of funds. It is therefore to be hoped that the above-mentioned Governments will continue to be generous and even that, if possible, one or two additional scholarships will be granted, since the changes made in the parities of certain currencies in 1971 have reduced the real value of the scholarships. It should be noted that the names of those chosen to receive scholarships are made known to the donor Governments and that the recipients are informed of the source of their scholarships.

ANNEX

Observations of Member States on the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, transmitted to the International Law Commission in accordance with section III of General Assembly resolution 2780 (XXVI) *

CONTENTS

NOTE

For the text of the conventions referred to in the present observations, see the following sources:

Convention on Consular Relations (Vienna, 24 April 1963)	United Nations, *Treaty Series*, vol. 596, p. 261.
Convention on Diplomatic Relations (Vienna, 18 April 1961)	*Ibid.*, vol. 500, p. 95.
Convention to Prevent and Punish the Acts of Terrorism taking the Form of Crimes against Persons and Related Extortion that are of International Significance (Washington, 2 February 1971)	*OAS Official Records*, OEA/Ser.A/17 (Washington D.C., OAS General Secretariat, 1971), p. 6.
Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947)	United Nations, *Treaty Series*, vol. 33, p. 261.
Convention on the Privileges and Immunities of the United Nations (New York, 13 February 1946)	*Ibid.*, vol. 1, p. 15.
Convention on Special Missions (New York, 8 December 1969)	United Nations General Assembly resolution 2530 (XXIV), annex.
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971)	ICAO, document 8966, p. 1.
Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970)	ICAO, document 8920, p. 1.
Single Convention on Narcotic Drugs (New York, 30 March 1961)	United Nations, *Treaty Series*, vol. 520, p. 204.

* The observations contained in this annex were originally distributed as documents A/8710/Add.1 and A/8710/Add.2.

Argentina

[*Original text: Spanish*]
[*29 June 1972*]

1. It is a principle of conventional and customary international law that States are obliged to take effective steps to ensure the personal inviolability of diplomatic agents and other official foreign representatives. This obligation to treat them with due respect and to take all appropriate steps to prevent any attack on their persons, freedom or dignity has been expressly provided for in article 29 of the Convention on Diplomatic Relations, article 40 of the Convention on Consular Relations and article 29 of the Convention on Special Missions.

2. With regard to national legislation, it seems appropriate to refer to the relevant part of the following articles of the Argentinian Constitution:

> "*Article 100.* The Supreme Court and lower courts of the nation shall exercise jurisdiction and pronounce judgement in all cases involving matters governed by the Constitution and laws of the nation, except for the reservation made in article 67, paragraph 11 [...]; in cases concerning ambassadors, Ministers, and foreign consuls [...].
>
> "*Article 101.* In these cases the Supreme Court shall exercise appellate jurisdiction according to the rules and exceptions prescribed by the Congress; but in all matters concerning ambassadors, Ministers and foreign consuls and those in which any province is a party, the Court shall exercise original and exclusive jurisdiction."

The above constitutional provisions are quoted as proof of the guarantees accorded by the State of Argentina to foreign diplomats in matters to which they are "party" and without prejudice to the following.

3. It should be added that article 221 of the Penal Code, as amended by Act No. 17567, provides as follows:

> "A sentence of six months' to three years' rigorous imprisonment shall be imposed on:
>
> "(1) Any person who violates the immunities of the Head of a State or the representative of a foreign Power.
>
> "(2) Any person who offends the dignity or self-respect of any of the said persons while they are in Argentine territory."

Finally, it should be stated that, when the victim of a crime is a diplomatic or consular agent, the Supreme Court shall have original and exclusive jurisdiction to deal with such cases.[a]

[a] *Fallos de la Corte suprema*, vol. 272 *, p. 87; *ibid.*, vol. 277, p. 69; recently [19 July 1971], *ibid.*, vol. 280, p. 164.

Australia

[*Original text: English*]
[*25 April 1972*]

Existing conventions already require a large number of the nations of the world to afford protection to diplomats. It is questionable whether yet another set of draft articles would prove more acceptable to nations outside this group than existing conventions. By these are meant the Vienna Conventions on Diplomatic and Consular Relations which require States Party thereto to treat a diplomatic agent or consul "with due respect" and take "all appropriate steps to prevent any attack on his person, freedom or dignity".

By "other persons entitled to special protection under international law" presumably is meant persons associated with international organizations e.g. representatives attending meetings, officials etc. The draft articles on the representation of States in their relations with international organizations [a] deal with representatives attending meetings of international organizations in similar terms to diplomats. It would seem that in respect of protection this reflects such instruments as the United Nations and the Specialized Agencies Conventions on Privileges and Immunities. On the other hand we know of no instrument applicable to an international organization which requires States parties thereto to provide protection to officials. The reverse is usually the situation in that officials are protected from the activities of the State itself e.g. immunity from arrest.

In this situation there may not be much value in the International Law Commission's preparing yet another set of draft articles dealing with offences against diplomats, consuls, representatives attending meetings etc. What could be of value would be for the Commission to investigate and provide a guide as to how States might implement the requirements of the Conventions. The Commission could examine the various ways in which States have implemented these requirements and produce a code of desirable practice. There would seem to be nothing in this proposal contrary to the Commission's function of encouraging "the progressive development of international law and its codification".

As to protection of "other persons entitled to special protection under international law" not covered by existing or proposed conventions already drafted, the extent of the problem—if any—is not clear. Perhaps this is something further that the United Nations itself could investigate. It would seem that in the normal situation such people would not be the focus of political activists as are the representatives of States. In the abnormal situation the effectiveness of a convention is debatable in any case. This could of course change if the power and influence of international organizations continue to grow.

[a] See *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 10* (A/8410/Rev.1), pp. 8 *et seq.* (*Yearbook of the International Law Commission, 1971*, vol. II (Part One), document A/8410/Rev.1, chap. II, D).

Belgium

[*Original text: French*]
[*2 June 1972*]

The observations made below are of a preliminary nature and relate mainly to public and private international law. Belgium intends to make more extensive comments at a later stage of the preparation of the draft convention, particularly with reference to international penal law.

I. General observations

A. *Significance of the convention*

1. The convention should be drawn up in such a way as to secure the widest possible agreement.

2. The aim is to ensure the safety of persons who are threatened with, or are victims of, kidnapping. Its deterrent effect should be of capital importance.

B. *Responsibility of the receiving State*

3. The point of departure should be the obligation of the receiving State to ensure appropriate protection for diplomats accredited to it. It would then be possible to take the position that the receiving State would be presumed to be in fault whenever it failed to meet a request by a diplomat for reasonable protection. The protective measures incumbent upon the receiving State should therefore be specified in the convention.

4. The basis of protection resides in the special legal status of diplomats and, secondarily, of the members of their families, as laid down in the Vienna Convention on Diplomatic Relations in 1961.

C. *Judicial measures*

5. Effective judicial co-operation must be established between States as soon as an attempt has been made against a diplomat. It should, in particular, include the duty of the Government of the receiving State to provide the Government of the sending State with all the information available to it.

6. One of the purposes of the draft convention should be to qualify certain offences affecting international relations as international crimes, so that the perpetrators can be tried by the competent authorities of any State on whose territory they are found, unless extradition proceedings have been started against them.

D. *Reparation for damages*

7. Reparation for offences which engage the responsibility of receiving States with respect to the resultant damages would appear to be of particular importance, since this responsibility is not at present reflected in any legal obligation.

It would be desirable to require the Government of the State in whose territory the crime was committed to pay compensation to the victim or to the victim's family.

II. Specific observations

The draft articles submitted by the United States of America (A/CN.4/2.182) [a] call for the following observations:

Article 1, paragraph 2

Subparagraph (*a*) would have the effect of creating a lacuna;

Subparagraph (*b*) is concerned with rather unlikely cases.

The two subparagraphs remove the obligations of third States, which would no longer be bound to extradite the presumed perpetrators of the offence, although they are likely to seek refuge in the territory of such States.

Article 3, paragraphs 2 and 4

The drafting of paragraph 2 and of paragraph 4 might create certain difficulties. A State cannot be bound by a convention which it has not signed.

The drafting of subparagraphs (*a*), (*b*) and (*c*) should be amended and based on the wording of subparagraph (*g*). Paragraph 4 could thus be deleted.

Articles 4, 5, 6 and 7

Logically, article 7 should be the third paragraph of article 4, which should become article 6.

Instead of referring to "severe penalties" (article 7), minimum penalties should be fixed.

Article 6 should be article 4.

Article 9, paragraph 2

Care should be taken not to give the perpetrators of the crimes in question special privileges by comparison with the normal system of remand in custody.

[a] To be printed in *Yearbook of the International Law Commission, 1972*, vol. II.

Brazil

[*Original text: English*]
[*15 March 1972*]

The issue of offences or crimes committed against persons with the right to special protection, such as diplomatic or consular representatives, is only one aspect of a wider question, i.e., international treatment of all offences or crimes committed by terrorists. With reference to the adoption of an adequate judicial remedy to be applied in the struggle against terrorism, the Brazilian Government has stressed the need for multilateral co-operation in the prevention, sanction and repression of acts of terrorism, since it is an undercover activity, organized on a world-wide basis, in order to undermine the structure of States, violating the most legitimate rights of man. In the forum of OAS Brazil defended the point of view that terrorist acts, kidnappings and corresponding demands for ransom should be categorized as grave common crimes against humanity and accordingly stressed the need for international regulations defining such crimes, especially for purposes of extradition. The perpetrators of acts of terrorism should be denied the right of asylum, which, however, must be maintained intact as far as its basic principles are concerned, particularly as to the faculty of the authority offering asylum to define the nature of the crime which gave rise to the request for asylum. This position is intended solely to prevent the institution of asylum from being distorted in order to serve in erroneous application as protection for common criminals.

During the third extraordinary session of the General Assembly of OAS (January 1971), Brazil favoured a broad draft convention covering the prevention of terrorism as a whole, since the approval of a limited convention, i.e., one dealing only with cases involving the kidnapping of diplomats, consuls and other persons with the right to special protection, would be of little use in achieving the purposes it is intended to serve. The persons whom such a restricted convention would cover already enjoy sufficient international protection in the field of law.

Canada

[*Original text: French*]
[*25 April 1972*]

Security and the absence of coercion are the two essential elements in inter-State and international relations. It is for this reason that one of the oldest institutions of international law is the inviolability of ambassadors and their staff, an inviolability which imposes on the receiving State the obligation to protect them from any attack against their person, freedom or dignity. This rule of inviolability is still as essential today as ever for the proper conduct of international relations. The attacks of a new kind against diplomatic and consular inviolability which we have been witnessing in recent years must be countered in an appropriate way. It is the Canadian Government's opinion that an international convention to ensure the inviolability traditionally accorded by international law to those professionally engaged in international relations is highly desirable.

The Vienna Conventions on Diplomatic Relations (1961) and on Consular Relations (1963) have already affirmed and codified the principle of inviolability. The convention now under consideration should contain measures for prevention and punishment calculated to deter from their purpose any person or group of persons who may be tempted to use representatives or agents of foreign States or international organizations as instruments for political pressure against a government or for publicity on the international scene. If its work is to be useful, the International Law Commission should embody in its draft convention, above all, the elements most likely to have a deterrent effect with regard to crimes against foreign representatives. In the opinion of the Canadian Government, this deterrent effect is the most important feature of any convention intended to ensure the security of international relations through better protection of diplomats, consuls and other agents concerned with international relations.

The Canadian Government also hopes that the convention to be drafted will be relatively simple and limited in scope, for the following reason: such a convention will necessarily touch on certain areas of international law which are still ill-defined and which the International Law Commission will eventually have to study, such as political asylum, State responsibility and non-territorial criminal

jurisdiction. Any incursion going too far into these areas might give rise to controversies which would make the convention unacceptable to some countries. For the purpose of deterrence mentioned above, it may be preferable to aim at a convention of limited legal scope, but acceptable to a majority of States. The Canadian Government's main suggestion is, therefore, that a restrictive approach should be adopted to the classes of person covered and the crimes to which the convention will apply.

The Canadian Government has examined with great interest the Convention to Prevent and Punish the Acts of Terrorism, adopted by OAS (1971), and the draft conventions on the protection of diplomats and other persons submitted by Uruguay [a] and the United States of America (A/CN.4/2.182) [b] as well as the Rome Draft.[c] The International Law Commission will certainly find constructive elements in them which it can combine in a universal instrument. The Canadian Government, for its part, has drawn on the above-mentioned work to define its present position on the constituent elements of the future convention, as presented below.

The persons to be protected

The above-mentioned texts use the expression "persons entitled to special protection under international law" or some similar wording. The Rome draft lists a number of examples; the United States draft establishes a limitative list by reference to other international instruments. This procedure introduces a doubtful element into the convention. Since the meaning of the expression "persons entitled to special protection" is ill-defined in international law, contracting States would be undertaking to fulfil an obligation whose precise scope remains unknown. Even taken in its narrowest sense, the expression may cover a multitude of persons, and this considerably increases the burden of the obligation placed on contracting States, the scope of which is unduly extended. Experience in recent years shows that those chosen as instruments for political pressure are mainly persons having an obvious representative function and an important post. The essential purpose of the convention would be to provide protection against crimes committed because of the victims' official status; and if the convention is to be made applicable without too many abuses it must, as far as possible, avoid sanctioning crimes in which the special status of the victim did not enter into consideration. If the convention covers a large number of foreign nationals, its effect will be to sanction mainly crimes which are of no international significance except for the status of the victim, which is merely incidental. This result could be avoided by restricting the application of the convention to cases in which the presumed offender was aware of the victim's special status; but such a condition would make the convention harder to enforce by providing the criminal with an easy pretext for evading its application. The persons who should be protected are foreign dignitaries (Heads of State, Heads of Government and ministers of persons of ministerial rank); diplomats and consular officials and persons entitled to the same inviolability as diplomats or consular officials under the Vienna Conventions on Diplomatic Relations and on Consular Relations; high officials of important international organizations and representatives of States to those organizations. The persons covered by the Convention on Special Missions should not enjoy the protection of the future convention: owing to the frequency of their movements and the absence of publicity regarding them, they are far less exposed to dangers of the kind that threaten permanent missions. Moreover, the lack of enthusiasm with which this convention has been received so far testifies to the danger of a convention extending the frontiers of international law too quickly.

In most cases persons other than dignitaries and the representatives or agents of foreign States or international organizations will be sufficiently protected by virtue of the general responsibility of States for the protection of foreign nationals resident on their territory.

Crimes

Only crimes constituting a serious infringement of the inviolability of the persons protected by the proposed convention should be taken into consideration, such as murder, kidnapping, illegal restraint and serious assault. It would be preferable not to create crimes that are new to the domestic law of contracting States. The Canadian Government would, however, be in favour of a provision imposing heavier penalties for crimes committed against persons protected by the convention. It also suggests that, in view of the special circumstances and the international repercussions of these crimes, the contracting States should recognize that they cannot be classed as political crimes; they should consequently be regarded as common crimes which leave the way open for extradition. Nor should the perpetrators of these crimes enjoy political asylum. Without these restrictions the deterrent effect of the convention would be seriously impaired. The Canadian Government hopes that States which are attached to the institution of political asylum will accept this restriction in regard to crimes of violence that are universally censured. Crimes committed against foreign representatives should be distinguished from crimes committed directly against the security or the government of a State by one of its own nationals. Unless some reasonable limit is set to the institution of political asylum, foreign representatives will continue to be the innocent victims of internal political strife in receiving States for a long time to come. Unless it sets such a limit, the proposed convention will have little justification. Some States will perhaps maintain that no limit should be set to the concessions which the receiving State may agree to in negotiations in such circumstances, and will accept the principle that it should be given full latitude. But it is not necessary for the extraordinary measures which a State may be led to adopt in special circumstances to be expressly provided for in a convention. International law can tolerate some breaches of treaty obligations when the higher interests of national defence and security of the State are involved.

Extradition

If the future convention recognizes that crimes against diplomats are not to be regarded as political offences, the extradition of those responsible for them will become possible in several cases under already existing treaties. In order to increase the convention's deterrent effect, however, it is none the less necessary to include at least some provisions stressing the need for extradition in accordance with the national laws and treaties governing it. It should be considered whether it would be advisable to follow the provisions of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, which imposes on States the obligation to include the crimes mentioned in that Convention in their existing or future extradition treaties, or to adopt the less rigorous terms of the Single Convention on Narcotic Drugs, which states that it is desirable that the offences referred to be included as extradition crimes in any extradition treaty which has been or may hereafter be concluded between any of the parties.

The choice of terms imposing heavier or lighter obligations on the parties to the future convention depends on a balance to be established between two equally desirable objects: that of an effective convention and that of a convention acceptable to a large majority of States. Lastly, criminal prosecution in a State other than that in which the crime was committed should be provided for as an exception and only in cases in which there is no possibility of extradition, either because there is no applicable law or treaty or because the presumed criminal is a national of the State from which extradition is requested.

As to the reservation covering extradition for political crimes, it should be remembered that several extradition treaties already contain a clause on outrages which provides for extradition for certain particularly serious political crimes.

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[a] Document A/C.6/L.822.

[b] To be printed in *Yearbook of the International Law Commission, 1972*, vol. II.

[c] See p. 114 below.

Responsibility of the receiving State

The Vienna Conventions on Diplomatic Relations and on Consular Relations are silent on the method of determining the receiving State's responsibility for infringements of the inviolability of foreign representatives. Thus, the receiving States does not have to show that it has taken "appropriate steps" to protect foreign representatives; the nature and extent of the receiving State's obligations remain ill-defined; there is no provision for compensation for damages suffered. These are gaps which should be filled in order to avoid disputes liable to disturb harmonious relations between States or between States and international organizations.

Where a representative or agent of a foreign State or an international official has been the victim of a crime, the receiving State has a duty to restore the lost inviolability as soon as possible and to prosecute the guilty persons. The receiving State may then find itself in a dilemma: for instance, in a case of kidnapping, the most direct and surest means of restoring the victim's inviolability may be to yield to his kidnappers' demands, regardless of the consequences for the maintenance of order, the security of the State and other domestic interests. On the other hand, to refuse the demands may endanger the victim's physical integrity and even his life. International law does not impose any rule of conduct on the receiving State in such cases, and it is better not to do so. In such a situation the receiving State should remain free to act according to the circumstances and the conflicting interests at stake. It cannot be accepted that because of its duty to provide special protection a government must give way to every demand made by the kidnappers of a foreign representative. No social system could tolerate an obligation carried to that length.

It is, however, important, in the interests of international relations, to guarantee fair reparation in every case. The difficulties involved in determining responsibility are practically insuperable. It might therefore be advisable to consider a system of reparation based not on responsibility, but on the principles of hospitality and courtesy. Rather than engage in an awkward discussion or make an embarrassing admission of responsibility, the receiving State would undertake in all cases to compensate the sending State for any damage to property or injury to persons, in accordance with scales to be established. This obligation to make reparation would also have the advantage of inducing the receiving State to pay more attention to preventive measures. In this sphere of preventive measures and diligence in protecting foreign representatives, the receiving State must be allowed to exercise its discretion freely. Certainly the receiving State must exercise the necessary vigilance and take any special measures required to provide foreign representatives with adequate protection; but it should not be thought that in order to honour this obligation it must accede to requests for protection which it considers unfounded or spend sums on protection which place an undue burden on the national budget. Conversely, protective measures should not be imposed on foreign representatives against their wishes or unduly restrict their freedom of action.

Canadian law

There are at present no special provisions in Canadian criminal law concerning crimes against foreign representatives. Those responsible for kidnapping the United Kingdom Trade Commissioner at Montreal in 1970 were not prosecuted on criminal charges, because they obtained a safe conduct to go abroad when the Commissioner was released. It is still possible that they may be tried on charges of criminal abduction and illegal restraint if they fall into the hands of Canadian justice.

As regards extradition, a treaty recently concluded between Canada and the United States of America contains a provision (article 4) under which the State to which application is made can refuse extradition if the offence in question is of a political nature; it is, however, also expressly provided that this clause shall not apply to serious crimes against a person enjoying special protection under international law.[c] Such a provision has the advantage of allowing the States concerned to grant political asylum, while at the same time excluding from the class of political offences proper those indirect and specially grave political offences whose victims are innocent foreigners, and whose effects go far beyond the framework of domestic politics and threaten international relations as a whole.

Conclusion

The Canadian Government is in favour of an international convention designed to increase the stability of international relations by protecting the inviolability of foreign representatives. It wishes to assure the International Law Commission of its willingness to collaborate in this project. It suggests that in order to achieve the proposed purpose effectively, a convention of this sort should be limited in scope and contain mainly deterrent elements, such as severity of punishment and refusal of political asylum; it should contain as few innovations and obligations as possible, so that a large majority of States may quickly accede to it.

[c] Articles 3 and 4 of the treaty and list of offences reproduced in *International Legal Materials*, Washington (D.C.), vol. XI, No. 1 (January 1972), pp. 22 *et seq.*

Colombia

[*Original text: Spanish*]
[*7 February 1972*]

Colombia has not yet adhered to the Vienna Convention on Diplomatic Relations of 18 April 1961, or the Conventions on the privileges and immunities of the United Nations and the specialized agencies, adopted respectively by the General Assembly of the United Nations on 13 February 1946 and 21 November 1947, and, in their absence, Decree No. 3135 of 1956 has been applied.[a]

Article 10 [b] of this Decree specifies the essential prerogatives, which, according to practice and custom, have been granted to diplomatic personnel, namely:

1. Inviolability of the person;
2. Inviolability of the home and of correspondence;
3. Immunity from criminal jurisdiction; and
4. Immunity from civil jurisdiction with the following exceptions:
   (*a*) Whenever the diplomatic official renounces his immunity, as plaintiff;
   (*b*) In the case of actions *in rem*, including actions *in personam* relating to an item of real or personal property located within the national territory; and
   (*c*) In case of acts relating to a professional activity extraneous to the functions of the diplomatic official.

There are no established legal opinions or judicial precedents on the subject.

[a] Colombia, *Diario Oficial* (Bogotá), 5 Febraury 1957, XCIIIrd Year, No. 29275, p. 281.

[b] In addition to article 10 Legislative Decree 3135 contains the following articles which the Secretariat feels may be of relevance:

Article 2. The granting of prerogatives and exemptions of a diplomatic nature shall always be understood to be subject to the observance of a system of the strictest international reciprocity.

Article 3. If the reciprocity that is invoked in order to obtain any privilege not covered in this decree is not based on a convention, the Government may or may not grant it, according to whether it coincides with its interests. Legislative rather than *de facto* reciprocity may be required.

Article 4. The application of the system of international reciprocity pertains solely to the Ministry of Foreign Affairs which,

Foot-note[b] *(continued)*

through its Protocol Division, may broaden or restrict specific prerogatives, in those cases when the Government deems it necessary, and settle any question which may arise over the interpretation of provisions contained herein.

Article 5. Commitments entered into by the Republic under agreements on points identical or similar to those covered in this decree shall not be affected by the provisions contained herein, and, shall therefore continue in force for the term specified in each agreement. When an extension is under discussion or a new agreement is to be concluded, the provisions governing the matter must be applied.

Article 6. No official of the Colombian Foreign Service may demand in the country in which he resides greater privileges or immunities than those granted to diplomatic or consular agents accredited in Colombia.

Article 7. The granting of any kind of prerogatives, exemptions or immunities requires that the recipient shall meet the following conditions:

(*a*) He is a duly accredited official;

(*b*) He is a national of the State that appoints him and is paid by its Government;

(*c*) He does not engage in activities other than his official functions, for which he has not been accredited.

Article 8. The following classification is established for persons who under the preceding article may enjoy prerogatives, privileges and immunities:

(*a*) *Accredited diplomatic personnel*, including: Nuncio and Ambassador Extraordinary and Plenipotentiary; Internuncio, Envoy Extraordinary and Minister Plenipotentiary, Chargé d'Affaires by appointment, Chargé d'Affaires *ad interim*, Minister-Counsellor, Legal Adviser, Counsellor, First Secretary, Second Secretary, Third Secretary, Military, Naval, Air, Civil and Specialized Attachés.

(*b*) *Unaccredited diplomatic personnel*, including any of the above-mentioned officials in transit through the national territory or on a temporary visit to the Republic, without being accredited in Colombia.

(*c*) *Consular personnel*, including any of the following officials; Consuls General, Consuls of first and second class, Vice-Consuls and Consular Agents.

(*d*) *International technical personnel*, including non-Colombian officials belonging to international or technical assistance organizations assigned to Colombia or contracted by the National Government. For the granting of prerogatives the chief of a technical office or representative of an international organization shall have the same rank as the personnel enumerated in (*a*) above, and the others, that of (*e*) below.

(*e*) *Official personnel*, consisting of non-Colombian office employees in the official service of a diplomatic or consular mission paid by the State to which the mission belongs and engaged exclusively in its service.

(*f*) *Service personnel*, consisting of non-Colombian employees in the domestic service of any of the members of a diplomatic mission.

Article 9. Privileges and immunities are in general extended to the family of the holder, defined as the wife, unmarried daughters and sons under 21 years of age who reside with the official and who do not engage in private activities for profit.

Article 18. For reasons of courtesy to the occupants, and at the request of the chief of mission, a free police guard service may be assigned to the headquarters of each foreign diplomatic mission.

Cuba *

[*Original text: Spanish*]
[*22 August 1972*]

1. Far from considering this a question of urgency and importance, the Revolutionary Government of Cuba considers it unnecessary, self-defeating and impractical, for the following reasons:

(*a*) It would be superfluous to undertake the study of a new convention on diplomatic inviolability, since this question is amply covered by other international conventions, under which it is the host Government that is responsible for the proper protection of diplomats accredited to the country.

(*b*) A convention containing nothing more than repressive measures could not deal with or remove the economic, social and political causes which give rise to the type of violence that it is intended to eliminate.

(*c*) Taking the question from another angle, any convention that might be adopted would have the opposite effect to what is intended and would be quite useless. It would have the opposite effect because its repressive tenor would stimulate violence instead of repressing it; and it would be useless because few States would be in a position to ratify it, some because they do not wish to prejudice the institution of asylum, which they consider just and suitable, and others because they do not wish to diminish the internal jurisdiction of the State, since it is the State which is responsible for upholding the rule of law.

2. Furthermore, it is obvious that, once established authority begins to crack under the irresistable onslaught of a revolutionary violence, a new convention will be quite useless; it will be simply a deplorable attempt to gain the sanction of international law for policies of terror unleashed against the national liberation movements by tyrannical régimes that are alien to the people and are the lackeys of imperialism.

3. For the reasons set out above, we categorically deny the importance and urgency of this question, and we shall oppose the adoption of any kind of repressive convention that may be submitted to the General Assembly.

Czechoslovakia

[*Original text: English*]
[*25 April 1972*]

Having in mind the ever more frequent criminal acts committed against persons entitled to special protection under international law and infringing thus in a flagrant manner upon the inviolability of such persons, taking into consideration that such criminal acts prevent persons against which they are committed from discharging their functions and affect normal relations among States, having in mind the progressive development of international law and its codification in accordance with the Charter of the United Nations, the Czecholovak Socialist Republic considers it appropriate that the International Law Commission should deal with the question of protection and inviolability of diplomatic agents and other persons entitled to special protection under international law as specified in section III, paragraph 2 of resolution 2780 (XXVI) adopted by the United Nations General Assembly on 3 December 1971.

At the same time, it considers it appropriate that the International Law Commission itself should decide when it includes, within the possibilities, this complex of problems in its programme of work.

Denmark

[*Original text: English*]
[*18 April 1972*]

1. In is the opinion of the Danish Government that the obligations of States as to the protection of diplomats and others are adequately established in international law as codified in existing conventions, such as the 1961 and 1963 Conventions on Diplomatic and on Consular Relations.

2. For this reason, the present need seems to be not so much for further emphasis on this obligation as for covering the situation where the author of such crimes is apprehended in a third country.

* These comments were received after the closure of the Commission's twenty-fourth session.

In the Danish view there is a similarity of purpose in this respect with the purposes of the Conventions concluded in the Hague in 1970 and in Montreal in 1971 on seizure of aircraft and on unlawful acts against the safety of civil aviation, respectively.

3. Firstly, it would seem that there is the same "international element" in both types of cases. In the aviation conventions, the object of protection is the unimpaired communication between countries and peoples. In the present convention, the object is the communications and relations between governments.

4. Secondly, there seems to be the same need for the major elements contained in the aviation conventions, namely:

(*a*) The establishment of a system of international co-operation with a view to preventing or counteracting such crimes or to safeguarding the victims;

(*b*) The establishment of a set of legal rules which will ensure the punishment of the authors of the crime, either by way of extradition or through criminal proceedings in the State in which they are apprehended. In other words, rules which widen the possibility of effecting extradition and oblige a State to adopt rules for international jurisdiction in such matters;

(*c*) The establishment of a basis for international condemnation of such crimes and the creation of legal platform for moral (or political) pressure on other States or organizations which might be condoning the crimes.

5. In the light of the above considerations, representatives of a group of States (including Denmark) meeting in Rome in February 1971, elaborated a draft convention, generally referred to as "the Rome Draft", of which the English text is enclosed.[a] In the view of the Danish Government this draft, which closely follows the Hague and Montreal Conventions, will constitute a suitable basis for elaboration of a final draft convention, especially because the provisions therein regarding extradition, punishment and jurisdiction must be considered the maximum results obtainable by consensus among a majority of States. The following examples would serve to illustrate this:

(*a*) During the Hague Conference it was amply demonstrated that for various reasons a majority of States would not be able to accept provisions for mandatory extradition. The balanced system of extradition or punishment adopted by the Hague Conference and likewise accepted in Montreal should be considered as the optimum of what can be accomplished at an international conference.

(*b*) The question whether the political motive behind the crime should be disregarded and the act considered as a "common crime" was a most controversial one in The Hague. A solution was found by the words "without exception whatsoever" in article 7 of that Convention (and of the Montreal Convention),

(*c*) A provision that a State which makes extradition conditional on the existence of a treaty shall consider the convention as sufficient legal basis could not find acceptance. The actual wording (in article 8, paragraph 2) reads: "may at its option...".

6. The Hague Convention was adopted by 74 votes, with none against, and 2 abstentions. On the last day of the Conference it was signed by 50 States and has since been widely adhered to. In consequence hereof and of considerations such as those mentioned above, the Montreal Conference generally agreed to adopt without further discussion the rules on extradition, punishment and jurisdiction set out in the Hague Convention. It would seem, therefore, that if the Hagues rules were to be disregarded in the preparation of a new convention, this would tend to create unnecessary difficulties on issues to which a widely acceptable solution has already been found.

7. It has been said that the Hague Convention differs from a convention on the protection of diplomats in that in the case of hijacking it is inherent in the crime that the author moves out of the country where the crime is committed or initiated to some other country, whereas it is typical of crimes against diplomats that the authors stay within the territory. In the Danish opinion this is not a pertinent distinction, because the Hague Convention also covers the case of an author being apprehended later in a third country, i.e. a State which has had no formal connexion with the actual crime. Further, it should be borne in mind that the Montreal Convention typically covers exactly the situation where the authors will stay behind (but may at a later stage seek refuge in a third country).

8. Some States have particularly stressed that a convention should be formulated in a manner that would not impede a State in attempts at obtaining the release of the victim through negotiations with kidnappers or otherwise rather than securing the arrest of the kidnappers. It is the Danish opinion that, irrespective of the wording of a convention, a State would by virtue of the law of necessity be free to take such action. If, however, it were possible to include in the formulation of the convention text a satisfactory provision to that effect, the Danish Government would be ready to support it.

9. While, as stated above, the Danish Government finds the Rome draft a suitable basis for the drafting of a convention, some doubt is felt about the advisability of allowing for the coverage of persons under protection to be so wide as attempted in the draft.

WORKING PAPER

The States Parties to this Convention ("Rome draft")

Considering that acts of assault against persons of a certain status seriously jeopardize the safety of these persons and may disturb peaceful relations between States,

Considering that the occurrence of such acts is a matter of grave concern,

Mindful of their obligations according to international law to protect by all appropriate means foreign persons of a certain status present in their territories,

Considering the urgent need for co-operation among States to prevent such acts of assault and to punish the offenders wherever they may be present,

Have agreed as follows:

Article 1

This Convention applies, in the case of offences directed against persons who are nationals of a Contracting State or offences which have taken place in the territory of a Contracting State, to kidnapping, murder and other assaults against the life or physical integrity of those persons to whom the State has the duty, according to international law, to give special protection and in particular:

(*a*) Members of permanent or special diplomatic missions and members of consular posts;

(*b*) Civil agents of States on official mission;

(*c*) Staff members of international organizations in their official functions;

(*d*) Persons whose presence and activity abroad is justified by the accomplishment of a civil task defined by an international agreement for technical co-operation or assistance;

(*e*) Members of the families of the above-mentioned persons.

Article 2

Each Contracting State shall take all appropriate measures in order to prevent and punish the offences described in article 1.

Article 3

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offences described in article 1 not only when they are committed in its territory, but also when they are directed against a person who is a national of that Contracting State, irrespective of where the offences are committed.

[a] See "Working paper" below.

2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences in the case where the alleged offender is present in its territory and it does not extradite him pursuant to article 5 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 4

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offences were committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

Article 5

1. The offences described in article 1 shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States. Contracting States undertake to include the offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. The offences shall be treated, for the purpose of extradition between Contracting States, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with paragraph 1 of article 3.

Article 6

1. Contracting States shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of the offences described in article 1. The law of the State requested shall apply in all cases.

2. The provisions of paragraph 1 of this article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.

... (*final clauses*).

Ecuador

[*Original text: Spanish*]
[*5 May 1972*]

The Government of Ecuador, aware of the United Nations' interest in devising appropriate measures to prevent the kidnapping of diplomatic agents and to ensure adequate punishment of the guilty when such offences occur, considers that there is a need for an international convention on the subject as a first step towards the development of an international penal code which will one day have to be prepared in the permanent interests of universal justice.

France

[*Original text: French*]
[*2 May 1972*]

1. The French Government considers that it should first recall its reservations on the actual principle of the possible preparation of a new convention on the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law.

As the French delegation to the twenty-sixth session of the General Assembly pointed out during the debate in the Sixth Committee devoted to consideration of the report of the International Law Commission on the work of its twenty-third session, the protection of diplomatic missions and consular posts and members of their staff seems to be properly provided for in international law.[a] Such protection is primarily the responsibility of the receiving State or State of residence. Thus article 29 of the Convention on Diplomatic Relations provides that the person of a diplomatic agent is inviolable and that the receiving State "shall take all appropriate steps to prevent any attack on his person, freedom or dignity". Similar provisions concerning consular officers are contained in article 40 of the Convention on Consular Relations and it goes without saying that in this matter the Vienna Conventions are merely the expression of general international law, so that the obligations and responsibility of States are no different in the absence of binding treaty provisions.

Thus the legal obligations of States are well established, and the problem is that of their effective application. It seems advisable not to weaken the effect of existing rules by attempting to formulate new ones.

2. The French Government has noted that the drafts submitted so far for consideration by the International Law Commission (working paper prepared by Mr. Richard D. Kearney (A/CN.4/L.182);[b] working paper submitted by the delegation of Uruguay to the Sixth Committee [c]) relate more to international judicial co-operation than to diplomatic law.

In this connexion too, the French Government has serious doubts about the necessity and the advisability of a convention of this kind. For the problem is very different from that with which States are confronted in cases of hijacking of aircraft. For these cases it was necessary to define a new offence since the hijacking of aircraft was not covered by the law of most States. However, there can be no doubt that kidnapping and illegal restraint are severely punished everywhere, whoever the victims may be. Moreover, the activities of aircraft hijackers are, in nearly all cases, international, since they move from country to country, which justifies the existence of special rules on jurisdiction and necessitates strengthened and specific international judicial co-operation. The case of kidnappers of diplomats is quite different, since these criminals do not usually take asylum in another State except as the outcome of negotiations to free their victims.

3. If it were nevertheless considered that there is a need—which the French Government does not at present perceive—to prepare a convention on the kidnapping of diplomats, in order to be effective, the new instrument should be acceptable to a large majority of States. It would therefore be essential, first, that the scope of the proposed convention should be well defined, secondly, that the solutions adopted should not be in conflict with the law of the States invited to become parties to it, and lastly, that the solutions should take account of the fact that the object in view is primarily to ensure the safety of persons who are threatened with kidnapping or have been kid-

[a] See *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee*, 1258th meeting.

[b] To be printed in *Yearbook of the International Law Commission, 1972*, vol. II.

[c] Document A/C.6/L.822.

napped and that, consequently, the freedom of action of States to protect such persons should not be hampered by carrying legal logic too far.

4. As regards the first of the above-mentioned points, the International Law Commission should first try to define the categories of persons who would be entitled to special protection for the purposes of the proposed convention. In the opinion of the French Government, since such a text will have implications for criminal law, this definition should be extremely precise. There can be no question here of referring, without further particulars, to international law or to the duty of States to give special protection to important persons who are not expressly mentioned. Nor can States be required to apply the convention to persons protected by treaties to which those States are not parties. Finally, even in the case of persons who have a special status under a convention to which the State concerned is a party, it is not certain that that status gives them an inviolability similar to that to which diplomats are entitled and therefore justifies the adoption of similar rules where they are concerned.

In addition, the Commission should take particular care in defining the acts to which the convention would apply. In the opinion of the French Government, no attempt should be made to define a new offence. Kidnapping, murder and illegal restraint are, as has already been pointed out, perfectly well known to national law, and States might be reluctant to accept a text which created special categories for such crimes according to the status of the victim. Hence no reference should be made to the concept of an "international crime", which is, moreover, difficult to pinpoint and to apply. In other words, the purpose of the definition should be only to specify the offences for which the mutual judicial assistance it is intended to establish would come into play. Its effect must not be to make the penalties for these offences different from those imposed when the victim has no special status. Moreover, if the Commission decides to study texts submitted, it will probably consider it advisable to verify that all the acts mentioned as requiring the application of the convention are in fact treated as criminal acts by the law of all States Members of the United Nations. It will also, no doubt, consider that it is unnecessary to bring international machinery of any kind into play for trifling infringements of diplomatic inviolability.

5. With regard to the actual substance of the proposed convention, the French Government wishes to make the following remarks:

(*a*) Since, as has already been stated, the offence is not in itself of an international nature and since persons committing it are only exceptionally found on the territory of a foreign State, usually after the commission of the act, there are far fewer reasons than in the case of aircraft hijacking to make exceptions to the basic principle of the territoriality of criminal law. In addition, account must be taken of the fact that the courts of a State other than that in which the crime was committed will have less information and evidence at their disposal in the case of a crime against a diplomat than in the case of unlawful seizure of an aircraft. If it were intended to request States to establish their jurisdiction over such acts—a point on which the French Government makes every reservation—it would obviously not be possible to create as many cases subject to jurisdiction as are provided for in the Hague Convention.

(*b*) The French Government could not accept a text which did not reserve the principle of the expediency of prosecution. The only obligation which could possibly be considered is that of referring the case to the authorities competent to institute criminal proceedings.

(*c*) The convention should also, in the provisions relating to extradition, respect the principal that the political or non-political nature of the offence may be taken into account for extradition purposes. Any convention which precluded the possibility of refusing extradition for a political crime would be contrary to the basic principles of the law of many States and, for that reason, would not secure a significant number of ratifications.

(*d*) It is quite clear that if States which do not make extradition conditional on the existence of a treaty had to extradite for the acts referred to in the proposed convention (subject to the reservations indicated in the preceding paragraph), the convention would have to serve as an extradition treaty for States which make extradition conditional on the existence of such a treaty.

(*e*) The French Government considers that if there are to be provisions relating to mutual assistance in the sphere in question, they can relate, as in all conventions on international judicial co-operation, only to punishment and not to prevention.

6. Finally, the French Government believes the Commission will be aware of the fact that this is a very delicate matter which sometimes calls for the adoption of solutions that emerge only at the time of the event. It should therefore be careful not to cast its draft in inflexible terms which might tend to defeat the object in view.

Iran

[*Original text: French*]
[*15 March 1972*]

1. Consideration of the question of the protection of diplomats by the International Law Commission and the Sixth Committee of the General Assembly has made it possible to reaffirm the importance of the basic rule of diplomatic law, namely that concerning the inviolability of diplomatic premises and the respect due to the person of the diplomat.

2. Demonstrations of violence against diplomats might paralyse the smooth operation of inter-State relations. In order to perform his functions, the diplomat must be protected from any hostile act by any person whatsoever.

3. The Imperial Government of Iran endorses the idea that the International Law Commission should prepare a draft international convention designed to strengthen the means of protection provided for under international instruments now in force.

4. It seems advisable to leave it to the International Law Commission to reconcile the need to complete the study of the questions to which it has already accorded priority and, given the importance of preparing a draft convention on the protection of diplomats, the need to submit such a draft to the General Assembly at the earliest possible date.

Israel

[*Original text: English*]
[*29 March 1972*]

In its broader context, the protection of missions—whether permanent or temporary—to international organizations cannot be separated from the problem of the protection of diplomatic missions in general. Although details may vary in accordance with the particular stipulations of "headquarters agreements" and analogous instruments, the basic elements of the law are common for all the representatives of a foreign State—diplomatic or consular—on the territory of the host State with its knowledge and consent. The Government of Israel is constrained to emphasize this at the outset, since several of its missions abroad have been the objects of deliberate and politically motivated attacks, and likewise several members of its foreign service or their spouses have been killed or injured as the result of those attacks. Others have been the victims of criminal attacks which were probably on the whole devoid of particular political motivation.

In this connexion the Government of Israel has noted that the International Law Commission in 1971, after a series of fatal attacks on diplomats had taken place in different parts of the world, has reaffirmed in strong terms the obligation of the host State to respect and to ensure respect for the person of individuals concerned and to take all necessary measures to that end, including "the provision of a special guard if circumstances so require "(draft articles on the representation of States in their relations with international

organizations, article 28, commentary, para. 3 [a]). It is necessary to recall from time to time in unambiguous terms the fundamental character of this rule, which is and must be the dominant principle. The possible weakening of it, implicit in the doctrine advanced in section 5, chapter VI, of the working paper prepared by the Secretary-General entitled *Survey of International Law* [b] seems to go too far in its search after "even-handedness". Some of its propositions must, therefore, be subject to very close scrutiny before they can be accepted as positive international law.

In its appreciation of the position in law, the Government of Israel proceeds from the view that it is an uncontroversial rule of public international law that States have a primary and fundamental obligation to secure the safety of all alien persons or property within their territory, and to do so both by preventive and repressive action, and that this rule applies with even greater cogency to foreign diplomatic personnel, considering that it is mainly through the medium of diplomatic contacts that a peaceful coexistence of nations is possible.

The first obligation of the receiving State obviously relates to the taking of preventing measures, and its responsibility is engaged whenever it has neglected to take all reasonable measures for the prevention of offences and damaging action. Such preventive action presupposes appropriate bilateral contacts and a sympathetic consideration of complaints, particularly those that are made after warnings or threatening communications are received, or prior attacks on nationals of the sending State, its institutions or any object symbolic of its international presence (exhibitions, ships, emblems, etc.) have taken place. The authorities of the receiving State will have to inform foreign representations of any advance knowledge they may have in this respect. In a number of countries the shortage of police and security personnel and the risks which this entails are frequently to a large extent overcome through modern technical means of crime prevention and of security for persons and premises. Although it would seem obvious, it appears that it would be timely to recall to host Governments that they are under a general obligation to facilitate the installations of technical devices of this kind should a diplomatic mission consider this necessary for its own security. This is not a matter which can be left to the exclusive initiative of the authorities of the host State.

As matters depend on local conditions, it is difficult to generalize as to the nature of the preventive measures to be taken; they may range from police screening of the surroundings of diplomatic offices and living quarters, protection of diplomats and members of their families therein and when moving about the receiving State, to the control of mail deliveries to their address, up to permitting diplomatic personnel to carry arms for their personal defence or allowing their protection by armed guards on their premises. Attention is drawn to certain local provisions for the establishment of security zones around foreign diplomatic or consular offices. The instances set out in this paragraph are, of course, illustrative only.

Obviously, police measures of protection must not interfere with *bona fide* visitors approaching and entering diplomatic premises.

No less important are deterrent measures, including the maintenance of a system of law adequate to deter acts of violence, and of police and other forces adequate for the protection required. Failure to exercise due diligence to afford protection, is wrongful. Part of deterrent action is penal retribution for criminal interference with diplomatic or consular activities, either on permanent or on special mission, including verbal or gestured insult. An appropriate punishment based on general guidelines and without giving consideration to the plea in attenuation that the act was a political crime, is part of doing justice in these matters, the object being not only to inflict on the accused a punishment commensurate with the fate of the individual victim of his crime but also to ensure the security of the service. Here too justice must be done, and, moreover, it must be patent to the public that justice is being done. It is an obligation of the public prosecutor—whatever otherwise the procedure in penal matters—to watch from the beginning and until the exhaustion of means of appeal, that the perpetrators of crimes against foreign States, the diplomatic and consular representations thereof, and the staff attached thereto, be prosecuted without delay, and any sentence duly imposed and carried out.

In case the perpetrator of a crime of this kind is not a national of the receiving State, a case for extradition may arise, and the insertion of an appropriate regulation in terms of international obligation is urgently called for. It might be useful if the International Law Commission were to draw up minimum standards of penal retribution to indicate in this way too the standards of responsibility of the receiving State and its providing for diplomatic security.

This Government has noted that the International Law Commission proposes taking up the subject of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law at its twenty-fourth session (1972). It is looking forward with interest to the progress which the Commission will report.

Jamaica

[Original text: English]
[23 March 1972]

It is an established principle of international law that the person of a diplomatic agent is inviolable. This principle was codified by the Vienna Convention on Diplomatic Relations, article 29 of which provides as follows:

> "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

In recent years the conscience of the world has been indignantly aroused by the frequent violations of this principle within the particular context of the kidnapping, violent assault, murder, and other outrages directed at the person of diplomatic agents or other representatives within the international community having special protection under international law. So far, the means by which the principles codified by article 29 of the Vienna Convention are translated into practical effect, have been left entirely to the host State within which a diplomatic representative may for the time being be present. Events have proved that there exists a very serious hiatus in the protective arrangements affecting diplomatic representatives, so far as these arrangements derive from existing international instruments and are translated into national legislation. It is well known that, so far as violations have in the past been directed against diplomatic agents, the offenders have, in the majority of cases, escaped with impunity by the simple device of getting away from the jurisdiction within which the acts took place.

It is the view of the Government of Jamaica that any study which the International Law Commission may give to the matter, with a view to affording wider protection to diplomatic agents, etc., must include the possibility or feasibility of concluding an international instrument which should have the widest possible application among the nations of the world; which instrument would have, *inter alia*, the following basic features:

1. Declaring as an offence under international law the kidnapping, murder, violent assault or other serious acts directed against the person of a diplomatic agent;

2. Making it an obligation for contracting parties to the instrument to extradite an offender to the jurisdiction where the offence was

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[a] *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 10* (A/8410/Rev.1), p. 27 (*Yearbook of the International Law Commission, 1971*, vol. II (Part One), document A/8410/Rev. 1, chap. II, D).

[b] See *Yearbook of the International Law Commission, 1971*, vol. II (Part Two), document A/CN.4/245.

committed; failing extradition, for the contracting party concerned, to have the offender appropriately tried and punished in accordance with its own laws; and

3. It should be possible for all States to become parties to the instrument.

Japan

[*Original text: English*]
[*25 April 1972*]

The Government of Japan shares the concern expressed by many States in various forums of international organizations over recent incidents involving offences against the person of diplomatic agents and other persons entitled to special protection under international law and international conventions. Such offences will seriously affect not only the friendly relations among States concerned but also the interests of the international community as a whole. The Government of Japan believes that some effective international measures should be taken to prevent the recurrence of such acts. It welcomes the action taken by the General Assembly of the United Nations. A thorough study of the question by the International Law Commission could be very useful, and it supports in principle that the Commission prepare a set of draft articles dealing with offences committed against diplomats and other persons entitled to special protection under international law. The Government of Japan is prepared to give its full co-operation to the work of the Commission.

The Government of Japan transmits herewith some of its preliminary comments on the question which the Commission is invited to take into account in considering a future draft convention.

1. *Persons to be protected*

In studying the contents of an international instrument on the subject, careful consideration should be given to the definition of persons for special protection under a future international instrument. It must be decided whether the persons who would be given special protection should include persons other than diplomats and consular agents and, if so, what other persons should be included.

The Government of Japan is of the view that the list of persons for special protection should be restrictive. The list should be decided in the light of recent trends which show that the offences against diplomatic and consular agents have been, in the main, politically inspired or for extortion purposes. A future convention should therefore deal only with those persons who are to be considered especially valuable for political extortion and for publicity purposes, namely, Heads of State or Government, members of imperial or royal families, members of Cabinet, and other high ranking government officials of ministerial rank, diplomats and consular agents.

2. *Offence*

(*a*) Acts, such as murder or kidnapping of diplomatic agents and other persons entitled to special protection under international law, if committed with the intention of extorting anything of value, of releasing offenders or alleged offenders, or changing important governmental actions or policies, should be made offences and punishable.

(*b*) Attempt to commit above-mentioned acts and participation as an accomplice should also be made punishable.

(*c*) It is considered to be necessary that a contracting State shall make the offence punishable if the offence is committed within its territory, or when its national committed the offence. Serious study should also be made of the necessity of making an offence punishable of which its national is victim.

(*d*) It is believed to be necessary that a provision be included in the draft to the effect that the offence should be made severely punishable.

(*e*) Careful study should be made whether it is advisable to qualify the offence as an "international crime", or a "crime against the law of nations" in view of the various concepts attached to the terms.

3. *Jurisdiction*

A contracting State should be obliged to take such measures as may be necessary to establish its jurisdiction over the offence when: (*a*) the offence is committed in its territory, (*b*) its national has committed the offence and, subject to the comment in paragraph 2 (*c*) above, (*c*) its national is the object of the offence. It should also be permitted to establish its jurisdiction when the alleged offender is in its territory and it does not extradite him to any State exercising its jurisdiction under (*a*), (*b*) and (*c*) of the present paragraph.

4. *Political offence*

The Government of Japan does not believe it necessary to include in the draft articles a provision to the effect that the offence shall not be considered as a political offence.

On the other hand, it is considered essential that a future convention on the subject should include a provision requiring a contracting State in whose territory an alleged offender is found to extradite him, or, if it does not extradite him and *if it has established its jurisdiction*, to submit the case to its competent authorities for the purpose of prosecution.

Kuwait

[*Original text: English*]
[*5 April 1972*]

Diplomats enjoy the special status of being representatives of foreign sovereign Governments in the receiving State, and this special status has been granted to them by custom and by international law. The receiving State, by accepting the appointment of the diplomat in its territory, is under a duty at the same time to provide him with the necessary protection in order that he may exercise his functions as a representative of a sovereign State.

The duty to protect accredited diplomats has been implemented in the Vienna Convention on Diplomatic Relations, and article 22, paragraph 2, of the said Convention imposes upon the receiving States the special duty to take all appropriate steps to protect the premises of the mission, etc., while article 29 of the same Convention provides that the receiving State shall take all appropriate steps to prevent any attack on the freedom or dignity of the diplomatic agent.

Although these articles may seem comprehensive in providing the necessary protection for the premises of the mission and the person of the diplomatic agent, they nevertheless contain ambiguous terms which are open for different interpretations. The major ambiguity lies here in the term "appropriate steps". What is meant by "appropriate steps"? Who decides what is "appropriate", the receiving State or the sending State? A protection may seem appropriate in the opinion of the receiving State. On the other hand, it may seem inappropriate in the opinion of the sending State. Is the receiving State bound to conform with what the sending State may regard as an appropriate step for the protection of its mission or its diplomatic agent in the receiving State?

Owing to the recent escalation of unjustified acts of violence committed by political groups in various capitals against certain identified diplomatic missions and the kidnapping of their personnel for the purpose of holding them as hostages in furtherance of political demands (which has often resulted in their humiliation if not their murder), the International Law Commission should give this matter its urgent consideration in order that a first phase solution could be achieved through the Commission while the second phase could be achieved with the willingness and co-operation of the Member States of the United Nations.

The Government of the State of Kuwait is of the view that the International Law Commission should endeavour to provide a clear interpretation to the above-mentioned articles, namely, article 22, paragraph 2, and article 29 of the Convention on Diplomatic Relations so that adequate protection will be constantly ensured by the receiving State.

Furthermore, the International Law Commission will be well advised to request or invite Member States of the United Nations to provide adequate legislation in their internal laws for a more severe punishment of offenders who are guilty of committing any acts of violence or humiliation against diplomatic personnel or interference with or destruction of diplomatic premises. In addition, rewards should be offered to any person giving any information leading to the arrest and conviction of the offenders. Such rewards will encourage citizens of the receiving State to co-operate with the authorities in the apprehension of such offenders.

In conclusion, the Government of the State of Kuwait would like at this stage to pledge the continuance of its maximum ability of protection of diplomatic premises and personnel on its territory whenever human and economic resources are available, on the condition that Kuwait missions and diplomats in foreign States enjoy the same standard of protection on a reciprocal basis. Furthermore, the State of Kuwait is pleased to note that during its 10 years of independence, not a single incident has ever occurred in Kuwait against any diplomatic mission or personnel accredited to it. The sense of security enjoyed by diplomats in Kuwait stems from our belief that diplomats should not be denied the right of self-security which they are entitled to, nor the necessary freedom to exercise their duties in order that peace and security shall prevail in international diplomatic relations.

Madagascar

[*Original text: French*]
[*2 May 1972*]

1. The Vienna Conventions on Diplomatic Relations and Consular Relations—to which Madagascar has acceded—require the receiving State to take all "reasonable" or "appropriate" steps to prevent any attack on the person, freedom or dignity of a diplomat or on his private residence, property or correspondence.

In the matter of offences against diplomats, with which we are concerned, Malagasy criminal law contains two kinds of provisions:

(*a*) The special provisions of article 38 of Law No. 52-29, of 27 February 1959, as amended, make offences committed in public against an ambassador, minister plenipotentiary, envoy, chargé d'affaires or other accredited diplomatic agent liable to the same penalties as offences against, or insults to, the President of the Republic or the Government. Diplomatic agents thus enjoy special protection.

(*b*) The general provisions of the Penal Code and the special criminal laws punish all such offences committed on Malagasy territory, though the fact that the victim has the status of a diplomatic agent does not constitute an aggravating circumstance.

The application of these rules, which are adequate in internal law, has not given rise to any difficulty so far.

2. A new form of criminality has recently made its appearance in some States: the taking of diplomats as hostages for the payment of a ransom, the release of political prisoners or the execution of an order given to the Government of the receiving State.

The Governments thus attacked have found themselves in a most embarrassing position. They have been faced with the choice of yielding to blackmail and so violating their own laws and the constitutional principle of the separation of powers, or refusing to make any concession and coming into conflict with the sending State of the diplomat concerned, especially where the threat has been carried out.

The decisions taken have differed from State to State, but are based either on considerations of pure expediency, or on a position of principle in which domestic policy takes precedence over foreign policy or vice versa.

The problem is obviously of a political nature and any solution must depend on a number of factors (the constitutional system, the strength or weakness of the receiving Government, the intensity of the economic and political pressures on it, etc.); it seems open to question whether an international convention on the subject would have any practical value.

3. States have two possibilities open to them:

(*a*) To provide that in all circumstances the protection accorded to diplomats is absolute and must take precedence over all other considerations. This thesis is untenable, for its application would lead to a recurrence of attacks on diplomats, their purpose being assured of success.

(*b*) Conversely, to declare that no Government will yield to blackmail. This would certainly provide a deterrent calculated to discourage the perpetrators of attacks and, indirectly, to promote the protection of diplomatic agents. In the present State of international society, however, it must be expected that many States will prefer to uphold the principle of freedom of action, if only in order to have more influence on the action of their neighbours.

4. What, then, would be the content of the new international convention?

It could, of course, recommend that measures be taken for the preventive protection of diplomatic agents. That is a matter for the authorities responsible for security and the administrative police.

It could also establish, on the lines of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, an international jurisdiction, each State undertaking to punish serious offences against diplomatic agents wherever committed, subject to extradition where appropriate.

Lastly, it could define the category of persons for whose benefit exceptional measures would be taken.

These are relatively minor points compared with those set out in paragraphs 2 and 3 above.

They might usefully be submitted to the International Law Commission for consideration, however, since in its work on State responsibility it will in any case have to state an opinion on the question of the international responsibility of States which give their constitutional and legislative rules precedence over the principle of absolute protection of diplomatic agents. This seems, in fact, to be the real heart of the matter.

Netherlands

[*Original text: English*]
[*20 April 1972*]

1. The Netherlands Government has carefully considered the problems involved in the preparation of a draft convention on the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law. It may be recalled that, in a letter to the President of the Security Council of 5 May 1970,[a] the Netherlands Government expressed its concern at the increasing number of attacks on diplomats, stating as its view that attacks involving the person, freedom or dignity of diplomats could lead to situations which might give rise to disputes which in turn might even constitute threats to international peace and security. On that occasion the Netherlands Government observed that

[a] See *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 10* (A/8010/Rev.1), p. 2 (*Yearbook of the International Law Commission, 1970*, vol. II, p. 273, document A/8010/Rev.1, chap. I, sect.F).

from ancient times peoples of all nations have recognized the status of diplomatic agents, whose immunity and inviolability have clearly been established by time-honoured rules of international law.

2. The latter point is one of major importance. During the discussions on the subject in the Sixth Committee of the General Assembly at its twenty-sixth session,[b] many delegations drew attention to the existing codification of the host State's duty to protect the inviolability of foreign diplomats who are on official missions in its territory (see article 29 of the Convention on Diplomatic Relations, article 40 of the Convention on Consular Relations, article 29 of the Convention on Special Missions; see also articles 28, 59 and M of the International Law Commission's draft articles on relations between States and international organizations [c]). The very fact of its codification underscores the existence of the obligation of host States under international law to take "all appropriate steps" to protect foreign diplomats on official missions in their territories against attacks involving their person, freedown or dignity. This obligation entails the responsibility for host States to take all reasonable measures to prevent and punish such acts.

3. It may be wondered whether it is necessary, or indeed feasible to lay down any further rules and to draft a special convention under which States (not only the host States of threatened diplomats) agree either to *prosecute* or to *extradite* persons in their territory who have committed such acts of violence against foreign diplomats. The Netherlands Government has carefully considered the matter. There are two sides to the medal: the question is not only how to *prevent* threats to the freedom and security of diplomats, but also how to bring a diplomat to a place of safety with the least delay once an *actual* attack involving his freedom and security has occurred. In this respect two conflicting responsibilities rest upon the host State of a "kidnapped" diplomat which is a party to a new convention establishing the obligation in principle either to prosecute or to extradite a diplomat's captors. Its obligation under the new convention envisaged may come into conflict with its *primary* obligation as a host State under general international law to take "all appropriate steps" to protect the diplomats on official missions in its territory. It may be opportune for the State to negotiate with the captors and agree to their conditions (e.g. payment of ransoms, free conduct out of the territory) to secure the diplomat's release. This should be left to the discretion of the State, and to the Netherlands Government it seems essential that any new convention of the kind envisaged clearly leave to the State parties the option to negotiate with and agree to the demands of the captors if they deem such a course advisable. In this respect the following text of article 7 of the draft convention submitted by Uruguay

> "The course to be followed in dealing with acts of extortion in connexion with the kidnapping or detention of one of the persons referred to in article 1 of this Convention shall be left to the discretion of the State concerned and shall in no case give rise to international responsibility." [d]

would seem misleading: the responsibilities of host States under existing general international law should on no account be lessened, so any new convention should offer certain possibilities of "escape" in respect of the obligation "to prosecute or to extradite".

4. If a convention were to be drawn up under which States were obliged in principle either to prosecute or to extradite persons in their territory who have committed offences against foreign diplomats, the Netherlands Government holds the view that it should satisfy the following conditions:

(*a*) The convention should be of a world-wide nature and should be open to all States to ensure the widest possible participation.

(*b*) The subject matter of the convention should not include all possible acts of "terrorism", but should be restricted to acts of violence (e.g. kidnapping, murder, assault resulting in serious bodily injury) against persons protected under international law. The group of persons protected (foreign diplomats, their families and staff), as well as the basis of the jurisdiction of the State parties in respect of the offenders, should be clearly defined.

(*c*) As stated above, a convention of this kind should in no way weaken the existing obligation of host States under international law to protect the foreign diplomats on official missions in their territories Contracting States should retain the option to negotiate with kidnappers of a diplomat and to agree to their demands to ensure the diplomat's safety and obtain his release.

(*d*) The rules effectuating the "either prosecute or extradite" system in the convention envisaged should not differ to any great extent from those laid down in two recently established conventions in this field, i.e. the Hague Convention for the Suppression of Unlawful Seizure or Aircraft of 1970 and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971, which after long deliberation have proved acceptable to a large number of States. Under these Conventions the "offence" is considered as an "ordinary offence of a serious nature" for purposes of *prosecution* (article 7), but for purposes of *extradition* the conditions in extradition treaties and in the national laws of the contracting States prevail (article 8). Consequently, a State like the Netherlands, whose Extradition Act does not allow extradition in cases of "serious misgivings whether the government requesting the extradition would not prosecute the accused for reasons of his race, religion, nationality or political conviction" [e] would retain the option not to extradite the offender in such an event, and the Netherlands Government deems this an essential condition in any convention of this kind.

(*e*) A clause should be added under which the States parties agree to submit any dispute arising from the interpretation and application of the convention to arbitration or to the International Court of Justice.

5. To summarize, the Netherlands Government believes that the convention envisaged should perforce offer certain possibilities of "escape". Though this may cause one to wonder whether such a convention would constitute a really effective remedy against attacks on diplomats, the Netherlands Government would not in principle oppose the drafting of a convention, provided that the conditions put forward in the foregoing are fulfilled.

[b] See *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee*, 1256th-1264th meetings.

[c] Articles 28 and 59 of the draft articles on the representation of States in their relations with international organizations: *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 10* (A/8410/Rev.1), pp. 26 and 43 (*Yearbook of the International Law Commission, 1971*, vol. II (Part One), document A/8410/Rev.1, chap. II, D); article M of the draft articles on observer delegations to organs and to conferences: *ibid.*, p. 61 (*ibid.*, document A/8410/Rev.1, chap. II, annex).

[d] Document A/C.6/L.822.

[e] Netherlands, *Staatsblad van het Koninkrijk der Nederlanden*, The Hague, 1967, No. 139.

Niger

[*Original text: French*]
[*22 February 1972*]

The Government of the Niger has noted with deep concern the events which in recent years have endangered the lives of diplomats and consuls of several countries, and which have in some cases had tragic consequences. It totally condemns such acts, which violate a tradition that is universally respected, even in time of war. Accordingly, it ap proves any initiative which may be taken by the international community to ensure the safety of diplomats on assignments and affirms its readiness to sign any convention prepared for this purpose. However, it has no specific suggestions or proposals to make in this regard to the International Law Commission.

Norway

[*Original text: English*]
[*14 April 1972*]

The Norwegian Government has viewed with grave concern the deteriorating situation during the past few years with regard to such crimes as assaults upon and kidnapping of diplomats and consular officials in certain countries. These crimes against persons entitled to special protection under international law—which on several occasions resulted in a tragic loss of life—constitute a serious threat to normal diplomatic activities and a considerable curtailment of the freedom of movement of these persons.

The Norwegian Government has therefore noted with satisfaction that the United Nations General Assembly, in its resolution 2780 (XXVI) of 3 December 1971, has requested the International Law Commission to study this important problem and submit proposals for an international convention regarding crimes against diplomats and consular officials.

However, since it is of the opinion that these crimes are in most cases closely connected with the internal political, economic and social conditions prevailing in the countries concerned, the Norwegian Government is somewhat doubtful as to whether such criminal activities can be effectively counteracted by means of a new international instrument. It should be recalled in this connexion that international rules aiming at the protection of diplomats and consular officials already exist. Among the most important of these rules are article 29 of the Convention on Diplomatic Relations and article 40 of the Convention on Consular Relations. Moreover, such crimes against persons entitled to special protection under international law are in most countries considered serious breaches of the law. It seems that much could be achieved through a more vigorous and strict law enforcement in each country when such crimes occur.

Should the International Law Commission, after further study of this question, reach the conclusion that a new convention is called for, the Norwegian Government would suggest that this convention be formulated in such a way that it will ensure the largest possible international support and approval. For this purpose, the convention should not include rules which are too comprehensive and detailed as regards the obligations incumbent upon receiving countries as well as third countries which might conceivably become involved. Each individual country should to the largest extent possible be free to solve the problem in its own way and be given the opportunity to complete the often delicate negotiations and manœuvres which such crimes necessitate.

On the other hand, the categories of persons entitled to protection should not be too restrictive. The development of international co-operation since the Second World War—especially in the technical and economic fields—makes this necessary. A wide definition of the categories of persons entitled to protection would also help ensure a larger measure of international support for the convention.

Furthermore, the Norwegian Government considers that serious attacks on diplomats should probably not be viewed as a political crime, for this could entail certain consequences as far as the question of political asylum and extradition is concerned.

Rwanda

[*Original text: French*]
[*4 May 1972*]

Under the Vienna Convention on Diplomatic Relations, particularly articles 29 to 40, the receiving State must take appropriate steps to ensure the protection of diplomats so that they may discharge their functions efficiently. Actually, it would be difficult for a diplomatic agent to exercise his functions if he were subjected at any moment to measures incompatible with the diplomatic privileges and immunities that he should enjoy in the territory of the State in which he resides.

In this connexion, the Government of Rwanda wishes to draw the attention of the States Members of the United Nations to the distressing subject of the abduction of diplomats. This highly regrettable situation, which is prevalent in certain countries, may well spread throughout most of the world unless the States parties to the Convention on Diplomatic Relations which experience cases of abduction mete out exemplary punishment to the offenders.

In addition to the abduction of diplomats and other acts incompatible with diplomatic privileges and immunities, the Government of Rwanda wishes to draw attention here to another important question that may arise in the event of the severance of diplomatic relations. The Governments of receiving States should bear in mind that, where relations between States are severed, the principles of respect for the human person and the right to life continue to apply none the less to diplomatic agents. They should therefore ensure the protection of the persons concerned as far as the point of departure from the State of residence to the sending State. Appropriate steps should also be taken to protect the premises of the former mission. Furthermore, the ransacking of such premises which, in certain countries, follows the decision to sever diplomatic relations is a matter of great concern to sending States, because, in the final analysis, there can be no justification for such acts.

In conclusion, the Government of the Rwandese Republic considers that respect for, and the application of, the principles set forth in the Convention on Diplomatic Relations would solve the problem of the protection of diplomats, since that Convention sets forth both the obligations and the rights of diplomatic agents, the sending State and the receiving State.

Sweden

[*Original text: English*]
[*10 April 1972*]

The Swedish Government, which is concerned about the increasing rate of acts of violence directed against diplomats and other official representatives, recognizes the importance of examining ways and means to prevent such acts. It welcomes therefore the initiative taken within the United Nations to study this matter. It is generally recognized that States, according to international law, are obliged to afford special protection to diplomats and certain other official representatives. This principle of general international law is reflected, for instance, in article 29 of the Vienna Convention on Diplomatic Relations which imposes upon States the duty to take all appropriate steps to prevent any attack on a diplomat's person, freedom or dignity. If this obligation is not fulfilled, the State may be held responsible under international law. The obligation to protect is thus clearly laid down in article 29 of the Vienna Convention. The problem is that, particularly during the last few years, the protective measures taken have not always been sufficient to prevent tragic acts of violence against diplomats, the root cause of which is often to be found in the political, economic and social situation in the countries concerned.

It was under the impact of such events that the General Assembly adopted resolution 2328 (XXII) on 18 December 1967, in which the Assembly recalled, *inter alia*, that the unimpeded functioning of the diplomatic channels for communication and consultation between Governments is vital to avoid dangerous misunderstanding and friction. By the same resolution, States were urged to take every measure necessary to secure the implementation of the rules of international law governing diplomatic relations and, in particular, to protect diplomatic missions and to enable diplomatic agents to fulfil their tasks in conformity with international law.

In view of the continued violence of this kind, it is natural to look for further ways and means. One way might be to deal with the matter in a binding international instrument. Without expressing at this stage an opinion as to whether a new convention is likely to contribute to improving the protection in this field, the Swedish Govern-

ment is gratified that the matter has been taken up in the United Nations and will be considered, in the first place, by the International Law Commission. The Swedish Government is confident that the International Law Commission in its work will take into consideration also drafts and studies on this subject which have already been elaborated within other international organizations and by individual States.

As to the contents of a possible convention the Swedish Government feels that it would be premature to make any detailed proposals. It wishes, however, to present the following preliminary suggestions of a general character.

The categories to be covered by the convention should not be too limited. They should include all persons who already enjoy special protection under international law. Experience shows, however, that other categories might also be in need of special protection against kidnapping and other acts of violence and the possibility of including such categories in the convention ought to be further examined.

An important question is whether the convention should contain provisions regarding the extradition of offenders. On this point, the Swedish Government wishes to observe that in any case extradition should not be made compulsory. A State should be free to choose between prosecuting an offender or extraditing him to the country where the offence was committed. In this connexion the question of asylum has also to be considered carefully.

The Swedish Government considers it important that a convention of this kind should not unduly restrict the freedom of action which any Government should enjoy when dealing with individual cases of kidnapping or other acts of violence. Moreover, it is essential that the convention should be so drafted that it can be expected to obtain universal acceptance which would considerably strengthen its deterrent effect.

Ukrainian Soviet Soialist Republic

[Original text: Russian]
[21 April 1972]

The question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, which, in its resolution 2780 (XXVI), the General Assembly has requested the International Law Commission to study, is a pressing matter of great importance.

Criminal acts against diplomats, which have become increasingly frequent of late, are incompatible with the basic principles of international law, create difficulties in relations between States and increase international tension. In the interests of co-operation and the development of friendly relations, States should use every means of preventing attempts on the life, health and dignity of diplomats.

At the same time, the Ukrainian SSR deems it necessary to emphasize that in preparing draft articles on the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, the International Law Commission should take account of the relevant generally accepted rules of international law in force, which have been confirmed, in particular, by articles 29 and 37 of the Vienna Convention on Diplomatic Relations, and whose importance the Commission should be careful not to impair. Moreover, in its work on these draft articles, the Commission should bear in mind its programme of work and the order of priorities laid down therein.

If the draft articles referred to are to serve as a constructive basis for an appropriate instrument of international law, they should spell out the obligations of States to ensure, under domestic law, the effective prosecution of persons who have committed criminal acts against diplomats.

Such acts should be regarded as international crimes interfering with peaceful and friendly relations between States.

For the prevention and suppression of such crimes, co-operation between States should play an important part in securing the extradition and punishment of the perpetrators pursuant to international agreements on extradition or in accordance with domestic law. In order to develop such co-operation, States should provide legal assistance and keep each other informed for the purpose of preventing and suppressing such crimes or of punishing those who have committed them.

Union of Soviet Socialist Republics

[Original text: Russian]
[18 April 1972]

The question of the protection and inviolability of diplomats and other persons entitled to special protection under international law is an urgent one of great importance. In this regard the General Assembly's proposal that the International Law Commission should study this question with a view to preparing a set of draft articles dealing with offences against diplomats and other persons entitled to special protection under international law deserves serious attention.

It should be borne in mind, however, that the preparation of special draft articles on the protection of diplomats and persons entitled to special protection under international law must not in any way detract from the existing international legal norms in this matter, more particularly articles 29 and 37 of the Vienna Convention on Diplomatic Relations, under which the receiving State is obliged to treat diplomatic agents and their families with due respect and to take all appropriate steps to prevent any attack on their person, freedom or dignity. At the same time, work on special draft articles should not be detrimental to the International Law Commission's work on other important international legal questions in its programme.

As regards the possible content of the draft articles, the following points should be incorporated:

1. Recognition of offences against the life, health and dignity of persons entitled to special protection under international law as being serious international crimes detrimental to relations between States.

2. The obligation of States to co-operate in preventing and suppressing such offences.

3. The obligation of States, for the above purposes and in accordance with their law, to prosecute as criminals persons who have planned, attempted to commit or committed such offences, and also their accomplices.

4. The obligation of States, in cases where the offender is found to be in the territory of a third State, to hand the offender over, in accordance with extradition treaties or domestic law, to the State in whose territory the offence was committed. In the case of failure of a State to hand over one of its own nationals, or in the absence of obligations in respect of extradition, States must prosecute the offender under domestic law, irrespective of the place where the offence was committed.

5. The obligation of States to afford legal assistance in the investigation of offences and other necessary legal aid for the purpose of exposing the offender and elucidating other attendant circumstances.

6. The obligation of States to provide reciprocal information on matters relating to the prevention and suppression of such offences and to the prosecution of the offenders.

United Kingdom of Great Britain and Northern Ireland

[Original text: English]
[30 March 1972]

1. International law has for many centuries regarded the persons of ambassadors as inviolable and has imposed on States to which they are accredited a special duty of protection. Thus article 29 of

the Vienna Convention on Diplomatic Relations provides that the receiving State shall treat a diplomatic agent with due respect and shall take all appropriate steps to prevent any attack on his person, freedom and dignity.

2. The kidnapping of diplomats and other serious offences against them have become in recent years a grave problem. The Government of the United Kingdom fully support appropriate measures which would be likely to reduce this danger.

3. The Government of the United Kingdom have therefore followed closely the course of international discussion of this question. OAS has prepared the Convention to Prevent and Punish the Acts of Terrorism (Washington, February 1971) and the United Nations General Assembly, in section III of its resolution 2780 (XXVI), has requested the International Law Commission to study this matter. Further drafts for a convention on the subject have now been submitted to the International Law Commission by the delegation of Uruguay at the twenty-sixth session of the General Assembly [a] and in a working paper prepared by Mr. Richard D. Kearney (A/CN.4/L.182).[b] These are all important events.

4. At present the United Kingdom Government have not formed a definitive view on the question whether the adoption of a convention would in fact and in practice be likely to deter those who commit such crimes. This is a matter on which they will take a position in the course of further consideration of this question and in the light of the views of other Governments.

5. However, there are a number of important factors which arise in connexion with any such draft convention; and the attitude of the Government of the United Kingdom to such a convention will be influenced by the extent to which due account is taken of these factors.

6. First, the convention should respect the principle of independence of the competent authorities in connexion with powers of arrest, and the independence of prosecuting authorities in deciding whether an accused person should be brought before the courts. These very points were discussed at great length and satisfactory wording for giving effect to these principles is to be found in articles 6 and 7 of the Convention for the Suppression of the Unlawful Seizure of Aircraft (The Hague, 1970), and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 1971). On these points those Conventions represent satisfactory precedents and it is recommended that any future convention on the present subject should follow closely the wording then adopted, with a view to assisting prompt and wide acceptance.

7. Secondly, experience has shown that it is very desirable that, in consultation together, the Governments concerned should be able to exercise a reasonable freedom of action in handling specific cases and the convention should be drawn up in terms sufficiently flexible to make this possible.

8. Thirdly, the generally accepted principles concerning extradition and, in particular, the treatment of political offences in connexion with extradition should be recognized and applied. Extradition must take place in accordance with the requirements of the requesting State and subject to any limitations customary in extradition treaties. The United Kingdom would see no objection to a provision providing an option whereby States whose extradition arrangements normally depend on extradition treaties could elect to treat the future convention as a basis for extradition to contracting States with which they have no extradition treaty. Such a provision is included in the Hague Convention (1970). The Government of the United Kingdom, however, reserve the position fully as to what action would be taken in relation to such an option.

9. Fourthly, the offences covered and the persons protected by the convention should be sufficiently and satisfactorily defined. The offences should be of a sufficient gravity to merit such exceptional treatment as would be involved in the convention and thus should include not only murder and kidnapping, but also assaults occasioning grievous bodily harm. Furthermore, it seems reasonable that the convention should apply when these offences are committed against the protected person with knowledge that he falls within the class protected. The justification for the convention lies in the internationally recognized status of diplomats and other protected persons, and it might be open to criticism if it applied to offences which had no connexion with that status.

10. The class of persons to be protected by the convention should also be satisfactorily and sufficiently defined. Obviously, it should extend beyond the field of diplomats in the traditional sense of the word. But, in preparing a definition, it should be borne in mind that States would have difficulty in according the protection of the convention to persons whose international status arises in connexion with organizations of which those States are not members or conventions to which they are not parties. If these problems cannot be satisfactorily resolved during the drafting of the convention, this might significantly reduce the number of States which were able to become parties and thus its effectiveness as an international instrument.

11. Accordingly, a central element of a convention, if there is general international support for one, would consist of a provision requiring that a State in which a person reasonably suspected of an offence within the convention is found, should either permit his extradition to the country where the offence occurred, or else should submit the case to its prosecution authorities with a view to his prosecution.

12. In addition, the convention could usefully provide for appropriate consultation among the countries concerned in order to deal with questions arising out of the convention.

13. The Government of the United Kingdom welcome this opportunity of indicating in outline their views on certain important aspects of the question. It is also hoped that the International Law Commission will so arrange its handling of this question that a further opportunity is given to Governments to comment on its proposals before the Commission comes to give final consideration to them.

United States of America

[*Original text: English*]
[*17 April 1972*]

The Government of the United States of America fully supports the request of the General Assembly (resolution 2780 (XXVI), sect. III) that the International Law Commission study as soon as possible the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law. The United States Government trusts that the International Law Commission will find itself able to prepare a set of draft articles dealing with offences committed against such persons during the course of its twenty-fourth session in 1972 in view of the urgent need to take all available steps to deter the commission of such offences.

With respect to the substance of such a set of draft articles the United States Government considers that the articles should provide a basis for the detention and prosecution of those accused of committing serious offences against diplomats and other persons entitled to special protection under international law wherever those accused persons may be found throughout the world. Consequently, it would be appropriate to include in any such set of articles provision to the effect that all States parties to any eventual convention shall have jurisdiction to try individuals accused of serious crimes against persons entitled to special protection under international law.

[a] Document A/C.6/L.822.

[b] To be printed in *Yearbook of the International Law Commission, 1972*, vol. II.

A major purpose of such a convention should be to eliminate to the greatest extent possible "safe havens" for persons who commit crimes of this nature. It would be desirable therefore that the draft articles impose an obligation upon a State where any person accused of such offence may be found, either to take steps to bring him before its own courts or to extradite him pursuant to the request of an interested State which proposes to prosecute him. It is the view of the United States that there are certain advantages to permitting the State where the accused may be found to decide whether it prefers to initiate legal action itself or to extradite the accused to another State. This freedom of choice would tend to reduce or eliminate the difficulties which could arise in certain circumstances such as when the accused individual is a national of the State in which he is found and the offence has been committed elsewhere.

There are a number of difficult problems to be faced in formulating a set of draft articles that will make a substantial contribution to the reduction of serious crimes against persons who are entitled to special protection under international law.

The United States trusts that in dealing with problems of this nature the Commission will bear in mind the essential importance of the maintenance of international channels of communication. International co-operation for peace, for economic development, for the improvement of living conditions, indeed for achievement of all the purposes and principles of the Charter of the United Nations, demand that persons specially selected by their States or by international organizations to promote such objectives be able to carry out their responsibilities without being subjected to the threat of murder, kidnapping or similar serious crimes.

The world has witnessed in the past several years a mounting tide of offences committed against diplomats and other officials engaged in carrying on international activities solely because of their diplomatic or official character. Such offences constitute serious common crimes which should be prosecuted as such; in addition they strike at the heart of international activity. In selecting the measures necessary to reduce such dangers, care must be taken to ensure that the perpetrators are not able to escape just punishment on the basis that they committed the offences for political ends. It is the view of the United States that the selection of diplomats and others entitled to special protection of international law as the objects of serious crimes for the purpose of obtaining political ends is so disruptive of the international order that the individuals who commit such offences should be prosecuted without reference to the validity or merit of the political ends concerned.

Yugoslavia

[*Original text: English*
[*5 May 1972*

The Government of the Socialist Federal Republic of Yugoslavia attaches great importance to the question of the protection of staff members of diplomatic missions which, as of late, is becoming more urgent. The number of crimes committed against diplomatic representatives and persons entitled to special protection under international law has increased in many States. Yugoslavia, in this respect, has undergone a particularly trying experience. The Yugoslav representatives in some countries have been subjected to attacks and acts of terrorism committed by individuals or groups, the evidence of which is the brutal murder of an Ambassador of the Socialist Federal Republic of Yugoslavia in 1971. Having in mind the need to prevent such crimes and acts of violence and to ensure normal discharging of duties by diplomatic representatives and other persons engaged in activities of international interest, the Yugoslav Government considers that it is essential to immediately prepare a set of draft articles relating to the question of the protection and inviolability of persons entitled to special protection under international law.

In this respect, the Government of the Socialist Federal Republic of Yugoslavia is of the opinion that the rules relating to protection and inviolability of persons entitled to special protection under international law should include, in particular, the following:

1. An obligation of host States to undertake preventive measures with a view to deterring the preparations of attacks, attempts at committing or participation in committing crimes against persons entitled to special protection under international law, including members of their families.

2. Grave offences and serious crimes should not be treated as political criminal acts even in those cases where motivations for committing such acts are of a political nature.

3. Sanctions should be undertaken against all perpetrators of such criminal acts, irrespective of whether or not they enjoy the same citizenship as their victim.

4. States are obliged in cases of attacks upon diplomatic representatives to take urgent measures against the perpetrators of such acts and to render more severe the existing punishments to this end.

5. A request for extradition may be refused, provided that the State in whose territory the crime was committed and the culprit was found institutes without delay legal proceedings against the said person.

6. When several States at the same time claim the right to extradition, the extradition should be granted to the State to which the victim of the crime belongs (especially in case of death).

7. States are obliged to mutually co-operate with a view to preventing and combating such crimes, especially with respect to undertaking preventive measures.

8. If the perpetrators of criminal acts belong to an organization which instigates, organizes, assists or participates in the execution of these criminal acts, each State is obliged, in addition to punishing the culprits, to undertake effective measures and to dissolve such an organization.

9. The rules under consideration would not apply to criminal acts committed in the territory of a State if both the culprit and the victim were the citizens of the said State.

The Government of the Socialist Federal Republic of Yugoslavia is of the opinion that the question of the protection of diplomats and other persons discharging duties of international interest, as well as of diplomatic missions, merits the full attention of the international community and hopes that the International Law Commission will give priority to the consideration of this question in conformity with General Assembly resolution 2780 (XXVI).

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