# YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1968

Volume II

Documents of the twentieth session including the report of the Commission to the General Assembly



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### NOTE

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A/CN.4/SER.A/1968/Add.1

UNITED NATIONS PUBLICATION

Sales number: E.69. V. 4

Price: \$U.S. 3.50 (or equivalent in other currencies)

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### SUCCESSION OF STATES AND GOVERNMENTS

[Agenda item 1]

# DOCUMENT A/CN.4/200 \* AND ADD.1 AND 2 Succession of States to multilateral treaties: studies prepared by the Secretariat

[Original text: English]
[21 February, 15 March and 23 April 1968]

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### Introduction

- 1. In order to assist the International Law Commission in its work on the topic of the succession of States, the Codification Division of the Office of Legal Affairs of the United Nations Secretariat has for some time been conducting research on the succession of States to multilateral treaties with respect to a number of selected international organizations, agencies and unions, and on the succession of States to various multilateral treaties concerning some of these bodies.
- 2. At its nineteenth session in 1967, the International Law Commission decided to divide the topic of the succession of States into three headings and confirmed its decision of 1963 to give priority to succession in respect of treaties. For this reason, the Commission also decided to advance the work under the heading "Succession in respect of treaties" as rapidly as possible at its twentieth session in 1968. Following this decision of the Commission, the Secretariat in turn decided to start publishing the results of the Codification Division's research on the succession of States to multilateral treaties.
- 3. This document describes the research carried out with regard to the International Union for the Protection of Literary and Artistic Works: Berne Convention of 1886 and subsequent Acts of revision, the Permanent Court of Arbitration and the Hague Conventions of

1899 and 1907, the Geneva Humanitarian Conventions of 1864, 1906, 1929 and 1949 and the International Red Cross, the International Union for the Protection of Industrial Property: Paris Convention of 1883 and subsequent Acts of revision and special agreements, and the General Agreement on Tariffs and Trade and its subsidiary instruments. The designations employed and the presentation of the material in this document do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country or territory or of its authorities.

- I. International Union for the Protection of Literary and Artistic Works: Berne Convention of 1886 and subsequent Acts of revision <sup>2</sup>
- A. The Berne Convention of 1886 and subsequent revisions
- 1. ESTABLISHMENT OF THE INTERNATIONAL UNION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: ORGANS OF THE UNION
- 4. The International Union for the Protection of Literary and Artistic Works, known as the Berne Union, developed by stages. Its original charter was the Berne

<sup>&</sup>lt;sup>1</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, paras. 38-41.

<sup>&</sup>lt;sup>2</sup> The following study covers the period up to September 1967. All questions of succession of States to the Berne Convention of 1886 have hitherto arisen when either the Berlin Act, the Paris Act or the Brussels Act was in force and when the Berne Union still had a traditional structure. Only those

Convention of 9 September 1886,3 which came into force on 5 December 1887. This Convention was amended and supplemented in Paris on 4 May 1896, by an Additional Act and an Interpretive Declaration,4 put into operation on 9 December 1897. A thorough overhaul took place at Berlin on 13 November 1908. The Berlin Act 5—the International Convention relative to the Protection of Literary and Artistic Works revising that signed at Berne on 9 September 1886—came into force on 9 September 1910. On 20 March 1914, an Additional Protocol to the revised Berne Convention of 1908 was signed at Berne.<sup>6</sup> This Protocol came into force on 20 April 1915. The Berlin text, in its turn, The Rome Act signed on was revised at Rome. 2 June 1928, has been in force since 1 August 1931. Another revision of the Berne Convention took place in Brussels. The Brussels Act,8 signed on 26 June 1948, has been in force since 1 August 1951. Lastly, a further revision of the Berne Convention was recently adopted in Stockholm. The Stockholm Act of 14 July 1967 has not yet come into force.9

5. The first article of the Brussels text states that "The countries to which this Convention applies constitute a Union". The purpose of the Convention and the

texts and that structure are dealt with in this study. Nevertheless, it should be borne in mind that in future the succession of States to the Berne Convention and Acts of revision will be effected within a substantially altered framework. The instruments adopted at the Intellectual Property Conference of Stockholm, 1967 provide for major changes in both the regulations and the structure of the Berne Union.

- <sup>3</sup> Le Droit d'Auteur, 1888, p. 4.
- 4 Ibid., 1896, p. 77.
- <sup>5</sup> Ibid., 1908, p. 141.
- 6 Ibid., 1914, p. 45.
- <sup>7</sup> Ibid., 1928, p. 73.
- 8 Ibid., 1948, p. 73.
- <sup>9</sup> Copyright, 1967, pp. 165-178. The general features of the reform adopted at the Stockholm Conference are as follows: (a) the Unions of Berne and Paris retain their complete independence and their own tasks; between revision conferences each Union is placed under the exclusive authority of the Assembly of the member States of that Union; (b) a new organization, the World Intellectual Property Organization (WIPO) is set up alongside the Unions; all States members of a Union, and States that satisfy certain conditions indicated in the Convention, may become members of the organization. The organization is entrusted essentially with the co-ordination of the administrative activities of the Unions and the promotion of the protection of intellectual property throughout the world; (c) the secretariat of the Unions and of the organization is provided by a joint body, the International Bureau of Intellectual Property, which is a continuation of the United International Bureaux for the Protection of Intellectual Property The Director-General of the International Bureau is invested with new rights enabling him to represent the organization and the Unions at the international level; (d) depending on its various activities, the International Bureau is placed under the authority of the organs of the Unions or of the organization. However, it is the General Assembly of the member States of the Unions that exercises the main supervision (Copyright, 1967, p. 155). For the text of the Convention establishing the World Intellectual Property Organization of 14 July 1967, see Copyright, 1967, pp. 146-152.
- "The Contracting States are constitued into a Union". The Rome Conference replaced the term "Contracting States" by "countries to which the [present] Convention applies" in order

Union is International protection of copyright, but they are not identical. <sup>11</sup> The Union has a more territorial and organic character. The Convention is the legal instrument which creates the Union and establishes the body of common rules for the protection of the various intellectual works enumerated in article 2 of the Berne Convention. The nature of the Convention and the structure of the Union determine the conditions for the succession of States in the organization.

6. The Berne Union was established in 1886 in response to certain definite needs. It is traditional in structure and has the following organs: an International Office, <sup>12</sup> a High Supervisory Authority, <sup>13</sup> the Revision Conferences <sup>14</sup> and a Permanent Committee. <sup>15</sup>

to bring the terminology of the Convention into harmony with the conceptions of British constitutional law, as laid down by the Imperial Conference of 1926, and in order to stress the territorial character of the Union. The same procedure was applied to the term "contracting country", which was replaced in the Convention by "country of the Union". See "La Conférence de Rome. Les modifications secondaires apportées à la Convention", Le Droit d'Auteur, 1928, p. 91.

- <sup>11</sup> Francesco Ruffini, "De la protection internationale des droits sur les œuvres littéraires et artistiques", Recueil des Cours, 1926, vol. 12, pp. 471 et seq. For a recent analysis of the problems of intellectual property see: G. H. C. Bodenhausen, "Problèmes actuels de la propriété industrielle, littéraire et artistique", Recueil des Cours, 1949, vol. 74, pp. 383 et seq.
- <sup>12</sup> The International Office is a permanent organ which collects information on the protection of the rights of authors and communicates it to [member] States, undertakes the study of questions of general interest and edits a monthly review, Le Droit d'Auteur, on questions which concern the Union. Since January 1965, the review has been published in English also under the title of Copyright. The contents of the two editions are identical. The Office also draws up annual reports on its administration which are communicated to the members of the Union, assists the administrations of countries organizing the Revision Conferences and places itself at the disposal of members of the Union in order to provide them with any special information which they might require. The head of the Office is a Director [arts. 21, 22, 23 and 24 (2) of the Berlin, Rome and Brussels texts]. As part of its duties under the Convention, the Government of the Swiss Confederation decided on 11 November 1892 to put the International Office for Industrial Property and the International Office for Literary and Artistic Property under one administration with the name "United International Bureaux for the Protection of Industrial, Literary and Artistic Property" (Georges Béguin, "L'organisation des Bureaux internationaux réunis pour la protection de la propriété industrielle, littéraire et artistique", Le Droit d'Auteur, 1962, pp. 11-19).
- 18 The Office is placed under the High Authority of the Swiss Government, "which shall regulate its organisation and supervise its working". The High Authority supervises the expenditure of the Office, makes the necessary advances and draws up the annual account, which is communicated to the administrations of the countries of the Union. It also receives from, and communicates to, States all declarations on the application of the various conventional instruments (ratifications, accessions, denunciations, extension to Non-Self-Governing Territories, entry into force of a convention, etc...) [arts. 21, 23 (5), 25 (2) and (3), 26, 28, 29 (1) and 30 of the Rome and Brussels texts].
- <sup>14</sup> The purpose of the diplomatic and periodic Revision Conferences held in the countries of the Union is to revise the Conventions with a view to introducing "improvements intended to perfect the system of the Union", and to consider questions which "in other respects concern the development of the Union". They also fix the ceiling for the expenses of the International Office. The Conferences are subject to the rule of unanimity [arts. 23 (1) and 24 of the Rome and Brussels texts].

7. The traditional structure of the Berne Union has helped to create uncertainty as to the treatment of some cases of succession of States which have taken place within the Union and it has made the adoption of prompt, uniform and generally acceptable solutions difficult. As it is a Union of a "dependent type",16 with no permanent representative organs of the member States with extensive powers, with an international legal status which has not been generally recognized 17 and an International Office with executive and informational functions, the organs of management and administration, namely, the Swiss Government as supervisory authority and the International Office, have often been confronted by situations created by the succession of States which it was beyond their competence to solve under the Convention. These difficulties and uncertainties may be discerned by an analysis of the circulars from the Swiss Government to the Governments of the countries of the Union and of the general studies and editorial notes of the International Office published in Le Droit d'Auteur. Sometimes the Swiss Government has been of the opinion that specific cases concerning the succession of States should be solved by the Revision Conference, the only diplomatic organ in which all the countries of the Union are represented.<sup>18</sup> But as the Revision Conference only meets at widely spaced intervals (1908,

1928, 1948, 1967), a definite solution of controversial cases may take a long time.<sup>19</sup>

# 2. PROCEDURE FOR BECOMING A CONTRACTING PARTY

- 8. The Berne Convention is an open Convention. Any "country outside the Union" may accede thereto, by acceding to the last revision open to accession, merely by notifying the Swiss Government.<sup>20</sup> The Convention does not require the previous agreement of the contracting States for the accession of another State, and does not prescribe any admission procedure before an organ of the Union. As for the "countries of the Union", they may accede to the revised texts by signature, followed by ratification or by accession if they have not signed or deposited their ratifications within the prescribed time-limit.<sup>21</sup> All ratifications and accessions are communicated by the Swiss Government to the Governments of the other countries of the Union.<sup>22</sup>
- 9. But, while the Berne Convention as an open Convention does not present any major problems of accession to other States, whether they are new, successor or other, the effectiveness of the protection it establishes depends to a large extent upon the continuity of its application and presupposes a minimum of uniform internal legislation.23 Starting from the principle of the assimilation of the foreign to the national, the essential points of the Convention's provisions constitute a kind of international body of minimum, common and imperative rules, which oblige contracting States to accord foreigners a certain treatment and certain rights determined by their national laws and certain rights determined "jure conventionis".24 One of the chief reasons for the conclusion of the Convention was precisely the need to eliminate divergencies among national laws on

<sup>15</sup> Since the diplomatic Conference which revised the Berne Convention at Brussels in 1948 the Berne Union has a new organ known as the "Permanent Committee", composed of representatives from twelve member States of the Union designated by the Conference "with due regard to equitable representation of the various parts of the world". The Permanent Committee's sole duty is to "assist the Office" in the co-operation which the latter must afford the Administration of a State in which a Revision Conference is to be held in preparing the programme of the Conference (resolution adopted on 26 June 1948 by the diplomatic Conference at Brussels) (Le Droit d'Auteur, 1948, p. 117). A third of the Committee is eligible for re-election every three years, according to methods which it shall establish, having due regard to the principle of equitable representation. See "Un nouvel organe de l'Union internationale pour la protection des œuvres littéraires et artistiques" (Le Droit d'Auteur, 1948, p. 123).

<sup>16</sup> See: Jacques Secretan, "Structural Evolution of the International Unions for the Protection of Intellectual Property", Le Droit d'Auteur, 1962, p. 122, and "La structure traditionnelle des unions internationales pour la protection de la propriété intellectuelle", Les Unions internationales pour la protection de la propriété intellectuelle, littéraire et artistique, Geneva, 1962, p. 11: Georges Béguin, op. cit., p. 9; Robert Plaisant, "L'évolution des conventions de propriété intellectuelle", Les Unions internationales pour la protection de la propriété industrielle, littéraire et artistique, Geneva, 1962, p. 47; G. H. C. Bodenhausen, "The Evolution of the United International Bureaux", Le Droit d'Auteur (Copyright), 1963, p. 91. In all these works the need to go beyond the traditional organic structure of the Union is stressed.

<sup>&</sup>lt;sup>17</sup> At the present time the legal status of the Unions and the Bureaux and the requisite privileges and immunities have not been formally recognized by the member States as a body; in Switzerland, however, the Federal Council has accorded unilateral recognition of the aforementioned legal status and privileges and immunities (Jacques Secretan, "La structure traditionnelle des Unions internationales pour la protection de la propriété intellectuelle", op. cit., p. 43, note 1).

<sup>18</sup> See below, the case of Austria, paras. 39-41.

<sup>19</sup> According to Guillaume Finniss, "Une étape importante", Le Droit d'Auteur, 1963, pp. 26 and 28, the Swiss Government has accepted the principle of the reorganisations and transformation of the Unions and Bureaux. In their letter of 24 May 1962, the Federal authorities indicated very explicitly that they were not concerned to preserve their present role of supervisory authority and declared themselves very much in favour of the idea of a more active participation of the States in the management, operation and modernization of the Unions and BIRPI. It was in these circumstances that in 1962, for the first time, the Swiss Government decided to consult the States of the Union about the replacement of the Director of BIRPI.

<sup>&</sup>lt;sup>20</sup> Article 25 of the Rome and Brussels texts. The only condition mentioned is that the country in question should make provision for "the legal protection of the rights forming the object of this Convention".

<sup>&</sup>lt;sup>21</sup> Articles 27 (3) and 29 (1) of the Rome and Brussels texts and 29 (3) of the Brussels text.

<sup>&</sup>lt;sup>22</sup> Articles 25 (2) and 28 (2) of the Rome and Brussels texts.

<sup>&</sup>lt;sup>28</sup> Francesco Ruffini, op. cit., p. 477; Potu, La Convention de Berne, Paris, 1914, art. 16, p. 16.

<sup>&</sup>lt;sup>24</sup> On the other hand, according to the principle of minimum protection, when the internal law of the country importing the work contains less favourable provisions, the obligatory rules of the Convention apply *ipso jure* to authors from countries members of the Union.

copyrights.<sup>25</sup> Moreover, it must not be forgotten that the Convention sometimes leaves to the national legislation of the countries of the Union the determination, or the conditions of enjoyment, of certain rights that it accords. Hence the concern of countries of the Union for the maintenance of "Unionist treatment", and the internal legislation which to a certain extent accompanies it, in the case of the birth of a new State, detached from a State member of the Union or of the transformation of a colony or territory member of the Union into an independent State. It may be of equal concern for the newly independent State.

# 3. RELATIONSHIP BETWEEN THE REVISED TEXTS OF THE CONVENTION

10. Although "countries outside the Union" may, since 1 July 1951, accede only to the Brussels Instrument,<sup>26</sup> article 27 of this text states that so far as "the countries of the Union" are concerned, "The Instruments previously in force shall continue to be applicable in relations with countries which do not ratify" or do not accede to that Instrument. The same article of the Rome text contains a similar provision. On 10 July 1967, the fifty-eight countries of the Union,<sup>27</sup> and the territories for whose international relations they are responsible and to which the Convention has been extended,<sup>28</sup> applied either the Rome text of 1928, or the Brussels text of 1948, or even Berlin text of 1908.<sup>29</sup> There are at the present time three texts simultaneously

governing the relations between countries of the Union. At the beginning of each year the *Droit d'Auteur* (Copyright) indicates the field of application of the various texts in force between the countries of the Union.

11. As for relations between States which now enter the Union by acceding to the Brussels text and the other countries of the Union which still apply the Rome text, or even the Berlin text, the Office maintains a thesis based on the general principle of the unity and continuity of the Berne Convention. According to this thesis, the Office considers that the relations of a State which now accedes to the Convention—necessarily the Brussels instrument—with States which have ratified the Brussels instrument or have acceded to it are governed by that text, and its relations with other States which are not bound by the Brussels text are governed by the carlier texts which these various States have ratified or to which they have acceded.30 Efforts are being made to avoid fragmentation in the relations between countries of the Union and to organize their relations within the Union in the simplest possible way.31

The diversity of the texts of the Convention in force may, moreover, raise problems in cases of succession. In principle, a State only succeeds to the instrument to which the predecessor State was a party. Unionist territories which have become independent States may succeed to the instruments declared applicable to their territories by the former metropolitan country. New States which were former Unionist territories to which the Rome text was extended may remain in the Berne Union by succession to that instrument to which accession is no longer possible today. In the case of new States which were former territories of members of the Union and to which the Rome and Brussels texts were extended, the question remains to be determined whether they may enter the Union as contracting States by succeeding only to the Rome instrument. The Brussels text introduced innovations and changes which some new States may find less favourable than the provisions of the Rome text.<sup>32</sup>

### 4. FORMULATION OF RESERVATIONS

13. "Countries outside the Union" which accede directly to the Rome or to the Brussels text may formulate only one reservation, concerning the right of transla-

<sup>&</sup>lt;sup>25</sup> "In spite [of the] reservations, the Convention ... seems to afford by its basic principles an ideal protection with which national laws are tending slowly to come into line" ... "Thus, in countries offering most protection, the Convention appears to be an instrument which could be improved by more extensive safeguards, and in countries offering less protection a model for the legislator's efforts. The Convention is thus a kind of magnet for national laws". (Robert Plaisant, "L'évolution des conventions de propriété intellectuelle", Les Unions internationales pour la protection de la propriété industrielle, littéraire et artistique, Geneva, 1962, pp. 47-51.

<sup>&</sup>lt;sup>26</sup> Article 28 (3) of the Brussels text.

<sup>&</sup>lt;sup>27</sup> Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Cameroon, Canada, Ceylon, Congo (Brazzaville), Congo (Democratic Republic of), Cyprus, Czechoslovakia, Dahomey, Denmark, Federal Republic of Germany, Finland, France, Gabon, Greece, Holy See, Hungary, Iceland, India, Ireland, Israel, Italy, Ivory Coast, Japan, Lebanon, Liechtenstein, Luxembourg, Madagascar, Mali, Mexico, Monaco, Morocco, Netherlands, New Zealand, Niger, Norway, Pakistan, Philippines, Poland, Portugal, Romania, Senegal, South Africa, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, United Kingdom, Upper Volta, Uruguay and Yugoslavia. The Office indicates that "the number of countries of the Union is fifty-nine if Eastern Germany or the German Democratic Republic is considered a party to the Berne Convention. Member States have been unable to agree on this question". (Le Droit d'Auteur, 1956, pp. 105, 117 and 169, and Copyright, 1967, p. 6, foot-note 2.)

<sup>&</sup>lt;sup>28</sup> Australia: Nauru, New Guinea, Papua and Northern Territory; France: Overseas Departments and Territories; Netherlands: Surinam and Netherlands Antilles; South Africa: South-West Africa; United Kingdom: colonies. possessions and certain protectorates.

<sup>&</sup>lt;sup>29</sup> "State of the International Union on 1 January 1967", Copyright, 1967, pp. 2-6.

<sup>30</sup> Information provided by the Director of BIRPI.

<sup>&</sup>lt;sup>31</sup> See, for example, the editorial notes accompanying the accessions of the Philippines and Turkey, *Le Droit d'Auteur*, 1950, pp. 97 and 98, *ibid.*, 1951, pp. 133 and 134 and "L'Union internationale au commencement de 1952", *Le Droit d'Auteur*, 1952, p. 15.

<sup>&</sup>lt;sup>32</sup> For conventional instruments applicable between new States which were former territories of members of the Union see: G. Ronga "Situation dans l'Union de Berne des pays devenus récemment indépendants", Le Droit d'Auteur, 1960, pp. 320-324. The Brussels text made changes of substance to the Rome text in articles 2, 4 (3), 4 (5), 6 (2), 6 bis, 7, 8, 10, 10 bis, 11, 11 bis, 11 ter, 12, 13, 14, 14 bis, and 15.

tion.33 But the older countries of the Union which were Parties to the Rome or Brussels instruments may retain the benefit of the reservations which they have previously formulated, if they make a declaration to that effect at the time of ratification or accession.31 The option of formulating reservations is an innovation of the Berlin text of 1908 and has no precedent either in the Berne Convention of 1886 or in the Paris text of 1896. When the Berlin Conference redrafted the Convention, the countries of the Union received the right to indicate, in the form of reservations, which provisions of the first text of 1886 or of the Additional Act of 1896 they intended to substitute for the corresponding provisions of the 1908 Convention.35 Thus, a new State which becomes a Contracting Party by succession may continue to benefit by the reservations formulated by the predecessor State. The same applies to the former territories of Union members to which the former metropolitan country applied the Convention with reservations.

# B. Participation in the Union and territorial extent of the Union

### 1. CONTRACTING STATES

14. All contracting States, that is, all States Parties to one or other of the revised texts of the Convention, take part in the Union and the Union's territorial scope is that of their metropolitan territories. In addition to protection of copyright under the Convention, the participation of Contracting States in the Union comprises, for example: (a) the sending of delegations to the periodic and diplomatic Revision Conferences; 36 (b) sharing in the expenses of the Office in the class in which the State concerned has asked to be placed;<sup>37</sup> (c) exchange of notes with the Swiss Government on the application of the conventional instruments; (d) exchange of communications with the International Office on matters dealt with by the Union; (e) receipt of the annual reports on administration communicated by the International Office; and (f) the right to designate or to be designated as a member of the Permanent Committee since it was set up by the Brussels Conference of 1948.38

# 2. DEPENDENT TERRITORIES OF CONTRACTING STATES

- 15. While dependent territories of contracting States do not have the capacity of contracting State or country, they may belong to the Berne Union as recipients of the juridical rules in the Convention. These territories may be "incorporated into the Union" and become "countries to which the Convention applies" while not being contracting countries.<sup>39</sup> Many dependent overseas territories of a contracting State belong and have always belonged to the Berne Union. Thus, the territorial extent of the Union is not limited to the metropolitan territories of the contracting States.
- 16. All the Revision Conferences have remained faithful to the rule expressed in article 26 of the Brussels text, namely:
- (1) Any country of the Union may at any time in writing notify the Swiss Government that this Convention shall apply to its overseas territories, colonies, protectorates, territories under its trusteeship, or to any other territory for the international relations of which it is responsible, and the Convention shall therefore apply to all the territories named in such notification, as from a date determined in accordance with Article 25, paragraph (3). In the absence of such notification, the Convention shall not apply to such territories.
- (2) Any country of the Union may at any time in writing notify the Government of the Swiss Confederation that this Convention shall cease to apply to all or any of the territories which have been made the subject of a notification under the preceding paragraph and the Convention shall cease to apply in the territories named in such notification twelve months after its receipt by the Government of the Swiss Confederation.
- (3) All notifications given to the Government of the Swiss Confederation in accordance with the provisions of paragraphs (1) and (2) of this Article shall be communicated by that Government to all the countries of the Union. 10
- 17. Thus, each of the contracting States may extend the application of the Convention to its overseas territories, colonies, protectorates, territories under its trusteeship, or to any other territory for the international

<sup>&</sup>lt;sup>38</sup> Article 25 (3) of the Rome and Brussels texts. This, for instance, is true in the case of Iceland, which acceded to the Rome text in 1947 while exercising the option to make a reservation concerning the right of translation.

<sup>&</sup>lt;sup>34</sup> Articles 27 (2) and (3) and 28 (3) of the Rome and Brussels texts.

<sup>&</sup>lt;sup>35</sup> For a list of the States of the Union which have formulated reservations, those which have later abandoned them, and the field of application of the reservations which are still valid, see: Le Droit d'Auteur, 1953, pp. 1-5.

<sup>36</sup> Article 24 (2) of the Rome and Brussels texts.

<sup>37</sup> Article 23 of the Rome and Brussels texts.

<sup>&</sup>lt;sup>38</sup> Every six months *Copyright* publishes a summary of the state of the Union comprising an analysis of the field of application of the various revised texts of the Berne Convention and a table containing a list of the contracting countries and of the territories for whose international relations they are responsible and to which the international agreements of the Union are applicable.

<sup>&</sup>lt;sup>39</sup> See for example G. Ronga "Les colonies et l'Union de Berne", Le Droit d'Auteur, 1956, p. 21, and (the) "Position in the Berne Union of the Countries which recently became Independent", Le Droit d'Auteur, 1960, p. 320.

<sup>10</sup> This article differs from the one in the Rome text of 1928 only in the terminology used to describe dependent territories. The Rome text speaks of colonies, protectorates, territories under mandate, under sovereignty authority or suzerainty. The Berlin text was more flexible. It authorized the metropolitan Government acceding for its colonies, protectorates, etc... either to declare its accession applicable to all the territories or to name specifically those comprised therein, or else to indicate those which were to be excluded. The Rome and Brussels texts are more precise. They start with the idea that a country with a colonial empire does not accede on behalf of that empire unless it expressly says so. But it may give notice that the Convention shall apply to all or part of the said empire, and the instrument in question will then apply to all the territories specified in the notification. To sum up, it is no longer possible to extend the application of the Convention to colonies, protectorates, etc., in an indirect way, by enumerating the possessions which are to be excluded from the application ("La Conférence de Rome, Les modifications secondaires apportées à la Convention", Le Droit d'Auteur, 1928, p. 90).

relations of which it is responsible. This is a right of which the contracting States may make use, and not an automatic application of the Convention to the aforementioned territories. In the absence of notification by the contracting State to the Swiss Government, the Convention is not applicable automatically to the dependent territories of the contracting State concerned.

- 18. Several States of the Union, such as France, the United Kingdom, the Netherlands, Belgium, New Zealand, Australia, South Africa, Spain and Portugal have at the appointed time given notice that the Brussels text or earlier texts of the Convention were applicable to the countries for whose international relations they were then responsible. The extension of the application of the Convention to the dependent territories of certain contracting States has often been accompanied by promulgation of the internal legislation necessary to adapt the copyright regulations in force in those territories to the requirements of the Berne Convention.
- 19. The question of the succession of States arises within the Berne Union above all from the point of view of the accession to independence of former territories of members of the Union. New independent States which were formerly territories of members of the Union may, of course, accede to the Berne Convention, but the general interest of the States of the Union requires assurance of continuity of the legal bonds in so far as possible. However, in the absence of declarations defining the position of the new States which were formerly colonies of members of the Union, their situation in the Union remains uncertain.

# C. Cases comprising elements related to the succession of States

20. After the Second World War the Berne Union had to deal with a number of cases comprising elements related to the succession of States and some States in fact became contracting countries by succession. The Swiss Government and the International Office sometimes had to take decisions in situations which arose when new States attained independence. Those decisions were taken as specific situations arose. Sometimes, too, member States of the Union made their views known in notes addressed to the Swiss Government. In one case the Revision Conference itself was asked to settle the matter. In 1960, as a result of the attainment of independence by a considerable number of former colonial territories within the Union, the director of the United International Bureaux for the Protection of Industrial, Literary and Artistic Property asked the Governments of many former Union colonial territories which had become independent States to define their position vis-à-vis the Union. Following this request, several former territories of Union members became contracting States, either by succession, on the basis of a declaration of continuity, or by accession. It must be added that cases concerning the succession of States had arisen in the Berne Union before the Second World War.

21. For convenience, all these cases have been arranged

as follows: (1) cases occurring before the Second World War; (2) cases occurring from the end of the Second World War until the request of the director of BIRPI in 1960; and (3) cases occurring after the request of the director of BIRPI in 1960 to the Governments of the new States, formerly territories of Union members.

### CASES OCCURRING BEFORE THE SECOND WORLD WAR

- (a) Former territories of Union members which BECAME CONTRACTING STATES BY SUCCESSION
- 22. Australia, British India, Canada, New Zealand and South Africa, as British possessions, had been members of the Berne Union from the beginning. As from 1928, all these Union territories became contracting countries participating in the Revision Conferences and sharing in the expenses of the Office. Their change of status within the Union followed notes from the British Government to the Swiss Government expressing the desire of each of the countries to be "considered as having acceded" to the Berne Convention. The notes were transmitted by a circular from the Swiss Federal Council to the Governments of the countries of the Union. The text of the Swiss Federal Council's circular, announcing the change in the status of the countries, reads:
  - ... by note of the ..., His Britannic Majesty's Legation at Berne has informed the Swiss Federal Council of the desire of the Government of [name of the country in question] to be considered as having acceded ["as from ..." being added in some cases] in the ... class in respect of its share of the expenses of the International Office.

23. These countries are considered to have joined the Union as contracting countries from the date of the note addressed by the British Government to the Swiss Government (in the case of Australia, 14 April 1928; of Canada, 10 April 1928) or from the date indicated in the British note (in the case of British India, 1 April 1928; of New Zealand, 24 April 1928; of South Africa, 3 October 1928). All these countries have continued to be bound by the Berlin text of 1908 which the United Kingdom had extended to their territories. Although the British Government's notes invoked the accession procedure laid down in article 25 of the Berlin text on the accession of "countries outside the Union", notification of accession was not required of each of the countries concerned in order to confirm

<sup>11</sup> Since 5 December 1887.

<sup>&</sup>lt;sup>42</sup> See for Australia, Canada, British India, New Zealand and South Africa, Le Droit d'Auteur, 1928, pp. 57, 58, 78 and 133,

their change of status in the Union. The change was made in fact by succession.43

- 24. Since joining the Union as contracting countries, Australia, Canada and New Zealand have acceded to the Rome text,44 and South Africa and India have acceded to the Rome and Brussels texts. 45
- (b) A FORMER TERRITORY OF A CONTRACTING STATE WHICH BECAME A CONTRACTING STATE BY ACCESSION
- 25. After the conclusion of the Treaty of 6 December 1921 between Great Britain and Ireland, the latter acceded to the Berne Union as an independent State with effect from 5 October 1927 by a note of the same date from His Britannic Majesty's Legation at Berne to the Swiss Government. 46 The Swiss Federal Council, by a circular dated 21 October 1927, informed the countries of the Union of the accession of the Irish Free State. 17 In an editorial note accompanying the Swiss Government circular, the Office considered the Irish Free State's accession to the Convention as "proof that, on becoming an independent territory, if had left the Union".48 There was no succession.49
- 43 The Office, in a report entitled "L'Union internationale au seuil de 1929", commented as follow: "... Five territories which, as British possessions, were members of the Union from the beginning became contracting countries of the Union during 1928... The independence conferred, in the Union, on large British colonies or dominions is only natural: the same situation exists in the League of Nations and other international unions (the postal and telegraph unions, for example)..." (Le Droit d'Auteur, 1929, pp. 3 and 4).
- <sup>11</sup> Australia, 18 January 1935; Canada, 1 August 1931; New Zealand, 4 December 1947 (Le Droit d'Auteur [Copyright], 1964, pp. 6 and 7).
- 45 South Africa acceded to the Rome text on 27 May 1935 and to the Brussels text on 1 August 1951; India to the Rome text on 1 August 1931 and to the Brussels text on 21 October 1958 (ibid.).
- The note specified the class in which the new State wished to be placed for the purpose of sharing the expenses of the International Office.
  - 47 Le Droit d'Auteur, 1927, pp. 125 and 126.
- 48 Ibid. The note stated further: "... when there is dismemberment of a State, that is to say when a part of its territory is detached from the whole either to become a new State or to become part of another State (annexation), treaties concluded by the renouncing or ceding State cease to be applicable to the area over which a change of sovereignty occurred. The new or annexing State does not succeed to the rights and obligations arising from the agreements signed by the renouncing or ceding State if those agreements do not create a right to the thing that is the object of the renunciation of the cession. Since treaties are motivated by considerations which are entirely personal to the contracting States, the rights and obligations arising therefrom cannot be transmitted to other States. new or annexing State cannot be bound by conventions in which it did not participate as a contracting party".
- 49 The accession of the Irish Free State concerned the Berne Convention, revised at Berlin in 1908, and the additional Protocol of 20 March 1914 to that Convention. Subsequently, Ireland acceded to the Rome text with effect from 11 June 1935 and to the Brussels text with effect from 5 July 1959. Le Droit d'Auteur (Copyright), 1964, pp. 5 and 6. Ireland took part in the Revision Conferences at Rome (1928) and Brussels (1948).

- 2. CASES OCCURRING FROM THE END OF THE SECOND WORLD WAR UNTIL THE REQUEST OF THE DIRECTOR OF THE UNITED INTER-NATIONAL BUREAUX IN 1960
  - (a) Former territories of Union members
  - (i) Territories which became contracting States by succession
- a. Transfer of sovereignty with a bilateral agreement containing a general clause concerning succession to treaties: denunciation of the Convention
- 26. On 27 December 1949, the Netherlands abandoned its sovereignty over the Netherlands East Indies and the independence of *Indonesia* was proclaimed. On 15 January 1913, the Netherlands had given notice, in accordance with article 26 of the Berne Convention, that the Convention would be applicable to the Netherlands East Indies from 1 April 1913. The Netherlands Government had also declared in 1931 that the Rome text of 1928 would also apply to the Netherlands East Indies.50
- 27. After the proclamation of its independence in 1949, Indonesia's status in the Berne Union gave rise to misunderstanding which was only finally cleared up in 1956 following a démarche by the Netherlands Government to the Swiss Government. In 1950, in its annual report on the state of the Union, the International Office stated that, pending instructions from the competent authorities, no change had been made under the heading "Netherlands" in the list of contracting countries.<sup>51</sup> Later, in 1952, the Office stated that a communication received from the Netherlands Ministry of Foreign Affairs left no doubt about the rupture of ties between the Literary and Artistic Union and independent Indonesia and it added: "We have reason to hope, however, that the Republic of the United States of Indonesia will accede to the Berne Convention at a more or less early date. We are engaged in talks with the Jakarta Government to this end".52
- 28. The situation was clarified by a note dated 23 February 1956 from the Royal Netherlands Legation at Berne to the Swiss Federal Political Department. After referring to the provisions of article 5 of the Agreement on Transitional Measures concluded between the Netherlands and Indonesia, the Netherlands Government expressed the view that Indonesia remained bound

<sup>50</sup> The application of the Rome text to the Netherlands East Indies took effect from 1 October 1931 (Le Droit d'Auteur, 1932, p. 41).

<sup>51</sup> Le Droit d'Auteur, 1950, p. 7.
52 Ibid., 1952, p. 15. Nevertheless, the transfer of sovereignty from the Netherlands to Indonesia did not include Netherlands New Guinea. From 1951 until 1963 the Office included Netherlands New Guinea in place of Indonesia in the list of Union territories for the international relations of which the Netherlands was responsible. Following its transfer to Indonesia on 1 May 1963, after a period of direct United Nations administration which began on 1 October 1962, Netherlands New Guinea was no longer included in the list of Netherlands territories in the Berne Union published by the Office in January 1964.

by the Berne Convention although it had not yet deposited a formal declaration of continuity. In consequence of the transfer of sovereignty, Indonesia should no longer be included in the list of Netherlands territories in the Union but should be placed in the list of contracting countries of the Berne Union. Here is the text of the Netherlands note:

The Royal Government hereby declares that the former Netherlands East Indies, later called Indonesia, were part of the Berne Union and were bound by the Rome Text of 22 June 1928 (see *Le Droit d'Auteur*, 1949, pp. 2 and 3).

Her Majesty's Government considers that the fact that it has transferred sovereignty over the territory to the Government of the Republic of Indonesia has not altered the situation, bearing in mind the Charter of the Transfer of Sovereignty dated 27 December 1949. Indeed, article 5 53 of the transitional agreement concluded on the occasion of the transfer was adopted precisely with a view to situations such as this.

The Royal Government believes that there can be no doubt that the Republic of Indonesia should be considered a member of the Berne Union, particularly in the case of an open multi-lateral treaty which can be denounced after a period of one year (article 26, paragraph 2, and article 29, paragraph 1, of the Convention).

The Netherlands Government regrets that its communication dated 20 January 1950 gave rise to a misunderstanding on the part of the United International Bureaux for the Protection of Industrial, Literary and Artistic Property at Berne.

Whereas the sole purpose of this communication was to point out that, since the transfer of sovereignty, Indonesia should no longer appear as a dependency of the Netherlands in the list of countries of the Union, the Bureaux came to the conclusion that Indonesia should not appear in the list at all.

Consequently, the Royal Government would be greatly obliged if the Government of the Swiss Confederation would be good enough to lend its valuable assistance so that the Republic of Indonesia may be inscribed again on the list of countries which are members of the Berne Union and to arrange for this communication to be transmitted to the other countries members of the Union.

The Netherlands Government considers that this procedure should be adopted, although Indonesia has evidently not yet

33 Article 5 of the agreement reads:

deposited a declaration of continuity in respect of the Berne Convention as it did in respect of the Paris Convention for the Protection of Industrial Property (see *La propriété industrielle*, of November 1950, p. 222).

The Netherlands Government considers that the fact that Indonesia remains bound to a treaty such as the Berne Convention does not depend on the formal deposition of such a declaration.<sup>54</sup>

- 29. The Swiss Government accepted the Netherlands Government's view and by a circular dated 15 May 1956 it notified the Governments of the countries of the Union that Indonesia belonged to the Berne Union as an independent member State. The text of the circular which reproduced the Netherlands Government's note concluded:
- ... In view of the legal situation described above, there are grounds for considering Indonesia, since it attained the status of an independent State, as being bound by the Berne Convention for the Protection of Literary and Artistic Works, in the Rome revision of 2 June 1928, and as a member of the International Union for the Protection of Literary and Artistic Works...........55
- 30. The Swiss Government thus agreed that the general clause relating to succession to international treaties in force on Indonesian territory before its independence, as set forth in the bilateral agreement between the Netherlands and Indonesia at the time of transfer of sovereignty, applies to the Berne Convention. From 1957 to 1959, Indonesia was mentioned by the Office, among the contracting countries of the Berne Union, as having acceded to the Rome text on 1 October 1931. But throughout this period, Indonesia did not indicate in which class it would like to be placed for the purpose of sharing the expenses of the Union. Set
- 31. Although it had succeeded to the Berne Convention, revised at Rome, Indonesia still had the right, of course, to denounce the Convention. It did so in a note dated 19 February 1959 from the Indonesian Embassy at Berne and with effect from 19 February 1960.<sup>59</sup> Indonesia's denunciation implicitly confirmed the Netherlands Government's view, wich was accepted by the Swiss Government, that Indonesia had become a member State of the Union by succession.

<sup>&</sup>quot;1. The Kingdom of the Netherlands and the Republic of the United States of Indonesia understand that, under observance of the provisions of paragraph 2 hereunder, the rights and obligations of the Kingdom arising out of treaties and other international agreements concluded by the Kingdom shall be considered as the rights and obligations of the Republic of the United States of Indonesia only where and inasmuch of such treaties and agreements are applicable to the jurisdiction of the Republic of the United States of Indonesia and with the exception of rights and duties arising out of treaties and agreements to which the Republic of the United States of Indonesia cannot become a party on the ground of the provisions of such treaties and agreements.

<sup>&</sup>quot;2. Without prejudice to the power of the Republic of the United States of Indonesia to denounce the treaties and agreements referred to in paragraph 1 above or to terminate their operation for its jurisdiction by other means as specified in the provisions of those treaties and agreements, the provisions of paragraph 1 above shall not be applicable to treaties and agreements in respect of which consultations between the Republic of the United States of Indonesia and the Kingdom of the Netherlands shall lead to the conclusion that such treaties and agreements do not fall under the stipulations of paragraph 1 above."

<sup>54</sup> Le Droit d'Auteur, 1956, pp. 93 and 94.

<sup>55</sup> Ibid.

<sup>&</sup>lt;sup>56</sup> G. Ronga, "Les colonies et l'Union de Berne. Situation particulière de l'Indonésie après son accession à l'autonomie", Le Droit d'Auteur, 1956, pp. 21-26.

<sup>&</sup>lt;sup>57</sup> Le Droit d'Auteur, 1957, p. 2; ibid., 1958, p. 2; ibid., 1959, p. 2.

<sup>58</sup> Ibid., foot-note 12.

<sup>59</sup> For the text of the note of denunciation of the communication from the Swiss Government to the countries of the Union, see: Le Droit d'Auteur, 1959, pp. 79 and 80. See also G. Ronga, (the) "Position in the Berne Union of the countries which recently became undependent", Le Droit d'Auteur, 1960, p. 321. The Berne Convention remains in force for a specified time (Rome text) or without limitation of duration (Brussels text) but it can be denounced at any time by notification addressed to the Swiss Government. Denunciation takes effect in respect of the country making it one year after notification (art. 29 of the Rome text and the Brussels text).

- b. Notification of accession considered as a declaration of continuity
- 32. Ceylon was in the list of British colonies, possessions and protectorates to which the Berne Convention, revised at Rome (1928), became applicable from 1 October 1931. The country gained its independence on 4 February 1948 and the Prime Minister, in a letter of 20 July 1959 to the Swiss Federal Political Department, gave notice of his country's accession to the Berne Convention, revised at Rome, and at the same time transmitted the instrument of accession to the Convention. Here are the relevant passages from the letter and from the instrument of accession:
- ... I have the honour to forward herewith an Instrument of Accession to the International Convention for the Protection of Literary and Artistic Works signed at Rome on 2 June 1928 and to inform you that the Government of Ceylon, while acceding to the said Convention reserves for itself the right to enact local legislation for the translation of educational, scientific and technical books into the national language.

I have also to inform . . . that Ceylon acceded to this Convention with effect from 1 October 1931, when she was a British Colony, and I am glad to inform you that the Government of Ceylon has now decided to accede to it in its own right as an independent nation.

In terms of article 23 (4) of the International Convention for . . ., I have the honour to inform Your Excellency that the Government of Ceylon wishes to be placed in the 6th class for the purposes of the payment of contributions . . . [instrument of accession attached].<sup>62</sup>

33. The Swiss Government, in its notification of 23 November 1959 to the countries of the Union, stated that Ceylon's instrument of accession "constituted in fact a declaration of continuity" since it confirmed, in respect of Ceylon, the United Kingdom declaration concerning the application of the Berne Convention, as revised at Rome, "to a number of British colonies and protectorates and territories under British mandate, including Ceylon, with effect from 1 October 1931" The Swiss notification continued: "Ceylon, which became independent in 1948, has therefore been a participant in the Convention as from that date and without interruption". Thus, the Swiss Government considered that Ceylon had become a contracting State by succession and not by accession. This interpretation has since been confirmed by the International Office, which reported Ceylon as having acceded to the Rome text on 1 October 1931 and as having joined the Union as a contracting country on 30 July 1950, the date of transmittal of the Ceylonese Prime Minister's letter. 63

# (ii) Part of a territory which became a contracting State by accession

34. After the First World War, the United Kingdom extended the Berne Convention to Palestine, then under United Kingdom Mandate, the extension to take effect on 21 March 1924.<sup>64</sup> The State of Israel was immediately proclaimed when the Mandate ended on 15 May 1948. The Israel Government, wishing Israel to succeed Palestine in the Berne Union without interruption as far as its territory was concerned, desired to accede retroactively to the Berne Convention, i.e., as from the date when the State of Israel was proclaimed independent. The Israel Government's intentions were notified to the contracting countries by a circular of 24 February 1950 from the Swiss Federal Council to the Governments of the contracting countries, as follows:

... in a note dated 14 December 1949 the Israel representative at the European Office of the United Nations at Geneva gave notice of the accession of his Government to the Berne Convention for the Protection of Literary and Artistic Works.

At present, the accession of the Israel Government applies to the Text of the Berne Convention agreed at Rome on 2 June 1928, the Text drawn up at Brussels on 26 June 1948 not yet being enforceable. The accession will apply de plano to this latter Text, as soon as it comes into force, in accordance with article 28 of the Brussels Text.

The State of Israel will share the expenses of the International Office as a contracting country of the fifth class (article 23 of the Rome Text of the Berne Convention).

As to the date from which this accession shall take effect, it would appear from a further statement from the Ministry of Foreign Affairs at Hakirya, on 1 December 1949, that the Israel Government considers itself bound by the provisions of the Rome Text of the Berne Convention as from 15 May 1948, the day the State of Israel was proclaimed independent. The Ministry bases its argument on "the special situation of the State of Israel, on the formal obstacles to its earlier accession and on the fact that Palestine belonged to the Literary and Artistic Union.

The Political Department and the Office of the International Union for the Protection of Literary and Artistic Works consider this formula convenient since it avoids any interruption between the terms of accession, on 21 March 1924, of Palestine (as a country under United Kingdom Mandate), and those of Israel's accession which is hereby notified. In agreement with the International Office, the Political Department therefore proposes, unless advised to the contrary before 24 March 1950, that the accession of the State of Israel take effect from 15 May 1948.....65

<sup>60</sup> Le Droit d'Auteur, 1931, p. 106; ibid., 1932, p. 39.

<sup>61</sup> Ibid., 1959, pp. 205 and 206.

<sup>62</sup> Ihid

<sup>&</sup>lt;sup>63</sup> Copyright, 1965, p. 4. Until 1964 the Office regarded Ceylon as having joined the Union of 1 October 1931. Since 1965 the practice more recently followed in the case of Union territories which became contracting countries by succession has been applied to Ceylon. The date of Ceylon's joining the Union was accordingly changed to the date of notification of the declaration of continuity.

<sup>&</sup>lt;sup>61</sup> This was the Berlin text of 1908 and the Protocol of 1914. The Rome text became applicable to Palestine on 1 September 1931. The United Kingdom gave notice of Palestine's accession to the Convention. In a circular letter to the Governments of the countries of the Union, the Government of the Swiss Confederation made the following observation: "... it (the accession) took place under article 19 of the Palestine Mandate. The United Kingdom Government, in the circumstances, does not consider it necessary to establish whether it comes within the scope of article 25 of the Convention... or, as has been the procedure under modern Conventions of this kind in the case of territories in an identical situation, within the scope of article 26 relating to colonies and foreign possessions..." (Le Droit d'Auteur, 1924, p. 97).

<sup>65</sup> Le Droit d'Auteur, 1950, p. 25.

- 35. The Political Department of the Swiss Confederation and the International Office therefore did not oppose retroactive accession, but because the Berne Convention did not provide for such accession, the matter was submitted for the approval of the contracting countries. As the unanimity needed for acceptance of the Israel request was not forthcoming, the Swiss Federal Council notified Governments of countries of the Union of the situation in a further circular on 20 May 1950, as follows:
- ... the proposal to allow this accession, as the Israel Government requested, with retroactive effect from 15 May 1948, has not been accepted with the necessary unanimity by the contracting countries.

In the circumstances, the accession cannot occur except under the provisions of article 25 (3) of the said Convention, that is, with effect from 24 March 1950. . . . 67

- 36. Consequently, the accession of Israel took effect one month after the dispatch of the first circular, dated 24 February 1950, from the Swiss Government, in other words, on 24 March 1950. The Territory of Israel is deemed to have remained outside the Union during the period between midnight on 14 May 1948, the date on which the United Kingdom Mandate for Palestine expired, and 24 March 1950.
- 37. At the time of Israel's accession, the Brussels text had not come into effect. To avoid confusion, and following the precedent established by Yugoslavia in 1930,68 the State of Israel declared its accession to the Rome text and the Brussels text simultaneously. The latter text, of course, became enforceable in Israel only from the time when the Brussels text itself came into force, that is from 1 August 1951.69
- (b) Former territory of a contracting State which became a contracting State by accession
- 38. Pakistan was a Union State before it became independent, because it had been part of British India which had been a Union State from the beginning, at first as a British possession, and then, from 1 April 1928, as a contracting country. British India had acceded to the Rome text from 1 August 1931. But despite its status as a Union territory, it was considered that, because of its separation from India, Pakistan had ceased to belong to the Berne Convention from the date it became independent, 14 August 1947. In fact, on

4 June 1948, Pakistan issued a declaration of accession to the 1928 Rome text of the Berne Convention, in accordance with article 25 of the text.<sup>72</sup> The Swiss Federal Council informed Governments of the members of the Union on 5 June 1948, and Pakistan's accession became effective from 5 July 1948.<sup>73</sup> According to the International Office:

when Pakistan formed part of India, it was *ipso facto* a party to the Union; subsequently it left the Union when India and Pakistan were separated. On 5 July 1948, it again became a member of the Union as a contracting country.<sup>74</sup>

### (c) Contracting States

- (i) Restoration of independence after annexation by another contracting State: Decision taken by the Brussels Revision Conference
- 39. Austria joined the Berne Union by accession to the Berlin text on 1 October 1920.75 After the Second World War, the International Office ruled that Austria was no longer a contracting country of the Union. According to the International Office, "the dismemberment suffered by Germany as a result of the reconstitution of Austria did not affect the rights and obligations devolving on the former from treaties which it had signed. Austria, on the other hand, did not automatically inherit the said rights and obligations from Germany". The International Office therefore concluded that Austria should "accede on its own behalf to the treaties from which it intended to benefit".76 This view was not accepted by the Austrian Government, which considered that the proclamation of freedom in April 1945 marked a return to its legal position before the Anschluss, with restoration of the formal responsibilities and advantages of the treaties to which Austria was signatory in March 1938—the date of its incorporation into Germany.77 In a note dated 1 April 1948, Austria requested the Swiss Government to ask the International Office to publish a statement on its membership of the Berne Union in Le Droit d'Auteur. The statement read:
- ... the Republic of Austria considers it has enjoyed uninterrupted membership of the International Union for the Protection of Literary and Artistic Works under the Berne Convention of 9 September 1886, revised at Berlin on 13 November 1908 and at Rome on 2 June 1928, since its accession on 1 October 1920. This applies equally to all the conditions implied in its uninterrupted membership of the Union, the continuity of Austrian rights in this respect not having been affected by German occupation of Austrian territory.

As regards its sharing the expenses of the International Office, the Republic of Austria considers it should still be placed in the

<sup>66 &</sup>quot;The International Union at the beginning of 1952" (Le Droit d'Auteur, 1952, p. 14).

<sup>67</sup> Le Droit d'Auteur, 1950, pp. 62 and 63.

cs Le Droit d'Auteur, 1930, p. 85. In a note dated 17 June 1930, the Yugoslav Government notified the Swiss Federal Council of its accession to the Berlin text of 1908 and the Rome text of 1928 with effect from the date when the latter came into force. On that date, 17 June 1930, the Rome text not yet being effective, Yugoslavia decided to register both these accessions, one with immediate effect, the other in advance. (Le Droit d'Auteur, 1950, p. 98, editor's note.)

<sup>69</sup> Ibid., 1952, p. 14; Le Droit d'Auteur (Copyright), 1964, p. 6.

<sup>&</sup>lt;sup>70</sup> Le Droit d'Auteur, 1949, p. 14.

<sup>&</sup>lt;sup>71</sup> Ibid., 1932, p. 40.

<sup>&</sup>lt;sup>72</sup> *Ibid.*, 1948, p. 61.

<sup>73</sup> Article 25 (3) of the Rome text of the Berne Convention.

<sup>&</sup>lt;sup>74</sup> Le Droit d'Auteur (Copyright), 1964, pp. 6 and 7, footnote 9.

<sup>&</sup>lt;sup>75</sup> Ibid., p. 6.

<sup>76</sup> Le Droit d'Auteur, 1946, p. 8.

<sup>&</sup>lt;sup>77</sup> Ibid., 1948, p. 4.

sixth class of countries in the Union, under article 23 of the Convention.<sup>78</sup>

- 40. This idea that Austria had belonged to the Union continuously was accepted by the Brussels Revision Conference and its decision, as the supreme authority of the Union, was final.
- 41. At the first plenary session of the Conference on 5 June 1948, the Austrian delegation made a statement similar to that published in *Le Droit d'Auteur*. After recalling that Austria had paid its contributions, it asked to be admitted to the Conference as it had been to "other international meetings of a similar character". After a brief discussion, in which the French, Swiss, Italian and Belgian delegations as well as the Director of the International Office took part, the Conference decided to uphold the Austrian position by 27 votes in favour and 1 abstention (Yugoslavia)."

# (ii) Accession to independence without change of status within the Union

- 42. Tunisia and Morocco (French zone) joined the Berne Union on 5 December 1887, so and 16 June 1917, st through notification to the Swiss Government on their behalf by France. Within the Union they have always ranked as contracting and contributing countries, taking part with voting rights in Revision Conferences—unlike colonies and possessions for which the mother country acts. Tunisia acceded to the Rome text on 22 December 1933 and Morocco on 25 November 1934. se
- 43. By note dated 23 October 1951, 33 France gave notice that the Brussels text was applicable to a large number of overseas territories, colonies, protectorates, territories under its trusteeship and the like, including Tunisia and Morocco. This note, addressed to the Belgian Government in its capacity as depositary, was transmitted by the latter to the Swiss Government, which communicated it by circular to the Governments of the countries members of the Union. The circular from the Swiss Government was published in *Le Droit d'Auteur* along with an editorial note from the Office, which contained the following clarification:

... On 26 June 1948, Morocco and Tunisia signed the Brussels Text. The notification from the French Government, dated 23 October 1951, should be interpreted, in so far as it mentions the two French Protectorates in North Africa, as a notification of accession made "in the form provided for by article 25" of the Brussels Text [see this Text, article 28, para. (3)], and not as being made in pursuance of article 26 (reserved for colonies) On the other hand, the overseas territories, territories under trusteeship and the Franco-British condominium have acceded in accordance with the procedure provided for in article 26.....81

- 44. In the opinion of the Office, therefore, since Morocco (French zone) and Tunisia had been contracting countries since their entry into the Union, the only way they could have been bound by the Brussels text was through their accession, in accordance with articles 25 and 28 (3) of that instrument. France's notification of the territorial application of the text was regarded as having the legal validity of an accession with effect from 22 May 1952. This is confirmed by the fact that the attainment of independence by Morocco and Tunisia did not bring any change in their status within the Berne Union. They did not have to make any kind of declaration of continuity or of new accession. Their respective dates of entry into the Union and of accession to both the Rome and the Brussels texts are still the same as before their independence. The legal status of a protectorate had no consequences for Morocco and Tunisia within the Berne Union other than those deriving from the fact that France was responsible for their international relations (diplomatic correspondence; appointment of plenipotentiaries to Revision Conferences; notification of accessions).85
- (iii) Separation of two countries forming a single contracting State after their accession to independence
- 45. By a note dated 18 June 1924 France stated that "the group of States of Syria and Lebanon" had acceded to the 1908 Berlin text of the Berne Convention.86 According to the provisions of article 25 of this text, this accession became effective as of 1 August 1924, the date of the Swiss Federal Council's circular notifying the States in the Union of the above-mentioned accession. The French Government did not merely extend the application of the Berlin text to Syria and Lebanon, at that time under French Mandate, but made a declaration of accession on their behalf. Moreover, the accession was made jointly for the two countries with a view to creating within the Berne Union a single contracting State, "the Group of States of Syria and Lebanon". This is confirmed by the French request that this "Group of States" should be placed in the sixth class for contribution to the expenses of the Inter-

<sup>&</sup>lt;sup>78</sup> *Ibid.*, p. 61.

<sup>&</sup>lt;sup>79</sup> The International Union for the Protection of Literary and Artistic Works, *Documents of the Brussels (Revision) Conference from 5-26 June 1948*, Berne, 1951, pp. 71 and 72. See also *Le Droit d'Auteur*, 1949, p. 15.

<sup>80</sup> Copyright, 1965, p. 5.

<sup>81</sup> Le Droit d'Auteur, 1917, p. 73.

<sup>82</sup> Le Droit d'Auteur (Copyright), 1964, pp. 5 and 6.

<sup>83</sup> Le Droit d'Auteur, 1952, p. 49.

<sup>84</sup> Ibid., p. 50.

<sup>&</sup>lt;sup>85</sup> Spain had declared that the Rome text was applicable to Morocco (Spanish zone) as from 23 March 1933 (*Le Droit d'Auteur*, 1934, p. 133). On 12 August 1926, a law was enacted for the *Tangier zone* concerning the protection of literary and artistic property, based directly on the Berlin text of 1908 (*Le Droit d'Auteur*, 1927, pp. 4 and 53).

<sup>86</sup> Le Droit d'Auteur, 1924, p. 85. By an Order dated 19 July 1923, an office for the protection of commercial, industrial, artistic, literary, and musical property was set up in the High Commissariat of the French Republic in Syria and Lebanon (1bid., p. 98). From 1925 to 1927, the Office included among the member countries of the Union, immediately after "France, together with Algeria and its colonies", "Countries under mandate: Syria and Lebanon" as applying the Berlin text (1bid., 1925, pp. 1 and 2). "The States of Syria and Greater Lebanon" participated as a single entity in the Rome Revision Conference, their plenipotentiaries being appointed by the President of the French Republic (1bid., 1928, p. 75). During the period 1928-1946 these countries appeared, under the heading "Syria and Lebanese Republic (countries under French mandate)", in the list which the Office drew up of countries members of the Union (1bid., p. 2).

national Office. As the status of mandated countries had not of course been anticipated in 1908 when the Berlin text was drawn up, the Swiss Government's circular to the member States of the Union drew attention to this fact in the following terms:

- ... we believe it our duty to point out that, as the status of mandated countries was not clarified in the system of the literary Union either from the point of view of their rights (representation at diplomatic revision conferences), or from that of their obligations (financial contributions), it seems appropriate that a uniform decision for all countries in this category should be taken at the next revision Conference provided for in article 24 of the Convention. . . .
- 46. In 1925 France acceded on behalf of Syria and Lebanon to the Additional Protocol of 20 March 1914 to the Berne Convention with effect from 28 March 1925.87 Syria and Lebanon have also acceded to the Rome text by notification made by France with effect from 22 December 1933.88
- 47. After the Second World War, Syria and Lebanon became separate and independent States. By a note dated 19 February 1946, Lebanon notified the Swiss Government of its accession to the Berne Convention, as revised at Rome. In informing the Governments of countries members of the Union of the Lebanese note, the Swiss Government said that "in accordance with article 25 of the Convention, the accession in question shall take effect one month after the date of the present notification, that is from 30 September 1947". However, in an editorial note accompanying the publication of the Swiss Government's circular in Le Droit d'Auteur, the Office made the following observations:

The accession of Lebanon to the Berne Convention... must not be interpreted as meaning that Lebanon joined the Union... on 30 September 1947. That is the date on which the separation of Lebanon from Syria became effective in so far as the abovementioned Union is concerned. Up to 30 September 1947, Syria and Lebanon together formed a single contracting country...

The Lebanese Government now declares its accession to this same Convention [Rome Text].... This is explained by the fact that the separation of Syria and Lebanon made it necessary to clarify the position of each of the two parts henceforward separate of what had previously formed a whole. The Lebanese Government has decided to remain in the Union; this is how we interpret the Swiss Federal Council's circular of 30 August 1947...

It was obviously necessary . . . to inform the other contracting parties of the separation of Syria and Lebanon into two individual contracting countries in the Union . . . but a single notification in respect of one of the two countries formerly united was sufficient for this purpose. . . . 90

48. Lebanon and Syria have always been regarded as having joined the Union on 1 August 1924 and as having acceded to the Rome text on 24 December 1933, that is, on the dates on which they formed a single

contracting country. They became separate contracting countries from 30 September 1947, the date mentioned in the Lebanese notification. Subsequently, Lebanon and Syria participated, as two separate contracting States, in the Brussels Revision Conference of 1948. Syria ceased to be a member of the Berne Union in 1962.

- (iv) Union with a non-contracting State: denunciation of the Convention: later dissolution of the unified State
- 49. Syria became a Contracting State separately from Lebanon on 30 September 1947. That did not give rise to any new situation in respect of the text of the Convention of the Berne Union then in force on Syrian territory, namely the Rome text of 1928, to which Syria had acceded with Lebanon, with effect from 24 December 1933. 4 50. After the union of Egypt with Syria and the proclamation of the United Arab Republic, the latter notified the Swiss Government, on 12 January 1961, of the denunciation by Syria of the Berne Convention, as revised at Rome. Syria had then become a province of the United Arab Republic. 5 The denunciation, which became effective as from 12 January 1962, was communicated by the Swiss Government to the Governments

of the countries members of the Union.96

51. Since then, however, Syria has resumed its full independence under the name of the Syrian Arab Republic. According to information appearing in Le Droit d'Auteur, the Damascus Government was asked, in 1964, whether it intended to regard the denunciation made on its behalf as null and void and to resume its place in the Berne Union. As no official reply has been received, Syria still does not appear on the list of contracting countries of the Union which the Office has drawn up. The Syrian Arab Republic has settled its arrears of contributions, but has not yet taken in respect of copyright a decision similar to that which enabled it to re-enter the Paris Union for the Protection of Industrial Property.<sup>97</sup>

<sup>87</sup> Ibid., 1925, p. 49.

<sup>88</sup> Ibid., 1933, p. 133.

<sup>&</sup>lt;sup>89</sup> Ibid., 1947, p. 109. Lebanon asked to be included in the sixth class for participation in the expenses of the Office.

<sup>90</sup> Le Droit d'Auteur, 1947, p. 109.

<sup>&</sup>lt;sup>91</sup> In this connexion, the Office made the following comment in 1948: "Two States, which had previously constituted a unit within the Literary and Artistic Union, decide to put an end to this situation; they split up but neither of them appears to have been strengthened at the expense of the other as a result of the separation. Neither Syria nor Lebanon has been 'dismembered'; each of them has expressed a wish to have the matter of their membership in our Union settled separately and individually. Moreover, if the theory of dismemberment were strictly applied, it would be necessary to consider, from the terms of the Lebanese note, that Lebanon had detached itself from Syria, which, for its part, has continued to be a member of the Union. On this view, Lebanon would be held to have left the Union and to have immediately rejoined it: Thus, this theory would have the same consequences as the one we have adopted..." (Le Droit d'Auteur, 1948, p. 5).

<sup>92</sup> Le Droit d'Auteur, 1948, p. 73.

<sup>93</sup> See para. 51 below.

<sup>94</sup> See para. 45 above.

<sup>95</sup> Le Droit d'Auteur, 1961, p. 70.

<sup>96</sup> Ibid.

<sup>&</sup>lt;sup>97</sup> Claude Masouyé, "The International Union on the Threshold of 1964", Le Droit d'Auteur (Copyright), 1964, p. 9.

- 3. CASES OCCURRING AS A RESULT OF THE RE-QUEST OF THE DIRECTOR OF THE UNITED INTERNATIONAL BUREAUX, IN 1960, TO NEW STATES FORMERLY TERRITORIES OF UNION MEMBERS
- 52. By letters dated 31 March 1960 and 5 December 1960, the Director of BIRPI asked countries which had attained independence in recent years to confirm whether they proposed to continue to apply the rules of the Berne Convention on their territories. The States in question are former dependent territories to which the Berne Convention had been extended in accordance with article 26, by the States which were then responsible for their international relations. The Director transmitted in the above-mentioned letters information and details about the purpose of the Berne Convention and the benefits it provided. The new States which were formerly dependent territories and which confirm their membership in the Union are required to share in the administrative expenses of the Office only from the date of confirmation of such membership.98
- 53. The Office has prepared a list of these countries, with accompanying information on the date of accession to independence, the date of the application of the Berne Convention (article 26 of the Convention), the text of the Berne Convention last applied and other relevant particulars.<sup>99</sup>
- 54. The initiative on the part of the Director of BIRPI prompted the newly independent States that were formerly dependent territories to state their position with regard to the Berne Convention without further delay. Some of the countries consulted notified the Director that they no longer considered themselves bound by the Berne Convention or that the matter was under study, whereas others gave an affirmative reply. The latter became contracting States either by accession or by succession.
- 55. The representations have been continued since then and on several occasions the Director of BIRPI has approached the Governments of the States which were formerly dependent territories. At the same time he offers them technical and legal assistance, particularly in the preparation of national copyright legislation.<sup>100</sup>

- (a) STATES CONSULTED WHICH HAVE BECOME CONTRACTING STATES BY SUCCESSION
- 56. As a result of the initiative taken by the Director of the United International Bureaux, five new African States, formerly French colonies or territories, namely, Cameroon, Congo (Brazzaville), Dahomey, Madagascar, Mali, Niger, as well as the Democratic Republic of the Congo and Cyprus have declared themselves Contracting States of the Berne Convention by means of succession. The procedure they have followed has been to address a letter to the Government of the Swiss Confederation, containing a "declaration of continuity". The Swiss Government has subsequently notified the Governments of the member States of the Union of the declarations of continuity communicated to it.<sup>101</sup>
- 57. In their "declarations of continuity" the States in question notify the Swiss Government that they are continuing to apply the Berne Convention on their territories and indicate at the same time the class in which they wish to be placed for the purpose of sharing in the expenses of the Office.
- 58. The following letter dated 3 January 1961 from the Prime Minister of the Republic of Dahomey to the Swiss Federal Political Department is an example:
- ... the Republic of Dahomey continues without interruption to be a member of the Berne Union for the Protection of Literary and Artistic Works, to which Dahomey is a party as a result of the accession made by France in accordance with article 26 of the Berne Convention.

Thus, Dahomey continues to apply on its territory the Berne Convention of 9 September 1886, last revised at Brussels on 26 June 1948, and retains the rights it acquired under the former régime.

Lastly, my Government wishes Dahomey to be placed in class VI for the purposes of its contribution.

I should be grateful if you would communicate this declaration of continuity to all the member States of the Berne Union. . . . 102

- 59. In addition to Dahomey, Mali, on 19 March 1962,<sup>103</sup> Niger, on 2 May 1962,<sup>104</sup> Congo (Brazzaville), on 8 May 1962,<sup>105</sup> the Democratic Republic of the Congo, on 8 October 1963,<sup>106</sup> Cyprus, on 24 February 1964,<sup>107</sup> Cameroon, on 21 September 1964,<sup>108</sup> and Madagascar, on 11 February 1966,<sup>109</sup> have also transmitted more or less similar "declarations of continuity" to the Swiss Government.
- 60. The notifications of the Swiss Government to the Governments of the countries members of the Union are worded, except for a few details, as follows:

<sup>98</sup> Le Droit d'Auteur, 1960, p. 336.

<sup>99</sup> Ibid. The same list of countries which have become independent; containing information on the dates of application of the Berne Convention, has been reproduced in Le Droit d'Auteur, 1961, p. 28. The thirty-one countries listed are the following in the order and according to the names used by the Office: Burma, Cambodia, Cameroon, Central African Republic, Cyprus, Congo (Leopoldville), Congo (Brazzaville), Korea (North), Korea (South), Ivory Coast, Dahomey, Formosa, Gabon, Ghana, Guinea, Upper Volta, Jordan, Laos, Madagascar, Malaysia, Mali, Mauritania, Niger, Nigeria, Federation of Rhodesia and Nyasaland, Senegal, Somalia (formerly British) and Somalia (formerly Italian), Chad, Togo, Viet-Nam (North) and Viet-Nam (South).

<sup>100</sup> Information supplied by the Director of BIRPI.

<sup>&</sup>lt;sup>101</sup> Copyright, 1965, pp. 4 and 5.

<sup>102</sup> Le Droit d'Auteur, 1961, p. 70.

<sup>&</sup>lt;sup>103</sup> Le Droit d'Auteur (Copyright), 1962, pp. 88 and 89.

<sup>104</sup> Ibid., p. 104.

<sup>195</sup> Ibid., p. 88.

<sup>106</sup> Ibid., 1963, p. 228.

<sup>&</sup>lt;sup>107</sup> *Ibid.*, 1964, p. 88.

<sup>108</sup> Ibid., p. 176.

<sup>109</sup> Copyright, 1966, p. 90,

... The Republic of [name of the State in question] has transmitted to the Swiss Government a declaration of continuity of membership in the Berne Convention for the Protection of Literary and Artistic Works, of 9 September 1886, last revised at Brussels on 26 June 1948.

This declaration confirms, with regard to [name of the State in question] a notification which was made earlier under article (26) 1 of the Berne Convention.

With regard to its participation in the expenses of the International Office of the Union, this State is placed, according to its request, in the ... class of contribution by virtue of article 23 of the Berne Convention revised at Brussels. . . . 110

- 61. In the case of the former French territories of Cameroon, Congo (Brazzaville), Dahomey, Madagascar, Mali and Niger, France gave notice on 23 October 1951 that the Berne Convention revised at Brussels would apply with effect from 22 May 1952.<sup>111</sup> The Berne Convention revised at Rome had been extended by France to Congo (Brazzaville), Dahomey, Mali and Niger from 26 May 1930.<sup>112</sup>
- 62. In the case of the Democratic Republic of the Congo, the former Belgian Congo, Belgium gave notice on 20 November 1948 that the Berne Convention revised at Rome would apply from 20 December 1948<sup>113</sup> and on 14 December 1951 that the Berne Convention revised at Brussels would apply from 14 February 1952.<sup>114</sup>
- 63. The United Kingdom gave notice that the Rome text would apply to Cyprus from 1 October 1931.<sup>113</sup> The Cyprus declaration, however, after affirming that "the Republic... continues without interruption to be a member of the Berne Union... to which Cyprus is a party consequent to the adhesion made by the United Kingdom" (art. (1) of the Berne Convention), continues:

Consequently, the Republic of Cyprus continues to apply on its territory the Convention of Berne signed on September 9, 1886, and as last revised at Brussels on June 26, 1948, and thereby retains all rights acquired under the former regime....<sup>116</sup>

- 64. The Swiss Government communicated the Cyprus declaration to the Governments of the members of the Union in the following terms:
- ... the Republic of Cyprus has transmitted to the Swiss Government a declaration of continued adherence, regarding the membership of this Republic in the Berne Convention for the Protection of Literary and Artistic Works, of 9 September 1886, last revised at Brussels on 26 June 1948.

Since the United Kingdom had made no declaration about the application of the Brussels text to Cyprus before its independence, the Office clarified the declaration of continuity of Cyprus to the Brussels text as follows:

It may be deduced . . . that this declaration confirms the adherence of Cyprus to the Rome Text of the Berne Convention without interruption since 1 October 1931 . . . and, at the same time, constitutes a notification of accession to the Brussels Text. As far as countries of the Union which have not yet adhered to the Brussels Text are concerned, the Rome Text will of course continue to be applicable as regards their relations with the Republic of Cyprus 118

65. The report on the State of the International Union on 1 January 1965, said that "Cyprus has addressed a declaration of continued adherence concerning the Rome text and, at the same time, a notification of accession to the Brussels text".<sup>119</sup>

# (b) STATES CONSULTED WHICH HAVE BECOME CONTRACTING STATES BY ACCESSION

- 66. Following the consultations undertaken by the director of the United International Bureaux, a number of former territories which are now independent States have become contracting States by accession. These are the former French colonies or territories of the *Ivory Coast, Gabon, Upper Volta* and *Senegal.*<sup>120</sup>
- 67. The accession of these new States was communicated by each of them to the Swiss Government and by the latter to the Governments of the countries of the Union, in accordance with the provisions of article 25 of the Berne Convention. The Ivory Coast, 121 Gabon, 122 and Senegal 123 made known their accession by letter only, indicating also the class in which they wished to be placed for the purposes of participation in the expenses of the Office. Upper Volta's communication 124 was also by a note, but the formal instrument of accession 125 and a further note specifying the form of participation in the Office's expenses 126 were subsequently transmitted. The Swiss Government's notification of these accessions to the countries of the Union indicated the date on which the accessions would take effect, in accordance with article 25, paragraph (3), of the Berne Convention. 127

<sup>&</sup>lt;sup>110</sup> Le Droit d'Auteur, 1961, p. 70; Le Droit d'Auteur (Copyright), 1962, pp. 88, 89 and 104; ibid., 1963, p. 228; ibid., 1964, pp. 88 and 176.

<sup>&</sup>lt;sup>111</sup> Le Droit d'Auteur, 1952, pp. 49 and 50.

<sup>112</sup> Ibid., 1930, p. 73.

<sup>113</sup> Ibid., 1948, p. 141.

<sup>114</sup> Ibid., 1952, p. 13.

<sup>115</sup> Ibid., 1932, p. 39.

<sup>116</sup> Le Droit d'Auteur (Copyright), 1964, p. 88.

<sup>117</sup> Ibid.

<sup>118</sup> Copyright, 1965, p. 3.

<sup>&</sup>lt;sup>119</sup> Ibid. This is an opposite case from that of Ceylon (see para. 32 above). Ceylon's accession was considered a declaration of continuity. Cyprus's declaration of continuity was considered an accession in so far as the Brussels text was concerned.

<sup>120</sup> Le Droit d'Auteur (Copyright), 1964, p. 9.

<sup>121</sup> Le Droit d'Auteur, 1961, pp. 257 and 258.

<sup>122</sup> Le Droit d'Auteur (Copyright), 1962, p. 44.

<sup>123</sup> Ibid., pp. 104 and 105.

<sup>124</sup> Ibid., 1963, p. 114.

<sup>&</sup>lt;sup>125</sup> Le Droit d'Auteur, 1963, p. 182.

<sup>&</sup>lt;sup>126</sup> Le Droit d'Auteur (Copyright), 1963, p. 180.

<sup>&</sup>lt;sup>127</sup> Le Droit d'Auteur, 1961, p. 257; Le Droit d'Auteur (Copyright), 1962, pp. 44 and 104; ibid., 1963, p. 114.

68. In accordance with article 28, paragraph (3), of the Convention revised at Brussels, the Ivory Coast, Gabon, Upper Volta and Senegal have acceded to the Brussels text, since from 1 July 1951 countries outside the Union may accede only to that text. Under the terms of article 25, paragraph (3), of the Convention, these accessions shall take effect "one month after the date of notification made by the Government of the Swiss Confederation to the other countries of the Union, unless some later date has been indicated by the acceding country". The accessions of Gabon, Upper Volta and Senegal took effect one month after the notification by the Swiss Government to the countries of the Union, namely 26 March 1962, 19 August 1963 and 25 August 1962 respectively. That of the Ivory Coast took effect on 1 January 1962, the date indicated in the letter of accession.

# (c) STATES CONSULTED WHICH NO LONGER CONSIDER THEMSELVES BOUND BY THE BERNE CONVENTION

69. Cambodia, the Republic of Korea, the Republic of Viet-Nam and the Republic of China, (for the Island of Formosa), replied to the Director of BIRPI that, in their opinion, any prior commitments undertaken by the Powers responsible for the international relations of their respective territories had ceased to be effective and that they no longer considered themselves bound by the provisions of the Berne Convention. The Republic of Korea, the Republic of Viet-Nam and the Republic of China indicated at the same time that they had not yet decided whether to accede to the Convention. Cambodia, on the other hand, ruled out the possibility for the present. Here is the gist of their replies:

Republic of Korea: ... the Government ... considers the accession made by the Japanese Government ... as ineffective on the territory of the Republic of Korea as from 15 August 1945.

Republic of Viet-Nam: . . . the undertaking given by France is not effective in the Republic of Viet-Nam since that country's attainment of independence.

That also appears to be the opinion of the Union, which did not mention "Viet-Nam" in the list of member States 130 and which did not require Viet-Nam to pay its contribution towards the expenses of the Office of the Union.

Republic of China (for the Island of Formosa): . . . the Government considers that the declaration made by Japan in 1932, extending the application of the said Convention to "Formosa", has ceased to be effective from 25 October 1945, the date on which Taiwan was restored to the Republic of China.

The Government . . . has not yet taken a decision concerning China's accession to the said Convention. . . . 132

### (d) STATES CONSULTED WHOSE POSITION IS UNDER STUDY

70. The Federation of Malaya, Ghana, and Nigeria have informed the Director of BIRPI that the question of their accession to the Union is under study. The Federation of Malaya, in its reply, commented that the international protection of copyright had not been studied, but added that it could not yet give its opinion as to the intentions of its Government concerning "accession" to the Berne Union. Ghana, after replying to the Director of BIRPI, took steps for the national and international protection of copyright which had no connexion with the Berne Convention. These three States are not included in the list of contracting States to the Berne Convention drawn up by the Office. 133

Ghana: . . . [the] question is under study.<sup>134</sup> This reply by Ghana is dated 22 August 1960. It should be pointed out, however, that Ghana subsequently adopted new legislation, Act 85 of 1961 relating to copyright <sup>135</sup> and on 22 May 1962 acceded to the Universal Copyright Convention of 6 September 1952.<sup>136</sup>

Federation of Malaya: . . . the Government . . . is at present studying new legislation designed to protect copyright on the territory of the Federation; it has not yet studied the question of the international protection of copyright. The Minister for Foreign Affairs is therefore not yet in a position to express an opinion as to his Government's intentions concerning his country's accession to the Union. . . . 137

Nigeria: . . . the Government . . . is at present studying the question of the Federation's accession to various international

<sup>&</sup>lt;sup>128</sup> Sce Le Droit d'Auteur, 1960, p. 338. France had extended the application of the Berne Convention, in the text revised at Rome, to Cambodia from 26 May 1930, in accordance with article 26 of the Convention. (Le Droit d'Auteur, 1930, p. 7).

<sup>129</sup> See *Ibid.*, 1960, p. 337. Japan had declared that the Berne Convention revised at Rome applied to Korea from 1 Augustus 1931, in accordance with article 26 of the Convention. (*Le Droit d'Auteur*, 1932, p. 40.)

<sup>130</sup> See above, foot-note 27.

that the Berne Convention revised at Rome would apply to Viet-Nam as from 26 May 1930, in accordance with article 26 of the Convention (*Le Droit d'Auteur*, 1930, p. 73).

<sup>132</sup> Ibid., 1961, pp. 27 and 28. Japan had declared that the Berne Convention revised at Rome was applicable to Formosa as from 1 August 1931 (Le Droit d'Auteur, 1932, p. 40). See also "L'Union internationale au commencement de 1950" (Le Droit d'Auteur, 1950, p. 7).

<sup>&</sup>lt;sup>133</sup> Copyright, 1965, pp. 4 and 5.

<sup>&</sup>lt;sup>134</sup> Le Droit d'Auteur, 1960, p. 337. The United Kingdom had extended the application of the Berne Convention revised at Rome to Ghana (then the Gold Coast) on 1 October 1931, in accordance with article 26 of the Convention (Le Droit d'Auteur, 1932, p. 39).

<sup>135</sup> Le Droit d'Auteur (Copyright), 1962, p. 89. Under the 1961 Act, the copyright countries are, in the first place, the parties to the Universal Copyright Convention (see articles 2, 14 and part I of the schedule to the Act). This Act repeals the United Kingdom Copyright Act of 1911 as well as the Copyright Ordinance (cap. 126) (see art. 17 of the Act).

<sup>136</sup> With effect from 22 August 1962, in accordance with article IX, paragraph 2, of the Universal Copyright Convention [Le Droit d'Auteur (Copyright), 1962, p. 99.]

<sup>137</sup> Le Droit d'Auteur, 1961, p. 134.

organizations, including your Organization. We will inform you as soon as a decision is reached concerning the Federation's membership of your Organization. . . . 138

### D. General questions concerning cases of succession

### 1. WAYS IN WHICH THE STATES CONCERNED MANIFEST THEIR CONSENT

- 71. Generally speaking, the Swiss Government has not expressed a definite opinion about the relations between States and the Berne Union, except in so far as it has received communications from the States concerned. The fact is that a number of new States, territories of members of the Union before they attained independence, which have not yet stated their position with regard to the Berne Union, are not included in the list pertaining to the "Field of application of the Rome and Brussels Conventions" prepared by the Office and published in Copyright. However, in 1960, the Director of BIRPI took the initiative of consulting all the new States which were formerly territories of members of the Union.
- 72. New States, formerly territories of members of the Union, have manifested their desire to remain in the Union by succession in various ways. The most common has recently been for a new State, formerly a territory of a member of the Union, to become the successor State by communicating "a declaration of continuity" directly to the Swiss Government. That course has been followed by Cameroon, Cyprus, Congo (Brazzaville), Ceylon, 140 Dahomey, Democratic Republic of the Congo, Madagascar, Mali and Niger.
- 73. In other cases, succession has taken place in accordance with a communication from the metropolitan contracting State to the Swiss Government. That was the case before the Second World War of the United Kingdom dominions: South Africa, Australia, Canada, India, and New Zealand; and, after the Second World War, of *Indonesia*. In the case of Indonesia, the Netherlands drew the attention of the Swiss Government to the general clause on succession to treaties in the bilateral agreement on the transfer of sovereignty concluded between Indonesia and the Netherlands. With the exception of misunderstanding which arose in that case and which was subsequently dispelled,141 the Swiss Government and the Office have accepted the two forms of manifesting consent described above and there have been no objections from the contracting States members of the Union.

- 74. In the case of certain States which had been contracting States members of the Union before attaining independence, the advent of independence was not accompanied by notifications concerning their status in the Union. That applies to *India, Syria, Tunisia* and *Morocco*. On the other hand, *Lebanon* gave notification of accession, which was regarded by the Office as a declaration whereby the country in question manifested its desire to remain in the Union "as a separate part of Syria", with which, before it attained independence, it had constituted a single contracting State member of the Union.<sup>142</sup>
- 75. Restitution of the rights in the Union of one contracting State, *Austria*, which recovered its independence after having been annexed to another contracting State, was effected by a declaration by the Austrian Government about its membership in the Union which was approved by the Brussels Revision Conference.<sup>143</sup>
- 76. The former territories of members of the Union which did not adopt the method of succession but acceded to the Berne Convention notified their accession directly to the Swiss Government (the *Ivory Coast, Gabon, Senegal, Upper Volta*). The same procedure was followed by States detached from a contracting State or from a dependent territory of a contracting State: they subsequently acceded to the Convention (*Ireland, Israel, Pakistan*).
- 77. A new State which becomes a contracting country of the Union by succession must choose the class in which it wishes to be placed for the purpose of sharing the expenses of the Office. As a general rule, the class is indicated in the declaration of continuity or in the communication from the former metropolitan country. However, since the choice of a class is a very different action from the declaration of continuity, it may be made after the declaration by a separate notification to the Swiss Government. The new State is regarded as a contracting country whether or not it has indicated its choice of class. After the Netherlands has approached the Swiss Government, Indonesia was included among the contracting countries until its denunciation of the Convention, although, during the period of its membership in the Union, a choice of class had not been notified to the Swiss Government.144

# 2. CONTINUITY IN THE APPLICATION OF THE CONVENTIONS AND PARTICIPATION IN THE UNION AS A CONTRACTING STATE

78. Continuity in the application of the Conventions is undoubtedly one of the most important results of succession. That continuity was fully recognized under the Berne Union. The instrument or instruments to

<sup>138</sup> Ibid.

that "This list should be completed by adding certain countries which have recently attained independence and to which the revised Berne Convention had previously been applied in virtue of article 26... We shall add the names of these countries to the list as soon as we have all the necessary information...". (Le Droit d'Auteur, 1962, p. 5, note (a)). The note does not appear from 1963 on.

<sup>&</sup>lt;sup>140</sup> Ceylon notified its accession, but the notification was interpreted as a declaration of continuity by the Swiss Government (see above, para. 33).

<sup>141</sup> See above, paras. 26-31.

<sup>&</sup>lt;sup>142</sup> See above, para. 47.

<sup>143</sup> See above, paras. 39-41.

Volta was to accede without specifying choice of class; the choice was made later and communicated by the Swiss Government to the Governments of the countries of the Union (Le Droit d'Auteur (Copyright), 1963, p. 180).

which former territories of members of the Union which became contracting countries after independence succeed, are regarded as applying to the countries in question as from the date or dates when that instrument or those instruments were extended to their territories by the former metropolitan country. There is no break in continuity in the legal relationships binding the successor States.<sup>145</sup>

- 79. On the other hand, there is a break in continuity when a former dependent territory of a contracting State, or a new State detached from a contracting State or from a territory of a member of the Union chooses the method of accession, because for a State to accede, it must no longer be bound by the instrument to which it accedes. The legal relationship is interrupted between the date of the State's independence and the date of its accession.<sup>146</sup>
- 80. An examination of the cases discussed in the Union proves that retroactive accession was not permitted. The retroactive accession requested by the State of Israel was opposed by certain members of the Union and finally was not accepted by the Swiss Government.147 In the case of Ceylon, its notification of its intention to accede from the date when the United Kingdom had declared the Convention applicable to its territory was interpreted by the Office as a declaration of continuity. 148 Lebanon's notification of accession after it attained independence was regarded by the Office as a declaration that it wished to continue its membership in the Union as a contracting country separate from Syria.149 Nor was there any question of any kind of retroactive accession in the case of Austria.150
- 81. Succession and accession also have different effects with regard to the date of admission to the Union as a contracting country. The acceding State today becomes a contracting country (a) one month after notification by the Swiss Government to the Governments of the countries of the Union, 151 or (b) at a later date indicated by the acceding country. 152 A successor

country enters the Union on: (a) the date of notification of continuity; 153 (b) a date prior to that notification specified in the declaration of continuity; 154 (c) the date of the country's attainment of independence; 155 (d) the date of notification of the change in the territory's status by the former metropolitan country; 156 or (e) on the date specified in the notification of the change in the territory's status by the former metropolitan country. 157 The date of admission to the Union under (d) and (e) is governed by the Berlin text. At the present time, the date of notification of the declaration of continuity is the one usually adopted. In the case of a successor State which has not made a declaration of continuity because the succession took place in accordance with a general succession clause in a bilateral agreement for the transfer of sovereignty, the Swiss Government appears to have regarded the date of accession to independence as the date of admission to the Union. 158

- 82. However, it should be pointed out that the distinction between the date of succession to the conventional instruments and the date of admission to the Union has only been clearly drawn by the Office in recent years. Until 1964 Ceylon was included in the list drawn up by the Office of States which had acceded to the Rome text and entered the Union on the same date, i.e., on 1 October 1931. From 1965 on, the date of Ceylon's admission to the Union was regarded as being the date of notification of the declaration of continuity, i.e., 20 July 1959. Likewise, from 1957 to 1959, Indonesia was listed as having been admitted to the Union on 1 April 1913, the date of the application of the Berlin text to the Netherlands East Indies by the Government of the Netherlands.
- 3. QUESTION OF CONVENTIONAL RELATIONS BETWEEN A STATE WHICH HAS SUCCEEDED TO A PARTICULAR REVISED TEXT AND STATES PARTIES TO A PREVIOUS TEXT SIMULTANEOUSLY IN FORCE
- 83. A successor State which was formerly a territory of a member of the Union succeeds to the revised texts applied to its territory by the former metropolitan country. In 1928, South Africa, Australia, Canada, India and New Zealand succeeded to the 1908 Berlin text. After the Second World War, Ceylon, Cyprus and

<sup>145</sup> See the table on the field of application of the Convention and its revised texts published in *Copyright*, 1967 pp. 2 and 3. Thus, for example, *Ceylon* and *Cyprus* are listed as having acceded to the Rome text on 1 October 1931; the *Democratic Republic of the Congo*, on 20 December 1948 to the Rome text and on 14 February 1952 to the Brussels text; *Cameroon, Congo (Brazzaville), Dahomey, Mali* and *Niger* on 22 December 1933 to the Rome text and on 22 May 1952 to the Brussels text. *Indonesia*, before denouncing the Convention, was regarded as having acceded to the Rome text on 1 October 1931 (*Le Droit d'Auteur*, 1957, p. 2).

<sup>&</sup>lt;sup>146</sup> This applies to the *Ivory Coast, Gabon, Senegal* and *Upper Volta* on the one hand, and to *Ireland, Pakistan* and *Israel* on the other.

<sup>&</sup>lt;sup>147</sup> See above, paras. 34-37.

<sup>&</sup>lt;sup>148</sup> See above, paras. 32 and 33.

<sup>&</sup>lt;sup>149</sup> See above, paras. 45-48.

<sup>150</sup> See above, paras. 39-41.

<sup>151</sup> Gabon, Upper Volta, Senegal, Israel and Pakistan.

<sup>152</sup> The Ivory Coast. The accession of Ireland took effect from the date of notification by the United Kingdom Government to the Swiss Government, that is, on 5 October 1927, and not a month after notification by the Swiss Government to the

countries of the Union nor at any specified later date. The reason is that Ireland acceded under the terms of the Berlin text, article 25 of which did not specify when accession took effect, whereas that specification was made subsequently in the Rome and Brussels texts in the terms given above.

<sup>153</sup> Cyprus, Ceylon, Cameroon, Congo (Brazzaville), Democratic Republic of the Congo, Dahomey, Mali and Niger.

<sup>154</sup> Madagascar.

<sup>155</sup> Indonesia.

<sup>156</sup> Australia and Canada.

<sup>157</sup> South Africa, India and New Zealand.

<sup>158</sup> See above, para. 29.

<sup>159</sup> Copyright, 1965, p. 4.

<sup>&</sup>lt;sup>160</sup> Le Droit d'Auteur, 1957, p. 3; ibid., 1958, p. 3; and ibid., 1959, p. 3.

Indonesia succeeded to the Rome text of 1928 and Cameroon, Congo (Brazzaville), Dahomey, Madagascar, Mali, Niger and the Democratic Republic of the Congo succeeded to the Brussels text of 1948. In all these cases, the revised text to which they succeeded had previously been extended to the territories of these States by their former metropolitan countries, the United Kingdom, Netherlands, France and Belgium respectively. The Office's interpretation of Cyprus's declaration of continuity is instructive on this point. The note from Cyprus referred specifically to the Rome and Brussels texts. Since the Brussels text had not been applied to Cyprus before its independence, the Office considered that the note from Cyprus was tantamount to a declaration of continuity with respect to the Rome text and of accession to the Brussels text. 161

84. The declarations of continuity of the Congo (Brazzaville), Dahomey, Mali and Niger specifically state that these Republics, in acceding to the Brussels text, retain the rights they had acquired under the previous régime. 162 The declaration of Madagascar states that the Government of the Malagasy Republic considers itself bound "by the Berne Convention of September 1886, as last revised at Brussels on 26 June 1948".163 The Cameroonian declaration does not contain that phrase, but neither does it state that Cameroon was succeeding to any specific text. Cameroon states that it "regards itself as bound by the Convention... which had been extended to the territory of the Republic before its attainment of independence". 164 Ceylon and Cyprus succeeded to the text which had been extended to their respective territories before independence, that is, the Rome text. The Democratic Republic of the Congo states in its declaration of continuity that it is succeeding to the Brussels text and says nothing about the Rome text, which Belgium had also applied to its territory. The Office appears to have felt that succession to the last revised text applied to the former territory of a member of the Union by the metropolitan country included succession to previous texts which had also been extended to the territory of the successor State before its attainment of independence.165

85. The diversity of legal relations within the Union resulting from the existence of several revisions simultaneously in force raises the question whether a new State to which the Rome and Brussels texts have been applied can now become contracting country by succeeding to the Rome text instead of the Brussels text. In addition, there is the problem of the legal régime to be applied to relations between a State which has succeeded to a given revision and the contracting States which have not yet become parties to that text. Some aspects of the latter problem resemble that of the relations between States which have acceded to the latest revision opened for accession and the old members of the Union

which have not yet acceded to the revision in question. It seems that no definitive solution to this problem has yet been found within the Berne Union. 166

### 4. RESERVATIONS

86. Colonies, possessions or overseas territories which form part of the Berne Union not as contracting countries but as dependent territories of their respective metropolitan countries follow the régime applied to the latter so far as reservations are concerned, except where otherwise stated. That régime has been maintained after independence in the cases of succession which have occurred within the Berne Union.

87. Belgium entered no reservation under the régime of the Berlin text, the Rome text or the Brussels text. In extending the Rome and Brussels texts to the former Belgian Congo, Belgium did not formulate any reservations for that territory. The *Democratic Republic of the Congo* joined the Union by succession and succeeded to the Brussels text without reservations.

The United Kingdom entered a reservation under the régime of the Berlin text. Its accession to that text, which was extended to "all the British colonies and foreign possessions, with the exception of the following: India, the Dominion of Canada, the Federation of Australia, the Dominion of New Zealand ..., the Union of South Africa..." was accompanied by a reservation concerning retroactivity.168 The United Kingdom subsequently acceded on behalf of the Commonwealth of Australia. 169 India. 170 the Dominion of New Zealand. 171 and the Union of South Africa, 172 with the same reservation on retroactivity. On the other hand, the United Kingdom's accession on behalf of Canada does not refer to that reservation.<sup>173</sup> When ratifying the Rome text in 1931 the United Kingdom abandoned its reservation with regard to the Berlin text,174 thus becoming a

<sup>&</sup>lt;sup>161</sup> Copyright, 1965, p. 3, and above, paras. 63-65.

<sup>162</sup> See above, para. 58.

<sup>163</sup> Copyright, 1966, p. 90.

<sup>164</sup> Le Droit d'Auteur (Copyright), 1964, p. 176.

<sup>165</sup> Ibid., pp. 6 and 7.

<sup>&</sup>lt;sup>168</sup> See Copyright, 1965, pp. 4 and 5, and G. Ronga, (the) "Position in the Berne Union of the countries which recently become independent", Le Droit d'Auteur, 1960, pp. 322-324.

<sup>167</sup> Le Droit d'Auteur, 1953, p. 4.

of the Berne Convention and No. 4 of its Closing Protocol, amended by the Additional Act of Paris of 1896 (Le Droit d'Auteur, 1912, p. 90).

<sup>&</sup>lt;sup>169</sup> Note of 13 November 1913 (Le Droit d'Auteur, 1913, p. 165).

<sup>170</sup> Note of 4 February 1914 (Le Droit d'Auteur, 1914, p. 33).

<sup>171</sup> Note of 30 March 1914 (Le Droit d'Auteur, 1914, p. 46).

<sup>172</sup> Note of 28 April 1920 (Le Droit d'Auteur, 1920, p. 49).

<sup>173</sup> Note of 7 January 1924 (Le Droit d'Auteur, 1924, p. 13). The only restriction accompanying the accession on behalf of Canada is the following: "Pursuant to the Additional Protocol of 1914, the Dominion of Canada restricts the protection of copyright with regard to the United States of America; the restrictions to which copyrights coming within the jurisdiction of this country are subject are established by articles 13, 14, 15 and 27 of the 1921 Copyright Act".

<sup>174</sup> A country renouncing its reservations when accepting the latest revision may, of course, extend the effects of that renunciation to countries governed by the previous text or texts. In principle, however, the reservations remain valid for countries still bound by the previous text or texts. (Le Droit d'Auteur, 1953, p. 4).

country with no reservations, but Australia, Canada, India, New Zealand and South Africa succeeded to the Convention in April and October 1928 under the régime of the Berlin text, for the Rome text had not yet come into force. Hence, Australia, India, New Zealand and South Africa joined the Union by succession, as reserving countries, with the reservation on retroactivity formerly entered on their behalf by the United Kingdom, whereas Canada joined the Union by succession as a country having no reservations.

- 89. Australia, India, New Zealand and South Africa abandoned their reservations, as did the United Kingdom, when ratifying or acceding to the Rome text as contracting countries of the Union. In 1959 and 1964 respectively, Ceylon and Cyprus became contracting countries of the Union under the régime of the Rome text without reservation, as the United Kingdom had formulated no reservation under that text.<sup>175</sup>
- 90. Under the régime of the Berlin text, France, together with Algeria and its colonies, had entered a reservation relating to works of applied art. France maintained that reservation when acceding to the Rome text, but dropped it on ratifying the Brussels text. France extended the Berlin, Rome and Brussels texts to its overseas colonies and territories. Cameroon, Congo (Brazzaville), Dahomey, Madagascar, Mali and Niger, on becoming contracting States of the Union by succession, inherited France's reservation relating to works of applied art as far as the Berlin and Rome texts are concerned. They have no reservations as far as the Brussels text is concerned.
- 91. The Netherlands, together with the Netherlands East Indies, had reserved its position under the Berlin text. It had entered three reservations on translation rights, <sup>178</sup> the content of newspapers and magazines <sup>179</sup> and representation and performing rights. <sup>180</sup> The Netherlands dropped these reservations when it ratified the Rome text. When *Indonesia* joined the Union by

succession, it became a country with no reservations with respect to the Rome text.<sup>181</sup>

92. In acceding to the Brussels text, new States separated from a contracting State, or former territories of members of the Union, which choose to join the Union as contracting countries by accession after attaining independence, can enter only the reservation on translation rights which that text authorizes for "countries outside the Union". None of these States, that is Gabon, Ireland, Israel, Ivory Coast, Pakistan, Senegal, and Upper Volta, has used its right to formulate a reservation on translation rights.<sup>182</sup>

### E. Summary

- 93. Fifty-eight contracting States are now members of the Berne Union. 183 Of these, fourteen became contracting States by succession, 184 five before the Second World War 185 and nine after the war. 186 All these last States had been territories of members of the Union. The five States which joined the Union by succession before the Second World War were dominions of the United Kingdom. The States which joined the Union by succession after the Second World War were formerly dependent territories of Belgium, France, the Netherlands and the United Kingdom. Eight of these States became contracting States as a result of the steps taken in 1960 by the director of BIRPI. 187
- 94. Although all the States which became contracting States by succession had previously been territories of members of the Union, not all former territories of members of the Union, chose the method of succession. Four States which were formerly territories dependent on France joined the Union by accession. Likewise, three States separated from certain contracting States, or separated from former Unionist territories dependent on a contracting State, have themselves become contracting countries by accession. 189
- 95. Some States which were contracting countries before independence have not changed their position in the Union as a result of independence. However, two of those States, which formerly constituted a single

<sup>175</sup> However, Ceylon, in its declaration of accession, interpreted as a declaration of continuity by the Swiss Government, stated that it "reserves for itself the right to enact local legislation or the translation of educational, scientific and technical books into the national language" (see above, para. 32). The Rome and Brussels texts state that "countries outside the Union" which accede directly to those texts may enter a reservation regarding the right of translation into the language or languages of that country. They may substitute article 5 of the Berne Convention of 1886 revised at Paris in 1896 for article 8 of the Rome and Brussels texts (see above, para. 13). In the list of contracting States drawn up by the Bureau, Ceylon figures as a country having no reservations (Le Droit d'Auteur (Copyright), 1964, p. 6).

<sup>&</sup>lt;sup>176</sup> Article 2.4 of the Berlin text was replaced by article 4 of the Berne Convention of 1886 (*Le Droit d'Auteur*, 1953, pp. 2-5).

<sup>&</sup>lt;sup>177</sup> Copyright, 1965, pp. 4 and 5.

<sup>&</sup>lt;sup>178</sup> Article 8 of the Berlin text, replaced by article 5 of the Berne Convention, as amended by the Additional Act of Paris of 1896 (*Le Droit d'Auteur*, 1953, pp. 2 and 3).

<sup>&</sup>lt;sup>179</sup> Article 9 of the Berlin text, replaced by article 7 of the Berne Convention of 1886, as amended by the Additional Act of Paris of 1896 (*Ibid.*).

<sup>&</sup>lt;sup>180</sup> Article 11 of the Berlin text, replaced by article 9.2 of the Berne Convention of 1886 (*Ibid.*).

<sup>&</sup>lt;sup>181</sup> Le Droit d'Auteur, 1957, p. 2.

<sup>182</sup> Le Droit d'Auteur (Copyright), 1964, pp. 6 and 7.

<sup>183</sup> See above, foot-note 27.

<sup>184</sup> Australia, Cameroon, Canada, Ceylon, Congo (Brazzaville), Congo (Democratic Republic of), Cyprus, Dahomey, India, Madagascar, Mali, New Zealand, Niger and South Africa. Indonesia also became a contracting State by succession, but subsequently denounced the Convention and is no longer a member of the Union.

<sup>185</sup> Australia, Canada, India, New Zealand and South Africa.

<sup>186</sup> Cameroon, Ceylon, Congo (Brazzaville), Congo (Democratic Republic of), Cyprus, Dahomey, Madagascar, Mali and Niger.

<sup>187</sup> Cameroon, Congo (Brazzaville), Congo (Democratic Republic of), Cyprus, Dahomey, Madagascar, Mali and Niger.

<sup>188</sup> Gabon, Ivory Coast, Senegal and Upper Volta.

<sup>189</sup> Ireland, Israel and Pakistan.

<sup>190</sup> Lebanon, Morocco, Syria and Tunisia.

contracting country, became two separate contracting States after attaining independence. After uniting with a non-contracting State, one of these States left the Union and denounced the Convention. 192

- 96. A contracting State annexed by another contracting State had its rights within the Union restored by the Revision Conference, after regaining its independence.<sup>193</sup>
- 97. Some former territories which have become independent no longer consider themselves bound by the Berne Convention and have left the Union.<sup>194</sup> Others are studying the question.<sup>195</sup>
- 98. In addition, twenty-four new States to whose territories the Berne Convention applied before they became independent have not yet taken a decision. Their position in the Berne Union remains uncertain, even if sometimes some of these new States continue to apply, with or without minor modifications, the domestic legislation promulgated in harmony with the Berne Convention by the former metropolitan country. 197

### II. Permanent Court of Arbitration and the Hague Conventions of 1899 and 1907 198

### A. The Hague Conventions of 1899 and 1907

- 1. ESTABLISHMENT OF THE PERMANENT COURT OF ARBITRATION: ORGANS OF THE COURT
- 99. The Permanent Court of Arbitration was established by the Convention for the Pacific Settlement of International Disputes concluded at The Hague on 29 July 1899, at the First Peace Conference. The Convention was revised and added to some years later, following the Second Peace Conference, by the Convention of the same title, signed at The Hague on 18 Octo-

ber 1907.<sup>199</sup> Articles 20-29 of the 1899 Convention and articles 41-50 of the 1907 Convention, concerning the establishment, maintenance, competence, composition and organization of the Court, constitute a chapter of the part concerning international arbitration, which also deals with the system and procedure of arbitration. Other chapters of the Conventions deal with the subjects of good offices and meditation, and of international commissions of inquiry.

100. Each Contracting Power selects four persons at the most as members of the Court, who are inscribed in a list by an International Bureau serving as registry for the Court. A Permanent Administrative Council, composed of the diplomatic representatives of the Contracting Powers accredited to H.M. the Queen of the Netherlands and the Minister for Foreign Affairs of the Netherlands, who acts as President, is charged with the direction and control of the International Bureau.<sup>200</sup>

### 2. PROCEDURE FOR BECOMING PARTY TO THE CONVENTIONS

- 101. This question, which had already claimed attention earlier, particularly in the period preceding the Second Peace Conference and that following the First World War, came up again after the Second World War and its practical importance has grown constantly in recent years with the appearance of an ever greater number of new States as a result of decolonization.<sup>201</sup>
- 102. The Hague Conventions are general multilateral treaties, in the sense that they are concerned with general rules of international law and deal with questions of general interest for all States. However, States which did not take part in their preparation can only become parties with the subsequent consent of the Contracting States.
- (a) DISTINCTION BETWEEN STATES WHICH WERE REPRESENTED AT OR INVITED TO THE PEACE CONFERENCES AND THOSE WHICH WERE NOT
- 103. The final provisions of the two Conventions distinguish two categories of States: the Powers which were "represented at" or "invited to" the First or Second Peace Conference and those which were not. States belonging to the first category can become parties to the Convention by signature followed by ratification or by accession if they did not sign. The instruments of ratification or accession are to be deposited with

<sup>191</sup> Lebanon and Syria.

<sup>192</sup> Syria.

<sup>193</sup> Austria.

<sup>194</sup> Cambodia, Republic of China (for the Island of Formosa), Republic of Korea and Republic of Viet-Nam.

<sup>195</sup> Ghana, Federation of Malaya and Nigeria.

<sup>196</sup> Algeria, Burma, Burundi, Central African Republic, Chad, Democratic People's Republic of Korea, Democratic Republic of Viet-Nam, Gambia, Guinea, Jamaica, Jordan, Kenya, Laos, Malawi, Malta, Mauritania, Rwanda, Sierra Leone, Somalia, Togo, Trinidad and Tobago, United Republic of Tanzania, Uganda, Western Samoa (see: Office of the Berne Union, Répertoire des documents officiels, 1948 and Le Droit d'Auteur, 1948, p. 141; ibid., 1952, pp. 13 and 49; Le Droit d'Auteur (Copyright), 1963, pp. 112 and 180.

<sup>197</sup> See Copyright Laws and Treaties of the World, Washington, D.C., 1956, supplements from 1958 to 1962, sections on each of the new States and the Berne Union; Spanish edition: Repertorio universal de legislación y convenios sobre derecho del autor, Madrid, 1960; French edition: Lois et traités sur le droit d'auteur, Paris, 1962 and Le Droit d'Auteur, 1944-1964, sections entitled "National Legislation".

<sup>&</sup>lt;sup>198</sup> The following study covers the period up to 29 March 1967.

<sup>199</sup> For the texts of the two Conventions, see James Brown Scott, *The Hague Conventions and Declarations of 1899 and 1907* (1915), pp. 41-88. An official United Kingdom text of the 1907 Convention and Declaration appeared in *H.M.S.O. Miscellaneous*, No. 6 (1908), Cd. 4175.

of the 1907 Convention. See James Brown Scott, op. cit., pp. 57-63.

<sup>&</sup>lt;sup>201</sup> See Daniel Bardonnet, "L'état des ratifications des Conventions de La Haye de 1899 et de 1907 sur le règlement pacifique des conflits internationaux", Annuaire français de droit international (1961), pp. 726-733.

the Government of the Netherlands, which acts as depositary.<sup>202</sup>

# (b) Procedure open to States not represented at or invited to the Peace Conferences

### (i) Formal procedure laid down in the Conventions

104. For States not represented at or invited to the Peace Conference, the procedure for participation is established in article 60 of the 1899 Convention and article 94 of the 1907 Convention, as follows: "The conditions on which the Powers... not represented at [invited to] the... Conference may adhere to the present Convention shall form the subject of a subsequent agreement between the Contracting Powers." Accession is thus the procedure which States not represented at or invited to the Peace Conference must employ to become parties to the 1899 or 1907 Convention, but it is subject to the agreement of the States parties to the Convention in question. Without their agreement, a State not represented at or invited to the Peace Conference cannot deposit an instrument of accession to the Convention.203 These provisions have been applied in a number of cases in the past.204

(ii) Decisions of the Administrative Council of the Court

105. Since 1955, the Administrative Council of the Court has taken a series of decisions, which, applying for certain cases the procedure for succession to treaties, have resulted in a number of States being added to those in the list of Contracting States. Instead of a special agreement by all Contracting Parties being required for each new State, a simplified procedure is followed, by means of decisions of the Administrative Council of the Court. This procedure involves agreement in advance by States parties to the Conventions of 1899 and 1907 to the participation of new States in This agreement, moreover, is those Conventions. general, in the sense that it applies to certain categories of States rather than to individual States. It is sufficient for certain newly independent States to give notice of their desire to become parties to the Conventions in reply to an invitation made to them. They simply have to address a letter or diplomatic note to that effect to the Government of the Netherlands, which is the depositary State. It should be pointed out, however, that the Administrative Council, in its decisions, has carefully avoided speaking of "succession" or "successor States", merely inviting the States concerned to signify whether they consider themselves Contracting Parties to the Conventions in question.

# 3. RELATIONSHIP BETWEEN THE TWO CONVENTIONS

106. According to article 91 of the 1907 Convention "the present Convention, duly ratified, shall replace, as between the contracting Powers, the Convention for the pacific settlement of international disputes of the 29th July, 1899". Among the Contracting Parties, therefore, the 1907 Convention has replaced the 1899 Convention, but the legal systems established by the two Conventions are both valid at the same time.

### B. Participation in the Permanent Court of Arbitration

# 1. STATES ABLE TO PARTICIPATE IN THE COURT'S ACTIVITIES

107. For a State to be able to participate in the activities of the Permanent Court of Arbitration, it must become party either to the 1899 or to the i907 Convention.<sup>205</sup> Participation in one or other of these Conventions is sufficient qualification for a State to participate in the

1922) and Poland (26 May 1922) to the 1907 Convention, following the First World War (Rapport du Conseil Administratif de la Cour Permanente d'Arbitrage pour l'année 1922, p. 5) were also preceded by an agreement among the Contracting Powers.

205 Although participation in the Court's activities is confined to the Contracting Powers, the jurisdiction of the Court is open "within the conditions laid down in the regulations" to non-contracting Powers (art. 26 of the 1899 Convention and art. 47 of the 1907 Convention). See James Brown Scott, op. cit., p. 61.

<sup>&</sup>lt;sup>202</sup> Articles 58 and 59 of the 1899 Convention and articles 92 and 93 of the 1907 Convention. See James Brown Scott, op. cit., pp. 77 and 78.

<sup>&</sup>lt;sup>203</sup> The accession of States represented at or invited to the Peace Conferences which did not sign the Conventions is not subject to the subsequent agreement of States parties to the Convention (article 59 of the 1899 Convention and article 93 of the 1907 Convention). Thus, for example, Nicaragua acceded to the 1907 Convention on 16 December 1909 without the prior agreement of the Contracting Parties being required. Nicaragua had been invited to the Second Peace Conference and had participated in it, signing the Final Act of the Conference. For Nicaragua, which had been invited to the Conference, the 1907 Convention was not a closed Convention.

<sup>&</sup>lt;sup>204</sup> This procedure was first applied on the very eve of the Second Peace Conference. It enabled certain Latin American States to become parties to the 1899 Convention. The United States and Mexico, the only American Powers represented at the First Conference (Brazil had been invited but declined the invitation), were authorized on 15 January 1902 by the Second Pan American Conference, which met at Mexico, "to negotiate with the other signatory Powers of the Convention for the adherence thereto of the American nations so requesting and not now signatory to the said Convention". An agreement was reached among the States which had ratified the 1899 Convention and a Protocol was signed by those States at The Hague on 14 June 1907 "to enable the States that were not represented at the First Peace Conference and were invited to the Second to adhere to the aforesaid Convention" (the Latin American States had been invited to the Second Conference). As had been agreed in the Protocol, a procès-verbal of adhesions, which was to take effect immediately, was drawn up and opened for signature by the Minister for Foreign Affairs of the Netherlands on 15 June 1907. On that day and the days following, the proces-verbal received the accession of seventeen Latin American States, which thus became parties to the 1899 Convention (James Brown Scott, op. cit., pp. viii, xxxii and xxxiii). They were the following: Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela. accessions of Czechoslovakia (12 June 1922), Finland (9 June

activities of the Court.<sup>206</sup> However, although the Government of the Netherlands, the depositary State of the Conventions, and the International Bureau of the Court consider that a State which recognizes itself to be party to one of the Conventions is automatically a "member" of the Permanent Court of Arbitration, there are certain States which do not accept this thesis and make a distinction between the idea of being a "Contracting State or Party" and that of being a "State member of the Court".<sup>207</sup>

# 2. STATES PARTICIPATING IN PRACTICE IN THE COURT'S ACTIVITIES

108. Any State which participates in practice in the activities of the Permanent Court of Arbitration, other than those directly related to the settlement of specific disputes, is invited to: (a) select four persons at the most disposed to accept the duties of arbitrator, as members of the Court; (b) attend proceedings of the Administrative Council of the Court and participate in its decisions; (c) share the expenses of the International Bureau, which are borne by the contracting Powers in the proportion fixed for the International Bureau of the Universal Postal Union.

# C. Cases comprising elements related to the succession of States

### 1. BEFORE THE SECOND WORLD WAR

### (a) FORMATION OF YUGOSLAVIA

109. Serbia and Montenegro had signed and ratified the 1899 Convention and signed that of 1907 and participated as independent States in the Permanent Court of Arbitration. Serbia's ratification of 11 May 1901 seems to have been considered binding on Yugoslavia. Thus, since 1921, diplomatic representatives of Yugoslavia have participated in the proceedings of the Administrative Council in place of representatives of the former Serbia. Since 1920, Yugoslavia has replaced Serbia on the list of countries sharing the

expenses of the International Bureau and members of the Court selected by Yugoslavia have taken the place of those selected by Serbia.<sup>210</sup> As far as Montenegro is concerned, members of the Court selected by that State appeared in the reports of the Administrative Council until 1923,<sup>211</sup> but from 1921 onwards Montenegro no longer shared the expenses of the International Bureau, the Government of H.M. the King of the Serbs, Croats and Slovenes having given notice that the State in question was now part of Yugoslavia.<sup>212</sup> Montenegro as such therefore ceased to participate in the Permanent Court of Arbitration as a result of its incorporation into Yugoslavia.

### (b) Dissolution of Austria-Hungary

110. Austria-Hungary ratified the 1899 Convention on 4 September 1900 and the 1907 Convention on 27 November 1909 and participated thereafter in the activities of the Permanent Court of Arbitration. It ceased to participate after the conclusion of the treaties of Saint-Germain and Trianon. In the report of the Administrative Council of the Court for 1919, Austria-Hungary no longer appears in the table giving the apportionment of the expenses of the International Bureau<sup>213</sup> and from 1920 onwards the list of arbitrators no longer gives any members of the Court selected by Austria-Hungary.<sup>214</sup> From 1919 onwards, there are no longer any diplomatic representatives of Austria-Hungary to be found among those taking part in the proceedings of the Administrative Council.<sup>215</sup>

111. In 1921, the Hungarian Government gave notice, by means of a communication from the Chargé d'Affaires of Hungary at The Hague that it considered "Hungary to be still bound by The Hague Convention of 18 October 1907 for the Pacific Settlement of International Disputes, since despite the fact that Austria-Hungary appears as a signatory Power of the Convention, the Convention was nevertheless concluded by the two States which formed the Monarchy and, after being ratified in accordance with the Constitution, became Hungarian law".216 The Rapport du Conseil administratif de la Cour pour 1923 stated that "Hungary is to be considered a signatory Power [of the 1907 Convention] in view of the fact that under Hungarian constitutional law, the Hungary of today, whose boundaries were demarcated by the Treaty of Trianon, is identical with the former Kingdom of Hungary, which, at the time of the dual system, formed with Austria the Austro-Hungarian Monarchy", 217 and the report for 1923 added

<sup>&</sup>lt;sup>208</sup> This is the case with *Italy*, for example, which ratified the 1899 Convention on 4 September 1900, but did not ratify the 1907 Convention. *Italy* nevertheless continues to participate in the Permanent Court of Arbitration, since it has never denounced the 1899 Convention. The *United Kingdom* and *Bulgaria* also ratified the 1899 Convention but not the 1907 Convention. *Italy*, the *United Kingdom* and *Bulgaria*, however, have always appeared among the States participating in the Court in the list reproduced in the annual reports of the Administrative Council of the Permanent Court of Arbitration.

<sup>&</sup>lt;sup>207</sup> Information provided by the Secretary-General of the Permanent Court of Arbitration.

<sup>&</sup>lt;sup>208</sup> Up to 1920, the names "State or Kingdom of the Serbs, Croats and Slovenes" and "Yugoslavia" were used indiscriminately in the reports of the Administration Council, but since then the reports have only used the latter.

<sup>&</sup>lt;sup>209</sup> Rapport du Conseil Administratif de la Cour Permanente d'Arbitrage pour 1921, p. 10.

<sup>210</sup> Ibid., pp. 10 and 21.

<sup>&</sup>lt;sup>211</sup> Rapports du Conseil administratif pour 1919, 1920, 1921, 1922, p. 8, and Rapport pour 1923, p. 9.

<sup>&</sup>lt;sup>212</sup> Rapport du Conseil administratif de la Cour Permanente d'Arbitrage pour 1921, p. 20, note 1.

<sup>&</sup>lt;sup>213</sup> *Ibid.*, p. 18, note 1.

<sup>&</sup>lt;sup>214</sup> Ibid., p. 6 and Rapport du Conseil administratif pour 1920, p. 6.

<sup>&</sup>lt;sup>215</sup> Rapport du Conseil administratif pour 1919, p. 14.

<sup>&</sup>lt;sup>216</sup> Rapport du Conseil administratif pour 1921, p. 20, note 2.

<sup>&</sup>lt;sup>217</sup> *Ibid.*, p. 5.

also that for the same reasons *Hungary* was to be considered as having ratified the 1907 Convention.<sup>218</sup> Since 1922, members selected by *Hungary* have figured among the members of the Court, Hungarian diplomatic representatives have participated in the proceedings of the Administrative Council and *Hungary* has contributed to the expenses of the International Bureau.

112. As far as *Austria* is concerned, it was not until 14 December 1937 that it recognized itself as bound by the 1899 and 1907 Conventions. On that date the Federal Chancellor of *Austria* declared "that Austria recognizes itself to be bound by the Conventions of 1899 and 1907 since they were signed and ratified in the past in the name of the Austro-Hungarian Monarchy". It was only in 1957, however, that *Austria* began to participate in practice in the activities of the Permanent Court, <sup>220</sup> as a result of certain decisions taken by the Administrative Council of the Court, which will be discussed below.

### 2. AFTER THE SECOND WORLD WAR

- (a) Decisions of the Administrative Council of the Court (1955-1957) and States participating in the Conventions of 1899 and 1907 and in the activities of the Court as a result of those decisions
- 113. Cases with elements relating to the succession of States had thus already occurred in the context of the 1899 and 1907 Conventions long before the decisions taken in 1955 by the Administrative Council of the Court. What seems to be new is the adoption by the Council of a general procedure of consultation designed to regularize the situation resulting from the appearance of new States or from changes in the status of former Contracting States. Also new is the fact that the Government of the Netherlands, as depositary State for the Conventions, and organs of the Court such as the Council and the Bureau have been used for the application of this procedure. In this connexion, the Rapport du Conseil administratif pour 1957 states the following:

In 1955, the Ministry of Foreign Affairs of the Netherlands, the depositary State for the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907, expressed the opinion that certain States which could be considered High Contracting Parties were not participating in the work of the Court. Those States were not represented on the Administrative Council (article 28 of 1899, article 49 of 1907), they did not share the expenses of the Bureau (article 29 of 1899, article 50 of 1907) and they had not selected persons to perform the duties of arbitrator (article 23 of 1899, article 44 of 1907). They included, among others, States which had been part of one of the High Contracting Parties at the time when the Conventions in question had been ratified, but which had subsequently gained full sovereignty.

The Administrative Council of the Permanent Court of Arbitration, composed of the diplomatic representatives accredited to The Hague of the States Parties to the 1899 or the 1907 Convention, was of the opinion that this situation needed to be regularized. The Council had requested the Government of the Netherlands, as the depositary State, to approach the High Contracting Parties in order to seek their approval for a recognition of the States in question as Parties to one or the other of the two Conventions. If they agreed, an invitation would be sent to those States by the International Bureau of the Court to appoint representatives to the Administrative Council, to select arbitrators and to share the expenses of the Bureau.

At the Council's meeting of 15 March 1957, the President of the Council, Minister for Foreign Affairs of the Netherlands, announced that a very large number of Governments had replied, expressly stating that they would not raise any objection to the States in question being considered High Contracting Parties to one or other of the Conventions of 1899 and 1907. No Government had expressed a contrary opinion. In those circumstances, the depositary State was of the opinion that those States could be considered High Contracting Parties to one or other of the Conventions.

Having taken note of that statement, the Administrative Council decided to recognize as High Contracting Parties those of the States in question which expressed a desire to that effect.

The Administrative Council therefore invited the States in question:

- 1. To appoint representatives to the Administrative Council;
- 2. To select four persons at the most disposed to accept the duties of arbitrator in accordance with article 23 of the 1899 Convention (article 44 of the 1907 Convention); and
- 3. To share the expenses of the Bureau, in accordance with article 29 of the 1899 Convention (article 50 of the 1907 Convention), beginning on 1 January 1957.<sup>221</sup>
- 114. These decisions of the Administrative Council of the Court concerned two kinds of States. Firstly, there were States formed as a result of the profound political and/or territorial changes undergone by former Contracting Parties to the 1899 and 1907 Conventions. Secondly, there were States which had been united with one of the Contracting Parties or had been part of its overseas territories or possessions at the time when the Conventions had been ratified, but which had since become independent and sovereign States.
- (i) Former dependent territories of a Contracting State
- a. which have considered themselves Contracting Parties and participate in the Court's activities
- 115. As a result of the decisions taken by the Administrative Council of the Court (1955-1957), nine States (Australia, Cambodia, Canada, Ceylon, Iceland, India, Laos, New Zealand, Pakistan), which at the time of the ratification of the 1899 or 1907 Convention had been dependent territories of a Contracting Party, became Contracting Parties to the 1899 and 1907 Conventions or to the former alone.
- 116. At some point before or after the decisions taken by the Administrative Council, all those States had expressed the desire to become Contracting Parties

<sup>&</sup>lt;sup>218</sup> *Ibid.*, p. 6.

<sup>&</sup>lt;sup>219</sup> Information provided by the Secretary-General of the Permanent Court of Arbitration.

<sup>&</sup>lt;sup>220</sup> Rapport du Conseil administratif de la Cour pour 1957, p. 6, in fine.

<sup>&</sup>lt;sup>221</sup> Ibid., p. 6.

to the Conventions. Three signified that they wished to be Contracting Parties to both the 1899 and 1907 Conventions, namely, Iceland (8 December 1955), Laos (18 July 1955), and Cambodia (4 January 1956). Until 1944, the date of the dissolution of the Danish Icelandic Union, Iceland had been united with Denmark, which ratified the Convention or 1899 on 4 September 1900 and that of 1907 on 27 November 1909. In the case of Cambodia and Laos, France had ratified the 1899 Convention on 4 September 1900 and the 1907 Convention on 7 October 1910. In addition, six members of the Commonwealth indicated their desire to become Contracting Parties to the 1899 Convention, ratified by the United Kingdom on 4 September 1900. They were India (29 July 1950), Pakistan (5 August 1950), Ceylon (9 February 1955), New Zealand (10 February 1959), Australia (1 April 1960) and Canada (19 August 1960).222

117. All these new Contracting States have since been participating in the activities of the Court. Cambodia and India have done so since 1957,<sup>223</sup> Laos and Pakistan since 1958.<sup>224</sup> Iceland, New Zcaland, and Ceylon since 1959 <sup>225</sup> and Canada and Australia since 1960.<sup>226</sup>

b. which have not considered themselves Contracting

118. The Government of the *Philippines* stated "that it did not consider itself bound by the Convention of 1899 or that of 1907" <sup>227</sup> despite the fact that the *United States of America* had ratified the 1899 Convention on 4 September 1900 and the 1907 Convention on 27 November 1909.

(ii) States which were formed as a result of political and/or territorial changes undergone by former Contracting Parties and which have considered themselves bound by the Conventions and participate in the Court's activities

119. This was the case with Austria and the Union of Soviet Socialist Republics. Austria, as indicated above, <sup>228</sup> declared itself bound by the 1899 and 1907 Conventions before the Second World War, on 14 December 1937. It was not until 1957, however, that it began to participate in practice in the work of Permanent Court, as a result of the approaches made by the Internatinoal Bureau in accordance with the decisions taken by the Administrative Council. Since 1957 also, the Union of Soviet Socialist Republics has

participated in the activities of the organs of the Court.<sup>229</sup> The Soviet Government had previously sent a note, dated 7 March 1955, stating that the *Union of Soviet Socialist Republics* considered itself bound by the 1899 and 1907 Conventions "in so far as they are not at variance with the Charter of the United Nations and have not been amended or replaced by subsequent international agreements".<sup>230</sup>

(b) Decision of the Administrative Council dated 2 December 1959 and States Members of the United Nations participating in the 1899 and 1907 Conventions and in the Court's activities as a result of that decision

120. More recently, the Administrative Council, at its meeting of 2 December 1959, considered the situation of States Members of the United Nations which were not yet participating in the Court's activities and decided unanimously:

... to request the Government of the Netherlands, the depositary State for the 1899 and 1907 Conventions, to approach the High Contracting Parties in order to seek their approval for the issuing of an invitation to the Governments of States Members of the United Nations which do not yet participate in the Court to state:

- 1. Whether they consider themselves a Contracting Party to either the 1899 Convention or the 1907 Convention;
- 2. If not, whether they were willing to accede to the Conventions or to one of them.

If it appears from the replies that a State considers itself a Contracting Party to one of the Conventions by reason of the fact that it was formerly part of a State which ratified it or acceded to it, the State in question shall ipso facto be considered a High Contracting Party. If, however, a State considers that it does not belong to that category of States, but declares itself willing to accede to one of the Conventions, it shall be required to transmit an act of accession to the Government of the Netherlands. In either case, the State shall only be requested to share the expenses of the Bureau from the year in which it makes its statement.

The High Contracting Parties have authorized the Netherlands Government to take the necessary action in this connexion.<sup>231</sup>

121. The decision of the Administrative Council of the Court of 1959 relates not only to new States which were formerly dependent territories of a Contracting Party to the 1899 and 1907 Conventions, but also to other States Members of the United Nations. For these latter States, the Administrative Council's decision has the legal force of the "subsequent agreement" provided for in the final clauses of the 1899 and 1907 Conventions, to enable States which had not been represented

<sup>&</sup>lt;sup>222</sup> Tractatenblad van het Koninkrijk der Nederlanden, 1963, No. 157, pp. 21-22 and No. 158, p. 35.

<sup>&</sup>lt;sup>223</sup> Rapport du Conseil administratif de la Cour pour 1957, pp. 6 and 7.

<sup>&</sup>lt;sup>224</sup> Rapport du Conseil pour 1958, p. 6.

<sup>&</sup>lt;sup>225</sup> Rapport du Conseil pour 1959, p. 6.

<sup>&</sup>lt;sup>226</sup> Rapport du Conseil pour 1960, p. 4. The report also stated that discussions were being held with *Ireland* and the *Union of South Africa*.

<sup>&</sup>lt;sup>227</sup> Rapport du Conseil pour 1960, p. 4.

<sup>&</sup>lt;sup>228</sup> See para. 112.

<sup>&</sup>lt;sup>229</sup> Rapport du Conseil administratif de la Cour pour 1957, p. 6, in fine.

<sup>&</sup>lt;sup>230</sup> Tractatenblad van het Koninkrijk der Nederlanden, 1963, No. 157, p. 21, and No. 158, p. 35. For the text, see Daniel Bardonnet, op. cit., p. 736. Russia had ratified the 1899 Convention on 4 December 1900 and the 1907 Convention on 27 November 1909.

<sup>&</sup>lt;sup>231</sup> Rapport du Conseil administratif de la Cour pour 1960, p. 5.

at or invited to the Peace Conference to deposit their instruments of accession and become Parties to the Conventions. However, it is in the solution given to the problem of the new States which were formerly dependent territories of Contracting States that the main interest of the decision taken in 1959 by the Administrative Council of the Court resides. The new States which have become Members of the United Nations in recent years are for the most part former dependent territories of Powers Parties to the 1899 and 1907 Conventions. 232 In the case of these new Members of the United Nations, the Administrative Council's decision made it possible for them to become parties to the Conventions by succession. They need only send the Netherlands Government a simple declaration of continuity. these States do not use the succession method, they can always become parties to the Conventions by accession. At the end of June and the beginning of July 1960, the Netherlands Government wrote to about twenty-five States Members of the United Nations which were affected by the Administrative Council's decision.233

(i) States which have considered themselves Contracting Parties and participate in the Court's activities

122. Five States (Byelorussian Soviet Socialist Republic, Cameroon, Congo (Democratic Republic of), Ukrainian Soviet Socialist Republic and Upper Volta) gave notice of the fact that they considered themselves Contracting Parties to the 1899 and 1907 Conventions. 234 Cameroon and Upper Volta acknowledged themselves to be bound by the Conventions by notifying the Netherlands Government to that effect on 1 August 1961 and 30 August 1961 respectively, France having ratified the two Conventions.<sup>235</sup> The Congo (Democratic Republic of) gave such notification on 25 March 1961, Belgium having ratified the 1899 Convention on 4 September 1900 and the 1907 Convention on 8 August 1910. In the case of the Byelorussian Soviet Socialist Republic and the Ukrainian Soviet Socialist Republic, whose notifications were dated 4 June 1962 and 4 April 1962 respectively, the Union of Soviet Socialist Republics had declared itself bound by the 1899 and 1907 Conventions by a note dated 7 March 1955.236 All these States now participate in the activities of the Permanent Court of Abitration.237

(ii) States which have acceded to the Conventions and participate in the Court's activities

123. The procedure of accession was adopted by three new States, *Israel*, *Uganda* and the *Sudan*, which gave notice of their accession to the 1907 Convention on 18 April 1962, 30 April 1966 and 2 December 1966, respectively, and have since participated in the activities of the Court. In accordance with article 95 of the Convention, these accessions became effective sixty days after notification.<sup>238</sup>

### D. General questions concerning cases of succession after the Second World War

### 1. WAYS IN WHICH THE STATES CONCERNED MANIFEST THEIR CONSENT

124. The Contracting States showed their consent to the procedure followed by the Administrative Council by participating in the decisions taken by the Council, the organ of the Court in which those States are represented. The decisions were preceded by consultations between each of them and the depositary State. The Bureau or the depositary State was subsequently given the task of making the necessary approaches to the States affected by the Council's decisions. Those States expressed their desire to be considered Contracting States simply by means of a diplomatic note or letter.<sup>239</sup> In no case was any objection raised and the States in question became Contracting States and later participated in practice in the Court's activities.

# 2. CONTINUITY IN THE APPLICATION OF THE CONVENTIONS AND PARTICIPATION IN THE COURT'S ACTIVITIES AS A CONTRACTING STATE

125. In the table of signatures, ratifications, accessions and denunciations of the 1899 and 1907 Conventions drawn up by the Netherlands Ministry of Foreign Affairs, the successor State appears as having become a party on the date of ratification or accession by the predecessor State <sup>240</sup> and not on the date of the successor

<sup>&</sup>lt;sup>232</sup> Daniel Bardonnet, op. cit., p. 731.

<sup>&</sup>lt;sup>233</sup> In accordance with the spirit and the letter of the Administrative Council's decision, the Netherlands Government appears to be continuing "its efforts to increase the number of States participating in the work of the Permanent Court of Arbitration", taking into account the increase in the number of Members of the United Nations which has occured since the Council's decision (Rapport du Conseil administratif pour 1963, p. 4).

<sup>&</sup>lt;sup>234</sup> Tractatenblad van het Koninkrijk der Nederlanden, 1963, No. 157, p. 22, and No. 158, p. 35.

<sup>&</sup>lt;sup>235</sup> See para. 116 above.

<sup>&</sup>lt;sup>236</sup> For the declaration by the *Union of Soviet Socialist Republics*, see para. 119 above.

<sup>&</sup>lt;sup>237</sup> Rapport du Conseil administratif de la Cour pour 1961, p. 4, and pour 1962, p. 4.

Tractatenblad van het Koninkrijk der Nederlanden, 1963, No. 158, p. 35. Honduras has also acceded to the 1899 and 1907 Conventions and Costa Rica has signified its intention of becoming party to them, but neither of these States, of course, is a new one (Rapport du Conseil administratif pour 1960, p. 5, and pour 1961, p. 4). Honduras did not take part in the First Peace Conference. The 1899 Convention was therefore a closed Convention for Honduras. But Honduras was invited to the Second Peace Conference, although it did not send a representative (James Brown Scott, op. cit., p. viii). As a Power invited to the Second Conference, it was always able to accede to the 1907 Convention without needing the subsequent agreement of the Contracting Powers (article 93 of the Convention). For Honduras the 1907 Convention was not a closed Convention.

<sup>&</sup>lt;sup>239</sup> Accession always entails the deposit of a formal instrument with the depositary.

<sup>&</sup>lt;sup>240</sup> Daniel Bardonnet, op. cit., pp. 731 and 738-741. A State which accedes does not become a party until sixty days after the deposit of its instrument of accession (article 95 of the 1907 Convention).

State's independence or the date on which it signifies its desire to be considered a Contracting State. There thus seems to be some confusion between the question of continuity in the application of the Conventions, and that of the date when a former dependent territory of a Contracting State having become an independent State is considered to be a Contracting State. On the other hand, it should be noted that the date of succession to the Conventions should not be confused with the initial date of participation in the Court's activities. The continuity of legal relations only applies to succession to the Con-A successor State's participation in the Court's activities only begins after its declaration that it considers itself a Contracting State. Thus, for example, Canada stated that its participation in the Court could be considered to take effect from 1 January 1960,241 whereas according to the table referred to above, it became party to the 1899 Convention "as the United Kingdom", i.e., on 4 September 1900, the date of the ratification of that Convention by the United Kingdom.

126. States which declare themselves bound by the Conventions only share the expenses of the International Bureau from a date close to that of their respective declarations. The Administrative Council's decision of 15 March 1957 fixed 1 January 1957 as the date on which all invited States would begin to share the expenses. Its decision of 2 December 1959 adopted a more flexible criterion, that of the year during which the State in question made its declaration that it considered itself bound by the Conventions a criterion which, moreover, also applies in cases of accession.

#### E. Summary

127. On 29 March 1967, the number of States parties to the Conventions of 1899 and/or 1907 participating in the Permanent Court of Arbitration was sixty-five.<sup>242</sup> Fifteen of these States, former dependent territories of a Contracting State, have become Parties to the 1899 or 1907 Convention and have participated in the Court's activities since the Council adopted the above-mentioned decisions. Of these fifteen States, twelve have become parties to the 1899 or 1907 Con-

vention by succession <sup>243</sup> and three by accession.<sup>244</sup> In addition, Austria, the Byelorussian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics have considered themselves bound by the 1899 and 1907 Conventions and are participating in the Court's activities. One State, the Philippines, declared that it did not consider itself bound by the 1899 and 1907 Conventions.

### III. The Geneva Humanitarian Conventions and the International Red Cross 245

#### A. The Geneva Conventions (1864, 1906, 1929 and 1949)

128. The Geneva Conventions (1864, 1906, 1929 and 1949) are one of the main sources of the substantive law of the Red Cross. They are multilateral instruments binding the States Parties and codifying the international law of the Red Cross. And in particular of the "International Red Cross" and in particular of the International Committee of the Red Cross, they were all prepared at ad hoc diplomatic congresses or conferences. They may be classified according to their subject in the following categories:

- (a) Wounded and sick in armed forces in the field
  - Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864;
  - Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 6 July 1906;

<sup>&</sup>lt;sup>211</sup> Rapport du Conseil administratif de la Cour pour 1959, p. 6.

<sup>242</sup> Argentina, Australia, Austria, Belgium, Byelorussian Soviet Socialist Republic, Bolivia, Brazil, Bulgaria, Cambodia, Cameroon, Canada, Ceylon, Chile, China, Colombia, Congo (Democratic Republic of), Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, El Salvador, Federal Republic of Germany, Finland, France, Greece, Guatemala, Haiti, Honduras, Hungary, Iceland, India, Iran, Israel, Italy, Japan, Laos, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua. Norway, Pakistan, Panama, Paraguay, Peru, Poland, Portugal, Romania, Spain, Sudan, Sweden, Switzerland, Thailand, Turkey, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Upper Volta, Uruguay, Venezuela and Yugoslavia (Rapport du Conseil administratif pour 1966, pp. 4 and 5).

<sup>&</sup>lt;sup>213</sup> Australia, Cambodia, Cameroon, Canada, Ceylon, Congo (Democratic Republic of), Iceland, India, Laos, New Zealand, Pakistan and Upper Volta.

<sup>244</sup> Israel, Sudan and Uganda.

<sup>&</sup>lt;sup>245</sup> The following study covers the period up to the end of 1967.

<sup>&</sup>lt;sup>246</sup> The Geneva Conventions (1864, 1906, 1929 and 1949) are not the only multilateral instruments codifying the substantive law of the Red Cross. In addition, the Handbook of the International Red Cross, Tenth Edition, Geneva, 1953 reproduces the following conventions: (1) The Hague Convention of 29 July 1899 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864 (Convention No. III of 1899); (2) The Hague Convention of 21 December 1904 concerning Hospital Ships; (3) Regulations respecting the Laws and Customs of War on Land, Annex to the Hague Convention of 18 October 1907 (Convention No. IV of 1907); (4) The Hague Convention of 18 October 1907 respecting the Rights and Duties of Neutral Powers and Persons in case of War on Land (Convention No. V of 1907); (5) The Hague Convention of 18 October 1907 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 6 July 1906 (Convention No. X of 1907; (6) Geneva Protocol of 17 June 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; (7) Convention of 12 July 1927 to Establish the International Relief Union. The substantive law of the Red Cross is also based on other sources, including the recommendations and resolutions of the Consultative Conference of 1863 and of the International Conferences of the Red Cross, separate decisions and acts of the various constituent elements of the Red Cross, and separate decisions and acts of the various Governments of the States Parties to the humanitarian conven-

- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 27 July 1929;
- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949;
- (b) Wounded, sick and shipwrecked members of armed forces at sea 247
  - Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949;
- (c) Prisoners of war
  - Geneva Convention relative to the Treatment of Prisoners of War, 27 July 1929;
  - 7. Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949;
- (d) Civilians
  - 8. Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949.
- 129. The diplomatic conferences at which the Geneva Conventions were adopted were convened and organized by the Swiss Federal Council, which became the depositary and administrator of these Conventions.<sup>218</sup> The 1929 Diplomatic Conference adopted Conventions (3) and (6) and the 1949 Diplomatic Conference adopted Conventions (4), (5), (7) and (8).

### 1. RELATIONSHIP BETWEEN THE VARIOUS GENEVA CONVENTIONS

130. Each of the Geneva Conventions is a separate instrument and differs from the others both as regards its content and as regards the States which are parties to it. In the case of conventions on the same subject, each of the new conventions replaces the earlier convention(s) only in relations between the Contracting States. The new convention has mandatory force only between States which are parties to it. The successive conventions on the same subject therefore coexist. The latest convention does not abrogate the earlier Geneva Conventions or the Hague Conventions. The States which are parties to the earlier Conventions but not to the most recent convention continue to be bound by those earlier conventions, which also govern the mutual relations between States which are parties to the earlier Conventions only and those which are parties both to the latest convention and earlier ones.249

131. For example, article 59 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949, reads:

The present Convention replaces the Conventions of August 22, 1864, July 6, 1906, and July 27, 1929, in relations between the High Contracting Parties.<sup>250</sup>

132. Article 134 of the Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949, contains a similar rule regarding the Convention relative to the Treatment of Prisoners of War concluded at Geneva on 27 July 1929.251 Similarly, article 58 of the Convention of 12 August 1949 for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea states that the said Convention replaces, in relations between the Contracting States, the Hague Convention of 18 October 1907 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1906.252 Lastly, in the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, article 154 states that "In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of July 29, 1899, or that of October 18, 1907, and who are parties to the present Convention (of 12 August 1949), this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the abovementioned Conventions of The Hague".253

# 2. NATURE OF THE GENEVA CONVENTIONS: PROCEDURE FOR BECOMING A CONTRACTING PARTY

133. The Geneva Conventions are pre-eminently treaties open to all.<sup>254</sup> Today they are formally binding on 117 States and are among the treaties with the most universal participation. In accordance with the final

<sup>&</sup>lt;sup>247</sup> The Hague Conventions of 29 July 1899 and 18 October 1907 dealt with the adaptation to maritime warfare of the principles of the Geneva Conventions of 22 August 1864 and 6 July 1906, respectively.

<sup>&</sup>lt;sup>248</sup> Articles 10 of the 1864 Convention, 29, 32 and 33 of the 1906 Convention; 32 and 36 to 38 of the 1929 Convention on the wounded and sick in armed forces in the field; 91 and 94 to 96 of the 1929 Convention on prisoners of war; 55, 57 and 61 to 63 of the 1949 Convention on the wounded and sick in armed forces in the field; 54, 56 and 60 to 62 of the 1949 Convention on wounded, sick and shipwrecked members of armed forces at sea; 133, 137 and 140 to 142 of the 1949 Convention on prisoners of war; and 150, 152 and 156 to 158 of the 1949 Convention on the protection of civilians.

<sup>&</sup>lt;sup>249</sup> See: Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Geneva 1952, p. 407.

<sup>&</sup>lt;sup>250</sup> Similar provisions are contained in article 34 of the Convention of 27 July 1929 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field with regard to the Conventions of 22 August 1864 and 6 July 1906, and in article 31 of the Convention of 6 July 1906 for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field with regard to the Convention of 22 August 1864.

<sup>&</sup>lt;sup>251</sup> Article 135 settles the question of the relationship with the Hague Conventions in the following manner: "In the relations between the Powers which are bound by the Hague Convention respecting the Laws and Customs of War on Land, whether that of 29 July 1899, or that of 18 October 1907, and which are parties to the present Convention, this last Convention shall be complementary to Chapter II of the Regulations annexed to the above-mentioned Conventions of the Hague."

<sup>&</sup>lt;sup>252</sup> Article 25 of the Hague Convention of 18 October 1907 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 6 July 1906 contains a similar provision with regard to the Hague Convention of 29 July 1899 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864.

<sup>233</sup> See foot-note 246 above.

<sup>&</sup>lt;sup>254</sup> Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, op. cit., p. 408.

clauses of these Conventions, any State may become a party to them. This principle, which was already included in the 1864 Convention, has been maintained in all the Geneva Conventions concluded subsequently. A distinction is made between States, however, as regards the methods of becoming a party to the Conventions in question. These methods are signature followed by ratification, or accession. The Conventions are silent on the procedure of succession, but this procedure has been sanctioned by recent practice.

134. The Convention of 22 August 1864 specified that it "shall be ratified" and added that the Contracting Parties would communicate the Convention "with an invitation to accede thereto to Governments unable to appoint Plenipotentiaries to the International Conference at Geneva. The Protocol has accordingly been left open." 255 After specifying that it "shall be ratified", the Convention of 6 July 1906 states that it may, up to a certain date, "be signed by the Powers represented at the Conference... and by the Powers not represented at [the] Conference but signatory to the Convention of 1864"; those Powers "which have not signed the...Convention" by the date set "shall be free to accede to it at a later date", and the Convention adds: "Other Power may apply for accession in the same manner, but their applications shall only be given effect if, during an interval of one year from the date of notification to the Federal Council, no opposition to the accession shall have been received by the latter from any of the Contracting Powers". 256 This provision concerning opposition to the accessions of States which did not participate in the Geneva Conferences or Conventions concluded in 1929 and 1949.

135. The Conventions of 1929 and 1949 follow a similar system. This consists in making a distinction between the method of signature by a certain date with subsequent ratification, which is reserved for States which participated in the Conference concerned or which are parties to certain earlier Conventions and the method of accession which, from the date of the entry into force of the Convention, is open to "any Power in whose name [the] Convention has not been signed".<sup>237</sup>

136. The instruments of ratification must be deposited and the accessions notified to the Swiss Federal Council.<sup>258</sup> In the 1929 and 1949 Conventions, rati-

fications take effect six months after the deposit of the the instrument of ratification and accessions six months after the date on which the notifications are received by the Swiss Federal Council.<sup>259</sup> The Swiss Federal Council has to draw up a procès-verbal of the deposit of the instruments of ratification and transmit a certified copy to the States which have signed or acceded to the Convention in question. In addition, it has to communicate accessions to those same States, but the Conventions do not require a procès-verbal of the accessions. The Swiss Federal Council also transmits to the Secretariat of the United Nations a certified copy of the deposit of the instruments of ratification and a copy of the notifications of accession and of the declarations of continuity, for registration purposes.<sup>260</sup>

### 3. TERRITORIAL APPLICATION OF THE GENEVA CONVENTIONS

137. The Geneva Conventions (1864, 1909, 1929 and 1949) contain no territorial application clauses.<sup>261</sup> In practice, the States parties to the Geneva Convention apply them to all the territories for whose external

of the Condition of the Wounded and Sick in Armed Forces in the Field; 91, 92 and 94 of the Convention of 27 July 1929 relative to the Treatment of Prisoners of War; 57, 58 and 61 of the Convention of 12 August 1949 for the Amelioration of the Wounded and Sick in Armed Forces in the Field; 56, 57 and 60 of the Convention of 12 August 1949 for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; 137, 138 and 140 of the Convention of 12 August 1949 relative to the Treatment of Prisoners of War; and 152, 153 and 156 of the Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War.

The 1864 Convention does not specify intervals of time. The 1906 Convention specifies an interval of six months for ratifications, fixes no intervals for States which accede although they could have signed and ratified, and specifies an interval of onc year for other acceding States, if in the meantime no opposition had been expressed by any of the Contracting Parties.

260 On the subject of registration, the two 1929 Conventions had stated that a certified copy would be deposited in the archives of the League of Nations, to which the Swiss Federal Council had to communicate ratifications accessions and denunciations. The functions entrusted to the League of Nations by those two Conventions were assumed by the Secretariat of the United Nations, under the terms of United Nations General Assembly resolution XIV of 12 February 1946. The four 1949 Conventions were registered with the Secretariat of the United Nations by the Swiss Federal Council. The English and French texts of the 1929 Conventions were published in League of Nations, Treaty Series, vol. CXVIII, pp. 303 and 343, and those of the 1949 Conventions were published in United Nations, Treaty Series, vol. 75, pp. 31, 85, 135 and 287.

<sup>261</sup> Sometimes, however, States have made declarations concerning the territorial application of the General Conventions. The United Kingdom, for example, on depositing its instrument of ratification of the 1949 Geneva Conventions, declared:

"The United Kingdom of Great Britain and Northern Ireland will apply each of the above-mentioned Conventions in the British Protected States of Bahrain, Kuwait, Qatar and the Trucial States to the extent of Her Majesty's powers in relation to those territories." (Procès-verbal of the deposit of the instrument of ratification by the United Kingdom of the 1949 Geneva Conventions. United Nations, Treaty Series, vol. 278, pp. 266-268.)

<sup>&</sup>lt;sup>255</sup> Articles 9 and 10 of the Convention.

<sup>&</sup>lt;sup>256</sup> Articles 29 and 32 of the Convention.

<sup>&</sup>lt;sup>257</sup> Articles 31, 32 and 35 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 27 July 1929; 90, 91 and 93 of the Convention relative to the Treatment of Prisoners of War of 27 July 1929; 56, 57 and 60 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949; 55, 56 and 59 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949; 136, 137 and 139 of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949; and 151, 152 and 155 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

<sup>&</sup>lt;sup>258</sup> Articles 29, 30 and 32 of the 1906 Convention; 32, 33 and 36 of the Convention of 27 July 1929 for the Amelioration

relations they are responsible. In the event of armed conflict, the Geneva Conventions have been applied in the protectorates, colonies and other dependent territories of the States parties. This territorial application of the Geneva Conventions is today confirmed by the fact that a considerable number of new States—former dependent territories of the States parties to the Geneva Convention—have signified, by means of a declaration of continuity, that the said Conventions were applicable in their territories by virtue of the ratification or accession effected, at the time, by the former metropolitan countries. This procedure has not given rise to any opposition from the States parties to the Geneva Conventions.

#### 4. FORMULATION OF RESERVATIONS

138. The final clauses of the Geneva Conventions do not mention reservations. However, twenty-four States— 20 per cent of the Contracting States—have made their participation in the Conventions subject to reservations. In the proces-verbal of deposit of an instrument of ratification or in the notification of an accession, the Swiss Federal Council mentions any reservations made by the State concerned and any opposition it has expressed to reservations previously made by another State. The Swiss Federal Council informs the United Nations Secretariat of reservations or opposition to reservations concerning the 1929 and 1949 Geneva Conventions. In the case of new States which become parties to the Geneva Conventions by succession, by means of a declaration of continuity, the question arises whether, in the absence of an explicit declaration on their part, they also succeed to the reservations made by their predecessors.

### B. The International Red Cross: its constituent elements and its organs

139. The "International Red Cross" is not an organization established by a treaty or an international convention.<sup>262</sup> Nor were the Geneva humanitarian con-

ventions, which, from 1864 on, have codified the substantive law of the Red Cross, concluded by States at international conferences of the Red Cross. However, constituent elements or organs of the Red Cross have always acted as promoters of the humanitarian conventions and guardians of its spirit, as has been recognized by States and is today confirmed by the Statutes of the International Red Cross. In addition, specific rights and functions have been expressly vested by certain humanitarian conventions in these constituent elements and organs 263 and the International Red Cross has associated the States parties to certain humanitarian conventions with its organic system. The study of the succession of States to the Geneva humanitarian Conventions accordingly concerns the States parties to and the depositary of these Conventions as well as the International Red Cross.

140. International Conferences of the Red Cross have been held several times since 1867 but it was not until 1928, during the XIIIth International Conference of the Red Cross at The Hague, that the Statutes of the International Red Cross were adopted. Revised at Toronto in 1952, the 1928 Statutes remain today the organic law of the "International Red Cross". These statutes describe and systematize the composition of the "International Red Cross" and the nature and functions of its organs. They maintain the organic independence of the constituent elements within the "International Red Cross" movement, while emphasizing their moral solidarity in the performance of the common task.

141. The constituent elements of the International Red Cross are the duly recognized National Red Cross Societies, the International Committee of the Red Cross and the League of Red Cross Societies. The International Committee, historically the promoter of the work of the Red Cross, is "an independent insti-

<sup>262 &</sup>quot;... the International Red Cross movement differs both in its methods and in its history from other international bodies which were based at outset on conventions and have predetermined technical or other duties" (Paul Ruegger, "The Juridical Aspects of the Organization of the International Red Cross", Recueil des Cours, 1953, I, vol. 82, p. 526). The International Red Cross has a certain official character which is explained by the very nature of the functions performed by its constituent elements and by the co-operation and recognition extended to the latter by States in the course of the empirical historical development of the organization (see, for example: Frédérique Noailly, La Croix-Rouge au point de vue national et international. Son histoire, son organisation, Paris, 1935). For the historical and legal development of the International ed Cross, see also: Eugène Borel, "L'Organisation internationale de la Croix-Rouge", Recueil des Cours, 1923, vol. 1, pp. 573-604; Jean S. Pictet, "La Croix-Rouge et les Conventions de Genève" (extract from Recueil des Cours, Paris, 1950); Henri Coursier, "La Croix-Rouge internationale" ("Que sais-je?", collection, Paris, 1959) and "Cours de cinq leçons sur les Conventions de Genève", Geneva, 1963; Pierre Boissier, "Histoire du Comité international de la Croix-Rouge" (vol. 1, "De Solferino à Tsoushima"), Paris, 1963.

<sup>&</sup>lt;sup>263</sup> "The fact that the Red Cross organization—that is, in the period of which we speak first, the movement's founder organ, the Geneva International Committee—was purposely and by that Committee's own wish not mentioned in the 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, in the revised Convention of 1906 or even in the revised Convention of 1929, in other words over six and a half decades of humanitarian work ... is no coincidence. For a very long time, the Geneva International Committee's power of persuasion and capacity for action grew precisely because activities were not defined or even touched on in the texts rooted in written and almost universal conventional law". See: Paul Ruegger, op. cit., p. 527).

<sup>&</sup>lt;sup>264</sup> The presence at the 1928 Hague Conference "of representatives of the Governments of the countries which had acceded to the Geneva Convention and the sanction given by their active participation in the International Conference, which now has the power to take decisions that will in principle be binding on them within the context of the Red Cross, means that these Governments gave their agreement to the statutes then adopted. Although they have no diplomatic status, these statutes therefore do constitute an international instrument binding on Governments and, so far as they alone are concerned binding them in their mutual relations, in the manner of a gentleman's agreement" (Auguste-Raynald Werner, "La Croix-Rouge et les Conventions de Genève. Analyse et synthèse juridiques", Geneva, 1943, p. 79).

<sup>&</sup>lt;sup>265</sup> Article I of the Statutes of the International Red Cross (Handbook of the International Red Cross, op. cit., p. 305).

tution, governed by its own Statutes and recruited by cooptation from among Swiss citizens".<sup>266</sup> The League of Red Cross Societies, established in 1919, is "the international federation of the National Red Cross, Red Crescent and Red Lion and Sun Societies".<sup>267</sup>

142. The Statutes of the "International Red Cross" state that the "International Conference" is "the supreme deliberative body of the International Red Cross".268 Composed of delegations of National Societies, of the International Committee, of the League and of the States parties to certain Geneva Conventions (see below, section C, para. 145), the "International Conference" ensures unity in the work of the constituent elements of the International Red Cross and may "make proposals concerning the humanitarian Conventions and other international Conventions relating to the Red Cross".269 The rules of procedure of the International Conference in force were adopted by the Conference held at Brussels in 1930 and revised by the Conference held at Toronto in 1952.270 The 1928 Statutes established a Standing Commission which, during the interval between sessions of the Conference and subject to any final decision the Conference may take, settles any difference of opinion which may arise as to the interpretation and application of the Statutes.271 The International Conference is convened and organized by the Central Committee of a National Society or by the International Committee or by the League, under a mandate conferred for the purpose by the previous Conference or by the Standing Commission.<sup>272</sup>

#### C. Participation of States in the Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field and the International Red Cross

143. In order to perform its task, the "International Red Cross" is anxious to obtain the widest possible participation of States in the Geneva Conventions. In addition, under the Statutes of the International Red Cross, the International Conference, the Standing Commission or the International Committee are sometimes required to take decisions based on the participation of States in the Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1864, 1906, 1929 or 1949). Only Governments of States parties to these Conventions have the right to send delegates to the International Conferences of the Red Cross and, in order to be recognized by the International Committee, all National Societies must be constituted on the territory of a State party to one of these Conventions. The decisions on this subject taken by the International Conference or by the International Committee are undoubtedly important for the study of the succession of States.

#### 1. PARTICIPATION OF DELEGATES OF GOV-ERNMENT AND DELEGATES OF NATIONAL RED CROSS SOCIETIES IN INTERNATIONAL CONFERENCES OF THE RED CROSS

144. The participation of Governments in International Conferences of the Red Cross dates from the very foundation of the movement. The 1863 Consultative Conference, which was the constituent conference, was already composed of representatives of States meeting in a private capacity under the auspices of the newly established International Committee. Since then, delegates of Governments have always taken part in the International Conferences of the Red Cross together with delegates of the constituent elements of the International Red Cross.<sup>273</sup>

145. Article 1 of the Statutes of the International Red Cross states:

The International Conference of the Red Cross shall be composed of delegations of duly recognized National Red Cross, Red Crescent and Red Lion and Sun Societies, delegations of the States parties to the Geneva Conventions and delegations of the International Committee of the Red Cross and of the League of Red Cross Societies,<sup>274</sup>

<sup>&</sup>lt;sup>268</sup> Article VI of the Statutes of the International Red Cross (op. cit., p. 307). See also: Statutes of the International Committee of the Red Cross of 10 March 1921, as amended on 12 October 1928, 28 August 1930, 2 March 1939, 22 June 1945, 22 February and 26 March 1946 and 25 September 1952

<sup>(</sup>Handbook of the International Red Cross, op. cit., p. 321).

267 Article VII of the Statutes of the International Red Cross (op. cit., p. 308). See also: Constitution of the League of Red Cross Societies, revised text, adopted by the Board of Governors of the League in 1950 (Handbook of the International Red Cross, op. cit., p. 325). For a report on the establishment of the League, see: Revue générale de droit international public, 1919, tome XXVI, pp. 484-493.

<sup>&</sup>lt;sup>268</sup> Article I, paragraph 2 (Handbook of the International Red Cross, op. cit., p. 305).

<sup>&</sup>lt;sup>269</sup> Article II, paragraph 3, of the Statutes (op. cit., p. 306). However, it is not the role of the International Conference to legislate: The Conferences adopt resolutions and recommendations, never binding ordinances. They play an important role, in that they feel the pulse of the expanding world of the Red Cross at regular intervals; they also play a considerable role by ensuring that the same goal is pursued and seeking common principles to govern the action of the national groups. In addition, the value and moral force of the resolutions of the regular International Conferences are undoubtedly enhanced by the participation of the delegates of the States signatory to the Geneva Conventions, who are officially members of the Conference. (See: Paul Ruegger, op. cit., pp. 510-512).

<sup>&</sup>lt;sup>270</sup> Handbook of the International Red Cross, op. cit., p. 312.

<sup>&</sup>lt;sup>271</sup> Articles IX and X of the Statutes (op. cit., pp. 309 and 310). The Standing Commission is composed of five members elected in a personal capacity by the Conference, two representatives of the International Committee and two representatives of the League. During each International Conference there is a meeting of a Council of Delegates (article IV of the Statutes). The Council of Delegates is composed of the delegates of National Societies, of the International Committee and of the League.

<sup>&</sup>lt;sup>272</sup> Articles III and X of the Statutes of the International Red Cross (op. cit., pp. 306 and 310) and article 4 of the rules of procedure of the international Conference of the Red Cross (op. cit., p. 313). The Standing Commission fixes the date and place of the International Conference, should this not have been already decided by the preceding Conference or should exceptional circumstances so require.

<sup>&</sup>lt;sup>273</sup> See: Auguste-Raynald Werner, op. cit., pp. 84 and 85.

<sup>&</sup>lt;sup>274</sup> Handbook of the International Red Cross, op. cit., p. 305.

and in article 1 of the rules of procedure of the International Conference of the Red Cross we read:

The following shall be members of the International Conference with the right to take part in all discussions and to vote:

- (b) the delegates of the States parties to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1864, 1906, 1929 or 1949)...<sup>275</sup>
- 146. The Statutes of the International Red Cross and the rules of procedure of the International Conference of the Red Cross have therefore sanctioned the traditional participation of delegates of Governments in the International Conferences of the Red Cross. At the International Conference, the delegates of Governments, who have the right to attend meetings and to vote, are placed on an equal footing with the delegates of National Societies, of the International Committee and of the League of Red Cross Societies.
- 147. Since participation in the Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1864, 1906, 1929 or 1949) is a condition which States must meet in order to participate in the International Conferences, it is the responsibility of the organization—National Society, International Committee or League-which, in agreement with the Standing Commission, is to convene and organize the International Conference, 276 to make a list of the States parties to the Geneva Conventions and of the National Societies entitled to participate in the Conference in question. Certain controversial cases or situations have given rise to difficulties and the Standing Commission and the International Conference itself have on occasion been required to rule on cases or situations which involved elements relating to the succession of States or Governments.
- 2. INTERNATIONAL RECOGNITION OF NATIONAL RED CROSS SOCIETIES BY THE INTERNATIONAL COMMITTEE OF THE RED CROSS
- 148. Red Cross Societies must be recognized by the Governments of their respective countries as services auxiliary to the military health services or, in States which do not maintain armed forces, as voluntary aid services, auxiliary to the public authorities and acting for the benefit of the civilian population. This is known as "national recognition". In order to acquire the status of a "National Red Cross Society", organizations enjoying national recognition must then be recognized as such by the International Committee of the Red Cross. This is known as "international recognition". The National Red Cross Societies are thus organizations which enjoy both the national recognition of the Government of their country and the international recogni-

tion of the International Committee. When this recognition is given by the International Committee, which notifies the existing National Societies of the constitution of the new Societies, it has the effect of integrating the latter into the International Red Cross.<sup>277</sup>

149. Article VI (3) of the Statutes of the International Red Cross establishes the function of recognition of new National Red Cross Societies by the International Committee.<sup>278</sup> Under this article, the International Committee:

After having assembled all pertinent data, ... announces the recognition of any newly established or reconstituted National Red Cross Society which fulfils the conditions for recognition in force.<sup>279</sup>

150. Under the Statutes of the International Committee of the Red Cross, it is one of the Committee's functions:

to recognize any newly established or reconstituted National Red Cross Society which fulfils the conditions for recognition in force, and to notify other National Societies of such recognition.<sup>280</sup>

151. In order to be recognized by the International Committee, a National Society must meet ten conditions and in particular must "be constituted on the territory of an independent State where the Geneva Convention relative to the Relief of Sick and Wounded (1864, 1906, 1929 or 1949) is in force".281 When a National Society requests recognition by the International Committe, the latter must see whether the Society in question fulfils the conditions for recognition and in particular whether it has been constituted on the territory of a State party to the said Geneva Conventions, whether it has first been "recognized by its legal Government" and whether it extends "its activities to the entire country and its dependencies". The International Committee has recently granted recognition to the National Societies of new States, former dependent territories of a State party to the Conventions mentioned, on the basis of the rules of succession to treaties and, in some cases, even before a declaration of continuity has been received by the Swiss Federal Council.

<sup>&</sup>lt;sup>275</sup> *Ibid.*, p. 312.

<sup>&</sup>lt;sup>276</sup> See above, para. 142.

<sup>&</sup>lt;sup>277</sup> Auguste-Raynald Werner, op. cit., pp. 30, 31, 36 and 37.
<sup>278</sup> All the National Red Cross Societies have a common international status. The principles formulated by the International Committee in 1887, following the Karlsruhe International Conference, to serve as conditions for the international recognition of new societies, are one of the corner-stones of the International Red Cross.

<sup>&</sup>lt;sup>279</sup> Handbook of the International Red Cross, op. cit., p. 308. <sup>280</sup> Article 4 (b) of the Statutes of the International Committee (Handbook of the International Red Cross, op. cit., p. 322).

<sup>&</sup>lt;sup>281</sup> Handbook of the International Red Cross, op. cit., pp. 319 and 320. The conditions in force for the international recognition of National Societies were drawn up by an ad hoc joint Commission of the International Committee and of the League and approved by the XVIIth International Red Cross Conference held at Stockholm in 1948.

### D. Cases comprising elements related to the succession of States

### 1. PARTICIPATION OF STATES IN THE GENEVA CONVENTIONS 282

#### (a) Convention of 22 August 1864 288

152. Austria-Hungary was a party to the 1864 Convention as of 21 July 1866. However, the *Handbook* of the International Red Cross, published in 1953, cites only Austria as a party to the Convention; Hungary is not mentioned.<sup>284</sup> In addition, Serbia, on 24 March 1876, and Montenegro on 29 November 1875, had also become parties to the 1884 Convention, but Yugoslavia is not listed in the Handbook as one of the parties to that Convention.<sup>285</sup>

The Union of Soviet Socialist Republics is also mentioned as a party to the 1864 Convention. Russia had become a party to the Convention on 10/22 May 1867.<sup>286</sup> The Council of People's Commissars of the Russian Soviet Federative Socialist Republic promulgated a decree "recognizing all the international Conventions of the Red Cross", published on 4 June 1918 in the Izvestia of the All-Russian Central Executive Committee. This decree "informs the International Committee of the Red Cross at Geneva and the Governments of all States which have recognized the Geneva Convention that the said Convention in its original version and in all subsequent versions, and all the other international agreements and conventions which concern the Red Cross and were recognized by Russia up to October 1915, are recognized and will be observed by the Russian Soviet Government, which reserves all the rights and prerogatives resulting from them...".287

#### (b) Convention of 6 July 1906 286

154. In the Handbook of the International Red Cross, Australia, Canada, India, the Irish Free State and South Africa are listed as parties to the 1906 Convention as of 1926.<sup>289</sup> However, the Handbook does not specify either the exact date or the method of participation of these five States in the Convention. Great Britain had ratified the Convention on 16 April 1907.<sup>290</sup>

155. From a comparison of the list of States parties to the 1864 and 1906 Conventions with the list of States which participated in the Geneva Diplomatic Conference of July 1929 it would appear that these five countries became parties to the 1906 Convention by succession. The list of States parties to the 1864 and 1906 Conventions reproduced in the Actes de la Conférence diplomatique de 1929 does not include these five States among those which ratified or acceded to the said Conventions. On the other hand, article 1 of the rules of procedure of the Conference specifies that the Conference "is composed of all the delegates of the countries parties to the Geneva Conventions of 22 August 1864 and 6 July 1906" 291 and Australia, Canada, India, the Irish Free State and South Africa appear in the list of States participating in the Conference. All these countries signed the Final Act of the Conference and the Conventions adopted.<sup>292</sup> The participation of these British Dominions in the 1906 Convention and in the Diplomatic Conference is explained by the internal evolution of the Commonwealth, which allowed certain dominions to become members of the League of Nations and to participate separately in international agreements and conventions. In this connexion, it should be emphasized that Great Britain signed the Final Act and the Conventions of 1929 for "any part of the British Empire not a separate Member of the League of Nations".\*

156. Australia, Canada, India, the Irish Free State and South Africa therefore became parties to the 1906 Convention by succession. They did not accede to the

<sup>&</sup>lt;sup>282</sup> For the participation of States divided *de jure* or *de facto* (China, Germany, Korea and Viet-Nam) see below, paras. 185-187.

<sup>283</sup> At the request of the International Committee of the Red Cross, the Swiss Federal Council sent the invitations to participate in the Geneva Diplomatic Conference which was held from 8 to 22 August 1864. For a list of the Powers represented see: C. Lueder, La Convention de Genève au point de vue historique, critique et dogmatique, Erlangen 1876, pp. 374 and 375. See also: G. Moynier, Etude de la Convention de Genève (1864 and 1868), Geneva 1870. When, in 1966, the Republic of Korea acceded to the four Geneva Conventions of 1949 (United Nations, Treaty Series, vol. 575, pp. 284 and 285), the Convention of 22 August 1864 became a historical document. The Republic of Korea was the last State party to the 1864 Geneva Convention which had not acceded to any of the later humanitarian treaties (International Review of the Red Cross, 1966, September, p. 481).

<sup>&</sup>lt;sup>284</sup> Op. cit., pp. 9, 10 and 300-302.

<sup>285</sup> Ibid.

<sup>286</sup> Ibid., pp. 9 and 10.

<sup>&</sup>lt;sup>287</sup> International Committee of the Red Cross, Recueil de textes relatifs à l'application de la Convention de Genève et à l'action des Sociétés nationales dans les Etats parties à cette Convention, Geneva, 1934, p. 768 (translation from the French by the United Nations Secretariat). See also: Report of the International Committee of the Red Cross on its activities during the Second World War, Geneva, 1948, p. 405, in fine.

<sup>\*</sup> Translation from the French by the United Nations Secretariat.

<sup>&</sup>lt;sup>238</sup> See: (1) Convention de Genève: Actes de la Conférence de révision réunie à Genève du 11 juin au 6 juillet 1906 (in particular: Rapport by L. Renault on behalf of the Drafting Committee); (2) E. Roethlisberger, Die Neue Genfer Konvention vom 6 Juli 1906, Berne, 1908. Costa Rica and Uruguay are the only States partics to the 1906 Convention which are not yet bound by the 1919 and 1949 Conventions (International Review of the Red Cross, 1966, July, p. 386).

<sup>&</sup>lt;sup>289</sup> Handbook of the International Red Cross, op. cit., pp. 300-302.

<sup>&</sup>lt;sup>200</sup> *Ibid.*, p. 26.

<sup>&</sup>lt;sup>291</sup> See: Actes de la Conférence diplomatique de Genève de 1929, Geneva, 1930, pp. 4, 8, 9, 37, 64, 672-680, 713-720 and 732-740.

Diplomatic Conference by virtue of its separate participation in the 1864 Convention. The Republic of South Africa had acceded to that Convention on 30 September 1896 (Handbook of the International Red Cross, op. cit., pp. 9, 10 and 300-302). New Zealand also participated in the 1929 Diplomatic Conference. However, it is not included among the States parties to the 1864 or 1906 Conventions mentioned in the Handbook of the International Red Cross.

Convention when their international status was altered. The *Handbook of the International Red Cross* considers these States to be separate parties to the Convention from the time when, after the change in their international status, they acquired the capacity to conclude international treaties in their own name.<sup>203</sup>

157. The references made in the Handbook of the International Red Cross to the Commonwealth States were the subject of a communication dated 26 July 1956 addressed to the Director for General Affairs of the International Committee of the Red Cross by the Consul-General of Great Britain at Geneva. This communication contains the following passage:

... In the list of ratifications of the 1906 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, it would be preferable for the date of ratification by the Commonwealth countries and the Irish Republic to be 16 April 1907, because not having repudiated them, the Commonwealth countries are bound by the international obligations deriving from the ratification of the Convention by the United Kingdom. If this proposal were accepted, it might be appropriate to add one explanatory foot-note referring to all the Commonwealth countries or separate footnotes stating "By virtue of the United Kingdom ratification on April 16, 1907." In addition, Ceylon, New Zealand and Pakistan should be added to complete the list... (Translation by the United Nations Secretariat.)

158. According to this communication, the United Kingdom considers that Australia, Canada, India, the Irish Republic and South Africa became parties to the 1906 Convention by succession, by virtue of the ratification by Great Britain on 16 April 1907. In addition, the United Kingdom considers that Ceylon, New Zealand and Pakistan also became parties to the 1906 Convention by succession.

159. Lastly, the table in the Handbook of the International Red Cross lists Hungary, the Union of Soviet Socialist Republics and Yugoslavia as parties to the 1906 Convention. Austria-Hungary had ratified the Convention on 27 March 1908, Serbia on 9 October 1909, and Russia on 9 February 1907.<sup>294</sup> A decree dated 16 June 1925 of the Council of People's Commissars of the Union of Soviet Socialist Republics recognizes the 1906 Convention and brings it into force in the Union of Soviet Socialist Republics.<sup>295</sup> The Kingdom of the Serbs, Croats and Slovenes participated in the 1929 Diplomatic Conference.

#### (c) Conventions of 27 July 1929 296

#### (i) Cases of succession

a. Former non-metropolitan territories for whose international relations the United Kingdom was responsible

160. Burma, which as part of India participated in the two 1929 Conventions, was separated from the Indian Empire on 1 April 1937 and acquired the status of a British oversea territory. At the time of the separation, the United Kingdom made a declaration of application of the 1929 Conventions to Burma "in virtue of the United Kingdom's signature and ratification thereof" on 23 June 1931.<sup>297</sup> The Handbook of the International Red Cross considers that Burma became a party to the 1929 Conventions separately, on 1 April 1937.<sup>298</sup> After becoming independent State on 4 January 1948, Burma was invited to and participated in the 1949 Geneva Diplomatic Conference and signed the Final Act of the Conference.<sup>299</sup>

<sup>&</sup>lt;sup>293</sup> When the Dominions acquired this new status, the Red Cross organizations existing on their territories asked for recognition by the International Committee of the Red Cross, which was granted in 1927 to Canada and Australia, in 1928 to South Africa and in 1929 to India. In circular No. 274 of 17 November 1927, announcing the recognition of the Australian Red Cross, the International Committee stated:

<sup>&</sup>quot;The Imperial Conference, held in October-November 1926, defined the status of Great Britain and the Dominions in the following terms: 'autonomous communities..., equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs'.

<sup>&</sup>quot;The British Government, for its part, has informed the Swiss Minister in London that the 1906 Geneva Convention (ratified by Great Britain on 16 April 1907) remains in force throughout the British Empire. The Dominions are therefore considered to be subject to the rights and obligations resulting from the Geneva Convention.

<sup>&</sup>quot;In a letter of 5 April 1927, the International Committee requested the British Red Cross to inform it whether, as a result of the change in the status of the communities composing the British Empire, the position of the Red Cross Societies of the British Dominions had undergone changes enabling them to be recognized by the International Committee as independent National Societies.

<sup>&</sup>quot;In reply to this request, the British Red Cross has informed the International Committee that the National Red Cross Societies of Canada, Australia, New Zealand, South Africa and British India are no longer branches of the British Red Cross but independent Societies and that the British Red Cross requests that they be recognized." (Information provided by the International Committee of the Red Cross.)

<sup>&</sup>lt;sup>294</sup> Handbook of the International Red Cross, op. cit., pp. 26, 27 and 300-302.

<sup>&</sup>lt;sup>295</sup> See: Recueil de textes relatifs à l'application de la Convention de Genève et à l'action des Sociétés nationales dans les Etats parties à cette Convention, op. cit., p. 770.

<sup>&</sup>lt;sup>296</sup> See: Paul des Gouttes, Commentaire de la Convention de Genève pour l'amélioration du sort des blessés et des malades dans les armées en campagne du 27 juillet 1929, Geneva, 1930. Burma, Bolivia and Ethiopia are parties to the 1929 Conventions but are not yet bound by the 1949 Conventions (International Review of the Red Cross, 1966, July, p. 386).

<sup>&</sup>lt;sup>297</sup> League of Nations, *Treaty Series*, vol. CXCIII, pp. 270 and 271. Following the separation of the *colony of Aden* from the Indian Empire, on 1 April 1937, the United Kingdom made a declaration relating to the application of the 1929 Conventions to Aden. The British declaration specified that the colony of Aden was "now to be considered a Party to the [Conventions] in virtue of the United Kingdom's signature and ratification thereof" (League of Nations, *Treaty Series*, vol. CXCVI, pp. 417 and 418). Despite the terms of this declaration, the colony of Aden is not listed among the States parties to the 1929 Conventions and it did not participate separately in the 1949 Geneva Diplomatic Conference. Since Aden was a British colony at the time, the declaration made by the United Kingdom seems more like a declaration of territorial application of the 1929 Conventions to the colony.

<sup>&</sup>lt;sup>298</sup> Handbook of the International Red Cross, op. cit., pp. 69 and 96.

<sup>&</sup>lt;sup>299</sup> Swiss Federal Political Department, Actes de la Conférence diplomatique de Genève de 1949, tome I, p. 196.

161. Under the terms of a communication from the Ministry of Foreign Affairs of the Hashemite Government of Transjordan, received by the Swiss Federal Council on 20 November 1948 and supplemented by a cable dated 9 March 1949, the two Geneva Conventions of 27 July 1929 are applicable to Transjordan in pursuance of the royal decree of 15 March 1932, published in Official Journal No. 345 of 31 May 1932. In notifying the Tranjordanian communication to the States parties and to the United Nations Secretariat, the Swiss Federal Council made the following classification:

The Transjordanian Government, assuming the obligations resulting from the accession effected on behalf of Transjordan in April 1932 by the United Kingdom Government, declares that it accedes separately to these Conventions as a Contracting State, on the basis of the proclamation of the independence of Transjordan and of the provisions of article 8, paragraph 2, of the Treaty of Alliance concluded on 22 March 1946 between the United Kingdom and the Kingdom of Transjordan. The notifications of the Transjordanian Government, which are in the nature of a declaration of continuity, take effect on the abovementioned dates of 20 November 1948, for the first Convention, and 9 March 1949 for the second.

162. The Swiss Federal Council therefore considered that the communications of the Transjordanian Government were in fact declarations of continuity and not notifications of accession. This is confirmed by the dates of entry into force of the Transjordanian communications: 20 November 1948 in the case of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field and 9 March 1949 for the Convention relative to the Treatment of Prisoners of War. In other words, the Transjordanian communications took effect on the date on which they were received by the Swiss Federal Council and not six months later, as prescribed in the case of accessions in articles 36 and 94 of the Conventions in question.

- b. Former non-metropolitan territory for whose international relations the Netherlands was responsible
- 163. On 5 June 1950, the High Commissioner of the Republic of the United States of *Indonesia* in the Netherlands signed a declaration, on behalf of his Government, in the Swiss Federal Political Department at Berne to the effect that the Republic of the United States of *Indonesia*: \*
- Recognizes that [the two Geneva Conventions of 27 July 1929] continue to be in force within the territory of the Republic of the United States of Indonesia;
- (2) undertakes to respect them and apply them;
- (3) requests the Swiss Federal Council to notify the Governments concerned that the Republic of the United States of Indonesia, as an independent and sovereign State, is a party separately to the 1929 Geneva Conventions.
- 164. On 7 November 1950, the Swiss Federal Council transmitted to the United Nations Secretariat a

circular note dated 9 June 1950 concerning the Indonesian Government's declaration, without mentioning the date from which Indonesia should be considered as being a party separately to the Conventions in ques-In the United Nations, Treaty Series, 301 the declaration of Indonesia is registered as "continuance of application within the territory of the Republic of the United States of Indonesia in the name of that State" of the 1929 Geneva Conventions, and no reference is made there either to the date on which the Indonesian declaration took effect. It appears that the Conventions were binding on Indonesia as from its accession to independence, i.e., there was no interruption in the application of the Conventions to Indonesian The Netherlands became a party to these Conventions on 5 October 1932 and Indonesia attained independence on 28 December 1949.

#### (ii) Cases of accession

#### a. Part of a former British Mandated Territory

165. After the Second World War, the State of *Israel*, established on part of the former British Mandated Territory of Palestine, became a Party to the two 1929 Geneva Conventions by accession. The accession of the Provisional Government at Berne on 3 August 1948 through the Legation of Uruguay at Berne, took effect on 3 February 1949.<sup>302</sup>

#### b. Former territory of British India

166. On 31 January 1948, the Secretary of State for Foreign Affairs of *Pakistan* cabled his country's accession to the 1929 Conventions. The Swiss federal authorities received the Pakistan communication on 2 February 1948. The accession of Pakistan took effect on 2 August 1948.<sup>303</sup> Pakistan's notification of accession contains the following passage:

... irrespective of this request Pakistan as one of the successor States to the late Government of India which ratified both conventions June 23rd 1931 considers itself automatically a contracting party.

167. However, this clarification by the Pakistan Government had no effect as regards the participation of Pakistan in the 1929 Conventions as a separate party. *Pakistan* became a party by accession and not by succession; indeed, this was in accordance with

<sup>\*</sup> Translation from the French by the United Nations Secretariat.

<sup>300</sup> United Nations, Treaty Series, vol. 31, pp. 495 and 497.

<sup>301</sup> Ibid., vol. 76, pp. 286 and 287.

<sup>&</sup>lt;sup>302</sup> *Ibid.*, vol. 31, pp. 495 and 497. When giving notice of Israel's accession, the Federal Political Department stated that:

<sup>&</sup>quot;... In its capacity as administrator of the Geneva Conventions of 27 July 1929, the Swiss Government is obliged, by the provisions of article 36 of the first of these Conventions and by those of article 94 of the second, to notify new accessions to the Governments of all countries on whose behalf the Conventions have been signed or whose accession has been notified. In the performance of this duty, the Political Department informs the States bound by the Geneva Conventions of 27 July 1929 of the declaration in question...".

<sup>&</sup>lt;sup>308</sup> United Nations, Treaty Series, vol. 31, pp. 495 and 497.

Pakistan's own wishes as expressed in its communication to the Swiss federal authorities.

#### c. Former French Mandated Territories

168. Lebanon and Syria have become parties to only one of the Geneva Conventions of 27 July 1929—the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Although France is a party to the Convention, the two States used the method of accession. The accession of Lebanon was communicated by a note from its Legation at Berne dated 12 June 1946 and entered into force six months later, on 12 December 1946. The accession of Syria, communicated by a note of 20 June 1946 from the Syrian Legation in Paris to the Swiss Legation in France, was received by the Swiss federal authorities on 4 July 1946 and entered into force six months later, on 4 January 1947.

#### d. Former territory associated with the United States

169. The *Philippines* announced its accession to the 1929 Convention in a note dated 17 March 1947 from its Washington Embassy addressed to the Swiss Legation in Washington. The accession of the *Philippines* took effect on 1 October 1947.<sup>305</sup> The United States had become a party to the Conventions on 4 February 1932.

#### (d) Conventions of 12 August 1949 306

#### (i) Cases of succession

a. Former non-metropolitan territories for whose international relations the United Kingdom was responsible

170. Five new States—former non-metropolitan territories for whose international relations the United Kingdom was responsible—became parties to the four 1949

Geneva Conventions by succession: Gambia, Jamaica, Nigeria, Sierra Leone and Tanganyika. In a letter received by the Swiss federal authorities on 20 June 1961, Nigeria stated that the Geneva Conventions of 12 August 1949, previously ratified by the United Kingdom, were binding on Nigeria as from the date on which it attained independence, i.e., as from 1 October 1960.<sup>307</sup> The terms of this letter were as follows:

- ... I have the honour to refer to the exchange of cablegrams on the subject of the accession by the Federation of Nigeria to the Four Geneva Conventions of 12th August, 1949.
- 2. I declare herewith the wish of the Government of the Federation of Nigeria that the ratification of the said Conventions by the Government of the United Kingdom of Great Britain and Northern Ireland on September 23rd, 1957 is considered binding by the Federation of Nigeria as from October 1st, 1960, when the Federation attained her independence and sovereignty....
- 171. A governmental communication from *Tanganyika* declaring that the four 1949 Geneva Conventions were applicable to that country was received by the Swiss federal authorities on 12 December 1962.<sup>308</sup> In notifying the declaration of Tanganyika to the United Nations Secretariat, the Swiss Observer to the United Nations said that the Conventions concerned had entered into force for Tanganyika on the date on which it attained independence, 9 December 1961. The communication from Tanganyika was worded as follows:
- ... I have the honour to request that you take formal note of the fact that the Government of Tanganyika recognizes that it continues to be bound by the Geneva Conventions of August 12th, 1949, which were applied to the Territory of Tanganyika by the United Kingdom prior to independence....
- 172. On 17 July 1964, Jamaica also sent the Swiss federal authorities a declaration of continuity concerning the application of the four 1949 Geneva Conventions.<sup>309</sup> These Conventions entered into force for Jamaica on the date on which it attained independence, 6 August 1962. The declaration of Jamaica was worded as follows:

I have the honour to bring to your notice that the four Conventions signed in Geneva on August 12, 1949, concerning the protection of war victims are lawfully applicable to the territory of Jamaica by virtue of their ratification by Great Britain on September 23, 1957. However, my Government hereby wishes to confirm its accession to these four Conventions, namely.... In requesting you to be good enough to bring the foregoing to the notice of the countries which are parties to these Conventions....

173. In a communication addressed to the Swiss Federal Council on 31 May 1965, the Government of Sierra

<sup>304</sup> Ibid., p. 495.

<sup>305</sup> Ibid., pp. 495 and 497.

<sup>308</sup> The Byelorussian Soviet Socialist Republic and the Ukrainian Soviet Socialist Republic, Members of the United Nations, participated in the 1949 Geneva Diplomatic Conference. At the proposal of Switzerland, the Conference adopted the following draft resolution: "whereas the USSR has signed the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; whereas a desire has been expressed that the Byelorussian SSR and the Ukrainian SSR should be allowed to participate separately in the work of the Conference, [the Conference] requests the Swiss Federal Council to invite the Governments of Byelorussia by delegates". Consequently, article 1 of the rules of procedure of the Conference relating to its composition was amended in order to add to the delegates of States parties to the Geneva Conventions of 1864, 1906 and 1929 and to the Hague Conventions of 1899 and 1907 for the Adaptation to Marine Warfare of the Principles of the Geneva Conventions, "delegates representing any other countries to which, at the request of the Conference, the Swiss Federal Council has sent an invitation." (Actes de la Conférence diplomatique de Genève de 1949, tome I, p. 183 and tome II, pp. 14, 19, 20 and 24-28.) In October 1967, the States which had specifically become parties to the 1949 Conventions numbered 116 (International Review of the Red Cross, 1967, October, p. 539).

<sup>&</sup>lt;sup>307</sup> United Nations, *Treaty Series*, vol. 404, pp. 322-325. The letter from Nigeria, dated 9 June 1961, is signed by the Prime Minister and Minister for Foreign and Commonwealth Affairs.

<sup>&</sup>lt;sup>308</sup> United Nations, *Treaty Series*, vol. 470, pp. 374 and 376. The communication from Tanganyika, dated 12 December 1962, is signed by the Foreign Secretary.

<sup>&</sup>lt;sup>309</sup> United Nations, *Treaty Series*, vol. 511, p. 266. The letter from Jamaica, dated 17 July 1964, is signed by the Prime Minister and Minister for Foreign Affairs.

Leone <sup>310</sup> declared itself bound by the four 1949 Geneva Conventions in the following terms:

The Government of Sierra Leone by virtue of the United Kingdom's ratification on September 23, 1957, of the following Geneva Conventions of 1949 for the Protection of War Victims, hereby declares their applicability to Sierra Leone and tenders this as the instrument of ratification....

In his communication to the United Nations Secretariat of 26 August 1965, the Observer of Switzerland to the United Nations stated that "these Conventions entered into force for Sierra Leone on 27 April 1961, in other words on the date on which that country attained independence". Although the communication from Sierra Leone was entitled "instrument of ratification", it was considered as a declaration of continuity—which, indeed, was consistent with its wording.

174. The International Review of the Red Cross for December 1966 311 announces that on 20 October 1966 the Swiss federal authorities received a declaration of continuity from Gambia.

b. Former non-metropolitan territories for whose international relations France was responsible

175. Cameroon, the Central African Republic, the Congo (Brazzaville), Dahomey, Gabon, the Ivory Coast, Madagascar, Mauritania, the Niger, Senegal, Togo and the Upper Volta became parties, separately, to the 1949 Geneva Conventions by succession. The declarations of continuity communicated by these States to the Swiss federal authorities confirm that the Conventions are applicable to their territories by virtue of their ratification by France.<sup>312</sup>

176. Some of these declarations of continuity were not worded very precisely. For example, the declaration of *Dahomey*, received by the Swiss federal authorities on 14 December 1961, was worded as follows: \*

... the Republic of Dahomey, succeeding in so far as it is concerned to the rights and obligations previously assumed by France, considers itself bound by the French signature affixed to the Geneva Conventions of 12 August 1949 for the protection of war victims...; 318

The declaration of the *Ivory Coast*, communicated by the Embassy of the Ivory Coast in Berne to the Federal Political Department on 28 December 1961 stated: \*

... The Embassy of the Ivory Coast presents its compliments to the Federal Political Department and, applying the procedure of declaration of continuity and accession, has the honour to submit to it a request by the Republic of the Ivory Coast for accession to the Geneva Conventions for the protection of war victims...; 314

The declaration of the *Niger*, addressed to the Swiss federal authorities on 16 April 1964, stated: \*

... the Republic of the Niger considers itself bound by the signature affixed by France to the four Conventions mentioned above. As France ratified these Conventions on 28 June 1951, they have been applicable to the territory of the Niger as from that date.<sup>315</sup>

177. On the other hand, the declarations of continuity of the *Upper Volta*, 316 *Togo*, 317 *Mauritania*, 318 *Senegal*, 319 *Madagascar* 320 and *Cameroon*, 321 received by the Swiss authorities on 7 November 1961, 26 January 1962, 27 October 1962, 23 April 1963, 13 July 1963 and 16 September 1963, respectively, and those of *Gabon*, 322 the *Central African Republic*, 323 the *Congo (Brazzaville)* 324 addressed to the Swiss authorities on 20 February 1965, 23 July 1966 and 30 January 1967, respectively, contain a much more precise wording. This wording is as follows:

... I have the honour, on behalf of my Government, to draw your attention to the following:

<sup>\*</sup> Translation from the French by the United Nations Secretariat.

<sup>&</sup>lt;sup>310</sup> United Nations, *Treaty Series*, vol. 544, p. 286. The declaration of Sierra Leone is signed on behalf of the Government of that country.

<sup>311</sup> Page 651.

<sup>&</sup>lt;sup>312</sup> France deposited its instrument of ratification on 28 June 1951. The Convention entered into force for France on 28 December 1951.

<sup>&</sup>lt;sup>313</sup> United Nations, *Treaty Series*, vol. 423, pp. 300-303. The declaration of Dahomey, signed by the Minister for Foreign Affairs, is dated 14 December 1961. The text of the declaration of Dahomey is not reproduced.

<sup>\*</sup> Translation from the French by the United Nations Secretariat.

<sup>&</sup>lt;sup>314</sup> United Nations, *Treaty Series*, vol. 423, pp. 300-303. The letter is dated 28 December 1961. The text of the communication from the Ivory Coast is not reproduced.

<sup>&</sup>lt;sup>315</sup> United Nations, *Treaty Series*, vol. 502, pp. 364 and 366-368. The letter of the Niger, signed by the President of the Republic, is dated 21 March 1964.

and 298. The letter from the Upper Volta, signed by the Minister for Foreign Affairs, is not dated. The text of the communication from the Upper Volta is not reproduced.

<sup>&</sup>lt;sup>217</sup> United Nations, *Treaty Series*, vol. 423, pp. 300-303. The letter from Togo, signed by the President of the Republic, is dated 6 January 1962. The text of the declaration of Togo is not reproduced.

<sup>&</sup>lt;sup>318</sup> United Nations, *Treaty Series*, vol. 445, pp. 313-317. The letter from Mauritania, signed by the President of the Republic, is dated 27 October 1962. The text of the declaration is not reproduced.

<sup>&</sup>lt;sup>319</sup> United Nations, *Treaty Series*, vol. 470, pp. 374, 376, 378 and 380. The letter from Senegal, signed by the President of the Republic, is dated 23 April 1963. The text of the declaration of Senegal is not reproduced.

<sup>&</sup>lt;sup>320</sup> United Nations, *Treaty Series*, vol. 478, pp. 414, 416, 418 and 420. The letter from Madagascar, signed by the Minister for Foreign Affairs, is dated 13 July 1963.

<sup>&</sup>lt;sup>321</sup> United Nations, *Treaty Series*, vol. 480, pp. 320, 322, 324 and 326. The letter from Cameroon, signed by the Deputy Minister for Foreign Affairs, is dated 16 September 1963.

<sup>&</sup>lt;sup>322</sup> United Nations, *Treaty Series*, vol. 535, p. 408. The letter from Gabon is signed by the Vice-President of the Government.

<sup>&</sup>lt;sup>323</sup> United Nations, *Treaty Series*, vol. 573, p. 304. The letter from the Central African Republic is signed by the Minister for Foreign Affairs.

<sup>&</sup>lt;sup>324</sup> United Nations, *Treaty Series*, vol. 600 (not yet published). The letter from the Congo (Brazzaville) is signed by the Minister for Foreign Affairs.

The four 1949 Geneva Conventions for the protection of war victims are lawfully applicable within the territory of the Republic of [name of the country in question], by virtue of their ratification by France on 28 June 1951.

The Government of the Republic of ... wishes, however, to confirm by this communication its participation in these four Conventions:

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949;

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949;

Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949;

Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949.

In requesting you to be good enough to bring the foregoing to the notice of the States parties to these Conventions. . . .\*

178. All the declarations of continuity of these States—former French territories—came into force on the date of their independence. These dates, which are usually specifically indicated in the notifications that the Permanent Observer of Switzerland to the United Nations sends to the United Nations Secretariat, are as follows:

Cameroon, 1 January 1960
Central African Republic, 13 August 1960
Congo (Brazzaville), 15 August 1960
Dahomey, 1 August 1960
Gabon, 17 August 1960
Ivory Coast, 7 August 1960
Madagascar, 26 June 1960
Mauritania, 28 November 1960
Niger, 3 August 1960
Senegal, 20 August 1960
Togo, 27 April 1960
Upper Volta, 5 August 1960.

c. Former non-metropolitan territories for whose international relations Belgium was responsible

179. The Democratic Republic of the Congo and Rwanda became parties to the 1949 Geneva Conventions by succession, by virtue of their previous ratification by Belgium.<sup>325</sup> Belgium's ratification specified that the application of the Conventions had been extended to the Belgian Congo and Ruanda-Urundi. The Democratic Republic of the Congo confirmed its participation in the 1949 Conventions by a letter received by the Swiss Federal Political Department on 24 February 1961.<sup>326</sup> In the notification sent to the United Nations

Secretariat, the Permanent Observer of Switzerland to the United Nations specified that "according to the communication received from Leopoldville, the participation of the Republic of the Congo in the Geneva Conventions took effect on the date on which that country became independent, namely 30 June 1960". The letter from the Democratic Republic of the Congo was worded as follows:

. . . At the request of the representatives of the International Committee of the Red Cross at Leopoldville, I have the honour to confirm that the Republic of the Congo is effectively bound by the so-called Geneva Conventions of 1949.

Belgium acceded to these Conventions on behalf of the Congo. By the very fact that it has attained independence, our country is therefore bound, without any further action on our part being necessary.

I should be grateful if you would kindly take note of this assurance. . . .  $^{*}$ 

180. Rwanda sent its declaration of continuity to the Swiss federal authorities on 21 March 1964,<sup>327</sup> the conventions having entered into force for Rwanda on the date when that country became independent, 1 July 1962. Rwanda's declaration was similar in wording to the declarations reproduced in paragraph 177 above.

#### (ii) Cases of accession

a. Former condominium and other former nonmetropolitan territories for whose international relations the United Kingdom was responsible

181. The Geneva Conventions of 12 August 1949 entered into force on 21 October 1950 but the United Kingdom did not deposit its instrument of ratification until 23 September 1957, and the Conventions entered into force for that country six months later, i.e., on 23 March 1958.328 Thus, some former United Kingdom territories which became independent States before the Conventions entered into force for the United Kingdom could only become parties to the 1949 Conventions by accession. That is, for example, the case of the Sudan and Ghana. On 23 September 1957 the Swiss Embassy at Cairo received from the Government of the Sudan a declaration of accession which took effect on the same date as the United Kingdom ratification, 23 March 1958.329 Ghana's instrument of accession to the four 1949 Conventions was received by the Swiss Consulate-General at Accra on 2 August 1958, and the Conven-

<sup>\*</sup> Translation from the French by the United Nations Secretariat.

<sup>&</sup>lt;sup>325</sup> United Nations, *Treaty Series*, vol. 139, pp. 461 and 462. Belgium deposited its instrument of ratification on 3 September 1952. The Belgian ratification became effective on 3 March 1953.

<sup>&</sup>lt;sup>326</sup> United Nations, *Treaty Series*, vol. 392, pp. 339-342. The letter from the Democratic Republic of the Congo, dated 20 February 1961, was signed by the Minister for Foreign Affairs.

<sup>\*</sup> Translation from the French by the United Nations Secretariat.

<sup>&</sup>lt;sup>327</sup> United Nations, *Treaty Series*, vol. 502, pp. 364 and 366-368. The letter from Rwanda, signed by the Minister for Foreign Affairs, is dated 21 March 1964.

<sup>&</sup>lt;sup>328</sup> United Nations, *Treaty Series*, vol. 278, pp. 259-262, and 266-268. The United Kingdom ratification is accompanied by reservations and declarations.

<sup>&</sup>lt;sup>329</sup> United Nations, *Treaty Series*, vol. 278, pp. 259-262. Sudan's declaration of accession is dated 7 September 1957. Before it became independent, the Sudan was legally an Anglo-Egyptian condominium.

tions entered into force for Ghana six months later, on 2 February 1959.330

182. Other States which were formerly United Kingdom territories and which attained independence after the United Kingdom ratified the 1949 Geneva Conventions-namely Cyprus, Kenya, Kuwait, the Federation of Malaya, Trinidad and Tobago, Uganda and Zambia-also used the accession procedure. The instrument of accession of Cyprus to the four 1949 Conventions was received by the Swiss authorities on 23 May 1962 and took effect on 23 November 1962.331 The Federation of Malaya submitted its declarations of accession on 24 August 1962, and they took effect on 24 February 1963.332 The declaration of accession of Trinidad and Tobago to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field was received by the Swiss federal authorities on 17 May 1963 and took effect on 17 November 1963; that State's declaration of accession to the three other Geneva Conventions of 1949 was received on 24 September 1963 and took effect on 24 March 1964.333 Uganda's instruments of accession to each of the four Conventions were received by the Swiss authorities on 18 May 1964, and the Conventions entered into force for Uganda on 18 November 1964.<sup>331</sup> In a letter received on 2 September 1967, Kuwait notified the Swiss Federal Council of its accession to the four 1949 Conventions, and its accession took effect on 2 March 1968.335 A notification of Kenya's accession 336 to the four Conventions was received at Berne on 20 September 1966, and an instrument of accession to those Conventions from Zambia 337 was deposited with the Swiss authorities on 19 October 1966.

b. Former Department, former protectorates and other former non-metropolitan territories for whose international relations France was responsible

183. Various former territories and protectorates for whose international relations France was responsible, having attained independence after France ratified the 1949 Conventions, used the accession procedure to become separate parties to those Conventions. Cambodia, Laos, Mali, Morocco and Tunisia became parties to the 1949 Conventions by sending notifications of accession to the Swiss federal authorities: that of Morocco, dated 26 July 1956, took effect on 26 January 1957; 338 that of Laos, dated 29 October 1956, took effect on 29 April 1957; 339 that of Tunisia, dated 4 May 1957, took effect on 4 November 1957; 340 that of Cambodia, dated 8 December 1958, became effective on 8 June 1959; 341 and that of Mali, dated 24 May 1965, became effective on 24 November 1965. 342

184. Algeria, too, used the accession method in order to become a party to the 1949 Conventions. procedure followed was quite exceptional. Although Algeria did not attain independence until 3 July 1962, it notified its accession to the 1949 Conventions on 20 June 1960. The Swiss Federal Council notified the accession of the "Provisional Government of the Algerian Republic", which had been transmitted to it through the Prime Minister and Minister for Foreign Affairs of the United Kingdom of Libya. The Swiss Federal Council communicated the accession, taking particular account of the fact that it related to humanitarian conventions which were to be applied immediately in the armed conflict then going on in Algeria. When communicating the accession, the Swiss Federal Council formulated certain reservations concerning its own position with regard to the "Provisional Government of the Algerian Republic".313 This notification of accession has not been registered with the United Nations Secretariat. Algeria is still deemed to have become a party to the 1949 Conventions on 20 June 1960.

### (e) Conventions of 1864, 1906, 1929 and 1949: SPECIAL CASES OF PARTICIPATION

185. The Republic of Viet-Nam,<sup>344</sup> the Democratic Republic of Viet-Nam,<sup>345</sup> the Federal Republic of Ger-

<sup>&</sup>lt;sup>330</sup> United Nations, *Treaty Series*, vol. 310, pp. 336-339. Ghana's instrument of accession is dated 28 July 1958.

<sup>&</sup>lt;sup>331</sup> United Nations, *Treaty Series*, vol. 445, pp. 313 and 315-317. The instrument of accession of Cyprus is dated 13 May 1962.

<sup>&</sup>lt;sup>332</sup> United Nations, *Treaty Series*, vol. 445, pp. 313 and 315-317. The declarations of accession of the Federation of Malaya are dated 14 August 1962.

<sup>&</sup>lt;sup>333</sup> United Nations, *Treaty Series*, vol. 480, pp. 320, 322, 324 and 326. The declaration of accession of Trinidad and Tobago to the first Convention is dated 8 May 1963 and that relating to the three other Conventions is dated 16 September 1963.

<sup>&</sup>lt;sup>334</sup> United Nations, *Treaty Series*, vol. 503, pp. 328-331. Uganda's instruments of accession are dated 17 April 1964.

<sup>&</sup>lt;sup>335</sup> United Nations, *Treaty Series*, vol. 608 (not yet published) and *International Review of the Red Cross*, 1967, October, p. 539.

<sup>&</sup>lt;sup>336</sup> International Review of the Red Cross, 1966, December, p. 651.

<sup>837</sup> Ibid.

<sup>&</sup>lt;sup>338</sup> United Nations, *Treaty Series*, vol. 248, pp. 362-365. Morocco's notification of accession, dated 18 July 1956, refers to the "joint Franco-Moroccan declaration of 2 March 1956, and the joint Hispano-Moroccan declaration of 7 April 1956, establishing the unity and independence of Morocco".

<sup>&</sup>lt;sup>339</sup> United Nations, *Treaty Series*, vol. 253, pp. 337-340. The notification of Laos is dated 23 October 1956.

<sup>&</sup>lt;sup>310</sup> United Nations, *Treaty Series*, vol. 269, pp. 283-286. Tunisia's instrument of accession is dated 26 April 1957.

United Nations, Treaty Series, vol. 320, pp. 334-337.

<sup>&</sup>lt;sup>342</sup> *Ibid.*, vol. 540, p. 332.

<sup>&</sup>lt;sup>343</sup> Information provided by the International Committee of the Red Cross. *India* and *Burma* also constitute cases of participation in the Geneva Conventions (see above, paras. 154-158 and 160) before the attainment of full independence. However, India was at the time a Member of the League of Nations, and the participation of India and Burma in the Geneva Conventions as Contracting States took place at the request of the United Kingdom.

<sup>&</sup>lt;sup>314</sup> United Nations, *Treaty Series*, vol. 181, pp. 349-352. Received by the Swiss federal authorities on 14 November 1953 and took effect on 14 May 1954.

<sup>&</sup>lt;sup>345</sup> United Nations, *Treaty Series*, vol. 274, pp. 335-342. Received by the Swiss authorities on 28 June 1957 and took effect on 28 December 1957.

many,<sup>346</sup> the German Democratic Republic,<sup>347</sup> the Republic of Korea,<sup>388</sup> and the Democratic People's Republic of Korea <sup>349</sup> have acceded to the four Geneva Conventions of 12 August 1949.<sup>350</sup> Before acceding to the 1949 Conventions in 1966, the Republic of Korea was bound by the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864 <sup>351</sup> by virtue of Korea's accession to that Convention on 8 January 1903.<sup>352</sup>

186. Before the Second World War, Germany became a party to the 1864 Convention on 12 June 1906, to the 1906 Convention on 27 May 1907 and to the 1929 Convention on 21 February 1934. 558

187. China is a party to the 1864 Convention (29 June 1904) and to the 1929 Convention (19 November 1935).354 After the Second World War, a delegation from the Republic of China participated in the 1949 Geneva Diplomatic Conference and signed the Final Act and the four Conventions drawn up by the conference. Subsequently, on 28 December 1956, the People's Republic of China deposited instruments of ratification of the four 1949 Conventions with the Swiss Federal Political Department. 555 The ratification of the 1949 Conventions by the People's Republic of China took effect on 28 June 1957. The People's Republic of China had previously communicated to the Swiss Federal Council a declaration by its Minister for Foreign Affairs, dated 13 July 1952, confirming the signature by the delegates of the Republic of China and announcing its intention of subsequently ratifying the 1949 Geneva Conventions. The declaration quoted the text of article 55 of the programme adopted by the Consultative Political Conference of the *People's Republic of China*, which reads as follows:

The central people's Government of the People's Republic of China shall examine the treaties and agreements concluded between [China before the establishment of the People's Republic of China] and Foreign Governments, and shall in accordance with their contents, recognize, abrogate, revise or reconclude them respectively.

As requested in the declaration itself, the Swiss Federal Council then transmitted it to the States parties to the Geneva Convention. (Information provided by the International Committee of the Red Cross.)

### 2. PARTICIPATION IN INTERNATIONAL CONFERENCES OF THE RED CROSS

188. Delegates of Governments and of National Societies take part in the International Conferences of the Red Cross. The preparation of the list of Governments and National Societies having the right to participate in the Conferences is the responsibility of the Standing Commission, which in performing this function must take into consideration the participation of States in the Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1864, 1906, 1929 or 1949) an the international recognition of National Societies by the International Committee.

189. At the International Conferences held at Toronto (1952) and New Delhi (1957), protests were raised by the Government and Red Cross of the People's Republic of China and by the Government and Red Cross of the Republic of China. These protests concerned: (a) the right of the Governments and Red Crosses of the People's Republic of China and the Republic of China to take part in the International Conferences; and (b) the title and quality by virtue of which the Government and Red Cross of the Republic of China had been invited. During the discussion of the protests, delegates of the participating Governments expressed their views on participation in International Conferences of the Red Cross by Governments and National Societies of States parties to the Geneva Conventions, and the Chairman of the Standing Commission explained the principles followed by the Commission in drawing up the list of Governments and National Societies.

190. At the *Toronto* Conference (1952), the question was discussed at the first and second plenary meetings and the Chairman of the Standing Commission made the following statement:

. . . I now propose to outline to you the principles that the Standing Commission has followed. These principles are: any government exercising authority over territories where the Conventions are applicable is automatically a member of the Conference. In virtue of this, the Government of Formosa is a member of the Conference, for the territory over which its authority is exercised. Similarly, the Government of the People's Republic of China is also a member of the Conference. The Peking National Red Cross Society, continuing, as it does, to carry out Red Cross activities in the territory of continental China, has been recognized by the International Committee and by the League as the de facto successor of the Chinese Red Cross. It

<sup>&</sup>lt;sup>316</sup> United Nations, *Treaty Series*, vol. 199, pp. 329-332. Received by the Swiss authorities on 3 September 1954 and took effect on 3 March 1955.

<sup>&</sup>lt;sup>347</sup> United Nations, *Treaty Series*, vol. 257, pp. 364-371. Received by the Swiss authorities on 30 November 1956 and took effect on 30 May 1957.

<sup>&</sup>lt;sup>318</sup> United Nations, *Treaty Series*, vol. 575, pp. 284-287. Received by the Swiss authorities on 16 August 1966 and took effect immediately.

<sup>&</sup>lt;sup>349</sup> United Nations, *Treaty Series*, vol. 278, pp. 259-265. Received by the Swiss authorities on 27 August 1957 and took effect on 27 February 1958.

<sup>350</sup> When depositing its instrument of ratification of the 1949 Conventions, Australia made the following declaration: "... I am further instructed by the Government of the Commonwealth of Australia to refer to notifications concerning the 'German Democratic Republic', the 'Democratic People's Republic of Korea', the 'Democratic Republic of Viet-Nam' and the 'People's Republic of China'. While the Government of the Commonwealth of Australia does not recognize any of the foregoing it has taken note of their acceptance of the provisions of the Conventions and their intention to apply them..." (United Nations, *Treaty Series*, vol. 314, pp. 334-336.)

<sup>351</sup> The Republic of Korea was invited to and took part in the International Conferences of the Red Cross held at Toronto (1952), New Delhi (1957) and Vienna (1965). There were no objections to its participation (see Proceedings of the XVIIIth (Toronto), XIXth (New Delhi) and XXth (Vienna) International Conferences of the Red Cross, pp. 14, 12 and 16 respectively).

<sup>352</sup> Handbook of the International Red Cross, op. cit., p. 9.

<sup>353</sup> Ibid., pp. 9, 26, 69 and 96.

<sup>354</sup> Ibid., pp. 9, 69 and 96.

<sup>&</sup>lt;sup>355</sup> United Nations, Treaty Series, vol. 260, pp. 438-445.

was accordingly invited as a member with full voting rights. The activities of the Formosa Red Cross are limited to Formosa; this Society cannot, therefore, claim to be the Chinese Red Cross. It has not lodged a request for recognition as the Formosan Red Cross. We suggested such a course to it; we said: if you agree to being considered as the Formosan Red Cross, you will be invited here with full voting rights. But the Formosan Red Cross would not agree to this. We therefore invited it in an advisory capacity, which means that it is entitled to attend all our sessions as well as all commission meetings, that it may take the floor to express its opinions and to endeavour to have these shared by the audiences before which it speaks. For the reasons I have just stated, however, it is debarred from voting. It is not incidentally the only Society participating in an advisory capacity; several other Societies are in the same position, they fall under the category of observers who, after all, have most prerogatives except that of voting, which is not, perhaps the most important. The Formosan Red Cross was therefore invited together with several other Societies who have not made a request for recognition or who do not fulfil the conditions for recognition. Among these, I particularly draw your attention to condition No. 7 which requires that, to be recognized, a Society shall extend its activities to the entire territory of its country. . . . 358

191. Thus, according to the principles enumerated by the Chairman of the Standing Commission, a given Government must exercise effective authority over the territory of a State party to the Geneva Conventions in order to have the right to take part in the International Conference. Similarly, when a National Society duly recognized by the International Committee exercises effective activity in the territory controlled by its Government, it has the right to participate with full rights in the International Conference as the National Society of the State concerned. At the proposal of its Bureau, the Conference adopted a resolution confirming "the action taken by the Standing Commission in extending invitations to both Governments and Societies and indicating the respective capacities in which they should attend" the Conference.<sup>357</sup> After the vote, the delegation of the Republic of China withdrew from the International Conference.358

192. During the preparations for the XIXth International Conference, the letter of invitation intended for the Government of the Republic of China was addressed to the Government of the Republic of Formosa. That Government first accepted the invitation but subsequently decided to go back upon its acceptance and refused to take part in the Conference. The XIXth International Conference, which met at New Delhi in 1957, again discussed various aspects of the question

at its first, second, third, fourth and seventh plenary meetings.

193. Several draft resolutions were submitted to the Conference, which adopted those submitted by the delegations of Switzerland and the United States. The Swiss draft resolution, which became resolution XXXV of the Conference, is entitled "Procedure for Invitations to International Conferences of the Red Cross" and reads as follows:

The XIXth International Conference of the Red Cross.

having taken note of the invitations issued, according to the Statutcs of the International Red Cross, by the Standing Commission, to Governments parties to the Geneva Conventions, to the Red Cross Societies and International Organizations of the Red Cross, as well as to other Organizations;

having noted also the observations made, at its first Meeting, on the subject of these invitations;

expresses its thanks to the Standing Commission for the work which it has accomplished;

reaffirms the general principle that the National Society which offers its hospitality to an International Conference acts in accordance with the Statutes in transmitting the invitations merely as an intermediary and that, therefore, all members must refrain from addressing themselves in this matter to the inviting National Society as such;

desires that, also in future, the invitations to all International Conferences of the Red Cross be issued in a spirit of broad universality and include in the interest of Humanitarian Law, all Governments exercising authority over territories where the Geneva Conventions are applicable, this regardless of whether these Governments enjoy recognition by other signatories;

underlines that, in the field of the Red Cross, the criteria of recognition customary in the intercourse between States do not apply, and that consequently the decisions regarding the invitations to Red Cross Conferences do not and cannot set a precedent in other fields.<sup>360</sup>

194. The United States draft resolution, which became resolution XXXVI of the Conference, is entitled "Invitations to International Conferences of the Red Cross" and is worded as follows:

The XIXth International Conference of the Red Cross,

having in mind the report of the Chairman of the Standing Commission,

confirming the statement of the Chairman of the Standing Commission that the Red Cross is not concerned with juridical and political questions regarding the status of governments,

resolves in accordance with the traditional principles of the Red Cross that it is the sense of the Conference that all parties invited to attend the Conference be addressed according to their own official titles.<sup>361</sup>

195. Following the adoption of the United States draft resolution, the delegations of Governments and National Societies of the People's Republic of China, India, the USSR, Czechoslovakia, Romania, Bulgaria, Hungary, Albania, the German Democratic Republic, the Democratic Republic of Viet-Nam, Poland, Yugoslavia, Indonesia, Syria and Egypt withdrew from the Conference, while the delegates of the Republic of China were seated. 362

<sup>&</sup>lt;sup>3.6</sup> Statement by Mr. A. François-Poncet, Chairman of the Standing Commission, XVIIIth International Conference of the Red Cross, Toronto, 1952, Proceedings, second plenary meeting, pp. 57 and 58. For the discussion of the question, see pp. 48-70 of the Proceedings, first plenary meeting.

<sup>&</sup>lt;sup>357</sup> XVIIIth International Conference of the Red Cross, Proceedings, op. cit., p. 68. The resolution was adopted by 58 votes to 25, with 5 abstentions.

<sup>358</sup> Ibid., third plenary meeting, p. 69.

<sup>359</sup> See statement by Mr. A. François-Poncet, Chairman of the Standing Commission, XIXth International Conference of the Red Cross, New Delhi, 1957, Proceedings, pp. 48 and 49.

<sup>&</sup>lt;sup>360</sup> *Ibid.*, p. 161.

<sup>361</sup> Ibid.

<sup>&</sup>lt;sup>362</sup> The United States draft resolution was adopted at the last plenary meeting of the Conference.

196. The delegates of the Governments and National Societies of the Federal Republic of Germany, the German Democratic Republic, the Republic of Korea, the Democratic People's Republic of Korea, the Republic of Viet-Nam and the Democratic Republic of Viet-Nam took part in the Toronto and New Delhi Conferences: the Government and Red Cross of the Federal Republic of Germany participated in both Conferences; the Government and Red Cross of the German Democratic Republic took part in the New Delhi Conference; the Governments of the Republic of Korea and the Democratic People's Republic of Korea took part in both Conferences and their National Societies participated in the Toronto Conference as observers and in the New Delhi Conference with full powers; the Governments and Red Crosses of the Republic of Viet-Nam and the Democratic Republic of Viet-Nam took part in the New Delhi Conference.

197. During the XXth International Conference of the Red Cross (Vienna, 1965), the President of the Conference received a number of communications concerning the participation of the German Democratic Republic, the Republic of China, and the Republic of Viet-Nam and the Red Cross of the Republic of Viet-Nam.<sup>363</sup> Delegates of the Government of the Republic of China took part in the Conference, and because of this the Government and Red Cross of the People's Republic of China were absent. The Government and Red Cross of the Democratic Republic of Viet-Nam did not participate in the Conference either. These absences prompted statements by the delegates of the Governments of Albania, Bulgaria, Cuba, Czechoslovakia, France, the German Democratic Republic, Hungary, the Democratic People's Republic of Korea, Mongolia and the Union of Soviet Socialist Republics. The delegate of the Republic of China also made a statement.<sup>364</sup> Delegates of the Governments and Red Crosses of the Federal Republic of Germany, the German Democratic Republic, the Republic of Korea, the Democratic People's Republic of Korea and the Republic of Viet-Nam took part in the Conference.

198. Most of the Governments and National Societies of the new States which became Parties by succession to the Geneva Conventions for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field were unable to participate in the Toronto and New Delhi Conferences, which took place before those States attained their independence. However, *Indonesia* and *Burma* were parties by succession to the 1929 Convention, and the former took part in the Toronto Conference while the latter participated in the New Delhi Conference. The Vienna Conference (1965) was attended by delegates of the Governments and National Red Cross Societies of eight new States

## 3. RECOGNITION OF NATIONAL SOCIETIES BY THE INTERNATIONAL COMMITTEE OF THE RED CROSS

199. The International Committee of the Red Cross informs National Red Cross Societies of the recognition of a new Society by means of circulars which are reproduced in the International Review of the Red Cross, published each month in Geneva by the International Committee. The circulars specify the method by which the State in whose territory the Society concerned has been established became a party to the Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1864, 1906, 1929 and 1949), i.e., signature followed by ratification, accession or succession. In recent years, the International Committee has tried to develop the method of succession in the case of new States which were formerly dependent territories of a State party to the Geneva Conventions concerned. In 1962, the International Committee made the following comments on the participation of the new African States in the 1949 Geneva Conventions:

Since the Geneva Conventions were signed on August 12, 1949, the International Committee of the Red Cross has endeavoured to make these texts universal since they constitute the basis of humanitarian law. Recently, it has put the emphasis on their dissemination in Africa because, in the critical phase which this continent is going through, it seems particularly desirable that all African States feel themselves bound by these treaties.

However, a problem arises when the country concerned has previously been under Colonial administration: Is the State which has recently acceded to independence bound by the international acts of the Power which was previously exercising sovereignty over its territory?

Certain treaties of a political nature, such as alliances, obviously lose their validity in the newly independent State, but other conventions of public or general interest can remain valid. In the ICRC's view, this is the case with the Geneva Conventions to which the governments have acceded in the interest of all people placed under their sovereignty. If these people accede to independence, they will be at a disadvantage if the Geneva Conventions are no longer applicable to them. The latter must therefore retain their validity.

which became parties to the 1949 Geneva Conventions by succession (Cameroon, Central African Republic, Congo (Democratic Republic of), Dahomey, Ivory Coast, Senegal, Togo, Upper Volta) and by delegates of the National Societies of five States which succeeded to those Conventions (Madagascar, Niger, Nigeria, Sierra Leone, Tanzania). No objections were made to their participation.<sup>865</sup>

<sup>&</sup>lt;sup>363</sup> See the list of these communications in XXth International Conference of the Red Cross, Report, Vienna, 1965, pp. 115 and 116.

<sup>364</sup> For all the statements see ibid., pp. 37-46.

<sup>&</sup>lt;sup>365</sup> Delegates of the Governments of *Malawi* and *Chad* also took part in the Vienna Conference (1965). At that time those States had formally become parties to the Geneva Conventions. *Malawi* subsequently acceded to the 1949 Conventions on 5 January 1968.

Participation of newly independent States in the Geneva Conventions can therefore be admitted as implied by virtue of the signature of the former Colonial Power. It is considered advisable, however, that they officially confirm their participation in the Conventions by notifying the administering State, that is to say the Federal Council at Berne. This is a question neither of accession nor of ratification, but of confirmation of participation or of declaration of continuity. . . . 386

200. This has sometimes led the International Committee to make a distinction for the purposes of the recognition of a new Society, between "participation" and "formal" or "express participation" in the Geneva While recommending that new States Conventions. which are former dependent territories of a State party to the Geneva Conventions should officially confirm their participation in those Conventions by notifying the Swiss Federal Council, the International Committee has in some cases recognized a new Society without waiting for the State in whose territory the Society concerned was established to confirm formally its participation in the Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.367 For the purposes of the recognition of new Societies, the International Committee has therefore considered some new States as having succeeded to their former metropolitan countries which were parties to the Geneva Conventions, even before those new States had notified the Swiss Federal Council of their desire to become parties to them.368

201. The International Committee's adoption of a flexible criterion for determining which States are parties to the Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field for the purpose of the international recognition of National Red Cross Societies is justified not only by the very nature of the Geneva humanitarian Conventions, but also by the specific mandates which the Committee has received from International Conferences of the Red Cross requesting it to intervene when necessary to ensure that the Geneva Conventions are complied with and at the same time to do all it can to secure the successive accession of all Powers to those Conventions.<sup>369</sup>

(a) RECOGNITION AFTER THE STATE OF THE APPLICANT SOCIETY HAS FORMALLY BECOME A PARTY TO THE GENEVA CONVENTIONS

202. This is the usual procedure. For example, in recent years the International Committee recognized the following National Societies after their respective States had notified the Swiss Federal Council of their participation in the Geneva Convention of 12 August 1949 for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field:

1959—Society of Ghana 370

1960—Society of Cambodia 371

1962—Society of Upper Volta 372

1963—Societies of the Federation of Malaya, the Democratic Republic of the Congo, Algeria, Ivory coast, Senegal, Trinidad and Tobago, Tanganyika, Dahomey and Madagascar 278

1964—Society of Jamaica 374

1965—Societies of Uganda and Niger 375

1966—Societies of Kenya and Zambia 376

203. In the case of the National Societies mentioned above which were established in the territory of a State which became a Party to the 1949 Geneva Convention by accession (Algeria, Cambodia, Federation of Malaya, Ghana, Kenya, Uganda and Zambia), the International Committee circulars concerning their recognition reported their accession in the following terms:

... [name of country concerned] acceded on [date when the Swiss Federal authorities received the notification of accession] to the Geneva Conventions of 1949....

When the States of the National Societies mentioned above became Parties to the 1949 Geneva Convention by succession (Dahomey, Ivory Coast, Jamaica, Madagascar, Niger, Senegal and Tanganyika), the International Committee circulars announced the event in the following terms:

... The Government of [name of country concerned] confirmed on [date when the Swiss Federal authorities received the declaration of continuity] that the Republic [or the State] was party to the Geneva Conventions of 1949, by virtue of their ratification by [name of the former metropolitan State] in [year in which the former metropolitan State deposited the instrument of ratification]...

<sup>386</sup> International Review of the Red Cross, 1962, April, pp. 207 and 208.

<sup>367</sup> Ibid., 1961, May, p. 244.

achieving independence remains bound by agreements of public or general interest signed by the Power formerly exercising sovereignty there. Then the Geneva Conventions remain in force, unless the new State expressly revokes these agreements signed by the State to which it has succeeded. ... However, the ICRC hopes that the governments of these States, following the example of many others which found themselves in the same position, confirm, either by a declaration of continuity or by accession, their participation in the Conventions, in order to avoid all misunderstanding." (International Review of the Red Cross, 1966, July, p. 386.)

<sup>&</sup>lt;sup>369</sup> See, for example, resolution No. IV of the IInd International Conference (Berlin, 1869) (Compte-rendu des Travaux de la Conférence Internationale (Berlin, 1869), p. 254) and resolution No. XVI of the Xth Conference (Geneva, 1921) (Dixième Conférence Internationale de la Croix Rouge (Genève, 1921), Compte-rendu, pp. 221 and 222).

<sup>&</sup>lt;sup>379</sup> International Committee circular No. 424 (Revue Internationale de la Croix Rouge, 1959, March, pp. 132 and 133).

<sup>&</sup>lt;sup>371</sup> International Committee circular No. 431 (Revue Internationale de la Croix Rouge, 1960, November, pp. 603 and 604).

<sup>&</sup>lt;sup>372</sup> International Committee circular No. 438 (International Review of the Red Cross, 1962, December, pp. 649 and 650).

<sup>&</sup>lt;sup>373</sup> International Committee circulars Nos. 443, 445, 446, 447, 448, 449, 450, 453 and 454 (*International Review of the Red Cross*, 1963, August, September and October, pp. 429 and 430, 433-436, 457-464, 536-539).

<sup>&</sup>lt;sup>371</sup> International Committee circular No. 459 (International Review of the Red Cross, 1964, November, pp. 578 and 579).

<sup>&</sup>lt;sup>375</sup> International Committee circulars Nos. 461 and 462 (*International Review of the Red Cross*, 1965, October, pp. 519 and 520, and 1966, January, pp. 17 and 18).

<sup>&</sup>lt;sup>376</sup> International Committee circulars Nos. 464 and 465 (International Review of the Red Cross, 1966, December, pp. 645 and 646, and 1967, January, pp. 17 and 18).

Or

... [name of country concerned] confirmed on [date when the Swiss Federal authorities received the declaration of continuity] that it is bound by the Geneva Conventions of 1949. . . .

204. It should be noted, however, that the International Committee circulars are sometimes inaccurate with regard to the method by which the State of the applicant Society became a party to the 1949 Geneva Convention. Among the Societies mentioned above, this is the case for the Democratic Republic of the Congo, Trinidad and Tobago and Upper Volta. According to the International Committee circulars, the Democratic Republic of the Congo and Upper Volta acceded to the 1949 Conventions, whereas in fact they became parties to them by succession.377 On other hand, Trinidad and Tobago, which acceded to the 1949 Geneva Convention, is described by the International Committee circular as a State "bound by the Geneva Conventions of 1949, by virtue of their ratification by Great Britain in 1957".378

205. The interval between the date on which a State becomes a party to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 and the date on which the National Society of that State is recognized by the International Committee of the Red Cross varies greatly from case to case.

206. For example, the interval was less than four months for Jamaica, Kenya, Madagascar, Senegal, Trinidad and Tobago and Zambia, between seven months and one year for Ghana, the Federation of Malaya, Niger, Tanganyika, Uganda, and Upper Volta and between seventeen months and two years for Cambodia, Dahomey and the Ivory Coast, about twenty-nine months for the Democratic Republic of the Congo and about three years for Algeria.

(b) RECOGNITION BEFORE THE STATE OF THE APPLICANT SOCIETY HAS FORMALLY BECOME A PARTY TO THE GENEVA CONVENTIONS

207. Some National Societies established in the territory of new States which were formerly dependent territories of a State Party to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 have been recognized by the International Committee before their respective States formally became parties to the Convention. This is true of the National Societies of Nigeria, Togo, Sierra Leone, Cameroon and Burundi. 208. The National Society of Nigeria was recognized by the International Committee in circular No. 434 of 15 May 1961, 379 which stated that:

. . . Nigeria acceded to the Geneva Conventions of 1949 by virtue of their ratification by Great Britain in 1957. The appli-

cation of these Conventions was proclaimed by a Government ordinance also published on September 29, 1960. . . .\*

However, *Nigeria's* declaration of continuity relating to the Conventions concerned did not reach the Swiss Federal Council until 20 June 1961.<sup>380</sup>

209. The recognition of the National Red Cross Societies of Togo 381 and Cameroon 382 was announced in International Committee circulars Nos. 435 and 444 of 7 September 1961 and 4 July 1963. In these circulars, the International Committee indicates that Togo "is a party to" and that Cameroon "is bound by" the 1949 Geneva Conventions by virtue of their ratification by France in 1951. In fact, it was not until 26 January 1962 and 16 September 1963 respectively that Togo and Cameroon transmitted to the Swiss Federal Council their declarations of continuity confirming their participation in the 1949 Geneva Conventions by virtue of their previous ratification by France.383 The International Committee recognized the National Society of Sierra Leone by circular No. 439 of 1 November 1962.384 The circular stated that Sierra Leone "is a Party to" the 1949 Geneva Conventions by virtue of their ratification by Great Britain in 1957. However, Sierra Leone did not send its declaration of continuity to the Swiss Federal Council until 31 May 1965.385 The National Society of Burundi was recognized by International Committee circular No. 452, dated 22 August 1963.386 The circular states that Burundi "is bound by" the 1949 Geneva Conventions by virtue of their ratification by Belgium in 1952. So far, however, Burundi has not sent the Swiss Federal authorities a notification of accession or a declaration of continuity concerning those Conventions.

210. According to information received from the International Committee of the Red Cross, the latter has now decided not to grant recognition unless participation in the Geneva Conventions has been expressly confirmed by accession or by a declaration of continuity. Once recognition has been granted the Committee can no longer use the powerful lever of recognition to obtain formal participation in the Geneva Conventions.

- (c) Fusion of National Societies when two parties to the Geneva Conventions become one State and subsequent separation following dissolution of the unified State
- 211. For the Red Cross, the union of Egypt and Syria in one State resulted in a fusion of the Egyptian

<sup>377</sup> See above, paras. 177 and 179.

<sup>378</sup> See above, para. 182.

<sup>&</sup>lt;sup>379</sup> International Review of the Red Cross, 1961, June, pp. 133 and 134.

<sup>\*</sup> Translation from the French by the United Nations Secretariat.

<sup>380</sup> See above, para. 170.

<sup>381</sup> International Review of the Red Cross, 1961, October, pp. 380 and 381.

<sup>382</sup> Ibid., 1963, August, pp. 431 and 432.

<sup>383</sup> See above, para. 177.

<sup>384</sup> International Review of the Red Cross, 1962, December, pp. 651 and 652.

<sup>&</sup>lt;sup>385</sup> See above, para. 173.

<sup>388</sup> International Review of the Red Cross, 1963, October, pp. 534 and 535.

continuity.

Red Crescent, established in 1912, and the Syrian Red Crescent, established in 1942. The unified Society took the name of Red Crescent of the *United Arab Republic*, and had its headquarters in Cairo. The International Committee notified national Red Cross Societies of this situation in the following terms:

... Considering that this case does not concern the establishment of a new Society but rather the unification of two existing Societies, the International Committee decided that there was no need for it to grant recognition anew. It did, however, decide to transfer to the Red Crescent of the United Arab Republic the recognition previously granted to the Egyptian and Syrian Red Crescents. . . .\* \* 387

After the dissolution of the unified State, the International Committee of the Red Cross, in circular No. 436 of 31 July 1962, announced that the Syrian Red Crescent Society and the Red Crescent Society of the United Arab Republic (formerly Egypt) had once more become two separate Societies and were therefore entitled to participate separately in International Conferences of the Red Cross.<sup>388</sup>

#### E. General questions concerning cases of succession

### 1. WAYS IN WHICH THE STATES CONCERNED MANIFEST THEIR CONSENT

212. The Geneva Conventions are open for participation by all States. The method of accession may be followed by any new State, whether or not it is a former dependent territory of a State party to the Geneva Conventions. However, when the State wishing to participate in the Geneva Conventions is a former dependent territory of a State party, it may choose between accession and succession. The Conventions do not provide for the latter alternative, but it has been sanctioned by custom. Analysis of the cases concerned shows that new States have very often used the succession method, and that this participation procedure has not been challenged by the States parties to the Conventions concerned or by the Swiss Federal Council. The successor State need only indicate that it considers itself bound by the Conventions by virtue of the fact that they were ratified or acceded to by the predecessor State.

213. However, study of participation by States in the Geneva Conventions shows that some United Kingdom dominions became contracting States before they attained full independence. This is true, for example, of *India*, which became a party to the 1906 Convention by succession (1926) 389 and to the 1929 Conventions by signature followed by ratification (1931), and of *Burma*, which became a party to the 1929 Conventions

by succession (1937).<sup>390</sup> These States have always been considered as contracting States and took part in the 1949 Geneva Diplomatic Conference in that capacity. After attaining independence they did not explicitly reaffirm the desire to remain bound by the Conventions. 214. Within the framework of the Geneva Conventions, consent by accession is expressed in simplified forms which have some similarity to those used for the expression of consent in the case of succession. Accession procedures are as simple in form as those used for the declarations of continuity characteristic of succession, for the Geneva Conventions call only for the submission of a notification of accession to the Swiss Federal Council, the deposit of a formal instrument being required only in the case of ratification. The Conventions do not prohibit a State wishing to accede from transmitting an instrument of accession—and in practice this has sometimes occurred—but the State concerned may validly express its desire to be bound by the Conventions by submitting a simple notification of accession. Even if the acceding State submits an instrument of accession, the Swiss Federal Council is not called upon to draw up a record of the deposit as it is in the case of ratification. The procedure for notification of accession is thus as simple as that for declarations of

215. Generally speaking, States express their desire to become parties to the Geneva Conventions by succession by a declaration of continuity. However, in some cases of succession to the 1929 Conventions, that desire was expressed by a "declaration of application" (Burma) or by "a declaration of continuance of application" (Indonesia).391 Nevertheless, the expression "declaration of continuity" already used by the Swiss Federal Council in connexion with Transjordan's succession to the 1929 Conventions, 392 is now used in the case of succession to the 1949 Conventions (Cameroon, Central African Republic, Congo (Brazzaville), Congo (Democratic Republic of), Dahomey, Gabon, Gambia, Ivory Coast, Jamaica, Madagascar, Mauritania, Niger, Nigeria, Rwanda, Senegal, Sierra Leone Tanganyika, Togo, Upper Volta). Declarations of continuity like notifications of accession, must be communicated to the Swiss Federal Council, which registers them with the United Nations Secretariat.

216. The declarations are sent to the Swiss Federal Council by the competent authorities of the successor State. Burma's "declaration of application" concerning the 1929 Conventions was an exception: it was communicated by the United Kingdom authorities, because Burma became a separate party to those Conventions before attaining full independence. Declarations of continuity may be contained in a letter (Cameroon, Central African Republic, Congo (Brazzaville), Congo (Democratic Republic of), Gabon, Jamaica, Madagascar, Mauritania, Niger, Nigeria, Rwanda, Senegal, Sierra

<sup>\*</sup> Translation from the French by the United Nations Secretariat.

<sup>&</sup>lt;sup>387</sup> Revue Internationale de la Croix Rouge, 1959, October, pp. 499 and 500.

<sup>288</sup> See International Review of the Red Cross, 1962, pp. 362 and 363.

<sup>&</sup>lt;sup>889</sup> See above, paras. 154-158.

<sup>390</sup> See above, para. 160.

<sup>&</sup>lt;sup>391</sup> See above, paras. 163 and 164.

<sup>392</sup> See above, paras, 161 and 162.

ses See above, para. 160.

Leone, Togo, Upper Volta), a note (Dahomey, Ivory Coast, Tanganyika), a communication (Transjordan) or even a cable (Transjordan, 1929 Convention relative to the Treatment of Prisoners of War). They are sent by the Head of State (Mauritania, Niger, Senegal, Togo), the Head of Government (Jamaica, Nigeria), the Vice-President of the Government (Gabon), the Minister for Foreign Affairs (Cameroon, Central African Republic, Congo Brazzaville), Congo (Democratic Republic of), Dahomey, Madagascar, Rwanda, Tanganyika, Transjordan, Upper Volta) and sometimes even by authorized diplomatic representatives (Indonesia, Ivory Coast). Indonesia's declaration concerning the 1929 Conventions was signed at the Federal Department in Berne by the High Commissioner of Indonesia to the Netherlands.<sup>394</sup>

Study of the various cases of succession shows that States may and very often do make a single declaration of continuity in order to succeed to all the Geneva Conventions concluded at the same diplomatic conference. The declarations relating to the 1929 Conventions mention the two Conventions concluded in that year and those relating to the 1949 Conventions the four Conventions concluded at the 1949 Diplomatic Conference. Thus, States succeed to more than one Convention by the same declaration of continuity. There is no example of a declaration of continuity relating to both the 1929 Conventions and the 1949 Conventions. When Transjordan succeeded to the two 1929 Conventions it began by communicating a declaration relating only to the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; this declaration was subsequently extended to the Convention relative to the Treatment of Prisoners of War.395

218. A distinction may be drawn between the declarations of continuity containing a comprehensive general formula (Burma, Congo (Democratic Republic of), Dahomey, Indonesia, Ivory Coast, Nigeria, Tanganyika, Transfordan) and those which list the Conventions concerned (Cameroon, Central African Republic, Congo (Brazzaville), Gabon, Jamaica, Madagascar, Mauritania, Niger, Rwanda, Senegal, Sierra Leone, Togo, Upper Volta). It is specified that the successor State considers itself a party to the Conventions concerned by virtue of their ratification by the predecessor State (Cameroon, Central African Republic, Congo (Brazzaville), Gabon, Jamaica, Madagascar, Mauritania, Niger, Nigeria, Rwanda, Sierra Leone, Togo, Upper Volta) signature and notification by the predecessor State (Burma), accession on its behalf by the predecessor State (Congo (Democratic Republic of), Transfordan), signature by the predecessor State (Dahomey) or the application of the Conventions to its territory by the predecessor State (Tanganyika). Some declarations state that the Conventions remain in force in the territory of the successor State, without mentioning the predecessor State (Indonesia, Ivory Coast). In some cases, the declaration recalls that the successor State has attained independence (Congo (Democratic Republic of), Indonesia, Nigeria, Tanganyika, Transjordan). Transjordan's declaration of continuity relating to the 1929 Conventions mentions, in support of succession, a treaty concluded with the predecessor State. 397

#### CONTINUITY IN THE APPLICATION OF THE CONVENTIONS AND DATE ON WHICH A STATE BECOMES A CONTRACTING STATE

Succession ensures continuity in the application of the Geneva Conventions. The Federal Council now considers a successor State as a contracting State from the date on which it attains independence. An acceding State does not become a party until six months after the Swiss federal authorities have received the notification of accession, in accordance with the final provisions of the Geneva Conventions. This makes it possible to determine, in case of doubt, whether a new State became a party by succession or by accession. The declaration of continuity confirms that the Conventions continue to apply in the State concerned. The notification of accession, on the other hand, results in an interruption in participation in the Conventions, which may lead to an interruption in the application of the Conventions by the State concerned. The interruption begins with the attainment of independence and ends six months after the Swiss authorities receive the notification of accession.

220. The following tables show that the interruption sometimes lasts for several years:

1929 Conventions

	Accession	Independenc <b>e</b>	Duration of
Israel	3 Feb. 1949	15 May 1949	8 months, 18 days
Lebanon 398	12 Dec. 1946	•	
Pakistan	2 Aug. 1958	_	, ,
Philippines	1 Oct. 1947	4 July 1946	14 months, 27 days
Syria <sup>398</sup>	4 Jan. 1947	1 Jan. 1944	36 months, 4 days
1949 Conventio	ns		
Cambodia	8 June 1959	9 Nov. 1953 395	67 months
Cyprus	23 Nov. 1962	16 Aug. 1960	27 months, 7 days
Federation		Ŭ	, ,
of Malaya	24 Feb. 1963	31 Aug. 1957	65 months, 24 days
Kenva	2 Mar. 1968	12 Dec. 1963	50 months, 19 days
Kuwait		19 June 1961	
Laos		29 Dec. 195440	
Mali	•		65 months, 4 days
	2,1,0,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,	(Federation	,.
		of Mali)	
		22 Sep. 1960	
		(Republic of	
		Mali)	
1/	26 Year 1057	,	10 months 24 days
Morocco			10 months, 24 days
Uganda	18 Nov. 1964	9 Oct. 1962	25 months, 9 days
Trinidad and			
Tobago		•	14 months, 17 days
Tunisia			19 months, 15 days
Zambia	19 April 196 <b>7</b>	24 Oct. 1964	29 months, 26 days

<sup>397</sup> See above, para. 161.

<sup>394</sup> See above, para. 163.

<sup>395</sup> See above, paras. 161 and 162.

<sup>&</sup>lt;sup>396</sup> See above, paras. 163 and 176 respectively.

<sup>398 1929</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field only,

<sup>399</sup> Date communicated in a letter of 27 June 1968 addressed to the Secretary-General by the Permanent Representative of Cambodia.

<sup>&</sup>lt;sup>400</sup> Date of transfer of final powers.

221. In the case of succession there is no interruption in the application of the Conventions to the territories of the successor States, which are considered as contracting States from the date on which they attained independence. The date on which Swiss Federal Council receives the declaration of continuity is not the date on which the successor State becomes a party to the Conventions. In the case of Burma's participation in the 1929 Conventions, the United Kingdom stated that Burma should be considered a party to the Conventions as from its separation from India, i.e., from 1 April 1937, although the declaration of application communicated by the United Kingdom was received by the Swiss federal authorities at a later date. 401 The retroactive effect of declarations of continuity is shown clearly in the following table relating to the participation of successor States in the 1949 Conventions:

	Declaration	Date on which th country became independent and the declaration took effect	
Cameroon	16 Sept. 1963	1 Jan. 1960	
Central African	•		
Republic	23 July 1966	13 Aug. 1960	
Congo (Brazzaville)	•	15 Aug. 1960	
Congo (Democratic		_	
Republic of)	24 Feb. 1961	30 June 1960	
Dahomey	14 Dec. 1961	1 Aug. 1960	
Gambia	20 Oct. 1966	18 Feb. 1965	
Gabon	20 Feb. 1965	17 Aug. 1965	
Ivory Coast	28 Dec. 1961	7 Aug. 1960	
<b>J</b> amaica	17 July 1964	6 Ang. 1962	
Madagascar	13 July 1963	26 June 1960	
Mauritania	27 Oct. 1962	28 Nov. 1960	
Niger	16 April 1964	3 Aug. 1960	
Nigeria	20 June 1961	1 Oct. 1960	
Rwanda	21 Mar. 1964	1 July 1962	
Senegal	23 April 1963	20 Aug. 1960	
Sierra Leone	31 May 1965	27 April 1961	
Tanganyika	12 Dec. 1962	6 Dec. 1961	
Togo	26 Jan. 1962	27 April 1960	
Upper Volta	7 Nov. 1961	5 Aug. 1960	

222. When the Swiss Federal Council registers declarations of continuity with the United Nations Secretariat, it now usually indicates the date of independence, on which the new State became a contracting party to the Conventions. This was not always done in the past. For example, the registration of *Indonesia's* declaration relating to the 1929 Conventions, which refers to "continuance of application", does not indicate the date on which Indonesia, as an independent and sovereign State, became a party to the 1929 Conventions.

223. There is one exception to the practice described thus far, namely *Transjordan's* declarations of continuity concerning the 1929 Conventions. The Swiss Federal Council considered that those declarations took effect on the date on which it received them

(20 November 1948 and 9 March 1949) and not on the date on which *Transjordan* attained independence (22 March 1946). This exception is perhaps due to the existence at that time of one of the situations which according to the final provisions of the Conventions concerned made it possible to give immediate effect to accessions or ratifications.

224. The date on which the United Kingdom Dominions (South Africa, Australia, Canada, India, New Zealand, Pakistan and Ceylon) and the Irish Free State became States parties to the 1906 Convention does not seem to have been established with absolute certainty. In that connexion, a distinction should be drawn between the continuity of application of the Conventions to the territories of those countries and the latter's participation in the Conventions as contracting parties.

3. QUESTION OF CONVENTIONAL RELATIONS BETWEEN A STATE WHICH HAS SUCCEEDED TO A PARTICULAR CONVENTION AND STATES PARTIES TO A PREVIOUS CONVENTION ON THE SAME SUBJECT SIMULTANEOUSLY IN FORCE

225. The declarations of continuity of successor States specifically mention the Geneva Convention or Conventions to which the State concerned wishes to succeed.403 Thus, for example, the declarations of Burma, Indonesia and Transjordan stipulate that these States are succeeding to the 1929 Conventions and do not mention the Conventions of 1864 and 1906. The same is true of the declarations of continuity relating to the 1949 Conventions submitted by new States which were formerly United Kingdom, French or Belgian territories. Thus, the declarations of continuity of Cameroon, Central African Republic, Congo (Brazzaville), Congo (Democratic Republic of), Dahomey, Gabon, Jamaica, Madagascar, Mauritania, Niger, Rwanda, Senegal, Sierra Leone, Tanganyika, Togo and Upper Volta refer generally to the Geneva Conventions of 12 August 1949 or enumerate separately the four Geneva Conventions of 12 August 1949. The declaration of continuity of the *Ivory Coast* is the only exception, for it mentions only "the Geneva Conventions for the protection of war victims". The Swiss Federal Council nevertheless registered the Ivory Coast declaration with the United Nations Secretariat as relating to the 1949 Conventions only.404

226. Generally speaking, therefore, the declarations of successor States mention only the last Convention or

the 1929 Conventions before attaining independence. With regard to its participation in the 1929 Convention, the separation from India produced effects which are normally the corollary of the attainment of full independence, which in the case of Burma did not take place until 4 January 1948.

<sup>&</sup>lt;sup>402</sup> See above, paras. 154-158.

<sup>&</sup>lt;sup>403</sup> This is true also of ratifications and accessions. For example, Somalia, notified the Swiss federal authorities of its accession "to the Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1864, 1906, 1929 and 1949)". In reply to a note verbale from the Swiss Federal Political Department, *Somalia* explained that it wished to notify its accession "to the four Geneva Conventions of 1949" (exchange of notes communicated to the United Nations Secretariat by the Swiss authorities).

<sup>404</sup> See above, para. 176.

Conventions concluded by the predecessor State and do not refer to any other Geneva Conventions to which the predecessor State may have been a party. Because of that omission, and because some States are still parties to the 1906 Convention only (Costa Rica, Uruguay) or to the 1929 Conventions only (Burma, Bolivia, Ethiopia), the solution of the problem of the legal relationship between the various Geneva Conventions is clearly of interest to new States.405 That solution will determine the existence or absence of treaty relations between a new State which is a party to the 1949 Conventions and a State which, although a party to one of the Geneva Conventions, is not yet a party to those of 1949. In that connexion, the Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, published by the International Committee of the Red Cross, contains the following observations:

... In strict law, they are not bound ... by any Convention ... But the very nature of the Geneva Conventions demands a less academic and more humane interpretation. Everything points to the fact that we are not considering a number of different Conventions, but successive versions of one and the same Convention the Geneva Convention, whose principles are concepts of natural law and which merely gives expression to the dictates of the universal conscience . . . the two States must therefore consider themselves bound, at any rate morally, by everything which is common to the two Conventions, beginning with the great humanitarian principles which they contain. An effort should be made to settle by special agreement matters dealt with differently in the two Conventions; in the absence of such an agreement, the Parties would apply the provisions which entailed the least extensive obligations. 406

227. When a new State decides to participate in the 1949 Conventions while remaining silent with regard to its participation in the Geneva Conventions concluded before that date, the way in which it became a party to the 1949 Conventions may be an important element in determining its treaty relations with States which are parties to the Geneva Conventions concluded before 1949 only. The succession method tends towards the "less academic interpretation" recommended by the International Committee of the Red Cross, for it involves an element of continuity which is lacking in the case of accession.

#### 4. RESERVATIONS

228. So far as the Geneva Conventions are concerned, the problem of succession to reservations arises only in the case of new States which were formerly United Kingdom territories and became parties by succession to the Convention relating to the Protection of Civilian Persons of 12 August 1949.<sup>407</sup> In ratifying

that Convention, the *United Kingdom* maintained the reservation it had made at the time of signature with respect to article 68, paragraph 2.<sup>408</sup> Since *Gambia, Jamaica, Nigeria, Sierra Leone* and *Tanganyika* suceeded to the United Kingdom with regard to the Convention of 12 August 1949 relative to the protection of Civilian Persons,<sup>409</sup> the question arises to what extent these five new States have inherited the United Kingdom reservation. Their declarations of continuity are silent on this point, and the United Kingdom reservation is not mentioned in the communications relating to the registration of the declarations received by the United Nations Secretariat.

229. Examination of the cases of succession to the Geneva Conventions thus provides no example that would make it possible to say with certainty whether or not it is necessary to confirm in declarations of continuity the reservations formulated by the predecessor State in order to be able to take advantage of them. Furthermore, in practice there are no cases of application of the Convention relating to the Protection of Civilian Persons in which the legal problem of the succession of new States to reservations formulated by a predecessor State has been raised by States parties to that Convention.

#### F. Summary

230. New States now participate in the Geneva Conventions by virtue of the principles governing the succes-The former British Dominions of sion of States. Australia, Canada, India and South Africa, and also the Irish Free State were the first to use the succession method to participate separately in the 1906 Convention.410 Three States—Burma, Indonesia and Transjordan—subsequently became parties to the two 1929 Conventions by succession.411 In recent years, participation in the 1949 Conventions by succession has become the general practice. From 1961 onwards, many new States adopted the succession method to become parties to the four 1949 Conventions. Of these new States, five were former United Kingdom territories: Gambia, Jamaica, Nigeria, Sierra Leone and Tanganyika: twelve were former French territories: Cameroon, Central African Republic, Congo (Brazzaville), Dahomey, Gabon, Ivory Coast, Madagascar, Mauritania, Niger, Senegal, Togo and Upper Volta; and two were former Belgian territories: the Democratic Republic of the Congo and Rwanda.412

231. Recognition by the International Committee of the Red Cross of the National Societies of new States

<sup>&</sup>lt;sup>405</sup> It should be remembered that a State party may denounce a given Convention. If the State concerned is also a party to previous Conventions, they remain in force as far as that is concerned unless it denounces them too.

<sup>406</sup> Page 408.

<sup>&</sup>lt;sup>407</sup> See: Claude Pilloud. "Reservations to the 1949 Geneva Conventions", Revue Internationale de la Croix Rouge, 1957 (August) and International Review of the Red Cross, 1965 (July).

<sup>&</sup>lt;sup>408</sup> United Nations, *Treaty Series*, vol. 278, pp. 266-268. Analogous reservations were confirmed by *Australia* and *New Zealand*.

<sup>409</sup> See above, paras, 170-174.

<sup>&</sup>lt;sup>410</sup> See above, paras. 154-158. It seems that *New Zealand*, *Pakistan* and *Ceylon* should also be considered as States parties by succession to the 1906 Convention (see above, paras. 157 and 158).

<sup>411</sup> See above, paras. 160-164.

<sup>412</sup> See above, paras. 170-180.

parties to the Geneva Conventions by succession has raised no difficulties. 413 In the past, the International Committee has in some cases even proceeded with recognition before the New State in which the applicant Society is situated has formally notified the Swiss Federal Council that it considers itself bound by the Geneva Conventions. Furthermore, the succession method has not given rise to any challenge at the International Conferences of the Red Cross. Thus, for example, Indonesia took part in the Toronto Conference (1952) and Burma took part in the New Delhi Conference (1957) by virtue of their participation by succession in the 1929 Conventions. Delegates from Governments or National Societies of thirteen new States parties to the 1949 Conventions by succession (Cameroon, Central African Republic, Congo (Democratic Republic of), Dahomey, Ivory Coast, Madagascar, Niger, Nigeria, Sierra Leone, Senegal, Tanzania, Togo and Upper Volta) took part in the Vienna Conference in 1965.

232. The Federal Republic of Germany, the German Democratic Republic, the Republic of Viet-Nam, the Democratic Republic of Viet-Nam, the Republic of Korea, the Democratic People's Republic of Korea and the People's Republic of China are parties to the 1949 Conventions. The People's Republic of China has ratified the 1949 Conventions which were previously signed by the Republic of China.414 The Republic of China has taken part in International Conferences of the Red Cross by virtue of China's participation in the Conventions of 1864 and 1929. All these States, with the exception of the Republic of China, have National Societies duly recognized by the International Committee of the Red Cross. Furthermore, they have sometimes sent delegations to International Conferences of the Red Cross. However, participation in these International Conferences by the Governments and National Societies of the People's Republic of China and the Republic of China has given rise to controversy. 415

#### IV. International Union for the Protection of Industrial Property: Paris Convention of 1883 and subsequent Acts of revision and special agreements 416

### A. The Paris Convention and the International Union for the Protection of Industrial Property

233. The "International Union for the Protection of Industrial Property", commonly referred to as the "Paris

Union", was established by the Paris Convention of 20 March 1883. The Paris Convention has been revised six times at the general conferences of members of the Paris Union held at Brussels (Act of Brussels of 14 December 1900), at Washington (Act of Washington of 2 June 1911), at The Hague (Act of The Hague of 6 November 1925), at London (Act of London of 2 June 1934), at Lisbon (Act of Lisbon of 31 October 1958) and at Stockholm (Act of Stockholm of 14 July 1967). Each of the Acts of revision supersedes its immediate forerunner in relations between the countries of the Union which became parties to it.

234. The Paris Convention is twofold in its function. It is not only a constituent instrument setting up

<sup>&</sup>lt;sup>418</sup> See above, paras. 199-211.

<sup>414</sup> See above, paras. 185-187.

<sup>415</sup> See above, paras. 189-195.

<sup>&</sup>lt;sup>416</sup> The present study covers the period prior to November 1967. All questions of succession of States to the Convention of Paris of 1883 and its Acts of revision have, thus far, arisen prior to the adoption of the Stockholm Act and within the traditional framework of the Paris Union. It must be borne in mind that in the future succession of States to the Paris Convention and its Acts of revision will occur within a framework substantially modified. The instruments adopted in the course of the 1967 Conference of Stockholm anticipate significant changes both in the regime and in the structure of the Paris Union.

<sup>&</sup>lt;sup>417</sup> Convention of Paris for the Protection of Industrial Property (BIRPI, Manual of Industrial Property Conventions, Paris Convention, Section A1. French text also published in British and Foreign State Papers, vol. 74, p. 44, and De Martens, Nouveau Recueil général de Traités, deuxième série, tome X, p. 133).

<sup>&</sup>lt;sup>418</sup> BIRPI, op. cit., Paris Convention, Section B1. French text also published in British and Foreign State Papers, vol. 92, p. 807, and De Martens, Nouveau Recueil général de Traités, deuxième série, tome XXX, p. 465.

<sup>&</sup>lt;sup>419</sup> BIRPI, op. cit., Paris Convention, Section C1. French text also published in British and Foreign State Papers, vol. 104, p. 116, and De Martens, Nouveau Recueil général de Traités, troisième série, tome VIII, p. 760.

<sup>&</sup>lt;sup>420</sup> BIRPI, op. cit., Paris Convention, Section D1. French text and English translation also published in Leage of Nations, Treaty Series, vol. LXXIV, pp. 289-315.

<sup>&</sup>lt;sup>421</sup> BIRPI, op. cit., Paris Convention, Section E1. French text and English translation also published in League of Nations, Treaty Series, vol. CXCII, pp. 17-45.

<sup>&</sup>lt;sup>422</sup> BIRPI, op. cit., Paris Convention, Section F1. See also French text in La Propriété industrielle, 1958, p. 202, and English translation in Industrial Property Quarterly, January 1959, pp. 6-29.

<sup>&</sup>lt;sup>423</sup> Not yet in force. For the main features of the reorganization of the Paris Union approved at the 1967 Stockholm Conference, see note 9, above.

<sup>424</sup> Article 18 of the Act of Lisbon reads in part as follows:

<sup>&</sup>quot;3) The present Act shall, as regards the relations between the countries to which it applies, replace the Convention of Paris of 1883 and the subsequent acts of revision.

<sup>&</sup>quot;4) As regards the countries to which the present Act does not apply, but to which the Convention of Paris revised at London in 1934 applies, the latter shall remain in force.

<sup>&</sup>quot;5) Similarly, as regards countries to which neither the present Act nor the Convention of Paris revised at London, nor the Convention of Paris revised at The Hague in 1925 shall remain in force.

<sup>&</sup>quot;6) Similarly, as regards countries to which neither the present Act nor the Convention of Paris revised at London, nor the Convention of Paris revised at The Hague apply, the Convention of Paris revised at Washington in 1911 shall remain in force."

Article 18 of the Acts of 1911, 1925 and 1934 contains mutatis mutantis similar provisions. The Paris Convention of 1883 and the Act of Brussels of 1900 are no longer applied by any country in view of the fact that, following successive revisions, all the members of the Paris Union are at present bound by more recent Acts.

the organs of the Paris Union 425 and providing for the rights and duties of its members, but it is also a general multilateral treaty laying down substantive rules on the protection of patents, utility models, industrial designs and models, trademarks, service marks, trade names and indications of source or appellations of origin, and the repression of unfair competition. 426 Under article 17 of the Convention, member countries are bound to ensure the application of these substantive rules by way of domestic enactment; and under article 2 they are required to grant the same rights to nationals of other countries of the Union as they give to their own nationals. 427

235. The Paris Convention and its subsequent Acts of revision are open to accession by any country not member of the Union. Under article 16, any accession shall be notified through diplomatic channels to the Government of the Swiss Confederation and by it to Governments of all other countries of the Union. The accession takes effect one month after the dispatch of such notification by the Swiss Government unless a subsequent date is indicated in the request for accession by the acceding country.

236. Territorial application is optional. Article 16bis reads: 430

1) Any country of the Union may at any time notify in writing the Government of the Swiss Confederation that the present Convention is applicable to all or part of its colonies, protectorates, territories under mandate or any other territories subject to its authority, or any territories under its sovereignty, and the Convention shall apply to all the territories named in the notification one month after the dispatch of the communication by the Government of the Swiss Confederation to the other countries of the Union unless a subsequent date is indicated in the notification. Failing such a notification, the Convention shall not apply to such territories.

2) Any country of the Union may at any time notify in writing the Government of the Swiss Confederation that the present Convention ceases to be applicable to all or part of the territories that were the subject of the notification under the preceding paragraph, and the Convention shall cease to apply in the territories named in the notification twelve months after the receipt of the notification addressed to the Government of the Swiss Confederation.

3) All notifications sent to the Government of the Swiss Confederation in accordance with the provisions of paragraphs (1) and (2) of the present article shall be communicated by that Government to all the countries of the Union.

237. The Swiss Government has been entrusted with most of the functions which are normally assumed by the depositary of multilateral treaties, even though the authentic text and instruments of ratification of the Paris Convention and its subsequent Acts of revision (excepting the Act of Lisbon) were deposited with the Government of the country in which a revision conference took place. All notification circulars on entry into force, accessions and denunciations, as well as declarations and observations made by parties to the Paris Convention have been sent by the Swiss Government ever since beginning of the Paris Union.

238. The International Bureau of the Union, 432 operating under the authority of the Swiss Government, publishes all the notification circulars sent by the Swiss Government in its official publications, e.g. La Propriété industrielle (monthly publication in French, since 1885), Industrial Property Quarterly (quarterly in English, 1957-1961 inclusive) and Industrial Property (monthly

<sup>&</sup>lt;sup>425</sup> The main organs are: (a) a diplomatic conference for revision of the Convention (article 14 of the Paris Convention and its Acts of revision); (b) a conference of representatives of all member countries which meets every three years in order to draw up a report on the foreseeable expenditure of the International Bureau for each three-year period and to consider certain questions in the interval between diplomatic conferences (article 14 (5) of the Act of Lisbon of 1958); (c) an International Bureau placed under the high authority of the Government of the Swiss Confederation (article 13 of the Paris Convention and its Acts of revision).

<sup>&</sup>lt;sup>426</sup> See articles 4 to 12 of the Paris Convention. *BIRPI*, op. cit., Section A1, pp. 2 and 4.

<sup>&</sup>lt;sup>427</sup> Nationals of countries not forming part of the Union, who are domiciled or who have real and effective industrial or commercial establishments in the territory of one of the countries of the Union, are treated in the same manner as nationals of the country of the Union (article 3 of the Paris Convention and its Acts of revision). BIRPI, op. cit., Section A1 p. 2

<sup>&</sup>lt;sup>128</sup> According to articles 18 and 19 of the London and Lisbon Acts, the countries of the Union may become parties to these Acts by signature followed, within a certain period of time, by ratification or if that period has elapsed, by accession under the terms of article 16. See *BIRPI*, op. cit., Sections E1 and F1.

<sup>429</sup> Article 16 has remained essentially the same since 1883. 430 Article 16 bis of the London text (1934), which remained the same in the Lisbon text (1958). Article 16 bis of the Washington text (1911) states:

<sup>&</sup>quot;The contracting countries shall, at any time, have the right to accede to the present Convention on behalf of all or part of their colonies, possessions, dependent territories and protectorates.

<sup>&</sup>quot;They may, for this purpose, make either a general declaration of adhesion that includes all their colonies, possessions, dependencies and protectorates, or expressly indicate only those which are included, or which are excluded."

excluded.
"This declaration shall be notified in writing to the Government of the Swiss Confederation, and by it to all the other Governments.

<sup>&</sup>quot;The contracting countries may, in the same way, denounce the Convention on behalf of all their colonies, possessions, dependent territories and protectorates, or on behalf of some of them."

The main changes introduced in the Washington text (1911) by The Hague text (1925) were the addition of a reference to "territories administered by virtue of a mandate of The League of Nations" and the replacement of the words "a general declaration of adhesion" by the words "a general declaration". The texts adopted at Paris (1883) and at Brussels (1900) did not contain any territorial application clause.

Lisbon text are deposited with the Swiss Government (articles 18 and 19). See *Industrial Property Quarterly*, January 1959, pp. 28 and 29.

<sup>432</sup> The Bureau of the Paris Union shares with the International Bureau of the Berne Union the same Director and secretariat with the little "United International Bureaux for the Protection of Intellectual Property" (BIRPI). See G. Béguin, "L'Organisation des Bureaux Internationaux réunis pour la protection de la propriété industrielle, littéraire et artistique", La Propriété industrielle (1961), pp. 203-213 and note 12, above.

publication in English, since 1962).<sup>433</sup> The Bureau occasionally makes an editorial note clarifying any ambiguities contained in such circulars and periodically puts out a list showing the status of the Paris Convention and its Acts of revision and certain other multilateral agreements administered within the framework of the Paris Union. The expenses of the Paris Union, that is, ordinary expenditures of the Bureau and expenses relating to conferences, special works, and publications, are borne by the member countries, which have the option to declare in which class of contribution from among the six classes enumerated in the Convention they wish to be placed.<sup>431</sup>

#### B. Special unions

239. Within the framework of the Paris Union, several "special unions" 435 have been established in accordance with article 15 of the Paris Convention which reads: 436

It is understood that the countries of the Union reserve the right to make separately between themselves special arrangements for the protection of industrial property, in so far as these arrangements do not contravene the provisions of the present Convention.

240. There are five special unions established by the following multilateral agreements:

The Agreement of Madrid of 14 April 1891, for the prevention of false or misleading indications of source on goods, revised at Washington (1911), at The Hague (1925), at London (1934), at Lisbon (1958) and at Stockholm (1967) (hereinafter referred to as the "Madrid Agreement (false indications of source)"; 437

The Agreement of Madrid of 14 April 1891 concerning the international registration of trademarks, revised at Brussels (1900), at Washington (1911), at The Hague (1925), at London (1934), at Nice (1957) and at Stockholm (1967) (hereinafter referred to as the "Madrid Agreement (registration of trademarks"; 438

The Agreement of the Hague of 6 November 1925 concerning the international deposit of industrial designs, revised at London (1934) and at The Hague (1960), with the additional Act of Monaco (1961) and the complementary Act of Stockholm (1967) (hereinafter referred to as "The Hague Agreement"); 439

The Agreement of Nice of 15 June 1957 concerning the international classification of goods and services to which trademarks are applied, revised at Stockholm (1967) (hereinafter referred to as the "Nice Agreement"); 440 and

The Agreement of Lisbon of 31 October 1958 for the protection of appellations of origin and their international registration, revised at Stockholm (1967) (hereinafter referred to as the "Lisbon Agreement").441

241. Membership in these special unions is contingent on membership in the Paris Union, and territorial application is optional. In fact, each of the above-mentioned multilateral agreements contains the following clause with some minor variations: 442

Member countries of the Union for the Protection of Industrial Property which are not parties to this Agreement shall be permitted to accede to it at their request and in the manner prescribed in articles 16 and 16bis of the Convention of Paris.

- 242. As in the case of the Paris Convention, each revised text of the two Madrid Agreements and The Hague Agreement supersedes its immediate forerunner in the relations between member countries accepting it.<sup>443</sup>
- 243. The Bureau of the Paris Union is entrusted with administrative services in the matter of registration and publication of trademarks, industrial designs and appellations of origin which are deposited or registered with the Bureau by nations of the members of the special unions.
- 244. The expenses incurred by the Bureau in connexion with the special union set up by the Nice Agreement are apportioned among the members of that Union in the same way as expenses are apportioned among the members of the Paris Union.<sup>444</sup> On the other hand, the expenses incurred in connexion with the special unions established by the Madrid Agreement (registration of trademarks) and The Hague Agreement are financed by fees and charges collected from the individ-

<sup>433</sup> BIRPI has also published a Manual of Industrial Property Conventions (Manuel des Conventions concernant la Propriété industrielle) (Manual de Tratados de la Propiedad Industrial). The English and Spanish versions of the Manual do not reproduce all revised texts of certain special arrangements relating to restricted unions.

<sup>434</sup> See article 13, paras. 6-9. BIRPI, op. cit., Section E1, p. 16.

<sup>435</sup> In contrast with the Paris Union which is often called the "General Union (L'Union générale), these "special unions" (unions particulières) are also called "restricted unions" (unions restreintes) in the official publications of the Bureau.

<sup>&</sup>lt;sup>436</sup> The wording of article 15 has remained essentially the same since 1883.

<sup>437</sup> British and Foreign State Papers, vol. 96, pp. 837 and 852; ibid., vol. 104, pp. 137-139; League of Nations, Treaty Series, vol. LXXIV, pp. 319-323; ibid., vol. CXCII, pp. 10-15; La Propriété industrielle, 1958, p. 211; BIRPI, op. cit.

<sup>438</sup> British and Foreign State Papers, vol. 96, pp. 839 and 848; ibid., vol. 108, p. 404; League of Nations, Treaty Series, vol. LXXIV, pp. 327-329; ibid., vol. CCV, pp. 163-175; Industrial Property Quarterly, July 1957, pp. 6-21; BIRPI, op. cit.

<sup>439</sup> League of Nations, Treaty Series, vol. LXXIV, pp. 341-351; ibid., vol. CCV, pp. 179-189; La Propriété industrielle, December 1960, pp. 230-236; ibid., November 1961, pp. 249 and 251; BIRPI, op. cit.

<sup>440</sup> La Propriété industrielle, 1957, p. 116; BIRPI, op. cit.

<sup>&</sup>lt;sup>441</sup> La Propriété industrielle, 1958, p. 212; BIRPI, op. cit. This Agreement entered into force on 2 September 1966.

<sup>&</sup>lt;sup>442</sup> Article 11 of the Lisbon Agreement. See also article 5 of the Madrid Agreement (false indications of source), article 11 of the Madrid Agreement (registration of trademarks), article 22 of The Hague Agreement and articles 6 and 10 of the Nice Agreement.

<sup>&</sup>lt;sup>443</sup> See article 6 of the Madrid Agreement (false indications of source), article 12 of the Madrid Agreement (registration of trademarks) and article 23 of The Hague Agreement.

<sup>444</sup> See article 5 of the Nice Agreement.

ual applicants for registration or any other persons who avail themselves of the Bureau's service; and the annual net revenue from the fees and charges is apportioned among the members after deducting the joint expenses occasioned by the execution of the Agreement.<sup>445</sup>

245. In addition to the twenty-nine multilateral instruments administered by the Paris Union (herein referred to as the "Paris Union instruments", 446 the members of the Paris Union concluded two multilateral treaties concerning conservation and restoration of industrial property rights following two world wars. The status of these treaties, however, is not presented periodically in the official publications of the Paris Union probably because these treaties had a limited significance only for a certain post-war period. Owing to the inadequacy of information on their status, the positions taken by States and organs of the Paris Union concerning succession to these treaties will be excluded from the present study.

### C. Description of cases comprising elements related to succession of States

246. Cases relating to the succession of States to multilateral instruments concluded within the Paris Union and to the Union itself, concern either countries of the Union (contracting countries) 448 or former dependent territories of a country of the Union. In this connexion, it is necessary to bear in mind that within the Paris Union the status of country of the Union (contracting country) has been and is still at present occasionally recognized not only to States but also to certain other entities not fully independent and sovereign. All cases concerning changes (formation and dissolution of a union with another country; transfer of sovereignty; annexation; dismemberment; etc.) under-

gone by countries of the Union (contracting countries), whether sovereign States or not, have been grouped in section 2. On the other hand, all cases concerning former dependent territories to which—as it is expressly provided for in article 16bis of the Paris Convention since the Act of Washington (1911) 419 the application of instruments of the Paris Union had been extended before independence by the country of the Union (contracting country) responsible at the time for their international relations have been grouped in section 1. From among such dependent territories about thirty-one new States have emerged by the end of October 1967 and twenty-four of them have, at present, joined the Paris Union and become parties to its instruments as countries of the Union (contracting countries).

247. The description of each particular case given below is based on the relevant circular notes sent by the Swiss Government to other countries of the Union concerning the exchange of communications between the Government of the States or countries concerned and the Swiss Government, as well as on the official list of members of the Union and parties to its multilateral instruments and other additional information provided by the Bureau. The circular notes of the Swiss Government, the lists of members and parties and the additional information given by the Bureau are printed in *La Propriété industrielle*. The lists of members and parties are included in the January issue of the latter official publication of the Union.<sup>450</sup>

- 1. FORMER DEPENDENT TERRITORIES TO WHICH MULTILATERAL INSTRUMENTS ADMINISTERED BY THE PARIS UNION HAVE BEEN APPLIED BY COUNTRIES OF THE UNION
- (a) Cases where the continuity in the application of the instruments seems to be recognized
- (i) Non-metropolitan territories for the international relations of which the United Kingdom was responsible

Australia, Canada, New Zealand

248. The territorial application of the Paris Convention was initially extended by the *United Kingdom* to *Australia, Canada* and *New Zealand* as follows: <sup>451</sup>

Australia—Brussels text (1900), as from 5 August 1907;

Canada—Washington text (1911), as from 1 September 1923;

New Zealand—Paris text (1883), as from 7 September 1891.

249. These three entities were dependent territories of the United Kingdom and were not regarded as

<sup>&</sup>lt;sup>495</sup> See article 5 ter to 8 of the Madrid Agreement (registration of trademarks) and articles 15 to 17 of The Hague Agreement. Article 7 of the Lisbon Agreement provides for a method of financing by collecting charges as well as by apportioning expenses among its members.

<sup>446</sup> Namely, the original texts of six multilateral treaties and twenty-three texts embodying revisions of some of these treaties.

<sup>447</sup> Arrangement de Berne du 30 juin 1920 pour la conservation et le rétablissement des droits de propriété industrielle atteints par la guerre mondiale (see text in La Propriété industrielle, 1920) and Arrangement du 8 février 1947 concernant la conservation ou la restauration des droits de propriété industrielle atteints par la deuxième guerre mondiale. (Actes de la Conférence réunie à Neuchatel du 5 au 8 février 1947.)

<sup>&</sup>lt;sup>448</sup> In the London (1934) and Lisbon (1958) texts of the Paris Convention the expression "countries of the Union" is the most frequently used, while the Washington (1911) and The Hague (1925) texts use more often the expression "contracting countries". Expressions such as "contracting States", "States of the Union", "States members of the Union" and "Unionist States" are found in the original Paris (1883) text and in the Brussels (1900) text but are no longer used as from the Washington (1911) text. Other expressions used at times are "contracting Parties" (Paris text), "High Contracting Parties" (Paris and Brussels texts), and "members of the Union" (Washington, The Hague, London and Lisbon texts). The countries to which all these expressions referred are separate members of the Paris Union and separate parties to the multilateral instruments concluded within the Paris Union.

<sup>449</sup> See para. 236, above.

<sup>450</sup> See para. 238, above.

<sup>&</sup>lt;sup>451</sup> La Propriété industrielle, 1891, p. 124; ibid., 1907, p. 157; and ibid., 1923, p. 125.

separate members or contracting countries of the Paris Union. As the Swiss Government's circulars quoted below will indicate, these territories subsequently became members of the Union when the British Government stated that the entity concerned should be regarded as "partie contractante" or "pays contractant" and that it should be placed in a certain class of contribution.

Circular of 12 May 1925 from the Swiss Federal Council to the States of the Union explaining Canada's status with regard to the International Union for the Protection of Industrial Property 452

By a note of 21 August 1923, the Legation of His Britannic Majesty notified the Swiss Federal Council that the Government of the Dominion of Canada acceded on 1 September 1923 to the Convention of Paris for the Protection of Industrial Property of 20 March 1883, revised at Brussels on 14 December 1900 and at Washington on 2 June 1911. The Governments of the countries of the Union were informed of this accession by a note-circulaire of 1 September 1923.

Further to this notification, the Legation of His Britannic Majesty informed the Swiss Federal Council by a note of 22 April 1925 that with regard to accession Canada should be considered as a contracting Party, under article 16 of the Convention of Paris, and that in accordance with article 13 of that instrument it should be placed in the Second Class in respect of its contribution to the expenses of the International Bureau.

Circular of 10 September 1925 from the Swiss Federal Council to the States of the Union explaining the status of the Commonwealth of Australia with regard to the International Union for the Protection of Industrial Property and stating that that country acceded to the text of that Convention as revised at Washington on 2 June 1911 453

By notes of 30 July and 20 August 1925, the Legation of His Britannic Majesty has stated that the Government of the Commonwealth of Australia accedes to the Convention signed at Washington on 2 June 1911, which amends the Convention of Paris for the Protection of Industrial Property of 20 March 1883, revised at Brussels on 14 December 1900, and wishes to be considered as a contracting country of the Industrial Union, to which it acceded as a colony on 5 August 1907.

In accordance with article 13 of the Convention, the Australian Government wishes to be placed in the Third Class in respect of its contribution to the expenses of the International Bureau.

Circular of 29 June 1931 from the Swiss Federal Council to the countries of the Union concerning the accession of New Zealand... to the Hague text of the Convention 454

We have the honour to inform you that by a note dated 10 June 1931, the Legation of Great Britain at Berne informed the Swiss Federal Council of the accession of the Government

<sup>452</sup> Ibid., 1925, p. 85 (translation from the French by the United Nations Secretariat). In the "note circulaire" of 1 September 1923 mentioned in the present circular, Canada was referred to as "Colonie du Canada" and a specific reference was made to article 16 bis (which concerns territorial application), whereas the present circular refers to Canada as "Dominion" and mentions article 16 (which concerns accession of a new member).

of His Britannic Majesty in the Dominion of New Zealand to the Convention for the Protection of Industrial Property of 20 March 1883, revised at The Hague on 6 November 1925, in accordance with article 16 of that instrument.

The Legation added that the Government of His Britannic Majesty in New Zealand wished that Dominion to be placed in the fourth of the classes provided for in article 13 of the Convention in respect of its contribution to the expenses of the International Bureau.

In accordance with the aforementioned article 16, [this accession will take effect] one month after the dispatch of this notification, i.e., on 29 July 1931.

It should be noted that the British note implies that New Zealand is joining the Union as a contracting country; in fact, that Dominion, which was admitted to the Union as a British colony on 7 September 1891, has hitherto been bound by the text of the Convention as revised at Washington on 2 June 1911.

250. In addition to the Paris Convention, the Madrid Agreement (false indications of source) had been made applicable to *New Zealand* (as from 20 June 1913) 455 when the change of status of *New Zealand* within the Paris Union was effected by the above circular dated 29 June 1931. With regard to the relations of *New Zealand* to the special union established by this Madrid Agreement, the Bureau added the following editorial note 456 to the above circular:

Since 20 June 1913 the Dominion of New Zealand, as a British possession, has also been a member of the restricted Union formed by the Agreement of Madrid of 14 April 1891 for the prevention of false or misleading indications of source on goods. For the time being it is bound by the text signed at Washington on 2 June 1911. The above note from the British Legation does not change the position of the Dominion of New Zealand with regard to that Agreement.

New Zealand, thenceforth, has been listed as a separate party to this Madrid Agreement and not as among the territories to which the United Kingdom extended its application.<sup>457</sup>

251. Starting with the 1926 January issue of La Propriété industrielle, the Bureau has listed Australia and Canada as separate parties to the Paris Convention, mentioning for the dates of their "adhésion à l'Union" the dates of initial territorial application by the United Kingdom, namely 5 August 1907 for Australia and 1 September 1923 for Canada. Likewise, New Zealand had been listed as a separate party to the Paris

<sup>&</sup>lt;sup>453</sup> La Propriété industrielle, 1925, p. 174 (translation from the French by the United Nations Secretariat).

<sup>&</sup>lt;sup>454</sup> Ibid., 1931, p. 84 (translation from the French by the United Nations Secretariat). Moreover, the circular contains

the following paragraphs concerning the territorial application to Western Samoa of the Hague text (1925) of the Paris Convention:

<sup>&</sup>quot;... Pursuant to article 16 bis of the Convention, the Legation [of Great Britain] also stated that Western Samoa, which was placed under the mandate of the Dominion [New Zealand] had acceded to that international act.

<sup>&</sup>quot;Furthermore, according to the Legation statement, Western Samoa had joined the Union as a territory placed under the mandate of New Zealand [as from 29 July 1931]..."

<sup>455</sup> La Propriété industrielle, 1913, p. 66.

<sup>&</sup>lt;sup>458</sup> *1bid.*, 1931, p. 84 (translation from the French by the United Nations Secretariat).

<sup>&</sup>lt;sup>467</sup> See January issues of *La Propriété industrielle* for the years 1932 on.

Convention since the January issue of 1932, along with the date 7 September 1891. The list of parties presented as from January 1965, however, has replaced these dates of initial territorial application by the effective dates of accession mentioned in the three circulars quoted above as dates of "adhésion à l'Union", that is to say, 12 June 1925 for Canada, 10 October 1925 for Australia and 29 July 1931 for New Zealand. The dates of initial territorial application are now mentioned in a foot-note. New Zealand is also considered to be a separate party to the Madrid Agreement (false indications of source) as from 10 January 1933.458

#### Ceylon

252. The United Kingdom first extended to its colony of Ceylon territorial application of the Paris Convention as from 10 June 1905 and the Madrid Agreement (false indications of source) as from 1 September 1913. When Ceylon became independent on 4 February 1948 the Washington texts (1911) of the Paris Convention and Madrid Agreement were in force in its territory.

253. In October 1952 the Prime Minister of Ceylon deposited an instrument of accession to the London texts (1934) of the Paris Convention and Madrid Agreement (false indications of source) with the Swiss Government. Accession took effect on 29 December 1952, one month after the date of the circular sent by the Swiss Government. In acceding to the above instruments Ceylon chose the sixth class of contribution. 460

254. During the intervening period between independence in 1948 and 1951, the Bureau continued to list Ceylon under the name of the United Kingdom along with other territories to which the United Kingdom extended territorial application, i.e., Tanganyika, Trinidad and Tobago, and Singapore.<sup>461</sup>

255. Since 1953, however, the Bureau lists Ceylon as having acceded to the Paris Union and being a separate party to the London texts (1934) of the Paris Convention and the Madrid Agreement (false indications of source) as from the effective date of accession, namely as from 29 December 1952. A note appended to the list of parties in the January issue of *La Propriété industrielle* mentions, since 1965, that prior to the attainment of independence by Ceylon the Paris Convention and the Madrid Agreement (false indications of source) had been applied to Ceylon as a territory of a contracting country as from 10 June 1905. 402

#### Tanzania

256. The territorial application of The Hague text (1925) of the Paris Convention was extended to the terri-

458 Industrial Property, January 1967, p. 8.

tory of Tanganyika as from 1 January 1938, and its London text (1934) was made applicable as from 28 January 1951.<sup>463</sup>

257. About fifteen months after attaining independence on 9 December 1961, *Tanganyika* acceded to the Lisbon text (1958) of the Paris Convention. As the Swiss Government's circular below indicates, the accession became effective on 16 June 1963.<sup>464</sup>

In compliance with the instructions of the Swiss Federal Political Department dated 16 May 1963, the Swiss Embassy has the honour to inform the Ministry of Foreign Affairs that its Government has received on 2 April 1963, the instrument of adhesion of the Republic of Tanganyika to the Convention of Paris for the Protection of Industrial Property of 20 March, 1883, as last revised at Lisbon on 31 October 1958.

In application of Article 16 (3) of the said Convention, the adhesion of Tanganyika will take effect on 16 June 1963.

With regard to its contribution to the common expenses of the International Bureau of the Union, this State is placed, at its request, in the Sixth Class, in accordance with Article 13 (8) and (9) of the Convention of Paris as revised at Lisbon.

258. In the January 1962 issue of La Propriété industrielle, the Bureau listed Tanganyika under the United Kingdom along with territories such as Trinidad and Tobago and Singapore; but in the January 1963 issue, Tanganyika was not mentioned at all. Since 1965, the Bureau has listed Tanzania (the union formed by Tanganyika and Zanzibar on 27 April 1964) as having acceded to the Paris Union and as being a party to the Lisbon text (1958) of the Paris Convention as from 16 June 1953. In listing Tanzania as such, the Bureau has indicated in a foot-note the territorial application of the Paris Convention made by the United Kingdom to Tanganyika as from 1 January 1938.

#### Trinidad and Tobago

259. The United Kingdom extended to its colony of *Trinidad and Tobago* territorial application of the Paris Convention as from 14 May 1908 and of the Madrid Agreement (false indications of source) as from 1 September 1913.<sup>467</sup> When *Trinidad and Tobago* attained independence on 31 August 1962, the Hague texts (1925) of these two instruments had been made applicable to its territory.<sup>468</sup>

260. Nearly two years after independence, Trinidad and Tobago addressed a communication to the Swiss Government confirming its "appartenance à l'Union internationale de Paris" and notifying its accession to the Lisbon text (1958) of the Paris Convention. This communication summarized in the Swiss Government's

<sup>459</sup> La Propriété industrielle, 1905, p. 73, and ibid., 1913, p. 105.

<sup>&</sup>lt;sup>460</sup> *Ibid.*, 1952, p. 177.

<sup>&</sup>lt;sup>461</sup> See January issues of *La Propriété industrielle*, 1949-1951 inclusive.

<sup>&</sup>lt;sup>462</sup> See January issues of *La Propriété industrielle*, 1953-1967 inclusive.

<sup>463</sup> La Propriété industrielle, 1951, pp. 1 and 3.

<sup>464</sup> Industrial Property, 1963, p. 94.

<sup>465</sup> Ibid., January 1962, p. 2 and ibid., 1963, p. 2.

<sup>&</sup>lt;sup>466</sup> Ibid., 1965, p. 6; ibid., 1966, p. 7; and ibid., 1967, p. 7. According to the Bureau, the question whether the Paris Convention has become applicable also to the former Zanzibar is under investigation.

<sup>467</sup> La Propriété industrielle, 1908, p. 49 and ibid., 1913, p. 105.

<sup>468</sup> Industrial Property, 1962, pp. 2 and 3.

circular which appeared in the July 1964 issue of *Industrial Property* as follows: 469

Trinidad and Tobago: Declaration of Membership of the International Union of Paris for the Protection of Industrial Property and of Adhesion to the Lisbon Text of the Convention

According to a communication received from the Federal Political Department, the following note was addressed by the Embassies of the Swiss Confederation in the countries of the Paris Union to the Ministries of Foreign Affairs of those countries:

In compliance with the instructions of the Swiss Federal Political Department dated 1 July 1964, the Swiss Embassy has the honour to inform the Ministry of Foreign Affairs that the Government of Trinidad and Tobago in a letter of May 14, 1964 (a copy of which is enclosed) has confirmed to the Swiss Government the membership of its country in the International Union of Paris for the Protection of Industrial Property by virtue of a declaration of application previously made in accordance with Article 16bis of the International Convention for the Protection of Industrial Property.

According to the above-mentioned letter the Government of Trinidad and Tobago further declares its adhesion to the Convention of Paris, as revised at Lisbon on October 31, 1958 In application of Article 16 (3) of the said Convention, the adhesion of Trinidad and Tobago will take effect on August 1, 1964.

With regard to its contribution to the common expenses of the International Bureau of the Union, this State is placed, according to its request, in the Sixth Class, for the purposes of Article 13 (8) and (9) of the Convention of Paris as revised at Lisbon.

As the last paragraph of the above note indicates, the Bureau considers *Trinidad and Tobago* as a new member of the Paris Union as from 1 August 1964, i.e., the effective date of accession. However, in the January issues of *La Propriété industrielle* for the years 1965 on, it is mentioned that the Convention had been applied to *Trinidad and Tobago* as a territory as from 14 May 1908.

261. It does not appear that *Trinidad and Tobago* mentioned territorial application formerly made by the United Kingdom of the Madrid Agreement (false indications of source) in the aforesaid communication, nor has it ever since stated its position as to whether the application of that Agreement lapsed upon independence. Since 1963, the Bureau has not listed *Trinidad and Tobago* as a party to this Madrid Agreement.<sup>470</sup>

(ii) Non-metropolitan territory for the international relations of which the Netherlands was responsible

#### Indonesia

262. The Netherlands first extended territorial application of the Paris Convention as from 1 October 1888, and the Hague Agreement, as from 1 June 1928, to the territory of Indonesia which was formerly called the Netherlands Indies.<sup>471</sup> About eight months after attaining independence, *Indonesia* sent two communications the content of which is summarized in the following circular of 24 November 1950 sent by the Swiss Government.<sup>472</sup>

The Federal Political Department has the honour to inform the Ministry of Foreign Affairs that, on the basis of article 5 of the Act of Transfer of Sovereignty concluded between the Kingdom of the Netherlands and the Republic of the United States of Indonesia on 27 December 1949, the Ministry of Foreign Affairs of that Republic has sent it two communications, dated 15 August and 20 October 1950 copies of which are attached hereto stating that the Convention for the Protection of Industrial Property, signed at Paris on 20 March 1883 and revised at London on 2 June 1934, the Agreement concerning the international deposit of industrial designs, signed at The Hague on 6 November 1925 and revised at London on 2 June 1934, and the Agreement concerning the conservation and restoration of industrial property rights affected by the Second World War, signed at Neuchâtel on 8 February 1947, together with the Final Protocol and the Additional Final Protocol annexed thereto,473 remain in force in the territory of that Republic, which considers itself bound separately, as an independent and sovereign State, by these Agreements concerning industrial property as from 27 December 1949, and wishes to be placed in the Fourth Class in respect of its contribution to the expenses of the International Bureau, according to the provisions of article 13 of the General Convention.

263. In the January issue of La Propriété industrielle of the following year, Indonesia was listed as a party to the Paris Convention as from 1 October 1888, and it was regarded as having been bound by its London text as from 5 August 1948. Likewise, Indonesia was regarded as a party to the Hague Agreement as from 1 June 1928 and as having been bound by its London text as from 5 August 1948. The following explanatory note, however, was added to the list of parties.<sup>474</sup>

It should be noted that Indonesia is bound separately, as an independent and sovereign State, by this instrument as from 27 December 1949, the date of the Act of Transfer of Sovereignty concluded between the Netherlands and Indonesia. It was formerly bound as a colony of the Netherlands, under the name of Netherlands East Indies.

264. The Bureau, however, seems to have changed its view lately. Since 1965, according to the list of parties in the January issue of *La Propriété industrielle*, *Indonesia* is regarded as having acceded to the Paris Union and been a party to the London texts of the Paris

<sup>469</sup> Page 139.

<sup>470</sup> Industrial Property, 1967, p. 8.

texts of the Paris Convention to the Netherlands Indies was as follows: Washington text (1911) as from 1 May 1913; The Hague text (1925) as from 1 June 1928; London text (1934) as from 5 August 1948. Application of the London text (1934) of The Hague Agreement took effect on 5 August 1948. (La Propriété industrielle, 1948, p. 125).

<sup>&</sup>lt;sup>472</sup> La Propriété industrielle, 1950, p. 222 (translation from the French by the United Nations Secretariat).

<sup>&</sup>lt;sup>473</sup> See para. 13, above and *La Propriété industrielle*, 1948, p. 126.

<sup>&</sup>lt;sup>474</sup> La Propriété industrielle, 1951, pp. 1 and 2 (translation from the French by the United Nations Secretariat).

Convention and the Hague Agreement only as from 24 December 1950, i.e. one month after the date of notification by the Swiss Government, although it is also indicated in a foot-note the dates as from which initial territorial application of the Paris Convention (1 October 1888) and of the Hague Agreement (1 June 1928) was made to Indonesia prior to the attainment of its independence.<sup>475</sup>

- (iii) Non-metropolitan territories for the international relations of which France was responsible
- 265. Territorial application of the Paris Union instruments by France to its non-metropolitan territories (i.e. overseas departments, territories and dependences) has been indicated in several different ways in the list of parties presented in the January issues of *La Propriété industrielle*. Until 1897, non-metropolitan territories of France to which the Paris Convention applied were specifically enumerated as follows: \*

France, together with Martinique, Guadeloupe and dependencies, Réunion and dependency (Sainte-Marie de Madagascar), Cochin China, St. Pierre and Miquelon, Guiana, Senegal and dependencies (Rivières-du-Sud, Grand Bassam, Assinie, Porto-Novo and Cotonou), the Congo and Gabon, Mayotte, Nossi Bé, the French settlements in India (Pondicherry, Chandernagore, Karikal, Mahe, Yanam), New Caledonia, the French settlements in Oceania (Tahiti and dependencies), Obock and Diego Suarez.<sup>476</sup>

266. The following note appended to the list of parties to the two Madrid Agreements implies that these instruments, to which France is an original party, also applied to the non-metropolitan territories of France; \*

Note. The two Agreements are also applicable in the respective colonies of the acceding countries designated as participating in the General Union of 1883.<sup>477</sup>

267. The above-mentioned specific enumeration was replaced by the expression "France, together with Algeria and its colonies" in the January issue of 1898, and since 1955 by the expression "France, including Algeria and all the Overseas Departments; Overseas Territories". After the formation of the French Community, the expression was changed to "France, including Overseas Departments and Territories, Algeria and States members of the Community" in 1960, and once again to "France, including metropolitan Departments, Algerian Departments, Saharan Departments, Departments of Guadeloupe, Guiana, Martinique and Réunion; Overseas Territories" in 1962.478

268. Since the end of the Second World War about nineteen new States have emerged out of these non-metropolitan territories of France to which the Paris Union instruments seemed to have been made applicable as from the following dates: 7 July 1884, in respect of the Paris Convention; 15 July 1892 in respect of the two Madrid Agreements; and 20 October 1930 in respect of the Hague Agreement. By the end of 1964, twelve of these nineteen new States have recognized, in one way or the other, the continued application of the Paris Convention in their territories; and one of these twelve, i.e. Viet-Nam alone, recognized such application not only in respect of the Paris Convention but also of three other special agreements.

#### Viet-Nam

269. From the wordings of the circular quoted below, 479 it appears that accession to the four instruments administered by the Paris Union communicated by *Viet-Nam* was construed by the Swiss Government as a declaration of continuity whereby accession previously given by France was replaced by accession of Viet-Nam without interruption:

Note of 8 November 1956 from the Swiss Federal Council (Federal Political Department) concerning the accession of Viet-Nam to the Acts of the International Union for the Protection of Industrial Property (declaration of continuity)

In compliance with the instructions of the Swiss Federal Political Department dated 8 November 1956, the Swiss Legation has the honour to inform the Ministry of Foreign Affairs that the Secretary of State for Foreign Affairs of the Republic of Viet-Nam has notified the President of the Swiss Confederation, in a letter dated 17 September 1956..., that Viet-Nam has acceded to the following Agreements:

- 1. The Convention for the Protection of Industrial Property, signed at Paris on 20 March 1883;
- 2. The Agreement for the prevention of false or misleading indications of source on goods, signed at Madrid on 14 April 1891;
- 3. The Agreement concerning the international registration of trademarks, signed at Madrid on 14 April 1891;
- 4. The Agreement concerning the international deposit of industrial designs, signed at The Hague on 6 November 1925.

The attached communication also constitutes a declaration of continuity, for now that Viet-Nam has become independent this accession replaces the accession of France to the aforementioned Acts (London texts of 2 June 1934), which in 1939 \* was also given in respect of the French Overseas Territories. Viet-Nam will thus participate without interruption in the Union of Paris for the Protection of Industrial Property and the restricted Unions Established by the Agreements of Madrid and The Hague.

Furthermore, the Ministry will note that Viet-Nam wishes to be placed in the Third Class for the purposes of its contribution to the expenses of the International Bureau for the Protection of Industrial Property.

270. In the January issue of 1957, the Bureau regarded Viet-Nam as having been bound by the four instruments mentioned above as from 25 June 1939. In the Janu-

<sup>\*</sup> Translation from the French by the United Nations Secretariat.

<sup>&</sup>lt;sup>475</sup> Industrial Property, 1967, pp. 6 and 7.

<sup>&</sup>lt;sup>476</sup> La Propriété Industrielle, 1896, p. 1.

<sup>&</sup>lt;sup>477</sup> Ibid. This note later disappears from the list of parties as the territories to which the Madrid Agreements applied were mentioned under the names of individual parties to the Agreement. See, for example, La Propriété industrielle, 1926, pp. 1 and 2.

<sup>&</sup>lt;sup>478</sup> See for instance, La Propriété industrielle, 1955, pp. 1 and 2, and circular note concerning the ratification by France of the Lisbon texts (1958) of the Paris Convention and the Madrid Agreement (false indications of source) and the Lisbon Agreement (La Propriété industrielle, 1961, pp. 97 and 98).

<sup>\*</sup> This accession took effect on 25 June 1939.

<sup>&</sup>lt;sup>479</sup> La Propriété industrielle, 1956, p. 213 (translation from the French by the United Nations Secretariat).

ary issues of 1958 to 1964 inclusive, however, the Bureau regarded Viet-Nam as having been bound by the four instruments as from the dates of their original entry into force. In the 1965 January issue, the Bureau once again changed its listing with regard to Viet-Nam; the Bureau listed Viet-Nam as having acceded to the Paris Union and been a separate party to the London texts (1934) of the four instruments referred to above as from 8 December 1956, i.e., one month after the dates of the aforementioned notification by the Swiss Government. As far as the date of the initial territorial application is concerned, the Bureau indicated in the 1967 January issue: (a) that the Paris Convention was applied to Viet-Nam as a territory (without mentioning the effective date); (b) that the dates from which the territorial application of the Madrid Agreements commenced in Viet-Nam were "en cours de vérification": (c) that the application of the Hague Agreement in Viet-Nam dates from 20 October 1930.480

Cameroon, Central African Republic, Chad, Congo (Brazzaville), Dahomey, Gabon, Ivory Coast, Laos, Madagascar, Mauritania, Niger, Senegal, Togo, Upper Volta

271. From the wording of the circulars sent by the Swiss Government on the actions taken by these fourteen new States born out of former non-metropolitan territories of France, it appears that such new States communicated their confirmation of the continued application of the London text (1934) of the Paris Convention previously made applicable to their territories by France and at the same time their accession to its Lisbon text (1958). For the purpose of reference, two notes published in La Propriété industrielle on the cases of the Congo (Brazzaville) and the Ivory Coast are reproduced below because of some difference in the wordings employed therein.

Declaration of Continuity and of Adhesion of the Republic of the Congo (Brazzaville) to the Paris Convention for the Protection of Industrial Property (London and Lisbon Texts) 481

The following communication has been received from the Swiss Federal Political Department:

In compliance with the instructions of the Swiss Federal Political Department dated 2 August 1963, the Swiss Embassy has the honour to inform the Ministry of Foreign Affairs that the Government of the Republic of the Congo (Brazzaville), in a letter dated 26 June 1963, addressed to the President of the Swiss Confederation, declared the Paris Convention for the Protection of Industrial Property, signed at Paris on 20 March 1883, and revised at Brussels on 14 December 1900, at Washington on 2 June 1911, at The Hague on 6 November 1925, and at London on 2 June 1934, applicable to that State by virtue of its former ratification by France.

In the above-mentioned letter, the Congolese Government further declares its adhesion to the Convention of Paris, as revised at Lisbon on 31 October 1958. In application of Article 16 (3) of the said Convention, the adhesion of the Republic of the Congo will take effect on 2 September 1963.

With regard to its contributions to the common expenses of the International Bureau of the Union, this State is placed, at its request, in the Sixth Class, for the purpose of Article 13 (8) and (9) of the Convention of Paris as revised at Lisbon.

Ivory Coast: Declaration of Membership of the International Union of Paris for the Protection of Industrial Property and of Adhesion to the Lisbon Text of the Convention 482

The following communication has been received from the Swiss Federal Political Department:

In compliance with the instructions of the Swiss Federal Political Department dated 23 September 1963, the Swiss Embassy has the honour to inform the Ministry of Foreign Affairs that the Government of the Republic of the Ivory Coast, in a letter dated 9 August 1963, addressed to the President of the Swiss Confederation, has confirmed the membership of this State to the International Union of Paris for the Protection of Industrial Property by virtue of a declaration of application previously made in accordance with Article 16bis of the International Convention for the Protection of Industrial Property.

According to the above-mentioned letter, the Government of the Ivory Coast further declares its adhesion to the Convention of Paris, as revised at Lisbon on 31 October 1958. In application of Article 16 (3) of the said Convention, the adhesion of the Republic of the Ivory Coast will take effect on 23 October 1963.

With regard to its contribution to the common expenses of the International Bureau of the Union, this State is placed, at its request, in the Sixth Class, for the purposes of Article 13 (8) and (9) of the Convention of Paris as revised at Lisbon.

272. The information on the positions taken by the twelve other new States was given in similar wording to that employed in the above note on the *Ivory Coast*. Some relevant data on all these former territories, e.g., the dates of communication by new States, dates of circulars sent by the Swiss Government and so forth, are presented in table I.

273. The Bureau listed in the January issue of 1964 those new States which communicated their declaration on continuity and accession during the year 1963 as having acceded to the Paris Union as members as from the effective dates of their accession to the Lisbon text (1958) of the Paris Convention, i.e., one month after the dates of circulars shown in table I. The listing is presented in a similar way in the January issue of 1965 with an editorial note that the commencement dates of territorial application made prior to their independence are "en cours de vérification". The 1966 and 1967 January issues indicate that the Paris Convention was applied to these former territories "à partir de dates diverses". 483

274. Inasmuch as these fourteen new States have not yet stated their position vis-à-vis three other instruments i.e. two Madrid Agreements and the Hague Agreement the London texts of which had previously

<sup>&</sup>lt;sup>180</sup> *Ibid.*, 1930, p. 193; *Industrial Property*, January 1966, pp. 7-10; *ibid.*, January 1967, pp. 7-10.

<sup>&</sup>lt;sup>481</sup> Industrial Property, 1963, p. 167.

<sup>&</sup>lt;sup>482</sup> Ibid., 1963, p. 214. Note that the expression "Membership of the International Union" is used for the French phrase "appartenance à l'Union internationale".

<sup>&</sup>lt;sup>483</sup> See *Industrial Property*, 1966, pp. 6 and 7, and *ibid.*, 1967, pp. 6 and 7.

Table I

Dates of communication from new States and circulars of the Swiss Government

	(a)	(b)	(c)	(d)
Cameroon	10 Feb. 1964	President	10 Apr. 1964	('64) p. 66
Central African Republic .	5 Oct. 1963	President	19 Oct. 1963	('63) p. 214
Chad	11 Sept. 1963	President	19 Oct. 1963	('63) p. 214
Congo (Brazzaville)	26 June 1963	Government	2 Aug. 1963	('63) p. 166
Dahomey	22 Sept. 1966	President	10 Dec. 1966	('66) p. 283
Gabon	16 Nov. 1963	President	29 Jan. 1964	('64) p. 22
Ivory Coast	9 Aug. 1963	Government	23 Sept. 1963	('63) p. 214
Laos	17 Sept. 1963	Foreign Minister	19 Oct. 1963	('63) p. 214
Madagascar	7 Oct. 1963	Government	21 Nov. 1963	('63) p. 235
Mauritania	26 Oct. 1964	President	11 Mar. 1965	('65) p. 46
Niger	10 Sept. 1963	Government	5 June 1964	('64) p. 118
Senegal	16 Oct. 1963	Government	21 Nov. 1963	('63) p. 235
Togo	11 July 1967	President	10 Aug. 1967	('67) p. 203
Upper Volta	17 Sept. 1963	President	19 Oct. 1963	('63) p. 214

#### Notes:

(a) Dates of communication from new States on "continuité et adhésion".

(b) Organs of new States which addressed the above communication. Cases where such organ is not mentioned in the circular are shown with "Government".

(c) Dates of circulars sent by the Swiss Government.

(d) Source reference: ('63), ('64), etc., are meant Industrial Property, 1963 and ibid., 1964, etc.

been made applicable to their territories as from 25 June 1939, the present status of these instruments in their territories remains uncertain.

275. With regard to the case of *Cameroon*, it may be added that the British Government never extended territorial application of the Paris Union instruments to the former "Southern Cameroon", part of the Trust Territory administered by the British Government, which was united with Cameroon (independent since 1 January 1960), to become the present internal division known as "West Cameroon" as from 1 October 1961.

- (b) Cases where the territorial application of the instruments lapsed as from the date of independence of New States
  - (i) Part of a former British mandate

#### Israel

276. In accordance with article 16bis the United Kingdom extended territorial application of the Hague texts (1925) of the Paris Convention and Madrid Agreement (false indications of source) to Palestine (excluding Transjordan) as from 12 September 1933.<sup>484</sup>

277. About a year and a half after the proclamation of independence (15 May 1948), *Israel* communicated its accession to the London texts (1934) of the above two instruments along with a declaration whereby the Israel Government considered itself bound by the instruments retroactively as from 15 May 1948. Some reasons given by *Israel* for making such declaration and the views of the Bureau and Swiss Government are

summarized in the circular dated 24 February 1950 which reads in part: 485

The Federal Political Department has the honour to inform the Ministry of Foreign Affairs that, in a note dated 14 December 1949, the Israel representative at the European Office of the United Nations gave notice of the accession of his Government to the Paris Convention for the Protection of Industrial Property and the Madrid Agreement for the prevention of false or misleading indications of source on goods, as revised at London on 2 June 1934, and to the Neuchâtel Agreement of 8 February 1947 concerning the conservation or restoration of industrial property rights affected by the Second World War [see para. 13 above].

With regard to the sharing of the expenses of the International Bureau, the State of Israel wishes to be placed in the fifth of the classes provided for in article 13 (8) of the Convention.

As to the date from which these accessions shall take effect, it would appear from a further statement from the Ministry of Foreign Affairs at Hakirya, on 1 December 1949, that the Israel Government considers itself bound by the aforementioned texts as from 15 May 1948, the day on which the State of Israel was proclaimed independent. The Ministry bases its argument on the special situation of the State of Israel, on the format obstacles to its earlier accession and on the fact that Palestine was a party to the Convention and to the Agreements of Madrid and Neuchâtel.

The Political Department and the Bureau of the International Union for the Protection of Industrial Property consider this declaration convenient, since it avoids any interruption between the terms of accession of Palestine, which as a country under United Kingdom Mandate, acceded to the Paris Convention and the Madrid Agreement on 12 September 1933 and to the Neuchâtel Agreement on 19 May 1947, and those of the accession hereby notified by the State of Israel. In agreement with the International Bureau, the Political Department therefore pro-

<sup>484</sup> La Propriété industrielle, 1933, p. 129.

<sup>&</sup>lt;sup>485</sup> Ibid., 1950, p. 23 (translation from the French by the United Nations Secretariat).

poses, unless advised to the contrary before 24 March 1950, that the accessions of the State of Israel shall take effect from 15 May 1948.

. . .

278. As the circular quoted below indicates, the Israel declaration did not receive unanimous approval of the contracting countries, and therefore 24 March 1950 was considered to be the effective date of accession by Israel: 485

### Circular (dated 27 May 1950)

Further to its note of 24 February last relating to the proposal to allow the State of Israel to accede to the Paris Convention for the Protection of Industrial Property, revised at London on 2 June 1934, with retroactive effect from 15 May 1948, the Federal Political Department has the honour to inform the Ministry of Foreign Affairs that this proposal has not been accepted with the necessary unanimity by the contracting countries.

In the circumstances, the accession cannot occur except under the provisions of article 16 (3) of the said Convention, that is, with effect from 24 March 1950.

The accession of the State of Israel to the Madrid Agreement for the prevention of false or misleading indications of source on goods, as revised at London on 2 June 1934, and to the Neuchâtel Agreement of 8 February 1947 concerning the conservation or restoration of industrial property rights affected by the Second World War became effective on the same date.

279. In the January issues of 1949 and 1950, the Bureau continued to list as before Palestine (excluding Transjordan) among the territories under the name of the United Kingdom and it was regarded as having been bound by the Hague texts of the Paris Convention and Madrid Agreement (false indications of source) as from 12 September 1933. Starting with the 1951 January issue of La Propriété industrielle, however, the Bureau has listed Israel as a separate member of the Paris Union and a separate party to the London texts of these instruments as from 24 March 1950. Furthermore, an editorial note appended to Israel in the list of parties since the 1965 January issue observes that the territorial application to Palestine (excluding Transjordan) lasted for the period 12 September 1933 to 15 May 1948.487

#### (ii) Former French department

Algeria

280. By virtue of territorial application made by France, various texts of the five instruments enumerated in table II had been applicable to *Algeria* prior to its independence on 3 July 1962.

Table II

Territorial application of Paris Union instruments to Algeria made prior to its independence

	Text (year)	Effective date	Source reference
Paris Convention, 1883	Lisbon (1958)	4 Jan. 1962	('61) pp. 97 and 98
1892	London (1934)	25 Jun. 1939	('39) p. 86
Madrid Agreement (registration), 1892 .	London (1934)	25 Jun. 1939	('39) p. 86
The Hague Agreement, 1925	London (1934)	25 Jun. 1939	('39) p. 86
Nice Agreement, 1957	Nice (1957)	29 Apr. 1962	('62) p. 98

Note — Source reference: by ('61), ('39) and ('62) are meant Industrial Property Quaterly, 1961, La Propriété Industrielle, 1939 and Industrial Property, 1962.

281. In addition, the Lisbon text (1958) of the Madrid Agreement (false indications of source), the Nice text (1957) of the Madrid Agreement (registration of trademarks) and the original text of the Lisbon Agreement (1958) were accepted by France on behalf of its overseas departments and territories including Algerian departments.<sup>488</sup> These particular texts, however, did not enter into force before *Algeria* attained independence.

282. As indicated in the notification of the Swiss Government quoted below, the Government of Algeria acceded to the Lisbon text of the Paris Convention during September 1965.<sup>489</sup>

In compliance with the instructions of the Federal Political Department, dated November 5, 1965, the Swiss Embassy has the honour to inform the Ministry of Foreign Affairs that the Embassy of the Democratic and Popular Republic of Algeria in Berne, in a note dated September 16, 1965, informed the Political Department of the adhesion of its country to the Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, and at Lisbon on October 31, 1958.

In accordance with Article 16 (3) of the said Convention and at the express request of the Algerian Government, this adhesion will take effect on March 1, 1966.

<sup>&</sup>lt;sup>486</sup> Ibid., p. 117 (translation from the French by the United Nations Secretariat).

<sup>&</sup>lt;sup>487</sup> Industrial Property, January 1965, pp. 5-7.

<sup>&</sup>lt;sup>488</sup> Ratification of the Lisbon text (1958) of Madrid Agreement (false indications of source) and Lisbon Agreement (1958) given by France on 22 March 1961 included declaration of territorial application (see *Industrial Property Quarterly*, July 1961, p. 147). Territorial application of the Nice text (1957) of Madrid Agreement (registration of trademarks) was communicated by France on 25 January 1962 (see *Industrial Property*, 1962, p. 90).

<sup>489</sup> Industrial Property, 1965, p. 239.

With regard to its contribution to the expenses of the International Bureau of the Union, this State is placed, at its request, in the Fourth Class for the purposes of Article 13 (8) and (9) of the Paris Convention as revised at Lisbon.

283. Inasmuch as the Government of Algeria did not make a declaration of continuity regarding the former territorial application of the Lisbon text of the Convention, it appears that such application lapsed as of the date of independence. The Bureau of the Paris Union lists Algeria as a member of the Union and a party to the Lisbon text (1958) of the Paris Convention as of 1 March 1966 and does not refer to the former territorial application. 490

### (c) Cases where the application of the instruments is uncertain

(i) Non-metropolitan territories for the international relations of which France was responsible

#### Cambodia, Guinea, Mali

284. The London texts (1934) of the Paris Convention, the two Madrid Agreements and the Hague Agreement were made applicable by France to the territories of *Cambodia*, *Guinea* and *Mali*, as from 25 June 1939.<sup>491</sup> Since independence these three new States have not as yet stated their position vis-à-vis the Paris Union instruments, and the names of these States have never appeared on the list of parties prepared by the Bureau.

 (ii) Non-metropolitan territory for the international relations of which the United Kingdom was responsible

#### Singapore

285. The territorial application of the London text (1934) of the Paris Convention was extended to Singapore by the United Kingdom as from 12 November 1949. The Government of Malaysia, which was formed out of former Malaya, Sabah, Sarawak and Singapore on 16 September 1963, did not express its position as to the territorial application previously made to Singapore. Since its independence from Malaysia, the Government of Singapore has not pronounced its position as to the fate of the territorial application of the London text of the Paris Convention.

#### (iii) Former Trust Territory of New Zealand

#### Western Samoa

286. Territorial application of the Hague text (1925) of the Paris Convention was first extended to Western Samoa as from 29 July 1931, 193 and the London texts (1934) of the Paris Convention and the Madrid Agreement (false indications of source) were made applicable

as from 14 July 1946 and 17 May 1947, respectively. Since independence (i.e., 1 January 1962), Western Samoa has not yet stated its position on these two instruments formerly applied in its territory.

(iv) Non-metropolitan territories for the international relations of which Japan was responsible

#### Formosa, Korea

287. The London text (1934) of the Paris Convention was made applicable to Korea and Formosa from 1 August 1938. The Bureau continued to list these territories under the name of Japan until 1951; and in the 1951 January issue of La Propriété industrielle a foot-note "Situation incertaine" was added to their names. Since then no reference has been made to Formosa and Korea in the list of members and parties published in the January issues of La Propriété industrielle. 495

### 2. COUNTRIES OF THE UNION OR CONTRACTING COUNTRIES 496

- (a) CONTINUITY IN MEMBERSHIP AND IN THE APPLICATION OF MULTILATERAL INSTRUMENTS ADMINISTERED BY THE PARIS UNION
  - (i) Dissolution of a State grouping two contracting countries

#### Austrian-Hungarian Empire

288. In 1908 the Legation of Austria-Hungary at Berne notified the Swiss Government of the accession of Austria and Hungary to the Brussels texts (1900) of the Paris Convention and the Madrid Agreement (registration of trademarks); their accession took effect on 1 January 1909.<sup>497</sup> With regard to the class of contribution, the notification reads: "... Chacun des deux pays doit être rangé dans la première classe". Inasmuch as Austria and Hungary were thus already participating in the Paris Union as two separate members, dismemberment of Austria-Hungary following the First World War did not affect their status within the Paris Union and the restricted union established by the Madrid Agreement (registration of trademarks).<sup>485</sup>

<sup>&</sup>lt;sup>490</sup> Ibid., 1967, p. 6.

<sup>&</sup>lt;sup>491</sup> La Propriété industrielle, 1939, p. 86.

<sup>492</sup> Ibid., 1949, p. 154.

<sup>493</sup> See note 454, above.

<sup>494</sup> La Propriété industrielle, 1946, p. 169, and ibid., 1947, p. 49.

<sup>&</sup>lt;sup>495</sup> From a brief, unofficial notice gazetted in *La Propriété* industrielle, 1958, p. 100, it would appear that a Japanese patent was susceptible of being revalidated in *Formosa* provided that it had been issued on application made before 30 September 1951.

<sup>&</sup>lt;sup>498</sup> For divided Germany see La Propriété industrielle, 1950, pp. 21, 22 and 150; ibid., 1951, pp. 37 ff; ibid., 1955, p. 198; ibid., 1956, pp. 21 ff, 41 ff, 153, 154 and 193; ibid., 1957, pp. 3 and 4; Industrial Property, 1964, p. 254; and ibid., 1967, pp. 6-10 and 75; and Industrial Property Quarterly, 1956, pp. 9 and 10; and ibid., 1957, pp. 2-8. In connexion with the Saar see La Propriété industrielle, 1950, pp. 124, 128, 238 and 245, ibid., 1958, p. 223; and ibid., 1959, p. 1, note 4 and p. 169.

<sup>&</sup>lt;sup>497</sup> La Propriété industrielle, 1908, p. 173.

<sup>498</sup> Ibid., 1919, pp. 1 and 2,

(ii) Restoration of independence of a contracting country after annexation by another contracting country

#### Austria

289. When the annexation of Austria by Germany took place on 13 March 1938, both Austria and Germany had been party to the Hague text (1925) of the Paris Convention and the original text (1891) of the Madrid Agreement (registration of trademarks) as from 1 May 1928.<sup>490</sup> Germany, however, had also been party to the original text (1891) of the Madrid Agreement (false indications of source) as from 12 June 1925 and to the Hague Agreement (1925) as from 1 June 1928.<sup>500</sup> After the annexation Germany became party to the London texts (1934) of the Paris Convention and the Madrid Agreement (false indications of source) as of 1 August 1938, and to the London texts (1934) of the Madrid Agreement (registration of trademarks) and the Hague Agreement as of 13 June 1939.<sup>501</sup>

290. After the restoration of Austria's independence following World War II, the Austrian Government deposited an instrument of accession to the London texts (1934) of the Paris Convention and the Madrid Agreement (registration of trademarks) which took effect as of 19 August 1947.<sup>502</sup> Since January 1848, the International Bureau lists Austria as a member of the Paris Union and the restricted union established by the Madrid Agreement (registration of trademarks) as from 1 June 1928, even though Austria was not listed among the members in the January issues of La Propriété industrielle of the intervening years, i.e., from 1939 to 1947 inclusive. Application of the Madrid Agreement (false indications of source) and the Hague Agreement in the territory of Austria, which was implied by German acceptance of these instruments as from 1 August 1938, did not survive the restoration of the independence of Austria. Austria is not listed by the Bureau as a party to the Madrid Agreement (false indications of source) and the Hague Agreement. 503

### (iii) Attainment of independence by a contracting country

#### Tunisia

291. Tunisia, which had been a French protectorate for the period 1881 to 1956, became a member of the Paris Union by way of accession dated 20 March 1884.<sup>504</sup> At the time of the Madrid Conference held in 1890, Tunisia was represented by France, and the plenipotentiary from France signed the two Madrid Agreements in 1891 in the name of Tunisia as well as

499 Ibid., 1928, p. 98.

on behalf of France.<sup>505</sup> Tunisia ever since has been regarded as an original party to the Madrid Agreements. Tunisia also became a party to the Hague Agreement of 1925 by virtue of accession made by France on its behalf in 1930.<sup>506</sup> All the revised texts of the abovementioned four instruments, i.e., the Paris Convention, the two Madrid Agreements and the Hague Agreement, subsequently adopted in 1900, 1925 and 1934 where-ever applicable, have been likewise accepted by France in the name of Tunisia.<sup>507</sup>

292. After attaining independence *Tunisia* continued to be listed by the Bureau as a separate member of the Paris Union as from 7 July 1884, of the two restricted Unions established by both Madrid Agreements as from 15 July 1892 and of the restricted union established by the Hague Agreement as from 20 October 1930. Its accession to the London texts (1934) of all these instruments is considered effective since 4 October 1942. Recently *Tunisia* acceded to the Nice Agreement (1957), with effect from 29 May 1967, and ratified the Nice text (1957) of the Madrid Agreement (registration of trademarks), with effect from 28 August 1967.

(iv) Attainment of independence by a contracting country and incorporation in the new independent State of another contracting country and a former territory of the Union

#### Morocco

293. When an independent Moroccan State was formed in 1956 out of three separate territorial entities formerly called the "French zone of Morocco", the "Spanish zone of Morocco" and the "International zone of Tangier", <sup>511</sup> the Paris Convention, Madrid Agreement (false indications of source), Madrid Agreement (registration of trademarks) and the Hague Agreement had been in force in these three entities. In the French zone of Morocco (which had been a separate party to the Paris Convention ever since it acceded to the Washington text (1911) in 1917) <sup>512</sup> and in Tangier (which had been a separate party to the Paris Convention ever since it acceded to the Hague text (1925) in 1936), <sup>513</sup> the London texts (1934) of the aforementioned four instru-

<sup>500</sup> Ibid., 1929, pp. 1 and 2.

<sup>501</sup> Ibid., 1940, pp. 1 and 2.

<sup>502</sup> Ibid., 1947, pp. 129 and 130.

<sup>&</sup>lt;sup>503</sup> Industrial Property, 1967, pp. 8 and 9.

p. 11. This date of accession, incidentally, was before the Paris Convention entered into force on 15 July 1884.

suivis des Actes signés en 1891 et ratifiés en 1892, pp. 5, 191 and 198.

<sup>506</sup> La Propriété industrielle, 1930, p. 193.

 $<sup>^{507}</sup>$  Ibid., 1942, pp. 1 and 2; ibid., 1947, pp. 1 and 2; and ibid., 1958, pp. 1 and 2.

<sup>508</sup> Industrial Property, 1967, pp. 6-10.

<sup>509</sup> Ibid., p. 103.

<sup>510</sup> Ibid., p. 161.

<sup>&</sup>lt;sup>511</sup> Upon relinquishing administrative powers of the French zone, France recognized Moroccan independence as of 2 March 1956. Administrative powers of Spain in the Spanish zone were transferred to Morocco as of 7 April 1956. Following the Fedala Conference held on 8 October 1956, the international zone of Tangier came under Moroccan control as of 29 October 1956.

<sup>&</sup>lt;sup>512</sup> La Propriété industrielle, 1917, p. 81.

<sup>513</sup> Ibid., 1936, pp. 21-23.

ments had been in force since 1941 and 1939, respectively; and in the Spanish zone of Morocco the Hague texts (1925) of the same four instruments had been in force since 1928 by virtue of a declaration of territorial application made by Spain.<sup>514</sup>

294. The January 1957 issue of *Industrial Property Quarterly* 515 carried the following memorandum prepared by the Bureau of the status of *Morocco* in the Paris Union:

Considerable changes have taken place in North Africa following recent events which have substantially altered the political status of the Protectorates of French Morocco and Spanish Morocco, and Tangier. These changes affect their relationship to the International Union, but the provisions of the Convention and the Arrangements will continue to apply in each of the former territories.

As a consequence of the Franco-Moroccan Treaty of 2nd March, 1956, and the Spanish-Moroccan Treaty of 7th April, 1956, the former French Zone and the former Spanish Morocco have ceased to exist and these territories have become fully independent of France and Spain.

Furthermore, at the International Conference of Fedala on the 8th October, 1956, it was decided that the former International Control of Tangier was to be abolished.

Henceforth all three territories will together form the independent Cherifian Empire of Morocco.

French Morocco and Tangier were already full members of the International Union and Spanish Morocco was a territory to which the Convention had been applied as a Protectorate of Spain. It therefore seems clear that, so far as the Union is concerned, Tangier will cease to be an independent member of the Union but that the reorganized State of Morocco will continue to be a member as it has been since 1917. The territory of the new State will include all the territory to which the Convention formerly applied.

We are informed that the Patent Office at Tangier will shortly cease to function and that the industrial property administration will be placed under the Ministry of Commerce of the Moroccan Government.

295. The January issues of La Propriété industrielle of 1957 to 1967 inclusive list Morocco as a party to the Paris Convention, Madrid Agreement (false indications of source) and Madrid Agreement (registration of trademarks) as from 30 July 1917,516 and to the Hague Agreement as from 20 October 1930 517 as well as having acceded to the London texts (1934) of all these instruments with effect as from 21 January 1941.518 In 1967 Morocco acceded to the

Lisbon texts (1958) of the Paris Convention and the Madrid Agreement (false indications of source) with effect as from 15 May 1967. Following the Swiss Government's circular notes on the accession of *Morocco* to the above-mentioned Lisbon texts, the April 1967 issue of *Industrial Property* explains 519 that "as a result of these notifications, Morocco is now bound by the Acts of Lisbon, as well as the previous Acts".

## (v) Formation and dissolution of a State by two contracting countries

United Arab Republic

296. The position taken by the *United Arab Republic* (formed by the Union of Egypt and Syria on 22 February 1958, and dissolved on 28 September 1961) is indicated in the two notes reproduced below (translations from the French by the United Nations Secretariat): <sup>520</sup>

Notes of the Swiss Federal Council (Political Department) concerning the United Arab Republic (the first note is dated 16 June 1960)

In compliance with the instructions of the Swiss Federal Political Department dated 16 June 1960, the Swiss Embassy has the honour to inform the Ministry of Foreign Affairs that according to the note dated 2 February 1960 addressed to the Swiss Embassy at Cairo by the Ministry of Foreign Affairs of the United Arab Republic, a copy of which is attached, that Republic will henceforth replace Egypt and Syria as a member country of the Paris Union for the Protection of Industrial Property. With regard to its contribution to the expenses of the Bureau of the Union, the Government of the United Arab Republic has chosen the fourth of the classes provided for in article 13 (8) of the Paris Convention for the Protection of Industrial Property, as revised at London on 2 June 1934.

The effects of this merger must logically be extended to the restricted Union of Madrid for the prevention of false or misleading indications of source on goods. With regard to the restricted Union of Madrid for the international registration of trademarks and the restricted Union of The Hague for the international deposit of industrial designs, of which only Egypt was hitherto a member, the Swiss Government will address further inquiries to the Government of the United Arab Republic regarding the exact territorial scope of the constitutive Agreements of these two Unions. Unless a contrary view is expressed by the Government of the United Arab Republic, there would be grounds for concluding that the Agreements in question will apply only to the Egyptian Province of that Republic. . . .

### Supplementary note

Further to its note of . . . concerning the merger of Egypt and Syria in a single member country of the Paris Union for the Protection of Industrial Property, the Swiss Embassy has the honour to transmit herewith to the Ministry of Foreign Affairs copies of two further notes concerning this question, dated 27 April and 3 May 1960 respectively, which have been addressed to the Swiss Embassy at Cairo by the Ministry of Foreign Affairs of the United Arab Republic.

The first of these communications confirms that the Madrid Agreement concerning the international registration of trademarks and The Hague Agreement concerning the international deposit of industrial designs, both revised at London on

<sup>314</sup> Ibid., 1928, pp. 145 and 214.

<sup>&</sup>lt;sup>515</sup> Page 10.

<sup>&</sup>lt;sup>518</sup> The date on which the French zone of Morocco became party to the Washington texts (1911) of these three instruments (see *La Propriété industrielle*, 1917, p. 81).

<sup>&</sup>lt;sup>517</sup> The date on which the French zone of Morocco became party to the Hague text (1925) of this Agreement (see *La Propriété industrielle*, 1930, p. 193).

<sup>&</sup>lt;sup>518</sup> Industrial Property, January 1967, pp. 6-10. The following note, appended to the "List of Member States" in the January issues from 1957 until 1964, has not appeared in the January issues since 1965:

<sup>&</sup>quot;The Industrial Property Laws and the Offices of the three parts of this Unionist country (former French and Spanish Protectorates and Zone of Tangier) have not yet been co-ordinated."

<sup>&</sup>lt;sup>519</sup> Industrial Property, April 1967, p. 74.

<sup>520</sup> La Propriété industrielle, 1960, p. 102.

2 June 1934, still apply only to the Egyptian Province of the United Arab Republic. The second communication states that the financial consequences of the merger took effect on 1 January 1959....

297. So far as the listing of the parties in La Propriété industrielle is concerned, Egypt and Syria were listed separately as before in the January issue of 1959; in the January issues of 1960 and 1961, the United Arab Republic was listed along with its subdivisions, "Province d'Egypte" and "Province de Syrie" with regard to the Paris Convention and the Madrid Agreement (false indications of source), and with one of its subdivisions, i.e., "Province d'Egypte" in respect of the Madrid Agreement (registration of trademarks) and The Hague Agreement. It appears that since the dissolution of the union on 28 September 1961 no communication has been received by the Swiss Government from the Syrian Arab Republic (formerly Province de Syrie). However, La Propriété industrielle listed since 1962 the Syrian Arab Republic and the United Arab Republic (formerly Province d'Egypte) as separate members of the Paris Union and separate parties to the Madrid Agreement (false indications of source) and the United Arab Republic as a party to the Madrid Agreement (registration of trademarks) and The Hague Agreement.<sup>521</sup> The Syrian Arab Republic is considered as having acceded to the Paris Union and been bound by the Madrid Agreement (false indications of source) as from 1 September 1924 and as having acceded to the London texts (1934) of the Paris Convention and the Madrid Agreement (false indications of source) with effect from 30 September 1947.522 The United Arab Republic is considered as former Egypt to be a member of the Paris Union to the London text (1934) of the Paris Convention since 1 July 1951 and to be bound by the London texts (1934) of the Madrid Agreement (false indications of source), the Madrid Agreement (registration of trademarks) and The Hague Agreement as from 1 July 1952. Recently, the United Arab Republic acceded to the Nice text (1957) of the Madrid Agreement (registration of trademarks) with effect from 15 December 1966.

- (b) Change in membership and continuity in the application of multilateral instruments administered by the Paris Union
- Division of a contracting country into two separate contracting countries following the attainment of their independence

Lebanon and Syria

298. By a note dated 18 June 1924 the Government of France communicated accession to the Washington texts (1911) of the Paris Convention and the Madrid Agreement (false indications of source) on behalf of a group of countries called "Etats de la Syrie et du Liban", which had been under mandate of the League of Nations

as from 23 September 1923. In the same note the French Government requested that this group of countries should be placed in the sixth class of contribution to the expenses of the Bureau. The Swiss Government, however, made the following observation concerning the status of this group of countries in the régime of the Paris Union: 523

... we believe it our duty to point out that, as the status of mandated countries was not clarified in the system of the Industrial Union either from the point of view of their rights (representation), or from that of their obligations (financial contributions), it seems appropriate that a uniform decision regarding the two aspects should be taken for all countries in this category at the next revision Conference provided for in article 14 of the General Convention.\*

299. One paragraph relevant to the above question may appropriately be quoted below from the report of the first Sub-Committee of the Hague Conference held in 1925: 524

The Chairman opened the discussion on the amendment to article 16bis proposed by Great Britain. 525 The Director of the International Bureau explained that countries under League of Nations mandate did not pay contributions as members of the Union and did not have the right to vote, being represented for those purposes by the Mandatory Power concerned. No objections were raised to that explanation or to the amendment proposed by Great Britain. The Chairman therefore stated that the amendment was accepted unanimously.\*

In fact, Syria and Lebanon were not represented at the Hague Conference, although the Hague texts (1925) of the Paris Convention and the Madrid Agreement (false indications of source) were signed on their behalf by the French delegate at the close of the Conference. Accession to these two instruments was later made by France in the name of Syria and Lebanon in 1930. 527

300. After becoming independent, *Lebanon* and *Syria* acceded to the London texts (1934) of the abovementioned two multilateral instruments by way of a note dated 19 February 1946 and 5 July 1947, respectively. These accessions became effective as from 30 September 1947. Part I of the circular of the Swiss Government concerning accession by Lebanon, dated 30 August 1947, reads: <sup>528</sup>

The Federal Political Department, International Organizations, has the honour to inform the Ministry of Foreign Affairs that

<sup>&</sup>lt;sup>521</sup> Industrial Property, 1967, pp. 6-9.

<sup>522</sup> See paras. 298-301, below.

<sup>\*</sup> Translation from the French by the United Nations Secretariat.

<sup>523</sup> La Propriété industrielle, 1924, pp. 149 and 150.

<sup>521</sup> Acte de la Conférence réunie à La Haye (1925), p. 420.

<sup>&</sup>lt;sup>525</sup> By this amendment countries under the League Mandate were added to various categories of dependencies mentioned in the territorial application clause of article 16 bis (see note 430, above).

s26 Acte de la Conférence réunie à La Haye (1925), pp. 371 and 599 ff. The situation was the same at the time of the London Conference (1934) (see Actes de la Conférence réunie à Londres (1934), pp. 311 and 540 ff.).

<sup>527</sup> La Propriété industrielle, 1930, p. 222.

<sup>&</sup>lt;sup>528</sup> Part II concerning accession by *Syria* repeats *mutatis mutandis* the same statement as part I (*La Propriété industrielle*, 1947, p. 150).

by a note dated 19 February 1946, the Legation of Lebanon in France has notified the Swiss Federal Council of the accession of the Lebanese Government to the Paris Convention for the Protection of Industrial Property of 20 March 1883, last revised at London on 2 June 1934, and to the Madrid Agreement for the prevention of false or misleading indications of source on goods, of 14 April 1891, last revised at London on 2 June 1934.

In accordance with articles 16 and 18 (2) of the Paris Convention (London text), the two accessions in question shall take effect one month after the date of the present notification, that is from 30 September 1947.

So far the Lebanese Republic has been bound by the Hague texts of these Agreements, of 6 November 1925.

With regard to its contribution to the expenses of the International Bureau, the Lebanese Government wishes Lebanon to be placed in the Sixth Class. . . .\*

301. Since January 1947, the International Bureau has listed *Lebanon* and *Syria* as two separate members of the Union and two separate parties to the Paris Convention and to the Madrid Agreement (false indications of source), and they are regarded as having been bound by these two instruments continuously as from 1 September 1924, i.e., the effective date of original accession made by France on behalf of a group of countries called "Etats de la Syrie et du Liban".

# (ii) Division of a contracting country into three separate contracting countries

Malawi, Rhodesia (Southern) and Zambia

302. The Federation of Rhodesia and Nyasaland, which was formed in 1953, as a semi-autonomous member of the Commonwealth, acceded to the Paris Union and the London text (1934) of the Paris Convention as from 1 April 1958, date requested in the communication sent to the Swiss Government. The Federation elected to be placed in the sixth class of contribution. The Federation sent its own delegate to the diplomatic Conference held at Lisbon. According to the Swiss Government's circular dated 16 May 1963, the instrument of ratification of this text of the Paris Convention by the Federation was deposited with the Swiss Government on 21 March 1963.

303. After the dissolution of the Federation on 31 December 1963, the following note was gazetted in the February 1964 issue of *Industrial Property:* 532

Communication concerning the former Federation of Rhodesia and Nyasaland

We have received from the Registrar of Patents of Southern Rhodesia a copy of the following circular of the Patent Institute of Rhodesia and Nyasaland. Dear Sirs,

Dissolution of the Federation of Rhodesia and Nyasaland

We wish to advise that upon the dissolution of the Federation on the 31st December 1963, the Patent Office, situated in Salisbury, will be taken over and operated by the Southern Rhodesian Government with effect from the 2nd January 1964. All Federal records will be retained in that Office.

The Order in Council made under the Rhodesia and Nyasaland Act, 1963, of the United Kingdom, provides that all Federal rights existing up to 31st December 1963, shall be of full force and effect in Southern Rhodesia, Northern Rhodesia, and Nyasaland, unless the respective legislatures of those territories provide otherwise.

The Southern Rhodesia Legislature has made the Patents (modification and adaptation) Regulations 1963 G.N. 793/1963, the Trade Marks (modification and adaptation) Regulations 1963 G.N. 806/1963, and the Registered Designs (modification and adaptation) Regulations 1963 G.N. 802/1963, which were published in the Southern Rhodesian *Gazette* of the 27th December 1963. These Regulations apply the Federal Patents, Trade Marks, and Registered Designs Acts to Southern Rhodesia with the necessary adjustments, and they will henceforth be administered by the Southern Rhodesian Government through the Salisbury Patent Office.

The Southern Rhodesia Government has notified through diplomatic channels its adherence to the Paris Convention, and has forwarded a declaration of continuity with the notification.\* This procedure should ensure the preservation of all existing Convention rights until Southern Rhodesia's accession to the Convention is finalised.

The Government of Northern Rhodesia has requested the Southern Rhodesia Government to permit it to make use of the services of the Salisbury Registry on an Agency basis for a period and on terms to be negotiated. It is understood that the Northern Rhodesia Government is taking similar steps as Southern Rhodesia to adhere to the Paris Convention, and to make similar Regulations under the Order in Council modifying and adapting the three Federal industrial property Acts.

With effect from 2nd January, 1964, therefore, the Salisbury Patent Office will operate in respect of Southern Rhodesia, and on an Agency basis for Northern Rhodesia, but separate applications and separate fees will be required in respect of each territory.

With regard to all pending matters up to and including the 31st December, 1963, these will be processed and completed in terms of the respective Federal Acts.

It is understood that Nyasaland wishes "to go it alone", and will set up its own Registry, but it is not known what steps are being or will be taken to this end. The Salisbury Office will have no jurisdiction whatsoever in respect of Nyasaland, and no application of any description in respect of that territory can be entertained.

Yours faithfully,

(Signed) F. B. d'ENIS Administrative Officer

304. As the communication of the Swiss Government quoted below indicates, 533 the Government of Southern Rhodesia, in September 1964, made a declaration of continuity relative to the participation of Southern Rhodesia in the Paris Convention, as last revised at

<sup>\*</sup> Translation from the French by the United Nations Secretariat.

p. 15. See note of the Swiss Government, dated 9 December 1957, reproduced in the January 1958 issue of the Industrial Property Quarterly, p. 3.

<sup>530</sup> La Propriété industrielle, 1958, p. 210.

<sup>&</sup>lt;sup>531</sup> Industrial Property, 1963, p. 94. In accordance with article 18, the ratification took effect on 16 June 1963.

<sup>532</sup> Pp. 23 and 24.

<sup>\*</sup> We understand from the Swiss Federal Political Department that this notification and declaration has not yet been received. (Ed.).

<sup>533</sup> Industrial Property, March 1965, p. 43.

Lisbon in 1958, and, at the same time, notified accession of Southern Rhodesia to the Paris Union:

The Swiss Embassy presents its compliments to the Ministry of Foreign Affairs and has the honour to send herewith a copy of a letter, dated September 2, 1964, addressed to the Head of the Federal Political Department by the Ministry of External Affairs of Southern Rhodesia.

In this letter, which reached the Department through the intermediary of the Embassy of the United Kingdom of Great Britain and Northern Ireland in Berne, the Government of Southern Rhodesia makes a declaration of continuity relating to the participation of that country in the Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, and at Lisbon on October 31, 1958.

The above-mentioned letter also informed the Swiss Government of the adhesion of Southern Rhodesia to the Paris Convention. In application of Article 16 (3) of the said Convention, this adhesion will take effect on 6 April 1965.

With regard to its contribution to the expenses of the International Bureau of the Union, Southern Rhodesia is placed in the Sixth Class, for the purposes of Article 13 (8) and (9) of the Paris Convention as revised at Lisbon.

305. In the January issues of *Industrial Property*, 1966 and 1967, the Bureau of the Paris Union listed *Rhodesia* (instead of Southern Rhodesia) as having acceded as a separate member to the Paris Union and been a separate party to the Lisbon text (1958) of the Paris Convention as from 6 April 1965, the effective date of accession mentioned in the above communication. The Bureau, at the same time, noted that the Paris Convention had been applied to *Rhodesia*, as an integral part of the former Federation of Rhodesia and Nyasaland as from 1 April 1958, the date on which accession to the London text (1934) by the Federation took effect.<sup>534</sup>

306. In August 1964, the Government of Northern Rhodesia, which later became the independent State of Zambia on 24 October 1964, declared through the intermediary of the British Government its position regarding its continued participation in the Paris Conventions, as last revised at Lisbon in 1958, not only for the period between the date of the dissolution of the Federation of Rhodesia and Nyasaland and the date of independence of Zambia but also for the period after the prospective date of independence of Zambia i.e., 24 October 1964. As the communication of the Swiss Government quoted below indicates, this undertaking by the Government of Northern Rhodesia was later confirmed by the Government of Zambia on 31 December 1964.

The Swiss Embassy has the honour to send herewith to the Ministry of Foreign Affairs a copy of a letter from the Ministry of Commerce and Industry of Northern Rhodesia dated August 26, 1964, which was transmitted to the Head of the Federal Political Department through the intermediary of the Embassy of the United Kingdom of Great Britain and Northern Ireland in Berne.

As the Ministry will note from the above-mentioned letter, it

contains declarations of continuity of the Government of Northern Rhodesia relating to the participation, as from January 1, 1964—the Federation of Rhodesia and Nyasaland having been dissolved on December 31, 1963—to October 23, 1964, in respect of Northern Rhodesia and as from October 24, 1964, in respect of the Republic of Zambia in the International Convention for the Protection of Industrial Property of March 20, 1883, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, and at Lisbon on October 31, 1958.

The above-mentioned letter also informed the Swiss Government of the adhesion of the Republic of Zambia to the Paris Convention, which declaration has been confirmed by a communication from the Ministry of Commerce and Industry of the Republic of Zambia, addressed to the Head of the Political Department on December 31, 1964. In application of Article 16 (3) of the said Convention, this adhesion will take effect on April 6, 1965.

With regard to its contribution to the expenses of the International Bureau of the Union, Zambia is placed in the Sixth Class, for the purposes of Article 13 (8) and (9) of the Paris Convention as revised at Lisbon.

307. In the January issues of *Industrial Property*, 1966 and 1967, the Bureau listed Zambia as having acceded as a separate member to the Paris Union and been a separate party to the Lisbon text (1958) of the Paris Convention as from 6 April 1965, the effective date of accession mentioned in the above communication.<sup>536</sup>

308. The Government of *Malawi*, former Nyasaland, which attained independence on 6 July 1964, addressed to the Swiss Government a declaration of continuity dated 24 May 1965. As indicated in the communication of the Swiss Government quoted below, *Malawi* was considered by the Swiss Government as having been bound by the Lisbon text (1958) of the Paris Convention as from the date of its independence.<sup>537</sup>

The Swiss Embassy presents its compliments to the Ministry of Foreign Affairs and has the honour to enclose herewith a copy of a declaration by the Prime Minister of External Affairs of Malawi, dated May 24, 1965, and received on October 6, 1965, by the Federal Political Department through the High Commission of that State in London.

With reference to the adhesion in 1963 of the Federation of Rhodesia and Nyasaland to the Paris Convention for the Protection of Industrial Property of March 20, 1883, as last revised at Lisbon on October 31, 1958, the Government of Malawi declares that since this adhesion came into force on June 16, 1963, the above-mentioned Convention has not ceased to be applied on its territory and continues to be so applied.

According to its declaration of continuity, Malawi is considered to be bound by the Paris Convention, as revised at Lisbon on October 31, 1958, from the date of its accession to independence, on July 6, 1964.

With regard to its contribution to the expenses of the International Bureau of the Union, Malawi is placed, at its request, in the Sixth Class for the purposes of Articles 13 (8) and (9) of the Paris Convention as revised at Lisbon.

309. Unlike the cases of Southern Rhodesia and Zambia, the Bureau listed Malawi as having acceded as

<sup>534</sup> *Ibid.*, January 1966, p. 7 and *ibid.*, 1967, p. 7.

<sup>535</sup> Ibid., 1965, p. 43.

<sup>536</sup> Ibid., 1966, pp. 6 and 7 and ibid., 1967, p. 7.

<sup>&</sup>lt;sup>337</sup> *Ibid.*, November 1965, p. 239.

a separate member to the Paris Union and been a separate party to the Lisbon text (1958) of the Paris Convention as of the date of independence, while it also noted that the application of the Paris Convention to *Malawi* as an integral part of the former Federation of Rhodesia and Nyasaland dated back to 1 April 1958, the date on which accession by the Federation to the London text (1934) took effect.<sup>538</sup>

#### D. Summary

#### 1. FORMER DEPENDENT TERRITORIES

310. With regard to new States emerging from former dependent territories to which multilateral instruments administered by the Paris Union have been applied, continuity in the application of the Paris Convention and its revised texts seems to have been recognized in twenty-two cases: Australia, Cameroon, Canada, Central African Republic, Ceylon, Chad, Congo (Brazzaville), Dahomey, Gabon, Indonesia, Ivory Coast, Laos, Madagascar, Mauritania, New Zealand, Niger, Senegal, Tanzania, Trinidad and Tobago, Togo, Upper Volta and Viet-Nam. In some instances, continuity in the application of special agreements establishing restricted unions seems also assured: (1) Madrid Agreement (false indications of source) (Ceylon, New Zealand, Viet-Nam); (2) Madrid Agreement (registration of trademarks) (Viet-Nam); (3) The Hague Agreement (Indonesia, Viet-Nam). Seven former dependent territories have not yet made clear their position: Cambodia, Formosa, Guinea, Korea, Mali, Singapore and Western Samoa. In two cases only continuity in the application of the instruments seems to have lapsed: Algeria and The retroactive accession by Israel was not unanimously approved by the Contracting countries. After attaining independence Algeria communicated to the Swiss Government its accession to a text of the Paris Convention (Lisbon text) which had been previously extended to it by France.

311. Continuity in the application of the instruments requires the consent of the new State concerned. Normally, the consent of the new State is communicated to the Swiss Government by the competent authorities of such State. In three exceptional cases (Austria, Canada, New Zealand) the communication has been transmitted by the contracting country which previously extended the territorial application of the instruments. Following the reception of such communications, the Swiss Government sends circulars to the countries of the Union explaining the status of the country in question within the Paris Union. Frequently, the circulars refer to the communications as "déclarations d'appartenance à l'Union" (Cameroon, Central African Republic, Chad, Dahomey, Gabon, Ivory Coast, Laos, Madagascar, Mauritania, Niger, Senegal, Togo, Trinidad and Tobago, Upper Volta) and occasionally as "déclarations de continuité" (Congo (Brazzaville) Viet-Nam). With the exception of Canada, Indonesia, and Viet-Nam, these communica-

538 Ibid., 1966, pp. 6 and 7 and ibid., 1967, p. 7.

tions notify at the same time the accession of the new State concerned to a revised text of the Paris Convention not extended to their territories prior to independence; and they are in fact "déclarations de continuité et d'adhésion".

312. Normally, the Bureau considers today that new States emerging from former dependent territories which made declarations of continuity (express or tacit; formal or informal) become separate members of the Paris Union—and of the special unions—and separate parties to its instruments one month after the date of the relevant circular sent by the Swiss Government to the countries of the Union. In the framework of the Paris Union, the declarations of continuity of new States are made with the intent to assure continuous application of the instruments by preventing the former territorial application from lapsing as of independence day. When a declaration of this kind exists, the territorial application of the instruments continues beyond independence day until the date when the new State becomes a separate party to the instrument in question. In the absence of a declaration of continuity (Algeria, Israel), the new State becomes also a separate member and a separate party one month after the date of the Swiss Government's circular, but the territorial application of the instruments lapses as from independence day until the date when the State concerned becomes a separate member and party. Finally, when continuity in the application of the instruments has been assured, the Bureau seems to recognize such continuity as from the date of the initial territorial application made by the contracting country responsible at the time for the international relations of the territory in question. The date of the initial territorial application of the instruments in non-metropolitan territories for the international relations of which the Netherlands and the United Kingdom were responsible is expressly mentioned in the 1967 January issue of Industrial Property, while in the case of Viet-Nam and other non-metropolitan territories for the international relations of which France was responsible this initial date is not mentioned and seems to have not yet been clearly established in all cases.

# 2. COUNTRIES OF THE UNION OR CONTRACTING COUNTRIES

313. Continuity in membership and in the application of multilateral instruments administered by the Paris Union has been assured with regard to Austria, Hungary, Morocco, the Syrian Arab Republic, Tunisia and the United Arab Republic. The changes undergone by these countries of the Union did not alter either their status within the Paris Union or their participation in its instruments. They continue to be considered countries of the Union and parties to its instruments as from the date of the original accession or ratification. After attaining independence, Morocco and Tunisia exercise themselves the rights and duties of membership that prior to independence had been exercised on their behalf by France. Once restored to its independence, Austria continues to be a member and a party as it was before the annexation. Likewise, following the dissolution of its union with Egypt, the Syrian Arab Republic recovered the place of Syria in the Union such as it was before the formation of the union.

314. In two cases the division of a contracting country ("Groupe d'Etats de la Syrie et du Liban"; Federation of Rhodesia and Nyasaland) has resulted in a change in the list of members of the Union and parties to its intruments, inasmuch as each part of the former single contracting country became a separate member and a separate party. However, even in these two cases continuity in the application of the instruments has been assured. With regard to Lebanon and Syria, this continuity has been safeguarded, making retroactive the date when they become separate members and parties. Both countries are considered to be separate members and parties as from the date of the original accession by the contracting country called "Groupe d'Etats de la Syrie et du Liban". In the case of each of the three parts into which the Federation of Rhodesia and Nyasaland has been divided (Malawi, Rhodesia (Southern), Zambia) continuity in the application of the instruments has been assured by means very similar to those used for former dependent territories of a country of the Union. Malawi, Rhodesia (Southern) and Zambia made declarations of continuity that had the effect of preventing a lapse of the instruments applied to the Federation of Rhodesia and Nyasaland after the date of their separation from the Federation. Rhodesia (Southern) and Zambia (former Northern Rhodesia) are considered to be separate members and separate parties as from a month after the date of the relevant circular sent by the Swiss Government to countries of the Union. In the case of Zambia, the declaration of continuity was first made by Northern Rhodesia and was confirmed by Zambia after attaining its independence. In accordance with the terms of its declaration of continuity, Malawi is listed as a separate member of the Union and a separate party to its instruments as from the date of its independence. Malawi's declaration has been interpreted as establishing separate membership as from the date of independence.

# V. The General Agreement on Tariffs and Trade (GATT) and its subsidiary instruments 539

### A. The GATT multilateral instruments

315. The General Agreement on Tariffs and Trade (hereinafter referred to as the "General Agreement") was adopted at Geneva on 30 October 1947 at the conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment.<sup>540</sup> By the Protocol of Provisional Appli-

cation of the General Agreement signed at Geneva on the same day the signatories to the Protocol undertook to apply provisionally on and after 1 January 1948 "(a) Parts I and III of the General Agreement on Tariffs and Trade, and (b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation".541 The contracting parties to the General Agreement (i.e. the governments which "make effective such provisional application" under the said Protocol or protocols of accession), acting jointly towards the reduction of tariffs and other trade barriers on a reciprocal and multilateral basis, form in effect an international organization known as "GATT". As the Agreement on the Organization for Trade Cooperation drawn up in 1955 has not entered into force, GATT still lacks a permanent organizational framework. Yet GATT has various organs, e.g., a general representative body called the "annual session of CONTRACTING PARTIES",542 a Council of Representatives, periodic Tariff Conferences, a secretariat under the direction of a Director-General (formerly called "Executive Secretary"), etc., and its annual budget is financed by the contributions from the members of GATT and other Governments which participate in the work of GATT under special agreements. 543

316. The CONTRACTING PARTIES, among other functions, adopt multilateral instruments which are called "Protocol", "Procès-Verbal", "Declaration" or "Agreement". These instruments, as they enter into force, amend or supplement certain provisions of the General Agreement, provide for, rectify or modify the schedules of tariff concessions, and stipulate the terms of accession of new members. The General Agree-

<sup>539</sup> The present study covers the period prior to January 1968.
510 For the original text see United Nations, Treaty Series, vol. 55, p. 194. The text as amended by several protocols of 1948 and 1949 was published in GATT, Basic Instruments and Selected Documents, vol. I (1952), p. 11, and with further amendments in ibid., vol. III (1958). A volume IV of GATT, Basic Instruments and Selected Documents, with the addition of Part IV introduced in 1966, will be published in 1969.

<sup>&</sup>lt;sup>541</sup> United Nations, Treaty Series, vol. 55, p. 308.

<sup>542</sup> Depending on the context in which it appears in the official documents of GATT, the term "CONTRACTING PARTIES" in capital letters stands either for this representative body or for "GATT" as an organization constituted by parties to the General Agreement. For the sake of convenience, CONTRACTING PARTIES hereinafter stands for the former only and individual contracting parties hereinafter are referred to as "members" of GATT.

<sup>543</sup> For the status of GATT and its relationship with the United Nations, see Final Act of the United Nations Conference on Trade and Employment, pp. 71 and 72 and "The Developing Countries in GATT" in Proceedings of the United Nations Conference on Trade and Development, vol. V, p. 433, para. 18.

TRACTING PARTIES are drawn up and opened for acceptance but are not binding upon members unless accepted by them. "Decisions" are in a different category; they do not normally require signature by individual Governments and therefore these are not listed in PROT/2 (see note 545) as instruments deposited with the Director-General of GATT. Exceptionally, as shown in ST/LEG/SER.D/1 (see note 545), the Decisions of 21 April 1951 on the accession of six countries were opened for signature and were deposited with the Secretary-General of the United Nations, but that is a procedure which has not been followed on other occasions.

subsidiary instruments and the Director-General of GATT of 81 subsidiary instruments (see: Multi-lateral treaties in respect of which the Secretary-General of Secretary-General of Secretary-General of GATT of 81 subsidiary instruments (see: Multi-lateral treaties in respect of which the Secretary-General performs depository functions (ST/LEG/SER.D/1), chap. X;

ment as well as the subsidiary instruments have been applied since 1948-1949 in almost all of the dependent territories of Belgium, France, the Netherlands and the United Kingdom. Of the new States emerging from these former dependent territories since 1948, forty-three that have joined GATT, have acceded provisionally or are applying the General Agreement on a de facto basis.

# B. Methods of becoming members of GATT available to new States

(a) PROCEDURE LAID DOWN IN ARTICLE XXVI, PARA-GRAPH 5 (c), FOR FORMER CUSTOMS TERRITORIES IN RESPECT OF WHICH A MEMBER OF GATT HAS ACCEPT-ED THE GENERAL AGREEMENT

317. The General Agreement contains a special clause which is directly relevant to a change in international status of member's territories to which the GATT instruments (i.e. the General Agreement and subsidiary instruments) are applicable. Article XXVI, paragraph 5 (c) reads: 548

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.

GATT, Status of Multilateral Protocols of which the Director-General acts as Depositary (PROT/2) (August 1968); Official Records of the General Assembly, Nineteenth Session, Annex No. 13, document A/5886, p. 34; GATT, L/2356 (11 February 1965). The Director-General of GATT acts as depositary of all the GATT instruments concluded after 1 February 1955.

sas See United Nations, Treaty Series, vol. 55, p. 194. The latest published list of the dependent territories to which the General Agreement is applied (a revision of the list appearing in GATT, document G/5) is in GATT, Basic Instruments and Selected Documents, Fourteenth Supplement (1966), pp. 1-5. Belgium, the Netherlands and France applied schedules embodying tariff concessions to most of their dependent territories whereas, with a few exceptions, no tariff schedules were applied to dependent territories of the United Kingdom (see United Nations, Treaty Series, vols. 56, 59 and 60).

<sup>547</sup> Algeria, Barbados, Botswana, Burundi, Cambodia, Cameroon, Central African Republic, Chad, Congo (Brazzaville), Congo (Democratic Republic of), Cyprus, Dahomey, Gabon, Gambia, Ghana, Guyana, Indonesia, Israel, Ivory Coast, Jamaica, Kenya, Kuwait, Lesotho, Madagascar, Malawi, Malaysia, Maldive Islands, Mali, Malta, Mauritania, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Singapore, Tanzania, Togo, Trinidad and Tobago, Tunisia, Uganda, Upper Volta and Zambia.

548 This clause was originally article XXVI, para. 4, section proviso (United Nations, Treaty Series, vol. 55, p. 274) in almost identical wording, which became para. 4 (c) pursuant to an amending protocol of 13 August 1949 (United Nations, Treaty Series, vol. 62, p. 116) and then para. 5 (c) pursuant to the Protocol Amending the Preamble and Parts II and III of the General Agreement which entered into force on 7 October 1957 (United Nations, Treaty Series, vol. 278, p. 204). There has been no change in article XXVI since 1957.

318. Although it does not appear that this special clause was originally intended by drafters to deal with issues arising from the formation of a new State, <sup>549</sup> it has provided convenient formulas for dealing with such issues, because the date of acquiring full autonomy in external commercial relations almost always coincided with the date of attaining full independence. In fact, it is through this procedure of article XXVI that a large majority of new States born out of members' territories have joined GATT acknowledging themselves continuously bound by the GATT instruments formerly made applicable to their territories. <sup>550</sup>

#### (b) Accession in accordance with article XXXIII

319. The territories acquiring independence have an alternative method of becoming members of GATT which is often called "accession through negotiation". Article XXXIII of the General Agreement provides:

A government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a two-thirds majority.

320. When a government wishes to accede through this procedure, arrangements are made for the conduct of tariff negotiations and, upon their conclusion, a protocol of accession is drawn up whereby the acceding government becomes a contracting party.<sup>551</sup>

Session of the Preparatory Committee of the United Nations Conference on Trade and Employment in September 1947, the above special clause was inserted in the Agreement upon the recommendation of the Ad Hoc Sub-Committee of the Tariff Agreement Committee. The Ad Hoc Sub-Committee dealt with the question whether Burma, Ceylon and Southern Rhodesia, which according to the British Government were possessed of autonomy in external commercial relations, could be admitted to participate as full contracting parties to the General Agreement. When answering the above question in the affirmative, the Ad Hoc Sub-Committee also recommended inclusion of the aforementioned special clause in order to deal with similar cases in the future. (See Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, documents E/PC/T/198 and 205, and verbatim reports of meetings (E/PC/T/TAC/PV/13, 24, 25 and 28 (1947)).)

has to accept the tariff concessions which its predecessor has negotiated on its behalf, but is free to have recourse to the various provisions contained in articles XVIII and XXVIII in order to modify these concessions once it has become a member (see "The Developing Countries in GATT", op. cit.).

<sup>&</sup>lt;sup>551</sup> See GATT, Basic Instruments and Selected Documents, vol. III (1958), p. 58. A favourable decision having been taken under article XXXIII, the protocol of accession is opened for acceptance by the acceding Government. A protocol of accession enters into force thirty days after it has been accepted by the acceding Government.

# C. Provisional application of the GATT instruments by new States after attaining independence

(a) CONTINUED APPLICATION ON A "DE FACTO" BASIS

321. In order to give to new States, former customs territories in respect of which the GATT instruments were applicable, some time for reviewing their commercial policy after attaining independence, the CON-TRACTING PARTIES devised in 1957 a procedure of "de facto application" of the General Agreement pending final decisions as to the future relations of these new States with GATT. By that procedure members of GATT continue to apply de facto the General Agreement in their relations with any territory which requires autonomy in the conduct of its external commercial relations and of other matters provided for in the General Agreement, provided that the new State, former customs territory, continues to apply de facto the Agreement to them. The procedure of "de facto application" has been laid down in successive recommendations adopted by the CONTRACTING PARTIES.

322. The first Recommendation approved by the CONTRACTING PARTIES on 1 November 1957 reads: <sup>552</sup> reads: <sup>552</sup>

The CONTRACTING PARTIES recommend that:

- 1. As soon as a customs territory in respect of which a contracting party has accepted the Agreement, or has made effective the provisional application of the Agreement, acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in the Agreement, the responsible contracting party should notify the Executive Secretary of that fact;
- 2. At their next ordinary session, the CONTRACTING PAR-TIES, after consultation with the representatives of the responsible contracting party and of the territory in question, should set a reasonable period during which the contracting parties should continue to apply de facto the Agreement in their relations with that territory, provided that that territory also continues to apply de facto the Agreement to them; and
- 3. At the same session, the CONTRACTING PARTIES, without prejudice to the rights conferred by Article XXVI: 5 (c), should make it clear that, if the sponsorship provided for in that sub-paragraph has not taken place with respect to the territory in question before the end of the period mentioned in (b) above, the contracting parties would not be expected to continue to apply de facto the Agreement in their relations with that territory.

In adopting the above Recommendation the CONTRACTING PARTIES agreed that if the sponsorship provided for in Article XXVI: 5 (c) were to take place at a time when the CONTRACTING PARTIES are not in session, the CONTRACTING PARTIES, at their next ordinary session, should record the legal effects of such sponsorship in an appropriate declaration.

323. By a new Recommendation of 18 November 1960 the CONTRACTING PARTIES decided that "a reasonable period" of *de facto* application should be two years from the date of acquiring full autonomy in external commercial relations. This Recommendation states the following: <sup>558</sup>

Considering that paragraph 5 (c) of Article XXVI of the General Agreement provides that if a territory, in respect of which the General Agreement has been applied, acquires full autonomy in the conduct of its external commercial relations and of other matters provided for in the Agreement such territory may be deemed to be a contracting party,

Considering that the CONTRACTING PARTIES, on 1 November 1957, adopted a recommendation as to procedure to be followed in cases in which a territory has acquired such full autonomy,

Considering that a number of territories, for which certain contracting parties had international responsibility and to which they applied the General Agreement, have recently acquired such full autonomy and that the Executive Secretary has entered into consultations in accordance with the said procedure with the governments of these newly independent territories,

Considering further that other territories may acquire such full autonomy in the near future, and

Recognizing that the governments of newly independent territories will normally require some time to consider their future commercial policy and the question of their relations with the General Agreement, and that it is desirable that meanwhile the provisions of the General Agreement should continue to be applied to trade between these territories and the contracting parties to GATT,

#### The CONTRACTING PARTIES

Recommend that contracting parties should continue to apply de facto the General Agreement in their relations with any territory which has acquired full autonomy in the conduct of its external commercial relations and of other matters provided for in the General Agreement, for a period of two years from the date on which such autonomy was acquired, provided that the territory continues to apply de facto the Agreement to them.

- 324. On 9 December 1961 the CONTRACTING PARTIES further recommended that "de facto application" should be continued for a further year in respect of any new State, former territory, which so requests. When reviewing the operation of the arrangement annually the CONTRACTING PARTIES have also, on request and by Decisions, extended, on an ad hoc basis, the period of de facto application of the GATT beyond the three-year period provided for in the Recommendations of 18 November 1960 and 9 December 1961. In some cases, it has been operative for more than six years. 554
- 325. Recently, at its twenty-fourth session, the CONTRACTING PARTIES adopted on 11 November 1967 a new Recommendation which provides for continuing *de facto* application without a specific time-limit. The text of this Recommendation is reproduced below: <sup>555</sup>

<sup>&</sup>lt;sup>552</sup> GATT, Basic Instruments and Selected Documents, Sixth Supplement (1958), pp. 11 and 12.

<sup>553</sup> Ibid., Ninth Supplement (1961), pp. 16 and 17.

<sup>554</sup> Ibid., Tenth Supplement (1962), p. 17; ibid., Eleventh Supplement (1963), pp. 53 and 54 and ibid., Twelfth Supplement (1964), p. 34. For an analysis of de facto application of the General Agreement, see Kunugi, "State Succession in the Framework of GATT", American Journal of International Law (1965), pp. 268-290.

<sup>555</sup> GATT, L/2946 (1 December 1967). The Recommendation was adopted on the basis of a draft recommendation annexed to a note by the Director-General of GATT (GATT, L/2757 (8 March 1967)). The said note contains the following explanatory paragraph:

<sup>&</sup>quot;It is evident from experience under these Recommendations that many territories which acquire such autonomy require

Considering that paragraph 5 (c) of Article XXVI of the General Agreement provides that if a customs territory, in respect of which a contracting party has accepted the Agreement, "acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in the Agreement", such territory may be "deemed" to be a contracting party,

Considering that the CONTRACTING PARTIES have recognized that the governments of territories which acquire such autonomy will normally require some time to consider their future commercial policy and the question of their relations with the General Agreement and that it is desirable that meanwhile the provisions of the Agreement should continue to be applied between such territories and the contracting parties, and accordingly recommended on 18 November 1960 that contracting parties should continue to apply de facto for a period of two years the General Agreement in their relations with any such territory, provided that the territory continued to apply de facto the Agreement to its trade with contracting parties, and

Considering that many such territories have requested repeated prolongations of this arrangement for the *de facto* application of the Agreement to their trade and that the CONTRACTING PARTIES have granted all such requests,

#### The CONTRACTING PARTIES

Recommend that contracting parties should continue to apply de facto the General Agreement in their relations with each territory which acquires full autonomy in the conduct of its external commercial relations and in respect of which a contracting party had accepted the Agreement, provided such territory continues to apply de facto the Agreement to its trade with the contracting parties;

Decide that, on the request of any contracting party, they will review the application of this Recommendation in respect of any such territory; and

Request the Director-General to submit at the end of three years from the date of this Recommendation a report on its application.

### (b) RESUMED APPLICATION ON A NEW PROVISIONAL BASIS

326. In some instances, special arrangements have been made in order to allow members of GATT and a particular new State, former customs territory to which the GATT instruments were applied prior to its independence, to re-establish treaty relations under the General Agreement on a provisional basis (declarations of provisional application or provisional accession) pending full accession by the new State in question under

some considerable time to decide upon their future commercial policy and their relations with the GATT. It may be that many, particularly those whose participation in international trade is relatively small, may wish to wait for a rather lengthy period before assuming the full responsibilities which devolve upon contracting parties, but may nevertheless wish to benefit from, and to apply on a reciprocal basis, the provisions of the GATT, and, in particular, the rules for most-favoured-nation treatment. In these circumstances, the contracting parties might wish to consider an arrangement whereby the de facto application of the GATT could be continued without the necessity of addressing communications each year to the governments concerned enquiring whether they had reached a decision as to their future relations with the GATT. Provision could be made for the Director-General to submit a report after three years on the application of the arrangement."

article XXXIII. Following a decision by the CONTRACTING PARTIES, the General Agreement has also been applied on a *de facto* basis to relations between members of GATT and a new State in preparation for full accession.

# D. Exceptions or quasi-reservations to the general rules provided for in the GATT instruments

327. No reservation as such is considered permissible under the General Agreement or its subsidiary instruments. However, some exceptions or quasi-reservations to the general rules provided for in the GATT instruments may be made by members of GATT on certain conditions prescribed therein. Two types of such quasi-reservations made by a predecessor State in connexion with non-application of the General Agreement between particular contracting parties (art. XXXV) and exceptions to the rule of non-discrimination (art. XIV, para. 1 (d) and Annex J) have been inherited by certain new States, former customs territories to which the GATT instruments have been applied.

- (a) Non-application of the General Agreement between particular contracting parties (article XXXV)
- 328. Article XXXV of the General Agreement reads: 556
- 1. 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.
- 2. The CONTRACTING PARTIES may review the operation of this Article in particular cases at the request of any contracting party and make appropriate recommendations.
- 329. Article XXXV was added to the General Agreement in 1948 when article XXXIII was amended in order to provide that accession of a new member should be approved by a two-thirds majority instead of by unanimity (see para. 319, above). It was then pointed out that otherwise two-thirds of the contracting parties would oblige a contracting party to enter a trade agreement with another country without its consent. 557

<sup>&</sup>lt;sup>556</sup> See GATT, Basic Instruments and Selected Documents, vol. III (1958), p. 58.

<sup>&</sup>lt;sup>557</sup> See: GATT, "Origins of article XXXV and Factual Account of its Application in the case of Japan: Report by the Executive Secretary" (L/1466) and "The Developing Countries in GATT", op. cit., p. 436, para. 44.

- (b) Exceptions to the rule of non-discrimination (article XIV, paragraph 1 (d) and Annex J)
- 330. Paragraph 1 (d) of article XIV of the General Agreement reads as follows: 558
- (d) Any contracting party which before July 1, 1948, has signed the Protocol of Provisional Application agreed upon at Geneva on October 30, 1947, and which by such signature has provisionally accepted the principles of paragraph I of Article 23 of the Draft Charter submitted to the United Nations Conference on Trade and Employment by the Preparatory Committee, may elect, by written notice to the CONTRACTING PARTIES before January 1, 1949, to be governed by the provisions of Annex J of this Agreement, which embodies such principles, in lieu of the provisions of sub-paragraphs (b) and (c) of this paragraph. The provisions of sub-paragraphs (b) and (c) shall not be applicable to contracting parties which have so elected to be provisions of Annex J shall not be applicable to contracting parties which have not so elected.
- 331. Annex J <sup>559</sup> embodies the requirements and principles according to which a contracting party may apply import restrictions consistent with the exceptions provided for under such annex. Annex J was deleted from the General Agreement with effect from 15 February 1961, following the revision of provisions of paragraph 1 of article XIV provided for in sections J (i), HH and QQ of the Protocol Amending the Preamble and Parts II and III of the General Agreement. <sup>560</sup>

# E. Description of cases comprising elements related to succession of States

332. Cases relating to the succession of States to the GATT multilateral instruments concern either former customs territories to which the instruments have been applied before attaining their independence or members of GATT (contracting parties). Cases relating to former territories have been grouped in section 1, while cases involving a change (formation and dissolution of unions) in the status of a member of GATT have been grouped in section 2. A distinction has been made in section 1 between cases where the continued application has been secured, or assured on a de facto basis, and cases where the application of the instruments has been discontinued after independence. Section 1 includes also cases of inheritance of exceptions or quasireservations by new States, former customs territories. The description of each particular case given below is based on relevant GATT official documents and the United Nations Treaty Series.

- 1. CASES CONCERNING FORMER TERRITORIES TO WHICH THE GATT MULTILATERAL IN-STRUMENTS HAVE BEEN APPLIED BY MEM-BERS OF GATT
- (a) CONTINUED APPLICATION OF GATT MULTILATERAL INSTRUMENTS AFTER INDEPENDENCE, IN ACCORDANCE WITH THE PROCEDURE LAID DOWN IN ARTICLE XXVI, PARAGRAPH 5 (c)
- (i) Continued application secured by sponsorship of the member of GATT formerly responsible for the territory, the consent of the new State and a declaration by the CONTRACTING PARTIES

#### Indonesia

333. At the Fourth Session of the CONTRACTING PARTIES held in 1950, the Netherlands Government proposed that Indonesia, to the territory of which the Netherlands had applied certain GATT instruments prior to its independence, should become a contracting The CONTRACTING PARTIES so agreed unanimously on 24 February 1950, but did not specify exactly when Indonesia should become a contracting party. In the Declaration of 1 April 1950 on tariff Schedule XXI (Indonesia), the CONTRACTING PAR-TIES took note that Indonesia had become a contracting party under the provisions of article XXVI and that consequently the tariff concessions contained in "Sections C of Schedule II (Schedule II annexed to the General Agreement and Schedule II in Annex A of the Annecy Protocol) have in effect become separate schedules relating to Indonesia..." 561 About two years later it was noted in an official publication of GATT that "Indonesia, having acquired independent status, became a contracting party in its own right on 24 February 1950." 562

334. Soon after *Indonesia* was thus recognized as having become a contracting party, a question arose as to whether Indonesia should be regarded as having automatically succeeded to the rights and obligations under the subsidiary instruments signed of otherwise accepted by the Netherlands prior to its independence; and if so, what actions should be taken to clarify the matter. After consulting with the Director of the Division of Immunities and Treaties of the United Nations Secretariat, the Director-General requested Indonesia to address a formal declaration to the United Nations Secretary-General recognizing itself to be bound by the undertakings given on its behalf by the Netherlands. By a communication dated 21 November 1950, which was received by the Secretary-General on 24 November 1950, the Indonesian Government recognized itself as bound by the following ten subsidiary instruments, including the three (shown with an asterisk) which had been signed by the Netherlands but had not entered into force by that time:

<sup>558</sup> GATT, Basic Instruments and Selected Documents, vol. III (1958), pp. 26 and 27.

<sup>&</sup>lt;sup>559</sup> *Ibid.*, pp. 80 and 81.

<sup>&</sup>lt;sup>560</sup> See corrigendum, p. 26-28, 70, 80 and 81, vol. III of GATT, Basic Instruments and Selected Documents (GATT, INT (61) 34).

<sup>&</sup>lt;sup>561</sup> GATT, Basic Instruments and Selected Documents, vol. II (1952), pp. 15 and 16.

<sup>562</sup> Ibid., First Supplement (1953), p. 6.

Protocol modifying certain provisions of the General Agreement 563

Special Protocol modifying article XIV 564

Special Protocol relating to article XXIV 565

Protocol modifying part I and article XXIX 566

Protocol modifying part II and article XXVI 567

\* Protocol replacing Schedule I (Australia) 568

\* Protocol replacing Schedule VI (Ceylon) 569

First Protocol of Rectifications 570

\* Third Protocol of Rectifications 571

Annecy Protocol of Terms of Accession 572

335. Upon receipt of this communication the Secretary-General accordingly notified, by way of a circular note, Members of the United Nations and other States which were associated with GATT.

### Ghana and Federation of Malaya

336. With respect to *Ghana* which became independent on 6 March 1957, the CONTRACTING PARTIES declared on 17 October 1957, taking note of the sponshorship given by the United Kingdom on the same date, that the "Government of Ghana shall henceforth be deemed to be a contracting party". A similar declaration was made on 24 October 1957 concerning the *Federation of Malaya* which became independent on 31 August 1957. 574

337. By notifications addressed to the Secretary-General of the United Nations, dated 16 October 1957 and 8 November 1957 trespectively, the Governments of *Malaya* and *Ghana* acknowledged themselves to be bound by the following subsidiary instruments:

Protocol modifying certain provisions of the General Agreement 576

Special Protocol modifying article XIV 577

Special Protocol relating to article XXIV 578

Protocol modifying part I and article XXIX 579

Protocol modifying part II and article XXVI 580

Protocol modifying article XXVI 581

First Protocol of Rectifications <sup>582</sup>
Second Protocol of Rectifications <sup>583</sup>
Third Protocol of Rectifications <sup>584</sup>
Fourth Protocol of Rectifications <sup>585</sup>
Fifth Protocol of Rectifications <sup>586</sup>
First Protocol of Modifications <sup>587</sup>
Protocol replacing Schedule I (Australia) <sup>588</sup>
Protocol replacing Schedule VI (Ceylon) <sup>589</sup>
First Protocol of Rectifications and Modifications <sup>590</sup>
Second Protocol of Rectifications and Modifications <sup>591</sup>
Third Protocol of Rectifications and Modifications <sup>592</sup>
Annecy Protocol of Terms of Accession <sup>593</sup>
Torquay Protocol <sup>594</sup>

338. By way of notification addressed to the Director-General of GATT, the Governments of *Ghana* and the *Federation of Malaya* also declared themselves to be bound by eight other subsidiary instruments previously made applicable to their territories.<sup>585</sup>

Nigeria, Sierra Leone, Tanganyika, Trinidad and Tobago and Uganda

339. In the foregoing cases of Ghana and the Federation of Malaya, the wording "henceforth be deemed a contracting party" used in the declarations made by the CONTRACTING PARTIES seems to leave some ambiguity as to exactly when these two new States became contracting parties. In the following five cases, however, this ambiguity does not seem to exist because the CONTRACTING PARTIES made the effect of their declarations under article XXVI, paragraph 5 (c) retroactive as from the date of independence of the new State concerned. For example, the Declaration of 18 December 1960 concerning Nigeria reads in part: 596

... the Government of the Federation of Nigeria is deemed to be a contracting party to the General Agreement on Tariffs and Trade as from 1 October 1960 [i.e. the date of its independence] and to have acquired the rights and obligations under the General Agreement of the Government of the United Kingdom . . . in respect of its territory as from that date.

340. Likewise, Sierra Leone, 597 Tanganyika, 598 Trinidad

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582 Ibid., p. 2.
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<sup>&</sup>lt;sup>563</sup> United Nations, Treaty Series, vol. 62, p. 30.

<sup>&</sup>lt;sup>564</sup> *Ibid.*, p. 40.

<sup>&</sup>lt;sup>565</sup> *Ibid.*, p. 56.

<sup>&</sup>lt;sup>566</sup> *Ibid.*, vol. 138, p. 334.

<sup>&</sup>lt;sup>567</sup> *Ibid.*, vol. 62, p. 80.

<sup>&</sup>lt;sup>568</sup> *Ibid.*, vol. 107, p. 83.

<sup>569</sup> Ibid., vol. 138, p. 346.

<sup>570</sup> Ibid., vol. 62, p. 2.

<sup>&</sup>lt;sup>571</sup> *Ibid.*, vol. 107, p. 311.

<sup>&</sup>lt;sup>572</sup> *Ibid.*, vol. 62, p. 121.

<sup>&</sup>lt;sup>573</sup> GATT, Basic Instruments and Selected Documents, Sixth Supplement (1958), p. 9.

<sup>574</sup> Ibid., pp. 9 and 10.

<sup>&</sup>lt;sup>575</sup> United Nations, *Treaty Series*, vol. 280, p. 350 and vol. 281, p. 394.

<sup>576</sup> *Ibid.*, vol. 62, p. 30.

<sup>577</sup> Ibid., p. 40.

<sup>578</sup> Ibid., p. 56.

<sup>&</sup>lt;sup>579</sup> *Ibid.*, vol. 138, p. 334.

<sup>580</sup> Ibid., vol. 62, p. 80.

<sup>&</sup>lt;sup>581</sup> *Ibid.*, p. 113.

<sup>&</sup>lt;sup>583</sup> *Ibid.*, p. 74.

<sup>&</sup>lt;sup>584</sup> *Ibid.*, vol. 107, p. 311.

<sup>&</sup>lt;sup>585</sup> *Ibid.*, vol. 138, p. 398.

<sup>Ibid., vol. 167, p. 265.
Ibid., vol. 138, p. 381.</sup> 

<sup>&</sup>lt;sup>588</sup> *Ibid.*, vol. 107, p. 83.

<sup>589</sup> *Ibid.*, vol. 138, p. 346.

<sup>&</sup>lt;sup>590</sup> *Ibid.*, vol. 176, p. 2.

<sup>101</sup>a., voi. 176, p. 2.

<sup>&</sup>lt;sup>591</sup> *Ibid.*, vol. 321, p. 245.

<sup>&</sup>lt;sup>592</sup> *Ibid.*, p. 266.

<sup>593</sup> Ibid., vol. 62, p. 121.

<sup>&</sup>lt;sup>594</sup> *Ibid.*, vol. 142, p. 34.

<sup>&</sup>lt;sup>595</sup> See Declarations of *Malaya* and *Ghana* in respect of multilateral protocols Nos. 5, 6, 7, 8, 10, 11, 15 and 16 which are mentioned in GATT, PROT/1, 1963.

<sup>&</sup>lt;sup>598</sup> GATT, Basic Instruments and Selected Documents, Ninth Supplement (1961), pp. 13 and 14.

<sup>&</sup>lt;sup>597</sup> Ibid., Tenth Supplement (1962), pp. 11 and 12.

<sup>598</sup> Ibid., pp. 14 and 15.

and Tobago 589 and Uganda 600 were deemed to be contracting parties as from the dates of their independence. In the preambular part of the declarations on the above five new States, the CONTRACTING PARTIES took note that the Government of the United Kingdom established the fact that these new States were qualified, in the sense of paragraph 5 (c) of article XXVI, to become contracting parties and that they wished to be deemed contracting parties. 601 As in earlier cases, soon after these declarations were made the new States acknowledged themselves to be bound by all the subsidiary instruments previously made applicable to their territories, by way of notifications addressed to the Secretary-General of the United Nations and to the Director-General of GATT. 602

(ii) Continued application secured by sponsorship of the member of GATT formerly responsible for the territory and the consent of the new State certified by a letter of the Director-General, following the adoption by the CONTRACTING PARTIES of a recommendation concerning de facto application of the General Agreement

Barbados, Burundi, Cameroon, Central African Republic, Chad, Congo (Brazzaville), Cyprus, Dahomey, Gabon, Gambia, Guyana, Ivory Coast, Jamaica, Kenya, Kuwait, Madagascar, Malawi, Malta, Mauritania, Niger, Rwanda, Senegal, Togo and Upper Volta

341. The above-mentioned twenty-four new States to which article XXVI, paragraph 5 (c), and the general policy recommendation of 18 November 1960 (see para. 323 above) was applicable, advised the Director-General that they wished to be deemed contracting parties. When the communications to that effect were received from these new States, the CONTRACTING PARTIES were not in session. For the purpose of dealing with these cases without delay, the Director-General of GATT immediately sent letters of certification to the Secretary-General of the United Nations, the members of GATT and other States which are associated with GATT under special arrangements. Sometimes the letters of certification made express reference to the Recommendation of 18 November 1960, as in the letter of certification concerning Niger quoted below: 603

On 5 August 1960 the Government of France advised that the Government of Niger had acquired, as from 3 August 1960, full

responsibility for matters covered by the General Agreement in its territory. Thus the French Government established the fact that Niger was qualified, in the sense of paragraph 5 (c) of Article XXVI, to become a contracting party.

The Government of Niger has been applying the General Agreement on a de facto basis, pursuant to the Recommendation of the CONTRACTING PARTIES of 18 November 1960, and has now advised that it wishes to be deemed a contracting party to the General Agreement under the provisions of Article XXVI: 5 (c). Since the conditions required by Article XXVI: 5 (c) have been met, Niger has become a contracting party; its rights and obligations date from 3 August 1960.

The concessions specified in Section C of Schedule XI will henceforth comprise a new Schedule LIII relating to Niger and formal provision for the establishment of this new schedule will be made through the procedure for certification of rectifications and modifications to the Schedules to the General Agreement.

342. In other cases, however, the letters of certification by the Director-General of GATT do not mention any relevant recommendation relating to *de facto* application of the General Agreement, as in the following certification concerning Rwanda.<sup>604</sup>

On I July 1962 Rwanda acquired full responsibility for matters covered by the General Agreement and became qualified, in the sense of paragraph 5 (c) of Article XXVI, to become a contracting party [see GATT/AIR/302 of 2 October 1962].

By letter dated 5 November 1965 the Government of Rwanda has advised that it wishes to be deemed, as from 1 January 1966, a contracting party to the General Agreement under the provisions of Article XXVI: 5 (c). Since the conditions required by Article XXVI: 5 (c) have been met, Rwanda will become a contracting party as from 1 January 1966; its rights and obligations will date from 1 July 1962.

The concessions specified in Section B of Schedule II will thereafter comprise a new Schedule LVI relating to Rwanda and formal provisions for the establishment of this new Schedule will be made through the procedure for certification of rectifications and modifications to the Schedule to the General Agreement.

#### and Guyana: 605

On 5 July 1966 the Government of the United Kingdom advised that on 26 May 1966 British Guiana acquired full autonomy in the conduct of its external commercial relations and other matters provided for in the General Agreement and is now known as "Guyana". Thus the United Kingdom Government has established the fact that the new State of Guyana is qualified, in the sense of paragraph 5 (c) of Article XXVI, to become a contracting party.

The Government of Guyana has advised that it wishes to be deemed a contracting party to the General Agreement under the provisions of Article XXVI: 5 (c). Since the conditions required by Article XXVI: 5 (c) have been met, Guyana has become a contracting party; its rights and obligations date from 26 May 1966.

343. The independence dates of these twenty-four States and the dates of the certification made by the Director-General of GATT are the following:

<sup>&</sup>lt;sup>399</sup> Ibid., Eleventh Supplement (1963), pp. 44 and 45.

<sup>600</sup> Ibid., pp. 45 and 46.

Governments of Nigeria, Tanganyika and Uganda sent letters to the Director-General of GATT expressing their wish to be deemed contracting parties. The United Kingdom gave sponsorship at the same time.

<sup>&</sup>lt;sup>602</sup> See United Nations, *Treaty Series*, vol. 377, p. 396; *ibid.*, vol. 405, p. 298; *ibid.*, vol. 419, p. 344; and sections on multi-lateral protocols Nos. 5-8, 10, 11, 15, 16, 19, 23-26, 28-30 in GATT, PROT/1 (1963).

<sup>603</sup> GATT, L/2102 (31 Decembre 1963).

<sup>604</sup> GATT, L/2514 (24 November 1965).

<sup>605</sup> GATT, L/2669 (7 July 1966).

New States			Independence Certification da date *	ertification date **	
Barbados			30 Nov. 1966 20 Feb. 1	1967	
Burundi			1 July 1962 13 Mar.	1965	
Cameroon			1 Jan. 1960 3 May 1	1963	
Central African Repu	bli	С	13 Aug. 1960 3 May	1963	
Chad			11 Aug. 1960 12 July	1963	
Congo (Brazzaville)			15 Aug. 1960 3 May	1963	
Cyprus			16 Aug. 1960 15 July	1963	
Dahomey			1 Aug. 1960 12 Sept.	1963	
Gabon			17 Aug. 1960 3 May	1963	
Gambia			18 Feb. 1965 22 Feb.	1965	
Guyana			26 May 1966 7 July	1966	
Ivory Coast			7 Aug. 1960 31 Dec.	1963	
Jamaica			6 Aug. 1962 31 Dec. 1	1963	
Kenya			12 Dec. 1963 5 Feb. 1	1964	
Kuwait			18 June 1961 3 May	1963	
Madagascar			25 June 1960 30 Sept.	1963	
Malawi				1964	
Malta			21 Sept. 1964 17 Nov.	1964	
Mauritania			28 Nov. 1960 30 Sept.	1963	
Niger			3 Aug. 1960 31 Dec.	1963	
Rwanda			1 July 1962 1 Jan.	1966	
Senegal			20 June 1960 27 Sept.	1963	
Togo			27 April 1960 20 Mar.		
Upper Volta			5 Aug. 1960 3 May	1963	

#### Notes:

\* Dates of acquiring full autonomy in external commercial relations always coincided with the dates of independence in cases listed here. Dates are shown in order to indicate the period of *de facto* application in each case.

\*\* As the date of notification from a new State, or the date of its receipt by the Director-General, is not always indicated in the certification letter, the date of certification alone is presented here.

- 344. As the Director-General's statement quoted below indicates, the effect of certification is to clarify the fact that the new States concerned acquired the rights and obligations of the General Agreement retroactively as from their respective independence dates. Yet no retroactive assessment has been made as to their contributions to the annual budget of GATT. A note by the Director-General on the assessment of additional contributions, dated 1 May 1964, reads in part: 606
- 1. Following the accession of Ivory Coast, Niger, Togo and Jamaica (documents L/2095, L/2102, L/2111 and L/2194), it is proposed that the following contributions to the 1964 budget be assessed on these Governments:

	Contribution in U.S. Dollars
Ivory Coast	6,600
Niger	2,500
Togo	2,500
Jamaica	_

2. Pursuant to Recommendations of the CONTRACTING PARTIES, the above countries have applied the General Agreement on a de facto basis since 1960 (Jamaica 1962). Although, following their accession in 1964, these countries acquired the rights and obligations of the General Agreement retroactively from 1960 (Jamaica 1962), it is proposed that in their case no retroactive assessment will be made in accordance with the proposals contained in document L/2051 adopted by the CONTRACTING PARTIES on 5 March 1964.

3. . .

- 345. In respect of these twenty-four new States whose relations with GATT were certified by the Director-General, the CONTRACTING PARTIES have dispensed with the adopting of the declarations which they made in cases referred to in paragraphs 333-340 above. On the other hand, none of these States has sent a declaration to the Secretary-General of the United Nations and the Director-General of GATT acknowledging its rights and obligations under specific GATT subsidiary multilateral instruments made applicable to their territories prior to independence. The CON-TRACTING PARTIES take the view that such acknowledgement is implied by a new State's declaration 608 wishing to be deemed a contracting party in accordance with article XXVI, paragraph 5 (c), and that if a new State wished to accede to GATT on any other conditions it would have to apply for accession under article XXXIII. In fact, these new States are considered as having been parties to a number of instruments as from the dates of their independence in the official publication of GATT, PROT/2: Status of Multilateral Protocols of which the Executive Secretary acts as Depositary (1964).
- (iii) Continued application provisionally assured on a de facto basis, pending final decisions of new States concerned as to their future commercial policy

Algeria, Botswana, Congo (Democratic Republic of), Lesotho, Maldive Islands, Mali, Singapore and Zambia

346. At present, the above-mentioned eight new States are listed as countries to whose territories the General Agreement has been applied and which now, as independent States, maintain a de facto application of the General Agreement pending final decisions as to their future commercial policy. Before the adoption of the Recommendation of 11 November 1967 (see para. 325 above), the CONTRACTING PARTIES agreed to extend de facto application of the General Agreement beyond the three-year period provided for in the Recommendations of 18 November 1960 and 9 December 1961 in respect to certain countries when requested by the new State concerned. Such extensions have been granted several times to Algeria, Congo (Democratic Republic of) and Mali, 100 the independence

<sup>606</sup> GATT, L/2214 (1 May 1964).

<sup>607</sup> The Director-General sent to these States the text of the General Agreement, advising whenever necessary that the text would be amended when certain protocols enter into force and that the protocols had been accepted by the former metropolitan Power; and advising further whenever necessary that certain other instruments were open to acceptance by the new States.

<sup>&</sup>lt;sup>608</sup> The following declaration dated 14 December 1963 made by the *Ivory Coast* is typical of all the others:

<sup>&</sup>quot;The Government of the Republic of the Ivory Coast, which enjoys complete autonomy with regard to the subject-matter of the General Agreement, applies the General Agreement on a de facto basis, in accordance with the Recommendation of the CONTRACTING PARTIES of 18 November 1960. It wishes to be deemed a contracting party to the General Agreement under the provisions of Article XXVI: 5 (c)."

 <sup>609</sup> See GATT press release (GATT/1005, 18 October 1967).
 610 See for instance, GATT, L/2420 (31 March 1965), L/2580 (14 March 1966) and L/2645 (27 April 1966).

day of these States being respectively 3 July 1962, 30 June 1960 and 20 June 1960.

347. With regard to Zambia which became independent on 24 October 1964, the initial recommended two-year period of de facto application (Recommendation of 18 November 1960) was extended, pursuant to the Recommendation of 9 December 1961, for one year more, until 24 October 1966. In 1965, the GATT secretariat issued the following note concerning the status of Zambia and de facto application of the General Agreement.

The Executive Secretary has been informed by the Government of the United Kingdom that on 24 October 1964 the territory of Northern Rhodesia (Zambia) acquired full autonomy in the conduct of its external commercial relations and of other matters provided for in the General Agreement. The Government of Zambia has advised that it has not yet decided how it wishes to accede to the GATT (i.e. under Article XXVI: 5 (c) or under Article XXXIII) and would therefore like to enjoy de facto status until a decision has been taken on this matter.

Accordingly, the Recommendation of 18 November 1960 (9S/16), providing for the *de facto* application of the GATT for a period of two years as between the contracting parties and a territory which acquires autonomy, is applicable in respect of Zambia.

#### Addendum

Referring to the application of the Recommendation of 18 November 1960 in respect of Zambia, the Government of Zambia has written as follows:

. . this Government will apply the General Agreement on Tariffs and Trade on a de facto basis, to the extent which it is possible for it to do so. Our future commercial policy is still very much in the process of formulation however, and I am sure that it will be appreciated by contracting parties that it may well be necessary for us to make certain changes which will necessitate a departure from the status quo which we inherited on attaining full autonomy in the conduct of our external commercial relations and of other matters provided for in the General Agreement. Nevertheless, it is hoped that whatever changes are made will not be considered by contracting parties as grounds for ceasing to apply the General Agreement, either in whole or in part to Zambia. It is felt by this Government that such questions, if they arise at all, could better be left to be dealt with if and when Zambia seeks accession to the Agreement.

348. Contracting parties were advised in November 1965 of the communication quoted below from the Government of Malaysia concerning the status of *Singapore*, following its separation from Malaysia dated 7 August 1965, and *de facto* application of the General Agreement to the new independent State of Singapore: <sup>618</sup>

The Director-General has received the following communication from the Government of Malaysia:

I have the honour to inform you that as from 9 August 1965 Singapore has ceased to be one of the component State of Malaysia and has thereupon become a sovereign nation separate from and independent of Malaysia. The Government of Malaysia is accordingly no longer responsible

for the conduct of external commercial relations and other matters provided for in the General Agreement in respect of Singapore.

I have further to inform you that by virtue of the Agreement relating to the separation of Singapore from Malaysia dated 7 August 1965, the provisions of Annex J of the Malaysia Agreement relating to the Malaysian Common Market are expressly rescinded. The Governments of Malaysia and Singapore however have undertaken to co-operate closely in conomic affairs for their mutual benefit and interest as provided for in Article VI of the Separation Agreement.

Accordingly, the Recommendation of 18 November 1960 (9S/16), providing for the *de facto* application of the GATT for a period of two years as between the contracting parties and a territory which acquires autonomy, is applicable in respect of Singapore.

349. Accordingly, the GATT secretariat indicated in 1966 that the Recommendation of 18 November 1960 was applicable to *Singapore* until 9 August 1967. In a communication of 8 February 1966, the Government of *Singapore* confirmed that "pending a decision of the question of Singapore's accession to the General Agreement, the Government of Singapore is prepared to continue to apply the provisions of the Agreement on a *de facto* basis to the trade of the contracting parties". 614

350. As far as the status of the *Maldive Islands, Botswana* and *Lesotho* is concerned, the GATT secretariat issued in 1966 the following notes concerning *de facto* application of the General Agreement to these new States:

The Director-General has been informed by the Government of the United Kingdom that on 26 July 1965 the Maldive Islands acquired full autonomy for their external commercial relations.

Accordingly, the Recommendation of 18 November 1960 (9S/16), providing for the *de facto* application of the GATT as between the contracting parties and a territory which acquires autonomy, is applicable in respect of the Maldive Islands; 615

The Director-General has been informed by the Government of the United Kingdom that on 30 September 1966 Bechuanaland acquired full autonomy in the conduct of its external commercial relations and of the other matters provided for in the General Agreement, and is now known as Botswana.

Accordingly, the Recommendation of 18 November 1960 (9S/16), providing for the *de facto* application of the GATT as between the contracting parties and a territory which acquires autonomy, is applicable in respect of Botswana; <sup>616</sup>

The Director-General has been informed by the Government of the United Kingdom that on 4 October 1966 Basutoland acquired full autonomy in the conduct of its external commercial relations and of the other matters provided for in the General Agreement, and is now known as Lesotho.

Accordingly, the Recommendation of 18 November 1960 (9S/16), providing for the *de facto* application of the GATT as between the contracting parties and a territory which acquires autonomy, is applicable in respect of Lesotho.<sup>617</sup>

<sup>&</sup>lt;sup>611</sup> GATT, L/2420 (31 March 1965) and L/2705 (14 November 1966).

<sup>612</sup> GATT, L/2343 and Add.1 (22 January and 7 May 1965).

<sup>613</sup> GATT, L/2495 (5 November 1965).

<sup>&</sup>lt;sup>614</sup> GATT, L/2580 (14 March 1966) and L/2645 (27 April 1966).

<sup>615</sup> GATT, L/2673 (12 July 1966).

<sup>616</sup> GATT, L/2700 (28 October 1966).

<sup>617</sup> GATT, L/2701 (28 October 1966).

- (b) Application of GATT multilateral instruments discontinued after independence
- (i) Discontinuity resulting from the accession procedure provided for in article XXXIII

#### Israel

351. After the establishment of *Israel* as an independent State the CONTRACTING PARTIES on 9 May 1949 declared the following: <sup>618</sup>

Whereas the Government of the United Kingdom, in the course of negotiations leading to the drawing up of the General Agreement on Tariffs and Trade in Geneva in 1947, negotiated on behalf of the mandated territory of Palestine for concessions to be accorded to products originating in such territory and for concessions to be accorded to the products of other contracting parties entering such territory, and,

Whereas the Government of the United Kingdom ceased to be responsible for the mandated territory of Palestine on 15 May 1948,

#### The CONTRACTING PARTIES

Declare that since the United Kingdom ceased, as from 15 May 1948, to be a contracting party in respect of the territory formerly included in the Palestine mandate,

 Section E shall be deemed to be no longer a part of Schedule XIX;

2. ...

352. The treaty relations under the General Agreement were re-established on a provisional basis between *Israel* and certain members of GATT when the Declaration on the Provisional Application of *Israel*, dated 29 May 1959, entered into force on 9 October 1959. This Declaration was later superseded by the Protocol for Accession of *Israel*, dated 6 April 1962, which entered into force on 5 July 1962.

#### Cambodia and Tunisia

353. Cambodia and Tunisia after independence revised their tariffs and preferred to negotiate on the basis of these tariffs rather than maintain the commitments negotiated by France on their behalf in 1947. Accordingly, de facto application which was expected to last until October 1958 in respect of Cambodia and until October 1959 as to Tunisia under the Recommendation of 22 November 1957 620 was terminated and some special arrangements were made in preparation for full accession under article XXXIII.

354. The Protocol for the Accession of Cambodia 621 was concluded on 6 April 1962. However, the Government of Cambodia has advised that it does not, for the moment, envisage accepting the Protocol for the Accession. It hopes that Cambodia, pending the first results of the implementation of the new economic and financial reforms, can continue in the capacity of a "provisional member" of GATT in accordance with

the Decision of 17 November 1958 on "arrangements for the accession of Cambodia" adopted by the CONTRACTING PARTIES. In paragraph 3 of that Decision, contracting parties which are prepared to continue de facto application of the General Agreement in their relations with Cambodia, until such time as Cambodia accedes to the General Agreement, are invited to notify the Executive Secretary of GATT. Fifty-eight members of GATT have given notification pursuant to paragraph 3 of the Decision of 17 November 1955 and are, at present, applying the General Agreement on a de facto basis in their relations with Cambodia. 223

355. A part of the treaty relations under GATT instruments resumed application in respect of *Tunisia* when the Declaration on the Provisional Accession of *Tunisia*, concluded on 12 November 1959, entered into force on 21 May 1960, namely, thirty days after the acceptance of said Declaration by *Tunisia* and eight members of GATT, and initially only among those nine States accepting the Declaration. At present, the Declaration on Provisional Accession of *Tunisia* is accepted by sixty-three members of GATT. The timelimit has been extended on four occasions and now runs until 31 December 1968. The Government of *Tunisia* has announced its intention to negotiate for full accession under article XXXIII in 1968.

356. Cambodia and Tunisia have been contributing to the annual budget of GATT. 626

(ii) Application of GATT multilateral instruments lapsed after a certain period of de facto application or immediately upon independence

## Guinea and Laos

357. In accordance with the Recommendation of 22 November 1957 627 the *de facto* application in respect of *Laos* lasted until 15 October 1958; and in accordance with the Recommendation of 19 November 1959 628 it lasted until 1 December 1961 with regard to *Guinea*. Inasmuch as no request for extension of the time-limit was made by these new States, *de facto* application lapsed as of the above-mentioned dates.

# Somalia and Viet-Nam

358. The General Agreement was applied to former British Somaliland but was never applied to former Italian Somalia. Since independence the Somali Repub-

<sup>&</sup>lt;sup>618</sup> GATT, Basic Instruments and Selected Documents, vol. 2, pp. 14 and 15.

<sup>619</sup> GATT, PROT/2 (1964), pp. 34 and 46.

<sup>&</sup>lt;sup>620</sup> GATT, Basic Instruments and Selected Documents, Sixth Supplement (1958), pp. 10 and 11.

<sup>621</sup> Ibid., Eleventh Supplement (1963), p. 12.

<sup>622</sup> Ibid., Seventh Supplement (1959), pp. 17 and 18.

<sup>623</sup> GATT, L/2271 (13 October 1964) and Add.1-3.

<sup>&</sup>lt;sup>624</sup> United Nations, Treaty Series, vol. 362, pp. 328 and 330.

<sup>623</sup> See "Fourth Procès-verbal extending the Declaration of the Provisional Accession of Tunisia" (GATT, L/2933 (27 November 1967)). The Procès-verbal is open for acceptance at the office of the secretariat of GATT. See also GATT, L/2127 (Decision of 18 December 1963) and L/2368 (Status of Declaration on Provisional Accession).

<sup>626</sup> See "Financial Arrangements" in GATT, Basic Instruments and Selected Documents, Seventh to Fifteenth Supplements inclusive.

<sup>&</sup>lt;sup>627</sup> GATT, Basic Instruments and Selected Documents, Sixth Supplement, pp. 10 and 11.

<sup>628</sup> Ibid., Eighth Supplement, p. 8.

lic has been maintaining preferential arrangements contrary to the GATT principles with its main trading partner and has not so far wished to join GATT. Since independence, Viet-Nam has not expressed its wish to participate in the work of GATT. In these two cases, therefore, the application of the GATT instruments 629 (including a tariff schedule in the case of Viet-Nam) made by the predecessor States lapsed upon the independence of the new States.

### (c) Inheritance of exceptions or quasi-reservations

## (i) Invocation of article XXXV

359. When Japan became a member of GATT through the accession procedure in 1955, the Governments of Belgium, France and the United Kingdom, among others, invoked article XXXV, paragraph 1, and thereby withheld the application of the General Agreement in their trade relations with Japan. 630

360. Some thirty new States emerging from the former dependencies of Belgium, France and the United Kingdom since 1957 have claimed inheritance of the invocation of article XXXV, paragraph 1. Pursuant to paragraph 2 of the said article, Japan requested a review of the operation of paragraph 1, which was done by a working party in 1961. With regard to those new States whose predecessors had formerly invoked paragraph 1, the report of the working party, which was submitted to the CONTRACTING PARTIES in November 1961, suggested that the Government concerned "would wish to reconsider the question in the light of the changed circumstances resulting from its acquisition of full autonomy", possibly through an exchange of views with the Japanese Government.681 The subject was also discussed at the Meetings of Ministers in November 1961 632 and at the subsequent sessions of the CONTRACTING PARTIES, and yet the solution has been left mainly to bilateral talks.

361. The United Kingdom, France and Belgium withdrew invocation of paragraph 1 in May 1963, January 1964 and October 1964, respectively. *Malaya, Ghana* and *Madagascar* did the same in August 1960, March 1962 and December 1964, respectively. Since 1964 *Barbados, Guyana* and *Trinidad and Tobago* have disinvoked article XXXV in respect of Japan. On 1 May 1967, the invocation of article XXXV in respect of Japan "inherited" by members of GATT upon becoming contracting parties under article XXVI, para-

graph 5 (c), was still operative with regard to the following new States: 635

Burundi	Gabon	Nigeria
Cameroon	Gambia	Rwanda
Central African	Ivory Coast	Senegal
Republic	Jamaica	Sierra Leone
Chad	Kenya	Tanzania
Congo	Kuwait	Togo
(Brazzaville)	Malta	Uganda
Cyprus	Mauritania	Upper Volta
Dahomey	Niger	

## (ii) Election of Annex J

362. Although Ghana and the Federation of Malaya do not seem to fall in the category of the contracting parties as defined in paragraph 1 (d) of article XIV; 636 the CONTRACTING PARTIES declared, on 17 Octobed 1957 in respect of Ghana, and on 24 October 1957 with regard to the Federation of Malaya, that "the election of the Government of the United Kingdom under article XIV: 1 (d) on 31 December 1948 to be governed by Annex J shall be deemed to apply to" the Government of Ghana and to the Government of Malaya. 637

### 2. CASES INVOLVING A CHANGE IN THE STATUS OF A MEMBER OF GATT

# (a) Formation and dissolution of the Federation of Rhodesia and Nyasaland

363. Southern Rhodesia was an original contracting party to the Protocol Provisional Application of the General Agreement. After the formation of the Federation of Rhodesia and Nyasaland as a semi-autonomous member of the Commonwealth, the Governments of the United Kingdom and Southern Rhodesia sent joint Declarations of 22 September and 6 November 1953 to the members of GATT informing them that the Federation had acquired full responsibility for matters covered by the General Agreement. The CONTRACTING PARTIES adopted a declaration on 29 October 1954, which read in part: 640

Considering that, by the said Declarations, the Government of the United Kingdom has established the fact that the Federation is qualified, in the sense of paragraph 4 (c) of Article XXVI of the Agreement, to become a contracting party in respect of the territories of Northern Rhodesia and Nyasaland, on behalf of which the Government of the United Kingdom had accepted the Agreement, and

<sup>628</sup> United Nations, Treaty Series, vol. 55, pp. 194, 286-288 and 306, and GATT, G/5, "The Territorial Application of the General Agreement" (1952).

<sup>630</sup> See paras. 328 and 329, above.

<sup>631</sup> GATT, L/1545 (report of the Working Party on article XXXV review).

<sup>&</sup>lt;sup>632</sup> GATT, Proceedings of the Meeting of Ministers (1961).

<sup>633</sup> GATT, The Activities of GATT: 1961/1962, and L/1992 (17 April 1963), L/2308 (19 November 1964) and L/2331 (30 December 1964).

<sup>684</sup> GATT, L/2671 (8 July 1966), L/2665 (29 June 1966) and L/2754 (21 February 1967).

<sup>635</sup> See GATT, INT(67)128.

<sup>636</sup> See paras. 330 and 331, above.

<sup>637</sup> GATT, Basic Instruments and Selected Documents, Sixth Supplement (1958), pp. 9 and 10.

<sup>638</sup> United Nations, Treaty Series, vol. 55, p. 308.

<sup>&</sup>lt;sup>639</sup> The Federation was established by the Act of the British Parliament dated 24 March 1953 which became effective on 1 August 1953.

<sup>&</sup>lt;sup>640</sup> GATT, Basic Instruments and Selected Documents, Third Supplement (1955), pp. 29 and 30.

Considering further that, by the said Declarations, the Government of Southern Rhodesia has notified the Contracting Parties that the Federal Government has succeeded to the rights and obligations under the Agreement formerly accepted by Southern Rhodesia,

#### The CONTRACTING PARTIES

Declare:

1. that the Government of the Federation of Rhodesia and Nyasaland shall henceforth be deemed to be a contracting party . . . and to have acquired the rights and obligations under the General Agreement of the Government of Southern Rhodesia and of the Government of the United Kingdom. . . .

364. By a notification received on 12 January 1956, the Government of the *Federation of Rhodesia and Nyasaland* notified the Secretary-General of the United Nations that: <sup>641</sup>

... the Government of the Federation of Rhodesia and Nyasaland, acting in its capacity of contracting party to the General Agreement on Tariffs and Trade, acknowledges that the rights and obligations of Southern Rhodesia and of the United Kingdom in respect of Northern Rhodesia and Nyasaland arising out of the signature of acceptance of the following instruments relating to the General Agreement on Tariffs and Trade are to be considered as rights and obligations of the Federation of Rhodesia and Nyasaland in as much as such instruments are applicable to the jurisdiction of the Federation of Rhodesia and Nyasaland.

(There follows the list of the nineteen GATT multilateral instruments reproduced in paragraph 337, above with the addition of the "Declaration on the Continued Application of Schedules of 24 October 1953" (United Nations, *Treaty Series*, vol. 183, p. 351).)

365. All of the twenty instruments had been applied to Southern Rhodesia, as a contracting party, and to Northern Rhodesia and Nyasaland, as dependent territories of the United Kingdom, prior to the formation of the Federation of Rhodesia and Nyasaland.

366. Shortly before the dissolution of the Federation of Rhodesia and Nyasaland, a joint Declaration by the Governments of the United Kingdom and the Federation of Rhodesia and Nyasaland was received by the Director-General of GATT on 19 December 1963 with a request that it be circulated for the information of contracting parties. The joint Declaration reads as follows: 642

As contracting parties will no doubt be aware the Federation of Rhodesia and Nyasaland is to be dissolved at the end of 1963. The three constituent territories will thereafter have separate Customs and Tariff administrations.

On 1 January 1964, Southern Rhodesia will resume direct control of its external commercial relations and of the other matters provided for in the General Agreement and will from that date resume its former status as a contracting party to the GATT. The responsible authority for Southern Rhodesia's rights and responsibilities under the GATT will then be the Government of Southern Rhodesia.

On the same date the British Government will resume direct responsibility for the external commercial relations of Northern

Rhodesia and Nyasaland, including their rights and obligations under the GATT.

367. The following submission made by the Government of *Southern Rhodesia* for the information of contracting parties was circulated by the GATT secretariat on 4 March 1964: <sup>643</sup>

Following the dissolution of the Federation of Rhodesia and Nyasaland on 31 December 1963 and the resumption by the Southern Rhodesian Government on 1 January 1964 of its former status as a contracting party to the General Agreement, the Southern Rhodesian Government wishes to inform contracting parties that it has adapted to its own use the former Federal customs and excise legislation and, for its part, is applying on a provisional basis the terms and provisions of the trade agreements concluded by the former Federal Government with the Governments of the Commonwealth of Australia, the Republic of South Africa, the Bechuanaland Protectorate, Swaziland and Basutoland, Canada, Portugal and Japan.

The Southern Rhodesian Government would also inform contracting parties that in so far as trade with Northern Rhodesia and Nyasaland is concerned its objective has been to disturb as little as possible the trading arrangements which existed up to 31 December 1963 . . .

In resuming its former status as a contracting party to the GATT, the Southern Rhodesian Government accepts, in respect of the territory of Southern Rhodesia

- (i) the rights and obligations incurred by the former Federal Government under various protocols, declarations and recommendations, including the disinvocation of Article XXXV in respect of Japan;
- (ii) that Schedule XVI once again becomes Southern Rhodesia's Schedule in the GATT and that the rights and obligations of the former Federal Government in relation to the concessions negotiated with other contracting parties will be applicable to Southern Rhodesia; and
- (iii) the base date provisions of the Decision of 19 November 1960 and the provisions of the further Decision of 19 November 1960 relative to the Customs Treatment for Products of United Kingdom Dependent Territories.

368. As earlier mentioned, after attaining independence, *Malawi* (former Nyasaland) became a separate member of GATT 644 and *Zambia* (former Northern Rhodesia) has been in the period of *de facto* application. 645

#### (b) FORMATION OF MALAYSIA

369. As stated above,<sup>648</sup> after attaining independence in 1957 the Federation of Malaya became a member of GATT (contracting party) in accordance with the procedure laid down in article XXVI, paragraph 5 (c). Following the formation of *Malaysia* on 16 September 1963, the Indonesian Government, by way of communication dated 12 October 1963 addressed to the Director-General, requested that the following note should be communicated to all contracting parties.<sup>647</sup>

<sup>641</sup> United Nations, Treaty Series, vol. 226, p. 342.

<sup>642</sup> GATT, L/2110 (23 Decembre 1963).

<sup>643</sup> GATT, L/2167 (4 March 1964).

<sup>&</sup>lt;sup>644</sup> See para. 343, above.

<sup>615</sup> See para. 347, above.

<sup>646</sup> See paras. 336-338, above.

<sup>617</sup> GATT, L/2076 (29 October 1963).

The Government of the Republic of Indonesia officially protests the participation of the Government of the so-called "Malaysia" in the Working Group on Preferences which took place from the 7th until the 11th of October 1963 in Room XV of the Palais des Nations based on the fact that prior to the meeting of this Working Group the Government of the so-called "Malaysia" was not officially recognized by the CONTRACT-ING PARTIES to the GATT as a member of the General Agreement on Tariffs and Trade and hence had not the right to take part in any discussion concerning the work of the GATT.

370. The Director-General received the following communication dated 24 October 1963 from the United Kingdom: 648

... as from 16 September 1963, the Government of the United Kingdom has relinquished responsibility for the conduct of the external commercial relations and of other matters provided for in the General Agreement in respect of Singapore, North Borneo and Sarawak. The territories have now federated with the States of the Federation of Malaya in Malaysia. The responsible authority will in future be the Government of Malaysia.

371. Malaysia for its part made the following statement in the communication dated 22 October 1963 addressed to the Director-General: <sup>649</sup>

... as from 16 September 1963 the Government of the former Federation of Malaya has now become the Government of Malysia. As from that date the Government of Malaysia has assumed responsibility for the conduct of external commercial relations and other matters provided for in the General Agreement in respect of Singapore, North Borneo (now known as Sabah) and Sarawak.

It is intended to secure uniformity in the customs tariffs of the States of Malaysia. This process will take some years and it is proposed in the meantime that the individual customs tariffs in force in the former Federation of Malaya, Sabah, Sarawak and Singapore will continue to operate in the respective States of Malaysia. It is also provided in the agreement relating to Malaysia that in order to ensure the balanced development of all the States concerned a common market should progressively be established for all goods or products produced, manufactured or assembled and consumed in significant quantities in Malaysia with the exception of goods and products of which the principal terminal markets lie outside Malaysia. For this purpose the Government of Malaysia has established a tariff advisory board to advise the Government generally on the establishment of the common market including the establishment and maintenance of a common external tariff for the protection (where required) of goods for which there is to be a common market. Should the CONTRACTING PARTIES consider it necessary to examine these arrangements in the light of the provisions of the General Agreement, the Government of Malaysia will be glad to give all possible assistance.

The Government of Malaysia wishes it to be understood that the commitments which the United Kingdom Government had undertaken on behalf of Singapore, Sarawak and North Borneo (Sabah) prior to Malaysia would continue to be binding on these States but will not be extended to the States of the former Federation of Malaya. One such commitment is the Declaration on export subsidies which the United Kingdom Government signed in 1961, on behalf of all its dependent territories (except Kenya), and to which the former Federation of Malaya was not a party.

As regards other commitments it is to be noted that the former Federation of Malaya had bound its export duty on tin ore and tin concentrates with the United States. The Government of Malaysia will take over this commitment in respect of States in the former Federation of Malaya only. The States of Singapore, Sarawak and Sabah will be bound at such time as they have aligned their tariffs with the tariff of the former Federation of Malaya.

372. Following its separation from Malaysia, Singapore became an independent State and has been in the period of de facto application of the GATT instruments. 650

(c) FORMATION OF THE UNITED REPUBLIC OF TANZANIA

373. Tanganyika was a member of GATT, or contracting party, as from the date of its independence. 651 On 7 October 1964, the following note entitled "Status of Zanzibar" was issued by the GATT secretariat: 652

The Government of the United Kingdom has advised that "Zanzibar became independent on 10 December 1963 and since that date Her Majesty's Government has not been responsible for Zanzibar's external commercial relations".

The Government of the United Republic of Tanganyika and Zanzibar has advised that "under the Articles of Union the United Republic is now solely responsible for all external trade relations of the two countries and should consequently be deemed a single contracting party to the General Agreement".

## F. Summary

## 1. FORMER CUSTOMS TERRITORIES

374. Continuity in the application of the GATT multilateral instruments has been secured in the case of thirty-two new States: Barbados, Burundi, Cameroon, Central African Republic, Chad, Congo (Brazzaville), Cyprus, Dahomey, Federation of Malaya, Gabon, Gambia, Ghana, Guyana, Indonesia, Ivory Coast, Jamaica, Kenya, Kuwait, Madagascar, Malawi, Malta, Mauritania, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Tanganyika, Trinidad and Tobago, Togo, Uganda and Upper Volta. Continued application is for the time being assured on a de facto basis in eight cases: Algeria, Botswana, Congo (Democratic Republic of), Lesotho, Maldive Islands, Mali, Singapore, and Zambia. Israel became a member of GATT by accession and Cambodia and Tunisia are in the process of acceding, applying in the meantime the GATT instruments on a new de facto or provisional basis. The application of the GATT instruments lapsed in four cases only: Guinea, Laos, Somalia and Viet-Nam.

375. In the thirty-two cases where continued application of the GATT multilateral instruments has been secured, the new States were former customs territories to which the member of GATT (contracting party) responsible for their foreign and commercial relations had

<sup>648</sup> GATT, L/2077 (30 October 1963).

<sup>649</sup> Ibid.

<sup>650</sup> See paras. 348 and 349, above.

<sup>651</sup> See paras. 339 and 340, above.

<sup>852</sup> GATT, L/2268 (7 October 1964).

applied the GATT instruments before the attainment of their independence. This allowed full use to be made of the procedure laid down in article XXVI, paragraph 5 (c), of the General Agreement. A feature common to all succession cases within GATT is precisely that the succession process takes place in conformity with a provision embodied in the General Agreement itself. In that sense it is a conventional succession. On the other hand, to facilitate the participation of new States in the GATT multilateral instruments, under article XXVI, paragraph 5 (c), the CONTRACTING PARTIES have elaborated, by way of general recommendations and specific decisions, a procedure of de facto application of the GATT instruments. This procedure, which has been fully implemented during the last years, allows the continued de facto application of the GATT instruments as far as a new State (former customs territory) is concerned, pending final decisions as to its future economic and commercial policy. Thus, the GATT provisions continue to operate on a de facto and quid pro quo basis in the relations between the members of GATT and the new State in question after independence, giving to the new State a time-period of reflection to decide whether or not it wants to join GATT as a member (contracting party) under article XXVI, paragraph 5 (c), accede in conformity with article XXXIII, or end its relations with GATT.

376. The procedure laid down in article XXVI, paragraph 5 (c), requires: (1) the sponsorship of the member of GATT (contracting party) formerly responsible for the territory; (2) the consent of the new State concerned; (3) the acknowledgement by the CON-TRACTING PARTIES of the fact established in the declaration of sponsorship and of the wish of the new State to join GATT as a contracting party. In earlier cases (Indonesia, Federation of Malaya, Ghana, Nigeria, Sierra Leone, Tanganyika, Trinidad and Tobago, Uganda), the CONTRACTING PARTIES adopted a declaration taking note of the sponsorship and of the wish of the new State and indicating that the new State was therefore deemed to be a member of GATT (contracting party). Such declarations by the CONTRACT-ING PARTIES made express reference to article XXVI, paragraph 5 (c). In all those cases, soon after the declarations by the CONTRACTING PARTIES were made, the new States recognized themselves to be bound by GATT subsidiary instruments previously made applicable to their territories, by way of formal declarations or notifications addressed to the Secretary-General of the United Nations and the Director-General of GATT.

377. Recently, and following the adoption by the CONTRACTING PARTIES of recommendations relating to de facto application of GATT multilateral instruments, the procedure referred to in the preceding paragraph for the implementation of article XXVI, paragraph 5 (c), has been somewhat modified. The CONTRACTING PARTIES have dispensed with the making of declarations. Acknowledgement is now made by a letter of certification issued by the Director-General of GATT, after consultations with the new State concerned and the receipt of the declaration of sponsorship

(Barbados, Burundi, Cameroon, Central African Republic, Chad, Congo (Brazzaville), Cyprus, Dahomey, Gabon, Gambia, Guyana, Ivory Coast, Jamaica, Kenya, Kuwait, Madagascar, Malawi, Malta, Mauritania, Niger, Rwanda, Senegal, Togo, Upper Volta). The letters of certification mention the wish of the new State to be deemed a member of GATT and, normally, the declaration of sponsorship. Also, they refer expressly to article XXVI, paragraph 5 (c), and, sometimes, to relevant recommendations concerning the de facto application of the GATT multilateral instruments. Finally, the new States which became members of GATT in accordance with article XXVI, paragraph 5 (c), are at present deemed by the CONTRACTING PARTIES to be bound by the GATT subsidiary instruments applicable to their territories prior to independence. Formal declarations or notifications addressed to the Secretary-General of the United Nations and the Director-General of GATT are no longer required to become a party to such subsidiary instruments.

378. A new State (former customs territory), which becomes a member of GATT under article XXVI, paragraph 5 (c), assumes the obligations accepted on its behalf by the State which has ceased to have responsibility for its international relations. The succession implied in such a procedure has retroactive effects as far as the date from which the new State is deemed to be a contracting party is concerned: the new State is considered to be a contracting party as from the date of its independence. With the exception of the declaration concerning the three first cases (Indonesia, Federation of Malaya, Ghana), the declarations adopted by the CONTRACTING PARTIES and the letters of certification issued by the Director-General of GATT clarify that the new State concerned acquired the rights and obligations of a contracting party as from its independence date, that date being expressly mentioned in the declaration or letter of certification. This retroactivity, however, does not entail any kind of retroactive assessment as to the contributions of the new State to the annual budget of GATT.

379. Another effect of the succession implied in the procedure laid down in article XXVI, paragraph 5 (c), is the "inheritance" of exceptions or quasi-reservations. As has been recorded, some new States which became contracting parties under article XXVI, paragraph 5 (c), inherited the invocation of article XXXV in respect to Japan made by the United Kingdom, France and Belgium. The "inheritance" of the said invocation is still operative with regard to twenty-four new States, former customs territories (see para. 361, above). The election of Annex J made by the United Kingdom, under article XIV, paragraph 1 (d), was also applied to the Federation of Malaya and Ghana.

### 2. MEMBERS OF GATT

380. Continued application of the GATT multilateral instruments has also been secured in cases where members of GATT (contracting parties) underwent

changes in their status as a result of the formation and dissolution of unions. The three cases of formation of unions relate to a contracting party, sovereign State (Federation of Malaya, Tanganyika) or not (Southern Rhodesia), and former customs territories to which another contracting party (United Kingdom) had previously applied the GATT multilateral instruments. The case of dissolution of a union (Federation of Rhodesia and Nyasaland) concerns a contracting party which was not a sovereign independent State.

381. When Malaysia was formed, continued application of the GATT multilateral instruments in the former Federation of Malaya and in the territories of North Borneo, Sarawak and Singapore was assured despite objections made by Indonesia. Following the establishment of the union, the Government of the United Kingdom and the Government of Malaysia sent communications to the Director-General of GATT whereby the United Kingdom relinquished its responsibilities as regards North Borneo, Sarawak and Singapore, and Malaysia assumed responsibility for the conduct of the external commercial relations of the Federation of Malaya and the territories of North Borneo, Sarawak and Singapore. Prior commitments undertaken by the Federation of Malaya and the United Kingdom were maintained by Malaysia with respect to the parts of the union to which such commitments had been made applicable before the formation of the union.

382. Following the independence of Zanzibar, the United Kingdom relinquished its responsibilities with regard to that former customs territory. After a short period of independence, Zanzibar joined Tanganyika, a contracting party, in the *United Republic of Tanzania*. The Government of the union communicated to GATT the assumption of responsibility for the external trade relations of both Tanganyika and Zanzibar and the *United Republic of Tanzania* became a single contracting party to GATT.

383. In the case of the Federation of Rhodesia and Nyasaland, established in 1953 by the union of a con-

tracting party (Southern Rhodesia) and two territories (Northern Rhodesia, Nyasaland), continued application of the GATT multilateral instruments was secured under the procedure laid down in article XXVI, paragraph 5 (c), as in the cases of former customs territories referred to above. After the establishment of the Federation, through joint declarations, the Government of the United Kingdom established the fact that the Federation of Rhodesia and Nyasaland was qualified to become a contracting party "in respect of the territories of Northern Rhodesia and Nyasaland" and the Government of Southern Rhodesia notified that the Federation had succeeded to the rights and obligations "formerly accepted by Southern Rhodesia". Thereafter, the CON-TRACTING PARTIES adopted a declaration stating that the Federation of Rhodesia and Nyasaland "shall henceforth be deemed to be a contracting party" and "... [has] acquired the rights and obligations... of the Government of Southern Rhodesia and the Government of the United Kingdom". Finally, the Government of the Federation of Rhodesia and Nyasaland notified the Secretary-General of the United Nations that the Federation was bound by the GATT subsidiary instruments previously applied to Southern Rhodesia as well as to Northern Rhodesia and Nyasaland.

384. Shortly before the dissolution of the Federation of Rhodesia and Nyasaland, the Government of the United Kingdom and the Government of the Federation communicated to the Director-General of GATT, by way of a joint declaration, that as from the date immediately after such dissolution Southern Rhodesia "will resume its former status as a contracting party to the GATT" and the United Kingdom "will resume direct responsibility for the external commercial relations of Northern Rhodesia and Nyasaland, including its rights and obligations under GATT". After the dissolution of the Federation, Southern Rhodesia informed the contracting parties that in resuming its former status as a member of GATT it accepted, in respect to its territory, rights and obligations incurred by the former Government of the Federation of Rhodesia and Nyasaland.

## **DOCUMENT A/CN.4/202**

# First report on succession of States and Governments in respect of treaties, by Sir Humphrey Waldock, Special Rapporteur

[Original text: English]
[15 March 1968]

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## I. Introduction

## A. HISTORICAL BACKGROUND

1. At its first session, in 1949, the International Law Commission placed the topic of "Succession of States and Governments" among the fourteen topics listed in paragraph 16 of its report for that year as being suitable for codification. The Commission did not, however, give the topic priority and, owing to its preoccupation with the codification of other branches of the law, did not revert to "Succession of States and Governments" until its fourteenth session held in 1962. Meanwhile, the General Assembly, in its resolution 1686 (XVI), of 18 December 1961, had recommended the Commission to include on its priority list the topic of "Succession of

2. During the fourteenth session, the Commission appointed a Sub-Committee on the Succession of States and Governments which examined the question of the preparatory work that would be required for the study of the topic.<sup>2</sup> In the light of suggestions of this Sub-Committee, the Commission decided that certain studies should be made by the Secretariat and by members of the Sub-Committee; that a meeting of the Sub-Committee should be held in January 1963 to discuss the scope of and approach to the subject; and that the Chairman of the the Sub-Committee should report the

States and Governments", and at its fourteenth session the Commission decided to include the topic in the programme for its future work.

<sup>&</sup>lt;sup>1</sup> Yearbook of the International Law Commission, 1949, p. 281.

<sup>&</sup>lt;sup>2</sup> Yearbook of the International Law Commission, 1962, vol. II, document A/5209, pp. 191 and 192.

outcome of the discussion to the Commission at its fifteenth session.

- 3. In the December following the fourteenth session, the Secretariat circulated to the Sub-Committee on Succession of States and Governments and to the Commission three documents 3 which the Secretariat had prepared relative to the topic:
- (i) The Succession of States in relation to membership in the United Nations (A/CN.4/149 and Add.1);
- (ii) Succession of States in relation to general multilateral treaties of which the Secretary-General is the Depositary (A/CN.4/150);
- (iii) Digest of the decisions of international tribunals relating to State succession (A/CN.4/151).
- The Sub-Committee met at Geneva between 17 and 25 January 1963 and again at the beginning of the Commission's fifteenth session, submitting its report to the Commission on 7 June 1963 (A/CN.4/160 and Corr.1). This report, which is printed as annex II to the Report of the Commission to the General Assembly for 1963,4 contains the Sub-Committee's conclusions regarding the scope of the subject of succession of States and Governments and its recommendations regarding the Commission's approach to the subject. It also contains in appendix I the summary records of the meetings of the Sub-Committee held in January 1963 and of its meeting of 6 June 1963. In addition, appendix II reproduces the memoranda and working papers presented to the Sub-Committee by Mr. T. O. Elias, Mr. A. H. Tabibi, Mr. S. Rosenne, Mr. E. Castrén, Mr. M. Bartoš and by Mr. M. Lachs (Chairman of the Sub-Committee).
- The report of the Sub-Committee was discussed at the fifteenth session of the Commission in its 702nd meeting, when the Commission gave its general approval to the Sub-Committee's recommendations. It endorsed the Sub-Committee's view that the succession in the matter of treaties should be considered in connexion with the succession of States, rather than in the context of the law of treaties, but that co-ordination between the Special Rapporteurs on the law of treaties and on succession of States was essential. It also endorsed the Sub-Committee's opinion that the objective should be "a survey and evaluation of the present state of the law and practice on State succession and the preparation of draft articles on the topic having regard also to new developments in international law in this field". It further expressed its agreement with the broad outline and the order of priority of the headings of the topic recommended by the Sub-Committee, which were as follows:
  - (i) Succession in respect of treaties;
  - (ii) Succession in respect of rights and duties resulting from other sources than treaties;
  - (iii) Succession in respect of membership of international organizations.<sup>5</sup>
  - <sup>a</sup> Ibid., document A/CN.4/149/Add.1, pp. 101-151.
- <sup>4</sup> Yearbook of the International Law Commission, 1963, vol. II, document A/5509, pp. 260-300.
  - <sup>5</sup> The Commission at the same time expressed its general

Finally, the Commission appointed Mr. M. Lachs as Special Rapporteur on the topic of the succession of States and Governments and gave certain instructions to the Secretariat with regard to the obtaining of information on the practice of Governments "relating to the process of succession and affecting States which have attained independence since the Second World War". During the session, the Secretariat circulated a document "which it had prepared, containing a "Digest of decisions of national courts relating to succession of States and Governments".

- 6. In resolution 1902 (XVIII) of 18 November 1963, the General Assembly recommended that the Commission should "continue its work on the succession of States and Governments, taking into account the views expressed at the eighteenth session of the General Assembly, the report of the Sub-Committee on the Succession of States and Governments and the comments which may be submitted by Governments, with appropriate reference to the views of States which have achieved independence since the Second World War".
- 7. At its sixteenth, seventeenth and eighteenth sessions, held respectively in 1964, 1965 and 1966, the heavy calls made upon the Commission's time by its work on the law of treaties and on special missions prevented it from giving further consideration to "Succession of States and Governments" during the remainder of the Commission's five-year term. In the course of its discussion of the law of treaties in 1964 the Commission noted certain points with respect to which the succession of States or Governments might have relevance (e.g. the territorial scope of treaties and the effects of treaties on third States); but it decided to leave these aside to be considered in connexion with its separate study of the topic of succession of States and Governments.7 In December 1966, Mr. M. Lachs, the Special Rapporteur for the "Succession of States and Governments", was elected to the International Court of Justice and ceased to be a member of the Commission.
- 8. The Commission, in its new composition, reviewed its programme of work at its nineteenth session and, in accordance with a suggestion of the former Special Rapporteur, decided to divide the topic of succession of States and Governments in order to advance its study more rapidly. Taking account of the Sub-Committee's division of the topic into three headings mentioned in paragraph 5 above, the Commission decided to appoint special rapporteurs for the subjects of (a) Succession in respect of treaties and (b) Succession in respect of rights and duties resulting from sources other than treaties. The third subject in the Sub-Committee's division—succession in respect of membership of international organizations—it decided to

agreement with the detailed division of the topic sketched out in paragraph 15 of the Sub-Committee's report.

<sup>&</sup>lt;sup>6</sup> Yearbook of the International Law Commission, 1963, vol. II, document A/CN.4/157, pp. 95-150.

<sup>&</sup>lt;sup>7</sup> Yearbook of the International Law Commission, 1964, vol. II, document A/5809, p. 176.

leave aside for the time being. As regards succession in respect of treaties, the Commission noted that it had already decided in 1963 to give this subject priority, and that the convocation of a Conference on the Law of Treaties in 1968 and 1969 by the General Assembly had made its codification more urgent. Accordingly, the Commission decided to advance the work on succession in respect of treaties as rapidly as possible at its twentieth session in 1968; and at the same time it appointed as its Special Rapporteur Sir Humphrey Waldock, the Commission's former Special Rapporteur on the law of treaties.

#### B. SCOPE AND FORM OF THE PRESENT DRAFT ARTICLES

9. The Commission has thus specifically limited the scope of the present report to the succession of States and Governments in respect of treaties. Furthermore, although in 1963 the Sub-Committee expressed the opinion that "succession in respect of treaties should be dealt with in the context of succession of States, rather than in that of the law of treaties",8 and the Commission accepted this opinion, the present Special Rapporteur believes that the solution of the problems of so-called "succession" in respect of treaties is today to be sought within the framework of the law of treaties rather than of any general law of "succession". This view is founded more especially on the modern practice of States, of international organizations and of the depositaries of treaties, though also on doubts as to how far any specific legal institution of "succession" has been recognized in international law.

10. Modern practice shows considerable diversity in regard both to the situations raising questions of succession and to the solutions adopted. The diversity in regard to the solutions makes it difficult to explain this practice in terms of any fundamental principle of "succession" producing compellingly specific logical 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.9 If any one specific theory were to be adopted by the Commission, it would almost certainly be found to be a strait-jacket into which the actual practice of States, organizations and depositaries could not be forced without inadmissible distortions either of the practice or the theory. Admittedly, that same diversity in the situations and in the solutions adopted may also make it difficult to deduce general rules from the modern practice. If, however, the question of "succession" is approached from the point of view of the law of treaties, it is believed that some general rules, however few or broad, are discernible in the practice. In any case, the diversity in the actual practice is itself a legal phenomenon which can hardly be disregarded or subordinated to a particular theory of succession in order to achieve

what may be thought a juridically more satisfying formulation of the rules governing succession in respect of treaties.

11. Accordingly, the draft contained in the present report consists of a group of articles designed as a sequel to the draft articles on the law of treaties rather than as one section of a single comprehensive codification of the several branches of the law applicable to succession of States and Governments. The precise form which the present draft should take—an addendum or a protocol to the projected Convention on the law of treaties, a text forming part of a series of instruments dealing with "succession", or a wholly independent instrument—is clearly a matter to be decided at a much later stage. At the present stage the tentative plan of the Special Rapporteur is to prepare an autonomous group of articles on succession in respect of treaties capable, with slight adjustments, of being converted into any of the above forms. But for present purposes he thinks that the convenient course may be to formulate the draft on the basis that it is intended to be an autonomous instrument, which assumes the existence of the Commission's articles on the law of treaties or of similar articles resulting from the Vienna Conference. This, therefore, is the course followed in the present report.

The title to the present report reproduces the rubric which the Special Rapporteur understands the Commission to have intended when it entrusted the subject of succession in respect of treaties to him at its nineteenth session. In 1963, there was some discussion in the Sub-Committee as to how far succession of Governments really forms part of the topic of succession; and some differences manifested themselves in the Sub-Committee as to whether certain situations should be regarded as cases of succession to States or to Governments. In paragraph 9 of its report, under the heading "Questions of Priority", 10 the Sub-Committee confined itself to recommending that, when appointed, the Special Rapporteur should "initially concentrate on the topic of State succession, and should study succession of Governments in so far as necessary to complement the study of State succession". The Special Rapporteur considers that the Commission will be in a better position to form a judgement on this matter and on the precise title to be given to its draft when it has completed its first examination of the sub-The recommendation of the Sub-Committee, however, provides a useful general guide for the work of the Commission and the Special Rapporteur has taken it as such in preparing the present report.

13. The Sub-Committee, in paragraph 6 of its report, 11 stressed the "need to pay special attention to problems of succession arising as a result of the emancipation of many nations and the birth of so many new States after World War II". It further advocated that the "problems concerning new States should be given special attention and the whole topic should be viewed

<sup>&</sup>lt;sup>8</sup> Yearbook of the International Law Commission, 1963, vol. II, document A/5509, Annex II, p. 261.

<sup>&</sup>lt;sup>9</sup> For a succinct account of various theories, see D. P. O'Connell, State Succession in Municipal Law and International Law (1967), vol. I, pp. 8-30.

<sup>&</sup>lt;sup>10</sup> Yearbook of the International Law Commission, 1963, vol. II, document A/5509, Annex II, p. 261.

<sup>11</sup> Ibid

in the light of contemporary needs and the principles of the United Nations Charter". The General Assembly, as already noted in paragraph 6 above, expressed the same idea, if perhaps in more cautious terms, in its resolution 1902 (XVIII) when it requested the Commission to continue its work "with appropriate reference to the views of States which have achieved independence since the Second World War". Some jurists, indeed, go so far as to suggest that the precedents of earlier years, such as the emergence to independence of the American colonies of Spain and Portugal or the territorial changes at the end of the First World War, are of limited or no relevance for the solution of the contemporary problems of succession which have arisen during the United Nations era.

- 14. The stress laid by the Sub-Committee and the General Assembly on the problems of the new States needs neither justification nor explanation at the present moment in history. At the same time, it may be doubted whether any purpose would be served by making a sharp distinction between the problems of the "old" and of the "new" States in the present connexion. After all, on the emergence of a new State, the problems of succession which arise in respect of treaties are inevitably problems that involve old States no less than the newly emerged one. Succession in respect of a treaty is a question which by its very nature involves 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 just as many recently emerged States as it will "old" States. The Commission cannot fail to give particular importance to the case of "new" States because it is both the commonest and the most perplexing form in which the issue of succession arises. But there is a risk that the perspective of the effort at codification might become distorted if succession in respect of treaties were to be approached too much from the viewpoint of the "new" State alone.
- 15. Similarly, it may be doubted whether any purpose would be served by distinguishing at all sharply between the value of earlier and later precedents. The basic elements of the situations giving rise to the questions of succession in the earlier precedents and the considerations motivating the attitudes of the States concerned were much the same as in the modern cases. Consequently, to attach no value to the earlier precedents would seem somewhat arbitrary. But in the nature of things more recent practice must be accorded a certain priority as evidence of the opinio juris of today. Moreover, in the case of "succession", the very frequency and extensiveness of the modern practice tends to overwhelm and submerge earlier precedents. In addition, it has to be 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.

Scarcely less important is the enormous growth of international organizations and the contribution which they have made both the development and the publication of State and depositary practice in matters of succession to multilateral treaties. Important also, if in a more general way, is the fact that the modern precedents reflects the practice of States conducting their relations under the régime of the principles of the Charter of the United Nations.

16. When all due weight is given, however, to the new factors and to the modern practice with respect to "new" States, the basic problem in regard to succession remains what it has always been: to discern with sufficient clearness how far the practice is an expression simply of policy and how far and in what points an expression of legal right or obligation.

#### II. Text of draft articles with commentary

#### CHAPTER I: GENERAL PROVISIONS

## Article I: Use of terms

- 1. The meanings specified for particular terms in article 2 of the draft articles on the Law of Treaties <sup>12</sup> are also to be given to those terms for the purposes of the present articles.
- 2. In addition, for the purposes of the present articles:
- (a) "Succession" means the replacements of one State by another or, as the case may be, of one Government by another, in the possession of the competence to conclude treaties with respect to a given territory;
- (b) "Successor State" and "successor Government" mean the State or, as the case may be, Government which has replaced another State or Government on the occurrence of a "succession";
- (c) "Predecessor State" and "predecessor Government" mean the State or, as the case may be, Government which has been replaced on the occasion of a succession".

#### Commentary

(1) Paragraph 1 raises, both as to substance and as to form, the question of the link between the present articles and the draft articles on the Law of Treaties (hereinafter called in these Commentaries the "Law of Treaties"). As to substance, articles 1 and 2 of the Law of Treaties specifically limit the application of that draft to international agreements in written form concluded between States. The Commission has therefore to consider whether the present articles concerning succession in respect of treaties should be so limited. There seems to be a disposition on the part of some Governments to question the exclusion of treaties concluded by international organizations from the draft on the Law of Treaties, so that the use of the term "treaty" in the

<sup>&</sup>lt;sup>12</sup> Yearbook of the International Law Commission, 1966, vol. II, document A/6309/Rev.1, part II, pp. 177-187.

Law of Treaties may be revised at Vienna. In general, however, it would seem logical for the use of the term "treaty" in the present articles to be uniform with its use in the Law of Treaties, unless it is thought that no special considerations apply to succession in respect of international agreements of "other subjects of international law" or of "oral agreements". On a preliminary view of the matter, the Special Rapporteur doubts very much that succession in respect of these other forms of international agreements would be found not to involve any special problems.

(2) As to form, paragraph 1 is drafted in the form of a general renvoi to the meanings given to particular terms in article 2 of the Law of Treaties. This seems the convenient course at the present stage of the Commission's work. If it should prove at a later stage that comparatively few of the terms mentioned in article 2 of the Law of Treaties require to be used in the present articles, it may be preferable only to reproduce the provisions of article 2 relating to the terms appearing in the present draft.

(3) Paragraph 2 (a) specifies the sense in which the term "succession" is used in the draft articles and is of cardinal importance for the whole structure of the present draft. In many systems of municipal law, "succession" is a legal term and a legal institution which connotes the devolution from one person to another of rights or obligations automatically by operation of law on the happening of an event, as, for example, upon a death. The "successor" may or may not, in any system of law, have an option to disclaim the "succession". But in principle the event and the relationship of the "successor" to the person affected by the event cause the successor as a matter of law to "succeed" to certain rights or obligations of that person. The term "succession" therefore tends in municipal law to carry the meaning of a legal institution which, given the relevant event, brings about by itself the transfer of legal rights and obligations. In international law analogies drawn from municipal law concepts of succession are to be found in the writings of jurists and sometimes also 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 or obligations previously applicable with respect to territory which has passed under its sovereignty without any nice consideration of whether this is truly succession by operation of law or merely a voluntary arrangement of the States concerned. The ambiguity surrounding the expression "State succession" in international law can be seen in the definition given to the term "Succession d'Etats" in the "Dictionnaire de la terminologie du droit international" 13 which is as follows:

"Expression fréquemment employée en doctrine pour désigner:

(a) la situation qui se présente lorsqu'un Etat se substitue à titre permanent à un autre Etat dans un territoire et à l'égard de la population de ce territoire par suite d'une incorporation totale ou d'une annexion partielle, d'un partage ou de la création

d'un Etat nouveau, que l'Etat dont relevait antérieurement ce territoire subsiste ou disparaisse.

- (b) la substitution d'un Etat dans les droits et obligations de l'autre résultant de cette situation. "On entend . . . par succession des Etats aussi bien la modification territoriale elle-même, soit le fait qu'à l'intérieur d'un territoire donné un Etat se substitue à un autre, que la succession de l'un de ces Etats aux droits et obligations de l'autre (c'est-à-dire de l'Etat dont le territoire a passé à l'Etat successeur)." Kelsen, Académie de Droit International, t. 42, p. 314.
- (4) Municipal law analogies, however suggestive and valuable in some connexions, have always to be viewed with some caution in international law; for an assimilation of the position of States to that of individuals as legal persons may in other connexions be misleading even when it is suggestive. In international law and more especially in the field of treaties, the great question is to determine whether and how far the law recognizes any cases of "succession" in the strict, municipal law sense of the transfer of rights or obligations by operation of law. The answer to be given to this question will only become clear for the purposes of the present articles when the Commission has undertaken a full examination of the subject of succession in respect of treaties. Meanwhile, for working purposes and without in any way prejudging the outcome of that examination, the Special Rapporteur considers it desirable to use the term "succession" exclusively as referring to the fact of the replacement of one State by another in the possession of the competence to conclude treaties with respect to a given territory. At the same time, he thinks that, purely for drafting reasons, it will probably be found convenient, whatever the Commission's conclusions on the questions of substance, to use the term "succession" exclusively as referring to the fact of a change in the possession of the treaty-making competence and to leave any possible succession to rights or obligations to be stated separately and expressly.
- (5) The meanings attributed in paragraphs 2 (b) and 2 (c) to the terms "Successor State", "Successor Government", "Predecessor State" and "Predecessor Government", are merely consequential upon the meaning given to "succession" in paragraph 2 (a).
- (6) As the work progresses, it may be found desirable in the present article to add the meanings of some further terms in order to give precision to the sense in which they are used in the draft. But the Commission has usually found it convenient to leave the general question of the use of terms until a later stage of its work.

# Article 2: International agreements not within the scope of the present articles

The fact that the present articles do not relate:

- (a) To international agreements concluded between States and other subjects of international law of between such other subjects of international law; or
- (b) To international agreements not in written form shall not affect the application to them of any of the rules set forth in the present articles to which they would be subject independently of these articles.

<sup>&</sup>lt;sup>13</sup> Paris 1960, p. 587.

#### Commentary

- (1) The inclusion of this article will become necessary if the Commission decides to use the term "treaty" in the present articles with the same meaning as in article 2 of the Law of Treaties. As in the case of the similar article in the Law of Treaties (art. 3), the purpose of the article would simply be to make a general reservation safeguarding the position in regard to the relevance of the general rules of "succession" for other forms of written or oral international agreements not covered by the present articles.
- (2) The text of the article reproduces the text of article 3 of the Law of Treaties, only omitting from the final phrase the words "the legal force of such agreements or", which do not seem applicable in the context of the present articles. Clearly, the text would be subject to revision in the light of the discussion of article 3 of the Law of Treaties at the Vienna Conference.

#### Article 3: Relevant rules of international organizations

The application of the present articles to treaties which are constituent instruments of an international organization or are adopted within an international organization shall be subject to any relevant rules of the organization.

#### Commentary

- (1) As in the case of the application of 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. 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 is therefore connected with the law of international organizations. Indeed, this was one of the reasons why the Commission at its last session decided to leave aside for the time being the subject of succession in respect of membership of international organizations. As to treaties "adopted within an international organization", it certainly cannot be excluded that organization should develop their own rules for dealing with questions of succession. In the International Labour Organisation, for example, a consistent and important practice has developed 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 customary law or other internal rule of that organization, the Special Rapporteur considers that a general reservation of relevant rules of organizations is necessary to cover such a possibility.
- (2) The present article reproduces textually the wording of article 4 of the Commission's draft articles on the Law and Treaties. The Commission will appreciate, however, that this wording may undergo a change at the Vienna Conference on the Law and Treaties, which is to take place before the Commission meets for its next session. Some Governments in their comments on the

Commission's draft have indicated a preference for a more restrictive definition of the treaties covered by this article; 11 some organizations, on the other hand, have advocated a broader definition. 15 The Special Rapporteur will, therefore, report to the Commission at its forthcoming session the outcome of any discussion of this article which may take place at the Vienna Conference

#### Article 4: Boundaries resulting from treaties

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

#### Commentary

(1) This article makes a general reservation in regard to the effect of the present articles on boundaries established by treaty for reasons similar to those which led the Commission in the Law of Treaties to except from the rule regarding a fundamental change of circumstances (article 59) "a treaty establishing a boundary". In paragraph (11) of its commentary to article 59, 16 after pointing out that the exception appeared to be recognized by most jurists, the Commission observed:

Some members of the Commission suggested that the total exclusion of these treaties from the rule might go too far, and might be inconsistent with the principle of self-determination recognized in the Charter. The Commission, however, concluded that treaties establishing a boundary should be recognized to be an exception to the rule, because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions. It also took the view that "self-determination", as envisaged in the Charter, was an independent principle and that it might lead to confusion if, in the context of the law of treaties, it were presented as an application of the rule contained in the present article. By excepting treaties establishing a boundary from its scope the present article would not exclude the 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.

The same general considerations appear to apply, mutatis mutantis, to cases of "succession" even although in these cases the question of the continuance or termination of the treaty may present itself somewhat differently.

(2) The weight both of opinion and practice seems clearly to be in favour of the view that boundaries

<sup>&</sup>lt;sup>14</sup> E.g. Czechoslovakia (see Official Records of the General Assembly, Twenty-second Session, Annexes, agenda item 86, document A/6827, p. 3) and the United States of America (ibid., document A/6827/Add.2, p. 25).

<sup>&</sup>lt;sup>15</sup> The Secretary-General of the United Nations (*ibid.*, document A/6827/Add.1, pp. 13 and 14) and the Food and Agriculture Organization of the United Nations (*ibid.*, pp. 16 and 17).

<sup>&</sup>lt;sup>16</sup> Yearbook of the International Law Commission, 1966, vol. II, document A/6309/Rev.1, part II, p. 259.

established by treaties remain untouched by the mere fact of a succession. The opinion of jurists seems, indeed, to be unanimous on the point even if their reasoning may not always be exactly the same.17 In State practice the unanimity may not be quite so absolute; but the State practice in favour of the continuance in force of boundaries established by treaty appears to be such as to justify the conclusion that a general rule of international law exists to that effect.18 The rule here in question, of course, concerns only the issue of the effect of a "succession", as such, upon boundaries established under previous treaties. It does not touch the application of the principle of selfdetermination in any given case. As the Commission said in the above-quoted passage of its commentary on article 59 of the Law of Treaties, "self-determination as envisaged in the Charter is an independent principle". Therefore, by excepting from succession in respect of treaties boundaries established through treaties, the present article in no way excludes the independent operation of the principle of self-determination in any case where the conditions for its application exist. Nor does it in any way touch the question of what precisely is to be considered the true line of the boundary established under the treaty. It simply prevents any provision of the present articles regarding either the application of the treaties of the successor State or the cessation of the application of the treaties of the predecessor State from affecting established boundaries.

(3) The opinions of a number of writers and some of the State practice might suggest a wider formulation of the present article so as to make it cover all so-called "localized" treaty stipulations or alternatively the conversion of the article into a provision laying down a general rule of succession to all "localized" or "dispositive" treaties. 19 The question of succession to "localized" treaties is, however, more controversial than the question of the continuance in force of boundaries.<sup>20</sup> Moreover, whereas a boundary established by or in conformity with a treaty may be regarded simply as a legal situation resulting from the execution of the treaty, "localized treaty stipulations" involve executory obligations and, in consequence, may appear to raise a question of succession in respect of treaty obligations as well as one of the continuance of a legal situation. The question of "localized treaty stipulations" also has certain analogies with the problem of "objective régimes" considered by the Commission in connexion with the effect of treaties on third States, and discussed more particularly in paragraph (4) of its commentary to article 34.21 Accordingly, the Special Rapporteur suggests that it may be better to reserve the case of boundaries generally by a provision of the kind contained in the present article and to leave the question of "localized stipulations" to be considered later in connexion with the different cases of succession.

<sup>&</sup>lt;sup>17</sup> E.g., E. J. S. Castrén, La succession d'Etats, Académie de droit international (1951), vol. I, p. 437; Alf Ross, A Textbook of International Law, p. 127; Lord McNair, The Law of Treaties (1961), pp. 656 and 657; P. Guggenheim, Traité de droit International (1953), vol. I, p. 465; Academy of Sciences of the USSR, International Law, pp. 128 and 129.

<sup>18</sup> See the precedents noted in the International Law Association's Handbook, The Effect of Independence on Treaties (1965), chap. 15. See also United Nations Legislative Series, Materials on Succession of States (ST/LEG/SER.B/14): reply of the United Kingdom, pp. 185-188, 189 and 190. An exception is Afghanistan, ibid.. pp. 1-6. For some earlier precedents see D. P. O'Connell, Law of State Succession, (1956), pp. 50 and 51.

<sup>&</sup>lt;sup>19</sup> E.g., P. Guggenheim, Traité de droit international public, p. 465; Lord McNair, op. cit., pp. 655 and 656; United Nations Legislative Series, Materials on succession of States (ST/LEG/SER.B/14), p. 183.

<sup>&</sup>lt;sup>20</sup> See E. J. S. Castrén, op. et vol. cit., pp. 436-439. Cf. the distinction made by the United Kingdom between the "boundary" and other "frontier" provisions in the Anglo-Ethiopian Treaties of 1897 and 1954, United Nations Legislative Series, Materials on succession of States (ST/LEG/SER.B/14), p. 185. Cf. also Tanzania's rejection of the Belbaa Agreements of 1921 and 1951 concluded between the United Kingdom and Belgium but recognition of the boundaries established by various treaties as binding upon it; E. E. Seaton and S. T. M. Maliti, Treaties and Succession of States and Governments in Tanzania, paras. 30-35 and 118-120.

<sup>&</sup>lt;sup>21</sup> Yearbook of the International Law Commission, 1966, vol. II, document A/6309/Rev.1, part II, p. 231.

# **DOCUMENT A/CN.4/204**

First report on succession of States in respect of rights and duties resulting from sources other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur

[Original text: French] [5 April 1968]

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### I. Introduction

- 1. In the League of Nations Committee of Experts for the Progressive Codification of International Law, set up in 1924, Professor De Visscher vainly requested that the question of the succession of States and Governments, which had often arisen in international relations during the period between the two World Wars, should be included in the list of topics for codification.<sup>1</sup>
- 2. The United Nations later acknowledged that the problem "would seem to deserve more attention in the scheme of codification than has been the case hitherto". Consequently, following a request by Mr. Alfaro, Mr. Cordova, Mr. François and Mr. Scelle, the question was included among those which the International Law Commission decided to study at the time of its establishment. At the first session, in 1949, the question was included in the provisional list of topics for codification; it was the sixth of the twenty-five topics which made up the Commission's programme of work, and the second of the fourteen topics provisionally chosen by the Commission from that list of twenty-five.
- 3. Subsequently, owing particularly to the emergence of many new States on the international scene, the United Nations expressed the hope that the International Law Commission would, as a matter of urgency, study the problem of the succession of States and Governments. At the thirteenth session of the Commission, Mr. Bartoš, Mr. Padilla Nervo, Mr. Pal, Mr. Tunkin and Mr. Zourek requested the codification of the topic.<sup>4</sup> Eight Governments expressed themselves in favour of such a study.<sup>5</sup> The Sixth Committee was of the same opinion, and finally, in its resolution 1686 (XVI) of 18 December 1961, the General Assembly recommended that the International Law Commission should "include on its priority list the topic of succession of States and Governments".
- 4. In fact, the Commission decided unanimously at its fourteenth session to include the topic on its priority list. At its 637th meeting, on 7 May 1962, it set up a Sub-Committee—composed of Mr. Lachs (Chairman), Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Liu, Mr. Rosenne, Mr. Tabibi and Mr. Tunkin 6—to prepare a preliminary report containing suggestions on the scope of the subject, the

<sup>1</sup> League of Nations, Committee of Experts for the Progressive Codification of International Law, first session, second meeting, pp. 10-13.

method of approach for a study and the means of providing the documentation.

- 5. At its 668th meeting, on 26 June 1962,7 the Commission adopted the Sub-Committee's suggestions, namely:
  - (i) that the Sub-Committee should meet in January 1963 to proceed with its work;
  - (ii) that each member of the Sub-Committee should prepare a report on the problem and its Chairman a report on the results achieved for submission to the next session of the Commission; and
  - (iii) that the United Nations Secretariat should be requested to undertake a number of studies.8
- 6. In its resolution 1765 (XVII) of 20 November 1962, the General Assembly, noting that, as regards State responsibility and the succession of States and Governments, the International Law Commission, in order to expedite its work, had established two subcommittees, which were to meet at Geneva in 1963, recommended that the Commission should continue its work on the succession of States and Governments, taking into account the views expressed at the seventeenth session of the General Assembly and the report of the Sub-Committee on the Succession of States and Governments, with appropriate reference to the views of States which had achieved independence since the Second World War.
- 7. At its 702nd meeting, the Commission discussed the report of the Sub-Committee, submitted in 1963, and considered that the priority given to the study of the question of State succession was fully justified, the succession of Governments at that stage being considered only to the extent necessary to supplement the study on State succession. Several members stressed the need to give special attention to the problems of concern to the new States, in view of the modern phenomenon of decolonization.
- 8. The Commission approved the objectives of the work as proposed by the Sub-Committee. It decided that the question of State succession called for an evaluation of the present state of the law and practice of States and the preparation of draft articles on the topic in the light of new developments in international law.
- 9. Succession in the matter of treaties was to be con-

<sup>&</sup>lt;sup>2</sup> Survey of international law in relation to the work of codification of the International Law Commission, p. 29.

<sup>&</sup>lt;sup>3</sup> Yearbook of the International Law Commission, 1949, document A/925, paras. 15 and 16.

<sup>&</sup>lt;sup>4</sup> Yearbook of the International Law Commission, 1961, vol. I, pp. 210-223.

<sup>&</sup>lt;sup>5</sup> Replies submitted in 1961 to the sixteenth session of the General Assembly by Austria (A/4796/Add.6), Belgium (A/4796/Add.4), Ceylon (A/4796/Add.8), Ghana (A/4796/Add.1), Mexico (ibid.), the Netherlands (A/4796/Add.7), Venezuela (A/4796/Add.5) and Yugoslavia (A/4796) (see Official Records of the General Assembly, Sixteenth Session, Annexes, agenda item 70).

<sup>&</sup>lt;sup>6</sup> Yearbook of the International Law Commission, 1962, vol. I, p. 45.

<sup>7</sup> Ibid., pp. 266 and 267.

s These studies were prepared and submitted to the Commission in 1963; they consisted of (a) a memorandum on the problem of succession in relation to membership in the United Nations; (b) a memorandum on the succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary; and (c) a digest of the decisions of international tribunals relating to State succession (see Yearbook of the International Law Commission, 1962, vol. II, document A/CN.4/149 and Add.1, pp. 101-151). The Secretariat subsequently prepared a digest of decisions of national courts relating to succession of States and Governments (see Yearbook of the International Law Commission, 1963, vol. II, document A/CN.4/157, pp. 95-150).

<sup>&</sup>lt;sup>9</sup> Yearbook of the International Law Commission, 1963, vol. II, document A/5509, Annex II, pp. 260-300.

sidered in connexion with the succession of States rather than in the context of the law of treaties. It was decided to co-ordinate the work of the Special Rapporteurs on the law of treaties, State responsibility and the succession of States, in order to avoid any overlapping in the codification of the three topics.

- 10. The Commission appointed Mr. Manfred Lachs as Special Rapporteur on the topic of the succession of States and Governments, after having approved the report of the Sub-Committee, which proposed a broad outline, a detailed division of the topic and an order of priority for the headings.<sup>10</sup> It was thus agreed that the subject should be divided into three main headings:
  - (i) Succession in respect of treaties;
  - (ii) Succession in respect of rights and duties resulting from sources other than treaties;
  - (iii) Succession in respect of membership of international organizations.
- 11. The Sixth Committee approved the International Law Commission's decision to give priority to the succession of States and not to deal with the succession of Governments for the time being, and its decision that succession in relation to treaties should be studied first, as part of the succession of States, in order to complete the work on the codification of the law of treaties. Many members pointed out once again that the topic was particularly important for newly independent States, and said that the problem should thus be studied not merely with regard to the traditional practice of States but also, and principally, in the light of the principles of the Charter and the situation created by the disappearance of the colonial system.
- 12. In its resolution 1902 (XVIII) of 18 November 1963, the General Assembly, noting that the work of codification of the succession of States and Government was proceeding satisfactorily, as set forth in chapter IV of the report of the Commission, recommended that the Commission should "continue its work on the succession of States and Governments, taking into account the views expressed at the eighteenth session of the General Assembly, the report of the Sub-Committee on the Succession of States and Governments and the comments which may be submitted by Governments, with appropriate reference to the views of States which have achieved independence since the Second World War".
- 13. Since the term of office of all its members was due to expire in 1966, the International Law Commission decided in 1964 to devote its 1965 and 1966 sessions to completing its current studies of the law of treaties and special missions. The question of the succession of States and Governments would be dealt with as soon as the aforementioned studies and the study of relations between States and inter-governmental organizations had been completed.<sup>12</sup>

- 14. Mr. Manfred Lachs, Special Rapporteur on the Succession of States, having been elected to the International Court of Justice in December 1966, the Commission, which had in the meantime completed its study of the law of treaties and had almost completed its study of special missions, considered at its nineteenth session new arrangements for dealing with the succession of States. It adopted the suggestion made by Mr. Lachs in 1963 that the topic should be divided among more than one Special Rapporteur. It therefore decided, on the basis of its 1963 decision to divide the topic into three main headings, to entrust the study of succession in respect of treaties to Sir Humphrey Waldock, Special Rapporteur on the law of treaties, who was particularly well-qualified to deal with that heading, which continued and supplemented the topic for which he had previously been responsible. Since a United Nations Conference on the Law of Treaties was to be convened at Vienna in 1968 and 1969, the Commission decided that the succession of States in respect of treaties should be given priority, and taken up at its twentieth session, in May 1968.
- 15. The second heading, "Succession in respect of rights and duties resulting from sources other than treaties" was entrusted to Mr. Mohammed Bedjaoui. The International Law Commission requested him to prepare a "preparatory study" on this "diverse and complex" aspect of the topic, and "to present an introductory report which would enable the Commission to decide what parts of the subject should be dealt with, the priorities to be given to them, and the general manner of treatment". 13
- 16. The third heading, succession in respect of membership of international organizations, was left aside for the time being, for it was related both to succession in respect of treaties and to relations between States and inter-governmental organizations.
- 17. These decisions of the International Law Commission were approved by the Sixth Committee and the General Assembly, which, at its twenty-second session, in resolution 2272 (XXII) of 1 December 1967, recommended that the work should be continued, taking into account the views and considerations referred to in General Assembly resolution 1765 (XVII) and 1902 (XVIII)...".

## II. Scope of the subject

18. This report deals with a limited aspect of the topic. It does not deal with the question of the succession of Governments, the latter having been excluded from the current work programme of the International Law Commission, which decided in 1963 that priority should be given to the succession of States and that the succession of Governments should for the time being be considered only to the extent necessary to supplement the study on State succession. Nor does it deal with succession in respect of treaties, which has

<sup>&</sup>lt;sup>10</sup> Ibid., document A/5509, pp. 224 and 225, paras. 56-61.

<sup>&</sup>lt;sup>11</sup> See Official Records of the General Assembly, Eighteenth Session, Annexes, agenda item 69, document A/5601, para. 28.

<sup>&</sup>lt;sup>12</sup> Yearbook of International Law Commission, 1964, vol. II, document A/5809, p. 226.

<sup>&</sup>lt;sup>13</sup> Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 368, para. 40.

been entrusted to another Special Rapporteur, or with succession in respect of membership of international organizations, which has been left aside for the time being. The report deals only with succession in respect of rights and duties "resulting from sources other than treaties".

- 19. This definition of the subject, however, does not eliminate all ambiguity. By referring to the criterion of sources, a distinction may be drawn between conventional succession and non-conventional succession, i.e., between succession resulting from treaties and succession "resulting from sources other than treaties". By adopting the criterion of the subject-matter of the law of succession, on the other hand, a distinction may be drawn between succession in respect of treaties and succession in respect of matters other than treaties (public or private property, debts, legislation, nationality, territorial rights, etc.). However, the headings adopted are (i) succession in respect of treaties and (ii) succession in respect of rights and duties resulting from sources other than treaties; thus, treaties are regarded as a subject matter of the law of succession in the first heading and as an instrument of that law in the second. A combination of two different criteria has thus been used, so that the whole lacks homogeneity. If the wording "succession...resulting from sources other than treaties" were interpreted literally, the study would have to be envisaged as dealing only with problems of succession not regulated by treaty. That would mean excluding problems relating to private property, debts, public property, acquired rights, etc., which have been regulated by treaty, and would preclude not only the examination of treaties regulating these matters, but also a survey of the practice and judicial precedents of States. In the final analysis, the subject would seem to be impracticable on the basis of the present wording.
- The Special Rapporteur considers that the criterion of sources is not helpful in the present case. It is probably not very feasible to divide the subject by making a distinction between succession regulated by treaties and succession regulated by sources other than treaties. That would oblige the first Special Rapporteur to study not succession in respect of treaties but succession resulting from treaties, while the second Rapporteur would be forced to exclude customary sources or judicial precedents if they referred to treaties. It is, of course, important to answer the basic question of what has generally been done and what should normally be done when succession is not regulated by treaty. However, the Special Rapporteur does not think that the Commission really intended him to examine succession resulting stricto sensu from sources other than treaties. Although the question of non-conventional succession is of considerable theoretical interest, its practical interest is somewhat limited, for situations are being regulated increasingly by agreements even when succession is the outcome of a rupture following tension.
- 21. The criterion of *subject-matter* seems to be the most useful, and in any case seems to be indicated by the spirit prevailing during the work of the Sub-Committee in 1963 and the work of the Commission

- itself. The Special Rapporteur will accordingly apply the criterion of succession according to subject-matter and not that of succession according to source, despite the excessively precise definition of the subject. In order to remove his uncertainty, however, it would be desirable for the Commission, at its twentieth session, to take a decision on the problem in order to redefine the subject, indicating whether it in fact intends to examine "succession in respect of matters other than treaties" and not "succession not regulated by treaties".
- 22. This report is also limited by the nature of the task entrusted to the Special Rapporteur by the International Law Commission, which instructed him to undertake a "preparatory study" and to present an introductory report on the question at its twentieth session, in 1968. According to the Special Rapporteur's terms of reference, this introductory report should enable the Commission "to decide what parts of the subject should be dealt with, the priorities to be given to them, and the general manner of treatment".
- 23. Since he was called upon to undertake a preparatory study that would delimit the problem and define its various aspects with a view to the subsequent establishment of an order of priority, the Special Rapporteur felt that it would be inconsistent with his terms of reference if at the present stage he were to study the topic itself, summarize the literature and make a systematic analysis of the question. In his view, his terms of reference precluded an examination of the substance of the problems involved. Clearly, however, the delimitation of the subject, the approach to be taken to it and the choice of matters to be studied will undoubtedly lead the Commission to undertake a discussion from which questions of substance cannot be excluded. In preparation for that discussion, the Special Rapporteur therefore considered it useful occasionally to devote some attention to substance in the report.
- 24. The Commission has already considered the earlier work on the subject undertaken by some of its members or former members in 1962 and 1963, and has approved the first approaches to the problem, which have served as a point of departure for this report.
- One question discussed in the Sub-Committee was not included in the list of matters to be dealt with, namely, adjudicative procedures for the settlement of disputes arising from the succession of States. By approving the Sub-Committee's report, the International Law Commission seems to have indicated that it did not wish to concern itself with that question. However, the Acting Chairman of the Sub-Committee, with the approval of its members, appears to have left the Special Rapporteurs free to discuss it if they deem it necessary. It is true that the question is important and should not be ignored. It is even more true, however, that it impinges on a specific branch of international law, namely the peaceful settlement of international disputes by judicial means. The problem of State succession is complex enough to justify an attempt to limit the topic as much as possible rather than to broaden it, at least in the initial phases of the Commission's work. The Special Rapporteur, while con-

sidering that the question should be mentioned again in order to stress its importance, therefore deems it advisable to propose that the Commission should postpone consideration of the question and examine it in a more appropriate context, namely, in connexion with the wider field to which it relates.

The problems of the origin of succession are not specifically entrusted to either Special Rapporteur. More precisely, examination of these problems as such as a separate heading would appear to be strictly excluded from each Special Rapporteur's terms of reference. However, the rules regulating succession vary considerably according to the origin of the succession, which seems to introduce so many elements of diversification into the forms of succession law that State succession changes not only in degree but also in nature according to its origin. Origin thus provides a means of drawing fundamental distinctions and not merely a means of making secondary classifications. Possible variations in the rules defined may, of course, be studied in connexion with the succession of States to treaties, as in connexion with succession to debts and to property. In fact, however, these differences are so great that they are no longer variations but "novations". indicating the evolution in State succession which has occurred as a result of the phenomenon of decolonization. The origin of succession may all the more justifiably be taken as the required point of departure for the classification of forms of succession because the General Assembly resolutions seem in some respects to refer to it by contrasting traditional succession with succession resulting from decolonization, to the study of which the Assembly wishes special attention to be paid.

#### III. Methods of work

- 27. A question which in some respects impinges on the methods of work and concerns all the matters to be dealt with by the various Special Rapporteurs relates to the choice which must be made between the technique of codification and the technique of progressive development of international law. In its resolutions 1765 (XVII) of 20 November, 1962 and 1902 (XVIII) of 18 November, 1963, the General Assembly, on the Commission's recommendation, seems to have opted for codification. The aim would thus be mainly, if not exclusively, to analyse the practice of States and bring out the rules on which it is certainly based, in order to codify them and set them down in draft articles. There would be no question of creating new rules, or of taking the uncontested practice of States as a basis for projecting into the future the elements of solutions which it contains and amplifying them with a view to the progressive development of international law.
- 28. Although the variety of rules and the complexity of situations, the multiplicity of solutions and the diversity of forms of succession may seem to call for codification strictly in accordance with uncontested practice, the Special Rapporteur does not know whether the Commission will be able to maintain this attitude of rigorous respect for practice. Indeed, it might equally

well be contended that because practice is inconsistent it should to some extent be "by-passed". Its contradictory aspects would probably make it very difficult, if not impossible, to reduce it to common denominators which would constitute its basic rules. It will no doubt be advisable to extrapolate a little from practice, i.e., to furtther the progressive development of international law, in order to achieve appropriate systematization of the subject.

- 29. General objections have already been made to this method. For example, one representative has stated that "Progressive development should be based on the foundation of known and accepted rules of international law, which are themselves ripe for codification. The International Law Commission should not be called upon to create new law under the guise of progressive development where the subject is so novel that it is a matter for agreement between States rather than for progressive development based on codification of existing rules".14 However, it is precisely because the General Assembly and the International Law Commission are not international legislative bodies imposing legal norms, but organs which may propose new rules for acceptance by States, that international law, which can only be progressively developed by incorporating those new rules, will be a body of law based on the agreement of States in relation to a set of norms known and accepted by them to a greater extent than traditional law. in whose formulation most existing States took no part.
- 30. It may be wondered—especially in the case of State succession resulting from decolonization—whether the codification of traditional rules which already seem obsolete and would limit the value of the work should not be accompanied by some attempt to further the progressive development of international law. International ethics necessitate such a course, and also the difficulty of deducing from a practice which is inconsistent enough basic rules to justify codification. matter itself and the practice to which it has given rise, with all uncertainties, would seem to call for both codification and progressive development of international law, as Professor Bartoš has observed.15 It is essential to harmonize practice by basing it on legal constructions embodying to the maximum extent possible the present trends of international law, the principles of the Charter, the right to self-determination, sovereign equality, ownership of natural resources, etc.
- 31. Many representatives at the United Nations and some members of the International Law Commission have in fact stated that they consider it desirable, indeed essential, to study the problem of State succession—and especially the problem of succession in respect of matters other than treaties—in a new spirit.<sup>16</sup> At the United

<sup>&</sup>lt;sup>14</sup> See Official Records of the General Assembly, Sixteenth Session, Annexes, agenda item 70, document A/4796, p. 8.

<sup>&</sup>lt;sup>15</sup> See summary record of the sixth meeting of the Sub-Committee on Succession of States and Governments, reproduced in the *Yearbook of the International Law Commission*, 1963, vol. II, document A/5509, Annex II, p. 273.

<sup>&</sup>lt;sup>16</sup> For example, the representative of the Byelorussian Soviet Socialist Republic stated that "...the twentieth century had been characterized by the elimination of colonialism and the

Nations, the majority considered that the experience of the new States should be taken into account during the examination of the question. The need to safeguard the sovereignty of those States, particularly in connexion with their natural resources, should be borne in mind.17 It was felt that the topic should be codified not with reference to the traditional rules of international law but in the light of recent sociological progress in the international community.18 In fact, the General Assembly requested in its resolution 1765 (XVII) of 20 November 1962 that the question should be approached "with appropriate reference to the views of States which have achieved independence since the Second World War". In a resolution adopted the following year (resolution 1902 (XVIII) of 18 November 1963), the General Assembly amended the text slightly but retained its spirit, since it mentioned "appropriate reference to the views of States which have achieved independence since the Second World War". The latest General Assembly resolution on the subject (resolution 2272 (XXII) of 1 December, 1967) recommends that the International Law Commission should continue its work on succession of States "taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII)". The various positions may be summed up thus, in the words of the Sixth Committee: "The majority emphasized the special importance which the topic now had for the new States which attained independence since the Second World War as a result, of the abolition of colonialism, and held that the Commission should pay particular attention to the practice followed and the experience acquired by these new States. Other representatives pointed out that the topic concerns all States, including States not concerned with the elimination of the colonial system". 19 In its report to the General Assembly at its twenty-second session on agenda item 85, the Sixth Committee again noted that the topic of State succession was "of considerable importance to developing States".20

32. These recommendations are binding on the International Law Commission and throw light on the search

appearance of a large number of new States whose development depended upon the solution adopted in the question of the succession of States. International practice was not the only criterion to be taken into consideration" (Official Records of the General Assembly, Eighteenth Session, Sixth Committee, 791st meeting, para. 11).

- <sup>17</sup> Official Records of the General Assembly, Seventeenth Session, Annexes, agenda item 76, document A/5287, para. 49.
- <sup>18</sup> See the comments of Austria in Official Records of the General Assembly, Sixteenth Session, Annexes, agenda item 70, document A/4796/Add.6, and the comments of Yugoslavia: "... The role of international law should in fact be to ensure that the powerful new trends in world affairs evolve in the sense indicated by the Charter of the United Nations" (ibid., document A/4796).
- 19 Official Records of the General Assembly, Seventeenth Session, Annexes, agenda item 76, document A/5287, para. 48. The last sentence explains why the General Assembly decided that "appropriate reference" should be made to the practice of new States.
- <sup>20</sup> Official Records of the General Assembly, Twenty-second Session, Annexes, agenda item 85, document A/6898, para. 83.

for a method of work. Among the various cases of State succession, particular attention should be paid to those resulting from decolonization. If, within the framework of this method of work, forms of succession are classified according to type, this will also provide an opportunity to establish an order of priority. Priority should be given to succession resulting from the elimination of colonialism, rather than to succession of the traditional type. For this reason, the Special Rapporteur considers that the problem of the *origin* of succession has an important bearing on the study of the problem.<sup>21</sup>

- 33. The study of the succession of States in fields other than treaties calls for a thorough examination of international practice and judicial precedents. For methodological reasons, however, it is essential to determine exactly what is meant by "international practice" in this context. In the case of decolonization, for example, the question is whether State succession should be codified on the basis and at the time of the agreements concluded between the former metropolitan country and the former colony, or on the basis of the inevitable development which sooner or later takes place in the relations between the two countries. There is always a general tendency, which varies in speed and scope from case to case, for those relations to deteriorate or to be readjusted on the basis of greater equality and greater respect for the sovereignty of the new State.
- 34. Efforts should not be limited to codifying solutions provided by texts which have fallen into disuse, much less those derived from texts which have remained a dead letter, for that would not be a faithful reflection of actual international practice. The texts governing succession to property, debts, legislation, etc., may never have been applied, may have lapsed after a certain time, or have been speedily denounced by one of the parties or revised by agreement. The continuity theoretically set forth in the texts may have been replaced in practice by rupture. For example, some agreements never come into force. The Joint Declaration of 28 April 1954 and the draft Treaty of Independence and Treaty of Association of 4 June 1954 between Viet-Nam and France were not even signed. The Franco-Guinean agreements of 5 January 1959 were never applied. The Joint Franco-Moroccan Declaration of La Celle-Saint-Cloud of 6 November 1955, organizing the famous "independence within interdependence", was supposed to constitute an indivisible whole, but was in fact divided into two phases (first independence, which was attained, then interdependence, which was never established) and thus lost its meaning. In the confusion and serious disturbances which followed the attainment of independence by the Democratic Republic of the Congo, nothing remained of the work of the first and second Brussels Round Tables of 1959 and 1960, at which independence had been organized. Other agreements soon fell into disuse. The 1949 Round-Table Conference Agreement between the Netherlands and Indonesia<sup>22</sup>

<sup>&</sup>lt;sup>21</sup> See above, para. 26.

<sup>&</sup>lt;sup>22</sup> United Nations, Treaty Series, vol. 69, p. 200.

lapsed long before it was officially denounced by the Indonesian Government. The co-operation conventions between France and the Federation of Mali concluded in April 1960 met the same fate following the dissolution of the Federation. The dissolution of Indonesia's union with the Netherlands on 13 February 1956 and the abrogation of its indebtedness to that country on 6 August 1956, the withdrawal of Viet-Nam, Morocco, Tunisia and, in some respects, Algeria from the franc area, and the termination of the Franco-Viet-Namese Economic Convention of 30 October 1955 provide examples of the denunciation of agreements. The return of military bases before the date fixed upon, the revision of the public debt, the re-examination of agreements relating to State territory, the arranging of supplementary transfers of property, etc., represent fairly common cases of bilateral revision of agreements regulating State succession.

- 35. Since decolonization is a phenomenon that tends to rapid development and the relations between the former metropolitan country and the new State may very soon become different from what they should have been if the agreements had been respected for a long time, the *International Law Commission should not concern itself with abortive or precarious solutions*.
- Although the Commission has in the past adopted the wisely pragmatic practice of not deciding in favour of a draft convention or a code until the work was completed, it nevertheless seems that if in this case it could take a decision at the outset, it would in some ways facilitate and orient research into this very complex matter. Furthermore, it could perhaps be argued that the problem has already been solved by the Commission, which, after having prepared a draft convention on the law of treaties, is about to complete it, probably by using the same formula, i.e., by preparing draft articles on the supplementary question of the succession of States in respect of treaties. The fact that the convention formula was used for the law of treaties doubtless does not compel the Commission to use it for the succession of States, but it would nevertheless seem to point the way quite naturally to that solution.
- 37. According to one view, the preparation of a draft multilateral convention would be inappropriate for this topic, mainly because the latter does not concern all States but only former metropolitan States and former colonies. On the other hand, it may be contended: (a) that such States already constitute a majority in the international community; (b) that State succession may affect the rights and obligations of other States, in addition to those of former colonial Powers and former colonial territories; (c) that new States should be given the maximum opportunity to discuss the rules of international law, since they complain that they played no part in their formulation in the past; and (d) that State succession does not result exclusively from decolonization, which concerns only a limited number of States, but results also, for example, from merger, which may concern any State, especially in the present era, in which efforts are being made to establish large, politically integrated units.

38. Since the General Assembly resolutions recommend that the problems of State succession should be examined in the light of the interest taken in them by the new States, or more precisely in the light of their importance for the development of those States, this factor must be taken into account in the methods of work, the delimitation of the questions to be studied and the order of priority to be established. The International Law Commission seems to be invited to accord less importance to the traditional problems of succession than to the more modern problems resulting from decolonization. It is, however, essential to begin by making a rough classification of the various types of succession, in order better to appreciate the differences between them.

# IV. Types of State succession

- 39. The classification which we are trying to establish here does not have the virtues of absolute rigour, and is not even completely orthodox. It is designed only to bring out—by magnifying or even caricaturing the facts—the marked differences between traditional succession and modern succession. The necessary nuances will be introduced later.
- 40. As a temporary definition, for the convenience of simple classification, the succession of States may be classified in three general types: "dismemberment", "decolonization" and "merger". Schematically, it could be said that the first refers to the past, the second covers the present and the third looks to the future.
- 41. If the term "dismemberment" is held to apply to any phenomenon which alters the geographical dimensions of two or more neighbouring States (by one State's annexing part of the other's territory, or by cession, or as the result of a plebiscite or a boundary rectification), it covers all the hypothetical cases of traditional State succession. Generally speaking, it does not involve the establishment of a new State-although the plebiscite, for example, may have that result—but the redistribution of territory within a region. Usually, too, the region itself is one that can be considered relatively "homogeneous" in levels of living and civilization (as in the case of the succession of States in Europe, for instance). Without necessarily being identical, the juridical orders of the countries concerned are substantially the same. The inhabitants of the piece of territory affected by succession were citizens of one country and become citizens of the same class of the other country (subject to various option rights). In principle, acquired rights are respected. The application of the principle of unjustified enrichment makes it possible to transfer to the acquiring State the encumbrances on the assets left by the ceding State. This hypothetical case, which continues to occur in practice from time to time, nevertheless represents a case of traditional State succession, for which a number of rules governing the matters other than treaties covered by the present report have been brought out on the basis of doctrine, precedent and State practice. It is one of the hypothetical cases relating to the past, when State succession, although regulated in some areas by the prin-

ciple of tabula rasa, was governed mainly by the principle of legal continuity and stability.

- 42. The hypothetical cases relating to the *present*, on the other hand, are regulated by the opposite principle of rupture and change, except for some important These cases of succession result from decolonization and, unlike the previous cases, involve the creation of a State. The new entity is under-developed; its level of living and degree of civilization differ from those of the former metropolitan country, and it seeks to become stronger. The juridical orders of the two countries are not identical and are sometimes not even comparable, although the former metropolitan country may have introduced some similarities, especially in former settler colonies. The legal status of the inhabitants of the new State changes from that of colonized persons to that of citizens. The relationship based on domination is dissolved, and the principle of succession does not apply to those components of the former juridical order which reflect that relationship. Since emancipation ex hypothesi involves a change in political, economic and social aims within the territory, it normally constitutes a hiatus, a break in continuity, especially since in many cases independence is achieved after a long period of very tense relations with the colonial Power.
- 43. In such cases the traditional rules can be applied only partially, if they can be applied at all. The principle of unjustified enrichment, the principle of respect for rights acquired by individuals in good faith, and the principle that public property cannot be transferred without valuable consideration correspond very little or not at all to the situation resulting from decolonization.

  44. In general, the new State considers that since these principles regulate situations radically different from its
- own they are not enforceable against it or applicable to it. Having been subjected to a period of domination during which its own property and that of its nationals were not consistently or completely protected, but were, on the contrary, often confiscated at the time of conquest by the colonial Power and its nationals, the new State tries to translate into legal terms its need to recover fully everything it considers it lost through colonization, and usually refuses to grant any indemnity or assume responsibility for any liabilities.
- 45. It views the co-operation entered into with the former metropolitan country in various fields mainly as a set of advantages which it accepts, as it were, as a reparation due to it for the exploitation it has suffered, while the former colonial Power regards that co-operation—and this is indeed one purpose of the institution—as a technique for ensuring the legal continuity of situations where rupture is thought to be prejudicial to its material interests or moral influence.
- 46. The third possible type of State succession involves us in what might be called a kind of "legal futurism". This possibility is merger, which has, of course, occurred often in the past but which seems above all to be the form of the future, of the era of groupings and large political aggregations. The history of mankind has seen the age of nationalism, which is

- gradually making way for the age of integration. It is probably not so much the dying phenomenon of decolonization as the emerging phenomenon of integration which will characterize the future of our planet and pose problems of State succession.
- 47. In the case of mergers, these problems cannot be solved simply by applying the principles governing either of the first two hypothetical cases. The legal system applicable to the third case will be drawn from both the others. A merger generally takes place between two political entities at approximately the same level of political and social development (otherwise it would be but another manifestation of colonialism). The inhabitants, who are not linked in any relationship of subordination or domination, become citizens of the new entity after being citizens, in like manner, of one of the two other entities. Like dismemberment (as defined above), merger or integration involves homogeneous and substantially comparable social bodies. The acquired rights of the citizen of the new State are respected. Reparation or recovery of lost assets is not The two merging States have decided to involved. join forces in the future and the liabilities of each are fully assumed by the new political entity they have created. Similarly, integration will draw some of its rules from those applicable to cases resulting from decolonization. Since a merger reflects a desire to pursue a common destiny, all the assets of the two former entities are transferred to the new third entity and clearly no valuable consideration need be involved. These are, in broad outline, the three modes of succession. It can be seen that the origin of State succession has a definite influence on the formulation of rules to govern the matter.
- 48. If the Commission, in order to comply with the wish expressed by the General Assembly, decides to devote somewhat less attention to past forms of succession ("dismemberment") and more attention to succession as a result of decolonization, which could, moreover, be given priority over what we have called the forms of the future ("integration" or "merger"), a more detailed study should be made of the problems of the newly independent States in order to elaborate on the first rough classification. It will then be possible to make an inventory of the problems of these new States and to establish priorities.

#### V. The specific problems of new States

49. In the case of the countries created by the abolition of the colonial régime, the mode of State succession—to both assets and liabilities—varies very considerably. There may be continuity and rupture in the same State, depending on the issue and the time. If we seek the reasons for this, we find that various factors, sometimes working against each other, determine how the problems of State succession are solved. Because of these variables, the solutions adopted vary from case to case, from country to country. We shall then see how State succession is organized—what procedures and techniques of accommodation are used—before con-

sidering how international law can protect the new States and classifying the problems facing them.

#### (a) Decolonization: continuity and rupture

50. Is the former metropolitan Power an example to be followed or a model to be rejected? Is the former dependence still considered a challenge or as something to be avenged, or is it seen as an example to be followed and imitated? Will the new State remain for ever a "trainee State" in the international community or will it quickly establish its sovereignty? A study of the problems of the succession of States in respect of matters other than treaties shows that often all these questions can be answered in the affirmative, to varying degrees. In the new relationship established between the former metropolitan country and the former dependency, there is a general effort to maintain preferential ties and an opposite and equally strong tendency to loosen them. In fact, it is not a question of rupture or continuity but, in each country, of periods of continuity and series of ruptures, depending on the sphere of interest involved. Neither tendency-preservation or rejection of the heritage—prevails to the exclusion of the other in the new State. The two tendencies always coexist. Because the situations vary so greatly and in many cases evolve so rapidly, it is difficult to make comparisons and dangerous to systematize.

51. Individual attitudes vary considerably: ties may be sought, in some cases, accepted in others, some may be tolerated, yet others rejected. In some spheres, co-operation hastily accepted as a necessity is soon considered a servitude. Some ties are held incompatible with political sovereignty (in military, diplomatic or police matters) or economic sovereignty (for example, in monetary matters). Everything depends, in the individual country, on various factors which will be analysed below. Indeed, it cannot be said that continuity necessarily means neo-colonialism or rupture, true independence.<sup>23</sup>

52. Generally speaking, the marks of domination are less quickly erased from economic than from political In theory, therefore, continuity is more perceptible and real, and succession more clearly marked, in the economic sphere. Political relations are not affected in the same way by decolonization. Succession is more acceptable for the administrative institutions than for the constitutional machinery. The habits, official routine and technical nature of administrative institutions make them less vulnerable to the changes Those institutions, the wrought by decolonization. civil service, the administrative law and sometimes even the staff are not affected by the change. This must be slightly qualified, however, in the case of the judicial administration, which is somewhat more sensitive to decolonization, possibly because the judicial power is the manifestation within the State of its newly acquired national sovereignty <sup>24</sup> and because the judicial institutions are not always appropriate to the needs of the new State, particularly as regards procedure.

53. One remark may be made in passing, to contrast State succession with the comparable institution in private municipal law and provide yet another reason for not using the term "succession". In matters of inheritance, under private law, the de cujus no longer has a physical existence or patrimony. He has not simply undergone certain changes; he has completely disappeared. This is not so in the case of succession as a result of decolonization. The ceding Power remains, although its patrimony has been altered. The problem of State succession thus concerns both the successor State and the ceding State. By its withdrawal, voluntary or imposed, the latter exposes itself to the effects of succession in various spheres—the same spheres as those in which the successor State is affected. The former colonial Power's economic situation, its constitutional and political order, its legislation, etc., are all involved.25 It may have commitments towards its nationals whom it has repatriated from the dependency and who make various claims against it or seek comprehension for property transferred to the successor State or "acquired rights" which the latter does not recognize. This involves certain aspects of international law and, similarly, third parties whose property or interests are affected may invoke the international responsibility of the ceding State, with all the difficulties that that entails.

### (b) Factors making for continuity or rupture

54. (i) The legal status of the territory, the method of administration and the form in which the colonial Power manifests its presence are all factors which influence the manner in which the problems of State succession in respect of matters other than treaties are solved. The solutions vary, depending on whether the territory concerned is a protectorate, a dominion or an integrated overseas department and whether it has been maintained as a dependency for strategic purposes, for settlement or for development. The Latin spirit of assimilation and the Anglo-Saxon fondness for local self-government influence State succession in different ways. The legal status of the former dependency is a factor in determining the arrangements for the transfer in particular.

55. At this point a qualifying remark should be made,

<sup>&</sup>lt;sup>23</sup> After the Geneva Agreements of July 1954 on Indo-China, the Government of South Viet-Nam made a spectacular break with the former metropolitan Power and established very close relations with another Power.

<sup>&</sup>lt;sup>24</sup> This has not prevented a higher metropolitan authority from supervising the administration of justice in a new State. Like Malaya, Ceylon and other Commonwealth countries, Ghana in its 1957 Constitution accepted the jurisdiction of the Judicial Committee of the Privy Council of the British Crown as the highest appelate court in a number of cases. In addition, a number of former French dependencies (Maghreb States and States of Indo-China) have reverted to the old system of capitulations, French nationals being tried in courts which are presided over by one or more French judges and in which the French language is used.

<sup>&</sup>lt;sup>25</sup> A recent example was the Commonwealth Immigrants Act passed by the United Kingdom Parliament on 1 March 1968 restricting entry into the United Kingdom by British subjects of Indian origin resident in Kenya.

which is relevant to the problem under consideration. It was an over-simplification to say, as we did, that decolonization results in the creation of new States. Actually, in some cases the entities involved may not be States and in others may not be new States. State succession may occur, particularly in respect of matters other than treaties, when the State does not yet enjoy full international capacity. The succession may be open and organized, for example, on the basis of local self-government or membership of a commonwealth or of a political community created by the former metropolitan Power. Alternatively, the successor States are sometimes mandated or Trust Territories or protectorates recovering their full international sovereignty. Before they regained their full independence, they were consistently regarded in theory and in practice as States. These are not, therefore, strictly speaking new States. As another possibility, a State may recover its lost sovereignty at the end of a period of colonization. This involves not so much the creation of a new State as the restoration of an old State (e.g. Ethiopia, at the end of the Italian colonization), with the implications this may have for the succession of States.

- 56. (ii) The gradual and peaceful transfer of power is another factor—one which makes for continuity. In particular, a long intervening period between the phase of domination and the phase of independence predisposes to continuity. During this period, the colonial Power gradually transfers power and shapes—sometimes decisively—the future institutions of the territory as it prepares them for almost total succession.
- 57. There are cases where the former metropolitan Power has itself drafted the Constitution of the new State, had it approved and finally promulgated it. This is even more remarkable when the Power concerned is, like the United Kingdom, governed by an unwritten constitution and pragmatic institutions but does not hesitate methodically to frame a written constitution for the territory in anticipation of its independence. The constitutional authorities are established by an Order in Council of the Crown and by an Act of Parlia-The constitutions prepared in this way for Ghana, Nigeria and Malta, for example, protected acquired rights by providing for the payment of adequate compensation for property taken possession of compulsorily. The rights of private property were guaranteed by the Constitution of Kenya.<sup>26</sup>
- 58. (iii) Tie within a wider framework, such as the Commonwealth, are conducive to a more lasting succession in all spheres. Solidarity has been found to be a more potent factor in avoiding legal rupture

than equality, which is difficult to achieve between a former metropolitan Power and its ex-colonies. In particular, the existence of this huge political aggregation into which the former dependencies are gradually integrated, links up with the factor we have discussed above of independence by stages, in which the idea of continuity is inculcated in the phase of self-government or local autonomy.

- 59. (iv) On the other hand, succession is disturbed or imperilled when decolonization is achieved by violent methods. When a country is emancipated by a colonial war it is left with a desire to appropriate public and private property, to repudiate debts and to refuse establishment guarantees to nationals of the former metropolitan Power—a desire which is all the more pronounced and, in its view, justified because the destruction left in the wake of the war of liberation has aggravated its structural under-development.
- 60. (v) The desire to achieve national unity and combat regionalism and tribalism is another factor which usually militates against succession, either directly because the new State refuses to recognize the privileges of the former metropolitan Power in a particular province (e.g. the problems between Belgium and the Congo in connexion with Katanga and between the Netherlands and Indonesia over West Irian), or indirectly because the question of unity becomes a source of friction between the former colonial Power and the emancipated State (e.g., the incomplete transfer to the central authority of sovereignty over the numerous Indian principalities).
- 61. (vi) Assistance granted by the former metropolitan Power is one of the most decisive factors in the succession of States. Rendered on a bilateral basis, it is a powerful instrument for exerting influence and even pressure—neither necessarily overt—on the recipient country. The existence of close ties of co-operation prevents disputes, facilitates the conclusion of agreements and inevitably causes the latter to reflect a presumption of quasi-automatic succession. Public loans and debts, fiscal debts and acquired interests and rights of individuals and bodies corporate are generally honoured and personal status is guaranteed by conventions of establishment.
- 62. (vii) Lastly, the desire to effect a radical and revolutionary transformation of the colonial society may have a considerable influence on the problems under consideration. The new State may want to embark on a socialist revolution and to introduce farreaching structural reforms in the economic, social and political spheres. Obviously, it can only do this by rejecting the legacy left by the former metropolitan Power.

# (c) Procedures for effecting State succession in decolonization cases

63. Two methods are commonly employed by the colonial Power. One is to grant independence first and then negotiate a preferential system to solve the various problems of State succession (e.g. in the case of Trust

<sup>&</sup>lt;sup>26</sup> For Nigeria, there were no fewer than five constitutional conferences, held in London and Lagos in 1953, 1954, 1957, 1958 and 1960 (Cmd.1063, 1960, constitutional discussions on Nigeria, May 1960; the Nigeria (Constitution) Order in Council, S.I., 1960, No. 1652). See also the Federation of Malaya Independence Order in Council, S.I., 1957, No. 1533, promulgating the Constitution of the Federation of Malaya and the Constitutions of the States of Penang and Malacca. For the Constitution of Malta, see S.I., 1959, vol. II, appendix, sect. 51, and for the Constitution of Kenya, see S.I., 1960, No. 2202, Annex, S.10.

Territories, protectorates or mandated territories: Lebanon, Syria, Jordan, Togo, Sudan, Morocco, Tunisia; African States of the Entente, etc.). The other is to do the opposite—to negotiate the terms of succession before granting independence. The classic example of this is Algeria, where the two sides agreed on exceptional guarantees because of the large French population in Algeria and the economic interests at stake.

- 64. When negotiations precede independence, the colonial Power may, in its efforts to obtain guarantees and safeguards, go so far as to establish itself the constitutional rules to govern the future State.<sup>27</sup> The first procedure does not give the metropolitan Power such a strong hand as the second in the negotiation of the terms of succession. Consequently, unless other factors operate to balance the situation, it may militate against succession, in contrast to the second procedure. Even the latter, however, may quickly produce the same result if, immediately after achieving independence, the new State is led to denounce the privileges retained by the colonial Power as unequal and obtained by force.
- 65. It will be noted that succession is almost always regulated by treaties even in the case of violent decolonization. These instruments have acquired considerable importance in international relations because of their large number and their subject matter. For twelve African countries which were to attain independence, France concluded no less than 300 instruments of succession.
- 66. When the agreements are concluded prior to independence (second procedure) and with rebels, they raise quite complex legal problems. For reasons of legal principle as well as of political expediency, the colonial Power is generally reluctant to concede international status to its partner in the agreement, although later it seeks to claim all the benefits of the agreement. It is in an awkward position. But the position of the new State is no easier, at least in classical law. The latter generally agrees to honour a commitment which circumstances will subsequently prompt it to repudiate. The agreement in question, concluded on the eve of the creation of a new State, is an agreement between an actual State and a potential State. The new State ultimately finds it too restrictive, either because of the similarity with the famous "unequal treaties" or simply because, rightly or wrongly, it considers the instrument an obstacle to its growth. It may then invoke, for example, the principle of rebus sic stantibus, in order to extricate itself from certain provisions of the "agreement" thus tending to adopt the principle of rupture when the principle of continuity should be applied.
- (d) Questions connected with the birth of new States
- 67. Four main questions arise in connexion with transfers of sovereignty and assets. They correspond to the following phases: (i) the pre-independence phase; (ii) the period of negotiations for independence; (iii) the period during which the succession instruments produce

their effects; (iv) the phase of normal or forced extinction of these effects.

- (i) The first question is how far international law can govern situations which are normally covered by Article 2 (7) of the Charter and which arise on the very eve of independence. It is during this period, when the exercise of authority is an "internal affair" of the colonial Power, that the latter may dissipate or encumber the estate of the colonized country, by acts which impoverish it or acts which mortgage its future. The effects of the former acts are exhausted on the eve of independence, while those of the latter continue to be produced after the acquisition of sovereignty. The former may consist of transfers abroad of all kinds of assets or alienation of supplies and equipment. They may be performed illegally or under ad hoc legislation authorizing such transfers or alienations or altering the composition of the assets and liabilities of various public sectors in the economy of the dependent country.
- 69. At the present stage of development of international law, it seems impractical to have a période suspecte, similar to the period provided for in French bankruptcy law during which the merchant's powers are limited. At least as regards dispositive acts which produce their effects until the eve of independence, the former colonized countries are not protected by the international law of State succession and probably not by the international law of State responsibility. Acts which continue to produce their effects and the legislation enacted to authorize them are usually matters within the newly acquired or regained jurisdiction of the new State, which has the power, if not to nullify their effects completely, at least to revoke what can be revoked, without recourse to international law. However, this aspect of the problem may involve the question of acquired rights and should therefore be a matter for consideration by the International Law Commission. It would seem necessary to assert that rights acquired in dubious circumstances on the eve of independence (during the période suspecte) cannot be protected by international law. It will be noted, however, that respect for acquired rights is by no means a generally accepted principle in the matter of State succession after decolonization. A fortiori, rights should not be protected when illegally acquired.
- 70. (ii) There is also the question how far the period of negotiations for independence is covered by international law. This has a direct bearing in some respects on the problems of succession being considered by the Commission. The emancipated State's protection in this matter lies in the general theory of treaties (although the agreements involved are usually not between two States but between an actual State and a potential State). However, the peculiarity of these agreements lics not so much in their form as in their content. In most cases, they are inevitably unequal, because they are usually concluded at a time when one of the parties is at a disadvantage. One view is that it may and should be possible, if not to declare such instruments null and void, at least to denounce their unequal provisions. The question is one which relates to the general theory of

<sup>&</sup>lt;sup>27</sup> See above, para. 57.

treaties. It remains unanswered, however, since the International Law Commission decided that, in codifying the law of treaties, it would not deal with agreements concluded between a State and a rebel movement. In order to minimize disputes after independence, the rules governing the essential aspects of negotiations for independence, i.e., all the principles to be applied both by the colonial Power and by the Non-Self-Governing Territory in regard to the transfer of sovereignty and succession to rights and obligations, should be brought out. This is the task of the International Law Commission.

71. (iii) The third question is how far international law can protect new States during the period immediately following their birth, when such effects and burdens as their succession to assets, debts, legislation, etc. may impose on them will perhaps weigh most heavily. In addition to the problem of repudiation of commitments, to which we have already referred and which is covered by the rules of the law of treaties, and to the domestic legislation which the new State may adopt in its sovereignty, there is another aspect which may be of interest to the Commission: do the burdens of succession have to be borne indefinitely by the successor State or can a time-limit be fixed, after which the emancipated country is released from those burdens? Some of them are self-extinguishing (e.g. payment of instalments on international loans, amortization of the public debt). Others continue for an indefinite but possibly lengthy period. Still others are perpetual (e.g., international servitudes, territorial rights granted to third Powers or to the former metropolitan Power). In particular, the problem of military bases which are ceded for very long and in some cases indefinite periods of time and are thus on the same footing as enclaves or presidios should be studied in this light.

72. (iv) Lastly, there is the question whether international law can concern itself with the measures which the successor State may take, after succession, in order to win or consolidate its economic independence. This embraces the vast problem of the law governing acts of nationalization and expropriation and, in general, all measures taken by a former dependent country to regain control of its natural resources. These are not matters of municipal law exclusively. The Commission should consider certain aspects which relate, according to some, to State succession and, according to others, to the international responsibility of States.

### (e) Relative importance of the problems

73. It is a truism that political independence is not true independence and that new States often remain under *de facto* domination for long periods of time because their economies are dependent on that of the former metropolitan country, to which they remain firmly bound by the ties of State succession. Economic structures have generally proved to be more stable than political structures,<sup>28</sup> since the latter are easier to alter,

with the result that succession is a more prolonged process in economic spheres. Ultimately, political independence itself often seems an illusion. Should such conclusions be placed on record and such tendencies reinforced, and should the codification of the rules of succession in matters other than treaties be undertaken in this spirit? Or would it not be better to list all factors in the matter of succession which affect economic independence, with a view to consolidating that independence and protecting the new State by means of appropriate rules against a succession which would weaken its economy and jeopardize its development? In other words, should the tendency to continuity in the matter of economic succession be reversed and brought into line with the tendency towards rejection of succession in political matters? Such a course of action is probably outside the Commission's terms of reference; the Commission could, however, work to bring about a readjustment and so help to make new States more truly independent.

74. The Commission may for that reason decide to give priority to these economic problems. If there is to be a positive response to the recommendation made in the General Assembly resolutions on the subject that State succession should be studied with reference to the experience of new States, and if the intention is therefore to devote less attention in this work to succession of the traditional type and more to succession arising out of decolonization, priority ought to be given to those rules whose operation can influence the general economic situation of a new State. The second subject of study should be the juridical framework of the new political entity, which should be examined from the standpoint of its repercussions both on the economic situation and on the political sovereignty of the new country. A third subject would be the status of private persons and private property.

The aim being to assist the new States, the first part of the work, that concerning economic problems, would consist essentially of a study of public property and public debts, the future treatment of which should be defined in the light of the General Assembly's expressed desire that these States should recover their sovereignty over their natural resources, property, land and sub-soil. The problem of private property will then arise, by antithesis. Acquired rights in respect of such property are found to exist within the framework of the traditional form of succession and within certain limits. In the context of decolonization, on the other hand, these "rights" are generally not recognized, or at least are not recognized on a permanent basis. The subject is, however, a complex one. The Commission might either set it aside for the moment (because it does not involve the recognition of indisputable rights and because prior consideration should be given to public property) or consider it, by way of antithesis, directly after property and debts; alternatively, it could be taken up third as part of the study on the status of private persons or, more precisely, as part of an expanded section on "the status of private persons and their property", because the two subjects are linked in a number of

<sup>28</sup> See above, para. 52.

ways; as yet another possibility, it could be made the subject of a final separate section on concessionary rights.

- 76. None of these approaches should be interpreted as implying the intention to attribute only minor importance to the individual, since we know that the individual is the ultimate beneficiary of the protective rules of international law. Nevertheless, among the Commission's subjects of study, with a view to meeting the wishes of the General Assembly, particular attention should be given to economic problems with affect the whole community in the new States and the work on private individuals should come second. The problem is more complicated, however, when private property is associated with public property in mixed-economy systems or in the case of concessions for the development of major natural resources.
- 77. Pending a decision by the Commission, we present below a few notes (which are necessarily short and preliminary only in the context of this report) on various aspects of the following matters:
  - (a) State succession and the requirements of economic sovereignty:
    - (i) public property;
    - (ii) public debts.
  - (b) State succession and the requirement of political sovereignty:
    - (i) succession to the juridical order;
    - (ii) succession and territorial problems.
  - (c) Succession and the status of the inhabitants:
    - (i) nationality;
    - (ii) conventions of establishment.
  - (d) The problem of acquired rights.

### VI. Public property

- 78. The whole problem of the transfer of property from the predecessor State to the successor State is dominated by the distinction between the public and the private domain of the State, and the solution to be adopted will depend on whether this distinction is maintained or discarded. In traditional practice, the public domain is transferred automatically and without payment to the successor State, whereas the private domain may not be transferred except against payment. Should this distinction be maintained?
- (a) Abolition or retention of the distinction between the public and the private domain of the State
- 79. Although widely applied in practice and jurisprudence prior to decolonization, this distinction had no absolute value, since it was not maintained in the treaties concluded at the end of the First World War. The Permanent Court of International Justice in its judgement of 15 December 1933 endorsed the principle of the general transfer of the property by stating that in the case in question the "alleged public or private character [of the property] is of no account" and that "this distinction is neither recognized nor applied by

- the Treaty of Trianon".<sup>20</sup> This tendency seems to have been confirmed after the Second World War in, for example, the case of Libya, when General Assembly resolution 388 (V) of 15 December, 1950 provided that Libya should receive, without payment, the movable and immovable property located in Libya owned by the Italian State, either in its own name or in the name of the Italian administration.
- However, recent French practice with regard to the transfer of property shows a marked trend towards complete abolition of the distinction between public domain and private domain. The policy adopted by France in the new African States is especially noteworthy as French law is one of the legal systems in which the distinction is most emphasized. A significant illustration of this trend is article 19 of the Declaration of Principles concerning Economic and Financial Co-operation between France and Algeria of 19 March 1962,30 which raises the principle of succession to all the property of the French State. The exchange of letters of 22 August 1963 concerning property settlement in Greater Algiers provides for the transfer of the public and private immovable property of the French State to Algeria. The same practice is followed in the agreements concluded between France and the French-speaking States of Black Africa and with the two former Maghreb protectorates.
- 81. This modern tendency favours the new States, which, for their own part, consider that what is involved is merely the restitution of the wealth of their territory which has been developed by capital not provided by the metropolitan country. Moreover, the retention by the prodecessor State of a possibly large private domain would have the effect of perpetuating economic domination of the colonial type in some sectors and enabling the predecessor State to establish itself as an important landowner or industrialist—a development which might conflict with the economic policy of the new State. It will also be borne in mind that as long as the distinction exists, it will be a source of temptation for the predecessor State, which will be free to remove property illegally from the public domain and place in the private domain, in order to exclude it from the automatic transfer.
- 82. In the present state of law and practice it would seem possible for the Commission to support the principle of the existence of a rule of automatic and total transfer without payment. Most of the recent agreements embodying this principle do, of course, contain a reservation with respect to the retention by the predecessor State of certain property which it deems necessary for the performance of its new function of co-operation (schools, hospitals, scientific centres) or for the operation of its diplomatic and consular services in the newly

<sup>&</sup>lt;sup>20</sup> P.C.I.J., Series A/B, fascicle No. 61; see also articles 56 and 256 of the Treaty of Versailles (British and Foreign State Papers, vol. 112, pp. 43 and 125), article 208 of the Treaty of Saint-Germain (ibid., pp. 412-414), article 191 of the Treaty of Trianon (ibid., vol. 113, p. 564) and article 142 of the Treatry of Neuilly (ibid., vol. 112, p. 781).

<sup>30</sup> See United Nations, Treaty Series, vol. 507, p. 65.

independent country. A reservation of this kind, embodied in an agreement, should be regarded not as invalidating the general rule of transfer but as an exception which proves it. The Commission's endorsement of this rule, which is adopted in practice, would also have the effect of restricting certain abuses which occur when the former metropolitan country, while acquiescing in the principle of general transfer without payment, retains an undue amount of property as being necessary to its services. Endorsement of the rule would make the retention of property beyond what is strictly necessary an increasingly rare occurrence. Above all, it would permit the transfer of natural resources exploited under the control of the predecessor State.

- 83. This rule will also obviate the difficulties which have inevitably arisen in the choice of the law applicable in determining what is public and what is private property. It has usually been the municipal law of the territory in which the property was situated which has determined what lay in the public domain and was thus transferable without payment. There are at least two ways, however, in which a dispute in this matter of characterization of property can arise between the former metropolitan country and the new State.
- 84. First, when the new State was originally conquered, new property legislation may have been imposed upon it, replacing its own law. Having regained its independence, it invokes the characterization given by its own legal system, under which certain assets may be regarded as falling within the State's public domain, whereas under the colonial law they were placed in the State's private domain.<sup>31</sup>
- 85. Secondly, the State which has become independent may not have possessed before its conquest a legal system sufficiently developed to permit the characterization of property, and the colonial law may have filled a legal gap in that respect. Is the new State entitled to repudiate the characterization given to a property by colonial law, in order to obtain its transfer without payment? The reply to this question depends in particular on the position adopted with regard to the problem of continuity of the internal juridical order, which will be examined below. If it is decided that there is a rule of international law which imposes the continuity of the internal juridical order until it is amended or replaced by the new sovereign, it would seem difficult to admit the possibility of changing the characterization of the property. If, on the other hand, it is considered—and this would seem to be the more natural approach—that the juridical order is nothing

more than the projection of sovereignty, it follows that there is a rupture, not continuity, even when the former legislation is retained, for in this case it is retained by the tacit or express will of the new sovereign, which considers it as its own: the possibility of changing the legal characterization of a property is thus within its power and more readily admissible. In the latter hypothesis, however, all difficulties will still not have been eliminated. It will be necessary to decide which date should be used in determining the characterization of property, and whether a change which has taken place since independence can be used in deciding what is to be done with property which the new State considers should be transferred gratuitously but which the predecessor State considers a part of its private domain. It seems that the successor State can acquire all the property owned by the predecessor State, even if that property is designated as private under the municipal law of the ceding State.32

86. The Commission could resolve this and other kinds of difficulty, by adopting the rule of the automatic and total transfer of public property without payment and abandoning the distinction between public and private domain of the State, a step which is all the more necessary because the distinction is not universally accepted. This rule should be applied to the irregular transfers made by the metropolitan country for its own benefit just before the change in sovereignty. By refusing to accept the distinction between public and private domain, the Commission could prevent any suspicious transfers of State property which might occur just before independence. An effort by the Commission to ensure uniformity in this sphere will be greatly appreciated.

# (b) State property in particular or public property in general?

87. In connexion with the rule of automatic and total transfer without payment, the Commission will have to take a decision on an acceptable definition of public property. Does this term refer to property owned by the State (in a public or private capacity) or to all public property? The problem has arisen in legal cases in connexion with the property of local authorities ("biens communaux") and property belonging to public establishments.

88. The 1947 Treaty of Peace 33 rectified the boundaries between Italy and France. The latter considered

<sup>&</sup>lt;sup>31</sup> In the case of colonies there are two separate problems relating to succession, the first arising when the colony is established and the second during decolonization. Succession is regulated differently in each case. During the colonial conquest, succession to property in some countries took place in conditions which did not always respect local legislation. This is true, for example, of the inalienable religious property in Algeria, known as "waqf" property, which is held in mortmain under Moslem law, and which according to some passed into the private domain of the French State and according to others was given to the settlers in concession or in freehold.

<sup>&</sup>lt;sup>32</sup> Hungarian law, for example, made no distinction between public and private property of the State and treated as private all assets owned by the State or by territorial corporations of public law. In dealing with the legal status of property of the Austro-Hungarian monarchy in territory transferred in 1919 to Czechoslovakia, the Permanent Court of International Justice, after having observed that the provision of the Treaty of Trianon relative to the passing of Hungarian State property "applies the principle of the generally accepted law of State succession", nevertheless ruled that Czechoslovakia must return to the Peter Pazmany University of Budapest the landed property owned by the latter. (Peter Pazmany University case, 15 December 1933, P.C.I.J., Series A/B, fascicle No. 61.)

ss United Nations, Treaty Series, vol. 49.

that the semi-Government property transferred to it by Italy should include the property of local corporate bodies and particularly biens communaux. The Franco-Italian Conciliation Commission established by the exchange of notes of 27 September 1951 handed down a decision <sup>34</sup> on this case on 1 December 1953, in which it rejected the French arguments. It recalled the resolution adopted by the Institute of International Law at its session held at Vienna in 1952, according to which "the territorial changes leave intact those patrimonial rights which were duly acquired before the change took place". According to the Institute, the rule also applied "to the patrimonial rights of municipalities or other corporate bodies belonging to the State which is affected by the territorial change". <sup>35</sup>

- 89. The definition of public property also raises the problem of public establishment—some of which, being of an industrial or commercial nature, may be of considerable importance for a country's economic growth. A United Nations tribunal was set up by General Assembly resolution 388 (V) of 15 December 1950, on provisions relating to the transfer to Libya of property owned by the Italian State. On 27 June 1955 this tribunal handed down a series of decisions relating to thirteen institutions which had taken part in the Italian colonization of Libya.<sup>36</sup>
- 90. Generally speaking, the former metropolitan country may have set up public establishments, autonomous agencies, offices, commissioner's offices, public companies and associations, etc., whose legal status is sometimes complex and which may have carried out very important activities in the former colony, occasionally extending to the metropolitan country itself. The problems relating to succession in connexion with these bodies are usually regulated by treaty and on the basis of municipal and international judicial precedents. The Commission can, however, play a pioneering role by breaking new ground in this sphere and bring out guiding rules to which judges and negotiators could refer.

# (c) Property situated in the territory and property situated outside the territory

91. The rule of total transfer should hypothetically apply both to property situated in the ceded territory and to that situated outside its boundaries. Difficulties are encountered particularly in the case of civil wars and above all in connexion with the succession of Governments or régimes. They also arise, however, with regard to State succession, and the Commission will have to decide whether the mere reaffirmation of the uncontested rule that property situated abroad should be transferred to the successor State will clarify the question sufficiently.

# (d) Plurality of successor States and distribution of property

92. If there is more than one successor State, the uncontested rule that property should be allocated to the State in whose territory it is situated does not resolve all difficulties. As noted above, property may be situated outside the territory of successor States. Furthermore, some property may have been temporarily removed from the territory where it was normally situated. Other property is jointly owned, e.g., property situated in the capital, whose territory may have been assigned to one of the successor States. Some of this property can be shared, such as monetary resources, securities, etc. Other types of property are harder to share or cannot be shared at all, e.g., works of art, objects whose value is difficult to estimate, and archives.

### (e) Archives

- 93. Here again, the uncontested rule that the archives of the territory like all other property pass to the successor State does not solve all the problems, especially when decolonization took place after a period of armed tension which may have led the former occupants of the territory to apply the "scorched earth" policy to the archives. Some archives may have been destroyed and thus lost to all, without any legal prohibition having thus far been introduced to prevent such acts. Other archives concern both the successor State and the predecessor State, or several successor States and the predecessor State. These include socalled administrative archives (civil registers, land registers, miscellaneous files, court records, pension and savings-bank books, documents relating to the public debt, etc.). These archives may concern both the former colonial Power and the former colony, particularly because of migrations following decolonization (repatriation of settlers, partition, etc.). Modern electronic reproduction methods should make it possible to solve these problems in practice, given the will to reach an understanding. It is difficult to apply the rule to political archives. The former metropolitan country is unwilling to abandon to the successor State archives which are too closely related to its imperium, its administration of the country, and whose highly sensitive contents could inopportunely disclose information relating to its administrative methods which it wishes to keep secret. In general, this property is repatriated just before independence. On the other hand, no exception to the rule should be made in the case of historical archives, which should belong to the land where they came into existence and may constitute both valuable property and precious sources of information. Unfortunately, this this rule is all too often ignored in practice.
- 94. It should be easier to decide what should be done with libraries, although spectacular and long-lasting disputes have occurred in this sphere too (the case of the India Office Library in London, claimed by India, and the case of the Prussian Library in Berlin, claimed by the Federal Republic of Germany).

<sup>&</sup>lt;sup>34</sup> International Law Reports, 1953, pp. 63-77.

<sup>35</sup> Annuaire de l'Institut de droit international, 1952, vol. 44, tome II, pp. 475-477.

<sup>36</sup> International Law Reports, 1955, pp. 103-113.

#### VII. Public debts

95. International practice with regard to succession to public debts is unusually complex, either because the very nature of the problems to be solved varies with the circumstances of each case or because there are several categories of debts, each raising different questions. This complexity is reflected in the diversity of views expressed in the literature and the divergencies of practice, where treaty obligations are rarely respected. The Round-Table Conference Agreement of 2 November 1949 between the Netherlands and Indonesia was denounced in 1956; it provided for Indonesia's succession to public debts 37 by virtue of the transfer of sovereignty, thus apparently recognizing the existence of a principle which was not subsequently applied in practice. A similar affirmation is included in the Evian Agreements, which state "Algeria shall assume the obligations and enjoy the rights contracted in its name or in that of Algerian public establishments by the competent French authorities".38 In this case, as in the case of the agreements concluded with the Frenchspeaking States of Black Africa, the exigencies of cooperation, and perhaps other considerations too, have led the predecessor State to depart from the exact terms of the Agreement and to assume various obligations which were originally to have been assumed by the successor State.

96. Questions relating to succession to debts following decolonization are dominated by the fundamental distinction between the *general debt* of the predecessor State and *local debts*. It has always been recognized that the State for whose benefit a piece of territory is detached does not assume responsibility for a corresponding portion of a general debt of the predecessor State. The contrary situation can only result from a treaty provision.<sup>39</sup> On the other hand, debts connected with the territory are generally assumed by the successor State. The devolution of the territory is accompanied by the debts connected with that territory.

97. Most of the theories formulated to justify succession to debts in general seem to justify succession to local debts only. For example, the "benefit" theory has been cited, according to which the territory of the successor State, having benefited as the result of financial commitments assumed by the predecessor State, is called upon to bear the burden of the debt. Accepted rules of private law, such as those relating to unjustified enrichment and the maxim "res transit cum suo onere", and considerations of equity have also been cited.

- 98. In the context of decolonization, only local debts may devolve upon the successor State, provided however that the concept of a local debt is clearly defined. The fact that the debt is connected with the territory in some way does not provide a sufficient basis for considering it as local and therefore transmissible to the successor State. The debt may be connected with the territory in various ways:
  - (i) it may have been contracted by the metropolitan country on behalf of the dependent territory;
  - (ii) it may have been contracted by the dependent territory as a financially autonomous entity; or
  - (iii) it may have been secured by a specific pledge situated in the dependent territory (pledged fiscal resources, mortgages or mines or other natural resources).
- 99. Some writers seem to consider that the existence of one of these connexions suffices to make the debt a local debt, which is the responsibility of the successor State. This view is based on the old maxim "res transit cum suo onere". 10 It seems, however, that the aforementioned connexions do not constitute a sufficient basis for considering these debts as local and transmissible to the successor State. A debt contracted on behalf of a colony or secured by a local mortgage may in practice not be intended to cover expenditures benefiting the dependent territory.

100. The International Law Commission will have to decide whether the real criterion to be taken into consideration is not rather the intended or actual use of the debt for the benefit of the territory, the existence of absence of a purely formal connexion not being a determining factor. If the Commission adopted this point of view, it would follow that the new State would succeed not only to local debts contracted previously for its benefit, but also to that part of the general debt used for the same purpose, i.e., for the benefit of the former dependent territory. On the other hand, this would eliminate from the field of succession not only "local" debts contracted by the predecessor State exclusively for its own benefit, but also general debts which could in no way be attributed to the successor State.

101. This solution would seem to satisfy the need for equity, since the devolution of the debt would depend upon the latter having been used for the benefit of the territory, i.e. for its economic, social and cultural development. However, the new State, referring to the need for equity and recalling the former relations based on domination and exploitation, may call for the establishment of a general balance-sheet of the whole situation.<sup>41</sup> In particular, it may cite the general benefits

<sup>&</sup>lt;sup>37</sup> Draft Financial and Economic Agreement, art. 25 (United Nations, *Treaty Series*, vol. 69, pp. 252-258).

<sup>&</sup>lt;sup>38</sup> Franco-Algerian Declaration of Principles concerning Economic and Financial Co-operation, art. 18 (United Nations, *Treaty Series*, vol. 507, p. 65).

<sup>&</sup>lt;sup>39</sup> For the Ottoman public debt, see the Treaty of Versailles (British and Foreign State Papers, vol. 112, pp. 1-210) and the Treaty of Lausanne (League of Nations, Treaty Series, vol. XXVIII, p. 12) and in connexion with the latter the arbitral award by Eugene Borel of 18 April 1925 (Reports of International Arbitral Awards, vol. 1, pp. 529-614).

<sup>&</sup>lt;sup>40</sup> Charles E. Rousseau, "La succession d'Etats', Cours de doctorat, 1964-1965, Paris, p. 275. See also Paul Guggenheim, Traité de droit international public, vol. I, Geneva, 1953, p. 472, where the author seems to consider debts secured by a mortgage as synonymous with debts contracted for the benefit of the territory.

<sup>&</sup>lt;sup>41</sup> The problem of the public debt of former colonies was touched upon at the second session of the United Nations Conference on Trade and Development at New Delhi. Mr. Louis Nègre, Minister of Finance of Mali, stated at the

which the metropolitan country derived from its presence in the colony and the specific benefits which it may have been able to obtain by investing the product of the debt contracted. For these and other reasons, the successor State does not always assume succession to the part of the general debt used in the dependent territory. Thus the same solution is adopted in both traditional and modern succession.

102. Correctly amended, the criterion of the purpose for which the debt was incurred could cover all hypothetical cases that are usually examined, including the debts of local corporate bodies and of local public establishments, which are by nature intended for the development of the territory. The debts must thus be not only intended for use in the dependent territory but also clearly individualized, i.e., specifically contracted for that use, which would exclude general debts of which a more or less identifiable part may in fact have been intended for use in the territory.

103. It is suggested that the Commission should not neglect the implications of the nationality of the creditor with regard to the regulation of the debt which devolves on the successor State. It would seem that a distinction could be drawn between debts owed to the predecessor State and its nationals and debts owed to others. The former involve bilateral relations, often regulated by conventions implemented in a co-operative atmosphere which reduces the burden of the obligations assumed by the successor State. Debts owed to third States or their nationals, on the other hand, raise complicated problems involving tripartite relations. Furthermore, the creditor to whom these debts are owed may recognize the predecessor State alone as debtor, thus raising the problem of the contractual responsibility of States, which is included in the Commission's programme of work. The agreement on the devolution of debts concluded between the successor and predecessor States is not enforceable against the creditor third State. No assignment of the obligation involving a change of debtor may be made without the creditor's consent.

104. The exclusion from succession of debts which have served the interests of the predecessor State or its nationals ("odious" debts) has never posed any problems. This is true of war debts, debts relating to the colonization of the territory by the metropolitan country and debts contracted in an endeavour to suppress the insurrection which led to independence.

58th plenary meeting: "Many of our countries could legitimately have contested the legal validity of debts contracted under the authority of foreign Powers... Going beyond respect for the letter of the law and the formation of 'good law', we simply want to appeal to the developed creditor countries for a little more equity, if not justice, by proposing, as a test of their goodwill in this connexion, that they should decree during the current session the outright annulment of all debts contracted during the colonial period for interests which were not fundamentally ours and which our States are unjustly expected to service...". (See Proceedings of the United Nations Conference on Trade and Development, Second Session, vol. I; Report and Annexes, p. 140).

# VIII. Succession to the legal régime of the predecessor State 42

105. The free formulation of municipal law is the unmistakable mark of a country's internal sovereignty. Thus, just as the demands of economic sovereignty impose non-succession, those of political sovereignty, which are here brought into play, call for a break with the former juridical order. But in this sphere, even more than in others, there is a wide divergence between principle and practice. This is due first of all to the fact that it is difficult to "short-circuit" the time-factor: changing a whole body of legislation takes a relatively long time. However, the time obstacle is often combined with others resulting from economic and social structures and habits of mind that oppose change by inertia and even active resistance. Last and most important, in the words of Professor Charles De Visscher, "the continuity of law, as a guarantee of security, is a basic necessity for the juridical order".43

106. It may be said that the principle of non-succession to the municipal law of the predecessor State is incontestable, but that in practice the principle of continuity remains in force for a period whose duration varies according to the country, the era and the sectors of juridical life involved. This comment seems applicable both to traditional State succession and to that arising from decolonization.

#### (a) Traditional succession

107. In the case of traditional succession, the municipal law of the acquiring State is applied to the annexed territory. In fact, it is this feature which normally characterizes annexation. The incorporated territory no longer possesses any legal individuality distinguishing it from the country to which it is attached. In particular, the constitutional system of the acquiring State is extended and applied to the ceded territory.

108. However, this rule of non-succession through the substitution of the juridical order of the annexing State for that of the incorporated territory is not easy to apply. First of all, the desire for continuity, prompt-

<sup>42</sup> The problem of treaties which have been "received" into municipal law and the legislation adopted pursuant to those treaties is not covered in the brief comments under this heading, since succession in respect of treaties is being dealt with separately. Nor, of course, will this section deal with the problem of succession to the international juridical order, which is constantly being called into question by the new States. International law is, in fact, behind the times: formulated during the Renaissance and systematized during the nineteenth century by the practice of the great Powers, it is not adapted to the new States, which took no part in its formulation. Even the normative institutions and international institutions established since the end of the Second World War were not adapted to the appearance of the new States. This has led to attempts to revise parts of the United Nations Charter and to adjust economic international law. The old Powers should pay attention to this phenomenon; bearing it in mind will make it possible to strengthen international law while preparing for certain necessary changes in that law.

<sup>43</sup> Charles De Visscher: Théories et réalités en droit international, 3rd edition, Paris, 1960, p. 242.

ed in particular by the size of the population concerned, which must be spared too abrupt a change in juridical relations, may lead the successor State to maintain the juridical order of the ceded territory on a temporary and sometimes even on a lasting basis. Sometimes the territory's special characteristics are too pronounced to permit the extension of the municipal law of the successor State. Furthermore, the latter may sometimes maintain the legislation of the ceding State because it considers it superior to its own, better formulated or in any case more appropriate.

109. In other cases, quite opposite reasons prevent the "exportation" of the municipal law of the successor State and lead to semi-continuity. This applies in cases of colonial conquest. Even in "settler colonies", which have the closest legal relations with the metropolitan country, the territory of the indigenous inhabitants does not "receive" the municipal law of the metropolitan country, which is deemed more developed or simply inappropriate for the establishment of a relationship based on domination. However, the former legislation of the colonized territory is not necessarily retained. From the point of view of the metropolitan sovereign, it has the same defect as the latter's own municipal law, namely, it does not lend itself to or facilitate the establishment of a relationship based on domination. Local pre-colonial legislation, metropolitan municipal law and new legislation enacted by the new sovereign, either at the metropolitan centre of administration or locally, co-exist in a mixture, or more precisely in a superimposition or mosaic, in proportions which vary with the metropolitan country, the colony, the period and the subject concerned and which endow colonial law in each Non-Self-Governing Territory with its own particular characteristics and nuances.

110. However, the rule of non-succession and the exceptional case of continuity both express the sovereignty of the successor State. Non-succession, which results either from an extension of the legislation of the acquiring State to the incorporated territory or from the formulation by the former of a body of autonomous rules applicable to the latter, is an obvious expression of that sovereignty. But that sovereignty is also expressed even when the acquiring State decides to maintain the municipal law of the annexed territory. This legislation, which is in fact that of the incorporated territory, is transformed into the law of the successor State in that territory by a sovereign act of "acceptance".

#### (b) Succession in recent times

111. In cases arising as a result of decolonization, nonsuccession to the existing juridical order is the established principle. But there, too, continuity often prevails for as long a period as is necessary to alter the entire body of legislation by stages or to cast off certain servitudes imposed by the metropolitan country.

112. The new State applies the municipal law enacted by the colonial Power, partly through a genuine process of succession (effected, for example, by treaty, under the independence agreements which may, as a

guarantee, confirm the maintenance of certain regulations in a particular sector) and partly proprio motu, by virtue of a sovereign act incorporating the colonial legislation into its own municipal law. Sometimes, however, the process is not one of succession by treaty or of incorporation by sovereign act, but one of "renewal" on a temporary basis, which clearly expresses the idea of a foreign body of legislation not incorporated into and merged with the country's own body of laws.<sup>44</sup>

### (c) Consequences

113. However, extensive and general continuity in the matter of legislation may be in practice, it does not affect the undisputed principle of non-succession to the former juridical order. If, having regard to the widespread practice of succession in this sphere, the International Law Commission were to sanction it by deciding that a rule of continuity truly exists, that action would deprive the successor State of the right to amend or revoke inherited legislation. However common and lasting succession to the legal system may be, it is not a right and remains precarious, i.e., liable to be replaced at any time. What in fact is involved is a gradual and fairly rapid discarding of the former legislation until it has entirely disappeared. It is a continuous erosion of a body of laws, proving that the rule of non-succession is applied in stages and that the exceptional case of continuity, important though it is, shrinks gradually but so inevitably that, despite the fact that practice provides some evidence to the contrary, the rule cannot be treated as the exception or the exception as the rule.

114. A problem that arises in this connexion is that of the formal procedure by which inherited legislation can be amended by the successor State. In other words, does the continuity which obtains in practice in the sphere of legislation apply equally in formal and in practical matters? Can the successor State amend a renewed enactment by one which is lower in the hierarchy of legal instruments formerly applied? Can it, for example, amend an Act by means of a simple decree? The domestic sovereignty of the successor State necessarily precludes any possibility of considering it as bound to respect the hierarchy of legal instruments previously in force. De facto continuity is not essential in the matter of form. Nevertheless, doubtful situations that may have important consequences will arise if, after introducing amendments without respect for that

<sup>&</sup>lt;sup>44</sup> In Algeria, for example, Act No. 62-157 of 31 December 1962 "renewed" legislation enacted prior to independence. But the renewal is at all times "subject to inventory". The legislation is, in fact, renewed "except for those provisions which are contrary to national sovereignty". As the Algerian Parliament did not specify which authority would be competent to decide whether a former enactment was contrary to national sovereignty, it is the judge who, as each case arises, screens the legislation concerned; he thus has very broad competence. He has power not only to annul legislation but also to declare that any former legislation which he deems to be contrary to national sovereignty is wholly "non-existent" in Algeria. The power vested in the Algerian judge is particularly extensive as the legislators have not established criteria for determining whether a law is contrary to national sovereignty.

hierarchy, the successor State renews the former legislation, including the act establishing the hierarchy, or fails to enact an instrument establishing its own hierarchy or legal instruments.

115. The continuity of the juridical order may be lasting and even permanent in some cases. According to one theorist, for instance, "the adoption, in some Commonwealth countries, of an advanced form of English law having ordinances, decrees and codes has a number of advantages. The codified forms of English law are often more highly developed than the noncodified form which still prevails in England. Despite their foreign origin, legal institutions and instruments were more advanced than feudal or tribal law and courts and were better suited to the requirements of building a modern State. As a result, countries such as India and Sudan have felt little need to seek a completely new foundation for their law and there are few legal systems of purely national origin in the new States."45

### (d) Pending court proceedings

116. A great many difficulties arise in connexion with court proceedings pending at the time when one State succeeds another. Proceedings commenced under the old law in the courts of the annexed or dependent territory continue under a new legal system and, in any event, before new courts. This inevitably creates quite complex problems, particularly as regards appeal procedures. The difficulties are especially acute in repressive law and in the matter of the execution of criminal sentences. The competence of the courts, the statutory ingredients of the alleged offence, the quantum of the penalty incurred by reason of the said offence, the avenues of appeal available, the conditions and mode of execution of the penalty—all these vary from one system to another and give rise to conflicting solutions which make it difficult to bring out rules applicable in all cases. The Commission will weigh the desirability of furthering the progressive development of law in this sphere in the light of the importance it attaches to this question.

### IX. Succession and territorial problems

117. The problems of State succession arise, by definition, from a change of sovereignty over a territory. The main purpose of succession is therefore the transfer of a territory from the predecessor State to the successor State. All the other problems of succession—enforceability of treaties, devolution of property, subrogation in debts, continuity of the juridical order, treatment of concessions—are, so to speak, only secondary effects grafted on to the main effect: the transfer of the territory and of sovereignty over that territory.

- 118. Despite its importance and the central place it occupies, this aspect of State succession does not seem to have been studied with the same care as the other aspects mentioned above. It is apparently regarded as self-evident or as not raising any problems. Yet the problems it raises are real and important and require solutions, and any complete study of State succession must attempt to bring out those solutions.<sup>48</sup> The problems raised by the territorial aspect of State succession are:
- (a) The question of boundaries, including the delimitation of the territory devolving upon the successor State and the extent to which the boundaries established by its predecessor (with or without the agreement of the other parties concerned) are binding on the successor State;
- (b) The problem of enclaves, rights of way and other servitudes running with the territory devolving upon the successor State;
  - (c) The question of incomplete devolution.

### (a) Succession with regard to boundaries

- 119. In order to fix the object of the succession, i.e., the territorial base for the succession and for the exercise of sovereignty, there bust be well-defined boundaries. In principle the territory devolves upon the successor State on the basis of the pre-existent boundaries. These boundaries will have been established by a treaty, an instrument issuing from an international conference, a statute or regulation of the predecessor State, or a de facto situation sanctioned by the passage of time.
- 120. The study of the first case—boundaries established by treaty—overlaps the study of the effect of State succession on treaties and should be made in consultation with the Special Rapporteur appointed to deal with that topic.
- 121. Boundaries established by unilateral enactments of the predecessor State are found rather often in the context of decolonization, for vast regions administered by a single metropolitan State have given birth to a number of independent States (for example, French West Africa, French Equatorial Africa). To what extent are these boundaries binding on the successor States? If they are binding, on what terms may the successor States request that they be revised?
- 122. The Charter of the United Nations and, in more explicit terms, the Charter of the Organization of African Unity proclaim the principle of respect for the territorial integrity of States and thus prohibit the reopening of the question of State boundaries. The attitude of the founders of the Organization of African Unity, is urging all the new States, after they attained their independence, to respect the *status quo* with regard to boundaries, was inspired by realism and political wisdom. Colonial

<sup>&</sup>lt;sup>45</sup> Ian Brownlie, "Aspects juridiques du passage à l'indépendance", Revue de droit contemporain, Brussels, June 1961, No. 1, p. 31.

<sup>&</sup>lt;sup>46</sup> The Sub-Committee on the Succession of States set up in 1962 by the International Law Commission had listed "territorial rights" among the aspects to be considered. In its final report, however, it limited the question to international servitudes, which would not seem to give sufficient consideration to the concerns of the new States and to the requirements of their political sovereignty.

administrative boundaries were made international boundaries in an effort to avoid throwing the political map of Africa into dangerous confusion. The boundaries drawn at the Congress of Berlin in 1885 by the colonial Powers in an agreed partition of spheres of influence in Africa or established administratively by the former metropolitan country to divide its vast colonial territory into regions were imposed in their existing form after independence. There were exceptions, however. The International Law Commission will have to consider whether a rule exists and, if so, how it should be stated.

123. In this connexion, it should be noted that respect for boundaries established by the predecessor State may be viewed in two ways:

As prohibiting expansionism and discouraging unwarranted territorial claims. According to this view, the principle should not be subject to any exception, or to any restrictions which would limit its scope. But other fundamental principles of international law fulfil this function, and the Commission may therefore question the need for a specific rule for succession with regard to boundaries;

As barring any revision of boundary lines, even if warranted by the desire to correct anomalies inherited from the colonial past, by the wish to establish boundaries which are more rational and more consistent with the interests of the peoples concerned, or by respect for rights existing before foreign domination which have been disregarded by the colonial Power. If it adopts this second approach, the Commission will have to decide whether there is a rule of international law barring any revision of boundaries, even if based on respect for other principles of international law (for example, the principle of self-determination). It will have to decide how this rule of the inviolability of boundaries might be combined with others such as the rule of acquisition of sovereignty by prescription or that of "acquired rights".

124. As stated above, in practice not all former colonial boundaries have been preserved. A single colonial entity has given birth to two new States (India and Pakistan), and several former colonial territories have formed a single State (Somalia, Cameroon). The justification for abandonment of pre-existent boundaries in these cases is generally the application of the principle of self-determination.

125. But the question of revision of former colonial boundaries may also arise without reference to any question of self-determination, in the case of territorial adjustments which are needed to achieve natural or more rational boundaries. Nevertheless, in order to avoid the dangerous developments to which these necessary revisions might lead, the independent countries of Africa have often sought to overcome the difficulty by establishing unions of States or confederations (raising new problems of succession), some ephemeral (Mali Federation), others still in the drafting stage (United States of Central Africa). Solutions of this kind are not always at hand, however, and the problems may remain dormant. How then can they be resolved?

126. The boundaries of the African States, like those of the Latin American States, were established on the basis of uti possidetis juris at the date of independence, and, as in Latin America, this method of establishing boundaries has not always prevented disputes from arising. In the case concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua) the International Court of Justice, by its Judgment of 18 December 1960,47 decided that the principle of uti possidetis did not preclude, in that case, territorial compensations and even indemnities in order to establish a better-defined natural boundary line. It is true that the Court's decision on that point was obiter dictum, since the remain question before it was the validity of the arbitral award.

127. The United Nations General Assembly, by its resolution 2353 (XXII) on the question of Gibraltar, adopted on 19 December 1967, maintained *inter alia* that "any colonial situation which partially or completely destroys the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations". 128. In the light of these principles and of State practice, the Commission will have to consider the problem of boundaries inherited from the colonial past and decide to what extent they are absolutely binding on the new States and what rules should govern the settlement of disputes arising in the matter.

#### (b) Servitudes, rights of way, enclaves

129. Situations giving rise to "servitudes" (the term is criticized by several authors) are created by treaty, by a unilateral act of the predecessor State or by special geographical conditions. Situations of the first type may be considered in connexion with the succession of States in respect of treaties. The suggestion may be advanced here, however, that when a situation is closely connected with the predecessor State's policy, which the successor State does not intend to follow, there are valid grounds for ending it, even if it was created by treaty. This is true, for example, of military bases, rights granted to a State to use ports and airports, etc. 130. Often the enclaves and the right of way through them were brought into being by the predecessor State. This was the case with certain Portuguese enclaves in India, which were the subject of the Judgment of the International Court of Justice of 12 April 1960.48 The question arises whether such remnants of the colonial régime should not logically disappear with it and whether they can reasonably be imposed on the successor State. In the above-mentioned case, the Court found that Portugal did not have a right of way. However, its judgment was based on the facts of that particular case, which considerably reduces its value as a guiding precedent. The Court considered that the practice followed by the parties made it unnecessary to refer to general rules governing enclaves. The colonial origin of the

18 Ibid., pp. 6-46.

<sup>47</sup> I.C.J. Reports 1960, pp. 192 et seq.

enclaves does not seem to have been a factor in the Court's decision.

### (c) Incomplete territorial devolutions

131. In the history of decolonization, there have been cases where the colonial Power agreed to transfer only a part of the dependent territory to the successor State. The classic example is West Irian (New Guinea), which the Netherlands did not transfer to Indonesia at the same time as the remainder of the 3,000 islands in the former Netherlands dependency.<sup>49</sup>

132. The Commission could consider the question whether such incomplete territorial devolution is compatible with the rules of international law and, in that connexion, study possible correlations between the principle of territorial integrity and the abolition of the colonial régime. In the language of private law, such incomplete devolution could be regarded as partial failure to make delivery.

#### X. Status of the inhabitants

### (a) Succession and nationality

133. In all cases of succession, traditional or modern, there is in theory no succession or continuity in respect of nationality. The successor State does not let the inhabitants of the territory retain their former nationality. This is a manifestation of its sovereignty. However, this desire to assert its sovereignty may also prompt the successor State, in its own interest, to adopt one or other or both of the following solutions, in order to make the principle of non-continuity less rigorous. One solution is a treaty provision giving the successor State the right to deny certain persons its nationality. The other is the transfer of populations which the successor State considers undesirable, in order to preserve the homogeneity of the group of people now in its charge. The International Law Commission will have to determine whether, if no agreement exists, the successor State has unlimited sovereign power to undertake the "denaturalization" of persons or groups of persons, resulting in their expulsion de facto (through lack of guarantees) or de jure (through mass transfers).

134. On the other hand, other arrangements are sometimes made to mitigate the principle of non-succession, not for the benefit of the successor State but in the interest of the population, whose members may be granted a right of option. The allows them a period of adjustment, after which they decide whether to retain the nationality of the successor State or to resume their former nationality. Two conditions, however, are usual-

ly attached to the grant of this period of adjustment—conditions which limit the effective choice of the population or lead it to regard this period as a grace period in which to eliminate all ties with the country. Persons wishing to resume their former nationality are obliged to emigrate and to sell all their immovable property (e.g. the case of the Hungarian optants in Transylvania).<sup>50</sup>

135. A new and original extension of this solution, providing a twofold mitigation, may be of interest to the Commission. It was conceived in connexion with the independence of Algeria, because of the large number of French residents in that country. Under the Declarations adopted on 19 March 1962 at the close of the Evian talks, certain categories of French nationals, defined on the basis of birth or length of residence in Algeria, were given a right of option for three years, during which period they could exercise Algerian civil rights without losing their French nationality and at the end of the period, if they did not opt for Algerian nationality, they would be protected by an establishment convention and allowed to live in Algeria, to keep their property and to acquire new property.<sup>51</sup> The period of adjustment and trial was thus replaced by a "period of reflection"—in other words, the option was not immediate and French nationals could weigh the advantages of the situation for three years, during which they enjoyed a kind of dual nationality. In addition, they were not obliged to sell their property and emigrate if, at the end of the prescribed period, they opted for their original nationality.52

#### (b) Conventions of establishment

136. However, the fate of the individual is more than just a question of nationality; it involves a number of important problems relating in particular to personal status i.e., the protection of individuals and their property, for which conventions of establishment are sometimes concluded. These conventions usually prescribe equal treatment for nationals on the basis of reciprocity. On occasion, however, they abandon the principle of equality and introduce a special régime which, rightly or wrongly, comes to be viewed as a preferential system and is therefore doomed to disappear relatively quickly.

<sup>&</sup>lt;sup>49</sup> There are two examples of "potential" incomplete devolution, which in the end did not take place. One is the Algerian Sahara; France was not prepared to transfer sovereignty over it and the independence negotiations were broken off in consequence. Similarly, at one stage in the negotiations concerning the independence of the Sudan, when a union with Egypt was envisaged, the United Kingdom tried to retain control of the southern part of the Sudan.

<sup>&</sup>lt;sup>50</sup> Annual Digest of Public International Law Cases, 1927-1928, pp. 88-90.

<sup>51</sup> See United Nations, Treaty Series, vol. 507, pp. 35 and 37. 52 Just before it expired, this three-year period, established by treaty, was unilaterally extended by Algeria in a liberal gesture to resolve various practical problems and to give those wishing to make a choice a final opportunity of doing so. In addition, the Algerian Nationality Code was more liberal than the Evian Agreements had anticipated in some respects. It is original in that it extended Algerian nationality to persons of any nationality, irrespective of their place of birth or residence, who proved that they had taken part in the Algerians' struggle for national liberation and who made a simple declaration expressing their desire to become Algerian. The intent of the Algerian legislator was to acknowledge in this way the services of the foreigners, particularly French nationals, who had helped Algeria to become a sovereign State (Act No. 63-96 of 27 March 1963 establishing the Algerian Nationality Code, art. 8).

For example, all the special judicial arrangements based on the capitulations which were introduced for the benefit of French nationals living in the North African States and the States of Indo-China were shortlived.

137. When they can be concluded, conventions of establishment impose limits on the principle of non-succession and ensure a certain continuity in various situations. Experience has shown, however, that these conventions are, first of all, difficult to conclude and then difficult to enforce. The protection which they afford for private rights is not a lasting one, as will be seen in connexion with the complex problem of "acquired rights".

### XI. Acquired rights

138. The traditional international law of State succession follows the principle of respect for acquired rights and imposes an obligation on the successor State to respect concessions granted by the predecessor State. Exceptions were made in the case of "odious" concessions or concession granted *mala fide* on the eve of the territorial transfer. Traditionally, jurisprudence and prevailing doctrine have concurred in making respect for acquired rights (public, private or mixed) the guiding principle.

139. In the present era of decolonization, however, it is fair to ask whether this principle is really valid, in view of the new concept of the sovereignty of States over their natural wealth. One opinion reflecting this concern has emphasized that a concessionary contract must end with the extinction of the personality of the ceding State and could survive the change of sovereignty only at the express wish of the new authority. According to this school of thought, the only right existing after the change of sovereignty was the evicted concessionary enterprise's right to compensation.

140. The current view is that private rights, concessionary or other, cannot be regarded as acquired rights. They are protected only if the new sovereign consents. It has sometimes been possible to protect public or mixed rights by treaty, when the interest of the successor State and that of the predecessor State could be reconciled or even closely linked by a novation of the relationship between the former concessionary enterprise and the successor State. This is a recent tendency.

### (a) Rejection of acquired rights

141. Treaty clauses can, of course, still be found providing for respect for acquired rights, both public and private. When it became independent, Burma agreed to respect contracts concluded by the United Kingdom. In the Philippines, United States and Philippine nationals were given equal rights for the exploitation and development of natural resources. The Franco-Algerian agreements clearly stated that acquired rights would be respected.<sup>58</sup> Algeria later con-

firmed all the rights granted by the French Republic under its Saharan Petroleum Code. Under the agreement of 2 November 1949 between the Netherlands and Indonesia, concessions granted before the transfer of sovereignty were made intangible rights. The Anglo-Jordanian treaty provided for the maintenance of concessions.

142. However, facts are more powerful than paper agreements and in most cases events have taken a different course. The solution to Algeria's petroleum problems, which will be described below, departed from the theory of acquired rights *stricto sensu*. Denounced in 1956, the above-mentioned agreement between the Netherlands and Indonesia from the start made the recognition of acquired rights subject to the express reservation that concessions could always be infringed upon in the public interest. Zambia refused to consider itself bound by the Charter granted by Queen Victoria to the British South Africa Company, whose concession was to expire in 1996.

143. The succession of States in the context of decolonization demonstrates that in the recognition of acquired rights in respect of concessions the governing factor is not general obligation to respect acquired rights but the sovereign will of the new State.

- (i) "Acquired" rights are rights obtained under the former legislation. Yet it has been seen that the continuation in force of the municipal law depends solely on the tacit or express wish of the new sovereign. There are no rules of international law providing for continuity of the former juridical order *ipso jure*. Consequently, concessions granted under the legislation of the predecessor State should not necessarily be binding on the new State.
- (ii) The prejudice which the successor State and its nationals may suffer as a result of the maintenance of concessions or acquired rights held by foreigners should also be taken into account.
- (iii) Furthermore, it should be noted that new developments regarding the right to nationalize have taken place as a result of the adoption on 14 December 1962 of General Assembly resolution 1803 (XVII) on permanent sovereignty over natural resources and the trends which appeared at the United Nations Conference on Trade and Development. It is interesting to observe that in adopting the aforementioned resolution, operative paragraph 4 of which refers to the protection of acquired rights and the principle of compensation, the General Assembly was careful to state that the paragraph did not apply to cases of State succession resulting from decolonization.
- 144. The Commission will have to determine whether—as we are inclined to think—a new rule, opposed to the traditional rule can be deduced from practice and the writings of jurists, making it possible to affirm that the successor State is not bound by the commitments entered into by the predecessor State with regard to concessionary enterprises and that it is empowered to

<sup>&</sup>lt;sup>53</sup> Article 12 of the Declaration of Principles concerning Economic and Financial Co-operation (see United Nations, *Treaty Series*, vol. 507, p. 63).

terminate, modify or maintain a concession by virtue of its sovereign will. If the Commission does not wish to go as far as that, it may have to determine the circumstances in which the successor State is justified in calling into question the concessions granted by the predecessor State. In our view, the economic conditions in which the concession was granted and the requirements of the new economic policy of the successor State should be taken into consideration. We also feel that the pre-colonial municipal law of the territory which has become independent should be taken into account when deciding whether concessions granted by the colonial Power should be maintained or withdrawn. 54 This applies particularly to cases where succession involves the restoration of a pre-existing sovereignty rather than the birth of a new sovereignty. Lastly, the Commission will have to define the scope and range of the reservation included in General Assembly resolution 1803 (XVII) on sovereignty over natural resources and state whether it constitutes a total exemption from the obligation to pay compensation, or merely a relaxation of the former rules in the light of the special problems of newly independent States.

145. The right of young States to carry out nationalizations which cannot be impeded by concessionary contracts is no longer contested. Although the former sovereign was free to grant concessions within the framework of its own political and economic system, it has no grounds for requesting that its successor maintain the *status quo ante*.<sup>55</sup> But many jurists who still subscribe to the concept of acquired rights contend that the successor State cannot retroactively annul the advantages granted to foreigners <sup>56</sup> without paying the latter monetary compensation. They tend to consider that the validity of the nationalization of industries engaged in exploiting natural wealth (petroleum, mineral ores, etc.) depends on the payment of "fair, effective and prompt compensation".

146. However, others will certainly deem the very concept of compensation "unfair" within the colonial context, or will at least consider that it is of no real

significance unless it is held to apply to both parties. This approach to the question would make it necessary for all profits earned by concessionary enterprises, the reinvestment of which outside the territory was prejudicial to the latter, to be taken into account in any dispute concerning compensation.<sup>57</sup> It has also been pointed out that a country whose economy has long been dominated by foreign owners cannot seriously contemplate developing its economy and raising the level of living of its inhabitants if it is forced to reimburse the total value of installations left behind by concessionary companies. Hence, the idea of fair compensation would not call for repayment of the value of industrial installations, but would imply that all the elements of a situation characterized by the transfer of profits and the total or partial amortization of the investments made should be taken into account.

147. However, the alternatives of respect for acquired rights or termination of those rights or without compensation are not the only possible solutions. Some States adopt a wholly original attitude with regard to certain situations.

# (b) Novations and transformation of the concessionary régime

148. In the case of some important natural resources the new State may be unable either to agree to maintain acquired rights, which would prevent it from developing its economy properly, or to abolish such rights immediately, since that would seriously disturb its economy. Combining the legacy of the past and the needs of the present in a balanced way, it reorganizes acquired rights, ensuring greater control and larger profits for itself.

149. For example, in the case of hydrocarbons and raw materials, which are of great importance both to the former metropolitan country and to the former colony, the successor State and the predecessor State have gradually adjusted their relations so as to satisfy the former's desire for novation and the latter's desire to assure itself of a steady source of supply. The interests of the two parties have become complementary rather than antagonistic, for they are dependent on each other.

150. A typical example of these new relations is provided by the Franco-Algerian Conventions, which contain the germ of a new law of State succession. The principle of acquired rights was established in the Declarations adopted on 19 March 1962 at the close of the Evian talks: "Algeria shall confirm all the rights attached to the mining and transport entitlements granted by the French Republic in pursuance of the Saharan Petroleum Code" 56 That was a remarkable result for

<sup>&</sup>lt;sup>54</sup> For example, in Moslem law, according to the views of the Iman Malek, whose school of thought predominates in North Africa, all mines, even those on freehold land, are the property of the community (*Umma*) and can only be worked by the State or through a concession, which is granted in return for the payment of either a fixed sum or part of the yield. The portion of the yield retained by the concessionary enterprise should in no case exceed a fair recompense for the work and effort involved in operating the mine. The concessionary enterprise's is thus reduced to that of a *mere operator*.

<sup>55</sup> Charles De Visscher has stressed the aleatory nature of concessions granted in such circumstances: "However, from the political point of view, which here is of considerable importance, it is necessary to bear in mind the dangers which inevitably threaten concessions granted to foreign enterprises when they relate to the exploitation of immense national wealth or are granted for a very long period. The awakening of national feeling exposes them to the risk of being regarded as an intolerable mortgage on the life of the community, extorted from a régime which did not represent public opinion." (Op. cit., p. 244).

<sup>&</sup>lt;sup>58</sup> It should be noted that nationalization may affect nationals too.

<sup>&</sup>lt;sup>57</sup> A similar consideration led the Algerian Government to call on mining companies to repatriate their assets situated outside Algeria before paying any compensation for the nationalization of nine mining companies, carried out pursuant to Ordinance No. 66-93 of 6 May 1966.

<sup>&</sup>lt;sup>58</sup> Declaration of Principles on Co-operation for the Exploitation of the Wealth of the Saharan Suboil, title I, para. 1. (See United Nations, *Treaty Series*, vol. 507, p. 67).

the concessionary enterprises, especially those holding prospecting licences or permits to work large deposits of gas and petroleum, as was the agreement relative to arbitration concerning petroleum, concluded a year later, on 23 June 1963. By making organizational arrangements for arbitration, this Agreement also ensured that acquired rights would be guaranteed by the Court. The main function of the court is to pronounce judgement on all litigation concerning those rights. It has substantial powers, since it can annul decisions taken by the Algerian Government in the sphere concerned or order that compensation be paid for damages suffered. These rights, henceforth protected under international law, derived from the colonial legislation previously applicable, the Saharan Petroleum Code and the contracts concluded by the concessionary companies and the former public authorities.

151. Furthermore, a new Agreement, signed on 29 July 1965, resolved in a bold and original manner the natural conflict between the concessionary régime and the right of the Algerian people to exploit their natural wealth. This Agreement confirms the acquired rights derived from concessions, but also strengthens the prerogatives of the Algerian Government, introduces a new fiscal

régime which is more advantageous to Algeria and ensures the local processing of the products and a certain measure of industrialization. It contains special provisions relating to gaseous hydrocarbons, assigning an important role to the successor State, whose full ownership of the gas is recognized, although the companies have some rights regarding the disposal of the gas.

152. The old formula of concession has been replaced by a co-operative association, thus satisfying the needs of the new State, which wishes to promote its economic development and renounces the nationalization procedure, and the requirements of the predecessor State, which is ensured of a regular supply of hydrocarbons. The formulation and implementation of this type of solution was greatly facilitated by the fact that a substantial part of the capital of most of the companies concerned was derived from public sources.

153. The considerations set out in this report and the few accompanying suggestions are of necessity brief in relation to the wide scope and complexity of the subject. The Special Rapporteur felt that he could do no more in a first preliminary report pending the general discussion and instructions from the International Law Commission.

# RELATIONS BETWEEN STATES AND INTER-GOVERNMENTAL ORGANIZATIONS

[Agenda item 2]

### DOCUMENT A/CN.4/203 AND ADD.1-5

# Third report on relations between States and inter-governmental organizations, by Mr. Abdullah El-Erian, Special Rapporteur

[Original text: English] [20 March, 8 May, 13 May, 5 July, 16 July and 31 July 1968]

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#### Introduction

- 1. In 1967, the Special Rapporteur presented to the Commission, at its nineteenth session, a second report on relations between States and inter-governmental organizations.\(^1\) As stated in paragraph 43 of its report on the work of its nineteenth session, "the Commission was unable to discuss it owing to the pressure of other work and to the unavoidable absence of [the Special Rapporteur].\(^1\) The Commission also stated that the second report, together with the report which the Special Rapporteur intends to submit at the twentieth session, "will contain a full set of draft articles on the privileges and immunities of representatives of States to inter-governmental organizations, and both reports will be submitted for discussion in 1968.\(^1\) a
- 2. The second report contained: (a) a summary of the Commission's discussions at its fifteenth and sixteenth sessions; (b) a discussion of the general problems relating to the diplomatic law of international organizations; (c) a survey of the evolution of the institution of permanent missions to international organizations; (d) a brief account of the preliminary questions, whose discussion by the Commission should precede the consideration of the draft articles; and (e) the text of draft articles relating to general provisions, of an introductory nature.
- 3. The present report is intended to present a full set of draft articles, with commentaries, on the legal position of representatives of States to international organizations, consisting of four parts:
  - part I. General provisions;
  - part II. Permanent mission to international organizations;
  - part III. Delegations to organs of international organizations or to conferences convened by international organizations;
  - part IV. Permanent observers of non-member States to international organizations.

4. Since the Special Rapporteur's second report was written, a discussion on the question of diplomatic privileges and immunities took place in the Sixth Committee during the twenty-second session of the General Assembly. The discussion touched on a number of the general problems and preliminary questions raised by the Special Rapporteur in his second report in relation to the diplomatic law of international organizations in general, and the legal position of representatives of States to international organizations in particular. The Special Rapporteur has therefore deemed it appropriate to include a summary of that discussion in the present report.

## CHAPTER I

### Summary of the Sixth Committee's discussion at the twenty-second session of the General Assembly

5. At its 1592nd plenary meeting, held on 25 October 1967, the General Assembly decided to include the following item in the agenda of its twenty-second session;

Question of diplomatic privileges and immunities:

- (a) Measures tending to implement the privileges and immunities of representatives of Member States to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations and the privileges and immunities of the staff and of the Organization itself, as well as the obligations of States concerning the protection of diplomatic personnel and property;
- (b) Reaffirmation of an important immunity of representatives of Member States to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations.

At the same meeting the General Assembly allocated the item to the Sixth Committee for consideration and report. The Sixth Committee examined the item at its 1010th to 1017th meetings, held between 29 November and 7 December 1967.<sup>4</sup>

The discussion in the Sixth Committee revealed widespread agreement on the need for the representatives

<sup>&</sup>lt;sup>1</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/195 and Add.1, pp. 133-153.

<sup>&</sup>lt;sup>2</sup> Ibid., document A/6709/Rev.1 and Rev.1/Corr.1, p. 369.

<sup>3</sup> Ibid.

<sup>&</sup>lt;sup>4</sup> Official Records of the General Assembly, Twenty-second Session, Annexes, agenda item 98, document A/6965.

of Member States to the United Nations, the Organization and its staff to enjoy appropriate privileges and immunities, and on the importance of respect for these privileges and immunities for the effective functioning of international organizations. The development of international organizations since 1945 and their central position in present-day international relations were stated to have served to underline the significance of the diplomatic law of international organizations. It was emphasized that if Member States wished the work of the Organization to be properly carried out, they must be prepared to observe strictly the immunities designed to secure the free and successful performance of its functions.

#### A. BILATERAL AND MULTILATERAL DIPLOMACY

- 7. Many delegations noted that the considerations on the need for the enjoyment by representatives sent on behalf of one State to another of a special status so as to enable them to perform their functions under conditions of adequate security and without being subject to pressures or constraint on the part of receiving States, applied in the case of representatives of Member States to the United Nations and with respect to the Organization itself and its staff. It was pointed out, however, that the application to representatives to international organizations of the rules concerning diplomatic missions between States would be mutatis mutandis. The application by the host State of the principle of reciprocity in determining the treatment to be given to the representatives of individual Member States was criticized by some delegations on the ground that this principle was inappropriate outside the framework of bilateral relations.
- B. Legal nature of the diplomatic law of international organizations as a part of general international law
- 8. The legal nature of the 1946 Convention on the Privileges and Immunities of the United Nations 5 and its relationship to the Charter of the United Nations and the customary norms of international law were raised in the discussion. The majority of the delegations that spoke on this point noticed that the purpose of the Convention on the Privileges and Immunities of the United Nations was to determine the details of the application of Article 105 of the Charter. Article 105 (1) and Article 105 (2) provide that the Organization, representatives of Member States and the officials of the Organization shall enjoy such privileges and immunities as are necessary for the fulfilment of the purposes of the Organization and the independent exercise of their functions. Article 105 (3) envisages that further content could be given to the term "necessary" by the General Assembly: it provides that the Assembly may make recommendations with a view to determining the details of the application of the

first two paragraphs or may propose conventions to the Members of the United Nations for this purpose. Those delegations expressed the view that "the standards and principles of the Convention had been so widely accepted as to have become a part of general international law governing the relations between States and the United Nations". They concluded that the contents of the Convention "now formed part of general international law between the Organization and its Members and were accordingly binding on States even in the absence of an express act of accession". Many speakers indicated that the privileges and immunities of representatives of Member States to the principal and subsidiary organs of the United Nations "were based not only on a system of conventional norms but also on the progressive development of customary law".

- 9. One delegation, however, invoked the rule pacta tertiis nec nocent nec prosunt to assert that the 1946 Convention was not regarded as being in force for States which had not adhered to it in accordance with the procedure indicated therein, and that it was thus difficult to accept that such States should be able to invoke the Convention when they were not parties to it. Consequently, that delegation concluded, the Convention on the Privileges and Immunities of the United Nations should remain res inter alios acta with regard to States which have not become parties to it.<sup>6</sup>
- 10. Another delegation stated that a detailed legal study of the instruments concerned would be necessary to determine the precise extent to which the 1946 Convention was binding upon States not parties to it.
- C. Interest and role of the United Nations in the protection and observance of the privileges and immunities of the representatives of Member States
- 11. It was generally agreed that the Organization itself had an interest in the enjoyment by the representatives of Member States of the privileges and immunities necessary to enable them to carry out their tasks, and that the Secretary-General should maintain his efforts to ensure that the privileges and immunities concerned were respected.<sup>8</sup> References were made to the fact that the obligations of Member States under the 1946 Convention, including those affecting representatives of other Members, were obligations to the Organization.
- 12. Another view was, however, expressed in favour of making a distinction between two categories of privileges and immunities. The first category related to privileges and immunities of the Organization itself and its agents, a matter in which the Organization "was competent to demand respect for or permit the waiving of the immunities concerned". The second category related to privileges and immunities of representatives of Member States, a matter in which it was for the State

<sup>&</sup>lt;sup>5</sup> United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations (ST/LEG/SER.B/10), p. 184.

<sup>&</sup>lt;sup>6</sup> See Official Records of the General Assembly, Twenty-second Session, Sixth Committee, 1011th meeting, para. 72.

<sup>&</sup>lt;sup>7</sup> Ibid., 1014th meeting, para 18.

<sup>&</sup>lt;sup>8</sup> Ibid., Twenty-second Session, Annexes, agenda item 98, document A/6965, para. 14.

to exercise diplomatic protection in respect of its representatives, and in which "the Organization should not usurp the role of the State concerned by taking up the question". According to this view "the legal bond existing between the representative of a Member State and the Organization could not be equated with the relationship which, under Article 100 of the Charter, existed between the United Nations on the one hand and the Secretary-General... on the other".

#### D. STATEMENT BY THE UNITED NATIONS LEGAL COUNSEL

- 13. At the close of the Committee's discussion of the item, the Legal Counsel, speaking as the representative of the Secretary-General, made a statement at the 1016th meeting of the Sixth Committee. In his statement the Legal Counsel expressed a number of views which can be summed up as follows:
- (a) The Secretary-General in interpreting diplomatic privileges and immunities would look to provisions of the Vienna Convention so far as they would appear relevant, mutatis mutandis, to representatives to the United Nations organs and conferences. It should of course be noted that some provisions such, for example, as those relating to agrément, nationality or reciprocity have no relevancy in the situation of representatives to the United Nations.
- (b) The Convention on the Privileges and Immunities of the United Nations, which was adopted by the General Assembly on 13 February 1946 and proposed for accession by each Member of the United Nations, is of a very special character—in fact, it is a convention sui generis. Nearly all multilateral conventions refer to the ratifying and acceding States as parties and the rights and obligations created are between the parties. The Convention on the Privileges and Immunities of the United Nations is different. Throughout, in referring to rights and obligations, it refers to Members of the United Nations. Section 35 of the Convention makes clear the character of each Member's obligations vis-à-vis the Organization itself.
- (c) The fact that these obligations are to the United Nations is not a mere formality. The Organization itself has a real interest in assuring the privileges and immunities necessary to enable the representatives of Members to attend and participate freely in all meetings and conferences. If the representatives of Members are prevented from performing their functions, the Organization could not function properly. It therefore seems elementary that the rights of representatives should properly be protected by the Organization and not left entirely to bilateral action of the States immediately involved.

- (d) The privileges and immunities as defined in the Convention are the minimum privileges and immunities deemed necessary by the Assembly to be accorded by all Member States in implementation of Article 105 of the Charter.
- (e) It should be noted that there are now ninety-six States which have acceded to the Convention. Moreover, in most of the remaining Member States as well as in many non-members, the provisions of the Convention have been applied by special agreement. While it may be true that in 1946 many of the provisions of the Convention had the character of lege ferenda, in the nearly twenty-two years since the adoption of the Convention by the Assembly its provisions have become the standard and norm for governing relations between States and the United Nations throughout the world. The standards and principles of the Convention have been so widely accepted that they have now become a part of the general international law governing the relations of States and the United Nations.
- 14. It must be noted that at the conclusion of the Legal Counsel's statement the Chairman of the Sixth Committee proposed that the Committee should not discuss the statement, but that this action should not be taken to imply that the Sixth Committee had adopted any position with regard to it. On this understanding it was decided that the entire statement should be circulated as a Committee document.

#### E. General Assembly resolution 2328 (XXII)

15. On 18 December 1967 the General Assembly adopted resolution 2328 (XXII) on the "Question of diplomatic privileges and immunities". Special mention should be made of the sixth preambular paragraph and operative paragraph 3 in view of their bearing on some of the above-mentioned problems of the diplomatic law of international organizations.

The sixth preambular paragraph reads:

Recalling further that the 1946 Convention on the Privileges and Immunities of the United Nations confirms and specifies the provisions of Article 105 of the Charter and lays down rules, inter alia, regarding the immunity of the property and the inviolability of the premises of the Organization, regarding facilities for its official communications and regarding the privileges and immunities of representatives of Members to organs of the United Nations and conferences convened by it, while exercising their functions and during their journey to and from the place of meeting,

### Operative paragraph 3 reads:

Urges States Members of the United Nations, whether or not they have acceded to the Convention on the Privileges and Immunities of the United Nations, to take every measure necessary to secure the implementation of the privileges and immunities accorded under Article 105 of the Charter to the Organization, to the representatives of Members and to the officials of the Organization.

<sup>&</sup>lt;sup>9</sup> Ibid., Twenty-second Session, Sixth Committee, 1011th meeting, paras. 79 and 80.

<sup>&</sup>lt;sup>10</sup> Ibid., Twenty-second Session, Annexes, agenda item 98, document A/C.6/385.

#### CHAPTER II

Draft articles on the legal position of representatives of States to international organizations with commentaries

PART I. GENERAL PROVISIONS

### Article 1. Use of terms

For the purposes of the present articles:

- (a) An "international organization" is an association of States established by treaty, possessing a constitution and common organs, and having a legal personality distinct from that of the member States;
- (b) A "permanent mission" is a mission of representative and permanent character sent by one State member of an international organization to that organization;
- (c) The "permanent representative" is the person charged by the sending State with the duty of acting as the head of a permanent mission;
- (d) The "members of the permanent mission" are the permanent representative and the members of the staff of the permanent mission;
- (e) The "members of the staff of the permanent mission" are the members of the diplomatic staff, the administrative and technical staff and the service staff of the permanent mission;
- (f) The "members of the diplomatic staff" are the members of the staff of the permanent mission who have diplomatic status;
- (g) The "members of the administrative and technical staff" are the members of the staff of the permanent mission employed in the administrative and technical service of the permanent mission;
- (h) The "members of the service staff" are the members of the staff of the permanent mission employed by it as household workers or for similar tasks;
- (i) The "private staff" are persons employed exclusively in the private service of the members of the permanent mission:
- (j) The "host State" is the State in whose territory the seat of an international organization is established, or the meeting of an organ of an international organization or a conference is held;
- (k) The "Secretary-General" is the principal executive official of the international organization in question whether designated "Secretary-General", "Director General" or otherwise;
- (1) A "member State" means a State which is a member of the international organization in question;
- (m) A "non-member State" means a State which is not a member of the international organization in question;
- (n) An "organ of an international organization" means a principal or subsidiary organ, and any commission, committee or sub-group of any of those bodies;
- (o) A "conference" is a meeting of representatives of States for negotiating and/or concluding a treaty on matters concerning the relations between the States;
  - (p) A "delegation" is the person or body of persons

charged with the duty of representing a State at a meeting of an organ of an international organization or at a conference.

(q) The "Organization" means the international organization in question.

#### Commentary

- (1) Following the example of many draft articles prepared by special rapporteurs of the Commission, the Special Rapporteur has specified in article 1 of the draft the meaning of the expressions most frequently used in it.
- (2) This article, as its title and introductory words indicate, is intended only to state the meanings with which terms are used in the draft articles.
- (3) "International organization" is defined by reference to its basic constitutional and structural elements. The definition is placed at the outset in sub-paragraph (a) to circumscribe the area which is the principal object and field of application of these draft articles.
- (4) Firstly, we are concerned with associations of States, 11 as distinct from associations of private individuals or professional organizations. Private international organizations, in spite of the great importance of some of them and the role envisaged for them in Article 71 of the Charter of the United Nations, are not international organizations in the proper sense. Their members are not States, and they are not created by a treaty, though some of them may be mentioned in or assigned certain functions by treaties. The Charter does not qualify them as international, but simply as nongovernmental organizations, in Article 71. But it uses the term international organization without qualification in the same Article as well as in the Preamble to indicate public international organizations. So do Articles 66 and 67 of the Statute of the International Court of Justice. But Article 34 of the same Statute uses the term "public international organization".
- (5) The term "State" is used in sub-paragraph (a) with the same meaning as in the Charter of the United Nations, the Statute of the Court, the General Conventions on the Law of the Sea, the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the International Law Commission's draft articles on the law of treaties, and the International Law Commission's draft articles on special missions.
- (6) Although, generally speaking, membership in international organizations is limited to States, there are exceptions. The membership of the Universal Postal Union, for example, consists of countries and their dependent territories where the latter possess an independent postal administration.<sup>12</sup> A number of specialized agencies provide for "associate membership", thus enabling participation of entities enjoying internal self-

<sup>&</sup>lt;sup>11</sup> This first element in the definition is explicit in the very term "organizations of States" which Lauterpacht uses as synonymous with the expression "international organization" in his draft articles on the law of treaties. See first report by Sir Hersch Lauterpacht, Yearbook of the International Law Commission, 1953, vol. II, document A/CN.4/63, p. 90.

<sup>&</sup>lt;sup>12</sup> United Nations, Treaty Series, vol. 364, p. 163.

government but which have not yet achieved full sovereignty. In the World Health Organization "territories or groups of territories which are not responsible for the conduct of their international relations" may be admitted upon application by the State or authority having responsibility for those relations.13 Associate membership does not confer the full rights of membership. These may be restricted as to the right to vote in the organs of the organization or as to the right of election to certain organs. The Pact of the League of Arab States provides in its article 4 for participation in the Committees established by the Council of the League of "the other Arab countries", i.e., countries other than the "Independent Arab States" which have the right to adhere to the League in accordance with article 1.14 Membership in an international organization of another international organization is envisaged in article 238 of the Treaty establishing the European Economic Community signed at Rome on 25 March 1957 which reads: "The Community may conclude with a third country, a union of States or an international organisation agreements creating an association embodying reciprocal rights and obligations, joint actions and special procedures . . ." 15 In order to include such entities of public international law other than fully independent States, the words "whose membership is composed primarily of States" were included in some definitions of international organizations. Examples: Lauterpacht 16 and Restatement on the Foreign Relations Law of the United States by the American Law Institute.17 Reuter includes in his definition that "en tant qu'organisation internationale, ce groupe est d'une manière normale, mais non exclusive, formé d'Etats...". Chaumont defines an international organization as "une réunion de personnes représentant généralement des Etats...".19 The exceptional character of dependent territories in the present-day community of nations and the infrequent occurence of membership of one international organization in another do not warrant, in the opinion of the Special Rapporteur, the provision for such contingencies in a general definition. Secondly, every international organization has a conventional basis, a multilateral treaty, which forms the constitution of the organization. Thirdly, this constituent instrument creates organs of the organization and these organs assume a separate identity distinct from that of the member States who make up the organ. Anzilotti distinguishes between international conferences where the wills expressed by representatives of States remain separate and do not merge, though they may meet in an agreement, and collective organs where a

common will emerges and is attributed to all States which have the organ in common.<sup>20</sup> This distinction may appear to be admitting the separate entity of the collective organ by emphasizing the existence of one will, namely that of the collective organ. In fact, it does not. True, there is only one will, that of the collective organ, but it is not a separate will of the organ, it is the common will of the States whose organ it collectively is.<sup>21</sup> The phenomenon of international organizations is explained in terms of organs (or representatives, agents) of States and treated as such side by side with diplomatic agents in the same chapter of the Cours. Although the institutional forms are dealt with by Anzilotti, they are treated as new modalities of the system of complex (collegiate) organs and not as a new phenomenon in itself. The emphasis is on the treaty aspects and the organ character of international organizations rather than on the institutional element.<sup>22</sup> Fourthly, the organization so created possesses a separate legal personality distinct from that of the individual member States and is thus a subject, though in a limited degree, of international law.28 In its Advisory Opinion of 11 April 1949 on the "Reparations for Injuries Suffered in the Service of the United Nations," the International Court of Justice found unanimously that the United Nations possessed a large measure of "international personality", and stated:

It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.

Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State . . . What it does mean is that it is a subject of

<sup>&</sup>lt;sup>18</sup> *Ibid.*, vol. 14, p. 189.

<sup>14</sup> Ibid., vol. 70, p. 254.

<sup>15</sup> Ibid., vol. 298, p. 92.

<sup>&</sup>lt;sup>16</sup> Yearbook of the International Law Commission, 1953, vol. II, document A/CN.4/63, p. 90.

<sup>&</sup>lt;sup>17</sup> American Law Institute, Restatement of the Law, Second, Foreign Relations Law of the United States, St. Paul, Minn., 1965, p. 17.

<sup>&</sup>lt;sup>18</sup> Paul Reuter, *Institutions Internationales*, 3° éd., Paris, 1962, p. 289.

<sup>&</sup>lt;sup>19</sup> Charles M. Chaumont, L'organisation des Nations Unies, 3º éd., Paris, 1962, p. 5.

<sup>&</sup>lt;sup>20</sup> D. Anzilotti, Cours de Droit International, (French translation by G. Gidel), Paris, 1929.

<sup>&</sup>lt;sup>21</sup> The difference between the two points of view is of little value as long as unanimity is required. But once votes are taken by majority the collective organ theory becomes less convincing. See Paul Reuter, Principes de Droit International Public, Recueil de Cours de l'Académie de droit international, 1961, vol. II, p. 516.

<sup>&</sup>lt;sup>22</sup> Anzilotti even objected to the term "international organization". M. O. Hudson wrote in this respect: "the term 'international organization' was never precisely defined in this connection [advisory proceedings before the P.C.I.J.]; in 1924 Judge Anzilotti referred to it as an 'unhappy expression' which had been adopted to avoid mention of the ILO and he sought to have the term defined, but he refrained from pressing this proposal in 1926 because he thought difficulties could be avoided so long as the initiative rested with the Court." Hudson, The Permanent Court of International Justice, 1920-1942. A Treatise, New York, 1943, p. 400.

<sup>&</sup>lt;sup>23</sup> The permanent character of the international organization, which distinguishes it from other forms of inter-State institutional co-operation, is explicitly mentioned in some constituent instruments of international organizations. Article 1 of the Constitution of the International Labour Organisation as amended by the Constitution of the International Labour Organisation instrument of amendment, 1946, provides that "... a permanent organization is hereby established for the promotion of the objects set forth in the Preamble to this Constitution..." United Nations, *Treaty Series*, vol. 15, p. 42.

international law and capable of possessing international rights and duties . . .  $^{24}$ 

- (7) With a few exceptions, the remaining sub-paragraphs do not appear to require any explanation, since the definitions explain themselves, or at least do so when read in conjunction with the articles to whose subject matter they particularly relate.
- (8) Sub-paragraphs (d), (e), (f), (g), (h), (i) are based, with a few changes in terminology, on the definitions in sub-paragraphs (b), (c), (d), (e), (f), (g) and (h) of article 1 of the Vienna Convention on Diplomatic Relations  $^{23}$  and sub-paragraphs (f), (g), (h), (i), (j) and (k) of article 1 of the International Law Commission's draft articles on special missions. $^{26}$
- (9) "Permanent representative" is the term generally used at present as title for heads of permanent missions to international organizations. Article V, section 15 of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations used the term "resident representative".27 However, since the adoption of General Assembly resolution 257 A (III) on permanent missions, the usage of the term "permanent representative" became the prevailing pattern in the statutory law and practice of international organizations, both universal and There are some exceptions to the general regional. The Agreement between the Republic of Austria and the International Atomic Energy Agency regarding the headquarters of IAEA uses the term "resident representative".28 So does the Agreement between the United Nations and Ethiopia regarding the headquarters of the United Nations Economic Commission for Africa 29 which is the only headquarters agreement for a regional economic commission which expressly envisages resident representatives. The term "resident representative" is also used in the Agreement between the Government of the Italian Republic and the Food and Agriculture organization of the United Nations (FAO) regarding the headquarters of FAO.
- (10) "Secretary-General". According to Article 97 of the Charter of the United Nations the Secretary-General "shall be the chief administrative officer of the Organization". The term "Secretary-General" is used in the constituent instruments of almost all the other (regional) organizations of general competence e.g., the League of Arab States, 31 the Organization of American States, 32 the

Council of Europe.<sup>33</sup> The Charter of the Organization of African Unity <sup>34</sup> adds the adjective "administrative" to the term "Secretary-General". Conversely, the Constitutions of the specialized agencies use the expression "Director-General" as title for their "principal executive official".<sup>35</sup> Some international organizations of specialized competence, other than those related to the United Nations, i.e., the specialized agencies, use, however, the expression "Secretary-General" e.g., the International Institute for the Unification of Private Law,<sup>36</sup> while the International Wheat Council uses the expression "Executive Secretary".<sup>37</sup>

(11) "Organ of an international organization". The constituent instruments of international organizations, apart from establishing the organizations themselves, also create or prescribe the process of creating a number of organs for the purpose of carrying out the aims of the organization. Chapter III of the Charter of the United Nations establishes a distinction between the principal and subsidiary organs of the Organization. Article 7 (1) lists as principal organs the General Assembly, Security Council, Economic and Social Council, Trusteeship Council, International Court of Justice and the Secretariat. Article 7 (2) merely provides for the establishment of such subsidiary organs as may be found necessary, but without defining the term "subsidiary organ" or listing any such organs. Only two other provisions of the Charter actually specifically refer to the competence of an organ to establish subsidiary organs (Art. 22 and Art. 29, the General Assembly and the Security Council, respectively). Although Article 68 authorizes the Economic and Social Council to set up commissions, the rules of procedure of the Trusteeship Council permit the establishment of committees and the Statute of the Court provides for the creation of chambers. It is doubtful whether the framers of the Charter intended to imply any distinction between the subsidiary organs of the Assembly or the Council and those of other organs, despite the differing terminology. The principal organs of the United Nations have made considerable use of the possibility afforded them by the Charter of establishing subsidiary organs, notably in regard to political, economic, social and legal matters. There would seem to be no limit to the number of such subsidiary organs which a principal organ may establish, provided the principal organ has the competence, under the Charter, to do so, and provided also the subsidiary organ's functions do not exceed those of the principal organ.

(12) "Conference". The definition of this term does not appear to require any comment except to indicate

<sup>&</sup>lt;sup>24</sup> Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports, 1949, p. 179.

<sup>&</sup>lt;sup>25</sup> United Nations, Treaty Series, vol. 500, pp. 96 and 98.

<sup>&</sup>lt;sup>26</sup> Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 348.

<sup>&</sup>lt;sup>27</sup> United Nations, Treaty Series, vol. 11, p. 26.

<sup>&</sup>lt;sup>28</sup> *Ibid.*, vol. 339, p. 153.

<sup>&</sup>lt;sup>29</sup> *Ibid.*, vol. 317, p. 108.

<sup>&</sup>lt;sup>30</sup> United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations, vol. II (ST/LEG/SER.B/11), p. 195.

<sup>&</sup>lt;sup>31</sup> United Nations, Treaty Series, vol. 70, p. 256.

<sup>&</sup>lt;sup>32</sup> *Ibid.*, vol. 119, p. 80.

<sup>&</sup>lt;sup>33</sup> *Ibid.*, vol. 87, p. 120.

<sup>34</sup> Ibid., vol. 479, p. 78.

<sup>&</sup>lt;sup>35</sup> See article I, section 1 (vii) of the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on 21 November 1947. United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations, vol. II (ST/LEG/SER.B/11), p. 102.

<sup>&</sup>lt;sup>36</sup> See Amos J. Peaslee, International Governmental Organizations, Constitutional Documents, The Hague, 1956.

<sup>&</sup>lt;sup>37</sup> United Nations, Treaty Series, vol. 349, p. 220.

that from the point of view of international law there is no essential difference between "conferences" and "congresses". "Both are meetings of plenipotentiaries for the discussion and settlement of international affairs; both include meetings for the determination of political questions, and for the treatment of matters of a social or economic order." 38 The first Special Rapporteur on Special Missions (Mr. Sandström) used the two terms jointly in the draft articles which he prepared for the Commission in 1960.39 The second Special Rapporteur (Mr. Bartoš) also used the two terms jointly in the preliminary questions which he included in his reports on Special Missions preceding his draft articles.40 stated by an authority on "diplomatic practice", the term congress "has in the past been more frequently applied to assemblies of plenipotentiaries for the conclusion of peace . . . The first international gathering to which the name of conference was given was that on the affairs of Greece, held at London in 1827-1832.... At the present day the term 'conference' is habitually used to describe all international assemblages in which matters come under discussion with a view to settlement . . . " 41

A survey of the practice of the United Nations reveals a consistent tendency towards the use of the term "con-Examples: the United Nations Maritime Conference, 1948; the United Nations Conference on Freedom of Information, 1948; the United Nations Conference on Road and Motor Transport, 1949; the United Nations Conference on Declaration of Death of Missing Persons, 1950; the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 1951; the United Nations Conference on Maintenance Obligations, 1956; the United Nations Conference of Plenipotentiaries on a Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956; the General Conference on the Statute of the International Atomic Energy Agency, 1956; the United Nations Conferences on the Law of the Sea, 1958 and 1960; the United Nations Conference on Diplomatic Intercourse and Immunities, 1961; the United Nations Conference on Consular Relations, 1963, and the United Nations Conference on the Law of Treaties, 1968 and 1969. The same applies to Conferences convened by other international organizations, universal or regional, as well as conferences convened by States.42

### Article 2. Scope of the present articles

The present articles relate to representatives of States to international organizations whose membership is of a universal character.

# Article 3. International organizations not within the scope of the present articles

The fact that the present articles do not relate to international organizations of a regional character shall not affect the application to them of any of the rules set forth in the present articles to which they would be subject independently of these articles.

# Commentary

- (1) Articles 2 and 3 have to be read together, because the insertion of article 3 is based on the assumption that the scope of the draft articles as delimited in article 2 will be favoured by the Commission.
- (2) One method of determining the international organizations which come within the scope of the present articles could be the one adopted by the Convention on the Privileges and Immunities of the Specialized Agencies of 1947.43 It identifies the organizations in question as the United Nations and the specialized agencies brought into relationship with the United Nations in accordance with Articles 57 and 63 of the Charter of the United Nations. This method of determination leaves out organizations such as the International Atomic Energy Agency which is not considered, strictly speaking, a specialized agency as defined above in view of the circumstances of its creation and the peculiar arrangements of its relationship with both the Economic and Social Council and the Security Council. It also does not include other organizations of universal character which are outside what has become known as the United Nations "system" or "family" or the United Nations and its "related" or "kindred" agencies. Examples: the Bank for International Settlements, the International Institute for the Unification of Private Law, the International Wheat Council, and the Central Office for International Transport by Rail.44 The wording of article 2 is designed to fill such a gap inasmuch as it uses a general definition which includes all international organizations of a universal character.
- (3) Article 2 contains a clause which restricts the scope of the present articles to international organizations of a universal character. The place of regional organizations in the work to be undertaken by the Commission on this topic was the subject of a division of opinion among its members. The Special Rapporteur has stated the

<sup>&</sup>lt;sup>38</sup> Sir Ernest Satow, A Guide to Diplomatic Practice, 4th ed., edited by Sir Neville Bland, London, 1957, p. 303.

<sup>&</sup>lt;sup>39</sup> Yearbook of the International Law Commission, 1960, vol. II, document A/CN.4/129, pp. 113 and 114.

<sup>&</sup>lt;sup>40</sup> Yearbook of the International Law Commission, 1964, vol. II, document A/CN.4/166, p. 73.

<sup>41</sup> Satow, op. cit., p. 304.

<sup>&</sup>lt;sup>42</sup> One of the few instances in which the term "congress" is still used at present relates to the Universal Postal Convention which continues to be revised periodically at "congresses" of the States forming the Universal Postal Union. United Nations, *Treaty Series*, vol. 364, p. 169.

<sup>&</sup>lt;sup>48</sup> See United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations, vol. II (ST/LEG/SER.B/11), pp. 101 and 102.

<sup>&</sup>lt;sup>44</sup> For a list of such organizations see Repertory of Practice of United Nations Organs, vol. III, p. 125; see also Amos J. Peaslee, op. cit.

reasons why he suggests to the Commission that it should concentrate its work on this subject first on international organizations of a universal character and prepare its draft articles with reference to these organizations only.<sup>45</sup>

(4) Article 3 is included on the assumption that the Commission will adopt article 2 which excludes regional organizations from the scope of application of the present articles. This will require a reservation to the effect that such a limitation of the scope of the articles is not to affect the application to them of any of the rules set forth in the present articles to which they would be subject independently of these articles. The purpose of this reservation is to give adequate expression to the view stated by some members of the Commission, when the first report of the Special Rapporteur was discussed, to the effect that relations with States were apt to follow a very similar pattern whether the organization in question was of a universal or a regional character.46

# Article 4. Nature of the present articles; relationship with the particular rules of international organizations

The application of the present articles to permanent missions of States to international organizations and other related subjects regulated in the present articles shall be subject to any particular rules which may be in force in the organization concerned.

#### Commentary

- (1) The purpose of this article is twofold. Firstly, it seeks to state the general nature of these draft articles. Given the diversity of international organizations and their heterogeneous character in contradistinction with States, the present articles only seek to detect the common denominator and lay down the general pattern which regulates the diplomatic law of relations between States and international organizations. Their purpose is the unification as far as possible of that law.
- (2) Secondly, article 4 seeks to safeguard the position of the particular rules which may be applicable to one or more international organizations. As mentioned before, although generally speaking membership in international organizations is limited to States, there are exceptions. The membership of the Universal Postal Union, for example, consists of countries and their dependent territories where the latter possess an independent postal administration. A number of specialized agencies provide for "associate membership", thus enabling participation of entities enjoying internal self-government but which have not yet achieved full sovereignty. In the World Health Organization "territories or groups of territories which are not responsible for the conduct of their international relations" may be admitted upon application by the State or authority having responsi-

bility for those relations (see para. (6) of the commentary to art. 1, above).

- (3) Another illustration of the particular rules which may prevail within an international organization relates to the character of representatives to international organizations as representatives of States. An exception to this general pattern is to be found in the peculiarity of the tripartite system of representation in the International Labour Organisation. The employers' and workers' members of the Governing Body do not represent the countries of which these persons are nationals, but are elected by employers' and workers' delegates to the Conference. By virtue of paragraph 1 of the International Labour Organisation Annex to the Specialized Agencies Convention, employers' and workers' members of the Governing Body are assimilated to representatives of Member States, except that the waiver of the immunity of any such person may be made only by the Governing Body.47
- (4) The Special Rapporteur did not consider it appropriate to include a number of specific reservations in the respective articles wherever the necessity arose for safe-guarding the particular rules prevailing in one or more international organizations. He, therefore, decided to formulate a general reservation and place it in the general provisions to cover the draft articles as a whole. This would, as he hopes, enable the Commission to simplify the drafting of the articles which would otherwise require specific reservations.

# PART. II. PERMANENT MISSIONS TO INTERNATIONAL ORGANIZATIONS

# Section I. Permanent missions in general General comments

16. Since the creation of the United Nations, the practice of establishing permanent missions of Member States at its Headquarters has greatly developed. In the introduction to his Annual Report on the Work of the Organization, 16 June 1958-15 June 1959, the Secretary-General of the United Nations observed that: "The permanent representation at Headquarters of all Member nations, and the growing diplomatic contribution of the permanent delegations outside the public meetings . . . may well come to be regarded as the most important "common law" development which has taken place . . . within the constitutional framework of the Charter". 48 Most institutional developments within the United Nations have had their impact upon the organizations related to it as well as those outside the United Nations family. Thus, the 1946 Convention on the Privileges and Immunities of the United Nations served

<sup>&</sup>lt;sup>45</sup> Yearbook of the International Law Commission, 1963, vol. I, 717th meeting, p. 298.

<sup>&</sup>lt;sup>46</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/195 and Add.1, p. 139, para. 36.

<sup>&</sup>lt;sup>47</sup> See "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat" (hereinafter referred to as the Study of the Secretariat), Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 191, para. 4.

<sup>&</sup>lt;sup>48</sup> Official Records of the General Assembly, Fourteenth Session, Supplement No. 1 (A/4132, Add.1).

as a prototype for and greatly helped in the drafting of a number of conventions relating to the specialized agencies and a number of regional organizations. The same is true with regard to the institution of permanent missions whose development within the United Nations has had its impact upon the development of that institution within other international organizations, universal and regional.

### League of Nations

17. The practice of permanent representation to international organizations was not unknown before the United Nations. Many members of the League of Nations had permanent delegates in Geneva.<sup>49</sup> They were usually members of the diplomatic missions accredited to Switzerland. Nevertheless, the practice had not been generally accepted of accrediting permanent delegations to the League of Nations.<sup>50</sup>

18. The position of permanent delegations to the League of Nations was described in a recent work on diplomatic law as follows:

Le développement des délégations permanentes est parallèle à celui des organisations internationales. Leur apparition se situe lors des premières années de la Société des Nations; leur existence pourtant n'était aucunement prévue par le pacte de la SDN. D'une part, en effet, on n'avait pas prévu la nécessité d'un lien permanent entre les Etats membres et l'Organisation; on pouvait penser alors que, ce lien étant assuré temporairement par les représentants des Etats aux réunions d'organes de la SDN, cela suffirait. D'autre part, la doctrine ne voyait pas clairement la nature de la SDN; elle hésitait sur la question de savoir si elle possédait ou non la personnalité juridique internationale; enfin elle était très réticente à lui accorder un droit de légation qu'elle considérait comme n'appartenant qu'aux Etats.

Pourtant le besoin s'en faisait sentir; la Pologne établit la première délégation permanente dès 1920, et son exemple fut suivi par un grand nombre d'Etats: dès 1922, on n'en comptait pas moins de 25 et, en 1930, 43. Toutefois, pendant toute la durée de la SDN et bien qu'une décision du Conseil fédéral Suisse de 1922 les assimilât, au point de vue de leur statut, aux missions diplomatiques accréditées à Berne, leur nature ne fut jamais très nette, ni leurs fonctions uniformes. Certaines délégations étaient accréditées auprès du Secrétariat de la SDN, d'autres ne l'étaient pas du tout; certaines estimaient qu'elles représentaient véritablement leur Etat alors que, pour d'autres, il s'agissait plutôt d'une mission d'information.<sup>51</sup>

United Nations

19. The Charter of the United Nations does not contain a general provision with regard to the question of permanent delegations to the United Nations. However, Article 28 (1) provides that: "The Security Council shall be so organized as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at all times at the seat of the Organization." In this article provision was made for the Security Council to be able to function continuously, and accordingly every member of the Council had to be permanently represented thereon. In other words, the only permanent representation envisaged by the Charter is the permanent representation of the States members of the Security Council.

20. The provisional rules of procedure of the Security Council contain no provision bearing on the stipulation in Article 28 (1) of the Charter that each member of the Security Council shall be represented at all times at the seat of the Organization. Rule 13, in its first sentence, is limited to the provision that "each member of the Security Council shall be represented at the meetings of the Security Council by an accredited representative", while the remainder of rule 13 contains provisions concerning credentials. All members of the Security Council have maintained delegations to the Security Council at Headquarters, usually consisting of the Head of delegation, an alternate representative and one or more advisers. <sup>52</sup>

21. The Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly of the United Nations on 13 February 1946, does not contain special rules for permanent representatives. Article IV, section 11 speaks in general terms of "representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations". It provides for the enjoyment by these representatives of certain privileges and immunities, mainly functional, e.g., immunity from personal arrest or detention and from seizure of their personal baggage, and in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind.

22. The omission of reference to permanent representatives was rectified in the agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, signed on 26 June 1947, which contains special provisions on the privileges and immunities of permanent representatives and which makes them entitled to the same privileges and immunities which the Government of the United States "accords to diplomatic envoys accredited to it" (article V, section 15).54

<sup>&</sup>lt;sup>49</sup> Pitman B. Potter, "Permanent Delegations to the League of Nations", Geneva Special Studies, vol. I, No. 8, 1930.

<sup>50</sup> The distinction between permanent representatives and non-resident delegates had little practical effect within the League system at least in relation to privileges and immunities, since Article 7, paragraph 4 of the Covenant of the League provided that: "Representatives of the Members of the League... shall enjoy diplomatic privileges and immunities." The situation within the United Nations is different. While permanent representatives enjoy diplomatic immunities, delegates to the organs of the United Nations enjoy functional immunities only. (See para. 19 below).

<sup>51</sup> Philippe Cahier, Le Droit Diplomatique Contemporain, Genève, No. 40, 1962, pp. 411 and 412. See also P. H. Frei, De la situation juridique des représentants des membres de la Société des Nations, Paris, 1929, p. 27; R. Genet, "La Société des Nations et le droit d'ambassade actif et passif" in Revue de Droit International et de Législation Comparée, 1935, pp. 527-573.

<sup>&</sup>lt;sup>52</sup> Repertory of Practice of United Nations Organs, vol. II, p. 110.

<sup>58</sup> United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations (ST/LEG/SER.B/10), p. 186.

<sup>54</sup> Ibid., p. 208.

- 23. The competence of permanent missions was considered by the Interim Committee of the General Assembly at its meetings held from 5 January to 5 August 1948. The Committee considered a proposal submitted by the Dominican Republic whereby the heads of permanent delegations at the seat of the United Nations should, in that capacity, be automatically entitled to represent their countries on the Interim Committee. This would provide for greater elasticity by making it unnecessary for each delegation to submit new credentials for each convocation of the Interim Committee.
- 24. The Committee considered also a proposal submitted by the Bolivian delegation on permanent missions to the United Nations. While the Committee generally recognized the value and interest of such a proposal, doubts were expressed as to whether the matter was properly within the terms of reference of the Interim Committee. The opinion was expressed that it was a matter which should be studied by the General Assembly itself, all the more so because in the limited time at its disposal the Interim Committee would not be in a position to devote to it the careful and thorough study it deserved. Consequently, it was decided that the Bolivian proposal should be submitted to the General Assembly as an annex to the Committee's report.<sup>55</sup>
- 25. The Bolivian proposal <sup>56</sup> on permanent missions to the United Nations was discussed by the General Assembly during the first part of its third session. <sup>57</sup> The discussion of the Bolivian proposal in the Sixth Committee gave rise to a substantial debate on a number of legal points which included: (a) the legal status of permanent missions; (b) the character of the institution of permanent missions; (c) the use of the term "credentials"; and, (d) the competence of the Credentials Committee. <sup>58</sup>
- 26. On 3 December 1948, the General Assembly unanimously adopted resolution 257 A (III), which reads as follows:

#### The General Assembly

Considering that, since the creation of the United Nations, the practice has developed of establishing, at the seat of the Organization, permanent missions of Member States,

Considering that the presence of such permanent missions serves to assist in the realization of the purposes and principles of the United Nations and, in particular, to keep the necessary liaison between the Member States and the Secretariat in periods between sessions of the different organs of the United Nations,

Considering that in these circumstances the generalization of the institution of permanent missions can be foreseen, and that the submission of credentials of permanent representatives should be regulated,

#### Recommends

- 1. That credentials of the permanent representatives shall be issued either by the Head of the State or by the Head of the Government or by the Minister of Foreign Affairs, and shall be transmitted to the Secretary-General;
- 2. That the appointments and changes of members of the permanent missions other than the permanent representative shall be communicated in writing to the Secretary-General by the head of the mission;
- 3. That the permanent representative, in case of temporary absence, shall notify the Secretary-General of the name of the member of the mission who will perform the duties of head of the mission:
- 4. That Member States desiring their permanent representatives to represent them on one or more of the organs of the United Nations should specify the organs in the credentials transmitted to the Secretary-General;

Instructs the Secretary-General to submit, at each regular session of the General Assembly, a report on the credentials of the permanent representatives accredited to the United Nations.

#### United Nations Office at Geneva

- 27. The Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council, signed at Berne on 11 June 1946 and at New York on 1 July 1946, does not contain special provisions relating to permanent representation. However, on 31 March 1948 the Swiss Federal Council adopted a resolution entitled "Décision du Conseil fédéral suisse concernant le statut juridique des délégations permanentes auprès de l'Office européen des Nations Unies ainsi que d'autres organisations internationales ayant leur siège en Suisse". It reads as follows:
- 1. Les délégations permanentes d'Etats Membres bénéficient, comme telles, de facilités analogues à celles qui sont accordées aux missions diplomatiques à Berne. "Elles ont le droit d'user de chiffres dans leurs communications officielles et de recevoir ou d'envoyer des documents par leurs propres courriers diplomatiques.
- 2. Les chefs de délégations permanentes bénéficient de privilèges et immunités analogues à ceux qui sont accordés aux chefs de missions diplomatiques à Berne, à condition toutefois qu'ils aient un titre équivalent.
- 3. Tous les autres membres des délégations permanentes bénéficient, à rang égal, de privilèges et immunités analogues à ceux qui sont accordés au personnel des missions diplomatiques à Berne.
- 4. La création d'une délégation permanente, les arrivées et les départs des membres des délégations permanentes sont annoncés au Département politique par la mission diplomatique à Berne de l'Etat intéressé. Le Département politique délivre aux membres des délégations une carte de légitimation attestant les privilèges et immunités dont ils bénéficient en Suisse. 60

<sup>&</sup>lt;sup>55</sup> Reports of the Interim Committee of the General Assembly (5 January-5 August 1948), Official Records of the General Assembly, Third Session, Supplement No. 10, documents A/578, A/583, A/605, A/606.

<sup>&</sup>lt;sup>56</sup> Official Records of the General Assembly, Third Session, Part I, Plenary Meetings, Annexes, agenda item 47, document A/609.

<sup>&</sup>lt;sup>57</sup> Ibid., Third Session, Part I, Sixth Committee, 124th-127th meetings, pp. 619-651.

<sup>&</sup>lt;sup>58</sup> An account of these points was included in the second report by the Special Rapporteur. See *Yearbook of the International Law Commission*, 1967, vol. II, document A/CN.4/195 and Add.1, pp. 145 and 146, paras. 75-78.

<sup>&</sup>lt;sup>59</sup> United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Satus, Privileges and Immunities of International Organizations (ST/LEG/SER.B/10), p. 196.

<sup>&</sup>lt;sup>50</sup> *Ibid.*, p. 92.

### Specialized agencies

28. The position of permanent representatives to the specialized agencies developed on lines similar to those described above regarding the United Nations Headquarters in New York and the United Nations Office at Geneva.

29. The Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on 21 November 1947, regulates the status of "representatives of members" in general (art. V). 11 does not contain special provisions concerning "permanent representatives" or "resident representatives". This gap was filled in a number of Headquarters Agreements concluded between the respective specialized agencies and the host Governments concerned. Examples: article XI. section 24 (a) of the Agreement between the Government of the Italian Republic and the Food and Agriculture Organization of the United Nations regarding the headquarters of the Food and Agriculture Organization of the United Nations, signed at Washington, on 31 October 1950, which provides that: "Every person designated by a Member Nation as its principal resident representative to FAO or as a resident representative to FAO with the rank of Ambassador or Minister Plenipotentiary, and the members of its mission, shall, whether residing inside or outside the headquarters seat, be entitled within the Italian Republic to the same privileges and immunities. subject to corresponding conditions and obligations, as the Government accords to diplomatic envoys and members of their missions of comparable rank accredited to the Government";62 article 18, paragraph 1 of the "Accord entre le Gouvernement de la République française et l'Organisation des Nations Unies pour l'éducation, la science et la culture, relatif au siège de l'UNESCO et à ses privilèges et immunités sur le territoire français", signed at Paris, on 2 July 1954, which provides that "Les représentants des Etats membres de l'Organisation aux sessions de ses organes ou aux conférences et réunions convoquées par elle, les membres du Conseil exécutif, ainsi que leur suppléants, les délégués permanents auprès de l'Organisation et leurs adjoints jouiront, pendant leur séjour en France pour l'exercice de leurs fonctions des facilités, privilèges et immunités qui sont reconnus aux diplomates de rang comparable des missions diplomatiques étrangères accréditées auprès du Gouvernement de la République française".63

#### Regional organizations

30. The impact of the development of the institution of permanent missions within the United Nations upon other international organizations can be further discerned

when one take a look at the position of permanent missions in a number of regional organizations.

(a) Organization of American States. Neither the Charter of the Organization of American States, 4 signed at Bogotá, on 30 April 1948, nor the Agreement on Privileges and Immunities of the Organization of American States 65 opened for signature on 15 May 1949, contain any provisions on permanent missions. Article 104 of the Charter speaks in general of the "Representatives of the Governments on the Council of the Organization". and accords to them the privileges and immunities "necessary for the independent performance of their duties". Article 7 of the Agreement speaks of "the Representatives of the States Members of the Organs of the Organization" and defines the modalities of their immunities along the lines of functional immunities. However, article 1 of the Bilateral Agreement between the Organization of American States and the Government of the United States of America relating to Privileges and Immunities of representatives and other members of delegations, 66 signed at Washington, on 22 July 1952, provides that "The privileges and immunities which the Government of the United States of America accords to diplomatic envoys accredited to it shall be extended, subject to corresponding conditions and obligations: (a) to any person designated by a Member State as its Representative or Interim Representative on the Council of the Organization of American States; (b) to all other permanent members of the delegation regarding whom there is agreement for that purpose between the Government of the Member State concerned, the Secretary-General of the Organization, and the Government of the United States of America".

(b) Council of Europe. Neither the Statute of the Council of Europe of 5 May 1949, or nor the General Agreement on Privileges and Immunities of the Council of Europe of 2 September 1949 octonemplates that Member States will install a permanent mission, and consequently no reference is made to the status, privileges, immunities or facilities of permanent representatives, other members of the mission, or the mission itself. Permanent representation was established pursuant to a resolution adopted by the Committee of Ministers at its eighth session in May 1951, on permanent representation of members at the seat of the Council, which reads as follows:

The Committee of Ministers,

Considering that it is in the interest of the Council of Europe to facilitate liaison between the Governments and the Secretary-General:

Resolves:

In order to facilitate liaison between the Governments and the Secretariat-General of the Council, each member should

<sup>61</sup> Ibid., vol. II, (ST/LEG/SER.B/11), p. 104.

<sup>62</sup> Ibid., p. 195.

<sup>63</sup> Ibid., p. 245. It is noteworthy that this Headquarters Agreement does not confine the enjoyment of diplomatic immunities to permanent delegations, but extends it to representatives to meetings of the organs of the organization and conferences convened by the organization, who in other Headquarters Agreements enjoy functional immunities only.

<sup>64</sup> Ibid., p. 377.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid., p. 281.

<sup>67</sup> United Nations, Treaty Series, vol. 87. p. 104.

<sup>&</sup>lt;sup>68</sup> Ibid., vol. 250, p. 14. Council of Europe, Consultative Assembly, third ordinary session, May-November 1951, Message and report of the Committee of Ministers, pp. 61 and 62.

consider the possibility of appointing an official to act as its permanent representative at the seat of the Council of Europe. 69

The status of the permanent representatives to the Council of Europe was regulated in the Additional Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, signed at Strasbourg on 6 November 1952.<sup>70</sup> Article 4 of this Protocol provides that: "The permanent representatives of Members of the Council of Europe shall, while exercising their functions and during their journey to and from the place of meetings, enjoy the privileges, immunities and facilities normally enjoyed by diplomatic envoys of comparable rank."

(c) League of Arab States. The Pact of the League of Arab States of 22 March 1945 does not contain provisions on permanent representatives. Article 14 regulates the status of the members of the Council of the League, the members of its committees...<sup>71</sup>

At the third meeting of the twelfth regular session of the Council of the League, held on 29 March 1950, the Political Committee approved the third resolution relating to the proposal to appoint permanent representatives to the League in order to ensure continuity in the work of the League and facilitate liaison between Member States and the League. The resolution reads as follows:

The Political Committee has considered the proposal of the Secretary-General and the Memorandum attached to it concerning the appointment of permanent representatives of member States to the Secretariat-General of the League of Arab States for the considerations stated in that Memorandum and has resolved to accept the principle and to recommend to member States that they take the necessary measures to fulfil the abovementioned purpose.

(d) Organization of African Unity. Neither the Charter of the Organization of African Unity of 25 May 1963, nor the General Convention on the Privileges and Immunities of the Organization of African Unity adopted by the Assembly of Heads of State and Government of that Organization 12 contain any provisions relating to permanent representatives. The Institutional Committee considered at its meetings from 6 to 9 December 1965, held at the seat of the Organization at Addis Ababa, the "question of the relations between the General-Secretariat and the African Diplomatic Missions accredited to Addis Ababa" and adopted the following recommendation:

The Institutional Committee recommends that the diplomatic missions of African States in Addis Ababa maintain the excellent relations they have established with the General-Secretariat of the Organization of African Unity and continue to serve as liaison between the Secretariat and their respective Governments.<sup>73</sup>

The report of the Institutional Committee was approved by the Council of Ministers of the Organization on 28 February 1966 at its Sixth Ordinary Session held at Addis Ababa. From the aforegoing it would appear that the Organization of African Unity is the only regional organization of general competence which has not yet developed the institution of permanent missions. The comparatively short period which has elapsed since the creation of that organization may not allow the drawing of definitive conclusions in this regard. When the question was considered by the Institutional Committee a number of difficulties were raised, in particular relating to budgetary or administrative expenses.

#### Article 5. Establishment of permanent missions

Member States may establish permanent missions at the seat of the Organization for the performance of the functions defined in article 6 of the present articles.

#### Commentary

- (1) Article 5 makes it clear that the institution of permanent representation before an international organization is of a non-obligatory character. Member States are under no obligation to establish permanent missions at the seat of the Organization.
- (2) When the question of permanent missions was discussed by the General Assembly during the first part of its third session, a number of representatives expressed doubts concerning the advisability of including in the draft resolution under consideration (see foot-note 56, above) the last preambular paragraph which recommended Member States of the United Nations . . ., to establish permanent missions to the United Nations at the seat of the Organization. They stated that while they considered that it would be desirable for all Member States to have a permanent mission attached to the United Nations, they did not see the necessity of making a special recommendation to that effect in view of the fact that "for internal reasons certain Member States might not be able to establish a permanent mission". One delegation considered that the recommendation was "unprofitable, as it constituted interference in the internal administration of Member States". Another pointed out that a number of Member States were deterred from maintaining permanent missions at the seat of the Organization by "special budgetary and administrative expenses." 74

<sup>&</sup>lt;sup>69</sup> The French text is less specific: "Chaque Membre est invité à étudier la possibilité de se faire représenter en permanence au Siège du Conseil de l'Europe."

<sup>&</sup>lt;sup>70</sup> United Nations, Treaty Series, vol. 250, p. 32.

<sup>&</sup>lt;sup>71</sup> United Nations, Treaty Series, vol. 70, p. 256.

<sup>&</sup>lt;sup>72</sup> Text published by the secretariat of the Organization of African Unity, Addis Ababa.

<sup>&</sup>lt;sup>73</sup> Organization of African Unity, document INST/Rpt.1/

<sup>74</sup> Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 124th-127th meetings, pp. 619-651. One delegation stated that: "Only the members of the Security Council were obliged to maintain permanent representatives, as laid down in Article 28 of the Charter", and considered that "if the appointment of permanent missions was made obligatory, it might impose a heavy burden on certain States" and therefore requested that "the appointment of permanent missions should be optional". Ibid., 126th meeting, p. 637.

(3) The legal basis of permanent missions is to be found in the constituent instruments of international organizations as supplemented by the general conventions on the privileges and immunities of the organizations and related headquarters agreements. To this must be added the practice that has accumulated since the development of that institution in the United Nations. According to Cahier "Le statut des délégations permanentes découle d'un certain nombre de textes: textes législatifs internes, traités internationaux tels qu'accords de siège, ainsi que de règles coutumières." <sup>75</sup>

This question gave rise to a division of opinion in the Sixth Committee when the question of permanent missions was discussed in the General Assembly of the United Nations at its third session. A memorandum prepared by the Secretariat on permanent delegations to the United Nations <sup>76</sup> mentioned that permanent missions as such had no recognized legal status under the Charter or under the rules of procedure of the various organs of the United Nations.

The third preambular paragraph of the draft resolution under consideration referred to the fact that it would be of interest for all Member States and for the United Nations as a whole that a legal status be given to the institution of permanent missions to the United Nations. Some representatives pointed out that while it was true that no regulations governing the status of permanent missions existed their legal status was already in existence. They cited Article 105 (3) of the Charter which states: "The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose", and article IV of the Convention on the Privileges and Immunities of the United Nations " which regulates the privileges and immunities of "the representatives of Members". They, therefore, thought that the problem did not lie in establishing the legal status of permanent missions but in laying down the general principles which should govern their establishment.

This question proved also to be controversial in doctrine. The controversy arose over the interpretation of Article 7, paragraph 4 of the Covenant of the League of Nations which provides that "Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities". Some writers (P. H. Frei) thought that the provision also covered permanent delegations. Others (Philippe Cahier) saw in such an interpretation "un élargissement du texte de l'art. 7, al. 4 du Pacte absolument injustifié". The

latter writer also took issue with the delegations which advocated in the Sixth Committee during the third session of the General Assembly of the United Nations an analogous interpretation and made the following observation:

Certains délégués à la sixième Commission de la troisième Assemblée Générale des Nations Unies, notamment Fitzmaurice, Chaumont . . ., ont prétendu que les articles des conventions générales consacrées aux représentants devraient être considérés comme comprenant aussi les délégués permanents. Il y a là un abus certain, car les termes employés ne laissent pas d'équivoque; on parle en effet dans ces conventions: . . . des représentants des membres auprès des organes principaux et subsidiaires des Nations Unies.80

Without wishing to involve the Commission in this doctrinal controversy, the Special Rapporteur wishes to state that he is of the opinion that what is needed is not the establishing of the legal basis of the institution of permanent missions to international organizations but rather the enunciation of the different rules for its regulation. He wishes to observe further that the provisions in the constitutive instruments of international organizations and the general conventions on their privileges and immunities relating to representatives of member States to the organs of the organization do cover permanent representatives. If the latter are considered representatives to the Secretary-General, then they are covered by the phrase "representatives to the organs of the organization", since the Secretary-General is one of those organs. If on the other hand permanent representatives are considered representatives to the organization itself and not to one of its organs, they could be covered a fortiori.

(4) Article 5 states that the establishment of the permanent mission takes place at the seat of the Organization. This emanates from the character of the permanent mission as representative to the Organization itself or its secretariat which keeps the necessary liaison between the sending State and the Organization.

International organizations usually have one principal seat. However, the United Nations has an office at Geneva, where a great number of Member States maintain permanent missions as liaison with that office as well as with a number of specialized agencies which have established their principal seats at Geneva: the International Labour Organisation (ILO), the World Health Organization (WHO) and the World Meteorological Organization (WMO). Reference has been made before in this report to the Agreement between the United Nations and Ethiopia regarding the headquarters of the United Nations Economic Commission for Africa which is the only headquarters agreement for a regional economic commission which expressly envisages resident representatives (see para. (9) of the commentary to art. 1, above).

<sup>&</sup>lt;sup>75</sup> Cahier, op. cit., p. 411.

<sup>&</sup>lt;sup>76</sup> A/AC.18/SC.4/4.

<sup>&</sup>lt;sup>77</sup> United Nations Legislative Series, Legislative Texts and Treaties concerning the Legal Status, Privileges and Immunities of International Organizations (ST/LEG/SER.B/10), p. 186.

<sup>&</sup>lt;sup>78</sup> Frei, op. cit., p. 27.

<sup>&</sup>lt;sup>79</sup> Cahier, op. cit., p. 412, foot-note 5.

<sup>80</sup> Ibid., foot-note 8.

### Article 6. Functions of a permanent mission

The functions of a permanent mission consist inter alia in:

- (a) keeping the necessary liaison between the sending State and the Organization;
  - (b) representing the sending State in the Organization;
  - (c) negotiating with the Organization;
- (d) ascertaining activities and developments in the Organization, and reporting thereon to the Government of the sending State;
- (e) promoting co-operation within the Organization and assisting in the realization of the purposes and principles of the Organization.

#### Commentary

- (1) A detailed enumeration of all the functions of a permanent mission would be very lengthy. Article 6 has merely mentioned the main categories under broad headings.
- (2) First of all, under sub-paragraph (a), comes the task which characterizes the principal activity of the permanent mission. This function was described by two writers who have served on the permanent missions of two Member States of the United Nations as follows: "They [the permanent missions] maintain contact with the United Nations Secretariat on a continuous basis, report on previous meetings, anticipate coming meetings and act as a channel of communication and centre of information for the relationships of their country with the United Nations." 81
- (3) Sub-paragraph (b) states the representational function of the permanent mission. The mission represents the sending State in the organization. The mission, and in particular the permanent representative, the head of the mission, is the spokesman for its Government in communications with the Organization, or in any discussions with that Organization to which relations between the member States and the Organization may give rise.
- (4) Sub-paragraphs (c) and (d) state two classic diplomatic functions, viz., negotiating with the Organization and ascertaining activities and developments in the Organization and reporting thereon to the Government of the sending State. In a memorandum submitted to the Secretary-General of the United Nations in 1958, the Legal Counsel stated: "The development of the institution of the permanent missions since the adoption of that resolution [General Assembly resolution 257 A (III)] shows that the permanent missions also have functions of a diplomatic character . . . The permanent missions perform these various functions through methods and in a manner similar to those employed by diplomatic missions, and their establishment and organ-

ization are also similar to those of diplomatic missions which States accredit to each other." 82

- (5) It should be noted, however, that certain functions of diplomatic missions are not performed by permanent missions to international organizations, e.g., consular functions and in particular diplomatic protection, which are the responsibility of the diplomatic mission accredited to the host State. Article 6 does not, therefore, include the classical function of diplomatic protection.

  (6) Sub-paragraph (e) is intended to reflect the hope that the presence of permanent missions will contribute
- (6) Sub-paragraph (e) is intended to reflect the hope that the presence of permanent missions will contribute to the realization of the purpose envisaged in Article 1 (4) of the Charter that the United Nations be "a centre for harmonizing the actions of nations".

# Article 7. Appointment of the same permanent mission to two or more organizations

The sending State may appoint the same permanent mission to two or more organizations.

Article 8. Appointment of a permanent mission to the host State and/or one or more other States

The sending State may appoint a permanent mission to the host State and/or one or more other States.

#### Commentary

- (1) There have been a number of cases where a permanent mission has been appointed to represent its State at more than one organization. At the United Nations Office at Geneva the practice has developed whereby the same mission has been appointed both to the various specialized agencies having their headquarters at Geneva and to the United Nations Office itself.
- (2) Article 7 states the principle in general terms. Although it refers to the mission as a body, it must be assumed that it covers the instances where the permanent representative or other members of the permanent mission were appointed to represent their country at two or more organizations during the same period. At United Nations Headquarters, members of permanent missions have also exercised functions on behalf of their respective States at the specialized agencies in Washington, for example.<sup>83</sup>
- (3) The practice of appointing the same mission or representative to two or more organizations is not limited to organizations of universal character. Representatives have on occasions represented their country both at the United Nations and at regional organizations (e.g. at the Organization of American States). Permanent representatives of Sweden and Norway to the Council of

<sup>&</sup>lt;sup>81</sup> John G. Hadwen and Johan Kaufmann, How United Nations decisions are made, Leyden, 1962, p. 26.

<sup>&</sup>lt;sup>82</sup> See Study of the Secretariat, Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 165, para. 17.

<sup>83</sup> Ibid., p. 169, para. 38.

<sup>81</sup> Ibid., para. 39.

Europe have been simultaneously accredited to the European Economic Community.

- (4) Article 5 of the Vienna Convention on Diplomatic Relations 85 which regulates the case of the accreditation of a head of mission or the assignment of a member of the diplomatic staff to more than one State and article 4 of the draft articles of the International Law Commission on special missions 86 which deals with the question of the sending of the same special mission to two or more States require that none of the receiving States objects. This restriction is intended to avoid the undesirable conflict and difficulties which may exist in certain instances of accreditation of the same diplomatic agent to more than one State. Given the different character of permanent missions to international organizations, which serve primarily as liaison between the sending State and the organization concerned, the considerations underlying the restriction embodied in article 5 of the Vienna Convention on Diplomatic Relations and article 4 of the draft articles of the International Law Commission on special missions do not apply in the case of permanent missions to international organizations. Article 7, therefore, does not require the non-objection of the organizations concerned for the appointment of the same permanent mission to two or more international organizations. Such a requirement is not supported by the practice of international organizations.
- (5) Article 8 corresponds to article 5, paragraph 3, of the Vienna Convention on Diplomatic Relations which provides that: "A head of mission or any member of the diplomatic staff of the mission may act as representative of the sending State to any international organization".
- (6) A number of permanent representatives or members of permanent missions have also served as the ambassador of their country to the host State or a nearby State, or as a member of a diplomatic mission.
- (7) Article 8, like article 5, paragraph 3, of the Vienna Convention on Diplomatic Relations, does not require the non-objection by the international organization and the receiving State. The considerations underlying such a restriction in the case of joint accreditation to two or more States do not apply in the combined situation of acrreditation to international organizations and States.

Note on appointment of a joint permanent mission by two or more States

- 31. Article 6 of the Vienna Convention on Diplomatic Relations <sup>87</sup> and article 5 of the draft articles of the International Law Commission on special missions <sup>88</sup> contain provisions on the appointment of a diplomatic mission by two or more States.
- 32. In the infrequent cases where such a situation arose within the framework of representation to international organizations, the question related in fact to

representation to one of the organs of the organization or a conference convened by it and not to the institution of permanent missions.

33. The situation is summed up in the Study of the Secretariat in the following manner:

The question of representation of more than one Government or State by a single representative has been raised on several occasions in United Nations bodies. It has been the consistent position of the Secretariat and of the organs concerned that such representation is not permissible unless clearly envisaged in the rules of procedure of the particular body. The practice, which has sometimes been followed, of accrediting the official of one Government as the representative of another, has not been considered legally objectionable, provided the official concerned was not simultaneously acting as the representative of two countries...<sup>59</sup>

34. For the considerations stated above, the Special Rapporteur has decided not to include an article on this situation in part II of these draft articles on permanent missions and to deal with it in part III on delegates to organs of international organizations and conferences convened by international organizations.

# Article 9. Appointment of the members of the permanent mission

The sending State may freely appoint the members of the permanent mission.

#### Commentary

- (1) Unlike the relevant articles of the Vienna Convention on Diplomatic Relations and the draft articles of the International Law Commission on special missions, article 9 does not make the freedom of the sending State in the choice of the members of its permanent mission to an international organization subject to the agrément of either the organization or the host State for the appointment of the permanent representative, the head of the permanent mission. Nor does article 9 require the sending State to obtain the consent of the host State for the appointment of a national of the latter as a member of the permanent mission.
- (2) The members of the permanent mission are not accredited to the host State in whose territory the seat of the organization is situated. They do not enter into direct relationship and transactions with the host State, unlike the case of bilateral diplomacy. In the latter case, the diplomatic agent is accredited to the receiving State in order to perform certain functions of representation and negotiation between the receiving State and his own State. This legal situation is the basis of the institution of acceptance by the receiving State of the diplomatic agent (agrément) and of the right of the receiving State to request his recall when it declares him persona non grata. In his statement at the 1016th meeting of the Sixth Committee of the General Assembly on

<sup>85</sup> See United Nations, Treaty Series, vol. 500, p. 100.

<sup>&</sup>lt;sup>86</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 349.

<sup>87</sup> See United Nations, Treaty Series, vol. 500, p. 100.

<sup>88</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 350.

<sup>89</sup> Ibid., document A/CN.4/L.118 and Add.1 and 2, p. 169, para. 40. See also *United Nations Juridical Yearbook, 1962* (provisional edition) (ST/LEG/8), fascicle 2, p. 258.

6 December 1967, the United Nations Legal Counsel pointed out that: "The Secretary-General in interpreting diplomatic privileges and immunities would look to provisions of the Vienna Convention so far as they would appear relevant *mutatis mutandis* to representatives to United Nations organs and conferences. It should of course be noted that some provisions such, for example, as those relating to *agrément*, nationality and reciprocity have no relevancy in the situation of representatives to the United Nations." <sup>90</sup>

(3) The position of permanent representatives and delegates to the United Nations in relation to the host State and the Secretary-General in reference to the question of acceptance was stated by one writer as follows:

The representatives of Members, however, are not accredited to the Government of the United States in any way or in any sense. Agréation implies prior approval and national control. It has its traditional place and significance in connection with diplomatic representatives of foreign States who are to transact business with the United States Government. Representatives of Members to the United Nations have no business to transact with the United States. Representatives to meetings of the General Assembly or to other organs of the United Nations have no business to transact with the United States. Representatives to meetings of the General Assembly or to other organs of the United Nations bear credentials which are scrutinized by those organs. Permanent delegates, although they present their credentials to him, are not accredited to the Secretary-General for this would imply control and the right to reject persons appointed by Members. No such right has been conceded by the sovereign Members to the Secretary-General.91

Note on nationality of members of a permanent mission

35. The Convention on the Privileges and Immunities of the United Nations does not contain any restrictions on the choice by the sending State of non-nationals as representatives. Article IV, section 15, provides, however, that: "The provisions of Sections 11, 12 and 13 [which define the privileges and immunities of the representatives of Members] are not applicable as between a representative and the authorities of the State of which he is a national or of which he is or has been the representative".92 The same applies to the Convention on the Privileges and Immunities of the Specialized Agencies. Article V, section 17, provides that: "The provisions of sections 13, 14 and 15 are not applicable in relation to the authorities of a State of which the person is a national or of which he is or has been a representative".93 Other examples: Article 11 of Supplementary Protocol No. 1 to the Convention for European Economic Cooperation on Legal Capacity, Privileges and Immunities of the Organization, 16 April 1948: "The provisions of

Examples of legislative provisions: Article 9 of the Diplomatic Privileges (United Nations and International Court of Justice) Order in Council 1947 of the United Kingdom: "For the purposes of the application of this Order, the expression 'representatives of member governments' shall be deemed to include..., but shall not include any person who is the representative of His Majesty's Government in the United Kingdom or any member of the staff of such representative, or any person who is a British subject and who is not the representative of a Government of His Majesty other than His Majesty's Government in the United Kingdom or the member of the staff of and accompanying any such representative";97 Article 24 of the Law on Civil Proceedings, 1957 of Yugoslavia: "The rules of international law apply with regard to the competence of Yugoslav Courts to hear cases of foreign nationals enjoying the right of immunity in Yugoslavia and of hearing the cases of foreign States and intergovernmental organizations"; 8 Article 6 of the Order-in-Council P.C. 1791 of 18 November 1954 of Canada—Privileges and Immunities of the International Civil Aviation Organization: "Nothing in this Order shall be construed as exempting a Canadian citizen residing or ordinarily resident in Canada, from liability for any taxes or duties imposed by any law in Canada";99 Article 8, paragraph 1 (c), of the Diplomatic Privileges (International Labour Organisation) Order in Council, 1949 (as amended), of the United Kingdom: "The provisions of this paragraph shall not apply to British subjects whose usual place of abode is in the United Kingdom".100

Article 9 are not applicable as between a representative and the authorities of the State of which he is a national or of which he is or has been the representative";94 Article 12 (a) of the General Agreement on Privileges and Immunities of the Council of Europe, 2 September 1949: "The provisions of articles 9, 10 and 11 are not applicable in relation to the authorities of a State of which the person is a national or of which he is or has been a representative";95 Article 15 of the Convention on the Privileges and Immunities of the League of Arab States, 10 May 1953: "The provisions of Articles 11, 12 and 13 are not applicable as between a representative and the authorities of the State of which he is a national or which he is or has been the representative";96 Article V, paragraph 5, of the General Convention on the Privileges and Immunities of the Organization of African Unity: "The provisions of paragraphs 1, 2 and 3 of Article V are not applicable as between a representative and the authorities of a State of which he is a national or of which he is or has been the representative".

<sup>&</sup>lt;sup>90</sup> Official Records of the General Assembly, Twenty-second Session, Annexes, agenda item 98, document A/C.6/385, p. 4.

<sup>&</sup>lt;sup>91</sup> Leo Gross "Immunities and Privileges of Delegations to the United Nations", in *International Organization*, vol. XVI, No. 3, summer 1962, p. 491.

<sup>&</sup>lt;sup>92</sup> United Nations Legislative Series, Legislative Texts and Treaties concerning the Legal Status, Privileges and Immunities of International Organizations (ST/LEG/SER.B/10), p. 187.

<sup>93</sup> Ibid., vol. II, (ST/LEG/SER.B/11), p. 105.

<sup>94</sup> Ibid., p. 371.

<sup>95</sup> Ibid., p. 393.

<sup>96</sup> Ibid., p. 417.

<sup>&</sup>lt;sup>97</sup> United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations (ST/LEG/SER.B/10), p. 116.

<sup>98</sup> Ibid., p. 175.

<sup>99</sup> Ibid., vol. II (ST/LEG/SER.B/11), p. 22.

<sup>100</sup> Ibid., p. 55.

- 36. State practice and treaty and statutory provisions reveal that the consent of the host State is not required for the appointment of one of its nationals as a member of a permanent mission of another State. The problem is usually dealt with in terms of the immunities conceded to the member of the mission, and a number of States make a distinction between nationals and non-nationals in this regard.
- 37. A different approach is suggested by one writer who observes:

Une question qui se pose est de savoir si un Etat pourrait nommer, comme membre de sa délégation permanente, un ressortissant de l'Etat du siège. Une telle mesure peut être fort utile pour les Etats ne possédant pas un service diplomatique développé; de plus, un des inconvénients d'une telle nomination qui se fait sentir pour les missions diplomatiques disparaît ici, car étant accréditées auprès d'une organisation internationale, les conflits de loyauté entre celle qu'une telle personne doit à l'Etat dont elle est ressortissant et celle qu'elle doit à l'Etat qui l'emploie sont peu probables. Toutefois un inconvénient majeur demeure, à savoir l'obligation dans laquelle se trouverait l'Etat du siège d'accorder un statut privilégié à un de ses ressortissants sur son propre territoire. Pour cette raison, nous pensons que les règles de droit diplomatique en la matière doivent s'appliquer aussi ici, c'est-à-dire que l'Etat du siège peut s'opposer à cette nomination lorsqu'il s'agit de personnel ayant un caractère diplomatique, alors que la délégation permanente peut choisir librement son personnel administratif et technique parmi des nationaux de cet Etat. La liberté doit par contre être laissée à la délégation permanente d'employer des personnes ressortissants d'un Etat tiers.101

It is to be noted that the writer quoted above does concede that the appointment of a national of the host State as a member of a permanent mission of another State does not present in principle the difficulties which are encountered in similar cases within the framework of bilateral diplomacy. Realizing, however, that the situation may place the host State in the position of granting privileges to one of its nationals, he seeks remedy in advocating the right of the host State to oppose the appointment of one of its nationals as a member of a permanent mission of another State instead of suggesting its right to restrict his privileges and immunities.

- 38. In view of the above, the Special Rapporteur has decided not to include a general provision of principle on the question of nationality of members of the permanent mission and to deal with this question as a problem of privileges and immunities in section II of part II of these draft articles.
- 39. The only objection which might be raised to those considerations is that, in some States, nationals have to seek the consent of their own Government before entering the service of a foreign Government. Such a requirement, however, is merely an obligation governing the relationship between a national and his own Government and does not affect relations between States, and is not therefore a rule of international law.

### Accreditation of the permanent representative

#### Article 10

- 1. The credentials of the permanent representative shall be issued either by the Head of the State or by the Head of Government or by the Minister of Foreign Affairs, and shall be transmitted to the Secretary-General.
- 2. The Secretary-General shall submit, at each regular session of the General Assembly or any other organ designated for this purpose in accordance with the rule applicable in the organization concerned, a report on the credentials of the permanent representatives accredited to the organization.

#### Article 11

- 1. Member States desiring their permanent representatives to represent them on one or more of the organs of the organization should specify the organs in the credentials submitted to the Secretary-General.
- 2. Subject to the rules of procedure of the organization concerned and unless the credentials of the permanent representative provide otherwise, the permanent representative shall represent the sending State in the different organs of the organization.

### Commentary

- (1) Article 10 reproduces, with the necessary drafting changes, sub-paragraph 1 of the first operative paragraph and the second operative paragraph of General Assembly resolution 257 A (III) on permanent missions to the United Nations.
- (2) The question of accreditation of permanent representatives was discussed at the third session of the United Nations General Assembly. 102 The use of the word "credentials" in the Bolivian proposal was criticized by some delegations. It was stated by one delegate that "the word 'credentials' was out of place, because it tended to give the impression that the United Nations was a State, headed by the Secretary-General, and that the permanent representatives were accredited to him, and because the permanent representatives had to have full powers to enable them to accomplish certain actions, such as the signing of conventions." Mention was made that as matters stood, the permanent representatives of some countries to the United Nations have "full powers" and not "credentials" (lettres de créance). A number of delegates did not, however, share this point of view; they preferred the use of the word "credentials", pointing out that it had been intentionally used in the draft resolution and that it was unnecessary for permanent representatives to receive full powers to carry out their functions.

<sup>101</sup> Cahier, op. cit., p. 419.

<sup>&</sup>lt;sup>102</sup> See paragraphs 19-26 of section 1 of part II above. See also the second report by the Special Rapporteur, *Yearbook of the International Law Commission*, 1967, vol. II, document A/CN.4/195 and Add.1, pp. 143 and 145, paras. 61-65 and 77.

- (3) The rules of procedure of the different organs of the United Nations use the term "credentials" (chapter IV of the rules of procedure of the General Assembly: chapter III of the provisional rules of procedure of the Security Council; rule 19 of the rules of procedure of the Economic and Social Council; and rules 14-17 of the rules of procedure of the Trusteeship Council). The term "credentials" is also the term commonly used in the rules of procedure of other international organizations (for example: Rule III-2 of the General Rules of the Food and Agriculture Organization of the United Nations: chapter 5 of the General Regulations annexed to the International Telecommunication Convention (Montreux 1965) which regulates the question of credentials for delegations to conferences of the International Telecommunications Union; rule 22 (b) of the rules of procedure of the World Health Assembly of the World Health Organization).
- (4) The general practice regarding issuance of credentials in respect of permanent representatives to international organizations is that these credentials are issued by the Head of the State or by the Head of Government or by the Minister for Foreign Affairs. In the case of one or two specialized agencies, the credentials of permanent representatives may also be issued by the member of government responsible for the department which corresponds to the field of competence of the organization concerned. Thus, credentials for representatives to the International Civil Aviation Organization are usually signed by the Minister for Foreign Affairs or the Minister of Communications or Transport. In the World Health Organization credentials must be issued by the Head of State, the Minister for Foreign Affairs, or the Minister of Health or by any other appropriate authority.
- (5) While the credentials of permanent representatives are usually transmitted to the principal executive official of the organization whether designated "secretary-general", "director-general" or otherwise, there is no consistent practice concerning the organ to which the secretary-general should report on this matter. second operative paragraph of General Assembly resolution 257 A (III) instructs the Secretary-General to submit, at each regular session of the General Assembly, a report on the credentials of the permanent representatives accredited to the United Nations. In the case of some organizations, the credentials are submitted to the Director-General who reports thereon to the Conference (FAO), or the Board of Governors (IAEA). In others, there is no similar procedure. Paragraph 2 of article 10 is designed to consolidate the practice in this matter and establish a general pattern for the submission of the credentials of permanent representatives to the secretarygeneral and the latter's reporting thereon to the General Assembly or any other organ of similar competence in accordance with the situation in the organization concerned.
- (6) Article 11 regulates the position of permanent representatives with regard to the representation of the sending State in the organs of the organization. Paragraph 1 is based on sub-paragraph 4 of the first opera-

tive paragraph of General Assembly resolution 257 A (III).

The competence of permanent representatives was considered by the Interim Committee of the General Assembly at its meetings held from 5 January to 5 August 1948. The Committee considered a proposal submitted by the Dominican Republic. According to this proposal, the heads of permanent delegations at the seat of the United Nations should, in that capacity, be automatically entitled to represent their countries on the Interim Committee. This, it was said, would provide for greater elasticity by making it unnecessary for each delegation to submit new credentials for each convocation of the Interim Committee. With regard to alternates and advisers, rule 10 of the rules of procedure of the Interim Committee stated that they could normally be designated by the appointed representative. Consequently, special credentials would only be required when a Member of the United Nations desired to send a special envoy. It was said that such a procedure, in addition to its practical usefulness, would induce all Governments to set up permanent delegations, which would be an important contribution to the work of the United Nations.

It was pointed out, on the other hand, that the matter of credentials was properly one for the Governments concerned to decide for themselves. For example, in accrediting the head of a permanent delegation, it might be specified that, in the absence of notification to the contrary, he might act as representative on all organs or committees of the United Nations. The representative of the Dominican Republic made it clear, however, that the proposal submitted by his Government was intended to apply exclusively to the Interim Committee. 103

- (7) According to the information supplied to the Special Rapporteur by the legal advisers of the specialized agencies, the question whether permanent representatives accredited to a particular agency are entitled to represent their State before all organs of the agency has received answers which vary to some extent from agency to agency. It would seem a general rule, however, that accreditation as a permanent representative does not entitle the representative to participate in the proceedings of any organ to which he is not specifically accredited.
- (8) While paragraph 1 of article 11 codifies this practice, paragraph 2 seeks to develop the practice in favour of conceding to the permanent representative general competence to represent his country in the different organs of the organization to which he is accredited. As a residual rule, it establishes a presumption to that effect. This rule is, however, without prejudice to the function of the credentials committee which may be set up or other procedures followed by the different organs to examine the credentials of delegates to their meetings.

<sup>&</sup>lt;sup>103</sup> Reports of the Interim Committee of the General Assembly (5 January-5August 1948), Official Records of the General Assembly, Third Session, Supplement No. 10 (A/578, A/583, A/605, A/606).

## Article 12. Full powers and action in respect of treaties

- 1. Permanent representatives are not required to furnish evidence of their authority to negotiate, draw up and authenticate treaties drawn up within an international organization to which they are accredited or concluded between their State and the organization.
- 2. Permanent representatives shall be required to furnish evidence of their authority to sign (whether in full or ad referendum) on behalf of their State a treaty drawn up within an international organization to which they are accredited or between their State and the organization by producing an instrument of full powers.

# Commentary

(1) Paragraph 1 of article 12 is modelled on article 4, paragraph 2 (b) of the draft articles on the law of treaties adopted provisionally by the International Law Commission in 1962. In the relevant part of the commentary on that article, the Commission stated that: "The practice of establishing permanent missions at the headquarters of certain international organizations to represent the State and to invest the permanent representatives with powers similar to those of the Head of a diplomatic mission is now extremely common." 104 However, in the process of finalizing its draft articles on the law of treaties, the Commission decided in 1966 to revise article 4, paragraph 2 (b) of the 1962 text, which treated heads of permanent missions to international organizations on a similar basis to heads of diplomatic missions, so that they would automatically have been considered as representing their States in regard to treaties drawn up within the organization and also in regard to treaties between their State and the organization. In paragraph (6) of its commentary to article 6 of the 1966 text, the Commission stated that: "In the light of the comments of Governments and on a further examination of the practice, the Commission concluded that it was not justified in attributing to heads of permanent missions such a general qualification to represent the State in the conclusion of treaties." 105

(2) The Special Rapporteur believes that the Commission has taken a rather strict approach to the question of the powers of permanent representatives to international organizations to represent their States in the conclusion of treaties. In interpreting the practice in this regard, it should be borne in mind that such practice has been developed at a time when the evolution of the institution of permanent mission was in its formative stage. With the evolution of the institution reaching at present a consolidated stage and the progressive attribution to permanent representatives to international organizations of functions and powers similar to those of heads of diplomatic missions, the Commission might consider whether it wished to reflect existing practice or to lay

down a rule entailing progressive development of international law in the matter.

(3) Paragraph 2 of article 12 is based on the practice of international organizations. The requirement of United Nations practice that permanent representatives need full powers to enable them to sign international agreements was described as follows by the Legal Counsel in response to an enquiry made by a permanent representative in 1953:

As far as permanent representatives are concerned, their designation as such has not been considered sufficient to enable them to sign international agreements without special full powers. Resolution 257 (III) of the General Assembly of 3 December 1948 on permanent missions does not contain any provision to this effect and no reference was made to such powers during the discussions which preceded the adoption of this resolution in the Sixth Committee of the General Assembly. However, the credentials of some permanent representatives contain general authorization for them to sign the conventions and agreements concluded under the auspices of the United Nations. But, even in such cases, in order to avoid any possible misunderstanding, if an agreement provides that States can be definitely bound by signature alone, it is the general practice to request a cable from the Head of the State or Government or from the Minister for Foreign Affairs confirming that the permanent representative so authorized in his credentials can sign the agreements concerned.106

Full powers, issued by the Head of State or Government, or by the Minister for Foreign Affairs or other responsible authority referred to in paragraph (4) of the commentary on articles 10 and 11 above, are generally required to enable permanent representatives to sign agreements drawn up within the specialized agencies. Except, to a limited extent, in IAEA and the United Nations Educational Scientific and Cultural Organization (UNESCO), accreditation as a permanent representative is not regarded as sufficient to enable a representative to sign agreements on behalf of his government; the limited exemption granted by IAEA in this respect is presently under review.<sup>107</sup>

### Article 13. Composition of the permanent mission

A permanent mission consists of one or more representatives of the sending State from among whom the sending State may appoint a head. It may also include diplomatic staff, administrative and technical staff and service staff.

#### Commentary

(1) Article 13 is modelled on article 1 of the Vienna Convention on Diplomatic Relations 108 and article 9 of

<sup>104</sup> Yearbook of the International Law Commission, 1962, vol. II, document A/5209, p. 165.

<sup>&</sup>lt;sup>105</sup> Yearbook of the International Law Commission, 1966, vol. II, document A/6309/Rev.1, p. 193.

<sup>100</sup> See the Study of the Secretariat, Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 169, para. 35. Further information may be found in United Nations Legislative Series, "Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements (ST/LEG/7), paras. 28-36.

<sup>&</sup>lt;sup>107</sup> For details of the practice of the various specialized agencies, see the study of the Secretariat, *Yearbook of the International Law Commission*, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 195, para. 12.

<sup>108</sup> See United Nations, Treaty Series, vol. 500, pp. 96 and 98.

the International Law Commission's draft articles on special missions. 109

- (2) Every permanent mission must include at least one representative of the sending State, that is to say, a person to whom that State has assigned the task of being its representative in the permanent mission. If the permanent mission comprises two or more representatives, the sending State may appoint one of them to be head of the mission.
- (3) "Permanent representative" is the term generally used at present as title for heads of permanent missions to international organizations. Article V, section 15 of the Headquarters Agreement between the United Nations and the United States of America uses the term "resident representative".110 However, since the adoption of General Assembly resolution 257 A (III) on permanent missions to the United Nations the usage of the term "permanent representative" became the prevailing pattern in the statutory law and practice of international organizations, both universal and regional. There are some exceptions from the general pattern. The Headquarters Agreement of the International Atomic Energy Agency with Austria uses the term "resident representative", 111 which is also used in the Headquarters Agreement of the Food and Agriculture Organization with Italy.112
- (4) The term "representatives" is defined in Article IV of the Convention on the Privileges and Immunities of the United Nations. Section 16 of this article, which defines the privileges and immunities to be accorded to the representatives of Member States, provides that:

In this article the expression "representatives" shall be deemed to include all delegates, deputy delegates, advisers, technical experts and secretaries of delegations.<sup>113</sup>

This definition is repeated in article I, section 1 ( $\nu$ ) of the Convention on the Privileges and Immunities of the Specialized Agencies <sup>114</sup> and article IV, section 13 of the Interim Arrangement on Privileges and Immunities concluded between the United Nations and Switzerland. <sup>115</sup> This definition is generally adopted in the corresponding instruments of regional organizations. The term "secretaries of delegations" is deemed to refer to diplomatic secretaries only and not to include clerical staff. In the Headquarters Agreement between the International Civil

Aviation Organization and Canada, article I, section 1 (f), which reproduces the substance of the above definition, specifies that the expression "secretaries of delegations" includes "the equivalent of third secretaries of diplomatic missions but not the clerical staff"."

(5) The composition and organization of permanent missions are very similar to those of diplomatic missions which States accredit to each other. In paragraphs (7) and (8) of its commentary on articles 13-16 of its draft articles on diplomatic intercourse and immunities the International Law Commission stated:

The Commission did not feel called upon to deal in the draft with the rank of the members of the mission's diplomatic staff. This staff comprises the following classes:

Ministers or Minister-Counsellors; Counsellors; First Secretaries; Second Secretaries; Third Secretaries; Attachés.

There are also specialized officials such as military, naval, air, commercial, cultural or other attachés who may be placed in one of the above mentioned.<sup>117</sup>

Note on military, naval and air attachés

- 40. The Vienna Convention on Diplomatic Relations includes an article which expressly provides that in the case of military, naval and air attachés, the receiving State may, in accordance with what is already a fairly common practice, require their names to be submitted beforehand, for its approval (article 7).<sup>118</sup>
- 41. Within the framework of international organizations, and except as regards regional organizations for military purposes, the staff of permanent missions does not include military, naval or air attachés. States do not in practice include such a category in their missions to the United Nations, the specialized agencies, regional organizations of general competence and regional organizations of limited competence for non-military purposes. One exception is that of the Permanent Members of the Security Council of the United Nations, who in this capacity are members of the Military Staff Committee. For the purpose of their representation in this military committee, the Permanent Members of the Security Council find it necessary to and do in fact include in their permanent missions specialized officials in military, naval and air matters.
- 42. The question of prior approval of these officials does not arise in the case of permanent missions. As stated before, the members of permanent missions are not accredited to the host State. Moreover, no prior approval (agrément) is required for the permanent representative, the head of the permanent mission. A fortiori, the same should apply to military, naval and air attachés. For these considerations, the Special Rapporteur did not

<sup>&</sup>lt;sup>109</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 351.

<sup>&</sup>lt;sup>110</sup> United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations (ST/LEG/SER.B/10), p. 208.

<sup>&</sup>lt;sup>111</sup> *Ibid.*, vol. II, (ST/LEG/SER.B/11), p. 336.

<sup>112</sup> Ibid., p. 195.

<sup>&</sup>lt;sup>113</sup> United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations (ST/LEG/SER.B/10), p. 187.

<sup>&</sup>lt;sup>114</sup> *Ibid.*, vol. II, (ST/LEG/SER.B/11), p. 102.

<sup>&</sup>lt;sup>115</sup> United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations (ST/LEG/SER.B/10), p. 199.

<sup>116</sup> Ibid., vol. II, (ST/LEG/SER.B/11), pp. 161 and 162.

<sup>&</sup>lt;sup>117</sup> Yearbook of the International Law Commission, 1958, vol. II, document A/3859, p. 94.

<sup>118</sup> See United Nations, Treaty Series, vol. 500, p. 100.

deem it appropriate to include an article similar to article 7 of the Vienna Convention on Diplomatic Relations.

## Article 14. Size of the permanent mission

The sending State should observe that the size of its permanent mission does not exceed what is reasonable and normal, having regard to the circumstances and conditions in the host State, and to the needs of the particular mission and the organization concerned.

### Commentary

- (1) Article 14 is modelled on article 11, paragraph 1 of the Vienna Convention on Diplomatic Relations.<sup>119</sup> There is, however, one basic difference. According to the provision of the Vienna Convention, the receiving State "may require that the size of a mission be kept within limits considered by it to be reasonable and normal...". Its original text as adopted by the Commission (article 10) used the words "... the receiving State may refuse to accept a size exceeding what is reasonable and normal...". <sup>120</sup> Article 14 states the problem differently. It merely lays down as a guide-line to be observed by the sending State the recommendation that the latter should endeavour, in composing its permanent mission, not to make it unduly excessive.
- (2) The problem of limiting the size of the mission was dealt with differently in the International Law Commission's draft articles on special missions. In paragraph (6) of the commentary on article 9 of these draft articles, 121 the Commission noted that in view of the obligation of the sending State, under the terms of article 8, to inform the receiving State in advance of the number of persons it intends to appoint to the special mission, the Commission decided that there was no need to include in the draft the rules stated in article 11 of the Vienna Convention.
- (3) In their replies to the questionnaire addressed to them by the Legal Counsel of the United Nations, the specialized agencies and the International Atomic Energy Agency stated that they encountered no difficulties in relation to the size of permanent missions accredited to them, and that the host States had imposed no restrictions on the size of these missions. The practice of the United Nations itself, as summed up in the study of the Secretariat indicates that altough no provision appears to exist specifically delimiting the size of a mission it has been generally assumed that some upper limit did exist. When negotiations were held with the United States authorities concerning the

Headquarters Agreement, the United States representative, while accepting the principle of the proposed article V dealing with permanent representatives, "felt that there should be some safeguard against too extensive an application." The text thereupon suggested (which, with slight modification, was finally adopted as article V) was considered by the Secretary-General and the Negotiating Committee to be a possible compromise. The relevant portion of article V (section 15 (2)) reads: "such resident members of their staffs as may be agreed upon between the Secretary-General, the Government of the United States and the Government of the Member concerned."

(4) The question of the size of the permanent missions was indirectly discussed at the seventh session of the Conference of the Food and Agriculture Organization in 1953. The debate related to the interpretation of article XI (a) of the Headquarters Agreement between that organization and Italy. 121 The Italian Government pointed out that its understanding when signing the Headquarters Agreement was that resident representatives would normally be chosen from amongst the heads or members of diplomatic missions accredited to the Italian Government, or possibly the Holy See, except in the case of countries with which Italy did not maintain diplomatic relations or where an Italian national was appointed by the sending State. In its memorandum of 6 August 1953 addressed to the Director-General of the Food and Agriculture Organization, the Italian Government stated that: "It is true that the Headquarters Agreement which in Article XI recognizes the right of Member Nations to designate 'principal' resident representatives or representatives 'with the rank of Ambassador or Minister Plenipotentiary' does not explicitly provide for prior approval of the nomination by the Italian Government." The memorandum pointed out, however, that this article is reproduced from the provisions of article V, section 15, of the Agreement between the United States of America and the United Nations, which provides that the designation of the permanent members of the staff of the representatives be agreed between the Secretary-General of the United Nations, the Government of the United States of America and the Government of the Member concerned. 125 As a ground for advocating a restrictive approach to the composition and indirectly the size of permanent missions to the Food and Agriculture Organization, the

<sup>119</sup> Ibid., p. 102.

<sup>&</sup>lt;sup>120</sup> See United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II, document A/CONF.20/4, p. 3.

<sup>&</sup>lt;sup>121</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 352.

<sup>&</sup>lt;sup>122</sup> Ibid., document A/CN.4/L.118 and Add.1 and 2, p. 166, para. 18.

<sup>123</sup> Ibid. See joint report by the Secretary-General and the Negotiating Committee on the negotiations with the authorities of the United States of America concerning the arrangements required as a result of the establishment of the seat of the United Nations in the United States of America, A/67 and A/67/Add.1, 4 September 1946. Reproduced in United Nations Legislative Series, "Handbook on the Legal Status, Privileges and Immunities of the United Nations" (ST/LEG/2), p. 441.

<sup>&</sup>lt;sup>124</sup> See United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations, vol. II (ST/LEG/SER.B/11), p. 195.

<sup>&</sup>lt;sup>125</sup> See United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations (ST/LEG/SER.B/10), p. 208.

Italian Government relied on considerations of a practical nature. The memorandum emphasized that "FAO has not the political character of the United Nations Organization and its Council is not in permanent session . . . The normal activity of the Organization is, furthermore, of a purely administrative and technical nature. It is, therefore, justifiable to assume that the Member Nations of FAO do not find it necessary to nominate in Rome a permanent representative having the rank of Head of Mission as well as a permanent ad hoc mission, in order to ensure liaison with FAO." 126 The Conference adopted resolution No. 54 which recommended to Member States that they should "consult the Director-General in order that he may seek the views of the Italian Government" if they wished to appoint resident representatives, "who are not and may not become members of diplomatic missions accredited to the Italian Government." 127 Problems arising out of the application of this resolution have been satisfactorily resolved by negotiations.128 The reference to article V, section 15 of the Headquarters Agreement of the United Nations as the basis for the Italian Government's interpretation of article XI (a) of the Food and Agriculture Organization Headquarters Agreement evoked some comments from the United Nations. It was pointed out in these comments that: "The purpose of the agreement required by section 15 (b) [sic] (of the United Nations Headquarters Agreement) was merely to designate administratively which ranks in the permanent missions would be entitled to the privileges and immunities of diplomatic envoys. A fixed agreement as to the dividing line between members of missions having diplomatic status and the purely administrative or service personnel was, therefore, reached shortly after the entry into force of the United Nations Headquarters Agreement. Neither then nor since has any consideration ever been given to the designations of individual members of any permanent representative's staff." It was further stated that consultation with the host Government before Members nominate members of the permanent missions "does not purpose to correspond to practice at the Headquarters of the United Nations." 129

(5) Article 14, as mentioned before in paragraph (1) of this commentary, does not provide that the host State or the organization may require that the size of the mission be kept within certain limits or that they may refuse to accept a size exceeding those limits, a prerogative which was recognized to the receiving State under article 11, paragraph 1 of the Vienna Convention on Diplomatic Relations.<sup>130</sup> Unlike the case of bilateral diplomacy,

the members of permanent missions to international organizations are not accredited to the host State. Nor are they accredited to the international organization in the proper sense of the word. As will be seen in different parts of these draft articles, remedy for the grievances which the host State or the organization may have against the permanent mission or one of its members cannot be sought in the prerogatives recognized to the receiving State in bilateral diplomacy, prerogatives which flow from the fact that diplomatic envoys are accredited to the receiving State and from the latter's inherent right in the last analysis to refuse to maintain relations with the sending State. In the case of permanent missions to international organizations, remedies must be sought in consultations between the host State, the organization concerned and the sending State, but the principle of the freedom of the sending State in the composition of its permanent mission and the choice of its members must be recognized.

(6) Like article 11, paragraph 1 of the Vienna Convention on Diplomatic Relations, article 14 lays down as guiding factors in the limiting of the size of the mission the conditions in the host State and the needs of the mission. To these it adds the needs of the organization concerned. A number of specialized agencies drew attention to the fact that, owing to the technical and operational nature of their work, they corresponded directly with the ministry or other authority of Member States immediately concerned; the functions of permanent representatives in these cases, therefore, tended to be of a formal and occasional nature rather than of day-to-day importance.<sup>181</sup>

### Article 15. Notifications

- 1. The Organization shall be notified of:
  - (a) The appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission;
  - (b) The arrival and final departure of a person belonging to the family of a member of the mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the mission;
  - (c) The arrival and final departure of private servants in the employ of persons referred to in sub-paragraph (a) of this paragraph and, where appropriate, the fact that they are leaving the employ of such persons;
  - (d) The engagement and discharge of persons resident in the receiving State as members of the mission or private servants entitled to privileges and immunities.
- 2. The Organization shall transmit to the host State the notifications referred to in paragraph 1 of this article.

<sup>&</sup>lt;sup>126</sup> Conference of FAO, Seventh Session, "Interpretation of Article XI (a) of the Agreement between the Government of the Italian Republic and the FAO": note by the Director-General, document C 53/52, of 25 August 1953, p. 3.

<sup>127</sup> See the Study of the Secretariat, Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 192, para. 8.

<sup>128</sup> Ibid.

<sup>129</sup> Conference of FAO, Seventh Session, "Comments of the United Nations on the Interpretation of Article XI (a) of the Agreement between the Italian Government and the FAO", Commission III, document C 53/III/11 of 23 November 1953.

<sup>130</sup> See foot-note 119 above.

<sup>&</sup>lt;sup>131</sup> See the Study of the Secretariat, Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 192, para. 9.

- 3. The sending State may also transmit to the host State the notifications referred to in paragraph 1 of this article.
- 4. Where possible, prior notification of arrival and final departure shall also be given.

## Commentary

- (1) Article 15 is modelled on article 10 of the Vienna Convention on Diplomatic Relations, with the changes required by the particular nature of permanent missions to international organizations.
- (2) It is desirable for the Organization and the host State to know the names of the persons who may claim privileges and immunities. The question to what extent the sending State is obliged to give the necessary notifications of the composition of the mission and the arrival and departure of its head, its members and its staff, arises with regard to permanent missions to international organizations just as it does with regard to permanent diplomatic missions and special missions. Of particular application, however, to permanent missions to international organizations is the problem whether the sending State is obliged to give the notifications referred to in paragraph 1 of article 15 to the Organization or to the host State or to both.
- (3) Position at United Nations Headquarters. The Secretariat wrote to Member States in December 1947 informing them that the Headquarters Agreement had come into effect and recalling the terms of General Assembly resolution 169 B (II); 133 Member States were requested to communicate the name and rank of all persons who, in the opinion of the State concerned, came within the categories of persons covered by sub-sections (1) or (2) of section 15 of the Headquarters Agreement. 134

The question of appointments of the members of permanent missions was regulated by General Assembly

<sup>132</sup> United Nations, Treaty Series, vol. 500, p. 102.

Section 16 of the Convention on the Privileges and Immunities of the United Nations reads: "In this article the expression representatives' shall be deemed to include all delegates, deputy delegates, advisers, technical experts and secretaries of delegations."

134 Sub-sections (1) and (2) of section 15 of the Headquarters Agreement read:

"(1) Every person designated by a Member as the principal resident representative to the United Nations of such Member or as a resident representative with the rank of ambassador or minister plenipotentiary,

"(2) such resident members of their staffs as may be agreed upon between the Secretary-General, the Government of the United States and the Government of the Member concerned . . ."

resolution 257 A (III). Sub-paragraph 2 of the first operative paragraph of this resolution provides "that the appointments and changes of members of the permanent missions other than the permanent representative shall be communicated in writing to the Secretary-General by the head of the mission".

On the basis of the practice established in 1947 and 1948 the normal procedure at the present time is for missions to notify the Protocol and Liaison Section of the Secretariat of the names and ranks of persons on their staff who are entitled to privileges and immunities under section 15, sub-sections (1) and (2) of the Head-quarters Agreement. These particulars are then forwarded by the Secretariat to the United States Department of State via the United States mission. Upon notification from the Department of State, the United States mission then dispatches to the person concerned a standard letter, giving details of the privileges and immunities afforded.<sup>135</sup>

A note was sent by the Secretary-General to permanent missions on 31 July 1964, setting out arrangements designed to reduce or eliminate delay between the arrival of members of the staff of permanent mission and the recognition by the host Government of the privileges and immunities accorded to them under the Headquarters Agreement. The note stated that: "The United States authorities informed the Secretary-General that it is proposed to put into effect a new procedure to reduce or eliminate the delay which presently arises between the arrival in the United States of members of the staff of Permanent Missions and the recognition by the host Government of the privileges and immunities accorded to such members under the Headquarters Agreement. This new procedure would permit Permanent Missions, if they so wished, to submit in advance, and prior to their arrival in the United States, the names of persons appointed to serve on their Missions".186 The note pointed out that "the Secretary-General has indicated to the United States Mission his belief that Permanent Missions may find the foregoing procedure a useful one, if they wish to avail themselves of it. This would be without prejudice to any questions of the interpretation to be given to section 15 (2) of the Headquarters Agreement between the United Nations and the United States of America." 137

<sup>133</sup> General Assembly resolution 169B (11), adopted on 31 October 1947, reads: "The General Assembly Decides to recommend to the Secretary-General and to the appropriate authorities of the United States of America to use Section 16 of the General Convention on the Privileges and Immunities of the United Nations as a guide in considering—under sub-section 2 and the last sentence of section 15 of the above-mentioned Agreement regarding the Headquarters—what classes of persons on the staff of delegations might be included in the lists to be drawn up by agreement between the Secretary-General, the Government of the United States and the Government of the Member State concerned."

<sup>&</sup>lt;sup>135</sup> See the Study of the Secretary, Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 171, para. 53.

<sup>136</sup> For the text of this note, ibid., p. 173, para. 60.

<sup>137</sup> The interpretation of section 15 sub-section (2) of the Headquarters Agreement became an issue in the Santiesteban case in 1962. In discussions with the United States authorities, the United Nations contended that the wording of section 15 sub-section (2) and the arrangements which had been previously established did not support the contention, made by the United States authorities, that the agreement of all three parties involved (viz., of the Secretary-General, the United States and of the Member States) extended to requiring the consent of all three to each individual resident member of a State's mission to the United Nations. *Ibid.*, p. 172, paras. 56-59. The problem of the approval by the host State of the individual nominations of members of the missions will be discussed in section II of part II of these draft articles entitled "Facilities, privileges and immunities".

(4) Position at the United Nations Office at Geneva. Paragraph 4 of the decision adopted by the Swiss Federal Council on 31 March 1948 entitled "Décision du Conseil fédéral suisse concernant le statut juridique des délégations permanentes auprès de l'Office européen des Nations Unies ainsi que d'autres Organisations internationales ayant leur Siège en Suisse" regulates the question of notifications. It provides that "la création d'une délégation permanente, les arrivées et les départs des membres des délégations permanentes sont annoncés au Département politique par la mission diplomatique à Berne de l'Etat intéressé. Le Département politique délivre aux membres des délégations une carte de légitimation attestant les privilèges et immunités dont ils bénéficient en Suisse". This rule was criticized by one writer who observed:

D'après la décision de 1948 du Conseil fédéral suisse, c'est à la mission diplomatique à Berne de l'Etat intéressé qu'il incombe de signaler les arrivées et départs au sein de la délégation permanente. C'est ignorer que le lien diplomatique a lieu entre l'organisation internationale et l'Etat d'envoi, et non entre ce dernier et l'Etat du Siège. En outre, que se passera-t-il au cas où la délégation permanente représente un Etat non reconnu par la Suisse? Il vaut mieux que ce soit l'organisation internationale qui transmette à l'Etat du Siège les allées et venues des membres des délégations permanentes. 139

(5) Practice of the specialized agencies. The practice of the specialized agencies regarding the procedure prescribed for notification of the composition of permanent missions and the arrival and departure of their members is varied and far from systematized. Some of these agencies (e.g., the International Labour Organisation) indicated in their replies that in certain cases member States merely inform the Director-General, before or immediately after his arrival, that a person has been designated as permanent representative to that organization. In other cases the person designated deposits a letter of credence. It is the practice for the Director-General, in reply to a communication on the subject, to inform the member State concerned that he has taken note of the communication. The Organisation has no procedure similar to that established in the United Nations under General Assembly resolution 257 A (III) of 3 December 1948. Member States notify the host State independently of the arrival and departure of representatives, members of their family and private Other specialized agencies (e.g., the United Nations Educational, Scientific and Cultural Organization) indicated that when a permanent representative submits his letter of credence to the Director-General it is the Organization which requests the host State to provide the representative with a diplomatic card; this request constitutes an implicit notification to the host State. In a very small number of cases this request is made by the Embassy of the State concerned, without the intervention of the Organization. However, other agencies (e.g., the World Health Organization) replied that there are no formal arrangements and the Director-General is informed of the appointment of the permanent representatives either directly by the Ministry of Foreign Affairs of the member concerned or through the United Nations Office at Geneva. The Organization does not, as a general rule, notify the host State of the arrival and departure of representatives. Mention should also be made of the distinction drawn in the replies of some organizations between the notification of appointments on the one hand and the notification of arrivals and departures on the other hand. While the nomination to the post of permanent representative is communicated to the Organization, Member States usually notify the host State of the arrival and departure of representatives directly through ordinary diplomatic channels.

(6) It would appear from the aforegoing survey of practice that while the United Nations has developed a system of notifications of the appointments of members of permanent missions and their departures and arrivals, the arrangements applied within the different specialized agencies are fragmentary and far from systematized. In laying down the rule for notifications one may consider two possibilities, either to take note of the practice of international organizations and provide a rule which sets out different alternatives, or to establish a uniform regulation. The first possibility would be to give as the principal alternative that notifications be addressed to the Organization while at the same time giving as a "variant" that notifications be addressed to the host State. The Special Rapporteur believes that it would be desirable to establish a uniform regulation and article 15 seeks to accomplish this end.

(7) The rule formulated in article 15 is based on considerations of principle as well as of a practical nature. Its rationale is that the direct relationship being between the sending State and the Organization, notifications are to be communicated to the Organization (para. 1). The transmission of notifications to the host State is effected through the intermediary of the Organization (para. 2). Paragraph 3 of the article makes it optional for the sending State to communicate the notifications independently to the host State. It should be noted that paragraph 3 provides a supplement to and not an alternative or a substitute for the basic pattern prescribed in paragraphs 1 and 2 of the article.

# Article 16. Permanent representative ad interim

If the post of permanent representative is vacant, or if the permanent representative is unable to perform his functions, a chargé d'affaires ad interim shall act provisionally as acting permanent representative. The name of the acting permanent representative shall be notified to the Organization either by the permanent representative or, in case he is unable to do so, by the sending State.

# Commentary

(1) Article 16 corresponds to article 19 of the Vienna Convention on Diplomatic Relations. It provides for

<sup>138</sup> United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations (ST./LEG/SER.B/10), p. 92.

<sup>&</sup>lt;sup>139</sup> Cahier, op. cit., p. 417, foot-note 14.

situations where the post of head of the mission falls vacant, or the head of the mission is unable to perform his functions.

- (2) General Assembly resolution 257 A (III) envisages that the duties of head of mission may be performed temporarily by someone other than the permanent representative. Sub-paragraph 3 of the first operative paragraph of this resolution reads: "That the permanent representative, in case of temporary absence, shall notify the Secretary-General of the name of the member of the mission who will perform the duties of head of the mission".
- (3) In the United Nations "blue book" listing members of permanent missions, the designation "chargé d'affaires, a.i." is used after the Secretariat has been informed of such an appointment. In their replies to the question whether there is a practice in these organizations for permanent missions to make notification that an acting permanent representive or chargé d'affaires has become temporary head of mission, the specialized agencies furnished varied information. A number of them indicated that notifications concerning the designation of acting permanent representatives are usually received. Some of the agencies replied that in practice certain permanent missions notify the Organization that the deputy permanent representative assumes the functions of temporary head of mission, or that the Organization is sometimes informed that a permanent representative ad interim or a chargé d'affaires is temporarily in charge of a mission. Others indicated that no such practice existed within them. One or two agencies pointed out that since missions frequently consist of the resident representative only and seldom exceed three members, no practice as mentioned in the above-mentioned question has so far been developed.
- (4) The appointment of a chargé d'affaires should be distinguished from that of an "alternate representative" or of a "deputy permanent representative". Both of these terms are used by Member States, the latter expression being frequently used to describe the person ranking immediately after the permanent representative himself.<sup>140</sup>

# Article 17. Precedence

Heads of permanent mission shall take precedence in the order established in accordance with the rule applicable in the Organization concerned.

# Commentary

(1) The question of precedence of heads of permanent mission did not figure in the list of questions included in the questionnaire prepared by the Legal Counsel of the United Nations.<sup>141</sup> Nor did the replies of the legal

advisers of the specialized agencies to whom the questionnaire was addressed include any information on the question of precedence. The Special Rapporteur has requested the Office of Legal Affairs of the United Nations to provide him the necessary data on the practice of the United Nations in this regard. Pending the receipt of such information, the Special Rapporteur has decided to include on a provisional basis the present text of article 17 of these draft articles.

(2) Unlike article 16 of the Vienna Convention on Diplomatic Relations, <sup>142</sup> article 17 does not make reference to the classes to which the heads of mission are assigned. The classification of diplomatic missions into ambassadors, ministers and chargés d'affaires *en pied* is not applicable within the system of permanent missions to international organizations. <sup>143</sup>

# Article 18. Seat of the permanent mission

- 1. A permanent mission shall have its seat in the locality in which the seat of the organization is established.
- 2. A permanent mission may, with the consent of the host State or the State concerned, have its seat in localities other than those in which the seat of the organization is established.

# Article 19. Offices away from the seat of the permanent mission

A permanent mission may not, without the consent of the host State, establish offices in localities other than those in which the mission itself is established.

- (1) The provisions of these two articles have been included to forestall the awkward situation which would result for the host State if the premises of a mission were established in localities other than that which is the seat of the organization.
- (2) There is no specific reference to mission premises in the United Nations Headquarters Agreement. General Assembly resolution 257 A (III) deals with the personnel of the permanent missions (credentials of a permanent representative, communication of appoint-

<sup>&</sup>lt;sup>140</sup> See the Study of the Secretariat, Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 164, para. 12.

<sup>&</sup>lt;sup>141</sup> See second report of the Special Rapporteur, Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/195 and Add.1, pp. 134 and 135, paras. 5 and 6.

<sup>&</sup>lt;sup>142</sup> United Nations, Treaty Series, vol. 500, p. 104.

<sup>&</sup>lt;sup>143</sup> "Article 14 of the Vienna Convention on Diplomatic Relations reads:

<sup>&</sup>quot;1. Heads of mission are divided into three classes, namely:

 <sup>(</sup>a) that of ambassadors or nuncios accredited to Heads of State, and other heads of mission of equivalent rank;

<sup>(</sup>b) that of envoys, ministers and internuncios accredited to Heads of State;

<sup>(</sup>c) that of charges d'affaires accredited to Ministers for Foreign Affairs.

<sup>&</sup>quot;2. Except as concerns precedence and etiquette, there shall be no differentiation between heads of mission by reason of their class."

ment of the staff of a permanent mission, etc.) but does not deal with the premises of such missions. The practice relating to the premises of permanent missions at United Nations Headquarters was summarized in a letter sent by the Legal Counsel of the United Nations to the Legal Adviser of one of the specialized agencies as follows: "In practice permanent missions do not inform us in advance of their intention to set up an office at a given location, and I understand do not inform the United States Mission, unless they desire assistance of some kind in obtaining the property of otherwise. They do of course advise us of the address of their office once it is established and of any changes of address. We publish the address in the monthly list of Permanent Missions. We also inform the United States Mission of new addresses, and the United States Mission is sometimes informed directly by the permanent mission, but there is no special procedure, consultation or acceptance, tacit or express, involved." 144

- (3) In the case of the United Nations Office at Geneva, the Swiss Federal Authorities in a circular note informed permanent missions at that Office that they had no objection in principle to one mission serving for the purposes of representing the State concerned both at Berne and at the Geneva Office, but that they would only recognize such missions as an embassy where the premises were situated in Berne. At the present time all permanent missions at the Geneva Office are located in Geneva, with the exception of two in Berne and one in Paris.<sup>145</sup>
- (4) The replies of the specialized agencies indicate in general that no restrictions on the location of the premises of a permanent mission have ever been imposed by the Organization or the host State. One organization (the International Atomic Energy Agency) pointed out in its reply that "the premises of some permanent missions accredited to IAEA are not in Austria, but in other European countries."

### Article 20. Use of flag and emblem

The permanent mission and the permanent representative shall have the right to use the flag and emblem of the sending State on the premises of the mission, including the residence of the permanent representative, and on his means of transport.

#### Commentary

- (1) This article is modelled on article 20 of the Vienna Convention on Diplomatic Relations. 146
- (2) There appear to be no express provisions which regulate the question of the use by permanent missions of national flags. In the practice of the United Nations Member States have placed their national flag and

emblem outside the premises of permanent offices and, to a lesser extent, on the residence and means of transport of the permanent representative.<sup>147</sup> At the United Nations Office at Geneva the national flag is flown only on the national day and on special occasions.<sup>148</sup>

(3) The replies of the specialized agencies and the International Atomic Energy Agency can be summarized as follows: In a number of cases the national flag of the Member State is flown from the office of its mission and, to a lesser extent, on the car used by the permanent representative. National flags are not flown from the offices in the United Nations Educational, Scientific and Cultural Organization building used by permanent missions. The International Atomic Energy Agency states that resident representatives are not known to have flown a national flag from their offices unless they were at the same time accredited to the host State. On the other hand, permanent representatives to the United Nations Educational, Scientific and Cultural Organization who are assimilated to heads of diplomatic missions normally fly the national flag on their cars when travelling on official business. In general, however, it would appear that the fact that many representatives are members of diplomatic missions and that many premises are also used for other purposes (e.g., as an embassy or consulate) has prevented any clear or uniform practice from emerging.

### Section II. Facilities, privileges and immunities

#### General comments

43. As a common feature, the headquarters agreements of international organizations, whether universal or regional, include provisions for the enjoyment by permanent representatives of privileges and immunities which the host State "accords to diplomatic envoys accredited to it". In general, these headquarters agreements do not contain restrictions on the privileges and immunities of permanent representatives which are based on the application of the principle of reciprocity in the relations between the host State and the sending State. However, the relevant articles of some of the headquarters include a proviso which makes it an obligation of the host State to concede to permanent representatives the privileges and immunities which it accords to diplomatic envoys accredited to it, "subject to corresponding conditions and obligations". Examples: article V, section 15 of the Headquarters Agreement of the United Nations; 149 article XI, section 24, paragraph (a) of the Headquarters Agreement of the Food and Agriculture Organization of the United Nations;150 article 1 of the

<sup>&</sup>lt;sup>144</sup> See Study of the Secretariat, Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 187, para. 154.

<sup>&</sup>lt;sup>145</sup> *Ibid.*, p. 187, para. 155.

<sup>&</sup>lt;sup>116</sup> United Nations, Treaty Series, vol. 500, p. 106.

<sup>&</sup>lt;sup>147</sup> See Study of the Secretariat, Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 187, para. 159.

<sup>148</sup> Ibid.

<sup>&</sup>lt;sup>149</sup> United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations (ST/LEG/SER.B/10), p. 208.

<sup>150</sup> Ibid., vol. II (ST/LEG/SER.B/11), p. 195.

Bilateral Agreement between the Organization of American States and the Government of the United States of America relating to privileges and immunities of representatives and other members of delegations.<sup>151</sup>

44. In determining the rationale of diplomatic privileges and immunities the International Law Commission discussed, at its tenth session in 1958, the theories which have exercised influence on the development of diplomatic privileges and immunities. The Commission mentioned the "exterritoriality" theory, according to which the premises of the mission represent a sort of extension of the territory of the sending State; and the "representative character" theory, which bases such privileges and immunities on the idea that the diplomatic mission personifies the sending State. The Commission pointed out that "there is now a third theory which appears to be gaining ground in modern times, namely, the "functional necessity" theory, which justifies privileges and immunities as being necessary to enable the mission to perform its functions. 152

45. Functional necessity as one of the bases of the privileges and immunities of representatives of States to international organizations is generally reflected in constituent instruments of international organizations. In accordance with Article 105 (2) of the Charter of the United Nations, "Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization."

The representation of States in international organizations is the basic function of permanent missions as defined in article 6 of these draft articles. Article 1, subparagraph (b) of these draft articles defines a "permanent mission" as a mission of representative and permanent character sent by one State member of an international organization to that organization. Paragraph (3) of the commentary on article 6 states that 'sub-paragraph (b) states the representation function of the permanent mission". The mission represents the sending State in the Organization. The mission, and in particular the permanent representative, the head of the mission, is the spokesman for its Government in communication with the organization, or in any discussions with that Organization to which relations between the member States and the Organization may give rise.

47. The representation of States within the framework of the diplomacy of international organizations and conferences has its particular characteristics. The representative of a State to an international organization does not represent his State before the host State. He does not enter into direct relationship and transactions with the host State, unlike the case of bilateral diplomacy. In the latter case, the diplomatic agent is accredited to the receiving State in order to perform certain functions of representation and negotiation between it and his own State. The representative of a State to an

international organization represents his State before the Organization as a collective organ which possesses a separate identity and legal personality distinct from those of the individual member States. In a sense it may be said that he also performs some kind of representation to the States members of the Organization in their collegiate capacity as an organization of States and not in their individual capacity. The host State is included in such a community when it is a member of the Organization. Such a situation cannot be said to exist when the host State is a non-member of the Organization.

48. Another characteristic of representation to international organizations springs from the fact that the observance of the juridical rules governing privileges and immunities is not solely the concern of the sending State as in the case of bilateral diplomacy. In the discussion on the "question of diplomatic privileges and immunities" which took place in the Sixth Committee during the twenty-second session of the General Assembly, it was generally agreed that the Organization itself had an interest in the enjoyment by the representatives of Member States of the privileges and immunities necessary to enable them to carry out their tasks. It was also recognized that the Secretary-General should maintain his efforts to ensure that the privileges and immunities concerned were respected.<sup>153</sup> In his statement at the 1016th meeting of the Sixth Committee the Legal Counsel, speaking as the representative of the Secretary-General, stated that: ". . . the rights of representatives should properly be protected by the Organization and not left entirely to bilateral action of the States immediately involved. The Secretary-General would therefore continue to feel obligated in the future, as he has in the past, to assert the rights and interests of the Organization on behalf of representatives of Members as the occasion may arise. I would not understand from the discussion in this Committee that the Members of the Organization would wish him to act in any way different from that which I have just indicated. Likewise, since the Organization itself has an interest in protecting the rights of representatives, a difference with respect to such rights may arise between the United Nations and a Member and consequently be the subject of a request for an advisory opinion under section 30 of the Convention [the Convention on the Privileges and Immunities of the United Nations of 1946]. It is thus clear that the United Nations may be one of the 'parties' as that term is used in section 30." 154

49. The privileges and immunities of permanent missions to international organizations, being analogous if not identical with those of diplomatic bilateral missions, the articles thereon are modelled on the corresponding provisions of the Vienna Convention on Diplomatic Relations. In view of this, there does not appear to be a need for an independent and elaborate commentary for this section, except inasmuch as it may

<sup>&</sup>lt;sup>151</sup> *Ibid.*, p. 382.

<sup>&</sup>lt;sup>152</sup> Yearbook of the International Law Commission, 1958, vol. II, document A/3859, p. 95.

<sup>153</sup> Official Records of the General Assembly, Twenty-second Session, Annexes, agenda item 98, document A/6965, para. 14.

<sup>154</sup> Ibid., document A/C.6/385, pp. 4 and 5.

be necessary to draw attention to certain departures from the Vienna text or to point out any particular content of application which a given rule might have assumed within one or more international organizations.

## Article 21. General facilities

The organization and the host State shall accord to the permanent mission the facilities required for the performance of its functions, having regard to the nature and task of the permanent mission.

# Article 22. Accommodation of the permanent mission and its members

- 1. The host State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its permanent mission or assist the latter in obtaining accommodation in some other way.
- 2. The host State and the Organization shall also, where necessary, assist permanent missions in obtaining suitable accommodation for their members.

## Commentary

- (1) Article 21 is based on article 25 of the Vienna Convention on Diplomatic Relations <sup>155</sup> and article 22 of the draft articles on special missions. <sup>156</sup> It states in general terms the obligations of both the Organization and the host State to accord to the permanent mission the facilities required for the performance of its functions.
- (2) The reference in the text of article 21 to the nature and task of the permanent mission—a reference which does not appear in article 25 of the Vienna Convention—makes the extent of the obligations both of the Organization and of the host State depend on the individual characteristics of the permanent mission according to the specific functional needs of the Organization to which the mission is assigned.
- (3) A permanent mission may often need the assistance of the host State, in the first place during the installation of the mission, and also in the performance of its functions. To an even greater extent, the permanent mission needs the assistance of the Organization which has a more direct interest in the permanent mission being able to perform its functions satisfactorily. The Organization can be particularly helpful to the permanent mission in obtaining documentation and information, an activity referred to in article 6, sub-paragraph (d) of these draft articles.
- (4) Article 22 is based on article 21 of the Vienna Convention on Diplomatic Relations. <sup>157</sup> As observed by the International Law Commission in the commentary

<sup>158</sup> United Nations, Treaty Series, vol. 500, p. 108.

<sup>157</sup> United Nations, Treaty Series, vol. 500, p. 106.

on the relevant provision (article 19) of its draft articles which served as the basis for the Vienna Convention, the laws and regulations of a given country may make it impossible for a mission to acquire the premises necessary to it. For that reason the Commission inserted in that provision a rule which makes it obligatory for the receiving State to ensure the provision of accommodation for the mission if the latter is not permitted to acquire it. These considerations equally underlie article 22, paragraph 1 of the draft articles.

# Article 23. Inviolability of the premises of the permanent mission

- 1. The premises of the permanent mission shall be inviolable. The agents of the host State may not enter them, except with the consent of the head of the mission.
- 2. The host State is under a special duty to take all appropriate steps to protect the premises of the permanent mission against any intrusion or damage and to prevent any disturbance of the peace of the permanent mission or impairment of its dignity.
- 3. The premises of the permanent mission, their furnishings and other property thereon and the means of transport of the permanent mission shall be immune from search, requisition, attachment or execution.

# Article 24. Exemption of the premises of the permanent mission from taxation

- 1. The sending State and the head of the permanent mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the permanent mission, whether owned or leased, other than such as represent payment for specific services rendered.
- 2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the sending State or the head of the permanent mission.

# Article 25. Inviolability of archives and documents

The archives and documents of the permanent mission shall be inviolable at any time and wherever they may be.

### Commentary

(1) Articles 23 to 25 relate to certain immunities and exemptions concerning the premises of the permanent mission and its archives and documents. These articles reproduce, with the necessary drafting changes, the provisions of articles 22 to 24 of the Vienna Convention on Diplomatic Relations.<sup>159</sup>

<sup>&</sup>lt;sup>156</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 359.

<sup>&</sup>lt;sup>158</sup> Yearbook of the International Law Commission, 1958, vol. II, document A/3859, p. 95.

<sup>&</sup>lt;sup>159</sup> United Nations, Treaty Series, vol. 500, pp. 106 and 108.

- (2) The requirement that the host State should ensure the inviolability of permanent missions' premises, archives and documents has been generally recognized. In a letter sent to the Legal Adviser of one of the specialized agencies in 1964, the Legal Counsel of the United Nations stated that: "There is no specific reference to mission premises in the Headquarters Agreement and the diplomatic status of these premises therefore arises from the diplomatic status of a resident representative and his staff".160
- (3) The headquarters agreements of some of the specialized agencies contain provisions relating to the inviolability of the premises of permanent missions and their archives and documents (for example, article XI of the Headquarters Agreement of the Food and Agriculture Organization of the United Nations;161 article XIII and article XIV, section 33 (c) of the Headquarters Agreement of the International Atomic Energy Agency, 162 which recognize the inviolability of correspondence, archives and documents of missions of member States). (4) The inviolability of the premises of the United Nations and the specialized agencies was sanctioned in article II, section 3 of the Convention on the Privileges and Immunities of the United Nations 163 and article III, section 5 of the Convention on the Privileges and Immunities of the Specialized Agencies 164 respectively. They provide that the property and assets of the United Nations and the specialized agencies, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action. The conventions also contain provisions on the inviolability of the archives and documents of the United Nations and the specialized agencies. Provision is also made for inviolability for all papers and documents of "Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations" and of "Representatives of members at meetings convened by a specialized agency".
- (5) An explicit reference to the premises of permanent missions has been made in the Headquarters Agreement of the International Civil Aviation Organization. Article II, section 4 (1) of this Agreement provides that the "headquarters premises of the Organization shall be inviolable". Article I, section 1 (b) defines the expression "headquarters premises" as follows: "The expression 'headquarters premises' means any building or part of a

building occupied permanently or temporarily by any unit of the Organization or by meetings convened in Canada by the Organization, including the offices occupied by resident Representatives of Member States." 186

(6) Article 24 provides for the exemption of the premises of the permanent mission from taxation. The replies of the United Nations and the specialized agencies indicate that this exemption is generally recognized. Examples of provisions in headquarters agreements for such exemption are to be found in article XI of the Headquarters Agreement of the Food and Agriculture Organization of the United Nations <sup>167</sup> and in articles XII and XIII of the Headquarters Agreement of the International Atomic Energy Agency. <sup>168</sup>

# Article 26. Freedom of movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State shall ensure to all members of the permanent mission freedom of movement and travel in its territory.

#### **Commentary**

- (1) This article is based on article 26 of the Vienna Convention on Diplomatic Relations. 169
- (2) Replies of the specialized agencies indicate that no restrictions have been imposed by the host State on the movement of members of permanent missions of member States.
- (3) At the United Nations Headquarters the host State has imposed limits on the movement of the representatives of certain Member States on the ground that similar restrictions have been placed on the representatives of the host State in the countries concerned.
- (4) The problem of reciprocity will be dealt with in article 41 on non-discrimination. Suffice it to mention here that it has been the understanding of the Secretariat of the United Nations that the privileges and immunities granted should generally be those afforded to the diplomatic corps as a whole, and should not be subject to particular conditions imposed, on a basis of reciprocity, upon the diplomatic missions of particular States.<sup>170</sup>

#### Article 27. Freedom of communication

1. The host State shall permit and protect free communication on the part of the permanent mission for all

<sup>&</sup>lt;sup>160</sup> See the Study of the Secretariat, Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 187, para. 154.

Treaty Provisions Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations, vol. II, (ST/LEG/SER.B/11), pp. 195 and 196.

<sup>162</sup> Ibid., pp. 336 and 337.

<sup>&</sup>lt;sup>168</sup> United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations (ST/LEG/SER.B/10), p. 185.

<sup>164</sup> Ibid., vol. II, (ST/LEG/SER.B/11), p. 103.

<sup>165</sup> Ibid., p. 162.

<sup>166</sup> Ibid., p. 161.

<sup>&</sup>lt;sup>167</sup> *Ibid.*, pp. 195 and 196.

<sup>168</sup> Ibid., pp. 336 and 337.

<sup>&</sup>lt;sup>189</sup> United Nations, Treaty Series, vol. 500, p. 108.

<sup>&</sup>lt;sup>170</sup> See Study of the Secretariat, Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 178, para. 96.

official purposes. In communicating with the Government and the diplomatic missions, consulates and special missions of the sending State, wherever situated, the permanent mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the host State.

- 2. The official correspondence of the permanent mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.
- 3. The bag of the permanent mission shall not be opened or detained.
- 4. The packages constituting the bag of the permanent mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the permanent mission.
- 5. The courier of the permanent mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the host State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.
- 6. The sending State or the permanent mission may designate couriers ad hoc of the permanent missions. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the permanent mission's bag in his charge.
- 7. The bag of the permanent mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a courier of the permanent mission. By arrangement with the appropriate authorities, the permanent mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

### Commentary

- (1) This article is based on article 27 of the Vienna Convention on Diplomatic Relations.<sup>171</sup>
- (2) Permanent missions to the United Nations, the specialized agencies and other international organizations enjoy in general freedom of communication on the same terms as the diplomatic missions accredited to the host State.
- (3) Replies of the United Nations and the specialized agencies indicate also that the inviolability of correspondence, which is provided in article IV, section 11 (b) of the Convention on the Privileges and Immunities of the United Nations 172 and article V, section 13 (b) of

- the Convention of Privileges and Immunities of the specialized Agencies 173 has been fully recognized.
- (4) One difference between this article and article 27 of the Vienna Convention on Diplomatic Relations is the addition in paragraph 1 of the words "[with] special missions" in order to coordinate the article with article 28, paragraph 1 of the draft articles on special missions.<sup>174</sup>
- (5) Another difference is that paragraph 7 of article 27 provides that the bag of the permanent mission may be entrusted not only to the captain of a commercial aircraft, as provided for the diplomatic bag in article 27 of the Convention on Diplomatic Relations, but also to the captain of a ship. This additional provision is taken from article 35 of the Vienna Convention on Consular Relations 175 and article 28 of the draft articles on special missions.
- (6) On the model of article 28 of the draft articles on special missions, the article uses the expression "the bag of the permanent mission" and "the courier of the permanent mission". The expressions "diplomatic bag" and "diplomatic courier" were not used in order to prevent any possibility of confusion with the bag and courier of the permanent diplomatic mission.
- (7) The expression "diplomatic missions" in paragraph 1 of the article is used in the broad sense in which it is used in paragraph 1 of article 28 of the draft articles on special missions, so as to include other missions to international organizations. Paragraph (4) of the commentary of the International Law Commission to article 28 of the draft articles on special missions states that "the 'Commission wishes to stress that by the expression 'diplomatic missions', used in the second sentence of paragraph 1, it means either a permanent diplomatic mission, or a mission to an international organization, or a specialized diplomatic mission of a permanent character". 176

#### Article 28. Personal inviolability

The persons of the permanent representative and of members of the diplomatic staff of the permanent mission shall be inviolable. They shall not be liable to any form of arrest or detention. The host State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.

# Article 29. Inviolability of residence and property

# 1. The private residence of the permanent representative and the members of the diplomatic staff of the

<sup>&</sup>lt;sup>171</sup> United Nations, Treaty Series, vol. 500, p. 108.

<sup>&</sup>lt;sup>172</sup> See United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations (ST/LEG/SER.B/10), p. 186.

<sup>&</sup>lt;sup>173</sup> *Ibid.*, vol. II, (ST/LEG/SER.B/10), p. 104.

<sup>&</sup>lt;sup>174</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, pp. 360 and 361.

<sup>&</sup>lt;sup>175</sup> United Nations Conference on Consular Relations, Official Records, vol. II, Annexes, document A/CONF.25/12, p. 175.

<sup>&</sup>lt;sup>176</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 361.

permanent mission shall enjoy the same inviolability and protection as the premises of the permanent mission.

2. Their papers, correspondence and, except as provided in paragraph 3 of article 30, their property, shall likewise enjoy inviolability.

## Commentary

- (1) Articles 28 and 29 reproduce, without change of substance, the provisions of articles 29 and 30 of the Vienna Convention on Diplomatic Relations 177 and of the draft articles on special missions. 178
- (2) Articles 28 and 29 deal with two generally recognized immunities which are essential for the performance of the functions of the permanent representative and of the members of the diplomatic staff of the permanent mission.
- (3) The principle of the personal inviolability of the permanent representative and of the members of the diplomatic staff, which article 28 confirms, implies, as in the case of the inviolability of the premises of the permanent mission, the obligation for the host State to respect, and to ensure respect for, the person of the individuals concerned. The host State must take all necessary measures to that end, including possibly the provision of a special guard where circumstances so require.
- (4) Inviolability of all papers and documents of representatives of members to the organs of the organizations concerned is generally provided for in the Conventions on the Privileges and Immunities of the United Nations, the Specialized Agencies and other international organizations.
- (5) In paragraph (1) of its commentary to article 28 (Inviolability of residence and property) of its draft articles on diplomatic intercourse and immunities adopted in 1958, the International Law Commission stated that: "This article concerns the inviolability accorded to the diplomatic agent's residence and property. Because this inviolability arises from that attaching to the person of the diplomatic agent, the expression 'the private residence of a diplomatic agent' necessarily includes even a temporary residence of the diplomatic agent." 179

# Article 30. Immunity from jurisdiction

- 1. The permanent representative and the members of the diplomatic staff of the permanent mission shall enjoy immunity from the criminal jurisdiction of the host State. They shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
  - (a) a real action relating to private immovable property situated in the territory of the host State, unless they hold it on behalf of the sending State for the purposes of the permanent mission;
  - <sup>177</sup> United Nations, Treaty Series, vol. 500, p. 110.
- <sup>178</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 361.
- <sup>179</sup> See Yearbook of the International Law Commission, 1958, vol. II, document A/3859, p. 98.

- (b) an action relating to succession in which the permanent representative or a member of the diplomatic staff of the permanent mission is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
- (c) an action relating to any professional or commercial activity exercised by the permanent representative or a member of the diplomatic staff of the permanent mission in the host State outside his official functions.
- 2. The permanent representative and the members of the diplomatic staff of the permanent mission are not obliged to give evidence as witnesses.
- 3. No measures of execution may be taken in respect of a permanent representative or a member of the diplomatic staff of the permanent mission except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.
- 4. The immunity of a permanent representative or a member of the diplomatic staff of the permanent mission from the jurisdiction of the host State does not exempt him from the jurisdiction of the sending State.

## Article 31. Waiver of immunity

- 1. The immunity from jurisdiction of permanent representatives or members of the diplomatic staff of permanent missions and persons enjoying immunity under article 37 may be waived by the sending State.
  - 2. Waiver must always be express.
- 3. The initiation of proceedings by a permanent representative, by a member of the diplomatic staff of a permanent mission or by a person enjoying immunity from jurisdiction under article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.
- 4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary.

- (1) Article 30 is based on article 31 of the Vienna Convention on Diplomatic Relations. 180
- (2) The immunity from criminal jurisdiction granted under paragraph 1 of article 30 is complete and the immunity from civil and administrative jurisdiction is subject only to the exceptions stated in paragraph 1 of the article. This constitutes the principal difference between the "diplomatic" immunity enjoyed by permanent missions and the "functional" immunity accorded to delegations to organs of international organizations

<sup>&</sup>lt;sup>180</sup> United Nations, Treaty Series, vol. 500, p. 112.

and conferences by the Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies. Article IV, section 11 (a) of the Convention on the Privileges and Immunities of the United Nations <sup>181</sup> and article V, section 13 (a) of the Convention on the Privileges and Immunities of the Specialized Agencies <sup>182</sup> accord to representatives of members to the meetings of the organs of the organization concerned or to the conferences convened by it "immunity from legal process of every kind" in respect of "words spoken or written and all acts done by them" in their official capacity.

(3) Article 31 is modelled on the provisions of article 32 of the Vienna Convention on Diplomatic Relations. 183 The basic principle of the waiver of immunity is contained in article IV, section 14 of the Convention on the Privileges and Immunities of the United Nations 184 which states: "Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connexion with the United Nations. Consequently a Member not only has the right, but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded." This provision was reproduced mutatis mutandis in article V, section 16 of the Convention on the Privileges and Immunities of the Specialized Agencies 185 and in a number of the corresponding instruments of regional organizations.

### Article 32. Consideration of civil claims

The sending State shall waive the immunity of any of the persons mentioned in paragraph 1 of article 31 in respect of civil claims in the host State when this can be done without impeding the performance of the functions of the permanent mission, and when immunity is not waived, the sending State shall use its best endeavours to bring about a just settlement of the claims.

#### Commentary

(1) This article is based on the important principle stated in resolution II adopted on 14 April 1961 by the United Nations Conference on Diplomatic Intercourse and Immunities.<sup>186</sup>

(2) The International Law Commission embodied this principle in article 42 of its draft articles on special missions "because"—as stated in the commentary on that article—"the purpose of immunities is to protect the interests of one sending State, not those of the persons concerned, and in order to facilitate, as far as possible, the satisfactory settlement of civil claims made in the receiving State against members of special missions. This principle is also referred to in the draft preamble drawn up by the Commission." 187

## Article 33. Exemption from social security legislation

- 1. Subject to the provisions of paragraph 3 of this article, the permanent representative and the members of the diplomatic staff of the permanent mission shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the host State.
- 2. The exemption provided for in paragraph 1 of this article shall also apply to persons who are in the sole private employ of a permanent representative or of a member of the diplomatic staff of the permanent mission, on condition:
  - (a) that such employed persons are not nationals of or permanently resident in the host State, and
  - (b) that they are covered by the social security provisions which may be in force in the sending State or a third State.
- 3. The permanent representative and the members of the diplomatic staff of the permanent mission who employ persons to whom the exemption provided for in paragraph 2 of this article does not apply shall observe the obligations which the social security provisions of the host State impose upon employers.
- 4. The exemption provided for in paragraphs 1 and 2 of this article does not exclude voluntary participation in the social security system of the host State where such participation is permitted by that State.
- 5. The provisions of the present article do not affect bilateral and multilateral agreements on social security which have been previously concluded and do not preclude the subsequent conclusion of such agreements.

- (1) This article is based on article 33 of the Vienna Convention on Diplomatic Relations.<sup>188</sup>
- (2) Paragraph 2 is modelled on paragraph 2 of article 32 of the draft articles on special missions <sup>189</sup> in that it substitutes the expression "persons who are in the sole private employ" for the expression "private servants", which is used in article 33 of the Vienna Convention. Referring to this change in terminology, the Interna-

<sup>&</sup>lt;sup>181</sup> See United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations (ST/LEG/SER.B/10), p. 186.

<sup>&</sup>lt;sup>182</sup> Ibid., vol. II, (ST/LEG/SER.B/11), p. 104.

<sup>&</sup>lt;sup>183</sup> United Nations, Treaty Series, vol. 500, p. 112.

<sup>&</sup>lt;sup>184</sup> See United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations (ST/LEG/SER.B/10), pp. 186 and 187.

<sup>&</sup>lt;sup>185</sup> *Ibid.*, vol. II, (ST/LEG/SER.B/11), p. 105.

<sup>&</sup>lt;sup>186</sup> United Nations Conference on Diplomatic Intercourse and Immunities, Official Records, vol. II, document A/CONF.20/10/Add.1, p. 90.

<sup>&</sup>lt;sup>187</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 365.

<sup>&</sup>lt;sup>188</sup> United Nations, Treaty Series, vol. 500, p. 112 and 114.

<sup>&</sup>lt;sup>189</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 362.

tional Law Commission stated in paragraph (2) of its commentary to article 32 of the draft articles on special missions: "Article 32... applies not only to servants in the strict sense of the term, but also to other persons in the private employ of members of the special mission such as children's tutors and nurses." 190

(3) Permanent representatives are generally exempt from payment of social security contributions. Permanent missions to the International Atomic Energy Agency are exempt from paying employers' social security contributions by virtue of articles XII and XIII of the Head-quarters Agreement; it is understood that in practice the employers' contribution has been paid by permanent missions on a voluntary basis.<sup>191</sup>

#### Article 34. Exemption from dues and taxes

The permanent representative and the members of the diplomatic staff of the permanent mission shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

- (a) indirect taxes of a kind which are normally incorporated in the price of goods or services;
- (b) dues and taxes on private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purposes of the permanent mission;
- (c) estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article 39;
- (d) dues and taxes on private income having its source in the host State and capital taxes on investments made in commercial undertakings in the host State:
- (e) charges levied for specific services rendered;
- (f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 24.

#### Commentary

- (1) This article is based on article 34 of the Vienna Convention on Diplomatic Relations.<sup>192</sup>
- (2) The immunity of representatives from taxation is dealt with indirectly in article IV, section 13 of the Convention on the Privileges and Immunities of the United Nations which provides that: "Where the incidence of any form of taxation depends upon residence, periods during which the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations are present in a State for the discharge of their duties shall not be considered as periods of

- residence." <sup>193</sup> This provision was reproduced mutatis mutandis in article V, section 15 of the Convention on the Privileges, Immunities of the Specialized Agencies <sup>194</sup> and in a number of the corresponding instruments of regional organizations.
- (3) Except in the case of nationals of the host State, representatives enjoy extensive exemption from taxation. In the International Civil Aviation Organization and the United Nations Educational, Scientific and Cultural Organization all representatives, and in the Food and Agriculture Organization and the International Atomic Energy Agency resident representatives, are granted the same exemptions in respect of taxation as diplomats of the same rank accredited to the host State concerned. In the case of the International Atomic Energy Agency, no taxes are imposed by the host State on the premises used by missions or delegates, including rented premises and parts of buildings. Permanent missions to the United Nations Educational, Scientific and Cultural Organization pay taxes only for services rendered and real property tax ("contribution foncière") when the permanent representative is the owner of the building. Permanent representatives are exempt from tax on movable property ("contribution mobilière"), a tax imposed in France on inhabitants of rented or occupied properties, in respect of their principal residence but not for any secondary residence.195

# Article 34bis. Exemption from personal services

The host State shall exempt the permanent representative and the members of the diplomatic staff of the permanent mission from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

- (1) This article is based on the provisions of article 35 of the Vienna Convention on Diplomatic Relations. 196
- (2) The immunity in respect of national service obligations provided in article IV, section 11 (d) of the Convention on the Privileges and Immunities of the United Nations <sup>197</sup> and article V, section 13 (d) of the Convention on the Privileges and Immunities of the Specialized Agencies <sup>198</sup> has been widely acknowledged. That immu-

<sup>190</sup> Ibid.

<sup>&</sup>lt;sup>191</sup> See the Study of the Secretariat, Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 201, para. 46.

<sup>192</sup> United Nations, Treaty Series, vol. 500, p. 114.

<sup>&</sup>lt;sup>193</sup> See United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations (ST/LEG/SER.B/10), p. 186.

<sup>&</sup>lt;sup>194</sup> Ibid., vol. II, (ST/LEG/SER.B/11), p. 105.

<sup>&</sup>lt;sup>195</sup> See the Study of the Secretariat, Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 201, para. 45.

<sup>&</sup>lt;sup>196</sup> United Nations, Treaty Series, vol. 500, p. 114.

<sup>&</sup>lt;sup>197</sup> See United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations (ST/LEG/SER.B/10), p. 186.

<sup>198</sup> Ibid., vol. II, (ST/LEG/SER.B/11), p. 104.

nity does not normally apply when the representative is a national of the host State.<sup>199</sup>

## Article 35. Exemption from customs duties and inspection

- 1. The host State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services, on:
  - (a) articles for the official use of the permanent mission;
  - (b) articles for the personal use of a permanent representative or a member of the diplomatic staff of the permanent mission or members of his family forming part of his household, including articles intended for his establishment.
- 2. The personal baggage of a permanent representative or a member of the diplomatic staff of the permanent mission shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host State. Such inspection shall be conducted only in the presence of the person enjoying the exemption or of his authorized representative.

#### Commentary

- (1) This article is based on article 36 of the Vienna Convention on Diplomatic Relations.<sup>200</sup>
- (2) While in general permanent representatives and members of the diplomatic staff of permanent missions enjoy exemption from customs and excise duties, the detailed application of this exemption in practice varies from one host State to another according to the system of taxation followed by the country in question.
- (3) At United Nations Headquarters the United States Code of Federal Regulation, Title 19—Customs Duties (Revised 1964) provides in section 10.30 b, paragraph (b), that resident representatives and members of their staffs may import "... without entry and free of duty and internal-revenue tax articles for their personal or family use".<sup>201</sup>
- (4) At the United Nations Office at Geneva the matter is dealt with largely in the Swiss Customs Regulation of 23 April 1952. Briefly, permanent missions may import all articles for official use and belonging to the Government they represent (art. 15). Permanent repre-

sentatives with a title equivalent to that of the head of a diplomatic mission and who have a "carte de légitimation" may import free of duty all articles destined for their own use or that of their family (art. 16, para. 1). Representatives with a title equivalent to members of a diplomatic mission and who have a "carte de légitimation", have a similar privilege except that the importation of furniture may only be made once (art. 16, para. 2).<sup>202</sup>

(5) The position in respect of permanent missions to specialized agencies having their headquarters in Switzerland in identical with that of permanent missions to the United Nations Office at Geneva. In the case of the Food and Agriculture Organization, the extent of the exemption of resident representatives depends on their diplomatic status and is granted in accordance with the general rules relating to diplomatic envoys. Permanent representatives to the United Nations Educational, Scientific and Cultural Organization assimilated to heads of diplomatic missions can import goods at any time for their own use and for that of their mission free of duty. Other members of permanent missions may import their household goods and effects free of duty at the time of taking up their appointment.

#### Article 36. Acquisition of nationality

Members of the permanent mission not being nationals of the host State, and members of their families forming part of their household, shall not, solely by the operation of the law of the host State, acquire the nationality of that State.

### Commentary

This article is based on the rule stated in the Optional Protocol concerning Acquisition of Nationality adopted on 18 April 1961 by the United Nations Conference on Diplomatic Intercourse and Immunities.<sup>203</sup>

#### Article 37. Persons entitled to privileges and immunities

- 1. The members of the family of a permanent representative or a member of the diplomatic staff of the permanent mission forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 28 to 35.
- 2. Members of the administrative and technical staff of the permanent mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 28 to  $34\,bis$ , except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 30 shall not extend to

<sup>&</sup>lt;sup>199</sup> See the Study of the Secretariat, Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 200, para. 37.

<sup>&</sup>lt;sup>200</sup> United Nations, Treaty Series, vol. 500, p. 116.

<sup>&</sup>lt;sup>201</sup> See the Study of the Secretariat, Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 183, para. 134. For details of the position in respect of the various federal and State taxes in New York, ibid., pp. 185 and 186, para. 147.

<sup>&</sup>lt;sup>202</sup> *Ibid.*, p. 183, para. 136.

<sup>&</sup>lt;sup>203</sup> United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II, document A/CONF.20/11, p. 88.

acts performed outside the course of their duties. They shall also enjoy the privileges specified in article 35, paragraph 1, in respect of articles imported at the time of first installation.

- 3. Members of the service staff of the mission who are not nationals of or permanently resident in the host State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in article 33.
- 4. Private staff of members of the permanent mission shall, if they are not nationals of or permanently resident in the host State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the permanent mission.

# Commentary

- (1) This article is modelled on article 37 of the Vienna Convention on Diplomatic Relations.<sup>204</sup>
- (2) The study of the Secretariat does not include data on the privileges and immunities which host States accord to the members of the families of permanent representatives, to the members of the administrative and technical staff and of the service staff of permanent missions and to the private staff of the members of permanent missions. It is assumed that the practice relating to the status of these persons conforms to the corresponding rules established within the framework of inter-State diplomatic relations as codified and developed in the Vienna Convention on Diplomatic Relations. assumption is corroborated by the identical legal basis of the status of these persons inasmuch as their status attaches to and derives from diplomatic agents or permanent representatives, who are accorded analogous diplomatic privileges and immunities.
- (3) In paragraph 4 of the article the expression "private servants" which appears in paragraph 4 of article 37 of the Vienna Convention on Diplomatic Relations, has been replaced by the expression "private staff" on the model of articles 32 and 38 of the draft articles on special missions. Paragraph (2) of the commentary to article 32 of the draft articles on special missions explains this change as follows: "Article 32... applies not only to servants in the strict sense of the term, but also to other persons in the private employ of members of special mission such as children's tutors and nurses." 200 This explanation is also valid for permanent missions to international organizations.

# Article 38. Nationals of the host State and persons permanently resident in the host State

- 1. Except in so far as additional privileges and immunities may be granted by the host State, a permanent representative or a member of the diplomatic staff of the permanent mission who is a national or a permanent resident of that State or is, or has been, its representative, shall enjoy immunity from jurisdiction, and inviolability only in respect of official acts performed in the exercise of his functions.
- 2. Other members of the staff of the permanent mission and private staff who are nationals or permanent residents of the host State shall enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

#### Commentary

- (1) This article reproduces, with the necessary drafting changes, article 38 of the Vienna Convention on Diplomatic Relations.<sup>207</sup> Here, too, the expression "private servants" has been replaced by "private staff".
- (2) As mentioned before in this report a number of the conventions on the privileges and immunities of international organizations, whether universal or regional, stipulate that the provisions which define the privileges and immunities of the representatives of members are not applicable as between a representative and the authorities of the State of which he is a national or of which he is or has been the representative.<sup>208</sup>

# Article 39. Duration of privileges and immunities

- 1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the host State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the host State.
- 2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the permanent mission, immunity shall continue to subsist.
- 3. In case of the death of a member of the permanent mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

<sup>&</sup>lt;sup>204</sup> United Nations, Treaty Series, vol. 500, p. 116.

<sup>&</sup>lt;sup>208</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, pp. 362 and 364 respectively.

<sup>&</sup>lt;sup>206</sup> Ibid., p. 362.

<sup>&</sup>lt;sup>207</sup> United Nations, Treaty Series, vol. 500, p. 118.

<sup>&</sup>lt;sup>208</sup> See part II, section 1, p. 136 above, "Note on nationality of members of a permanent mission".

4. In the event of the death of a member of the permanent mission not a national or permanent resident of the host State or a member of his family forming part of his household, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the host State was due solely to the presence there of the deceased as a member of the permanent mission or as a member of the family of a member of the permanent mission.

# Commentary

- (1) This article is based on the provisions of article 39 of the Vienna Convention on Diplomatic Relations.<sup>209</sup>
- (2) The first two paragraphs of the article deal with the times of commencement and termination of entitlements for persons who enjoy privileges and immunities in their own right. For those who do not enjoy privileges and immunities in their own right other dates may apply, viz., the dates of commencement and termination of the relationship which constitutes the grounds for the entitlement.
- (3) Article IV, section 11 of the Convention on the Privileges and Immunities of the United Nations 210 and article V, section 13 of the Convention on the Privileges and Immunities of the Specialized Agencies 211 provide that representatives shall enjoy the privileges and immunities listed therein "while exercising their functions and during their journey to and from the place of meeting". In 1961 the Legal Counsel of the United Nations replied to an inquiry made by one of the specialized agencies as to the interpretation to be given to the first part of this The reply contained the following: "You enquire whether the words 'while exercising their functions' should be given a narrow or broad interpretation... I have no hesitation in believing that it was the 'broad' interpretation that was intended by the authors of the Convention." 212
- (4) The duration of privileges and immunities of members of permanent missions gave rise to differences between the Secretariat of the United Nations and the host States both at Headquarters in New York and at the Geneva Office. One of the two host Governments contended that the commencement of privileges and immunities was dependent on the notification to it of the appointment of the members of the mission and the other required the prior consent of its authorities before

giving diplomatic privileges and immunities to the individual concerned.<sup>213</sup>

(5) Article IV, section 12 of the Convention on the Privileges and Immunities of the United Nations,<sup>214</sup> which is reproduced mutatis mutandis in article V, section 14 of the Convention on the Privileges and Immunities of the Specialized Agencies,<sup>215</sup> provides that: "In order to secure for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded notwithstanding that the persons concerned are no longer the representatives of Members."

### Article 40. Duties of third States

- 1. If a permanent representative or a member of the diplomatic staff of the permanent mission passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the permanent representative or member of the diplomatic staff of the permanent mission, or travelling separately to join him or to return to their country.
- 2. In circumstances similar to those specified in paragraph 1 of this article, third States shall not hinder the passage of members of the administrative and technical or service staff of a permanent mission, and of members of their families, through their territories.
- 3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the host State. They shall accord to diplomatic couriers, who have been granted a passport visa if such visa was necessary, and diplomatic bags in transit the same inviolability and protection as the host State is bound to accord.
- 4. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons

<sup>&</sup>lt;sup>209</sup> United Nations, Treaty Series, vol. 500, p. 118.

<sup>&</sup>lt;sup>210</sup> See United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations (ST/LEG/SER.B/10), p. 186.

<sup>&</sup>lt;sup>211</sup> *1bid.*, vol. II, (ST/LEG/SER.B/11), pp. 104 and 105.

<sup>&</sup>lt;sup>212</sup> See the Study of the Secretariat, Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 176, para. 87.

<sup>&</sup>lt;sup>213</sup> See the case of B.v.M., Arrêts du Tribunal fédéral suisse, 85, 1959, II, p. 153. Study of the Secretariat, Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 176, para. 89 and the Santiesteban case, ibid., p. 172, paras. 56-59. For the differences of interpretation of section 15 (2) of the Headquarters Agreement of the United Nations, see supra, paragraph (3) of the commentary on article 15.

<sup>&</sup>lt;sup>214</sup> See United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations (ST/LEG/SER.B/10), p. 186.

<sup>&</sup>lt;sup>215</sup> Ibid., vol. II, (ST/LEG/SER.B/11), p. 105.

mentioned respectively in those paragraphs, and to official communications and diplomatic bags, whose presence in the territory of the third State is due to force majeure.

### Commentary

- (1) The provisions of this article are taken from article 40 of the Vienna Convention on Diplomatic Relations 216
- (2) Reference has been made in paragraph (3) of the commentary to article 39 to the broad interpretation given by the Legal Counsel of the United Nations to the provisions of article IV, section 11 of the Convention on the Privileges and Immunities of the United Nations and article V, section 13 of the Convention on the Privileges and Immunities of the Specialized Agencies which stipulate that representatives shall enjoy the privileges and immunities listed in those provisions "while exercising their functions and during their journeys to and from the place of meeting".
- (3) The study of the Secretariat mentions the special problem which may arise when access to the country in which a United Nations meeting is to be held is only possible through another State. It states that: "While there is little practice, the Secretariat takes the position that such States are obliged to grant access and transit to the representatives of Member States for the purpose in question".<sup>217</sup>

#### Article 41. Non-discrimination

In the application of the provisions of the present articles, no discrimination shall be made as between States.

#### Commentary

- (1) Article 41 reproduces, with the necessary drafting changes, paragraph 1 of article 47 of the Vienna Convention on Diplomatic Relations.<sup>218</sup>
- (2) A difference of substance between the two articles is the non-inclusion in article 41 of the second paragraph of article 47 of the Vienna Convention. That paragraph refers to two cases in which, although an inequality of treatment is implied, no discrimination occurs, since the inequality of treatment in question is justified by the rule of reciprocity.
- (3) In general, headquarters agreements of international organizations contain no restrictions on privileges and immunities of members of permanent missions based on the application of the principle of reciprocity in the relations between the host State and the sending State. Some headquarters agreements, however, include a clause providing that the host State shall grant permanent representatives the privileges and immunities which it accords to diplomatic envoys accredited to it, "subject

<sup>216</sup> United Nations, Treaty Series, vol. 500, pp. 118 and 120.

- to corresponding conditions and obligations". Examples of such clauses may be found in article V, section 15 of the Headquarters Agreement of the United Nations,<sup>219</sup> article XI, section 24, paragraph (a) of the Headquarters Agreement of the Food and Agriculture Organization <sup>220</sup> and article 1 of the Bilateral Agreement between the Organization of American States and the Government of the United States of America relating to privileges and immunities of representatives and other members of delegations.<sup>221</sup>
- (4) The Study of the Secretariat states that it has been the understanding of the Secretariat of the United Nations that the privileges and immunities granted should generally be those afforded to the diplomatic corps as a whole, and should not be subject to particular conditions imposed, on a basis of reciprocity, upon the diplomatic missions of particular States. 222 In his statement at the 1016th meeting of the Sixth Committee of the General Assembly, the Legal Counsel of the United Nations stated that: "The Secretary-General in interpreting diplomatic privileges and immunities would look to provisions of the Vienna Convention so far as they would appear relevant *mutatis mutandis* to representatives to the United Nations organs and conferences. It should of course be noted that some provisions such, for example, as those relating to agrément, nationality or reciprocity have no relevancy in the situation of representatives to the United Nations".223

Section III. Conduct of the permanent mission and its members

# Article 42. Obligation to respect the Laws and regulations of the host State

- 1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the host State. They also have a duty not to interfere in the internal affairs of that State.
- 2. The premises of the permanent mission must not be used in any manner incompatible with the functions of the permanent mission as laid down in the present articles or by other rules of general international law or by any special agreements in force between the sending and the host State.

#### Commentary

(1) This article is based on the provisions of article 41, paragraphs 1 and 3, of the Vienna Convention on Diplo-

<sup>&</sup>lt;sup>217</sup> See the Study of the Secretariat, *Yearbook of the International Law Commission*, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 190, para. 168.

<sup>&</sup>lt;sup>218</sup> United Nations, Treaty Series, vol. 500, p. 122.

<sup>&</sup>lt;sup>219</sup> United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and International Organizations (ST/LEG/SER.B/10), p. 208.

<sup>&</sup>lt;sup>220</sup> *Ibid.*, vol. II, (ST/LEG/SER.B/11), p. 195.

<sup>&</sup>lt;sup>221</sup> *Ibid.*, p. 382.

<sup>&</sup>lt;sup>222</sup> See the Study of the Secretariat, Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 178, para. 96.

<sup>&</sup>lt;sup>223</sup> Official Records of the General Assembly, Twenty-second Session, Annexes, agenda item 98, document A/C.6/385, para. 4.

matic Relations,<sup>224</sup> and article 48 of the draft articles on special missions.<sup>225</sup>

- (2) Paragraph 1 states that, in general, it is the duty of all persons enjoying privileges and immunities to respect the laws and regulations of the host State. This duty naturally does not apply when the member's privileges and immunities exempt him from it. With respect to immunity from jurisdiction, this immunity implies merely that a member of the permanent mission may not be brought before the courts if he fails to fulfil his obligations. Such a failure by a member of the permanent mission who enjoys immunity from jurisdiction does not absolve the host State from its duty to respect the member's immunity.
- (3) Paragraph 2 stipulates that the premises of the permanent mission shall be used only for the legitimate purposes for which they are intended. Failure to fulfil the duty laid down in this articles does not render article 23 (inviolability of the premises of the permanent mission) inoperative. That inviolability, however, does not authorize a use of the premises which is incompatible with the functions of the permanent mission.

## Article 43. Professional activity

The permanent representative and the members of the diplomatic staff of the permanent mission shall not practice for personal profit any professional or commercial activity in the host State.

#### Commentary

- (1) This article reproduces, with the necessary drafting changes, the provisions of article 42 of the Vienna Convention on Diplomatic Relations <sup>226</sup> and article 49 of the draft articles on special missions. <sup>227</sup>
- (2) In paragraph (2) of the commentary on article 49 of its draft articles on special missions, the Commission stated that: "Some Governments proposed the addition of a clause providing that the receiving State may permit the persons referred to in article 49 of the draft to practise a professional or commercial activity on its territory. The Commission took the view that the right of the receiving State to grant such permission is self-evident. It therefore preferred to make no substantive departure from the text of the Vienna Convention on this point." 228

Section IV. End of the function of the permanent representative

## Article 44. Modes of termination

The function of a permanent representative or a member of the diplomatic staff of the permanent mission comes to an end, *inter alia*:

- (a) on notification by the sending State that the function of the permanent representative or the member of the diplomatic staff of the permanent mission has come to an end;
- (b) if the membership of the sending State in the international organization concerned is terminated or suspended or if the activities of the sending State in that organization are suspended.

- (1) Sub-paragraph (a) of this article reproduces, with the necessary drafting changes, the provisions of sub-paragraph (a) of article 43 of the Vienna Convention on Diplomatic Relations.<sup>229</sup>
- (2) Sub-paragraph (b) refers to those cases where the sending State recalls the permanent mission for reasons relating to the membership of the sending State in the organization to which that mission has been sent. In general, constituent instruments of international organizations contain provisions on expulsion of a member, withdrawal from membership and suspension of membership. Sub-paragraph (b) expressly provides also for the case of suspension of the activities of the sending State in the organization. The absence of Indonesia from the United Nations during the period from 1 January 1965 to 28 September 1966 has been interpreted by the United Nations as suspension of activities in the Organization and not as withdrawal from member-On 19 September 1966, the Ambassador of Indonesia in Washington transmitted a message to the Secretary-General from his Government, stating that it had decided "to resume full co-operation with the United Nations and to resume participation in its activities starting with the twenty-first session of the General Assembly".230 At the 1420th plenary meeting of the General Assembly on 28 September 1966, the President, having read this communication, declared: "It would . . . appear that the Government of Indonesia considers that its recent absence from the Organization was based not upon a withdrawal from the United Nations but upon a cessation of co-operation. The action so far taken by the United Nations on this matter would not appear to preclude this view." 231
- (3) This article does not contain a provision corresponding to sub-paragraph (b) of article 43 of the Vienna

<sup>&</sup>lt;sup>224</sup> United Nations, Treaty Series, vol. 500, p. 120.

<sup>&</sup>lt;sup>225</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 367.

<sup>&</sup>lt;sup>226</sup> United Nations, Treaty Series, vol. 500, p. 120.

<sup>&</sup>lt;sup>227</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 367.
<sup>228</sup> Ibid.

<sup>&</sup>lt;sup>229</sup> United Nations, Treaty Series, vol. 500, p. 122.

<sup>&</sup>lt;sup>230</sup> See Official Records of the Security Council, Twenty-first year, Supplement for July, August and September 1966, document S/7498.

<sup>&</sup>lt;sup>231</sup> See the Study of the Secretariat, Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 177, foot-note 39.

Convention on Diplomatic Relations, which provides as one of the modes of termination of the function of a diplomatic agent the "notification by the receiving State to the sending State that, in accordance with paragraph 2 of article 9, it refuses to recognize the diplomatic agent as a member of the mission". 282 Under paragraph 2 of article 9 of the Vienna Convention on Diplomatic Relations the receiving State may refuse such recognition if the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 -relating to the declaration of a diplomatic agent as persona non grata by the receiving State.253 As mentioned before in paragraph (2) of the commentary to article 9 of these draft articles, the members of the permanent mission are not accredited to the host State. They do not enter into direct relationship and transactions with the host State, unlike the case of bilateral diplomacy. In the latter case, the diplomatic agent is accredited to the receiving State in order to perform certain functions of representation and negotiation between the receiving State and his own State. This legal situation is the basis of the institution of acceptance by the receiving State of the diplomatic agent (agrément) and of the right of the receiving State to request his recall when it declares him persona non grata.234

(4) Article VII, section 25, paragraph 1 of the Convention on the Privileges and Immunities of the Specialized Agencies provides that:

The following comment was made on this provision in the Study of the Secretariat:

No corresponding provision is contained in the General Convention (the Convention on the Privileges and Immunities of the United Nations). In the absence of any cases in which article VII of the Specialized Agencies Convention, or any similar provision in a headquarters agreement, has been applied, no practice has been developed regarding its interpretation.<sup>236</sup>

#### Article 45. Facilities of departure

The host State must, even in the case of armed conflict, grant facilities in order to enable persons enjoying privi-

leges and immunities, other than nationals of the host State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

## Article 46. Protection of premises and archives

- 1. When the functions of a permanent mission come to an end, the host State must, even in the case of armed conflict, respect and protect the premises as well as the property and archives of the permanent mission. The sending State must withdraw that property and those archives within a reasonable time.
- 2. The host State is required to grant the sending State, even in the case of armed conflict, facilities for removing the archives of the permanent mission from the territory of the host State.

## Commentary

The provisions of article 45 are substantially the same as those of article 44 of the Vienna Convention on Diplomatic Relations.<sup>237</sup> The provisions of article 46 are based on the provisions of article 45 of the same Convention.<sup>238</sup> The Special Rapporteur considers that these two articles call for no special comment.

PART III. DELEGATIONS TO ORGANS OF INTERNATIONAL ORGANIZATIONS OR TO CONFERENCES CONVENED BY INTERNATIONAL ORGANIZATIONS

# General comments

- 50. The draft articles contained in part III (articles 47 to 52) are presented in a tentative form with a view to enabling the Commission to decide the preliminary question whether to confine its draft articles on representatives of States to international organizations to permanent missions to international organizations, or to broaden their scope by including delegations to organs of international organizations and to conferences convened by international organizations.
- 51. In his second report, the Special Rapporteur raised a number of preliminary questions as to the treatment of the subject of delegations to organs of international organizations and to international conferences and its place in the present draft articles.<sup>239</sup> These questions can be summed up as follows:
- A. Delegations to conferences convened by international organizations
- 52. There is little disagreement on the treatment, with-

<sup>&</sup>lt;sup>232</sup> United Nations, Treaty Series, vol. 500, p. 122.

<sup>&</sup>lt;sup>233</sup> *Ibid.*, p. 102.

<sup>&</sup>lt;sup>234</sup> Supra, p. 135.

<sup>&</sup>lt;sup>235</sup> United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations, vol. II (ST/LEG/SER.B/11), p. 107.

<sup>&</sup>lt;sup>236</sup> See the Study of the Secretariat, Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 200, para. 36.

<sup>&</sup>lt;sup>237</sup> United Nations, Treaty Series, vol. 500, p. 122.

<sup>&</sup>lt;sup>238</sup> Ibid.

<sup>&</sup>lt;sup>239</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/195 and Add.1, pp. 149-152, paras. 95-117.

in the framework of the present topic, of the question of privileges and immunities of delegations to conferences convened by international organizations. Article IV, section 11 of the Convention on the Privileges and Immunities of the United Nations stipulates that delegates to "conferences convened by the United Nations" shall enjoy the same privileges and immunities that the Convention accords to representatives of Members to the principal and subsidiary organs of the United Nations.<sup>210</sup>

# B. Conferences not convened by international organizations

- 53. The Special Rapporteur favours a joint treatment of the legal position of delegations to conferences convened by international organizations and that of delegations to conferences convened by States. It should be noted that in substance international conferences, whether convened by international organizations or by one or more States, are conferences of States. The distinction between the two types of conferences is purely formal, the criterion being who convenes the conference.
- C. The extent of the privileges and immunities of delegations to organs of international organizations and to international conferences
- 54. These privileges and immunities are usually regulated in the convention on the privileges and immunities of the organization concerned. Generally speaking, the privileges and immunities are functional and immunity from jurisdiction is limited to words spoken or written and all acts done by the representatives in their capacity as representatives. The Special Rapporteur takes the position that representatives of States to organs of international organizations and to conferences should be accorded in principle, and with particular reference to immunity from jurisdiction, diplomatic privileges and immunities such as those accorded to members of permanent missions to international organizations.

#### Article 47. Composition of the delegation

- 1. A delegation to an organ of an international organization or to a conference convened by an international organization consists of one or more representatives of the sending State from among whom the sending State may appoint a head.
- 2. The expression "representatives" shall be deemed to include all delegates, deputy delegates, advisers, technical experts and secretaries of delegations.
- 3. A delegation to an organ of an international organization or to a conference convened by an inter-

<sup>240</sup> United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations (ST/LEG/SER.B/10), p. 186.

national organization may also include administrative and technical staff and service staff.

# Article 48. Appointment of a joint delegation to two or more organs or conferences

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

#### Article 49. Accreditation

The credentials of representatives to an organ of an international organization or to a conference convened by an international organization shall be issued either by the Head of the State or by the Head of Government or by the Minister of Foreign Affairs, and shall be transmitted to the Secretary-General.

Article 50. Full powers and action in respect of treaties

- 1. Representatives accredited by States to an organ of an international organization or to a conference convened by an international organization are not required to furnish evidence of their authority to negotiate, draw up and authenticate treaties concluded at that organ or conference.
- 2. Representatives accredited by States to an organ of an international organization or to a conference convened by an international organization shall be required to furnish evidence of their authority to sign (whether in full or ad referendum) on behalf of their State a treaty drawn up at that organ or conference by producing an instrument of full powers.

### Article 51. Size of the delegation

The sending State should observe that the size of its delegation to an organ of an international organization or to a conference convened by an international organization does not exceed what is reasonable and normal, having regard to the circumstances and conditions in the host State, and to the needs of the particular delegation and representation at the organ or conference concerned,

### Article 52. Precedence

Heads of delegations to an organ of an international organization or to a conference convened by an international organization shall take precedence in the order

established in accordance with the rule applicable in the organization concerned.

PART IV. PERMANENT OBSERVERS OF NON-MEMBER STATES TO INTERNATIONAL ORGANIZATIONS

#### General comments

- 55. The draft articles contained in part IV (articles 53-56) are presented in a tentative form for the same purpose as that stated in paragraph 50 (general comments preceding the draft articles contained in part III).
- 56. Permanent observers have been sent by non-member States to the Headquarters of the United Nations in New York and to its office at Geneva. Since 1946 a permanent observer has been designated by the Swiss Government. Observers have been also appointed by States such as Austria, Finland, Italy and Japan before they became members of the United Nations. The Federal Republic of Germany, Monaco, the Republic of Korea, San Marino and the Republic of Viet-Nam, which are not members of the Organization at the present time, maintain permanent observers. In addition, the Holy See has recently appointed permanent observers both in New York and at Geneva.
- 57. There are no provisions relating to permanent observers of non-member States in the United Nations Charter, the Headquarters Agreement or General Assembly resolution 257 A (III) of 3 December 1948 relating to permanent missions of Member States. The Secretary-General referred to permanent observers of non-members in his report on permanent missions to the fourth session of the General Assembly,<sup>241</sup> but no action was taken by the Assembly to provide a legal basis for permanent observers. Their status, therefore, has been determined by practice (see memorandum to the Acting Secretary-General) issued by the Office of Legal Affairs, 22 August 1962.<sup>242</sup>
- 58. In the introduction to his Annual Report on the Work of the Organization 16 June 1965-15 June 1966, the Secretary-General of the United Nations stated:

I feel that all countries should be encouraged and enabled, if they wish to do so, to follow the work of the Organization more closely. It could only be of benefit to them and to the United Nations as a whole to enable them to maintain observers at Headquarters, at the United Nations Office at Geneva and in the regional economic commissions, and to expose them to the impact of the work of the Organization and to the currents and cross-currents of opinion that prevail within it, as well as to give them some opportunity to contribute to that exchange. Such contacts and intercommunication would surely lead to a better understanding of the problems of the world and a more realistic approach to their solution. In this matter I have felt myself obliged to follow the established tradition by which only

certain Governments have been enabled to maintain observers. I commend this question for further examination by the General Assembly so that the Secretary-General may be given a clear directive as to the policy to be followed in the future in the light, I would hope, of these observations.<sup>243</sup>

A similar statement was again included in the introduction to the Annual Report of the Secretary-General on the Work of the Organization 16 June 1966-15 June 1967.<sup>244</sup>

59. Reference should also be made to the message of the Secretary-General of the United Nations to the twenty-third session of the Economic Commission for Europe dated 17 April 1968 in which he stated:

It seems to me that the advances so far achieved in the field of economic development in Europe, laudable as they had been, would be even greater if the United Nations and its agencies could achieve the goal of universality of membership. As the attainment of this objective may, however, take some time, I should like to reiterate what I have underscored in the introduction to my last two Annual Reports to the General Assembly that all countries should be encouraged and enabled, if they so wish, to follow the work of the Organization more closely at the Headquarters and regional level.<sup>245</sup>

Privileges and immunities of permanent observers of non-members

60. The position of permanent observers as regards privileges and immunities was stated in the memorandum dated 22 August 1962 sent by the Legal Counsel to the then Acting Secretary-General of the United Nations:

Permanent Observers are not entitled to diplomatic privileges or immunities under the Headquarters Agreement or under other statutory provisions of the host State. Those among them who form part of the diplomatic missions of their Governments to the Government of the United States may enjoy immunities in the United States for that reason. If they are not listed in the United States diplomatic list, whatever facilities they may be given in the United States are merely gestures of courtesy by the United States authorities.<sup>246</sup>

61. The Special Rapporteur is of the opinion that the Commission should consider the regulation of the legal position of permanent observers of non-members on the basis of recognizing their right in principle to privileges and immunities analogous to those enjoyed by permanent missions of members.

# Article 53. Establishment of permanent observers

Non-member States may establish permanent observers at the seat of the organization.

<sup>&</sup>lt;sup>241</sup> Official Records of the General Assembly, Fourth Session, Sixth Committee, Annex, document A/939.

<sup>&</sup>lt;sup>242</sup> United Nations Juridical Yearbook, 1962 (provisional edition) (ST/LEG/8), fascicle 2, p. 236.

<sup>&</sup>lt;sup>243</sup> Official Records of the General Assembly, Twenty-first Session, Supplement No. 1A (A/6301/Add.1), p. 14.

<sup>&</sup>lt;sup>244</sup> Ibid., Twenty-second Session, Supplement No. 1A (A/6701/Add.1), pp. 20 and 21.

<sup>&</sup>lt;sup>245</sup> Official Records of the Economic and Social Council, Forty-fifth Session, Supplement No. 3, (E/4491), Annex II, A.

<sup>&</sup>lt;sup>248</sup> United Nations Juridical Yearbook, 1962, (provisional edition) (ST/LEG/8), fascicle 2, p. 237.

# Article 54. Functions of permanent observers

- 1. The principal function of permanent observers is to ensure the necessary liaison between the sending State and the organization.
- 2. Permanent observers may also perform *mutatis mutandis* other functions of permanent missions as defined in article 6.

Article 55. Composition of the office of the permanent observer

The office of permanent observers consists of the per-

manent observer and may include one or more representatives of the sending State. It may also include diplomatic staff, administrative and technical staff and service staff.

# Article 56. Accreditation

The credentials of permanent observers shall be issued either by the Head of the State or by the Head of Government or by the Minister of Foreign Affairs, and shall be transmitted to the Secretary-General.

# **DOCUMENT A/CN.4/L.129**

# Precedence of representatives to the United Nations: note by the Secretary-General

[Original text: English]
[3 July 1968]

- 1. The precedence of members of diplomatic missions sent by one State to another, which is dealt with in articles 16 and 17 of the Vienna Convention on Diplomatic Relations done at Vienna on 18 April 1961, is a relatively simple question in comparison with the precedence of representatives to international organizations. In regard to members of diplomatic missions, there are usually only three basic principles which govern precedence, and they are the following:
  - (a) Class in the diplomatic service of the sending State:
  - (b) The question whether or not the person concerned is the chargé d'affaires of his mission;
  - (c) The date and time at which the person concerned has taken up his functions.

Article 17 provides that the head of the mission shall give notification of the precedence of the members of the diplomatic staff.

- 2. The precedence of representatives to the United Nations depends upon the combination of a larger number of criteria than those applicable in the case of diplomatic missions sent by one State to another. Two of the criteria are the same, namely, class or rank of the person concerned in the service of his country, and whether the person concerned is the chargé d'affaires of his mission, but both of these criteria require further explanation in the context of the United Nations.
- 3. As regards the ranks of representatives, the United Nations has a very wide range to deal with, ranging from Heads of State downwards, and including some persons who do not have rank in the usual diplomatic classes.

advisers, experts and persons of similar status as may be

are always given first precedence. Heads of Government follow thereafter, and lower in the order of precedence come deputy Heads of Government, Ministers for Foreign Affairs, and other Cabinet Ministers. On what might be called the ambassadorial level, there are a large number of persons to be dealt with, since there are not only delegations to the General Assembly and other organs, each of which may contain several ambassadors, but also permanent missions to the United Nations, in which it is becoming more and more usual to find several persons of ambassadorial rank. Chairmen of delegations to the General Assembly are given precedence over deputy Ministers for Foreign Affairs and over permanent representatives. Within the category of permanent representatives, precedence is accorded in the order of personal diplomatic rank, and chargés d'affaires of permanent missions follow thereafter, also in the order of personal diplomatic rank. Next come representatives to the General Assembly of ambassadorial or equivalent rank, then alternate representatives with ambassadorial rank, and finally representatives and alternate representatives without ambassadorial rank, the representatives preceding the alternates. The names of representatives are notified to the United Nations in a certain order, and this order serves as a basis for precedence within the various classes; thus all first representatives of ambassadorial rank have precedence over all second representatives with that rank, all first alternates over all second alternates, etc.

In accordance with international practice, Heads of State

required.

<sup>&</sup>lt;sup>3</sup> Article 9 of the Charter provides that "Each Member shall have not more than five representatives in the General Assembly". Rule 25 of the rules of procedure of the General Assembly adds that there may also be not more than five alternate representatives, and as many advisers, technical

<sup>&</sup>lt;sup>1</sup> United Nations, Treaty Series, vol. 500, pp. 104 and 106.

<sup>&</sup>lt;sup>2</sup> Apart from the practice in some States, referred to in paragraph 3 of article 16, of according precedence to the representative of the Holy See.

- 4. As regards chargés d'affaires, in diplomatic practice those accredited by letters from their Foreign Ministers to the Foreign Minister of the receiving State are given precedence over chargés d'affaires ad interim. This distinction is not made in United Nations practice, since it is not usual for chargés d'affaires of permanent missions to be accredited by Foreign Ministers.
- 5. Apart from the foregoing, there are two other criteria of precedence which are applied in the practice of the United Nations. First, the General Assembly and other organs elect officers, whose position must be recognised by appropriate precedence, at least while the organs are in session. The principal organs of the United Nations are listed in order in Article 7 (1) of the Charter. First comes the General Assembly, and its President is in the practice of the Organization given precedence over all other representatives. Vice-Presidents of the General Assembly with the rank of Foreign Minister or Cabinet Minister are ranked immediately following Heads of Government, and other vice-presidents rank after the presidents of principal organs other than the General Asssembly.
- 6. The foregoing criteria are not sufficient to settle all questions of precedence, since there may be persons of equal rank in almost all classes. When this situation occurs in ordinary diplomatic protocol, precedence is settled on the basis of the date and time at which the person concerned has taken up his functions. This criterion, however, is not well adapted for use in connexion with sessions of the organs of the United Nations, since almost all representatives take up their functions at the same time. Therefore this criterion is never used by the United Nations, but is replaced by the criterion of alphabetical order of the names of States represented. Since it would be inequitable always to give precedence to countries whose names appear early in the alphabet, the name of a country from which the alphabetical order

- will start throughout the following year is drawn every year before the opening of the regular session of the General Assembly. This order is used for the seating of the General Assembly and other organs, and may also serve for the order of precedence for official events. At Headquarters the English alphabetical order is used, but when United Nations organs meet in French-speaking countries, the alphabetical order is in French. The wishes of countries concerning their appellations are taken into account and thus there is some variation of practice; for example "Congo (Democratic Republic of)" is alphabetized under "c", but the United Republic of Tanzania" is alphabetized under "u" in English.
- 7. Under the rules of procedure of the various organs,<sup>4</sup> the alphabetical order of the names of States is also used in determining the order in which a roll-call vote is taken, the name of Member being called in the English alphabetical order of the names of Members, beginning with the Member whose name is drawn by lot by the presiding officer. In addition, the rules of procedure of the various organs contain several provisions concerning precedence in the order of speaking. As a general rule, the presiding officer calls upon representatives in the order in which they signify their desire to speak.<sup>5</sup> However, in the General Assembly and its committees, for example, the chairman and rapporteur of a committee may be accorded precedence for the purpose of explaining conclusions arrived at by their committees.<sup>6</sup>

<sup>&</sup>lt;sup>4</sup> See, for example, rules 89 and 128 of the rules of procedure of the General Assembly and rule 61 of the rules of procedure of the Economic and Social Council.

<sup>&</sup>lt;sup>5</sup> For example, rules 70 and 111 of the rules of procedure of the General Assembly and rule 27 of the provisional rules of procedure of the Security Council.

<sup>&</sup>lt;sup>6</sup> For example, rules 71 and 112 of the rules of procedure of the General Assembly and rule 29 of the provisional rules of procedure of the Security Council.

# MOST-FAVOURED-NATION CLAUSE

[Agenda item 3]

# **DOCUMENT A/CN.4/L.127**

# The most-favoured-nation clause in the law of treaties: working paper submitted by Mr. Endre Ustor, Special Rapporteur

[Original text: English]
[19 June 1968]

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# I. Introduction

1. At its sixteenth session, the International Law Commission considered a proposal put forward by one of its members 1 to the effect that it should include in its draft

on the law of treaties a provision on the so-called "most-favoured-nation clause". The suggested provision was intended to reserve formally the clause from the operation of the articles dealing with the problem of the effect of treaties and third States (articles 30 to 33 in the 1966 draft).<sup>2</sup>

<sup>&</sup>lt;sup>1</sup> Mr. Jiménez de Aréchaga. See Yearbook of the International Law Commission, 1964, vol. I, 752nd meeting, pp. 184 and 185, paras. 2-11.

<sup>&</sup>lt;sup>2</sup> See Yearbook of the International Law Commission, 1966, vol. II, document A/6309/Rev.1, part II, pp. 101 and 182.

- 2. It was urged in the support of the proposal that the broad and general terms in which the articles relating to third States had been provisionally adopted by the Commission might blur the distinction between provisions in favour of third States and the operation of the most-favoured-nation clause, a matter that might be of particular importance in connexion with the article dealing with the revocation or amendment of provisions regarding obligations or rights of States not parties to treaties (article 33 in the 1966 draft).
- 3. The Commission, however, while recognizing the importance of not prejudicing in any way the operation of most-favoured-nation clauses, did not consider that these clauses were in any way touched by the articles in question and for that reason decided that there was no need to include a saving clause of the kind proposed. In regard to most-favoured-nation clauses in general, the Commission did not think it advisable to deal with them in the codification of the general law of treaties, although it felt that they might at some future time appropriately form the subject of a special study.<sup>3</sup> The Commission maintained this position in the course of its eighteenth session.<sup>4</sup>
- 4. At its nineteenth session, however, the Commission noted that several representatives in the Sixth Committee at the twenty-first session of the General Assembly had urged that it should deal with the most-favoured-nation clause as an aspect of the general law of treaties. In view of the interest expressed in the matter and of the fact that clarification of its legal aspects might be of assistance to the United Nations Commission on International Trade Law (UNCITRAL) the Commission decided to place on its programme the topic of most-favoured-nation clauses in the law of treaties and appointed a special rapporteur to deal with it.<sup>5</sup>
- 5. The purpose of the present working paper is to give an account of the preparatory work already undertaken by the special rapporteur, to outline the possible contents of a report on the topic and to solicit advice and comments from the members of the Commission.

### II. History of the clause

6. Mediaeval origins. Capitulations. Treaty of amity and commerce between the United States of America and France signed at Paris on 6 February 1778.6

Treaty of commerce between Great Britain and France signed at Paris on 23 January 1860, usually known as the Cobden Treaty. Practice of the nineteenth and twentieth centuries. Modern developments:

- (i) General Agreement on Tariffs and Trade signed at Geneva on 30 October 1947;<sup>8</sup>
- (ii) Treaty establishing a free-trade area and instituting the Latin American Free-Trade Association, signed at Montevideo on 18 February 1960, including protocols and resolutions;
- (iii) Proposal submitted by the Soviet Union in 1956 on the preparation within the framework of the United Nations Economic Commission for Europe of an all-European agreement on economic co-operation.<sup>10</sup> This proposal contained an unconditional and unrestricted most-favourednation clause.

[See: Suzanne Basdevant, "La clause de la nation la plus favorisée" in Lapradelle et Niboyet, Répertoire de Droit International, (Paris, 1929), vol. III, p. 464; Georg Schwarzenberger, "The most favoured-nation standard in British State practice", The British Yearbook of International Law, 1945, XXII (London), p. 96; Arthur Nussbaum, A concise history of the law of nations (New York, 1947); Manuel A. Vieira, "La clausula de la nación más favorecida y el Tratado de Montevideo", Anuario Uruguayo de Derecho International, IV, 1965-1966, p. 189].

#### III. Definition of the clause and its various types

- 7. In the most simple form of the clause, the conceding State or promiser undertakes an obligation towards another State—the beneficiary—to treat it, its nationals, goods, etc., on a footing not inferior to the treatment it has been giving or will be giving to the most-favoured third State in pursuance of a separate treaty or otherwise.
- 8. A clause containing a unilateral promise is only of historical significance. It was characteristic of the capitulations and was also included in the peace treaties concluding the First and Second World Wars to the detriment of the defeated countries (see: Versailles treaty with Germany, articles 264 to 267; Trianon treaty with Hungary, articles 203 and 211 (b); Paris peace treaties with Italy, article 82 and with Hungary, article 33).<sup>11</sup>

Today the clause is never unilateral and the States inserting it in their treaties undertake the obligation to grant the most-favoured-nation treatment reciprocally. Thus the clause now represents a combination of as many promises as there are Contracting Parties: two in a

<sup>&</sup>lt;sup>3</sup> See report of the International Law Commission on the work of its sixteenth session in *Yearbook of the International Law Commission*, 1964, vol. II, document A/5809, p. 176, page 21

<sup>&</sup>lt;sup>4</sup> See report of the International Law Commission on the work of its eighteenth session in *Yearbook of the International Law Commission*, 1966, vol. II, document A/6309/Rev.1, Part II, p. 177, para. 32.

<sup>&</sup>lt;sup>5</sup> See report of the International Law Commission on the work of its nineteenth session in *Yearbook of the International Law Commission*, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 369, para. 48.

<sup>&</sup>lt;sup>6</sup> William M. Malloy, Treaties, conventions, international acts, protocols and agreements between the USA and other powers, 1776-1909 (Washington, D.C., 1910), vol. I, p. 468.

<sup>&</sup>lt;sup>7</sup> British and Foreign State Papers (London, 1867), vol. L, p. 13.

<sup>8</sup> United Nations, Treaty Series, vol. 55, p. 188.

<sup>&</sup>lt;sup>9</sup> Multilateral Economic Co-operation in Latin America, 1962, vol. I, p. 57.

<sup>&</sup>lt;sup>10</sup> E/ECE/270, parts I, II and III.

<sup>&</sup>lt;sup>11</sup> British and Foreign State Papers (London, 1919), vol. 112, pp. 129 and 130; *ibid.* (London, 1920), vol. 113, pp. 569, 572 and 573; United Nations, *Treaty Series*, vol. 49, pp. 166 and 167; *ibid.*, vol. 41, pp. 204 and 206.

bilateral treaty and as many in a multilateral treaty as the number of the participants. The reciprocal promises of most-favoured-nation treatment result directly from the common participation of the States concerned in the treaty. The reciprocity in the bilateral mostfavoured-nation clause, being a "formal" and "subjective" reciprocity, does not ensure the material identity or equivalent of the give and take. particularly true as regards the so-called unconditional type of clause. Niboyet points out that "[la clause de la nation la plus favorisée est] une formule de réciprocité abstraite car elle consiste dans l'affirmation d'une méthode sans garantie de ses résultats. [Avec cette clause les Etats] se soucient moins de s'assurer la jouissance d'un droit déterminé que de n'en pas laisser jouir d'autres, s'il ne leur est pas assuré également". 12

Before the First World War, the United States interpreted the most-favoured-nation clause in a narrower sense. According to that interpretation an advantage granted to the nationals of State Y in consideration of a concession made by Y to the United States would accrue to the nationals of the most-favoured State Z only if the United States should receive from Z the same equivalent as was received from Y. The operation of this "conditional" or "reciprocal" most-favoured-nation clause raised vexing questions. Suppose the United States reduced the tariff on Y silk in consideration of a reduction in the Y tariff on American oranges; a lowering of the duties on oranges may, vis-à-vis Z, amount to much less or much more than vis-à-vis Y, not to mention the difficulty of ascertaining the true quid pro quo in the Y transaction. Hence the "conditional" most-favourednation clause procured for the favoured party no more than a contingent bargaining position, and not even that in the case of a free-trade country, like England at that time, which had no concession left to offer. According to Nolde: "On peut . . . dire que la clause conditionnelle, pratiquement, équivaudra toujours à l'absence de toute clause de la nation la plus favorisée".13 The American conception was probably influenced by the common law idea that a valid promise normally requires the giving of a "consideration" on the part of the promises; in America the transfusion of this idea into the law of commercial conventions was not hampered by free-trade notions; quite the contrary, it fitted into the ever growing high protectionism of the country. In intra-European relations, however, the unconditional form and interpretation of the clause were entirely dominant, particularly in the period following the Cobden treaty.14

10. In 1922 the United States made a concession to economic liberalism by turning from the conditional to the unconditional type of the most-favoured-nation clause. The reason for this departure from previous practice was explained as follows by the United States

Tariff Commission: "... the use by the United States of the conditional interpretation of the most-favoured-nation clause has for half a century occasioned, and, if it is persisted in, will continue to occasion frequent controversies between the United States and European countries." 15

## IV. Literature and bibliography

11. There is a considerable literature on the subject. The greater part of it, however, deals with the economic and political rather than the legal aspects of the most-favoured-nation clauses and it is not easy to find guidance on the questions of law which arise.<sup>16</sup>

#### V. Tables of cases

12. See the tables of cases of the Permanent Court of International Justice, the International Court of Justice and of international and national tribunals.

# VI. Previous attempts at codification

13. League of Nations: convention opened for signature by the Pan American Union on 15 July 1934. Sessions of the *Institut de droit international* of 1934, 1936 and 1967.

# VII. Field of application of the clause and scope of the report

- 14. The fields in which most-favoured-nation clauses are applied are extremely varied. They may be classified as follows:
  - (a) International regulation of trade and payments.
  - (b) Treatment of foreign means of transport (ships, aircraft, trains, motor vehicles, etc.).
  - (c) Establishment, personal statute and professional activities of foreign physical and juridical persons.
  - (d) Privileges and immunities of diplomatic, consular and trade missions.
  - (e) Intellectual property (patents, copyrights, etc.).
  - (f) Recognition and execution of foreign judgments and abitral awards.
- 15. The most important of these fields is international trade. Here the clause is a permanent feature of treaties regulating export and import trade in general and questions of tariffs, customs and other duties in particular. This has been implicitly recognized by the International Law Commission when in the decision mentioned above in paragraph 4 it referred to UNCITRAL.

<sup>&</sup>lt;sup>12</sup> J. P. Niboyet, Traité de droit international privé français (Paris, 1938), vol. II, p. 245.

<sup>&</sup>lt;sup>18</sup> Boris E. Nolde, La clause de la nation la plus favorisée et les tarifs préférentiels (La Haye), Académie de droit international, Recueil de cours, 1932, I, vol. 39, p. 91.

<sup>&</sup>lt;sup>14</sup> Arthur Nussbaum, A concise history of the law of nations (New York, revised edition 1954), pp. 205 and 206.

<sup>&</sup>lt;sup>15</sup> Quoted by Charles Hyde, in *International Law*, second revised edition (Boston, 1947), vol. 2, p. 1506, foot-note 13.

<sup>&</sup>lt;sup>16</sup> See the bibliography in Lord McNair, *The Law of Treaties* (Oxford, 1961), p. 272.

<sup>&</sup>lt;sup>17</sup> Manley Hudson, *International Legislation* (Washington, D.C., 1937), vol. VI, p. 927.

16. A thorough study of all the fields in which most-favoured-nation clauses are used would reveal many particular problems.<sup>18</sup> Since, however, the Commission does not intend to deal with the matter from the economic point of view, the Special Rapporteur does not propose to examine the whole spectrum of the use of the clause, notwithstanding some brief excursions in the field of commerce. The Commission may therefore wish to confine itself to the formal and legal aspects of the clause <sup>19</sup> without, of course, dealing with the matter out of the context of realities.

#### VIII. Nature and effect of the clause

- 17. The most-favoured-nation clause has a harmonizing and levelling effect.<sup>20</sup> Although until quite recently the clause appeared mostly in bilateral treaties, it now transcends the bilateralism of commercial relations and produces a tendency to multilateralism. Its effect is automatic. Since the provision ensuring favours to a third party applies automatically vis-à-vis the beneficiary, it renders the conclusion of new individual agreements superfluous.<sup>21</sup> It can be linked to the most diverse systems of economic policy, to free trade as well as to protectionism.<sup>22</sup> Embodied in commercial treaties, it creates favourable conditions for the development of mutual commercial relations between States. It consists of two main factors: the granting of favours and the elimination of discrimination.
- 18. The system of the most-favoured treatment which creates a situation of equal rights for the States participating in international trade does not and cannot affect the economic system of the States. A different solution could not be admitted because it would amount to an interference in the internal life of other countries.<sup>23</sup> In this connexion, it is necessary to study the interrelation of such principles as the sovereign equality of States, the duty of States to co-operate with one another in accordance with the Charter of the United Nations, equal rights and self-determination of peoples, non-discrimination and reciprocity.
- 19. Technically the most-favoured-nation clause is a renvoi to another treaty, whereas the national treatment

clause is a *renvoi* to municipal law.<sup>24</sup> Georges Scelle analysed the clause as follows:

La clause de la nation la plus favorisée ... est un procédé de communication automatique du régime réglementaire de traités particuliers à des sujets de droit d'Etats non signataires ... les nouveaux traités ... jouent ... le rôle d'actes-condition, cependant que la clause elle-même s'analyse en un acte-règle liant ... la compétence des gouvernements signataires ...

La clause agit donc tout ensemble comme une prévention de l'exclusivisme des traités, comme une extension automatique d'un ordre juridique nouveau, et spécialisé, et, en définitive, comme un facteur d'unification du droit des gens.<sup>25</sup>

#### IX. Form of the clause

- 20. The most-favoured-nation clause is part of a treaty as this term is defined in article 2.1 (a) of the 1966 draft articles on the law of treaties. By definition the clause as such cannot be part of an international agreement not concluded in written form. This does not preclude the possibility of granting the most-favoured-nation treatment orally or by tacit agreement. States may also grant such treatment by autonomous action.
- 21. The treaty embodying the clause must be concluded between States; it may be bilateral or multilateral. The collateral agreement—that which accords the favour or preferential treatment to a third State—need not be in written form.

# X. Application of the clause to individuals

22. Although the Contracting Parties promising each other most-favoured-nation treatment are always States, the object of the treatment is not a State but its nationals, inhabitants, juristic persons, groups of individuals, ships, aircraft, products, etc. Thus the treaty embodying a most-favoured-nation clause provides for rights to be performed or enjoyed by individuals. Since the International Law Commission, when codifying the law of treaties, left aside the question of the application of treaties to individuals, it is not proposed to go into this matter in connexion with the study of the clause.<sup>26</sup>

<sup>&</sup>lt;sup>18</sup> Alice Piot, "La clause de la nation la plus favorisée", Revue critique de droit international privé (Paris, 1956), XLV, p. 1.

<sup>&</sup>lt;sup>19</sup> See the statement by Mr. Jiménez de Aréchaga summarized in paragraph 16 of the record of the 741st meeting of the Commission, Yearbook of the International Law Commission, 1964, vol. I, p. 114.

<sup>&</sup>lt;sup>20</sup> Georg Erler, Gründprobleme des internationalen Wirtschaftrechts (Göttingen, 1956), pp. 53 and 99.

<sup>&</sup>lt;sup>21</sup> Georg Dahm, Völkerrecht (Stuttgart, 1958), vol. II, p. 594.

<sup>&</sup>lt;sup>22</sup> *Ibid.*, p. 593.

<sup>&</sup>lt;sup>23</sup> D. M. Genkin, *Printsip naïbolshevo blagopriatstvovania v torgovykh dogovorakh gosudarstv* (The most-favoured-nation principle in the commercial treaties of States), Sovictskoe gosudarstvo i pravo (Soviet State and Law), 1958, 9, p. 22. See also the meeting of experts called in Rome in February 1958 by the International Association of Legal Science.

<sup>&</sup>lt;sup>24</sup> See the statement by Mr. Reuter summarized in paragraph 14 of the record of the 741st meeting of the Commission, Yearbook of the International Law Commission, 1964 vol. I, p. 113.

<sup>&</sup>lt;sup>25</sup> Georges Scelle, "Règles générales du droit de la paix", Académie de droit international, *Recueil de cours*, 1933, IV, vol. 46, pp. 461 and 462.

<sup>&</sup>lt;sup>26</sup> See the commentary to article 66 in the third report on the law of treaties by Sir Humphrey Waldock (Yearbook of the International Law Commission, 1964, vol. II, document A/CN.4/167 and Add.1-3, p. 45) and paragraph 33 of the report of the Commission on the work of its eighteenth session in Yearbook of the International Law Commission, 1966, vol. II, document A/6309/Rev.1, Part II, p. 177.

## XI. Scope of the rights arising out of the clause

23. Scope ratione materiae. There can be no doubt that, through the operation of a specific grant to another country, the clause can only attract, in principle, rights of the same kind or order, or belonging to the same class, as those contemplated therein. The subject matter or category of subject matters must be the same: the grant of most-favoured-nation rights relating to one subject matter or category of subject matters cannot confer a right to enjoy the treatment granted to another country in respect of a different subject matter or category of subject matters.27 It is essential to bear in mind the exact scope of each particular clause for most-favourednation treatment can be claimed only with respect to favours ejusdem generis granted by the promiser to third States. One has to examine each point of the preferential treaty in order to ascertain whether the beneficiary or the third State is more favoured. The comparison cannot take place in globo, which would have no sense, but point by point, in detail. If the new arrangement deals with tariffs, the duties paid by the beneficiary and by the third State have to be examined rubric by rubric, position by position.

- 24. Scope ratione personae. The rules of diplomatic protection apply (nationality, nationality of companies, double nationality, etc.). The question arises, however, whether this matter should be dealt with in the report in view of the observations in paragraph 22 above.
- 25. Territorial scope. The rule of article 25 of the International Law Commission draft on the law of treaties applies.
- 26. Scope ratione temporis. In cases where it is not otherwise expressly provided (e.g. clause pro futuro), the presumption militates for a general unconditional most-favoured-nation treatment.<sup>28</sup> The clause begins to operate when the third State becomes entitled to claim a certain treatment whether or not it actually claims the treatment.<sup>29</sup> The clause ceases to operate when the right of the third State to a certain treatment expires.<sup>30</sup> 27. Scope ratione originis beneficii. The right of the beneficiary to a most-favoured-nation treatment extends to all favours granted by the conceding State to a third State independently of the fact whether the favour granted originated in a treaty, in a mere practice of reciprocity or in the operation of the internal law of the

<sup>27</sup> Sir Gerald Fitzmaurice, "The law and procedure of the International Court of Justice, 1951-1954, miscellaneous points of substantive law", Part II. *The British Yearbook of International Law*, 1955-1956, XXXII (London, 1957). p. 84.

promiser.<sup>21</sup> This right is created by the treaty embodying the most-favoured-nation clause and not by the treaty between the conceding State and the third State, which is a res inter alios acta for the beneficiary.<sup>32</sup> The operation of the clause extends also to preferential treatment granted by multilateral treaties. Some have objected to this view on the ground that multilateral treaties are results of reciprocal concessions and that it would, therefore, be unjust that the beneficiary of the clause should enjoy the preferences without having made concessions himself.<sup>33</sup> But this introduces the idea of the reciprocity of concessions which, while it applies to the conditional most-favoured-nation clause, is alien to its unconditional form.<sup>31</sup>

# XII. Customary and conventional exceptions to the operation of the clause

- 28. The following exceptions can be cited:
  - (i) Customs unions;
  - (ii) Frontier traffic;
  - (iii) Interests of developing countries; 35

<sup>31</sup> Knapp, op. cit., pp. 297 and 306; McNair, op. cit., p. 280; Genkin, op. cit., p. 25. See also the following extract from a study dated 12 September 1936 by the Economic Committee of the League of Nations:

- "Broadly it may be said that the clause . . . implies a right to claim immediately, as of right . . . all reductions of duties and charges . . . accorded to the nation most favoured in customs matters, whether such reductions . . . result from autonomous action or from conventions concluded with third countries." (League of Nations, document 1936.II.B.9, p. 10).
- <sup>32</sup> Anglo-Iranian Oil Co. Case (jurisdiction), Judgment of 22 July 1952, 1.C.J. Reports, 1952, p. 109; Hildebrando Accioly, Traité de droit international public (Paris, 1941), tome II, p. 479; Marcel Sibert, Traité de droit international public (Paris, 1951), tome II, p. 255. For the opposite view see: Dissenting opinion of Judge Hackworth, I.C.J. Reports 1952, p. 141; L. Oppenheim, International Law, vol. I, 8th edition by H. Lauterpacht (London, 1955), para. 522; Paul Fauchille, Traité de droit international (Paris, 1926), tome I, 3° partie, p. 359.
  - 33 Scelle, op. cit., p. 463.
  - 34 Knapp, op. cit., pp. 306 and 307.
- <sup>35</sup> "... New preferential concessions, both tariff and nontariff, should be made to developing countries as a whole and such preferences should not be extended to developed countries. Developing countries need not extend to developed countries preferential treatment in operation amongst them." (General Principle Eight, adopted by the United Nations Conference on Trade and Development, see Proceedings of the United Nations Conference on Trade and Development, vol. I, Final Act and Report, p. 20.
- ... The traditional most-favoured-nation principle is designed to establish equality of treatment... but it does not take account of the fact that there are in the world inequalities in economic structure and levels of development; to treat equally countries that are economically unequal, constitutes equality of treatment only from a formal point of view but amounts actually to inequality of treatment." Hence the necessity of granting preferences in favour of developing countries (see report by the Secretariat of the United Nations Conference on Trade and Development, entitled: "A system of preferences for exports of manufactures and semi-manufactures from developing to developed countries", Proceedings of the United Nations Conference on Trade and Development, Second Session, vol. III. Problems and policies of trade in manufactures and semi-manufactures, document TD/12/Supp.1, document TD/B/C.2/AC.1/7, p. 11, para. 9.

<sup>&</sup>lt;sup>28</sup> Schwarzenberger, op. cit., p. 108: Blaise Knapp, Le système préférentiel et les Etats tiers (Genève, 1959), p. 287.

<sup>&</sup>lt;sup>29</sup> McNair, op. cit., pp. 278-280; Knapp, op. cit., p. 298.

<sup>&</sup>lt;sup>30</sup> Proposal submitted by Mr. Jiménez de Aréchaga; see Yearbook of the International Law Commission, 1964, vol. 1, 752nd meeting, para. 1; Case concerning rights of nationals of the United States in Morocco. Judgment of 27 August 1952, I.C.J. Reports 1952, pp. 191-192; Genkin, op. cit., p. 25. It should be noted that the situation is different in the GATT system (see articles III and XXVIII of the General Agreement on Tariffs and Trade, United Nations, Treaty Series, vol. 55, pp. 204, 206, 208, 276 and 278).

- (iv) Interests of public policy and security of the contracting parties; 36
- (v) Other exceptions.37

# XIII. Exceptions resulting from treaties

29. Article XXV of the General Treaty on Central American Economic Integration, signed at Managua on 13 December 1960,<sup>38</sup> provides that:

The Signatory States . . . agree . . . to maintain the "Central American exception clause" in any trade agreements they may conclude on the basis of most-favoured-nation treatment with countries other than the Contracting Parties.

30. Paragraph 1 of article 10 of the Convention on Transit Trade of Land Locked States, signed in New

York on 8 July 1965, contains the following provision:

1. The Contracting States agree that the facilities and special rights accorded by this Convention to land-locked States in view of their special geographical position are excluded from the operation of the most-favoured-nation clause . . . <sup>39</sup>

#### XIV. Violations of the clause

31. Mention should be made in this connexion of indirect discrimination 40 and of the adoption of unduly specialized tariffs. A classical example of the latter is provided by the Additional Commercial Treaty of 1904 between Germany and Switzerland.41 By this treaty, Germany conceded to Switzerland a reduced tariff for heifer calves "reared at 300 metres above sea level" with "at least one month of grazing at at least 800 metres above sea level". No such calves could be produced by the Netherlands and other most-favoured-nations.

<sup>&</sup>lt;sup>36</sup> Articles XX and XXI of the General Agreement on Tariffs and Trade, United Nations, *Treaty Series*, vol. 55, pp. 262, 264 and 266.

<sup>&</sup>lt;sup>37</sup> Paul Guggenheim, Traité de droit international public, vol. I, p. 104.

<sup>38</sup> United Nations, Treaty Series, vol. 455, p. 90.

<sup>39</sup> United Nations, Treaty Series, vol. 597, p. 54.

<sup>40</sup> McNair, op. cit., p. 299.

<sup>&</sup>lt;sup>41</sup> Recueil officiel des lois et ordonnances de la Confédération suisse (Berne, 1906), tome XXI, Annex A, p. 428.

# REVIEW OF THE COMMISSION'S PROGRAMME AND METHODS OF WORK

[Agenda item 4]

# **DOCUMENT A/CN.4/205/REV.1**

# The final stage of the codification of international law: memorandum by Mr. Roberto Ago

[Original text: French]
[29 July 1968]

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# Progress made in the preparatory stage of the codification of international law and in the adoption of codification conventions

- 1. It is generally recognized that, under the impulse of the urgent needs characteristic of our time, the work of preparing and concluding general conventions codifying international law has by now made considerable progress.
- 2. The International Law Commission of the United Nations, because of its composition, its procedure, the assistance given it by the Secretariat, and the experience it has acquired over the twenty years of its existence, is able to prepare drafts which are not only technically unexceptionable, but also represent carefully selected ground common to the different concepts and trends of the modern world.

3. Diplomatic conferences of representatives of States, which can be easily convened under present United Nations procedures, can have the altogether invaluable assistance of the United Nations legal services in their work and, above all, can base their discussions on the already highly polished drafts prepared by the International Law Commission, so that it is relatively easy for them to adopt, by the required majority, the texts of conventions concerning important sectors of international law.

# II. Difficulties remaining at the stage of final acceptance of codification conventions by States

- 4. Unfortunately, the same satisfactory state of affairs cannot be said to obtain with regard to the final phase of the work of codifying international law; that in which States are required to ratify the conventions or to accede to them.
- 5. Once the text of a convention codifying a given sector of international law has been embodied in the final act of a conference of government representatives, it is entrusted to the Secretary-General of the United Nations, who becomes the depositary. In this capacity, he communicates the text to all States entitled to become parties to the convention, and his main task is to receive the signatures, ratifications, acceptances and accessions of these States. His role is an eminently passive one. He registers the instruments and communications he receives; he verifies their conformity with the general or special provisions applicable to them; he informs the other States of what has happened; when the required minimum number of ratifications or other equivalent instruments has been received, he establishes that the convention has entered into force and notifies States of the date on which it did so. But neither the depositary nor any other United Nations organ is empowered to take any action to bring about or even to hasten the initiation of the procedures which States must follow in order to manifest their will to become bound by a convention.
- 6. In other words, after the adoption of a convention, the work of codification ceases to be a collective action and splits up into a series of individual actions. Each individual State decides for itself whether or not it is advisable to give its final consent to the international instrument, even though, more often than not, it has itself helped to establish the text; it is also the sole judge of the moment when it should give its consent and of the time it needs to reach its decision, if it intends to take one. From this point on, the internal constitutional procedures of each State take precedence over international procedures, and one must wait patiently for the expressions of consent to come in one by one and be fitted together like the pieces of a puzzle. It is only when a sufficiently large proportion of them have come in, that the rules so laboriously prepared, drawn up and approved during the previous stages of the work of codification can officially take effect as rules of law accepted, if not by the whole of the international community, at least by the major part of it. Of course,

- even before this condition is fulfilled, what has been accomplished is not without importance. of a text adopted by a large majority, and sometimes unanimously, by a general conference of State representatives can hardly be called in question, even by a country which has not yet ratified or accepted it and even if it is not yet in force. International arbitral tribunals and courts will also probably tend to recognize this value, especially if, in the text in question, codification stricto sensu preponderates over the development of law. But all this is conditional on the final consent of a large and, in some way, representative part of the States which participated in the preparation and adoption of the convention being given within a reasonable time. On the other hand, if the years go by and only a small number of parties can be gathered round the convention, even the value originally attributed to the text will gradually diminish and the fruits of all these successive efforts may finally be lost.
- The disadvantages of such a situation are easily understandable. Conventions codifying international law are written agreements by which States undertake to redefine, and if necessary to adapt to new circumstances, the unwritten law in force in some important sector of the international legal order. The necessity and urgency of such codification are due mainly to the conditions in which international society is living today and to the need to restore legal stability in spheres where there is a growing tendency to question certain traditionally established rules. But if, after the stages of drafting and adopting codification conventions have been successfully accomplished, there is a failure at the stage of final acceptance, the only practical effect of this lame result may be to make the situation in regard to the law in force still more vague and uncertain, whereas the intention was to re-establish certainty. This is a danger which must not be under-estimated.

# III. Confirmation of the reality of the difficulties brought to light by an examination of the *de facto* situation

8. These reflections are based, not on more or less hypothetical speculations, but on consideration of the facts. To appreciate this, it will be sufficient to glance at the present state of ratifications, accessions and acceptances of the conventions codifying important branches of international law adopted during the last ten years. Of the four Conventions on the Law of the Sea, signed at Geneva on 23-29 April 1958, two, namely those on the High Seas and on the Continental Shelf, have at the present time received respectively forty-one and thirty-eight ratifications, accessions or notifications of succession; that is not very many, though fortunately they are fairly representative of the various groups of members of the international community.<sup>1</sup> The Convention on the Territorial Sea and the Contiguous Zone

<sup>&</sup>lt;sup>1</sup> The Convention on the High Seas entered into force on 30 September 1962. By July 1968, the following States had deposited their instruments of ratification or accession or given notification of succession (in chronological order): Afghanistan,

has received thirty-four ratifications, accessions or notifications of succession,<sup>2</sup> and the Convention on Fishing and Conservation of the Living Resources of the High Seas only twenty-five.<sup>3</sup> Of the two Vienna Conventions, on Diplomatic Relations (1961) and Consular Relations (1963), the first has reached a very satisfactory stage with seventy-seven ratifications, accessions or notifications of succession.<sup>4</sup> The second, on the other hand, has so far received only thirty-three ratifications

United Kingdom of Great Britain and Northern Ireland, Cambodia, Haiti, Union of Soviet Socialist Republics, Malaysia, Ukrainian Soviet Socialist Republic, Byelorussian Soviet Socialist Republic, United States of America, Senegal, Nigeria, Venezuela, Indonesia, Czechoslovakia, Israel, Guatemala, Hungaria, Romania, Sierra Leone, Poland, Malagasy Republic, Bulgaria, Central African Republic, Nepal, Portugal, South Africa, Australia, Dominican Republic, Uganda, Albania, Italy, Finland, Upper Volta, Malawi, Yugoslavia, Netherlands, Trinidad and Tobago, Switzerland, Mexico, Japan and Thailand.

The Convention on the Continental Shelf entered into force on 10 June 1964. By 1967, the following States had deposited instruments of ratification or accession or given notification of succession (in chronological order): Cambodia, Haiti, Union of Soviet Socialist Republics, Malaysia, Ukrainian Soviet Socialist Republic, Byelorussian Soviet Socialist Republic, United States of America, Senegal, Venezuela, Czechoslovakia, Israel, Guatemala, Romania, Colombia, Poland, Malagasy Republic, Bulgaria, Portugal, South Africa, Australia, Denmark, United Kingdom of Great Britain and Northern Ireland, Dominican Republic, Uganda, Albania, New Zealand, Finland, France, Jamaica, Malawi, Yugoslavia, Netherlands, Switzerland, Malta, Sweden, Mexico, Sierra Leone, and Trinidad and Tobago.

- <sup>2</sup> The Convention on the Territorial Sea and the Continguous Zone entered into force on 10 September 1964. By 1967, the following States had deposited their instruments of ratification or accession or given notification of succession (in chronological order): United Kingdom of Great Britain and Northern Ireland, Cambodia, Haiti, Union of Soviet Socialist Republics, Malaysia, Ukrainian Soviet Socialist Republic, Byelorussian Soviet Socialist Republic, United States of America, Senegal, Nigeria, Venezuela, Czechoslovakia, Israel, Hungary, Romania, Sierra Leone, Malagasy Republic, Bulgaria, Portugal, South Africa, Austral, Dominican Republic, Uganda, Italy, Finland, Malawi, Yugoslavia, Netherlands, Trinidad and Tobago, Switzerland, Malta, Mexico, Japan and Thailand.
- <sup>3</sup> Those of the following States (in chronological order): United Kingdom of Great Britain and Northern Ireland, Cambodia, Haiti, Malaysia, United States of America, Senegal, Nigeria, Sierra Leone, Malagasy Republic, Colombia, Portugal, South Africa, Australia, Venezuela, Dominican Republic, Uganda, Finland, Upper Volta, Malawi, Yugoslavia, Netherlands, Trinidad and Tobago, Switzerland, Mexico and Thailand. The Convention entered into force on 20 March 1966.
- <sup>4</sup> The Convention, adopted on 18 April 1961, entered into force on 24 April 1964. By 1967, the following States had ratified the Convention, acceded to it or given notification of succession (in chronological order): Pakistan, Liberia, Ghana, Mauritania, Sierra Leone, Ivory Coast, Tanganyika, Laos, Nigeria, Congo (Brazzaville), Yugoslavia, Czechoslovakia, Nigeria, Congo (Brazzaville), Yugoslavia, Czechoslovakia, Jamaica, Malagasy Republic, Cuba, Guatemala, Argentina, Iraq, Switzerland, Panama, Dominican Republic, Union of Soviet Socialist Republics, Gabon, Algeria, Rwanda, Holy See, Liechtenstein, Byelorussian Soviet Socialist Republic, Japan, United Arab Republic, Ukrainian Soviet Socialist Republic, United Kingdom of Great Britain and Northern Ireland, Ecuador, Costa Rica, Federal Republic of Germany, Iran, Venezuela, Brazil, Poland, Malawi, Mexico, Kenya, Democratic Republic of the Congo, Cambodia, San Marino, Nepal, Hungary, Afghanistan, India, Trinidad and Tobago, Malaysia, Philippines, Salvador, Niger, Austria, Canada, Luxembourg, Mongolia, Malta, Sweden, Dahomey, Ireland, Nigeria, Norway, Spain, Chile, Guinea, Bulgaria, Tunisia, Australia, Honduras, Mali, Somalia, Burundi, Belgium, Barbados and Morocco.

or accessions; <sup>5</sup> these are not at present representative of a large part of the community of States, in particular, because of the relatively short time which has elapsed since the Convention was adopted. Thus the position is not one that can be considered generally satisfactory. In particular, it is not reassuring as regards the fate of the more ambitious attempts at codification planned for the near future.

# IV. Need for the earlier and wider final acceptance of codification conventions by States

- 9. The problem which thus remains to be solved, if the codification of international law is to be successfully carried out in favourable conditions, is that of securing the earlier and wider final acceptance by States of the rules they have jointly drawn up and adopted.
- 10. To form a clear idea of the difficulties to be overcome in this matter, it must be borne in mind that a State is seldom really hostile to the ratification of a convention, particularly if its representatives have voted in favour of that convention at a general diplomatic conference. Political reasons, or more often fears concerning the possible repercussions of certain rules on particular situations, may explain delay in ratification or accession, or even failure to ratify. But in most cases the reasons why a State delays transmission of the instrument formally establishing its consent have nothing to do with any real opposition, either on principle or on a particular point.
- 11. The reasons are mainly inherent in the inertia of the political and administrative machinery of the modern State. The procedure leading to the ratification of a convention is long and complicated.
- The organs of government required to take the initiative in setting the procedure in motion are often overburdened with other tasks and dominated by the need to deal with questions they regard as being of more immediate urgency. The government departments whose prior opinion or consent is required are numerous and not always very familiar with problems of the international legal order. The zeal shown by some offices in seeking out and drawing attention to more or less real imperfections in the instrument being considered, or to alleged difficulties in application, is sometimes worthy of a better cause. Then, too, the democratic development of the State, which assigns to the legislature, and not to the executive, the power to authorize ratification or acceptance of an important convention, also has to be paid for in parliamentary delays. Both governments and parliaments, moreover, are often influenced

<sup>&</sup>lt;sup>5</sup> The Convention, adopted on 24 April 1963, entered into force on 19 March 1967. Up to the present, the following States have ratified the Convention or acceded to it (in chronological order): Ghana, Dominican Republic, Algeria, Tunisia, Upper Volta, Yugoslavia, Gabon, Ecuador, Switzerland, Mexico, United Arab Republic, Kenya, Nepal, Cuba, Trinidad and Tobago, Venezuela, Philippines, Niger, Senegal, Liechtenstein, Costa Rica, Madagascar, Argentina, Ireland, Cameroon, Brazil, Panama, Chile Nigeria, Honduras, Czechoslovakia, Mali, and Somalia.

by considerations of immediate political importance; they are therefore inclined to give priority to internal measures which, in their view, a substantial body of public opinion will naturally regard as being of greater importance. The result is that the ratification of an international convention may easily come to be regarded as a matter that can wait; and the adoption of the measures it necessitates is postponed from one session to the next, from one government to the next, from one legislature to the next, and so on.

- 13. Unfortunately, it also happens that delay in some countries is reflected in, or even provokes, delay in others. The authorities of one country sometimes wait to see what those of other countries will do before finally deciding to proceed with the acceptance of a convention; thus at a particular time the progress of ratifications and accessions reaches a state of stagnation from which it becomes increasingly difficult to free it.
- 14. Now there is no doubt that means could be devised, within the legal system of the countries where treaty approval procedures are particularly complicated, to simplify these procedures and speed up their completion. But it is clear that if substantial over-all results are to be achieved on the international plane, it is also on that plane that we must seek the most suitable means of applying the necessary pressure to the constitutional organs of States to ensure that their decisions on the ratification or acceptance of treaties are taken within a reasonable time.
- In a resolution of 23 September 1926, adopted at its seventh session, the League of Nations Assembly had already given attention to the undue delay involved in the procedure for ratifying agreements and conventions concluded under the auspices of the League, and had invited the Council to call for a report from the Members, every six months, on the progress of ratification, and to consider methods of securing the more rapid bringing into force of those agreements and conventions.6 Later, by a resolution adopted at its tenth session on 24 September 1929 7—thus on the eve of the meeting of the First Conference on the Progressive Codification of International Law at The Hague—the Assembly requested the Council "to set up a Committee to investigate, with the assistance of the Secretariat services, the reasons for the delays which still exist and the means by which the number of signatures, ratifications or accessions given to the conventions referred to above could be increased". In a later resolution, adopted on Mr. A. Giannini's report at the eleventh session, on 3 October 1930, and following the work of the Committee which had been set up in the meantime, the Assembly emphasized that it was "of the greatest importance that all steps should be taken to assure that conventions concluded under the auspices of the League of Nations should be accepted by the largest possible number of countries and that ratification of such conventions should be deposited with the least possible

- 16. The first of those proposals was that each year the Secretary-General should request any of the eighty-eight Members of the League or any non-member State "which has signed any general convention concluded under the auspices of the League of Nations, but has not ratified it before the expiry of one year from the date at which the protocol of signature is closed, to inform him what are its intentions with regard to the ratification of the convention". These requests were to be sent at such a date as to allow time for the replies of governments to be received before the date of the Assembly. The information thus collected was to be communicated to the Assembly.
- 17. The second proposal was that, "at such times and at such intervals as seem suitable in the circumstances, the Secretary-General should, in the case of each general convention concluded under the auspices of the League of Nations, request the Government of any Member of the League of Nations which has neither signed nor acceded to a convention within a period of five years from the date on which the convention became open for signature, to state its views with regard to the convention—in particular, whether such Government considers there is any possibility of its accession to the convention or whether it has objections to the substance of the convention which prevent it from accepting the convention". The information received was to be communicated to the Assembly.
- 18. The third proposal authorized the Council of the League of Nations to consider, in the light of the information thus collected and after consultation with any appropriate organ or committee, "whether it would be desirable and expedient that a second conference should be summoned for the purpose of determining whether amendments should be introduced into the convention, or other means adopted, to facilitate the acceptance of the convention by a greater number of countries".
- 19. Still in conformity with the Committee's suggestions, the Assembly resolution recommended that, "at future conferences... at which general conventions are signed, protocols of signature shall, as far as possible, be drawn up on the general lines of the alternative drafts".9
- 20. The first draft protocol (Annex I) provided: I. That the Government of every Member of the League of Nations or non-Member State on whose behalf the said Convention has been signed undertakes, not later than... (date), either to submit the said Convention for parliamentary approval, or to inform the Secretary-General of the League of Nations of its attitude with regard to the Convention; and II. that "If on... (date) the said Convention is not in force with regard to... Members of the League of Nations and non-Member States, the Secretary-General of the League shall bring

delay". The Assembly recommended that effect should be given to three proposals contained in the report of the Committee.

<sup>&</sup>lt;sup>6</sup> League of Nations, Official Journal, Special Supplement No. 43, Geneva, October 1926, p. 27.

<sup>&</sup>lt;sup>7</sup> Ibid., Special Supplement No. 75, Geneva, 1929, p. 17.

<sup>&</sup>lt;sup>8</sup> Ibid., Special Supplement No. 83, Geneva, October 1930, pp. 12 et seq.

<sup>&</sup>lt;sup>9</sup> Ibid., pp. 14 and 15.

the situation to the attention of the Council of the League of Nations, which may either convene a new conference of all the Members of the League and non-Member States on whose behalf the Convention has been signed or accessions thereto deposited, to consider the situation, or take such other measures as it considers necessary". All signatory or acceding States would undertake to be represented at any conference so convened.

- 21. The alternative draft (Annex II) simply provided for the inclusion in the convention of a *final article*, indicating the number of ratifications or accessions required for the entry into force of the convention, and a *protocol of signature* comprising only provision II of the first draft.<sup>10</sup>
- 22. Unfortunately the general situation did not permit of the Assembly resolution's having any positive result at that time. But it certainly contained some useful suggestions, and any fresh action contemplated today for the purposes under consideration here might be guided by the same ideas.

## V. Practical measures that could be taken to facilitate the attainment of the object in view

- 23. A practical measure of a general nature which might be recommended to facilitate the achievement of these aims would be to extend to all general conventions adopted by the United Nations, or by conferences convened by the United Nations, the system in force in some of the specialized agencies. These are, particularly, the International Labour Organisation and, to some extent, the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Health Organization (WHO)—organizations whose work is reflected mainly or at least partly in the adoption of convention—which possess constitutions capable of furnishing the most suitable model for the provisions to be adopted.
- 24. The constitution of the International Labour Organisation contains, first of all, a rule aimed directly at promoting the ratification of international labour conventions, or at least at ensuring that the competent constitutional organs of Member States are obliged specifically and seriously to examine the possibility of ratifying them. Article 19, paragraph 5 (b), requires the Members of the Organisation to bring every convention adopted by the Conference before their competent national authorities (generally their parliaments) within one year, or in exceptional circumstances within not more than eighteen months, after its adoption. Subparagraphs (c) and (d) of the same paragraph require Members to inform the Director-General of the Inter-

national Labour Office of the measures taken to give effect to the requirements of sub-paragraph (b), and a Member which has obtained the consent of the competent authorities to communicate the ratification of the convention to the Director-General.<sup>11</sup> Paragraph 7 (a) and (b) (i), (ii) and (iii) of article 19 lays down the special procedures for applying these provisions to a federal State. It should be noted that these are old rules, since before they were included in the present Constitution—which entered into force on 26 September 1946—they had already appeared in article 19 of the Constitution of 1919.

- 25. It is time that these provisions do not require governments to propose to the legislative assemblies that effect should be given to the conventions and that they should be ratified; but they are nevertheless under an obligation to submit the conventions promptly to parliament, so that they can be considered at the most representative and responsible level. This avoids the danger of conventions being buried or rejected without due consideration, or even being simply forgotten by governments.
- 26. It should also be noted that if conventions are thus put before the legislative power capable of authorizing the necessary measures to give effect to them, public attention is drawn to the matter, which may in turn as a spur to those required to take a decision. In any case, there is no denying that the application of this rule has resulted in a greater number of ratifications of certain international labour conventions by Member States in a shorter time.
- 27. A rule corresponding in part to the one just described appears in the last sentence of article IV, paragraph 4, of the Constitution of UNESCO, which provides that conventions adopted by the General Conference shall be submitted to the competent national authorities within one year after their adoption.<sup>12</sup>

<sup>&</sup>lt;sup>10</sup> The same resolution further provided that the Council would investigate to what extent, in the case of general conventions dealing with particular matters, it was possible "to adopt the procedure of signing instruments in the form of governmental agreements which are not subject to ratification"; and that general conventions made subject to ratification should not be left open for signature after the close of the conference for a longer period than six months.

<sup>&</sup>lt;sup>11</sup> Constitution of the International Labour Organisation, 1963 edition, Geneva, p. 12. The sub-paragraphs referred to read as follows:

<sup>&</sup>quot;(b) each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than 18 months from the closing of the session of the Conference, bring the Convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action:

<sup>(</sup>c) Members shall inform the Director-General of the International Labour Office of the measures taken in accordance with this article to bring the Convention before the said competent authority or authorities, with particulars of the authority or authorities regarded as competent, and of the action taken by them;

<sup>(</sup>d) if the Member obtains the consent of the authority or authorities within whose competence the matter lies, it will communicate the formal ratification of the Convention to the Director-General and will take such action as may be necessary to make effective the provisions of such Convention".

<sup>&</sup>lt;sup>12</sup> Constitution of UNESCO (16 November 1945), in *Conference Manual*, 1967, Paris, p. 14. The text of the passage in question reads as follows:

- 28. As to the Constitution of WHO, the first part of article 20 requires Members to take, within eighteen months after the adoption of a convention by the Health Assembly, action relative to the Convention's acceptance.<sup>13</sup>
- 29. A second rule in the ILO Constitution, article 19, paragraph 5 (e), requires States which have not ratified a convention to submit a report, at intervals fixed by the Governing Body, stating the difficulties preventing or delaying ratification or the extent to which their law or practice has nevertheless given effect to any provisions of the Convention.<sup>14</sup>
- Through this rule the convention gains the benefit of some measure of de facto implementation by States which have not ratified it. In addition, the provision enables States to reconsider the situation periodically; and it sometimes happens that, faced with the choice between submitting a report specifying in writing the causes delaying or preventing ratification, and initiating the ratification procedure, even belatedly, a government will opt for the second alternative. Lastly, this rule has the advantage of enabling the International Labour Organisation's organs to consider the reasons given in the reports by States, to discuss them, and possibly either to eliminate the difficulties which some States encounter in accepting the convention, or to initiate action for revision of the text if those difficulties are sufficiently generalized and seem to have some justification.
- 31. These obligation to state in writing the reasons for

"Each of the Member States shall submit recommendations or conventions to its competent authorities within a period of one year from the close of the session of the General Conference at which they were adopted."

This provision is supplemented by that of article VIII: "Each Member State shall report periodically to the Organization, in a manner to be determined by the General Conference, . . . on the action taken upon the recommendations and conventions referred to in Article IV, paragraph 4."

<sup>13</sup> Constitution of WHO (of 22 July 1946), in WHO Basic Documents, eighteenth edition, Geneva, 1967:

"Article 20. Each Member undertakes that it will, within eighteen months after the adoption by the Health Assembly of a convention or agreement, take action relative to the acceptance of such convention or agreement . . . In case of acceptance, each Member agrees to make an annual report to the Director-General in accordance with Chapter XIV."

14 Constitution of the International Labour Organisation. "(e) If the Member does not obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member except that it shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention." (Italics by the author of this memorandum). For the situation with regard to a federal State, see also article 19, para. 7 (b), (iv) and (v).

This rule did not appear in the 1919 Constitution of the International Labour Organisation.

non-acceptance of a convention is also laid down in article 20 of the WHO Constitution; <sup>15</sup> and a similar provision is to be found in article 22 of the European Social Charter adopted by the Council of Europe and signed at Turin on 18 October 1961. <sup>16</sup>

- 32. These constitutional rules, it will be observed, are based on the same criteria as were embodied in the draft of the Committee set up by the League of Nations Assembly and in the League Assembly's own resolution. They merely make the criteria more precise by laying down in positive terms the dual obligation to cause the convention to be considered within a specified time by the authorities responsible for the decision to ratify and, failing satisfaction, to report to the appropriate international body, specifying in writing the reasons for that situation.
- 33. The usefulness of such rules in prompting a decision on the acceptance of a general convention cannot fail to become clear when the causes which, in many cases, underlie inaction or delay on the part of organs of State are called to mind. These provisions may provide an effective means of overcoming hesitation and passive resistance, of preventing other questions from being successively given priority for consideration and decision, and of ensuring publicity for discussion of the reasons for or against accepting a convention. The application of such rules to the general conventions of the United Nations, and in particular to conventions adopted by conferences for the codification of international law, could not fail to contribute effectively to the improvement of the work of codification.
- 34. At the same time, the fact that the positive effects of these rules have been experienced in some international organizations in which international conventions are produced in particularly large numbers should be a decisive factor in favour of recommending States to extend the rules to other fields and to generalize them within the United Nations family.

## VI. Means by which those measures could be put into effect

#### A. AMENDMENT TO THE UNITED NATIONS CHARTER

35. As to the means of bringing about this extension, the ideal method would obviously be that of an amendment to the United Nations Charter introducing into the

<sup>&</sup>lt;sup>15</sup> Article 20, second sentence: "Each Member shall notify the Director-General of the action taken, and if it does not accept such convention or agreement within the time limit, it will furnish a statement of the reasons for non-acceptance".

<sup>&</sup>lt;sup>16</sup> See text of the European Social Charter in *United Kingdom Treaty Series*, No. 38 (1965), Cmnd. 2643. Article 22, on "Reports concerning provisions which are not accepted", states: "The Contracting Parties shall send to the Secretary-General, at appropriate intervals as requested by the Committee of Ministers, reports relating to the provisions of Part II of the Charter which they do not accept at the time of their ratification or approval or in a subsequent notification. The Committee of Ministers shall determine from time to time in respect of which provisions such reports shall be requested and the form of the reports to be provided".

Charter rules on the lines of those which have long existed in the constitutions of certain specialized agencies. Member States would then all be subject to the same obligations. Care would, however, have to be taken to ensure that the obligations applied not only to general conventions adopted by the General Assembly itself, but also to general conventions adopted by a conference convened by the United Nations and, in the first instance, to conventions codifying international law.<sup>17</sup>

36. The difficulties involved in adopting an amendment of this kind should perhaps not be exaggerated. It is true that, since the establishment of the United Nations, the first amendments to the Charter to have come into force are those adopted by General Assembly resolutions 1991 A (XVIII) and 1991 B (XVIII) of 17 December 1963, to increase the number of nonpermanent members of the Security Council from six to ten, the membership of the Council from eleven to fifteen, and the membership of the Economic and Social Council from eighteen to twenty-seven. But it is also true that those amendments attracted ninety-three ratifications and entered into force twenty months after their adoption. This means that over two-thirds of the Members (i.e. more than the required number) including the permanent members of the Security Council had, in compliance with the Assembly's recommendation managed to ratify the amendments before the date indicated in the recommendation. It is therefore probable that an amendment which is devoid of political implications, like the one proposed here, and which enjoys the same support, would not require an unduly long time to become applicable.

#### B. RECOMMENDATION BY THE GENERAL ASSEMBLY

- 37. It would also, however, be understandable if, before embarking on the procedure of constitutional amendment, the United Nations should prefer to test the proposed rules in practice, if that were possible, in order to ascertain whether they were effective. There are a number of different methods which may be considered.
- 38. One which springs immediately to mind is that the General Assembly should adopt a recommendation addressed to all Member and non-member States entitled to become parties to a general convention. There are a number of precedents for such a step, including some recent ones: operative paragraph 2 of the abovementioned General Assembly resolutions of 17 December 1963 contains precisely an invitation to States Members to ratify the proposed amendments in accordance with their respective constitutional procedures by 1 September 1965. A resolution of a more general character

was adopted on 20 December 1965 (resolution 2081 (XX)) inviting all Member States to ratify before 1968 a series of conventions dealing with human rights and adopted by the United Nations, by the International Labour Organisation or by UNESCO.

- The proposed recommendation could be of a general character in the sense that it would apply comprehensively and indefinitely to all general conventions adopted in future. It might then invite the governments of States to which it was addressed: (a) to submit the text of any general convention adopted within or under the auspices of the United Nations to the appropriate authorities for a decision on ratification or accession within twelve, or in exceptional cases eighteen, months of the date of the adoption of the convention; and (b) to forward to the Secretary-General of the United Nations either the instrument of ratification or accession or a report indicating what had prevented or delayed ratification or accession. The recommendation could also invite States which had not yet accepted a particular convention to report periodically to the Secretary-General, either on the prospects of subsequent ratification or accession or on the state of their legislation and practice in the matter covered by the convention.18
- 40. Another possibility would be a recommendation referring specifically to a particular convention which had just been adopted, or to a group of conventions already adopted, such as, for example, conventions codifying a particular sector of international law. In that case, one might follow the example of the invitation addressed to member States in connexion with the human rights conventions, though the terms of the invitation would have to be adjusted.
- Of course, a recommendation or an invitation contained in a resolution of the General Assembly has not the same value as a rule embodied in an Article of the Charter or in a separate agreement to the same effect. It does not impose on the governments to which it is addressed a legal obligation to conform to the course of conduct recommended. But the main concern for our purpose here is not whether States consider themselves bound or not bound by a recommendation, but whether in practice they carry it out and, if so, to what extent. New experience shows that recommendations having a general purpose, such as the purpose contemplated here, and emanating from the whole or a majority of the members of the General Assembly, are normally treated by States with the serious consideration they deserve. Their efficacy is proved by facts and that is what counts. And even if their only effect to add a small number of ratifications or accessions to the number which a general convention would have attracted in any event, their utility would still be beyond dispute. At all events, once an actual trial had been made, it would probably be easier to convert these mere exhortations into legal obligations by the appropriate procedures.

<sup>&</sup>lt;sup>17</sup> The introduction into the Charter of rules of this kind would not have automatic effect for the few non-member States that might be invited to participate in a conference. It would be easy to overcome this difficulty by setting out the obligations laid down in those rules in the letters of invitation addressed by the United Nations Secretary-General to the governments of those States, and requesting them in the case of an affirmative reply, to indicate expressly their acceptance of those obligations.

<sup>&</sup>lt;sup>18</sup> The General Assembly could, in turn, examine such reports periodically or have them examined by a special committee, and decide, if need be, that measures should be taken, including, in exceptional cases, the revision of a convention if the majority refused to accept it.

## C. Adoption of appropriate protocols of signature at codification conferences

- 42. A different procedure might be considered for conventions adopted by a general conference of representatives of States, such as conventions codifying international law. This procedure might, under certain conditions, induce States entitled to become parties to a convention to assume genuine legal obligations in respect of ratification or accession; it could also draw on the provisions considered for the same purpose by a League of Nations ad hoc Committee and endorsed by the League Assembly in a resolution of 3 October 1930.<sup>19</sup>
- 43. The United Nations General Assembly could adopt a resolution recommending that, at conferences held under the auspices of the United Nations at which general conventions were adopted, a protocol of signature should be drawn up similar to a model included in the resolution. States signing the convention would undertake by that protocol to take the measures mentioned therein, which would be either the submission of the convention, within a specified period, to the appropriate authorities for a decision on ratification or accession or the transmission of reports to the Secretary-General of the United Nations.
- 44. There is no doubt that the clauses of the protocol would acquire binding force by signature, despite the fact that the protocol be attached to a convention expressly providing for the requirement of ratification.<sup>20</sup>
- 45. The obligations laid down in the clauses of the protocol would, however, be binding only upon the signatory States and the time limits set for ratification or accession would only run from the date of signature. Consequently, this system would obviously be less general and less rapid in its effects than the adoption of a constitutional rule specifying that such obligations result from the adoption of a convention and are binding on all members of the General Assembly and all States participating in a conference convened by the United Nations. But there can be no doubt it would definitely help to secure a wider and speedier acceptance of general conventions.
- 46. To complete the list of possible courses of action, if the adoption of a protocol of signature, as described above, were not provided for in a United Nations General Assembly resolution as a uniform measure applying to all future conferences convened by the United Nations, then it could be decided on independently at

<sup>19</sup> League of Nations, Official Journal, Special Supplement No. 83, October 1930, pp. 12 et seq.

the close of a diplomatic conference for application to the convention adopted by the conference. This solution, although more limited in scope, might nevertheless constitute a useful precedent and be adopted to advantage without having to wait for a decision of principle by the United Nations.<sup>21</sup>

#### VII. Possible action by the United Nations to gain the support of public opinion for codification

47. The review of these measures—the adoption of which would seem to be advisable in one way or another-cannot be completed without drawing attention once again to how essential it is in any event, for the purposes contemplated here, to be able to count on the support, in the different countries, of an active public opinion alive to the importance of the issues involved. This support, which is valuable at any time during the process of the codification of international law, may become decisive in the final stage which, as has been stressed, takes place at the national level. The mobilization of the forces capable of exerting an influence on the administrative, governmental and parliamentary authorities and of spurring them on to take the necessary action, is a task to which the United Nations might usefully apply itself. If, when relaunching his idea of instituting an international law decade, the Secretary-General were to consider devoting it mainly to a campaign for promoting the generalized acceptance of conventions codifying international law and of the rules embodied in them; if, with that object mainly in view, it were decided to promote the establishment of national advisory committees for international law, on the lines of the national advisory committees for human rights, dedicated to the idea of the progress of this law and the strenghthening of its authority over the community of States; then an instrument would probably be forged which would be capable of giving significant support to the efforts to bring to a successful conclusion the task -so arduous and delicate, so set about with obstacles and dangers, and yet today so indispensable-of codifying international law.

<sup>&</sup>lt;sup>20</sup> The same would apply if the clauses, instead of forming a separate protocol, were included in the final clauses in the text of the convention itself.

<sup>&</sup>lt;sup>21</sup> A measure that might perhaps be even easier to carry out would be to persuade the diplomatic conference to adopt a resolution containing a simple recommendation to the governments of the participating States. It should be noted that the practice of adopting recommendations side by side with convenions at diplomatic conferences is spreading. In this connexion see the commentaries by Antonio Malintoppi—"Il valore delle raccomandazioni adottate da conference delle Nazioni Unite" in Rivista di Diritto Internazionale (Milano, 1961), vol. 44, fasc. 4, pp. 604-623. However, an appeal of this kind made by the conference to the participant States could have no legal effect: it is also doubtful whether it could have the authority and efficacy of a recommendation of principle emanating from the General Assembly of the United Nations.

#### **CO-OPERATION WITH OTHER BODIES**

[Agenda item 5]

#### **DOCUMENT A/CN.4/207**

Report of the ninth session of the Asian-African Legal Consultative Committee by Mr. Mutsafa Kamil Yasseen, Observer for the Commission

[Original text: English/French]

[1 August 1968]

- 1. In accordance with the wish expressed by Sir Humphrey Waldock, Chairman of the nineteenth session of the International Law Commission and with the decision taken in that connexion by the Commission at that session, I had the pleasure of attending, as an observer, the ninth session of the Asian-African Legal Consultative Committee, which was held at New Delhi from 18 to 29 December 1967. The session was attended by delegations from Ceylon, Ghana, India, Indonesia, Iraq, Japan, Pakistan and the United Arab Republic; observers for Algeria, Iran, Jordan, Malaysia, Mongolia, the Philippines, Sierra Leone, Singapore, the International Law Commission, the League of Arab States and the International Law Association of the USSR were also present.
- 2. Mrs. Indira Gandhi, the Prime Minister of India, addressed the opening meeting, and like her father, the late Mr. Jawaharlal Nehru, when inaugurating the first session of the Committee, she expressed the hope that the emergence of African and Asian countries as independent nations would make an impact on the scope and content of international law and would make it a law of universal application, a law which would protect the legitimate interests of all members of the international community.
- <sup>1</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 370, para, 53.

- 3. The Head of the delegation of India (Mr. C. K. Daphtary) and the Head of the delegation of Ghana (Mr. R. J. Hayfron-Benjamin) were elected President and Vice-President, respectively. The secretariat for the session was directed by Mr. Ben Sen, Secretary of the Committee, whose term of office was renewed "in an honorary capacity" for two years.
- 4. At its first meeting, the Committee adopted the following agenda:
  - I. Administrative and organizational matters
    - 1. Adoption of the agenda
    - 2. Election of the President and Vice-President
    - Election of the Secretary for the term April 1968-March 1970
    - 4. Admission of observers to the session
    - Consideration of the Secretary's report and the Committee's programme of work
    - 6. Date and place of the tenth session
- II. Matters arising out of the work done by the International Law Commission under article 3 (a) of the Statutes
  - Consideration of the report of the Committee's observer (Mr. J. H. Rizvi) on the work done by the International Law Commission at its nineteenth session
  - Law of treaties (Consideration of the draft articles adopted by the International Law Commission)
- III. Matters referred to the Committee by the Governments of the participating countries under article 3 (b) of the Statutes Law of international rivers (referred by the Governments of Iraq and Pakistan) for preliminary statements only

- IV. Matters of common concern taken up by the Committee under article 3 (c) of the Statutes
  - Relief against double taxation (referred by the Government of India)—Consideration of the reports of the Sub-Committees appointed at the seventh and eighth sessions
  - 2. Judgment of the International Court in the South West Africa cases (referred by the Government of Ghana)
- 5. The main items considered by the Committee will now be briefly reviewed:

Questions arising out of the judgment of the International Court of Justice in the South West Africa cases <sup>2</sup>

- 6. This item was referred to the Committee at its eighth session by the representative of Ghana. On that occasion the Committee discussed it briefly and decided to place it on the agenda of the ninth session as a priority item. On the basis of a report submitted by the secretariat, and following a statement by Mr. Hidayatuccah, Judge of the Supreme Court of India, who had been invited for that purpose in his capacity as an expert, the Committee held a general debate on various aspects of the International Court's judgment.
- 7. The members of the Committee criticized the judgment from both the legal and political points of view; they acknowledged that the United Nations was competent to solve the problem of South West Africa and endorsed the resolutions on that subject already adopted by the General Assembly. Some members pointed out in that connexion that the main forms of civilization and the principal legal systems of the world should be more equitably represented in the membership of the International Court of Justice.
- 8. In conclusion, the Committe considered that it was not necessary to make recommendations at the present stage, "considering that action is being taken in regard to South West Africa by the United Nations". However, the Committee "decided that the subject be placed on the agenda of its next session and the secretariat be directed to collect any further material that may be relevant for consideration of this question, and to place the same before the Committee at the next session".

#### Law of international rivers

9. This item was referred to the Committee by the Government of Iraq and the Government of Pakistan, whose representatives stressed the importance of the subject for the countries of Africa and Asia, particularly with regard to agriculture. The representative of Pakistan even said that the formulation of rules, which could help solve the problems relating to international rivers, was of great importance to the Asian and African countries in the task of solving the problems of hunger and famine. The Committee decided to invite the secretariat to collect material on the subject and to prepare a brief for consideration by the Committee.

#### Relief against double taxation

- 10. This item was referred to the Committee by the Government of India. It was first taken up at the fourth session, held at Tokyo, since when successive Sub-Committees have continued to examine it. At its ninth session the Committee had before it two reports of the Sub-Committees established at the seventh and eighth sessions respectively.
- 11. After a general discussion, the Committee expressed the view that the principles formulated by the two Sub-Committees were generally acceptable. It was stressed that "the conflicting interests of the countries, the varied pattern of their taxing laws, different tax structures and the absence of a universally acceptable system of tax distribution among various countries would make the task of proposing any model agreement on this subject extremely difficult".
- 12. Furthermore, "having regard to the fact that the Committee's functions under its statutes are of an advisory character, the Committee considered that the appropriate manner in which it could deal with this subject was to formulate the principles for avoidance of double or multiple taxation, and it would be up to each participant State to decide as to how it would give effect to the Committee's recommendations whether by entering into multilateral or bilateral arrangements or by incorporating the principles formulated by the Committee in their own municipal laws. In this view of the matter the Committee has formulated the general principles on the subject." <sup>3</sup>

#### Matters arising out of the work done by the International Law Commission

13. At the request of the President of the Committee, I made a statement on behalf of the International Law Commission in which I introduced the Commission's report on its nineteenth session. After a general debate on the relations between the Commission and the Committee, the latter adopted resolution 14, which states, among other things, that "The Committee places on record its appreciation and thanks to the International Law Commission for its interest in this Committee's work and for sending a member of the Commission to represent it at the present session of the Committee, and expresses the hope of continued cooperation.... [It] directs the Secretary to take appropriate steps in consultation with the Liaison Officers for the Committee to be represented by an observer at the twentieth session of the Commission."

#### Law of treaties 5

14. The rest of the debate was devoted exclusively to the Commission's draft articles on the law of treaties.

<sup>&</sup>lt;sup>2</sup> South West Africa, Second Phase, Judgment, I.C.J. Reports 1966, p. 6.

<sup>&</sup>lt;sup>3</sup> These general principles are reproduced in annex B.

<sup>&</sup>lt;sup>4</sup> This statement is reproduced in annex D.

<sup>&</sup>lt;sup>5</sup> For the draft articles on the law of treaties, see Yearbook of the International Law Commission, 1966, vol. II, document A/6309/Rev.1, Part II, pp. 171-187.

The Committee had before it a report submitted by the Special Rapporteur appointed at the eighth session (Mr. Sompong Sucharitkul) and a brief prepared by the secretariat on the historical background to the articles. The Committee also had before it the views on the various draft articles expressed by the African and Asian members of the International Law Commission and by the African and Asian representatives in the Sixth Committee of the General Assembly. The draft articles were allocated to three Sub-Committees, whose report were examined at several meetings by the Committee as a whole. I was obliged to intervene in the debate on several occasions, at the Committee's request, to clarify certain points and explain why the Commission had decided to adopt one solution rather than another.

15. The Committee expressed appreciation for the Commission's work on the law of treaties, but had some comments to make on certain articles <sup>6</sup> and decided to transmit those comments to Member States.

It has generally been agreed that the Committee should indicate in a general manner the points which require consideration by the Conference of Plenipotentiaries and that it would refrain from suggesting any text by way of amendment to the articles as that would be really a matter for the Drafting Committee appointed by the Conference of Plenipotentiaries.

Lastly, the following decision was taken:

The Committee decides that this subject be placed on the agenda of its next session as a priority item for its final consideration, particularly on the points that may arise in the course of deliberations in the Conference of Plenipotentiaries during its 1968 session, so as to enable the Committee to consider and recommend on those points for consideration of the Governments before the second part of the Conference of Plenipotentiaries is held in 1969. The Committee directs the Secretary, in consultation with the Liaison Officers, to take appropriate steps to nominate an observer on behalf of the Committee to attend the Conference of Plenipotentiaries.

16. In conclusion, I must express my admiration for the spirit which prevailed during the discussions of a very high standard which took place in the Committee, a spirit which sought to harmonize the legitimate aspirations of Africa and Asia with the need for a reasonable and balanced universal approach. I must also express my admiration for the studies made by the Secretary and his staff and for the valuable work produced during the session. I take particular pleasure in expressing to the President and members of the Committee and its secretariat my deep gratitude for the warm welcome they gave me, and to Mr. Nagendra Singh, member of the International Law Commission, and Mr. Krishna Rao, Legal Counsel of the Indian Ministry for Foreign Affairs, my sincere thanks for their kindness and civility.

#### **ANNEXES**

#### ANNEX A

List of heads of delegations and observers at the ninth session of the Asian-African Legal Consultative Committee

[not reproduced]

#### ANNEX B

General principles recommended for adoption in international agreements for avoidance of double or multiple taxation of income

#### PART I

#### General

- 1. Relief against double taxation of the same income by two or more countries is given either unilaterally or by the countries concerned entering into bilateral or multilateral agreements providing for such relief.
- 2. Bilateral agreements which take care of the special relations between the two countries afford the most practical method for providing relief against double taxation.
- 3. The laws of the Contracting States should contain provisions empowering their governments to grant relief against double or multiple taxation unilaterally and also to enter into bilateral or multilateral treaties or agreements setting forth the principles

for granting such relief on a reciprocal or non-reciprocal basis and to implement them.

- 4. The laws in force in each of the Contracting States will govern the assessment and taxation of income in that State except where express provision to the contrary is made in the agreement.
- 5. The agreements should cover the taxes on income and capital gains imposed under the law of each of the Contracting States.
- 6. The agreements should provide that they will also apply to any other taxes of a substantially similar character imposed in each of the Contracting States subsequent to the date of the agreements.
- 7. The Contracting States shall not impose upon the nationals of other countries more burdensome taxes than they impose upon their own nationals.

#### PART II

#### Definitions

- 8. The agreements should contain definitions of important terms used therein, such for example as "person", "company", "enterprise of a Contracting State", "resident of a Contracting State", "permanent establishment", etc.
- 9. The term "person" includes natural persons, companies and all other entities which are treated as taxable units under the tax laws of the respective Contracting States.

<sup>&</sup>lt;sup>6</sup> These comments are reproduced in annex C.

- 10. "Company" shall mean any body corporate or entity which is treated as a body corporate for tax purposes under the tax laws of the respective Contracting States.
- 11. "Enterprise of a Contracting State" shall mean an industrial or commercial enterprise or undertaking carried on in that Contracting State by a resident of that State.
- 12. The expression "resident of a Contracting State" shall mean any person who under the law of that State is a resident of that State for the purpose of taxation in that State and not a resident of the other Contracting State for the purpose of taxation in that other State.
- 13. A "company" shall be deemed to be a resident of the Contracting State in which its business is wholly managed and controlled
- 14. (i) The term "permanent establishment" shall mean a fixed place of business in which the business of the enterprise is wholly or partly carried on and shall include a place of management, a branch, an office, a factory, a workshop, a warehouse, a mine, a quarry or other place of extraction of natural resources and a permanent sales exhibition.
  - (ii) An enterprise of one of the Contracting States shall be deemed to have a permanent establishment in the other Contracting State if it carries on in that other State a construction, installation or assembly project or the like.
  - (iii) The use of mere storage facilities shall not constitute the place a permanent establishment; or the use of mere storage facilities or the maintenance of a place of business exclusively for the purchase of goods or merchandise and not the purpose of display or for any processing of such goods or merchandise in the territory of purchase shall not constitute a permanent establishment.
  - (iv) A person acting in one of the Contracting States for or on behalf of an enterprise of the other Contracting State shall be deemed to be a permanent establishment of that enterprise in the first mentioned State if—
    - (a) he has and habitually exercises in the first mentioned State a general authority to negotiate and enter into contracts for or on behalf of that enterprise, or
    - (b) he habitually maintains in the first mentioned State a stock of goods or merchandise belonging to that enterprise from which he regularly delivers goods or merchandise for or on behalf of the enterprise, or
    - (c) he habitually secures orders in the first mentioned enterprise wholly or almost wholly for the enterprise itself or for the enterprise and other enterprises which are controlled by it or have a controlling interest in it.
  - (v) A broker of a genuinely independent status who merely acts as an intermediary between an enterprise of one of the Contracting States and a prospective customer in the other Contracting State will not be deemed to be a permanent establishment of the enterprise.
  - (vi) The fact that a company is a resident of a Contracting State and has a subsidiary company which is a resident of the other Contracting State or which carries on trade or business in that other State (whether through a permanent establishment or otherwise) shall not of itself constitute that subsidiary company a permanent establishment of its parent company or shall not constitute either company a permanent establishment of the other.

#### PART III

#### Allocation of tax jurisdiction

- 15. Income from immovable property may be taxed by the State in which such property is situated.
- 16. Royalties and profits from operation of mines, quarries and of extraction and exploitation of other natural resources may be taxed by the State in which such mining or quarrying operations are carried on.
- 17. Profits derived by a resident of one of the Contracting States from operations of international shipping or flights may be taxed by the State in which the enterprise is registered or where its business is wholly managed or controlled unless the vessel or aircraft is operated wholly or mainly between places in the other Contracting State. In the alternative, if this allocation is considered disadvantageous to participating countries this source may be allocated exclusively to the taxing jurisdiction of the State in which the profits are earned.
- 18. Industrial and commercial profits of an enterprise of one of the Contracting States should be taxed in the other Contracting State only if that enterprise carries on trade or business in that other Contracting State through a permanent establishment situated therein. Such taxes should be levied only on such profits of that enterprise as are attributable to the permanent establishment situated in the taxing State.
- 19. Income from movable capital, such as dividends paid by a company, interest on bonds, loans, securities or debentures, issued by governments, local authorities, companies or other corporate bodies should be taxed in the country where the investment is made and not in the country of residence of the recipient of such income.<sup>8</sup>
- 20. Capital gains derived from the sale, exchange or transfer of a capital asset, whether movable or immovable, should be taxed only in the State in which the capital asset is situated at the time of such sale, exchange or transfer. For this purpose the situs of the shares of a company should be deemed to be the country in which the company is incorporated. (Capital asset would not include movable property in the form of personal effects like wearing apparel, jewellery and furniture held for personal use by the taxpayer or any member of his family dependent on him.) b
- 21. Remuneration, including pensions and gratuities, paid in one of the Contracting States for services rendered therein out of government funds or funds belonging to a local authority in the other Contracting State, should not be taxed in the first mentioned Contracting State.
- 22. Profits or remuneration for professional services (including services as a director) derived by an individual who is a resident of one of the Contracting States may be taxed in the other Contracting State only if such services are rendered in the territory of that other State.
- 23. A professor or a teacher from one of the Contracting States who receives remuneration for teaching during a period of temporary residence not exceeding two years at a university, college, school or other educational institution in the other Contracting State should not be taxed in that other State in respect of such remuneration.

<sup>&</sup>lt;sup>a</sup> The delegation of Japan stated that the principal taxing authority should be vested in the country of residence of the recipient of income and, therefore, the tax to be charged in the country where the investment is made should be restricted to certain limits.

<sup>&</sup>lt;sup>b</sup> The delegation of Japan stated that capital gains in regard to movable property other than those pertaining to a permanent establishment or to a fixed base may be taxed in the country of residence of the alienator.

- 24. An individual from one of the Contracting States who is temporarily present in the other Contracting State solely as—
  - (a) a student at a university, college or school, or
  - (b) as a business apprentice, or
- (c) as a recipient of a grant, scholarship or other allowance or award for the primary purpose of study or research, from religious, charitable, scientific or educational organizations,

should not be taxed in that other Contracting State in respect of remittances from abroad for the purposes of his maintenance, education or training, in respect of a scholarship and in respect of any amount representing remuneration from an employment which he exercises in that other territory for the purpose of practical training.

25. An individual from one of the Contracting States who is present in the other Contracting State solely as a student at a university, college or school in that other State, or as a business apprentice, should not be taxed in that other State for a period not exceeding three consecutive years in respect of remuneration from employment in such other State if the remuneration (a) constitutes earnings necessary for his maintenance and education and (b) does not exceed a certain sum to be settled by agreement between the Contracting States.

26. Royalties and profits earned as a consideration for the use of, or the right to use any copyright, patents, trade marks, trade names, designs, etc. will be taxable in the State in which such property is used.

#### PART IV

#### Miscellaneous

- 27. As a means of giving relief against double taxation of the same income the Contracting States may as far as possible adopt the method of exemption in preference to the tax credit method. Alternately they may use a combination of both the methods.
- 28. If the tax credit method is used in preference to the exemption method, the agreements should provide that special tax concessions which are given by way of incentive measures designed to promote economic development, such as tax holidays or development rebates, should not be taken into consideration in granting relief against taxation and full credit should be given for the tax which would normally have been payable but for such concessions.°
- 29. The Contracting States should exchange such information as is necessary for carrying out the provisions of the agreements. The information so exchanged should be treated as secret and should not be disclosed to any persons other than those concerned with the assessment and collection of taxes which are the subject of the agreement. No information should be exchanged which would disclose any trade, business, industrial or professional secret or any trade process.
- 30. If the action of the taxing authorities of one of the Contracting States results in double taxation contrary to the provisions of the agreement, any taxpayer may make representations to the competent authority of the Contracting States of which the taxpayer is a resident and that authority should be given the right to present his case to the appropriate authorities of the taxing State. Every effort should be made to come to an

agreement with a view to avoiding double taxation and ensuring fair implementation of the agreement between the two States.

#### ANNEX C

## Comments on the draft articles prepared by the International Law Commission \*

Participation in general multilateral treaties

The majority of the Committee considers that the right of every State to participate in general multilateral treaties is of vital importance to the progressive development of international law. General multilateral treaties concern the international community as a whole. If international law is to be in keeping with the real interest of the international community and if universal acceptance of the progressive development of this legal order is desirable, then the participation of every member of the community is essential. The majority of the Committee, therefore, considers that the articles on the law of treaties should contain a provision regarding participation in general multilateral treaties.

One member, however, holds that in view of the principle of freedom of contract and the existing practice of the international conferences held under the auspices of the United Nations and the possible complications that it may imply, it would be better for the draft articles to be silent on this point.

#### Article 5

The Committee is of the opinion that paragraph 2 of this article requires reformulation to include within its scope not only the units of a federation but all kinds of unions of States. It, therefore, suggests that paragraph 2 should incorporate the following principle:

"In case of union between States, the capacity of Member States as well as the capacity of the units of a Federal State to conclude treaties will be subject to the respective constitutional provisions of that union or the Federation."

#### Article 7

The majority of the Committee is of the opinion that this article should be amended so as to include a provision to the effect that confirmation of the act performed without authority should be made within a reasonable time. This is suggested with a view to reducing any possibility of abuse. The minority has, however, no objection to the retention of the present text of article 7 of the International Law Commission's draft.

#### Articles 10 and 11

The majority of the Committee considers that there is a lacuna in these provisions as no provision has been made to cover cases which do not fall either within article 10 or within article 11. It felt that such cases are considerable and that a provision should be made, if possible, by linking up the two articles to cover cases which are not covered by the present text of these articles.

The majority is also in favour of the deletion of the words "or was expressed during the negotiation" in article 10.1 (c).

The minority of the Committee is in favour of retention of the present text of the draft articles.

<sup>&</sup>lt;sup>c</sup> The delegation of the United Arab Republic pointed out that the United Arab Republic tax laws grant certain exemptions on tax on profits of an industrial or commercial establishment in free zones and also on wages and salaries paid by such establishments in free zones to foreigners in their employment. The United Arab Republic delegation is of the view that such concessions also should not be taken into account in granting relief against double taxation.

<sup>\*</sup> For the draft articles on the law of treaties, see Yearbook of the International Law Commission, 1966, vol. II, document A/6309/Rev.1, Part II, pp. 177-187.

#### Article 15

The Committee considers this article to contain a new norm of international law which could be supported as progressive development of international law.

The majority of the Committee is, however, in favour of deletion of clause (a) of this article as in its view the object of a proposed treaty might not be clear during the progress of negotiations. Some of the delegations are of the view that a provision like clause (a) of this article may hamper negotiations for a treaty.

Some members, however, are in favour of the retention of the present text.

#### Articles 27 and 28

The Committee discussed the provisions of these two articles in great detail. There was some difference of opinion in the Committee in regard to how the question of interpretation of treaties should be approached. There were on the one hand those who considered the task of interpretation to be the elucidation of the text of a treaty and, on the other, those who held the discovery of the true intention of the parties to be the paramount function of interpretation. One view expressed was that the provisions of these articles do not sufficiently take into account that the main aim of interpretation is to look for the real intention of the parties and that these articles should be suitably modified to bring out that position. Another view was that "preparatory work" as a source of determination of real intention of the parties should be included in article 27 so as to make it a primary means of interpretation and that this source should not be assigned a secondary place in article 28. A suggestion was, therefore, made for assimilation of article 28 to article 27 as a new sub-clause (d) to clause 3 of article 27.

The majority, while appreciating that it is basic to the whole process of interpretation that the goal should be the ascertainment of the true intention of the parties, concludes that the primary emphasis should be placed on the intention as evidenced by the text, that is to say, the actual terms of the treaty, and that it would not be either necessary or desirable to state specifically in article 27 that the object of interpretation is the discovery of the intention of the parties. According to the majority view, this is manifest from the formulation of the general rule in clause (1) which is a succinct statement of the essential rule. They feel that by the further elaboration of what is meant by the expression "the text" in clause (2) and by the indication of additional sources of interpretation in clauses (3) and (4), the International Law Commission's draft has taken full account of the paramountcy of the element of intention. The majority, therefore, is of the opinion that the draft rules of interpretation as formulated by the International Law Commission are quite adequate to the ascertainment of intention and are an inherent body of rules emphasizing the unitary character of the interpretative process. The majority is also of the view that the distinction contemplated in articles 27 and 28 should be maintained. They feel that a formulation of the rule which does not stress sufficiently the primacy of the text in relation to the extrinsic sources of interpretation would tend to considerable uncertainty and that there should be no room for recourse to preparatory material if the textual reading establishes a clear meaning in accordance with the rules specified in article 27. The majority is further of the view that though no rigid distinction is possible and that a nexus exists between the several sources, it is unable to accord preparatory material a parity of status with the primary criteria mentioned in article 27 and is of the opinion that the two articles should be separate and distinct.

#### Articles 30, 31, 32 and 33

The Committee considered the provisions of this group of articles which deal with the rights and obligations of third States. The majority of the Committee is of the view that article 32 should be amended by deletion of the words "and the State assents thereto. Its assent shall be presumed so long as the contrary is not indicated" and substitution therefor of the words "and the State has expressly consented thereto". The majority is also of the opinion that article 30 should be amended by interpolation of the word "express" before the word "consent". The majority is of the opinion that as in the case of obligations, the express consent of such third State should also be a condition precedent to the creation of a right. Whatever may be the true position in regard to stipulations for the benefit of a third party in systems of municipal law, in international relations the express consent of such third State be required even in the case of the conferment of rights consistently with the principle of sovereign equality of States. The majority feels that such a requirement would also reduce any uncertainty in regard to the question whether a third State has assented to the conferment of the right, and insistence on such consent by the third State or States would in the case of multilateral treaties tend to ensure the effective participation of all States in treaties of a law-making character. The majority is also of the view that if express consent of the third State is stipulated as a requirement it would help to reduce the danger of the creation of rights which carry with them contingent obligations to which such third State may well be deemed to have assented by its silence.

The minority, however, is of the view that the draft articles as drawn up by the International Law Commission are adequate.

#### Article 37

A view was expressed in the Committee that the modifications contemplated in article 37 should be in writing so as to obviate any uncertainty. The majority, however, was in favour of the provision as it appears in the draft articles.

#### Article 38

A view was expressed in the Committee that this article should be deleted as subsequent practice was too vague and uncertain a criterion for modification of a treaty. Another view is that there could be no objection to accepting this article as in the present draft with the clarification that the "parties" in this article meant all the parties to a treaty. A third view was that there was no objection to the present text as in the International Law Commission's draft.

#### Article 39

The principles contained in this article were generally found to be acceptable to the majority. A delegation was, however, of the view that the word "only" in paragraphs 1 and 2 of this article should be deleted,

#### Article 43

The Committee considered the provisions of this article in some detail. The majority was in favour of retaining the article as it is. A view was however expressed that the provision of article 43 as drafted might lead to practical difficulties, and therefore should be brought in consonance with the principle embodied in Article 110 of the United Nations Charter. Moreover, it was suggested that if the Committee retains the principle adopted in article 43, the expression "constitutional law" should be substituted for the words "internal law".

#### Articles 46 and 47

One delegation was in favour of deletion of these articles as in its view their provisions introduce an element of doubt into legal security and order. In the view of that delegation the provisions of article 47 in regard to the concept of corruption were too vague.

#### Article 49

The majority of the Committee is in favour of the addition of the words "or by economic or political pressure" at the end of the article. The minority is, however, in favour of the retention of the article as in the draft.

#### Article 50

While the majority had no objection to the present draft being retained, one delegation expressed the view that this is one of the concepts which may cause dispute in its application. In the view of that delegation it was desirable to designate or establish a body which is invested with standing competence to pass objective and purely legal judgements upon such disputes when they have not been solved through diplomatic negotiations or some other peaceful means.

#### Articles 58 and 59

One delegation was of the view that these articles should be so formulated as to provide a safeguard against situations in which the destruction of the object or a change in the fundamental circumstances is brought about by the voluntary act of the party itself.

#### Article 60

The majority of the Committee is in favour of the addition of the words "suspension or" before the word "severance". A minority of one is of the opinion that the addition of these words is superfluous.

#### NOTE:

A general comment on the draft articles made by one delegation is that there are quite a few provisions in the draft articles which contain, as is admitted by the commentary of the International Law Commission, certain concepts which may cause disputes in their application. The delegation considered it desirable to designate or establish appropriate bodies or authorities invested with standing competence to resolve such disputes in a purely objective and legal manner.

#### ANNEX D

Statement by Mr. Mustafa Kamil Yasseen, observer for the International Law Commission, at the ninth session of the Asian-African Legal Consultative Committee

Mr. Chairman,

I should like to express my great pleasure at seeing you and my other friends in the Asian-African Legal Consultative Committee, whose eighth session I had the honour to attend in Bangkok in August 1966. I should also like to express to you my deep gratitude for the warmth of the welcome which I have received. The cordiality of the relations between this Committee and the International Law Commission is the result of the importance which both bodies attach to close co-operation between them.

I should lie to say a few words by way of introducing the report of the International Law Commission on the work of its nineteenth session. in order to assist the Committee in its consideration. The principal content of the report is the draft articles on special missions and commentaries thereon, now finally adopted by the Commission and submitted to the General Assembly at its twenty-second session. Special missions are becoming an increasingly important means for the conduct of international relations in the modern world, and the Commission considered that their importance fully justified the regulation of their legal status, privileges and immunities by an international convention. Individuals engaged on missions on behalf of their countries should be entitled to a certain status compatible with their functions. The work on special missions is a continuation of the work already done by the Commission on diplomatic relations and consular relations, two topics on which conventions have been adopted by conferences and have been brought into force.b These conventions will be supplemented by a third convention dealing with special missions. In this connexion the Asian-African Legal Consultative Committee can perform important work by promoting a wider understanding of the draft among the governments of its members, thus enabling them to take positions in the future work on the topic. The General Assembly, by resolution 2273 (XXII), adopted on 1 December 1967, decided that the preparation of a convention on special missions should be undertaken by the General Assembly itself at its regular session in 1968, and thus your governments will have the opportunity of participating in this work in the Sixth Committee.

I should like to mention a few features of the draft articles prepared by the International Law Commission. In the first place, it may be remarked that the whole of the draft articles constitutes jus dispositivum and not jus cogens; that is, governments are free to make whatever arrangements they wish on the matters dealt with, and the articles apply only to the extent that such special arrangements have not been made. This element of flexibility results from the requirement of consent which governs the establishment of any special mission. The privileges and immunities provided may thus be expanded or contracted by special agreement in particular cases.

The element of flexibility thus provided allowed the Commission to deal very simply in draft article 21 with the problem of so-called "high level missions", which at some stages of its discussions gave rise to some difficulties. It would have been a rather delicate task to lay down detailed provisions concerning the different levels of special missions. Under the articles as adopted, the facilities, privileges and immunities to be accorded to special missions led by Heads of State, Heads of Government, Ministers and other persons of high rank are left to be settled either by special agreement between the States concerned or by customary international law.

The Commission found that it could in general follow the pattern of the Vienna Convention on Diplomatic Relations, and in many cases could take over the wording of that Convention. Some variations had to be made in view of the nature of special missions, and in a few cases there were improvements in drafting, either based on the later (1963) Vienna Convention on Consular Relations or newly worked out by the Commission. These variations, however, are of limited extent, and in general the 1961 Convention has been closely followed.

<sup>&</sup>lt;sup>a</sup> Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1.

<sup>&</sup>lt;sup>b</sup> See United Nations Conference on Diplomatic Intercourse and Immunities, 1961, Official Records, vol. II, p. 82, and United Nations Conference on Consular Relations, 1963, Official Records, vol. II, p. 175.

This adherence to precedent should simplify the consideration of the draft articles by governments in preparation for and during the twenty-third session of the General Assembly. It is to be hoped that a convention will be adopted speedily and without difficulty.

The report of the International Law Commission on its nineteenth session also sets out the Commission's plans for future work, to which this Committee can also make an important contribution. As regards the topic of succession of States and Governments, which has already been on the agenda of the Commission for some years, it is intended to take up its consideration actively at the twentieth (1968) session. For this purpose the topic has been divided into three parts. The first of these parts is succession in respect of treaties, on which Sir Humphrey Waldock has been appointed Special Rapporteur. The second part, which covers many of the most difficult questions of the topic, is succession in respect of rights and duties resulting from sources other than treaties, and on this part the Commission has appointed as Special Rapporteur, Mr. Mohammed Bedjaoui, the Minister of Justice of Algeria. Both Sir Humphrey Waldock and Mr. Bedjaoui are expected to submit reports for discussion in 1968. The third part of the topic is succession in respect of membership of international organizations, which is closely related with other topics being considered by the Commission, and on which for the time being no Special Rapporteur has been appointed.

The second major topic to be considered is State responsibility, on which the Special Rapporteur is Mr. Roberto Ago.

Mr. Ago will submit a report for discussion at the twenty-first session (1969).

It is hoped that progress can be made in 1968 on the topic of relations between States and inter-governmental organizations, on which the Special Rapporteur is Mr. Abdullah El-Erian, who has already submitted some draft articles to the Commission.

Finally, at its nineteenth session the Commission decided to begin work on a question which had been laid aside in the preparation of the draft on the law of treaties. This question is the most-favoured-nation clause, on which Mr. Endre Ustor of Hungary was appointed Special Rapporteur. Some interest was expressed in the General Assembly in the Commission's dealing with this topic, and work on it may also be useful in connexion with the activities in regard to international trade law which are to commence in 1968.

It is to be expected that the Commission at its twentieth session will be able to adopt a number of draft articles on more than one of the topics I have just mentioned. As you all know, the procedure of the Commission is first, provisional adoption of draft articles, which are then submitted to Governments for comments and are later revised and finally adopted in the light of the comments received. I hope that this Committee will find it possible to examine these provisional draft articles, and will inform the International Law Commission of its views. In this way the Committee will make an important contribution to the work of the Commission and to the codification and progressive development of international law, a cause which is of the highest importance and interest to us all.

#### **DOCUMENT A/CN.4/L.126**

#### European Committee on Legal Co-operation: exchange of letters

[Original text: English]
[6 May 1968]

#### I. Letter dated 1 December 1967 from Sir Humphrey Waldock, Chairman of the International Law Commission, to the Director of Legal Affairs, European Committee on Legal Co-operation

The international Law Commission was fortunate at its nineteenth session to receive a visit from you in your capacity of observer on behalf of the European Committee on Legal Co-operation. As Chairman of the Commission, I can assure you how much it appreciated the account which you then gave of the work of the European Committee in the field of codification.

During your visit to Geneva you intimated that the Commission would be receiving an invitation from the Council of Europe to send a representative to attend the eighth meeting of its Committee on Legal Cooperation; and this invitation you subsequently transmitted to the Commission by your letter of 19 October 1967 to Mr. Constantin Stavropoulos, Legal Counsel to the United Nations. Meanwhile, having regard to your previous intimation, the Commission nominated me to represent it in connexion with the meeting of the European Committee.

I was hoping to be in Strasbourg for the meeting of the Committee but, in the event, this has proved not to be possible. The European Court of Human Rights, as you are aware, is now engaged in the hearing of the Belgian Linguistics Case and, in my capacity as a Judge of the Court, I have been in Strasbourg during the present week. Having regard to the further visits to Strasbourg in the near future which the work of the Court will entail and other urgent duties, I do not now find it possible to be present at the meeting of the Committee next week.

The International Law Commission attaches great importance to its friendly links with the several regional bodies engaged in codification in the field of international law; for it believes that only by this mutual cooperation will it be possible to prevent legal concepts in the different regions from so far diverging as to prejudice the codification of general international law through the United Nations. Accordingly, it is with real regret that I find myself unable to attend the Committee in person and I shall be grateful if you would convey this regret to the Committee.

At the same time I should like to do what I can to make good my absence by communicating to the Committee in this letter some of the points which I would have wished to make, if I had been able to be present next week. You have been good enough to make available to me the agenda for the meeting and the papers which accompany it and this has enabled me to inform myself of the general nature of the work in progress in the Committee.

The item on the Committee's agenda which is most directly linked with the present work of the International Law Commission is "Privileges and immunities of international organizations" (item 4(b)). At your seventh session Mr. Yasseen, then Chairman of the Commission, pointed out that one of the questions under study by the Commission is "Relations between States and intergovernmental organizations"; and, in fact, the intention of the Commission is to give priority to the "privileges and immunities" aspect of that topic. The work of the European Committee on item 4 (b) of its agenda could, therefore, be of undoubted value to the International Law Commission. This being so, I may mention that at its session last summer [nineteenth session] the programme of the Commission was upset by events in the Middle East which obliged its Special Rapporteur on the relations between States and inter-governmental organizations to absent himself from Geneva. In consequence, no further progress was made with this topic but the Commission intends to begin its discussion of the Special Rapporteur's report at its forthcoming session in 1968.

In connexion with the same item the Committee may like to have its attention also drawn to the fact that at its last session the International Law Commission completed its draft articles on special missions and recommended the General Assembly to take appropriate steps to have them converted into an international convention.1 This topic, entrusted to the Commission at the request of the 1961 Vienna Conference on Diplomatic Relations, has points of contact with the privileges and immunities of representatives attending diplomatic conferences, which in turn has points of contact with the privileges and immunities of inter-governmental organizations. The Commission's draft articles on special missions, if they cover the case of two or more special missions of different countries meeting together for the same purpose in the territory of the same host State, do not attempt to deal generally with the privileges and immunities of diplomatic conferences. The latter question the Commission has left to be studied in conjunction with the privileges and immunities of intergovernmental organizations. I may add that, according to the latest information available to me, the examination of the Commission's draft articles on special missions with a view to preparing an international convention is likely to be taken up in the Sixth Committee of the General Assembly in 1968.

I note from item 7 the European Committee's interest in the work of the United Nations Commission on International Trade Law (UNCITRAL). The Committee may therefore like to know that at its recent session the International Law Commission decided to add to its agenda the topic of the "most-favoured-nation" clause as a continuation of its codification of the law of treaties and with the express hope that it might thereby assist the work of UNCITRAL.

The International Law Commission, for its part, will certainly be interested to hear of the comprehensive character of the study that is being made by the European Committee, under item 4 (c), of the means of promoting the uniform interpretation of European treaties. If this study is being undertaken with particular reference to European treaties, much of it would appear to have a more general relevance.

I understand from you that a special meeting is being held in January [1968] under the aegis of the European Committee for an exchange of views prior to the opening of the Diplomatic Conference on the Law of Treaties next March. The Commission is informed that the Asian-African Legal Consultative Committee will be holding one of its regular sessions in the second half of December [1967] at which it also will be having an exchange of views regarding the work of the forthcoming Conference on the Law of Treaties. Mr. Yas-

seen will be attending the session of this Committee as observer on behalf of the Commission. The magnitude of the task which confronts the Diplomatic Conference is something of which the Commission cannot fail to be aware and it will certainly applaud the initiative being taken by the regional bodies concerned to prepare the the way for the Conference. As Chairman, I would only stress to you—as I have already stressed to the Secretary of the Asian-African Legal Consultative Committee—the importance of the several regional bodies not arriving at too fixed positions before the Conference.

In connexion with the law of treaties I may, perhaps, mention that at its recent [nineteenth] session the Commission decided to give priority to the topic of State succession in respect of treaties at its session in 1968 which will open in Geneva immediately after the end of the Diplomatic Conference.

Finally, it may be of interest to the European Committee to know that the Commission has decided to celebrate the first twenty years of its experience in the codification of international law by undertaking a general review of its programme and methods of work.

(Signed) Humphrey WALDOCK

#### II. Reply from Mr. Golsong, Director of Legal Affairs, European Committee on Legal Co-operation

Thank you for your letter of 1 December 1967, which was communicated to the European Committee on Legal Co-operation (CCJ) at its eighth meeting held in December 1967.

The Committee regretted that you were prevented from being present, but of course understood the reason for your absence. It noted, with satisfaction, the contents of your letter, as mentioned on page 36 of its report (document CM(67)187).

As regards the item "Privileges and immunities of international organizations", the Sub-Committee of the CCJ has continued its comparative study of the privileges and immunities of the United Nations, the Council of Europe, ELDO [the European Space Vehicle Launcher Development Organisation] and ESKO [the European Space Research Organisation], and has revised the preliminary conclusions it reached earlier. The draft report on this matter will be put into final shape early in March. At the time the Sub-Committee will consider:

- (a) The position of international organizations other than the four which had so far been considered;
- (b) Any special problems which arose in connexion with the granting of privileges and immunities by the "host State" in respect of the headquarters or other permanent establishment of an international organization in its territory.

When informing the CCJ of the present state of work of this Sub-Committee, its Chairman stressed the usefulness of the work in connexion with:

<sup>&</sup>lt;sup>1</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 347, para. 33.

- (a) The establishment of further international organizations;
- (b) The revision, if any, of existing agreement governing privileges and immunities of international organizations;
- (c) The United Nations International Law Commission's work on relations between States and intergovernmental organizations.

I am sending you the report of the Sub-Committee on the Uniform Interpretation of European Treaties (document CCJ(67)22) which will be examined by the CCJ at its ninth meeting from 18 to 22 March 1968.

I very much hope that it will be possible for the International Law Commission to be represented at that meeting, particularly for the discussion of this report.

I appreciate your remarks about the special meeting which is being held later this month for an exchange of views on the forthcoming Diplomatic Conference on the Law of Treaties and I assure you that I will do all in my power to avoid that the meeting should do anything to prejudice the success of the Conference.

Yours sincerely,

(Signed) H. GOLSONG

## REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

### DOCUMENT A/7209/REV.1

# Report of the International Law Commission on the work of its twentieth session, 27 May-2 August 1968

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#### CHAPTER I

#### Organization of the session

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947 and in accordance with its Statute annexed thereto, as subsequently amended, held its twentieth session at the United Nations Office at Geneva from 27 May to 2 August 1968. The work of the Commission during this session is described in the present report. Chapter II of the report, on relations between States and international organizations, contains a description of the Commission's work on that topic, together with twenty-one draft articles on representatives of States to international organizations and commentaries thereon. Chapter III, on the Succession of States and Governments, contains a description of the Commission's work on that topic. Chapter IV relates to the progress of the Commission's work on the topic of the mostfavoured-nation clause. Chapter V deals with the Commission's review of its programme and methods of work and a number of administrative and other questions.

#### A. Membership and attendance

- 2. The Commission consists of the following members:
  - Mr. Roberto Ago (Italy)
  - Mr. Fernando Albónico (Chile)
  - Mr. Gilberto Amado (Brazil)
  - Mr. Milan Bartoš (Yugoslavia)
  - Mr. Mohammed Bedjaoui (Algeria)
  - Mr. Jorge Castañeda (Mexico)
  - Mr. Erik Castrén (Finland)
  - Mr. Abdullah EL-ERIAN (United Arab Republic)
  - Mr. Taslim O Elias (Nigeria)
  - Mr. Constantin Th. Eustathiades (Greece)
  - Mr. Louis Ignacio-Pinto (Dahomey)

- Mr. Eduardo Jiménez de Aréchaga (Uruguay)
- Mr. Richard D. KEARNEY (United States of America)
- Mr. NAGENDRA SINGH (India)
- Mr. Alfred RAMANGASOAVINA (Madagascar)
- Mr. Paul REUTER (France)
- Mr. Shabtai Rosenne (Israel)
- Mr. José María Ruda (Argentina)
- Mr. Abdul Hakim Tabibi (Afghanistan)
- Mr. Arnold J. P. Tammes (Netherlands)
- 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. With the exception of Mr. Taslim O. Elias, all members attended meetings of the twentieth session of the Commission.

#### B. Officers

4. At its 942nd meeting, held on 27 May 1968, the Commission elected the following officers:

Chairman: Mr. José María Ruda

First Vice-Chairman: Mr. Erik Castrén

Second Vice-Chairman: Mr. Nikolai Ushakov

Rapporteur: Mr. Abdul Hakim Tabibi

#### C. Drafting Committee

5. At its 962nd meeting, held on 26 June 1968, the Commission appointed a Drafting Committee composed as follows:

Chairman: Mr. Erik Castrén

Members: Mr. Roberto Ago; Mr. Fernando Albónico; Mr. Milan Bartoš; Mr. Jorge Castañeda; Mr. Richard D. Kearney; Mr. Nagendra Singh; Mr. Alfred Ramangasoavina; Mr. Paul Reuter; Mr. Nikolai Ushakov;

and Mr. Endre Ustor. Mr. Abdullah El-Erian took part in the Committee's work on relations between States and international organizations in his capacity as Special Rapporteur for that topic. Mr. Abdul Hakim Tabibi also took part in the Committee's work in his capacity as Rapporteur of the Commission.

#### D. SECRETARIAT

6. Mr. Constantin A. Stavropoulos, Legal Counsel, attended the 957th to 959th, 977th and 978th meetings, held on 19, 20 and 21 June, 17 and 18 July 1968, respectively, and two private meetings held on 18 and 19 July 1968, and represented the Secretary-General on those occasions. Mr. Anatoly P. Movchan, Director of the Codification Division of the Office of Legal Affairs represented the Secretary-General at the other meetings of the session, and acted as Secretary to the Commission. Mr. Nicolas Teslenko, Mr. Santiago Torres-Bernárdez, Mr. Vladimir Prusa and Mr. Eduardo Valencia-Ospina served as assistant secretaries.

#### E. AGENDA

- 7. The Commission adopted an agenda for the twentieth session, consisting of the following items:
- 1. Succession of States and Governments:
  - (a) Succession in respect of treaties;
  - (b) Succession in respect of rights and duties resulting from sources other than treaties.
- Relations between States and inter-governmental organizations.
- 3. Most-favoured-nation clause.
- 4. Review of the Commission's programme and methods of work
- 5. Co-operation with other bodies.
- 6. Organization of future work.
- 7. Date and place of the twenty-first session.
- 8. Other business.
- 8. In the course of the session, the Commission held forty-eight public meetings and two private meetings. In addition, the Drafting Committee held ten meetings. The Commission considered all the items on its agenda.

#### CHAPTER II

#### Relations between States and international organizations

- A. HISTORICAL BACKGROUND AND SCOPE OF THE TOPIC
- 9. At its tenth session, in 1958, the International Law Commission submitted to the General Assembly forty-five draft articles on diplomatic intercourse and immunities. The report covering the work of that session specified that the draft articles dealt only with permanent diplomatic missions.<sup>1</sup> It noted, however, in paragraph 52, that:
- <sup>1</sup> Yearbook of the International Law Commission, 1958, vol. II, document A/3859, p. 89, para. 51.

- "Apart from diplomatic relations between States, there are also relations between States and international organizations. There is likewise the question of the privileges and immunities of the organizations themselves. However, these matters are, as regards most of the organization, governed by special conventions."
- 10. By resolution 1289 (XIII) of 5 December 1958, the General Assembly invited the International Law Commission "to give further consideration to the question of relations between States and inter-governmental international organizations at the appropriate time, after study of diplomatic intercourse and immunities, consular intercourse and immunities and *ad hoc* diplomacy has been completed by the United Nations and in the light of the results of that study and of the discussion in the General Assembly".
- 11. At its eleventh session, in 1959, the International Law Commission took note of the above-mentioned resolution and decided to consider the question in due course.<sup>2</sup>
- 12. At its fourteenth session, in 1962, the Commission decided to place the question on the agenda of its next session. It appointed Mr. Abdullah El-Erian as Special Rapporteur, and requested him to submit a report on the subject to the next session of the Commission.<sup>3</sup>
- 13. At the fifteenth session of the Commission, in 1963, the Special Rapporteur presented a first report on "relations between States and inter-governmental organizations" in which he made a preliminary study of the subject with a view to defining its scope and the order of the Commission's future work on it. At its 717th and 718th meetings, the Commission had a first general discussion of that report and asked the Special Rapporteur to continue his work with a view to further consideration of the question at a later stage.<sup>5</sup>
- 14. At the sixteenth session of the Commission, in 1964, the Special Rapporteur submitted a working paper 6 as a basis for discussion of the definition of the scope and method of treatment of the subject. That working paper contained a list of questions which related to:
- (a) The scope of the subject (interpretation of General Assembly resolution 1289 (XIII);
- (b) The approach to the subject (either as an independent subject or as collateral to the treatment of other topics);
- (c) The method of treatment (whether priority should be given to "diplomatic law" in its application to relations between States and international organizations);

<sup>&</sup>lt;sup>2</sup> Yearbook of the International Law Commission, 1959, vol. II, document A/4169, p. 123, para. 48.

<sup>&</sup>lt;sup>3</sup> Yearbook of the International Law Commission, 1962, vol. II, document A/5209, p. 192, para. 75.

<sup>&</sup>lt;sup>4</sup> Document A/CN.4/161 and Add.1. Yearbook of the International Law Commission, 1963, vol. II, p. 159.

<sup>&</sup>lt;sup>5</sup> Yearbook of the International Law Commission, 1963, vol. II, document A/5509, p. 225, para. 66.

<sup>&</sup>lt;sup>6</sup> Document A/CN.4/L.104.

- (d) The order of priorities (whether the status of permanent missions accredited to international organizations and delegations to organs of and conferences convened by international organizations should be taken up before the status of international organizations and their agents);
- (e) The question whether the Commission should concentrate in the first place on international organizations of universal character or should deal also with regional organizations.
- 15. The Special Rapporteur informed the Commission that he had begun consultations with the legal advisers of several international organizations.7 As a result of these consultations, two questionnaires were prepared by the Legal Counsel of the United Nations and addressed by him to the legal advisers of the specialized agencies and the International Atomic Energy Agency (IAEA). The first questionnaire related to the "status, privileges and immunities of representatives of Member States to specialized agencies and IAEA", and the second to the "status' privileges and immunities of the specialized agencies and of IAEA, other than those relating to representatives". After receiving replies from the organizations concerned, the Secretariat of the United Nations issued in 1967 a provisional edition of a study entitled "The Practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency concerning their Status, Privileges and Immunities".8 That document is referred to hereafter as the "Study of the Secretariat".
- 16. The conclusion reached by the Commission on the scope and method of treatment of the topic, after its discussion of the working paper and the questions referred to above, was recorded in paragraph 42 of its report on the work of its sixteenth session, in the following terms:
- "At its 755th to 757th meetings, the Commission discussed these questions, and certain other related questions that arose in connexion therewith. The majority of the Commission, while agreeing in principle that the topic had a broad scope, expressed the view that for the purpose of its immediate study the question of diplomatic law in its application to relations between States and inter-governmental organizations should receive priority." 9
- 17. Also at its sixteenth session, in 1964, the Commission adopted its programme of work for 1965 and 1966, in which it decided to complete the study of the law of treaties and of special missions during those two years. That decision was taken having regard, in particular, to the fact that the term of office of the members of the Commission was to expire at the end of 1966 and that it was desirable to complete the study of both

Yearbook of the International Law Commission, 1964,

- subjects before that date. The topic of special missions was chosen in preference to that of relations between States and inter-governmental organizations in the light of General Assembly resolution 1289 (XIII) of 5 December 1958.<sup>10</sup>
- 18. At the nineteenth session of the Commission in 1967, the Special Rapporteur submitted a second report on relations between States and inter-governmental organizations. The report contained: (a) a summary of the Commission's discussions at its fifteenth and sixteenth sessions; (b) a discussion of general problems relating to the diplomatic law of international organization; (c) a survey of the evolution of the institution of permanent missions to international organizations; (d) a brief account of the preliminary questions, which should be discussed by the Commission before it considered draft articles; and (e) three draft articles relating to general provisions, of an introductory nature.<sup>11</sup> The Commission, however, devoted that session almost entirely to the conclusion of its work on the subject of special missions, and was thus unable to discuss the Special Rapporteur's second report.
- 19. At the present session of the Commission the Special Rapporteur submitted a third report <sup>12</sup> containing a full set of draft articles, with commentaries, on the legal position of representatives of States to international organizations. Those draft articles were divided into the following four parts:
  - Part I. General provisions.
  - Part II. Permanent missions to international organizations.
  - Part III. Delegations to organs of international organizations and to conferences convened by international organizations.
  - Part IV. Permanent observers from non-member States to international organizations.
- 20. The third report also included a summary of the discussion which had taken place in the Sixth Committee during the twenty-second session of the General Assembly on the "Question of diplomatic privileges and immunities" (agenda item 98), since that discussion had touched on a number of the general problems and preliminary questions raised in the second report in relation to the diplomatic law of international organizations in general, and the legal position of representatives of States to international organizations in particular.
- 21. At its 986th meeting, on 31 July 1968, the Commission adopted a provisional draft of twenty-one articles which are reproduced in section E below, with the Commission's commentary on each article. The first five articles form part I (General provisions). The remaining articles make up the first section of part II (Permanent missions to international organizations). That section is entitled "Permanent missions in general".

vol. I, 757th meeting, pp. 221 and 222, para. 20.

<sup>8</sup> Document A/CN.4/L.118 and Add.1 and 2. This study, with minor changes, is published in the Yearbook of the International Law Commission, 1967, vol. II, p. 154.

<sup>&</sup>lt;sup>9</sup> Yearbook of the International Law Commission, 1964, vol. II, document A/5809, p. 227.

<sup>&</sup>lt;sup>10</sup> *Ibid.*, p. 226, paras. 36 and 37.

<sup>&</sup>lt;sup>11</sup> Document A/CN.4/195 and Add.1. Yearbook of the International Law Commission, 1967, vol. II, p. 133.

<sup>&</sup>lt;sup>12</sup> See p. 119 above (A/CN.4/203 and Add.1-5).

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

#### B. TITLE OF THE TOPIC

The Commission noted that in its original form the draft resolution which was subsequently adopted by the General Assembly as resolution 1289 (XIII) 13 used the expression "international organizations". The adjective "inter-governmental" was added as a result of an oral suggestion made by a representative at the Sixth Committee shortly before the voting took place. reason given for that suggestion was that the resolution should make it clear that it applied only to intergovernmental organizations.14 The Commission observed, however, that the expression "international organizations" without the adjective "inter-governmental" is used in the Vienna Convention on Diplomatic Relations 15 and the draft articles on the law of treaties.16 It decided therefore to substitute that expression in the title of the topic for "inter-governmental organizations". To avoid any misunderstanding the Commission included in article 1 of the draft articles a sub-paragraph stating that "an international organization" means an intergovernmental organization.

#### C. FORM AND TITLE OF THE DRAFT ARTICLES

24. In preparing the draft articles the Commission had in mind that they were intended to serve as a basis for a draft convention and constitute a self-contained and autonomous unit. Some members of the Commission stated that they would have preferred to see the draft articles combined with those on representatives of organizations to States which the Commission might prepare at a future stage. They pointed out that relations between States and international organizations had two aspects—that of representatives of States to international organizations and that of representatives of international organizations to States; and that since the two aspects were closely related it would be preferable to treat them in one instrument. The majority of the members of the Commission thought, however, that since representatives of international organizations to States were officials of the organizations, the question of their status was an integral part of the question of the status of the organizations themselves, a subject the consideration of which the Commission had deferred for the time being as a consequence of its decision to concentrate its work at the present stage on the subject of representatives of States to international organizations.

25. To make it clear that the draft articles prepared at this stage of its work related only to that specific

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aspect of the topic, the Commission decided that they should be entitled "Draft articles on representatives of States to international organizations".

#### D. Scope of the draft articles

26. Members of the Commission had differing opinions on whether the work of the Commission on the topic should extend to regional organizations. In paragraph 179 of his first report, 17 the Special Rapporteur had suggested that the Commission should concentrate its work on this topic first on international organizations of a universal character and prepare its draft articles with reference to these organizations only, and should examine later whether the draft articles could be applied to regional organizations as they stood, or whether they required modification. In explaining his suggestion he stated that the study of regional organizations raised a number of problems, which would require the formulation of particular rules for those organizations. Some members of the Commission took issue with that suggestion. They thought that regional organizations should be included in the study, pointing out that relations between States and organizations of a universal character might not differ appreciably from relations between States and similar regional organizations. Indeed, they considered that there were at least as great differences between some of the universal organizations—for example, between the Universal Postal Union (UPU), the International Labour Organisation and the United Nations—as between the United Nations and the major regional organizations. They further pointed out that if the Commission were to confine itself to the topic of relations of organizations of a universal character with States, it would be leaving a serious gap in the draft articles. Other members, however, expressed themselves in favour of the suggestion by the Special Rapporteur to exclude regional organizations at least from the initial stage of the study. They stated that any draft convention to be prepared concerning relations between States and international organizations should deal with organizations of a universal character and not with regional organizations, though the experience of the latter could be taken into account in the study. They argued that regional organizations were so diverse that uniform rules applicable to all of them could hardly be formulated. They therefore thought that it would probably be better to leave those regional organizations great latitude to settle their own relations with Governments. It was further pointed out that some regional organizations had their own codification organs, and that they should therefore be free to develop their own rules.

- 27. The Commission was able at its twentieth session to compose these differences and adopted an intermediary solution which is contained in paragraph 2 of article 2 of the draft articles.
- 28. Some members of the Commission were of the opinion that the scope of the draft articles should be confined to permanent missions to international organizations. In his third report the Special Rapporteur had

<sup>&</sup>lt;sup>13</sup> See para. 10 above.

<sup>14</sup> Official Records of the General Assemb

<sup>&</sup>lt;sup>14</sup> Official Records of the General Assembly, Thirteenth Session, Anneres, agenda item 56, document A/4007, para. 21.

<sup>15</sup> United Nations, Treaty Series, vol. 500, p. 96.
16 Yearbook of the International Law Commission. 19

Yearbook of the International Law Commission, 1966. vol. II, document A/6309/Rev.1, part II, p. 177, para. 38.

<sup>17</sup> See foot-note 4.

included a number of articles on delegations to organs of international organizations and to conferences convened by international organizations and on permanent observers of non-member States to international organizations (parts III and IV). The Commission was of the opinion that no decision should be taken on that question until it had had an opportunity to consider those articles. If the Commission were to decide to cover those two subjects in the draft articles, the title of the draft articles would have to be changed.

## E. Draft articles on representatives of States to international organizations

#### Part 1. General provisions

#### Article 1. Use of terms

For the purposes of the present articles:

- (a) An "international organization" means an intergovernmental organization;
- (b) An "international organization of universal character" means an organization whose membership and responsibilities are on a world-wide scale;
- (c) The "Organization" means the international organization in question;
- (d) A "permanent mission" is a mission of representative and permanent character sent by a State member of an international organization to the Organization;
- (e) The "permanent representative" is the person charged by the sending State with the duty of acting as the head of a permanent mission;
- (f) The "members of the permanent mission" are the permanent representative and the members of the staff of the permanent mission;
- (g) The "members of the staff of the permanent mission" are the members of the diplomatic staff, the administrative and technical staff and the service staff of the permanent mission;
- (h) The "members of the diplomatic staff" are the members of the staff of the permanent mission, including experts and advisers, who have diplomatic status;
- (i) The "members of the administrative and technical staff" are the members of the staff of the permanent mission employed in the administrative and technical service of the permanent mission;
- (j) The "members of the service staff" are the members of the staff of the permanent mission employed by it as household workers or for similar tasks;
- (k) The "private staff" are persons employed exclusively in the private service of the members of the permanent mission;
- (l) The "host State" is the State in whose territory the Organization has its seat, or an office, at which permanent missions are established;
- (m) An "organ of an international organization" means a principal or subsidiary organ, and any commission, committee or sub-group of any of those bodies.

#### Commentary

- (1) Following the example of many conventions concluded under the auspices of the United Nations, the Commission has specified in article 1 of the draft the meaning of the expressions most frequently used in it.
- (2) As the introductory words of the article indicate, the definitions contained therein are limited to the draft articles. They only state the meaning in which the expressions listed in the article should be understood for the purposes of the draft articles.
- (3) The definition of the term "international organization" in sub-paragraph (a) is based on sub-paragraph (i) of paragraph 1 of article 2 of the draft articles on the law of treaties. In his third report, the Special Rapporteur had proposed the following definition: "an international organization is an association of States established by treaty, possessing a constitution and common organs, and having a legal personality distinct from that of the Member States".18 The Commission thought, however, that such an elaborate definition was not necessary for the time being since it was not dealing at the present stage of its work with the status of the international organizations themselves, but only with the legal position of representatives of States to the organizations. The Commission intends to harmonize, if necessary, the definition contained in sub-paragraph (a) with the corresponding provision of the Convention on the Law of Treaties which will be adopted by the Vienna Conference.
- (4) The definition of the term "international organization of universal character" in sub-paragraph (b) flows from Article 57 of the Charter which refers to the "various specialized agencies, established by intergovernmental agreement and having wide international responsibilities".
- (5) The term "permanent representative"—defined in sub-paragraph (e)—is used in general at the present time to designate the heads of permanent missions to international organizations. It is true that article V of the Headquarters Agreement between the United Nations and the United States 19 refers to "resident representatives". However, since the adoption in 1948 of General Assembly resolution 257 A (III) on permanent missions, the use of the term "permanent representative" has become the prevailing pattern in the law and practice of international organizations, both universal and regional. There are some exceptions to this general pattern. The Headquarters Agreement of IAEA with Austria uses the term "resident representative".20 So does the Headquarters Agreement of the United Nations Economic Commission for Africa with Ethiopia,<sup>21</sup>—which is the only Headquarters agreement for an economic commission which expressly envisages resident representatives.

<sup>&</sup>lt;sup>18</sup> A/CN.4/203, chapter II, article 1, sub-paragraph (a).

<sup>19</sup> United Nations, Treaty Series, vol. II, p. 26.

<sup>&</sup>lt;sup>20</sup> Section 1 (j) of the Agreement, United Nations, Treaty Series, vol. 339, p. 153.

<sup>&</sup>lt;sup>21</sup> Section 10 (b) of the Agreement, United Nations, *Treaty Series*, vol. 317, p. 108.

The term "resident representative" is also used in the Headquarters Agreement of the Food and Agriculture Organization of the United Nations (FAO) with Italy.<sup>22</sup> (6) The definition of the term "members of the diplomatic staff" in sub-paragraph (h) differs in two respects from the corresponding definition in sub-paragraph (d) of article 1 of the Vienna Convention on Diplomatic Relations. In the first place, sub-paragraph (h) refers expressly to experts and advisers in view of the prominent role played by these officials and the important services rendered by them as members of permanent missions, especially as regards international organizations of a technical character. In the second place, in the English text, the term "diplomatic status" has been substituted for "diplomatic rank". The Commission has already used the term "diplomatic status" in the English text of the corresponding provision of the draft articles on special missions.23 It has a broader connotation than "diplomatic rank" and covers not only persons having diplomatic titles but also experts and advisers assimilated

- (7) As regards sub-paragraphs (1), which defines the term "host State", the Commission observed that international organizations usually have one seat. The United Nations, however, has, in addition to its Headquarters in New York, an Office in Geneva, where a great number of Member States maintain permanent missions as liaison with the Office as well as with the following specialized agencies established in Geneva: the International Labour Organisation (ILO), International Telecommunication Union (ITU), World Health Organisation (WHO) and World Meteorological Organisation (WMO).
- (8) Sub-paragraphs (f), (g), (i), (j) and (k) are based, with a few changes in terminology, on the corresponding provisions of article 1 of the Vienna Convention on Diplomatic Relations and of article 1 of the draft articles on special missions.
- (9) The other sub-paragraphs of article 1 are self-explanatory in the light of the relevant draft articles and call for no particular comment on the part of the Commission.

#### Article 2. Scope of the present articles

- 1. The present articles apply to representatives of States to international organizations of universal character.
- 2. The fact that the present articles do not refer to representatives of States to other international organizations is without prejudice to the application to those representatives of any of the rules set forth in the present articles to which they would be subject independently of these articles. Likewise, it shall not preclude States

members of those other organizations from agreeing that the present articles apply to their representatives to such organizations.

#### Commentary

- (1) One method of determining the international organizations which, in addition to the United Nations, come within the scope of the draft articles could be the method adopted by the Convention on the Privileges and Immunities of the Specialized Agencies.<sup>24</sup> That Convention lists in article 1 a certain number of specialized agencies and adds that the term "specialized agencies" also applies to "any other agency in relationship with the United Nations in accordance with Articles 57 and 63 of the Charter". That method of determining the scope of the Convention leaves out such organizations as IAEA, which is not considered, strictly speaking, a specialized agency as defined in the Convention in view of the circumstances of its creation and the nature of its relationship with the United Nations. It also leaves out other organizations of universal character which are outside what has become known as the United Nations "system" or "family" or the United Nations and its "related" or "kindred" agencies. Examples of such organizations are the Bank for International Settlements, the International Institute for the Unification of Private Law, the International Wheat Council, and the Central Office of International Transport by Rail.25 The wording of paragraph 1 of article 2 of the draft articles is designed to fill that gap by using the method of a general definition covering all international organizations of universal character.
- (2) Paragraph 2 of the article lays down a reservation to the effect that the limitation of the scope of the draft articles to international organizations of universal character does not affect the application to representatives of States to other organizations of any of the rules set forth in the draft articles to which they would be subject independently of the articles. The purpose of that reservation is to give adequate expression to the view stated by some members of the Commission that relations between States and international organizations often follow similar patterns whether the organizations are of a universal or a regional character.
- (3) Paragraph 2 of the article also leaves it open for States members of the organizations not covered in paragraph 1 to decide to apply the provisions of the draft articles to their representatives to such organizations by adopting such instruments as they may find appropriate.

## Article 3. Relationship between the present articles and the relevant rules of international organizations

The application of the present articles is without prejudice to any relevant rules of the Organization.

<sup>&</sup>lt;sup>22</sup> Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations (United Nations Legislative Series), vol. II (ST/LEG/SER.B/11), section 24, p. 195.

<sup>&</sup>lt;sup>23</sup> Sub-paragraph (h) of article 1. See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 348.

<sup>&</sup>lt;sup>24</sup> United Nations, Treaty Series, vol. 33, p. 262.

<sup>&</sup>lt;sup>25</sup> For a list of such organizations see Repertory of Practice of United Nations Organs, vol. III, article 57, annex; see also Amos J. Peaslee, International Governmental Organizations, Constitutional Documents, The Hague, 1961.

#### Commentary

- (1) The purpose of this article is twofold. First, it seeks to state the general nature of the draft articles. Given the diversity of international organizations and their heterogeneous character, in contradistinction to that of States, the draft articles merely seek to detect the common denominator and lay down the general pattern which regulates the diplomatic law of relations between States and international organizations. Their purpose is the unification of that law to the extent feasible in the present stage of development.
- (2) Secondly, article 3 seeks to safeguard the particular rules which may be applicable in a given international organization. An example of the particular rules which may prevail in an organization concerns membership. Although membership in international organizations is, generally speaking, limited to States, there are some exceptions. The members of UPU, for example, include a certain number of territories for whose international relations a member Country is responsible and which possess an independent postal administration.26 A number of specialized agencies provide for "associate membership", thus enabling participation of entities which enjoy internal self-government but have not yet achieved full sovereignty. In WHO, for instance, "territories or groups of territories which are not responsible for the conduct of their international relations" may be admitted as associate members upon application by the State or authority having responsibility for those relations.27
- (3) Another illustration of the particular rules which may prevail in a given international organizations relates to the character of representatives to international organizations as representatives of States. An exception to this general pattern is to be found in the tripartite system of representation in the ILO. The employers' and workers' members of the Governing Body do not represent the countries of which they are nationals, but are elected by employers' and workers' delegates to the Conference. By virtue of paragraph 1 of the ILO annex to the Specialized Agencies Convention, employers' and workers' members of the Governing Body are assimilated to representatives of member States, except that the waiver of the immunity of any such person may be made only but the Governing Body.<sup>28</sup>
- (4) The Commission did not consider it appropriate to include a specific reservation in each article in respect of which it was necessary to safeguard the particular rules prevailing in one or more international organizations. It therefore decided to formulate a general reservation and to place it in part I so as to cover the draft articles as a whole. This enabled the Commission to simplify the drafting of the articles.

(5) The expression "relevant rules of the Organization" used in article 3 is broad enough to include all relevant rules whatever their source: constituent instruments, resolutions of the organization concerned or the practice prevailing in that organization.

## Article 4. Relationship between the present articles and other existing international agreements

The provisions of the present articles are without prejudice to other international agreements in force between States or between States and international organizations.

#### Article 5. Derogation from the present articles

Nothing in the present articles shall preclude the conclusion of other international agreements having different provisions concerning the representatives of States to an international organization.

#### Commentary

- (1) Articles 4 and 5 regulate the relationship between the draft articles and other international agreements. Some members of the Commission considered that these two articles were not necessary since the expression "relevant rules of the Organization" used in article 3 could be interpreted to cover international agreements relating to representatives of States to international They pointed out that headquarters organizations. agreements and general conventions on privileges and immunities are concluded with or approved by the organizations concerned. Their provisions could therefore be considered as forming part of the rules of the organizations. The majority of the members of the Commission, however, was of the opinion that, given the great variety of agreements relating to international organizations and of the situations envisaged therein, it would be more appropriate to devote to them a specific provision of the draft articles.
- (2) The purpose of article 4 is to reserve the position of existing international agreements regulating the same subject matter as the draft articles and in particular headquarters agreements and conventions on privileges and immunities. The draft articles, while intended to serve as a general pattern and a uniform rule, are without prejudice to different rules which may be laid down in such agreements and conventions.
- (3) Article 4 refers to international agreements "in force between States or between States and international organizations". Headquarters agreements are usually concluded between the host State and the Organization. As regards the Convention on the Privileges and Immunities of the United Nations,<sup>20</sup> the determination of the parties to that Convention has given rise to difficulties of interpretation. Section 31 of the Convention provides that "This convention is submitted to every Member

<sup>&</sup>lt;sup>26</sup> Article 4 of the Universal Postal Convention of 1957, United Nations, *Treaty Series*, vol. 364, p. 166.

<sup>&</sup>lt;sup>27</sup> Article 8 of the Constitution of WHO, ibid., vol. 14, p. 189.

<sup>&</sup>lt;sup>28</sup> Study of the Secretariat. See Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 199, para. 34.

<sup>&</sup>lt;sup>29</sup> United Nations, Treaty Series, vol. 1, p. 16.

of the United Nations for accession". It has been asserted by the United Nations Secretariat—an assertion supported by some writers—that the Convention is of a very special character, being in fact a convention sui generis, and that the United Nations could be considered in a sense to be a party to it.<sup>30</sup>

(4) Some members of the Commission also suggested that reference should be made in article 4 to agreements between international organizations. The Commission, however, thought that such a reference was not necessary since agreements between international organizations are rare and, when they do exist, probably do not concern representatives to international organizations. The Commission therefore decided to cover in article 4 the principal cases only.

(5) Article 5 relates to future agreements which may contain provisions in conflict with some of the rules laid down in the draft articles. Some members of the Commission stated that this article was not necessary since the relationship between the draft articles and future international agreements is governed by the rules of the general law of treaties. The majority of the members of the Commission thought, however, that an article providing for the possibility of the future adoption by States of different provisions relating to representatives to international organizations would serve a useful purpose. The Commission hopes that the draft articles will provide a basis for conventions on representatives of States to particular international organizations which their members may see fit to conclude. The Contmission believes, however, that situations may arise in the future in which States establishing a new international organization may find it necessary to adopt different rules more appropriate to such an organization. It must also be noted that the draft articles are not intended-and should not be regarded as intending—in any way to preclude any further development of the law in this area.

## Part II. Permanent missions to international organizations

Section 1. Permanent missions in general

#### Article 6. Establishment of permanent missions

Member States may establish permanent missions to the Organization for the performance of the functions set forth in article 7 of the present articles.

Commentary

(1) Article 6 makes it clear that the institution of permanent representation to an international organization is of an non-obligatory character. Member States are under no obligation to establish permanent missions at the seat of the Organization.

- (2) When the question of permanent missions was discussed in the Sixth Committee during the first part of the General Assembly's third session, a number of representatives expressed doubts concerning the advisability of including in a draft resolution submitted by Bolivia 31 a provision which would have recommended that Member States should establish permanent missions to the United Nations. They stated that while they considered that it would be desirable for all Member States to have a permanent mission attached to the United Nations, they did not think it appropriate to make a special recommendation to that effect in view of the fact that for internal reasons certain Member States might not be able to establish permanent missions. One representative considered that the recommendation was "unprofitable, as it constituted interference in the internal administration of Member States". He pointed out that a number of Member States were deterred from maintaining permanent missions by the "special budgetary and administrative expenses" involved.32
- (3) Since permanent missions represent the sending State in the Organization and since they keep the necessary liaison, they are established at the seat of the Organization. International organizations usually have one seat. However, the United Nations has an Office at Geneva, where a large number of Member States maintain permanent missions as liaison with that Office as well as with a number of specialized agencies which have established their seats at Geneva (the International Labour Organisation, ITU, WHO and WMO). As mentioned previously the Headquarters Agreement of the Economic Commission for Africa with Ethiopia is the only headquarters agreement of a United Nations economic commission which expressly envisages resident representatives.<sup>33</sup>
- (4) The legal basis of permanent missions is to be found in the constituent instruments of international organizations—particularly in the provisions relating to functions—as supplemented by the general conventions on the privileges and immunities of the organizations and by headquarters agreements. To this must be added the practice that has accumulated in respect of permanent missions in the United Nations. According to one writer, "the status of permanent delegations derives from a number of texts: internal legislative texts, international treaties such as headquarters agreements, and from customary rules".<sup>34</sup>

<sup>&</sup>lt;sup>30</sup> See the statement by the Legal Counsel at the 1016th meeting of the Sixth Committee, Official Records of the General Assembly, Twenty-second Session, Annexes, agenda item 98, document A/C.6/385.

<sup>&</sup>lt;sup>31</sup> A/609; for the final text adopted by the General Assembly see resolution 257 (III).

<sup>&</sup>lt;sup>32</sup> Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 125th meeting, p. 626. Another representative observed: "Only the members of the Security Council were obliged to maintain permanent representatives, as laid down in Article 28 of the Charter . . . If the appointment of permanent missions was made obligatory, it might impose a heavy burden on certain States". He therefore suggested that "the appointment of permanent missions should be optional". Ibid., 126th meeting, p. 637.

<sup>&</sup>lt;sup>33</sup> See above paragraph (5) of the commentary to article 1.
<sup>34</sup> Philippe Cahier, Le droit diplomatique contemporain.

<sup>&</sup>lt;sup>34</sup> Philippe Cahier, Le droit diplomatique contemporain, Genève et Paris, 1962, p. 411.

- (5) The Commission wishes to make it clear that the establishment by member States of permanent missions is subject to the general reservations laid down in articles 3, 4 and 5 concerning the relevant rules of the organizations, the existing international agreements, and derogation from the draft articles. Special reference should also be made to article 16, which concerns the size of the permanent mission.
- (6) It is to be noted that the institution of permanent missions of member States has not been developed so far within the Organization of African Unity. During meetings held at Addis Ababa from 6 to 9 December 1965, the Institutional Committee of that Organization considered the "question of the relations between the General-Secretariat and the African Diplomatic Missions accredited to Addis Ababa" and adopted the following recommendation:

"The Institutional Committee recommends that the diplomatic missions of African States in Addis Ababa maintain the excellent relations they have established with the General Secretariat of the Organization of African Unity and continue to serve as liaison between the Secretariat and their respective Governments." 35

The report of the Institutional Committee was approved by the Council of Ministers of the Organization on 28 February 1966 at its sixth ordinary session, held in Addis Ababa.

#### Article 7. Functions of a permanent mission

The functions of a permanent mission consist inter alia in:

- (a) Representing the sending State in the Organization;
- (b) Keeping the necessary liaison between the sending State and the Organization;
- (c) Carrying on negotiations with or in the Organization:
- (d) Ascertaining activities and developments in the Organization, and reporting thereon to the Government of the sending State;
- (e) Promoting co-operation for the realization of the purposes and principles of the Organization.

#### Commentary

- (1) Since the functions of permanent missions are numerous and varied, article 7 merely lists the most important functions under broad headings.
- (2) Sub-paragraph (a) is devoted to the representational function of the permanent mission. It provides that the mission represents the sending State in the Organization. The mission, and in particular the permanent representative as head of the mission, is responsible for the maintenance of official relationship between the Government of the sending State and the Organization.

(3) Sub-paragraph (b) relates to the function which characterizes a principal activity of the permanent mission. That function has been described by two writers who have served on the permanent missions of two Member States of the United Nations as follows:

"They [the permanent missions] maintain contact with the United Nations Secretariat on a continuous basis, report on previous meetings, anticipate coming meetings and act as a channel of communication and centre of information for the relationships of their country with the United Nations."<sup>36</sup>

(4) Sub-paragraphs (c) and (d) state two classic diplomatic functions, viz., negotiating and reporting to the Government of the sending State on activities and developments. In a memorandum submitted to the Secretary-General of the United Nations in 1958 the Legal Counsel stated:

"The development of the institution of the permanent missions since the adoption of that resolution [General Assembly resolution 257 A (III)] shows that the permanent missions also have functions of a diplomatic character.... The permanent missions perform these various functions through methods and in a manner similar to those employed by diplomatic missions, and their establishment and organization are also similar to those of diplomatic missions which States accredit to each other." 37

(5) The role of permanent missions in negotiations is assuming increasing importance with the steady growth of the activities of international organizations, especially in technical assistance and in the economic and social fields. Negotiations carried out by permanent missions are not confined to negotiations "with" the organizations. The reference in sub-paragraph (c) to negotiations "in" the organizations is intended to underline the importance of consultations and exchanges of views between permanent missions. This latter type of negotiation, which includes what has come to be known as multilateral diplomacy, is generally recognized to be one of the significant achievements of contemporary international organizations. In the introduction to his annual report on the work of the United Nations from 16 June 1958 to 15 June 1959 the Secretary-General observed that

"The permanent representation at Headquarters of all Member nations, and the growing diplomatic contribution of the permanent delegations outside the public meetings...may well come to be regarded as the most important 'common law' development which has taken place so far within the constitutional framework of the Charter." 38

(6) It should be noted, however, that certain functions of diplomatic missions are not usually performed

<sup>35</sup> Document INST/Rpt.1/Rev.1 of the Organization of African Unity.

<sup>&</sup>lt;sup>36</sup> John G. Hadwen and Johan Kaufmann, *How United Nations decisions are made*, Leyden and New York, 1962, p. 26.

<sup>&</sup>lt;sup>37</sup> Study of the Secretariat. See Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 165, para. 17.

<sup>&</sup>lt;sup>38</sup> Official Records of the General Assembly, Fourteenth Session, Supplement No. I A (A/4132/Add.1), p. 2.

by permanent missions to international organizations. This applies in particular to the function of diplomatic protection, which belongs to the diplomatic mission of the sending State accredited to the host State. However, during the discussion of article 7 in the Commission, reference was made to some exceptional cases in which the function of diplomatic protection could be performed by the permanent mission. But since such cases are rare and the enumeration of the functions in the article is not exhaustive, the Commission did not feel it necessary to include therein the function of diplomatic protection. It was also pointed out during the discussion that permanent missions may perform functions in relation to the host State. It should be noted, however, that the functions enumerated in article 7 concern mainly relations with or within the Organization.

(7) Sub-paragraph (e) is intended to reflect the hope that permanent missions will not only serve the interests of their respective countries in the narrow sense, but will seek to promote the cause of international cooperation and will contribute to the realization of the purpose expressed in Article 1, paragraph 4, of the Charter that the United Nations "be a center for harmonizing the actions of nations in the attainment of [the] common ends".

# Article 8. Accreditation to two or more international organizations or assignment to two or more permanent missions

- 1. The sending State may accredit the same person as permanent representative to two or more international organizations or assign a permanent representative as a member of another of its permanent missions.
- 2. The sending State may accredit a member of the staff of a permanent mission as permanent representative to other international organizations or assign him as a member of another of its permanent missions.

#### Commentary

- (1) There have been a number of cases where a permanent representative has been appointed to represent his State in more than one international organization. At the United Nations Office at Geneva the practice has developed of appointing the same person as permanent representative both to the various specialized agencies having their headquarters in Geneva and to the Office itself.
- (2) Article 8 is drafted in general terms. It covers the practice of designating a permanent representative or another member of a permanent mission to represent his country in two or more organizations during the same period. At United Nations Headquarters, for instance, members of permanent missions have also exercised functions on behalf of their respective States at specialized agencies in Washington.<sup>39</sup>

- (3) The practice of appointing the same mission or permanent representative to two or more organizations is not limited to organizations of universal character. Representatives have on occasion simultaneously represented their country both at the United Nations and at regional organizations (e.g., at the Organization of American States).<sup>40</sup> Permanent representatives of Sweden and Norway to the Council of Europe have been simultaneously accredited to the European Economic Community.
- (4) Both paragraph 1 of article 5 of the Vienna Convention on Diplomatic Relations, which regulates the case of the accreditation of a head of mission or the assignment of a member of the diplomatic staff to more than one State, and article 4 of the draft articles on special missions, which deals with the sending of the same special mission to two or more States, require that none of the receiving States objects. That requirement is designed to avoid the undesirable conflict and difficulties that may arise in certain instances of accreditation of the same diplomatic agent to more than one State. Given the different character of permanent missions to international organizations, which serve primarily as liaison between the sending State and the organization concerned, the considerations underlying the requirement contained in paragraph 1 of article 5 of the Vienna Convention and in article 4 of the draft articles on special missions do not apply to permanent missions to international organizations. Moreover, such a requirement is not supported by the practice of international organizations. Article 8 therefore does not condition the appointment of the same permanent representative or another member of the permanent mission to two or more international organizations on the lack of objection of the organizations concerned.
- (5) Article 6 of the Vienna Convention on Diplomatic Relations provides that two or more States may accredit the same person as head of mission to another State, and article 5 of the draft articles on special missions deals with the sending of a joint special mission by two or more States. In the infrequent cases where a similar situation has arisen within the framework of representation to international organizations, what has been involved in fact has been representation to one of the organs of the organization or to a conference convened by it, and not the institution of permanent missions as such. The practice of the United Nations in the matter is summed up as follows in the study of the Secretariat:

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

<sup>&</sup>lt;sup>39</sup> Study of the Secretariat. See Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 169, para. 38.

<sup>40</sup> Ibid., para. 39.

provided the official concerned was not simultaneously acting as the representative of two countries..." 41

(6) For the reasons stated above, the Commission has decided not to include an article on this matter in part II of the draft articles, devoted to permanent missions, but to deal with it if and when it considers the question of delegates to organs of international organizations and to conferences convened by those organizations.

## Article 9. Accreditation, assignment or appointment of a member of a permanent mission to other functions

- 1. The permanent representative of a State may be accredited as head of a diplomatic mission or assigned as a member of a diplomatic or special mission of that State to the host State or to another State.
- 2. A member of the staff of a permanent mission of a State may be accredited as head of a diplomatic mission or assigned as a member of a diplomatic or special mission of that State to the host State or to another State.
- 3. A member of a permanent mission of a State may be appointed as a member of a consular post of that State in the host State or in another State.
- 4. The accreditation, assignment or appointment referred to in paragraphs 1, 2 and 3 of this article shall be governed by the rules of international law concerning diplomatic and consular relations.

#### Commentary

- (1) Paragraph 1 of article 9 deals with the situation envisaged in paragraph 3 of article 5 of the Vienna Convention on Diplomatic Relations, which provides that:
- "3: A head of mission or any member of the diplomatic staff of the mission may act as representative of the sending State to any international organization." There is, however, a difference of substance between the two provisions in that paragraph 1 of article 9 refers to the assignment of the permanent representative to a special mission as well as to a diplomatic mission.
- (2) Paragraph 2 of article 9 extends the scope of the rule laid down in paragraph 1 to other members of the permanent mission. In practice, a number of permanent representatives or members of permanent missions have served as ambassadors of the sending State to the host State or to a neighbouring State, or as members of diplomatic missions.
- (3) Paragraph 3 of article 9 deals with the situation envisaged in the first sentence of paragraph 2 of article 17 of the Vienna Convention on Consular Relations, which provides that: "A consular officer may, after notification addressed to the receiving State, act as representative of the sending State to any intergovernmental organization."
- <sup>41</sup> Ibid., para. 40. See also United Nations, Juridical Yearbook, 1962 (provisional edition), ST/LEG/8, fascicle 2, p. 258.

- (4) During the discussion of article 9 some members of the Commission maintained that the article was unnecessary since the performance of diplomatic and consular functions by representatives to international organizations was already regulated by the two Vienna Conventions. The majority of the Commission, however, was in favour of retaining it since the parties to the draft articles and the two Vienna Conventions may not be the same and in order to make the draft articles an autonomous and self-contained unit.
- (5) Adopting the principle laid down in paragraph 3 of article 5 of the Vienna Convention on Diplomatic Relations, article 9 does not provide that the Organization or the host State may object to the accreditation or assignment dealt with in the article. The reasons why paragraph 1 of article 5 of that Convention grants the receiving States the right to object when the same person is accredited as head of mission or assigned as member of the diplomatic staff to more than one State do not apply to the case dealt with in article 9 of the draft articles.
- (6) Paragraph 4 of article 9 reserves inter alia the rules of international law governing the granting of the agrément to the heads of diplomatic missions and of the exequatur to consular officers.
- (7) When the Commission discusses at its next session the section of the draft articles relating to the privileges and immunities of permanent missions, it will consider the inclusion in that section of a provision analogous to the one contained in the second sentence of paragraph 2 of article 17 of the Vienna Convention on Consular Relations. That sentence states that when a consular officer acts as a representative of a State to an inter-governmental organization "he shall be entitled to enjoy any privileges and immunities accorded to such a representative by customary international law or by international agreements; however, in respect of the performance by him of any consular function, he shall not be entitled to any greater immunity from jurisdiction than that to which a consular officer is entitled under the present Convention".

## Article 10. Appointment of the members of the permanent mission

Subject to the provisions of articles 11 and 16, the sending State may freely appoint the members of the permanent mission.

#### Commentary

(1) The freedom of choice by the sending State of the members of the permanent mission is a principle basic to the effective performance of the functions of the mission. Article 10 expressly provides for two exceptions to that principle. The first is embodied in article 11, which requires the consent of the host State for the appointment of one of its nationals as a permanent representative or as a member of the diplomatic staff of the permanent mission of another State. The

second exception relates to the size of the mission; that question is regulated by article 16.

- (2) Unlike the relevant articles of the Vienna Convention on Diplomatic Relations and the draft articles on special missions, article 10 does not make the freedom of choice by the sending State of the members of its permanent mission to an international organization subject to the agrément of either the organization or the host State as regards the appointment of the permanent representative, the head of the permanent mission.
- (3) The members of the permanent mission are not accredited to the host State in whose territory the seat of the organization is situated. They do not enter into direct relationship with the host State, unlike the case of bilateral diplomacy. In the latter case, the diplomatic agent is accredited to the receiving State in order to perform certain functions of representation and negotiation between the receiving State and his own. That legal situation is the basis of the institution of agrément, for the appointment of the head of the diplomatic mission. As regards the United Nations, the Legal Counsel pointed out at the 1016th meeting of the Sixth Committee, on 6 December 1967, that:

"The Secretary-General, in interpreting diplomatic privileges and immunities, would look to provisions of the Vienna Convention so far as they would appear relevant *mutatis mutandis* to representatives to United Nations organs and conferences. It should of course be noted that some provisions such as those relating to *agrément*, nationality or reciprocity have no relevancy in the situation of representatives to the United Nations." 42

(4) The position of permanent representatives and delegates to the United Nations in relation to the host State and to the Secretary-General with reference to the question of acceptance was described by one writer as follows:

"The representatives of Members, however, are not accredited to the Government of the United States in any way or in any sense. Agréation implies prior approval and national control. It has its traditional place and significance in connexion with diplomatic representatives of foreign States who are to transact business with the United States Government. Representatives of Members to the United Nations have no business to transact with the United States. Representatives to meetings of the General Assembly or to other organs of the United Nations bear credentials which are scrutinized by those organs. delegates, although they present their credentials to him, are not accredited to the Secretary-General for this would imply control and the right to reject persons appointed by Members. No such right has been conceded by the sovereign Members to the Secretary-General." 48

## Article 11. Nationality of the members of the permanent mission

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

#### Commentary

(1) The Convention on the Privileges and Immunities of the United Nations does not contain any restrictions on the choice by the sending State of non-nationals as its representatives. Section 15 provides, however, that:

"The provisions of Sections 11, 12 and 13 [which define the privileges and immunities of the representatives of members] are not applicable as between a representative and the authorities of the State of which he is a national or of which he is or has been the representative."

A similar provision appears in section 17 of the Convention on the Privileges and Immunities of the Specialized Agencies as well as in the following: article 11 of Supplementary Protocol No. 1 to the Convention for European Economic Co-operation on the Legal Capacity, Privileges and Immunities of the Organization,44 article 12 (a) of the General Agreement on Privileges and Immunities of the Council of Europe, 45 article 15 of the Convention on the Privileges and Immunities of the League of Arab States,46 and article V, paragraph 5, of the General Convention on the Privileges and Immunities of the Organization of African Unity.47 Examples of similar provisions in national legislation may be found in paragraph 9 of the Diplomatic Privileges (United Nations and International Court of Justice), Order in Council 48 (United Kingdom), and paragraph 6 of the Order in Council PC 1791 relating to the Privileges and Immunities of the International Civil Aviation Organization <sup>19</sup> (Canada).

(2) Some members of the Commission considered that in principle there should be no restrictions on the appointment by the sending State of non-nationals to its permanent mission. In support of that view they stated that the study of State practice and treaty and statutory provisions reveals that the consent of the host State is not required for the appointment of one of its nationals as a member of a permanent mission of another State.

<sup>&</sup>lt;sup>42</sup> Official Records of the General Assembly, Twenty-second Session, Annexes, agenda item 98, document A/C.6/385, para. 4.

<sup>&</sup>lt;sup>43</sup> Lco Gross, Immunities and Privileges of Delegations to the United Nations, in *International Organization*, vol. XVI, No. 3, Summer 1962, p. 491.

<sup>&</sup>lt;sup>44</sup> United Nations Legislative Series, Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations, vol. II (ST/LEG/SER.B/11), p. 371.

<sup>45</sup> *Ibid.*, p. 393.

<sup>46</sup> Ibid., p. 417.

<sup>&</sup>lt;sup>47</sup> Text published by the Secretariat of the Organization of African Unity, Addis Ababa.

<sup>&</sup>lt;sup>48</sup> United Nations Legislative Series, Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations (ST/LEG/SER.B/10), p. 116.

<sup>49</sup> Ibid., vol. II (ST/LEG/SER.B/11), p. 22.

They observed that the question was usually dealt with in terms of the immunities granted to the members of the mission, and that a number of States made a distinction between nationals and non-nationals in this regard.

- (3) This view, however, was not accepted by the majority of the members of the Commission. The Commission, therefore, decided to include in the present draft articles a provision based on paragraphs 1 and 2 of article 8 of the Vienna Convention on Diplomatic Relations. This provision—contained in article 11—states that the permanent representative and the members of the diplomatic staff of the permanent mission should in principle be of the nationality of the sending State, and that they may not be appointed from among persons having the nationality of the host State, except with the consent of that State.
- (4) The Commission decided to limit the scope of that provision to nationals of the host State and not to extend it to nationals of a third State. It therefore did not include in article 11 the rule laid down in paragraph 3 of article 8 of the Vienna Convention on Diplomatic Relations. The highly technical character of some international organizations makes it desirable not to restrict unduly the free selection of members of the mission since the sending State may find it necessary to appoint, as members of its permanent mission, nationals of a third State who possess the required training and experience.
- (5) To the considerations stated in the preceding paragraph, the objection might be raised that, in some States, nationals have to seek the consent of their own Government before entering into the service of a foreign Government. Such a requirement, however, applies only to the relationship between a national and his own Government; it does not affect relations between States and is therefore not a rule of international law.
- (6) The Commission also considered the question of the appointment to permanent missions of stateless persons or persons with dual nationality. It concluded that, like the cases falling under the two Vienna Conventions and the draft articles on special missions, the matter should be settled according to the relevant rules of international law.

#### Article 12. Credentials of the permanent representative

The credentials of the permanent representative shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or by another competent minister if that is allowed by the practice followed in the Organization, and shall be transmitted to the competent organ of the Organization.

#### Commentary

(1) Article 12 is based on the first operative paragraph of General Assembly resolution 257 A (III) on permanent missions, adopted on 3 December 1948 dur-

ing the first part of the third session. That paragraph reads:

[The General Assembly recommends]

. . .

- 1. "That credentials of the permanent representatives shall be issued either by the Head of the State or by the Head of the Government or by the Minister of Foreign Affairs, and shall be transmitted to the Secretary-General;".
- (2) During the debates in the Sixth Committee which led to the adoption of the resolution the use of the word "credentials" in the draft resolution under consideration 50 was criticized by some representatives. It was argued that "the word 'credentials' was out of place because it tended to give the impression that the United Nations was a State, headed by the Secretary-General, and that the permanent representatives were accredited to him, and because the permanent representatives had to have full powers to enable them to accomplish certain actions, such as the signing of conventions. As matters stood, [certain] permanent representative[s] ... had full powers and not 'credentials' (lettres de créance)." 51 A number of representatives, however, did not share that point of view. They preferred the use of the word "credentials", pointing out that it had been intentionally included in the draft resolution and that it was unnecessary for permanent representatives to receive full powers to carry out their functions.<sup>52</sup>
- (3) The rules of procedure of United Nations organs use in the English text the word "credentials" and in the French text "pouvoirs" or "lettres de créance" (rules 27 to 29 of the rules of procedure of the General Assembly, chapter III of the provisional rules of procedure of the Security Council, rule 19 of the rules of procedure of the Economic and Social Council and rules 14 to 17 of the rules of procedure of the Trusteeship Council). The word "credentials" is also the term commonly used in the rules of procedure of other international organizations (for example: rule III (2) of the general rules of FAO, chapter 5 of the general regulations annexed to the International Telecommunication Convention 53 and rule 22 (b) of the rules of procedure of the World Health Assembly of WHO).
- (4) The general practice regarding issuance of credentials in respect of permanent representatives to international organizations is that these credentials are issued by the Head of State or by the Head of Government or by the Minister for Foreign Affairs. In the case of one or two specialized agencies the credentials of permanent representatives may also be issued by the member of government responsible for the department which corresponds to the field of competence of the organization concerned. Thus, credentials for representatives to CAO are usually signed by the Minister for Foreign

<sup>50</sup> See foot-note 31.

<sup>&</sup>lt;sup>51</sup> Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 125th meeting, pp. 624 and 625.

<sup>&</sup>lt;sup>52</sup> *Ibid.*, pp. 626, 628 and 630.

<sup>&</sup>lt;sup>53</sup> International Telecommunication Convention (ITU publication) annex 4, chapter 5, p. 102.

Affairs of the Minister of Communications or Transport. In WHO credentials may be issued by the Head of State, the Minister for Foreign Affairs, or the Minister of Health or by any other appropriate authority.

(5) While the credentials of permanent representatives are usually transmitted to the chief administrative officer of the Organization, whether designated "Secretary-General", "Director General" or otherwise, there is no consistent practice as to which organ that officer should report to on the matter. The last operative paragraph of the General Assembly resolution 257 A (III) instructs the Secretary-General to submit, at each regular session of the General Assembly, a report on the credentials of the permanent representatives accredited to the United Nations. In the case of some other organizations, the credentials are submitted to the Director-General who reports thereon to the Conference (FAO), or the Board of Governors (IAEA). There are also some organizations which have no procedure of this kind in relation to credentials. Article 12 is designed to consolidate the practice in the matter, where such practice exists, and to set up a general pattern for the submission of the credentials of permanent representatives to the competent organ of the Organization, whether the chief administrative officer of the Organization or any other organ designated for that purpose.

#### Article 13. Accreditation to organs of the Organization

- 1. A member State may specify in the credentials submitted in accordance with article 12 that its permanent representative shall represent it in one or more organs of the Organization.
- 2. Unless a member State provides otherwise its permanent representative shall represent it in the organs of the Organization for which there are no special requirements as regards representation.

#### Commentary

- (1) Article 13 regulates the position of permanent representatives with regard to the representation of the sending State in the organs of the Organization. Paragraph 1 is derived from operative paragraph 4 of General Assembly resolution 257 A (III).
- (2) The competence of a permanent representative to represent his State on the Interim Committee of the General Assembly was discussed by the Committee in 1948. The summary of the discussion in the Committe's report contains, *inter alia*, the following passages:

"The Committee considered [a] proposal submitted by the Dominican Republic. According to that proposal, the heads of permanent delegations at the seat of the United Nations should, in that capacity, be automatically entitled to represent their countries on the Interim Committee. This would provide for greater elasticity by making it unnecessary for each delegation to submit new credentials for each convocation of the Interim Committee. With regard to alternates and advisers, rule 10 of the rules of procedure of the Interim Committee stated that they

could normally be designated by the appointed representative. Consequently, special credentials would only be required when a Member of the United Nations desired to send a special envoy. It was said that such a procedure, in addition to its practical usefulness, would induce all Governments to set up permanent delegations, which would be an important contribution to the work of the United Nations."

"It was pointed out that the matter of credentials was properly one for the Governments concerned to decide for themselves. For example, in accrediting the head of a permanent delegation, it might be specified that, in the absence of notification to the contrary, he might act as representative on all organs or committees of the United Nations. The representative of the Dominican Republic made it clear, however, that the proposal submitted by his Government was intended to apply exclusively to the Interim Committee." <sup>54</sup>
(3) According to the information supplied to the Special Rapporteur by the legal advisers of the specialized agencies, the position on whether a permanent representative accredited to a particular agency is en-

- Special Rapporteur by the legal advisers of the specialized agencies, the position on whether a permanent representative accredited to a particular agency is entitled to represent his State before all organs of the agency varies to some extent from agency to agency. It would seem to be a general rule, however, that accreditation as a permanent representative does not entitle the representative to participate in the proceedings of any organ to which he is not specifically accredited.
- (4) While paragraph 1 of article 13 takes account of this practice, paragraph 2 seeks to develop the practice in favour of granting to the permanent representative general competence to represent his country in the different organs of the organizations to which he is accredited. As a residual rule, it establishes a presumption to that effect.
- (5) As the reservation stated in the first phrase of paragraph 2 makes it clear, the principle that the permanent representative has competence to represent his State in the organs of the organizations to which he is accredited is subject to exceptions. The sending State may provide otherwise either in the credentials of the permanent representative or by accrediting another representative to a particular organ. Another exception is expressly provided for in the last phrase of paragraph 2. This exception concerns the organs for which special requirements are prescribed as regards accreditation or representation. Special credentials, for instance, are required for the representative of a Member State in the Security Council. Also the constituent instruments of some international organizations or the rules of procedure of some of their organs allow member States to be represented by only a limited number of representatives. For example, Article 9, paragraph 2, of the Charter of the United Nations and rule 25 of the rules of procedure of the General Assembly provide that each Member shall have not more than five representatives in the General Assembly. In the case of the Security Council, the Economic and Social Council and

<sup>54</sup> Official Records of the General Assembly, Third Session, Supplement No. 10, document A/606, paras. 67 and 68.

the Trusteeship Council, each Member may have only one representative (Article 23, paragraph 3; Article 61, paragraph 4, and Article 86, paragraph 2, of the Charter). There are also organs of international organizations with special requirements regarding representation; that is true of the employers' and workers' delegates to the General Conference of the International Labour Organisation. Another case is that of representatives who are appointed to certain organs in their personal capacity notwithstanding the fact that they represent States—for example the government members of the Governing Body of the International Labour Organisation and the members of the Executive Board of UNESCO.

- (6) It should also be noted that the rule stated in paragraph 2 of article 13 is without prejudice to the functions of the credentials committees which may be set up or to other procedures followed by the different organs to examine the credentials of delegates to their meetings.
- (7) Some members of the Commission expressed certain misgivings as to the difficulties of interpretation which might arise from the wording of article 13. They, therefore, suggested the following formulation:
- "1. A member State may specify in the credentials submitted in accordance with article 12 that its permanent representative shall represent it in one or more organs of the Organization, in which event the permanent representative may represent the State only in those organs.
- "2. In other cases its permanent representative may represent it in all the organs of the Organization unless there are special requirements as regards representation in any particular organ or the State in question otherwise provides."

That formulation, however, was not put to the vote.

## Article 14. Full powers to represent the State in the conclusion of treaties

- 1. A permanent representative in virtue of his functions and without having to produce full power is considered as representing his State for the purpose of adopting the text of a treaty between that State and the international organization to which he is accredited.
- 2. A permanent representative is not considered in virtue of his functions as representing his State for the purpose of signing a treaty (whether in full or ad referendum) between that State and the international organization to which he is accredited unless it appears from the circumstances that the intention of the Parties was to dispense with full powers.

Commentary

(1) The Commission decided to limit the scope of article 14 to treaties between States and international organizations; the article does not cover treaties concluded in organs of international organizations or in conferences convened under the auspices of international

organizations. This decision is based on the fact that the conclusion of treaties in the latter category usually involves delegations to organs of international organizations or to conferences convened under the auspices of the organizations. Those treaties therefore fall outside the scope of the draft articles being considered by the Commission at the present stage of its work.

(2) The language of paragraph 1 of article 14 is based on the relevant provisions of article 6 of the Draft Convention on the Law of Treaties as adopted in 1968 by the Committee of the Whole at the first session of the Vienna Conference.<sup>55</sup> Those provisions were in turn derived from sub-paragraph 2 (b) of article 4 of the draft articles on the law of treaties adopted provisionally by the International Law Commission in 1962.<sup>56</sup> Subparagraph 2 (b) treated heads of permanent missions to international organizations on a similar basis as heads of diplomatic missions, so that they would automatically have been considered as representing their States in regard to treaties drawn up under the auspices of the Organization and also in regard to treaties between their States and the Organization. In its commentary on the sub-paragraph the Commission stated in 1962 that "The practice of establishing permanent missions at the headquarters of certain international organizations to represent the State and to invest the permanent representatives with powers similar to those of the Head of a diplomatic mission is now extremely common." 57 In the process of finalizing its draft articles on the Law of Treaties, the Commission decided in 1966 to amend sub-paragraph 2(b) of article 4. In its commentary on the amended provision—which became sub-paragraph 2 (c) of article 6 of the 1966 draft—the Commission explained its decision as follows: "In the light of the comments of Governments and on a further examination of the practice, the Commission concluded that it was not justified in attributing to heads of permanent missions...a general qualification to represent the State in the conclusion of treaties." 58 Sub-paragraph 2 (c) of article 6 of the 1966 draft contained therefore no reference to representatives accredited by States to international organizations as such. It applied only to "representatives accredited by States to an international conference or to an organ of an international organization". However, at the first session of the Conference on the

<sup>&</sup>quot;Article 6. Full powers to represent the State in the conclusion of treaties

<sup>&</sup>quot;2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

<sup>&</sup>quot;(c) Representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of the adoption of the text of a treaty in that conference, organization or organ" (A/CONF.39/C.1/L.370/Add.4).

<sup>&</sup>lt;sup>56</sup> See Yearbook of the International Law Commission, 1962, vol. II, document A/5209, p. 165.

<sup>57</sup> Ibid.

<sup>&</sup>lt;sup>58</sup> See Yearbook of the International Law Commission, 1966, vol. II, document A/6309/Rev.1, part II, p. 193.

Law of Treaties held at Vienna in the spring of 1968, the Committee of the Whole added to sub-paragraph 2 (c) of article 6 the expression "representatives accredited by States to ... an international organization", thus reverting to the idea underlying the Commission's 1962 draft. The Committee of the Whole therefore appears to have taken the view—a view shared by the Commission at the present session—that permanent representatives are invested with powers similar to those of the head of a diplomatic mission in relation to the adoption of treaties. The Commission has not taken a definite position on whether paragraph 1 of article 14 merely reflects existing practice or lays down a rule entailing progressive development of international law.

(3) Paragraph 2 of article 14 is based on the practice of international organizations. The requirement of United Nations practice that permanent representatives need full powers to sign international agreements was described as follows by the Legal Counsel of the United Nations in response to an enquiry made by a permanent representative in 1953:

"As far as permanent representatives are concerned, their designation as such has not been considered sufficient to enable them to sign international agreements without special full powers. Resolution 257 (III) of the General Assembly of 3 December 1948 on permanent missions does not contain any provision to this effect and no reference was made to such powers during the discussions which preceded the adoption of this resolution in the Sixth Committee of the General Assembly." <sup>59</sup>

- (4) In the case of treaties in simplified form, the production of an instrument of full powers is not usually insisted upon in the pratice of States. Since treaties between States and international organizations are sometimes concluded by exchanges of notes or in other simplified forms, the Commission has included in paragraph 2 of article 14 a clause which dispenses with the production of full powers if "it appears from the circumstances that the intention of the Parties was to dispense with full powers".
- (5) Some members of the Commission raised the question of full powers relating to termination of treaties. The Commission may consider this matter later, together with other changes which it may find necessary to introduce in article 14 in the light of the final text of the Convention which will be adopted by the Conference on the Law of Treaties.

#### Article 15. Composition of the permanent mission

In addition to the permanent representative, a permanent mission may include members of the diplomatic

## staff, the administrative and technical staff and the service staff.

#### Commentary

- (1) Article 15 is based on article 1 of the Vienna Convention on Diplomatic Relations and article 9 of the draft articles on special missions.
- (2) Every permanent mission must include at least one representative of the sending State, that is to say, a person to whom that State has assigned the task of being its representative in the permanent mission. As was explained in paragraph (5) of the commentary to article 1, "permanent representative" is the term generally used at present to designate heads of permanent missions to international organizations.
- (3) During the discussion of article 15 in the Commission reference was made to the practice of certain States Members of the United Nations of appointing to their permanent missions "deputy permanent representatives" or "alternate permanent representatives", and to the increasing importance of the functions performed by these officials. It was observed, however, that while that practice was often followed at the Organization's Headquarters in New York, it was not a common occurrence at its Office in Geneva or at the headquarters of other international organizations.
- (4) The term "representatives" is defined in section 16 of article IV of the Convention on the Privileges and Immunities of the United Nations. Article IV deals with the privileges and immunities to be accorded to representatives of Member States. Section 16 provides:

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

That definition is repeated in section 13 of Article IV of the Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General and the Swiss Federal Council. 60 Similar definitions appear in the Convention on the Privileges and Immunities of the Specialized Agencies (section 1 (v)) and in most of the corresponding instruments of regional organizations. The term "secretaries of delegations" in section 16 quoted above clearly refers to diplomatic secretaries and not to the clerical staff. In this respect the Headquarters Agreement between ICAO and Canada, which reproduces the substance of section 16, specifies that the "secretaries of delegations . . . include the equivalent of third secretaries of diplomatic missions but not the clerical staff" [section 1 (f)]. 61

(5) The composition of permanent missions is very similar to that of diplomatic missions which States accredit to each other. In paragraphs (7) and (8) of its commentary to articles 13 to 16 of the 1958 draft articles on diplomatic intercourse and immunities, the International Law Commission stated as regards the composition of diplomatic missions:

<sup>&</sup>lt;sup>59</sup> Study of the Secretariat. See Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 169, para. 35. For the practice of specialized agencies, see *ibid.*, pp. 195 and 196, para. 12; see also "Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements" (ST/LEG/7), paras. 28-36.

<sup>60</sup> United Nations, Treaty Series, vol. I, p. 173.

<sup>&</sup>lt;sup>61</sup> United Nations, Treaty Series, vol. 96, p. 158.

"The Commission did not feel called upon to deal in the draft with the rank of the members of the mission's diplomatic staff. This staff comprises the following classes:

- "Ministers or minister-counsellors;
- "Counsellors;
- "First secretaries;
- "Second secretaries;
- "Third secretaries;
- "Attachés.

"There are also specialized officials such as military, naval, air, commercial, cultural or other attachés, who may be placed in one of the above-mentioned [classes]." 62

- (6) As mentioned before in paragraph (6) of the commentary to article 1, permanent missions often include experts and advisers who play an important role, especially as regards international organizations of a technical character.
- (7) Article 7 of the Vienna Convention on Diplomatic Relations expressly provides that in the case of military, naval and air attachés, the receiving State may, in accordance with what was already a fairly common practice, require their names to be submitted beforehand, for its approval. Within the framework of international organizations, and except as regards regional organizations for military purposes, the staff of permanent missions does not include military, naval or air attachés. States do not in practice appoint such attachés to their permanent missions to the United Nations, the specialized agencies, regional organizations of general competence or regional organizations of limited competence for non-military purposes. One exception concerns the permanent members of the Security Council of the United Nations, which in that capacity are members of the Military Staff Committee. For the purpose of their representation at that Committee, these members appoint to their permanent missions officials specialized in military, naval and air matters. The question of the prior approval of those officials by the host State does not arise. As stated before, the members of permanent missions are not accredited to the host State.

#### Article 16. Size of the permanent mission

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

#### Commentary

(1) Article 16 is based on paragraph 1 of article 11 of the Vienna Convention on Diplomatic Relations. There is, however, one essential difference between the two texts. According to the provision of the Vienna Convention, the receiving State "may require that the

size of a mission be kept within limits considered by it to be reasonable and normal...". That provision is derived from paragraph 1 of article 10 of the draft articles on diplomatic intercourse and immunities adopted by the Commission in 1958. Paragraph 1 of article 10 used the expression "the receiving State may refuse to accept a size exceeding what is reasonable and normal...".63 Article 16 of the present draft articles states the problem differently. It lays down as a guideline to be observed by the sending State that the latter should endeavour, when establishing the composition of its permanent mission, not to make it excessively large. (2) The problem of limiting the size of missions was dealt with differently by the International Law Commission in its draft articles on special missions. In paragraph (6) of the commentary to article 9 of those draft articles the Commission noted that in view of the obligation of the sending State, under the terms of article 8, to inform the receiving State in advance of the number of persons it intended to appoint to a special mission, the Commission had decided that there was no need to include in the draft the rule set forth in article 11 of the Vienna Convention.

- (3) In their replies to the questionnaire addressed to them by Legal Counsel, the specialized agencies and IAEA stated that they has encountered no difficulties in relation to the size of permanent missions accredited to them, and that host States had imposed no restrictions on the size of those missions. The practice of the United Nations itself, as summed up in the study of the Secretariat indicates that although no provision appears to exist specifically delimiting the size of permanent missions it has been generally assumed that some upper limit does exist.<sup>64</sup>
- (4) When negotiations were held with the United States authorities concerning the Headquarters Agreement, the United States representative, while accepting the principle of the proposed article V dealing with permanent representatives, "felt that there should be some safeguard against too extensive an application". The text thereupon suggested, which, with slight modifications, was finally adopted as article V, was considered by the Secretary-General and the Negatiating Committee to be a possible compromise. 65 This compromise is reflected in section 15, paragraph (2), of article V, which grants privileges and immunities to: "such resident members of [the] staffs [of the resident representatives] as may be agreed upon between the Secretary-General, the Government of the United States and the Government of the Member concerned;".

<sup>&</sup>lt;sup>62</sup> See Yearbook of the International Law Commission, 1958, vol. II, document A/3859, p. 94.

<sup>63</sup> Ibid., p. 92.

<sup>&</sup>lt;sup>64</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 166, para. 18.

of Ibid. See also the joint report of the Secretary-General and the Negotiating Committee on the negotiations with the authorities of the United States of America concerning the arrangements required as a result of the establishment of the seat of the United Nations in the United States of America, A/67 and A/67/Add.1; reproduced in "Handbook on the Legal Status, Privileges and Immunities of the United Nations" (ST/LEG/2), p. 441.

- (5) The main difference between article 16 and the corresponding provision of the Vienna Convention on Diplomatic Relations has already been indicated in paragraph (1) of the commentary. In this respect, the Commission wishes to observe that, unlike the case of bilateral diplomacy, the members of permanent missions to international organizations are not accredited to the host State. Nor are they accredited to the international organization in the proper sense of the word. As will be seen in different parts of the draft articles, remedy for the grievances which the host State or the organization may have against the permanent mission or one of its members cannot be sought in the prerogatives recognized to the receiving State in bilateral diplomacy, prerogatives which flow from the fact that diplomatic envoys are accredited to the receiving State and from the latter's inherent right, in the final analysis, to refuse to maintain relations with the sending State. In the case of permanent missions to international organizations, remedies must be sought in consultations between the host State, the organization concerned and the sending State, but the principle of the freedom of the sending State in the composition of its permanent mission and the choice of its members must be recognized (see paragraph (8)
- (6) Like paragraph 1 of article 11 of the Vienna Convention on Diplomatic Relations, article 16 lays down as guiding factors in determining the size of the mission, the needs of the particular mission and the circumstances and conditions in the host State. To these it adds the "functions of the Organization". Indeed, the Commission observed that a number of specialized agencies drew attention to the fact that, owing to the technical and operational nature of their functions, they corresponded directly with ministries or other authorities of Member States; hence, the role of the permanent representatives to those agencies tended to be of a formal and occasional nature rather than of day-to-day importance.
- (7) Specific mention should be made of those cases in which a permanent mission represents the sending State before two or more international organizations. In such cases, particularly if there is more than one permanent representative, from the legal point of view there is more than one mission. Also, the particular needs of a mission which has a function of representation to more than one organization may be different from those of a permanent mission representing the sending State in one organization only.
- (8) Some members of the Commission raised the question of the remedies available to the host State in case of non-observance by the sending State of the rule laid down in article 16. They suggested that a provision should be included in the text of the article for consultation between the host State, the sending State and the organization. When it takes up the remainder of draft articles, the Commission will consider inclusion of an article of general scope concerning remedies available to the host State in the event of claimed abuses by a permanent mission.

#### Article 17. Notifications

- 1. The sending State shall notify the Organization of:
- (a) The appointment of the members of the permanent mission, their position, title and order of precedence, their arrival and final departure or the termination of their functions with the permanent mission;
- (b) The arrival and final departure of a person belonging to the family of a member of the permanent mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the permanent mission;
- (c) The arrival and final departure of persons employed on the private staff of members of the permanent mission and the fact that they are leaving that employment;
- (d) The engagement and discharge of persons resident in the host State as members of the permanent mission or persons employed on the private staff entitled to privileges and immunities.
- 2. Whenever possible, prior notification of arrival and final departure shall also be given.
- 3. The Organization shall transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.
- 4. The sending State may also transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.

#### Commentary

- (1) Article 17 is modelled on article 10 of the Vienna Convention on Diplomatic Relations, with the changes required by the particular nature of permanent missions to international organization.
- (2) It is desirable for the Organization and the host State to know the names of the persons who may claim privileges and immunities. The question to what extent the sending State is obliged to give notification of the composition of the mission and the arrival and departure of its members, arises with regard to permanent missions to international organizations just as it does with regard to diplomatic and special missions. However, the question whether the sending State is obliged to give the notification referred to in paragraph 1 of article 17 to the Organization or to the host State or to both applies specifically to permanent missions to international organizations.
- (3) When the Secretariat of the United Nations wrote to Member States in December 1947 informing them that the Headquarters Agreement had come into effect and recalling the terms of General Assembly resolution 169 (II),66 it requested them to communicate the

<sup>&</sup>lt;sup>66</sup> The resolution is divided into two parts. Part A approves the Headquarters Agreement. Part B reads:

<sup>&</sup>quot;The General Assembly

<sup>&</sup>quot;Decides to recommend to the Secretary-General and to the appropriate authorities of the United States of America to use section 16 of the General Convention on the Privileges and Immunities of the United Nations as a guide in considering

name and rank of all persons who, in the opinion of the State concerned, came within the categories covered by sub-sections (1) and (2) of section 15 of the Headquarters Agreement.67 The question of the notification of the appointment of members of permanent missions to the United Nations was regulated by General Assembly resolution 257 A (III) whose operative paragraph 2 provides that "the appointments and changes of members of the permanent missions other than the permanent representative shall be communicated in writing to the Secretary-General by the head of the mission". On the basis of the practice established in 1947 and 1948 the normal procedure at present is for missions to notify the Protocol and Liaison Section of the Secretariat of the names and ranks of persons on their staff who are entitled to privileges and immunities under sub-section (1) and (2) of section 15 of the Headquarters Agreement. These particulars are then forwarded by the Secretariat to the United States Department of State through the United States Mission.

(4) The question of notifications is also dealt with in the "Decision of the Swiss Federal Council concerning the legal status of permanent delegations to the European Office of the United Nations and to other international organizations having their headquarters in Switzerland" of 31 March 1948. Paragraph 4 of the decision provides that:

"The establishment of a permanent delegation and the arrivals and departures of members of permanent delegations are notified to the Political Department by the diplomatic mission of the State concerned at Berne. The Political Department issues to members of delegations an identity card (carte de légitimation) stating the privileges and immunities to which they are entitled in Switzerland." <sup>68</sup>

—under sub-section 2 and the last sentence of section 15 of the above-mentioned Agreement regarding the Headquarters—what classes of persons on the staff of delegations might be included in the lists to be drawn up by agreement between the Secretary-General, the Government of the United States of America and the Government of the Member State concerned."

67 These sub-section read:

"(1) Every person designated by a Member as the principal resident representative to the United Nations of such Member or as a resident representative with the rank of ambassador or minister plenipotentiary;

"(2) Such resident members of their staffs as may be agreed upon between the Secretary-General, the Government of the United States and the Government of the Member concerned;

"shall, whether residing inside or outside the headquarters district, be entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it. In the case of Members, whose Governments are not recognized by the United States, such privileges and immunities need be extended to such representatives, or persons on the staffs of such representatives, only within the headquarters district, at their residences and offices outside the district, in transit between the district and such residences and offices, and in transit on official business to or from foreign countries."

<sup>68</sup> United Nations Legislative Series, Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations (ST/LEG/SER.B/10), p. 92.

(5) The practice of the specialized agencies regarding the procedure for notification of the composition of permanent missions and the arrival and departure of its members varies and is far from systematized. For example, the International Labour Organisation has indicated that in certain cases the Director-General is merely informed by member States that a person has been designated as permanent representative to the Organisation. This information is given either before or immediately after the representative's arrival. In other cases the person designated submits his credentials. It is the practice for the Director-General, in reply to a communication on the subject, to inform the member State concerned that he has taken note of that com-The International Labour Organisation munication. has no procedure similar to that established in the United Nations under General Assembly resolution 257 A (III). Member States notify directly the host State of the arrival and departure of representatives, members of their families and private servants. UNESCO has indicated that when a permanent representative submits his credentials to the Director-General, it is the Organization which requests the host State to provide the representative with a diplomatic card; this request constitutes implicit notification. In a small number of cases the request is made by the Embassy of the State concerned, without the intervention of the Organization. Other agencies (e.g. WHO) stated that there are no formal arrangements in this regard and that the chief administrative officer is merely informed of the appointment of permanent representatives either directly by the Ministry of Foreign Affairs of the member concerned or through the Office of the United Nations at Geneva. The agencies in question do not, as a general rule, notify the host State of the arrival and departure of representatives. Mention should also be made of the distinction drawn by some specialized agencies between the notification of appointment, on the one hand, and the notification of arrivals and departures, on the other. While the appointment to the post of permanent representative is communicated to the agency, member States usually notify the host State of the arrival and departure of representatives directly through ordinary diplomatic channels.

(6) It would appear from the foregoing survey of practice that while the United Nations has developed a system of notification of the appointment of members of permanent missions and of their departures and arrivals, the arrangements applied within the different specialized agencies are fragmentary and far from systematized. In laying down a rule for notifications one may consider two possibilities: either to take note of the practice of international organizations and adopt a rule setting out different alternatives, or to establish a uniform regulation. The Commission believes that it would be desirable to establish a uniform regulation and article 17 seeks to do this.

(7) The rule formulated in article 17 is based on considerations of principle as well as practical considerations. Its rationale is that since the direct relationship is between the sending State and the Organization,

notifications are to be made by the sending State to the Organization (paragraph 1). Those notifications are transmitted to the host State by the Organization (paragraph 3). Paragraph 4 of the article makes it optional for the sending State to address notifications directly to the host State. It should be noted that paragraph 4 provides a supplement to and not an alternative or a substitute for the basic pattern prescribed in paragraphs 1 and 3 of the article.

# Article 18. Chargé d'affaires ad interim

If the post of permanent representative is vacant, or if the permanent representative is unable to perform his functions, a *chargé d'affaires ad interim* shall act as head of the permanent mission. The name of the *chargé d'affaires ad interim* shall be notified to the Organization either by the permanent representative or, in case he is unable to do so, by the sending State.

#### Commentary

- (1) Article 18 provides for situations where the post of head of mission falls vacant, or the head of the mission is unable to perform his functions. It corresponds to paragraph 1 of article 19 of the Vienna Convention on Diplomatic Relations. However, the word "provisionally", which appears in that paragraph has not been retained in article 18; the Commission deemed the word unnecessary since the concept it expresses is already covered by the words "ad interim", and misleading since it may give the impression that acts performed by a chargé d'affaires are subject to confirmation.
- (2) General Assembly resolution 257 A (III) envisages the possibility that the duties of head of mission may be performed temporarily by someone other than the permanent representative. Operative paragraph 3 of the resolution provides that: "the permanent representative, in case of temporary absence, shall notify the Secretary-General of the name of the member of the mission who will perform the duties of head of the mission".
- (3) In the list of permanent missions published by the United Nations ("blue book") the designation "chargé d'affaires, a.i." is used once the Secretariat has been informed of such an appointment. The specialized agencies gave differing replies to the question whether there is a practice in those roganizations for permanent missions to give notification that an acting permanent representative or chargé d'affaires has become temporary head of mission. A number of them indicated that notifications are usually received concerning the designation of acting permanent representatives. Some of the agencies replied that in practice certain permanent missions notify them that the deputy permanent representative has assumed the funcions of temporary head of mission or inform them that a permanent representative ad interim or a chargé d'affaires is temporarily in charge of a mission. Others indicated that no such practice existed. One or two agencies pointed out that since missions frequently consist of only the resident representative and

seldom exceed three members, no practice in respect of the question has so far developed.

(4) The term "chargé d'affaires" should be distinguished from the terms "alternate representative" or "deputy permanent representative". The latter are frequently used by member States to designate the person ranking immediately after the permanent representative.

#### Article 19. Precedence

Precedence among permanent representatives shall be determined by the alphabetical order or according to the time and date of the submission of their credentials to the competent organ of the Organization, in accordance with the practice established in the Organization.

### Commentary

- (1) Article 19 regulates only precedence among permanent representatives. It does not regulate the precedence of permanent representatives in relation to representatives to organs to international organizations; neither does it deal with precedence among members of delegations to such organs or to conferences convened by international organizations.
- (2) The question of the precedence of permanent representatives was not included in the questionnaire prepared by the Legal Counsel of the United Nations, and the replies of the legal advisers of the specialized agencies to that questionnaire contained no information on the matter. On 3 July 1968, the Secretary-General submitted to the Commission a note 69 entitled "Precedence of representatives to the United Nations". The information supplied in the note related mainly to representatives of Member States to the General Assembly of the United Nations.
- (3) Treatises on diplomatic practice and protocol deal chiefly with the question of precedence in the relations between States. A recent work on protocol, however, devotes a section to the United Nations. It States, in particular:

"The principle of the equality of States prevails absolutely. When their representatives meet officially they are disposed according to the English alphabetical order of their country. This alphabetical order changes annually at the opening of the General Assembly. Members of missions take their places grade by grade in the same alphabetical order. No special favours are granted to an agent who is called upon to replace the chief of mission when he is absent or unable to attend.... The heads of permanent missions, whether permanent or temporary, constitute a first category whose members are seated... according to the English alphabetical order of the States which delegated them." 70

the practice of international organizations concerning

<sup>69</sup> See p. 163 above (A/CN.4/L.129).

<sup>&</sup>lt;sup>70</sup> Jean Serres, Manuel pratique de protocole, Vitry-le-François, 1965, paras. 730 and 733.

precedence varied greatly and expressed doubts about the desirability of including a rule on the matter in the draft articles. But most of the members of the Commission thought that the draft articles, like the Vienna Convention on Diplomatic Relations, should contain a rule on precedence. The absence of such a rule would leave an unnecessary gap in the draft. They differed, however, as to the order of precedence which should be laid down in the rule to be adopted by the Commission. Some favoured the alphabetical order, stating that it was followed in most international organizations. Others observed that as regards precedence there was no essential difference between the situation of permanent representatives and that of heads of diplomatic missions. They suggested therefore that the order of the time and date of submission of credentials should be adopted. A third alternative mentioned during the discussion would have determined precedence in accordance with the order applied in each of the organizations concerned.

- (5) The rule adopted by the Commission in article 19 is based on two variants, the first being the alphabetical order and the second the order of time and date of submission of credentials, in accordance with the practice established in the Organization.
- (6) Unlike article 16 of the Vienna Convention on Diplomatic Relations, article 19 does not make reference to the classes of permanent representative. The division of heads of diplomatic missions into the classes of ambassadors, ministers and *chargés d'affaires en pied* is not applicable to permanent missions to international organizations.<sup>71</sup>

#### Article 20. Offices of permanent missions

- 1. The sending State may not, without the prior consent of the host State, establish offices of the permanent mission in localities other than that in which the seat or an office of the Organization is established.
- 2. The sending State may not establish offices of the permanent mission in the territory of a State other than the host State, except with the prior consent of such a State.

#### Commentary

(1) The provisions of article 20 have been included in the draft to avoid the awkward situation which would result for the host State in an office of a permanent mission was established in a locality other than that in which the seat or an office of the Organization is established. The article deals also with the rare cases in which sending States wish to establish offices of their permanent missions outside the territory of the host State.

(2) There is no specific reference to the offices of permanent missions in the United Nations Headquarters Agreement. General Assembly resolution 257 A (III) refers to the personnel of the permanent missions (credentials) of a permanent representative communication of appointment of the staff of a permanent mission, etc.) but does not deal with the offices of such missions. The practice relating to the matter at United Nations Headquarters was summarized as follows in a letter sent by the Legal Counsel of the United Nations to the legal adviser of one of the specialized agencies:

"In practice permanent missions do not inform us in advance of their intention to set up an office at a given location, and I understand do not inform the United States Mission, unless they desire assistance of some kind in obtaining the property or otherwise. They do of course advise us of the address of their office once it is established and of any changes of address. We publish the address in the monthly list of Permanent Missions. We also inform the United States Mission of new addresses, and the United States Mission is sometimes informed directly by the permanent mission, but there is no special procedure, consultation or acceptance, tacit or express, involved." 72

(3) As regards the United Nations Office at Geneva. the Swiss Federal Authorities informed permanent missions that they had no objection in principle to the same mission representing the sending State both at Berne and at the Geneva Office, but that they would recognize such a mission as an embassy only when its premises were situated in Berne. At the present time all permanent missions at the Geneva Office are located in Geneva, with the exception of two in Berne and one in Paris.73 (4) The replies of the specialized agencies to the questionnaire prepared by the Legal Counsel indicate in general that no restrictions on the location of the premises of a permanent mission have been imposed by the host State. One organization—IAEA pointed out in its reply that "the premises of some permanent missions accredited to IAEA are not in Austria, but in other European countries".

# Article 21. Use of flag and emblem

- 1. The permanent mission shall have the right to use the flag and emblem of the sending State on its premises. The permanent representative shall have the same right as regards his residence and means of transport.
- 2. In the exercise of the right accorded by this article, regard shall be had to the laws, regulations and usages of the host State.

<sup>&</sup>lt;sup>71</sup> This division is dealt with in article 14 of the Vienna Convention on Diplomatic Relations. Article 14 reads:

<sup>&</sup>quot;1. Heads of mission are divided into three classes—namely:
"(a) That of ambassadors or nuncios accredited to Heads of

State, and other heads of mission of equivalent rank;
"(b) That of envoys, ministers and internuncios accredited to Heads of State;

<sup>&</sup>quot;(c) That of chargés d'affaires accredited to Ministers for Foreign Affairs.

<sup>&</sup>quot;2. Except as concerns precedence and etiquette, there shall be no differentiation between heads of mission by reason of their class."

<sup>&</sup>lt;sup>72</sup> Study of the Secretariat. See Yearbook of the International Law Commission, 1967, vol. II, document A/CN.A/L.118 and Add.1 and 2, p. 181, para. 154.

<sup>&</sup>lt;sup>13</sup> Ibid., para. 155.

# Commentary

- (1) Paragraph 1 of this article is based on article 20 of the Vienna Convention on Diplomatic Relations. There is, however, a difference in drafting between the two texts. Unlike article 20 of the Vienna Convention, paragraph 1 of article 21 is divided into two sentences to make clearer the distinction between the right granted therein to the permanent mission as such and the right granted to the permanent representative.
- (2) Paragraph 2 of article 21 is modelled on paragraph 3 of article 29 of the Vienna Convention on Consular Relations and on paragraph 2 of article 19 of the draft articles on special missions.
- (3) So far no express provisions appear to regulate the question of the use by permanent missions of national flags and emblems. In the practice of the United Nations, Member States have used their national flags and emblems on the premises of their permanent missions and, to a lesser extent, on the residence and means of transport of their permanent representatives.<sup>74</sup> In Geneva national flags are flown only on national days and on special occasions.<sup>75</sup>
- (4) The replies of the specialized agencies and IAEA to the questionnaire prepared by the Legal Counsel can be summarized as follows. In a number of cases the national flags of member States are flown from the offices of their permanent missions and, to a lesser extent, on the cars used by the permanent representatives. National flags are not flown from the offices of permanent mission located in the UNESCO building. IAEA stated that it had no knowledge of resident representatives having flown a national flag from their offices unless they were at the same time accredited to the host State. On the other hand, permanent representatives to UNESCO who are assimilated to heads of diplomatic missions normally fly the national flag on their cars when travelling on official business. In general, however, it would appear that the fact that many representatives are members of diplomatic missions and that many premises are also used for other purposes (e.g., as an embassy or consulate) has prevented any clear or uniform practice from emerging.76

# CHAPTER III

# Succession of States and Governments

#### A. BACKGROUND

29. At its first session, held in 1949, the International Law Commission included "Succession of States and Governments" among the fourteen topics selected for codification, listed in paragraph 16 of its reports for that

- year.<sup>77</sup> The Commission did not give priority to this topic, however, and because it was occupied with the codification of other branches of international law, such as arbitral procedure, the law of the sea, nationality, including statelessness, and diplomatic and consular intercourse and immunities, it did not revert to "Succession of States and Governments" until its fourteenth session held in 1962. On that occasion, the International Law Commission considered its future programme of work, in accordance with General Assembly resolution 1686 (XVI) of 18 December 1961.78 Bearing in mind that paragraph 3 (a) of this resolution recommended the Commission to include "on its priority list the topic of succession of States and Governments", the Commission decided to include that topic in its future programme of work." 79
- 30. During its fourteenth session, at the 637th meeting, held on 7 May 1962, the Commission set up a Sub-Committee on the Succession of States and Governments, which it entrusted to submit suggestions on the scope of the subject, the method of approach for a study and the means of providing the necessary documentation. The Sub-Committee consisted of the following ten members: Mr. Lachs (Chairman), Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Liu, Mr. Rosenne, Mr. Tabibi and Mr. Tunkin. The Sub-Committee held two private meetings, on 16 May and 21 June 1962. S1
- 31. In the light of the Sub-Committee's suggestions, the Commission took the following decisions at its 668th meeting, held on 26 June 1962; (1) the Sub-Committee was to meet at Geneva in January 1963 to continue its work; (2) the members of the Sub-Committee were to submit memoranda dealing essentially with the scope of and approach to the subject; (3) the Chairman of the Sub-Committee was to submit to the latter a working paper containing a summary of the views expressed in the memoranda; (4) the Chairman of the Sub-Committee was to prepare a report on the results of its work, for submission to the Commission at its fifteenth session; (5) the Secretariat was to undertake specific studies.<sup>82</sup> In addition, at its 669th meeting, held on 27 June 1962, the Commission decided to place on the agenda for its fifteenth session the item "Report of

<sup>&</sup>lt;sup>74</sup> *Ibid.*, para. 159.

<sup>75</sup> Ibid.

<sup>&</sup>lt;sup>76</sup> Ibid., p. 203, para. 58.

<sup>&</sup>lt;sup>77</sup> Official Records of the General Assembly, Fourth Session, Supplement No. 10 (A/1925); Yearbook of the International Law Commission, 1949, p. 279. The Commission selected the fourteen topics after reviewing twenty-five, on the basis of a memorandum by the Secretary-General entitled "Survey of International Law in relation to the Work of Codification of the International Law Commission (document A/CN.4/1/Rev.1, published in English and French only.

<sup>&</sup>lt;sup>78</sup> The General Assembly adopted resolution 1686 (XVI) after considering the item "Future work in the field of the codification and progressive development of international law", which had been placed on the provisional agenda of its sixteenth session pursuant to resolution 1505 (XV) of 12 December 1960.

<sup>79</sup> See Yearbook of the International Law Commission, 1962, vol. II, document A/5209, p. 190, para. 60.

<sup>&</sup>lt;sup>80</sup> See Yearbook of the International Law Commission, 1962, vol. II, document A/5209, p. 189, para. 54.

<sup>81</sup> Ibid., pp. 189, 190 and 191, paras. 55, 70 and 71.

<sup>82</sup> Ibid., pp. 191 and 192, para. 72.

the Sub-Committee on Succession of States and Governments".83

32. By its resolution 1765 (XVII) of 20 November 1962, the General Assembly, noting that the International Law Commission, in order to expedite its work on the succession of States and Governments, had established a Sub-Committee which was to meet at Geneva in January 1963 to study the scope of, and approach to, that topic, recommended that the Commission should "continue its work on the succession of States and Governments taking into account the views expressed at the seventeenth session of the General Assembly and the report of the Sub-Committee on the Succession of States and Governments with appropriate reference to the views of States which have achieved independence since the Second World War".

33. The Sub-Committee on the Succession of States and Governments met at Geneva from 17 to 25 January 1963 and again on 6 June 1963, at the beginning of the International Law Commission's fifteenth session. On concluding its work, the Sub-Committee approved a report (A/CN.4/160), which appears as annex II to the report of the International Law Commission to the General Assembly on the work of its fifteenth session (1963).84 The Sub-Committee's report contains its conclusions on the scope of the topic of succession of States and Governments and its recommendations on the approach the Commission should adopt in its study. In the Yearbook of the International Law Commission, 1963, the Sub-Committee's report is accompanied by its two appendices.85 Appendix I reproduces the summary records of the meetings held by the Sub-Committee in January 1963 and on 6 June of the same year, and appendix II contains the memoranda and working papers submitted to the Sub-Committee by Mr. Elias (ILC (XIV)/SC.2/WP.1 and A/CN.4/SC.2/WP.6), Mr. Tabibi (A/CN.4/SC.2/WP.2), Mr. Rosenne (A/CN.4/ SC.2/WP.3), Mr. Castrén (A/CN.4/SC.2/WP.4) Mr. Bartoš (A/CN.4/SC.2/WP.5) and Mr. Lachs (Chairman of the Sub-Committee) (A/CN.4/SC.2/WP.7).

34. The report of the Sub-Committee on the Succession of States and Governments was discussed by the Commission during its fifteenth session (1963), at the 702nd meeting, after being introduced by Mr. Lachs, the Chairman of the Sub-Committee, who explained the Sub-Committee's conclusions and recommendations. 86 The Commission unanimously approved the Sub-Committee's report and gave its general approval to the recommendations contained therein. The Commission "considered that the priority given to the study of the question of State succession was fully justified", and stated that the succession of Governments would, for the time being, be considered "only to the extent necessary to supplement the study on State succession". Several members emphasized that, in view of the modern phe-

nomenon of decolonization, "special attention should be given to the problems of concern to the new States". The Commission endorsed the Sub-Committee's opinion that succession in the matter of treaties should be "considered in connexion with the succession of States rather than in the context of the law of treaties", and considered it "essential to establish some degree of co-ordination between the Special Rapporteurs on, respectively, the law of treaties, State responsibility, and the succession of States". It also endorsed the Sub-Committee's view that the objective should be a "survey and evaluation of the present state of the law and practice in the matter of State succession and the preparation of draft articles on the topic in the light of new developments in international law". The broad outline, the order of priority of the headings and the detailed division of the topic recommended by the Sub-Committee were likewise agreed to by the Commission, it being understood that the purpose was to lay down "guiding principles to be followed by the Special Rapporteur" and that the Commission's approval was "without prejudice to the position of each member with regard to the substance of the questions included in the programme". The headings into which the topic was divided were as follows: (i) succession in respect of treaties; (ii) succession in respect of rights and duties resulting from sources other than treaties; (iii) succession in respect of membership of international organizations.

35. Lastly, at its fifteenth session, the Commission appointed Mr. Lachs as Special Rapporteur on the topic of the succession of States and Governments and gave instructions to the Secretariat with regard to obtaining information on the practice of States.<sup>87</sup> The Secretary-General had sent a circular note to the Governments of Members States, in accordance with the relevant provisions of the Commission's Statute, inviting them to submit the text of any treaties, laws, decrees, regulations, diplomatic correspondence, etc., concerning the procedure of succession relating to the States which have achieved independence since the Second World War.<sup>88</sup>

36. In its resolution 1902 (XVIII) of 18 November 1963, the General Assembly, noting that the work of codification of the topic of succession of States and Governments was proceeding satisfactorily, recommended that the International Law Commission should "continue its work on the succession of States and Governments, taking into account the views expressed at the eighteenth session of the General Assembly, the report of the Sub-Committee on the Succession of States and Governments and the comments which may be submitted by Governments, with appropriate reference to the views of States which have achieved independence since the Second World War.

37. Having regard to the fact that the term of office of its members would expire in 1966, the International

<sup>83</sup> Ibid., p. 192, para. 74.

<sup>&</sup>lt;sup>84</sup> See Yearbook of the International Law Commission, 1963, vol. II, document A/5509, p. 260.

<sup>85</sup> Ibid., pp. 262-300.

<sup>86</sup> Ibid., pp. 224 and 225, paras. 56-61.

<sup>87</sup> Ibid., pp. 224 and 225, para. 61.

<sup>&</sup>lt;sup>88</sup> See Yearbook of the International Law Commission, 1962, vol. II, document A/5209, p. 192, para. 73. The Sub-Committee had proposed that the Commission should remind Governments of the Secretary-General's circular note.

Law Commission decided, in 1964, to devote its 1965 and 1966 sessions to the work then in progress on the law of treaties and on special missions, since some considerable time would be needed to complete that work. The question of succession of States and Governments would be dealt with as soon as the study of those subjects and of relations between States and intergovernmental organizations had been completed. Consequently, the Commission did not consider the topic of the succession of States and Governments at its sixteenth (1964), seventeenth (1965/1966) and eighteenth (1966) sessions. In 1966, the Commission decided to place the topic of the succession of States and Governments on the provisional agenda for its nineteenth session (1967).

38. In its work on the law of treaties the Commission noted certain points to which the succession of States or Governments might be relevant. Examples which may be mentioned are the reference to the succession of States and Governments made in 1963, in connexion with the extinction of the international personality of a State and the termination of treaties, 91 and the reference made in 1964 to the territorial scope of treaties and the effects of treaties on third States.92 However, in accordance with the decision of principle referred to in paragraph 34 above, the Commission decided not to concern itself with these points in the context of the codification of the law of treaties. The introduction to the final draft on the law of treaties, adopted by the Commission in 1966, states that "the draft articles do not contain provisions concerning the succession of States in respect of treaties, which the Commission considers can be more appropriately dealt with under the item of its agenda relating to succession of States and Governments, or concerning the effect of the extinction of the international personality of a State upon the termination of treaties".83 Article 69 of the final draft articles on the law of treaties expresses the following reservation on this matter; "The provisions of the present articles are without prejudice to any question that may arise in regard to a treaty from succession of States or from the international responsibility of a State."

39. In its resolutions 2045 (XX) of 8 December 1965 and 2167 (XXI) of 5 December 1966, the General Assembly noted with approval the Commission's programme of work referred to in its reports of 1964, 1965 and 1966. Resolution 2045 (XX) recommended that the Commission should continue, "when possible", its work

on the succession of States and Governments, "taking into account the views and considerations referred to in General Assembly resolution 1902 (XVIII)". Resolution 2167 (XXI) in turn recommended that the Commission should continue that work "taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII)".

At its nineteenth session (1967), the Commission made new arrangements for the work on this topic.94 In doing so it took account of the broad outline of the subject laid down in the report by its Sub-Committee in 1963, which has been agreed to by the Commission in the same year, and of the fact that in December 1966 Mr. Lachs, the Special Rapporteur on succession of States and Governments, had been elected to the International Court of Justice and had ceased to be a member of the Commission. Acting on a suggestion previously made by Mr. Lachs, the Commission decided to divide the topic of succession of States and Governments in order to advance its study more rapidly. Taking into account the division of the topic into three headings by the Sub-Committee (see paragraph 34 above), the Commission decided to appoint Special Rapporteurs for two of these. Sir Humphrey Waldock, formerly Special Rapporteur of the Commission on the law of treaties, was appointed Special Rapporteur for "succession in respect of treaties" and Mr. Mohammed Bedjaoui, Special Rapporteur for "succession in respect of rights and duties resulting from sources other than treaties". The Commission decided to leave aside, for the time being, the third heading in the division made by the Sub-Committee, namely, "succession in respect of membership of international organizations", which it considered to be related both to succession in respect of treaties and to relations between States and inter-governmental organizations. Consequently, the Commission did not appoint a Special Rapporteur for his heading.

41. With regard to "succession in respect of treaties", the Commission observed that it had already decided in 1963 to give priority to this aspect of the topic, and that the convocation by General Assembly resolution 2166 (XXI), of 5 December 1966, of a conference on the law of treaties in 1968 and 1969 had made its codification more urgent. The Commission therefore decided to advance the work on that aspect of the topic as rapidly as possible at its twentieth session in 1968.95 The Commission considered that the second aspect of the topic, namely, "succession in respect of rights and duties resulting from sources other than treaties", was a diverse and complex matter which would require some preparatory study. It requested the Special Rapporteur for this second aspect of the topic "to present an introductory report which would enable the Commission to decide what parts of the subject should be dealt with, the priorities to be given to them, and the general manner of treatment".96

<sup>&</sup>lt;sup>89</sup> See Yearbook of the International Law Commission, 1964, vol. II, document A/5809, p. 226, paras. 36 and 37.

<sup>&</sup>lt;sup>90</sup> See Yearbook of the International Law Commission, 1966. vol. II, document A/6309/Rev.1, part II, p. 278, para. 74.

<sup>&</sup>lt;sup>91</sup> See Yearhook of the International Law Commission, 1963, vol. II, document A/5509, p. 206, para. (3) of the commentary to article 43.

<sup>92</sup> See Yearbook of the International Law Commission, 1964, vol. II, document A/5809, p. 175, para. 18.

<sup>&</sup>lt;sup>93</sup> See Yearbook of the International Law Commission, 1966, vol. II, document A/6309/Rev.1, part II, pp. 177 and 256, para. 30 of the report and para. (6) of the commentary to article 58 of the draft.

<sup>&</sup>lt;sup>94</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 368, paras. 38-41.

<sup>95 1</sup>bid., para. 39.

<sup>96</sup> Ibid., para. 40.

42. The Commission's decisions referred to in paragraphs 40 and 41 above received general support in the Sixth Committee at the General Assembly's twenty-second session. The Assembly, in its resolution 2272 (XXII) of 1 December 1967, noted with approval the International Law Commission's programme of work for 1968, and, repeating the terms of its resolution 2167 (XXI), recommended that the Commission should continue its work on succession of States and Governments, "taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII)".

#### B. STUDIES BY THE SECRETARIAT

43. In connexion with the topic of "Succession of States and Governments", the Secretariat has so far prepared and distributed the following documents and publications: 97 (a) a memorandum on the succession of States in relation to membership in the United Nations (A/CN.4/149 and Add.1); (b) a memorandum on the succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary (A/CN.4/150); (c) a study entitled "Digest of the decisions of international tribunals relating to State succession" (A/CN.4/151); (d) a study entitled "Digest of decisions of national courts relating to succession of States and Governments" (A/CN.4/157); (e) five studies on the succession of States to multilateral treaties (A/CN.4/200 and Add.1 and 2); (f) a volume of the United Nations Legislative Series entitled "Material on succession of States" (ST/LEG/SER.B/14), containing the information provided or indicated by Governments of Member States in response to the Secretary-General's request referred to in paragraph 35 above. The first three documents, which were distributed in January 1962,98 were submitted to the Sub-Committee in January 1963 and the fourth to the Commission some months later at its fifteenth session.99 At the present session, the five studies 100 and the volume of the United Nations Legislative Series mentioned in (e) and (f) above were distributed. The Commission expressed its high appreciation for the studies prepared by the Secretariat.

# C. COMMISSION'S DEBATE AT ITS TWENTIETH SESSION

44. At its twentieth session, the Commission had before it a first report on "Succession of States in respect of rights and duties resulting from sources other than treaties" (A/CN.4/204) submitted by Mr. Mohammed

Bedjaoui, Special Rapporteur on that aspect of the topic, and a first report on the succession of States and Governments in respect of treaties (A/CN.4/202) <sup>101</sup> submitted by Sir Humphrey Waldock, Special Rapporteur on succession in respect of treaties. The two reports were considered successively, beginning with the report on succession of States in respect of rights and duties resulting from sources other than treaties.

# (a) SUCCESSION IN RESPECT OF MATTERS OTHER THAN TREATIES

45. The Commission considered the report (A/CN.4/ 204) submitted by Mr. Mohammed Bedjaoui, the Special Rapporteur, at its 960th to 965th and 968th meetings. After a general debate on the report the Commission requested the Special Rapporteur to prepare a list of preliminary questions relating to points on which he wished to have the Commission's views. In compliance with that request the Special Rapporteur submitted to the Commission, at its 962nd meeting, a questionnaire on the following eight point: (a) title and scope of the topic; (b) general definition of State succession; (c) method of work; (d) form of the work; (e) origins and types of State succession; (f) specific problems of new States; (g) judicial settlement of disputes; (h) order of priority or choice of certain aspects of the topic. At its 965th meeting, the Commission provisionally adopted a number of conclusions on the points listed in the Special Rapporteur's questionnaire, pending whatever decisions it might take on succession in respect of treaties. After considering the report (A/CN.4/202) submitted by Sir Humphrey Waldock, the Commission, at its 968th meeting, reaffirmed the conclusions it had reached concerning succession in respect of matters other than treaties. These conclusions are given below together with a summary of the views expressed by the members of the Commission during the discussion preceding their adoption.

# 1. Title and scope of the topic

46. All the members of the Commission who participated in the debate agreed that the criterion for demarcation between this topic and that concerning succession in respect of treaties was "the subject-matter of succession" i.e., the content of succession and not its modalities. In order to avoid all ambiguity, it was decided, in accordance with the Special Rapporteur's suggestion, to delete from the title of the topic all reference to "sources", since any such reference might imply that it was intended to divide up the topic by distinguishing between conventional and non-conventional succession. The Commission accordingly replaced the original title, "Succession in respect of rights and duties resulting from sources other than treaties", by the following title: "Succession in respect of matters other than treaties". Some members of the Commission added that, to delimit the subject properly, it was also necessary to take account of the distinction between questions pertaining to the international law of succession and those pertaining to

<sup>&</sup>lt;sup>97</sup> For the studies, documentation and publications requested from the Secretariat, see *Yearbook of the International Law Commission*, 1962, vol. II, document A/5209, pp. 191-193, paras. 72 and 73, and *Yearbook of the International Law Commission*, 1963, vol. II, document A/5509, pp. 224 and 225, para. 61, and annex II, p. 262, paras. 16 and 17.

<sup>98</sup> Reproduced in the Yearbook of the International Law Commission, 1962, vol. II.

<sup>&</sup>lt;sup>89</sup> Reproduced in the Yearbook of the International Law Commission, 1963, vol. II.

<sup>100</sup> See p. 119, above.

<sup>&</sup>lt;sup>101</sup> See p. 87, above.

other branches of international law, and of the distinction between the international law of succession and succession in internal law.

# 2. General definition of State succession

- Some members observed that if a general definition was considered necessary, the Commission could take as its starting point the definition given in paragraph 2 (a) of draft article 1 in the report (A/CN.4/202)submitted by Sir Humphrey Waldock, or at least temporarily attribute to "succession" the meaning suggested in that sub-paragraph, namely, a change in the possession of "competence" to conclude treaties with respect to a given territory. The use of the term "competence" instead of "sovereignty" would, in the opinion of certain members, have the advantage that the definition would cover a greater number of international situations (international mandates; territories under trusteeship; protectorates; maritimes zones over which the adjacent coastal State can exercise limited jurisdiction, etc.). Other members preferred the term "sovereignty", however, as it would exclude certain situations; for instance, those arising from a military occupation. It was also pointed out that if a definition was drawn up, it would be necessary to take account of partial succession and deal with every case in which a displacement of sovereignty occurred, even if that displacement affected only a fraction, however small, of the territory of a State.
- 48. Many members of the Commission considered that at the present stage of the work the drafting of a general definition of "State succession" was a theoretical or academic matter which should be avoided. In their opinion, the Commission's task was to formulate rules on the concrete problems raised by the topic and not to attempt to draw up definitions, which would necessarily be of an abstract nature and of doubtful utility. The problems raised by the formulation of a definition of that kind really went beyond the scope of the topic of succession proper; moreover, the immediate usefulness of a definition would be very relative, for as its study of the topic progressed, the Commission would probably have to amend or adapt the formula originally adopted. These members thought that the best course would be to explain, at a later stage in the work, the meaning of the terms used in the draft or drafts prepared, in other words, to try to give an agreed meaning to those terms in the context of the draft in question. They added that the Special Rapporteurs should consult each other before defining the terms to be used in their respective drafts.
- 49. Some members of the Commission considered the use of the term "succession" unsatisfactory, though they agreed that it should continue to be used so long as no more acceptable term was found. Other members, on the other hand, found it appropriate, since it was a term now widely used in international law; they pointed out that this was not the only case in which public international law made use of an expression that had its origin in private law. Lastly, it was also pointed out that the use of the term "succession" in future drafts would largely depend on the rules formulated in them.

50. The Commission decided: (a) that there was no need to attempt to draw up a general definition of State succession or, for the time being, of the term "succession"; (b) that it might be advisable, at a later stage, to give some explanations concerning the meaning of the expressions used in the draft; (c) that the term "succession" would meanwhile continue to be used.

# 3. Method of work

- 51. The Commission decided that the study of the topic of succession of States should combine the technique of codification with that of progressive development. Drawing attention to the link between the codification and the progressive development of international law, the members of the Commission took the view that it was not really a question of choosing between one and the other, but of achieving a balance between the two in the rules to be formulated, taking into account the comments which would be submitted by Governments in due course.
- 52. According to some members, the succession of States would lend itself particularly well to progressive development, because of the very recent phenomenon of decolonization. While not denying the value of traditional rules or the importance of rules laid down in treaties, these members pointed out that such rules are changing under the influence of the development of the general principles of international law, the recognition of the existence of certain peremptory norms and State practice. Consequently, in formulating general rules on the succession of States, the Commission should endeavour to harmonize the old rules with contemporary conditions.
- 53. Other members, while noting that the diverse character of the practice in State succession would clearly necessitate a certain element of progressive development, considered it essential to ascertain what the international community accepted as law in regard to State succession, with a view to formulating a balanced system of rules that would take account of all the relevant precedents and factors and all the legitimate interests. The objectives stated in the report of the Sub-Committee of 1963, approved by the Commission the same year, should continue to serve as a general guide and should not be changed without good reason.

#### 4. Form of the work

- 54. All the members of the Commission who spoke in the debate rejected the idea of preparing a mere dissertation or commentary. Although some considered that what was important at the present stage was to formulate a set of rules, irrespective of whether they were stated in the language of treaties or in less rigorous terms, the majority of the Commission was in favour of preparing a draft of articles with reasoned commentaries on the aspects of the topic it was decided to select.
- 55. Some members said that the articles should be so drafted that they could subsequently serve as the basis for a convention. However, the prevailing opinion was that until the Commission had a complete set of draft

articles before it, it could not decide on the final form to be given to its work on succession of States in respect of matters other than treaties. Finally, some members urged that the draft rules or articles should be formulated concisely and should not enter into unnecessary details.

56. In conclusion, the Commission requested the Special Rapporteur to prepare draft articles, or possibly a set of rules, and postponed its decision on the final form of the work.

# 5. Origins and types of State succession

- 57. In his report, the Special Rapporteur provisionally classified the succession of States in three general types: "dismemberment", "decolonization" and "merger". Reservations were expressed on the grounds that those were not the only types and that in practice they were frequently mixed, and also because the Special Rapporteur thought it desirable to distinguish between past, present and future types of State succession. Some members of the Commission considered that this classification provided a useful working hypothesis.
- 58. In this connexion, it was pointed out that each type of succession raises specific problems which must be approached in a different way. For instance, succession through the cession or transfer of part of the territory of a State cannot always be dealt with according to the same criteria as succession resulting from the birth of a new State. Moreover, the typology of successions makes it possible to study the material basis of the changes wich have occurred in the rules governing State succession. For this reason, some members thought that the Commission should consider the advisability of devoting a separate chapter of the future draft to decolonization. Other members expressed doubts regarding that idea and stressed that, in spite of the importance of decolonization, other causes of succession might become more frequent in the future (economic integrations; forms of federalism).
- 59. Nevertheless, the members of the Commission unanimously agreed that it was not advisable to deal separately with the origins and types of State succession. For the purposes of codifying the rules relating to succession, it was considered sufficient for the Commission and the Special Rapporteurs on the topic to bear in mind the various situations, with a view to formulating, when necessary, a special rule for the case of a succession due to a particular cause. The Special Rapporteurs could consult each other when the need arose.

# 6. Specific problems of new States

- 60. As stated in paragraphs 32 and 36 above, the General Assembly in its resolutions 1765 (XVII) and 1902 (XVIII) recommended that the Commission should continue its work on the succession of States and Governments "with appropriate reference to the views of States which have achieved independence since the Second World War".
- 61. After the views summarized in the following paragraphs of this section had been put forward in the

- debate, the Commission concluded that the problem of new States should be given special attention throughout the study of the topic, without, however, neglecting other causes of succession on that account.
- 62. Emphasizing that the present importance of the topic of State succession is due to the phenomenon of decolonization, various members of the Commission expressed the view that succession resulting from decolonization should be the subject of a special study in the context of the topic. Under the impact of the principles embodied in the United Nations Charter and the relevant resolutions and declarations adopted by the General Assembly, decolonization has become one of the aims of the international community and is proceeding under its supervision. As a result, succession resulting from decolonization presents—in the opinion of these members—specific aspects which are peculiar to it and which distinguish it from other causes of succession. Decolonization has given rise to rules which affect the rules of traditional succession. The Commission should therefore give decolonization problems all the attention they deserve. Although the process of emancipation is now nearly complete, some countries have still not achieved their independence; moreover, in nearly every case a number of questions remain in dispute between the new State and the former metropolitan country. Problems also arise in the relations of each new State with States other than the former metropolitan country. Consequently, formulation of the rules relating to succession problems connected with decolonization might prove useful even for the purpose of consolidating the political and economic independence of the recently emancipated States. It was not a question of minimizing the other aspects of succession, but of emphasizing the aspects resulting from decolonization.
- 63. Some members also drew attention to the difference in nature between decolonization and other cases of succession. They said that decolonization may bring a radical change in the social structure of new States and not merely a formal change of sovereignty. Its political, economic and social objectives are not the same as those of traditional succession. Conditions are not the same in the successor State and in the predecessor State. It was also pointed out that succession resulting from decolonization involves not only the transfer of sovereignty from one State to another, but sometimes also the return of an earlier sovereignty. All this affects the permanence of the acts performed by the predecessor State, so that the elements of rupture tend to carry more weight than those of continuity.
- 64. Other members stressed the need to avoid confusing State succession with decolonization. Decolonization is merely one of the processes of transferring sovereignty from one State to another which create succession problems. These members thought it unnecessary to stress unduly the differences between the old and new theories of State succession. There have always been new States. Countries undergoing these processes, whether they are former colonies or not, are faced with succession problems which are basically the same. Elements of continuity and rupture appear both in decoloni-

zation and in traditional succession. Decolonization is approaching completion, and the adoption of rules governing it will not satisfy future needs. Hence, attention should be devoted mainly to the cases of succession most likely to occur in the future (dissolution; merger; economic integration) and not only to the important, but transitory, problems of decolonization. If the Commission were to deal only with certain aspects of sucession, such as decolonization, the rules it drew up would be ephemeral and ill-balanced. It should avoid establishing a special law for the problems of the new States, since that would reduce the value of its work of codification, the object of which is, precisely, uniformity. For all these reasons, the members in question were opposed to the Commission's limiting its objective to the drafting of rules governing only one aspect of succession, and concentrating its efforts on the present situation to the exclusion of future needs.

- 65. Other members took the view that since the Commission was to study the problems of succession affecting all new States, the question of studying decolonization was ultimately only a matter of priorities. The fact of giving priority to the study of the recent problems of decolonization did not mean that the other problems of succession should be overlooked. In this connexion, it was noted that in the absence of comments by Governments, the Commission did not have sufficient information to be able to determine which aspects of State succession were of immediate importance for the international community in general.
- 66. As regards the question how much importance the Commission should attach, in its work on the topic, to the views of States which have achieved independence since the Second World War, some members drew attention to relevant resolutions of the General Assembly and stressed the fact that due account should be taken by the Commission of the General Assembly's recommendations. Hence due account must be taken of the views of the new States, which reflected recent practice and experience, especially in the matter of decolonization. The old rules and precedents had not lost all their force but they should be adapted and brought into line with present requirements and the development undergone by the principles of international law. Other members, while not underestimating the importance of the views of new States, thought it necessary to consider all views and make use of all existing practice. Otherwise, valuable and useful assistance would be lost and there would be some danger of the draft articles being difficult for all to accept. In preparing its codification drafts the Commission took account of the views of States, without making any distinction between old and new States.
- 67. It was also pointed out that State succession, and particularly succession resulting from decolonization concerns not only relations between the new State and the former metropolitan country and its nationals, but also relations between the new State and third States and their nationals. Certain situations may even be foreign to relations between the former metropolitan country and the new State. Problems frequently arise which affect relations between new States and international organiza-

- tions, as well as relations between the former metropolitan country and third States or international organizations. Not even relations between the new States themselves can be disregarded. In fact, the problems raised by succession resulting from decolonization are of concern to the whole international community, so that it is necessary to reconcile and protect the legitimate interests of all the interested parties in order to promote the welfare and collaboration of States and thereby consolidate world peace. Some members, however, observed that it would be necessary to draw up special rules for cases in which third States had profited from the colonial occupation, as otherwise the new States would be obliged to suffer the consequences of the acts of the colonial Power which had deprived them of freedom.
- 68. Some members thought that the best method would be to identify the specific problems raised for new States by a given general rule, and subsequently to formulate, when necessary, a special rule for decolonization or any other type of State succession requiring it. Others considered that the Commission should not try to draw up specific rules, but should concentrate on drafting general rules. A set of general rules on State succession would be more suitable for all States, including the new States. It could be stipulated in the draft being prepared that the rules laid down in it were without prejudice to special regulations.
- 69. Referring to devolution treaties, some members said that the Commission should take them into account when it draws up the rules concerning the birth of a new State, and that the aspects of such treaties coming under the separate headings into which the topic of succession of States and Governments had been divided, should be studied on the same basis. The effects of these treaties, and questions relating to their validity, would be governed by the law of treaties, unless the Commission found valid reasons for proposing some special rule on the subject. In this connexion it was pointed out that the draft articles on the law of treaties, which are being considered by the United Nations Conference on the Law of Treaties, contain an exhaustive enumeration of the grounds for invalidity of treaties. Devolution treaties may sometimes raise delicate problems including their effects on third States; but any suggestion that this kind of treaty may be void simply as such should be examined with the greatest caution. Experience shows that such treaties have been accepted as often as they have been rejected and the Commission should not examine controversial matters which belonged more properly to other branches of law. Devolution agreements might also, no doubt, provide indications of customary rules but that was part of the general problem of appreciating the State practice in regard to succession.
- 70. Other members considered that the specific problems of the new States born of decolonization should be solved in accordance with the general principles of contemporary international law rather than conventional rules. Devolution treaties may be a disguised means of maintaining a colonial relationship contrary to international law. It will be necessary to consider whether the consent of the former colonies to these treaties was

an expression of their free will or the price paid for their emancipation. If a devolution treaty so limits the sovereignty of a new State that the relationship it creates does not differ substantially from the former colonial relationship (unequal treaties), the treaty in question will violate the rule of international law which prohibits colonialism in all its forms and manifestations and is therefore void or voidable. The fact that this is difficult to determine in each specific case does not detract from the value of the principle. These members considered that the question of the relationship between treaties and the rules on State succession is one of the aspects of the topic that calls for separate treatment, according to whether the new State was created by decolonization or in some other manner.

# 7. Judicial settlement of disputes

- 71. During the debate, some members expressed the view that the Commission should deal with the judicial settlement of disputes arising out of State succession and should attempt to work out an adequate system. Other members were of the opinion that the question of the judicial settlement of disputes went beyond the scope of the topic and should be excluded from the Commission's work on succession of States in respect of matters other than treaties,
- 72. The prevailing opinion among members of the Commission was that no decision should be taken on this question until more progress had been made in studying the substance of the topic. Only then would it be possible to determine the types of dispute which might arise from the rules proposed, and the procedures or methods of settlement best suited to those aspects concerning which it might be considered advisable to work out a system of settlement. The Special Rapporteur should have complete freedom to examine the question and to submit his proposals to the Commission when he saw fit. The Commission concluded that it was premature to take a decision on the question of the judicial settlement of disputes.

# 8. Particular comments by some members on certain aspects of the topic

- 73. During the debate, some members of the Commission referred to certain particular aspects of the topic (public property; public debts; territorial problems; legal régime of the predecessor State; territorial problems; status of the inhabitants; acquired rights) and made a few preliminary comments on them. The Commission did not discuss these subjects.
- 74. With regard to "public property", opinions differed on the desirability of abandoning the traditional distinction between the public domain and the private domain of the State and it was considered advisable to formulate rules on the fate of archives and libraries. The general interest of the territory passing to the successor State was considered the decisive factor for determining succession in respect of public debts. Some members, believing that there is no succession to the legal régime of the predecessor State, considered that

- anything relating to succession to that régime should be omitted, whereas others thought that the Commission should examine the *de facto* problems that arose in this connexion. With regard to the question of the status of the inhabitants, attention was drawn to questions of nationality, the right of option and the protection of persons and their property.
- 75. It was also pointed out that the Commission should not formulate rules which might encourage States to question boundaries established legally, but should consider whether the wisest course would not be to formulate a general reservation on territorial problems and to examine those problems in detail outside the framework of the topic of State succession. Other members thought that territorial disputes between new States should not be settled according to an excessively formalistic criterion based on treaty provisions which might have their origin in unequal or colonial treaties, but according to the principle of self-determination and other general principles of international law stated in the United Nations Charter. In this connexion it was pointed out that there is no satisfactory definition of a "boundary", "frontier" or "line of demarcation" and that a boundary is not merely a question of drawing up a line but it involves a territory with a people whose right of self-determination should be respected. In addition, it was suggested by a member that in territorial questions the Commission might perhaps not be able to go beyond the study of international servitudes.
- 76. Lastly, with regard to so-called "acquired rights", some members took the view that, except for obligations arising out of treaties, such rights exist only if the successor State decides to subrogate itself in the contract of the predecessor State (novation). The Commission should endeavour to strengthen the sovereignty of new States, avoiding the perpetuation, as acquired rights, of earlier situations which it would be right to bring to an end. States have no obligation, on the international plane, to draw a distinction between so-called acquired rights and other property rights, which their legislation can modify when the general interest so requires. What aliens are entitled to claim is equality of treatment with nationals. On the other hand, the contractual nature of concession and other pre-existing government contracts cannot be invoked, because the successor State has not given its consent to them. As the whole question of State succession presents itself in terms of continuity or rupture, i.e., the maintenance or extinction of rights or situations acquired by a State or by a private person, some of these members maintained that acquired rights should not constitute a separate chapter of the future
- 77. Other members thought that the Commission should not adopt a dogmatic attitude in the matter. Reasons of justice and equity required that the Commission should take due account of the question of acquired rights, with a view to codifying the rules governing it and, if necessary, developing them progressively. If the possessors of private rights are nationals of a third State, the successor State does not have unlimited freedom of action, since it is obliged to observe the relevant rules

of international law. In the view of these members, save in exceptional cases the termination of concessions granted to aliens entails payment of compensation and the Commission should examine the circumstances in which the Successor State is entitled to cancel or modify the terms of such concessions. For although it is true that a new State cannot permit the perpetuation of acquired rights which would prevent it from developing its economy adequately, such rights cannot be suddenly abolished without seriously disrupting its economy.

# 9. Order of priority or choice of certain aspects of the topic

78. In view of the breadth and complexity of the task entrusted to the Special Rapporteur, the members of the Commission were in favour of giving priority to one or two aspects for immediate study, on the understanding that this did not in any way imply that all the other questions coming under the same heading would not be considered later. It was also pointed out that the order in which subjects would be studied would not affect their positions in the draft finally adopted.

79. Among the aspects to which priority should be given, the following were mentioned: (a) public property and public debts; (b) the question of natural resources; (c) territorial questions which came under the heading; (d) special problems arising from decolonization; (e) nationality changes resulting from succession; (f) certain aspects of succession to the legal régime of the predecessor State. The predominant view was that the economic aspects of succession should be considered first. At the outset, it was suggested that the problems of public property and public debts should be considered first. But, since that aspect appeared too limited, it was proposed that it should be combined with the question of natural resources as to cover problems of succession in respect of the different economic resources (interests and rights) including the associated questions of concession rights and government contracts (acquired rights). The Commission accordingly decided to entitle that aspect of the topic "Succession of States in economic and financial matters" and instructed the Special Rapporteur to prepare a report on it for the next session.

#### (b) SUCCESSION IN RESPECT OF TREATIES

80. The Commission considered the first report on succession of States and Governments in respect of treaties (A/CN.4/202) by Sir Humphrey Waldock, the Special Rapporteur, at its 965th, 966th, 967th and 968th meetings. The Commission endorsed the suggestion of the Special Rapporteur that it was unnecessary to repeat in the context of the present report the general debate which had taken place on the several aspects of succession in matters other than treaties which might also be of interest in regard to succession in respect of treaties. It would be for the Special Rapporteur to take account of the views expressed by members of the Commission in that debate in so far as they might also have relevance in the present connexion.

81. Following the discussion of the Special Rappor-

teur's report, summarized below, the Commission concluded that it was not called upon to take any formal decision in regard to "Succession in respect of treaties".

# 1. Dividing line between the two topics of succession

82. The Commission noted the view of the Special Rapporteur that he interpreted his own task as strictly limited to succession with respect to 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 that here would be the broad dividing line between the present topic and the topic entrusted to Mr. Bedjaoui. If in some instances the particular subjectmatter of the treaty might require consideration for its possible implications in regard to succession, the Special Rapporteur proposed to proceed on the basis that the present topic was essentially concerned only with the question of succession in respect of the treaty as such.

# 2. Nature and form of the work

- 83. The Commission, in line with the decision mentioned in paragraph 51 of this chapter, was in agreement that the present topic also should combine the technique of codification with that of progressive development.
- 84. The Commission noted the statement of the Special Rapporteur in introducing his report that he was casting his work in the form of draft articles on the model of a convention in order to provide the Commission with specific texts on which to focus the discussion and in order to clarify the issues; and that, in adopting this form for the work, he had not intended in any way to anticipate the ultimate decision of the Commission on this point.
- 85. One member of the Commission, without questioning the method of work for purposes of study, expressed doubts as to the advisability of a draft convention because of the difficulties which might arise in any endeavour to make such a convention effective. The succession or non-succession of the former dependent territories was now largely completed and the solutions adopted had varied with respect to varying types of treaties. The question therefore would arise whether the drafts articles would apply to the positions already taken by the "successor" States. Equally, in regard to future new States or mergers of States the problem would arise as to how the convention on succession could be made binding on a State which only came into existence after its adoption; for the convention could not include a mandatory provision that a new State would automatically be subject to the rules contained in it. The Special Rapporteur pointed out that analogous objections had formerly been made to the whole idea of the convention on the law of treaties which was even now before a diplomatic conference and that objections of a somewhat similar kind could be made to almost any codifying convention. In any case, examination of the question seemed premature and meanwhile the formulation of articles would provide a useful technique for isolating what might be genuine rules of law from practice which merely reflected considerations of expediency or policy.

86. Some members of the Commission expressed reservations in regard to the suggestion in paragraph 9 of the Special Rapporteur's report that the solution of the problems of succession in respect of treaties is today to be sought within the framework of the law of treaties rather than of any general law of succession. These members said that it was doubtful whether what took place at the time of succession could be explained solely by the law of treaties. The practice in succession to treaties, particularly to multilateral treaties, tended to show that a right of succession was created in favour of the successor State, and at the same time did not show that there was any obligation to succeed. Whether that constituted a rule or was merely a description of what occurred, the question remained whether it was to be explained solely by the rules of the law of treaties. If it should be necessary to postulate a general law of succession, it might hardly be justifiable to consider succession in respect of treaties within the framework of the law of treaties rather than of any general law of succession. They also recalled that the Commission itself in 1963 and 1966 had appeared to envisage that the question of succession in respect of treaties would be dealt with within the context of the law of succession rather than of the law or treaties.

87. Other members observed that the Commission's decision to appoint two rapporteurs for succession of States and Governments indicated that the present topic should be treated in its own right, and that its choice as Special Rapporteur of its former rapporteur on the law of treaties suggested that the starting point should be the law of treaties. This did not mean that the aspects of State succession was to be disregarded but rather that, at the present stage of the work, an approach to the topic from the point of view of the law of treaties would give the best chance of achieving concrete results. Clearly, since the topic was succession of States in respect of treaties, it could not be studied solely within the framework of the law of treaties or solely within the framework of the law of succession.

88. The Special Rapporteur emphasized that the statement in his report which had given rise to the discussion did not go beyond suggesting that the solution of the problems of succession in respect of treaties was today to be sought within the framework of the law of treaties rather than of any general law of succession. As the title of the topic itself indicated, there could not be any question of detaching the present topic altogether from succession of States or from such general principles of succession as the Commission might find to exist. In his view, the position was that the problems to be solved were problems of the law of treaties which arose in a special context—a succession of States. Succession of States took different forms resulting from such processes as decolonization, dismemberment, fusion and transfers of territory and these different forms of succession could have different implications when viewed as the context of the problems of succession in respect of treaties which required solution. He shared the view expressed by some members that in the case of large multilateral treaties an extensive practice indicated that there might exist at least one basic rule; that a new State was entitled, by using one procedure or another, to continue the application of the treaty to its own territory as a party in its own right, independently of the actual provisions of the final clauses of the treaty concerning participation; in this connexion he pointed out that the draft Vienna Convention on the law of treaties had a new article-article 9 bis-providing in general terms for "other methods" of participation in treaties in addition to signature, ratification, acceptance, etc. Such a right, if endorsed by the Commission, fell outside the normal institutions of the law of treaties and might be considered as a form of "succession"; for even in municipal law, as pointed out by a member in the debate, the need for an element of consent was not inconsistent with the concept of "succession". But the case would be one of succession to a right to be a party to the treaty not of a direct succession to the rights and obligations of the treaty. The State practice in itself showed considerable divergence on the question whether the "successor" State regarded itself as standing in the shoes of its predecessor or as entering the treaty in the guise of an entirely new Party. In general, it was, of course, essential-indeed inevitable—that the Commission should examine the different causes of "succession" situations and their implications with regard to succession in respect of treaties. 89. In the same general connexion, the question was raised in the discussions as to whether the drafts on the present topic should be considered as a sequel to the draft articles on the law of treaties rather than as one section of a single codification of a comprehensive codification of a general law of succession of States. For the time being, however, it was merely noted that the draft would be prepared in the form of an autonomous group of articles on the specific topic of succession in respect of treaties. During the discussion, various particular aspects of the topic were touched upon by members, including the definition of succession, but were not pursued by members having regard to the preliminary character of the debate.

# 3. Title of the topic

90. Some members noted that the title to the topic used in the report was "Succession of States and Governments" in respect of treaties, and suggested that it should be changed in the light of the view previously expressed in the Comission that it should cover only succession of States and leave succession of Governments aside. In the introduction to his report, the Special Rapporteur had recalled the recommendation of the Sub-Committee in 1963 that the Special Rapporteur should "initially concentrate on the topic of State succession, and should study succession of Governments in so far as necessary to complement the study of State succession".

91. During the debate on Mr. Bedjaoui's report, the Special Rapporteur suggested that the wording of the title of the present topic might be brought closely into line with that of the new title to the other topic. The Commission noted that the title would read "Succession in respect of treaties".

# CHAPTER IV

#### The most-favoured-nation clause

- 92. The Special Rapporteur, Mr. Endre Ustor, submitted at the present session a working paper (A/CN.4/ L.127) giving an account of the preparatory work undertaken by him on the topic and outlining the possible contents of a report to be presented at a later stage. The working paper was aimed mainly at soliciting comments and guidance from the members of the Commission. The Special Rapporteur also submitted a questionnaire listing points on which he specifically asked the members of the Commission to express their opinion. 93. The Commission discussed the matter in the course of its 975th, 976th and 979th meetings. While recognizing the fundamental importance of the role of the most-favoured-nation clause in the domain of international trade, the Commission instructed the Special Rapporteur not to confine his studies to that area but to explore the major fields of application of the clause. The Commission considers that it should focus on the legal character of the clause and the legal conditions governing its application. It intends to clarify the scope and effect of the clause as a legal institution in the context of all aspects of its practical application. To this end the Commission wishes to base its studies on the broadest possible foundations without, however, entering into fields outside its functions.
- 94. In the light of the foregoing considerations the Commission accepted a suggestion of the Special Rapporteur and instructed him to consult, through the Secretariat, all organizations and interested agencies which may have particular experience in the application of the most-favoured-nation clause.

# CHAPTER V

# Other decisions and conclusions of the Commission

# A. Review of the Commission's programme and methods of work

- 95. Having in mind that its 1968 session would be the twentieth, the Commission decided in 1967 to place on the provisional agenda of the session an item on review of its programme and methods of work.<sup>102</sup>
- 96. The Commission discussed this item at the 957th to 959th, 974th, and 977th to 979th meetings and at two private meetings held on 18 and 19 July 1968. The Commission had before it two working papers prepared by the Secretariat on the programme and on the methods of work of the Commission (A/CN.4/L.128; ILC(XX) Misc.2), which it decided to include as an annex to the present report. An account is given below of the various

- questions dealt with by the Commission under this item and of its conclusions and decisions thereon. At the end of its consideration of the item the Commission expressed the wish that in introducing this report to the twentythird session of the General Assembly its Chairman should also make a statement giving a general appraisal of the Commission's twenty years of activity.
- 97. At its two private meetings, the Commission discussed certain aspects of its organization, the arrangement of its sessions and the process of consideration of a topic of international law with a view to its codification and progressive development. The decisions of the Commission in this regard were announced by its Chairman at the 979th meeting.
- (a) The Commission deemed it suitable to propose that the term of office should be extended from five to six or seven years. Experience had shown that, given the time-consuming nature of the codification process, a period of six or seven years was the minimum required for the completion of a programme of work, particularly when the programme includes a major topic. The fiveyear term of office had remained unchanged since 1955, when the Commission was composed of fifteen members, even though its size had been increased to twenty-one in 1956 and twenty-five in 1961, the larger membership necessarily requiring more time for discussion. general need of codification, as demonstrated by the proliferation of United Nations bodies dealing with international law, called for the increased ability to plan and execute a balanced programme that would result from the proposed extension.
- (b) The Commission also deemed it necessary to express its concern at the present situation regarding honoraria and per diem. It further agreed to recommend that an additional special allowance should be made available to Special Rapporteurs in order to help them defray travel and incidental expenses in connexion with their work.
- (c) Finally, the Commission stressed the need to increase the staff of the Codification Division of the Office of Legal Affairs so that it could provide additional assistance to the Commission and to its Special Rapporteurs. The Commission agreed that it should give attention to its long-term programme of work before the term of office of the present membership expired. For this purpose, the Commission decided to ask the Secretary-General to prepare a new survey of the whole field of international law on the lines of the memorandum entitled "Survey of international law in relation to the work of codification of the International Law Commission" (A/CN.4/1/Rev.1) submitted at the Commission's first session in 1949. On the basis of such a new survey, the Commission, in 1970 or 1971, could draw up a list of topics that were ripe for codification, taking into account General Assembly recommendations and the international community's current needs, and discarding those topics on the 1949 list which were no longer suitable for treatment.
- 100. With regard to the Commission's present programme of work, for the next three years the Commission would be fully occupied, in accordance with pre-

<sup>&</sup>lt;sup>102</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 369, para. 49.

vious decisions of the Commission endorsed by the General Assembly, with the consideration of four of those topics, namely "State responsibility", "Relations between States and international organizations", "Most-favourednation clause" and "Succession of States and Governments", this last topic having been divided into two parts (succession in respect of treaties and succession in respect of matters other than treaties). Although the reasons were still valid which in 1967 had led the Commission to postpone consideration of the two other topics in the present programme of work ("Right of asylum"; "Juridical régime of historic waters, including historic bays"), 103 the possibility had to be envisaged of dealing in the near future with a new topic. The Committee of the Whole of the United Nations Conference on the Law of Treaties has adopted a draft resolution concerning the study of the question of treaties concluded between States and international organizations, or between two or more international organizations. If this draft resolution were to be adopted in plenary meeting at the second session of the Conference in 1969, the General Assembly might recommend to the Commission to place the question referred to in the draft resolution on its programme of work and the Commission would then give full consideration to that recommendation and add this new topic to its programme.

101. As reflected in the pertinent chapters of this report, the Commission has already undertaken the active consideration of three topics—"Relations between States and international organizations", "Succession of States and Governments" and "Most-favoured-nation clause"—out of the four to which it had given priority. With respect to the fourth topic, namely "State responsibility", since the General Assembly, by its resolution 2272 (XXII) of 1 December 1967, had recommended that the Commission should expedite the study of that topic, it was stressed that a special effort should be made in order to do substantive work on it at the 1969 session of the Commission.

102. At the 957th and 959th meetings of the Commission, Mr. Roberto Ago raised the question of the outcome of conventions codifying international law after the adoption of the text by a diplomatic conference, and announced his submission of a written memorandum thereon. A preliminary discussion on the question raised took place at the 959th and 974th meetings, and a more thorough discussion at the 977th and 978th meetings. In the course of these discussions Mr. Ago introduced in final form a memorandum entitled "The final stage of the codification of international law" (A/CN.4/ 205/Rev.1). The memorandum focused on the desirability of expediting the process of ratification of or accession to codification conventions in order to shorten the final stage of the codification of international law. It dealt with the possible means of attaining that end, emphasizing the rule applied by certain specialized agencies (the International Labour Organisation, UNESCO, WHO), whereby States are required to submit conventions to their constitutional authorities within a given

period and to keep the organization in question informed of the situation. Finally, the memorandum considered the methods whereby a similar system could be applied in connexion with the codification work undertaken by the United Nations, such as the adoption of a recommendation of the General Assembly or the signature of an additional protocol to a convention to be adopted by a diplomatic codification conference.

#### B. Organization of future work

103. The Commission deemed it desirable to complete the study of relations between States and international organizations and of succession in respect of treaties, and to make progress on the study of State responsibility and of succession in respect of matters other than treaties during the remainder of the Commision's term of office in its present composition. To this effect the Commission deemed it necessary to reserve the possibility of a winter session in 1970 and agreed to record this decision in the present report in order that arrangements for budgetary appropriations could be made in time.

104. The Commission intends, at its twenty-first session, in 1969, and at its suggested winter session early in 1970, to conclude the first reading of its drafts on relations between States and international organizations and on succession in respect of treaties. After comments have been received from Governments on the two drafts, the Commission aims at concluding its work on both topics at its twenty-third session in 1971 if the scope of the work on these subjects should allow it. At its twenty-first session, in 1969, the Commission plans also to undertake substantive consideration of State responsibility. The study of this topic, as well as of succession in respect of matters other than treaties, would be given priority at the Commission's twenty-second session in 1970. During its mandate the Commission plans also to continue its study of the most-favoured-nation clause.

#### C. DATE AND PLACE OF THE TWENTY-FIRST SESSION

105. The Commission decided to hold its next session at the United Nations Office at Geneva for ten weeks from 2 June to 8 August 1969.

# D. RELATIONS WITH THE INTERNATIONAL COURT OF JUSTICE

106. The Vice-President of the International Court of Justice, Mr. Vladimir M. Koretsky, visited the Commission at its 971st meeting and addressed it on behalf of the President and the members of the Court. He referred to the natural link existing between the Court and the Commission and commented on the importance of the Commission's work and its recognition by the General Assembly.

# E. Co-operation with other bodies

#### 1. Asian-African Legal Consultative Committee

107. Mr. Mustafa Kamil Yasseen reported orally at the 952nd meeting and later in writing (A/CN.4/207)

<sup>103</sup> Ibid., para. 45.

on his attendance as an observer on behalf of the Commission at the Asian-African Legal Consultative Committee during its ninth session, held in New Delhi from 18 to 29 December 1967.

108. The Asian-African Legal Consultative Committee was represented before the Commission by its Secretary-General, Mr. B. Sen, who addressed the Commission at its 952nd meeting. He commented on the importance of the Commission's work for Asian and African countries and on the functions and work of the Committee, which had dealt with topics such as the legal problems connected with the status and rights of refugees, dual or multiple nationality, the legality of nuclear tests, the extradition of refugee offenders and the status and treatment of aliens, and which had also twice been called upon to advise its member Governments on draft articles prepared by the Commission. He stated that at its next session the Committee would mainly consider the law of treaties in the light of the first session of the United Nations Conference on the Law of Treaties.

109. The Commission was informed that the next session of the Committee, to which it has a standing invitation to send an observer, would be held in Pakistan in December 1968. The Commission requested its Chairman, Mr. José María Ruda, to attend the Committee's 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

110. The Commission had before it a document (A/CN.4/L.126) reproducing the letters exchanged between Sir Humphrey Waldock, Chairman of the International Law Commission at its nineteenth session, and Mr. H. Golsong, Director of Legal Affairs of the Council of Europe, concerning the eighth session of the European Committee on Legal Co-operation held at Strasbourg in December 1967.

111. The European Committee on Legal Co-operation was represented by Mr. H. Golsong, who addressed the Commission at its 985th meeting. He referred to the adoption or conclusion, within the Council of Europe, of four new conventions, namely, the European Convention on Consular Functions; the Convention for the Abolition of the Legalization of Acts drawn up by Diplomatic or Consular Agents; the European Convention on Information on Foreign Law; and the European Convention on the Adoption of Children. He commented on the Committee's work in progress, which included a study of the problem of State immunity from jurisdiction and that of the privileges and immunities of international organizations. He stated that at its next session the Committee would consider among other items the number of ratifications of universal conventions by Member States.

112. The commission was informed that the next session of the Committee, to which it has a standing invitation to send an observer, would open in Strasbourg on 11 November 1968. The Commission requested its Chairman, Mr. José María Ruda, to attend the session

or, if he were unable to do so, to appoint another member of the Commission for the purpose.

#### 3. Inter-American Juridical Committee

113. The Inter-American Juridical Committee was represented by Mr. José Joaquín Caicedo Castilla, who addressed the Commission at its 957th meeting. He commented on the various amendments introduced to the Charter of the Organization of American States by the Third Special Inter-American Conference held at Buenos Aires in April 1967. He pointed out that the Charter, as amended, assigned to the Committee the following tasks: codification and development of public and private international law in the Americas; uniformity of legislation, wherever possible, in American countries; advisory opinions to American Governments or to the OAS itself; legal problems concerning the integration of the developing countries of the American Continent; studies and projects assigned to it by the Councils of the Organization. He referred to draft conventions prepared by the Committee on the following subjects: the industrial and agricultural use of international rivers; extradition law; definition of political crimes for the purpose of the application of the conventions on asylum; the breadth of the territorial sea; double taxation; commercial arbitration; and simplification of frontier formalities for nationals of American States. He also referred to the completion by the Committee of a draft code of private international law and to its formulation of ten principles concerning international responsibility.

114. The Commission was informed that the 1968 session of the Committee, to which it has a standing invitation to send an observer, would be held at Rio de Janeiro from 16 June to 15 September. The Commission requested its Chairman, Mr. José María Ruda, to attend the meetings of the Committee's session.

# F. Representation at the twenty-third session of the General Assembly

115. The Commission decided that it will be represented at the twenty-third session of the General Assembly by its Chairman, Mr. José María Ruda.

#### G. SEMINAR ON INTERNATIONAL LAW

116. In pursuance of General Assembly resolution 2272 (XXII) of 1 December 1967, the United Nations Office at Geneva organized a fourth session of the Seminar on International Law for advanced students of the subject and young government officials responsible in their respective countries for dealing with questions of international law, to take place during the twentieth session of the Commission. The Seminar, which held thirteen meetings between 8 and 26 July 1968, was attended by twenty-two students, all from different countries. Participants also attended meetings of the Commission during that period. They heard lectures by nine members of the Commission (Mr. Bartoš, Mr. El Erian, Mr. Eustathiades, Mr. Nagendra Singh, Mr. Rosenne, Mr. Ruda, Mr. Ustor, Mr. Yasseen and Sir Humphrey Waldock), Professor Virally of Geneva University,

Mr. F. Wolf, Legal Adviser to the ILO, and one member of the Secretariat (Mr. P. Raton). Lectures were given on various subjects connected with the work of the Commission, such as the problem of the development of international law in the United Nations; various problems related to the codification of the law of treaties, including the results of the first session of the Vienna Conference; the question of special missions; the question of permanent missions to international organizations, and the breadth of the territorial sea. One lecture was devoted to the question of International Trade Law and the United Nations Commission on International Trade Law and one to the International Labour Organisation and International Labour Law.

117. The Seminar was held without cost to the United Nations, which undertook no responsibility for the travel

or living expenses of the participants. However, the Governments of Danemark, Finland, the Federal Republic of Germany, Israel, the Netherlands, Norway and Sweden offered scholarships for participants from developing countries. Nine candidates were chosen to be beneficiaries of the scholarships. The increased number of scholarships made it possible this year to further the aim of admitting a larger number of nationals from developing countries. It is hoped that scholarships will again be granted next year.

118. The Commission expressed appreciation, in particular to Mr. Pierre Raton, for the manner in which the Seminar was organized, the high level of discussion and the results achieved. The Commission recommended that future seminars be held in conjunction with its sessions.

# ANNEX Review of the Commission's programme and methods of work

# Working paper prepared by the Secretariat\*

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<sup>\*</sup> The introduction and section A were issued earlier, in a different form, under the symbol A/CN.4/L.128; section B was issued in its entirety under the symbol ILC(XX) Misc. 2.

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#### Introduction

1. At its last session, in 1967, the Commission decided to place on the provisional agenda for its twentieth session an item on "Review of the Commission's programme and methods of work." As stated in paragraph 49 of the report on its nineteenth session, the Commission

"having in mind that next year it will hold its twentieth session, considered that that session would be an appropriate time for a general review of the topics which had been suggested for codification and progressive development, of the relation between its work and that of other United Nations organs engaged in development of the law, and its procedures and methods of work under its Statute." 1

- 2. By resolution 2272 (XXII) of 1 December 1967, the General Assembly recommended that the International Law Commission should "carry out a review of its programme and methods of work".
- 3. The present working paper has been prepared in order to facilitate the review by the Commission of its programme and methods of work, in accordance with the decision referred to in paragraph 1 above as well as its consideration of the item entitled "Organization of future work" included as usual in the agenda of the twentieth session of the Commission.

#### Section A. Programme of work

4. The present section revises, completes and up-dates the information given in the paper on organization of future work (A/CN.4/L.119) which the Secretariat submitted to the Com-

mission at its nineteenth session. Brief indications of recent activities and achievements of other United Nations organs engaged in the development of the law have been added when appropriate.

#### I. LIST OF TOPICS FOR CODIFICATION DRAWN UP BY THE COMMISSION IN 1949

5. The list of topics of international law provisionally selected for codification by the Commission in 1949 2 is given hereunder, with brief notes indicating the extent to which they have been dealt with by the Commission and by the General Assembly and codification conferences which considered drafts prepared by it.

# (1) Recognition of States and Governments

Article 11 of the draft Declaration on Rights and Duties of States, adopted by the Commission at its first session (1949), refers to a duty of States to refrain from recognizing any territorial acquisition made by illegal means by another State, but the Commission "concluded that the whole matter of recognition was too delicate and too fraught with political implications to be dealt with in a brief paragraph in this draft Declaration...". Paragraph 2 of article 7 of the draft articles on special missions adopted by the Commission at its nineteenth session (1967) states: "A State may send a special mission to a State, or receive one from a State which it does not recognize". As indicated in the commentary to the draft article, the Commission did not, however, decide the question whether the sending or reception of a special mission prejudges the solution of the problem of recognition, as that problem lies outside the scope of the topic of special missions.

<sup>&</sup>lt;sup>1</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 369, para. 49.

<sup>&</sup>lt;sup>2</sup> See Yearbook of the International Law Commission, 1949, document A/925, p. 281, para. 16.

#### (2) Succession of States and Governments

Currently under study by the International Law Commission (see paragraph 12 (2) below).

#### (3) Jurisdictional immunities and their property

The immunities of State-owned ships and warships are referred to in the Convention on the Territorial Sea and Contiguous Zone and the Convention on the High Seas, both adopted at the first United Nations Conference on the Law of the Sea (1958). The immunities of State property used in connexion with diplomatic missions are regulated in the Vienna Convention on Diplomatic Relations (1961), and those of such property used in connexion with consular posts in the Vienna Convention on Consular Relations (1963). The draft articles on special missions, adopted by the Commission at its nineteenth session (1967), also contain provisions on the immunity of State property, and so presumably will the draft articles on relations between States and inter-governmental organizations. One main aspect of the topic which has not yet been touched on by the Commission is the immunities, if any, of State-owned property used for commercial purposes.

# (4) Jurisdiction with regard to crimes committed outside national territory

The Convention on the Territorial Sea and the Contiguous Zone (1958) and the Convention on the High Seas (1958) contain provisions concerning crimes committed at sea. One aspect not yet touched on by the Commission is jurisdiction with regard to crimes committed on land in foreign countries (except for those committed by persons with diplomatic or consular status, which have been or are being dealt with by the Commission).

#### (5) Régime of the high seas

Part II (articles 26 to 73) of the draft articles concerning the law of the sea adopted by the Commission at its eighteenth session (1956).<sup>3</sup> The first United Nations Conference on the Law of the Sea (1958) adopted: (1) the Convention on the High Seas <sup>4</sup> (articles 26 to 43 and 61 to 65 of the Commission's draft on the law of the sea); (2) the Convention on Fishing and Conservation of the Living Resources of the High Seas <sup>5</sup> (articles 49 to 60 of the Commission's draft on

the law of the sea); (3) the Convention on the Continental Shelf 6 (articles 67 to 73 of the Commission's draft on the law of the sea). Article 66 (Contiguous Zone) was considered by the Conference together with part I (Territorial sea) of the Commission's draft on the law of the sea (see "Régime of territorial waters" below).

#### (6) Régime of territorial waters

Part I of the draft articles concerning the law of the sea adopted by the Commission at its eighteenth session (1956).<sup>8</sup> The first United Nations Conference on the Law of the Sea (1958) adopted the Convention on the Territorial Sea and the Contiguous Zone.<sup>9</sup> The questions of the breadth of the territorial sea and fishery limits were considered at the Second United Nations Conference on the Law of the Sea (1960), but the Conference did not adopt any decisions on those questions. The topic of "Juridical régime of historic waters, including historic bays" (see below, paragraph 13 (1) is also connected with this topic).

succession (in chronological order): United Kingdom of Great Britain and Northern Ireland, Cambodia, Haiti, Malaysia, United States of America, Senegal, Nigeria, Sierra Leone, Madagascar, Colombia, Portugal, South Africa, Australia, Venezuela, Jamaica, Dominican Republic, Uganda, Finland, Upper Volta, Malawi, Yugoslavia, Netherlands, Trinidad and Tobago, Switzerland, Mexico, Thailand.

- <sup>6</sup> The Convention on the Continental Shelf entered into force on 10 June 1964. By September 1968 the following thirty-nine States had deposited instruments of ratification or accession or given notification of succession (in chronological order): Cambodia, Haiti, Union of Soviet Socialist Republics, Malaysia, Ukrainian Soviet Socialist Republic, Byelorussian Soviet Socialist Republic, United States of America, Senegal, Venezuela, Czechoslovakia, Israel, Guatemala, Romania, Colombia. Poland, Madagascar, Bulgaria, Portugal, South Africa, Australia, Denmark, United Kingdom of Great Britain and Northern Ireland, Dominican Republic, Uganda, Albania. New Zealand, Finland, France, Jamaica, Malawi, Yugoslavia, Netherlands, Switzerland, Malta, Sweden, Mexico, Sierra Leone, Thailand, Trinidad and Tobago.
- <sup>7</sup> At its twenty-second-session, the General Assembly adopted resolution 2340 (XXII) of 18 December 1967 entitled "Examination of the question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind". The resolution established the Ad Hoc Committee to study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction. The Ad Hoc Committee is entrusted with the task of studying the scope and various aspects (scientific, technical, economic, legal, etc.) of the item. During the First Committee's debate leading to the adoption of resolution 2340 (XXII) many representatives underlined the relationship between this new subject and the existing conventions on the law of the sea. Particular reference was made to the definition of the "continental shelf" embodied in article 1 of the Convention on the Continental Shelf.
  - 8 See foot-note 3 above.
- <sup>9</sup> The Convention on the Territorial Sea and the Contiguous Zone entered into force on 10 September 1964. By September 1968 the following thirty-five States had deposited their instruments of ratification or accession or given notification of succession (in chronological order): United Kingdom of Great Britain and Northern Ireland, Cambodia, Haiti, Union of Soviet Socialist Republic, Malaysia, Ukrainian Soviet Socialist Republic, Byelorussian Soviet Socialist Republic, United States of America, Senegal, Nigeria, Venezuela, Czechoslovakia, Israel, Hungary, Romania, Sierra Leone, Madagascar, Bulgaria, Portugal, South Africa, Australia, Dominican Republic, Uganda, Italy, Finland, Jamaica, Malawi, Yugoslavia, Netherlands, Trinidad and Tobago, Switzerland, Malta, Mexico, Japan, Thailand.

<sup>&</sup>lt;sup>3</sup> In pursuance of General Assembly resolution 899 (IX) of 14 December 1954, the Commission grouped together systematically all the rules it had adopted concerning the high seas, the territorial sea, the continental shelf, the contiguous zone and the conservation of the living resources of the sea. The final draft was entitled "Articles concerning the law of the sea".

<sup>&</sup>lt;sup>4</sup> The Convention of the High Seas entered into force on 30 September 1962. By September 1968 the following forty-two States had deposited their instruments of ratification or accession or given notification of succession (in chronological order): Afghanistan, United Kingdom of Great Britain and Northern Ireland, Cambodia, Haiti, Union of Soviet Socialist Republics, Malaysia, Ukrainian Soviet Socialist Republic, Byelorussian Soviet Socialist Republic, United States of America, Senegal, Nigeria, Indonesia, Venezuela, Czechoslovakia, Israel, Guatemala, Hungary, Romania, Sierra Leone, Poland, Madagascar, Bulgaria, Central African Republic, Nepal, Portugal, South Africa, Australia, Dominican Republic, Uganda, Albania, Italy, Finland, Upper Volta, Jamaica, Malawi, Yugoslavia, Netherlands, Trinidad and Tobago, Switzerland, Mexico, Japan, Thailand.

<sup>&</sup>lt;sup>5</sup> The Convention on Fishing and Conservation of the Living Resources of the High Seas entered into force on 20 March 1966. By September 1968 the following twenty-six States had deposited instruments of ratification or accession or given notification of

#### (7) Nationality, including statelessness

At its sixth session (1954), the Commission adopted a draft convention on the elimination of future statelessness and a draft convention on the reduction of future statelessness as well as some suggestions concerning the problem of present statelessness. At the same session, the Commission decided to defer any further consideration of multiple nationality and other questions relating to nationality. A conference which met in 1959 and 1961 adopted the Convention on the Reduction of Statelessness, which has not yet come into force.<sup>10</sup>

#### (8) Treatment of aliens

From its eighth (1956) to its thirteenth (1961) sessions, the Commission had before it a series of six reports on State responsibility which were mainly devoted to the development and explanation of a draft on the responsibility of a State for injuries caused in its territory to the person or property of aliens. The Commission, which was occupied with other work, was unable to give full consideration to these reports. After considering at its fifteenth session (1963) a report of a sub-committee on State responsibility, the Commission agreed "(1) that, in an attempt to codify the topic of State responsibility, priority should be given to the definitions of the general rules governing the international responsibility of the State, and (2) that in defining these general rules the experience and material gathered in certain special sectors, especially that of responsibility for injuries to the persons or property of aliens, should not be overlooked..." (see paragraph 12 (3) below).

#### (9) Right of asylum

See paragraph 13 (2) below.

#### (10) Law of treaties

The Commission adopted a set of draft articles at its eighteenth session (1966). By resolution 2166 (XXI) of 5 December 1966, the General Assembly decided that an international conference of plenipotentiaries should be convened to consider the law of treaties and to embody the results of its work in an international convention and such other instruments as it might deem appropriate. The draft articles on the law of treaties adopted by the International Law Commission were referred to the conference by the said General Assembly resolution as the basic proposal for consideration by the conference. During the first session of the United Nations Conference on the Law of Treaties (Vienna, 26 March to 24 May 1968), the Committee of the Whole established by the Conference considered the draft articles adopted by the International Law Commission and the amendments thereto. A second session of the Conference will be convened in 1969.

## (11) Diplomatic intercourse and immunities

At its tenth session (1958), the Commission adopted its final draft articles on diplomatic intercourse and immunities. The draft dealt only with diplomatic relations between States and permanent diplomatic missions. On the basis of that draft the United Nations Conference on Diplomatic Intercourse and Immunities (1961) adopted the Vienna Convention on

Diplomatic Relations.<sup>11</sup> At its nineteenth session (1967), the International Law Commission adopted a set of draft articles on special missions. The General Assembly, by resolution 2273 (XXII) of 1 December 1967, decided to include an item entitled "Draft Convention on Special Missions" in the provisional agenda of its twenty-third session, with a view to the adoption of a convention by the General Assembly. The aspects of the item "Relations between States and intergovernmental organizations", currently under study by the International Law Commission (see paragraph 12 (1) below), also constitute part of this topic.<sup>12</sup>

#### (12) Consular intercourse and immunities

Final draft articles on consular relations were adopted by the Commission at its thirteenth session (1961). On the basis of that draft the United Nations Conference on Consular Relations (1963) adopted the Vienna Convention on Consular Relations.<sup>13</sup>

- <sup>11</sup> The Convention, adopted on 18 April 1961, entered into force on 24 April 1964. By September 1968 the following seventy-nine States had ratified the Convention, acceded to it or given notification of succession (in chronological order): Pakistan, Liberia, Ghana, Mauritania, Sierra Leone, Ivory Coast, United Republic of Tanzania, Laos, Niger, Congo (Brazzaville), Yugoslavia, Czechoslovakia, Jamaica, Madagascar, Cuba, Guatemala, Argentina, Iraq, Switzerland, Panama, Dominican Republic, Union of Soviet Socialist Republics, Gabon, Algeria, Rwanda, Holy See, Liechtenstein, Byelorussian Soviet Socialist Republic, Japan, United Arab Republic, Ukrainian Soviet Socialist Republic, United Kingdom of Great Britain and Northern Ireland, Ecuador, Costa Rica, Federal Republic of Germany, Iran, Venezuela, Brazil, Uganda, Poland, Malawi, Mexico, Kenya, Democratic Republic of the Congo, Cambodia, San Marino, Hungary, Nepal, Afghanistan, India, Trinidad and Tobago, Malaysia, Philippines, El Salvador, Austria, Canada, Luxembourg, Mongolia, Malta, Sweden, Dahomey, Ireland, Nigeria. Norway, Spain, Chile, Guinea, Bulgaria, Tunisia, Australia, Honduras, Mali. Somalia, Burundi, Belgium, Barbados, Morocco, Cyprus, Portugal.
- 12 At its twenty-second session, the General Assembly adopted resolution 2328 (XXII) of 18 December 1967 entitled "Question of diplomatic privileges and immunities". By paragraphs 2 to 5 of the operative part of that resolution, the General Assembly urges: (a) States Members of the United Nations which have not yet done so to accede to the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly of the United Nations on 13 February 1946; (b) States Members of the United Nations, whether or not they have acceded to the Convention on the Privileges and Immunities of the United Nations to take every measure necessary to secure the implementation of the privileges and immunities accorded under Article 105 of the Charter to the Organization, to the representatives of Members and to the officials of the Organization; (c) States which have not yet done so to ratify or accede to the Vienna Convention on Diplomatic Relations of 18 April 1961; (d) States, whether or not they are parties to the Vienna Convention on Diplomatic Relations, 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.
- <sup>13</sup> The Convention, adopted on 24 April 1963, entered into force on 19 March 1967. By September 1968 the following thirty-three States had ratified the Convention or acceded to it (in chronological order): Ghana, Dominican Republic, Algeria, Tunisia, Upper Volta, Yugoslavia, Gabon, Ecuador, Switzerland, Mexico, United Arab Republic, Kenya, Nepal, Cuba, Trinidad and Tobago, Venezuela, Philippines, Niger, Senegal, Liechtenstein, Costa Rica, Madagascar, Argentina, Ireland, Brazil, Cameroon, Panama, Chile, Nigeria, Honduras, Czechoslovakia, Mali, Somalia.

women, a topic which the Commission was requested to study by Economic and Social Council resolution 304 D (XI) of 17 July 1950, is the subject of a convention, which was adopted by the General Assembly in its resolution 1040 (XI) of 29 January 1957, and which is now in force.

#### (13) State responsibility

Currently under study by the International Law Commission (see paragraphs 12 (3) below and 5 (8) above).

#### (14) Arbitral procedure

- The Commission at its fifth session (1953) adopted a draft Convention on Arbitral Procedure, which was the subject of General Assembly resolution 989 (X) of 14 December 1955. At its tenth session (1958) the Commission adopted a set of Model Rules on Arbitral Procedure, which were the subject of General Assembly resolution 1262 (XIII) of 14 November 1958.
- II. TOPICS OTHER THAN THOSE INCLUDED IN THE 1949 PRO-VISIONAL LIST ON WHICH THE COMMISSION HAS SUBMITTED DRAFTS OR REPORTS
- 6. With the exception of the topic "Ways and means for making the evidence of customary international law more readily available" considered by the Commission in accordance with article 24 of its Statute, all other topics listed under this heading have been considered by the Commission at the request of the General Assembly. However, the question of participation of new States in certain general multilateral treaties had originally been brought to the attention of the General Assembly by the Commission itself in connexion with the codification of the law of treaties.
- (1) Draft Declaration on the Rights and Duties of States (General Assembly resolution 178 (II) of 21 November 1947)
- At its first session, in 1949, the Comimssion drew up a draft Declaration on the Rights and Duties of States on the basis of a draft referred to it by General Assembly resolution 178 (II) of 21 November 1947. By resolution 375 (IV) of 6 December 1949, the General Assembly commenced the draft Declaration to the continuing attention of Member States and of jurists of all nations and requested Member States to provide their comments on the draft. The General Assembly, in resolution 596 (VI) of 7 December 1951, decided to postpone consideration of the matter until a sufficient number of States had transmitted their comments and suggestions, and in any case to undertake consideration as soon as a majority of the Member States had transmitted such replies.
- (2) Ways and means for making the evidence of customary international law more readily available (article 24 of the Commission's Statute)
- At its second session, in 1950, the Commission completed the consideration of this topic and made a report to the General Assembly, containing specific ways and means suggested by the Commission. Since these recommendations were made, the General Assembly has authorized the Secretary-General to issue most of the publications suggested by the Commission and certain other publications relevant to the Commission's recommendations.
- (3) Formulation of the Nürnberg principles (General Assembly resolution 177 (II) of 21 November 1947)
- The formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgement of the Tribunal was completed by the Commission at its second session (1950). By resolution 488 (V) of 12 December 1950, the General Assembly decided to send the formulation to the Governments of Member States for comments, and requested the Commission, in preparing the draft code of offences against the peace and security of mankind, to take

- account of the observations made on this formulation by delegations and Governments.
- (4) Question of international criminal jurisdiction (General Assembly resolution 260 B (III) of 9 December 1948)
- The Commission concluded, at its second session (1950), that the establishment of an international juridical organ for the trial of persons charged with genocide or other crimes was both desirable and possible. It recommended against such an organ being set up as a chamber of the International Court of Justice. The task of preparing concrete proposals relating to the creation and the statute of an international criminal court and of studying the implications and consequences of establishing such a court was entrusted by the General Assembly to two Committees composed of the representatives of seventeen Member States set up respectively by resolutions 489 (V) of 12 December 1950 and 687 (VII) of 5 December 1952. General Assembly resolutions 898 (IX) of 14 December 1954 and 1187 (XII) of 11 December 1957 deferred discussion of the topic until such a time as the Assembly again took up two related items, namely the question of defining aggression and the draft code of offences against the peace and security of mankind.
- (5) Reservations to multilateral conventions (General Assembly resolution 478 (V) of 16 November 1950)
- The Commission's conclusions on this topic were reported to the General Assembly in the report of the Commission covering the work of its third session (1951). The question was the subject of General Assembly resolutions 598 (VI) of 12 January 1952 and 1452 (XIV) of 7 December 1959. The Commission returned again to the subject in the course of its preparation of draft articles on the law of treaties (see paragraph 5 (10) above).
- (6) Question of defining aggression (General Assembly resolution 378 (V) of 17 November 1950)
- The Commission considered the question at its third session (1951) but it did not draw up a definition of aggression. During the same session, however, the matter was reconsidered in connexion with the preparation of the draft code of offences against the peace and security of mankind and the Commission decided to include among the offences defined in the draft code any act of aggression and any threat of aggression.
- By resolution 599 (VI) of 31 January 1952, the General Assembly concluded that it was "possible and desirable" to define aggression. A Special Committee composed of the representatives of fifteen Member States was established by resolution 688 (VII) of 20 December 1952 to submit to the General Assembly "draft definitions of aggression or draft statements of the notion of aggression". Another Special Committee, consisting of the representatives of nineteen Member States, was established by General Assembly resolution 895 (IX) of 4 December 1954. By resolution 1181 (XII) of 29 November 1957, the General Assembly decided to establish a new Committee, composed of the Member States which served on the General Committee of the Assembly at its most recent regular session, and entrusted the Committee with the procedural task of studying Governments' comments "for the purpose of determining when it shall be appropriate for the General Assembly to consider again the question of defining aggression". The Committee established by resolution 1181 (XII) met in 1959, 1962, 1965 and 1967, but on each occasion found itself unable to determine any particular time as appropriate for the Assembly to resume consideration of the question of defining aggression.

- At its twenty-second session (1967), the General Assembly included in its agenda an item entitled "Need to expedite the drafting of a definition of aggression in the light of the present international situation". As a result of the consideration of that item, the General Assembly, by resolution 2330 (XXII) of 18 December 1967: (1) recognized that there is a widespread conviction of the need to expedite the definition of aggression; (2) established a Special Committee on the Question of Defining Aggression, composed of thirty-five Member States; (3) instructed the Special Committee to consider all aspects of the question so that an adequate definition of aggression may be prepared and to submit to the General Assembly at its twenty-third session a report which will reflect all the views expressed and the proposals made; (4) decided to include in the provisional agenda of its twenty-third session an item entitled "Report of the Special Committee on the Question of Defining Aggression". The Special Committee on the Question of Defining Aggression established by resolution 2330 (XXII) met at Geneva in June 1968.
- (7) Draft code of offences against the peace and security of mankind (General Assembly resolution 177 (II) of 21 November 1947)
- The Commission, at its sixth session in 1954, adopted the text of a draft code of offences against the peace and security of mankind and submitted it to the General Assembly. By resolution 897 (IX) of 4 December 1954 the General Assembly postponed consideration of the draft code until the Special Committee on the question of defining aggression established by resolution 895 (IX) has submitted its report. Resolution 1186 (XII) of 11 December 1957 transmitted the text of the draft code to Member States for comment and further deferred the consideration of the topic until such time as the General Assembly takes up again the question of defining aggression.
- (8) Extended participation in general multilateral treaties concluded under the auspices of the League of Nations (General Assembly resolution 1766 (XVII) of 20 November 1962)
- The conclusions resulting from the Commission's study of this question are summarized in the report covering the work of its fifteenth session (1963). On the basis of these conclusions the General Assembly, in resolution 1903 (XVIII) of 18 November 1963, decided that the Assembly was the appropriate organ of the United Nations to exercise the functions of the League Council under twenty-one general multilateral treaties of a technical and non-political character concluded under the auspices of the League of Nations; it also placed on record the assent to this decision by Members of the United Nations. The resolution requested the Secretary-General to invite certain States to accede to the treaties in question by depositing an instrument of accession with the Secretary-General of the United Nations. By resolution 2021 (XX) of 5 November 1965, the General Assembly recognized that nine of these treaties, listed in the annex to the resolution, might be of interest for accession by additional States within the terms of resolution 1903 (XVIII) and drew the attention of the parties to the desirability of adopting some of them to contemporary conditions.
- III. TOPICS SUGGESTED FOR STUDY BY THE COMMISSION, WHICH HAVE NOT YET BEEN PLACED ON ITS PROGRAMME OF WORK
  - (a) Topics suggested in 1949, but not included by the Commission in its provisional list for codification
- 7. The provisional list of topics for codification referred to in paragraph 5 above was drawn up after consideration of a

memorandum by the Secretary-General entitled "Survey of international law in relation to the work of codification of the International Law Commission" (A/CN.4/1/Rev.1). That memorandum suggested certain topics which after discussion by the Commission were not selected by it, and those topics, concerning which the memorandum makes full explanation, were the following: 14

- (1) Subjects of international law
- (2) Sources of international law
- (3) Obligations of international law in relation to the law of States
- (4) Fundamental rights and duties of States 15
- (5) Domestic jurisdiction
- (6) Recognition of acts of foreign States
- (7) Obligations of territorial jurisdiction
- (8) Territorial domain of States
- (9) Pacific settlement of international disputes 16
- (10) Extradition.
- (b) New topics suggested by Governments in response to General Assembly resolution 1505 (XV) and in the Sixth Committee at the fifteenth and sixteenth sessions
- 8. The General Assembly, by resolution 1505 (XV) of 12 December 1960, decided to place on the provisional agenda of its sixteenth session an item entitled "Future work in the field of codification and progressive development of international law", and also asked for the views and suggestions of Member States thereon. Various suggestions were made by Members in written form, and other suggestions were made orally in the Sixth Committee, at the fifteenth and sixteenth sessions. The General Assembly, by resolution 1686 (XVI) of 18 December 1961, operative paragraph 3 (b), requested the International Law Commission to consider its future programme of work in the light of all the suggestions. The Secretariat prepared a

<sup>&</sup>lt;sup>14</sup> The Commission also discussed the topic of the laws of war, which had not been suggested in the memorandum; the topic was not included in the list.

<sup>&</sup>lt;sup>16</sup> The Commission at its first session (1949) adopted a draft Declaration on Rights and Duties of States (see paragraph 6 (1) above).

<sup>&</sup>lt;sup>16</sup> Without attempting to recall all the various efforts of the United Nations on this topic, it may be mentioned that an item entitled "Peaceful settlement of disputes" has been discussed at the twentieth (item 99) and twenty-first sessions (item 36) of the General Assembly, but no resolution on it has been adopted. Also, one of the principles considered by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States is "the principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered" (see foot-note 17 below).

<sup>17</sup> By operative paragraph 4 of the same resolution, the General Assembly decided to place on the provisional agenda of its seventeenth session the question entitled "Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations". In 1962 the General Assembly, pursuant to Article 13 of the Charter, resolved to undertake a study of these principles with a view to their progressive development and codification, the aim of the study being the adoption by the General Assembly of a declaration containing an enunciation of the principles. Since then, the Sixth Committee and the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, established in 1963 and reconstituted in 1965, have examined the following seven principles: (1) the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of

Working paper concerning the future work in the field of the codification and progressive development of international law (A/CN.4/145) 18 summarizing what had been suggested. The Commission considered the matter at its fourteenth session (1962) and decided to limit its future programme of work, for the time being, to the three main topics under study or to be studied pursuant to operative paragraph 3 (a) of resolution 1686 (XVI) (Law of treaties, State responsibility, and Succession of States and Governments) and to four additional topics of more limited scope (Special missions, Relations between States and inter-governmental organizations, the Right of asylum, and the Juridical régime of historic waters, including historic bays) which had been referred to it by earlier General Assembly resolutions. As to other topics the Commission considered:

"that many of the topics proposed by Governments deserved study with a view to codification. In drawing up its future programme of work, however, it is obliged to take account of its resources.... The Commission...considers it inadvisable for the time being to add anything further to the already long list of topics on its agenda." 19

9. The seven new topics suggested by Governments, as given in the Secretariat's working paper referred to in the preceding paragraph, are listed below with brief indications of recent United Nations legal activities relating thereto:

#### (1) Law of space

Space law is being studied by the General Assembly's Committee on the Peaceful Uses of Outer Space. At its twenty-first session the General Assembly adopted resolution 2222 (XXI) of 19 December 1966, relating to the Treaty on Principles Governing the Activities of States in the Exploration and Uses of Outer Space, including the Moon and Other Celestial Bodies. At its last session, by resolution 2260 (XXII) of 3 November 1967, the General Assembly requested the Committee on the Peaceful Uses of Outer Space "in the further progressive development of the law of outer space, to continue with a sense of urgency its work on the elaboration of an agreement on liability for damage caused by the launching of objects into outer space and an agreement on assistance to and return of astronauts and space vehicles, and to pursue actively its work on questions relative to the

any State, or in any other manner inconsistent with the purposes of the United Nations; (2) the principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered; (3) the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter; (4) the principle of sovereign equality of States; (5) the duty of States to co-operate with one another in accordance with the Charter; (6) the principle of equal rights and self-determination of peoples; (7) the principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter. In 1966, the Special Committee adopted formulations for principles (2) and (4) and linked the principle of nonintervention with General Assembly resolution 2131 (XX) of 21 December 1965. Texts concerning principles (5) and (7) were agreed upon, in 1967, by the Drafting Committee of the Special Committee. At its twenty-second session, the General Assembly, by resolution 2327 (XXII) of 18 December 1967, decided to ask the Special Committee to meet in 1968 in order to complete the formulation of principles (1) and (6) and to consider proposals compatible with General Assembly resolution 2131 (XX) on principle (3) with the aim of widening the area of agreement already expressed in that resolution. As in previous sessions, the item will be considered by the General Assembly at its twenty-third session.

definition of outer space and the utilization of outer space and celestial bodies, including the various implications of space communications".

#### (2) Law of international organizations

Under this heading were grouped various suggestions relating in general not only to the status of international organizations and their relations with States but also to their responsibility, the law of treaties respecting them, and the entrance of new members to the international community. The relations between States and inter-governmental organizations is one of the topics currently under study by the International Law Commission (see paragraph 12 (1) below). The study of the question of treaties concluded between States and international organizations or between two or more international organizations is recommended in a draft resolution adopted by the Committee of the Whole of the United Nations Conference on the Law of Treaties (see paragraph 11 below).

# (3) Human rights and defence of democracy

The United Nations bodies mainly responsible for promotion and protection of human rights and fundamental freedoms are the Commission on Human Rights, the Commission on the Status of Women, the Economic and Social Council and the Third Committee of the General Assembly. Recently the General Assembly adopted the International Convention on the Elimination of all Forms of Racial Discrimination (resolution 2106 (XX) of 21 December 1965), the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the Optional Protocol to the International Covenant on Civil and Political Rights (resolution 2200 (XXI) of 16 December 1966) and the Declaration on the Elimination of Discrimination against Women (resolution 2263 (XXII) of 7 November 1967). By resolution 2295 (XXII) of 11 December 1967, the General Assembly decided to accord priority during its twenty-third session to the consideration of the draft Declaration on the Elimination of All Forms of Religious Intolerance and the draft International Convention on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief.

#### (4) Independence and sovereignty of States

Four out of the seven principles examined in connexion with the item "Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations" relate to this topic, namely principles listed (1), (3), (4) and (6) in foot-note 17 above.

#### (5) Enforcement of international law

As indicated above (see foot-notes 16 and 17), "The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered" is being studied as one of the principles of international law concerning friendly relations and co-operation among States.

#### (6) Utilization of international rivers

By resolution 1401 (XIV) of 21 November 1959, the General Assembly, considering it desirable to initiate preliminary studies on this topic "with a view to determining whether the subject is appropriate for codification", requested the Secretary-General to submit a report on legal problems relating to the utilization and use of international rivers. The Secretary-General accordingly prepared and circulated to

<sup>&</sup>lt;sup>18</sup> See Yearbook of the International Law Commission, 1962, vol. II, p. 84.

<sup>&</sup>lt;sup>19</sup> *1bid.*, document A/5209, p. 190, para. 61.

Member States a report (A/5409) as requested by the General Assembly's resolution. A collection of legislative texts and treaty provisions on the subject has been printed in the *United Nations Legislative Series*.<sup>20</sup>

(7) Economic and trade relations

The General Assembly, by resolution 2205 (XXI) of 17 December 1966, decided to establish the United Nations Commission on International Trade Law. At its first session (29 January-26 February 1968), a great number of delegations considered that the future programme of work of the Commission should contain the following topics: (1) international sale of goods; (2) commercial arbitration; (3) transportation; (4) insurance; (5) international payments; (6) intellectual property; (7) elimination of discrimination in laws affecting international trade; (8) agency; (9) legalization of documents. The United Nations Commission on International Trade Law decided that the following topics should be given priority: (1) international sale of goods; (2) international payments; (3) international commercial arbitration. In respect of the topic "Elimination of discrimination in laws affecting international trade", one representative noted that his delegation "reserved its position on the inclusion of the most-favoured-nation clause under that topic pending the future steps to be taken by the International Law Commission concerning the legal aspects of that question" (see chapter IV of the report of the United Nations Commission on International Trade Law on the work of its first session.21

- (c) Additional topics for inclusion in the programme of work suggested by members of the Commission at its nineteenth session
- 10. As stated below,<sup>22</sup> the Commission decided, at its nineteenth session, to place on its programme of work the topic of most-favoured-nation clauses in the law of treaties. During the debate leading to such a decision several members suggested other additional topics for consideration by the Commission in the future when its other work might permit. The Commission's report on the session <sup>23</sup> summarized the views expressed in this respect as follows:
  - "46. Among the other topics mentioned were the effect of unilateral acts; the use of international rivers; and international bays and international straits. The possibility was also mentioned that the Commission might return to some of the topics it dealt with in its early years, such as the draft Declaration on the Rights and Duties of States,<sup>24</sup> and the question of international criminal jurisdiction and related matters.<sup>25</sup> Other members thought that the Commission

should envisage work on questions of international legal procedure,<sup>26</sup> such as model rules for conciliation, arrangements to enable international organizations to be parties to cases before the International Court of Justice, or drawing up the statute of a new United Nations body for fact-finding in order to assist the General Assembly in its consideration of that question.<sup>27</sup>

"47. While some members felt that several of these topics, and in particular unilateral acts and international rivers, were suitable for work by the Commission in the future, it was believed that their wide scope precluded their being taken up at the present time, when the Commission was preparing to deal with the major topics of State succession and State responsibility...".

- (d) Draft resolution adopted by the Committee of the Whole of the United Nations Conference on the Law of Treaties concerning the study of the question of treaties concluded between States and international organizations or between two or more international organizations
- 11. Article 1 of the draft articles on the law of treaties adopted by the International Law Commission in 1966 and referred by General Assembly resolution 2166 (XXI) of 5 December 1966 to the United Nations Conference on the Law of Treaties states that "the present articles relate to treaties concluded between States". At the Committee of the Whole of the Conference two adendments were submitted to that article with a view to extending the scope of the future convention to treaties concluded between subjects of international law other than States or treaties concluded between States and other subjects of international law. The two amendments having been withdrawn, the Committee of the Whole, as orally proposed by Sweden, charged the Drafting Committee with the task of formulating a resolution to be adopted by the Conference recommending that the General Assembly of the United Nations ask the International Law Commission to study the question of treaties concluded between States and international organizations or between two or more international organizations. At its eleventh meeting, the Committee of the Whole adopted unanimously the text of the draft resolution submitted by the Drafting Committee and recommended it to the Conference for adoption. The plenary will consider the draft resolution next year during the second session of the Conference. The draft resolution reads as follows:

"The United Nations Conference on the Law of Treaties, "Recalling that the General Assembly of the United Nations, by its resolution 2166 (XXI) of 5 December 1966, referred to the Conference the draft articles contained in chapter II of the report of the International Law Commission on the work of its eighteenth session,

"Taking note that the Commission's draft articles deal only with treaties concluded between States,

<sup>&</sup>lt;sup>20</sup> Legislative texts and treaty provisions concerning the utilization of international rivers for other purposes than navigation/Textes législatifs et dispositions de traités concernant l'utilisation des fleuves internationaux à des fins autres que la navigation (ST/LEG/SER.B/12).

<sup>&</sup>lt;sup>21</sup> Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216).

<sup>&</sup>lt;sup>22</sup> See paragraph 12 (4) below.

<sup>&</sup>lt;sup>25</sup> Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 369, paras. 46 and 47.

<sup>&</sup>lt;sup>24</sup> See paragraph 6 (1) above.

<sup>&</sup>lt;sup>25</sup> See paragraph 6 (4) above. As recommended by the Third Committee, the General Assembly adopted, at its twenty-second session, resolution 2338 (XXII) of 18 December 1967 concerning the question of the punishment of war criminals and of persons who have committed crimes against humanity. By this resolution the Assembly decided to give high priority to the completion of the draft convention on the non-applicability of statutory

limitation to war crimes and crimes against humanity, with a view to its adoption at the twenty-third session.

<sup>&</sup>lt;sup>26</sup> By resolution 268 (III) of 28 April 1949, the General Assembly revised the General Act for the Pacific Settlement of International Disputes of 26 September 1928 and opened the revised text to accession by States (United Nations, *Treaty Series*, vol. 71, p. 101).

<sup>&</sup>lt;sup>27</sup> General Assembly resolution 2329 (XXII) of 18 December 1967 did not establish any new body for fact-finding. Operative paragraph 4 requests the Secretary-General "to prepare a register of experts in legal and other fields, whose services the States parties to a dispute may use by agreement for fact-finding in relation to the dispute, and requests Member States to nominate up to five of their nationals to be included in such a register".

"Recognizing the importance of the question of treaties concluded between States and international organizations or between two or more international organizations,

"Recommends to the General Assembly of the United Nations that it refer to the International Law Commission the study of the question of treaties concluded between States and international organizations or between two or more international organizations."

# IV. TOPICS OF INTERNATIONAL LAW CURRENTLY UNDER STUDY BY THE INTERNATIONAL LAW COMMISSION

12. Following the completion of its work on the law of treaties at the eighteenth session, the Commission, at its nineteenth session, completed likewise its work on special missions and added to its programme an additional topic. This means that there are now four topics of international law under current study by the Commission. However, the Commission is at present working, as in recent years, with five special rapporteurs, because two were appointed at the Commission's last session to deal respectively with two of the three main headings into which one of the topics has been divided. The four topics under current study are listed below with the Commission's latest decisions and General Assembly recommendations related thereto. The latest documents furnishing a basis for their consideration are also mentioned.

#### (1) Relations between States and inter-governmental organizations

Second report (A/CN.4/195 and Add.1) and third report (A/CN.4/203 and Add.1-5) of Mr. Abdullah El-Erian, Special Rapporteur. At its nineteenth session (1967), the Commission decided to discuss both reports in 1968. The General Assembly, by resolution 2272 (XXII) of 1 December 1967, recommended that the Commission should continue its work on the topic, taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII). The Secretariat prepared a study entitled "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities" (A/CN.4/L.118 and Add.1 and 2).

#### (2) Succession of States and Governments

At its nineteenth session in 1967, the Commission made new arrangements for dealing with this topic. 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 of a Sub-Committee of the Commission (1963) and agreed to by the Commission the same year. By resolution 2272 (XXII) of 1 December 1967, the General Assembly recommended, at its twenty-second session, that the International Law 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). A volume of the United Nations Legislative Series (ST/LEG/SER.B/14) entitled Materials on Succession of States has been published by the Secretariat.

#### (i) Succession in respect of treaties

First report (A/CN.4/202) by Sir Humphrey Waldock, Special Rapporteur. The Commission decided in 1967 to advance the work on this aspect of succession as rapidly as possible at its twentieth session in 1968. The Secretariat prepared five studies on "Succession of States to multilateral treaties" (A/CN.4/200 and Corr.1 and Add.1 and 2).

- (ii) Succession in respect of rights and duties resulting from sources other than treaties
- First report (A/CN.4/204) of Mr. Mahommed Bedjaoui, Special Rapporteur. In 1967, the Commission requested the Special Rapporteur to present an introductory report which would enable the Commission to decide what parts of the subject should be dealt with, the priorities to be given to them, and the general manner of treatment.
- (iii) Succession in respect of membership of international organizations
- At its nineteenth session (1967), the Commission decided to leave aside for the time being this aspect of succession, without assigning it to a special rapporteur. It was considered that succession in respect of membership of international organizations related both to succession in respect of treaties and to relations between States and intergovernmental organizations.

#### (3) State responsibility

In 1967, Mr. Roberto Ago, Special Rapporteur, submitted a note (A/CN.4/196) on the topic. The Commission confirmed the instructions given to the Special Rapporteur at the fifteenth session in 1963, as set forth in his paper. The Commission noted that Mr. Ago would submit a substantive report on the topic at the twenty-first session (1969) of the Commission. At its twenty-second session, the General Assembly recommended "that the International Law Commission should expedite the study of the topic of State responsibility" (resolution 2272 (XXII) of 1 December 1967).

#### (4) Most-favoured-nation clause

At its nineteenth session (1967), the Commission decided to place this topic on its programme. At its twenty-second session, the General Assembly, by resolution 2272 (XXII) of 1 December 1967, recommended "that the International Law Commission should study the topic of most-favoured-nation clauses in the law of treaties". Mr. Endre Ustor, Special Rapporteur, submitted a working paper (A/CN.4/L.127) for consideration at the twentieth session of the Commission.

#### V. Topics which the Commission has placed on its programme of work, but on which no Special Rapporteur has yet been appointed

13. At its fourteenth session, in 1962, the Commission, without appointing special rapporteurs, placed on its programme of work two topics—"Right of asylum" and "Juridical régime of historic waters, including historic bays"—whose codification had earlier been requested by the General Assembly. The advisability of proceeding actively in the near future with the study of these topics was examined by the Commission at its nineteenth session, in 1967. Paragraph 45 of the Commission's report on that session summarized the views expressed on the matter as follows:

"The Commission considered in the first place two topics which the General Assembly had requested it to take up as soon as it considered it advisable, and which had been included in its programme of work, though no Special Rapporteur had ever been appointed to deal with them. These were the right of asylum, referred to the Commission by General Assembly resolution 1400 (XIV) of 21 November 1959, and historic waters, including historic bays, referred by General Assembly resolution 1453 (XIV) of 7 December 1959. Most members doubted whether the time had yet come to proceed actively with either of these topics. Both were of considerable scope and raised some political problems

and to undertake either of them at the present time might seriously delay the completion of work on the important topics already under study, on which several resolutions of the General Assembly had recommended that the Commission should continue its work." <sup>28</sup>

(1) Juridical régime of historic waters, including historic bays

The first United Nations Conference on the Law of the Sea (1958) adopted, in paragraph 6 of article 7 of the Convention on the Territorial Sea and Contiguous Zone, a provision to the effect that its rules on bays "shall not apply to so-called 'historic' bays".29 The Conference on 27 April 1958 also adopted a resolution requesting the General Assembly to arrange for the study of the juridical régime of historic waters, including historic bays. The General Assembly thereafter adopted resolution 1453 (XIV) of 7 December 1959, which requests "the International Law Commission, as soon as it considers it advisable, to undertake the study of the question of the juridical régime of historic waters, including historic bays, and to make such recommendations regarding the matter as the Commission deems apropriate". The Commission, at its twelfth session (1960) requested the Secretariat to undertake a study of the topic, and deferred further consideration to a future session.<sup>30</sup> A study prepared by the Secretariat (A/CN.4/143) was published in 1962.31 Also in 1962, the Commission, at its fourteenth session, decided to include the topic in its programme, but without setting any date for the start of its consideration.32

#### (2) Right of asylum

(i) Inclusion of the topic in the programme of work of the Commission

This topic was included in the provisional list for codification drawn up by the Commission in 1949. The General Assembly, at its fourteenth session, adopted resolution 1400 (XIV) of 21 November 1959, which requested "the International Law Commission, as soon as it considers it advisable, to undertake the codification of the principles and rules of international law relating to the right of asylum". The Commission, at its twelfth session (1960), "took note of the resolution and decided to defer further consideration of this question to a future session". At its fourteenth session (1962), the Commission decided to include the topic in its programme, but without setting any date for the start of its consideration.

(ii) Adoption of a Declaration on Territorial Asylum at the twenty-second session of the General Assembly

By resolution 2312 (XXII) of 14 December 1967, the General Assembly adopted, at its twenty-second session, a Declaration on Territorial Asylum. The culmination of many years of effort by the Commission on Human Rights (1957-1960), the Third Committee (1962-1964), and the Sixth

Committee (1965-1967), the Declaration constitutes an elaboration of article 14 of the Universal Declaration on Human Rights. Resolution 2312 (XXII) contains a preambular part which reads as follows:

"The General Assembly,

"Recalling its resolutions 1839 (XVII) of 19 December 1962, 2100 (XX) of 20 December 1965 and 2203 (XXI) of 16 December 1966 concerning a declaration on the right of asylum,

"Considering the work of codification to be undertaken by the International Law Commission in accordance with General Assembly resolution 1400 (XIV) of 21 November 1959.

"Adopts the following Declaration:"

In this connexion the Sixth Committee's report indicates:

"It was further explained that the sponsors had found it necessary, in order to stress that the adoption of a declaration on territorial asylum would not bring to an end the work of the United Nations in codifying the rules and principles relating to the institution of asylum, to make a reference at the very beginning of the draft resolution, in a preambular paragraph to the proposed declaration, to the work of codification of the right of asylum to be undertaken by the International Law Commission pursuant to General Assembly resolution 1400 (XIV) of 21 November 1959.

"Some other delegations, while accepting such a reference, recorded their understanding that the preambular paragraph in question should not be understood as modifying or prejudicing in any way the order of priorities for the consideration of items already established by the International Law Commission and by the General Assembly." 35

The views expressed on the meaning of the Declaration on Territorial Asylum for the future codification of legal rules relating to the rights of asylum are summarized in the Sixth Committee's report as fellows:

"It was also said that the practical effect given to the declaration by States would help to indicate whether or not the time was ripe for the final step of elaborating and codifying precise legal rules relating to asylum. In this respect, many representatives expressed the conviction that the declaration, when adopted, should be regarded as a transitional step, which should lead in the future to the adoption of binding rules of law in an international convention. They drew attention to the fact that asylum was on the programme of work of the International Law Commission pursuant to General Assembly resolution 1400 (XIV) of 21 November 1959. The declaration now to be adopted would be one of the elements to be considered by the Commission in its work. Certain of these representatives expressed the hope that, when it took up the codification of the institution of asylum, the Commission would correct some of the ambiguities in the terms of the Declaration and would also extend the subject to cover other forms of asylum, such as diplomatic asylum, on which there was extensive Latin American treaty law and practice, both in Latin America and elsewhere. It was also said that the existence of the Declaration should not in any way diminish the scope or depth of the work to be undertaken when the International Law Commission took up the subject of asylum." 36

<sup>&</sup>lt;sup>28</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 369.

<sup>&</sup>lt;sup>29</sup> See Official Records of the United Nations Conference on the Law of the Sea (1958), vol. II, p. 145.

<sup>&</sup>lt;sup>30</sup> See Yearbook of the International Law Commission, 1960, vol. II, document A/4425, p. 180, para. 40.

<sup>&</sup>lt;sup>31</sup> See Yearbook of the International Law Commission, 1962, vol. II, p. 1.

<sup>32 1</sup>bid., document A/5209, p. 190, para. 60.

<sup>&</sup>lt;sup>33</sup> See Yearbook of the International Law Commission, 1960, vol. II, document A/4425, p. 180, para. 39.

<sup>&</sup>lt;sup>34</sup> See Yearbook of the International Law Commission, 1962, vol. II, document A/5209, p. 190, para. 60.

<sup>&</sup>lt;sup>35</sup> Official Records of the General Assembly, Twenty-second Session, Annexes, agenda item 89, document A/6912, paras. 64 and 65.

<sup>36</sup> *Ibid.*, para. 16.

#### Section B. Methods of work

14. The present section is not intended to be comprehensive, historically or otherwise, but merely to provide summary information on some relevant aspects of the establishment of the Commission, its organization, the arrangement of its sessions and the process followed for consideration of a topic of international law with a view to its codification and progressive development, from the time when it is placed on the Commission's programme of work until a final draft or report is submitted to the General Assembly. In the light of the Commission's decision to review its methods of work as they have evolved after twenty years, this section aims at presenting the aspects selected as they appear under the existing organization and practices of the Commission.

#### I. ESTABLISHMENT OF THE INTERNATIONAL LAW COMMISSION

#### (a) Subsidiary organ of the General Assembly

15. As a means of fulfilling the task entrusted to it under Article 13 (1) (a) of the Charter of the United Nations the General Assembly, following the recommendations of the Committee on the progressive development of international law and its codification,37 by resolution 174 (II) of 21 November 1947 established the International Law Commission, as a subsidiary organ, to be constituted and to exercise its functions in accordance with the provisions of the statute annexed thereto. The fact that the Commission is governed by its own statute sets it apart from other organs of the General Assembly and gives it a considerable degree of initiative, further acknowledged, expressly or impliedly, in some of the statutory provisions 38 and confirmed by the practice of the General Assembly.39 Nevertheless, the constitutional and, in the final analysis, operational dependency of the Commission results from the fact that, being embodied in a resolution of the General Assembly, the Commission's Statute can be amended or revoked only by the latter.10 This dependency is further manifested by the existence of provisions in the Statute whereby, inter alia, the Commission is to give priority to the requests of the General Assembly to deal with any question,41 and it is for the General Assembly to determine the final outcome of the Commission's work once submitted as a completed draft.<sup>42</sup> Also, the General Assembly considers annually the Commission's report and adopts recommendations and instructions regarding the Commission's work.

#### (b) Object of the Commission

16. The Commission's object is the promotion of the progressive development of international law and its codification. The Commission shall concern itself primarily with public international law, but is not precluded from entering the field of private international law.43 Although a clear distinction between public and private international law is not easy to draw, it might still be said that with the possible exception of the topic of nationality, including statelessness, the attention of the Commission has been focused on subjects of public international law proper.44 At the invitation of the Legal Counsel of the United Nations and in accordance with suggestions made in the Sixth Committee at the twentieth session of the General Assembly, the Commission, at its eighteenth session, discussed the question of the responsibilities of United Nations organs in furthering co-operation in the development of the law of international trade and in promoting its progressive unification and harmonization. The Commission, however, was of the opinion that it should not undertake responsibility for studying the topic in question.45

#### II. ORGANIZATION OF THE COMMISSION

17. The International Law Commission, as at present constituted, is a permanent and part-time body, composed of twenty-five members elected for five years in their personal capacity, in a manner such as to assure representation in the Commission as a whole of the main forms of civilization and of the principal legal systems of the world.

#### (a) Permanent body

18. As envisaged by the Committee on the Progressive Development of International Law and its Codification when making its recommendation in favour of a single commission,46 the General Assembly established the International Law Commission as a permanent body, furnishing it with its own Statute. The Commission's permanency, as distinguished from the term of office of its members, has been likewise recognized by the Commission itself 47 and acknowledged by the Secretary-General.48 This characteristic has been at the root of the selection made by the Commission in 1949 of a list of topics for codification as well as the decisions taken by the Commission from time to time concerning its programme and the planning of its future work. Thus, the Commission has made arrangements to ensure the continuation of work on the topics selected for codification and progressive development, even though aware of the freedom of action of a new membership.49 Also, the Commission has arrived at 50 and further confirmed 51 the conclusion that a Special Rapporteur who had been re-elected should continue his work unless and until the newly constituted Commission decided otherwise.

<sup>&</sup>lt;sup>37</sup> A/AC.10/51, reissued as A/331. The Committee was established by General Assembly resolution 94 (I) of 11 December 1946.

<sup>&</sup>lt;sup>38</sup> See, inter alia, Statute of the International Law Commission (hereinafter referred to as Statute), articles 11 and 18 (2).

<sup>&</sup>lt;sup>39</sup> See, inter alia, Official Records of the General Assembly, Fourth Session, Sixth Committee, 158th to 164th meetings; ibid., Resolutions (A/1251), resolution 373 (IV) of 6 December 1949.

<sup>&</sup>lt;sup>40</sup> The Commission's Statute has been amended by the General Assembly in resolutions 485 (V) of 12 December 1950, 984 (X) and 985 (X) of 3 December 1955, 1103 (XI) of 18 December 1956 and 1647 (XVI) of 6 November 1961. With the exception of the last two, all other amendments were adopted on the initial recommendation of the Commission itself. By resolution 484 (V) of 12 December 1950, the General Assembly requested the International Law Commission to review its Statute with the object of making recommendations to the General Assembly concerning revisions of the Statute; the General Asembly, however, failed to act upon the recommendations made by the Commission [resolution 600 (VI) of 31 January 1952, see para. 19 below].

<sup>41</sup> Statute, article 18 (3).

<sup>42</sup> Ibid., articles 16 (j), 17 (d), 22 and 23.

<sup>13</sup> Ibid., article 1 (2).

<sup>&</sup>lt;sup>44</sup> See section A above.

<sup>&</sup>lt;sup>45</sup> Yearbook of the International Law Commission, 1966, vol. I, part II, pp. 249-252, paras. 38-66.

<sup>&</sup>lt;sup>46</sup> A/AC.10/SR.7.

<sup>&</sup>lt;sup>47</sup> See Yearbook of the International Law Commission, 1966, vol. II, document A/6309/Rev.1, p. 277, para. 72.

<sup>&</sup>lt;sup>48</sup> See Yearbook of the International Law Commission, 1950, vol. I, p. 249, para. 10.

<sup>&</sup>lt;sup>49</sup> See Yearbook of the International Law Commission, 1966, vol. II, document A/6309/Rev.1, part II, p. 277, para. 72.

<sup>&</sup>lt;sup>50</sup> See Yearbook of the International Law Commission, 1953, vol. II, document A/2456, p. 231, para. 172.

<sup>&</sup>lt;sup>51</sup> See Yearbook of the International Law Commission, 1966, vol. II, document A/6309/Rev.1, part II, p. 277, para. 73.

#### (b) Part-time body

19. Although the Commission has always functioned as a part-time organ, suggestions have been made sporadically to place it on a full-time basis. In the Committee on the Progressive Development of International Law and its Codification opinions differed on the question whether the members of the Commission should be required to render full-time service. The Committee, by a majority vote, thought that this would be both desirable and necessary.<sup>52</sup> Its suggestion was, however, rejected by the General Assembly in 1947 on the unanimous recommendation of Sub-Committee 2 of the Sixth Committee, based on the imperative necessity for the greatest possible reduction in the United Nations budget, and the consideration that such a composition would make the acceptance of membership more difficult.53 At its third session in 1951, the International Law Commission, having undertaken a review of its Statute at the request of the General Assembly (resolution 484 (V) of 12 December 1950), also recommended that its work be placed on a full-time basis.<sup>54</sup> The General Assembly, by resolution 600 (VI) of 31 January 1952, adopted on the recommendation of the Sixth Committee, decided "for the time being not to take any action in respect of the revision of [the Commission's] Statute".

#### (c) Membership of the Commission

#### (i) Size

20. As presently constituted, the Commission is composed of twenty-five members.<sup>55</sup> The Statute, however, originally provided for a membership of fifteen. This size was increased in 1956 to twenty-one by General Assembly resolution 1103 (XI) of 18 December 1956 and to the present number in 1961 by General Assembly resolution 1647 (XVI) of 6 November 1961.

#### (ii) Election of members

21. Members are elected by the General Assembly in their capacity as persons of recognized competence in international law from a list of candidates nominated by the Governments of States Members of the United Nations. No two members of the Commission shall be nationals of the same State. 56 Electors shall bear in mind that candidates should individually possess the qualifications required and that in the Commission as a whole representation should be assured of the main forms of civilization and of the principal legal systems of the world. 57 Casual vacancies are filled by the Commission itself having regard to the same provisions originally addressed to the General Assembly concerning qualifications. 58

#### (iii) Term of office

22. At present, members are elected to serve in the Commission for five years.<sup>59</sup> The original term of office provided in the Statute was however three years. The extension of the term was made by General Assembly resolution 985 (X) of 3 December 1955, on the recommendation of the Commission itself.<sup>60</sup> The Commission's members are eligible for re-election.<sup>61</sup>

Elections have taken place in 1948, 62 1953, 1956, 1961 and 1966. The next election will take place at the twenty-sixth regular session of the General Assembly in 1971.

#### (iv) Emoluments

23. Article 13 of the Statute originally provided:

"Members of the Commission shall be paid travel expenses and shall also receive a *per diem* allowance at the same rate as the allowance paid to members of commissions of experts of the Economic and Social Council."

The Commission, however, at its first and second sessions suggested to the General Assembly to reconsider the terms of the above provision since the *per diem* allowance was hardly sufficient to meet the living expenses of its members.<sup>63</sup> The Commission's point of view met with the approval of the Sixth Committee and the opposition of the Fifth Committee at the fourth and fifth sessions of the General Assembly in 1949 and 1950 respectively.<sup>64</sup> At its fifth session, however, the General Assembly amended article 13 of the Statute to read as it does at present:

Members of the Commission shall be paid travel expenses and shall also receive a special allowance the amount of which shall be determined by the General Assembly." <sup>65</sup>

By the same resolution, the General Assembly fixed the special allowance at \$US35 per day.<sup>66</sup>

- 24. At its eleventh session, in 1956, the General Assembly established the principle that "the subsistance allowance shall be paid uniformly to members of all eligible bodies" and set the rate of that allowance at the equivalent in local currency of \$US20 a day for meetings away from New York.<sup>67</sup> Although members of the Commission continued to be paid \$US35 per day of attendance, \$US20 of that was considered to be a "subsistence allowance" and \$US15 a "special allowance".<sup>58</sup>
- 25. At its twelfth session in 1957, the General Assembly, on the basis of reports submitted by the Secretary-General 69 and the Advisory Committee on Administrative and Budgetary Questions 70 adopted recommendations made by the Fifth Committee 71 to the effect, *inter alia*, that:

<sup>&</sup>lt;sup>52</sup> A/AC.10/51, reissued as A/331; see also A/AC.10/SR.24.

<sup>&</sup>lt;sup>53</sup> A/C.6/193, para. 4.

<sup>&</sup>lt;sup>54</sup> See Yearbook of the International Law Commission, 1951, vol. II, document A/1858, pp. 137-139, paras. 60-71.

<sup>55</sup> Statute, article 2.

<sup>56</sup> Ibid., articles 2 and 3.

<sup>&</sup>lt;sup>57</sup> *Ibid.*, article 8.

<sup>58</sup> Ibid., article 11.

<sup>59</sup> Ibid., article 10.

<sup>&</sup>lt;sup>60</sup> Yearbook of the International Law Commission, 1955, vol. II, document A/2934, pp. 41 and 42, paras. 27 and 28.

<sup>61</sup> Statute, article 10.

<sup>&</sup>quot;…

<sup>&</sup>lt;sup>62</sup> By General Assembly resolution 486 (V) of 12 December 1950, the original three-year term of office of the Commission's members was extended by two years, making a total period of five years from their election in 1948.

<sup>63</sup> See Yearbook of the International Law Commission, 1949, document A/925, p. 284, para. 42; see also Yearbook of the International Law Commission, 1950, vol. II, document A/1316, p. 367, para. 21.

<sup>&</sup>lt;sup>64</sup> Official Records of the General Assembly, Fourth Session, Sixth Committee, 168th meeting; see also A/C.5/320; ibid., Fifth Committee, 222nd meeting; cf. ibid., Annexes, agenda item 52, documents A/1639, paras. 6-16, and A/1648; ibid., Fifth Committee, 258th and 259th meetings.

<sup>&</sup>lt;sup>05</sup> Official Records of the General Assembly, Fifth Session, Supplement No. 20 (A/1775), resolution 485 (V) of 12 December 1950.

<sup>&</sup>lt;sup>66</sup> See also ibid., Ninth Session, Supplement No. 21 (A/2890), resolution 875 (IX).

<sup>&</sup>lt;sup>67</sup> Ibid., Eleventh Session, Supplement No. 17 (A/3572 and Corr.1), resolution 1075 (XI) of 7 December 1956, annex, para. 6.

<sup>68</sup> Ibid., Eleventh Session, Supplement No. 17 (A/3572 and Corr.1), resolution 1106 (XI) of 21 February 1957.

<sup>&</sup>lt;sup>69</sup> Ibid., Twelfth Session, Annexes, agenda item 41, document A/C.5/713.

<sup>70</sup> Ibid., document A/3705.

<sup>71</sup> Ibid., document A/3766,

- "(a) There are to be only two types of payments to members of experts bodies of the United Nations;
  - "(i) Subsistence allowance
  - "(ii) Payments additional to this allowance
- "(b) The subsistence allowance shall be paid uniformly to members of all eligible bodies at the rates approved by the General Assembly in its resolution 1075 (XI) of 7 December 1956:
  - "(i) \$US25 per diem for meetings at Headquarters,
  - "(ii) \$US20 per diem for meetings away from Head-quarters,

"...

"(c) Payment in addition to the subsistence allowance shall be made to the following:

" . . .

- "(iii) The Chairman, the Special Rapporteurs and the other members of the International Law Commission;
- "(d) Methods of payments:
- "(i) Additional payments shall be consolidated and shall be paid as honoraria in the following lump sums
  - "Chairman of the International Law Commission: \$US2,500°
  - "Special Rapporteurs of the International Law Commission: \$US2,500°
  - "Other members of the International Law Commission: \$US1,000

"···

- "(ii) The above sums would be payable for any year during which the recipient attends the meetings of the body of which he is a member.
- "c In the case of the International Law Commission, the payment of the higher sum shall be subject to the preparation of specific reports or studies between sessions of the Commission." 72
- 26. After 1958, therefore, members of the Commission have enjoyed, in addition to travel expenses, a subsistence allowance of \$US20 per day and honoraria of \$US1,000 per annum, payable at the rate of \$US100 per week of attendance during the regular ten-week session. By a decision of the General Assembly taken at its fifteenth session, the subsistence allowance payable to eligible members of organs and subsidiary organs were set at the following rates:

US dollars

23"78

exceed the equivalent in local currency of . .

- <sup>72</sup> Ibid., para. 6. See also ibid., Twelfth Session, Plenary Meetings, 729th meeting, 13 December 1957. For an account of the historical development prior to 1957 of the honoraria paid to Special Rapporteurs see ibid., Annexes, agenda item 41, document A/3766, annex, paras. 2-8.
- <sup>73</sup> Ibid., Fifteenth Session, Supplement No. 16 A (A/4684), resolution 1588 (XV) of 20 December 1960.

#### III. ARRANGEMENT OF THE COMMISSION'S SESSION

#### (a) Place of session

27. Articles 12 of the Statute originally provided that:

"The Commission shall sit at the Headquarters of the United Nations. The Commission shall, however, have the right to hold meetings at other places after consultation with the Secretary-General."

On the recommendation of the Commission, the General Assembly, by resolution 984 (X) of 3 December 1955, amended the first sentence of article 12 to read as it does at present: "The Commission shall sit at the European Office of the United Nations at Geneva". With the exception of the first session, held in New York in 1949, the sixth session, held in Paris in 1954 owing to the temporary lack of facilities in Geneva, and the second part of the seventeenth session, held at Monaco in 1966 at the invitation of the Government of the Principality of Monaco, all sessions of the Commission have been held at Geneva.

- 28. When expressing itself on the question of the place to meet, the Commission has favoured Geneva, since, in its opinion, the general conditions or atmosphere in that city are more conducive to efficiency in the kind of work to be performed. The fact has also been stressed by the Commission that there exists in Geneva an exceptionally well planned legal library, unsurpassed in the field of international law.<sup>74</sup>
- 29. The Commission's preference reflected in the Statute, has been given further recognition by the General Assembly in resolution 2116 (XX) of 21 December 1965, "Pattern of conferences", whose operative paragraph 2 (a) reads as follows:
  - "2. Decides further that, as a general principle, meetings of United Nations bodies shall be held at the established head-quarters of the bodies concerned with the following exceptions:
  - "(a) The sessions of the International Law Commission shall be held at Geneva;" 75
- 30. As regards the Commission's statutory right to hold meetings at other places than Geneva after consultation with the Secretary-General, the terms of operative paragraph 2 (h) of resolution 2116 (XX) should be borne in mind, whereby the General Assembly decided that:

"..

"(h) In other cases meetings may be held away from the established headquarters or authorized meeting-place of any body when a Govenment issuing an invitation for a meeting to be held within its territory has agreed to defray, after consultation with the Secretary-General as to their nature and possible extent, the actual additional costs directly and indirectly involved;" <sup>76</sup>

#### (b) Date of session

31. Since its establishment, and with the exception of the second part of its seventeenth session held in the winter of 1966 (see paragraph 34 below), the Commission has annually con-

<sup>&</sup>lt;sup>74</sup> See Yearbook of the International Law Commission, 1953, vol. II, document A/2456, p. 232, para. 173; see also Yearbook of the International Law Commission, 1955, vol. II, document A/2934, p. 41, para. 26.

<sup>&</sup>lt;sup>75</sup> See also Official Records of the General Assembly, Seventeenth Session, Supplement No. 17 (A/5217), resolution 1851 (XVII) of 19 December 1962.

<sup>&</sup>lt;sup>76</sup> See also Official Records of the General Assembly, Twelfth Session, Supplement No. 18 (A/3805), resolution 1202 (XII) of 13 December 1957.

vened in the spring or early summer. This time of the year has been deemed most appropriate by the Commission to facilitate the full attendance of its members and ensure the timely submission of its annual report to the immediately ensuing session of the General Assembly. As of 1953, a more compelling reason for this choice, given the Commission's preference for Geneva as the place to meet, resulted from the decision taken by the General Assembly at its seventh session in 1952, and reaffirmed at its twelfth session in 1957, to the effect that "the International Law Commission would meet in Geneva only when its session could be held there without overlapping with the summer session of the Economic and Social Council". This condition, however, was eliminated by the General Assembly in 1962.

- 32. Before the removal of the limitation referred to in the preceding paragraph the Commission, at its fourteenth session, had decided on the first Monday in May as the most convenient opening date for its annual session in order to minimize the duration of overlapping with the session of the Economic and Social Council and the period during which members would find it difficult to take part in the Commission's work.<sup>30</sup> Although this decision has not been strictly complied with, the opening date of the Commission's last six sessions has nevertheless taken place in May.<sup>81</sup> The actual opening date of the Commission's session may depend on factors such as the convening of a codification conference by the General Assembly, as was the case at the twentieth session of the Commission, whose opening date was postponed in view of the dates of the first session of the Vienna Conference on the Law of Treaties.<sup>82</sup>
- 33. The average length of the Commission's annual session has been ten weeks. This period has been considered by the Commission to be the "indispensable minimum it would require to carry out its work". 83 Extensions of the scheduled ten-week period have taken place, by one week in 1964 on the Commission's own decision 84 and by one week in 1966 on the approval by the General Assembly of a recommendation made by the Commission. 85

34. At its fifteenth to seventeenth sessions, the Commission considered the question of holding winter sessions in order to finish before the end of the term of office of its members its draft articles on the law of treaties on special missions. At its fifteenth session in 1963, the Commission decided that a three-week winter session should take place in January 1964 and reported to the General Assembly that suggestions had been made also for a winter session, in January 1965.86 The General Assembly, however, at its eighteenth session, made no appropriations for the 1964 winter session of the Commission. At its sixteenth session in 1964, the Commission again reported to the General Assembly its belief that it was essential to hold a fourweek winter session in 1966.87 No action having been taken by the General Assembly due to the circumstances prevailing at its nineteenth session, the Commission, at its seventeenth session, considered the question whether the proposed winter session could be replaced by extensions of the regular sessions of 1965 and 1966. Concluding, respectively, that such extensions were not possible or sufficient, it reaffirmed its recommendation of 1964 to the General Assembly that arrangements should be made for the Commission to meet for four weeks in January 1966, those meetings to constitute the second part of the seventeenth session of the Commission.88 The Commission also decided in principle to accept an invitation of the Government of the Principality of Monaco to hold those meetings in Monaco.89 The General Assembly, by resolution 2045 (XX) of 8 December 1965, approved the Commission's proposal. The second part of the Commission's seventeenth session was therefore held in Monaco from 3 to 28 January 1966.90

#### (c) Rules of procedure

35. Since the Commission is a subsidiary organ of the General Assembly, it is governed in principle by rule 162 of the rules of procedure of the General Assembly, which provides in part:

"... The rules relating to the procedure of committees of the General Assembly, as well as rules 45 and 62, shall apply to the procedure of any subsidiary organ, unless the General Assembly or the subsidiary organ decides otherwise." <sup>91</sup>

The Commission, at its first session in 1949, decided that the rules of procedure referred to in rule 162 should apply to the procedure of the Commission, and that the Commission should, when the need arose, adopt its upon rules of procedure. 92

## (d) Meetings of the Commission

36. As a general rule, the Commission meets once a day in plenary, for three hours Monday through Friday. In

the International Law Commission, 1966, vol. II, document A/6309/Rev.1, part II, p. 173, para. 1; Official Records of the General Assembly, Twentieth Session, Supplement No. 14 (A/6014), resolution 2045 (XX) of 8 December 1965.

<sup>&</sup>lt;sup>77</sup> See Yearbook of the International Law Commission, 1951, vol. II, document A/1858, p. 138, para. 64; see also Yearbook of the International Law Commission, 1953, vol. II, document A/2456, p. 232, para. 174.

<sup>&</sup>lt;sup>78</sup> Official Records of the General Assembly, Seventh Session, Supplement No. 20 (A/2361), resolution 694 (VII) of 20 December 1952; ibid., Twelfth Session, Supplement No. 18 (A/3805), resolution 1202 (XII) of 13 December 1957.

<sup>&</sup>lt;sup>79</sup> Ibid., Seventeenth Session, Supplement No. 17 (A/5217), resolution 1851 (XVII) of 19 December 1962.

<sup>&</sup>lt;sup>80</sup> See Yearbook of the International Law Commission, 1962, vol. II, document A/5209, p. 193, para. 83.

<sup>&</sup>lt;sup>81</sup> The sixteenth and nineteenth sessions of the Commission opened on the second Monday in May of 1964 and 1967, respectively. The twentieth session opened on the last Tuesday in May of 1968.

<sup>&</sup>lt;sup>82</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 369, para. 50; cf. Yearbook of the International Law Commission, 1962, vol. II, document A/5209, p. 193, para. 82, regarding the Vienna Conference on Consular Relations.

<sup>&</sup>lt;sup>83</sup> See Yearbook of the International Law Commission, 1953, vol. II, document A/2456, p. 232, para. 176; see also Yearbook of the International Law Commission, 1955, vol. II, document A/2934, p. 42, para. 30; Yearbook of the International Law Commission, 1956, vol. II, document A/3159, p. 302, para. 50; Yearbook of the International Law Commission, 1957, vol. II, document A/3623, pp. 145 and 146, para. 34.

<sup>&</sup>lt;sup>84</sup> See Yearbook of the International Law Commission, 1964, vol. II, document A/5809, p. 226, para. 38.

<sup>&</sup>lt;sup>85</sup> See Yearbook of the International Law Commission, 1965, vol. II, document A/6009, p. 194, para. 54; see also Yearbook of

<sup>&</sup>lt;sup>86</sup> See Yearbook of the International Law Commission, 1963, vol. II, document A/5509, pp. 225 and 226, paras. 72-74.

<sup>&</sup>lt;sup>87</sup> See Yearbook of the International Law Commission, 1964, vol. II, document A/5809, p. 226, para. 38.

<sup>\*\*</sup> See Yearbook of the International Law Commission, 1965, vol. II, document A/6009, pp. 193 and 194, para. 53.

<sup>89</sup> *Ibid.*, p. 195, para. 65.

<sup>&</sup>lt;sup>90</sup> See Yearbook of the International Law Commission, 1966, vol. II, document A/6309/Rev.1, part I, p. 169, paras. 1-3.

<sup>&</sup>lt;sup>01</sup> Rule 45 relates to the duties of the Secretary-General. Rule 62 states the general principles concerning the public or private meetings of the General Assembly, its Committees and Sub-Committees.

<sup>&</sup>lt;sup>92</sup> See Yearbook of the International Law Commission, 1949, document A/925, p. 278, para. 5; see also ibid., p. 281, para. 18.

accordance with rule 62 of the rules of procedure of the General Assembly, these meetings are held in public. Under the same rule, however, the Commission is empowered to meet in private if it deems it necessary; it has done so when filling casual vacancies and occasionally when dealing with internal organizational matters.93 The decisions to fill a casual vacancy and, when appropriate, on organizational matters, are announced by the Chairman at a subsequent public meeting of the Commission.94 Records of the Commission's public meetings are published in summary form as mimeographed documents and are subsequently printed in volume I of the Commission's Yearbook. As to the practice of holding only one plenary meeting a day, its endorsement by the Commission has been mainly based on the need to allow sufficient time for the private and individual work of members, and to enable the Special Rapporteur of the topic being considered, the General Rapporteur and the members of the Drafting Committee to keep pace with the work of the Commission and fully participate in its plenary discussions.95

# (e) Quorum

37. In accordance with rule 110 of the rules of procedure of the General Assembly, one third of the members of the Commission (9 members) constitute the quorum. The presence, however, of a majority of the Commission's members (13 members is required for a decision to be taken.

#### (f) The Bureau

38. At the beginning of each session, the Commission elects the officers who constitute its Bureau, on the proposal of the Commission's members, as follows: the Chairman, the First and Second Vice-Chairmen and the General Rapporteur. Apart from its functions under rules 108 and 109 of the rules of procedure of the General Assembly, the Commission's Chairman performs tasks such as to propose the members who are to be appointed to the Drafting Committee for the session. The Commission's First Vice-Chairman has been the Chairman of the Drafting Committee, beginning at the seventh session. The General Rapporteur is responsible for the preparation of the draft of the Commission's annual report to the General Assembly.

# (g) Agenda

39. As distinguished from its programme of work, the Commission adopts at the beginning of each session the agenda for the session. The provisional agenda is prepared by the Secretariat on the basis of the relevant decisions of the General Assembly and the Commission and the pertinent provisions of the Commission's Statute. The order in which items are listed in the agenda adopted does not necessarily determine their actual order of consideration by the Commission, the latter being rather a result of ad hoc decisions.

## (h) Report of the session

40. At the end of each session the Commission adopts a report to the General Assembly, covering the work of the session, on the basis of a draft which the Commission examines paragraph by paragraph, prepared by the General Rapporteur with the assistance of the Special Rapporteurs concerned and the Secretariat. Apart from standard chapters (Organization of

the session; Other decisions and conclusions of the Commission), the report devotes separate chapters to the topics given substantive consideration at the session. The report includes, as appropriate, drafts and reports on particular topics with commentaries and recommendations relating thereto, information on the progress of work on the topics under study and on the future work of the Commission and other recommendations calling for a decision on the part of the General Assembly. Comments by Governments on the Commission's drafts are normally printed as an annex to the report when the drafts are presented in their final form. Apart from being the vehicle for their submission to the General Assembly,96 the report serves as a means of giving to the Commission's drafts and reports all necessary publicity.97 An item entitled "Report of the International Law Commission" is included by the General Assembly in its agenda for each regular session and allocated to the Sixth Committee. The report is customarily 98 introduced in this Committee by the Commission's Chairman, in whose presence the consideration of the item takes place.

# IV. PROCESS OF CONSIDERATION OF A TOPIC OF INTERNATIONAL LAW WITH A VIEW TO ITS CODIFICATION AND PROGRESSIVE DEVELOPMENT

41. As a methodological standard the distinction embodied in chapter II of the Statute between codification and progressive development of international law has not been maintained in the practice of the Commission. A single consolidated procedure based on its Statute has been evolved by the Commission out of the need to incorporate elements of both lex lata and lex ferenda in the rules to be formulated. This procedure comprises basically the formulation by the Commission of a plan of work and the appointment of a Special Rapporteur, the request for data and information from Governments, the submission of studies and research projects by the Secretariat, the discussion of the reports and drafts submitted by the Special Rapporteur, the elaboration of drafts and their submission to Governments for comments, the revision of the provisional drafts in the light of the written comments and oral observations from Governments and the submission of final drafts with recommendations to the General Assembly.

# (a) Plan of work

- 42. After the decision has been taken by the Commission to undertake work on a topic already placed on its programme of work, 90 the Commission engages in a general discussion as to when and how best to deal with it. This discussion normally results in the appointment of a Special Rapporteur for the topic in question.
- 43. On two occasions, the appointment of a Special Rapporteur has been preceded by the assignment of the topic to a sub-committee for examination. At its fourteenth session in 1962, the Commission appointed Sub-Committees, composed of ten members each, on State responsibility and succession of

<sup>93</sup> See, inter alia, Yearbook of the International Law Commission, 1952, vol. I, 135th meeting.

<sup>&</sup>lt;sup>94</sup> See inter alia, Yearbook of the International Law Commission, 1955, vol. I, 292nd meeting.

<sup>95</sup> See Yearbook of the International Law Commission, 1957, vol. II, document A/3623, pp. 144 and 145, para. 26.

<sup>96</sup> Statute, articles 16 (j), 17 (c), 20 and 22.

<sup>97</sup> Ibid., articles 16 (g) and 21 (l).

<sup>98</sup> At its eighth session, the Commission, on the proposal of the Chairman, decided that the Special Rapporteur on the régimes of the high sea and territorial sea should attend the eleventh session of the General Assembly and furnish such information on the Commission's draft on the law of the sea as might be required in connexion with the consideration of the matter by the Assembly. Yearbook of the International Law Commission, 1956, vol. II, document A/3159, p. 302, para. 48.

<sup>&</sup>lt;sup>99</sup> The inclusion of a topic in the Commission's programme of work has not implied its actual consideration by the Commission. See paragraph 13 above.

States and Governments.<sup>100</sup> The Sub-Committee met during the Commission's regular session <sup>101</sup> and in January 1963 at Geneva. The conclusions and recommendations set out in the Sub-Committee's reports, including a plan of work, were approved by the Commission at its fifteenth session in 1963.<sup>102</sup> After this approval, the Commission appointed the Chairman of the two Sub-Committees as Special Rapporteurs for the respective topics.<sup>103</sup> At its last session in 1967, however, new arrangements were made by the Commission for dealing with the topic "Succession of States and Governments", which had been divided into three main aspects by the 1963 Sub-Committee. Two of the aspects were assigned each to a Special Rapporteur, but the third was left aside for the time being, without being so assigned.<sup>104</sup>

44. Once appointed, the Special Rapporteur is expected to submit to the Commission, at a subsequent session, a substantive report on the topic entrusted to him. However, his initial presentation may be, at the Commission's request or on his initiative, of a general and exploratory character, in the form of a working paper or preliminary report. 105 Whatever the case, the practice of the Commission has not been consistent regarding its reference to time limits for the submission of a first paper by a newly appointed Special Rapporteur. At its last session, in 1967, the Commission decided "to advance... as rapidly as possible at its twentieth session in 1968" its work on one of the aspects of a topic already taken up by the Commission, while appointing a Special Rapporteur to deal specifically with that aspect for the first time. 108 On other occasions, the Commission has refrained from expressly making any such reference.107 This difference in the Commission's attitude is mainly a result of its decisions concerning the organization of its future work.

## (b) The Special Rapporteur

45. The Special Rapporteur for a topic is selected by the Commission from among its members. In principle, it has been the practice of the Commission to allow a newly elected Special Rapporteur to deal with his topic as he deems it most appropriate. The Commission, however, on the occasion of the appointment of the Special Rapporteur or upon his submission of a working paper or a preliminary or further report, may engage in a discussion aimed at giving him guidelines 109 or

instructions on aspects such as the manner of treatment, parts of the subject to be dealt with and priorities to be given to them, especially in the light of relevant decisions of the General Assembly 110 or in cases where the topic has been already dealt with by a previous Special Rapporteur or it is related to subjects already dealt with or being dealt with by the Commission. 111 For the preparation of his reports the Special Rapporteur, aside from the data and information furnished by Governments or intergovernmental organizations and the substantive assistance of the Secretariat, may also ascertain the specific views of the Commission's members by circulating among them a questionnaire. 112 The Special Rapporteur may also be allowed to consult with experts with a view to elucidating technical questions. 113

#### (c) Request for data and information from Governments

46. Following the decision to undertake work on a given topic, the Commission usually asked the Secretary-General to address a request to Governments to furnish it with data and information relevant to the topic in question, which may take the form of texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other materials.<sup>114</sup> The request may also take the form of a questionnaire prepared by the Secretariat <sup>115</sup> to which Governments may reply specifically or

Sub-Committee on State Responsibility and Succession of States and Government (para. 31 above), nevertheless pointed out that the questions listed in the first report were intended solely to serve as an aide-mémoire and that the second report laid down guiding principles for the Special Rapporteur, who would not be obliged to conform to them in detail. Yearbook of the International Law Commission, 1963, vol. II, document A/5509, p. 224, paras. 54 and 60.

110 The General Assembly, inter alia, by resolutions 1765 (XVII) of 20 November 1962 and 1902 (XVIII) of 18 November 1963 recommended that: (a) the law of treaties "be placed upon the widest and most secure foundations"; (b) on State Responsibility, due consideration be given "to the purposes and principles enshrined in the Charter of the United Nations"; (c) on Succession of States and Governments, appropriate reference be made "to the views of States which have achieved independence since the Second World War". Official Records of the General Assembly, Seventeenth Session, Supplement No. 17 (A/5217); ibid., Eighteenth Session, Supplement No. 15 (A/5515).

vol. I, 597th meeting, p. 99, para. 33; 621st meeting, p. 258, para. 47; see also Yearbook of the International Law Commission, 1963, vol. II, document A/5509, p. 225, paras. 62-64; Yearbook of the International Law Commission, 1964, vol. II, document A/5809, pp. 175 and 176, 226 and 227, paras. 18, 41, 42; Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 368, para. 40; see also Yearbook of the International Law Commission, 1968, vol. I, 962nd to 965th and 968th meetings.

<sup>112</sup> See Yearbook of the International Law Commission, 1956, vol. II, document A/3159, p. 301, para. 36; Yearbook of the International Law Commission, 1959, vol. II, document A/4169, para. 23.

113 See Yearbook of the International Law Commission, 1954, vol. II, document A/2693, p. 152, paras. 60 and 63; Yearbook of the International Law Commission, 1956, vol. II, document A/3159, p. 255, paras. 15-18.

114 See Yearbook of the International Law Commission, 1954, vol. II, document A/2693, p. 152, paras. 60 and 64; Yearbook of the International Law Commission, 1962, vol. II, document A/2693, p. 152, paras. 60 and 64; Yearbook of the International Law Commission, 1962, vol. II, document A/5209, p. 192, para. 73; Yearbook of the International Law Commission, 1963, vol. II, document A/5509, pp. 224 and 225, para. 61.

<sup>115</sup> See Yearbook of the International Law Commission, 1950, vol. II, document A/1316, pp. 380 and 381, paras. 160 and 165.

<sup>&</sup>lt;sup>100</sup> See Yearbook of the International Law Commission, 1962, vol. II, document A/5209, pp. 188-190, paras. 33-56, 62.

<sup>&</sup>lt;sup>101</sup> *1bid.*, pp. 191 and 192, paras. 67-74 (one and two private meetings, respectively).

<sup>&</sup>lt;sup>102</sup> See Yearbook of the International Law Commission, 1963, vol. II, document A/5509, pp. 223-225, paras. 51-61; *ibid.*, annexes 1 and 2.

<sup>103</sup> Ibid., pp. 224 and 225, paras. 55 and 61.

<sup>104</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 368, paras. 38-40.

<sup>&</sup>lt;sup>105</sup> See, inter alia, ibid., p. 368, para. 40; Yearbook of the International Law Commission, 1963, vol. II, document A/5509, p. 225, para. 66; and A/CN.4/L.127.

<sup>108</sup> See Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 368, para. 39; see also Yearbook of the International Law Commission, 1961, vol. I, 621st meeting, p. 258, para. 47 (iii); Yearbook of the International Law Commission, 1962, vol. II, document A/5209, p. 192, para. 75.

<sup>&</sup>lt;sup>107</sup> See Yearbook of the International Law Commission, 1963, vol. II, document A/5509, p. 224, para. 55.

<sup>&</sup>lt;sup>108</sup> See, inter alia, Yearbook of the International Law Commission, 1968, vol. I, 965th meeting, p. 132, para. 65.

<sup>109</sup> At its fifteenth session in 1963, the Commission, while approving the recommendations contained in the reports of the

by way of general observations. The Secretariat systematizes the data and information thus gathered, which is transmitted to the Special Raporteur and published as a compilation in the *United Nations Legislative Series* or in documents later to be included in the Commission's Yearbook.

#### (d) Studies and research projects by the Secretariat

47. Among its functions as regards the Commission, the Secretariat, at the Commission's request or on its own initiative, prepares substantive studies and research projects to facilitate the Commission's work and to aid the Special Rapporteurs in the fulfilment of their tasks. The Secretariat also, when appropriate, addresses itself to concrete substantive questions that may arise during the consideration of the reports submitted by the Special Rapporteur.<sup>116</sup>

#### (e) Discussion of the Special Rapporteur's reports

48. The reports submitted by the Special Rapporteur for the Commission's consideration, as distinguished from working papers or preliminary reports, normally contain a set of draft articles with commentaries. 117 After its introduction by the Special Rapporteur and an exchange of views thereon, the Commission proceeds to an article by article discussion with a view to the formulation of a set of draft articles. Prior to its consideration by the Commission, each draft article is introduced by the Special Rapporteur. Members may submit amendments or alternative formulations to the draft articles presented by the Special Rapporteur 118 or written memoranda thereon. 119 Upon the conclusion of its consideration on a given draft article, the Commission transmits it, together with pertinent suggestions and proposals to the Drafting Committee, in the light of the debate and the decisions taken.

#### (f) The Drafting Committee

49. Although committees in the nature of drafting committees were set up by the Commission to deal with specific topics or questions at its first three sessions, 120 a standing Drafting Committee has been used at each session of the Commission since its fourth session in 1952. 121 The Drafting Committee

118 See, inter alia, Yearbook of the International Law Commission, 1962, vol. II, document A/5209, pp. 191 and 192, paras. 72 and 76; Yearbook of the International Law Commission, 1963, vol. II, document A/5509, pp. 224 and 225, paras. 55 and 61; and A/CN.4/200 and Add.1 and 2, A/CN.4/L.129.

117 See, inter alia, Yearbook of the International Law Commission, 1963, vol. II, document A/5509, p. 225, paras. 64 and 66; Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 369, para. 43; A/CN.4/201.

vol. II, document A/3859, p. 108, para. 64; Yearbook of the International Law Commission, 1958, p. 110, para. 28; Yearbook of the International Law Commission, 1959, vol. II, document A/4169, p. 110, para. 28; Yearbook of the International Law Commission, 1960, vol. II, document A/4425, p. 179, para. 31.

<sup>119</sup> See Yearbook of the International Law Commission, 1953, vol. I, 227th meeting, pp. 277 and 278, paras. 35-38.

120 See Yearbook of the International Law Commission, 1949, vol. I, 16th meeting, p. 129, paras. 112-116; 29th meeting, p. 214, para. 68; Yearbook of the International Law Commission, 1950, vol. I, 62nd meeting p. 177, para. 146; Yearbook of the International Law Commission, 1951, vol. I, 117th meeting, pp. 299 and 300, paras. 71-88.

<sup>121</sup> See Yearbook of the International Law Commission, 1952, vol. I, 143rd meeting, p. 41, para. 62.

prepares texts of draft articles for the consideration of the Commission. These texts embody solutions not only to drafting points but also to questions of substance which the Commission "has been unable to resolve or which appeared likely to give rise to unduly protracted discussion". 122 Beginning at the Commission's seventh session, in 1955, the Chairman of the Drafting Committee has been the Commission's first Vice-Chairman. 123 Customarily also, the General Rapporteur is appointed to be a member of the Drafting Committee. 124 Other members are appointed by the Commission on the recommendation of its Chairman with a view to ensuring an adequate representation and taking into account, among other factors, their linguistic competence in English, French and Spanish, these being the languages of the texts of the draft articles for which the Drafting Committee is responsible.125 When a member of the Drafting Committee cannot attend its meetings, he is normally replaced by a member of the Commission of the same language or from the same geographical region.128 Special Rapporteurs who have not been appointed members of the Drafting Committee, take part in the Drafting Committe's work when the draft articles relating to their topics are considered.127 Under the Commission's terms of referral, the Special Rapporteur prepares and submits new texts to the Drafting Committee as a basis for the consideration of the draft article in question. The Drafting Committee enjoys interpretation services but no records are kept of its discussions.

# (g) Consideration by the Commission of the texts approved by the Drafting Committee

50. The Commission discusses the text of each of the draft articles adopted by the Drafting Committee, following its introduction by the Chairman of the Drafting Committee. The Drafting Committee's texts may be subjects to amendments or alternative formulations submitted by members of the Commission and may be referred back by the Commission to the Drafting Committee for further consideration. The texts of the draft articles are voted upon by the Commission and those adopted are included in the relevant chapter of the Commission's report for the session. Detailed explanations of dissenting opinions are not inserted in the report but merely a statement to the effect that for the reasons given in the summary records a member was opposed to the adoption of a certain article. 128

# (h) Submission of drafts to Governments for comments

51. Once adopted, the preliminary drafts are submitted by the Commission, through the Secretary-General, to Governments

<sup>&</sup>lt;sup>122</sup> See Yearbook of the International Law Commission, 1958, vol. II, document A/3859, p. 108, para. 65.

<sup>123</sup> See Yearbook of the International Law Commission, 1955, vol. I, 295th meeting, p. 170, para. 13.

<sup>124</sup> See Yearbook of the International Law Commission, 1952, vol. I, 143rd meeting, p. 41, para. 62; Yearbook of the International Law Commission, 1954, vol. I, 250th meeting, p. 45, para. 61.

<sup>&</sup>lt;sup>125</sup> See Yearbook of the International Law Commission, 1964, vol. II, document A/5809, p. 174, para. 5.

<sup>126</sup> See Yearbook of the International Law Commission, 1959, vol. I, 491st meeting, p. 52, para. 7.

<sup>127</sup> See Yearbook of the International Law Commission, 1952, vol. I, 143rd meeting, p. 41, para. 62.

<sup>&</sup>lt;sup>128</sup> See Yearbook of the International Law Commission, 1953, vol. II, document A/2456, pp. 230 and 231, para. 163; Yearbook of the International Law Commission, 1955, vol. II, document A/2934, p. 43, para. 38.

of Member States for their written comments.<sup>129</sup> Normally, a two-year period is allowed for the receipt of such comments.<sup>130</sup> The necessities of its work may move the Commission to submit to Governments for comments preliminary drafts either in whole or in part. The inclusion of the preliminary drafts in the Report of the session to the General Assembly further allows the expression of oral views by representatives of Member States in the Sixth Committee. The General Assembly usually requests the Secretary-General to transmit to the Commission the records of the debates on the Commission's Report.

(i) Adoption of final drafts with recommendations and submission thereof to the General Assembly

52. In the light of the written comments received from Governments and the oral observations made in the Sixth Committee, the Commission re-examines the preliminary drafts adopted, on the basis of further reports by the Special Rapporteur. A procedure similar to that described above (paras. 48-50) is followed by the Commission when undertaking this reexamination. After a final draft containing a set of draft articles is adopted, the Commission submits it with its recommendations to the General Assembly. The General Assembly may refer the draft back to the Commission 131 or accept it as final and decide then on its outcome.

<sup>129</sup> Statute, articles 16 (h) and 21 (2); see, however, Yearbook of the International Law Commission, 1958, vol. I, 432nd meeting, p. 3, paras 11 and 12, and 478th meeting, p. 257, paras. 33-38; cf. Yearbook of the International Law Commission, 1968, vol. I, 956th meeting.

<sup>130</sup> See Yearbook of the International Law Commission, 1958, vol. II, document A/3859, pp. 108 and 109, paras. 60 and 61; Yearbook of the International Law Commission, 1964, vol. II, document A/5809, pp. 175 and 226, paras. 16 and 40.

<sup>&</sup>lt;sup>131</sup> Official Records of the General Assembly, Tenth Session, Supplement No. 19 (A/3116), resolution 989 (X) of 14 December 1955.

# CHECK LIST OF DOCUMENTS REFERRED TO IN THIS VOLUME

Document	Title	Observations and references
A/925	Report of the International Law Commission covering its first session, 12 April-9 June 1949	Official Records of the General Assembly, Fourth Session, Supplement No. 10; also published in Yearbook of the International Law Commission, 1949.
A/1316	Report of the International Law Commission covering its second session, 5 June-29 July 1950	Official Records of the General Assembly, Fifth Session Supplement No. 12; also published in Yearbook of the International Law Commission, 1950, vol. II.
A/1858	Report of the International Law Commission covering the work of its third session, 16 May-27 July 1951	Official Records of the General Assembly, Sixth Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1951, vol. II.
A/2456	Report of the International Law Commission covering the work of its fifth session, 1 June-14 August 1953	Official Records of the General Assembly, Eighth Session, Supplement No. 12; also published in Yearbook of the International Law Commission, 1953, vol. II.
A/2693	Report of the International Law Commission covering the work of its sixth session, 3 June-28 July 1954	Official Records of the General Assembly, Ninth Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1954, vol. II.
A/2934	Report of the International Law Commission covering the work of its seventh session, 2 May-8 July 1955	Official Records of the General Assembly, Tenth Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1955, vol. II.
A/3159	Report of the International Law Commission covering the work of its eighth session, 23 April-4 July 1956	Official Records of the General Assembly, Eleventh Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1956, vol. II.
A/3623	Report of the International Law Commission covering the work of its ninth session, 23 April-28 June 1957	Official Records of the General Assembly, Twelfth Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1957, vol. II.
A/3859	Report of the International Law Commission covering the work of its tenth session, 28 April-4 July 1958	Official Records of the General Assembly, Thirteenth Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1958, vol. II.

Document	Title	Observations and references
A/4169	Report of the international Law Commission covering the work of its eleventh session, 20 April-26 June 1959	Official Records of the General Assembly, Fourteenth Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1959, vol. II.
A/4425	Report of the International Law Commission covering the work of its twelfth session, 25 April-1 July 1960	Official Records of the General Assembly, Fifteenth Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1960, vol. II.
A/5209	Report of the International Law Commission covering the work of its fourteenth session, 24 April-29 June 1962	Official Records of the General Assembly, Seventeenth Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1962, vol. II.
A/5509	Report of the International Law Commission covering the work of its fifteenth session, 6 May-12 July 1963	Official Records of the General Assembly, Eighteenth Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1963, vol. II.
A/5809	Report of the International Law Commission covering the work of its sixteenth session, 11 May-24 July 1964	Official Records of the General Assembly, Nineteenth Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1964, vol. II.
A/6009	Report of the International Law Commission on the work of the first part of its seventeenth session, 3 May-9 July 1965	Official Records of the General Assembly, Twentieth Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1965, vol. II.
A/6309/Rev.1	Reports of the International Law Commission on the second part of its seventeenth session, 3-28 January 1966, and on its eighteenth session, 4 May-19 July 1966	Official Records of the General Assembly, Twenty-first Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1966, vol. II.
A/6709/Rev.1 and Rev.1/ Corr.1	Report of the International Law Commission on the work of its nineteenth session, 8 May-14 July 1967	Official Records of the General Assembly, Twenty-second Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1967, vol. II.
A/CN.4/161 and Add.1	Relations between States and inter-governmental organizations: first report by Mr. Abdullah El-Erian, Special Rapporteur	Yearbook of the International Law Commission, 1963, vol. II.
A/CN.4/195 and Add.1	Relations between States and inter-governmental organizations: second report by Mr. Abdullah El-Erian, Special Rapporteur	Yearbook of the International Law Commission, 1967, vol. II.
A/CN.4/200 and Add.1 and 2	The succession of States to multilateral treaties: studies prepared by the Secretariat	Printed in this volume, p. 1.
A/CN.4/202	Succession of States and Governments in respect of treaties: first report by Sir Humphrey Waldock, Special Rapporteur	Printed in this volume, p. 87.
A/CN.4/203 and Add.1-5	Relations between States and inter-governmental organizations: third report by Mr. Abdullah El-Erian, Special Rapporteur	Printed in this volume, p. 119.
A/CN.4/204	Succession of States in respect of rights and duties resulting from sources other than treaties: first report by Mr. Mohammed Bedjaoui, Special Rapporteur	Printed in this volume, p. 94.
A/CN.4/205 Rev.1	The final stage of the codification of international law: memorandum by Mr. Roberto Ago	Printed in this volume, p. 171.
A/CN.4/207	Report on the ninth session of the Asian-African Legal Consultative Committee by Mr. Mustafa Kamil Yasseen, Observer for the Commission	Printed in this volume, p. 179.

Document	Title	Observations and references	
A/CN.4/L.104	Relations between States and inter-governmental organizations: suggested list of questions as basis of discussion for the definition of the scope and mode of treatment: working paper prepared by Mr. Abdullah El-Erian, Special Rapporteur	See chapter V of the Commission's report on its sixteenth session (A/5809) for the substance of this paper.	
A/CN.4/L.118 and Add.1 and 2	The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat	Yearbook of the International Law Commission, 1967, vol. II.	
A/CN.4/L.126	Co-operation with other bodies: European Committee on Legal Co-operation: exchange of letters	Printed in this volume, p. 187.	
A/CN.4/L.127	The most-favoured-nation clause in the law of treaties: working paper by Mr. Endre Ustor, Special Rapporteur	Printed in this volume, p. 165.	
A/CN.4/L.129	Precedence of representatives to the United Nations: note by the Secretary-General	Printed in this volume, p. 163.	

# CHECK LIST OF DOCUMENTS OF THE TWENTIETH SESSION NOT REPRODUCED IN THIS VOLUME

Document	Title	Observations and references	
A/CN.4/201	Provisional agenda	Mimeographed.	
A/CN.4/206	Report of the International Law Commission on the work of its twentieth session	Same as document A/7209/Rev.1 printed in this volume p. 191.	
A/CN.4/L.128	"Review of the Commission's programme and methods of work" and "Organization of future work": Programme of work: working paper prepared by the Secretariat	Mimeographed. See document A/7209/Rev.1, Annex, printed in this volume p. 226.	
A/CN.4/L.130 and Add.1 and Corr.1 and Add.2-6	Relations between States and international organizations: draft articles on representatives of States to international organizations: text of articles 1, 2, 4, 4 bis, 5-9, 9 bis, 10-20 adopted by the Drafting Committee	Mimeographed.	
A/CN.4/L.131 and Add.1	Relations between States and international organizations: draft articles on representatives of States to international organizations: text of articles 2, 4 bis and 4 ter adopted by the Drafting Committee on second reading	Mimeographed.	
A/CN.4/L.132 and Add.1, A/CN.4/L.133, A/CN.4/L.134 and Corr.1 and Add.1-5, A/CN.4/L.135 and Add.1	Draft report of the International Law Commission on the work of its twentieth session	Mimeographed.	
ILC (XX) Misc.2	"Review of the Commission's programme and methods of work": B. Methods of work: working paper prepared by the Secretariat	Mimeographed. See document A/7209/Rev.1, Annex, section B, printed in this volume, p. 236.	

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