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**Third report on succession of States in respect of matters other than treaties, by
Mr. Mohammed Bedjaoui , Special Rapporteur - draft articles with commentaries on
succession to public property**

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SUCCESSION OF STATES:

(b) Succession in respect of matters other than treaties

[Agenda item 3(b)]

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Third report on succession in respect of matters other than treaties,
by Mr. Mohammed Bedjaoui, Special Rapporteur

Draft articles with commentaries on succession to public property

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EXPLANATORY NOTE: ITALICS IN QUOTATIONS

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

Part One**Text of draft articles on succession to public property**

The Special Rapporteur suggests the following articles to cover the subject of succession to public property:

ARTICLE 1. DEFINITION AND DETERMINATION OF PUBLIC PROPERTY

For the purposes of these articles, "public property" means all property, whether tangible or intangible, and rights and interests therein, belonging to the State, a territorial authority thereof or a public body.

Save in the event of serious conflict with the public policy of the successor State, the determination of what constitutes public property shall be made by reference to the municipal law which governed the territory affected by the change of sovereignty.

Variant to article 1

For the purposes of these articles, "public property" means all property, rights and interests which, on the date of the change of sovereignty and in accordance with the law of the predecessor State, were not under private ownership in the territory ceded by that State.

ARTICLE 2. PROPERTY APPERTAINING TO SOVEREIGNTY

Property appertaining to sovereignty over the territory shall devolve, automatically and without compensation, to the successor State.

Property of the territory itself shall pass within the juridical order of the successor State.

ARTICLE 3. PUBLIC FUNDS, GOVERNMENT SECURITIES, DEBT-CLAIMS

[to be formulated later]

ARTICLE 4. PROPERTY OF PUBLIC ESTABLISHMENTS

[to be formulated later]

ARTICLE 5. PROPERTY OF LOCAL AUTHORITIES

[to be formulated later]

ARTICLE 6. PROPERTY OF FOUNDATIONS

[to be formulated later]

ARTICLE 7. ARCHIVES AND PUBLIC LIBRARIES

Archives and public documents of every kind relating directly or belonging to the territory affected by the change of sovereignty, and public libraries of that territory, shall,

wherever they may be situated, be transferred to the successor State.

The successor State shall not refuse to hand over copies of such items to the predecessor State or to any third State concerned, upon the request and at the expense of the latter State, save where they affect the security or sovereignty of the successor State.

ARTICLE 8. PROPERTY SITUATED OUTSIDE THE TERRITORY

Subject to the application of the rules relating to recognition, public property of the ceded territory itself which is situated outside that territory shall pass within the juridical order of the successor State.

The ownership of such property shall devolve to the successor State in cases of total absorption or decolonization.

Part Two**Text of draft articles with commentary****Article 1. Definition and determination of public property**

For the purposes of these articles, "public property" means all property, whether tangible or intangible, and rights and interests therein, belonging to the State, a territorial authority thereof or a public body.

Save in the event of serious conflict with the public policy of the successor State, the determination of what constitutes public property shall be made by reference to the municipal law which governed the territory affected by the change of sovereignty.

Variant to article 1

For the purposes of these articles, "public property" means all property, rights and interests which, on the date of the change of sovereignty and in accordance with the law of the predecessor State, were not under private ownership in the territory ceded by that State.

COMMENTARY

(1) The Special Rapporteur suggests two definitions of public property.

One of them simply refers to such property as being the opposite of private property. It may well be considered expedient to resort to a definition *a contrario*, since the notion of public property covers such a variety of situations and cases that it has become rather a complicated matter to arrive at a comprehensive definition.

However, the distinction between public and private property is not always absolutely rigid under some legal systems, and legal technicalities in certain countries produce situations where the right of ownership is not clearly attributed either to the public authorities or to individuals.

Despite this, a definition making public property anything that is not manifestly private property might have some merit because of the simplicity of the criterion adopted.

An alternative definition would refer to public property as being property which is of a "public" character *because it belongs* to the State, a territorial public authority or a public-law corporation or establishment.

(2) Whatever the definition, however, for the purposes of the following articles, it does not obviate two difficulties:

(a) In the first place, under some legal systems public property is divided into what are called the "public domain" and the "private domain" of the State. However, such terminology is not used everywhere. It is unknown, for instance, in Anglo-American law and in the law of socialist countries. It was highly regarded in the law of continental European countries and was exported to some parts of the third world, but it is tending somewhat to die out in recent times. Yet the traditional theory of State succession gives quite considerable prominence to this distinction, which is used to produce effects that vary according to the type of domain.

(b) What is encompassed by public property varies in magnitude, not only from one political system to another, but even among the members of one political family.

(3) In view of these difficulties, it did not seem appropriate, in this attempt at codification, to formulate rules based on the existence of distinctions, such as public domain and private domain, which are not applied everywhere and do not constitute the denominator common to all legal systems. The difficulty is a major one, however, since it is not easy to find such a common denominator.

(4) One is confronted with three problems:

(a) An internationalist approach to the notion of public property is hazardous, since there is in international law no autonomous criterion for determining what constitutes public property.

(b) Determination of this by treaty or by tribunals or other jurisdictions has its limits and does not resolve all problems.

(c) Whatever the circumstances, recourse to municipal law seems inevitable. The question is, however, which legislation—that of the predecessor State or that of the successor State—should be applied for this purpose.

These three points are discussed individually below.

I. LACK OF AN AUTONOMOUS CRITERION FOR DETERMINING WHAT CONSTITUTES PUBLIC PROPERTY

(5) Public property may be defined by its *public character*. Such property generally has three characteristics: (a) it is subject to a special legal régime governed by municipal public law; (b) it is publicly owned; (c) it is used for all purposes which come within the objectives of the State. Again, as in some international agreements, such property may simply be defined as property *belonging to a public-law corporation*.

With either of these approaches, however, recourse to municipal law is essential. This appears obvious in the

first case, if for no other reason than that the property is subject to a public-law régime. It is equally true in the second case, where the public-law corporation (e.g., a public utility undertaking or a public establishment) can be defined only by reference to municipal law. It can hardly be otherwise, since the characterization of property pertaining to a territory can only be a subject for municipal law.

(6) The fact that international law cannot be completely substituted for municipal law in this matter was emphasized by the Franco-Italian Conciliation Commission in an award relating to the property of the Order of Saint Maurice and Saint Lazarus, when it observed that "customary international law has not established any autonomous criterion for determining what constitutes State property".¹

International treaty law has accordingly taken precautions against this unavoidable deficiency and provided a special definition peculiar to each case dealt with.

II. DETERMINATION BY TREATY OF WHAT CONSTITUTES PUBLIC PROPERTY

(7) Treaties of cession quite often describe public property, in some cases in detail.

Article 10 of the Treaty of Utrecht (11 April 1713) states:

The [...] most Christian King shall restore to the Kingdom and Queen of *Great Britain*, to be possessed in full Right for ever, the Bay and Straits of Hudson, together with all Lands, Seas, Sea-Coasts, Rivers and Places situate in the said Bay and Straits, and which belong thereunto, no Tracts of Land or of Sea being excepted, which are at present possessed by the Subjects of *France* [...] as well as any Buildings there made [...] and likewise all Fortresses there erected [...] together with all the Cannon and Cannon-Ball which are therein, as also with a Quantity of Powder, if it be there found, in proportion to the Cannon-Ball, and with the other Provision of War usually belonging to Cannon [...].²

Article 11 of the Treaty of 30 April 1803, whereby France sold Louisiana to the United States of America, provided for the transfer of "all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private property".³

The Spanish-American Treaty of Peace signed in Paris on 10 December 1898 effected the transfer of (a) property in the *public domain*, as it existed and with its legal status, (b) property in the *domain of the Crown*, and (c) movable and other property accessory to property in the public domain. Accordingly, article VIII of the Treaty required

¹ Franco-Italian Conciliation Commission, verdict of 26 September 1964, "Dispute regarding property belonging to the Order of St. Maurice and St. Lazarus". President: Professor P. Guggenheim. (*Annuaire français de droit international*, XI, 1965 (Paris, C.N.R.S.), p. 323).

² F. Israel, ed., *Major Peace Treaties of Modern History, 1648-1967* (New York, Chelsea House publishers in association with McGraw-Hill Book Co., 1967), vol. I, pp. 207-208. French text in M. de Clercq, *Recueil des Traités de la France* (Paris, A. Durand et Pédone-Lauriel, édit., 1880), t. I (1713-1802), pp. 5-6.

³ G. F. de Martens, ed., *Recueil des principaux traités* (Göttingen, Librairie Dieterich, 1831), t. VII, p. 709.

Spain to relinquish to the United States of America, in the ceded territories,⁴ "all the buildings, wharves, barracks, forts, structures, public highways, and other immovable property which, in conformity with law, belong to the public domain, and as such belong to the Crown of Spain".⁵

Article 2 of the Treaty of 9 January 1895, whereby King Leopold ceded the "Independent State of the Congo" to the Belgium State, provided that:

The cession includes all the immovable and movable assets of the Independent State, in particular:

1. The ownership of all lands belonging to its public or private domain [. . .]
2. Shares and founder's shares. . . .
3. All buildings, constructions, installations, plantations and properties whatsoever [. . .] of the Independent State [of the Congo], movable property of every kind and livestock owned by the Independent State, its ships and boats, together with their equipment, and its military arms equipment;
4. The ivory, rubber and other African products which are at present the property of the Independent State and the stores and other merchandise belonging to it.⁶

Article II of the Treaty of Peace of Shimonoseki of 17 April 1895 between China and Japan,⁷ and article I of the Treaty of Retrocession of 22 September 1895 between the same States, provide for reciprocal cessions of territories "together with all fortifications, arsenals, and public property thereon".⁸

When the State of Cyprus became independent in 1960, the Treaties concerning its establishment indicated, in a wealth of detail and by means of annexes, schedules, plans and so forth, what public property devolved to the new Republic. For the purposes of these Treaties, a number of expressions such as "movable property" and "immovable property" were defined.⁹

⁴ The territories in question were Cuba, Puerto Rico, the islands in the West Indies, the island of Guam and the Philippine archipelago.

⁵ G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Librairie Dieterich, 1905), 2nd series, t. XXXII, p. 76. In the Philippines and Guam, however, Spain was to retain "stands of colours, uncaptured war-vessels, small-arms, guns of all calibres, with their carriages and accessories, powder, ammunition, live-stock, and materials and supplies of all kinds, belonging to the land and naval forces of Spain" [article V, last paragraph] (*ibid.*, p. 75).

⁶ G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Librairie Dieterich, 1896), 2nd series, t. XXI, p. 693.

⁷ *Ibid.*, p. 642.

⁸ See also the Treaty of Portsmouth of 5 September 1905 between Japan and Russia. G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Librairie Dieterich, 1906), 2nd series, t. XXXIII, pp. 3-12.

⁹ Treaties concerning the establishment of the Republic of Cyprus signed on 16 August 1960 at Nicosia, with annexes, schedules, plans, etc. United Nations, *Treaty Series*, vol. 382, pp. 3-252. See, in particular, annex E, section 1, paragraph 4, which provides as follows:

"4. In this Section:

"(a) 'property' means —

(i) property, whether movable or immovable, tangible or intangible; and

(ii) rights of every description;

"(b) a reference to specific property includes a reference to rights in, over, or related to that property; and

"(c) 'property of the Government of the Colony of Cyprus' means property vested in that Government or in Her Britannic

Agreements sometimes include annexes with lists of the public property transferred.¹⁰

Paragraph 1 of annex XIV to the 1947 Treaty of Peace with Italy,¹¹ after providing for the transfer of all Italian State and para-statal property to the successor State, refers in the second sub-paragraph to the criterion of ownership of the property in the following terms:

The following are considered as State or para-statal property for the purposes of this Annex: movable and immovable property of the Italian State, of local authorities and of public institutions and publicly owned companies and associations, as well as movable and immovable property formerly belonging to the Fascist Party or its auxiliary organizations.¹²

(8) Treaty definitions of public property are not always specific,¹³ however, and even when they are detailed they

Majesty for the purposes of that Government or in some other person or authority on behalf of that Government immediately before the date of entry into force of this Treaty. It is understood that the property of public utility corporations does not fall within this sub-paragraph." (*Ibid.*, p. 130).

See also the various exchanges of notes in the same volume.

¹⁰ See, for example, the agreement concluded after France's withdrawal from Lebanon, concerning monetary and financial relations between the two countries, signed at Paris on 24 January 1948 (United Nations, *Treaty Series*, vol. 173, pp. 117-119).

Cf. in particular the "Agreement between Italy and Ethiopia concerning the settlement of economic and financial matters issuing from the Treaty of Peace and economic collaboration", signed at Addis Ababa on 5 March 1956, which includes three annexes, A, B, and C, in the form of lists of objects of historical value that had been or were to be returned to Ethiopia (United Nations, *Treaty Series*, vol. 267, pp. 204-216).

¹¹ Treaty of Peace with Italy, signed at Paris on 10 February 1947 (United Nations, *Treaty Series*, vol. 49, annex XIV, p. 225).

¹² The United Nations has also provided a definition of public property in a number of cases; article I, paragraph 2, of General Assembly resolution 530 (VI) entitled "Economic and financial provisions relating to Eritrea", of 29 January 1952, provides as follows:

"The property referred to in paragraph 1 shall be taken as comprising:

"(a) The public property of the State (*demanio pubblico*);

"(b) The inalienable property of the State (*patrimonio indisponibile*);

"(c) The property of the Fascist Party and its organizations as listed in article 10 of the Italian Royal Decree No. 513 of 28 April 1938;

"(d) The alienable property of the State (*patrimonio disponibile*);

"(e) The property belonging to the autonomous agencies (*aziende autonome*) of the State which are: [. . .]

"(f) The rights of the Italian State in the form of shares and similar rights in the capital of institutions, companies and associations of a public character which have their *siège social* in Eritrea [. . .]"

See also articles I and II of General Assembly resolution 388 (V), of 15 December 1950, entitled "Economic and financial provisions relating to Libya".

¹³ In some cases of decolonization, what constitutes public property is determined not by a treaty definition but by a constitution granted by the former metropolitan country.

Cf., for example, the Constitution of the Federation of Malaya, 1957, which provided that all property and assets in the Federation or one of the colonies which were vested in Her Britannic Majesty should on the date of proclamation of independence vest in the Federation or one of its States. The term used, being general and without restrictions or specifications, authorizes, the transfer of all the property, of whatever kind, of the predecessor State. See United Nations Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No.: E/F.68.V.5), pp. 84-85.

give rise to difficulties of interpretation which inevitably bring one back to municipal law. Accordingly, treaties or other international instruments make provision for various bodies or procedures designed to articulate the treaty law with municipal law. For instance, General Assembly resolution 388 (V) of 15 December 1950, relating to Libya, set up a United Nations Tribunal in Libya; the peace treaties which terminated the First World War set up a Reparation Commission and a number of international arbitral bodies; and the Treaty of Peace with Italy of 10 February 1947 set up a Franco-Italian Conciliation Commission.

Thus, what constitutes public property is determined not only by means of treaties, but also by *international jurisdictions*.

For example, in his award in the case relating to German reparations under article 260 of the Treaty of Versailles, the arbitrator took the view¹⁴ that the term "public utility undertaking" is "not capable of precise definition" and that it was more prudent to "make a declaratory and non-exhaustive enumeration", as the Reparation Commission had done.¹⁵

However, there hardly seem to have been any cases of treaties or of special jurisdictions on which it was possible completely to avoid having recourse to municipal law. In the award relating to the property of the Order of St. Maurice and St. Lazarus,¹⁶ the Franco-Italian Conciliation Commission, seeking to clarify the notion of public property for the purposes of annex XIV to the Treaty of Peace with Italy, observed that "legal theory and practice with regard to State succession, where there is no explicit rule, *allow of the applicability of the rules of the ceding State* * which is transferring its property to the cessionary State [. . .]"

¹⁴ Arbitral award concerning the interpretation of article 260 of the Treaty of Versailles: arbitrator M. Beichmann (*Publications de la Commission des réparations*, annex 2145 a, Paris, 1924, and *United Nations, Reports of International Arbitral Awards*, vol. I (United Nations publication, Sales No.: 1948.V.2), pp. 467-468). One of the thirteen questions put to the arbitrator — the second one — concerned the definition of the term "public utility undertaking" as used in article 260 of the Treaty of Versailles.

¹⁵ Cf. the decisions of the Franco-Italian Conciliation Commission, especially on the "Dispute concerning the apportionment of the property of local authorities whose territory was divided by the frontier established under article 2 of the Treaty of Peace. Decisions Nos. 145 and 163 rendered on 20 January and 9 October 1953 respectively" (United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No.: 64.V.3), pp. 501-549).

See also the decisions of the United Nations Tribunal in Libya, especially the awards of 27 June 1955 concerning the public character of institutions, companies and associations.

Cf. also — although the problem did not arise in the same manner — the arbitral award of Professor Keller concerning the division of the Canton of Basel into two half-cantons pursuant to the decision of the Federal Diet of 1833 (P. Guggenheim: *Traité de droit international public* (Geneva, Librairie de l'Université Georg et Cie S. A., 1953), t. I, p. 467).

¹⁶ Award cited in foot-note 1 above. The property in dispute between Italy and France was the Little St. Bernard Hospice and the Chanousia botanical garden, also on the Little St. Bernard Pass. Before the Second World War they were in Italian territory, which became French territory after the Treaty of Peace with Italy.

This problem of the applicability of municipal law is the next point to be discussed.

III. RECOURSE TO MUNICIPAL LAW

(9) This raises a number of questions: (a) Is the municipal law of the successor State or the municipal law of the predecessor State to be applied? (b) Is recourse to be had to the law of the predecessor State or to the law in force in the territory affected by the change of sovereignty? (c) How much weight is to be given to cases in which the application of the law of the successor State nevertheless prevailed? (d) What effects are changes made at the last moment by the predecessor State in its legislation applicable to public property to be recognized as having?

A. Legislation of the precedent State or law of the successor State?

(10) The Special Rapporteur confesses that he is hard put to indicate which of the two bodies of legislation should be applied in order to determine what constitutes public property. It seems logical to opt for that of the predecessor State, but this involves the risk of formulating a rule that may be violated on many and frequent occasions because, as will be seen below, it does not sit well with prevailing practice. It would therefore mean setting up a rule that was illusory and would have no real force. On the other hand, to accept the applicability of the legislation of the successor State would in a way make any codification of the subject-matter futile, since it would mean leaving the successor State free to specify for itself what public property should devolve to it; for experience has frequently shown that it is the successor State, particularly in cases of annexation, which imposes its definition of public property. In such cases, the successor State even deviates from its own municipal public law when it considers that law too restrictive in determining what constitutes public property. Thus, the successor State has a completely free hand.

(11) In view of this, the Special Rapporteur tentatively suggests that the relevant municipal law should be that of the predecessor State. Nevertheless, he is well aware that this rule has been assailed in practice with a persistency which he will illustrate below with a number of specimen cases. This position is the only logical one, even if actual experience is to the contrary.

(12) The point is that, unless one wishes to have recourse to international law itself, which would then, by means of a norm imposable on all States, determine in a uniform manner what constituted public property—something that would be impracticable and would have consequences unacceptable to States—one must logically have recourse to the municipal law of the predecessor State; the successor is the transferee of property determined according to the "rules of the game" to which the property in question was formerly subject.

What is involved is the public property of the *predecessor State*. In order actually to identify that property,

it is both natural and inevitable to refer to the *lex rei sitae*.¹⁷ The property of the predecessor State capable of transfer is property which, according to the legislation of that State, was owned by the State. This is self-evident.

(13) However, as soon as the municipal law of the predecessor State has performed its function of determining what constitutes public property, it of course gives way to the juridical order of the successor State. Once the property has been characterized for the purposes of transfer, the latter State reassumes its sovereign power to change the legal status of the property devolving to it, if it so desires.¹⁸

B. Legislation of the predecessor State or legislation of the territory affected by the change of sovereignty?

(14) The wording suggested in the draft articles refers to the municipal law, not of the predecessor State, but of the territory relinquished by that State. It is necessary that this should be spelt out. It can happen in the case of various types of succession that the municipal public law in force in the territory is not necessarily identical with the law in force in the predecessor State. This is clearly to be seen in the case of decolonization; the legislation which formerly governed the newly independent territory is a body of colonial legislation peculiar to itself and not in force in the metropolitan country or, in other words, in what will become at the time of independence the predecessor State. The character of public property and what comprises it in the new State must therefore be appraised on the basis of the public law in force in the colony, and not by reference to the public law applied in the metropolitan country. Substantial differences do exist, and not always to the advantage of the successor State.

(15) The same problem can likewise occur in cases of partial annexation. For instance, Alsace-Lorraine, which underwent several changes of status, came eventually to have a body of legislation of its own which the various successor States respected to some extent. Moreover, it was that legislation of the territory annexed by Germany and later recovered by France, and not the public law of either of those two successor States, that was referred

to for the purpose of appraising the legal status of certain property.

Thus, it appears more correct to have recourse to the municipal law of the territory affected by the change of sovereignty.

(16) Clearly, however, there will have to be an exception in one case. In the event of the termination of a union of States which had, perhaps, existed in the form of a federation and had left each of the States with a distinctive body of legislation, the public property left to each successor will obviously be defined not only by reference to the municipal law of each federated State (as concerns the return of the property of each State) but also by application of the public law of the federation (as concerns the division of property common to the federation). Basically, however, both bodies of legislation may be regarded as legislation of the predecessor States.

C. Examples of the application of the law of the successor State

(17) The Special Rapporteur is aware that in some circumstances the characterization of public property according to the legislation of the territory may not have bound the State, which instead made its own appraisal. Such cases of diplomatic practice have on some occasions even given rise to decisions of international jurisdictions. The question is whether the weight of these precedents is such that they vitiate the rule suggested by the Special Rapporteur. An account of these cases follows below.

1. The case of the British Protestant mission hospitals in Madagascar¹⁹

(18) During the nineteenth century hospitals were erected in Madagascar by Protestant missions, under the sanction of a contract concluded with the Malagasy authorities. Later, towards the end of the century, following the establishment of the French protectorate (1886-1896), Queen Ranavaloa attempted to eject these missions. When the protectorate was replaced by annexation in 1896, the question of France's succession to the hospitals arose. Under the municipal law of the territory affected by the change—namely, the Malagasy public law of the day—the hospitals were not “public property”. However, the French Government took the view that it could not be bound by such a characterization because it was contrary to its municipal public policy, according to which all “religious edifices” were the property of the State.²⁰

¹⁷ An arbitral award had occasion to determine what constituted the public domain or, more precisely, to state whether certain “ponds and marshes” (in Spanish “ *pantanos* ”) in the Spanish zone of Morocco formed part of the Moroccan public domain in accordance with Moroccan law (arbitral award given by Max Huber at The Hague on 1 May 1925 in the case between Spain and the United Kingdom concerning “British property in Spanish Morocco”, Claim No. 11, United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No.: 1949.V.1), pp. 672-674).

¹⁸ Judgement No. 865 of 1926 of the Court of Appeal at Athens, *Themis*, vol. 38, p. 408, and *Journal de droit international* (Paris, 1929), t. 56, p. 494. Under the Treaty of Athens of 21 June 1832 between Turkey and the Protecting Powers of Greece, the mineral springs at Aedipos, in Euboea, became the property of Greece because, according to Ottoman law, they formed part of the public domain of the Turkish State. However, according to the law of the Pandects, which was the Greek law in force after the cession, these springs form part of the private domain. Consequently, it could no longer be argued that they were inalienable and imprescriptible, as they had been under Ottoman law.

¹⁹ See, *inter alia*, G. Gidel, *Des effets de l'annexion sur les concessions* (Paris, 1904) [thesis], p. 248; H. Mosler, *Wirtschaftskonzeptionen bei Änderungen der Staatshoheit* (Stuttgart, W. Kohlhammer Verlag, 1948), p. 183; D. P. O'Connell, *The Law of State Succession* (Cambridge, University Press, 1956), pp. 111-112; *id.*, *State Succession in Municipal Law and International Law* (Cambridge, University Press, 1967), vol. I: *Internal Relations*, p. 203; Ch. Rousseau [edition based on the notes and with the permission of] *Cours de droit international public: Les transformations territoriales des Etats et leurs conséquences juridiques* (Paris, Les cours de droit, 1964-1965), pp. 128-129.

²⁰ Did the term “religious edifices” mean places of worship, or did it mean edifices erected by ecclesiastics?

Two opinions were given, on 22 March 1897 and 2 February 1898, by the British Law Officers of the Crown, who had been consulted by their Government. They criticized the French position, which remained unchanged.²¹

2. "Habous" property in Algeria

(19) There was in Algeria, apart from public property and private property as in any other country, a special type of property—known as "habous property"—destined for religious endowments. An individual could place the usufruct of his property at the disposal of religious foundations for as long as he wished, and sometimes in perpetuity. This property, which was of considerable value, thus became inalienable and imprescriptible and the income from it, which was administered by the religious community, could be used only for religious works, such as the maintenance and management of religious edifices and educational establishments, or for activities connected with worship in Algeria and at the Holy Places of Islam, at Mecca and Medina. Also, in some cases, the income was used for some charitable work or for a purpose of public utility.

After the occupation of Algeria, there were promulgated a number of French laws and decrees²² whereby this

²¹ Generally speaking, the French Government in Madagascar did not consider itself bound (*vis-à-vis* either foreign States or the annexed kingdom of Madagascar) by the Malagasy public law which had formerly governed the domain of the State by means of customary or written rules (1881 Code concerning forests and public works, canals, dikes . . .). The courts subsequently had to separate the property of the State domain into various categories (see E. Coquet, *Le domaine public colonial* (Poitiers, Imprimerie "L'Union", 1905) [Law thesis], and Court of Tananarive, 17 April 1901, *Recueil général de jurisprudence, de doctrine et de législation coloniale. La Tribune des colonies et des protectorats* (1902), Part I, p. 283).

In another case—which, however, was rather more singular because it related to the return of Alsace-Lorraine to France in 1918—the Conseil d'Etat declined to apply the law of the predecessor State and ruled, in accordance exclusively with French law, that the buildings, tracks and appurtenances of a railway station were State property and that even the acquired rights of an individual were annulled (Conseil d'Etat, 5 December 1952, *Haydi* (Sirey 1954), Part 3, p. 21, annotation by Alain Plantey).

Note, however, that recourse was had to the local law of a territory when it enabled the whole of the land to be transferred: Court of appeal of French West Africa, judgement of 8 February 1907, *Daour Diop et al. v. French State* (Sirey 1908, Part 2, p. 209): "The State is now substituted in Cayor in all the rights of the Damels and it has, like them, full ownership of the territories over which its sovereignty extends [. . .]. The character of the land [. . .] as it was originally and reference must be made to the former custom in order to determine the extent of the rights of the natives* [. . .]. The land belongs to the sovereign, and the inhabitants have only a right of precarious and revocable tenure [. . .]. [Hence] the French Government is now sole owner of all the land of this kingdom."

²² See, for example, the order of the Commanding General of 8 September 1830 "defining the property of the domain" (R. Estoublon and A. Lefebure, *Code de l'Algérie annoté* [1830-1895] (Alger, A. Jourdan, édit., 1896), pp. 1-2), art. 1:

"All houses, stores, shops, gardens, lands, premises and establishments whatsoever formerly occupied by or administered on behalf of the Dey, the Beys and Turks who have quitted the territory of the Regency of Algiers, and any such property used by virtue of any right whatsoever for the purposes of Mecca and Medina, shall revert to the public domain and shall be administered for the benefit thereof.*"

religious property passed into the domain of the successor State.²³

3. Restoration of the Polish State

(20) The Polish State died four times but revived each time, despite conquest, occupation and partition.²⁴ After the third partition, in 1795, Poland lost its own political existence for 124 years—until 11 November 1918, when the restoration of the Polish State was proclaimed. The first action of President Pilsudski after leaving Magdeburg prison was to notify the Allies in 1918 of the *rebirth* of the Polish State.

The Polish courts have always taken the view that Poland did not succeed the various States which had dismembered it but was restored by an act of its own sovereignty. In this way, it "reassumed" possession of public property, without troubling to determine what constituted such property by referring to the legislation of the States which had preceded it in the exercise of sovereignty over its territory.²⁵ The political case of Poland is somewhat special, and this fact is reflected in these judicial decisions.

See also order of the Commanding General of 7 December 1830 "appropriating to the domain the income of all establishments used for the purposes of Mecca and Medina or of mosques or for other special purposes" (*ibid.*, p. 2); Order of the Minister of War of 23 March 1843 "providing that the income and expenditure of religious establishments shall be incorporated in the colonial budget of Algeria" (*ibid.*, pp. 48-49); Order of the Governor-General of Algeria of 30 October 1848 "incorporating in the domain of the State immovable property owned by mosques, marabouts, zaouias and all Moslem religious establishments generally" (*ibid.*, pp. 113-114); Act of 16 June 1851 "concerning the character of property in Algeria" (*ibid.*, pp. 135-142), art. 4, para. 2.

²³ The same situation also arose in Libya under annexation. The Italian successor State incorporated such *habous* property in its domain, and it was later returned to independent Libya; see United Nations General Assembly resolution 388 (V) of 15 December 1950, entitled "Economic and financial provisions relating to Libya".

Similarly, the various treaties ceding territories of the Ottoman Empire in Bulgaria, Greece and elsewhere during the nineteenth century did not always respect the character of such *habous* property as it existed under the municipal law of the ceding State (cf. M. Costes, *Des cessions de territoires envisagées dans leur principe et dans leurs effets relatifs au changement de souveraineté et de nationalité* (Paris, Rivière et Cie, édit., 1914) [thesis], pp. 77-91).

²⁴ First dismemberment of Poland by the Treaty of St. Petersburg (between Russia, Prussia and Austria) of 14-25 July 1772 and other Warsaw Treaties of 1773, 1775 and 1776. Second dismemberment by the Treaty of St. Petersburg of 12-23 January 1793. Third partition by the Treaty of St. Petersburg of 13-24 October 1795. (All these treaties will be found conveniently grouped together, in an English version, in F. Israel, *op. cit.*, pp. 351-424. The fourth and last demise of the Polish State was in 1939, during the Second World War. See K. Marek, *Identity and Continuity of States in Public International Law* (Geneva, Librairie E. Droz, 1954), chap. IX, pp. 417-546.

²⁵ See paras. 31 and 32 below. Poland considered even some private property to be public property and did not recognize the existence of the rights acquired during the periods of partition. Cattle of the German occupation troops on a private estate in the Warsaw region are Polish public property (Polish Supreme Court, judgement of 3 March 1923, *Graffowa and Wolanowski v. Polish Ministry of Agriculture and State Lands*, in J. Fischer and H. Lauterpacht, *Annual Digest of Public International Law Cases, 1923 to 1924* (London, Longmans, Green and Co., 1933),

4. *The case of the Central Rhodopé forests, between Greece and Bulgaria*²⁶

(21) A dispute had arisen between Greece and Bulgaria concerning the application of article 181 of the Treaty of Neuilly of 1919²⁷ to certain forests situated in a territory ceded by Turkey to Bulgaria in 1913. Article 181 stated that transfers of territory under the Treaty of Neuilly should not prejudice the *private rights* guaranteed by the earlier treaties of 1913-1914, concluded between Turkey and Bulgaria or between Turkey and Greece and Serbia. In Central Rhodope, a territory ceded to it by Turkey, the Bulgarian Government had terminated a forestry concession previously granted by the Turkish authorities to a company whose owners had become Greek nationals after the First World War. The case was submitted to arbitration.

(22) Bulgaria pleaded before the arbitrator that article 181, which dealt with private rights, was not applicable to the case, which, it argued, related to *public property*. In support of this plea, the Bulgarian Government referred to the legislation of the predecessor State as evidence of the public character of forests in the territory. It considered that no private person "could, under Ottoman law", have acquired full ownership of such forests, which would have had the character of public property of which private persons could enjoy only very limited usufruct.²⁸ The forests, which were part of the public domain of Turkey had therefore passed into the public domain of Bulgaria.²⁹

(23) Only one aspect of this case is described here, namely, the reference by the successor State to the municipal law of its predecessor for the purpose of determining what constituted public property. As to the actual merits of the case, it is really irrelevant to the present discussion that the arbitrator did not accept—and rightly so—the Bulgarian argument.³⁰

In this case, the international jurisdiction did not in fact rule out recourse to the municipal law of the predecessor State for the purpose of determining what consti-

tuted public property. The problem put to the arbitrator was different in substance. This was not so in the case of a decision of the United Nations Tribunal in Libya.³¹

5. *The case of enti pubblici in Libya*

(24) Under article I of United Nations General Assembly resolution 388 (V) of 15 December 1950, Libya was to 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 of Libya". The same resolution established a United Nations Tribunal, competent to decide disputes concerning its interpretation and application.

In its award of 27 June 1955, the Tribunal had to decide what property of companies, institutions or associations was of a *public character*. The agent of the Italian Government had contended that the Tribunal's decisions must relate to the character of an "*ente pubblico*" in the strict sense of the term and in conformity with Italian legislation—in other words, the law of the predecessor State.

(25) The Tribunal rejected this view, stating that it was "*not bound by Italian legislation and case law.*" The Tribunal will therefore consider this question by freely appraising the various factors in each individual case.³² It adopted this position, which rejects recourse to the municipal law of the predecessor State, because the wording used in the resolution indicated "that the drafters [...] purposely chose a term with a general meaning, broader than the term '*ente pubblico*' in Italian law".³³

6. *The case of the property of the Order of St. Maurice and St. Lazarus on the Little St. Bernard Pass*

(26) In its decision of 26 September 1964, mentioned above,³⁴ the Franco-Italian Conciliation Commission applied the municipal law of Italy, the ceding State, in denying the transfer to France of the Little St. Bernard Hospice and the Chanousia botanical garden. However, the third member of the Commission³⁵ delivered a

case No. 26, pp. 55-57. Huts for refugees built by a private individual during the period of Austrian sovereignty were deemed to be the property of the Polish State (Polish Supreme Court, Knoll v. Polish State Treasury, in A. D. McNair and H. Lauterpacht, *Annual Digest of Public International Law Cases, 1927 and 1928* (London, Longmans, Green and Co., 1931), foot-note on p. 75).

²⁶ Case of the Central Rhodope forests, Greece v. Bulgaria, arbitrator: Osten Undén (Sweden), award of 29 March 1933 on the merits (United Nations, *Reports of International Arbitral Awards*, vol. III (United Nations publication, Sales No.: 149.V.2), pp. 1405-1436).

²⁷ Quoted in *ibid.*, pp. 1416-1417. (See also E. Parkes, J. E. Field and R. C. Thomson, eds., *British and Foreign State Papers* (London, H. M. Stationery Office, 1922), vol. 112, p. 848).

²⁸ *Ibid.*, p. 1412.

²⁹ A letter from the Minister of Agriculture of Bulgaria, dated 20 September 1918, announced the final decision to treat the disputed forests as State forests. The Bulgarian Government considered that "under Turkish legislation, the forests had the character of public lands" (*ibid.*, p. 1423).

³⁰ The arbitrator ruled that the Treaty required respect for the concession which had been granted (and which could quite well have been granted even in the case of lands recognized as public property) under the law of the predecessor and ordered Bulgaria to pay Greece 475,000 gold leva in compensation.

³¹ Cf. M. Grawitz, "Chroniques—jurisprudence internationale: Tribunal des Nations Unies en Libye, sentence du 27 juin 1955", in *Annuaire français de droit international*, I, 1955 (Paris, C.N.R.S.), pp. 282-290. The author wrote in this connexion: "The public domain [...] passes from the annexed State to the annexing State. The difficulties start, however, with the question of definitions [...] (*ibid.*, p. 289). Definitions do not necessarily concur and, contrary to the opinion of the agent of the Italian Government, in this case it is usually the definition of the annexing State which prevails." One example was the annexation of Savoy by France. Under Sardinian law, waterways non-negotiable for craft or floats were part of the public domain. Under French law, they are not" (*ibid.*, p. 289, foot-note 4).

³² "Case of the institutions, companies and associations mentioned in article 5 of the agreement concluded on 28 June 1951 between the United Kingdom and Italian Governments concerning the disposal of certain Italian property in Libya", decision of 27 June 1955 (United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No.: 63.V.3), p. 390).

³³ *Ibid.*

³⁴ Cf. paras. 6 and 8 above.

³⁵ Mr. G. Perier de Féral, French *conseiller d'Etat*.

dissenting opinion and emphasized "the impossibility of taking as a starting-point Italian legislation [. . .] from which nothing conclusive can be deduced", in view of the confusion which in Italian law surrounds the very subtle concept of State property and, in particular, para-statal property. He therefore considered that "one is necessarily obliged, irrespective of the Italian legislation, to make a case-by-case analysis". In this sense, the solution which he advocated was no different from the one adopted by the United Nations Tribunal in Libya in the "*enti pubblici*" case described above.³⁶

7. *The Peter Pázmány University case*³⁷

(27) On 30 December 1923, the University of Budapest, citing various provisions of the Treaty of Trianon,³⁸ brought a suit against the Czechoslovak Government before the Hungaro-Czechoslovak Mixed Arbitral Tribunal, requesting the revocation of the retention imposed by that Government on property which, according to the said University, belonged to it but was situated in territory ceded by Hungary to Czechoslovakia. An appeal from the judgement rendered by the Tribunal was submitted to the Permanent Court of International Justice.³⁹

(28) The judgement of the Court states:

The Czechoslovak Government maintains that Article 250 [of the Treaty of Trianon] [. . .] only covers *private* * property, rights and interests. Property, rights and interests which, according to the local law—in the present case, the Hungarian law still in force in the territory in which is situated the property in dispute before the Tribunal—are not *private* * property, rights and interests, and do not, it is argued, come under Article 250 [. . .]

According to the observations of the Hungarian Agent in the proceedings before the Court, Hungarian law makes no distinction between public property and private property; in so far as it forms the subject of the private law right of ownership, all property is private property, even if owned by the State or by territorial corporations of public law. If this were really the case, the Czechoslovak Government's argument would automatically fall to the ground.

However, the Court has no need to reply upon this interpretation of Hungarian law.* It is content to observe that the distinction between public and private property, in the sense of the Czechoslovak Government's argument, is neither recognized nor applied by the Treaty of Trianon.⁴⁰

(29) It is a fact that the Court had to follow the Treaty on this point. Article 191 of the Treaty of Trianon determined that the property and possessions of the Hungarian Government should be transferred to the successor States

and specified that they included "the property of the former Kingdom of Hungary and the interests of that Kingdom in the joint property of the Austro-Hungarian Monarchy, as well as all the property of the Crown and the private property of members of the former Royal Family of Austria-Hungary."

While it is true that the property devolving to the successor States is thus specified by enumeration, the Court advanced an insufficient argument in rejecting the application of Hungarian law on the ground that it was superfluous. The enumeration of the property is based quite simply, according to the Court, "not on the public or private nature of the property, but solely on the category of persons to whom it belonged".⁴¹

Although the article refers to the criterion of persons enjoying these rights, in practice it is difficult, if not impossible, to ignore Hungarian law when determining, not whether a property is public property, since this is irrelevant under article 191 of the Treaty of Trianon, but whether it belongs to the Government, since article 191 adopts this personal criterion.

(30) In any case, there had to be some appraisal of Hungarian law and, despite its statement, the Court (like the Mixed Arbitral Tribunal) examined in great detail and at great length,⁴² in the light of the law of the ceding Hungarian State, the transfer of ownership of the property claimed by the University and known as the "University Fund". The Court reached the conclusion that ownership of the property had passed to the University after a deed of donation of 13 February 1775 by Queen Maria Theresa. It was no longer public property of the Austro-Hungarian monarchy, which would have come under article 191 of the Treaty of Trianon and would accordingly have devolved to the successor State as State property.

8. *Position of the successor State in the case of the Oberschlesische Stickstoffwerke and Bayerische Stickstoffwerke (factory at Chorzow)*⁴³

(31) The Polish Government, which under the Treaty of Versailles succeeded Germany in Upper Silesia, had promulgated on 14 July 1920 a law⁴⁴ which was subsequently introduced in Polish Upper Silesia by the law of 16 June 1922. The statement of the reasons for the 1920 law, submitted to the Warsaw Sejm, contained the following comment:

The definition of what has passed to the Polish Republic under the Treaty is not so specific as to remove all doubt about what may be classified as property and possessions [. . .]. The Prussian Government's interpretation of the term 'property and possessions' is incorrect [. . .]. The Reparation Commission will take the final decision on how the term 'property and possessions' should be understood [. . .]. However, this course would be unpractical in several respects [. . .]. Only a law passed by the Sejm can provide a radical solution.*

⁴¹ *Ibid.*, p. 237.

⁴² *Ibid.*, pp. 222-226, 233-236, 240-242 and *passim*.

⁴³ P.C.I.J., Series A, Nos. 6 and 7.

⁴⁴ Law of 14 July 1920 "concerning the transfer of the rights of the German Treasury and of members of reigning German Houses to the Treasury of the State of Poland", *Legislative Gazette of the Polish Republic*, 1920, No. 62.

³⁶ See paras. 24 and 25.

³⁷ Judgement of 15 December 1933, "Appeal from a judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University v. the State of Czechoslovakia)", in P.C.I.J., Series A/B, No. 61, pp. 208-262.

³⁸ E. Parkes, J. E. Field and R. C. Thomson, eds., *British and Foreign State Papers* (London, H. M. Stationery Office, 1923), vol. 113, p. 486. See also G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Librairie Th. Weicher, 1924), 3rd series, t. XII, p. 423.

³⁹ In accordance with article X of Agreement II signed in Paris on 28 April 1930 by certain signatory Powers of the Treaty of Trianon and by Poland. For the text of that article, see P.C.I.J., Series A/B, No. 61, p. 220.

⁴⁰ P.C.I.J., Series A/B, No. 61, pp. 236-237.

Here, therefore, the successor State made an attempt to discard the definition of public property given in an international treaty, to claim that the definition provided by the municipal law of the predecessor State was questionable because vitiated by error and to apply exclusively, not even its own municipal law as the cessionary State, but legislation improvised *ex post facto*. In the absence of an agreement concerning interpretation between Germany and Poland, the Polish Government recognized itself competent "for the interpretation (of the Treaty of Versailles) within the boundaries of the Polish State [. . .] in accordance with the principles of sovereignty".⁴⁵

(32) The substance of the case is well known. Poland's action was due to the anxiety it had felt as a result of various acts of alienation of public property effected by Germany immediately before the transfer of the territory, which it had suspected of diminishing the patrimony to be ceded.

Poland's position of principle is also well known. It did not consider itself the successor of Germany but maintained that it had been *restored* as a sovereign State after recovering its international capacity on its own. The Polish legislation reflects this belief that the State had revived spontaneously and had no umbilical connexion with the predecessor State.⁴⁶

(33) One could probably find other examples of cases in which the municipal law of the successor State has been applied. However, these illustrations should suffice. It will be noted that the decisions of international jurisdictions have not always endorsed this position of the successor State. However, they have seldom discussed the actual problem of the applicability of the municipal law of the successor State, having found other grounds peculiar to the circumstances of each case for rejecting the arguments of that State. Moreover, the reason why international jurisdictions sometimes had to rule out recourse to the legislation of the predecessor State was that they were obliged to apply various treaty provisions or resolutions of international organizations which they were bound to observe.

(34) In any case, it cannot be denied that international practice is somewhat inconsistent and requires clarification. For this reason, the Special Rapporteur has tentatively suggested in his draft article that in principle recourse should be had to the legislation of the predecessor State for the purpose of determining what constitutes public property but that, if necessary, an exception should be made to the rule when it might create a serious conflict with the public policy of the successor State. While this has the advantage of better reflecting disparate practice and introducing some order into it, there remains the fact that no objective criterion of "serious conflict" or, indeed, of "public policy" exists.

(35) There is another problem. It is whether the law of the predecessor State should be applied without limitation or whether no account should be taken of changes which

that State might be tempted to make in its law immediately before the transfer of the territory. This is the problem of what the Special Rapporteur called in his first report the "*période suspecte*".⁴⁷

D. *Extent to which the law of the predecessor State is applicable: fate of the legislation of the "période suspecte"*

(36) This section will consist simply of an account of the *Chorzow factory* case, which has already been mentioned, and the case of *German settlers in Upper Silesia*, followed by a very brief reference to a Danish case.

1. *The Chorzow factory case*

(37) In proceedings before the Permanent Court of International Justice, neither Germany nor Poland disputed the fact that landed property situated in Upper Silesia, at Chorzow, in and around a nitrate factory were, *under Germanic public law*, the public property of the German Reich. When Upper Silesia under German jurisdiction was transferred to Poland by the Treaty of Versailles, the German Reich had just concluded with various German private companies, on 24 December 1919, contracts transferring to them the ownership of some of the factory's property.

Both the parties had taken German law—in other words, the law of the predecessor State—as the basis for determining whether the factory at Chorzow possessed the status of public property. However, the problem was whether, between the date of the armistice on 11 November 1918 and the date on which the actual cession of the territory occurred, the ceding State could make changes in its legislation which would in fact have the result of reducing the amount of public property to be ceded.⁴⁸ Indeed, in this particular case, it had apparently not been necessary to make any change in municipal law. All that the ceding State had to do was to perform dispositive acts relating to its patrimony. In the case under discussion, this raises the question of the conformity of an act of German private law with international law.

(38) The Polish Government had considered that the transaction effected in 1919 was an act *in fraudem* with regard to Poland. The Counter-Case of the Polish Government stated:

⁴⁷ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 104, document A/CN.4/204, paras. 68-69. Some past cases will be mentioned later. Among the cases involving decolonization, special attention has been given to the case of the former Belgian Congo, but it will not be discussed under this heading because it will be dealt with in the commentary on draft article 8.

⁴⁸ The Armistice Convention was dated 11 November 1918 and the Protocol of Spa was dated 1 December 1918. The Treaty of Versailles was signed on 28 June 1919, was ratified by Germany on 13 July 1919 and promulgated and published in the *Reichsgesetzblatt* (the German official gazette) on 16 July 1919, and entered into force on 10 January 1920. The contested acts took place on 24 December 1919—in other words, after the signature and ratification of the Treaty and a fortnight before its entry into force.

⁴⁵ Polish Government Counter-Case, *P.C.I.J.*, Series C, No. 11, vol. II, p. 670.

⁴⁶ See para. 20 above.

If the ceding State, after signing the Treaty of cession and particularly after the ratification of the said Treaty, had effected a sale of the most valuable property under State ownership situated in the territory included in the cession and if it had placed the value of this property outside this territory, its action was contrary to international law, which is essentially based on the good faith of the contracting Parties.⁴⁹

The Armistice Convention⁵⁰—notably article XIX, second paragraph—and the Protocol of Spa of 1 December 1918⁵¹ prohibited the German Government from alienating, conceding or mortgaging the appurtenances of its public domain, including the railways, mines, canals, woods and colonial, industrial or commercial enterprises belonging to it or in which it possessed interests.

(39) The case of the German Government laid stress on the normal exercise of the attributes of sovereignty over a territory so long as it had not been transferred, and added:

It is only manifestly abusive transactions which are inadmissible—in other words, transactions for which no serious reasons are given by the ceding State and which are designed solely to harm the annexing State, such as bulk sales of State properties effected for this purpose.⁵²

This viewpoint was expounded in the pleading for Germany by Professor Kaufmann who stated, *inter alia*:

Any transaction which is manifestly an abuse of the dismembered State is inadmissible but [...] on the other hand, transactions are certainly legitimate and unquestionably valid if the ceding State would reasonably have performed them even though no change of sovereignty was envisaged or if it performed them as a *bonus paterfamilias*, precisely with an eye to the eventual change of sovereignty, either in order to create clear and plain situations or to prevent the annexing State from damaging its interests* or those of its nationals.⁵³

(40) The German and Polish viewpoints would certainly be very similar, with their condemnation of fraud, had it not been for the reservation contained in the last phrase quoted above. It is natural for the State not to harm its own interests. However, the criterion of protection of interests, if it is not applied in good faith, may serve to justify any measures, since the transfer of public property is *ex hypothesi* an obligation which cannot fail to damage the interests of the ceding State.

(41) In any case, the Court rejected Poland's argument and recognized Germany's full sovereignty over the territory to be ceded, so long as the cession had not taken place. Up to the date of the cession, it was Germany that had full exercise of all powers; the Court decided that the Treaty of Versailles

contains no prohibition of alienation and does not give the State to whom territory is ceded any right to consider as null and void alienations effected by the ceding State before the transfer of sovereignty⁵⁴ [...]. Germany undoubtedly retained

until the actual transfer of sovereignty the right to dispose of her property, and *only a misuse of this right** could endow an act of alienation with the character of a breach of the Treaty; such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement⁵⁵ [...]. In the Court's opinion, such misuse has not taken place in the present case.⁵⁶

(42) It therefore seems clear that the Court's decision was due to the fact that this eminent international jurisdiction saw in the German action no intent to defraud. Germany's international commitments did not prohibit it from discontinuing an economic activity (the operation of the factory at Chorzow) which it considered to be detrimental to its finances. Consequently, *a contrario*, the Court does not seem to rule out condemnation of a predecessor State which acts with intent to defraud.

2. The case of German settlers in Upper Silesia⁵⁷

(43) The same problem arose in the German settlers case, which was summarized as follows in the resolution of the Council of the League of Nations of 3 February 1923 for the information of the Permanent Court of International Justice:

A number of colonists who were formerly German nationals, and who are now domiciled in Polish territory previously belonging to Germany, have acquired Polish nationality. . . They are occupying their holdings under contracts (*Rentengutsverträge*) which although concluded with the German Colonization Commission prior to the Armistice of November 11th, 1918, did not receive an "*Auflassung*" before that date. The Polish Government regards itself as the legitimate owner of these holdings under article 256 of the Treaty of Versailles, and considers itself entitled to cancel the above contracts [...]. The Polish authorities will not recognize leases conceded before November 11th, 1918, by the German Government to German nationals who have now become Polish subjects. These are leases over German State properties which have subsequently been transferred to the Polish State in virtue of the Treaty of Versailles, in particular of Article 256.⁵⁸

(44) The Polish Government had passed a law on 14 July 1920 known as the "annulment law". The case differs, however, from that of the Chorzow factory, because it concerns German measures taken not during the "*période suspecte*" but well before the Armistice of 11 November 1918.

Article 1 of the law stated:

In all cases in which the Crown, the German Reich, the German States, the institutions of the Reich or of the German States, the ex-Emperor of Germany or other members of the German

international law which attaches to statehood. There is not a "transfer" of sovereignty but a *substitution* of sovereignties by the extinction of one and the creation of another (see *Yearbook of the International Law Commission, 1969*, vol. II, p. 77, document A/CN.4/216/Rev.1, paras. 29 *et seq.*).

⁴⁹ *P.C.I.J.*, Series A, No. 7, p. 30. The French version of the phrase underlined, which is the authoritative text, reads as follows: "*ce n'est qu'un abus de ce droit ou un manquement au principe de la bonne foi*".

⁵⁰ *Ibid.*, p. 37.

⁵¹ Advisory Opinion of 10 September 1923 on certain questions relating to settlers of German origin in the territory ceded by Germany to Poland, 1923, *P.C.I.J.*, Series B, No. 6, pp. 6-43.

⁵² *Ibid.*, pp. 6-7.

⁴⁹ *P.C.I.J.*, Series C, No. 11, vol. II, p. 632.

⁵⁰ G. F. de Martens, ed., *Nouveau recueil général de traités* (Leipzig, Librairie Th. Weicher, 1923), 3rd series, t. XI, p. 172.

⁵¹ *Ibid.*, p. 185.

⁵² *P.C.I.J.*, Series C, No. 11, vol. I, p. 375.

⁵³ *Ibid.*, pp. 136-137.

⁵⁴ In his second report, on economic and financial acquired rights and State succession, the Special Rapporteur felt it necessary to express reservations about the appropriateness of the expression "transfer" of sovereignty. Sovereignty is an attribute of public

reigning houses, are, or were, after November 11th, 1918, inscribed in the land registers of the former Prussian provinces as owners or possessors of real rights, the Polish Courts shall, in accordance with the terms of the Treaty of Versailles of June 28th, 1919, inscribe *ex officio* in such registers, the Treasury of the Polish State, in place of the persons or persons in law above mentioned.⁵⁹

(45) The Court considered that the position adopted by the Polish Government was not in conformity with its international obligations.

3. *The Schwerdtfeger case*

(46) In a case tried by the Danish Supreme Court, it was decided that the successor State was justified in not recognizing the validity of the renewal by the predecessor State of a lease to a farm which was State land, even if the lease was an old one. In the opinion of the Court, lease renewals granted with an eye to or in anticipation of an impending transfer of territory secure additional rights for the leaseholder at the expense of the successor State and are calculated to weaken the significance of the forthcoming cession.⁶⁰

* *

(47) It will be noted that in draft article 1, at least in its initial version, the Special Rapporteur has left the matter open for discussion and has not suggested any solution. The question is therefore provisionally left pending.

(48) To conclude this commentary on draft article 1, some brief explanations should be given of the terminology used to designate the territory which passes under a new sovereignty.

IV. NOTION OF THE TERRITORY AFFECTED BY THE CHANGE OF SOVEREIGNTY

(49) It will be noted that an attempt has been made to choose as broad an expression as possible in order to cover all types of succession: total absorption, decolonization, partial annexation, merger and so forth.

Care has been taken, in this and the following draft articles, to avoid using the shorter, more convenient but somewhat inaccurate expression "territory ceded". In an award concerning the interpretation of article 260 of the Treaty of Versailles,⁶¹ the arbitrator, Mr. Beichmann, defined the cession of a territory as the "*renunciation* * by one State in favour of another State of the *rights and titles* * which the first State might have to the territory in question". However, a dispute arose regarding this expression, in connexion with the interpretation of the Treaty of Peace with Italy, in which it appeared. One of the Italian Government's contentions before the Franco-

Italian Conciliation Commission was that Ethiopia, for example, had been neither "ceded" nor "transferred".⁶²

(50) In order to forestall any discussion and to cover all types of succession, the neutral wording "territory affected by the change of sovereignty" has been used.

Article 2. *Property appertaining to sovereignty*

Property appertaining to sovereignty over the territory shall devolve, automatically and without compensation, to the successor State.

Property of the territory itself shall pass within the juridical order of the successor State.

COMMENTARY

(1) Draft article 2 raises four questions: the first concerns a definition of "property appertaining to sovereignty over the territory"; the second relates to practice with regard to the transfer of such property; the third is the question of transfer "automatically and without compensation"; the fourth has to do with property of the territory itself. These four points are discussed individually below.

I. PROPERTY APPERTAINING TO SOVEREIGNTY OVER THE TERRITORY

(2) The Special Rapporteur has not found any satisfactory expression to describe property of a public character, which, being linked to the *imperium* of the predecessor State over the territory, can obviously not remain the property of that State after the change of sovereignty, or, in other words, after the termination of precisely that *imperium*.

Much, if not all, of this property is referred to in some bodies of legislation as property in the "public domain". This expression is unknown in many legal systems, however, and its lack of universality makes it unsuitable for use in the draft article.

(3) The distinction between public domain and private domain is unsatisfactory, not only because it does not exist in all legal systems, but also because it does not cover public property in a uniform and identical manner from country to country. Consequently, the mind may well balk at deciding, for instance, that all property in the public domain devolves automatically and without compensation to the successor, even though the kind of property included in that domain and what constitutes it can vary to a very great degree. Even more disconcerting would be an approach whereby the predecessor State, in the view of some writers, would retain its private domain and, in the view of others, would cede it to its successor only against compensation. There does not exist a uniform criterion for dividing property into public domain and private domain. This would mean setting up rules which

⁵⁹ *Ibid.*, p. 14.

⁶⁰ Supreme Court of Denmark, Judgement of 6 December 1923, *Schwerdtfeger v. Danish Government*, in J. Fischer and H. Lauterpacht, *Annual Digest of Public International Law Cases, 1923-1924* (London, Longmans, Green and Co., 1933), case No. 40, p. 82.

⁶¹ United Nations, *Reports of International Arbitral Awards*, vol. I, (United Nations publication, Sales No.: 1948.V.2), p. 443.

⁶² Franco-Italian Conciliation Commission. Dispute regarding the interpretation and application of the provisions of article 78, paragraph 7, of the Treaty of Peace to Ethiopian territory. Decisions Nos. 176 and 201 rendered on 1 July and 16 March 1956 respectively. United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No.: 64.V.3), *passim* and in particular p. 633 and pp. 646-653.

would not be identically applied in practice and whose scope would vary from country to country.

(4) The Special Rapporteur's suggestion that the notion of public domain and private domain should be replaced by the notion of "property appertaining to sovereignty" is not, perhaps, much of an improvement and may be open to the same criticisms. This suggestion does not spare us the still difficult task of seeking a definition of such property. Yet, however difficult such a definition may be, it is nevertheless easier to express internationally than a definition which would try to encompass notions that vary and are not accepted by everyone, such as public domain and private domain.

It may be said that property appertaining to sovereignty over the territory represents the patrimonial aspects of the expression of the domestic sovereignty of the State. It is true that this expression may differ from one political system to another, but it has the characteristic of covering everything that the State, in accordance with its own guiding philosophy, regards as a "strategic" activity which cannot be entrusted to a private person.

In order to carry on this activity, the State becomes the owner of movable and immovable property. It is this property, which the State uses to manifest and exercise its sovereignty or to perform the general obligations involved in the exercise of its sovereignty (e.g., national defence, security, the promotion of public health and education, and national development), that may be regarded as property appertaining to sovereignty over the territory.

(5) How is one to determine more precisely what constitutes this property?

It will include first of all "public" property—in other words, property which is defined according to three criteria: the public character which it possesses by reason of its being governed by public law; the fact that it is not owned by a private person and therefore belongs to the State; and the fact that it is for the use, or at the service, of all the population.

In addition, it includes property which, in accordance with the legislation of the predecessor State, helps to fulfil the general interest and through which the public power expresses its sovereignty over the territory. It can, and assuredly will, happen that what constitutes such property varies from State to State and from one political system to another. That is inevitable. One State may feel that it is not expressing its sovereignty and is not fully possessed of all its attributes of public power unless it manages directly and exclusively a given sector of activity, or even all sectors of activity. Another State, by contrast, confines its activity to very limited sectors. It may regard certain roads, certain airfields, even some arms factories, as being capable of private ownership. It is the very limited range of property to which it confines its activities that will have to be regarded as property appertaining to its sovereignty. It is, in short, all the property which follows the juridical destiny of the territory and which accordingly is transferable along with it, unlike property that is not closely linked to the territory in question.

"The right and the duty to ensure the functioning of public services", wrote the French Minister of War in 1876,⁶³ "to order,

for example, major roadworks, waterworks or fortifications, and ownership of or eminent domain over such works which are an appurtenance of the public domain—this entire aggregate of duties and rights is, in the final analysis, *an attribute of sovereignty*.* *This inseparable attribute of sovereignty moves with the sovereignty itself [. . .]*".

It is because political régimes have a direct influence on the establishment of this domain that reference should be made to the public law of the predecessor State in order to determine what constitutes such property in each individual case.

(6) The advantage of the suggested formula is, however, that it does not depend entirely on municipal law for its definition. It must also take into account international law, and in particular the resolutions of the United Nations on the right of peoples to dispose of their natural resources. This right is increasingly being seen as an integral part of a country's sovereignty, or even as the prime expression of that sovereignty. "Property appertaining to sovereignty over the territory affected by the change" should include these natural resources.

II. PRACTICE WITH REGARD TO THE TRANSFER OF PUBLIC PROPERTY OF THIS KIND

(7) It is beyond question that such property devolves to the successor State. *Writers* are unanimous on this point. The rule goes back to the days when the patrimonial conception of the State prevailed in legal systems where the patrimonial rights of the State were regarded as appurtenances of the territory.

(8) The principle is extensively sanctioned in *practice*.

The instruments which will be cited do not, of course, refer *expressis verbis* to "property appertaining to sovereignty over the territory". They may speak of the "public domain" in legal systems where that institution is known, or of both the "public domain" and the "private domain" which under the terms of the instruments concerned are together transferred to the successor State—a fact which constitutes *a fortiori* a proof of the existence of the customary rule in question. In other cases, the wording of the instruments relating to State succession in countries where the distinction between public domain and private domain is not made is such as to leave no doubt that the reference is at least to "property appertaining to sovereignty".

(9) Actually, very many international instruments simply record the express relinquishment by the predecessor State, without any *quid pro quo*, of all *public property* without distinction situated in the territory.⁶⁴

⁶³ In a memorial in support of an appeal to the Conseil d'Etat (Conseil d'Etat, 28 April 1876, Minister of War v. Hallet, *Recueil Lebon*, 1876, pp. 397-401).

⁶⁴ Cf. the case of the Federation of Malaya in 1957 cited in foot-note 13 above. See also the Malaysia Act., 1963: "... any land which [. . .] is vested in any of the Borneo States or in the State of Singapore, and was [. . .] occupied or used by the Government of the United Kingdom [. . .] shall [. . .] be occupied, used, controlled and managed by the Federal Government". (United Nations Legislative Series, *Materials on Succession of States* (United Nations publication, Sales No.: E/F.68.V.5), p. 92.) A similar wording is used in the Constitution of the Independent State of Western Samoa, 1962: "All property which [. . .] is vested in Her Majesty the Queen [. . .] or in the Crown [. . .] shall [. . .] vest in Western Samoa" (*ibid.*, p. 117).

Other instruments refer to the cession "*in full ownership*" of the territory, thus giving sustenance to the patrimonial conception of the State.⁶⁵

Lastly, there is a clause which is encountered quite as frequently, if not more so, particularly in many peace treaties, providing that the ceding State "renounces all *rights and title* * whatsoever over or respecting the territory".⁶⁶

(10) The devolution rule applies in all cases of succession. It is impossible to cite all the actual situations which have occurred. A few specimens will give some idea of the continuity of the rule, or of the custom that has been followed.

Two types of cases will be omitted from these specimens as being not sufficiently illustrative—or, perhaps one should say, as being too readily illustrative in themselves—because the fact they reflect the application of this rule is due to other causes of a peculiar and specific kind.

(11) The first type comprises *all cessions of territories against payment*. The purchase of provinces, territories and the like was an accepted practice in centuries past

See also the Treaty of cession of the territory of the Free Town of Chandernagore signed at Paris by India and France on 2 February 1951, article V: "The Government of the French Republic transfers [. . .] *all the properties owned by the State and the public bodies** lying within the territory of the Free Town" (United Nations, *Treaty Series*, vol. 203, p. 158).

By the return to Morocco of the town of Tangier, the newly independent State recovered all its property and succeeded to all the property of the International Administration of Tangier: "The Moroccan State, which recovers possession of the public and private domain entrusted to the International Administration [. . .] receives the latter's property [. . .]" (Final Declaration of the International Conference in Tangier, signed at Tangier on 29 October 1956, and annexed Protocol. United Nations, *Treaty Series*, vol. 263, p. 171, article 2 of the Protocol, etc.

⁶⁵ See, for example, the Franco-Annamese Treaty of 6 June 1884 (G. F. de Martens, ed., *Nouveau recueil général de traités* [Göttingen, Librairie Dieterich, 1887], 2nd series, t. XII, p. 634). Pursuant to that Treaty, the King of Annam issued an ordinance of 3 October 1888 declaring that he ceded "in full ownership" the territories of the towns of Hanoi, Haiphong and Tourane [Da Nang] to the French Government and renounced all his rights for ever. The Court of Appeal of Indochina (judgement of the Third Division of 24 June 1910, *Trân-Gia-Muu v. Nguyen-Quang-Mân*, *Journal du droit international privé et de la jurisprudence comparée* (Paris, Marchal et Godde, 1912), t. 39, pp. 881-882) took the view that "the word *ownership* is not to be interpreted in the sense of ordinary ownership under the ordinary law [. . .], it must be taken as being synonymous with *royal ownership*. [This] right [. . .] includes, under Annamese law, not only certain private rights, such as the right of personal ownership over property in the public domain [. . .] but also political sovereignty."

See also, by way of example, treaties of the seventeenth and eighteenth centuries sanctioning the patrimonial conception of the State, such as the Treaty of Utrecht (11 April 1713) in which France yielded a number of possessions, including Hudson Bay, Newfoundland, the island of St. Christopher, etc. In the case of St. Christopher, France delivered "Dominion, Propriety and Possession [. . .] And all Right whatsoever, by Treaty, or by any other way obtained [. . .] and that in such ample manner and form" that it included a ban on fishing within thirty leagues (article XII of the Treaty, English text in F. Israel, *op. cit.*, p. 209; French text in M. de Clercq, *op. cit.*, pp. 6-7).

⁶⁶ The expression appears in the Treaty of Lausanne of 24 July 1923, notably in articles 15, 16 and 17 (League of Nations, *Treaty Series*, vol. XXVIII, p. 11). It occurs as many as six times in a single article in the Treaty of Peace with Japan signed at San Francisco on 8 September 1951 (article 2, which refers to the renunciation of "all right, title and claim") (United Nations, *Treaty Series*, vol. 136, p. 45).

but has been tending towards complete extinction since the First World War, as the right of peoples to self-determination becomes more and more firmly recognized. It follows from this right that the practice of transferring the territory of a people against payment must be condemned. Clearly, these old cases of transfer are not sufficiently demonstrative. On purchasing a territory, a State purchased everything in it, or everything it wanted, or everything the other party wanted to sell there, and the transfer (or non-transfer) of public property linked to sovereignty is not an indication of the existence of a rule which in this case resulted simply from capacity to pay.⁶⁷

⁶⁷ See, for example, the Convention between the United States and Denmark providing for the cession of the Danish West Indies, signed at New York on 4 August 1916 (English text in *Supplement to the American Journal of International Law* (New York, American Society of International Law, Oxford University Press, 1917), vol. 11, pp. 53-54; French text in *Revue générale de droit international public* (Paris, A. Pédone, édit., 1917), t. XXIV, pp. 454-458), art. 1:

"His Majesty the King of Denmark by this convention cedes to the United States *all territory, dominion and sovereignty, possessed, asserted or claimed** by Denmark in the West Indies including the Islands of Saint Thomas, Saint John and Saint Croix together with the adjacent islands and rocks.

"This cession includes the right of property in *all public, government or crown lands, public buildings, wharves, ports, harbors, fortifications, barracks, public funds, rights, franchises, and privileges, and all other public property of every kind or description** now belonging to Denmark together with all appurtenances thereto."

See also the Convention of Gastein of 14 August 1865 whereby Austria sold Lauenburg to Prussia for the sum of 2.5 million Danish rix-dollars (English text in *British and Foreign State Papers, 1865-1866* (London, William Ridgeway, 1870), vol. 56, p. 1026; French text in *Archives diplomatiques, 1865* (Paris, Aymot, édit., 1865), t. IV, p. 6); the Treaty of 30 June 1899 between Spain and Germany whereby Germany acquired the Caroline, Pellew and Mariana Islands in return for a payment of 25 million pesetas (English text in A. H. Oakes and W. Maycock, *British and Foreign State Papers* (London, H. M. Stationery Office, 1903), vol. 101, p. 69; French text in *Revue générale de droit international public* (Paris, A. Pédone, édit., 1899), t. VI, p. 303); the Treaty of Washington of 30 March 1867 whereby Russia sold its North American possessions to the United States of America for \$1.2 million (English text in W. M. Malloy, comp., *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776-1909* (Washington D.C., Government Printing Office, 1910), vol. II, p. 1521); the Convention whereby France ceded Louisiana to the United States of America for \$15 million (English and French texts in G. F. de Martens, *Recueil des principaux traités* (Göttingen, Librairie Dieterich, 1831), t. VII, pp. 706 and 707); the Convention of 1850 for the cession by Denmark to Great Britain of the Coast of Guinea for 10,000 pounds; the Franco-Swedish Treaty of 10 August 1877 for the retrocession to France of the island of Saint-Barthélemy and the Protocol of Paris of 31 October 1877 (French text of both instruments in G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Librairie Dieterich, 1879), 2nd series, t. IV, pp. 366-368) [article 5 of the Protocol: "In exchange for the *State property** owned by the Crown of Sweden in the island of Saint-Barthélemy, the French Government shall pay to the Swedish Government the sum of 80,000 francs, representing the valuation of the said property as determined by mutual agreement"]. Cession as a result of exchanges of territory may be assimilated to cession against payment; see the Agreement of 1 July 1890 whereby Great Britain transferred the island of Heligoland to Germany in exchange for territory in East Africa (*ibid.*, [1891], 2nd series, t. XVI, p. 895); the Convention of 4 November 1911 whereby Germany and France adjusted their African possessions (*ibid.*, [Leipzig, Librairie Dieterich, 1911], 3rd series, t. V, p. 64); etc.

(12) The second type consists of *forced cessions of territories*, which are normally prohibited by international law, so that succession to public property in such cases cannot be regulated by international law.⁶⁸

(13) There are numerous examples of devolution of property appertaining to sovereignty—so many, in fact, that it is difficult to make a choice. A few specimens will be given to illustrate each type of succession.⁶⁹

A. Examples of secession or decolonization

(14) Libya, for example, received “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”.⁷⁰ In particular, the following

⁶⁸ In former times, such forced cessions were frequent and widespread. Of the many examples which history affords, one may be cited here as documentary evidence of the way in which the notion of succession to property that was linked to sovereignty could be interpreted in those days. Article XLI of the Treaty of the Pyrenees, which gained France the places of Arras, Béthune, Lens, Bapaume, and so forth, specified that the places in question “... shall remain [...] unto the said Lord the most Christian King, and to his Successors and Assigns [...] with the same rights of Sovereignty, Propriety, Regality, Patronage, Wardianship, Jurisdiction, Nomination, Prerogatives and Preeminences upon the Bishopricks, Cathedral Churches, and other Abbys, Priories, Dignities, Parsonages, or any other Benefices whatsoever, being within the limits of the said Countrys [...] formerly belonging to the the said Lord the Catholick King [...] And for that effect, the said Lord the Catholick King [...] doth renounce [these rights] [...] together with all the Men, Vassals, Subjects, Boroughs, Villages, Hamlets, Forests [...] the said Lord the Catholick King [...] doth consent to be [...] united and incorporated to the Crown of France; all Laws, Customs, Statutes and Constitutions made to the contrary [...] notwithstanding.”

(English text in F. Israel, ed., *Major Peace Treaties of Modern History, 1648-1967* (New York, Chelsea House publishers in association with Mc Graw-Hill Book Co., 1967), vol. I, pp. 69-70; French text in J. Du Mont, *Corps universel diplomatique du droit des gens, contenant un recueil des traités d'alliance, de paix, de trêve...* (Amsterdam, P. Brunel, etc., édité., 1728), t. VI, part II, p. 269).

There was a very special conception of patrimony and domain in many European countries at that time. Cession effected transfer of the sovereign power in its entirety, involving not only property but also rights over property and over persons. Treaties of the sixteenth and seventeenth centuries contained clauses whereby the dispossessed sovereign absolved the inhabitants of the ceded territory from their oath of fidelity and the successor received their “faith, homage, service and oath of fidelity”.

See also, for example, article 47 of the 1667 Treaty of Capitulation of Lille, Douai and Orchies:

“And shall retain the said towns and the commoners aforesaid without distinction of station, and likewise the churches, chapels, public loan-offices, and all foundations, cloisters, hospitals, communities, poor-houses whether general or special, lazarets, confraternities, convents, including such as are foreign, all their movable and immovable property, rights, titles, privileges, plate, or coin, bells, pewter, lead, all other metals whether worked or unworked, rings, jewels, ornaments, sacred vessels, relics, libraries and in general all their property, offices and benefices of any kind or condition whatsoever, without any obligation of payment, and shall also recover property that has been confiscated or carried away, if such there be or if it is situated in the kingdom, whether in conquered territory or elsewhere.”

⁶⁹ Many examples are given in I. Paenson: *Les conséquences financières de la succession des Etats (1932-1953)* [Paris, Editions Domat-Montchrestien, 1954], *passim*.

⁷⁰ United Nations General Assembly resolution 388 (V) of 15 December 1950, entitled “Economic and financial provisions relating to Libya”, article I.

property was transferred immediately: “the public property of the State (*demanio pubblico*) and the inalienable property of the State (*patrimonio indisponibile*) in Libya”, as well as the public archives and “the property in Libya of the Fascist Party and its organizations”.⁷¹

Burma was to succeed to all property in the public and private domain of the colonial Government,⁷² including fixed military assets of the United Kingdom in Burma.⁷³ In addition, the United Kingdom Government undertook to supply initial equipment for the Burmese army.

The “agreements on transitional measures” of 2 November 1949 between Indonesia and the Netherlands,⁷⁴ adopted at the end of the Hague Round-Table Conference (August-November 1949), provided for the devolution of all property in the Netherlands public and private domain in Indonesia. In addition, a subsequent military agreement⁷⁵ transferred to Indonesia some warships, military maintenance equipment of the Netherlands fleet in Indonesia and all installations and equipment used by the colonial troops.

When the Colony of Cyprus attained independence, all property of the Government of the island became the property of the Republic of Cyprus.⁷⁶

B. Examples of partial cession

(15) The peace treaties of 1919 opted for the devolution to the successor States of all public property situated in the ceded German, Austro-Hungarian or Bulgarian territories.⁷⁷

A Treaty of 29 June 1945 between Czechoslovakia and the USSR stipulated the cession to the USSR of the Sub-Carpathian Ukraine within the boundaries specified in the Treaty of Saint-Germain-en-Laye. An annexed protocol provided for “transfer without payment of the right of ownership over State property in the Sub-Carpathian Ukraine”.⁷⁸

The Treaty of Peace concluded on 12 March 1940 between Finland and the USSR⁷⁹ provided for reciprocal

⁷¹ *Ibid.* The inalienable property of the State is defined in articles 822 to 828 of the Italian Civil Code and includes, in particular, mines, quarries, forests, barracks, arms, munitions, etc.

⁷² Government of Burma Act, 1935.

⁷³ See United Kingdom, *Treaty between the Government of the United Kingdom and the Provisional Government of Burma regarding the recognition of Burmese independence and related matters*, Annex: Defence Agreement signed on the 29th August 1947 in Rangoon, Cmd 7360 (London, H. M. Stationery Office, 1948).

⁷⁴ United Nations, *Treaty Series*, vol. 69, p. 266.

⁷⁵ *Ibid.*, p. 288.

⁷⁶ Treaties concerning the establishment of the Republic of Cyprus, signed at Nicosia on 16 August 1960, with annexes, schedules, maps, etc. United Nations, *Treaty Series*, vol. 382, annex E, pp. 130-138, particularly article 1, and *passim*.

⁷⁷ Articles 256 of the Treaty of Versailles (E. Parkes, J. E. Field and R. C. Thomson eds., *British and Foreign State Papers* [London, H. M. Stationery Office, 1922] vol. 112, p. 125), 208 of the Treaty of Saint-Germain-en-Laye (*ibid.*, pp. 412-414), 191 of the Treaty of Trianon (*ibid.* [1923], vol. 113, pp. 564-565), and 142 of the Treaty of Neuilly-sur-Seine (*ibid.* [1922], vol. 112, pp. 821-822).

⁷⁸ English text in *British and Foreign State Papers, 1943-1945* (London, H. M. Stationery Office, 1953), vol. 145, p. 1098.

⁷⁹ English text in *Supplement to the American Journal of International Law* (Concord (N. H.), American Society of International Law, Rumford Press, 1940), vol. 34, pp. 127-131.

territorial cessions and included an annex requiring that all constructions and installations of military or economic importance situated in the territories ceded by either country should be handed over intact to the successor. The protocol makes special mention of bridges, dams, aerodromes, barracks, warehouses, railway junctions, manufacturing enterprises, telegraph and electric stations.

C. Cases of total annexation or merger

(16) After the Italo-Ethiopian war of 1936, the *debellatio* of Ethiopia permitted succession to all the rights and all the property of the predecessor State. On 9 May 1936, Legislative Decree No. 754 declared this succession to be total.⁸⁰

The *Anschluss* of Austria in 1938 had the same effect on all Austrian property.

The public property of the Baltic States incorporated in the USSR did not devolve to the successor State but, rather, passed within its juridical order. The Baltic States which constituted themselves Soviet Republics retained their public property, but upon their entry into the Soviet Union this public property passed within the Soviet juridical order.

D. Cases of dismemberment

(17) The various treaties under which Poland was dismembered at the end of the eighteenth century⁸¹ contain still more radical provisions. All public property passed to the various successor States of Poland, which was absorbed by its neighbours and partitioned among them.

Yugoslavia, which was constituted after the First World War by a Serbia resuscitated and expanded into the Kingdom of the Serbs, Croats and Slovenes, was invaded by the Third Reich in April 1941 and dismembered. It was partitioned among its neighbours—mainly Hungary, Bulgaria, Italy and, of course, Germany. A treaty of 22 July 1942⁸² was concluded between the successor States,⁸³ consisting of these neighbours plus Croatia, Serbia, Montenegro and Albania.

All property in the public and private domain of the kingdom (and some other property) devolved to each of these States in whose territory it was situated, property intersected by the new frontiers being divided between them in accordance with "the principles of equity" (article 1).

(18) Many more examples could be found in history. It will be more useful, however, to see whether there are

⁸⁰ Arrigho Cavaglieri had submitted to the Institute of International Law a draft containing the following article 4: "The annexing or new State automatically becomes the master of *all the property*,* in both the public and the private domain, belonging to the State which has ceased to exist [. . .]" (*Annuaire de l'Institut de droit international, session de Paris, 1934* [Paris, A. Pédone, éd.], pp. 478-479). In this case, the devolution affects not only property appertaining to sovereignty but all property.

⁸¹ Cf. the commentary on article 1; see para. (20) above and foot-note 24.

⁸² G. F. De Martens, ed., *Nouveau Recueil général de traités*, (Greifswald, Librairie J. Abel, 1943), 3rd series, t. XL, p. 651.

⁸³ The term "successor States" was carefully avoided. The Italian text of the Treaty spoke of "*Stati acquirenti*" and the German text of "*Erwerberstaaten*". See I. Paenson, *op. cit.*, pp. 153-154.

any examples to the contrary which would conflict with the rule suggested by the Special Rapporteur.

One case might be mentioned in this connexion. It concerns the manner in which public property was able to devolve to some of the new French-speaking African States.⁸⁴ The independence agreements were followed by various protocols concerning property, under which the independent State did not succeed to the whole of the property appertaining to sovereignty. It is in France that the strongest legal tradition has sanctioned the distinction between the public domain and the private domain of the State. In the colonies, there were usually not only these two categories of property belonging to the metropolitan country but also property classified as being in the public domain or the private domain of the territory. These various distinctions between property of the State and property of the territory and between property in the public domain and property in the private domain were in several cases discarded in favour of treaty provisions designed to take into account the military, cultural or other presence of the predecessor State in these countries. In exchange for French co-operation, a limited transfer of public property was agreed upon.

(19) In some cases, the pre-independence *status quo* was provisionally maintained.⁸⁵ In others, devolution of the (public and private) domain of the French State was affirmed as a principle but was actually implemented only in the case of property which would not be needed for the operation of the various French military or civilian services.⁸⁶ Sometimes the agreement between France and the newly independent territory clearly transferred all the public and private domain to the successor, which

⁸⁴ See G. Fouilloux: "La succession aux biens publics français dans les Etats nouveaux d'Afrique", in *Annuaire français de droit international, XI, 1965* (Paris, C.N.R.S.), pp. 885-915. Cf. also G. Fouilloux: "La succession des Etats de l'Afrique du Nord aux biens publics français", in *Annuaire de l'Afrique du Nord, 1966*, pp. 51-79.

⁸⁵ "Agreement between the Government of the French Republic and the Government of the Republic of Chad concerning the transitional arrangements to be applied until the entry into force of the agreements of co-operation between the French Republic and the Republic of Chad", signed in Paris on 12 July 1960 (United Nations Legislative Series, *Materials on Succession of States* [United Nations publication, Sales No.: E/F.68.V.5], pp. 153-154), article 4: "[. . .] the statute of the Domain currently in force shall continue to be applied . . .". A protocol to a property agreement was signed later, on 25 October 1961. It met the concern of the two States to provide for "respective needs" and enabled the successor State to waive the devolution of certain public property (see Decree No. 63-271 of 15 March 1963 publishing the Protocol to the property agreement between France and the Republic of Chad of 25 October 1961 [with the text of the protocol annexed], in France, *Journal officiel de la République française, Lois et décrets* (Paris, 95th year), 21 March 1963, pp. 2721-2722).

⁸⁶ See Decree No. 63-270 of 15 March 1963 publishing the Convention concerning the property settlement between France and Senegal, signed on 18 September 1962 (with the text of the convention annexed), in *ibid.*, p. 2720. Article 1 establishes the principle of the transfer of "ownership of State appurtenances registered [. . .] in the name of the French Republic" to Senegal. However, article 2 specifies: "Nevertheless, State appurtenances shall remain under the *ownership** of the French Republic and be registered in its name if they are certified to be needed for the operation of its services [. . .] and are included in the list" given in an annex. This provision concerns not the *use* of State property for the needs of the French services but the *ownership* of such property.

incorporated them in its patrimony, but under the same agreement, retroceded parts of them either in ownership or in usufruct.⁸⁷ In some cases the newly independent State agreed to a division of public property between France and itself, but the criterion for this division is not apparent except in the broader context of the requirements of technical assistance and of the French presence.⁸⁸ Lastly, there have been cases where a treaty discarded the distinctions between public and private domains, of the territory or of the metropolitan country, and provided for a division which would satisfy "respective needs", as defined by the two States in various co-operation agreements: the Contracting Parties agree to replace the property settlement based on the nature of the appurtenances by a global settlement based on equity and *satisfying their respective needs*.*⁸⁹

(20) Is French-speaking Black Africa an isolated case,⁹⁰

⁸⁷ A typical example is the public property Agreement between France and Mauritania of 10 May 1963 (Decree No. 63-1077 of 26 October 1963), in France, *Journal officiel de la République française, Lois et décrets* (Paris, 31 October 1963), 95th year, No. 256, pp. 9707-9708. Article 1 permanently transfers the public domain and the private domain. Article 2 grants ownership of certain public property needed for the French Services. Article 3 retrocedes to France the ownership of military premises used for residential purposes. Article 4 states that France may freely dispose of "installations needed for the performance of the defence mission entrusted to the French military forces" under a defence agreement.

⁸⁸ Cf. Decree No. 63-268 of 15 March 1963 publishing the Protocol to the property agreement between France and the Gabonese Republic, of 6 June 1961, in France, *Journal officiel de la République française, Lois et décrets* (Paris, 21 March 1963), 95th year, No. 69, pp. 2718-2719, and Decree No. 63-267 of the same date concerning the Central African Republic (*ibid.*, p. 2718).

⁸⁹ Article 31 of the Franco-Malagasy agreement of 27 June 1960 concerning economic and financial co-operation, approved by a Malagasy Act of 5 July 1960 and by a French Act of 18 July 1960 (France, *Journal officiel de la République française, Lois et décrets* [Paris, 20 July 1960], 92nd year, No. 167, p. 6615). A Franco-Malagasy protocol on property was signed later, on 18 October 1961 (Decree No. 63-269 of 15 March 1963 publishing this protocol, in France, *Journal officiel de la République française, Lois et décrets* (Paris, 21 March 1963), 95th year, No. 69, pp. 2719-2720). This confirms the situation created by another economic co-operation agreement of 27 June 1960 and acknowledges — but in this context — Madagascar's ownership of the remaining State appurtenances, although France retains the ownership of military premises and constructions.

⁹⁰ Cf. also the Franco-Indian agreement of 21 October 1954 concerning the French Establishments in India (English text in *Foreign Policy of India — Texts of Documents, 1947-64* (New Delhi, Lok Sabha Secretariat, 1966), p. 207; French text in *Recueil des traités et accords de la France, année 1962*, p. 537), article 32; the Franco-Cambodian agreements of 29 August 1953 (French text in *Recueil des traités et accords de la France, année 1959*, p. 39), articles 2 and 3 and of 17 October 1953, article 11.

Special treaty provisions were also adopted in the case of Algeria (Evian agreements of 19 March 1962). Article 19, first paragraph, of the Declaration of Principles concerning Economic and Financial Co-operation reads:

"Public real estate in Algeria will be transferred to the Algerian State, *except, with the agreement of the Algerian authorities,** for the premises deemed essential to the normal functioning of temporary or permanent French services." (United Nations, *Treaty Series*, vol. 507, p. 65).

What happened was, in brief, that over the years the military domain gradually passed almost entirely to the Algerian State but the rest of the domain, including movable property and the real estate referred to in the above-mentioned article, is the subject of pending litigation. A Franco-Algerian exchange of letters of 22 August 1963 specified, for what is known as Greater Algiers, which premises were to be retained by the French services.

or are roughly similar cases to be found in the demise of other colonial empires? The Special Rapporteur has not at present all the documentation he would need to form an opinion. In any case, it seems that the only conclusion to be drawn from the foregoing cases is that they involve treaty provisions illustrating the freedom usually given to States to depart by agreement from a customary rule which would otherwise be definite.⁹¹

(21) Courts and other jurisdictions also seem to endorse unreservedly the principle of the devolution of public property, particularly when it appertains to sovereignty. This is true, firstly, of national courts. Professor Rousseau writes: "The general principle of the passing of public property to the new or annexing State is now accepted without question by national courts."⁹² One could safely add that the principle appears to be accepted for all types of succession.⁹³

(22) Decisions of international jurisdictions confirm this rule. In the Peter Pázmány University case,⁹⁴ which did not perhaps concern property appertaining to sover-

⁹¹ "There is a custom [. . .] (one dare not say a principle) [. . .], one of the rare customs in the extremely diverse and confusing question of State succession; it is that the successor State inherits the public domain of the annexed State!" M. Grawitz, "Chronique — Jurisprudence internationale, Tribunal des Nations Unies en Libye", sentence du 27 juin 1955, *Annuaire français de droit international*, I, 1955 (Paris, C.N.R.S.), p. 289.

⁹² Ch. Rousseau, *op. cit.*, p. 139. Reference is generally made to the judgement of the Berlin Court of Appeal (*Kammergericht*) of 16 May 1940 (case of the succession of States to Memel—return of the territory of Memel to the German Reich following the German-Lithuanian Treaty of 22 March 1939; see H. Lauterpacht, *Annual Digest and Reports of Public International Law Cases, 1919-1942, Supplementary Volume* (London, Butterworth and Co., Ltd., 1947), case No. 44, pp. 74-76), which refers to the "comparative law" (a mistake for what the context shows to be "the ordinary law") of the passing of public property to the successor. Reference is also made to the judgement of the Palestine Supreme Court of 31 March 1947 (case of Amine Namika Sultan v. Attorney-General, *ibid.*, 1947 (London, Butterworth and Co., Ltd, 1951), case No. 14, pp. 36-40), which recognizes the validity of the transfer of Ottoman public property to the (British) Government of Palestine, by interpretation of article 60 of the Treaty of Lausanne of 1923.

⁹³ See also judgement of the Court of Cassation, 15 March 1837, Soubise case (Sirey, 1837, part 1, p. 722); Court of Appeal of French West Africa, judgement of 8 February 1907, Daour Diop *et al.* v. French State, quoted above (Sirey, 1908, part 2, p. 209): the constant principle of public international law is that "the annexing State inherits the *rights of sovereignty and of State ownership** vested in the sovereign of the annexed country [. . .]. It is therefore logical and lawful to consider and declare that the French Government, which has taken the place of the former chiefs of Cayor, is now sole owner of all the land of this kingdom [. . .]."

Cf. also Court of Appeal of French West Africa, judgement of 1 March 1907 (*ibid.*, p. 209); Court of Appeal of Bordeaux, judgement of 24 June 1903 (*Revue de législation, de doctrine et de jurisprudence coloniales*, 1904, part II, p. 159); Appeals Council of the French Congo, decision of 5 June 1900 (*ibid.*, 1902, part II, p. 162).

The study prepared by the Secretariat, "Digest of decisions of national courts relating to succession of States and Governments" (*Yearbook of the International Law Commission, 1963*, vol. II, pp. 131-137, document A/CN.4/157, paras. 326-374) cites a number of cases, some of which involve public property that could be regarded as appertaining to sovereignty.

⁹⁴ Judgement of 15 December 1953, Appeal from a judgement of the Hungaro-Czechoslovak Mixed Arbitral Tribunal Peter Pázmány University v. the State of Czechoslovakia, *P.C.I.J.*, Series A/B, No. 61, pp. 208-262.

eignty, the Permanent Court of International Justice stated in general terms (which is why the statement can be cited in this context) the principle of the devolution of public property to the successor State. According to the Court, this is a "principle of the generally accepted law of State succession".⁹⁵

* * *

(23) It will thus be seen that legal theory, judicial decisions and State practice generally admit devolution of the public property of the predecessor State, and not only devolution of property appertaining *stricto sensu* to sovereignty. The illustrations given by the Special Rapporteur seem in each case to be broader in scope than the rule he has suggested. Nevertheless, it was considered preferable to concentrate exclusively on finding the least common denominator, because a broader approach would have raised the problem of whether devolution is really always automatic—in other words, without compensation or indemnity. It appears to be generally agreed that, in the case of public property appertaining to sovereignty, succession does in fact take place automatically; in the case of other public property there is still some doubt, because practice is equally divided. A discussion of this problem follows below.

III. AUTOMATIC TRANSFER

(24) The problem here is whether the cession takes place automatically and without compensation or indemnity. In the case of property which is linked to the sovereignty exercised by the predecessor State over the territory affected by the change, it is obvious that the loss of sovereignty involves the simultaneous loss of everything through which and over which that sovereignty was exercised. This seems to be a matter of simple common sense, and there is no need even to link the problem of sovereignty too closely with a problem of territory.

(25) The French Minister of War's memorial to the Conseil d'Etat cited above⁹⁶ stated that

... major roadworks, waterworks or fortifications, and ownership of or eminent domain over such works which are an appurtenance of the public domain—this entire aggregate of duties and rights is, in the final analysis, an attribute of sovereignty. *This inseparable attribute of sovereignty moves with the sovereignty itself, no special stipulation being required in order to transfer the attendant benefit and responsibility.**

The writer cited Bluntschli to support his point.^{97,98}

⁹⁵ *Ibid.*, p. 237.

⁹⁶ See para. 5 above.

⁹⁷ J. K. Bluntschli, *Le droit international codifié*, translated from the German by M. C. Lardy (Paris, F. Alcan, édit., 1895), articles 47, 54, 56, 70, 77.

⁹⁸ French courts had on various occasions ruled that the territories which had become part of France were automatically incorporated in the public domain (Court of Cassation, Civil Chamber, judgement of 2 July 1822, Prefect of Doubs v. dame de Roussillon (Sirey, 1833), part 1, p. 540; judgement of 30 January 1866, Cabaud v. Chambéry Canal Company, M. Dalloz *et al.* *Recueil périodique et critique de jurisprudence, de législation et de doctrine en matière civile, commerciale, criminelle, administrative et de droit public* (Paris, Bureau de jurisprudence générale, 1866), part 1, pp. 374-376; etc.).

It is difficult to imagine that a State which has lost all sovereignty over an aerodrome, barracks, prison or police station, or even a road, school or hospital, could continue to have rights over that property which would enable it, for example, to claim compensation for such transfers, since—as shown by the above quotation—the transfers are automatic and need not be expressly stipulated.

(26) However, this position carried to extremes—and to excess—led certain countries, such as Poland after 1919, strongly to reject the merest hint of an idea of succession. Poland's entry into possession of its public property (very broadly defined, moreover) was considered by the national courts to be not the result of devolution by treaty but the expression of restored sovereignty. It was by "an act of its sovereign power" that it recovered its public property.⁹⁹ In a context such as this, where it is considered that the public property never ceased to be part of Poland, despite the dismemberment of the country, compensation of the predecessors is obviously out of the question.

(27) Apart from this example, several different situations are found in practice:

(a) Many diplomatic texts, treaties of transfer or other instruments make no reference to the payment of compensation to the predecessor State. It is obvious that, in the absence of such a reference, it cannot be assumed that the successor State has any obligation in this respect. This is the situation most frequently encountered.

(b) Certain instruments specifically state that public property shall be transferred without payment. The transaction takes place "without compensation",¹⁰⁰ "in full right",¹⁰¹ "without payment",¹⁰² "free",¹⁰³ "free of

⁹⁹ Supreme Court of Poland, judgement of 3 March 1923, *Graffowa and Wolanowski v. Polish Ministry of Agriculture and State Lands* (J. Fischer and H. Lauterpacht, *op. cit.*, case No. 26, pp. 55-57); judgement of 1 February 1923, *Attorney-General of Poland v. Serewicz* (*ibid.*, case No. 25, pp. 54 and 55); judgement of 1 June 1922, *Attorney-General of Poland v. Zalewski* (*ibid.*, p. 55); judgement of 2 March 1928, *Polish Treasury v. Heirs of Dietl* (A. D. McNair and H. Lauterpacht, *Annual Digest of Public International Law Cases, 1927 and 1928* (London, Longmans, Green and Co., 1931), case No. 51, p. 77).

¹⁰⁰ Agreement between the United States of America and Japan concerning the Amami Islands, signed at Tokyo on 24 December 1953 (United Nations, *Treaty Series*, vol. 222, p. 193, art. III, para. 4).

¹⁰¹ Article 10 of the Treaty of Utrecht (11 April 1713) concerning the cession of the Bay and Straits of Hudson by France to Great Britain (see foot-note 65 above).

¹⁰² Treaty of Peace of 10 February 1947 between the Allied and Associated Powers and Italy, paragraph 1 of annex X ("Economic and Financial Provisions Relating to the Free Territory of Trieste") and paragraph 1, first sub-paragraph, of annex XIV ("Economic and Financial Provisions Relating to Ceded Territories"). United Nations, *Treaty Series*, vol. 49, pp. 209 and 225. United Nations General Assembly resolutions 388 (V) of 15 December 1950, entitled "Economic and financial provisions relating to Libya", article I, paragraph 1, and 530 (VI) of 29 January 1952, entitled "Economic and financial provisions relating to Eritrea", article I, paragraph 1.

¹⁰³ Article 60 of the Peace Treaty signed at Lausanne on 24 July 1923 concerning the cession to the successor States of the property, natural wealth and possessions of the Ottoman Empire (G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Librairie Th. Weicher, 1925), 3rd series, t. XIII, p. 362).

cost".^{104,105} The various property agreements concluded between France and the African States which obtained independence stated that "cessions and transfers . . . shall be free of cost" and that "the transactions involved shall be effected without payment".

(c) There have, however, been some instances of compensation of the ceding State. The treaties of peace concluded after the First World War do not adopt a uniform solution. The Treaty of Lausanne (1923) discards the principle of compensation, but the other Treaties, of Versailles, Saint-Germain-en-Laye, Trianon and Neuilly¹⁰⁶ adopt the principle, although with a number of exceptions so broad that they would further becloud the issue, were it not for the fact that they concern special cases which are actually in the majority.

The value of the ceded public property was to be fixed by a Reparation Commission and paid by the successor State into a fund for the credit of the predecessor States (Germany, Bulgaria, Hungary, Austria) on account of the sums due for reparation. For both technical and political reasons, however, this system was never put into effect.

In addition, the Treaty of Versailles made an exception to the system of compensation in the special case of Alsace-Lorraine. France had this territory transferred to it on the terms specified in article 56 of the Treaty, namely, "without any payment or credit on this account to any of the States ceding the territories." This provision applies to all movable or immovable property of public or private domain, together with all rights whatsoever belonging to the German Empire or German States or to their administrative areas.^{107,108}

¹⁰⁴ See the various protocols to the property agreements concluded between France and the newly independent countries in French-speaking Africa (for the references, see foot-notes 85-89 above).

¹⁰⁵ See also cases of "voluntary cessions without payment", which, *ex hypothesi*, preclude any payment (e.g. cession by Great Britain to the United States in 1850 of part of the Horse-Shoe Reef in Lake Erie; decision in July 1821 by an assembly of representatives of the Uruguayan people held at Montevideo concerning the incorporation of the Cisplatina Province; voluntary incorporation in France of the free town of Mulhouse in 1798; voluntary incorporation of the Duchy of Courland in Russia in 1795; Treaty of Rio of 30 October 1909 between Brazil and Uruguay for the cession without compensation of various lagoons, islands and islets; voluntary cession of Lombardy by France to Piedmont, without payment, under the Treaty of Zurich of 10 November 1859; etc.).

¹⁰⁶ Article 256 of the Treaty of Versailles; article 208 of the Treaty of Saint-Germain-en-Laye; article 191 of the Treaty of Trianon; article 142 of the Treaty of Neuilly-sur-Seine (references in foot-note 77 above).

¹⁰⁷ G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Librairie Th. Weicher, 1923), 3rd series, t. XI, p. 382.

It may be of interest to quote here from the records of the Peace Conference (Paris, 1919-1920):

[Translation from French]

"MR. SERGENT (France) said that in assuming part of the debt of the German Empire, the domain of the State was being paid for in the form of interest, because the domain was constituted and developed with the help of loans. Consequently, unless payment were to be made twice, it would be inconceivable for this domain—either the productive or the non-productive domain—to be transferred against payment. *In all cases, the transfer must be effected without payment.*"

"Mr. ARMITAGE SMITH (British Empire) [...] *The peace preliminaries would stipulate that Germany's public domain should be*

IV. PROPERTY OF THE TERRITORY ITSELF

(28) Writers give no attention at all to property of the territory affected by the change of sovereignty itself. The amount of such property is, however, considerable. There is no territory which does not possess property of its own.

In the colonies, the situation was not always clear and this property was often governed by a host of parallel or overlapping legal régimes.

In legal systems which recognize the concept of the public and private domain of the State, the situation is not always simple. In former French Indochina, for example, there were no less than eight different kinds of domain: (a) and (b) a "colonial" domain composed of the two domains, public and private, of the French State in Indochina; (c) and (d) a "general" domain comprising the two domains, public and private, of the former Federation of the States of Indochina; (e) and (f) "local domains" belonging to each protectorate or colony in the Federation (Tonkin, Annam, Cochin China, Cambodia, Laos) with distinctions between the public and private domain; (g) and (h) public and private domains belonging to the provincial, local and municipal authorities of each protectorate or colony in the Federation.¹⁰⁹

*ceded without payment.** The Allies would then consider whether the value of that domain should be deducted from the compensation to be made to the cessionary States.

"Mr. SERGENT [...] If the cessionary State allowed the value of this domain to be deducted from its claim against Germany, its claim will be diminished. In the case of Alsace-Lorraine, since Germany had seized French public property without compensation in 1871, the proposed method would mean that France was made to pay for State property which had been taken from it by force.

"Mr. MONTAGUE (British Empire) Suggested specifying that *the German public domain would be transferred without payment to the cessionary State** and that the Allies would decide later how allowance should be made for this.

"Mr. SERGENT (France) said that France could pay the Allies for something it received without payment from Germany."

Peace Conference (1919-1920), *Recueil des actes de la Conférence de la paix* (Paris, Imprimerie Nationale, 1922), part IV (Commissions of the Conference), B (General questions), (6) Financial Commission, First Sub-Commission, meeting of 21 March 1919, extract from the records, pp. 130-131.

This discussion shows the very modest scope of the system of compensation adopted in cases other than that of Alsace-Lorraine by the 1919 peace treaties.

¹⁰⁸ See, for example, French Court of Cassation, Civil Chamber, judgement of 11 July 1928, *Alsace-Lorraine Railway Company v. Ducreux* (Dalloz, *Recueil hebdomadaire de jurisprudence, année 1928* (Paris, Jurisprudence générale Dalloz), p. 512), which emphasizes that the cessation of Alsace-Lorraine took place without payment.

¹⁰⁹ The situation was (and probably still is) quite complicated in the former Belgian Congo. For example, the precise legal characterization of the property of the Special Committee for Katanga raised very difficult problems (Cf. J.-P. Paulus, *Droit public du Congo belge*, Université libre de Bruxelles, Institut de Sociologie Solvay, *Études coloniales*, No. 6, 1959, pp. 120 *et seq.*). The Treaty of 9 January 1895 between the "Independent State of the Congo" and the Belgian State had ceded to Belgium, under the terms of article 2,

"... all the immovable and movable assets of the Independent State, and in particular (1) the ownership of all lands belonging to its public or private domain [...] (2) shares and founder's shares [...] (3) all buildings, constructions, installations, plantations and properties whatsoever established or acquired by the Government [...], movable property of every kind and livestock [...], its ships and boats together with their equip-

(29) The reason why writers neglected this problem of property of the territory itself is, perhaps, that they did not believe such property should be affected by the change of sovereignty.

However, while it seems obvious that this property should not devolve to the successor State¹¹⁰ and that it remains the property of the territory ceded, it is equally clear that this does not amount to maintenance of the *status quo ante*. The property does not continue to be governed by the former law or to be subject to the former sovereignty. This, of course, is part of the broader problem of succession of States in respect of legislation. However, the point must be made here that public property owned by the ceded territory in its own right continues to belong to it but follows the political and judicial destiny of the territory, which passes under another sovereignty. Such property will continue to be owned by the territory but will be governed by the legislation of the successor State. In other words, the public property belonging to the territory is not affected by the change of sovereignty so far as ownership is concerned, but it passes within the juridical order of the successor State.

(30) A resolution of the Institute of International Law laid down the same principle, stating that local corporate bodies retained the right of ownership over their property after territorial changes: "The territorial changes leave intact those patrimonial rights which were duly acquired before the change took place." The resolution specified "*These rules also apply to the patrimonial rights of municipalities or other corporate bodies belonging to the State which is affected by the territorial change*."¹¹¹

(31) This plain fact is worth recalling and recording in a rule of the kind suggested by the Special Rapporteur. Although it is so obvious as to be unremarkable in the case of property situated in the territory itself, it becomes most important when a decision has to be taken on the fate of property of the territory itself which is situated outside its geographical boundaries. That specific problem will be dealt with in draft article 8 suggested below, in the context of the clear rule expressed here.

(32) This problem often arises, either because the territory possesses property of its own which may normally be situated outside its geographical boundaries or because such property comes to be situated outside its new boundaries as a result of partition of the territory, cession of part of the territory, frontier adjustments, and so forth.

The Franco-Italian Conciliation Commission established under the Treaty of Peace with Italy of 10 February 1947 had to deal with a problem of this kind.¹¹² In this case the Commission, bound by the very clear wording of paragraph 1 of annex XIV to the Treaty,¹¹³ which it had to interpret, went further than is suggested here and recognized the devolution to the successor State, *in full ownership*, of the property of the ceded territory itself. This property does not merely come *within the juridical order* of the successor State.

(33) The agent of the Italian Government had argued that when paragraph 1 states that the successor State shall receive, without payment, State and para-statal property (including the property of local agencies) within territory ceded, it is not—at least in the case of the property of local agencies—referring to succession of the State to the ownership of such property but to the property's incorporation into the juridical order of the successor State.¹¹⁴

(34) The Commission rejected that viewpoint, since

the main argument of the Italian Government conflicts with the very clear wording of paragraph 1: it is the successor State that shall receive, without payment, not only the State property but also the para-statal property, including *biens communaux*, within the territories ceded. It is the municipal legislation of the successor State that must determine the fate (final destination and juridical régime) of the property thus transferred, in the new State context into which the property has passed following the cession of the territory.¹¹⁵

[Articles 3 to 6

Draft articles 3, 4, 5 and 6 relating respectively to "public funds, government securities and debt claims", to "property of public establishments", to "property of local authorities" and to "property of foundations", will be formulated and submitted at a later stage.]

Article 7. Archives and public libraries

Archives and public documents of every kind relating directly or belonging to the territory affected by the change

ment and its military arms equipment, (4) the ivory, rubber and other African products which are at present the property of the Independent State and the stores and other merchandise belonging to it".

(G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Librairie Dieterich, 1896), 2nd series, t. XXI, p. 693.)

Public property was later divided into categories. Land, for example, formed one category—"State lands", which were in turn divided into land in the public domain, land in the private domain, land for which concessions had been granted and vacant land (J.-P. Paulus, *op. cit.*, pp. 15 *et seq.*). However, there was never any generally accepted demarcation between the patrimony of the colony and that of the metropolitan country (Paulus, *op. cit.*, pp. 26 *et seq.*).

¹¹⁰ Except in the case of the total demise of the predecessor State—in other words, when there is, *ex hypothesi*, no property of the territory itself distinct from the property of the State which has ceased to exist. The ceded territory is coextensive with the former territory.

¹¹¹ Paragraphs 3 and 4 of resolution II of the Institute of International Law adopted at its forty-fifth session, held at Sienna from 17 to 26 April 1952 (*Annuaire de l'Institut de droit international*, 1952, II (Bâle, Editions juridiques et sociologiques S.A.), pp. 475-476).

¹¹² Franco-Italian Conciliation Commission, "Dispute concerning the apportionment of the property of local authorities whose territory was divided by the frontier established under article 2 of the Treaty of Peace: decisions Nos. 145 and 163, rendered on 20 January and 9 October 1953 respectively" (United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No.: 64.V.3), pp. 501-549).

¹¹³ United Nations, *Treaty Series*, vol. 49, p. 225.

¹¹⁴ United Nations, *Reports of International Arbitral Awards*, vol. XIII [United Nations publication, Sales No.: 64.V.3], pp. 512-513. Annex XIV, paragraph 1, stated that "The Successor State shall receive, without payment, Italian State and para-statal property within territory ceded [. . .]" (*ibid.*, p. 503).

¹¹⁵ *Ibid.*, pp. 514-515.

of sovereignty, and public libraries of that territory, shall, wherever they may be situated, be transferred to the successor State.

The successor State shall not refuse to hand over copies of such items to the predecessor State or to any third State concerned, upon the request and at the expense of the latter State, save where they affect the security or sovereignty of the successor State.

COMMENTARY

I. INTRODUCTION

(1) Archives, jealously preserved, are the essential instrument for the administration of a community. They both record the management of State affairs and enable it to be carried on, while at the same time embodying the ins and outs of human history; consequently, they are of value to both the researcher and the administrator. Secret or public, they constitute a heritage and a public property which the State generally makes sure is inalienable and imprescriptible. Espionage is often nothing but a paper war which enables the more successful to obtain the enemy's—or even the ally's—plans, designs, documents, secret treaties, and so forth.

The destructive hatchet and torch of the wars that have eternally afflicted mankind have seriously impaired the integrity of archival collections. The documents are sometimes of such importance that the victor hastens to remove these valuable sources of information to its own territory. Armed conflict may result not only in the occupation of a territory, but also in the plundering of its records.

(2) The Second World War, more than any other conflict, was concerned with this problem of archives. The Hitlerite régime played havoc with archives, for instance in Moravia, in the Sudetenland. The victors of 1945 gave extra attention to the question of archives and confiscated those in the possession of the Reich, wherever they were, the better to ascertain and pin-point Hitlerite responsibility. Some of these archives were later returned to the post-war German Government.¹¹⁶ The peace treaties reflected the concern of the Allies that the important problem of archives should not be ignored, and it was found possible to include in those agreements a number of provisions which will be discussed later.

(3) Where State succession is concerned, this matter has been regulated by treaty in quite considerable detail. It is only in rare cases that the instrument setting the seal on the understanding between the two parties simply provides that arrangements for the handing over of documents, deeds and archives will be agreed on by the competent authorities of the parties.¹¹⁷ Even less frequently

does the agreement merely legalize the *status quo*, each party retaining the archives which are in its possession.¹¹⁸ Treaties relating to changes of sovereignty over a territory are, on the contrary, usually more specific in regulating this problem.

(4) Advances in technology have completely changed the factual background to the question of archives and, it would seem, must inevitably have an effect on State succession in this respect. The difficulties which used to arise between States because archives were indivisible and reproducing them was a very lengthy task no longer exist, owing to modern reproduction methods. In the past, the problem was resolved in a drastic manner and the archives went to whoever fared best on the field of battle. The old idea of the indivisibility of archives, which aroused fears of the breaking up of collections and was responsible in some cases for the preservation of the integrity of historical repositories, is more easily accepted by the parties because photostating, microfilming and other modern techniques make it possible to find solutions better fitted to the situations which arise. The predecessor State can without harm leave the archives to the successor, in the assurance that they can be rapidly and conveniently reproduced.

(5) In some cases, diplomatic instruments include clauses relating not only to the public archives, but even to private archives.¹¹⁹ Generally speaking, the number of agreements which are fairly explicit as concerns archives is quite large in the case of all types of succession, except perhaps in the field of decolonization, where such instruments seem on the whole to be somewhat rare.

(6) Draft article 7, as formulated, suggests a number of questions. One is how to define the expression “archives and [. . .] documents of every kind”. The second concerns the principle of the transfer of archives to the successor State. A third question relates to the “archives-territory” link which enables the transfer to be limited to items belonging or relating to the territory. A fourth question, which follows from this, is the fate of archives situated outside the territory. Fifthly, there is the question whether, in consideration of total transfer to the successor State, the latter does not assume a number of special obligations. Time-limits for handing over the archives, cases where there is more than one successor, and the problem of public libraries, are other matters meriting examination.

II. DEFINITION OF ITEMS AFFECTED BY THE TRANSFER

(7) Draft article 7 refers to “archives and [. . .] documents of every kind”. There does not exist—at least in French—

¹¹⁶ Cf., for example, the exchange of letters constituting an agreement between the United States of America and the Federal Republic of Germany relating to the transfer of German files and archives, Bonn, 14 March 1956, and Bonn/Bad Godesberg, 18 April 1956 (United Nations, *Treaty Series*, vol. 271, p. 320).

¹¹⁷ Cf., for example, article 8 of the Treaty between the Netherlands and the Federal Republic of Germany concerning certain parcels of land on the frontier, signed on 8 April 1960 (United Nations, *Treaty Series*, vol. 508, p. 154).

¹¹⁸ Cf., for example, the agreement between France and Viet-Nam concluded by an exchange of letters dated 8 March 1949, section VI “(Cultural questions)”, sub-section “Archives” (France, *Présidence du Conseil, Secrétariat général du Gouvernement et Ministère de la France d’outre-mer, Direction des affaires politiques, La documentation française* (Paris, 20 June 1949), No. 1147, p. 7).

¹¹⁹ Article 37 of the Treaty of Peace with Italy of 10 February 1947 required the restoration of archives and cultural or artistic objects “belonging to Ethiopia or its nationals” (United Nations, *Treaty Series*, vol. 49, p. 142).

any generic term capable of covering the great wealth of written, photographic or graphic material which the expression used is intended to suggest. It must be understood as a comprehensive expression referring to the ownership, type, character, category and nature of the items, and the article as finally formulated will have to be accompanied by a detailed commentary to provide the necessary explanations.

(8) The phrase "archives and [. . .] documents" is used here in the broadest sense, due regard being had to diplomatic practice, which is extremely consistent.

It is understood that the words "of every kind" refer in the first place to the *ownership* of the archives; it is immaterial whether they are the property of the State, of an intermediate authority or of a local public body, the essential point being that they consist of public documents. Whatever public-law corporations and administrative divisions exist in a State, their archives are what is meant.

The expression "of every kind" also refers to the *type* of archives, whether diplomatic, political or administrative, military, civil or ecclesiastical, historical or geographical, legislative or regulative, judicial, financial or other.

The *character* of the items—whether public or secret—is likewise immaterial.

The question of the *nature* or *category* of the archives relates not only to the fact that they may consist of written material, whether in manuscript or in print, or of photographs, graphic material, and so forth, or that they may be originals or copies, but also to the substance of which they are made, such as paper, parchment, fabric, leather, etc.

Lastly, the expression used is intended to cover all *varieties* of documents. It seemed to the Special Rapporteur unnecessary and pointless to enumerate all these varieties in a list which would necessarily be incomplete and would certainly be tedious. Examples of the wordings used in diplomatic instruments are "archives, registers, plans, title-deeds and documents of every kind",¹²⁰ "archives, documents and registers concerning the civil, military and judicial administration of the ceded territories",¹²¹ "all title-deeds, plans, cadastral and other registers and papers",¹²² "any government archives, records, papers or documents which relate to the cession or the rights and property of the inhabitants of the islands

ceded",¹²³ "archives and objects of historical value",¹²⁴ "all archives having a general historic interest", as opposed to "archives which are of interest to the local administration";¹²⁵ "all documents exclusively referring to the sovereignty relinquished or ceded [. . .], the official archives and records, executive as well as judicial";¹²⁶ "documents, deeds and archives [. . .], registers of births, marriages and deaths, land registers, cadastral papers [. . .]",¹²⁷ and so forth.

One of the most detailed definitions of the term "archives" that the Special Rapporteur has come across is the one in article 2 of the Agreement of 23 December 1950 between Italy and Yugoslavia, concluded pursuant to the Treaty of Peace of 10 February 1947. It encompasses documents relating to all the public services, to the various parts of the population, and to categories of property, situations or private juridical relations.¹²⁸

¹²⁰ Article 1, para. 3, of the Convention between the United States of America and Denmark providing for the cession of the Danish West Indies, signed at New York on 4 August 1916 (English text in *Supplement to the American Journal of International Law* (New York, American Society of International Law, Oxford University Press, 1917), vol. 11, p. 54; French text in *Revue générale de droit international public* (Paris, A. Pédone, édit., 1917), t. XXIV, p. 454).

¹²¹ Article 37 (concerning Ethiopia) of the Treaty of Peace with Italy, signed at Paris on 10 February 1947 (United Nations, *Treaty Series*, vol. 49, p. 142). On the basis of that article and article 75 (*ibid.*, p. 157), Ethiopia and Italy concluded an Agreement concerning the settlement of economic and financial matters issuing from the Treaty of Peace and economic collaboration, signed at Addis Ababa on 5 March 1956, which had three annexes, A, B and C, listing the archives and objects of historical value that had been or were to be returned to Ethiopia by Italy (*ibid.*, vol. 267, pp. 204-216).

¹²² Article VI of the Treaty of cession of the territory of the Free Town of Chandernagore between India and France, signed at Paris on 2 February 1951 (United Nations, *Treaty Series*, vol. 203, pp. 158-160).

¹²³ Article VIII of the Treaty of Peace between Spain and the United States of America, signed at Paris on 10 December 1898 (English text in W. M. Malloy (comp.), *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776-1909* (Washington, Government Printing Office, 1910), vol. II, p. 1693).

¹²⁴ See foot-note 117 above.

¹²⁵ Agreement, signed at Rome on 23 December 1950, between the Italian Republic and the Federal People's Republic of Yugoslavia with respect to the apportionment of archives and documents of an administrative character or of historical interest relating to the territories ceded under the terms of the Treaty of Peace (United Nations, *Treaty Series*, vol. 171, p. 291). Article 2 reads as follows:

"The expression 'archives and documents of an administrative character' shall be construed as covering the documents of the central administration and those of the local public administrative authorities.

"The following [in particular shall be covered] [. . .]

"Documents [. . .] such as cadastral registers, maps and plans; blueprints, drawings, drafts, statistical and other similar documents of technical administration, concerning *inter alia* the public works, railways, mines, public waterways, seaports and naval dockyards;

"Documents of interest either to the population as a whole or to part of the population, such as those dealing with births, marriages and deaths, statistics, registers or other documentary evidence of diplomas or certificates testifying to ability to practice certain professions;

"Documents concerning certain categories of property, situations or private juridical relations, such as authenticated deeds, judicial files, including court deposits in money or other securities [. . .];

¹²⁰ This expression appears in several clauses of the Treaty of Versailles of 28 June 1919: part III, sect. I, art. 38, concerning Germany and Belgium; sect. V, art. 52, concerning Germany and France in respect of Alsace-Lorraine; sect. VIII, art. 158, concerning Germany and Japan in respect of Shantung (E. Parkes, J. E. Field and R. C. Thomson, eds., *British and Foreign State Papers* (London, H. M. Stationery Office, 1922), vol. 112, pp. 29-30, 42, and 81), as well as in the Treaty of Saint-Germain-en-Laye of 10 September 1919: art. 93 concerning Austria (*ibid.*, p. 361) and in the Treaty of Trianon of 4 June 1920, art. 77 concerning Hungary (*ibid.*, vol. 113, p. 518).

¹²¹ Article 3 of the Treaty of Peace between the German Empire and France, signed at Frankfurt on 10 May 1871 (G.F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Librairie Dieterich, 1874), t. XIX, p. 689).

¹²² Article 8 of the Additional Agreement to the Treaty of Peace, signed at Frankfurt on 11 December 1871 (*ibid.* [1875], t. XX, p. 854).

III. THE PRINCIPLE OF THE TRANSFER OF ARCHIVES TO THE SUCCESSOR STATE

(9) The principle of the transfer of archives to the successor State seems to be unquestioned, irrespective of the type of succession. Writers comment only occasionally and briefly on the problem of archives and appear to be unanimous on this point, and judicial decisions, although even rarer, do not deviate from this principle. Diplomatic practice, on the other hand, is more copious and enables the scope of the principle to be pin-pointed.

A. Archives of every kind

(10) *Archives of every kind are generally handed over to the successor State immediately or within a very short time-limit.* The Franco-German Treaty of 1871 providing for transfer required the French Government to hand over to the German Government the archives relating to the ceded territories.¹²⁹ The Additional Agreement to that Treaty imposed on the two States the obligation to return to each other all the title-deeds, registers, and so forth, for municipalities on either side bounded by the new frontier line between the two countries.¹³⁰ After the First World War, the territories ceded in 1871 having changed hands again, the archives were dealt with in the same way and the Treaty of Versailles required the German Government to hand over without delay to the French Government the items relating to those territories.¹³¹

Under the terms of an identically worded provision of the same Treaty, the German Government contracted the same obligation towards Belgium.¹³² Without any change in wording, other international instruments, namely, the Treaty of Saint-Germain-en-Laye and the Treaty of Trianon, imposed on Austria and Hungary respectively the same obligation towards the successor States.¹³³

B. Archives as an instrument of evidence

(11) In old treaties, archives were handed over to the successor State primarily as instruments of evidence and as titles to property.

"The expression 'historical archives and documents' shall be construed as covering not only the material from archives of historical interest properly speaking but also documents, acts, plans and drafts concerning monuments of historical and cultural interest."

The enumeration given in article 6 of the same Agreement rounds off the definition of "administrative" archives.

¹²⁹ Article 3 of the Treaty of Peace signed at Frankfurt on 10 May 1871 (see foot-note 121 above).

¹³⁰ Article 8 of the Additional Agreement signed on 11 December 1871 (see foot-note 122 above).

¹³¹ Treaty of Versailles of 28 June 1919, part III, sect. V (Alsace-Lorraine) article 52 (see foot-note 120 above).

¹³² *Idem*, part III, sect. I, art. 38 (*ibid.*).

¹³³ Article 93 of the Treaty of Saint-Germain-en-Laye of 10 September 1919 (*ibid.*), and article 77 of the Treaty of Trianon of 4 June 1920 (*ibid.*).

The writings of past years seem to retain the impress of this concern for "evidence". "Archives", wrote Fauchille, "and titles to the property acquired by the annexing State,* which form [. . .] part of the public domain, must also be handed over to it".¹³⁴ The Convention whereby the islands constituting the Danish West Indies were sold to the United States of America by Denmark in 1916 provided as follows: "In this cession shall also be included any government archives, records, papers or documents which relate to the cession or the rights and property * of the inhabitants of the islands ceded [. . .]".¹³⁵ When Spain, by the Treaty of Paris of 10 December 1898, ceded to the United States of America the property in the public domain of Cuba, Puerto Rico, the islands of Guam and the Philippine archipelago, it was stated that the cession included "all documents exclusively referring to the sovereignty relinquished or ceded [. . .] and such rights * as the Crown of Spain and its authorities possess in respect of the official archives [. . .]".¹³⁶

However, the treaties in question do not seem to have implied by this that the ceding State had a right to retain other categories of archives.

C. Archives as an instrument of administration

(12) The simple idea has prevailed that, when territory is transferred, concern for handing over as viable a territory as possible should induce the predecessor State to relinquish to the successor all such instruments as will enable breakdowns in administration to be kept to a minimum and help to ensure that the territory is properly and easily governable. Hence the custom of leaving to the territory all the written, graphic and photographic material needed for the continuance of the proper administrative functioning of the territory.

(13) One effect of this "practice" which is encountered in some treaties of annexation, especially in Europe, was that in a few rare cases the predecessor State considered itself entitled to hand over only archives of an administrative character¹³⁷ and to retain those which had a historical interest. However, such instances seem to be isolated ones and become questionable with the passage of time.

(14) This distinction between types of archives was applied, apart from cases of annexation, in one case of decolonization. Article 33 of the Agreement between France and India of 21 October 1954,¹³⁸ concerning the French Establishments in India, provided as follows:

¹³⁴ P. Fauchille, *Traité de droit international public*, eighth edition of the Manuel de droit international public de H. Bonfils (Paris, Rousseau et Cie, édit., 1922), t. 1, p. 360, para. 219.

¹³⁵ Article 1, para. 3, of the Convention of 4 August 1916 (for reference, see foot-note 123 above).

¹³⁶ Article VIII of the Treaty of 10 December 1898 (see foot-note 126 above).

¹³⁷ This expression was understood in the broadest sense: taxation documents of all kinds, cadastral and public property registers, administrative documents, registers of births, marriages and deaths, land registers, judicial and penitentiary archives, etc.

¹³⁸ See foot-note 90 above. A similar provision already appeared in article VI of the Treaty of cession of the territory of the Free Town of Chandernagore (see foot-note 125 above).

The French Government shall keep in their custody the records having an historical interest, they shall leave in the hands of the Indian Government the records required for the administration of the Territory.

Clearly, if the retention of historical archives by the predecessor State is unjustified in the case of annexation, it is even less justified in the case of decolonization. Decolonization closes a parenthesis in the history of a country and should enable the country in question to link up with its past history.

In any event, the Special Rapporteur's search for other, similar diplomatic precedents was fruitless, and this does not seem to be either a rule or a custom, nor even a tendency, but rather one of those isolated cases which are probably due to special circumstances.

(15) Very much to the contrary, in the developments cited below there will be seen many examples of transfers of archives including historical documents. In some cases, indeed, only this latter category is referred to, not because it may at one time have been excluded from such transfers but simply because the tribulations of international life had not yet drawn attention to it. For instance, France, as the successor State in Savoy and Nice, was able not only to obtain from the Sardinian Government the historical archives which were in the ceded territories at the time but also, a century later, to obtain from Italy¹³⁹ the historical archives at Turin.¹⁴⁰ Similarly, Yugoslavia and Czechoslovakia obtained from Hungary, by the Treaty of Peace of 10 February 1947, all historical archives which had come into being under the Hungarian monarchy between 1848 and 1919 in those territories. Under the same Treaty, Yugoslavia was also to receive from Hungary the archives concerning Illyria, which dated from the eighteenth century.¹⁴¹ It would appear very easy to find many more examples relating to this point.

Thus, it seems reasonable to lay down as a general rule for all types of succession the principle of the transfer of *archives of every kind* to the successor State. However, the draft article makes another specification which requires commentary. It refers to archives "relating [. . .] or belonging to the territory".

IV. THE "ARCHIVES-TERRITORY" LINK

(16) The suggested text enunciates the principle of the handing over to the successor State of archives "relating directly or belonging to the territory". It should be made clear what is meant by these words.

Obviously, the successor State cannot claim simply any archives, but only those which belong to the territory.¹⁴² This must be appraised from two standpoints.

¹³⁹ This seems especially significant, in that Italy was itself the successor to the Sardinian Government.

¹⁴⁰ See para. 30 below.

¹⁴¹ Article 11 of the Treaty of Peace with Hungary (United Nations, *Treaty Series*, vol. 41, p. 178).

¹⁴² Article I, paragraph 2 (a), of General Assembly resolution 388 (V) entitled "Economic and financial provisions relating to Libya" stipulates that the property to be transferred immediately shall include "the relevant archives and documents of an administrative character or technical value concerning Libya or relating to property* the transfer of which is provided for by the present resolution".

(17) First, there are archives which were acquired before the change of sovereignty by or on behalf of the territory, against payment or free of cost, and with funds of the territory or otherwise.¹⁴³ From this first standpoint, such archives "belong" to the territory and must follow its destiny in the change of sovereignty. In order to do so, it is not necessary that the archives should relate to the territory, since it is quite conceivable that the territory may have acquired, free of cost or against payment, historical, cultural or other documents concerning other parts of the world.

(18) Secondly, the organic link between the territory and the archives relating to it must be taken into account.¹⁴⁴ However, a difficulty arises when the strength of this link has to be appraised by category of archives. Writers agree that, where the documents in question "relate to the predecessor State as such and refer only incidentally to the ceded territory", they "remain the property of the ceding State, [but] it is generally accepted that copies will be supplied to the annexing State at its request".¹⁴⁵ The "archives-territory" link was specifically taken into account in the Rome Agreement of 23 December 1950 between Yugoslavia and Italy concerning archives.¹⁴⁶

Attention may be drawn at this point to the decision of the Franco-Italian Conciliation Commission in which the Commission held that archives and historical documents, even if they belonged to a municipality whose territory was divided by the new frontier drawn up in the Treaty of Peace with Italy, must be assigned in their entirety to France whenever they related to the territory ceded.¹⁴⁷

¹⁴³ Article 11, paragraph 2, of the Treaty of Peace with Hungary (see foot-note 141 above) rightly specifies that the successor States, Yugoslavia and Czechoslovakia, shall not have any rights over archives or objects "acquired by purchase, gift or legacy and original works of Hungarians".

¹⁴⁴ Under article 11, paragraph 1, of the Treaty of Peace of 10 February 1947 (see foot-note 141 above), Hungary handed over to the successor States, Czechoslovakia and Yugoslavia, objects "constituting [their] cultural heritage [. . .] which originated in those territories* [. . .]".

¹⁴⁵ Ch. Rousseau, *op. cit.*, p. 136. Cf. also D. P. O'Connell, *State Succession in Municipal Law and International Law* (Cambridge, University Press, 1967), vol. I: *Internal Relations*, pp. 232-233.

¹⁴⁶ Article 6 of the Agreement (see foot-note 128 above) provides that archives which are indivisible or of common interest to both parties "shall be assigned to that Party which, in the Commission's judgement, is more interested in the possession of the documents in question, according to the extent of the territory or the number of persons, institutions or companies to which these documents relate." In this case, the other Party shall receive a copy of such documents, which shall be handed over to it by the Party holding the original."

¹⁴⁷ Decision No. 163 rendered on 9 October 1953 (United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No.: 64.V.3), p. 503). This decision includes the following passage:

"Communal property which shall be so apportioned pursuant to paragraph 18 [of annex XIV to the Treaty of Peace with Italy] should be deemed not to include 'all relevant archives and documents of an administrative character or historical value'; such archives and documents, even if they belong to a municipality whose territory is divided by a frontier established under the terms of the Treaty, pass to what is termed the successor State if they concern the territory ceded or relate to property transferred* (annex XIV, para. 1); if these conditions are not fulfilled, they are not liable either to transfer under paragraph 1

(19) After the Franco-German war of 1870, the archives of Alsace-Lorraine were handed over to the new German authority in the territory. However, the problem of the archives of the Strasbourg educational district and of its schools was amicably settled by means of a special convention. In this case, however, the criterion of the "archives-territory" link was applied only in the case of documents considered to be "of secondary interest to the German Government".¹⁴⁸

(20) Another problem which is touched on by the draft article as submitted and which has caused some difficulties concerns archives which, for one reason or another, are situated outside the territory affected by the change of sovereignty.

V. ARCHIVES SITUATED OUTSIDE THE TERRITORY

(21) The text suggested by the Special Rapporteur is of a general nature. According to the wording submitted for discussion, the successor State has the right to claim its archives, wherever they may be situated. In fact, the formulation of such a rule seems to follow inevitably from a consideration of practice, some examples of which will be given below.

A distinction may be drawn between two cases: that of archives removed from the territory concerned, and that of archives established outside the territory but relating directly to it. (There is a third case which will not be considered in this study, namely, that of documents belonging or relating to the territory which are situated outside the geographical boundaries of both the predecessor State and the successor State.)

A. Archives which have been removed

(22) Current practice seems to acknowledge that archives which have been removed by the predecessor State, either immediately before the transfer of sovereignty or even at a much earlier period, should be returned to the successor State.

For example, following the dissolution in 1944 of the Union between Denmark and Iceland, the High Court of Justice of Denmark ruled, in a decision of 17 November 1966,¹⁴⁹ that some 1,600 priceless parchments and manuscripts containing old Icelandic legends should be restored to Iceland. It should be noted that these parchments were not public archives, since they did not really concern the history of the Icelandic public authorities and administration, and were not the property of Iceland, since they had been collected in Denmark by an Icelander who was Professor of History at the University of Copen-

hagen. He had saved them from destruction in Iceland, where they were said to have been used on occasion to block up holes in the doors and windows of Icelandic houses. These parchments, whose value has been estimated by experts at 600 million Swiss francs, had been bequeathed in perpetuity by their owner to a university foundation in Denmark. Despite the fact that they were private property, duly bequeathed to an educational institution, and did not relate to the history of the public authorities in Iceland, these archives were finally handed over to the Reykjavik Government, which had been claiming them since the end of the Union between Denmark and Iceland, as others had been doing ever since the beginning of the century.

(23) In the case of the annexation of Ethiopia by Italy in 1935, Italy was obliged to return the archives which it had removed from Ethiopia. Article 37 of the Treaty of Peace with Italy provides as follows: "[. . .] Italy shall restore all [. . .] archives and objects of historical value belonging to Ethiopia or its nationals and removed from Ethiopia to Italy since October 3, 1935".¹⁵⁰

(24) There is a striking similarity in the wording of the instruments which terminated the wars of 1870 and 1914. Article 3 of the Treaty of Peace between France and Germany signed at Frankfurt on 10 May 1871¹⁵¹ provided as follows: "If any of these items [archives, documents, registers, etc.] have been removed, they will be restored by the French Government on the demand of the German Government". This statement of the principle that archives which have been removed must be returned was later incorporated, in the same wording, in article 52 of the Treaty of Versailles, article 93 of the Treaty of Saint-Germain-en-Laye and article 77 of the Treaty of Trianon, the only difference being that in these treaties it was Germany that was compelled to obey the law of which it had heartily approved when it was the victor.¹⁵²

The Treaty of Versailles states the rule with even greater force in article 158, which provides that Germany shall hand over to Japan all the archives, documents and the like relating to the territory of Kiaochow, "wherever they may be".¹⁵³ It even gives Germany a very short period of three months in which to complete the operation, thus making the measure yet more stringent.

(25) Similar considerations prevailed in the relations between Italy and Yugoslavia. Italy was to restore to the latter administrative archives relating to the territories ceded to Yugoslavia under the treaties signed in Rapallo on 12 November 1920 and in Rome on 27 January 1924 which had been removed by Italy between 4 November 1918 and 2 March 1924 as the result of the Italian occupation, and also deeds, documents, registers and the like belonging to those territories which had been removed by the Italian Armistice Mission operating in Vienna

or to apportionment under paragraph 18, but remain the property of the Italian municipality. *What is decisive, in the case of property in a special category of this kind, is the notional link with other property or with a territory**" (*ibid.*, pp. 516-517).

¹⁴⁸ Convention of 26 April 1872 signed at Strasbourg (G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Librairie Dieterich, 1875), t. XX, p. 875).

¹⁴⁹ *Revue générale de droit international public* (Paris, A. Pédone, éd., 1967), t. LXXI, p. 401.

¹⁵⁰ See foot-note 124 above.

¹⁵¹ See foot-note 121 above.

¹⁵² See foot-note 120 above. The Treaties of Saint-Germain-en-Laye and Trianon concerned respectively Austria and Hungary, which were to return the archives they had removed.

¹⁵³ G. F. de Martens, *Nouveau Recueil général de traités* (Leipzig, Librairie Th. Weicher, 1923), 3rd series, t. XI, p. 443.

after the First World War.¹⁵⁴ The agreement between Italy and Yugoslavia of 23 December 1950 is even more specific: article 1 provides for the delivery to Yugoslavia of all archives "which are in the possession, or which will come into the possession * of the Italian State, of local authorities, of public institutions and publicly owned companies and associations" and adds that "should the material referred to *not be in Italy*,* the Italian Government shall endeavour to recover and deliver it to the Yugoslav Government".¹⁵⁵

(26) However, some French writers of an earlier era seemed for a time to accept a contrary rule. Referring to partial annexation, which in those days was the most common type of State succession, owing to the frequent changes in the political map of Europe, Despagnet wrote: "The dismembered State retains archives relating to the ceded territory which are preserved in a repository situated outside that territory".¹⁵⁶ Fauchille did not go so far as to support this contrary rule, but implied that distinctions could be drawn: if the archives are outside the territory affected by the change of sovereignty, exactly which of them must the dismembered State give up? As Fauchille put it: "Should it hand over only those documents that will provide the annexing Power with a means of administering the region, or should it also hand over documents of a purely historical nature?"¹⁵⁷

(27) The fact is that these writers hesitated to support the generally accepted rule, and even went so far as to formulate a contrary rule, because they accorded excessive weight to a court decision which was not only an isolated instance but bore the stamp of the political circumstances of the time. This was a judgement rendered by the Court of Nancy on 16 May 1896, after Germany had annexed Alsace-Lorraine, ruling that "the French State, which prior to 1871 had an imprescriptible and inalienable right of ownership over all these archives, *was in no way divested of that right by the change of nationality imposed on * a part of its territory*".¹⁵⁸ It should be noted that the main purpose in this case was not to deny Germany (which was not a party to the proceedings) a right to the archives belonging to the territories under its control at that time, but to deprive an individual of public archives which were improperly in his possession.¹⁵⁹ Hence, the scope of this isolated decision, which appeared to leave to France the right to claim from individuals archives which should or which might fall to Germany, seems to be somewhat limited.

¹⁵⁴ Article 12 of the Treaty of Peace with Italy of 10 February 1947 (United Nations, *Treaty Series*, vol. 49, p. 134). For the Rapallo Treaty, see League of Nations, *Treaty Series*, vol. XVIII, p. 387; for the Rome Treaty, *ibid.*, vol. XXIV, p. 31.

¹⁵⁵ United Nations, *Treaty Series*, vol. 171, p. 293.

¹⁵⁶ F. Despagnet, *Cours de droit international public*, 2nd ed. (Paris, Librairie de la Société du Recueil général des lois et des arrêts fondé par J.-B. Sirey, 1899), p. 106, para. 99.

¹⁵⁷ P. Fauchille, *op. cit.*, p. 360, para. 219.

¹⁵⁸ Judgement of the Court of Nancy of 16 May 1896, Dufresne v. the State (M. Dalloz et al., *Recueil périodique*. . . (Paris, Bureau de jurisprudence générale, 1896), part 1, pp. 411-412.

¹⁵⁹ The decision concerned sixteen cartons of archives which an individual had deposited with the archivist of Meurthe-et-Moselle. They related both to the ceded territories and to territories which remained French, and this provided a ground for the Court's decision.

(28) The Special Rapporteur has nevertheless mentioned this isolated school of thought because it seemed to prevail, at least for some time and in some cases, in French diplomatic practice. If we are to give credence to one interpretation of the texts at least, this practice seems to indicate that only administrative archives should be returned to the territory affected by the change of sovereignty, while historical documents relating to that territory which are situated outside or are removed from it remain the property of the predecessor State. For example, the Treaty of Zurich of 10 November 1859 between France and Austria provided that archives containing *titles to property and documents concerning administration and civil justice* relating to the territory ceded by Austria to the Emperor of the French "which may be in the archives of the Austrian Empire", including those at Vienna, should be handed over to the commissioners of the new government of Lombardy.¹⁶⁰ If there is justification for interpreting in a very strict and narrow way the expressions used, which apparently refer only to items relating to current administration, it may be concluded that the historical part of the imperial archives at Vienna relating to the ceded territories was not affected.¹⁶¹

Article 2 of the Treaty of the same date between France and Sardinia¹⁶² refers to the aforementioned provisions of the Treaty of Zurich, while article 15 of the Treaty concluded between Austria, France and Sardinia on the same date reproduces them word for word.¹⁶³

Similarly, a Convention between France and Sardinia, signed on 23 August 1860 pursuant to the Treaty of Turin of 24 March 1860 confirming the cession of Savoy and the County of Nice to France by Sardinia, includes an article 10 which is cast in the same mould as the articles cited above when it states:

Any archives containing titles to property and any administrative, religious and civil justice documents relating to Savoy and the administrative district of Nice which may be in the possession of the Sardinian Government shall be handed over to the French Government.¹⁶⁴

(29) Here again, the Special Rapporteur is somewhat hesitant to conclude that these texts contradict the existence of a rule permitting the successor State to claim all archives, including historical archives, relating

¹⁶⁰ Article 15 of the Treaty of Peace between France and Austria, signed at Zurich on 10 November 1859 [France, *Archives diplomatiques, Recueil de diplomatie et d'histoire* (Paris, Aymot, édit., 1861), t. 1, p. 10; M. de Clercq, *op. cit.*, t. VII (1856-1859), p. 647].

¹⁶¹ For this viewpoint, see G. May, "La saisie des archives du département de la Meurthe pendant la guerre de 1870-1871", in *Revue générale de droit international public* (Paris, A. Pédone, édit., 1911), t. XVIII, p. 35, and G. May, *Le Traité de Francfort* (Paris, Berger-Levrault et Cie, édit., 1909), p. 269, foot-note 2.

¹⁶² Article 2 of the Treaty between France and Sardinia concerning the cession of Lombardy, signed at Zurich on 10 November 1859 (France, *Archives diplomatiques, Recueil de diplomatie et d'histoire* (Paris, Aymot, édit., 1861), t. I, p. 14; M. de Clercq, *op. cit.*, p. 652).

¹⁶³ Article 15 of the Treaty between Austria, France and Sardinia, signed at Zurich on 10 November 1859 (France, *Archives diplomatiques, Recueil de diplomatie et d'histoire* (Paris, Aymot, édit., 1861), t. I, pp. 22-23; M. de Clercq, *op. cit.*, pp. 661-662).

¹⁶⁴ M. de Clercq, *op. cit.*, t. VIII (1860-1863), p. 83; G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Librairie Dieterich, 1869), t. XVII, part II, p. 25.

to the territory affected by the change of sovereignty which are situated outside that territory. Would it, after all, be very rash to interpret the words "titles to property" in the formula "titles to property, administrative, religious and judicial documents", which is used in all these treaties, as alluding to historical documents (and not only administrative documents) that prove the ownership of the territory? The fact is that in those days, in the Europe of old, the territory itself was the property of the sovereign, so that all titles tracing the history of the region concerned and providing evidence regarding its ownership, were claimed by the successor.¹⁶⁶ If this view is correct, the texts mentioned above, no matter how isolated, do not contradict the rule concerning the general transfer of archives, including historical archives, situated outside the territory concerned. If the titles to property meant only titles to public property, they would be covered by the words "administrative and judicial documents". Such an interpretation would seem to be supported by the fact that these treaties usually include a clause which appears to create an exception to the transfer of all historical documents, in that private documents relating to the reigning house, such as marriage contracts, wills, family mementoes, and so forth, are excluded from the transfer.¹⁶⁶

(30) What really clinches the argument, however, is the fact that these few cases which occurred in French practice were deprived of all significance when France, some ninety years later, claimed and actually obtained the remainder of the Sardinian archives, both historical and administrative, relating to the cession of Savoy and the administrative district of Nice, which were preserved in the Turin repository. The agreements of 1860 relating to that cession were supplemented by the provisions of the Treaty of Peace with Italy of 10 February 1947, article 7 of which provided that the Italian Government should hand over to the French Government

*all archives, historical and administrative, prior to 1860, which concern * the territory ceded to France under the Treaty of March 24, 1860, and the Convention of August 23, 1860.*¹⁶⁷

(31) Consequently, there seems to be ample justification for accepting as a rule which adequately reflects State practice the fact that the successor State should receive all the archives, historical or other, relating to the territory affected by the change of sovereignty, even if those archives have been removed or are situated outside that territory.

(32) In more recent times, in cases of decolonization, the application of such a principle would help new States to

acquire greater mastery of their internal and external problems. A better knowledge of these problems can be gained only through the possession of retired or current archives, which should be left with or returned to the States concerned. For obvious reasons, however, the former colonial Power cannot be expected to agree to hand over all archives, especially those linked to its *imperium* over the territory concerned. Many considerations relating to politics and expediency prevent such Powers from leaving to the new sovereign revealing documents on colonial administration. For that reason, the principle of the transfer of such archives—which the former metropolitan country is careful to remove before independence—is rarely applied in practice.

At this point, a distinction must be drawn between the various categories of archives which the former metropolitan country is tempted to evacuate before the termination of its sovereignty. A distinction should be made between (a) historical archives proper, which antedate the beginning of colonization of the territory, (b) archives of the colonial period, relating to the *imperium* and *dominium* of the metropolitan country and to its colonial policy generally in the territory, and (c) purely administrative and technical archives relating to the current administration of the territory.

(33) The information collected by the Special Rapporteur, which although voluminous is not sufficiently complete to permit the formation of a definitive judgement, seems to show that the problem of returning the archives removed by the former metropolitan country to the new independent State has not yet been solved satisfactorily. It may even be said that, no matter how sound and well-founded the principle of the transfer of archives may be, it would be unreasonable to expect the immediate return of all the archives referred to under (b) above. Indeed, in the interest of good relations between the predecessor State and the successor State, it may be unrealistic and undesirable for the new independent State to claim them and to start a dispute over them which is bound to be difficult.

(34) However, in the case of the archives mentioned under (a) above, which may have been removed by the former metropolitan country, the principle of transfer should be firmly and immediately applied. These archives antedate colonization, they are the product of the land and spring from its soil; they are bound up with the land where they came into existence and they contain its history and its cultural heritage.

(35) Similarly, the removal of administrative documents of all kinds mentioned under (c) above, which may have occurred in some cases, is bound to be a source of considerable inconvenience, confusion and maladministration for the young independent State, which already faces considerable difficulties owing to its inexperience and lack of trained personnel. Except in the rare cases where independence resulted from a sharp and sudden rupture of the links between the metropolitan country and the territory, which, compounded by misunderstandings or rancour, led to the malicious destruction or removal of administrative documents, the removal of these archives, which are instruments of administration, has reflected primarily the metropolitan country's desire

¹⁶⁶ As the Special Rapporteur noted above, historical documents were often claimed by the successor State as instruments of evidence (see para. 11).

¹⁶⁶ Article 10 of the Convention between France and Sardinia of 23 August 1860 (see foot-note 164 above) provided that France was to return to the Sardinian Government "titles and documents relating to the royal family", which implies that France had already taken possession of them together with the other historical archives. This clause relating to private papers, which is based on the dictates of courtesy, is also included, for example, in the Treaty of 28 August 1736 between France and Austria concerning the cession of Lorraine, article 16 of which left to the Duke of Lorraine family papers such as "marriage contracts, wills and other papers".

¹⁶⁷ United Nations, *Treaty Series*, vol. 49, p. 132.

to retain documents and titles which might concern the minority composed of its own nationals. However, reproduction techniques are now so highly developed that it would be unreasonable and unjustified to retain such administrative or technical archives, as this would entail depriving a majority in order to meet the needs of a minority, which could, moreover, be satisfied in another way.

(36) Generally speaking, it is to be hoped that the formulation of the rule of transfer will lead to better relations between States and open the way for appropriate co-operation in the field of archives. This would enable the new sovereignty to recover the items which express its history, its traditions, its heritage and its national genius and provide it with a means of improving the daily life of its inhabitants, and would also enable the former sovereignty to ease its own difficulties, intangible and material, which inevitably accompany its withdrawal from the territory.

(37) Professor Rousseau, discussing a case of decolonization, writes:

The problem is posed at present in the relations between France and Cambodia, but so far no final settlement seems to have been reached. The logical solution would be the return of all items concerning the history of Cambodia during the period in which France assumed international responsibility for its affairs (1863-1953).¹⁶⁸

In the case of Algeria, historical archives concerning the pre-colonial period, which had been carefully catalogued by the colonial administration, were removed by the latter immediately before independence.¹⁶⁹ The negotiations between the two Governments have so far resulted in the return of some of the documents from the Turkish collection and microfilms of part of the Spanish collection.¹⁷⁰

B. Archives established outside the territory

(38) This section concerns archives consisting of items and documents which relate to the territory affected by the change of sovereignty but which were established and have always been kept outside the territory. Many treaties include this category among the archives which must revert to the successor State.

The Protocol concerning retrocession by Sweden to France of St. Bartélemy in the West Indies provides that papers and documents of all kinds relating to the acts [of the Swedish Crown] which may be in the possession of the Swedish administration * [...] shall be handed over to the French Government.¹⁷¹

¹⁶⁸ Ch. Rousseau, *op. cit.*, p. 136.

¹⁶⁹ These archives are commonly known as the Arab collection, the Turkish collection and the Spanish collection.

¹⁷⁰ Exchange of notes between Algeria and France, which took place at Algiers on 23 December 1966.

¹⁷¹ Article 3, paragraph 2, of the Protocol of Paris of 31 October 1877, annexed to the Treaty between France and Sweden signed in Paris on 10 August 1877 (M. Dalloz *et al.*, *Recueil périodique* . . . (Paris, Bureau de Jurisprudence générale, 1878), 4th part, pp. 33-34; G. F. de Martens, éd., *Nouveau Recueil général de traités* (Göttingen, Librairie Dieterich, 1879), 2nd series, t. IV, p. 368.

In section VIII of the Treaty of Versailles, concerning Shantung, article 158 states that Germany shall hand over to Japan the archives and documents relating to the territory of Kiaochow, "wherever they may be".¹⁷²

Article 1 of the Convention between the United States of America and Denmark concerning the cession of the Danish West Indies, signed on 4 August 1916,¹⁷³ provides for the transfer to the United States of any archives relating to the islands which may be in Denmark, just as article VIII of the Treaty of Peace between Spain and the United States of America of 10 December 1898 already gave the United States the same right over the documents of the archives established in Spain which referred to Cuba, Puerto Rico, the Philippines and the island of Guam.¹⁷⁴

France was able to obtain,¹⁷⁵ through the Treaty of Peace with Italy of 10 February 1947, archives relating to Savoy and Nice established by the City of Turin.

Under the agreement signed at Craiova on 7 September 1940 concerning the cession of Southern Dobruja from Romania to Bulgaria, the latter obtained not only the archives situated in the ceded territory but also certified true copies of the documents at Bucharest relating to the region which had become Bulgarian.

(39) What if the archives relating to the territory affected by the change of sovereignty are situated neither within the territory itself nor in the predecessor State? The generality of the provisions of article 158 of the Treaty of Versailles¹⁷⁶ excluded any attenuation of the obligation laid on the predecessor State, which was to hand over the archives wherever they might be, but on the other hand article 1 of the Agreement between Italy and Yugoslavia of 23 December 1950¹⁷⁷ provided that "should the material referred to not be in Italy, the Italian Government shall endeavour * to recover and deliver it to the Yugoslav Government *. In other words, to use terms dear to experts in French civil law, the former is a rigorous obligation concerning the result, while the latter is a simple obligation concerning the means.

VI. SPECIAL OBLIGATIONS OF THE SUCCESSOR STATE

(40) The proposed draft article puts the successor State under an essential obligation which is the natural counterpart of the obligation of the predecessor State to transfer all archives to the successor. Changes of sovereignty over a territory are often accompanied by population movements (establishment of new frontier lines which divide the inhabitants on the basis of a right of choice, annexations leaving the population a choice of nationality, return of the colonizing minority to the metropolitan country when a territory becomes independent, etc.). Clearly, the populations in question cannot be governed without, at least, administrative archives. For that reason the second

¹⁷² See foot-note 153 above.

¹⁷³ See foot-note 123 above.

¹⁷⁴ See foot-note 126 above.

¹⁷⁵ See para. 30 above.

¹⁷⁶ See foot-note 153 above.

¹⁷⁷ See foot-note 128 above.

paragraph of the draft article provides that the successor State shall not refuse to hand over to the predecessor State, upon its request, copies of any archives which it may need. Of course, this must be done at the expense of the requesting State.

It seemed useful to extend this possibility even to third States, since such States may have nationals returning from the territory affected by the change of sovereignty, where they may have constituted a relatively large minority.

(41) Clearly, however, the successor State is only obliged to hand over copies of administrative documents and other documents used for current administration. Furthermore, the handing over of these documents must not jeopardize the security or sovereignty of the successor State. For example, if the predecessor State claims the purely technical file for a base it has constructed in the territory or the judicial record of one of its nationals who has left the ceded territory, the successor State can refuse to hand over copies of either. Such cases involve elements of discretion and expediency of which the successor State, like any other State, may not be deprived.

(42) The successor State is sometimes obliged, by treaty, to preserve carefully certain archives which may be of interest to the predecessor State in the future. The aforementioned Convention of 4 August 1916 between the United States of America and Denmark for the cession of the Danish West Indies provides, in the third paragraph of article 1, that "such archives and records shall be carefully preserved, and authenticated copies thereof, as may be required, shall be at all times given to [...] the Danish Government [...] or to such properly authorized persons as may apply for them."¹⁷⁸

The Agreement of 21 October 1954 between France and India is even more interesting, because it specifies the period of time for which the archives are to be preserved, and states that copies of the archives shall be handed over to the predecessor State whenever they exist.¹⁷⁹

In some cases, the successor State has handed over

copies or microfilms not only of administrative archives but also of historical documents and papers.¹⁸⁰

VII. CASES WHERE THERE IS MORE THAN ONE SUCCESSOR

(43) The draft article says nothing about the problem which arises when there is more than one successor State. The Special Rapporteur feels that there is no need to encumber the wording of the proposed article by making specific provision for this case. The archives can be divided on the basis of all the principles set out above. Each successor State receives the part of the archives situated in the territory over which it is now exercising its sovereignty. The central archives can be divided among all the successor States, in so far as they are divisible, each territory receiving the part relating to it. If some of the central archives are indivisible and relate to one or more of the successors, they are placed in charge of the State they concern most directly. That State is then responsible for making copies of them for the other States.

(44) Practice in this field has usually been based on these rules. In the case of India and Pakistan, the archives were left to the two Dominions,¹⁸¹ which decided in an agreement of 1 December 1947 that documents concerning one of the two States exclusively would be given to that State, and that the others would be copied and divided between them.

When Czechoslovakia was annexed by Hitler's troops, its archives were divided among the Third Reich, the Protectorate of Bohemia-Moravia, Hungary and Slovakia.¹⁸² The Treaty of Peace with Hungary of 10 February 1947 met the demands of Yugoslavia and Czechoslovakia, which recovered and divided the archives, including those relating to the two countries which were in the possession of Hungary between 1848 and 1919 (article 11 of the Treaty).¹⁸³

VIII. TIME-LIMITS FOR HANDING OVER THE ARCHIVES

(45) The Special Rapporteur considered it unnecessary to suggest the fixing of a time-limit for the transfer or

¹⁷⁸ See foot-note 123 above.

¹⁷⁹ See foot-note 90 above. Article 10 concludes as follows:

"The records of the French courts shall be preserved in their entirety during a period of twenty years and communication of their contents shall be given to the duly accredited representatives of the French Government whenever they apply for such communications."

Article 11 reads:

"The records of the Registrars' offices shall be preserved and copies or extracts of the proceedings shall be issued to the parties or the authorities concerned upon request.

"The third copies of each of the Registrars' offices books of every commune shall be handed over to the French representative on the date of the *de facto* transfer.

"For the year 1954, the records of the Registrars' offices which concern the Ministère de la France d'outre-mer (Service de l'Etat civil et des Archives) shall be forwarded to that department at the end of the year.

"The personal judicial records of the Courts' Registries shall be preserved and copies or extracts of these records shall be issued to the French authorities upon their application."

¹⁸⁰ After France had restored to Algeria certain items from the "Turkish collection", which forms part of the historical archives removed immediately before independence, Algeria offered France microfilms of some documents from that collection following their return. It had previously allowed all the registers of births, marriages and deaths in Algeria to be microfilmed.

¹⁸¹ The Indian Independence (Rights, Property and Liabilities) Order, 1947, article 7 (*The Gazette of India Extraordinary*, 14 August 1947, p. 915).

¹⁸² Convention of 4 October 1941 between the Third Reich and the Protectorate of Bohemia-Moravia (*Reichsgesetzblatt*, Teil II [Official Gazette, part II], Berlin, 24 April 1942, No. 13, p. 195); Agreement of 13 April 1940 between the Third Reich and Slovakia (*ibid.*, 20 August 1941, No. 34, p. 305); Agreement of 21 May 1940 between the Third Reich and Hungary (*ibid.*, 6 June 1941, No. 23, p. 199).

¹⁸³ See foot-note 141 above.

return of archives to the successor State, although diplomatic practice often sanctions the existence of specific provisions along those lines.¹⁸⁴

Furthermore, in most countries public archives are not only inalienable but may also be claimed at any time because they are imprescriptible. The Special Rapporteur has cited various cases in this commentary, and will recall here only the case of the Icelandic parchments which were claimed from Denmark and obtained after a century, although they had been bequeathed to the University of Copenhagen in conformity with Danish law.¹⁸⁵

IX. TRANSFER AND RETURN FREE OF COST

(46) The Special Rapporteur felt that there would be no point in spelling out something which goes without saying, namely, that archives must be handed over to the successor State free of cost and free of any tax or duty. The problem has already been settled in principle in draft article 2, which states that property appertaining to sovereignty over the territory shall be transferred automatically and without compensation. This property includes archives. Furthermore, this usage is firmly established in practice.

The Special Rapporteur has nevertheless included the principle of transfer free of cost implicitly and *a contrario* in draft article 7, which provides that copies of archives shall be made at the expense of the requesting State.

X. LIBRARIES

(47) The Special Rapporteur has not yet succeeded in obtaining sufficient information on the transfer of libraries. The problem seems to brook no discussion as regards the principle that libraries should be transferred to the successor State and as regards the return of libraries removed by the predecessor State immediately before the change of sovereignty, even if some newly independent States have not yet succeeded in practice in arranging for the effective application of either of these principles. As to libraries which were not removed by the predecessor,

but were established outside the territory with the latter's funds, they too should be transferred to the State which is henceforth to exercise sovereignty over the territory. This point touches on the wider problem of succession to public property situated outside the territory, which will be considered below.

The two examples to which brief reference will be made are taken from the work of Professor Charles Rousseau.¹⁸⁶ The Special Rapporteur does not know whether a final solution has been found for these two cases since Professor Rousseau studied the problem in 1964.

A. *The problem of the allocation of the India Office Library*

(48) In 1801 the British East India Company established a library which now contains about 280,000 volumes and some 20,000 unpublished manuscripts, constituting the finest treasury of Hinduism in the world. In 1858 this library was transferred to the India Office in Whitehall. After the partition in 1948, the Commonwealth Relations Office assumed responsibility for the library. On 16 May 1955 the two successor States, India and Pakistan, asked the United Kingdom Government to allow them to divide the library on the basis of the percentages (82.5 per cent for India, 17.5 per cent for Pakistan) used in 1947 for dividing all assets between the two Dominions.

The problem would assuredly be quite difficult to solve, since the Government of India Act of 1935 allocated the contents of the Library to the Crown. Since the Commonwealth Relations Office could not find a solution, the case was referred in June 1961 to arbitration by three Commonwealth jurists, who were members of the Judicial Committee of the Privy Council.¹⁸⁷

B. *The problem of the allocation of the Prussian Library*

(49) Difficulties having arisen with regard to the allocation of this large library which contains 1.7 million volumes and various Prussian archives, an Act of 25 July 1957 of the Federal Republic of Germany placed it in the charge of a special body, the "Foundation for the Ownership of Prussian Cultural Property". This legislative decision is at present being contested by the German Democratic Republic.

Article 8. Property situated outside the territory

Subject to the application of the rules relating to recognition, public property of the ceded territory itself which is situated outside that territory shall pass within the juridical order of the successor State.

¹⁸⁴ The archives were to be handed over "without delay" (article 93 of the Treaty of Saint-Germain-en-Laye, article 77 of the Treaty of Trianon, articles 38 and 52 of the Treaty of Versailles [see foot-note 120 above], etc.). The immediate transfer of the archives was provided for in General Assembly resolution 388 (V) of 15 December 1950 relating to Libya [article I, para. 2 (a)]. Sometimes provision is made for a *time-limit of three months* (Treaty of Versailles, article 158 [see foot-note 120 above]) or *eighteen months* (Treaty of Peace with Italy, article 37 [see foot-note 119 above]). It has also been stipulated that arrangements should be made by agreement for the handing over of archives "so far as is possible, *within a period of six months** following the entry into force of the [...] treaty" (article 8 of the Treaty of 8 April 1960 between the Netherlands and the Federal Republic of Germany [see foot-note 117 above]). Article 11 of the 1947 Treaty of Peace with Hungary is one of the most specific with regard to time-limits: it establishes a veritable time-table within the framework of a time-limit of eighteen months (see foot-note 141 above). In some cases the establishment of a time-limit is left to a joint commission, which is responsible for locating the archives and arranging for their transfer.

¹⁸⁵ See para. 22 above.

¹⁸⁶ Ch. Rousseau, *op. cit.*, pp. 137-139.

¹⁸⁷ However, both India and Pakistan had abolished from their domestic judicial systems appeals to the Judicial Committee of the Privy Council in London against decisions of their respective Supreme Courts (Indian Act No. 5 of 1949; the Pakistan Federal Court Jurisdiction Act of 12 April 1950).

The ownership of such property shall devolve to the successor State in cases of total absorption or decolonization.

COMMENTARY

I. EXPOSITION OF THE PROBLEM

(1) In paragraphs (23) to (34) of the commentary on article 2, the Special Rapporteur considered one aspect of the problem of property of the territory itself where such property appertains to sovereignty. In paragraphs (21) to (39) of the commentary on article 7, he also discussed this question as it relates to public archives situated outside the territory affected by the change of sovereignty. These few previous remarks on the subject under discussion need not be repeated in the present commentary.

(2) The amount of public property situated abroad is not negligible. Sometimes a great deal of property is involved. In the case of a State which ceases to exist, the State may leave behind in other countries a portfolio of securities, gold and foreign currency reserves, educational, cultural or research establishments, and so forth. The dissolution of a union may raise the problem of how much of the cash value of the union's participation in international financial institutions is to be apportioned to each of its former components. Even a territory which becomes independent may leave in what was for it the metropolitan country such property as buildings, administrative premises, appurtenances of public establishments, or rest and recreation facilities acquired with funds of the then dependent territory.

(3) The Special Rapporteur was somewhat reluctant to recommend to the International Law Commission the adoption of a special article on the problem of public property situated abroad, since he felt sure that there was nothing, *at least in the field of State succession (which is the subject of his study)*, to justify special treatment for this category of property. Such property, like other kinds which do not seem to the Special Rapporteur to differ from it in any way, should be governed by the general principles enunciated in the preceding articles.

Nevertheless, as this category of property might, owing to the fact that it is situated outside the territory affected by the change of sovereignty, be subject to other rules derived not from State succession but from other sectors of international law, the Special Rapporteur persuaded himself to consider the effects of these norms on the rules relating to State succession itself. Here, the whole problem is dominated primarily by *the question of recognition*. The Special Rapporteur did not go into this at all, because to do so would be outside his terms of reference, but he did consider the reaction, as it were, of the topic of State succession in the sphere of the problems of recognition.

(4) Professor O'Connell writes:

It would seem that in the case of partial succession, property of the predecessor State not actually located in the territory does not change its ownership. It has not come within the sovereign jurisdiction of the successor State, and the latter can claim only so much of it as it can seize or as is ceded to it. In the case of

total succession, however, the predecessor loses its competence to own property. Such of its assets, therefore, as are situated in foreign countries must either become property of the successor State or cease to have any owner. There is no reason to adopt the latter alternative. A successor State in the case of total succession acquires all the rights of its predecessor that appertain to sovereign jurisdiction. Such jurisdiction embraces the capacity to possess assets located in foreign countries. It is reasonable to conclude, therefore, that the claims of the successor State to be the owner of the assets of its predecessor located in other States must be recognized by the States concerned.¹⁸⁸

He also cites a number of writers who admit succession to property abroad in cases of total succession.¹⁸⁹

(5) Professor Rousseau likewise takes the view that "it is generally agreed that property abroad of a State which is dismembered or which ceases to exist should also be transferred to the successor States [. . .]. There is little difference of opinion among writers on this point." Like O'Connell, however, he cites Professor Hall, who, along with a very few other writers, maintains that in the case of land situated outside the territory the successor State has at the most a right to its value.¹⁹⁰ An obligation to sell would be imposed on it, since the right of actual possession might prove more or less impracticable for some reason arising out of the fact that the property is now in foreign territory.

(6) It does seem, however, that some ambiguities of language, which are probably due to the difficulty of finding general expressions appropriate to all types of succession, should be cleared up.

In the case of partial succession, for instance, the point is not—at least in the view of the Special Rapporteur—what becomes of "public property of the predecessor State which is not situated in the ceded territory". Obviously, such property remains under the ownership of that State and cannot be transferred to the successor. What is at issue is the exact opposite, namely, the fate of public property of the *ceded territory* situated outside the boundaries of the territory, and in particular in the territory of the predecessor State.

(7) In the case of partial succession, however, writers do not always consider—or do not consider clearly—what happens to property of the ceded territory which is situated either in the now foreign territory of the predecessor State or in the territory of a third State. Professor Rousseau, for instance, does not consider this at all because he is only dealing with the case of total succession or, in other words, of "a State which is dismembered or which ceases to exist".¹⁹¹

Yet, as was mentioned above,¹⁹² the ceded territory may

¹⁸⁸ D. P. O'Connell, *State Succession . . . (op. cit.)*, p. 207.

¹⁸⁹ *Ibid.*, foot-note 2.

¹⁹⁰ W. E. Hall, *A Treatise on International Law*, 8th ed. (Oxford, Clarendon Press, 1924), p. 115.

¹⁹¹ In a paragraph headed "Exposition of the problem", Ch. Rousseau excludes even more clearly from the matters he is considering the problem of property of the ceded territory situated in the predecessor State:

"It is equally important to know where *the property affected by the transfer is situated*—whether it is in the territory transferred or in the territory of *any third State*" (Ch. Rousseau, *op. cit.*, pp. 122-123).

¹⁹² Cf. commentary on article 2 above, paras. 28-29.

have, and is necessarily the owner of, property of its own distinct from that the ownership of which was in the hands of the predecessor State when the territory was an integral part of that State, and such property of the ceded territory may, for one reason or another,¹⁹³ be situated outside its own geographical area, either in the territory remaining to the predecessor State or in a third State.

(8) In the case of total succession, which occurs as a result of the complete demise of the predecessor State through absorption or dismemberment, writers generally take the view that the predecessor State no longer has the legal capacity to own property and that its property abroad would become ownerless if it were not transferred to the successor State. Consequently, some writers feel that there would be no reason for refusing to assign such property to the successor State.

(9) For the sake of greater clarity, argumentation should in all cases be based not on the public property of the predecessor State itself (whether the latter has ceased to exist or has been curtailed) but on that belonging to the territory affected by the change of sovereignty (which can in the most extreme case be geographically identical with the entire territory of the predecessor State).

Thus, partial succession results in two situations as regards property of the ceded territory itself which is situated outside its physical boundaries: it may be situated either in the ceding State or in a third State. The sole difference in the case of total succession is that only the second alternative is possible, because the predecessor State has ceased to exist. In this case, the territory ceded and the territory of the ceding State are geographically coextensive.

(10) To say that in the case of total succession the successor receives the public property of the predecessor because the property would otherwise become abandoned and ownerless is not a fully explicative argument. Abandonment of the property is not *the reason* for the *right* to succeed; at the most, it is *the occasion* for it. After all, ownerless property may be appropriated by anyone, and not necessarily by the successor. Indeed, if abandonment were the only consideration it might seem more natural, or at least more expedient, to assign the property to the third State in whose territory it is situated.

(11) It would perhaps be simpler to specify, in the case of partial succession as in that of total succession, that State succession triggers off a process of transfers of rights¹⁹⁴ which must definitely be effected in favour of the successor State, and not at all in favour of the predecessor State or the third State. In other words, State succession cannot have the paradoxical effect of conferring on the predecessor State a right of ownership which it did not possess prior to the transfer of the territory.

In the case of partial succession, it has been suggested that what is involved is property *belonging* to the ceded territory which is situated outside that territory. If the State of which the territory was formerly an integral

part did not already own the property before the cession of the territory, it is impossible to see how it could become the owner of it once the cession has been effected. What State succession normally means for the ceding State is a loss of property rights, and not the creation of such rights.

If the property in question is to continue to belong as of right to the ceded territory—and one does not see why it should be otherwise—it will be understood that it passes, along with the territory ceded, within “the juridical order of the successor State” as defined below.¹⁹⁵ In other words, what the effects of State succession amount to in this case is that the juridical order of the cessionary State is substituted for that of the ceding State (which, not having been the owner of the property in question, had only the right to subject them to its juridical order).

In the case of total succession, the public property of the ceded territory itself is coextensive with the public property of the ceding State. The two are identical because the territory ceded is coextensive with the territory of the State which has ceased to exist.

(12) Accordingly, in this study concerning the fate of property of the territory itself which is situated outside its geographical boundaries, three comments may be made:

(a) One hardly seems to encounter any writers who have really objected to the principle of the succession of the new sovereignty to public property situated outside the territory. However, two qualifications should be attached to this statement: firstly, very few writers have discussed the problem, and then only very briefly, and, secondly, they have concentrated primarily on total succession, where the predecessor State ceases to exist. They have not considered the problem in other cases of succession, where there is public property belonging to the ceded territory which is either in the predecessor State or in a third State. Writers seem to have regarded this case as self-evident. Ownership of the property is not transferred, but remains with the ceded territory; however, as the territory falls under a new sovereignty, it is the new juridical order which governs this property also. The reason why the question is neglected in the context of succession to public property is probably that the problem it poses is not that of succession to such property but that of the substitution of one juridical order for another as applying to the property in question.

(b) Judicial decisions are even scantier than writings. Actually, they do not appear to espouse the position expressed by the writers. This did not seem to the Special Rapporteur sufficient reason to disagree with the writers and suggest a draft article reflecting the decisions of the courts, since the latter appear to have been constrained by a factor whose implications for State succession distorted their decisions; this factor, as has been mentioned, is the problem of recognition. Sometimes, in fact, the decisions went against the successor State not so much because the existence of a rule as expressed in the draft article was denied as because the successor State

¹⁹³ *Idem*, para. 32.

¹⁹⁴ The problem of *obligations* is not considered here, since what is under discussion is essentially an asset, namely, public property.

¹⁹⁵ See para. 16 below.

had not been recognized by the third State within whose jurisdiction the decision was rendered.

(c) Lastly, an analysis of practice shows that this is really more a matter of succession of governments than of succession of States. Nevertheless, it seemed useful to give an account of the practice because it embodies the elements of a significant trend. Moreover, it is sometimes difficult to determine the precise nature of a case which may be on the border line between the two types of succession.

(13) Clarity of exposition demands that a sharp distinction should be made between cases where the property situated outside the territory affected by the change of sovereignty is in the predecessor State and cases where it is in a third State.

II. PROPERTY OF THE TERRITORY SITUATED IN THE PREDECESSOR STATE

(14) This case is encountered in all types of succession (e.g., decolonization or partial annexation) that leave the predecessor State in existence, although within a reduced territory.

This is a clear case: it concerns property belonging as of right to the territory affected by the change which is situated in the rest of the territory retained by the predecessor State. It applies to all types of succession except one, which is obviously excluded, namely, total succession through the demise of the predecessor State itself. It is a logical impossibility in this case that there should be property of the territory itself which is outside the ceded territory but at the same time is in the predecessor State, since the two geographical areas are identical.

Consequently, only types of succession other than that resulting from the demise of a State can be considered in the present context.

A. *Non-transferability of ownership of property of this kind*

(15) The occurrence of State succession does not transfer the right of ownership of property of this kind. The property remains within the patrimony of the ceded territory.

(a) It cannot suddenly, merely because of the succession, become the property of the predecessor State, even if it is situated in the territory remaining to that State after curtailment. Since the predecessor State did not own this property before succession, it cannot, as a result of the succession, create new rights for itself.

(b) Nor does property of this kind pass to the successor State merely because of the succession. There is no valid reason for stripping the ceded territory of its own property.

Exceptions may, however, be made in two ways—either by treaty provisions to the contrary or by an act of the new sovereign after the transfer of the territory. In either of these cases, however, the transfer of the right of ownership to the successor is not effected on the basis of the rules relating to State succession:

(i) There may be treaty provisions to the contrary. Annex XIV to the 1947 Treaty of Peace with Italy¹⁹⁶ allowed France, the successor State of Italy in certain frontier areas, to succeed to certain para-statal property normally belonging to the municipalities affected by the new boundary line. The Italian Government had contended, to no avail, that it could not have been the intention of the contracting Powers to strip municipalities of property which ensured their actual viability and to give it to the successor State. The Franco-Italian Conciliation Commission rejected this argument and decided that the clear wording of annex XIV of the Treaty of Peace undeniably transferred such *biens communaux* to the successor State.¹⁹⁷

(ii) The successor State has, of course, the sovereign power to modify, by an act of municipal law, the way in which ownership of the property is divided between itself and the territory it has incorporated. This operation, which can take place only after the transfer of the territory, may therefore affect the latter's right of ownership of the property which it possessed outside its geographical boundaries. It is, however, no longer covered by the rules relating to State succession and falls outside the scope of those rules.

B. *Modification of the legal régime governing property of this kind*

(16) If property of this kind should never pass to the predecessor State—and it generally does not pass to the successor State except as otherwise provided—it can only remain the property of the ceded territory. Although the right of ownership is thus non-transferable, there is a change in the rules governing the exercise and enjoyment of this right. The change is twofold:

Firstly, the predecessor State, in which the property is situated, will now treat it as *foreign* public property, with all that this implies as regards restrictive or protective legislation. This right of ownership, which is otherwise unchanged as regards the entity in which it is vested, is thus exercised in a new setting and it is the laws, if any, relating to foreign property that will now be applied to it by the predecessor State.

Secondly, the ceded territory has passed within a new juridical order—that of the successor State. As a result, property which belongs to that territory and which naturally follows the destiny of its owner can only be placed under the protection of this new juridical order. While it is true that the successor State is not given the ownership of this property, it nevertheless becomes the subject of international law responsible for the property. As the property belongs to a territory which belongs to that State, it falls within its juridical order. For example, it is the successor State that will ensure the international protection of the property against the predecessor State in which it is situated or against any third State.

It is this idea which, in a tentative and probably not entirely suitable formulation, the Special Rapporteur

¹⁹⁶ United Nations, *Treaty Series*, vol. 49, p. 225.

¹⁹⁷ Decision No. 163, of 9 October 1953 (see foot-note 112 above).

has tried to express in the suggested rule stating that "public property of the ceded territory itself which is situated outside that territory shall pass within the juridical order of the successor State".

(17) The problem of non-recognition, which can preclude the application of this provision in practice, rarely arises in this connexion. There may, of course, be cases where the State succession occurs against the wishes of the predecessor State (e.g., violent decolonization or sudden secession), which may be reluctant to recognize the situation. In such cases all the rules relating to succession, and not only the rule relating to property situated in the territory of the ceding State, are suspended in practice. We are concerned here, however, only with the usual situation in which the predecessor State assents to the change.

(18) It should also be noted that, in the case of decolonization, the territory ceded and the territory of the successor State are identical and coextensive, so that the property of the one is also the property of the other. In this type of succession, the successor State itself enjoys the ownership of this property and does not simply receive the property into the juridical order it has created.

C. Diplomatic practice

(19) It was difficult for the Special Rapporteur to characterize decolonization practice in the particular case of property situated abroad. While the principle of the transfer of such property to the newly independent State is not in question, it often proves difficult to put into practice because the former metropolitan country disputes not the principle but the fact of the right of ownership, because the territory which has seceded finds it difficult to know exactly how much property, and of what kind, it could rightfully claim, or because of other political or non-political considerations. For example, various colonial offices of an administrative or industrial and commercial nature, rest and recreation facilities for officials of the colonial territory and their families, administrative premises or residences may have been constructed or purchased in the metropolitan country by the detached territory, using its own funds or those of public agencies under its jurisdiction (e.g., family allowance or social security funds).

(20) The former colony of the Congo had in its patrimony a portfolio of Belgian shares situated in Belgium which in 1959, according to Professor D. P. O'Connell, were valued at \$750 million. The independent Congo does not appear to have recovered all these shares.¹⁹⁸

On the eve of independence, during the Belgian-Congolese Conference at Brussels in May 1960, the Congolese negotiators had requested that the liquid assets, securities and property rights of the Special Committee for Katanga and of the Union Minière should be divided in proportion to the assets of the Congo and its provinces, on the one hand, and of private interests, on the other hand, so that the new State could succeed to the sizable portfolio of stocks and shares situated outside its territory.

Numerous complications ensued, in the course of which the Belgian Government, without the knowledge of the prospective Congolese Government, pronounced the premature dissolution of the Special Committee for Katanga so that its assets could be shared out and the capital of the Union Minière could be reapportioned. This was all designed to ensure that the Congo no longer had a majority holding in these entities.¹⁹⁹ This first dissolution of the Special Committee, which was the principal shareholder in the Union and in which the State held a two-thirds majority while the rest belonged to the Compagnie du Katanga, was decided on 24 June 1960 under an agreement signed by the representatives of the Belgian Congo and of the Compagnie du Katanga.²⁰⁰ The agreement was approved by Decree of the King of the Belgians on 27 June 1960.²⁰¹

As a reaction against this first dissolution by the Belgian authorities, the constitutional authorities of the independent Congo pronounced a second dissolution of the Special Committee by Legislative Decree of 29 November 1964.

(21) The Belgian-Congolese Agreements of 6 February 1965²⁰² put an end to these unilateral measures by both parties. These Agreements are partly concerned with the assets situated in Belgium—in other words, public property situated outside the territory involved in the change of sovereignty. In exchange for the cession to the Congo of the net assets administered by the Special Committee in that territory, the Congolese party recognized the devolution to the Compagnie du Katanga of the net assets situated in Belgium. Various compensations and mutual retrocessions took place in order to unravel the tangled skein of respective rights. On 8 February 1965, Mr. Tshombé accepted the first part of the portfolio of the Congo on behalf of his Government, in an official ceremony at Brussels.

This was not, however, the end of the affairs. After General Mobutu had taken office, and after various upheavals, the Union minière du Haut-Katanga was nationalized on 23 December 1966²⁰³ because it had refused to transfer its headquarters from Brussels to Kinshasa, believing that the transfer would have the effect of placing under Congolese jurisdiction all the assets of the company situated outside the Congo. A compromise was finally reached on 15 February 1967.

(22) On the occasion of the disannexation of Ethiopia, articles 37 and 75 of the Treaty of Peace of 10 February 1947²⁰⁴ required Italy to restore objects of historical value to Ethiopia, and the Agreement of 5 March 1956²⁰⁵ between the two countries contained various annexes listing the objects concerned. Annex C allowed the return

¹⁹⁹ For an account of all these problems, see R. Kovar, "La 'congolisation' de l'Union minière du Haut-Katanga", *Annuaire français de droit international*, XIII, 1967 (Paris, C.N.R.S.), pp. 742-781.

²⁰⁰ *Moniteur congolais*, 19 September 1960, No. 38, p. 2053.

²⁰¹ *Ibid.*

²⁰² United Nations, *Treaty Series*, vol. 540, p. 227.

²⁰³ Fondation nationale des sciences politiques, *Chronologie politique africaine*, November-December 1966, 23 December 1966.

²⁰⁴ See foot-note 124 above.

²⁰⁵ *Idem.*

¹⁹⁸ D. P. O'Connell, *State Succession . . . (op. cit.)*, p. 228.

to Ethiopia of the large Aksum obelisk, which Italy was obliged to dismount and remove from a square in Rome and transport to Naples at its expense for shipment to Ethiopia.

(23) Some treaty provisions are restrictive, authorizing succession to public property only if it is *situated in the territory*, and not if it is located elsewhere.

This was so, for example, in the case of article 191 of the Treaty of Trianon cited above²⁰⁶ and in the case of the resolutions of the United Nations General Assembly on economic and financial provisions relating to Libya and Eritrea.²⁰⁷

In fact, however, such provisions do not conflict with the suggested rule, because they cover a different situation from the one with which we are concerned here. They involve public property of the *ceding State*—for example, the property of Italy in Libya or in Eritrea—whereas what is under discussion here is the exact opposite, namely, property of (formerly Italian) Libya or Eritrea themselves which is outside their geographical boundaries.

(24) There now remains to be discussed the case of property of the ceded territory itself which is in a third State. This is where the rules relating to recognition have to be considered in conjunction with those on State succession. This is also where a distinction should be drawn between total succession through the demise of the predecessor State and other types of succession.

III. PROPERTY OF THE TERRITORY SITUATED IN A THIRD STATE

(25) The position is clear in the case of absorption of a State (dismemberment, total annexation or *debellatio*). In this case, the successor State succeeds to property of the defunct State which is situated in a third State. As will be seen, however, the courts sometimes do not seem to have followed this rule because there was a problem of recognition.

(26) With other types of succession, the property of the territory passes within the juridical order of the successor State, except in the case of decolonization, where the actual ownership reverts to the new State because the territory ceded and the territory of the successor State are physically coextensive.

We shall now see how the courts have applied these rules in the case of these different types of succession.

A. Cession of vessels for navigation on the Danube

(27) In the case of the cession of vessels and tugs for navigation on the Danube, which was the subject of an arbitral award,²⁰⁸ there was no problem of recognition.

²⁰⁶ E. Parkes, J. E. Field and R. C. Thomson, eds., *British and Foreign State Papers* (London, H. M. Stationery Office, 1923), vol. 113, pp. 564-565.

²⁰⁷ United Nations General Assembly resolutions 388 (V) and 530 (VI) of 15 December 1950 and 29 January 1952 respectively.

²⁰⁸ Case of the cession of vessels and tugs for navigation on the Danube, Allied Powers (Greece, Romania, Serb-Croat-Slovene

In the course of the proceedings, Czechoslovakia had submitted a claim to ownership of a part of the property of certain shipping companies which had belonged to the Hungarian monarchy and to the Austrian Empire or received a subvention from them, on the ground that

these interests were bought with money obtained from all the countries forming parts of the former Austrian Empire and of the former Hungarian Monarchy, and that such countries contributed thereto in proportion to the taxes paid by them, and therefore, are to the same proportionate extent the owners of the property.²⁰⁹

(28) The position of Austria and Hungary was that, in the first place, the property was not *public* property, which alone could pass to the successor States, and, in the second place, even admitting that it did have such status because of the varying degree of financial participation by the public authorities, "the Treaties themselves do not give Czecho-Slovakia the right to State property except to such property *situated in Czecho-Slovakia*"²¹⁰

The arbitrator did not settle the question, on the ground that the treaty clauses did not give him jurisdiction to take cognizance of it. There is no contradiction between this decision and the principle of succession to public property situated abroad. It is obviously within the discretion of States to conclude treaties making exceptions to a principle.

B. Financial participation in international institutions

(29) Similarly, there is no problem of recognition in cases of succession in international organizations. One writer notes that "countries coming into existence through decolonization do not seem to have claimed any part of the subscriptions of the States which were responsible for their international relations", including, in particular, their representation in international financial institutions.²¹¹ This certainly comes within the case with which we are dealing—assets situated abroad, elsewhere than in the former metropolitan country. The fact that these newly independent countries—and particularly those which were deemed in law to form an integral part of the territory of the colonial Power—did not think of claiming some of these assets, or were unable to do so, cannot logically be used to refute the principle that has been enunciated. It will also be noted that, in cases of withdrawal from a union, succession to such property has been allowed in financial institutions of this kind. When

Kingdom, Czechoslovakia) v. Germany, Austria, Hungary and Bulgaria [Decision: Paris, August 2, 1921, Arbitrator: Walker D. Hines (USA)] (United Nations, *Reports of International Arbitral Awards*, vol. I (United Nations publication, Sales No.: 1948.V.2), pp. 97-212.

²⁰⁹ *Ibid.*, p. 120.

²¹⁰ *Ibid.*, pp. 120-121. The reference was to article 208 of the Treaty of Saint-Germain-en-Laye (E. Parkes, J. E. Field and R. C. Thomson, eds., *British and Foreign State Papers* (London, H. M. Stationery Office, 1922), vol. 112, pp. 412-414) and article 191 of the Treaty of Trianon (*ibid.* [1923], vol. 113, pp. 564-565).

²¹¹ L. Focsaneanu, "Les banques internationales intergouvernementales", *Annuaire français de droit international*, IX, 1963 (Paris, C.N.R.S.), p. 133.

the Syrian Arab Republic seceded from the United Arab Republic, it had no difficulty, in November 1961, in recovering 200 shares in the International Bank for Reconstruction and Development out of the total of 1,266 shares held by the union.

We turn next to cases in which the problem of recognition does arise.

C. Annexation of Ethiopia by Italy

(30) The foreign State in whose territory the property claimed by the successor State is situated usually allows the claim only if it has recognized the successor State *de jure*. This can be seen from a judgement of the Court of Appeal of England.²¹² After the annexation of Ethiopia by Italy in 1936, Emperor Haile Selassie claimed from a cable and wireless company sums which it owed to him. The company pleaded in defence, that the debt owed to the Emperor in his sovereign capacity had passed into the patrimony of the Italian State which has succeeded the sovereign, who had been divested of all public property.

(31) In the Chancery Division, where the case had been tried, the main issue had been the effect of the United Kingdom's *de facto* recognition, on 21 December 1936, of Italy's annexation of Ethiopia, of which the Emperor was still recognized by the United Kingdom to be the *de jure* sovereign. The trial court had ruled, in a decision of 27 July 1938, that the *de facto* recognition of the annexation was not sufficient to effect the transfer to Italy of the property situated in England, and the case was taken to the Court of Appeal. However, on 16 November 1938, before the appeal was considered on its merits, the United Kingdom finally recognized the King of Italy as the *de jure* Emperor of Ethiopia. The Court of Appeal ruled, in its judgement of 6 December 1938, that the right to sue had itself become vested in the successor State since the *de facto* recognition of 21 December 1936 and that the title to the property situated in England had accordingly passed to the new sovereign. The principle of succession to public property situated abroad was thus sanctioned even in the case of *de facto* recognition.

(32) Emperor Haile Selassie was equally unsuccessful in the French courts on another occasion. In his sovereign capacity, he was the holder of 8,000 shares of the Franco-Ethiopian Djibouti-Addis Ababa Railway Company, registered in the name of the Ethiopian Government; he wanted to convert the shares into bearer securities and to cash the coupons which had matured. The Italian Government lodged an objection with the Company's head office in Paris, requesting that the Emperor should be prohibited from selling, transferring or ceding the securities, which it claimed should revert to the successor State. The *juge des référés* of the *Tribunal de la Seine*, to whom the displaced sovereign applied for an order barring the objection of the Italian Government, declared that he had no jurisdiction in the case of an act of sov-

eighty by Italy.²¹³ The practical effect of this decision was to leave the Italian Government in ownership of the securities, which reverted to it despite an appeal by Emperor Haile Selassie. The original decision was confirmed on appeal²¹⁴ and, although the ruling again dealt solely with the question of jurisdiction, the result was to leave to the successor State the ownership of public property of the predecessor State situated abroad. Thus, the two decisions had the indirect effect of sanctioning the principle of the transfer of public property.

D. American War of Secession: the *McRae* case

(33) After the failure of the secession of the Southern states of the United States, the Federal Government claimed from a Southern agent who had settled in England funds which he had deposited there on the instructions of the secessionist authorities. The agent in question refused to hand over these funds to the Federal Government, arguing that he himself had various claims against the erstwhile Southern government.

(34) The judgement rendered by the Court of Equity of England in 1869 recalled the principle that the property of an insurrectionary government must, if that government is defeated, revert to the legal government as the successor. Since, however, the successor State could not have more rights than the entity in which the rights were formerly vested, the counter-claim of the agent *McRae* must be allowed and the amount of this claims, if they were justified, must be deducted from the funds claimed.

The judgement of the Court therefore confirmed the principle of the transfer to the successor State of public property situated abroad: it stated that it is

the clear public universal law that any government which *de facto* succeeds to any other government, whether by revolution or restoration, conquest or reconquest, *succeeds to all the public property [. . .] and to all rights in respect of the public property of the displaced power* *.²¹⁵

(35) According to some writers, this is a case of succession of States and not of succession of governments, since the Southern Confederate Government, which represented a number of states, had been recognized, at least as a

²¹³ One of the reasons given in the decision was:

"The *juge des référés* cannot pass judgement on the validity of the objections without resolving, at least implicitly, the dispute regarding the ownership of the securities, which is an extremely weighty matter involving principles of public international law and of private law that are manifestly outside his jurisdiction" (*Tribunal civil de la Seine, ordonnance de référé* of the President of the Tribunal, dated 2 November 1937, *Gazette du Palais*, 16 December 1937; commentary in Ch. Rousseau, "Le conflit italo-éthiopien", *Revue générale de droit international public* [Paris, A. Pédone, édit., 1938], t. XLV, pp. 98-99, and *ibid.* [1939], t. XLVI, pp. 445-447).

²¹⁴ Appeals Court of Paris, Haile Selassie v. Italian State, 1 February 1939; *Gazette des tribunaux*, 18 March 1939; *Gazette du Palais*, 11 April 1939; *Revue générale de droit international public* (Paris, A. Pédone, édit., 1947), t. LI, p. 248. In addition to its own statement of reasons, the Court repeated word for word the reason given by the *juge des référés* (quoted in footnote 214).

²¹⁵ D. P. O'Connell, *State Succession . . . (op. cit.)*, p. 208.

²¹² Court of Appeal of England, judgement of 6 December 1938, Emperor Haile Selassie v. Cable and Wireless, Ltd. (H. Lauterpacht, *Annual Digest and Reports of Public International Law Cases, 1938-1940* (London, Butterworth and Co., Ltd., 1942), case No. 37, pp. 94-101).

belligerent, by various foreign States because it had exercised an effective administration for a lengthy period of time over a clearly defined territory.

E. *The case of Irish funds deposited in the United States of America*²¹⁶

(36) Irish revolutionary agents of the Sinn Fein movement had deposited in the United States funds collected by a republican political organization, the Dáil Éireann, which had been established at the end of the First World War with the aim of forcibly overthrowing the British authorities in Ireland and proclaiming the independence of the country. During the Irish uprising of 1920-1921, these movements brought forth a revolutionary republican *de facto* government, headed by E. De Valera.

When a Government of the "Irish Free State" was constituted by the Treaty between Great Britain and Ireland of 6 December 1921, this new authority claimed the funds from the United States, as the successor of the insurrectionary *de facto* government.

An Irish court upheld this claim, ruling that the Government of the Irish Free State was "absolutely entitled to all the property and assets of the [*de facto*] Revolutionary Government upon which as a foundation it had been established".²¹⁷

(37) However, an American court dismissed the claim. The two judgements to this effect rendered by the Supreme Court of New York (New York County)²¹⁸ stated that, although the case involved a problem of succession of State or government, the Court considered that the Irish Free State was the successor of the British State and that consequently the Government of the Free State was not the successor of the "insurrectionary government", which was only a political organization and not a government recognized as such by the British authorities or by any foreign State.

The Supreme Court of New York therefore held that only Great Britain could be entitled to claim the funds. Although the case does not concern a succession of States, it is interesting to note that it could be deduced from the reasons stated by the Court that, if the funds had been paid over to Great Britain, the Irish Free State would in turn have been able to claim them from Great Britain as the successor State of that country.

²¹⁶ See E. D. Dickinson, "The case of the Irish Republic's Funds", *The American Journal of International Law* (Concord [N.H.], 1927), vol. 21, pp. 747-753; J. W. Garner, "A Question of State Succession", *ibid.*, pp. 753-757; Ch. Rousseau, *Cours de droit international public. — Les transformations territoriales . . . (op. cit.)*, pp. 145-146; D. P. O'Connell, *State Succession . . . (op. cit.)*, pp. 208-209; Ch. K. Uren, "The Succession of the Irish Free State", *Michigan Law Review* (Ann Arbor [Mich.], University of Michigan Law School, 1930), vol. XXVIII (1929-1930), p. 149.

²¹⁷ Supreme Court of the Irish Free State, *Fogarty and others v. O'Donoghue and others*, 17 December 1925. See A. D. McNair and H. Lauterpacht, *Annual Digest of Public International Law Cases, 1925-1926* (London, Longmans, Green and Co., 1929), case No. 76, pp. 98-100.

²¹⁸ Supreme Court of New York (New York County), *Irish Free State v. Guaranty Safe Deposit Company*. *Ibid.*, case No. 77, pp. 100-102.

F. *The case of Algerian funds deposited in Switzerland*

(38) From 1954 to 1962, the Algerian National Liberation Front (NLF) had collected funds to cover the cost of the armed struggle in Algeria. On 19 September 1958, a Provisional Government of the Algerian Republic (GPRA) was established at Cairo; it was recognized *de facto* or *de jure* by some thirty countries.²¹⁹ The National Liberation Front, which was the only liberation party during the war and also the only governing party after independence, stated in its statutes, adopted in 1959, that its resources did not belong to it as a movement but were "national property" in law and in fact (article 39, paragraph 2). At the end of the war, the unexpended balance of the funds intended for use in the struggle amounted to some 80 million Swiss francs; these funds were in various bank accounts in the Middle East in the name of the GPRA and in Europe in the name of the NLF. In 1962, all these funds were deposited together in a Swiss bank, in the name of Mr. Mohammed Khider, General Secretary of the NLF, acting in his official capacity.

Political differences arose between the Algerian governmental authorities and Mr. Khider, who was removed from office as General Secretary of the single party in power but refused to hand over the remaining funds which were in his possession at Geneva.

(39) To this day, various civil as well as criminal proceedings, including sequestration of the bank account, have still not enabled the Algerian State and the NLF to recover these sums. The problem was not really dealt with from the standpoint of succession of States or governments; it involved criminal matters, because the bank with which the funds were deposited had improperly allowed Mr. Khider to withdraw them quickly, although he had just been dismissed from office and no longer had authority to administer the funds. Consequently, the funds were fraudulently transferred to a destination and for a purpose which is still unknown to this day.

If this case is considered, from the civil viewpoint, as a problem of succession of governments, it has obvious similarities with the case of the Irish funds considered above. The Algerian liberation movement and its Provisional Government of the day left property to which independent Algeria should normally succeed, through its single ruling party and its new government. From the outset, this property had the status of "national property", according to the statutes of the NLF.

(40) On 16 July 1964, the Algerian authorities, represented by the leader of the NLF and the Head of the Government, brought a suit before the Swiss courts, which, however, were induced by the defence to evaluate the legitimacy of the NLF, although they were *judicial* bodies and, moreover, foreign ones. This was because the defendant had stated that he would hand over the funds only to the "legitimate" NLF. Which NLF? According to the defendant, the one that would emerge from a new national Congress of the party. A Congress had in fact

²¹⁹ See M. Bedjaoui, *La révolution algérienne et le droit* (Brussels, International Association of Democratic Lawyers, 1961), p. 91 and *passim*.

been held, but the defendant had not considered it "legitimate". There is no doubt that, from the strictly juridical point of view, this notion of legitimacy should have been ruled out of the proceedings. The funds had, from the outset, been "Algerian national property", and upon the attainment of independence should certainly have been returned to the Algerian public authorities, the party and the Government.

It is all the more necessary to being this case—which has its own special characteristics, although in some respects it resembles the case of the Irish funds—to a logical conclusion because Mr. Khider died at Madrid on 4 January 1967, and if the funds are not assigned to the Algerian authorities, to whom they belong, they may become "ownerless property".

G. *The case of the property abroad of the Baltic States*²²⁰

(41) The incorporation of the Baltic States in the USSR was not recognized by some countries, including the United Kingdom and the United States of America, which refused to accept the Soviet Socialist Republics as the successors to those States in the case of property situated abroad. The Western countries which did not

²²⁰ Cf., in particular, K. Marek, *Identity and Continuity of States in Public International Law* (Geneva, Librairie E. Droz, 1954), pp. 369-416; M. Flory, *Le statut international des gouvernements réfugiés et le cas de la France libre, 1939-1945* (Paris, A. Pédone, édit., 1952), pp. 202-205 and *passim*, and their bibliographies.

recognize the incorporation continued for a number of years to accept the credentials of the former representatives of those States, whom they recognized as possessing the right of ownership, or at least of management, over property situated outside the frontiers of the Baltic Republics. For a long time, premises of legations and consulates, and Baltic ships,²²¹ were not recognized as being the property of the successors. The situation was normalized later.

Professor Guggenheim reports the decision of the Swiss Federal Council of 14 November 1946²²²

placing under the trusteeship of the Confederation the public property of the Baltic States, as well as the archives of their former diplomatic missions in Switzerland, those missions having ceased to be recognized as from 1 January 1941.²²³

In these cases, the problem of recognition of the successor State obscured the problem of State succession.

²²¹ Eleven ships flying the flag of the Baltic nations remained in United States ports for a long time as "refugees". Cf. H. W. Briggs, "Non-Recognition in the Courts: the Ships of the Baltic Republics", *The American Journal of International Law* (Concord [N. H.], 1943), vol. 37, pp. 585-596. The United Kingdom had requisitioned thirty-four Baltic ships during the Second World War, but entered into negotiations on the subject with the USSR, which it finally recognized as the owner of the ships.

²²² Switzerland, *Rapport du Conseil fédéral à l'Assemblée fédérale sur sa gestion en 1946* [Annual Report of the Federal Council to the Federal Assembly, 1946], No. 5231, 1 April 1947, p. 119.

²²³ P. Guggenheim, *Traité de droit international public* (Geneva, Librairie de l'Université, Georg et Cie S. A., 1953), t. I, p. 466, foot-note 1.